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Washington, DC 20002

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Presidential Documents

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The President

Proclamation 8304 of October 10, 2008

National School Lunch Week, 2008

By the President of the United States of America

A Proclamation

During National School Lunch Week, we underscore the importance of providing America's children with access to nutritious meals and helping them develop good eating habits through the National School Lunch Program.

The National School Lunch Program is a federally assisted meal program administered by the Department of Agriculture's Food and Nutrition Service in cooperation with State agencies. Since 1946, the National School Lunch Program has served more than 187 billion lunches to students across America. The program is designed to ensure that each day millions of children are receiving the healthy food necessary to succeed by providing access to nutritious low-cost or free meals. By serving well-balanced meals that are lower in fat and have plenty of fruits, vegetables, and whole-grain foods, this program helps children learn healthy eating habits, reduce their risk of serious health problems, and perform better in the classroom.

Throughout National School Lunch Week, we recognize the school officials and parents who encourage young people to develop good eating habits. We also thank the dedicated food service professionals who serve our children healthy foods each day at school.

In recognition of the contributions of the National School Lunch Program to the health, education, and well-being of America's children, the Congress, by joint resolution of October 9, 1962 (Public Law 87–780), as amended, has designated the week beginning on the second Sunday in October of each year as ''National School Lunch Week'' and has requested the President to issue a proclamation in observance of this week.

NOW, THEREFORE, I, GEORGE W. BUSH, President of the United States of America, do hereby proclaim the week of October 12 through October 18, 2008, as National School Lunch Week. I call upon all Americans to join the dedicated individuals who administer the National School Lunch Program in appropriate activities that support the health and well-being of our Nation's children.

IN WITNESS WHEREOF, I have hereunto set my hand this tenth day of October, in the year of our Lord two thousand eight, and of the Independence of the United States of America the two hundred and thirty-third.

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Presidential Documents

Title 3—

The President

Proclamation 8305 of October 10, 2008

Columbus Day, 2008

By the President of the United States of America

A Proclamation

Christopher Columbus' bold voyage across the Atlantic changed the world forever. On Columbus Day, we remember this Italian explorer's courage in traveling to the unknown and celebrate his landmark achievements and lasting legacy.

History holds remarkable examples of heroism and adventure, and the journey of the navigator from Genoa in 1492 is one of history's great stories of daring and bravery. Columbus' expedition became an epic of discovery and opened up the New World for future generations. His journey will forever stand as a testament to his intrepid spirit and persistence. Today, his legacy of discovery and determination is an example for innovators and dreamers as they pursue broader understanding and use their talents to benefit humanity.

Columbus Day is also an opportunity to reaffirm the close ties between the United States and Italy. Our two countries will continue to work together to advance liberty, peace, and prosperity around the globe. Our Nation recognizes the many inspiring contributions made by Americans of Italian descent. We also honor the dedication and sacrifice of Italian Americans who are serving in our country's Armed Forces. In commemoration of Columbus' journey, the Congress has requested (36 U.S.C. 107) that the President proclaim the second Monday of October of each year as ''Columbus Day.''

NOW, THEREFORE, I, GEORGE W. BUSH, President of the United States of America, do hereby proclaim October 13, 2008, as Columbus Day. I call upon the people of the United States to observe this day with appropriate ceremonies and activities. I also direct that the flag of the United States be displayed on all public buildings on the appointed day in honor of Christopher Columbus.

IN WITNESS WHEREOF, I have hereunto set my hand this tenth day of October, in the year of our Lord two thousand eight, and of the Independence of the United States of America the two hundred and thirty-third.

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Title 3—

The President

Proclamation 8306 of October 10, 2008

General Pulaski Memorial Day, 2008

By the President of the United States of America

A Proclamation

On General Pulaski Memorial Day, we celebrate General Casimir Pulaski's selfless dedication to the cause of freedom during the American Revolution.

In our Nation's struggle for independence, brave individuals such as Casimir Pulaski came to our shores and risked their lives to help bring liberty to a new continent. General Pulaski fought first against Russian domination of his Polish homeland and later joined General George Washington's Continental Army. Pulaski's valor in battle and love of freedom earned him the rank of Brigadier General and authority to organize an independent corps of cavalry. Through his skilled leadership and cavalry tactics he became known as the ''Father of the American Cavalry.'' During the siege of Savannah, General Pulaski was mortally wounded, making the ultimate sacrifice for our country and the cause of freedom.

General Pulaski's life exemplifies the courage and determination of the many Polish immigrants who have helped make the United States the greatest Nation on Earth. On General Pulaski Memorial Day, we recognize our time-honored friendship with Poland, and we are reminded of the great price our forefathers paid so that we might live in liberty.

NOW, THEREFORE, I, GEORGE W. BUSH, President of the United States of America, by virtue of the authority vested in me by the Constitution and laws of the United States, do hereby proclaim October 11, 2008, as General Pulaski Memorial Day. I urge Americans to commemorate this occasion with appropriate activities and ceremonies honoring General Casimir Pulaski and all those who defend our freedom.

IN WITNESS WHEREOF, I have hereunto set my hand this tenth day of October, in the year of our Lord two thousand eight, and of the Independence of the United States of America the two hundred and thirty-third.

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Presidential Documents

Title 3—

The President

Proclamation 8307 of October 13, 2008

White Cane Safety Day, 2008

By the President of the United States of America

A Proclamation

Compassion is one of our Nation's defining values, and we must work to ensure that all Americans are able to participate fully in society. The white cane allows many of our citizens who are blind or visually impaired to enjoy increased mobility. On White Cane Safety Day, we celebrate the symbolism of the white cane and highlight the importance of ensuring that individuals who are blind or visually impaired can live independently and realize their full potential.

Through the New Freedom Initiative, my Administration has put into action our strong commitment to helping more individuals with disabilities participate in all aspects of life. Since 2001, this initiative has built on the progress of the Americans with Disabilities Act and helped create greater access to schools, the workplace, and community life. These efforts are helping to remove barriers and enabling more Americans to live with greater dignity and freedom.

The Congress, by joint resolution approved on October 6, 1964 (Public Law 88–628), as amended, has designated October 15 of each year as ''White Cane Safety Day.''

NOW, THEREFORE, I, GEORGE W. BUSH, President of the United States of America, do hereby proclaim October 15, 2008, as White Cane Safety Day. I call upon public officials, business leaders, educators, librarians, and all the people of the United States to observe this day with appropriate ceremonies, activities, and programs.

IN WITNESS WHEREOF, I have hereunto set my hand this thirteenth day of October, in the year of our Lord two thousand eight, and of the Independence of the United States of America the two hundred and thirty-third.

[FR Doc. E8–24873
Filed 10–15–08; 1:15 pm]
Billing code 3195–W9–P

Rules and Regulations

Federal Register
Vol. 73, No. 202
Friday, October 17, 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.

FEDERAL RESERVE SYSTEM

12 CFR Part 201

[Regulation A]

Extensions of Credit by Federal Reserve Banks

AGENCY: Board of Governors of the Federal Reserve System.

ACTION: Final rule.

SUMMARY: The Board of Governors of the Federal Reserve System (Board) has adopted final amendments to its Regulation A to reflect the Board's approval of a decrease in the primary credit rate at each Federal Reserve Bank. The secondary credit rate at each Reserve Bank automatically decreased by formula as a result of the Board's primary credit rate action.

DATES: The amendments to part 201 (Regulation A) are effective October 17, 2008. The rate changes for primary and secondary credit were effective on the dates specified in 12 CFR 201.51, as amended.

FOR FURTHER INFORMATION CONTACT: Jennifer J. Johnson, Secretary of the Board (202/452–3259); for users of Telecommunication Devices for the Deaf (TDD) only, contact 202/263–4869.

SUPPLEMENTARY INFORMATION: The Federal Reserve Banks make primary and secondary credit available to depository institutions as a backup source of funding on a short-term basis, usually overnight. The primary and secondary credit rates are the interest rates that the twelve Federal Reserve Banks charge for extensions of credit under these programs. In accordance with the Federal Reserve Act, the primary and secondary credit rates are established by the boards of directors of the Federal Reserve Banks, subject to the review and determination of the Board.

The Board approved requests by the Reserve Banks to decrease by 50 basis points the primary credit rate in effect at each of the twelve Federal Reserve Banks, thereby decreasing from 2.25 percent to 1.75 percent the rate that each Reserve Bank charges for extensions of primary credit. As a result of the Board's action on the primary credit rate, the rate that each Reserve Bank charges for extensions of secondary credit automatically decreased from 2.75 percent to 2.25 percent under the secondary credit rate formula. The final amendments to Regulation A reflect these rate changes.

The 50-basis-point decrease in the primary credit rate was associated with a similar decrease in the target for the federal funds rate (from 2.00 percent to 1.50 percent) approved by the Federal Open Market Committee (Committee) and announced at the same time. A press release announcing these actions indicated that:

> Incoming economic data suggest that the pace of economic activity has slowed markedly in recent months. Moreover, the intensification of financial market turmoil is likely to exert additional restraint on spending, partly by further reducing the ability of households and businesses to obtain credit. Inflation has been high, but the Committee believes that the decline in energy and other commodity prices and the weaker prospects for economic activity have reduced the upside risks to inflation.
>
> The Committee will monitor economic and financial developments carefully and will act as needed to promote sustainable economic growth and price stability.

Regulatory Flexibility Act Certification

Pursuant to the Regulatory Flexibility Act (5 U.S.C. 605(b)), the Board certifies that the new primary and secondary credit rates will not have a significantly adverse economic impact on a substantial number of small entities because the final rule does not impose any additional requirements on entities affected by the regulation.

Administrative Procedure Act

The Board did not follow the provisions of 5 U.S.C. 553(b) relating to notice and public participation in connection with the adoption of these amendments because the Board for good cause determined that delaying implementation of the new primary and secondary credit rates in order to allow notice and public comment would be unnecessary and contrary to the public interest in fostering price stability and sustainable economic growth. For these same reasons, the Board also has not provided 30 days prior notice of the effective date of the rule under section 553(d).

12 CFR Chapter II

List of Subjects in 12 CFR Part 201

Banks, Banking, Federal Reserve System, Reporting and recordkeeping.

Authority and Issuance

■ For the reasons set forth in the preamble, the Board is amending 12 CFR Chapter II to read as follows:

PART 201—EXTENSIONS OF CREDIT BY FEDERAL RESERVE BANKS (REGULATION A)

■ 1. The authority citation for part 201 continues to read as follows:

Authority: 12 U.S.C. 248(i)–(j), 343 *et seq.*, 347a, 347b, 347c, 348 *et seq.*, 357, 374, 374a, and 461.

■ 2. In § 201.51, paragraphs (a) and (b) are revised to read as follows:

§ 201.51 Interest rates applicable to credit extended by a Federal Reserve Bank.[1]

(a) *Primary credit.* The interest rates for primary credit provided to depository institutions under § 201.4(a) are:

Federal Reserve Bank	Rate	Effective
Boston	1.75	October 8, 2008.
New York	1.75	October 8, 2008.
Philadelphia	1.75	October 8, 2008.
Cleveland	1.75	October 8, 2008.
Richmond	1.75	October 8, 2008.
Atlanta	1.75	October 8, 2008.
Chicago	1.75	October 8, 2008.
St. Louis	1.75	October 9, 2008.
Minneapolis	1.75	October 8, 2008.
Kansas City	1.75	October 8, 2008.
Dallas	1.75	October 8, 2008.
San Francisco	1.75	October 8, 2008.

(b) *Secondary credit.* The interest rates for secondary credit provided to depository institutions under 201.4(b) are:

[1] The primary, secondary, and seasonal credit rates described in this section apply to both advances and discounts made under the primary, secondary, and seasonal credit programs, respectively.

Federal reserve bank	Rate	Effective
Boston	2.25	October 8, 2008.
New York	2.25	October 8, 2008.
Philadelphia	2.25	October 8, 2008.
Cleveland	2.25	October 8, 2008.
Richmond	2.25	October 8, 2008.
Atlanta	2.25	October 8, 2008.
Chicago	2.25	October 8, 2008.
St. Louis	2.25	October 9, 2008.
Minneapolis	2.25	October 8, 2008.
Kansas City	2.25	October 8, 2008.
Dallas	2.25	October 8, 2008.
San Francisco	2.25	October 8, 2008.

* * * * *

By order of the Board of Governors of the Federal Reserve System,

Dated: October 9, 2008.

Jennifer J. Johnson,

Secretary of the Board.

[FR Doc. E8–24519 Filed 10–16–08; 8:45 am]

BILLING CODE 6210–01–P

FEDERAL DEPOSIT INSURANCE CORPORATION

12 CFR Part 330

RIN 3064–AD36

Deposit Insurance Regulations; Temporary Increase in Standard Coverage Amount; Mortgage Servicing Accounts

AGENCY: Federal Deposit Insurance Corporation (FDIC).

ACTION: Interim rule with request for comments.

SUMMARY: The FDIC is adopting an interim rule to amend its deposit insurance regulations to reflect Congress's recent action to temporarily increase the standard deposit insurance amount from $100,000 to $250,000 and to simplify the deposit insurance rules for funds maintained in mortgage servicing accounts.

The FDIC's main goals in revising its insurance rule on mortgage servicing accounts are to simplify a rule that has become increasingly complex in application due to developments in securitizations and to provide additional certainty with respect to the deposit insurance coverage of these accounts at a time of turmoil in the housing and financial markets. The FDIC believes this regulatory change will help improve public confidence in the banking system.

DATES: The effective date of the interim rule is October 10, 2008. Written comments must be received by the FDIC not later than December 16, 2008.

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

- *Agency Web Site: http://www.fdic.gov/regulations/laws/federal.* Follow instructions for submitting comments on the Agency Web Site.
- *E-mail: Comments@FDIC.gov.* Include ''Mortgage Servicing Accounts'' in the subject line of the message.
- *Mail:* Robert E. Feldman, Executive Secretary, Attention: Comments, Federal Deposit Insurance Corporation, 550 17th Street, NW., Washington, DC 20429.
- *Hand Delivery/Courier:* Guard station at the rear of the 550 17th Street Building (located on F Street) on business days between 7 a.m. and 5 p.m. (EST).
- *Federal eRulemaking Portal: http://www.regulations.gov.* Follow the instructions for submitting comments.

Public Inspection: All comments received will be posted without change to *http://www.fdic.gov/regulations/laws/federal* including any personal information provided. Paper copies of public comments may be ordered from the Public Information Center by telephone at (877) 275–3342 or (703) 562–2200.

FOR FURTHER INFORMATION CONTACT: Joseph A. DiNuzzo, Counsel, Legal Division (202) 898–7349 or Christopher Hencke, Counsel, Legal Division (202) 898–8839, Federal Deposit Insurance Corporation, Washington, DC 20429.

SUPPLEMENTARY INFORMATION:

I. Background

A. Temporary Increase in Insurance Coverage

The Emergency Economic Stabilization Act of 2008 temporarily increased the standard maximum deposit insurance amount (''SMDIA'') from $100,000 to $250,000, effective October 3, 2008, and ending December 31, 2009.[1] After that date, the SMDIA will, by law, return to $100,000. In the interim rule the FDIC is amending its deposit insurance regulations to reflect the temporary increase in the SMDIA.

B. Mortgage Servicing Accounts

The FDIC was established to maintain public confidence and stability in the United States banking system and protect insured depositors. The regulations governing deposit insurance coverage are codified at 12 CFR part 330, and they include specific rules on deposits of payments collected by mortgage servicers and placed into accounts at insured depository institutions. 12 CFR 330.7(d) (''mortgage servicing accounts''). Accounts maintained by a mortgage servicer, in a custodial or other fiduciary capacity, may include funds paid by mortgagors for principal, interest and escrowed amounts for taxes and insurance premiums. Principal and interest funds are insured for the interest of each owner (mortgagee, investor or security holder) in those accounts. Under section 330.7(d) funds maintained by a servicer, in a custodial or other fiduciary capacity, which represent payments by mortgagors of taxes and insurance premiums are added together and insured for the ownership interest of each mortgagor in those accounts.

The FDIC's rules for mortgage servicing accounts were adopted in 1990, after the Financial Services Reform, Recovery, and Enforcement Act of 1989, abolished the Federal Savings and Loan Insurance Corporation (''FSLIC'') and transferred the insurance of savings association deposits to the FDIC. Prior to that time, the FDIC did not have specific rules for mortgage servicing accounts, and the FSLIC's rules provided insurance coverage for principal and interest funds based on the interest of each mortgagor.[2]

As described above, under section 330.7(d), funds representing payments of principal and interest are insurable on a pass-through basis to each mortgagee, investor or security holder. In contrast, funds representing payments of taxes and insurance are insurable on a pass-through basis to each mortgagor or borrower. When the FDIC adopted these rules in 1990, it focused largely on the fact that principal and interest funds are owned by the investors, on whose behalf the servicer, as agent, accepts the principal and interest payments, and are not owned by the borrowers. By contrast, under the current rule, taxes and insurance funds are insured to the mortgagors or borrowers on the theory that the borrower still owns the funds until the tax and insurance bills are actually paid by the servicer.

Over the past several years, securitization methods and vehicles for mortgages have become more layered and complex. The FDIC believes that it has become much more difficult and time-consuming for a servicer to identify and determine the share of any investor in a securitization and in the principal and interest funds on deposit at an insured depository institution.

Under the current regulation, in the event of the failure of an FDIC-insured depository institution, the FDIC is concerned that there could be unexpected loss to securitization investors of principal and interest payments deposited at the institution by

[1] Public Law 110–343 (October 3, 2008).

[2] 12 CFR 564.3(b)(2)(1989).

a securitization servicer. As noted above, these accounts may involve multi-layered securitization structures, and it may prove difficult for the servicer holding a deposit account in the institution to identify every security holder in the securitization and determine his or her share. In addition, some investor holdings may far exceed the current $250,000 per-depositor insurance limit.[3] Application of the current rule under these circumstances could result in delays in the servicer receiving the insured amounts and in losses for amounts that, because of the complexity of the securitization agreements, cannot be attributed to the particular investors to whom the funds belong. This outcome could increase losses to otherwise insured depositors, lead to withdrawal of deposits for principal and interest payments from depository institutions, and unnecessarily reduce liquidity for such institutions.

II. The Interim Rule (for Mortgage Servicing Accounts)

Explanation

The FDIC's goals in this rulemaking are twofold. First, the FDIC seeks to make the coverage rules for mortgage servicing accounts easy to understand and easy to apply (in determining the applicable coverage amount). Second, the FDIC recognizes that, at any one time, billions of dollars in principal and interest funds may be on deposit at insured depository institutions, providing a significant source of liquidity for the institution and credit to the institution's community. The FDIC seeks to avoid any uncertainty as to the extent of deposit insurance coverage that could have inadvertent adverse consequences.

Because it may be difficult for a servicer to identify all investors and their individual interests in a securitization following the failure of an insured depository institution, the coverage under the interim rule will be determined on a per-mortgagor (or borrower) basis. Moreover, servicers will be able to identify mortgagors more quickly than investors, thus per-mortgagor coverage will enable the FDIC to pay deposit insurance more quickly.

Under the interim rule, the coverage afforded in connection with a mortgage servicing account will be based on each mortgagor's payments of principal and interest into the mortgage servicing account, up to standard maximum deposit insurance amount (currently, through December 31, 2009, $250,000) per mortgagor. In effect, coverage will be provided to the mortgagees/investors, as a collective group, based on the cumulative amount of the mortgagors' payments of principal and interest into the account. This insurance coverage afforded in connection with principal and interest payments in mortgage servicing accounts will not be aggregated with or otherwise affect the coverage provided to mortgagors in connection with other accounts the mortgagors might maintain at the same insured depository institution. As under the current insurance rules, under the interim rule amounts in a mortgage servicing account constituting payments of taxes and insurance premiums will be insured on a *pass-through* basis as the funds of each respective mortgagor. Such funds will be added to other individually owned funds held by each such mortgagor at the same insured institution and insured to the applicable limit.

Effective Date of the Interim Rule

The interim rule applies to all existing and future mortgage servicing accounts as of October 10, 2008, the date on which the FDIC Board of Directors approved the interim rule. October 10, 2008 also is the date the interim rule was filed for public inspection with the Office of the **Federal Register**. In this regard, the FDIC invokes the *good cause* exception to the requirements in the Administrative Procedure Act[4] (''APA'') that, before a rulemaking can be finalized, it must first be issued for public comment and, once finalized, must have a delayed effective date of thirty days from the publication date. The FDIC believes good cause exists for making the interim rule effectively immediately. Under the current rules, the complexity of determining the actual interest of each investor in a securitization could delay significantly the payment of insurance coverage and, potentially, could result in a determination of uninsured funds because investors and their interests cannot be identified. The interim rule simplifies the coverage rules for mortgage servicing accounts to address those issues, while recognizing the continued relationship of the principal and interest payments and taxes and insurance payments to the mortgagor. As a result, the interim rule will provide greater certainty to depositors, servicers, mortgagees, investors, and other security holders, depository institutions, and other parties involved in the securitization of mortgages about the extent to which those accounts are insured.

For these reasons, the FDIC has determined that the public notice and participation that ordinarily are required by the APA before a regulation may take effect would, in this case, be contrary to the public interest and that good cause exists for waiving the customary 30-day delayed effective date. Nevertheless, the FDIC desires to have the benefit of public comment before adopting a permanent final rule and thus invites interested parties to submit comments during a 60-day comment period. In adopting the final regulation, the FDIC will revise the interim rule, if appropriate, in light of the comments received on the interim rule.

III. Request for Comments

The FDIC requests comments on all aspects of this interim rule.

IV. Paperwork Reduction Act

The interim rule will revise the FDIC's deposit insurance regulations. It will not involve any new collections of information pursuant to the Paperwork Reduction Act (44 U.S.C. 3501 *et seq.*). Consequently, no information collection has been submitted to the Office of Management and Budget for review.

V. Regulatory Flexibility Act

The Regulatory Flexibility Act requires an agency that is issuing a final rule to prepare and make available a regulatory flexibility analysis that describes the impact of the final rule on small entities. 5 U.S.C. 603(a). The Regulatory Flexibility Act provides that an agency is not required to prepare and publish a regulatory flexibility analysis if the agency certifies that the final rule will not have a significant economic impact on a substantial number of small entities.

Pursuant to section 605(b) of the Regulatory Flexibility Act, the FDIC certifies that the interim rule will not have a significant impact on a substantial number of small entities. The interim rule implements the temporary increase in the SMDIA and simplifies the coverage rules for mortgage servicing accounts.

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

The FDIC has determined that the interim rule will not affect family well-being within the meaning of section 654

[3] As noted above, the Emergency Economic Stabilization Act of 2008 temporarily increased the standard maximum deposit insurance amount from $100,000 to $250,000, effective October 3, 2008, and ending on December 31, 2009. After that date, the insurance coverage limit will, by law, return to $100,000.

[4] 5 U.S.C. 553.

of the Treasury and General Government Appropriations Act, enacted as part of the Omnibus Consolidated and Emergency Supplemental Appropriations Act of 1999 (Pub. L. 105–277, 112 Stat. 2681).

The interim rule should have a positive effect on families by clarifying the coverage rules for mortgage servicing accounts, which contain, for some period of time, the mortgage payments from borrowers.

VII. Small Business Regulatory Enforcement Fairness Act

The Office of Management and Budget has determined that the interim rule is not a ''major rule'' within the meaning of the relevant sections of the Small Business Regulatory Enforcement Act of l996 (''SBREFA'') (5 U.S.C. 801 *et seq.*). As required by SBREFA, the FDIC will file the appropriate reports with Congress and the General Accounting Office so that the interim rule may be reviewed.

List of Subjects in 12 CFR Part 330

Bank deposit insurance, Banks, banking, Reporting and recordkeeping requirements, Savings and loan associations, Trusts and trustees.

■ For the reasons stated above, the Board of Directors of the Federal Deposit Insurance Corporation amends part 330 of chapter III of title 12 of the Code of Federal Regulations as follows:

PART 330—DEPOSIT INSURANCE COVERAGE

■ 1. The authority citation for part 330 continues to read as follows:

Authority: 12 U.S.C. 1813(l), 1813(m), 1817(i), 1818(q), 1819 (Tenth), 1820(f), 1821(a), 1822(c).

■ 2. In § 330.1, paragraph (n) is revised to read as follows:

§ 330.1 Definitions.

* * * * *

(n) *Standard maximum deposit insurance amount*, referred to as the ''SMDIA'' hereafter, means $250,000 from October 3, 2008, until December 31, 2009. Effective January 1, 2010, the SMDIA means $100,000 adjusted pursuant to subparagraph (F) of section 11(a)(1) of the FDI Act (12 U.S.C. 1821(a)(1)(F)). All examples in this part use $100,000 as the SMDIA.

* * * * *

■ 3. In § 330.7, paragraph (d) is revised to read as follows:

§ 330.7 Account held by an agent, nominee, guardian, custodian or conservator.

* * * * *

(d) *Mortgage servicing accounts.* Accounts maintained by a mortgage servicer, in a custodial or other fiduciary capacity, which are comprised of payments by mortgagors of principal and interest, shall be insured for the cumulative balance paid into the account by the mortgagors, up to a limit of the SMDIA per mortgagor. Accounts maintained by a mortgage servicer, in a custodial or other fiduciary capacity, which are comprised of payments by mortgagors of taxes and insurance premiums shall be added together and insured in accordance with paragraph (a) of this section for the ownership interest of each mortgagor in such accounts. This provision is effective as of October 10, 2008, for all existing and future mortgage servicing account.

* * * * *

By order of the Board of Directors.

Dated at Washington DC., this 10th day of October 2008.

Federal Deposit Insurance Corporation.

Valerie J. Best,

Assistant Executive Secretary.

[FR Doc. E8–24626 Filed 10–16–08; 8:45 am]

BILLING CODE 6714–01–P

FEDERAL HOUSING FINANCE BOARD

12 CFR Part 951

FEDERAL HOUSING FINANCE AGENCY

12 CFR Part 1291

RIN 2590–AA04

Affordable Housing Program Amendments: Federal Home Loan Bank Mortgage Refinancing Authority

AGENCY: Federal Housing Finance Agency.

ACTION: Interim final rule with request for comments.

SUMMARY: The Federal Housing Finance Agency (FHFA) is issuing and seeking comment on an interim final rule to implement section 1218 of the Housing and Economic Recovery Act of 2008 (Recovery Act), which requires the FHFA to allow the Federal Home Loan Banks (Banks) until July 30, 2010, to use Affordable Housing Program (AHP) homeownership set-aside funds to refinance low- or moderate-income households' mortgage loans. This rulemaking relocates the AHP regulation to the FHFA rules, and adds new provisions that allow the Banks to use AHP set-aside funds to provide direct subsidies to low- or moderate-income households who qualify for refinancing assistance under the HOPE for Homeowners Program established by the Federal Housing Administration (FHA) under Title IV of the Recovery Act.

ADDRESSES: This interim final rule is effective October 17, 2008. The FHFA will accept written comments on the interim final rule on or before December 16, 2008.

Comments: Submit comments to the FHFA using any *one* of the following methods:

E-mail: comments@fhfb.gov. Please include RIN 2590–AA04 in the subject line of the message.

Fax: 202–408–2580.

Mail/Hand Delivery: Federal Housing Finance Board, 1625 Eye Street, NW., Washington, DC 20006, *Attention:* Public Comments/RIN 2590–AA04.

Federal eRulemaking Portal: http://www.regulations.gov. Follow the instructions for submitting comments. If you submit your comment to the Federal eRulemaking Portal, please also send it by e-mail to the FHFA at *comments@fhfb.gov* to ensure timely receipt by the agency. Include the following information in the subject line of your submission: Federal Housing Finance Agency. Interim Final Rule: Affordable Housing Program Amendments: Federal Home Loan Bank Mortgage Refinancing Authority. RIN 2590–AA04.

We will post all public comments we receive without change, including any personal information you provide, such as your name and address, on the FHFA Web site at *http://www.fhfb.gov/Default.aspx?Page=93&Top=93.*

FOR FURTHER INFORMATION CONTACT: Sylvia Martinez, Senior Policy Analyst, 202–408–2825, *martinezs@fhfb.gov;* or Amy Bogdon, Senior Advisor, 202–408–2546, *bogdona@fhfb.gov.* For legal questions: Sharon B. Like, Senior Attorney-Advisor, 202–408–2930, *likes@fhfb.gov.* You can send regular mail to the Federal Housing Finance Board, 1625 Eye Street, NW., Washington, DC 20006.

SUPPLEMENTARY INFORMATION:

I. Background

A. Federal Housing Finance Regulatory Reform Act of 2008

Effective July 30, 2008, Division A of the Housing and Economic Recovery Act of 2008, Public Law No. 110–289, 122 Stat. 2654 (2008), titled the Federal Housing Finance Regulatory Reform Act of 2008 (Reform Act), created the Federal Housing Finance Agency (FHFA) as an independent agency of the federal government. The Reform Act

transferred the supervisory and oversight responsibilities over the Federal National Mortgage Association (Fannie Mae), Federal Home Loan Mortgage Corporation (Freddie Mac) (collectively, Enterprises), the Federal Home Loan Banks (Banks), and the Bank System's Office of Finance, from the Office of Federal Housing Enterprise Oversight (OFHEO) and the Federal Housing Finance Board (FHFB) to the FHFA. The Reform Act provides for the abolishment of OFHEO and the FHFB one year after the date of enactment. The FHFA is responsible for ensuring that the Enterprises and the Banks operate in a safe and sound manner, including being capitalized adequately, and carry out their public policy missions, including fostering liquid, efficient, competitive, and resilient national housing finance markets.

The Enterprises and the Banks continue to operate under regulations promulgated by OFHEO and the FHFB until the FHFA issues its own regulations.

B. The Banks' Affordable Housing Program

Section 10(j) of the Federal Home Loan Bank Act (Bank Act) requires each Bank to establish an affordable housing program, the purpose of which is to enable a Bank's members to finance homeownership by households with incomes at or below 80 percent of the area median income (low- or moderate-income households), and to finance the purchase, construction, or rehabilitation of rental projects in which at least 20 percent of the units will be occupied by and affordable for households earning 50 percent or less of the area median income (very low-income households). *See* 12 U.S.C. 1430(j)(1) and (2). The Bank Act requires each Bank to contribute 10 percent of its previous year's net earnings to its AHP annually, subject to a minimum annual combined contribution by the 12 Banks of $100 million. *See* 12 U.S.C. 1430(j)(5)(C). Section 1218 of the Reform Act amended section 10(j) by adding a new paragraph (2)(C) that requires the FHFA to allow the Banks until July 30, 2010, to use AHP homeownership set-aside funds to refinance low- or moderate-income households' first mortgage loans on their primary residences. *See* 12 U.S.C. 1430(j)(2)(C). The Director of the FHFA must establish the percentage of set-aside funds eligible for this use by regulation.

The FHFB regulation implementing the AHP provisions of the Bank Act, previously codified at 12 CFR part 951, is relocated by this rulemaking to part 1291. The following discussion uses the new numbering references. Among other things,[1] the AHP regulation authorizes a Bank, in its discretion, to set aside a portion of its annual required AHP contribution to establish homeownership set-aside programs for the purpose of promoting homeownership for low- or moderate-income households. *See* 12 CFR 1291.6. Under the homeownership set-aside programs, a Bank may provide AHP direct subsidy (grants) to members to pay for down payment assistance, closing costs, and counseling costs in connection with a household's purchase of its primary residence, and for rehabilitation assistance in connection with a household's rehabilitation of an owner-occupied residence. *See* 12 CFR 1291.6(c)(4). The AHP regulation does not authorize the Banks to use AHP set-aside funds for refinancing of mortgages. Currently, a Bank may allocate up to the greater of $4.5 million or 35 percent of its annual required AHP contribution to homeownership set-aside programs in that year, provided that at least one-third of the Bank's annual set-aside allocation is targeted to first-time homebuyers. *See* 12 CFR 1291.2(b)(2)(i).

In January 2008, the FHFB waived certain provisions of the AHP homeownership set-aside program rule to allow the Federal Home Loan Bank of San Francisco (San Francisco Bank) to establish a temporary pilot program to provide AHP direct subsidy to enable a household with a subprime or nontraditional loan held by a San Francisco Bank member or its affiliate to refinance or restructure the loan into an affordable, long-term fixed-rate mortgage. *See* FHFB Resolution 2008–01 (Jan. 15, 2008). The authority will expire on December 31, 2009. In April 2008, the FHFB published a proposed rule that would have temporarily extended the authority to use set-aside funds for mortgage refinancing or restructuring to all of the Banks. *See* 73 FR 20552 (Apr. 16, 2008). The FHFB received 36 comments on the proposal. Commenters who supported use of AHP funds for refinancing suggested flexibility in the rules governing use of the funds so the Banks and their members would be able to assist a greater number of borrowers in distress, including allowing use of AHP set-aside funds in conjunction with other federal, state or local mortgage refinancing programs.

Before the FHFB took final action on the proposed amendments to the AHP rule, the Reform Act added section 10(j)(2)(C) to the Bank Act. Title IV of the Recovery Act also required establishment by the FHA of the HOPE for Homeowners Program, a temporary program expected to be implemented by October 1, 2008, and which will expire on September 30, 2011. Participation in the HOPE for Homeowners Program is voluntary on the part of homeowners and existing loan holders. Under the HOPE for Homeowners Program, FHA-approved lenders may refinance loans that will qualify for FHA insurance if the amount of the loan is reduced to no more than 90 percent of the currently appraised value of the owner-occupied property. The FHA insurance premium, which equals 3 percent of the remaining principal, is deducted upfront. The borrower will pay an annual premium of 1.5 percent of the outstanding mortgage amount.

The purpose of the HOPE for Homeowners Program, like that of the Banks' refinancing authority under the AHP, is to assist distressed homeowners and support long-term affordable homeownership. The FHFA believes that use of AHP subsidy in conjunction with the HOPE for Homeowners Program will leverage and enhance the effectiveness of each program, ensure that the full range of federal assistance to affected homeowners is available quickly, and provide the flexibility that the Banks and their members need to make the AHP refinancing program successful. In adopting this approach, the FHFA has consulted with the FHA. Linking the use of the AHP subsidy to refinancing under the HOPE for Homeowners Program also would be consistent with the requirement in section 10(j)(9)(G) of the Bank Act that the AHP rule coordinate AHP activities with other federal or federally-subsidized affordable housing activities to the maximum extent possible. *See* 12 U.S.C. 1430(j)(9)(G). Accordingly, this interim final rule authorizes a Bank, in its discretion, to temporarily establish a homeownership set-aside program for the use of AHP direct subsidy by its members to assist in the refinancing of a household's mortgage loan under the FHA's HOPE for Homeowners Program.

Section 1201 of the Reform Act requires the Director of the FHFA to consider the differences between the Banks and the Enterprises in rulemakings that affect the Banks with respect to the Banks' cooperative ownership structure, mission of providing liquidity to members, affordable housing and community development mission, capital structure,

[1] In addition to the discretionary set-aside authority, the AHP regulation requires that each Bank establish a competitive application program under which the Bank's members may apply for AHP subsidies pursuant to eligibility requirements and scoring criteria set forth in the regulation and implemented through Bank policies. *See* 12 CFR 1291.5.

and joint and several liability. 12 U.S.C. 4513(f). In preparing the interim final rule, the Director considered these factors and determined that the rule is appropriate, particularly because the AHP regulation implements a statutory provision of the Bank Act that applies only to the Banks. *See* 12 U.S.C. 1430(j).

II. Analysis of the Interim Final Rule

A. Relocation of AHP Rule to Part 1291

The interim final rule relocates the AHP rule from part 951 of the FHFB regulations to part 1291 of the FHFA regulations, and renames the new part to read ''Federal Home Loan Banks' Affordable Housing Program''. The rule also renumbers references within the rule to reflect its new part number.

B. Authority To Establish Mortgage Refinancing Program: § 1291.6(f)(1)

The interim final rule adds a new paragraph (f) under the existing AHP homeownership set-aside program provisions of § 1291.6 of the AHP regulation, that authorizes a Bank, in its discretion, to temporarily establish a homeownership set-aside program for the use of AHP direct subsidy by its members to assist in the refinancing of a household's mortgage loan under FHA's HOPE for Homeowners Program. 12 CFR 1291.6(f). As a general proposition, any such new refinancing program must comply with the existing requirements in § 1291.6, except for certain specified provisions, as well as with the requirements of part 1291. Thus, the existing provisions in § 1291.6 governing eligible member applicants, member allocation criteria, household income eligibility, maximum subsidy per household limit of $15,000, *de minimis* cash backs, application approvals, funding procedures, reservation of subsidies, and progress towards use of the subsidy, all apply to a Bank's mortgage refinancing program. *See* 12 CFR 1291.6(b), (c)(1), (c)(2)(i), (c)(3), (c)(9), (d), (e). Similarly, a Bank's mortgage refinancing program must otherwise meet the requirements of part 1291, including the monitoring, remedial actions for member noncompliance, and agreements provisions in §§ 1291.7, 1291.8, and 1291.9, respectively, other than the requirement in § 1291.9(a)(7) for five-year retention agreements in connection with a household's subsequent sale or refinancing of the unit.

The interim final rule provides that the provisions in § 1291.6 governing household completion of a counseling program, first-time homebuyer and additional discretionary household eligibility criteria, eligible uses of AHP subsidy, five-year retention agreements, lender financial or other concessions, loan financing costs, and counseling costs requirements, all do not apply to the new refinancing programs. *See* 12 CFR 1291.6(c)(2)(ii), (c)(2)(iii), (c)(4)–(c)(8).

C. Funding Allocation: § 1291.2(b)(2)(i)

In order to maximize the Banks' role in responding to the current national mortgage crisis, the interim final rule allows a Bank to allocate the maximum permissible homeownership set-aside allocation entirely to a mortgage refinancing program established under new paragraph (f). *See* 12 CFR 1291.2(b)(2)(i). The interim final rule further provides that if a Bank sets aside funds solely for homeownership set-aside programs other than a mortgage refinancing program established under paragraph (f), at least one-third of the Bank's aggregate annual set-aside allocation to such programs shall be to assist first-time homebuyers. This is consistent with the current one-third first-time homebuyers requirement.

D. Eligible Loans: § 1291.6(f)(2)

Under the interim final rule, a loan is eligible to be refinanced with AHP direct subsidy if the loan is secured by a first mortgage on an owner-occupied unit that is the primary residence of the household, and the loan is refinanced under the HOPE for Homeowners Program. 12 CFR 1291.6(f)(2). In order to be refinanced under the HOPE for Homeowners Program, the loan must meet all applicable underwriting requirements and other FHA standards for the HOPE for Homeowners Program. The FHFA believes that these requirements and standards will provide both adequate protections to borrowers whose loans will be refinanced and protect the integrity of the AHP. For example, under the HOPE for Homeowners Program and FHA standards:

- The borrower must be unable to afford its existing mortgage payments; the borrower's mortgage debt-to-income ratio, as of March 1, 2008, must have been greater than 31 percent, or such higher amount as the FHA determines appropriate;
- The principal amount of the refinanced loan shall not exceed 90 percent of the currently appraised value of the property;
- The refinanced loan must be a fixed-rate, fully amortizing, 30-year loan;
- Prepayment fees must be waived;
- All fees and penalties related to default or delinquency on the original mortgage must be waived or forgiven;
- Any outstanding mortgage liens on the property shall be removed;
- Investor-owned properties are not eligible—the borrower must be an owner-occupant;
- The borrower must have verified income based on an IRS tax return or other equivalent standards;
- The borrower may be charged only reasonable and customary closing costs established by the FHA;
- Origination fees are subject to limitation; and
- Rates on refinanced mortgages must be commensurate with market interest rates.

There are other programs that provide refinancing assistance to distressed borrowers. The Enterprises offer programs that allow for loan modifications targeted at subprime mortgage borrowers but which do not require that lenders take an initial write-down based on the current appraised value. The FHA offers a refinancing option in addition to the HOPE for Homeowners Program called FHA Secure. Under FHA Secure, any mortgage payment arrearage on the first loan can be rolled into a new FHA-insured loan. Further, lenders have the option of placing a second lien on the property if the borrower owes more than the property is worth or exceeds the FHA loan limit or to cover prepayment penalties and arrearages. In addition, state housing finance agencies are developing their own refinancing programs to assist distressed homeowners. Because these programs are diverse and emerging, the FHFA has not analyzed their specific merits.

The FHFA requests comment on whether the rule should authorize the Banks to use AHP set-aside funds to assist homeowners refinancing under other programs intended to aid distressed homeowners, such as those offered by the Enterprises, FHA Secure, or any state housing finance agency programs. In addition, the FHFA requests comment on how the standards for these programs will assure the affordability of the housing costs to the borrower and the sustainability of the refinanced loan.

E. Eligible Uses of AHP Subsidy: § 1291.6(f)(3)

The interim final rule allows members to provide AHP direct subsidy for two uses. 12 CFR 1291.6(f)(3). A member may use the subsidy to reduce the outstanding principal balance of the household's loan below the maximum loan-to-value ratio required under the HOPE for Homeowners Program in order to enable the household to meet the applicable mortgage debt-to-income

ratio requirements under such Program, *i.e.*, to make the refinanced loan affordable to the household. This use of the AHP subsidy is consistent with the current AHP rule, which permits use of the AHP subsidy to pay for down payment assistance in connection with the purchase of a home under the homeownership set-aside program. *See* 12 CFR 1291.6(c)(4). In addition, under the new AHP refinancing authority, a member may use the AHP subsidy to pay FHA-approved loan closing costs. This use of AHP subsidy also is consistent with the current AHP rule, which permits use of the AHP subsidy to pay for closing costs in connection with the purchase of a home under the homeownership set-aside program. *See* 12 CFR 1291.6(c)(4) and (8).

F. Eligible Lender Participants: § 1291.6(f)(4)

Under the interim final rule, a Bank may provide the AHP direct subsidy to members that are FHA-approved lenders for the purpose of refinancing an eligible loan with an FHA-insured loan by the member. A Bank may also, in its discretion, provide the AHP subsidy to members that will provide the subsidy to FHA-approved lenders that are not members of the Bank for the purpose of refinancing an eligible loan if, after consulting with the Bank's Advisory Council, the Bank determines that such action would be in the best interests of borrowers in the Bank's district. 12 CFR 1291.6(f)(4). Providing the subsidy to members, or to members who provide it to nonmembers, is consistent with the current AHP homeownership set-aside process under which a Bank provides the AHP subsidy to a member for use in conjunction with making a loan to a borrower, or to a member that provides the subsidy to another member or nonmember lender to make an AHP-assisted loan to a borrower.

G. AHP Retention Agreements

The interim final rule does not require five-year retention agreements as required under the current AHP regulation and, therefore, does not require repayment of AHP subsidy by a household in the event of a subsequent sale or refinancing of the unit during the five-year retention period. *See* 12 CFR 1291.6(c)(5) and 1291.9(a)(7). The FHFA has decided not to include this requirement because the HOPE for Homeowners Program includes a requirement generally that any appreciation or equity created as a result of a sale or refinancing during the five-year period must be shared between the FHA, the borrower, and any subordinate mortgage holder whose lien was extinguished as part of the refinancing under the Program. *See* Reform Act at sec. 1402(a) (National Housing Act sec. 257(e)(4)(B), and (k)).

H. Monitoring: § 1291.7(b)

The interim final rule amends existing § 1291.7(b), which sets forth the monitoring requirements for homeownership set-aside programs generally, to make a Bank's mortgage refinancing program subject to those monitoring requirements. Thus, a Bank's written monitoring policies for its homeownership set-aside programs must include requirements for: (i) Determining whether AHP subsidy was provided to households with incomes at or below 80 percent of the area median income as required in § 1291.6(c)(2)(i), and all other applicable eligibility requirements in § 1291.6(c) and (f); (ii) Bank review of member certifications, prior to disbursement of the AHP subsidy, that the subsidy will be provided in compliance with all applicable eligibility requirements in § 1291.6(c) and (f); and (iii) Bank review of back-up documentation regarding household incomes maintained by the member, and maintenance and Bank review of other documentation in the Bank's discretion.

I. Sunset Date: § 1291.6(f)(5)

The interim final rule includes a provision terminating the Banks' authority to commit AHP subsidy for refinancing after July 30, 2010, which is the expiration date of the two-year period in section 1218 of the Reform Act. 12 CFR 1291.6(f)(5). The rule allows lenders to use AHP subsidy committed by that date to refinance loans that are in the pipeline. This means that a lender may use the AHP subsidy for a loan that was submitted to the FHA for approval on or before July 30, 2010 that is approved for refinancing under the HOPE for Homeowners Program after that date. Title IV of the Reform Act provides that the sunset date for the HOPE for Homeowners Program is September 30, 2011. *See* Reform Act at sec. 1402(a) (National Housing Act sec. 257(r)). In light of our view that prior to its amendment by the Reform Act, section 10(j) of the Bank Act provided the legal authority for the FHFA to permit the Banks to use AHP subsidy to pay costs associated with refinancing existing mortgage loans, *see* 73 FR at 20553–55, the FHFA requests comment on whether it should extend the sunset date to be co-extensive with that of the HOPE for Homeowners Program.

The FHFA invites comments on all aspects of the interim final rule.

III. Notice and Public Participation

The FHFA for good cause finds that the notice and comment procedure required by the Administrative Procedure Act is impracticable or contrary to the public interest in this instance. *See* 5 U.S.C. 553(b)(3)(B). Section 1218 of the Reform Act requires that the FHFA's regulations authorize the use of AHP subsidy for mortgage refinancing for a two-year period commencing on July 30, 2008. Issuance of an interim final rule will enable the Banks to expedite implementation of AHP mortgage refinancing programs pursuant to section 1218. The delay that would ensue during a proposed notice and comment rulemaking would significantly curtail the available period of time for implementation and operation of AHP mortgage refinancing programs by the Banks. However, because the FHFA believes that public comments are valuable, it encourages comments on this interim final rule, and will consider all comments received on or before December 16, 2008 in promulgating a final rule.

IV. Effective Date

For the reasons stated in part III above, the FHFA for good cause finds that the interim final rule should become effective on October 17, 2008. *See* 5 U.S.C. 553(d)(3).

V. Paperwork Reduction Act

The information collection contained in the current AHP regulation, entitled ''Affordable Housing Program (AHP),'' has been assigned control number 3069–0006 by the Office of Management and Budget (OMB). The interim final rule does not substantively or materially modify the approved information collection. Consequently, the FHFA has not submitted any information to OMB for review under the Paperwork Reduction Act of 1995 (PRA). *See* 44 U.S.C. 3501 *et seq.*

VI. Regulatory Flexibility Act

The FHFA is adopting this regulation in the form of an interim final rule and not as a proposed rule. Therefore, the provisions of the Regulatory Flexibility Act do not apply. *See* 5 U.S.C. 601(2) and 603(a).

List of Subjects in 12 CFR Parts 951 and 1291

Community development, Credit, Federal home loan banks, Housing, Reporting and recordkeeping requirements.

■ For the reasons stated in the preamble, the FHFA hereby amends chapters IX

and XII of title 12 of the Code of Federal Regulations as follows:

CHAPTER XII—FEDERAL HOUSING FINANCE AGENCY

■ 1. Amend title 12 CFR chapter XII by establishing subchapter E, consisting of parts 1280 through 1299, to read as follows:

Subchapter E—Housing Goals and Mission

CHAPTER IX—FEDERAL HOUSING FINANCE BOARD

PART 951—AFFORDABLE HOUSING PROGRAM

■ 2. Transfer 12 CFR part 951 from chapter IX, subchapter G, to chapter XII, subchapter E and redesignate as 12 CFR part 1291.

PART 1291—FEDERAL HOME LOAN BANKS' AFFORDABLE HOUSING PROGRAM

■ 3. The authority citation for the newly redesignated part 1291 continues to read as follows:

Authority: 12 U.S.C. 1430(j).

■ 3A. Revise the heading of newly redesignated part 1291 to read as set forth above.

■ 4. Amend the newly redesignated part 1291 as follows:

Amend:	By removing the reference to:	And adding in its place:
§ 1291.1, definition of "Affordable"	§ 951.1 of this part	§ 1291.1.
§ 1291.1, definition of "Competitive application program".	§ 951.5 of this part	§ 1291.5.
§ 1291.1, definition of "Homeownership set-aside program".	§ 951.6 of this part	§ 1291.6.
§ 1291.3(a)(1)	§ 951.1 of this part	§ 1291.1.
§ 1291.3(a)(2)	§ 951.5 of this part	§ 1291.5.
§ 1291.3(a)(3)	§ 951.6 of this part	§ 1291.6.
§ 1291.3(a)(4)	§ 951.5(c)(13) of this part	§ 1291.5(c)(13).
§ 1291.3(a)(5)	§ 951.5(c)(14) of this part	§ 1291.5(c)(14).
§ 1291.3(a)(6)	§ 951.7 of this part	§ 1291.7.
§ 1291.3(a)(7)	§ 951.8(f)(2) of this part	§ 1291.8(f)(2).
§ 1291.3(a)(8)	§ 951.9(a)(7) and (a)(8) of this part	§ 1291.9(a)(7) and (8).
§ 1291.5(c)(9)(i)	§ 951.9(a)(7) of this part	§ 1291.9(a)(7).
§ 1291.5(c)(9)(ii)	§ 951.9(a)(8) of this part	§ 1291.9(a)(8).
§ 1291.5(c)(10)(ii)	§ 951.5(c)(13) of this part	paragraph (c)(13) of this section.
§ 1291.5(c)(10)(iii)	§ 951.5(c)(14) of this part	paragraph (c)(14) of this section.
§ 1291.5(c)(13)(iii)(A)	§§ 951.7(a) and 951.9 of this part	§§ 1291.7(a) and 1291.9.
§ 1291.5(c)(13)(iii)(B)	§§ 951.8 and 951.9 of this part	§§ 1291.8 and 1291.9.
§ 1291.5(c)(14)(iii)	§ 951.7(a), 951.8, and 951.9, respectively, of this part.	§§ 1291.7(a), 1291.8, and 1291.9.
§ 1291.5(c)(16)(i)(A)	§ 951.5(f) of this part	paragraph (f) of this section.
§ 1291.5(g)(6)	§ 951.8(f)(2) of this part	§ 1291.8(f)(2).
§ 1291.5(h)(1)(i)	§ 951.3 of this part	§ 1291.3.
§ 1291.5(h)(1)(ii)	§ 951.5(e) of this part	paragraph (e) of this section.
§ 1291.6(c)(2)(iii)	§ 951.2(b)(2) of this part	§ 1291.2(b)(2).
§ 1291.6(c)(5)	§ 951.9(a)(7) of this part	§ 1291.9(a)(7).
§ 1291.7(a)(1)(i)(C)(*4*)	§ 951.9(a)(7) or (a)(8), respectively, of this part	§ 1291.9(a)(7) or (8).
§ 1291.7(a)(5)	§ 951.1 of this part	§ 1291.1.
§ 1291.7(b)(1)(i)	§ 951.6(c)(2) of this part	§ 1291.6(c)(2).
§ 1291.7(b)(1)(ii)	§ 951.6(c) of this part	§ 1291.6(c).
§ 1291.7(b)(1)(ii)	§ 951.6(c)(5) of this part	§ 1291.6(c)(5).
§ 1291.7(b)(2)(i)	§ 951.6(c) of this part	§ 1291.6(c).
§ 1291.8(c)(2)	§ 951.5(f) of this part	§ 1291.5(f).
§ 1291.8(i)	§ 907.9 of this chapter	12 CFR 907.9.
§ 1291.9(a)(4)(i)	§ 951.8(b)(1) of this part	§ 1291.8(b)(1).
§ 1291.9(a)(4)(ii)(A)	§ 951.8(b)(2)(i) or (b)(2)(ii) of this part	§ 1291.8(b)(2)(i) or (ii).
§ 1291.9(a)(4)(ii)(B)	§ 951.8(b)(2)(i) of this part	§ 1291.8(b)(2)(i).
§ 1291.9(a)(5)(i)	§ 951.7 of this part	§ 1291.7.
§ 1291.9(a)(5)(ii)	§ 951.7 of this part	§ 1291.7.
§ 1291.9(a)(7)(iii)(A)	§ 951.8(f)(2) of this part	§ 1291.8(f)(2).
§ 1291.9(a)(7)(iii)(B)	§ 951.8(f)(2)	§ 1291.8(f)(2).
§ 1291.9(a)(9)	§ 951.5(c)(13) of this part	§ 1291.5(c)(13).
§ 1291.9(b)	§ 951.8(b)(2)(ii) of this part	§ 1291.8(b)(2)(ii).
§ 1291.11(a)	§ 951.2(a) of this part	§ 1291.2(a).
§ 1291.12(a)	§ 951.2(a) of this part	§ 1291.2(a).
§ 1291.12(b)	§ 951.2(a) of this part	§ 1291.2(a).

■ 5. In newly redesignated part 1291, revise all references to "Finance Board" to read "FHFA".

■ 6. In newly redesignated § 1291.1, add the following definitions in alphabetical order:

§ 1291.1 Definitions.

* * * * *

Director means the Director of the Federal Housing Finance Agency, or his or her designate.

* * * * *

FHFA means the Federal Housing Finance Agency.

* * * * *

■ 7. Amend § 1291.2(b)(2)(i) to read as follows:

§ 1291.2 Required annual AHP contributions; allocation of contributions.

* * * * *

(b) * * *

(2) *Homeownership set-aside programs*—(i) *Allocation amount; first-time homebuyers.* (A) A Bank, in its discretion, may set aside annually, in the aggregate, up to the greater of $4.5 million or 35 percent of the Bank's annual required AHP contribution to provide funds to members participating in homeownership set-aside programs, including a mortgage refinancing set-aside program established under paragraph (f) of this section, pursuant to the requirements of this part.

(B) If a Bank sets aside funds solely for homeownership set-aside programs other than a mortgage refinancing program established under paragraph (f) of this section, at least one-third of the Bank's aggregate annual set-aside allocation to such programs shall be to assist first-time homebuyers.

* * * * *

■ 8. Amend § 1291.6 by adding paragraph (f) to read as follows:

§ 1291.6 Homeownership set-aside programs.

* * * * *

(f) *Mortgage refinancing program*—(1) *General.* A Bank may establish a homeownership set-aside program for the use of AHP direct subsidy by its members to assist in the refinancing of a household's mortgage loan, provided such program meets the requirements of this paragraph (f) and otherwise meets the requirements of part 1291. The provisions of paragraphs (c)(2)(ii), (c)(2)(iii), and (c)(4) through (c)(8) of this section, shall not apply to such program.

(2) *Eligible loans.* A loan is eligible to be refinanced with AHP direct subsidy if the loan is secured by a first mortgage on an owner-occupied unit that is the primary residence of the household, and the loan is refinanced under the Federal Housing Administration's (FHA) HOPE for Homeowners Program established pursuant to Title IV of the Housing and Economic Recovery Act of 2008 and thereby meets all applicable underwriting requirements and other standards under Title II of the National Housing Act, as amended by Title IV (12 U.S.C. 1707 *et seq.*).

(3) *Eligible uses of AHP direct subsidy.* Members may provide the AHP direct subsidy to:

(i) Reduce the outstanding principal balance of the loan below the maximum loan-to-value ratio required under the HOPE for Homeowners Program in order to make the refinanced loan affordable to the household by enabling the household to meet the HOPE for Homeowners Program's debt-to-income standards for a low-or moderate-income household; or

(ii) Pay FHA-approved loan closing costs.

(4) *Eligible lender participants.* A Bank may provide the AHP direct subsidy to members that are FHA-approved lenders for the purpose of refinancing an eligible loan with an FHA-insured loan by the member, or, in the Bank's discretion, to members that provide the subsidy to FHA-approved lenders that are not members of the Bank for the purpose of refinancing an eligible loan if, after consulting with the Bank's Advisory Council, the Bank determines that such action would be in the best interests of borrowers in the Bank's district.

(5) *Sunset.* (i) This paragraph (f) shall expire on July 30, 2010, and a Bank may not commit AHP subsidy to households under its refinancing program after such date.

(ii) A lender may use the AHP subsidy committed by such date for a loan submitted to the FHA for approval on or before July 30, 2010 that is approved for refinancing under the HOPE for Homeowners Program after such date.

■ 9. Amend § 1291.7 by:

■ a. In paragraph (b)(1)(ii), adding ''and § 1291.6(f)'' after ''§ 1291.6(c)''; and

■ b. In paragraph (b)(2)(i), adding ''and § 1291.6(f)'' after ''§ 1291.6(c)''.

■ 10. In newly redesignated § 1291.11, revise all references to ''Board of Directors'' to read ''Director''.

Dated: October 7, 2008.

James B. Lockhart III,

Director, Federal Housing Finance Agency.

[FR Doc. E8–24320 Filed 10–16–08; 8:45 am]

BILLING CODE 8070–01–P

SMALL BUSINESS ADMINISTRATION

13 CFR Part 101

RIN 3245–AF75

Small Business Energy Efficiency Program

AGENCY: Small Business Administration.

ACTION: Direct final rule; comment request.

SUMMARY: The U.S. Small Business Administration (SBA or Administration) is establishing a government-wide program that builds on the Energy Star for Small Business Program, and is located at *http://www.sba.gov/energy.* This rule is promulgated to comply with a provision of the Energy Independence and Security Act of 2007.

DATES: This rule is effective December 1, 2008, without further action, unless SBA receives a significant adverse comment by November 17, 2008. If SBA receives any significant adverse comments, SBA will publish a timely withdrawal of this rule in the **Federal Register**.

ADDRESSES: You may submit comments, identified by RIN: 3245–AF75, by any of the following methods:

- *Federal eRulemaking Portal: http://www.regulations.gov.* Follow the instructions for submitting documents.
- *Mail, for paper, disk, or CD–ROM submissions:* Kathryn Holt, Analyst, Office of Policy and Strategic Planning, Office of the Administrator, 409 Third Street, SW., Mail Code 2150, Washington, DC 20416.
- *Hand Delivery/Courier:* Kathryn Holt, Analyst, Office of Policy and Strategic Planning, Office of the Administrator, 409 Third Street, SW., Mail Stop 2150, Washington, DC 20416.

SBA will post all comments on *http://www.regulations.gov.* If you wish to submit confidential business information (CBI) as defined in the User Notice at *http://www.regulations.gov*, please submit the information to Kathryn Holt, Analyst, Office of Policy and Strategic Planning, Office of the Administrator, 409 Third Street, SW., Mail Stop 2150, Washington, DC 20416, or send an e-mail to *kathryn.holt@sba.gov.* Highlight the information that you consider to be CBI and explain why you believe SBA should hold this information as confidential. SBA will review the information and make its final determination of whether it will publish the information or not.

FOR FURTHER INFORMATION CONTACT: Kathryn Holt, Analyst, Office of Policy and Strategic Planning, Office of the Administrator, 409 Third Street, SW., Mail Stop 2150, Washington, DC 20416 or *kathryn.holt@sba.gov.*

SUPPLEMENTARY INFORMATION: The Administration has developed and coordinated a Government-wide program, building on the Energy Star for Small Business Program, to assist small business concerns in: Becoming more energy efficient, understanding the cost savings from improved energy efficiency, and identifying financing options for energy efficiency upgrades. This rule is promulgated to comply with the Energy Independence and Security Act of 2007, § 1203(b). (15 U.S.C. 657h).

The program was developed and coordinated in consultation with the Secretary of the Department of Energy and the Administrator of the Environmental Protection Agency, and

in cooperation with entities the Administration has considered appropriate, for example, industry trade associations, industry members, and energy efficiency organizations.

The Administration is making available the information and materials developed under the program to small business concerns, including smaller design, engineering, and construction firms, and other Federal programs for energy efficiency, such as the Energy Star for Small Business Program.

The Administration will develop a strategy to educate, encourage, and assist small business concerns in adopting energy efficient building fixtures and equipment.

Consideration of Comments

This is a direct final rule, and SBA will review all comments. SBA believes that this rule is routine and non-controversial, and SBA anticipates no significant adverse comments to this rulemaking. If SBA receives any significant adverse comments, it will publish a timely withdrawal of this direct final rule.

Compliance With Executive Orders 12866, 12988, and 13132, the Paperwork Reduction Act (44 U.S.C. Ch. 35), and the Regulatory Flexibility Act (5 U.S.C. 601–612)

Executive Order 12866

The Office of Management and Budget (OMB) has determined that this rule does not constitute a significant regulatory action under Executive Order 12866.

Executive Order 12988

This action meets applicable standards set forth in sections 3(a) and 3(b)(2) of Executive Order 12988, Civil Justice Reform, to minimize litigation, eliminate ambiguity, and reduce burden. The action does not have retroactive or preemptive effect.

Executive Order 13132

For purposes of E.O. 13132, the SBA has determined that the rule will not have substantial, direct effects on the States, on the relationship between the national government and the States, or on the distribution of power and responsibilities among the various levels of government. Therefore, for the purpose of Executive Order 13132, Federalism, SBA determines that this proposed rule has no federalism implications warranting preparation of a federalism assessment.

Paperwork Reduction Act, 44 U.S.C. Ch. 35

SBA has determined that this proposed rule does not impose additional reporting or recordkeeping requirements under the Paperwork Reduction Act, 44 U.S.C. Chapter 35.

Regulatory Flexibility Act, 5 U.S.C. 601–612

The Regulatory Flexibility Act (RFA) 5 U.S.C. 601, requires administrative agencies to consider the effect of their actions on small entities, small non-profit enterprises, and small local governments. Pursuant to the RFA, when an agency issues a rulemaking, the agency must prepare a regulatory flexibility analysis which describes the impact of the rule on small entities. However, section 605 of the RFA allows an agency to certify a rule, in lieu of preparing an analysis, if the rulemaking is not expected to have a significant economic impact on a substantial number of small entities. Within the meaning of RFA, SBA certifies that this rule will not have a significant economic impact on a substantial number of small entities.

List of Subjects in 13 CFR Part 101

Administrative practice and procedure, Authority delegations (Government agencies), Intergovernmental relations, Investigations, Organization and functions (Government agencies), Reporting and recordkeeping requirements.

■ For the reasons stated in the preamble, the Small Business Administration amends 13 CFR part 101 as follows:

PART 101–ADMINISTRATION

■ 1. The authority citation for part 101 is revised to read as follows:

Authority: 5 U.S.C. 552 and App. 3, secs. 2, 4(a), 6(a), and 9(a)(1)(T); 15 U.S.C. 633, 634, 687; 31 U.S.C. 6506; 44 U.S.C. 3512; 42 U.S.C. 6307(d); 15 U.S.C. 657h; E.O. 12372 (July 14, 1982), 47 FR 30959, 3 CFR, 1982 Comp., p. 197, as amended by E.O. 12416 (April 8, 1983), 48 FR 15887, 3 CFR, 1983 Comp., p. 186.

■ 2. Amend part 101 by adding Subpart E to read as follows:

Subpart E—Small Business Energy Efficiency

Sec.
101.500 Small Business Energy Efficiency Program.

§ 101.500 Small Business Energy Efficiency Program.

(a) The Administration has developed and coordinated a Government-wide program, which is located at *http://www.sba.gov/energy*, building on the Energy Star for Small Business Program, to assist small business concerns in becoming more energy efficient, understanding the cost savings from improved energy efficiency, and identifying financing options for energy efficiency upgrades.

(b) The Program has been developed and coordinated in consultation with the Secretary of the Department of Energy and the Administrator of the Environmental Protection Agency, and in cooperation with entities the Administrator has considered appropriate, for example, such as industry trade associations, industry members, and energy efficiency organizations. SBA's Office of Policy and Strategic Planning will be responsible for overseeing the program but will coordinate with the Department of Energy and EPA.

(c) The Administration is distributing and making available online, the information and materials developed under the program to small business concerns, including smaller design, engineering, and construction firms, and other Federal programs for energy efficiency, such as the Energy Star for Small Business Program.

(d) The Administration will develop a strategy to educate, encourage, and assist small business concerns in adopting energy efficient building fixtures and equipment.

Sandy K. Baruah,

Acting Administrator.

[FR Doc. E8–24599 Filed 10–16–08; 8:45 am]

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SECURITIES AND EXCHANGE COMMISSION

17 CFR Part 240

[Release No. 34–58774; File No. S7–08–08]

RIN 3235–AK06

''Naked'' Short Selling Antifraud Rule

AGENCY: Securities and Exchange Commission.

ACTION: Final rule.

SUMMARY: The Securities and Exchange Commission (''Commission'') is adopting an antifraud rule under the Securities Exchange Act of 1934 (''Exchange Act'') to address fails to deliver securities that have been associated with ''naked'' short selling. The rule will further evidence the liability of short sellers, including broker-dealers acting for their own

accounts, who deceive specified persons about their intention or ability to deliver securities in time for settlement (including persons that deceive their broker-dealer about their locate source or ownership of shares) and that fail to deliver securities by settlement date.

DATES: *Effective Date:* October 17, 2008.

FOR FURTHER INFORMATION CONTACT: James A. Brigagliano, Associate Director, Josephine J. Tao, Assistant Director, Victoria L. Crane, Branch Chief, Joan M. Collopy, Special Counsel, Christina M. Adams and Matthew Sparkes, Staff Attorneys, Office of Trading Practices and Processing, Division of Trading and Markets, at (202) 551–5720, at the Securities and Exchange Commission, 100 F Street, NE., Washington, DC 20549–6628.

SUPPLEMENTARY INFORMATION: We are adding Rule 10b–21 [17 CFR 242.10b–21] under the Exchange Act.

I. Introduction

We are adopting an antifraud rule, Rule 10b–21, aimed at short sellers, including broker-dealers acting for their own accounts, who deceive specified persons, such as a broker or dealer, about their intention or ability to deliver securities in time for settlement and that fail to deliver securities by settlement date. Among other things, Rule 10b–21 will target short sellers who deceive their broker-dealers about their source of borrowable shares for purposes of complying with Regulation SHO's ''locate'' requirement.[1] Rule 10b–21 will also apply to sellers who misrepresent to their broker-dealers that they own the shares being sold.

A seller misrepresenting its short sale locate source or ownership of shares may intend to fail to deliver securities in time for settlement and, therefore, engage in abusive ''naked'' short selling. Although abusive ''naked'' short selling is not defined in the federal securities laws, it refers generally to selling short without having stock available for delivery and intentionally failing to deliver stock within the standard three-day settlement cycle.[2]

Although abusive ''naked'' short selling as part of a manipulative scheme is always illegal under the general antifraud provisions of the federal securities laws, including Rule 10b–5 of the Exchange Act,[3] Rule 10b–21 will further evidence the liability of persons that deceive others about their intention or ability to deliver securities in time for settlement, including persons that deceive their broker-dealer about their locate source or ownership of shares.[4] We believe that a rule further evidencing the illegality of these activities will focus the attention of market participants on such activities. Rule 10b–21 will also further evidence that the Commission believes such deceptive activities are detrimental to the markets and will provide a measure of predictability for market participants.

All sellers of securities should promptly deliver, or arrange for delivery of, securities to the respective buyer and all buyers of securities have the right to expect prompt delivery of securities purchased. Thus, Rule 10b–21 takes direct aim at an activity that may create fails to deliver. Those fails can have a negative effect on shareholders, potentially depriving them of the benefits of ownership, such as voting and lending. They also may create a misleading impression of the market for an issuer's securities. Rule 10b–21 will also aid broker-dealers in complying with the locate requirement of Regulation SHO and, thereby, potentially reduce fails to deliver. In addition, Rule 10b–21 could help reduce manipulative schemes involving ''naked'' short selling.

II. Background

A. Regulation SHO

Short selling involves a sale of a security that the seller does not own or that is consummated by the delivery of a security borrowed by or on behalf of the seller.[5] In a ''naked'' short sale, a seller does not borrow or arrange to borrow securities in time to make delivery to the buyer within the standard three-day settlement period.[6] As a result, the seller fails to deliver securities to the buyer when delivery is due (known as a ''fail'' or ''fail to deliver'').[7] Sellers sometimes intentionally fail to deliver securities as part of a scheme to manipulate the price of a security,[8] or possibly to avoid borrowing costs associated with short sales.

Although the majority of trades settle within the standard three-day settlement period,[9] we adopted Regulation SHO[10] in part to address problems associated with persistent fails to deliver securities and potentially abusive ''naked'' short selling.[11] Rule

[1] *See* 17 CFR 242.203(b)(1).

[2] *See* Exchange Act Release No. 56212 (Aug. 7, 2007), 72 FR 45544 (Aug. 14, 2007) (''2007 Regulation SHO Final Amendments''); Exchange Act Release No. 54154 (July 14, 2006), 71 FR 41710 (July 21, 2006) (''2006 Regulation SHO Proposed Amendments'').

[3] 17 CFR 240.10b–5.

[4] This conduct is also in violation of other provisions of the federal securities laws, including the antifraud provisions.

[5] 17 CFR 242.200(a).

[6] *See* Exchange Act Release No. 50103 (July 28, 2004), 69 FR 48008 (Aug. 6, 2004) (''2004 Regulation SHO Adopting Release'') (stating that ''naked'' short selling generally refers to selling short without having borrowed the securities to make delivery).

[7] Generally, investors complete or settle their security transactions within three business days. This settlement cycle is known as T+3 (or ''trade date plus three days''). T+3 means that when the investor purchases a security, the purchaser's payment generally is received by its brokerage firm no later than three business days after the trade is executed. When the investor sells a security, the seller generally delivers its securities, in certificated or electronic form, to its brokerage firm no later than three business days after the sale. The three-day settlement period applies to most security transactions, including stocks, bonds, municipal securities, mutual funds traded through a brokerage firm, and limited partnerships that trade on an exchange. Government securities and stock options settle on the next business day following the trade. In addition, Rule 15c6–1 prohibits broker-dealers from effecting or entering into a contract for the purchase or sale of a security that provides for payment of funds and delivery of securities later than the third business day after the date of the contract unless otherwise expressly agreed to by the parties at the time of the transaction. 17 CFR 240.15c6–1; Exchange Act Release No. 33023 (Oct. 7, 1993), 58 FR 52891 (Oct. 13, 1993). However, failure to deliver securities on T+3 does not violate Rule 15c6–1.

[8] In 2003, the Commission settled a case against certain parties relating to allegations of manipulative short selling in the stock of a corporation. The Commission alleged that the defendants profited from engaging in massive ''naked'' short selling that flooded the market with the stock, and depressed its price. *See Rhino Advisors, Inc. and Thomas Badian,* Lit. Rel. No. 18003 (Feb. 27, 2003); *see also SEC* v. *Rhino Advisors, Inc. and Thomas Badian,* Civ. Action No. 03–civ–1310 (RO) (S.D.N.Y) (Feb. 26, 2003); *see also* Securities Exchange Act Release No. 48709 (Oct. 28, 2003), 68 FR 62972, 62975 (Nov. 6, 2003) (''2003 Regulation SHO Proposing Release'') (describing the alleged activity in the settled case involving stock of Sedona Corporation); 2004 Regulation SHO Adopting Release, 69 FR at 48016, n.76.

[9] According to the National Securities Clearing Corporation (''NSCC''), 99% (by dollar value) of all trades settle on time. Thus, on an average day, approximately 1% (by dollar value) of all trades, including equity, debt, and municipal securities fail to settle. The vast majority of these fails are closed out within five days after T+3. In addition, fails to deliver may arise from either short or long sales of securities. There may be legitimate reasons for a fail to deliver. For example, human or mechanical errors or processing delays can result from transferring securities in custodial or other form rather than book-entry form, thereby causing a fail to deliver on a long sale within the normal three-day settlement period. In addition, broker-dealers that make markets in a security (''market makers'') and who sell short thinly-traded, illiquid stock in response to customer demand may encounter difficulty in obtaining securities when the time for delivery arrives. The Commission's Office of Economic Analysis (''OEA'') estimates that, on an average day between May 1, 2007 and July 31, 2008 (*i.e.*, the time period that includes all full months after the Commission started receiving price data from NSCC), trades in ''threshold securities,'' as defined in Rule 203(b)(c)(6) of Regulation SHO, that fail to settle within T+3 account for approximately 0.3% of dollar value of trading in all equity securities.

[10] 17 CFR 242.200. Regulation SHO became effective on January 3, 2005.

[11] *See* 2007 Regulation SHO Final Amendments, 72 FR at 45544 (stating that ''[a]mong other things,

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203 of Regulation SHO, in particular, contains a ''locate'' requirement that provides that, ''[a] broker or dealer may not accept a short sale order in an equity security from another person, or effect a short sale in an equity security for its own account, unless the broker or dealer has: (i) Borrowed the security, or entered into a bona-fide arrangement to borrow the security; or (ii) Reasonable grounds to believe that the security can be borrowed so that it can be delivered on the date delivery is due; and (iii) Documented compliance with this paragraph (b)(1).'' [12] In the 2004 Regulation SHO Adopting Release, the Commission explicitly permitted broker-dealers to rely on customer assurances that the customer has identified its own source of borrowable securities, provided it is reasonable for the broker-dealer to do so.[13] We are concerned, however, that some short sellers may have been deliberately misrepresenting to broker-dealers that they have obtained a legitimate locate source.[14]

In addition, we are concerned that some short sellers may have made misrepresentations to their broker-dealers about their ownership of shares as an end run around Regulation SHO's locate requirement.[15] Some sellers have also misrepresented that their sales are long sales in order to circumvent Rule 105 of Regulation M,[16] which prohibits certain short sellers from purchasing securities in a secondary or follow-on offering.[17] Under Rule 200(g)(1) of Regulation SHO, ''[a]n order to sell shall be marked 'long' only if the seller is deemed to own the security being sold pursuant to paragraphs (a) through (f) of this section [18] and either: (i) The security to be delivered is in the physical possession or control of the broker or dealer; or (ii) it is reasonably expected that the security will be in the physical possession or control of the broker or dealer no later than the settlement of the transaction.'' [19]

Under Regulation SHO, the executing or introducing broker-dealer is responsible for determining whether there are reasonable grounds to believe that a security can be borrowed so that it can be delivered on the date delivery is due on a short sale, and whether a seller owns the security being sold and can reasonably expect that the security will be in the physical possession or control of the broker-dealer no later than settlement date for a long sale. However, a broker-dealer relying on a customer that makes misrepresentations about its locate source or ownership of shares may not receive shares when delivery is due. For example, sellers may be making misrepresentations to their broker-dealers about their locate sources or ownership of shares for securities that are very difficult or expensive to borrow. Such sellers may know that they cannot deliver securities by settlement date due to, for example, a limited number of shares being available to borrow or purchase, or they may not intend to obtain shares for timely delivery because the cost of borrowing or purchasing may be high. That result undermines the Commission's goal of addressing concerns related to ''naked'' short selling and extended fails to deliver.

B. Concerns About ''Naked'' Short Selling

We have been concerned about ''naked'' short selling and, in particular, abusive ''naked'' short selling, for some time. As discussed above, our concerns about potentially abusive ''naked'' short selling were an important reason for our adoption of Regulation SHO in 2004. In addition, due to our concerns about the potentially negative market impact of large and persistent fails to deliver, and the fact that we continued to observe a small number of threshold securities [20] with fail to deliver positions that were not being closed out under existing delivery and settlement requirements, in 2007 we eliminated the ''grandfather'' exception to Regulation SHO's close-out requirement [21] and today we adopted amendments to eliminate the options market maker exception to the close-out requirement.[22]

In addition to the actions we have taken aimed at reducing fails to deliver and addressing potentially abusive ''naked'' short selling in threshold securities, recently we took emergency action targeting ''naked'' short selling in some non-threshold securities. Specifically, on July 15, 2008, we published an emergency order under Section 12(k) of the Exchange Act (the ''July Emergency Order'') [23] that temporarily imposed enhanced requirements on short sales in the publicly traded securities of certain substantial financial firms.[24]

We issued the July Emergency Order because we were concerned that false rumors spread by short sellers regarding financial institutions of significance in the U.S. could continue to threaten significant market disruption. As we

Regulation SHO imposes a close-out requirement to address persistent failures to deliver stock on trade settlement date and to target potentially abusive ''naked'' short selling in certain equity securities.'').

[12] 17 CFR 242.203(b). Market makers engaged in bona fide market making in the security at the time they effect the short sale are excepted from this requirement.

[13] *See* 2004 Regulation SHO Adopting Release, 69 FR at 48014.

[14] *See, e.g., Sandell Asset Management Corp., Lars Eric Thomas Sandell, Patrick T. Burke and Richard F. Ecklord*, Securities Act Release No. 8857 (Oct. 10, 2007) (settled order).

[15] *See id.*

[16] 17 CFR 242.105.

[17] *See Goldman Sachs Execution and Clearing L.P.,* Exchange Act Release No. 55465 (Mar. 14, 2007) (settled order); *Weitz and Altman,* Lit. Release No. 18121 (April 30, 2003) (settled civil action).

[18] Rule 200(b) of Regulation SHO provides that a seller is deemed to own a security if, ''(1) The person or his agent has title to it; or (2) The person has purchased, or has entered into an unconditional contract, binding on both parties thereto, to purchase it, but has not yet received it; or (3) The person owns a security convertible into or exchangeable for it and has tendered such security for conversion or exchange; or (4) The person has an option to purchase or acquire it and has exercised such option; or (5) The person has rights or warrants to subscribe to it and has exercised such rights or warrants; or (6) The person holds a security futures contract to purchase it and has received notice that the position will be physically settled and is irrevocably bound to receive the underlying security.''

[19] 17 CFR 242.200(g)(1).

[20] A ''threshold security'' is defined in Rule 203(c)(6) as any equity security of an issuer that is registered pursuant to section 12 of the Exchange Act (15 U.S.C. 78l) or for which the issuer is required to file reports pursuant to section 15(d) of the Exchange Act (15 U.S.C. 78o(d)): (i) For which there is an aggregate fail to deliver position for five consecutive settlement days at a registered clearing agency of 10,000 shares or more, and that is equal to at least 0.5% of the issue's total shares outstanding; and (ii) that is included on a list disseminated to its members by a self-regulatory organization. 17 CFR 242.203(c)(6).

[21] *See* 2007 Regulation SHO Final Amendments, 72 FR 45544. The ''grandfather'' exception had provided that fails to deliver established prior to a security becoming a threshold security did not have to be closed out in accordance with Regulation SHO's close-out requirement. This amendment also contained a one-time phase-in period that provided that previously-grandfathered fails to deliver in a security that was a threshold security on the effective date of the amendment must be closed out within 35 consecutive settlement days from the effective date of the amendment. The phase-in period ended December 5, 2007.

[22] *See* Exchange Act Release No. 34–58775 (Oct. 14, 2008) (''2008 Regulation SHO Final Amendments''). The options market maker exception had excepted from the close-out requirement any fail to deliver position in a threshold security resulting from short sales effected by a registered options market maker to establish or maintain a hedge on options positions that were created before the underlying security became a threshold security.

[23] *See* Exchange Act Release No. 58166 (July 15, 2008).

[24] *See id.* The Emergency Order required that, in connection with transactions in the publicly traded securities of the substantial financial firms identified on Appendix A to the Emergency Order (''Appendix A Securities''), no person could effect a short sale in the Appendix A Securities using the means or instrumentalities of interstate commerce unless such person or its agent had borrowed or arranged to borrow the security or otherwise had the security available to borrow in its inventory prior to effecting such short sale and delivered the security on settlement date.

noted in the July Emergency Order, false rumors can lead to a loss of confidence in our markets. Such loss of confidence can lead to panic selling, which may be further exacerbated by ''naked'' short selling. As a result, the prices of securities may artificially and unnecessarily decline well below the price level that would have resulted from the normal price discovery process. If significant financial institutions are involved, this chain of events can threaten disruption of our markets.[25]

On July 29, 2008, we extended the July Emergency Order after carefully reevaluating the current state of the markets in consultation with officials of the Board of Governors of the Federal Reserve System, the Department of the Treasury, and the Federal Reserve Bank of New York. Due to our continued concerns about the ongoing threat of market disruption and effects on investor confidence, we determined that the standards of extension had been met.[26] Pursuant to the extension, the July Emergency Order terminated at 11:59 p.m. EDT on August 12, 2008.[27]

In addition to our adopting Rule 10b–21, as noted above, today we also adopted amendments to eliminate the options market maker exception to Regulation SHO's delivery requirement.[28] We also adopted today an interim final temporary rule that enhances the delivery requirements for sales of all equity securities (''2008 Interim Rule'').[29]

The amendments to the options market maker exception and the 2008 Interim Rule that we adopted today both focus on the timely delivery of securities and are not aimed at pre-trade activity, such as compliance with Regulation SHO's locate requirement. Because we continue to be concerned about fails to deliver and potentially abusive ''naked'' short selling, in addition to our initiatives to strengthen Regulation SHO's delivery requirements, we are adopting Rule 10b–21 to also target sellers who deceive their broker-dealers or certain other persons about their source of borrowable shares and their share ownership.

As we stated in the Proposing Release,[30] we are concerned about persons that sell short securities and deceive specified persons about their intention or ability to deliver the securities in time for settlement, or deceive their broker-dealer about their locate source or ownership of shares. Commission enforcement actions have contributed to our concerns about the extent of misrepresentations by short sellers about their locate sources and ownership of shares, regardless of whether they result in fails to deliver. For example, the Commission recently announced a settled enforcement action against hedge fund adviser Sandell Asset Management Corp. (''SAM''), its chief executive officer, and two employees in connection with allegedly (i) improperly marking some short sale orders ''long'' and (ii) misrepresenting to executing brokers that SAM personnel had located sufficient stock to borrow for short sale orders.[31]

In addition, as we have stated on several prior occasions, we are concerned about the negative effect that fails to deliver may have on the markets and shareholders.[32] For example, fails to deliver may deprive shareholders of the benefits of ownership, such as voting and lending.[33] In addition, where a seller of securities fails to deliver securities on settlement date, in effect the seller unilaterally converts a securities contract (which is expected to settle within the standard three-day settlement period) into an undated futures-type contract, to which the buyer might not have agreed, or that might have been priced differently.[34]

In addition, commenters (including issuers and investors) have repeatedly expressed concerns about fails to deliver in connection with manipulative ''naked'' short selling. For example, in response to proposed amendments to Regulation SHO in 2006[35] designed to further reduce the number of persistent fails to deliver in certain equity securities by eliminating Regulation SHO's ''grandfather'' exception, and amending the options market maker exception, we received a number of comments that expressed concerns about ''naked'' short selling and extended delivery failures.[36] Commenters continued to express these concerns in response to proposed amendments to eliminate the options market maker exception to the close-out requirement of Regulation SHO in 2007[37] and in response to the Proposing Release.[38]

[25] We delayed the effective date of the Emergency Order to July 21, 2008 to create the opportunity to address, and to allow sufficient time for market participants to make, adjustments to their operations to implement the enhanced requirements. Moreover, in addressing anticipated operational accommodations necessary for implementation of the Emergency Order, we issued an amendment to the Emergency Order on July 18, 2008. *See* Exchange Act Release No. 58190 (July 18, 2008) (excepting from the Emergency Order bona fide market makers, short sales in Appendix A Securities sold pursuant to Rule 144 of the Securities Act of 1933, and certain short sales by underwriters, or members of a syndicate or group participating in distributions of Appendix A Securities).

[26] *See* Exchange Act Release No. 58248 (July 29, 2008).

[27] In addition, on September 17, 2008, the Commission further addressed abusive ''naked'' short selling by issuing an Emergency Order that temporarily adopted amendments to Regulation SHO's close-out requirement, amendments to eliminate Regulation SHO's options market maker exception to the close-out requirement, and Rule 10b–21. *See* Exchange Act Release No. 58572 (Sept. 17, 2008). The Commission also issued emergency orders to require disclosure of short sales, Exchange Act Release 58591 (Sept. 18, 2008) and 58591A (Sept. 21, 2008), and temporarily halt short selling in financial stocks, Exchange Act Release 58592 (Sept. 18, 2008) and Exchange Act Release 58611 (Sept. 21, 2008).

[28] *See supra* note 22.

[29] *See* Exchange Act Release No. 58773 (Oct. 14, 2008).

[30] Exchange Act Release No. 57511 (Mar. 17, 2008), 73 FR 15376, 15377 (Mar. 21, 2008) (''Proposing Release'').

[31] *See Sandell Asset Management Corp.,* Securities Act Release No. 8857; *see also Goldman Sachs Execution and Clearing L.P.,* Exchange Act Release No. 55465; *U.S.* v. *Naftalin,* 441 U.S. 768 (1979) (discussing a market manipulation scheme in which brokers suffered substantial losses when they had to purchase securities to replace securities they had borrowed to make delivery on short sale orders received from an individual investor who had falsely represented to the brokers that he owned the securities being sold).

[32] *See supra* note 22; 2007 Regulation SHO Final Amendments, 72 FR at 45544; 2006 Regulation SHO Proposed Amendments, 71 FR at 41712; 2007 Regulation SHO Proposed Amendments, 72 FR at 45558–45559; Proposing Release, 73 FR at 15378.

[33] *See id.*

[34] *See id.*

[35] See 2006 Regulation SHO Proposed Amendments, 71 FR 41710.

[36] See, *e.g.*, letter from Patrick M. Byrne, Chairman and Chief Executive Officer, Overstock.com, Inc., dated Sept. 11, 2006 (''Overstock''); letter from Daniel Behrendt, Chief Financial Officer, and Douglas Klint, General Counsel, TASER International, dated Sept. 18, 2006 (''TASER''); letter from John Royce, dated April 30, 2007 (''Royce''); letter from Michael Read, dated April 29, 2007 (''Read''); letter from Robert DeVivo, dated April 26, 2007 (''DeVivo''); letter from Ahmed Akhtar, dated April 26, 2007 (''Akhtar'').

[37] See, *e.g.*, letter from Jack M. Wedam, dated Oct. 16, 2007; letter from Michael J. Ryan, Executive Director and Senior Vice President, Center for Capital Markets Competitiveness, U.S. Chamber of Commerce, dated Sept. 13, 2007 (''U.S. Chamber of Commerce''); letter from Robert W. Raybould, CEO Enteleke Capital Corp., dated Sept. 12, 2007; letter from Mary Helburn, Executive Director, National Coalition Against Naked Shorting, dated Sept. 11, 2007 (''NCANS 2007'').

[38] *See, e.g.*, letter from Richard H. Baker, President and Chief Executive Officer, Managed Funds Association, dated May 21, 2008 (''MFA'') (stating that ''[m]arket manipulation, such as intentional and abusive naked short selling, undermines the integrity of the U.S. capital markets and threatens investor confidence, market liquidity and market efficiency''); letter from Kurt N. Schacht and Linda Rittenhouse, Centre for Financial Market Integrity, dated June 17, 2008 (stating that they ''support efforts by the Commission to curtail naked short selling, for all the reasons noted in the [Proposing Release] relating to the detrimental effects on the marketplace. As noted [in the Proposing Release], this practice not only affects

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To the extent that fails to deliver might be part of manipulative ''naked'' short selling, which could be used as a tool to drive down a company's stock price,[39] such fails to deliver may undermine the confidence of investors.[40] These investors, in turn, may be reluctant to commit capital to an issuer they believe to be subject to such manipulative conduct.[41] In addition, issuers may believe that they have suffered unwarranted reputational damage due to investors' negative perceptions regarding fails to deliver in the issuer's security.[42] Unwarranted reputational damage caused by fails to deliver might have an adverse impact on the security's price.[43]

Strengthening rules that address ''naked'' short selling will provide increased confidence in the markets. Since the issuance of the July Emergency Order, members of the public have repeatedly expressed their concerns about a loss of confidence in the markets. For example, one commenter stated that ''financial confidence is critically important'' for companies to do business.[44] Another commenter stated that ''existing laws should be enforced, but further steps should be taken to prevent any further erosion of the investing publics [sic] confidence.'' [45]

We are concerned about the ability of short sellers to use ''naked'' short selling as a tool to manipulate the prices of securities.[46] Thus, in conjunction with our other short selling initiatives aimed at further reducing fails to deliver and addressing abusive ''naked'' short selling, we have adopted Rule 10b–21 substantially as proposed.

Proposed Rule 10b–21 was narrowly tailored to specify that it is unlawful for any person to submit an order to sell a security if such person deceives a broker-dealer, participant of a registered clearing agency,[47] or purchaser regarding its intention or ability to deliver the security on the date delivery is due, and such person fails to deliver the security on or before the date delivery is due.[48] We received over 700 comment letters in response to the Proposing Release.

The comment letters were from numerous entities, including issuers, retail investors, broker-dealers, SROs, associations, members of Congress, and other elected officials.[49] Many commenters supported our goals of further addressing potentially abusive ''naked'' short selling and fails to deliver, while not necessarily agreeing with the Commission's approach. For example, some commenters argued for more stringent short sale regulation.[50] Others urged us to take stronger enforcement action against abusive ''naked'' short sellers under the current federal securities laws rather than, or in addition to, adopting Rule 10b–21.[51]

shareowners by depriving the[m] of the basic benefits of ownership, it also may detrimentally affect the issuer's reputation and subvert the appropriate workings of the market by avoiding certain restrictions applicable to those who deliver on time. All of these issues can ultimately undermine investor confidence.''); letter from Wallace E. Boston, President and Chief Executive Officer, American Public Education, Inc., dated May 20, 2008 (noting that ''[a]s the CEO of a recently public company, I am acutely aware of the impact that abusive short-selling can have on issuers and investors.'').

[39] *See, e.g., Rhino Advisors, Inc. and Thomas Badian,* Lit. Rel. No. 18003 (Feb. 27, 2003); *see also SEC* v. *Rhino Advisors, Inc. and Thomas Badian,* Civ. Action No. 03 civ 1310 (RO) (S.D.N.Y) (Feb. 26, 2003) (settled case in which we alleged that the defendants profited from engaging in massive ''naked'' short selling that flooded the market with the company's stock, and depressed its price); *see also S.E.C.* v. *Gardiner,* 48 S.E.C. Docket 811, No. 91 Civ. 2091 (S.D.N.Y. 1991) (alleged manipulation by sales representative by directing or inducing customers to sell stock short in order to depress its price); *U.S.* v. *Russo,* 74 F.3d 1383, 1392 (2d Cir. 1996) (short sales were sufficiently connected to the manipulation scheme as to constitute a violation of Exchange Act Section 10(b) and Rule 10b–5).

[40] In response to the 2007 Regulation SHO Proposed Amendments, we received comment letters discussing the impact of fails to deliver on investor confidence. *See, e.g.*, letter from NCANS 2007. Commenters expressed similar concerns in response to the 2006 Regulation SHO Proposed Amendments. *See, e.g.*, letter from Mary Helburn, Executive Director, National Coalition Against Naked Shorting, dated Sept. 30, 2006 (''NCANS 2006''); letter from Richard Blumenthal, Attorney General, State of Connecticut, dated Sept. 19, 2006.

[41] In response to the 2007 Regulation SHO Proposed Amendments, we received comment letters expressing concern about the impact of potential ''naked'' short selling on capital formation, claiming that ''naked'' short selling causes a drop in an issuer's stock price and may limit the issuer's ability to access the capital markets. *See, e.g.*, letter from Robert K. Lifton, Chairman and CEO, Medis Technologies, Inc., dated Sept. 12, 2007; letter from NCANS 2007. Commenters expressed similar concerns in response to the 2006 Regulation SHO Proposed Amendments. *See, e.g.*, letter from Congressman Tom Feeney—Florida, U.S. House of Representatives, dated Sept. 25, 2006; *see also* letter from Zix Corporation, dated Sept. 19, 2006 (stating that ''[m]any investors attribute the Company's frequent re-appearances on the Regulation SHO list to manipulative short selling and frequently demand that the Company ''do something'' about the perceived manipulative short selling. This perception that manipulative short selling of the Company's securities is continually occurring has undermined the confidence of many of the Company's investors in the integrity of the market for the Company's securities.'').

[42] Due in part to such concerns, some issuers have taken actions to attempt to make transfer of their securities ''custody only,'' thus preventing transfer of their stock to or from securities intermediaries such as the Depository Trust Company (''DTC'') or broker-dealers. *See* 2003 Regulation SHO Proposing Release, 68 FR at 62975. Some issuers have attempted to withdraw their issued securities on deposit at DTC, which makes the securities ineligible for book-entry transfer at a securities depository. *See id.* Withdrawing securities from DTC or requiring custody-only transfers would undermine the goal of a national clearance and settlement system designed to reduce the physical movement of certificates in the trading markets. *See id.* We note, however, that in 2003 the Commission approved a DTC rule change clarifying that its rules provide that only its participants may withdraw securities from their accounts at DTC, and establishing a procedure to process issuer withdrawal requests. *See* Exchange Act Release No. 47978 (June 4, 2003), 68 FR 35037 (June 11, 2003).

[43] *See also* 2006 Regulation SHO Proposed Amendments, 71 FR at 41712; 2007 Regulation SHO Amendments, 72 FR at 45544; 2007 Regulation SHO Proposed Amendments, 72 FR at 45558–45559; Proposing Release, 73 FR at 15378 (providing additional discussion of the impact of fails to deliver on the market); *see also* 2003 Regulation SHO Proposing Release, 68 FR at 62975 (discussing the impact of ''naked'' short selling on the market).

[44] *See* Comment of Ron Heller (July 21, 2008) (''Heller'') (commenting on the Emergency Order).

[45] *See* Comment of Ronald L. Rourk (July 21, 2008) (''Rourk'') (commenting on the proposal to eliminate Regulation SHO's options market maker exception).

[46] *See, e.g.*, Commission press release, dated July 13, 2008, announcing that the Commission's Office of Compliance Inspections and Examinations, as well as FINRA and New York Stock Exchange Regulation, Inc., will immediately conduct examinations aimed at the prevention of the intentional spreading of false information intended to manipulate securities prices. *See http://www.sec.gov/news/press/2008/2008-140.htm.* In addition, in April of this year, the Commission charged Paul S. Berliner, a trader, with securities fraud and market manipulation for intentionally disseminating a false rumor concerning The Blackstone Group's acquisition of Alliance Data Systems Corp (''ADS''). The Commission alleged that this false rumor caused the price of ADS stock to plummet, and that Berliner profited by short selling ADS stock and covering those sales as the false rumor caused the price of ADS stock to fall. *See http://www.sec.gov/litigation/litreleases/2008/lr20537.htm.*

[47] The term ''participant'' has the same meaning as in section 3(a)(24) of the Exchange Act. *See* 15 U.S.C. 78c(a)(24). The term ''registered clearing agency'' means a clearing agency, as defined in section 3(a)(23) of the Exchange Act, that is registered as such pursuant to section 17A of the Exchange Act. *See* 15 U.S.C. 78c(a)(23)(A), 78q–1 and 15 U.S.C. 78q–1(b), respectively.

[48] *See* Proposed Rule 10b–21.

[49] The comment letters are available on the Commission's Internet Web Site at *http://www.sec.gov/comments/s7-08-08/s70808.shtml.*

[50] *See, e.g.*, letter from Arik B. Fetscher, Esq., dated April 2, 2008; letter from Fred Adams, Jr., Chairman and Chief Executive Officer, Cal-Maine Foods, Inc., dated May 19, 2008; letter from David T. Hirschman, President and Chief Executive Officer, Center for Capital Markets Competitiveness, United States Chamber of Commerce, dated May 20, 2008 (''Chamber of Commerce''); letter from Wallace E. Boston, Jr., President and Chief Executive Officer, American Public Education, Inc., dated May 20, 2008; letter from Kurt N. Schacht, Executive Director, and Linda L. Rittenhouse, Senior Policy Analyst, CFA Institute Centre for Financial Market Integrity, dated June 17, 2008; letter from Guillaume Cloutier, dated July 25, 2008; letter from Shunliang Wang, dated July 27, 2008; letter from Scott Bridgford, dated July 29, 2008; letter from Keith Kottwitz, dated Aug. 1, 2008.

[51] *See, e.g.*, letter from Tony J. Akin, Jr., Financial Advisor, dated March 31, 2008; letter from Gary D. Owens, CEO, OYO Geospace, dated April 22, 2008; letter from Daniel J. Popeo, Chairman & General Counsel, and Paul D. Kamenar, Senior Executive Counsel, Washington Legal Foundation, dated May

Some commenters asked that if we adopt Rule 10b–21 as proposed, we provide certain clarifications regarding the application of the rule.[52] We highlight in the discussion below some of the main issues, concerns, and suggestions raised in the comment letters.

III. Discussion of Rule 10b–21

A. Rule 10b–21

After careful consideration of the comments, we are adopting Rule 10b–21 substantially as proposed. Rule 10b–21 specifies that it is unlawful for any person to submit an order to sell an equity security if such person deceives a broker-dealer, participant of a registered clearing agency,[53] or purchaser regarding its intention or ability to deliver the security on the date delivery is due, and such person fails to deliver the security on or before the date delivery is due.[54] Scienter is a necessary element for a violation of the rule.[55] Some commenters questioned whether, similar to Regulation SHO, proposed Rule 10b–21 would apply only to equity securities.[56] In response to these comments, we clarify that as proposed and adopted, Rule 10b–21 applies only to equity securities.[57]

Rule 10b–21 will cover those situations where a seller deceives a broker-dealer, participant of a registered clearing agency, or a purchaser about its intention to deliver securities by settlement date, its locate source, or its share ownership, and the seller fails to deliver securities by settlement date.[58] Rule 10b–21 will prohibit the deception of persons participating in the transaction—broker-dealers, participants of registered clearing agencies, or purchasers. Further, because one of the principal goals of Rule 10b–21 is to reduce fails to deliver, violation of the rule will occur only if a fail to deliver results from the relevant transaction.

For purposes of Rule 10b–21, broker-dealers (including market makers) acting for their own accounts will be considered sellers. For example, a broker-dealer effecting short sales for its own account will be liable under the rule if it does not obtain a valid locate source and fails to deliver securities to the purchaser. Such broker-dealers defraud purchasers that may not receive delivery on time, in effect unilaterally forcing the purchaser into accepting an undated futures-type contract.[59]

As noted above, under Regulation SHO, the executing or introducing broker-dealer is responsible for determining whether there are reasonable grounds to believe that a security can be borrowed so that it can be delivered on the date delivery is due on a short sale.[60] In the 2004 Regulation SHO Adopting Release, the Commission explicitly permitted broker-dealers to rely on customer assurances that the customer has identified its own locate source, provided it is reasonable for the broker-dealer to do so.[61] If a seller elects to provide its own locate source to a broker-dealer, the seller is representing that it has contacted that source and reasonably believes that the source can or intends to deliver the full amount of the securities to be sold short by settlement date. In addition, if a seller enters a short sale order into a broker-dealer's direct market access or sponsored access system (''DMA'') with any information purporting to identify a locate source obtained by the seller, the seller makes a representation to a broker-dealer for purposes of Rule 10b–21.[62]

If a seller deceives a broker-dealer about the validity of its locate source, the seller will be liable under Rule 10b–21 if the seller also fails to deliver securities by the date delivery is due. For example, a seller will be liable for a violation of Rule 10b–21 if it represented that it had identified a source of borrowable securities, but the seller never contacted the purported source to determine whether shares were available and could be delivered in time for settlement and the seller fails to deliver securities by settlement date. A seller will also be liable if it contacted the source and learned that the source did not have sufficient shares for timely delivery, but the seller misrepresented that the source had sufficient shares that it could deliver in time for settlement and the seller fails to deliver securities by settlement date; or, if the seller contacted the source and the source had sufficient shares that it could deliver in time for settlement, but the seller never instructed the source to deliver the shares in time for settlement and the seller otherwise refused to deliver shares on settlement date such that the sale results in a fail to deliver.

One commenter recommended that the rule focus on whether there is a fail to deliver in the Continuous Net Settlement (''CNS'') system, rather than on a seller's failure to deliver the securities sold.[63] The majority of equity trades in the United States are cleared and settled through systems administered by clearing agencies registered with the Commission. The NSCC clears and settles the majority of equity securities trades conducted on the exchanges and in the over the counter market. NSCC clears and settles trades through the CNS system, which nets the securities delivery and payment obligations of all of its members. The majority of NSCC's members are broker-

20, 2008; letter from David Hughes, dated July 17, 2008; letter from Dave Morgan, dated July 25, 2008; letter from Seth Bradley, dated July 30, 2008; letter from Michael Kianka, dated Aug. 1, 2008.

[52] *See, e.g.*, letter from James J. Angel, Associate Professor of Finance, Georgetown University, dated May 17, 2008 (''Angel''); letter from Heather Traeger, Assistant Counsel, Investment Company Institute, dated May 20, 2008; letter from Dr. Robert J. Shapiro, Chairman, Sonecon, LLC, and former U.S. Under Secretary of Commerce, dated May 20, 2008 (''Shapiro''); letter from Ira D. Hammerman, Managing Director and General Counsel, Securities Industry and Financial Markets Association, dated May 22, 2008 (''SIFMA''); letter from Michael R. Trocchio, Bingham McCutchen LLP, dated July 14, 2008 (''Bingham''); letter from MFA.

[53] *See supra* note 47 (defining the terms ''participant'' and ''registered clearing agency'' for purposes of the rule).

[54] *See* Rule 10b–21.

[55] *Ernst & Ernst* v. *Hochfelder, et al.,* 425 U.S. 185 (1976). Scienter has been defined as ''a mental state embracing the intent to deceive, manipulate or defraud.'' *Id.* at 193, n.12. While the Supreme Court has not decided the issue (*see Aaron* v. *SEC,* 446 U.S. 686 (1980); *Ernst & Ernst,* 425 at 193 n.12), federal appellate courts have concluded that scienter may be established by a showing of either knowing conduct or by ''an 'extreme departure from the standards of ordinary care * * * which presents a danger of misleading buyers or sellers that is either known to the defendant or is so obvious that the actor must have been aware of it.'" *Dolphin & Bradbury* v. *SEC,* 512 F.3d 634 (D.C. Cir. Jan. 11, 2008) (quoting *Sundstrand Corp.* v. *Sun Chemical Corp.,* 553 F.2d 1033, 1045 (7th Cir. 1977)). Some commenters stated they believe that Rule 10b–21 should require a finding of ''intentional deception'' to best achieve our goals without deterring legitimate short selling. *See, e.g.*, letter from MFA; another commenter, however, requested that we confirm that the concept of scienter, for purposes of Rule 10b–21, is identical to established precedent under Section 10(b) of the Exchange Act and Rule 10b–5 thereunder. *See* letter from SIFMA. We intend the scienter requirement of Rule 10b–21 to be the same as that required under Rule 10b–5.

[56] *See, e.g.*, letter from MFA.

[57] *See, e.g.*, Proposing Release, 73 FR at 15380; *see also* Rule 10b–21.

[58] As proposed, the rule referenced ''the date delivery is due.'' To provide specificity as to when delivery is due for purposes of the rule, we are modifying this language to ''settlement date'' and defining ''settlement date'' as ''the business day on which delivery of a security and payment of money is to be made through the facilities of a registered clearing agency in connection with the sale of a security.'' *See* Rule 10b–21(b).

[59] *See supra* note 22; 2007 Regulation SHO Final Amendments, 72 FR at 45544; 2006 Regulation SHO Proposed Amendments, 71 FR at 41712; 2007 Regulation SHO Proposed Amendments, 72 FR at 45558–45559.

[60] *See* 17 CFR 242.203(b)(3)(1).

[61] *See* 2004 Regulation SHO Adopting Release, 69 FR at 48014.

[62] Broker-dealers offer DMA to some customers by providing them with electronic access to a market's execution system using the broker-dealer's market participant identifier. The broker-dealer, however, retains the ultimate responsibility for the trading activity of its customer.

[63] *See* letter from SIFMA.

dealers.[64] NSCC notifies its members of their securities delivery and payment obligations daily. In addition, NSCC guarantees the completion of all transactions and interposes itself as the contraparty to both sides of the transaction. This commenter noted that a seller's clearing broker generally bears the responsibility to meet the firm's CNS delivery requirement and that it is difficult for a broker-dealer to determine which customer transactions or accounts give rise to a fail to deliver in the CNS system. We note, however, that Rule 10b–21 as proposed was not based on whether a fail to deliver occurred in CNS. Rather, the rule as proposed was concerned with whether an individual seller delivered securities that it sold. Along those lines, another commenter stated that the proposed rule should require a failure to deliver by the seller.[65]

We have determined to adopt the rule as proposed. The rule targets the misconduct of sellers. As discussed above, sellers should promptly deliver the securities they have sold and purchasers have the right to the timely receipt of securities that they have purchased. Thus, Rule 10b-21's focus is on whether or not there is a fail to deliver by the seller, rather than on whether or not there is a fail to deliver in the CNS system. Because fails to deliver in the CNS system are netted with pending deliveries, some sellers may be able to postpone delivery if another customer's purchase is received the same day. Thus, a person engaging in abusive ''naked'' short selling may be able to avoid detection for a period of time. This would undermine our goal of addressing abusive ''naked'' short selling.

B. Seller's Reliance on a Broker-Dealer or ''Easy to Borrow'' Lists

Rule 10b–21 provides that it shall be unlawful for any person to submit an order to sell an equity security if such person deceives a broker-dealer, participant of a registered clearing agency, or purchaser regarding its intention or ability to deliver the security on the date delivery is due.[66] Thus, as we discussed in the Proposing Release,[67] if a seller is relying on a broker-dealer to comply with Regulation SHO's locate obligation and to make delivery on a sale, the seller would not be representing at the time it submits an order to sell a security that it can or intends to deliver securities on the date delivery is due. For example, a seller might be relying on its broker-dealer to borrow or arrange to borrow the security to make delivery by settlement date. Alternatively, a seller might be relying on a broker-dealer's ''Easy to Borrow'' list. If a seller in good faith relies on a broker-dealer's ''Easy to Borrow'' list to satisfy the locate requirement, the seller would not be deceiving the broker-dealer at the time it submits an order to sell a security that it can or intends to deliver securities on the date delivery is due. In discussing the locate requirement of Regulation SHO, in the 2004 Regulation SHO Adopting Release, the Commission stated that ''absent countervailing factors, 'Easy to Borrow' lists may provide 'reasonable grounds' for a broker-dealer to believe that the security sold short is available for borrowing without directly contacting the source of the borrowed securities.'' [68]

C. Bona Fide Market Makers

As we discussed in the Proposing Release,[69] a market maker engaged in bona fide market making activity would not be making a representation at the time it submits an order to sell short that it can or intends to deliver securities on the date delivery is due, because such market makers are excepted from the locate requirement of Regulation SHO. Regulation SHO excepts from the locate requirement market makers engaged in bona-fide market making activities because market makers need to facilitate customer orders in a fast moving market without possible delays associated with complying with the locate requirement.[70] Thus, at the time of submitting an order to sell short, market makers that have an exception from the locate requirement of Regulation SHO may know that they may not be able to deliver securities on the date delivery is due.

D. ''Long'' Sales

Under Rule 10b–21, a seller will be liable if it deceives a broker-dealer, participant of a registered clearing agency, or purchaser about its ownership of shares or the deliverable condition of owned shares and fails to deliver securities by settlement date.[71] As we discussed in the Proposing Release,[72] a seller will be liable for a violation of Rule 10b–21 for causing a broker-dealer to mark an order to sell a security ''long'' if the seller knows or recklessly disregards that it is not ''deemed to own'' the security being sold, as defined in Rules 200(a) through (f) of Regulation SHO [73] or if the seller knows or recklessly disregards that the security being sold is not, or cannot reasonably be expected to be, in the broker-dealer's physical possession or control by the date delivery is due, and the seller fails to deliver the security by settlement date.

Broker-dealers acting for their own accounts will also be liable under Rule 10b–21 for marking an order ''long'' if the broker-dealer knows or recklessly disregards that it is not ''deemed to own'' the security being sold or that the security being sold is not, or cannot reasonably be expected to be, in the broker-dealer's physical possession or control by the date delivery is due, and the broker-dealer fails to deliver the security by settlement date.[74]

However, a seller would not be making a representation at the time it submits an order to sell a security that it can or intends to deliver securities on the date delivery is due if the seller submits an order to sell securities that are held in a margin account but the broker-dealer has loaned out the shares pursuant to the margin agreement. Under such circumstances, it would be reasonable for the seller to expect that the securities will be in the broker-dealer's physical possession or control by settlement date.

E. Rule 10b–21 and Other Antifraud Provisions of the Federal Securities Laws

One commenter stated that it believes proposed Rule 10b–21 is unnecessary ''because the Commission already has ample existing authority, under Section 10(b) of the Exchange Act and Rule 10b–5 thereunder, to prosecute manipulative and/or fraudulent activity, including the type of activity that proposed Rule 10b–21 seeks to address.'' [75] Other commenters urged us to use less formal means than rulemaking to address our concerns regarding misrepresentations in the order entry process.[76] For

[64] As of July 31, 2008 approximately 91% of members of the NSCC were registered as broker-dealers.

[65] *See* letter from Bingham.

[66] *See* Rule 10b–21.

[67] *See* Proposing Release, 73 FR at 15379.

[68] 2004 Regulation SHO Adopting Release, 69 FR at 48014.

[69] *See* Proposing Release, 73 FR at 15379.

[70] *See* 2004 Regulation SHO Adopting Release, 69 FR at 48015, n. 67; *see also* 2008 Regulation SHO Final Amendments, *supra* note 22 (providing interpretive guidance regarding bona fide market making activities for purposes of Regulation SHO).

[71] *See* Rule 10b–21.

[72] *See* Proposing Release, 73 FR at 15379.

[73] 17 CFR 242.200(a)–(f).

[74] Such broker-dealers will also be liable under Regulation SHO Rule 203(a).

[75] *See* letter from SIFMA; *see* also letter from Bingham (stating that ''[t]he Firms agree that the illicit conduct the Commission seeks to address through [proposed Rule 10b–21] is already illegal''); letter from MFA.

[76] *See, e.g.*, letter from Bingham; letter from MFA; *but, c.f.*, letter from Chamber of Commerce (noting

instance, these commenters suggested that the Commission or its staff could convey this message through FAQs, staff bulletins, and speeches.[77] We have determined, however, that the negative effects of abusive ''naked'' short selling on market confidence warrant formal Commission action.

While ''naked'' short selling as part of a manipulative scheme is already illegal under the general antifraud provisions of the federal securities laws, we believe that a rule further evidencing the illegality of these activities will focus the attention of market participants on such activities. Rule 10b–21 will also further evidence that the Commission believes such deceptive activities are detrimental to the markets and will provide a measure of predictability for market participants.

Some commenters sought clarification as to how this rule was different from Rule 10b–5.[78] We note that the set of factors that will serve as the basis for a violation of Rule 10b–21 as adopted are not determinative of a person's obligations under the general antifraud provisions of the federal securities laws. Accordingly, and in order to clarify the continued applicability of the general antifraud provisions outside of the strict context of Rule 10b–21, we have added a preliminary note to the rule as adopted, which states: ''This rule is not intended to limit, or restrict, the applicability of the general antifraud provisions of the federal securities laws, such as section 10(b) of the Act and rule 10b–5 thereunder.'' We added this preliminary note because we believe it is important to underscore that Rule 10b–21 is not meant, in any way, to limit the general antifraud provisions of the federal securities laws. Additionally, this preliminary note provides much needed public clarity in answer to the confusion voiced by many commenters.

Similarly, we are modifying the proposed rule text slightly to add the word ''also,'' as follows: ''It shall *also* constitute a 'manipulative or deceptive device or contrivance' as used in section 10(b) of this Act for any person to submit an order to sell an equity security if such person deceives a broker or dealer, a participant of a registered clearing agency, or a purchaser about its intention or ability to deliver the security on or before the settlement date, and such person fails to deliver the security on or before the settlement date.''

We believe the adding the word ''also'' in the rule text further clarifies that Rule 10b–21 does not affect the operation of Rule 10b–5 or other antifraud rules, but is instead intended to supplement the existing antifraud rules.

Commenters also raised questions whether there would be a private right of action for a violation of proposed Rule 10b–21.[79] We note that the courts have held that a private right of action exists with respect to Rule 10b–5 provided the essential elements constituting a violation of the rule are met.[80] Thus, a private plaintiff able to prove all those elements in a situation covered by Rule 10b–21 would be able to assert a claim under Section 10(b) of the Exchange Act and Rule 10b–5 thereunder.

F. Aiding and Abetting Liability

In the Proposing Release, we stated that ''[a]lthough the proposed rule is primarily aimed at sellers that deceive specified persons about their intention or ability to deliver shares or about their locate source and ownership of shares, as with any rule, broker-dealers could be liable for aiding and abetting a customer's fraud under the proposed rule.'' [81] One commenter stated that broker-dealers should not be held responsible for policing their customer's compliance with their own legal requirements.[82] Another commenter urged us to specifically state that reliance by a broker-dealer on a customer representation regarding long/short status or receipt of a locate does not rise to the level of scienter required for aiding and abetting liability.[83] This commenter also asked us to make clear that broker-dealers who merely offer DMA or sponsored access to a customer who violates the new rule would not be liable for aiding and abetting such violation.[84]

Rule 10b–21 as adopted does not impose any additional liability or requirements on any person, including broker-dealers, beyond those of any existing Exchange Act rule. As we stated in the Proposing Release, broker-dealers would remain subject to liability under Regulation SHO and the general antifraud provisions of the federal securities laws.[85]

G. Administrative Law Matters

The Administrative Procedure Act also generally requires that an agency publish an adopted rule in the **Federal Register** 30 days before it becomes effective.[86] This requirement, however, does not apply if the agency finds good cause for making the rule effective sooner.[87] The Commission has determined that the rule should be effective in fewer than 30 days because it addresses illegal conduct that can cause market disruption. In addition, because the rule further evidences conduct that is manipulative and deceptive under existing general antifraud rules, market participants should not need time to adjust systems or procedures to comply with the rule. Therefore, the Commission finds good cause to make the rule effective on October 17, 2008.

IV. Paperwork Reduction Act

Rule 10b–21 does not contain a ''collection of information'' requirement within the meaning of the Paperwork Reduction Act of 1995.[88]

V. Cost-Benefit Analysis

We are sensitive to the costs and benefits of our rules and we have considered the costs and benefits of Rule 10b–21. In order to assist us in evaluating the costs and benefits, in the Proposing Release, we encouraged commenters to discuss any costs or benefits that the rule would impose. In particular, we requested comment on the potential costs for any modification to both computer systems and surveillance mechanisms and for information gathering, management, and recordkeeping systems or procedures, as well as any potential benefits resulting from the rule for issuers, investors, brokers or dealers, other securities industry professionals, regulators, and other market participants. Commenters were encouraged to provide analysis and data to support their views on the costs and benefits associated with the rule.

A. Benefits

Rule 10b–21 is intended to address abusive ''naked'' short selling and fails

that although the activity covered by proposed Rule 10b–21 is already a violation of the antifraud provisions of the federal securities laws, ''[e]mphasizing that such deceit violates these laws may deter some of this activity in the future'').

[77] *See, e.g.*, letter from Bingham.

[78] *See, e.g.*, letter from MFA; *see also* letter from SIFMA (seeking clarification as to whether the level of scienter in the proposed rule differs from that of Rule 10b–5).

[79] *See, e.g.*, letter from SIFMA. Another commenter stated that ''[t]he Commission should make explicitly clear that the adoption of Proposed Rule 10b–21 does not create a private right of action for violations of the rule. * * *'' *See* letter from Bingham.

[80] *See, e.g., Superintendent of Insurance* v. *Bankers Life & Cas. Co.*, 404 U.S. 6, 13, n. 9 (1971); *Ernst & Ernst*, 425 at 196 (citing prior cases).

[81] *See* Proposing Release, 72 FR at 15379.

[82] *See* letter from SIFMA.

[83] *See* letter from Bingham.

[84] *See id.*

[85] *See* Proposing Release, 72 FR at 15380.

[86] *See* 5 U.S.C. § 553(d).

[87] *Id.*

[88] 44 U.S.C. 3501 *et seq.*

to deliver. The rule is aimed at short sellers, including broker-dealers acting for their own accounts, who deceive broker-dealers, participants of a registered clearing agency, or purchasers about their intention or ability to deliver securities in time for settlement and that fail to deliver securities by settlement date. Among other things, Rule 10b–21 targets short sellers who deceive their broker-dealers about their source of borrowable shares for purposes of complying with Regulation SHO's ''locate'' requirement.[89] The rule also applies to sellers who misrepresent to their broker-dealers that they own the shares being sold.[90]

A seller misrepresenting its short sale locate source or ownership of shares may intend to fail to deliver securities in time for settlement and, therefore, engage in abusive ''naked'' short selling. As noted above, although abusive ''naked'' short selling is not defined in the federal securities laws, it refers generally to selling short without having stock available for delivery and intentionally failing to deliver stock within the standard three-day settlement cycle.[91] Such short selling may or may not be part of a scheme to manipulate the price of a security. Although ''naked'' short selling as part of a manipulative scheme is always illegal under the general antifraud provisions of the federal securities laws, including Rule 10b–5 under the Exchange Act,[92] Rule 10b–21 will further evidence the specific liability of persons that deceive specified persons about their intention or ability to deliver securities in time for settlement, including persons that deceive their broker-dealer about their locate source or ownership of shares and that fail to deliver securities by settlement date. We believe that a rule specifying the illegality of these activities will focus the attention of market participants on such activities. The rule will also further evidence that the Commission believes such deceptive activities are detrimental to the markets and will provide a measure of predictability for market participants.

All sellers of securities should promptly deliver, or arrange for delivery of, securities to the respective buyer and all buyers of securities have a right to expect prompt delivery of securities purchased. Thus, the rule takes direct aim at an activity that may create fails to deliver. Those fails can have a negative effect on shareholders, potentially depriving them of the benefits of ownership, such as voting and lending. They also may create a misleading impression of the market for an issuer's securities. As noted above, issuers and investors have expressed concerns about fails to deliver in connection with ''naked'' short selling. For example, in response to the 2006 Regulation SHO Proposed Amendments, we received a number of comments that expressed concerns about ''naked'' short selling and extended delivery failures.[93] Commenters continued to express these concerns in response to the 2007 Regulation SHO Proposed Amendments,[94] and in response to the Proposing Release.[95]

To the extent that fails to deliver might be indicative of manipulative ''naked'' short selling, which could be used as a tool to drive down a company's stock price,[96] such fails to deliver may undermine the confidence of investors.[97] These investors, in turn, may be reluctant to commit capital to an issuer they believe to be subject to such manipulative conduct.[98] In addition, issuers may believe that they have suffered unwarranted reputational damage due to investors' negative perceptions regarding fails to deliver in the issuer's security.[99] Any unwarranted reputational damage caused by fails to deliver might have an adverse impact on the security's price.[100]

Thus, to the extent that fails to deliver might create a misleading impression of the market for an issuer's securities, the rule will benefit investors and issuers by taking direct aim at an activity that may create fails to deliver. In addition, to the extent that ''naked'' short selling and fails to deliver result in an unwarranted decline in investor confidence about a security, the rule will improve investor confidence about the security. In addition, the rule will lead to greater certainty in the settlement of securities which should strengthen investor confidence in that process.

We believe the rule will result in broker-dealers having greater confidence that their customers have obtained a valid locate source and, therefore, that shares are available for delivery on settlement date. Thus, the rule will aid broker-dealers in complying with the locate requirement of Regulation SHO and, thereby, potentially reduce fails to deliver. In addition, to the extent that the rule results in fewer sales of threshold securities resulting in fails to deliver, the rule will reduce costs to broker-dealers because such broker-dealers will have to close-out a lesser amount of fails to deliver under Regulation SHO's close-out requirement.[101] The rule should also help reduce manipulative schemes involving ''naked'' short selling.

In the Proposing Release, we solicited comment on any additional benefits that could be realized with the proposed rule, including both short-term and long-term benefits. We also solicited comment regarding benefits to market efficiency, pricing efficiency, market stability, market integrity and investor protection. In response, one commenter stated that the ''rule will have a positive impact on liquidity and market quality in securities traded.'' [102] Another commenter stated that ''the liquidity of the market and the market quality of securities traded can be threatened or damaged if investors perceive that naked short sales may artificially distort the price of securities, in ways and instances unknown to honest investors, * * * in this regard, the strict application of the rule * * * should enhance liquidity and the market quality of securities traded.'' [103] This commenter also noted that, ''[b]y increasing the liability of naked short sellers, the proposed rule should reduce the incidence of naked short sales and thereby reduce the likelihood of short squeezes.'' [104]

B. Costs

Rule 10b–21 is intended to address abusive ''naked'' short selling by further evidencing the liability of persons that deceive specified persons about their intention or ability to deliver securities

[89] *See* 17 CFR 242.203(b)(1).

[90] *See* Rule 10b–21.

[91] *See supra* note 2.

[92] 17 CFR 240.10b–5.

[93] *See supra* note 36.

[94] *See supra* note 37.

[95] *See supra* note 38.

[96] *See supra* note 39.

[97] *See supra* note 40.

[98] *See supra* note 41.

[99] *See supra* note 42 (discussing the fact that due to such concerns some issuers have taken actions to attempt to make transfer of their securities ''custody only,'' thus preventing transfer of their stock to or from securities intermediaries such as the DTC or broker-dealers).

[100] *See supra* note 43.

[101] Rule 203(b)(3)(iii) of Regulation SHO contains a close-out requirement that applies only to broker-dealers for securities in which a substantial amount of fails to deliver have occurred, also known as ''threshold securities.'' Specifically, Rule 203(b)(3)'s close-out requirement requires a participant of a clearing agency registered with the Commission to take immediate action to close out a fail to deliver position in a threshold security in the CNS system that has persisted for 13 consecutive settlement days by purchasing securities of like kind and quantity; *see also* 2008 Interim Rule, *supra* note 29 (temporarily enhancing Regulation SHO's delivery requirements for sales of all equity securities).

[102] *See* letter from Susanne Trimbath, PhD., CEO and Chief Economist, STP Advisory Services, LLC, dated May 30, 2008 (''Trimbath'') (noting also a tax benefit to investors from enforcing delivery on settlement date).

[103] *See* letter from Shapiro.

[104] *See id.*

in time for settlement, including persons that deceive their broker-dealer about their locate source or ownership of shares and that fail to deliver securities by settlement date. In the Proposing Release, we sought data supporting any potential costs associated with the rule, and specific comment on any systems changes to computer hardware and software, or surveillance costs that might be necessary to implement the rule. One commenter stated that ''the rule will have a positive impact on liquidity and market quality in securities traded * * * [w]ithout strict rules against settlement failures, a systemic crisis could occur where investors are reluctant to engage in trades in U.S. markets because settlement finality is in question. The markets and investors need the assurance of Rule 10b–21 that securities transactions will be settled.'' [105] Another commenter stated that ''the liquidity of the market and the market quality of securities traded can be threatened or damaged if investors perceive that naked short sales may artificially distort the price of securities, in ways and instances unknown to honest investors, * * * in this regard, the strict application of the rule * * * should enhance liquidity and the market quality of securities traded.'' [106] This commenter also noted that, ''[b]y increasing the liability of naked short sellers, the proposed rule should reduce the incidence of naked short sales and thereby reduce the likelihood of short squeezes. The prospect of short squeezes is increased by the moral hazard that occurs when short sellers believe there is little or no cost to carrying out abusive naked short sales, and therefore rules that impose such costs reduce this prospect.'' [107] The commenter also noted that any costs associated with purchasing or borrowing securities to deliver on a sale instead of allowing the fail to deliver position to remain open ''would not represent an additional cost, since a legitimate short sale involves borrowing the security for delivery at the cost of such borrowing. Therefore, it would reflect only the cost of complying with the rules and laws that apply to all investors.'' [108] This commenter also noted that ''[s]trict liability for failing to deliver securities in short sales is needed to offset the implicit savings of violating the law and rules, and getting away with it.'' [109]

We recognize, however, that Rule 10b–21 may result in increased costs to broker-dealers to the extent that the rule encourages or results in broker-dealers limiting the extent to which they rely on customer assurances in complying with the locate requirement of Regulation SHO. In addition, the rule may result in increased costs to sellers who inadvertently fail to deliver securities because such sellers, in an attempt to avoid liability under the rule, might purchase or borrow securities to deliver on a sale at a time when, but for the rule, the seller would have allowed the fail to deliver position to remain open.

One commenter stated that, ''unless Proposed Rule 10b–21 were modified to eliminate aiding and abetting liability and allow reliance upon customer assurances, the price discovery and liquidity provided through short sales may be constrained.'' [110] Although broker-dealer concerns regarding aiding and abetting liability under Rule 10b–21 may potentially impact liquidity and efficiency in the markets, we believe that such an impact, if any, will be minimal. Rule 10b–21 as adopted does not impose any additional liability or requirements on any person, including broker-dealers, beyond those of any existing Exchange Act rule. Aiding and abetting liability is a question of fact, determined on a case-by-case basis. In addition, as we stated in the Proposing Release, broker-dealers would remain subject to liability under Regulation SHO and the general antifraud provisions of the federal securities laws.[111]

VI. Consideration of Burden on Competition and Promotion of Efficiency, Competition, and Capital Formation

Section 3(f) of the Exchange Act requires the Commission, whenever it engages in rulemaking and whenever it is required to consider or determine if an action is necessary or appropriate in the public interest, to consider whether the action would promote efficiency, competition, and capital formation.[112] In addition, Section 23(a)(2) of the Exchange Act requires the Commission, when adopting rules under the Exchange Act, to consider the impact such rules would have on competition.[113] Exchange Act Section 23(a)(2) prohibits the Commission from adopting any rule that would impose a burden on competition not necessary or appropriate in furtherance of the purposes of the Exchange Act.

Rule 10b–21 is intended to address abusive ''naked'' short selling and fails to deliver. The rule is aimed at short sellers, including broker-dealers acting for their own accounts, who deceive specified persons, such as a broker-dealer, about their intention or ability to deliver securities in time for settlement and fail to deliver securities by settlement date. Among other things, Rule 10b–21 targets short sellers who deceive their broker-dealers about their source of borrowable shares for purposes of complying with Regulation SHO's ''locate'' requirement.[114] The rule also applies to sellers who misrepresent to their broker-dealers that they own the shares being sold.[115]

Although ''naked'' short selling as part of a manipulative scheme is always illegal under the general antifraud provisions of the federal securities laws, including Rule 10b–5 under the Exchange Act,[116] Rule 10b–21 will further evidence the liability of persons that deceive specified persons about their intention or ability to deliver securities in time for settlement, including persons that deceive their broker-dealer about their locate source or ownership of shares and that fail to deliver securities by settlement date. We believe that a rule further evidencing the illegality of these activities will focus the attention of market participants on such activities. The rule will also provide a measure of predictability for market participants. We believe Rule 10b–21 will have minimal impact on the promotion of price efficiency.

In the Proposing Release, we sought comment regarding whether Rule 10b–21 will adversely impact liquidity, disrupt markets, or unnecessarily increase risks or costs to customers. In response, one commenter noted that, ''the liquidity of the market and the market quality of securities traded can be threatened or damaged if investors perceive that naked short sales may artificially distort the price of securities, in ways and instances unknown to honest investors, * * * in this regard, the strict application of the rule * * * should enhance liquidity and the market quality of securities traded.'' [117] This commenter also noted that, ''[b]y increasing the liability of naked short sellers, the proposed rule should reduce the incidence of naked short sales and

[105] *See* letter from Trimbath.
[106] *See* letter from Shapiro.
[107] *See id.*
[108] *See id.*
[109] *See id.*
[110] *See* letter from Bingham.
[111] *See* Proposing Release, 72 FR at 15377.
[112] 15 U.S.C. 78c(f).
[113] 15 U.S.C. 78w(a)(2).
[114] *See* 17 CFR 242.203(b)(1).
[115] *See* Rule 10b–21.
[116] 17 CFR 240.10b–5.
[117] *See* letter from Shapiro.

thereby reduce the likelihood of short squeezes. * * *'' [118]

Another commenter stated that, ''unless Proposed Rule 10b–21 were modified to eliminate aiding and abetting liability and allow reliance upon customer assurances, the price discovery and liquidity provided through short sales may be constrained.'' [119] Although broker-dealer concerns regarding aiding and abetting liability under Rule 10b–21 may potentially impact liquidity and efficiency in the markets, we believe that such an impact, if any, will be minimal. Rule 10b–21 as adopted does not impose any additional liability or requirements on any person, including broker-dealers, beyond those of any existing Exchange Act rule. Aiding and abetting liability is a question of fact, determined on a case-by-case basis. In addition, as we stated in the Proposing Release, broker-dealers would remain subject to liability under Regulation SHO and the general antifraud provisions of the federal securities laws.[120]

In addition, we believe that the rule will have minimal impact on the promotion of capital formation. The perception that abusive ''naked'' short selling is occurring in certain securities can undermine the confidence of investors. These investors, in turn, may be reluctant to commit capital to an issuer they believe to be subject to such manipulative conduct. For example, in response to the Proposing Release, one commenter noted that, ''[c]onfidence in the securities markets is diminished when investors and others cannot rely on the receipt of securities in trades.'' [121] Thus, we believe that strengthening our rules against ''naked'' short selling by targeting sellers who deceive their broker-dealers about their source of borrowable shares and their share ownership will provide increased confidence in the markets.

In addition, we note that we have previously sought comment regarding the impact on capital formation of other proposed amendments aimed at reducing fails to deliver and addressing potentially abusive ''naked'' short selling, including whether the proposed increased short sale restrictions would affect investors' decisions to invest in certain equity securities.[122] In response, commenters expressed concern about the potential impact of ''naked'' short selling on capital formation claiming that ''naked'' short selling causes a drop in an issuer's stock price that may limit the issuer's ability to access the capital markets.[123] Thus, to the extent that ''naked'' short selling and fails to deliver result in an unwarranted decline in investor confidence about a security, the rule is expected to improve investor confidence about the security. We note, however, that persistent fails to deliver exist in only a small number of securities and may be a signal of overvaluation rather than undervaluation of a security's price.[124] In addition, we believe that the rule will lead to greater certainty in the settlement of securities, which is expected to strengthen investor confidence in the settlement process.

We also believe that Rule 10b–21 will not impose any burden on competition not necessary or appropriate in furtherance of the purposes of the Exchange Act. By specifying that abusive ''naked'' short selling is a fraud, the Commission believes the rule will promote competition by providing the industry with guidance regarding the liability of sellers that deceive specified persons about their intention or ability to deliver securities in time for settlement, including persons that deceive their broker-dealer about their locate sources or share ownership and that fail to deliver securities by settlement date.

VII. Final Regulatory Flexibility Analysis

The Commission has prepared a Final Regulatory Flexibility Analysis (''FRFA''), in accordance with the provisions of the Regulatory Flexibility Act (''RFA''),[125] regarding Rule 10b–21 under the Exchange Act. An Initial Regulatory Flexibility Analysis (''IRFA'') was prepared in accordance with the RFA and was included in the Proposing Release. We solicited comments on the IRFA.

A. Reasons for the Rule

Rule 10b–21 is intended to address fails to deliver associated with abusive ''naked'' short selling. While ''naked'' short selling as part of a manipulative scheme is already illegal under the general antifraud provisions of the federal securities laws, Rule 10b–21 specifies that it is unlawful for any person to submit an order to sell an equity security if such person deceives a broker-dealer, participant of a registered clearing agency, or purchaser about its intention or ability to deliver securities on the date delivery is due, and such person fails to deliver the security on or before the date delivery is due. Thus, Rule 10b–21 will further evidence the liability of persons that deceive specified persons about their intention or ability to deliver securities in time for settlement, including persons that deceive their broker-dealer about their locate source or ownership of shares.

B. Objectives

Rule 10b–21 is aimed at short sellers, including broker-dealers acting for their own accounts, that deceive specified persons, such as a broker or dealer, about their intention or ability to deliver securities in time for settlement and that fail to deliver securities by settlement date. We believe that a rule further evidencing the illegality of these activities will focus the attention of market participants on such activities. The rule will also underscore that the Commission believes such deceptive activities are detrimental to the markets and will provide a measure of predictability for market participants.

All sellers of securities should promptly deliver, or arrange for delivery of, securities to the respective buyer and all buyers of securities have a right to expect prompt delivery of securities purchased. Thus, Rule 10b–21 takes direct aim at an activity that may create fails to deliver. Those fails can have a negative effect on shareholders, potentially depriving them of the benefits of ownership, such as voting and lending. They also may create a misleading impression of the market for an issuer's securities. Rule 10b–21 will also aid broker-dealers in complying with the locate requirement of Regulation SHO and, thereby, potentially reduce fails to deliver. In addition, the rule is expected to help reduce manipulative schemes involving ''naked'' short selling.

C. Significant Issues Raised By Public Comment

The IRFA appeared in the Proposing Release. We requested comment on any aspect of the IRFA. In particular, we requested comment on: (i) The number of small entities that would be affected by the rule; and (ii) the existence or nature of the potential impact of the rule on small entities. We requested that the

[118] *See id.*

[119] *See* letter from Bingham.

[120] *See* Proposing Release, 72 FR at 15377.

[121] *See* letter from Trimbath.

[122] *See* 2006 Regulation SHO Proposed Amendments, 71 FR 41710; 2007 Regulation SHO Proposed Amendments, 72 FR 45558.

[123] *See, e.g., supra* note 41 (citing to comment letters expressing concern regarding the impact of potential ''naked'' short selling on capital formation).

[124] Persistent fails to deliver may be symptomatic of an inadequate supply of shares in the equity lending market. If short sellers are unable to short sell due to their inability to borrow shares, their opinions about the fundamental value of the security may not be fully reflected in a security's price, which may lead to overvaluation.

[125] 5 U.S.C. 603.

comments specify costs of compliance with the rule, and suggest alternatives that would accomplish the objectives of the rule. We did not receive any comments that responded specifically to this request.

D. Small Entities Subject to the Rule

The entities covered by Rule 10b–21 will include small broker-dealers, small businesses, and any investor who effects a short sale that qualifies as a small entity. Although it is impossible to quantify every type of small entity that may be able to effect a short sale in a security, paragraph (c)(1) of Rule 0–10 under the Exchange Act [126] states that the term ''small business'' or ''small organization,'' when referring to a broker-dealer, means a broker or dealer that had total capital (net worth plus subordinated liabilities) of less than $500,000 on the date in the prior fiscal year as of which its audited financial statements were prepared pursuant to § 240.17a–5(d); and is not affiliated with any person (other than a natural person) that is not a small business or small organization. As of 2007, the Commission estimates that there were approximately 896 broker-dealers that qualified as small entities as defined above.[127]

Any business, however, regardless of industry, could be subject to the rule if it effects a short or long sale. The Commission believes that, except for the broker-dealers discussed above, an estimate of the number of small entities that fall under the rule is not feasible.

E. Reporting, Recordkeeping, and Other Compliance Requirements

Rule 10b–21 is intended to address abusive ''naked'' short selling by further evidencing the liability of persons that deceive specified persons about their intention or ability to deliver securities in time for settlement, including persons that deceive their broker-dealer about their locate source or ownership of shares and that fail to deliver securities by settlement date. The Commission believes that the rule may impose new or additional compliance costs on any affected party, including broker-dealers, that are small entities. To comply with Regulation SHO, small broker-dealers needed to modify their systems and surveillance mechanisms to comply with Regulation SHO's locate, marking and delivery requirements. Thus, any systems and surveillance mechanisms necessary for broker-dealers to comply with the rule should already be in place. We believe that any necessary additional systems and surveillance changes, in particular changes by sellers who are not broker-dealers, will be similar to the changes incurred by broker-dealers when Regulation SHO was implemented.

F. Agency Action To Minimize Effect on Small Entities

The RFA directs the Commission to consider significant alternatives that would accomplish the stated objective, while minimizing any significant adverse impact on small entities. Pursuant to Section 3(a) of the RFA,[128] the Commission must consider the following types of alternatives: (a) The establishment of differing compliance or reporting requirements or timetables that take into account the resources available to small entities; (b) the clarification, consolidation, or simplification of compliance and reporting requirements under the rule for small entities; (c) the use of performance rather than design standards; and (d) an exemption from coverage of the rule, or any part thereof, for small entities.

A primary goal of Rule 10b–21 is to address abusive ''naked'' short selling. While ''naked'' short selling as part of a manipulative scheme is always illegal under the general antifraud provisions of the federal securities laws, Rule 10b–21 specifies that it is a fraud for any person to submit an order to sell an equity security if such person deceives a broker-dealer, participant of a registered clearing agency, or purchaser about its intention or ability to deliver the security on the date delivery is due and such person fails to deliver the security on or before the date delivery is due. Rule 10b–21 is aimed at short sellers, including broker-dealers acting for their own accounts, who deceive specified persons, such as a broker or dealer, about their intention or ability to deliver securities in time for settlement and who do not deliver securities by settlement date. Among other things, Rule 10b–21 targets short sellers who deceive their broker-dealers about their source of borrowable shares for purposes of complying with Regulation SHO's ''locate'' requirement.[129] The rule also applies to sellers who misrepresent to their broker-dealers that they own the shares being sold.

We believe that imposing different compliance requirements, and possibly a different timetable for implementing compliance requirements, for small entities would undermine the Commission's goal of addressing abusive ''naked'' short selling and fails to deliver. In addition, we have concluded similarly that it is not consistent with the primary goal of the rule to further clarify, consolidate, or simplify the rule for small entities. Finally, the rule imposes performance standards rather than design standards.

VIII. Statutory Authority

Pursuant to the Exchange Act and, particularly, Sections 2, 3(b), 6, 9(h), 10, 11A, 15, 15A, 17, 17A, 19 and 23(a) thereof, 15 U.S.C. 78b, 78c(b), 78f, 78i(h), 78j, 78k–1, 78o, 78o–3, 78q, 78q–1, 78s and 78w(a), the Commission is adopting a new antifraud rule, Rule 10b–21, to address abusive ''naked'' short selling.

List of Subjects in 17 CFR Part 240

Brokers, Fraud, Reporting and recordkeeping requirements, Securities.

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

PART 240—GENERAL RULES AND REGULATIONS, SECURITIES EXCHANGE ACT OF 1934

■ 1. The authority citation for part 240 continues to read, in part, as follows:

Authority: 15 U.S.C. 77c, 77d, 77g, 77j, 77s, 77z–2, 77z–3, 77eee, 77ggg, 77nnn, 77sss, 77ttt, 78c, 78d, 78e, 78f, 78g, 78i, 78j, 78j–1, 78k, 78k–*1*, 78l, 78m, 78n, 78o, 78p, 78q, 78s, 78u–5, 78w, 78x, 78–*ll*, 78mm, 80a–20, 80a–23, 80a–29, 80a–37, 80b–3, 80b–4, 80b–11, and 7201 *et seq.;* and 18 U.S.C. 1350, unless otherwise noted.

■ 2. Add § 240.10b–21 to read as follows:

§ 240.10b–21 Deception in connection with a seller's ability or intent to deliver securities on the date delivery is due.

Preliminary Note to § 240.10b–21: This rule is not intended to limit, or restrict, the applicability of the general antifraud provisions of the federal securities laws, such as section 10(b) of the Act and rule 10b–5 thereunder.

(a) It shall also constitute a ''manipulative or deceptive device or contrivance'' as used in section 10(b) of this Act for any person to submit an order to sell an equity security if such person deceives a broker or dealer, a participant of a registered clearing agency, or a purchaser about its intention or ability to deliver the security on or before the settlement date, and such person fails to deliver the

[126] 17 CFR 240.0–10(c)(1).

[127] These numbers are based on OEA's review of 2007 FOCUS Report filings reflecting registered broker-dealers. This number does not include broker-dealers that are delinquent on FOCUS Report filings.

[128] 5 U.S.C. 603(c).

[129] *See* 17 CFR 242.203(b)(1).

security on or before the settlement date.

(b) For purposes of this rule, the term *settlement date* shall mean the business day on which delivery of a security and payment of money is to be made through the facilities of a registered clearing agency in connection with the sale of a security.

By the Commission.

Dated: October 14, 2008.

Florence E. Harmon,

Acting Secretary.

[FR Doc. E8–24714 Filed 10–16–08; 8:45 am]

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SECURITIES AND EXCHANGE COMMISSION

17 CFR Parts 240 and 249

[Release No. 34–58785; File No. S7–31–08; October 15, 2008]

RIN 3235–AK23

Disclosure of Short Sales and Short Positions by Institutional Investment Managers

AGENCY: Securities and Exchange Commission.

ACTION: Interim final temporary rule; Request for comments.

SUMMARY: The Commission is adopting an interim final temporary rule requiring certain institutional investment managers to file information on Form SH concerning their short sales and positions of section 13(f) securities, other than options. The new rule extends the reporting requirements established by our Emergency Orders dated September 18, 2008, September 21, 2008 and October 2, 2008, with some modifications. The extension will be effective until August 1, 2009. Consistent with the Orders, the rule requires an institutional investment manager that exercises investment discretion with respect to accounts holding section 13(f) securities having an aggregate fair market value of at least $100 million to file Form SH with the Commission following a calendar week in which it effected a short sale in a section 13(f) security, with some exceptions.

DATES: *Effective Date:* §§ 240.10a–3T, 249.326T and temporary Form SH are effective from October 18, 2008 until August 1, 2009.

Compliance Dates: An institutional investment manager that is required to file a Form SH report on October 24, 2008 or October 31, 2008, must comply with Rule 10a–3T, except that it:

- May exclude disclosure of short positions reflecting short sales before September 22, 2008 from the Form SH report filed on either or both of those dates. An institutional investment manager choosing to exclude these short sales effected before September 22 is not required to report short positions otherwise reportable if the short position in the section 13(f) security constitutes less than one-quarter of one percent of that class of the issuer's securities issued and outstanding as reported on the issuer's most recent annual or quarterly report, and any current report subsequent thereto, filed with the Commission pursuant to the Securities Exchange Act of 1934, unless the manager knows or has reason to believe that the information contained therein is inaccurate, and the fair market value of the short position in the section 13(f) security is less than $1,000,000; and
- Does not have to file Form SH in XML format in accordance with the special filing instructions posted on the Commission's Web site. Instead, the institutional investment manager may file Form SH on EDGAR in the same manner as the form was filed pursuant to the Emergency Orders dated September 18, 2008, September 21, 2008 and October 2, 2008.

Comment Date: Comments on the interim final temporary rule should be received on or before December 16, 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/final.shtml*); or
- Send an e-mail to *rule-comments@sec.gov.* Please include File Number S7–31–08 on the subject line; or
- Use the Federal Rulemaking Portal (*http://www.regulations.gov*). Follow the instructions for submitting comments.

Paper Comments

- Send paper comments in triplicate to Florence E. Harmon, Acting Secretary, Securities and Exchange Commission, 100 F Street, NE., Washington, DC 20549–1090.

All submissions should refer to File Number S7–31–08. This file number should be included on the subject line if e-mail is used. To help us process and review your comments more efficiently, please use only one method. The Commission will post all comments on the Commission's Internet Web site (*http://www.sec.gov/rules/final.shtml*). Comments are also available for public inspection and copying in the Commission's Public Reference Room, 100 F Street, NE., Washington, DC 20549. 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 publicly available.

FOR FURTHER INFORMATION CONTACT: Steven Hearne, at (202) 551–3430, in the Division of Corporation Finance, Marlon Paz, at (202) 551–5756, in the Division of Trading and Markets, or Stephan N. Packs, at (202) 551–6865, in the Division of Investment Management, U.S. Securities and Exchange Commission, 100 F Street, NE., Washington, DC 20549–3010.

SUPPLEMENTARY INFORMATION: The Commission is adopting temporary Rule 10a–3T and Temporary Form SH (Form SH) under the Securities Exchange Act of 1934 [1] as an interim temporary final rule. We are soliciting comments on all aspects of the interim temporary final rule and Form SH. We will carefully consider the comments that we receive and intend to address them in a subsequent release.

I. Background

Recently, we have become concerned that there is a substantial threat of sudden and excessive fluctuations of securities prices and disruption in the functioning of the securities markets that could threaten fair and orderly markets. These concerns are evidenced by our recent publication of Emergency Orders under section 12(k) of the Exchange Act in July [2] and September of this year.[3] In these Orders, we noted our concerns about the possible unnecessary or artificial price movements that may be based on unfounded rumors and may be exacerbated by short selling.

Short selling involves a sale of a security that the seller does not own or a sale which is consummated by the delivery of a security borrowed by, or for the account of, the seller.[4] Short sales normally are settled by the

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[1] 15 U.S.C. 78 *et seq.*

[2] Release No. 34–58166 (July 15, 2008) [73 FR 42379] (imposing borrowing and delivery requirements on short sales of the equity securities of certain financial institutions).

[3] Release Nos. 34–58592 (Sept. 18, 2008) [73 FR 55169] (temporarily prohibiting short selling in the publicly traded securities of certain financial institutions), 34–58591 (Sept. 18, 2008) [73 FR 55175] (requiring institutional investment managers to report short sales activities) and 34–58572 (Sept. 17, 2008) [73 FR 54875] (imposing enhanced delivery requirements on sales of all equity securities).

[4] 17 CFR 242.200(a).

delivery of a security borrowed by or on behalf of the seller. Regulation SHO, which became fully effective on January 3, 2005, sets forth the regulatory framework governing short sales.[5] Among other things, Regulation SHO imposes a close-out requirement to address failures to deliver stock on trade settlement date and to target potentially abusive short selling in certain equity securities.

As adopted, Regulation SHO included two major exceptions to the close-out requirement: The ''grandfather'' provision and the ''options market maker'' exception. Due to our concerns about the potentially negative market impact of large and persistent fails to deliver, and the fact that we continued to observe threshold securities with fail to deliver positions that are not being closed out under existing delivery and settlement requirements, effective on October 15, 2007, we adopted an amendment to Regulation SHO that eliminated the ''grandfather'' exception to Regulation SHO's close-out requirement.[6] The options market maker provision excepted any fail to deliver position in a threshold security resulting from short sales effected by a registered options market maker to establish or maintain a hedge on options positions that were created before the underlying security became a threshold security. On September 17, 2008, we adopted and made immediately effective an amendment to Rule 203(b)(3) of Regulation SHO to eliminate the options market maker exception to the rule's close-out requirement.[7]

On September 18, 2008, the Commission issued an Emergency Order pursuant to section 12(k)(2) of the Exchange Act[8] requiring institutional investment managers to report information concerning their short sales of section 13(f) securities on a weekly basis.[9] We amended the Order on September 21, 2008 to clarify certain technical issues and the public availability of the information provided by the institutional investment managers.[10] On October 2, 2008, we extended the Order's effectiveness through October 17, 2008, and stated that the Forms SH filed under the Order would remain nonpublic to the extent permitted by law.[11]

Under the terms of the Emergency Orders, institutional investment managers that exercise investment discretion with respect to accounts holding securities described in Rule 13f–1(c) under the Exchange Act[12] that have an aggregate fair market value of at least $100,000,000, and effect short sales of those securities generally are required to file Form SH with the Commission on a weekly basis. The Form SH filing currently must be made on the first business day of each calendar week following a week in which the institutional investment manager has effected short sales with respect to any section 13(f) security that is not an option.[13] With respect to each applicable section 13(f) security, the Form SH filing must identify the issuer and CUSIP number of the relevant security and reflect the manager's start of day short position, the number and value of securities sold short during the day, the end of day short position, the largest intraday short position, and the time of the largest intraday short position.

To make clear that continuous reporting of open short positions previously reported on Form SH was not required when no new short sales had been effected during the calendar week covered by the next Form SH filing due to be filed, the Emergency Orders stated that no Form SH filing is required when no short sales of a section 13(f) security have been effected since the previous filing of a Form SH.[14] Further, an institutional investment manager need not report certain information regarding short sales and positions that otherwise would be reportable on Form SH if:

- The short sale or position in the section 13(f) security constitutes less than one-quarter of one-percent of that class of the issuer's section 13(f) securities issued and outstanding, as reported on the issuer's most recent annual or quarterly report, and any subsequent current report, filed with the Commission pursuant to the Exchange Act, unless the manager knows or has reason to believe that the information contained therein is inaccurate; and
- The fair value market of the short sale or position in the section 13(f) security is less than $1,000,000.

II. Purposes of the Interim Final Temporary Rule

As explained in the Emergency Orders requiring Form SH filings, and other emergency orders under section 12(k) of the Exchange Act,[15] we are concerned by sudden and excessive fluctuation of securities prices and disruptions in the fair and orderly functioning of the securities markets. We are concerned about possible unnecessary or artificial price movements that may be based on unfounded rumors and may be exacerbated by short selling.

We note that regulators in several foreign jurisdictions also have adopted rules requiring disclosure of short sales and net short positions. For example, the Netherlands Authority for the Financial Markets (AFM) requires daily disclosure to the AFM of net short positions greater than 0.25% of the capital of financial institutions listed on the Euronext Amsterdam stock exchange. The UK Financial Services Authority (FSA) requires daily disclosure to UK exchanges of net short positions greater than 0.25% of the ordinary stock of UK financial institutions listed in the United Kingdom.

The Commission believes that requiring the filing of the information on Form SH will provide useful information to the staff to analyze the effects of our rulemakings relating to short sales and in evaluating whether our current rules are working as intended, particularly in times of financial stress in our markets. The reports will supply the Commission with important information about the size and changes in short sales of particular issuers by particular investors. That information will be available to the Commission to consider when questions about the propriety of certain short selling occur.

Because of these concerns, we are extending the requirements to file the Forms SH until August 1, 2009 with the following modifications to the reporting requirements:

- Beginning on October 18, 2008, the Form SH weekly filing deadline will be the last business day of the calendar

[5] 17 CFR 242.200(a).

[6] *See* Release No. 34–56212 (Aug. 7, 2007) [72 FR 45544].

[7] *See* Release No. 34–58572 (Sept. 17, 2008).

[8] 15 U.S.C. 78*l*(k)(2).

[9] Release No. 34–58591.

[10] Release No. 34–58591A (Sept. 21, 2008) [73 FR 58987].

[11] Release No. 34–58724 (Oct. 2, 2008) [73 FR 58987–01]. Release 34–58724, together with Release 34–58591 and 34–58591A are collectively referred to as the Emergency Orders.

[12] 17 CFR 240.13f–1(c).

[13] Our discussion here and elsewhere in the release regarding the need to disclose short sales and short positions assumes that the reporting exception, which is described in Section II.A.3, does not apply.

[14] Similarly, under the Emergency Orders no Form SH filing is required when all short sales of section 13(f) securities that have been effected since the last day of the prior reporting period for which a Form SH was due qualify for the reporting exception.

[15] *See also* Release Nos. 34–58166 (July 15, 2008) [73 FR 42837] and 34–58572 (Sept. 17, 2008) [73 FR 58698].

week following a calendar week in which short sales are effected instead of the first business day as required by the Emergency Orders. This change will provide filers with additional time to gather and verify the necessary information and file the forms.

• Form SH filers will no longer be required to disclose the value of the securities sold short (currently column 5 of Form SH), the largest intraday short position (currently column 7 of Form SH) and the time of day of the largest intraday short positions (currently column 8 of Form SH). We understand that some of this information has been difficult for filers to obtain.

• Form SH filers will be required to report all short positions, including short positions effected prior to September 22, 2008, when reporting data elements 5, 6 and 7, Short Position (Start of Day), Number of Securities Sold Short (Day) and Short Position (End of Day). We believe this additional data will assist with our goals of tracking short sale activity.

• The threshold for reporting short sales or positions will be raised from a fair market value of $1 million to a fair market value of $10 million. We have raised this threshold due to the new requirement to disclose pre-September 22, 2008 short sales and positions.[16]

• Filers will be required to submit an XML tagged data file to the Commission providing the requested data. This new requirement will facilitate the review of the filed data by the Commission staff.

III. Interim Final Temporary Exchange Act Rule 10a–3T and Form SH

We are adopting interim final temporary Exchange Act Rule 10a–3T (Rule 10a–3T) to require institutional investment managers to continue filing Form SH in a form that is substantially similar to that required by the Emergency Orders. Adoption of the interim final temporary rule, which will be effective immediately and will continue in effect until August 1, 2009, will facilitate our review of our regulation of short sales. We have included several requests for comment in this release. We will consider public comments on Rule 10a–3T and Form SH in determining whether we should revise the interim final temporary rule or Form SH in any respect, as well as whether we should promulgate a longer-term or permanent short sale reporting requirement upon expiration of Rule 10a–3T and Form SH on August 1, 2009. We intend to address any comments received in a subsequent release.

A. Description of Rule 10a–3T

Exchange Act Rule 10a–3T requires certain institutional investment managers that exercise investment discretion[17] with respect to accounts holding section 13(f) securities[18] to file a nonpublic Form SH on a weekly basis if they have effected short sales with respect to a section 13(f) security during the reporting period preceding the due date of the filing.

1. Institutional Investment Managers Required To Report Short Sales

Rule 10a–3T requires institutional investment managers to keep track of certain short sale transactions and file Form SH to report them. The rule requires the filing of Form SH by those institutional investment managers that: (1) As of the end of the most recent calendar quarter, filed, or were required to file, a Form 13F for the calendar quarter; and (2) during a Sunday to Saturday calendar week effected a short sale in a section 13(f) security other than options.[19] The manager is required to file a Form SH report with the Commission on the last business day of the ensuing calendar week. By limiting the Form SH reporting requirement to institutional investment managers that are required to file Form 13F, we subject only those institutional investment managers that exercise investment discretion with respect to accounts holding section 13(f) securities that have an aggregate fair market value on the last trading day of any month of the previous calendar year of at least $100 million to the Form SH reporting requirement.[20]

We are applying the rule only to Form 13F filers because they exercise discretion over large accounts that have significant potential to affect the markets. In addition, these filers already are subject to Exchange Act reporting and in most instances, the Emergency Orders, and therefore are familiar with using the Commission's EDGAR system to submit filings. In addition, the Form SH reporting requirement applies only to section 13(f) securities, which include equity securities of a class described in section 13(d)(1) of the Exchange Act that are admitted to trading on a national securities exchange or quoted on the automated quotation system of a registered securities association, because this is a useful and tested term that is well-suited to capture the information we are seeking.

Request for Comment

• Rule 10a–3T limits reporting of short sales and short positions to institutional investment managers that are required to file Form 13F. Should we continue to require Form SH reporting by these institutional investment managers? Should we require only a subset of these institutional investment managers to file Form SH reports? If so, how should we limit the type of institutional investment manager that we require to file Form SH? Should we instead require a different set of persons to file Form SH? Are there categories of persons that conduct a significant amount of short sales but who are not required to submit Form SH because they are not institutional investment managers required to file Form 13F? If so, which categories of short sellers should be subject to Form SH reporting? Would it be appropriate to require anyone who conducts short sales or has short positions in excess of specified thresholds, such as those in Rule 10a–3T(b)(2)(ii), to report?

• Are there other, better ways to collect information about short sales than by requiring Form SH?

• Should we require short sellers to keep current detailed books and records of their short sale activities and their short positions, of the sort required under Rule 17a–3(a)(6) under the Exchange Act?[21] If so, should we require short sellers to retain the name of the broker, the number of shares, the price, the issuer name, the time and date of entry of the order, the time and date of execution of the order, the type of order (limit or market), the locate source or exception to locate claimed, the contact at the locate, the time and date when the locate was received, the amount of shares located, the time and

[16] Under the Emergency Orders, institutional investment managers did not have to disclose short sales effected, and positions held, prior to September 22, 2008.

[17] For purposes of this rule, the term ''investment discretion'' has the same meaning as in Rule 13f–1(b) under the Exchange Act. [17 CFR 240.13f–1(b)].

[18] The term ''section 13(f) securities'' is defined in Rule 13f–1(c) under the Exchange Act [17 CFR 240.13f–1(c)] to include securities of a class described in Section 13(d)(1) of the Exchange Act [15 U.S.C. 78m(d)(1)] that are admitted to trading on a national securities exchange or quoted on the automated quotation system of a registered securities association. In determining what classes of securities are section 13(f) securities, an institutional investment manager may rely on the Official List of Section 13(f) Securities published by the Commission available at *http://www.sec.gov/divisions/investment/13flists.htm*.

[19] As adopted, the rule differs from the requirement of the Order which applied to institutional investment managers that were required to file Form 13F for the quarter ended June 30, 2008. Because the temporary rule will be in effect until August 1, 2009, the temporary rule refers instead to the previous calendar quarter.

[20] *See* 17 CFR 240.13f–1(a)(1).

[21] 17 CFR 240.17a–3(a)(6).

date of the borrow, the number of shares borrowed, the source from which they were borrowed, and where the borrowed shares are located? Should we require other information be maintained?

• In the alternative, or in addition, should we require all short sellers to publicly provide a notice filing when their short sale activity or positions cross a specific threshold that would be deemed significant? If so, what information should the notice filing contain? If a notice filing is required, should it be filed with us on a nonpublic basis? Would there be any concerns about publicly filing such a notice? Would such a notice filing provide useful information to investors? Would requiring all short sellers to keep detailed records of their short sale activities and filing when necessary a notice filing relating to those activities raise any other concerns, such as concerns about the potential costs? In the alternative, should we instead require short sellers to produce books and records upon request from the Commission?

2. Short Sales and Short Positions Required To Be Reported

Rule 10a–3T requires an institutional investment manager to report short sales and short positions, as defined in Rule 200 of Regulation SHO. Rule 200 defines a short sale to mean any sale of a security which the seller does not own or any sale which is consummated by the delivery of a security borrowed by, or for the account of, the seller.[22] For purposes of Rule 10a–3T, a short position is the aggregate gross short sales of an issuer's section 13(f) securities (excluding options), less purchases to close out a short sale in the same issuer. The Form SH short position is not net of long position in the issuer. If a person that has loaned a security to another person sells the security and a *bona fide* recall is initiated within two business days after trade date, the person that has loaned the security is deemed to own the security for purposes of Rule 200(g)(1) and Rule 200(b) of Regulation SHO, and such sale will not be treated as a short sale.[23] Rule 10a–3T is intended to broadly require institutional investment managers to account for their short sales.

Options and short sales of options on section 13(f) securities are not required to be reported on Form SH. However, certain transactions that involve options are required to be reported.[24] For example, if an institutional investment manager exercises a put and is net short pursuant to Rule 200(c) of Regulation SHO, the resulting transaction is a short sale and must be reflected on Form SH. Similarly, if the institutional investment manager effects a short sale as a result of assignment to it as a call writer, upon exercise, the resulting transaction is a short sale and must be reflected on Form SH.

Request for Comment

• Rule 10a–3T is limited to reporting on short sales and short positions of section 13(f) securities, other than options. Should we continue to require disclosure about short sales of these section 13(f) securities? Should we limit the securities that institutional investment managers are required to report on to a subset of these securities, such as equity securities of financial institutions? Would it be more appropriate for the Form SH reporting requirement to cover all publicly traded equity securities regardless of whether they are listed on a national securities exchange or quoted on the automated quotation system of a registered securities association? Should we require reporting on Form SH for transactions relating to any equity security of a company reporting under the Exchange Act?

• Rule 10a–3T requires reporting of the start of day short position, the gross number of securities sold short during the day and the end of day short position. Does requiring reporting of this information have the effect of reducing manipulative behavior and other improper conduct by short sellers? Do these categories of information provide the most useful data for analyzing short selling activities and combating market manipulation? If not, are there other benefits that Form SH information will provide? Are there other categories of information that we should require that would be useful to our objectives, such as transaction audit trails or the portion of the number of securities sold short in foreign markets?

• Do the definitions of the terms short sale and short position that we use in Rule 10a–3T adequately capture the types of transactions on which the Commission should focus? Should we use definitions for the terms short sale or short position in Rule 10a–3T that are different from the Regulation SHO definitions? If so, how should we define these terms?

• How can we best address the risk that managers may try to evade reporting by conducting short sales through synthetic instruments or through third parties that are not required to report on Form SH? Should we require disclosure of these transactions as well? Should we amend the rule to require filers to report any synthetic arrangements that function as short sales and provide Form SH information for those positions and identify the parties to those transactions? How would we define or describe these transactions? Should we require any short seller that is entering the short to hedge a synthetic position entered into with another party to identify the other party in Form SH?

• Should we revise Rule 10a–3T to require disclosure of options and short sales of options? Should Rule 10a–3T require disclosure of other financial instruments such as single stock futures?

• Rule 10a–3T requires information to be reported to the Commission. Should the rule require this information to be provided to the self-regulatory organizations? If so, which self-regulatory organizations should receive this information? Should we work with the exchanges and self-regulatory organizations to capture this information? Would these organizations be well equipped to monitor the data that we are requesting?

• Should we consider harmonizing our short sale reporting and regulation with foreign regulators? Would it be appropriate to require similar short sale reporting to that implemented by the FSA in the United Kingdom?[25] What aspects would be more or less appropriate?

3. Exceptions to the Filing and Reporting Requirements

Rule 10a–3T does not require an institutional investment manager to file a Form SH to report short sales and positions if:[26]

• The institutional investment manager has not effected any short sales of section 13(f) securities during the reporting period covered by the Form SH due to be filed; or

[22] 17 CFR 242.200.

[23] For staff guidance regarding how sales of loaned but recalled securities should be treated for purposes of the Emergency Orders, see the Division of Trading and Market Guidance Regarding Sale of Loaned but Recalled Securities available at *http://www.sec.gov/divisions/marketreg/loanedsecuritiesfaq.htm.*

[24] Short sales resulting from the exercise of option contracts are reportable as of the date of the exercise.

[25] *See* information on the short selling instruments issued in September 2008 at the Financial Services Authority Web site at *http://www.fsa.gov.uk/pages/Library/Policy/Handbook/short-selling.shtml.*

[26] Unlike the requirements under the Emergency Orders, the rules we adopt today require short sales or positions effected prior to September 22, 2008, to be reported.

• On each calendar day during the calendar week, the start of day short position, the gross number of securities sold short during the day and the end of day short position constitute less than one-quarter of one percent of that class of the issuer's section 13(f) securities issued and outstanding as reported on the issuer's most recent annual, quarterly or current report filed with the Commission pursuant to section 13 of the Exchange Act, unless the manager knows or has reason to believe the information contained therein is inaccurate and the fair market value of the start of day short position, the gross number of securities sold short during the day and the end of day short position is less than $10,000,000.[27]

Once a determination is made that a Form SH filing is required, Rule 10a–3T permits an institutional investment manager to disclose in the appropriate data element its reliance on this exception with respect to information otherwise required to be reported. The institutional investment manager may disclose ''N/A'' in the appropriate data element to report the number of securities sold short or corresponding information regarding the short position in that class where the data element falls below the reporting threshold. The exception limits the substantive disclosure required on Form SH to significant short sales and positions that have the potential to materially affect the price of the underlying securities. This limitation is designed to strike a balance between the burden of compiling and providing the information to the Commission and the need for information about short sales to be available to the Commission.

We are clarifying in accordance with staff guidance provided in conjunction with the Emergency Orders that institutional investment managers may act as conduits for customer orders by handling such orders on a ''riskless principal'' [28] basis in the following scenarios, which may result in the broker-dealer effecting a short sale: (i) A broker-dealer receives an order to sell a section 13(f) security from a customer who is net long on the securities being sold, and the broker-dealer then seeks to execute that order, either in whole or in part, by selling the section 13(f) security as riskless principal, and the broker-dealer has an overall net short position in such section 13(f) security; or (ii) a broker-dealer receives an order to buy a section 13(f) security from a customer, and the broker-dealer then seeks to execute that order, either in whole or in part, by purchasing the section 13(f) security as riskless principal, and then selling the section 13(f) security to the customer, and the broker-dealer has an overall net ''short'' position in such section 13(f) security. In both scenarios, the short sales need not be reported by the broker-dealer on Form SH.

We are eliminating the ''grandfather'' provision that was included in the Form SH filing conditions set forth in the Emergency Orders. The Emergency Orders did not require disclosure of existing or outstanding short positions in section 13(f) securities held before the September 22, 2008 effective date of the initial order. This grandfather provision was established primarily to address concerns about the public disclosure of institutional investment managers' pre-existing short positions before we indicated that Form SH filings would be made on a nonpublic basis. One of the commenters on the Emergency Orders noted that a consequence of the grandfather provision is that some Form SH filers will have to keep two sets of books until all of the pre-September 22 positions are cleared out.[29]

Under Rule 10a–3T, Form SH filers will be required to report all short positions, including short positions effected prior to September 22, 2008, when reporting data elements 5, 6 and 7, Short Position (Start of Day), Number of Securities Sold Short (Day) and Short Position (End of Day) on Form SH. We believe that the additional data about the pre-September 22 positions will improve our efforts to analyze short sale activity.

In connection with elimination of the grandfather provision, we are revising the exception to the Form SH filing requirements. Under the Emergency Orders, Form SH filers are not required to report short sales or short positions otherwise reportable if: The short sale or short position in the section 13(f) security constitutes less than one-quarter of one per cent of that class of the issuer's section 13(f) securities issued and outstanding, as reported on the issuer's most recent Exchange Act report; and the fair market value of the short sale or short position in the section 13(f) security is less than $1 million. We are raising the threshold for filing and reporting short sales or short positions in a class of section13(f) securities other than options from a fair market value of $1 million to a fair market value of $10 million primarily due to the new requirement for institutional investment managers to report information about their pre-September 22 short positions. In addition, we note that the threshold is intended to ensure that small percentage positions that comprise large monetary positions are reported, and we believe that $10 million more suitably addresses this concern.

An institutional investment manager that is required to file a Form SH report on October 24, 2008 or October 31, 2008 may exclude disclosure of short positions reflecting short sales effected before September 22, 2008 from the Form SH report filed on either or both of those dates. However, if the manager excludes such disclosure, the relevant fair market threshold for reporting short sales or positions is the $1 million threshold.

Request for Comment

• Is the exception in Rule 10a–3T to Form SH reporting of short sales that fall below the specified thresholds appropriate? If so, are the thresholds set at appropriate levels, or should they be higher or lower? What threshold would be appropriate? Should we use 5% as in Regulation 13D [30] or is a smaller threshold, such as 2.5%, more appropriate? If you suggest a different type of exception to Form SH reporting, please describe the exception that you think is appropriate.

• Is the reporting exception in Rule 10a–3T for ''riskless principal'' transaction appropriate? If not, why not and what would be the best way to address ''riskless principal'' transactions in the rule?

• Should we continue to use a significance test that couples a percentage of shares outstanding threshold with a fair market value threshold? Should the percentage and market value thresholds be combined or should they be separate standards? If separate, what level should each be set at? Would $1 million or $10 million be appropriate? Would 1%, 2.5% or 5% be appropriate? Should we instead adopt a threshold that is tied to the number of shares sold short or some other standard?

• As adopted, a manager is required to report its short sales and short

[27] For purposes of determining whether the $10,000,000 threshold is met, the manager should multiply the number of shares the manager sold short that day by the market price as of the time of the close of trading at the NYSE on that day.

[28] A ''riskless principal'' transaction is generally described as trades in which, after receiving an order to buy (or sell) from a customer, the broker-dealer purchases (or sells) the security from (or to) another person in a contemporaneous offsetting transaction. *See* Exchange Act Rule 10b–10(a)(2)(ii)(A) [17 CFR 240.10b–10(a)(2)(ii)(A)]; Release No. 34–33743 (Mar. 9, 1994) at n.11.

[29] See letter from the Securities Industry and Financial Markets Association dated October 9, 2008 available in file No. S7–24–08.

[30] 17 CFR 240.13d–1 *et seq.*

positions. However, managers often take short positions in order to hedge the risk on long positions in which they invest and not for speculative purposes. Should we develop an exemption that would permit managers to avoid reporting of hedging short positions or in the alternative require additional information that explains the purposes of various short positions? If so, how would we best develop the exemption or the request for additional information and how would we define hedging transactions? Would such an exemption be useful? Would it subsume the purpose of the rule?

4. Transition and Expiration Dates of Rule 10a–3T

As noted above, the Commission remains concerned by sudden and excessive fluctuation of securities prices and disruptions in the fair and orderly functioning of the securities markets. We are adopting this temporary rule to continue the reporting obligations established in our Emergency Orders as modified. For the reasons those Orders were adopted and for the reasons explained in this release, no gap between the reporting obligations of the Emergency Orders and the obligations established by this rule should exist. In addition, we received a variety of comments from the public about the Emergency Orders, which were valuable in developing this interim temporary final rule. As a result, this rule is immediately effective.

In order to assist with the transition, institutional investment managers that are required to file a Form SH report on October 24, 2008 or October 31, 2008, must comply with Rule 10a–3T, except that they may exclude disclosure of short positions reflecting short sales before September 22, 2008 from the Form SH report filed on either or both of those dates. An institutional investment manager may choose to exclude these short sales effected before September 22 if the short position in the section 13(f) security constitutes less than one-quarter of one percent of that class of the issuer's securities issued and outstanding as reported on the issuer's most recent annual or quarterly report, and any current report subsequent thereto, filed with the Commission pursuant to the Exchange Act, unless the manager knows or has reason to believe that the information contained therein is inaccurate, and the fair market value of the short position in the section 13(f) security, as of September 22, 2008, was less than $1,000,000. In addition, institutional investment managers do not have to file Form SH in XML format in accordance with the special filing instructions posted on the Commission's Web site for their Form SH reports on October 24, 2008 or October 31, 2008. Instead, the institutional investment manager may file Form SH on EDGAR in the same manner as the form was filed pursuant to the Emergency Orders dated September 18, 2008, September 21, 2008 and October 2, 2008.

Subsequently, beginning with the calendar week ending November 1, 2008, institutional investment managers are required to report as specified in Rule 10a-3T and the filer instructions as to the assembly of the EDGAR submission provided on the Commission's Web site at *http://www.sec.gov/info/edgar/ednews/formshsubmission.htm* or in a future update of the EDGAR Filer Manual. Rule 10a–3T will expire and cease to be effective on August 1, 2009 unless we act to continue or revise the rule and extend the effective date.

Request for Comment

- How long should institutional investment managers be required to file Form SH reports with the Commission? Is the period extending until August 1, 2009 that we are adopting appropriate? Should we require Form SH reporting beyond August 1, 2009?

B. Form SH

1. Timing and Nonpublic Nature of Form SH

Rule 10a–3T requires institutional investment managers to report certain short sales to the Commission on Form SH. Under Rule 10a-3T, institutional investment managers must file Form SH on the last business day of each calendar week following a week in which the institutional investment manager has effected certain short sales with respect to any section 13(f) security that is not an option.[31]

This is a change from the Form SH filing deadline set forth in the Emergency Orders which required Form SH to be filed on the first business day of each calendar week immediately following a week in which the institutional investment manager effected certain short sales. This change will provide filers with additional time to gather, verify and file the data, decreasing the burden on the filers without affecting the efficacy of the information to the staff.

As we explained in our October 2008 Order, we are concerned that publicly available Form SH data could give rise to additional, imitative short selling. Accordingly Rule 10a–3T states that all Forms SH filed with the Commission will be nonpublic to the extent permitted by law. The Freedom of Information Act provides at least two exemptions under which the Commission has authority to withhold the information.[32] A Form SH filer should not submit a confidential treatment request to the Commission. A Form SH filer must label its Form SH as non-public, as required by the instructions to the form.

Request for Comment

- Form SH requires detailed reports regarding institutional investment managers' significant short positions in section 13(f) securities. Are there better ways for the Commission to gather short selling information and address our concerns than by using Form SH? Are the detailed reports required on Form SH appropriate? Is there any information that should be required in, or deleted from, the requirements of the Form?
- When requiring reporting of short positions, should we generally only require reporting of new positions, or should we require reporting of all short positions? Does requiring reporting of all short positions create significant additional burdens on filers? If so, what burdens and how can they best be addressed?
- Form SH requires filers to report the short position at the start of the day, the aggregate number of securities sold short on that day, and the short position at the end of the day. Is this information sufficient to provide an adequate understanding of the filer's short sale activity during the day? Should we require filers to report their net long and short positions in addition to the information already required? Is it sufficient to simply track the net short positions and not to report the start and end of day positions and the aggregate activity?
- As adopted, Form SH no longer requires reporting of the daily value of securities sold short, the largest intraday short position and the time of day of that short position. We understand that some institutional investment managers have had significant difficulty

[31] The Form SH is required to be filed electronically on the Commission's EDGAR system on or before 5:30 p.m. Eastern Time on the last business day of the calendar week.

[32] The Freedom of Information Act (''FOIA'') Exemption 4 provides an exemption for ''trade secrets and commercial or financial information obtained from a person and privileged or confidential.'' FOIA Exemption 8 provides an exemption for matters that are ''contained in or related to examination, operating, or condition reports prepared by, on behalf of, or for the use of an agency responsible for the regulation or supervision of financial institutions.''

identifying the largest intraday short position and the time of day of that short position. This information may be helpful in identifying manipulative short selling. How difficult is it for filers to track and report this information? Should we require filers to report this information? Is there an alternative way to track this kind of information and better identify when manipulative short selling may be taking place?

• Rule 10a–3T provides that the information required by Form SH shall remain nonpublic to the extent permitted by law. Institutional investment managers have expressed concern about making this information public. Should the information required by Form SH be publicly reported? Would concerns about public reporting be alleviated if there was a delay in filing the information, such as a delay of 10 days, or 45 days after the end of a quarter in which the transaction occurred, similar to the 45-day deadline for Form 13F filings? Would concerns be alleviated if the information was reported by the institutional investment manager on a nonpublic basis, but made public after a delay on an issuer basis?

• If the Form SH remains nonpublic, what is the best way to require filers to report the Form SH information to the Commission? Is EDGAR the best vehicle for reporting Form SH information to the Commission? If not, what vehicle would be superior and why?

• We are permitting institutional investment managers to provide the information required by Form SH on the last business day following a calendar week in which the institutional investment manager effected a short sale. Are there concerns with permitting institutional investment managers with extra time to provide the information to the Commission? Is the extra time sufficient time to address concerns about the need for more time to be able to provide the information in a timely fashion? Should we change the weekly reporting period so it is not based on a calendar week?

• Institutional investment managers are required to file Form SH for any week during which they make a reportable short sale. Is it appropriate to require the filing of Form SH on a weekly basis? Should we require the filing to be made more frequently, such as daily? Should we require the filing less frequently, such as bi-weekly, monthly or quarterly, to reduce the filing burden? Would we be able to capture short selling information as effectively if Form SH reports were required to be filed less frequently?

2. Form SH

Under the Emergency Orders, Form SH may be filed in ASCII or HTML. We are adopting rules that require that short sale and position information to be filed in XML tagged data format and additional identification within the data file. By requiring reporting in XML, the Commission staff will be able to more easily analyze the data that we receive. Based on our experience with reporting under the Emergency Orders, we are reducing the data that institutional investment managers are required to report to the Commission by removing the requirement that managers report the value of securities sold short during the day, the largest intraday short position and the time of day of the largest intraday short position.

We understand that some filers have found it difficult to obtain and burdensome to track and report the largest intraday short position disclosure, and the time thereof. We are no longer requiring disclosure of the value of securities sold short during the day as our staff has the ability to perform this calculation without the disclosure from the institutional investment manager.

There are three Form SH report types: Form SH Entries Report, Form SH Notice and Form SH Combination Report. An Entries Report is filed if all of the information that an institutional investment manager is required to report is included in the Form SH filing; a Notice is filed if all of the information that a manager is required to include in the XML tagged data file is reported by another Manager; a Combination Report is filed if a portion of the manager's entries are filed in the manager's report and a portion are reported by another manager. When filing a Form SH Notice or Combination Report, the manager is required to disclose the other managers that are reporting for the manager.

Rule 10a–3T requires filers to format the Form SH data differently than under the Emergency Orders, but will similarly include:

• Disclosure of the time period of the report;
• An indication of whether the report is an amendment;
• The name and address of the institutional investment manager;
• A representation by the signer;
• A signature block for the person signing the form;
• An indication of the report type;
• A list of any other managers reporting for the manager filing the report;
• The total number of transactions reported;
• A list of other managers for whom the Form SH is filed; and
• The number of other included managers.[33]

In addition, the Form SH will include, where applicable, an XML tagged data file that provides much of the information that was previously required by the Emergency Orders to be included in the Information Table. The XML tagged data file will provide the information regarding short sales, including:

• The date;
• The Central Index Key (CIK) of the filer;
• The name of the issuer;
• The CUSIP of the issuer;
• The short position at the start of the day;
• The number of securities sold short on that day; and
• The short position at the end of the day.

The XML data elements provide the bulk of the required disclosure in Form SH and are limited to the information requested in the instructions to the form. Data elements 1 through 4 provide the date, identify the manager by CIK, and the name and CUSIP of the issuer. Data Elements 5 and 7 require the manager to report the number of securities that represent the manager's short position in the issuer as of the start and end of each calendar day during the reporting period. Data element 6 requires the manager to report the gross, not net, number of securities in the issuer that the manager sold short for each calendar day during the reporting period.

When determining the disclosure required in the XML tagged data file, an institutional investment manager may apply the exclusion in Rule 10a–3T(b)(2)(ii) on a day-by-day and data element-by-data element basis. For example, if a filer has triggered a filing obligation for a given calendar week, has start and end of day short positions on a particular day that do not qualify for the reporting exception, but does not effect any short sales on that day, the filer would disclose the appropriate numbers under elements 5 and 7 and enter zero under element 6. Using the same facts, if the filer did engage in short sales during that particular day but those sales in the aggregate met the reporting exception, the filer may enter

[33] Additional information the manager wishes to report may be included on the Form SH provided that the information does not, either by its nature, quantity, or manner of presentation, impede the understanding or presentation of the required information. Only information requested by the Form SH and its instructions is permitted in the XML tagged data file.

''N/A'' under element six. ''N/A'' can to be used any time a filer has a filing obligation and is omitting information under the reporting exception.

To the extent still relevant, institutional investment managers may look to the staff guidance provided pursuant to the Emergency Orders regarding reporting short sales and positions on Form SH such as the Guidance Regarding the Commission's Emergency Order Concerning Disclosure of Short Selling provided by the staff of the Divisions of Corporation Finance, Investment Management, and Trading and Markets available at *http://www.sec.gov/divisions/marketreg/shortsaledisclosurefaq.htm.*

Request for Comment

- Is the XML tagged data file format more easily generated than an ASCII document in columned or delimited format? Would XBRL tagged data be a preferred solution? Are there any other technology issues resulting from the use of XML tagged data format? Do filers have the ability to submit the XML tagged data by November 7, 2008?
- Should delimited ASCII text data be considered for transaction data? If the data is to be provided to the public, which data file format would be preferred? If the data is to be provided to the public, is there an advantage to using XML because a style sheet can be used to present XML data elements in a readable format?

IV. Other Matters

The Administrative Procedure Act generally requires an agency to publish notice of a proposed rulemaking in the **Federal Register**.[34] This requirement does not apply, however, if the agency ''for good cause finds * * * that notice and public procedure are impracticable, unnecessary, or contrary to the public interest.'' [35] Further, the Administrative Procedure Act also generally requires that an agency publish an adopted rule in the **Federal Register** 30 days before it becomes effective.[36] This requirement, however, does not apply if the agency finds good cause for making the rule effective sooner.[37] The Commission, for good cause, finds that notice and solicitation of comment before Rule 10a–3T and Form SH is impracticable, unnecessary, or contrary to the public interest.

For the reasons we discussed throughout this release, we believe that we have good cause to act immediately to adopt this rule and form on a temporary interim final basis. As discussed throughout this release, we are concerned by recent sudden and excessive fluctuation of securities prices and disruptions in the fair and orderly functioning of the securities markets and believe that the nonpublic submission of Form SH may provide the Commission with useful information to combat market manipulation that threatens investors and our capital markets. Adopting the rules as interim temporary rules also will minimize any disruption in reporting by institutional investment managers of their short sale activities. Avoiding such disruption should obviate the need for those managers to stop and restart their reporting apparatus and should allow us uninterrupted access to the information in the reports during a time of significant market upheaval.

Rule 10a–3T takes effect on October 18, 2008. For the reasons discussed above, we have acted on a temporary interim final basis. We emphasize that we are requesting comments on the temporary rule and will carefully consider any comments that we receive. We intend to respond to the comments in a subsequent release. Moreover, this is a temporary rule that will expire on August 1, 2009. Setting a termination date for the rule will necessitate further Commission action no later than the end of that period if the Commission determines to continue the same, or similar, requirements contained in the temporary rule. The Commission finds that there is good cause to have Rule 10a–3T and Form SH effective as temporary interim rules on October 18, 2008 and that notice and public procedure in advance of effectiveness of the rules are impracticable, unnecessary and contrary to the public interest.[38]

V. Paperwork Reduction Act

A. Background

Temporary Exchange Act Rule 10a–3 relates to a ''collection of information'' requirement within the meaning of the Paperwork Reduction Act of 1995 (PRA).[39] The title for the information collection is ''Form SH'' (OMB Control No. 3235–0646). An agency may not conduct or sponsor, and a person is not required to respond to, a collection of information unless it displays a current valid control number.

The Office of Management and Budget (''OMB'') approved Form SH on September 19, 2008 in connection with the Commission's issuance of the Emergency Order to require institutional investment managers to file Form SH with the Commission.[40] We submitted revised burden estimates to OMB for review and approval in accordance with 44 U.S.C. 3507(j) and 5 CFR 1320.13. Separately, we submitted the revised burden estimates to OMB for review and approval in accordance with 44 U.S.C. 3507(d) and 5 CFR 1320.11. OMB has approved the revised Form SH burden estimates related to our adoption of Rule 10a–3T on an emergency basis.

B. Summary of Rule 10a–3T and Form SH Burden Estimates

Rule 10a–3T will require certain institutional investment managers that exercise investment discretion with respect to accounts holding section 13(f) securities that have an aggregate fair market value of at least $100,000,000 to file Form SH on a weekly basis during the period covered by this interim rule. The Form SH filing must be made on the last business day of each calendar week following a week in which the institutional investment manager has effected any short sale with respect to any section 13(f) security that is not an option. Form SH is filed on a nonpublic basis and compliance is mandatory.

With respect to each applicable section 13(f) security, the Form SH filing must reflect the number of securities sold short during the day, as well as the start of day short position and end of day short position, for that security on each calendar day of the prior week in which the institutional investment manager engaged in trading activity with respect to short sales. No Form SH filing is required when no short sales of a section 13(f) security have been effected during the reporting period to be covered by the Form SH filing or where all short sales and short positions are below the following thresholds on each day of the calendar week to be covered by the report:

- The short sales and short positions in the section 13(f) security constitute less than one-quarter of one-percent of that class of the issuer's section 13(f) securities issued and outstanding as reported on the issuer's most recent annual or quarterly report, and any current report subsequent thereto, filed with the Commission pursuant to the Exchange Act, unless the manager knows or has reason to believe that the

[34] *See* 5 U.S.C. 553(b).

[35] *Id.*

[36] *See* 5 U.S.C. 553(d).

[37] *Id.*

[38] This finding also satisfies the requirements of 5 U.S.C. 808(2), allowing the rules to become effective notwithstanding the requirement of 5 U.S.C. 801 (if a federal agency finds that notice and public comment are ''impractical, unnecessary or contrary to the public interest,'' a rule ''shall take effect at such time as the federal agency promulgating the rule determines.'').

[39] 44 U.S.C. 3501 *et seq.*

[40] Release No. 34–58591.

information contained therein is inaccurate; and

• The fair value market of the short sale and short position in the section 13(f) security is less than $10,000,000.

When we originally requested approval of Form SH in connection with the Emergency Orders, we estimated that the same number of respondents that file Form 13F also would file Form SH, and that each Form SH filing would impose an estimated five burden hours on each respondent. Some Form SH filers indicated that the five hour burden estimate is too low, so we are increasing it to 20 hours as explained below. We also now have actual data from the Form SH filings that we received on September 29, 2008, October 6, 2008 and October 14, 2008 upon which to base our revised burden estimates. We estimate that we will receive approximately 1,000 Form SH filings from institutional investment managers each week during the nine-month period during which Rule 10a–3T will be in effect.

Pursuant to Rule 10–3T, Form SH contains three fewer data elements than did the version of Form SH required by the Emergency Orders. Therefore, we estimate that 1,000 institutional investment managers will file 36 Form SH reports annually at an estimated 20 hours per filing for a total annual reporting burden of 720,000 hours.[41] The 20 hour per filing estimate is based on data received from a small sample of actual filers and a random sample of filings conducted by our Office of Economic Analysis. Staff in the Office of Economic Analysis sampled 100 of the Form SH filings that we received on October 6, 2008. The average number of pages filed was 8.2 and the median number of pages filed was 6, while the maximum number of pages included in a sample filing was 228 and the minimum was 1 page.

Based on limited data from a small sample of actual filers, we estimate that the legal costs of filing Form SH for investment managers that retain an outside law firm to be approximately $1,000 per filing for 36 filings for a total of $36,000.[42] We further estimate the filing agent costs to be $1,500 per week for managers that retain an outside agent to assist them in filing Form SH on EDGAR for a total of $54,000 ($1,500 × 36), and a combined cost total of $90,000,000 ($90,000 per filer × 1000 filers).

We understand that many institutional investment managers incurred a much higher reporting burden than five hours per filing in connection with the Form SH reports that they filed to comply with the Emergency Orders. A substantial portion of the initial reporting burden, as discussed in more detail in the Cost-Benefit Analysis, was attributable to the compressed timeframe in which the managers had to comply with the newly created form and the need for new programs to combine data from two different types of automated information systems to satisfy the Form SH disclosure requirements. The revised 20 hour estimate and cost estimate reflects an estimated average reporting burden associated with Form SH for each of the 36 filings that some institutional investment managers must make during the nine month period covered by Rule 10a–3T.

C. Solicitation of Comments

Pursuant to 44 U.S.C. 3506(c)(2)(B), we request comments to: (1) Evaluate whether Form SH is necessary for the proper performance of the functions of the agency, including whether it will have practical utility; (2) evaluate the accuracy of our estimate of the burden imposed by Form SH; (3) determine whether there are ways to enhance the quality, utility and clarity of the information to be collected; and (4) evaluate whether there are ways to minimize the burden of the collection of information on those who are to respond, including through the use of automated collection techniques or other forms of information technology.

Persons submitting comments on the collection of information requirements should direct the comments to the Office of Management and Budget, Attention: Desk Officer for the Securities and Exchange Commission, Office of Information and Regulatory Affairs, Washington, DC 20503, and should send a copy to Florence E. Harmon, Acting Secretary, Securities and Exchange Commission, 100 F Street, NE., Washington, DC 20549–1090, with reference to File No. S7–31–08. Requests for materials submitted to OMB by the Commission with regard to these collections of information should be in writing, refer to File No. S7–31–08, and be submitted to the Securities and Exchange Commission, Records Management, Office of Filings and Information Services, 100 F Street, NE., Washington, DC 20549.

VI. Cost-Benefit Analysis

A. Background

As stated in the Emergency Orders, we are concerned about the potential for sudden and excessive fluctuations of securities prices and disruption in the functioning of the securities markets that could threaten fair and orderly markets. In particular, we are concerned that some persons may manipulate the stock of issuers that have become temporarily weakened by current market conditions. Possible unnecessary or artificial downward price movements may be based on unfounded rumors and may be exacerbated by short selling. Such price declines can give rise to questions about the underlying financial condition of an issuer, which in turn can create a crisis of confidence that is not warranted by the issuer's true financial condition. This undue crisis of confidence can threaten an issuer's viability as a going concern, even when the underlying fundamentals of the firm do not suggest cause.

For example, financial institutions with demand deposit liabilities might experience unwarranted depositor withdrawals that, without replacement, could lead to a funding shortfall for the financial institution's long term assets, such as residential mortgages and commercial loans. Liquidation of these assets to meet depositor redemption could force sales at unfavorable prices that erode capital and increase the risk of insolvency and institutional failure.

Non-financial institutions can face similar risks from an undue crisis in confidence. Manufacturers that rely on credit with suppliers or financial institutions for production inputs might see this credit offered at less favorable terms, or even worse, become unavailable, placing undue burden on their working capital and cash reserves. An undue crisis in confidence also could lead customers to choose alternative products or producers if customers fear that future commitments, such as warrantees or service agreements, might not be honored.

We therefore believe that it is necessary to continue requiring institutional investment managers subject to the Form 13F filing requirements to report information concerning their short sales of Rule 13(f) securities on Form SH after the expiration of the Emergency Order dated October 2, 2008 on October 17, 2008. New Exchange Act Rule 10a–3T requires an institutional investment manager that exercises investment discretion with respect to accounts holding section 13(f) securities having an aggregate fair market value of at least

[41] This estimate conservatively assumes that each Form SH filer will make a Form SH filing each week during the period covered by Rule 10a–3T.

[42] The $1,000 per filing estimate is based on two-and-a-half hours of outside law firm time at a rate of $400 per hour.

$100 million to file Form SH with the Commission each calendar week immediately following a calendar week in which the manager effects a short sale of section 13(f) securities, other than options, exceeding stated thresholds. Rule 10a–3T and Form SH are temporary requirements that will expire on August 1, 2009.

B. Benefits

The securities markets have undergone significant stress in recent months. An expected benefit of Rule 10a–3T and Form SH is to help restore investor confidence in the markets. The disclosure may help to combat manipulative behavior by making it easier for us to analyze short selling activity. To the extent that the rule does reduce manipulative behavior while still permitting legitimate trading activity should help to alleviate any undue crisis of investor confidence and may strengthen the market's ability to correctly incorporate accurate information into securities prices.

Among other things, the Form SH disclosure will enable staff in our Office of Economic Analysis and Office of Compliance, Inspections and Examinations to analyze short selling patterns and use the data along with other information to study the impact of short selling on the market in times of financial crisis. For example, the Form SH disclosure can help Commission staff evaluate the effectiveness of some of our other emergency initiatives relating to short selling, such as our new temporary Rule 204T requiring short sellers and their broker-dealers to deliver securities by the settlement date (three days after the sale transaction date, or T+3).

In response to feedback on the Emergency Orders, we have further tailored the information collected. We believe that this will limit the expense of complying with the disclosure, while still providing us with the information that we need.

C. Costs

Rule 10a–3T will impose costs on institutional investment managers subject to the Form SH filing requirement. We estimate that approximately 1,000 Form SH reports will be filed with the Commission each week during the period through August 1, 2009, and that each filing will impose an estimated reporting burden of 20 hours on the filer at an estimated internal cost of $3,500 per filing,[43] plus an estimated $90,000 per filing in legal and filing costs for managers that retain the services of an outside law firm and EDGAR filing agent.[44]

In addition to the costs associated with the reporting burden, we understand that many institutional investment managers spent a substantial number of hours creating a reporting mechanism to capture the data required by Form SH when they first became subject to the reporting requirement under the Emergency Orders. The managers typically maintain an automated system to generate information about their short positions, and a different automated system to generate information about their trading activity. Due to the fact that Form SH requires information about the manager's short positions, as well as the number of securities sold short during the day, they had to create new programs to generate the necessary data.

The temporary rule will also be associated with implementation costs. By requiring filings in XML, filers will need to reprogram systems to be prepared to file in XML by November 7. In addition, changing the form to report fewer data items will also involved reprogramming costs. We believe that these extra costs are justified because the changes help to limit the costs and improve the ability of the Commission to use the information in the filings.

We recognize that the Form SH reporting requirement imposed by Rule 10a–3T may result in increased short selling costs for participants that may impact legitimate short selling activities. We sought to limit the potential costs associated with Form SH filing under Rule 10a–3T by:

- Imposing the Form SH filing obligation only on institutional investment managers that exercise discretion over accounts holding section 13(f) securities having an aggregate fair market value of at least $100 million—these managers have experience with SEC filing and tend to be larger and better able to bear the cost;
- Requiring reporting only about section 13(f) securities, but not including options or equity securities of all public companies—the section 13(f) category of securities is a well-defined, pre-existing category of securities that institutional investment managers use in connection with their Form 13F filing obligations;
- Not requiring Form SH to be filed following a week in which the institutional investment manager did not effect any short sale of a section 13(f) security, even if the manager closes a short position during that week;
- Allowing aggregation of reporting on Form SH across multiple institutional investment managers;
- Establishing thresholds below which short sales need not be reported on Form SH; and
- Establishing a last business day of each calendar week reporting deadline, which should help to reduce weekend labor and systems time.

We request comments on this Cost-Benefit Analysis and any of the costs and benefits associated with Rule 10a–3T and Form SH. We solicit quantitative data to assist with our assessment of the costs and benefits of the rule and form.

- Have we accurately estimated the costs?
- Are additional costs involved in complying with the rule? What are the types, and amounts, of the costs?
- Can the rule be modified to mitigate costs?
- Do the benefits justify the costs?
- Will the Form SH reporting requirements influence the day-to-day decisions made by institutional investment managers in any substantive way? For example, will managers choose in some cases to avoid short selling, or to short through alternative vehicles such as OTC derivatives to avoid reporting?
- Given that Rule 10a–3T requires reporting of short sales and short positions, but does not require Form SH filers to report whether the short sales are being used to hedge other positions, does the Form SH information provide an accurate picture of the short selling activities of institutional investment managers and their clients? Is there an alternative reporting requirement that would more accurately reflect managers' true activities?
- Rule 10a–3T requires a single form that aggregates short positions across multiple systems and across portfolios managed for multiple customers. Does the aggregation process pose any special difficulties or impose additional costs beyond those that would be incurred if filers could submit separate reports for separate units or systems?
- How costly will it be for Form SH filers to develop the code needed to file Form SH in XML format? Are there less costly alternatives that will present the Form SH data in a machine readable format?

[43] Consistent with recent rulemaking estimates, we used a $175 per hour rate to estimate the cost of work performed internally at the company.

[44] We do not expect that all Form SH filers will retain the services of an outside law firm or filing agent to assist them, but we conservatively assume that they will for purposes of these cost estimates.

VII. Consideration of Burden of Competition and Promotion of Efficiency, Competition and Capital Formation

Section 23(a)(2) of the Exchange Act[45] requires us, when adopting rules under the Exchange Act, to consider the impact that any new rule would have on competition. In addition, section 23(a)(2) prohibits us from adopting any rule that would impose a burden on competition not necessary or appropriate in furtherance of the purposes of the Exchange Act. Section 3(f) of the Exchange Act[46] and section 2(c) of the Investment Company Act of 1940[47] require us, when engaging in rulemaking to consider or determine whether an action is necessary or appropriate in the public interest, to consider, in addition to the protection of investors, whether the action will promote efficiency, competition, and capital formation.

We believe that Rule 10–a3T will not have an adverse impact on competition among the institutional investment managers required to file Form SH and other parties effecting short sales because the Commission will keep Form SH information nonpublic to the extent permitted by law. We have received comments indicating that the information required by Form SH is highly proprietary and could be used to try and reverse engineer an institutional investment manager's trading strategy.[48] In addition, there is a concern that public disclosure could inaccurately suggest that the managers effecting short sales have a negative view of some issuers' prospects given that short sales may be a part of some managers' routine hedging strategies.[49]

Further, the rule imposes similar costs on institutional investment managers of similar size, given that only larger institutional investment managers subject to the Form 13F filing requirement are subject to the Form SH filing requirement. Therefore, it does not create any competitive disadvantages among these managers. Rule 10a–3T could, however, create an advantage for smaller institutional investment managers that are not subject to the Form SH filing requirement as compared to the larger filers. We believe any burden on competition imposed by the rule is necessary or appropriate in furtherance of the purposes of the Exchange Act because the rule will assist us in addressing concerns that short selling may be used to manipulate the stock of issuers.

To the extent Rule 10a–3T achieves its objective of combating market manipulation, the rule should promote efficiency and capital formation by increasing investor confidence and strengthening the market's ability to correctly incorporate accurate information into securities prices. We request comment on these matters in connection with the rule.

VIII. Regulatory Flexibility Certification

Section 3(a) of the Regulatory Flexibility Act requires the Commission to undertake a Regulatory Flexibility Analysis of the effect of its rules on small entities unless the Commission certifies that the rules do not have a significant economic impact on a substantial number of small entities.[50] Pursuant to Section 605(b) of the Regulatory Flexibility Act, the Commission hereby certifies that Exchange Act Rule 10a–3T and Form SH do not have a significant impact on a substantial number of small entities.[51] A ''small entity'' is defined under Rule 0–7 of the Investment Advisers Act of 1940 for purposes of the Regulatory Flexibility Act as an investment adviser that:

- Has assets under management and reported in its annual updating amendment to Form ADV of less than $25 million;
- Did not have total assets of $5 million or more on the last day of its most recent fiscal year; and
- Does not control, is not controlled by, and is not under common control with another investment adviser that has assets under management of $25 million or more, or any person (other than a natural person) that had total assets of $5 million or more on the last day of the most recent fiscal year.

Rule 10a–3T requires only an institutional investment manager that exercises investment discretion over investment accounts holding section 13(f) securities having an aggregate fair market value of at least $100 million on the last trading day of a month that is relevant to the period covered by the rule to file Form SH with the Commission. Therefore, we do not expect the rule to affect a significant number of small entities under the definition of ''small entity'' set forth above. Not all of the institutional investment managers that may be required to file Form SH are registered as investment advisers under the Investment Advisers Act. Despite the fact that the Rule 0–7 definition of a small entity is designed for purposes of the Investment Advisers Act, it also provides a useful basis for determining whether unregistered investment advisers are small entities.

We solicit comment on the certification. Commenters are asked to describe the nature of any impact on small entities and provide any empirical data.

IX. Statutory Basis and Text of Amendments

We are adopting amendments to rules pursuant to sections 3(b), 10 and 23(a) of the Exchange Act, as amended.

List of Subjects in 17 CFR Parts 240 and 249

Reporting and recordkeeping requirements, Securities.

■ In accordance with the foregoing, the Securities and Exchange Commission is amending Title 17, chapter II of the Code of Federal Regulations as follows:

PART 240—GENERAL RULES AND REGULATIONS, SECURITIES EXCHANGE ACT OF 1934

■ 1. The authority citation for part 240 continues to read, in part, as follows:

Authority: 15 U.S.C. 77c, 77d, 77g, 77j, 77s, 77z–2, 77z–3, 77eee, 77ggg, 77nnn, 77sss, 77ttt, 78c, 78d, 78e, 78f, 78g, 78i, 78j, 78j–1, 78k, 78k–1, 78*l*, 78m, 78n, 78o, 78p, 78q, 78s, 78u–5, 78w, 78x, 78*ll*, 78mm, 80a–20, 80a–23, 80a–29, 80a–37, 80b–3, 80b–4, 80b–11, and 7201 *et seq.*; and 18 U.S.C. 1350, unless otherwise noted.

* * * * *

■ 2. Section 240.10a–3T is added to read as follows:

§ 240.10a–3T Temporary Rule for reporting short sales by institutional investment managers.

(a)(1) For purposes of this section, the terms ''investment discretion'' and ''section 13(f) securities'' shall have the meanings set forth in § 240.13f–1(b) and § 240.13f–1(c), respectively.

(2) For purposes of this section, the term ''short sale'' shall have the meaning set forth in § 242.200(a) of this chapter, and, for purposes of Form SH a ''short position'' is the aggregate gross short sales of an issuer's section 13(f) securities (excluding options), less purchases to close out a short sale in the

[45] 15 U.S.C. 78w(a)(2).

[46] 15 U.S.C. 78c(f).

[47] 15 U.S.C. 80a–2(c).

[48] See, for example, letter from WilmerHale dated October 10, 2008 available in file No. S7–24–08.

[49] *Id.*

[50] 5 U.S.C. 603(a).

[51] Although the requirements of the Regulatory Flexibility Act do not apply to rules adopted under the Administrative Procedure Act's ''good cause'' exception, *see* 5 U.S.C. 601(2) (defining ''rule'' and notice requirements under the Administrative Procedure Act), we have nevertheless provided this certification.

same issuer. The Form SH short position is not net of long position in the issuer. If a person that has loaned a security to another person sells the security and a *bona fide* recall is initiated within two business days after trade date, the person that has loaned the security is deemed to own the security for purposes of Rule 200(g)(1) and Rule 200(b) of Regulation SHO, and such sale will not be treated as a short sale.

(b)(1) Every institutional investment manager that exercises investment discretion with respect to accounts holding section 13(f) securities that has filed, or was required to file, a Form 13F (§ 249.325 of this chapter) for the calendar quarter, as required under Section 13(f) of the Act (15 U.S.C. 78m(f)) and § 240.13f–1(a) thereunder, shall file a report on Form SH (§ 249.326T of this chapter) with the Commission on the last business day of each calendar week immediately following a calendar week in which the institutional investment manager has effected a reportable short sale with respect to a section 13(f) security that is not an option.

(2) An institutional investment manager is not required to file Form SH to report short sales or short positions of section 13(f) securities on Form SH where:

(i) No short sales of a section 13(f) security have been effected during the reporting period to be covered by the Form SH filing; or

(ii) On each calendar day during the calendar week, the start of day short position, the gross number of securities sold short during the day and the end of day short position each constitute less than one-quarter of one percent of that class of the issuer's section 13(f) securities issued and outstanding as reported on the issuer's most recent annual, quarterly or current report filed with the Commission pursuant to section 13 of the Exchange Act, unless the manager knows or has reason to believe the information contained therein is inaccurate, and the fair market value of the start of day short position, the gross number of securities sold short during the day and the end of day short position each are less than $10,000,000.

(3) Once a determination is made that a Form SH filing is required, an institutional investment manager is not required to report short sales or short positions of section 13(f) securities on Form SH where:

(i) On any calendar day of the calendar week, the start of day short position, the gross number of securities sold short during the day, or the end of day short position in the section 13(f) security constitutes less than one-quarter of one percent of that class of the issuer's section 13(f) securities issued and outstanding as reported on the issuer's most recent annual, quarterly or current report filed with the Commission pursuant to section 13 of the Exchange Act, unless the manager knows or has reason to believe the information contained therein is inaccurate, and the fair market value of the start of day short position, the gross number of securities sold short during the day, or the end of day short position is less than $10,000,000. The institutional investment manager must designate in the appropriate data element its reliance on this exception with respect to information otherwise required to be reported; or

(ii) A broker-dealer seeks to execute a customer order, either in whole or in part, through a riskless principal transaction, and a short sale results from a sale order of a customer who is net long the section 13(f) security, or a purchase order of a section 13(f) security.

(4) The Form SH shall be nonpublic to the extent permitted by law.

(c) A report on Form SH shall identify the date of the transaction, the institutional investment manager by EDGAR Central Index Key, the issuer name and CUSIP for the relevant securities and reflect the start of day short position, the gross number of securities sold short during the day, and the end of day short position, on each day of the calendar week in which short sale trading activity occurred.

(d) This section will expire on August 1, 2009.

PART 249—FORMS, SECURITIES EXCHANGE ACT OF 1934

■ 3. The authority citation for Part 249 continues to read in part as follows:

Authority: 15 U.S.C. 78a *et seq.* and 7201 *et seq.*; and 18 U.S.C. 1350, unless otherwise noted.

* * * * *

■ 4. Add § 249.326T and Temporary Form SH to read as follows:

§ 249.326T Form SH, weekly report of short sales and positions.

(a) This form shall be used by institutional investment managers to file weekly reports pursuant to § 240.10a–3T of this chapter. A weekly report on this form pursuant to § 240.10a–3T of this chapter shall be filed on the last business day of each calendar week immediately following a calendar week in which the institutional investment manager effected a short sale and shall be nonpublic to the extent permitted by law.

(b) The temporary section will expire on August 1, 2009.

Note: The text of Form SH does not, and this amendment will not, appear in the Code of Federal Regulations.

OMB APPROVAL

OMB Number: 3235–0646
Expires: April 30, 2009
Estimated average burden hours per response: 20.0

UNITED STATES SECURITIES AND EXCHANGE COMMISSION

Form SH

Weekly Report of Short Sales and Short Positions

General Instructions

1. *Rule as to Use of Temporary Form SH (''Form SH'').* Institutional investment managers (''Managers'') that exercise investment discretion with respect to accounts holding section 13(f) securities, as defined in rule 13f–1(c) under the Securities Exchange Act of 1934 [15 U.S.C. 78m(f)] (''Exchange Act''), who have filed or were required to file a Form 13F for the previous calendar quarter, must file a nonpublic report on Form SH with the Commission to report certain information about short sales and short positions. The nonpublic Form SH filing must be made on the last business day of each calendar week immediately following a Form SH reporting period (*i.e.*, the preceding Sunday-Saturday calendar week) in which the Manager entered into any new short positions with respect to any section 13(f) securities except for any short positions for options (''SH Short Positions''). The nonpublic Form SH will report SH Short Positions for the Sunday-Saturday calendar week that precedes the date on which the Form SH is due to be filed.

2. *Rules to Prevent Duplicative Reporting.* If two or more Managers that are required to file a report on Form SH for the reporting period exercise investment discretion with respect to the same securities, only one such Manager must include information in its reports on Form SH. A Manager whose information is reported on Form SH by another Manager (or Managers), must identify the Manager(s) reporting on its behalf.

3. *Filing of Form SH.* A Form SH report that is filed by a Manager with the Commission shall be nonpublic to the extent permitted by law. A Manager must label its Form SH as non-public by adding the phrase NONPUBLIC (in bold and capital letters) at the top and bottom of each page of the form with the exception of the XML tagged data file containing transaction data. A Manager must file a Form SH report with the Commission on the last business day of each calendar week immediately following the preceding calendar week period (Sunday—Saturday) in which the Manager has entered into any new SH Short Position(s) in accordance with Rule 232.13 of Regulation S–T [17 CFR 232.13]. The Form SH must be

filed electronically using the Commission's EDGAR system.

4. *Official List of Section 13(f) Securities.* The Official List of Section 13(f) Securities published by the Commission (the ''13F List'') lists the securities the holdings of which a Manager is to report on Form 13F. *See* rule 13f–1(c) [17 CFR 240.13f–1(c)]. Form SH filers may rely on the current 13F List in determining whether they need to report on Form SH information about any particular equity security, excluding short positions for options that are on the 13F List. The 13F List is available on the SEC's Web site, at *http://www.sec.gov/divisions/investment/13flists.htm.* Paper copies are available at a reasonable fee from the Securities and Exchange Commission, Public Reference Room, 100 F Street, NE., Washington, DC 20549–1520.

Paperwork Reduction Act Information

The Office of Management and Budget has approved this collection of information pursuant to 44 U.S.C. 3507 and 5 CFR 1320.13. The OMB control number for this collection of information is 3235–0646. 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. We estimate that providing the requested information will take, on average, approximately 20 hours. Any member of the public may direct to the Commission any comments concerning the accuracy of this burden estimate and any suggestions for reducing this burden.

Filings with the form types set forth in this instruction will be filed on a nonpublic basis.

UNITED STATES

SECURITIES AND EXCHANGE COMMISSION

WASHINGTON, DC 20549

TEMPORARY FORM SH

WEEKLY REPORT OF SHORT SALES AND SHORT POSITIONS

Report for the Period Ended: [Month, Day, Year] _____

Check here if Amendment [ ]; Amendment Number: _____

This Amendment (Check only one):

[ ] is a restatement.

[ ] adds new entries.

Institutional Investment Manager Filing this Report:

Name: _____

Address: _____

_____

_____

Form 13F File Number: 28– _____

Central Index Key (CIK) Number: _____

The institutional investment manager filing this report and the person by whom it is signed hereby represent that the person signing the report is authorized to submit it, that all information contained herein is true, correct and complete, and that it is understood that all required items, statements, schedules, lists, and tables, are considered integral parts of this form.

Person Signing this Report on Behalf of Reporting Manager:

Name: _____

Title: _____

Phone: _____

Signature, Place, and Date of Signing

_____

[Signature]

_____

[City, State]

_____

[Date]

Report Type (Check only one):

[ ] FORM SH ENTRIES REPORT. (Check here if all entries of this reporting manager are reported in this report.)

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List of Other Managers Reporting for this Manager:

Provide a list of the name(s), Form 13F file number(s) and CIK numbers of all institutional investment managers who are reporting for this manager.

[If there are no entries in this list, state ''NONE''.]

Number of Other Included Managers: _____

Total Number of Transactions Reported: _____

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Provide a numbered list of the name(s), Form 13F file number(s) and CIK numbers of all institutional investment managers with respect to which this Form SH report is filed, other than the manager filing this report.

[If there are no entries in this list, state ''NONE''.]

INFORMATION TABLE

Element 1	Element 2	Element 3	Element 4	Element 5	Element 6	Element 7
Date	CIK of Manager ...	Name of Issuer ...	CUSIP	Short Position (Start of Day).	Number of Securities Sold Short (Day).	Short Position (End of Day).

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By the Commission.

Florence E. Harmon,

Acting Secretary.

[FR Doc. E8–24895 Filed 10–16–08; 8:45 am]

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SECURITIES AND EXCHANGE COMMISSION

17 CFR Parts 241 and 242

[Release No. 34–58775; File No. S7–19–07]

RIN 3235–AJ57

Amendments to Regulation SHO

AGENCY: Securities and Exchange Commission.

ACTION: Final rule.

SUMMARY: The Securities and Exchange Commission (''Commission'') is adopting amendments to Regulation SHO under the Securities Exchange Act of 1934 (''Exchange Act''). The amendments are intended to further reduce the number of persistent fails to deliver in certain equity securities by eliminating the options market maker exception to the close-out requirement of Regulation SHO. As a result of the amendments, fails to deliver in threshold securities that result from hedging activities by options market makers will no longer be excepted from Regulation SHO's close-out requirement. The Commission is also providing guidance regarding bona fide market making activities for purposes of the market maker exception to Regulation SHO's locate requirement.

DATES: *Effective Date:* October 17, 2008.

FOR FURTHER INFORMATION CONTACT: James A. Brigagliano, Associate Director, Josephine J. Tao, Assistant Director, Victoria L. Crane, Branch Chief, Joan M. Collopy, Special Counsel, Christina M. Adams and Matthew Sparkes, Staff Attorneys, Office of Trading Practices and Processing, Division of Trading and Markets, at (202) 551–5720, at the Securities and Exchange Commission, 100 F Street, NE., Washington, DC 20549–6628.

SUPPLEMENTARY INFORMATION: The Commission is amending Rule 203 of Regulation SHO [17 CFR 242.203] under the Exchange Act.

I. Introduction

To further Regulation SHO's goal of reducing fails to deliver in equity

securities, the Commission is adopting its proposal [1] to eliminate the options market maker exception to the close-out requirement of Regulation SHO.[2] As discussed in detail below, we believe that eliminating the exception, and thereby imposing additional delivery requirements on securities with a substantial amount of fails to deliver, will help to protect and enhance the operation, integrity, and stability of the markets, as well as reduce potential short selling abuses.

II. Background

A. Regulation SHO

Regulation SHO, which became fully effective on January 3, 2005, sets forth the regulatory framework governing short sales.[3] Among other things, Regulation SHO imposes a close-out requirement to address failures to deliver stock on trade settlement date [4] and to target potentially abusive ''naked'' short selling [5] in certain equity securities.[6] While the majority of trades settle on time,[7] Regulation SHO is intended to address those situations where the level of fails to deliver for the particular stock is so substantial that it might impact the market for that security.[8]

Although high fails levels exist only for a small percentage of issuers,[9] we believe that all sellers of securities should promptly deliver, or arrange for delivery of, securities to the respective buyer, and that all buyers of securities have a right to expect prompt delivery of securities purchased. In addition, as we have stated on several prior occasions, we are concerned about the negative effect that fails to deliver may have on the markets and shareholders.[10] For example, fails to deliver may deprive shareholders of the benefits of ownership, such as voting and lending.[11] In addition, where a seller of securities fails to deliver securities on settlement date, in effect the seller unilaterally converts a securities contract (which is expected to settle within the standard three-day settlement period) into an undated futures-type contract, to which the buyer might not have agreed, or that might have been priced differently.[12]

Moreover, sellers that fail to deliver securities on settlement date may enjoy fewer restrictions than if they were required to deliver the securities in a timely manner, and such sellers may attempt to use this additional freedom to engage in trading activities that are designed to improperly depress the price of a security.[13] In addition, by not borrowing securities and, therefore, not making delivery within the standard three-day settlement period, the seller avoids the costs of borrowing.

In addition, issuers and investors have repeatedly expressed concerns about fails to deliver in connection with manipulative ''naked'' short selling. For example, in response to proposed amendments to Regulation SHO in 2006 [14] designed to further reduce the number of persistent fails to deliver in certain equity securities by eliminating Regulation SHO's ''grandfather'' provision, and limiting the duration of the rule's options market maker exception, the Commission received a number of comments that expressed concerns about ''naked'' short selling and extended delivery failures.[15] Commenters continued to express these concerns in response to the Reproposal.[16]

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[1] *See* Exchange Act Release No. 56213 (Aug. 7, 2007), 72 FR 45558 (Aug. 14, 2007) (''Reproposal''); *see also* Exchange Act Release No. 54154 (July 14, 2006), 71 FR 41710 (July 21, 2006) (''2006 Regulation SHO Proposed Amendments''); Exchange Act Release No. 58107 (July 7, 2008), 73 FR 40201 (July 14, 2008) (''2008 Regulation SHO Re-Opening Release'').

[2] 17 CFR 242.200; *see also* Securities Exchange Act Release No. 50103 (July 28, 2004), 69 FR 48008 (Aug. 6, 2004) (''2004 Regulation SHO Adopting Release'').

[3] Rule 200(a) of Regulation SHO defines a short sale as ''any sale of a security which the seller does not own or any sale which is consummated by the delivery of a security borrowed by, or for the account of, the seller.'' 17 CFR 242.200(a).

[4] Generally, investors complete or settle their security transactions within three business days. This settlement cycle is known as T+3 (or ''trade date plus three days''). T+3 means that when a trade occurs, the participants to the trade deliver and pay for the security at a clearing agency three business days after the trade is executed. The three-day settlement period applies to most security transactions, including stocks, bonds, municipal securities, mutual funds traded through a brokerage firm, and limited partnership interests that trade on an exchange. Government securities and stock options settle on the next business day following the trade. In addition, Rule 15c6–1 prohibits broker-dealers from effecting or entering into a contract for the purchase or sale of a security that provides for payment of funds and delivery of securities later than the third business day after the date of the contract unless otherwise expressly agreed to by the parties at the time of the transaction. 17 CFR 240.15c6–1; Exchange Act Release No. 33023 (Oct. 7, 1993), 58 FR 52891 (Oct. 13, 1993). However, failure to deliver securities on T+3 does not violate Rule 15c6–1.

[5] We have previously noted that abusive ''naked'' short selling, while not defined in the federal securities laws generally refers to selling short without having stock available for delivery and intentionally failing to deliver stock within the standard three day settlement cycle. *See* 2004 Regulation SHO Adopting Release, 69 FR at 48009, n.10; Exchange Act Release No. 56212 (Aug. 7, 2007), 72 FR at 45544, n.3 (Aug. 14, 2007) (''2007 Regulation SHO Final Amendments''); Exchange Act Release No. 57511 (March 17, 2008), 73 FR 15376 (March 21, 2008) (''Naked Short Selling Anti-Fraud Rule Proposing Release'').

[6] In 2003, the Commission settled a case against certain parties relating to allegations of manipulative short selling in the stock of Sedona Corporation. The Commission alleged that the defendants profited from engaging in massive ''naked'' short selling that flooded the market with Sedona stock, and depressed its price. *See Rhino Advisors, Inc. and Thomas Badian*, Lit. Rel. No. 18003 (Feb. 27, 2003); *see also, SEC* v. *Rhino Advisors, Inc. and Thomas Badian*, Civ. Action No. 03 civ 1310 (RO) (S.D.N.Y); *see also*, Securities Exchange Act Release No. 48709 (Oct. 28, 2003), 68 FR 62972, 62975 (Nov. 6, 2003) (''2003 Regulation SHO Proposing Release'') (describing the alleged activity in the case involving stock of Sedona Corporation); 2004 Regulation SHO Adopting Release, 69 FR at 48016, n.76.

[7] According to the National Securities Clearing Corporation (''NSCC''), 99% (by dollar value) of all trades settle on time. Thus, on an average day, approximately 1% (by dollar value) of all trades, including equity, debt, and municipal securities fail to settle. The vast majority of these fails are closed out within five days after T+3.

[8] These fails to deliver may arise from either short or long sales of securities. There may be legitimate reasons for a fail to deliver. For example, human or mechanical errors or processing delays can result from transferring securities in custodial or other form rather than book-entry form, thereby causing a fail to deliver on a long sale within the normal three-day settlement period. In addition, broker-dealers that make markets in a security (''market makers'') and who sell short thinly-traded, illiquid stock in response to customer demand may encounter difficulty in obtaining securities when the time for delivery arrives. The Commission's Office of Economic Analysis (''OEA'') estimates that, on an average day between May 1, 2007 and July 31, 2008 (*i.e.*, the time period that includes all full months after the Commission started receiving price data from NSCC), trades in ''threshold securities,'' as defined in Rule 203(b)(c)(6) of Regulation SHO, that fail to settle within T+3 account for approximately 0.3% of dollar value of trading in all equity securities.

[9] The average daily number of securities on a threshold list (as defined *infra* note 22) in July 2008 was approximately 523 securities, which comprised 0.6% of all equity securities, including those that are not covered by Regulation SHO. Regulation SHO's close-out requirement applies to any equity security of an issuer that is registered under Section 12 of the Exchange Act, or that is required to file reports pursuant to Section 15(d) of the Exchange Act.

[10] *See* 2007 Regulation SHO Final Amendments, 72 FR at 45544; 2006 Regulation SHO Proposed Amendments, 71 FR at 41712; Reproposal, 72 FR at 45558–45559; ''Naked'' Short Selling Anti-Fraud Rule Proposing Release, 73 FR at 15378.

[11] *See id.*

[12] *See id.*

[13] *See* Reproposal, 72 FR at 45559.

[14] *See* 2006 Regulation SHO Proposed Amendments, *supra* note 1.

[15] *See, e.g.*, letter from Patrick M. Byrne, Chairman and Chief Executive Officer, Overstock.com, Inc., dated Sept. 11, 2006; letter from Daniel Behrendt, Chief Financial Officer, and Douglas Klint, General Counsel, TASER International, dated Sept. 18, 2006; letter from John Royce, dated April 30, 2007; letter from Michael Read, dated April 29, 2007; letter from Robert DeVivo, dated April 26, 2007 (''DeVivo''); letter from Ahmed Akhtar, dated April 26, 2007.

[16] *See, e.g.*, letter from Jack M. Wedam, dated Oct. 16, 2007; letter from Michael J. Ryan, Executive Director and Senior Vice President, Center for Capital Markets Competitiveness, U.S. Chamber of Commerce, dated Sept. 13, 2007 (''U.S. Chamber of Commerce''); letter from Robert W. Raybould, CEO Enteleke Capital Corp., dated Sept. 12, 2007 (''Raybould''); letter from Mary Helburn, Executive

Continued

To the extent that fails to deliver might be part of manipulative ''naked'' short selling, which could be used as a tool to drive down a company's stock price,[17] such fails to deliver may undermine the confidence of investors.[18] These investors, in turn, may be reluctant to commit capital to an issuer they believe to be subject to such manipulative conduct.[19] In addition, issuers may believe that they have suffered unwarranted reputational damage due to investors' negative perceptions regarding fails to deliver in the issuer's security.[20] Unwarranted reputational damage caused by fails to deliver might have an adverse impact on the security's price.[21]

B. Amendments to Regulation SHO's Close-Out Requirement

Regulation SHO's close-out requirement, which is contained in Rule 203(b)(3) of Regulation SHO, applies only to securities in which a substantial amount of fails to deliver have occurred (also known as ''threshold securities'').[22] Specifically, the close-out requirement requires a participant of a clearing agency registered with the Commission[23] to take immediate action to close out a fail to deliver position in a threshold security in the Continuous Net Settlement (''CNS'')[24] system that has persisted for 13 consecutive settlement days by purchasing securities of like kind and quantity.[25] In addition, if the failure to deliver has persisted for 13 consecutive settlement days, Rule 203(b)(3)(iv) prohibits the participant, and any broker-dealer for which it clears transactions, including market makers, from accepting any short sale orders or effecting further short sales in the particular threshold security without borrowing, or entering into a bona-fide arrangement to borrow, the security until the participant closes out the fail to deliver position by purchasing securities of like kind and quantity.[26]

As adopted in August 2004, Rule 203(b)(3) of Regulation SHO included two exceptions to the mandatory close-out requirement. The first was the ''grandfather'' provision, which excepted fails to deliver established prior to a security becoming a threshold security.[27] The second was the ''options

Director, National Coalition Against Naked Shorting, dated Sept. 11, 2007 (''NCANS'').

[17] *See supra*, note 6 (discussing a case in which we alleged that the defendants profited from engaging in massive ''naked'' short selling that flooded the market with the company's stock, and depressed its price); *see also S.E.C.* v. *Gardiner*, 48 S.E.C. Docket 811, No. 91 Civ. 2091 (S.D.N.Y. March 27, 1991) (alleged manipulation by sales representative by directing or inducing customers to sell stock short in order to depress its price); *U.S.* v. *Russo*, 74 F.3d 1383, 1392 (2d Cir. 1996) (short sales were sufficiently connected to the manipulation scheme as to constitute a violation of Exchange Act Section 10(b) and Rule 10b–5).

[18] In response to the Reproposal, we received comment letters discussing the impact of fails to deliver on investor confidence. *See, e.g.*, letter from NCANS. Commenters expressed similar concerns in response to the 2006 Regulation SHO Proposed Amendments. *See, e.g.*, letter from Mary Helburn, Executive Director, National Coalition Against Naked Shorting, dated Sept. 30, 2006 (''NCANS 2006''); letter from Richard Blumenthal, Attorney General, State of Connecticut, dated Sept. 19, 2006 (''Blumenthal'').

[19] In response to the Reproposal, we received comment letters expressing concern about the impact of potential ''naked'' short selling on capital formation, claiming that ''naked'' short selling causes a drop in an issuer's stock price and may limit the issuer's ability to access the capital markets. *See, e.g.*, letter from Robert K. Lifton, Chairman and CEO, Medis Technologies, Inc., dated Sept. 12, 2007 (''Medis''); letter from NCANS. Commenters expressed similar concerns in response to the 2006 Regulation SHO Proposed Amendments. *See, e.g.*, letter from Congressman Tom Feeney—Florida, U.S. House of Representatives, dated Sept. 25, 2006 (''Feeney''); *see also* letter from Zix Corporation, dated Sept. 19, 2006 (''Zix'') (stating that ''[m]any investors attribute the Company's frequent re-appearances on the Regulation SHO list to manipulative short selling and frequently demand that the Company ''do something'' about the perceived manipulative short selling. This perception that manipulative short selling of the Company's securities is continually occurring has undermined the confidence of many of the Company's investors in the integrity of the market for the Company's securities.'').

[20] Due in part to such concerns, some issuers have taken actions to attempt to make transfer of their securities ''custody only,'' thus preventing transfer of their stock to or from securities intermediaries such as the Depository Trust Company (''DTC'') or broker-dealers. *See* Exchange Act Release No. 48709 (Oct. 28, 2003), 68 FR 62972, at 62975 (Nov. 6, 2003). Some issuers have attempted to withdraw their issued securities on deposit at DTC, which makes the securities ineligible for book-entry transfer at a securities depository. *See id.* Withdrawing securities from DTC or requiring custody-only transfers would undermine the goal of a national clearance and settlement system that is designed to reduce the physical movement of certificates in the trading markets. See id. We note, however, that in 2003 the Commission approved a DTC rule change clarifying that its rules provide that only its participants may withdraw securities from their accounts at DTC, and establishing a procedure to process issuer withdrawal requests. *See* Securities Exchange Act Release No. 47978 (June 4, 2003), 68 FR 35037 (June 11, 2003).

[21] *See* 2006 Regulation SHO Proposed Amendments, 71 FR at 41712; 2007 Regulation SHO Final Amendments, 72 FR at 45544; Reproposal, 72 FR at 45558–45559; ''Naked'' Short Selling Anti-Fraud Rule Proposing Release, 73 FR at 15378 (providing additional discussion of the impact of fails to deliver on the market); *see also* 2003 Regulation SHO Proposing Release, 68 FR at 62975 (discussing the impact of ''naked'' short selling on the market).

[22] A threshold security is defined in Rule 203(c)(6) as any equity security of an issuer that is registered pursuant to section 12 of the Exchange Act (15 U.S.C. 78*l*) or for which the issuer is required to file reports pursuant to section 15(d) of the Exchange Act (15 U.S.C. 78o(d)): (i) For which there is an aggregate fail to deliver position for five consecutive settlement days at a registered clearing agency of 10,000 shares or more, and that is equal to at least 0.5% of the issue's total shares outstanding; and (ii) that is included on a list (''threshold securities list'') disseminated to its members by a self-regulatory organization (''SRO''). *See* 17 CFR 242.203(c)(6). Currently, each SRO provides the threshold securities list for those securities for which the SRO is the primary market.

[23] For purposes of Regulation SHO, the term ''participant'' has the same meaning as in section 3(a)(24) of the Exchange Act. *See* 15 U.S.C. 78c(a)(24). The term ''registered clearing agency'' means a clearing agency, as defined in section 3(a)(23) of the Exchange Act, that is registered as such pursuant to section 17A of the Exchange Act. *See* 15 U.S.C. 78c(a)(23)(A), 78q–1 and 15 U.S.C. 78q–1(b), respectively. *See also* 2004 Regulation SHO Adopting Release, 69 FR at 48031. As of July 31, 2008 approximately 91% of participants of the NSCC, the primary registered clearing agency responsible for clearing U.S. transactions, were registered as broker-dealers. Those participants not registered as broker-dealers include such entities as banks, U.S.-registered exchanges, and clearing agencies. Although these entities are participants of a registered clearing agency, generally these entities do not engage in the types of activities that would implicate the close-out requirements of Regulation SHO. Such activities of these entities include creating and redeeming Exchange Traded Funds, trading in municipal securities, and using NSCC's Envelope Settlement Service or Inter-city Envelope Settlement Service. These activities rarely lead to fails to deliver and, if fails to deliver do occur, they are small in number and are usually closed out within a day. Thus, such fails to deliver would not trigger the close-out provisions of Regulation SHO.

[24] The majority of equity trades in the United States are cleared and settled through systems administered by clearing agencies registered with the Commission. The NSCC clears and settles the majority of equity securities trades conducted on the exchanges and over the counter. NSCC clears and settles trades through the CNS system, which nets the securities delivery and payment obligations of all of its members. NSCC notifies its members of their securities delivery and payment obligations daily. In addition, NSCC guarantees the completion of all transactions and interposes itself as the contraparty to both sides of the transaction. While NSCC's rules do not authorize it to require member firms to close out or otherwise resolve fails to deliver, NSCC reports to the SROs those securities with fails to deliver of 10,000 shares or more. The SROs use NSCC fails data to determine which securities are threshold securities for purposes of Regulation SHO.

[25] 17 CFR 242.203(b)(3).

[26] *Id.* at (b)(3)(iv). It is possible under Regulation SHO that a close out by a participant of a registered clearing agency may result in a fail to deliver position at another participant if the counterparty from which the participant purchases securities fails to deliver. However, Regulation SHO prohibits a participant of a registered clearing agency, or a broker-dealer for which it clears transactions, from engaging in ''sham close outs'' by entering into an arrangement with a counterparty to purchase securities for purposes of closing out a fail to deliver position and the purchaser knows or has reason to know that the counterparty will not deliver the securities, and which thus creates another fail to deliver position. *See id.* at (b)(3)(vii); 2004 Regulation SHO Adopting Release, 69 FR at 48018 n.96. In addition, we note that borrowing securities, or otherwise entering into an arrangement with another person to create the appearance of a purchase would not satisfy the close-out requirement of Regulation SHO. For example, the purchase of paired positions of stock and options that are designed to create the appearance of a bona fide purchase of securities but that are nothing more than a temporary stock lending arrangement would not satisfy Regulation SHO's close-out requirement.

[27] *See* 2004 Regulation SHO Adopting Release, 69 FR at 48031. The ''grandfathered'' status applied in

market maker exception,'' which excepted any fail to deliver in a threshold security resulting from short sales effected by a registered options market maker to establish or maintain a hedge on options positions that were created before the underlying security became a threshold security.[28]

At the time of Regulation SHO's adoption, the Commission stated that it would monitor the operation of Regulation SHO to determine whether grandfathered fail to deliver positions were being cleared up under the existing delivery and settlement guidelines or whether any further regulatory action with respect to the close out provisions of Regulation SHO was warranted.[29] In addition, with respect to the options market maker exception, the Commission noted that it would take into consideration any indications that this provision was operating significantly differently from the Commission's original expectations.[30]

Based, in part, on the results of examinations conducted by the Commission's staff and the SROs since Regulation SHO's adoption, as well as the persistence of certain securities on threshold securities lists, on July 14, 2006, the Commission proposed amendments to Regulation SHO,[31] which were intended to reduce the number of persistent fails to deliver in certain equity securities by eliminating the ''grandfather'' provision and narrowing the options market maker exception contained in that rule. In addition, in March 2007, the Commission re-opened the comment period to the 2006 Regulation SHO Proposed Amendments for thirty days to provide the public with an opportunity to comment on a summary of the National Association of Securities Dealers, Inc.'s (''NASD's'') (n/k/a Financial Industry Regulatory Authority, Inc.) analysis that the NASD had submitted to the public file on March 12, 2007. In addition, the notice regarding the re-opening of the comment period directed the public's attention to summaries of data collected by the Commission's Office of Compliance Inspections and Examinations and the New York Stock Exchange LLC (''NYSE'').[32]

On June 13, 2007, we approved the adoption of the amendment, as proposed, to eliminate the ''grandfather'' provision of Regulation SHO.[33] With respect to the options market maker exception, however, in response to comments to the 2006 Regulation SHO Proposed Amendments, we reproposed amendments to eliminate the exception.[34] In addition, the Commission sought comment on two alternative proposals that would require options market maker fails to deliver to be closed out within specific time-frames.[35] The Reproposal also included an amendment to Regulation SHO that would require brokers-dealers marking a sale as ''long'' to document the present location of the securities being sold.

We received over 1,000 comment letters in response to the Reproposal.[36] Some commenters urged the Commission to obtain empirical data to demonstrate the relationship between fails to deliver and the options market maker exception before determining whether additional rulemaking was necessary.[37] In particular, commenters urged the Commission to obtain data relating to the impact of the elimination of the ''grandfather'' provision and connecting fails to deliver to the options market maker exception.[38] In response, the Commission staff obtained data from SROs, options market makers, and clearing agency participants that shows extensive use of the options market maker exception to Regulation SHO's close-out requirement and the resulting fails to deliver that were not closed out during 2006, 2007, and 2008. In addition, OEA provided data which indicates that since the elimination of the ''grandfather'' provision, fails to deliver in threshold securities with options traded on them (''optionable threshold securities'') have increased significantly. The Commission made this data available to the public for review and comment by including it in a Commission release and re-opening the comment period to the Reproposal on July 7, 2008.[39] The comment period ended on August 13, 2008.

As discussed below, after considering the comments received, the data, and the purposes underlying Regulation SHO, we are adopting amendments to eliminate the options market maker exception, as proposed.[40] At this time, we are not acting on the proposed amendments to Rule 200(g) of Regulation SHO regarding long sale documentation. Instead, in a companion release we have adopted a ''naked'' short selling anti-fraud rule that, in part, targets sellers' representations regarding long sales.[41] In addition, we note that we have adopted an interim final temporary rule, Rule 204T, which strengthens the delivery requirements for sales of all equity securities.[42] Under temporary Rule 204T, fail to deliver positions resulting from short sales of all equity securities by options market makers must be closed out by no later than the beginning of regular trading hours on the settlement day after the fail to deliver position occurs.[43] In conjunction with these short sale-related initiatives, and our goal of further reducing fails to deliver and

two situations: (i) To fail to deliver positions occurring before January 3, 2005, Regulation SHO's effective date; and (ii) to fail to deliver positions that were established on or after January 3, 2005 but prior to the security appearing on a threshold securities list.

[28] *See* 2004 Regulation SHO Adopting Release, 69 FR at 48031.

[29] *See id.* at 48018.

[30] *See id.* at 48019.

[31] *See* 2006 Regulation SHO Proposed Amendments, 71 FR 41710.

[32] *See* Securities Exchange Act Release No. 55520 (March 26, 2007), 72 FR 15079 (March 30, 2007) (''2007 Regulation SHO Re-Opening Release'').

[33] *See* 2007 Regulation SHO Final Amendments, 72 FR 45544.

[34] *See* Reproposal, 72 FR 45558.

[35] *See id.*

[36] The comment letters are available on the Commission's Internet Web Site at *http://www.sec.gov/comments/s7-19-07/s71907.shtml.*

[37] *See, e.g.*, Comments of Keith F. Higgins, Committee on Federal Regulation of Securities, American Bar Association, Section of Business Law, dated Oct. 5, 2007 (''ABA''); comments of John Gilmartin and Ben Londergan, Group One Trading, LP, dated Sept. 28, 2007; *see also* comments of Gerald D. O'Connell, Susquehanna Investment Group, dated Oct. 11, 2007 (''Susquehanna'').

[38] *See* letter from ABA.

[39] *See* 2008 Regulation SHO Re-Opening Release, 73 FR 40201.

[40] On September 17, 2008, we issued an emergency order pursuant to Section 12(k)(2) of the Exchange Act in which we adopted and made immediately effective the elimination of the options market maker exception to Regulation SHO's close-out requirement. *See* Exchange Act Release No. 58572 (Sept. 17, 2008) (the ''September Emergency Order''). The September Emergency Order expires on October 17, 2008. This release makes permanent the amendments to Rule 203(b)(3) of Regulation SHO contained in the September Emergency Order.

[41] *See* Exchange Act Release No. 58774 (Oct. 14, 2008); *see also*, September Emergency Order, *supra* note 40 (adopting and making immediately effective Rule 10b–21, a ''naked'' short selling anti-fraud rule).

[42] *See* Exchange Act Release No. 58773 (Oct. 14, 2008) (''Interim Final Temporary Rule''); *see also*, September Emergency Order, *supra* note 40 (adding to Regulation SHO, and making immediately effective, temporary Rule 204T, imposing enhanced delivery requirements for sales of all equity securities).

[43] *See id.* The Interim Final Temporary Rule includes a limited exception from its delivery requirements for registered market makers, options market makers, or other market makers obligated to quote in the over-the-counter market. Specifically, temporary Rule 204T(a)(3) provides that if a participant of a registered clearing agency has a fail to deliver position at a registered clearing agency in any equity security that is attributable to bona fide market making activities by a registered market maker, options market maker, or other market maker obligated to quote in the over-the-counter market, the participant shall, by no later than the beginning of regular trading hours on the third consecutive settlement day following the settlement date, immediately close out the fail to deliver position by purchasing securities of like kind and quantity.

addressing potentially abusive ''naked'' short selling, we believe that we must eliminate Regulation SHO's options market maker exception.

III. Options Market Maker Exception

A. Discussion of Comments to the Reproposal and 2008 Regulation SHO Re-Opening Release

The Commission received comment letters from numerous entities, including issuers, individual retail investors, options market makers, SROs, elected officials, and academics.[44] Although the comment letters are publicly available to be read in their entirety, we highlight below some of the main issues, concerns, and suggestions raised in the letters.

Several commenters supported the proposal to eliminate the options market maker exception. One commenter stated that it believes that the current options market maker exception ''harms investors and issuers, hinders the formation of capital, and is fatally flawed as written'' and that it should be eliminated.[45] Another commenter stated that the options market maker exception ''is a well known tool of manipulators and must be removed to ensure a level playing field for public companies and their shareholders.'' [46] One commenter that supported the amendments noted that ''options market makers should factor the cost of borrowing stock and selling short into the price of the put options being sold.'' [47] Commenters also stated that 13 consecutive settlement days was more than sufficient to close out a fail to deliver relating to an options position.[48]

Commenters who opposed the proposed amendments generally criticized the impact of elimination on options market making risk, quote depths, spread widths, and market liquidity in threshold securities and securities that might become threshold securities. Among other things, they stated that the options market maker exception is integral to the options market maker's ability to make markets and manage risk and that, without the exception, making continuous markets would be very difficult, particularly in longer-dated options.[49] One commenter suggested that ''withdrawing or greatly reducing the exception would cause varying losses of liquidity in over 20% of listed options and their underlying stocks.'' [50] Another commenter stated that ''[i]f the exception is eliminated or narrowed in the manner proposed, [it] anticipates [options market makers] would be reluctant or even unable to effectively make markets on securities if they cannot be certain of their ability to establish and maintain an effective hedge and manage their risk through selling stock.'' [51] Another commented that ''[t]he uncertainty, time, processing and expense necessary to pre-borrow when effecting a short sale, as well as the uncertainty and expense caused by a close out of a hedge, will by its nature adversely affect the [options market makers'] pricing of the option.'' [52]

Some commenters who opposed elimination of the exception argued that options market makers, unlike equity market makers, should have an exception to Regulation SHO's close-out requirement because there are distinct differences between options market making and market making in the underlying stock. For example, one commenter stated that the risk to an options market maker of trading options on a threshold security is higher than that of a stock specialist because in the equity markets there is often a natural flow of buyers and sellers to trade against each other without the stock specialist having to take a position.[53] According to the commenter, options market makers routinely have to take the other side of customer trades in the options transaction and must hedge the residual risk. This commenter also noted that when an options market maker must close out a fail to deliver position, it may have to worry about the risk and exposure for the options positions that were previously offset by the stock position.

Other commenters stated that equity market makers ''can freely hedge an equity position in a threshold security with a short options position, but, if the options market maker exception is eliminated, options market makers would face restrictions in their ability to hedge options positions with the underlying equity.'' [54] These commenters stated that the ability to keep open a fail to deliver position is particularly important with longer-term options positions where the options market maker must maintain the hedge for extended periods of time.[55] In such circumstances, these commenters stated that often the only available and/or economically feasible hedge is the underlying security.

Some commenters also stated that the one-time 35 consecutive settlement day phase-in period was ''particularly troubling because it would not be sufficient to account for pre-existing options positions that were assumed in reliance on the [options market maker exception].'' [56] In particular, these commenters expressed concerns about increased costs and risks associated with having to close out previously-exempted fails to deliver relating to the hedging of longer-term options positions, such as Long-term Equity Anticipation Securities (''LEAPS''),[57] that were not anticipated at the time the options positions were originally taken.[58]

Some commenters also opposed the proposed alternatives. For example, one commenter stated that the ''35-day window afforded options market makers to fail would simply create opportunities for sophisticated market participants to employ complex derivative strategies to roll failed positions from one period to the next.'' [59] Other commenters preferred the proposed 35 day close out

[44] *See, e.g.*, letter from Patrick M. Byrne, Chairman and Chief Executive Officer, Overstock.com, Inc., dated Oct. 1, 2007 (''Overstock''); letter from NCANS; letter from James H. Bramble, Vice President & General Counsel, USANA Health Sciences, Inc., dated Aug. 31, 2007 (''USANA''); letter from Paul Rivett, Vice President and Chief Legal Officer, Fairfax Financial Holdings, Ltd., dated Sept. 12, 2007 (''Fairfax Financial''); letter from Medis; letter from U.S. Chamber of Commerce; letter from Thomas Vallarino, dated Sept. 17, 2007; letter from Mark L. Shurtleff, Attorney General, State of Utah, dated Sept. 13, 2007; James J. Angel, Ph.D., CFA, Associate Professor of Finance, Georgetown University, dated Sept. 10, 2007 (''Angel''); letter from Ira D. Hammerman, Senior Vice President and General Counsel, SIFMA, dated Sept. 26, 2007 (''SIFMA''); letter from ABA; letter from Edward J. Joyce, President and Chief Operating Officer, Chicago Board Options Exchange, dated Sept. 17, 2007 (''CBOE''); letter from Gerard S. Citera, Chadbourne & Parke LLP, dated Sept. 13, 2007 (''UBS''); letter from Charles Mogilevsky, Managing Director, Citigroup Derivatives Markets, Inc., dated Sept. 14, 2007 (''Citigroup''); letter from The American Stock Exchange, Boston Options Exchange, CBOE, International Securities Exchange, NYSE/Arca, The Options Clearing Corporation, Philadelphia Stock Exchange, dated Sept. 19, 2007 (''Options Exchanges''); letter from Susquehanna.

[45] *See* letter from NCANS.

[46] *See* letter from USANA; *see also* letter from Fairfax Financial (stating that the exception should be eliminated due to its ''detrimental impact on issuers and their shareholders and also because such exception is susceptible to significant abuse'').

[47] *See* letter from Fairfax Financial.

[48] *See, e.g.*, letter from U.S. Chamber of Commerce.

[49] *See* letter from CBOE.

[50] *See* letter from Susquehanna.

[51] *See id; see also* letter from Options Exchanges; Citigroup.

[52] *See* letter from Citigroup.

[53] *See* letter from CBOE.

[54] *See* letter from Options Exchanges.

[55] *See, e.g.*, letter from Citigroup.

[56] *See* letter from CBOE; *see also* letter from Options Exchanges.

[57] LEAPS are long-term stock or index options. LEAPS, like all options, are available in two types, calls and puts, with expiration dates up to three years in the future. *See http://www.cboe.com/LearnCenter/glossary_g-l.aspx#L* (defining LEAPS).

[58] *See, e.g.*, letter from CBOE; Options Exchanges; Citigroup.

[59] *See* letter from Overstock.

alternative to elimination of the options market maker exception.[60] Some commenters, however, requested that the Commission extend the proposed alternative 35 day close-out requirement to 42 days [61] or even 45 days,[62] to allow for 2 options expirations before a fail to deliver position must be closed out.

We also received a number of comment letters in response to the 2008 Regulation SHO Re-Opening Release, most of which urged the Commission to take action on the proposed amendments to eliminate the options market maker exception.[63] In contrast, one commenter noted that it does not believe that there is evidence of a significant problem with extended fails to deliver or, if such a problem exists, evidence that it is attributable to the options market maker exception.[64] In addition, this commenter stated that it believes ''[t]he perceived benefits of modifying the exception * * * would not outweigh the costs associated and burden placed on OMMs and options market they support.'' [65]

As discussed in detail below, although we recognize commenters' concerns that elimination of the options market maker exception may place costs and burdens on options market makers, we believe that such potential effects are justified by the benefits that are expected to result from requiring that all fails to deliver in threshold securities be closed out within specific time-frames rather than being allowed to continue indefinitely.

B. Discussion of Amendments

After careful consideration of the comments, we are adopting amendments to eliminate the options market maker exception to Regulation SHO's close-out requirement. Specifically, as a result of the amendments, all fails to deliver in a threshold security resulting from short sales by a registered options market maker effected to establish or maintain a hedge on options positions established before the security became a threshold security will, like all other fails to deliver in threshold securities, have to be closed out in accordance with the close-out requirements of Regulation SHO.[66]

The amendments include a one-time 35 consecutive settlement day phase-in period, as proposed.[67] Under this provision of the amendments, any previously excepted fail to deliver position in a threshold security on the effective date of the amendments, including any adjustments to that fail to deliver position, must be closed out within 35 consecutive settlement days of the effective date of the amendments.[68] We chose 35 settlement days because 35 days was used in Regulation SHO as adopted in August 2004, and in Regulation SHO, as amended.[69]

In the September Emergency Order, we adopted and made immediately effective the elimination of the options market maker exception to Regulation SHO's close-out requirement.[70] Thus, if there was a fail to deliver position at a registered clearing agency in a security that was a threshold security on the effective date of the September Emergency Order, participants of a registered clearing agency had to close out that position within 35 consecutive settlement days, regardless of whether the security became a non-threshold security after the effective date of the September Emergency Order. Because this release makes the elimination of the options market maker exception as set forth in the September Emergency Order permanent, and because the amendments contained in this release are effective on the expiration date of the September Emergency Order (*i.e.*, October 17, 2008), any fails to deliver in threshold securities that were being closed out pursuant to the 35 consecutive settlement day phase-in period as set forth in the September Emergency Order will not receive an additional 35 consecutive settlement days from October 17, 2008 in which to be closed out. Instead, the 35 consecutive settlement days will continue to run from the effective date of the September Emergency Order. Any fails to deliver in securities that became threshold securities after the effective date of the September Emergency Order and that are still threshold securities on the effective date of these amendments, must be closed out in accordance with the current close-out requirements of Regulation SHO, rather than within 35 consecutive settlement days of the effective date of these amendments.[71]

Although, as noted above, some commenters stated that the one-time 35 consecutive settlement day phase-in period was ''particularly troubling because it would not be sufficient to account for pre-existing options positions that were assumed in reliance on the [options market maker exception]'' [72], we believe that a 35 consecutive settlement day phase-in period allows participants sufficient time to close out any previously excepted fail to deliver positions with limited disruption to the market and helps foster market stability because it provides participants with a sufficient length of time to effect purchases to close out these positions in an orderly manner.

We are also adopting our proposal that if the fail to deliver position persists for 35 consecutive settlement days from the effective date of the amendment, a participant of a registered clearing agency (and any broker-dealer for which it clears transactions, including any market maker), is prohibited from accepting any short sale orders or effecting further short sales in the particular threshold security without borrowing, or entering into a bona-fide arrangement to borrow, the security until the participant closes out the entire fail to deliver position by purchasing securities of like kind and quantity.[73] Due to the requirements of the September Emergency Order, this provision of the amendments is applicable to those fails to deliver that may be closed out within 35 consecutive settlement days of the effective date of the September Emergency Order but are not closed out within that time-frame.

[60] *See, e.g.*, letter from CBOE; Options Exchanges; UBS.

[61] *See, e.g.*, letter from CBOE; Options Exchanges.

[62] *See* letter from Susquehanna.

[63] Comment letters are available on the Commission's Internet Web site at *http://www.sec.gov/comments/s7-19-07/s71907.shtml.*

[64] *See* letter from Edward J. Joyce, President and Chief Operating Officer, Chicago Board Options Exchange, dated Aug. 15, 2008 (''CBOE 2008'').

[65] *See id.*

[66] Accordingly, the amendments remove the options market maker exception from Rule 203(b)(3)(iii) of Regulation SHO, as adopted. We note that we have adopted on an interim final temporary basis, temporary Rule 204T that strengthens the delivery requirements of Regulation SHO for sales of all equity securities such that fails to deliver must be closed out by no later than the beginning of regular trading hours on the settlement day following the day the participant incurred the fail to deliver position. The temporary rule has a limited exception from this close-out requirement for options market makers. *See* Interim Final Temporary Rule, *supra* at notes 42 and 43.

[67] *See* Adopted Rule 203(b)(3)(iii).

[68] If the security is a threshold security on the effective date of the amendments, participants of a registered clearing agency will have to close out that position within 35 consecutive settlement days, regardless of whether the security becomes a non-threshold security after the effective date of the amendments.

[69] *See* 2004 Regulation SHO Adopting Release, 69 FR at 48031; 2007 Regulation SHO Final Amendments, 72 FR at 45557.

[70] *See supra* note 40.

[71] For the duration of temporary Rule 204T, fails to deliver in all equity securities, regardless of whether or not the security is a threshold security, must be closed out in accordance with the requirements of the temporary rule.

[72] *See, e.g.*, letter from CBOE.

[73] *See* Adopted Rule 203(b)(3)(v).

If a security becomes a threshold security after the effective date of the amendments, any fails to deliver that result or resulted from short sales effected by a registered options market maker to establish or maintain a hedge on options positions that were created before the security became a threshold security will be subject to Regulation SHO's close-out requirements, similar to any other fail to deliver position in a threshold security.[74]

We believe that it is appropriate to eliminate Regulation SHO's options market maker exception because substantial levels of fails to deliver continue to persist in threshold securities and it appears that a significant number of these fails to deliver are as a result of the options market maker exception.[75] As noted above, the Commission staff obtained data from SROs, options market makers, and clearing agency participants that shows extensive use of the options market maker exception to Regulation SHO's close-out requirement and the resulting fails to deliver that were not closed out during 2006, 2007, and 2008.[76] For example, the data showed that as of January 31, 2008, a participant that settles and clears for a large segment of the options market claimed the options market maker exception to the close-out requirement in 16 threshold securities for a total of 6,365,158 fails to deliver. As of February 29, 2008, the data indicated that this participant claimed the options market maker exception in 20 threshold securities for a total of 6,963,949 fails to deliver. In addition, according to data provided by FINRA for 2007 relating to a participant that settles and clears for a large segment of the options market, fail to deliver positions not closed out by the participant due to it claiming the options market maker exception ranged from 35,655 fails to deliver in one month that year, to as much as 5,621,982 in another month that year. According to a review conducted by several SROs between May to July 2006, there were 598 exceptions claimed, covering 58 threshold securities for a total of 11,759,799 fails to deliver.[77]

In addition, following the elimination of the ''grandfather'' exception to Regulation SHO's close-out requirement, data collected by OEA indicates that although fails to deliver overall decreased slightly, fails to deliver in optionable threshold securities increased significantly. The ''grandfather'' exception was eliminated as of October 15, 2007 with a one-time phase in period which expired on December 5, 2007. The sample data used by OEA compares two time periods: April 9, 2007–October 14, 2007, which is defined as the ''pre-amendment period'' and December 10, 2007–March 31, 2008, which is defined as the ''post-amendment period.'' Specifically, the results of OEA's analysis of fails to deliver before and after the elimination of Regulation SHO's ''grandfather'' exception show that:[78]

- The average daily number of optionable threshold securities increased by 25.0%.
- The average daily number of new fail to deliver positions in optionable threshold securities increased by 45.3%.
- For fails aged more than 17 days in optionable threshold securities, the average daily dollar value of fails to deliver increased by 73.4%.
- For fails aged more than 17 days in optionable threshold securities, the average daily number of fail to deliver positions increased by 30.7%.
- The average daily number of optionable threshold securities with fails aged more than 17 days increased by 40.9%.

The data shows a 25 percent increase in the number of optionable threshold securities and a substantial increase in fails to deliver in optionable threshold securities when comparing the pre- and post-amendment periods. As the OEA Memorandum notes ''[o]ne explanation of these results is that the investors who previously failed to deliver in the equity market have now moved to the options market to establish a synthetic position. Since the option market makers still enjoy an exception to the close-out rule and tend to hedge their positions in the equity markets, the fails may now be coming from the option market makers instead of the equity investors themselves.''[79]

As discussed above, commenters opposing the proposed amendments criticized the impact of the proposals on options market making risk, quote depths, spread widths, and market liquidity, particularly in threshold securities and securities that might become threshold securities.[80] Although we recognize these commenters' concerns regarding a mandatory close-out requirement for fails to deliver in threshold securities underlying options positions, for the reasons outlined below, we believe these potential effects are justified by the benefits of requiring that fails to deliver in all threshold securities be closed out within specific time-frames rather than being allowed to continue indefinitely. In addition, we believe the overall market impact of these potential effects, if any, will be minimal.

First, as discussed above, large and persistent fails to deliver can deprive shareholders of the benefits of ownership, such as voting and lending. They can also be indicative of potentially manipulative conduct, such as abusive ''naked'' short selling. The deprivation of the benefits of ownership, as well as the perception that abusive ''naked'' short selling is occurring in certain securities, can undermine the confidence of investors. These investors, in turn, may be reluctant to commit capital to an issuer they believe to be subject to manipulative conduct.

In the Reproposal, we sought comment on whether the proposed amendments would promote capital formation, including whether the proposed increased short sale restrictions would affect investors' decisions to invest in certain equity securities. Commenters expressed concern about ''naked'' short selling causing a drop in an issuer's stock price and that it may limit an issuer's ability to access the capital markets.[81] We believe that, by requiring that all fails to deliver in threshold securities be closed out within specific time-frames rather than allowing them to continue indefinitely, there will be a decrease in the number of threshold securities with persistent and high levels of fails to deliver. If persistence on the threshold securities lists leads to an unwarranted decline in investor confidence about the security, the amendments should improve investor confidence about the security.[82] We also believe that the amendments should lead to greater certainty in the settlement of securities which should strengthen investor confidence in the settlement process. The reduction in fails to deliver and the resulting reduction in the number of securities on the threshold securities

[74] *See* 17 CFR 242.203(b)(3); *see also* Interim Final Temporary Rule, *supra* notes 42 and 43 (amending Regulation SHO to strengthen the delivery requirements for sales of all equity securities).

[75] *See* 2008 Regulation SHO Re-Opening Release, 73 FR 40201.

[76] *See id.*

[77] *See id.*

[78] *See id; see also* Memorandum from the Commission's Office of Economic Analysis (dated June 9, 2008), which is available on the Commission's Internet Web site at *http://www.sec.gov/comments/s7-19-07/s71907-562.pdf* (the ''OEA Memorandum'').

[79] *See* OEA Memorandum.

[80] *See, e.g.*, letter from Citigroup.

[81] *See supra* note 19.

[82] *See* letter from Overstock.

lists could result in increased investor confidence.

Thus, by eliminating the options market maker exception so that all fails to deliver in threshold securities that result from short sales effected to maintain or establish a hedge on options positions will have to be closed out in accordance with Regulation SHO's close-out requirements, we expect a reduction in the number of threshold securities with large and persistent fails to deliver and, thereby, offsetting any potential negative impact of such fails to deliver on the market for these securities.[83]

Second, while we recognize commenters' concerns that on a security-by-security basis the impact on options market maker costs, liquidity, quote depths, and spread widths may vary considerably, and in some cases, might be large,[84] we believe the overall market impact of the amendments will be minimal because the number of securities that will be impacted by the amendments will be relatively small. As previously noted by one commenter, a small number of securities that meet the definition of a ''threshold security'' have listed options, and those securities form a very small percentage of all securities that have options traded on them.[85] In addition, OEA estimates that in July 2008, 451 (13.6%) of the 3,326 securities with options classes trading on at least one options market appeared on a threshold securities list for at least one day that month. Even though these securities may form a small percentage of all securities that have options traded on them, we are still concerned that these fails to deliver can have a disproportionate impact on the markets and shareholders.

Moreover, the options market maker exception only excepted from Regulation SHO's mandatory 13 consecutive settlement day close-out requirement those fail to deliver positions resulting from short sales effected by registered options market makers to establish or maintain a hedge on options positions established *before* the underlying security became a threshold security. Thus, it did not apply to fails to deliver resulting from short sales effected to establish or maintain a hedge on options positions established *after* the underlying security became a threshold security. Because the options market maker exception had a very limited application, the overall impact of its removal on liquidity, hedging costs, spreads, and depth, should be relatively small. Nevertheless, we understand commenters' concerns that on a security-by-security basis the impact on options market maker costs might, in some cases, be large. However, on balance, we believe such costs are justified by the benefits that are expected to result from requiring that all fails to deliver in threshold securities be closed out within specific time-frames rather than being allowed to continue indefinitely.

Third, some commenters noted concerns about having to close out fails to deliver in connection with the hedging of longer-term options because such fails may have been open for months or years.[86] These commenters suggested that with respect to such fails to deliver, the close-out requirement be tied to the expiration or liquidation of such options. However, this would mean that these fails to deliver could persist for months or years. We believe that all fails to deliver in threshold securities must be closed out in a timely manner. Longer-term options can have expiration periods that extend for years. To tie the close out of a fail to deliver position resulting from a hedge of such options to the liquidation or expiration of such options would undermine this goal. As discussed above, large and persistent fails to deliver can deprive shareholders of the benefits of ownership, such as voting and lending. We also believe that all sellers of securities should promptly deliver, or arrange for delivery of, securities to the respective buyer and all buyers of securities have a right to expect prompt delivery of securities purchased.

In addition, the 35 consecutive settlement day phase-in period of the amendments allows participants sufficient time to close out any previously excepted fail to deliver positions that may have been open for months or years as a result of hedging activity in connection with longer-term options. The phase-in period limits the disruption to the market and helps foster market stability because it provides participants with a sufficient length of time to effect purchases to close out these positions in an orderly manner.

Fourth, the potential impact of the amendments on options market making risk, quote depths, spread widths, and market liquidity will be limited because, as noted above, Regulation SHO's options market maker exception applied only to those fail to deliver positions that resulted from short sales effected by registered options market makers to establish or maintain a hedge on options positions established *before* the underlying security became a threshold security. Thus, it did not apply to fails to deliver resulting from short sales effected to establish or maintain a hedge on options positions established *after* the underlying security became a threshold security. Some commenters stated that they believe there has been harm to the markets under the current close out structure of Regulation SHO.[87] As we noted in the Reproposal, however, in examining the application of the mandatory close-out requirement of Rule 203(b)(3) of Regulation SHO for all non-excepted fail to deliver positions, it does not appear that Rule 203(b)(3)'s close-out requirement for non-excepted fails to deliver in threshold securities has impacted options market makers' willingness to provide liquidity in threshold securities or securities likely to become threshold securities, or substantially impacted option market maker risk, quote depths, or spread widths.

In addition, we note that options market makers may only need to hedge via a short sale in the equity markets for a small fraction of their total trading activity. Academic research suggests that non-market maker option open interest tends to heavily favor the upside, which implies that the customary hedge for the typical option market making position is a long equity position rather than a short equity position.[88] More recent data from January to July 2008 also suggests an upside bias in option open interest.[89]

Fifth, while commenters may believe that a mandatory close-out requirement for all fails to deliver resulting from hedging activity in the options markets may potentially impact liquidity, hedging costs, depth, or spreads, or impact the willingness of options market makers to make markets in certain securities, we believe that such effects are justified by our belief that fails to deliver resulting from hedging activities by options market makers

[83] *See* 17 CFR 242.203(b)(3); *see also* Interim Final Temporary Rule, *supra* notes 42 and 43 (amending Regulation SHO to strengthen the delivery requirements for sales of all equity securities).

[84] *See, e.g.*, letter from Options Exchanges.

[85] For example, in its letter, Susquehanna noted that in June 2007, 174 (8%) of the 2,242 stocks with options classes trading on the CBOE, appeared on a threshold list for at least one day that month. *See* letter from Susquehanna.

[86] *See, e.g.*, letter from CBOE; Options Exchanges; Citigroup.

[87] *See, e.g.*, letter from CBOE; *see also* letter from Overstock.

[88] *See* Lakonishok, Poteshman, and Lee, ''Investor Behavior and the Options Markets,'' Working Paper 10264 (2004) (*http://www.nber.org/papers/w10264.pdf.*).

[89] Data from The Options Clearing Corporation web site shows that call open interest generally exceeded put open interest by about 10% on the average day during January to July 2008.

should be treated similarly to fails to deliver resulting from sales in the equities markets so that market participants trading threshold securities in the options markets do not receive an advantage over those trading such securities in the equities markets.

As discussed above, commenters who opposed elimination of the exception argued that options market makers, unlike equity market makers, should have an exception to Regulation SHO's close-out requirement because there are distinct differences between options market making and market making in the underlying stock. We do not believe that for purposes of the close-out requirement of Regulation SHO, options and equity market makers should be treated differently. Due to our concerns about the potentially negative market impact of large and persistent fails to deliver, and the fact that we continue to observe a small number of threshold securities with fail to deliver positions that are not being closed out under existing delivery and settlement requirements, we adopted amendments to eliminate Regulation SHO's ''grandfather'' provision that allowed fails to deliver resulting from long or short sales of equity securities to persist indefinitely if the fails to deliver occurred prior to the security becoming a threshold security.[90] We believe that once a security becomes a threshold security, fails to deliver in that security must be closed out, regardless of whether or not the fails to deliver resulted from sales of the security in connection with the options or equities markets.

Moreover, we are concerned that the options market maker exception might have allowed for a regulatory arbitrage not permitted in the equities markets.[91] For example, an options market maker who sells short to hedge put options purchased by a market participant unable to locate shares for a short sale in accordance with Rule 203(b)(2) of Regulation SHO may not have to close out any fails to deliver that result from such short sales under the options market maker exception. The ability of options market makers to sell short and never have to close out a resulting fail to deliver position, provided the short sale was effected to hedge options positions created before the security became a threshold security, runs counter to the goal of requiring that all fails to deliver in threshold securities be closed out.

In addition, we note that although the proposed alternatives could lessen the potential negative impact of large and persistent fails to deliver, we believe that complete elimination of the options market maker exception would achieve this goal more effectively. By eliminating the options market maker exception, all fails to deliver in threshold securities will have to be closed out in accordance with Regulation SHO's close-out requirements.[92] The proposed alternatives, however, would each allow a longer period of time for fail to deliver positions to be closed out. Specifically, the first alternative would allow certain fails to deliver to be closed out within 35 consecutive settlement days of the security becoming a threshold security. Under the second alternative, although some fails to deliver would be required to be closed out in less than 35 consecutive settlement days, other fails to deliver would not have to be closed out until 35 consecutive settlement days from the security becoming a threshold security.[93]

As we discussed in the Reproposal,[94] we believe that the options market maker exception should be eliminated, rather than limited as in the proposed alternatives, because large and persistent fails to deliver are not being closed out under existing delivery requirements and because we are concerned that these fails to deliver may have a negative impact on the market for those securities. In addition, as noted in the Reproposal, we believe that fails to deliver resulting from hedging activities by options market makers should be treated similarly to fails to deliver resulting from sales in the equities markets so that market participants trading threshold securities in the options markets do not receive an advantage over those trading such securities in the equities markets. Thus, we have determined that the proposed alternatives are not feasible or in the public interest to act upon at this time.

IV. Bona-Fide Market Making

We are also taking the opportunity to provide guidance regarding issues that have arisen regarding what is bona-fide market making for purposes of complying with the market maker exception to the ''locate'' requirement of Rule 203(b)(1) of Regulation SHO. The 2004 Regulation SHO Adopting Release provides guidance as to what is bona-fide market making. We are reiterating that guidance and providing additional guidance in this adopting release.

Rule 203(b)(1) provides that ''[a] broker or dealer may not accept a short sale order in an equity security from another person, or effect a short sale in an equity security for its own account, unless the broker or dealer has: (i) Borrowed the security, or entered into a bona-fide arrangement to borrow the security; or (ii) Reasonable grounds to believe that the security can be borrowed so that it can be delivered on the date delivery is due; and (iii) Documented compliance with this paragraph (b)(1).''[95] This is known as the ''locate'' requirement. Rule 203(b)(2)(iii) excepts market makers engaged in bona-fide market making activities from the locate requirement. The Commission adopted this narrow exception to the locate requirement because such market makers may need to facilitate customer orders in a fast moving market without possible delays associated with complying with the locate requirement.[96]

The term ''market maker'' includes any specialist permitted to act as a dealer, any dealer acting in the capacity of a block positioner, and any dealer who, with respect to a security, holds itself out (by entering quotations in an inter-dealer quotation system or otherwise) as being willing to buy and sell such security for its own account on a regular or continuous basis.[97] Moreover, as the Commission has stated previously, a market maker engaged in bona-fide market making is a ''broker-dealer that deals on a regular basis with other broker-dealers, actively buying and selling the subject security as well as regularly and continuously placing quotations in a quotation medium on both the bid and ask side of the market.''[98] We note that block positioners, to the extent they engage in bona fide block positioning activities,

[90] *See* 2007 Regulation SHO Final Amendments, 72 FR 45544; *see also* 2006 Regulation SHO Proposed Amendments, 71 FR 41710.

[91] *See* Reproposal, 72 FR at 45563.

[92] *See* 17 CFR 242.203(b)(3); *see also* Interim Final Temporary Rule, *supra* notes 42 and 43 (amending Regulation SHO to strengthen the delivery requirements for sales of all equity securities).

[93] *See* Reproposal, 72 FR at 45589–45590.

[94] *See id.* at 45566–45567.

[95] 17 CFR 242.203(b).

[96] *See* 2004 Regulation SHO Adopting Release, 69 FR at 48015, n. 67; *see also* Emergency Order Pursuant to Section 12(k)(2) of the Securities Exchange Act of 1934 Taking Temporary Action to Respond to Market Developments, Exchange Act Release No. 58166 (July 15, 2008); Amendment to Emergency Order Pursuant to Section 12(k)(2) of the Securities Exchange Act of 1934 Taking Temporary Action to Respond to Market Developments, Exchange Act Release No. 58190 (July 18, 2008) (excepting from the Emergency Order bona fide market makers).

[97] *See* 2004 Regulation SHO Adopting Release, 69 FR at 48015, n. 66 (citing to Section 3(a)(38) of the Exchange Act).

[98] *See* Exchange Act Release No. 32632 (July 14, 1993), 58 FR 39072, 39074 (July 21, 1993).

may also rely on this exception from the locate requirement in connection with such activities. Rule 3b–8(c) of the Exchange Act (17 CFR 240.3b–8(c)) defines a ''qualified block positioner'' as a dealer that: (1) Is a broker or dealer registered pursuant to Section 15 of the Exchange Act; (2) is subject to and in compliance with Rule 15c3–1 of the Exchange Act (17 CFR 240.15c3–1); (3) has and maintains minimum net capital, as defined in Rule 15c3–1, of $1,000,000; and (4) except when such activity is unlawful, meets all of the following conditions: (i) Engages in the activity of purchasing long or selling short, from time to time, from or to a customer (other than a partner or a joint venture or other entity in which a partner, the dealer, or a person associated with such dealer, as defined in Section 3(a)(18) of the Exchange Act, participates) a block of stock with a current market value of $200,000 or more in a single transaction, or in several transactions at approximately the same time, from a single source to facilitate a sale or purchase by such customer, (ii) has determined in the exercise of reasonable diligence that the block could not be sold to or purchased from others on equivalent or better terms, and (iii) sells the shares comprising the block as rapidly as possible commensurate with the circumstances.

As discussed below, in the 2004 Regulation Adopting Release, we provided examples of the types of activities that would indicate that a market maker is not engaged in bona fide market making activities. In addition to reiterating that guidance, we are also providing examples of the types of activities that would indicate that a market maker is engaged in bona fide market making activities for purposes of claiming the exception to Regulation SHO's locate requirement.

Although determining whether or not a market maker is engaged in bona-fide market making would depend on the facts and circumstances of the particular activity, factors that indicate a market maker is engaged in bona-fide market making activities may include, for example, whether the market maker incurs any economic or market risk with respect to the securities (*e.g.*, by putting their own capital at risk to provide continuous two-sided quotes in markets). In fulfilling its obligations as a market maker, a market maker engaged in bona-fide market making may provide liquidity to a security's market, take the other side of trades when there are short-term buy-and-sell-side imbalances in customer orders, or attempt to prevent excess volatility. Such activities will result in the market maker assuming some risk. Thus, if the market maker does not incur any market risk with respect to a transaction or related set of transactions, the market maker may not be engaged in bona-fide market making activities.[99]

A pattern of trading that includes both purchases and sales in roughly comparable amounts to provide liquidity to customers or other broker-dealers would generally be an indication that a market maker is engaged in bona-fide market making activity. Thus, even selling short into a declining market may be an indication that a market maker is engaged in bona-fide market making activity. Continuous quotations that are at or near the market on both sides and that are communicated and represented in a way that makes them widely accessible to investors and other broker-dealers are also an indication that a market maker is engaged in bona-fide market making activity. However, as noted above, a market maker must hold itself out as being willing to buy and sell a security for its own account on a regular or continuous basis. Thus, a market maker's quotes must be generally accessible to the public for a market maker to be considered as holding itself out as being willing to buy and sell a security for its own account on a regular or continuous basis, and therefore, to be engaged in bona-fide market making activity.

While determining whether or not a market maker is engaged in bona-fide market making would depend on the facts and circumstances of the particular activity, there are clear examples of what types of activities would not be bona-fide market making activities. For example, the Commission has stated that bona-fide market making does not include activity that is related to speculative selling strategies or investment purposes of the broker-dealer and is disproportionate to the usual market making patterns or practices of the broker-dealer in that security.[100] Likewise, where a market maker posts continually at or near the best offer, but does not also post at or near the best bid, the market maker's activities would not generally qualify as bona-fide market making.[101] Moreover, a market maker that continually executes short sales away from its posted quotes would generally not be considered to be engaging in bona-fide market making.[102] For purposes of qualifying for the locate exception in Regulation SHO, a market maker must also be a market maker in the security being sold, and must be engaged in bona-fide market making in that security at the time of the short sale.[103]

V. Other Matters

The Administrative Procedure Act also generally requires that an agency publish an adopted rule in the **Federal Register** 30 days before it becomes effective.[104] This requirement, however, does not apply if the agency finds good cause for making the rule effective sooner.[105]

As noted above, in the September Emergency Order, we adopted, and made immediately effective, amendments to Rule 203(b)(3) of Regulation SHO to eliminate the options market maker exception to Regulation SHO's close-out requirement. The September Emergency Order expires on October 17, 2008. We believe that the amendments contained in this adopting release should be effective on October 17, 2008 so that the elimination of the options market maker exception becomes permanent when the September Emergency Order expires. In addition, we believe that the amendments should become effective on October 17, 2008 so that fails to deliver resulting from short sales in both the equity and options markets receive similar treatment under the close-out requirements of Regulation SHO, and to further reduce fails to deliver and address potentially abusive ''naked'' short selling. Thus, the Commission finds good cause to make the amendments effective on October 17, 2008.

VI. Paperwork Reduction Act

The amendments to Regulation SHO do not contain a ''collection of information'' requirement within the meaning of the Paperwork Reduction Act of 1995 (''PRA'').[106]

VII. Consideration of Costs and Benefits of Proposed Amendments to Regulation SHO

We are sensitive to the costs and benefits of our rules and we have

[99] For example, if a market maker sells stock (short) together with a synthetic short position (*e.g.*, a conversion) to a client and the client then sells the stock (long) retaining the synthetic short position, the effect would be as if the market maker had ''rented'' its exemption to the client. Such transactions or other transactions that have the same effect will not be considered bona-fide market making activity.

[100] *See* 2004 Regulation SHO Adopting Release, 69 FR at 48015.

[101] *See id.*

[102] *See id.*

[103] *See* Rule 203(b)(1) and (b)(2)(iii).

[104] *See* 5 U.S.C. § 553(d).

[105] *Id.*

[106] 44 U.S.C. 3501 *et seq.*

considered the costs and the benefits of the amendments to Regulation SHO. In order to assist us in evaluating the costs and benefits, in the Reproposal, we encouraged commenters to discuss any costs or benefits that the amendments might impose. In particular, we requested comment on the potential costs for any modifications to both computer systems and surveillance mechanisms and for information gathering, management, and recordkeeping systems or procedures, as well as any potential benefits resulting from the amendments for registrants, issuers, investors, brokers or dealers, other securities industry professionals, regulators, and other market participants. Commenters were encouraged to provide analysis and data to support their views on the costs and benefits associated with the amendments to Regulation SHO.

A. Benefits

The amendments to Rule 203(b)(3) of Regulation SHO are intended to further reduce the number of persistent fails to deliver in threshold securities by eliminating the options market maker exception to Regulation SHO's close-out requirement. As a result of the amendments, all fails to deliver in a threshold security resulting from short sales by a registered options market maker effected to establish or maintain a hedge on options positions established before the security became a threshold security will, like all other fails to deliver in threshold securities, have to be closed out in accordance with Regulation SHO's close-out requirements.[107]

We are concerned that large and persistent fails to deliver are not being closed out due to the options market maker exception in Regulation SHO, and that these fails to deliver may have a negative effect on the market in these securities.[108] For example, large and persistent fails to deliver may deprive shareholders of the benefits of ownership, such as voting and lending.[109] In addition, where a seller of securities fails to deliver securities on trade settlement date, in effect the seller unilaterally converts a securities contract (which should settle within the standard 3-day settlement period) into an undated futures-type contract, to which the buyer may not have agreed, or that would have been priced differently.[110] Moreover, sellers that fail to deliver securities on settlement date may enjoy fewer restrictions than if they were required to deliver the securities in a timely manner, and such sellers may attempt to use this additional freedom to engage in trading activities that deliberately depress the price of a security.[111] In addition, by not borrowing securities and, therefore, not making delivery within the standard three-day settlement period, the seller avoids the costs of borrowing.

Thus, consistent with the Commission's investor protection mandate, the amendments will benefit investors by facilitating the receipt of shares so that more investors receive the benefits associated with share ownership, such as the use of the shares for voting and lending purposes. The amendments will also enhance investor confidence as they make investment decisions by providing investors with greater assurance that securities will be delivered as expected. An increase in investor confidence in the market should facilitate investment.

The amendments will also benefit issuers. A high level of persistent fails to deliver in a security may be perceived by potential investors negatively and may affect their decision about making a capital commitment.[112] For example, in response to the Reproposal, one commenter stated that it believes that the current options market maker exception ''harms investors and issuers, hinders the formation of capital, and is fatally flawed as written'' and that it should be eliminated.[113] Some issuers may believe that they have endured unwarranted reputational damage due to investors' negative perceptions regarding a security having a large fail to deliver position and becoming a threshold security.[114] Thus, issuers may believe the elimination of the options market maker exception will restore their good name. Some issuers may also believe that large and persistent fails to deliver indicate that they have been the target of potentially manipulative conduct as a result of ''naked'' short selling.[115] Thus, elimination of the options market maker exception should decrease the possibility of artificial market influences and, therefore, should contribute to price efficiency.

B. Costs

To comply with Regulation SHO when it became effective in January 2005, market participants needed to modify their recordkeeping systems and surveillance mechanisms. In addition, market participants should have retained and trained the necessary personnel to ensure compliance with the rule. Thus, the infrastructure necessary to comply with the amendments should already be in place because the amendments will require that all fails to deliver be closed out in accordance with the close-out requirements of Regulation SHO.[116] The only fails to deliver not subject to Regulation SHO's mandatory close-out requirements will be those fails to deliver that would be previously-excepted from the close-out requirement and, therefore, eligible for the one-time 35 consecutive settlement day phase-in period of the amendments.[117] Thus, we anticipate that any changes to personnel, computer hardware and software, recordkeeping or surveillance costs will be minimal.

In the Reproposal, we requested comment regarding the costs of the proposed amendments to the options market maker exception and how those costs would affect liquidity in the options markets. As discussed above, commenters opposing the proposed amendments criticized the impact of the proposals on options market making risk, quote depths, spread widths, and market liquidity, particularly in threshold securities and securities that might become threshold securities. These commenters stated that the current exception is integral to the options market maker's ability to make markets and manage risk and that, without the exception, making continuous markets would be very difficult, particularly in longer-dated options.[118] One commenter suggested that ''withdrawing or greatly reducing the exception would cause varying losses of liquidity in over 20% of listed

[107] *See* 17 CFR 242.203(b)(3); *see also* Interim Final Temporary Rule, *supra* notes 42 and 43 (amending Regulation SHO to strengthen the delivery requirements for sales of all equity securities).

[108] *See* 2007 Regulation SHO Final Amendments, 72 FR at 45544; 2006 Regulation SHO Proposed Amendments, 71 FR at 41712; Reproposal, 72 FR at 45558–45559; ''Naked'' Short Selling Anti-Fraud Rule Proposing Release, 73 FR at 15378.

[109] *See id.*

[110] *See id.*

[111] *See id.*

[112] *See, e.g., supra* note 19 (citing to comment letters expressing concern regarding the impact of potential ''naked'' short selling on capital formation).

[113] *See* letter from NCANS.

[114] *See, e.g., supra* note 18; *see also* letter from Fairfax Financial (stating that the exception should be eliminated due to its ''detrimental impact on issuers and their shareholders and also because such exception is susceptible to significant abuse'').

[115] *See, e.g., supra* note 19 (citing to comment letters from issuers and investors discussing extended fails to deliver in connection with ''naked'' short selling).

[116] *See* 17 CFR 242.203(b)(3); *see also* Interim Final Temporary Rule, *supra* notes 42 and 43 (amending Regulation SHO to strengthen the delivery requirements for sales of all equity securities).

[117] *See* Adopted Rule 203(b)(3)(iii).

[118] *See* letter from CBOE.

options and their underlying stocks.'' [119] Another commenter stated that ''[i]f the exception is eliminated or narrowed in the manner proposed, [it] anticipates [options market makers] would be reluctant or even unable to effectively make markets on securities if they cannot be certain of their ability to establish and maintain an effective hedge and manage their risk through selling stock.'' [120] Another commented that ''[t]he uncertainty, time, processing and expense necessary to pre-borrow when effecting a short sale, as well as the uncertainty and expense caused by a close out of a hedge, will by its nature adversely affect the [options market makers'] pricing of the option.'' [121] However, one commenter noted that ''options market makers should factor the cost of borrowing stock and selling short into the price of the put options being sold.'' [122] Another commenter noted that ''[o]ptions market makers should have to pay to borrow stock like everyone else does. Most options market makers are excellent risk managers, and they can manage the risk that stock borrowing costs can fluctuate. Any additional costs involved will rightfully be passed to those who trade options.'' [123]

Although we recognize commenters' concerns that a mandatory close-out requirement for fails to deliver in threshold securities underlying options positions, for the reasons outlined below, we believe these potential effects are justified by the benefits of requiring that fails to deliver in all threshold securities be closed out within specific time-frames rather than being allowed to continue indefinitely. In addition, we believe the overall market impact of these potential effects, if any, will be minimal.

First, as discussed above, large and persistent fails to deliver can deprive shareholders of the benefits of ownership, such as voting and lending. They can also be indicative of potentially manipulative conduct, such as abusive ''naked'' short selling. The deprivation of the benefits of ownership, as well as the perception that abusive ''naked'' short selling is occurring in certain securities, can undermine the confidence of investors. These investors, in turn, may be reluctant to commit capital to an issuer they believe to be subject to manipulative conduct.

In the Reproposal, we sought comment on whether the proposed amendments would promote capital formation, including whether the proposed increased short sale restrictions would affect investors' decisions to invest in certain equity securities. Commenters expressed concern about ''naked'' short selling causing a drop in an issuer's stock price and that it may limit an issuer's ability to access the capital markets.[124] We believe that, by requiring that all fails to deliver in threshold securities be closed out within specific time-frames rather than allowing them to continue indefinitely, there will be a decrease in the number of threshold securities with persistent and high levels of fails to deliver. If persistence on the threshold securities lists leads to an unwarranted decline in investor confidence about the security, the amendments should improve investor confidence about the security.[125] We also believe that the reduction in fails to deliver and the resulting reduction in the number of securities on the threshold securities lists should strengthen investor confidence and increase certainty in the settlement process.

Thus, by eliminating the options market maker exception so that all fails to deliver in threshold securities that result from short sales effected to maintain or establish a hedge on options positions will have to be closed out in accordance with Regulation SHO's close-out requirements,[126] we expect a reduction in the number of threshold securities with large and persistent fails to deliver and, thereby, offsetting any potential negative impact of such fails to deliver on the market for these securities.

Second, while we recognize commenters' concerns that on a security-by-security basis the impact on options market maker costs, liquidity, quote depths, and spread widths may vary considerably, and in some cases, might be large,[127] we believe the overall market impact of the amendments will be minimal because the number of securities that will be impacted by the amendments will be relatively small. As previously noted by one commenter, a small number of securities that meet the definition of a ''threshold security'' have listed options, and those securities form a very small percentage of all securities that have options traded on them.[128] In addition, OEA estimates that in July 2008, 451 (13.6%) of the 3,326 securities with options classes trading on at least one options market appeared on a threshold securities list for at least one day that month. Even though these securities may form a small percentage of all securities that have options traded on them, we are still concerned that these fails to deliver can have a disproportionate impact on the markets and shareholders.

Moreover, the options market maker exception only excepted from Regulation SHO's mandatory 13 consecutive settlement day close-out requirement only those fail to deliver positions that resulted from short sales effected by registered options market makers to establish or maintain a hedge on options positions established *before* the underlying security became a threshold security. Thus, it does not apply to fails to deliver resulting from short sales effected to establish or maintain a hedge on options positions established *after* the underlying security became a threshold security. Because the options market maker exception has a very limited application, we anticipate that the overall impact of its removal on liquidity, hedging costs, spreads, and depth should be relatively small. Nevertheless, we understand commenters' concerns that on a security-by-security basis the impact on options market maker costs might, in some cases, be large. However, on balance, we believe such costs are justified by the benefits that are expected to result from requiring that all fails to deliver in threshold securities be closed out within specific time-frames rather than being allowed to continue indefinitely.

Third, some commenters noted concerns about having to close out fails to deliver in connection with the hedging of longer-term options because such fails may have been open for months or years.[129] These commenters suggested that with respect to such fails to deliver, the close-out requirement be tied to the expiration or liquidation of such options. However, this would mean that these fails to deliver could persist for months or years. We believe that all fails to deliver in threshold securities must be closed out in a timely manner. Longer-term options can have expiration periods that extend for years. To tie the close out of a fail to deliver position resulting from a hedge of such options to the liquidation or expiration

[119] *See* letter from Susquehanna.

[120] *See id.; see also* letter from Options Exchanges; Citigroup.

[121] *See* letter from Citigroup.

[122] *See* letter from Fairfax Financial.

[123] *See* letter from Angel.

[124] *See supra* note 19.

[125] *See* letter from Overstock.

[126] *See* 17 CFR 242.203(b)(3); *see also* Interim Final Temporary Rule, *supra* notes 42 and 43 (amending Regulation SHO to strengthen the delivery requirements for sales of all equity securities).

[127] *See, e.g.*, letter from Options Exchanges.

[128] *See supra* note 85.

[129] *See, e.g.*, letter from CBOE; Options Exchanges; Citigroup.

of such options would undermine this goal. As discussed above, large and persistent fails to deliver can deprive shareholders of the benefits of ownership, such as voting and lending. We also believe that all sellers of securities should promptly deliver, or arrange for delivery of, securities to the respective buyer and all buyers of securities have a right to expect prompt delivery of securities purchased.

In addition, the 35 consecutive settlement day phase-in period of the amendments allows participants sufficient time to close out any previously excepted fail to deliver positions that may have been open for month or years as a result of hedging activity in connection with longer-term options. The phase-in period limits the disruption to the market and helps foster market stability because it provides participants with a sufficient length of time to close out these positions in an orderly manner.

Fourth, the potential impact of the amendments on options market making risk, quote depths, spread widths, and market liquidity will be limited because, as noted above, Regulation SHO's options market maker exception applied only to those fail to deliver positions that resulted from short sales effected by registered options market makers to establish or maintain a hedge on options positions established *before* the underlying security became a threshold security. Thus, it does not apply to fails to deliver resulting from short sales effected to establish or maintain a hedge on options positions established *after* the underlying security became a threshold security. Some commenters stated that they believe there has been harm to the markets under the current close out structure of Regulation SHO.[130] As we noted in the Reproposal, however, in examining the application of the mandatory close-out requirement of Rule 203(b)(3) of Regulation SHO for all non-excepted fail to deliver positions, it does not appear that Rule 203(b)(3)'s close-out requirement for non-excepted fails to deliver in threshold securities has impacted options market makers' willingness to provide liquidity in threshold securities or securities likely to become threshold securities, or substantially impacted option market maker risk, quote depths, or spread widths.

We also note that option market makers may only need to hedge via a short sale in the equity markets for a small fraction of their total trading activity. Academic research suggests that non-market maker option open interest tends to heavily favor the upside, which implies that the customary hedge for the typical option market making position is a long equity position rather than a short equity position.[131] More recent data from January to July 2008 also suggests an upside bias in option open interest.[132]

Fifth, while commenters may believe that a mandatory close-out requirement for all fails to deliver resulting from hedging activity in the options markets may potentially impact liquidity, hedging costs, depth, or spreads, or impact the willingness of options market makers to make markets in certain securities, we believe that such potential effects are justified by our belief that fails to deliver resulting from hedging activities by options market makers should be treated similarly to fails to deliver resulting from sales in the equities markets so that market participants trading threshold securities in the options markets do not receive an advantage over those trading such securities in the equities markets.

As discussed above, commenters who opposed elimination of the exception argued that options market makers, unlike equity market makers, should have an exception to Regulation SHO's close-out requirement because there are distinct differences between options market making and market making in the underlying stock. We do not believe that for purposes of the close-out requirement of Regulation SHO, options and equity market makers should be treated differently. Due to our concerns about the potentially negative market impact of large and persistent fails to deliver, and the fact that we continue to observe a small number of threshold securities with fail to deliver positions that are not being closed out under existing delivery and settlement requirements, we adopted amendments to eliminate Regulation SHO's ''grandfather'' provision that allowed fails to deliver resulting from long or short sales of equity securities to persist indefinitely if the fails to deliver occurred prior to the security becoming a threshold security.[133] We believe that once a security becomes a threshold security, fails to deliver in that security must be closed out, regardless of whether or not the fails to deliver resulted from sales of the security in connection with the options or equities markets.

Moreover, we are concerned that the options market maker exception might have allowed for a regulatory arbitrage not permitted in the equities markets.[134] For example, an options market maker who sells short to hedge put options purchased by a market participant unable to locate shares for a short sale in accordance with Rule 203(b)(2) of Regulation SHO may not have to close out any fails to deliver that result from such short sales under the options market maker exception. The ability of options market makers to sell short and never have to close out a resulting fail to deliver position, provided the short sale was effected to hedge options positions created before the security became a threshold security, runs counter to the goal of requiring that all fails to deliver in threshold securities be closed out.

Also, the pre-borrow requirement of Adopted Rule 203(b)(3)(v) for fail to deliver positions that are not closed out within the applicable time-frame set forth in the amendments will result in limited, if any, costs to participants of a registered clearing agency, and options market makers for which they clear transactions.[135] The pre-borrow requirement is similar to the pre-borrow requirement of Rule 203(b)(3)(iv) of Regulation SHO relating to fails to deliver that have not been closed out in accordance with the 13 consecutive settlement day close-out requirement of Regulation SHO.[136] Thus, participants of a registered clearing agency, and any options market maker for which it clears transactions, must already comply with such a requirement if a fail to deliver position has not been closed out in accordance with Regulation SHO's mandatory close-out requirement. Accordingly, these entities should already have in place the personnel, recordkeeping, systems, and surveillance mechanisms necessary to comply with the adopted pre-borrow requirement. While the pre-borrow requirement may be costly in each instance it is used, pre-borrowing is not necessary if a close-out is completed on time and, therefore, may be used only rarely.

VIII. Consideration of Burden and Promotion of Efficiency, Competition, and Capital Formation

Section 3(f) of the Exchange Act requires the Commission, whenever it engages in rulemaking and is required to

[130] *See, e.g.*, letter from CBOE; *see also* letter from Overstock.

[131] *See supra* note 88.

[132] *See supra* note 89.

[133] *See* 2007 Regulation SHO Final Amendments, 72 FR 45544; *see also* 2006 Regulation SHO Proposed Amendments, 71 FR 41710.

[134] Reproposal, 72 FR at 45563.

[135] *See* Adopted Rule 203(b)(3)(v).

[136] *See* 17 CFR 242.203(b)(3)(iv).

consider or determine whether an action is necessary or appropriate in the public interest, to consider whether the action would promote efficiency, competition, and capital formation.[137] In addition, Section 23(a)(2) of the Exchange Act requires the Commission, when making rules under the Exchange Act, to consider the impact such rules would have on competition.[138] Exchange Act Section 23(a)(2) prohibits the Commission from adopting any rule that would impose a burden on competition not necessary or appropriate in furtherance of the purposes of the Exchange Act.

We believe the amendments will have minimal impact on the promotion of price efficiency. In the Reproposal, we sought comment on whether the amendments would promote price efficiency. Commenters expressed concern that failures to deliver due to the options market maker exception harm pricing efficiency in the equity markets.[139] Other commenters stated that the proposed amendments to the options market maker exception would disrupt the markets because they would not provide sufficient flexibility to permit efficient hedging by options market makers, would unnecessarily increase risks and costs to hedge, and would adversely impact liquidity and result in higher costs to customers.[140] These commenters stated that they believe the proposed amendments would likely discourage options market makers from making markets in illiquid securities since the risk associated in maintaining the hedges in these option positions would be too great.[141] Moreover, these commenters stated that the reluctance of options market makers to make markets in threshold securities would result in wider spreads in such securities to account for the increased costs of hedging, to the detriment of investors.[142]

We recognize commenters' concerns that a mandatory close-out requirement for fails to deliver in threshold securities underlying options positions may potentially impact options market makers' willingness to provide liquidity in threshold securities, make it more costly for options market makers to accommodate customer orders, or result in wider bid-ask spreads or less depth.[143] For the reasons discussed below, however, we believe that the overall impact of these potential effects, if any, will be minimal.

We believe that the overall market impact of the amendments will be minimal because the number of securities that will be impacted by the amendments will be relatively small. The amendments apply only to those threshold securities with listed options. As previously noted by one commenter, a small number of securities that meet Regulation SHO's definition of a ''threshold security'' have listed options, and those securities form a very small percentage of all securities that have options traded on them.[144] In addition, the amendments will only impact fails to deliver in those securities that resulted from short sales by registered options market makers to hedge options positions that were created before, rather than after, the security became a threshold security because all other fails to deliver in threshold securities are already subject to Regulation SHO's close-out requirements.[145]

Because the options market maker exception has a very limited application, we anticipate that the overall impact of its removal on liquidity, hedging costs, spreads, and depth will be relatively small. Nevertheless, we understand commenters' concerns that on a security-by-security basis the impact on options market maker costs might, in some cases, be large. However, on balance, we believe such costs are justified by the benefits that are expected to result from requiring that all fails to deliver in threshold securities be closed out within specific time-frames rather than being allowed to continue indefinitely.

We also note that option market makers may only need to hedge via a short sale in the equity markets for a small fraction of their total trading activity. Academic research suggests that non-market maker option open interest tends to heavily favor the upside, which implies that the customary hedge for the typical option market making position is a long equity position rather than a short equity position.[146] More recent data from January to July 2008 also suggests an upside bias in option open interest.[147]

In addition, the 35 consecutive settlement day phase-in period of the amendments allows participants sufficient time to close out any previously excepted fail to deliver positions that may have been open for months or years as a result of hedging activity in connection with longer-term options. The phase-in period limits the disruption to the market, and helps foster market stability by providing participants with a sufficient length of time to close out these positions in an orderly manner. Some of the commenters to the Reproposal also noted that 13 consecutive settlement days was more than sufficient to close out a fail to deliver relating to an options position.[148]

While commenters may believe that a mandatory close-out requirement may potentially impact liquidity, hedging costs, depth, or spreads, or impact the willingness of options market makers to make markets in securities subject to such a requirement, we believe such potential effects are justified by our belief that fails to deliver resulting from hedging activities by options market makers should be treated similarly to fails to deliver resulting from sales in the equities markets so that market participants trading threshold securities in the options markets do not receive an advantage over those trading such securities in the equities markets. In addition, we believe that such potential costs are justified by the benefits of requiring that all fails to deliver be closed out rather than being allowed to continue indefinitely.

We also believe that the amendments will have minimal impact on the promotion of capital formation. Large and persistent fails to deliver can deprive shareholders of the benefits of ownership, such as voting and lending. They can also be indicative of potentially manipulative conduct, such as abusive ''naked'' short selling. The deprivation of the benefits of ownership, as well as the perception that abusive ''naked'' short selling is occurring in certain securities, can undermine the confidence of investors. These investors, in turn, may be reluctant to commit capital to an issuer they believe to be subject to such manipulative conduct.

In the Reproposal, we sought comment on whether the proposed amendments would promote capital formation, including whether the proposed increased short sale restrictions would affect investors' decisions to invest in certain equity securities. Commenters expressed concern about the potential impact of

[137] 15 U.S.C. 78c(f).

[138] 15 U.S.C. 78w(a)(2).

[139] *See, e.g.*, letter from Overstock.

[140] *See, e.g.*, letter from Options Exchanges.

[141] *See id.*

[142] *See* letter from Citigroup.

[143] *See, e.g.*, letter from CBOE.

[144] *See supra* note 85.

[145] *See* 17 CFR 242.203(b)(3); *see also* Interim Final Temporary Rule, *supra* notes 42 and 43 (amending Regulation SHO to strengthen the delivery requirements for sales of all equity securities).

[146] *See supra* note 88.

[147] *See supra* note 89.

[148] *See, e.g.*, letter from U.S. Chamber of Commerce.

''naked'' short selling on capital formation claiming that ''naked'' short selling causes a drop in an issuer's stock price that may limit the issuer's ability to access the capital markets.[149] Another commented that the options market maker exception ''is a well known tool of manipulators and must be removed to ensure a level playing field for public companies and their shareholders.'' [150] In addition, one commenter stated that it believes that the current options market maker exception ''harms investors and issuers, hinders the formation of capital, and is fatally flawed as written'' and that it should be eliminated.[151]

By requiring that all fails to deliver in threshold securities be closed out rather than allowing them to continue indefinitely, we believe that there will be a decrease in the number of threshold securities with persistent and high levels of fails to deliver. If persistence on the threshold securities lists leads to an unwarranted decline in investor confidence about the security, the amendments should improve investor confidence about the security. We also believe that the amendments will lead to greater certainty in the settlement of securities which should strengthen investor confidence in the settlement process. The reduction in fails to deliver and the resulting reduction in the number of securities on the threshold securities lists may result in increased investor confidence.

The amendments to eliminate the options market maker exception will also not impose any burden on competition not necessary or appropriate in furtherance of the purposes of the Exchange Act. By eliminating the options market maker exception, the Commission believes the amendments will promote competition by requiring similarly situated participants of a registered clearing agency, including broker-dealers for which they clear transactions, to close out fails to deliver in all threshold securities within similar time-frames.[152] One commenter, in particular, noted that the options market maker exception ''is a well known tool of manipulators and must be removed to ensure a level playing field for public companies and their shareholders.'' [153]

As discussed above, commenters who opposed elimination of the exception argued that options market makers, unlike equity market makers, should have an exception to Regulation SHO's close-out requirement because there are distinct differences between options market making and market making in the underlying stock. We do not believe that for purposes of the close-out requirement of Regulation SHO, options and equity market makers should be treated differently. Due to our concerns about the potentially negative market impact of large and persistent fails to deliver, and the fact that we continue to observe a small number of threshold securities with fail to deliver positions that are not being closed out under existing delivery and settlement requirements, we adopted amendments to eliminate Regulation SHO's ''grandfather'' provision that allowed fails to deliver resulting from long or short sales of equity securities to persist indefinitely if the fails to deliver occurred prior to the security becoming a threshold security.[154] We believe that once a security becomes a threshold security, fails to deliver in that security must be closed out, regardless of whether or not the fails to deliver resulted from sales of the security in connection with the options or equities markets.

Moreover, we are concerned that the options market maker exception might allow for a regulatory arbitrage not permitted in the equities markets.[155] For example, an options market maker who sells short to hedge put options purchased by a market participant unable to locate shares for a short sale in accordance with Rule 203(b)(2) of Regulation SHO may not have to close out any fails to deliver that result from such short sales under the options market maker exception. The ability of options market makers to sell short and never have to close out a resulting fail to deliver position, provided the short sale was effected to hedge options positions created before the security became a threshold security, runs counter to the goal of requiring that all fails to deliver in threshold securities be closed out.

IX. Final Regulatory Flexibility Analysis

The Commission has prepared a Final Regulatory Flexibility Analysis (''FRFA''), in accordance with the provisions of the Regulatory Flexibility Act (''RFA''),[156] regarding the amendments to Regulation SHO, Rule 203, under the Exchange Act. An Initial Regulatory Flexibility Analysis (''IRFA'') was prepared in accordance with the RFA and was included in the Reproposal. We solicited comments on the IRFA.

A. Reasons for and Objectives of the Amendments

The amendments to Rule 203(b)(3) of Regulation SHO are intended to further reduce the number of persistent fails to deliver in threshold securities by eliminating the options market maker exception to Regulation SHO's close-out requirement. As a result of the amendments, all fails to deliver in a threshold security resulting from short sales by a registered options market maker effected to establish or maintain a hedge on options positions established before the security became a threshold security will, like all other fails to deliver in threshold securities, have to be closed out in accordance with the close-out requirements of Regulation SHO.[157]

We are concerned that persistent, large fail positions may have a negative effect on the market in these securities. For example, although high fails levels exist only for a small percentage of issuers, they may impede the orderly functioning of the market for such issuers, particularly issuers of less liquid securities. A significant level of fails to deliver in a security may have adverse consequences for shareholders who may be relying on delivery of those shares for voting and lending purposes, or may otherwise affect an investor's decision to invest in that particular security. In addition, a seller that fails to deliver securities on trade settlement date effectively unilaterally converts a securities contract into an undated futures-type contract, to which the buyer might not have agreed, or that would have been priced differently.

[149] *See, e.g., supra* note 19 (citing to comment letters expressing concern regarding the impact of potential ''naked'' short selling on capital formation).

[150] *See* letter from USANA; *see also* letter from Fairfax Financial (stating that the exception should be eliminated due to its ''detrimental impact on issuers and their shareholders and also because such exception is susceptible to significant abuse'').

[151] *See* letter from NCANS.

[152] Academic research suggests that the ability for all option market makers to fail when hedging actually creates a competitive advantage for large option market makers over small option market makers. *See, e.g.,* Evans, Richard B., Reed, Adam V., Geczy, Christopher Charles and Musto, David K. ''Failure is an Option: Impediments to Short Selling and Options Prices,'' Rev. Financ. Stud. (January 2008). The elimination of the options market maker exception, therefore, will remove this competitive advantage.

[153] *See* letter from USANA; *see also* letter from Fairfax Financial (stating that the exception should be eliminated due to its ''detrimental impact on issuers and their shareholders and also because such exception is susceptible to significant abuse'').

[154] *See* 2007 Regulation SHO Final Amendments, 72 FR 45544; *see also* 2006 Regulation SHO Proposed Amendments, 71 FR 41710.

[155] *See* Reproposal, 72 FR at 45563.

[156] 5 U.S.C. 604.

[157] *See* 17 CFR 242.203(b)(3); *see also* Interim Final Temporary Rule, *supra* notes 42 and 43 (amending Regulation SHO to strengthen the delivery requirements for sales of all equity securities).

Moreover, sellers that fail to deliver securities on settlement date may enjoy fewer restrictions than if they were required to deliver the securities in a timely manner, and such sellers may attempt to use this additional freedom to engage in trading activities that deliberately depress the price of a security.

B. Significant Issues Raised by Public Comment

The IRFA appeared in the Reproposal. We requested comment on any aspect of the IRFA. In particular, we requested comment on: (i) The number of small entities that would be affected by the amendment; and (ii) the existence or nature of the potential impact of the amendments on small entities. We requested that the comments specify costs of compliance with the amendment, and suggest alternatives that would accomplish the objectives of the amendment. We did not receive any comments that responded specifically to this request.

C. Small Entities Subject to the Amendment

The entities covered by the amendments will include small entities that are participants of a registered clearing agency, including small registered options market makers for which the participant clears trades or for which it is responsible for settlement. In addition, the entities covered by these amendments will include small entities that are market participants that effect sales subject to the requirements of Regulation SHO. Most small entities subject to the amendments will be registered broker-dealers. Paragraph (c)(1) of Rule 0–10 [158] states that the term ''small business'' or ''small organization,'' when referring to a broker-dealer, means a broker or dealer that had total capital (net worth plus subordinated liabilities) of less than $500,000 on the date in the prior fiscal year as of which its audited financial statements were prepared pursuant to § 240.17a–5(d); and is not affiliated with any person (other than a natural person) that is not a small business or small organization. As of 2007, the Commission estimates that there were approximately 896 registered broker-dealers that qualified as small entities as defined above.[159]

As noted above, the entities covered by the amendments will include small entities that are participants of a registered clearing agency. As of July 31, 2008, approximately 91% of participants of the NSCC, the primary registered clearing agency responsible for clearing U.S. transactions, were registered as broker-dealers. Participants not registered as broker-dealers include such entities as banks, U.S.-registered exchanges, and clearing agencies. Although these entities are participants of a registered clearing agency, generally these entities do not engage in the types of activities that would implicate the close-out requirements of Regulation SHO. Such activities of these entities include creating and redeeming Exchange Traded Funds, trading in municipal securities, and using NSCC's Envelope Settlement Service or Inter-city Envelope Settlement Service. These activities rarely lead to fails to deliver and, if fails to deliver do occur, they are small in number and are usually cleaned up within a day. Thus, such fails to deliver would not trigger the close-out provisions of Regulation SHO.

The federal securities laws do not define what is a ''small business'' or ''small organization'' when referring to a bank. The Small Business Administration regulations define ''small entities'' to include banks and savings associations with total assets of $165 million or less.[160] As of July 31, 2008, no bank that was a participant of the NSCC was a small entity because none met these criteria.

Paragraph (e) of Rule 0–10 under the Exchange Act [161] states that the term ''small business'' or ''small organization,'' when referring to an exchange, means any exchange that: (1) Has been exempted from the reporting requirements of Rule 11Aa3–1 under the Exchange Act; and (2) is not affiliated with any person (other than a natural person) that is not a small business or small organization, as defined by Rule 0–10. No U.S. registered exchange is a small entity because none meets these criteria.

Paragraph (d) of Rule 0–10 under the Exchange Act [162] states that the term ''small business'' or ''small organization,'' when referring to a clearing agency, means a clearing agency that: (1) Compared, cleared and settled less than $500 million in securities transactions during the preceding fiscal year (or in the time that it has been in business, if shorter); (2) had less than $200 million in funds and securities in its custody or control at all times during the preceding fiscal year (or in the time that it has been in business, if shorter); and (3) is not affiliated with any person (other than a natural person) that is not a small business or small organization as defined by Rule 0–10. No clearing agency that is subject to the requirements of Regulation SHO is a small entity because none meets these criteria.

D. Reporting, Recordkeeping, and Other Compliance Requirements

The amendments to eliminate the options market maker exception to Regulation SHO's close-out requirement will impose minimal new or additional reporting, recordkeeping, or compliance costs on broker-dealers that are small entities. In order to comply with Regulation SHO when it became effective in January, 2005, entities needed to modify their systems and surveillance mechanisms. Thus, the infrastructure necessary to comply with the amendments to eliminate the options market maker exception should already be in place. Any additional changes to the infrastructure should be minimal. In addition, entities that will be subject to the mandatory close-out requirement of Rule 203(b)(3) of Regulation SHO should already have systems in place to close out non-excepted fails to deliver as required by Regulation SHO.

E. Agency Action To Minimize Effect on Small Entities

The RFA directs the Commission to consider significant alternatives that would accomplish the stated objectives, while minimizing any significant adverse impact on small entities. In connection with the amendments, the Commission considered the following types of alternatives: (a) Establishment of differing compliance or reporting requirements or timetables that take into account the resources available to small entities; (b) clarification, consolidation, or simplification of compliance and reporting requirements under the amendments for small entities; (c) use of performance rather than design standards; and (d) an exemption from coverage of the amendment, or any part thereof, for small entities.

A primary goal of the amendments is to reduce the number of persistent fails to deliver in threshold securities. As such, we believe that imposing different compliance requirements, and possibly a different timetable for implementing compliance requirements, for small entities would undermine the goal of reducing fails to deliver. In addition, the rule amendment is already quite simple, so we do not believe it necessary to

[158] 17 CFR 240.0–10(c)(1).

[159] These numbers are based on OEA's review of 2007 FOCUS Report filings reflecting registered broker-dealers. This number does not include broker-dealers that are delinquent on FOCUS Report filings.

[160] *See* 13 CFR 121.201.

[161] 17 CFR 240.0–10(e).

[162] 17 CFR 240.0–10(d).

further clarify, consolidate or simplify the amendments for small entities. The Commission also believes that using performance standards to specify different requirements for small entities or exempting small entities from having to comply with the amendment would not accomplish the regulatory goal of adopting a consistent approach to persistent fails to deliver.

X. Statutory Authority

Pursuant to the Exchange Act and, particularly, Sections 2, 3(b), 9(h), 10, 11A, 15, 17(a), 17A, and 23(a) thereof, 15 U.S.C. 78b, 78c(b), 78i(h), 78j, 78k–1, 78o, 78q(a), 78q–1, 78w(a), the Commission is adopting an amendment to § 242.203.

List of Subjects

17 CFR Part 241

Securities.

17 CFR Part 242

Brokers, Fraud, Reporting and recordkeeping requirements, Securities.

Text of the Amendments to Regulation SHO

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

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

■ 1. Part 241 is amended by adding Release No. 34–58775 and the release date of October 14, 2008 to the list of interpretative releases.

PART 242—REGULATIONS M, SHO, ATS, AC, AND NMS, AND CUSTOMER MARGIN REQUIREMENTS FOR SECURITY FUTURES

■ 2. The authority citation for part 242 continues to read as follows:

Authority: 15 U.S.C. 77g, 77q(a), 77s(a), 78b, 78c, 78g(c)(2), 78i(a), 78j, 78k–1(c), 78*l*, 78m, 78n, 78o(b), 78o(c), 78o(g), 78q(a), 78q(b), 78q(h), 78w(a), 78dd–1, 78mm, 80a–23, 80a–29, and 80a–37.

* * * * *

■ 3. Section 242.203 is amended by:

■ a. Revising paragraph (b)(3)(iii) and paragraph (b)(3)(v) to read as follows:

§ 242.203 Borrowing and delivery requirements.

* * * * *

(b) * * *

(3) * * *

(iii) *Provided, however,* that a participant of a registered clearing agency that has a fail to deliver position at a registered clearing agency in a threshold security on the effective date of this amendment and which, prior to the effective date of this amendment, had been previously excepted from the close-out requirement in paragraph (b)(3) of this section (*i.e.*, because the participant of a registered clearing agency had a fail to deliver position in the threshold security that is attributed to short sales effected by a registered options market maker to establish or maintain a hedge on options positions that were created before the security became a threshold security), shall immediately close out that fail to deliver position, including any adjustments to the fail to deliver position, within 35 consecutive settlement days of the effective date of this amendment by purchasing securities of like kind and quantity;

* * * * *

(v) If a participant of a registered clearing agency entitled to rely on the 35 consecutive settlement day close-out requirement contained in paragraph (b)(3)(i), (b)(3)(ii), or (b)(3)(iii) of this section has a fail to deliver position at a registered clearing agency in the threshold security for 35 consecutive settlement days, the participant and any broker or dealer for which it clears transactions, including any market maker, that would otherwise be entitled to rely on the exception provided in paragraph (b)(2)(ii) of this section, may not accept a short sale order in the threshold security from another person, or effect a short sale in the threshold security for its own account, without borrowing the security or entering into a bona fide arrangement to borrow the security, until the participant closes out the fail to deliver position by purchasing securities of like kind and quantity;

By the Commission.

Dated: October 14, 2008.

Florence E. Harmon,

Acting Secretary.

[FR Doc. E8–24742 Filed 10–16–08; 8:45 am]

BILLING CODE 8011–01–P

SECURITIES AND EXCHANGE COMMISSION

17 CFR Part 242

[Release No. 34–58773; File No. S7–30–08]

RIN 3235–AK22

Amendments to Regulation SHO

AGENCY: Securities and Exchange Commission.

ACTION: Interim final temporary rule; request for comments.

SUMMARY: The Securities and Exchange Commission (''Commission'') is adopting an interim final temporary rule under the Securities Exchange Act of 1934 (''Exchange Act'') to address abusive ''naked'' short selling in all equity securities by requiring that participants of a clearing agency registered with the Commission deliver securities by settlement date, or if the participants have not delivered shares by settlement date, immediately purchase or borrow securities to close out the fail to deliver position by no later than the beginning of regular trading hours on the settlement day following the day the participant incurred the fail to deliver position. Failure to comply with the close-out requirement of the temporary rule is a violation of the temporary rule. In addition, a participant that does not comply with this close-out requirement, and any broker-dealer from which it receives trades for clearance and settlement, will not be able to short sell the security either for itself or for the account of another, unless it has previously arranged to borrow or borrowed the security, until the fail to deliver position is closed out.

DATES: *Effective Date:* October 17, 2008 until July 31, 2009. *Comment Date:* Comments should be received on or before December 16, 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/final.shtml*); or
- Send an e-mail to *rule-comments@sec.gov.* Please include File Number S7–30–08 on the subject line; or
- Use the Federal eRulemaking Portal (*http://www.regulations.gov*). Follow the instructions for submitting comments.

Paper Comments

- Send paper comments in triplicate to Florence E. Harmon, Acting Secretary, Securities and Exchange Commission, 100 F Street, NE., Washington, DC 20549–1090.

All submissions should refer to File Number S7–30–08. This file number should be included on the subject line if e-mail is used. To help us process and review your comments more efficiently, please use only one method. The Commission will post all comments on the Commission's Internet Web site (*http://www.sec.gov/rules/final.shtml*).

Comments are also available for public inspection and copying in the Commission's Public Reference Room, 100 F Street, NE., Washington, DC 20549 on official business days between the hours of 10 a.m. and 3 p.m. All comments received will be posted without change; we do not edit personal identifying information from submissions. You should submit only information that you wish to make available publicly.

FOR FURTHER INFORMATION CONTACT: James A. Brigagliano, Associate Director, Josephine J. Tao, Assistant Director, Victoria L. Crane, Branch Chief, Joan M. Collopy, Special Counsel, Christina M. Adams and Matthew Sparkes, Staff Attorneys, Office of Trading Practices and Processing, Division of Trading and Markets, at (202) 551–5720, at the Commission, 100 F Street, NE., Washington, DC 20549–6628.

SUPPLEMENTARY INFORMATION: We are adopting temporary Rule 204T of Regulation SHO [17 CFR 242.204T] as an interim final temporary rule. We are soliciting comments on all aspects of the rule. We will carefully consider the comments that we receive and intend to respond to them in a subsequent release.

I. Introduction

Recently, we have become concerned that there is a substantial threat of sudden and excessive fluctuations of securities prices and disruption in the functioning of the securities markets that could threaten fair and orderly markets. These concerns with respect to financial institutions are evidenced by our recent publication of emergency orders under section 12(k) of the Exchange Act in July (the ''July Emergency Order'') [1] and September of this year (the ''Short Sale Ban Emergency Order'').[2] In these orders we noted our concerns about the possible use of unfounded rumors regarding the stability of financial institutions by short sellers for the purpose of manipulating the prices of securities issued by the financial institutions to increase profits through ''naked'' short selling.[3]

Our concerns, however, are not limited to just the financial institutions that were the subject of the July Emergency Order and the Short Sale Ban Emergency Order. Given the importance of confidence in our financial markets as a whole, we have become concerned about sudden and unexplained declines in the prices of equity securities generally. Such price declines can give rise to questions about the underlying financial condition of an institution, which in turn can create a crisis of confidence even without a fundamental underlying basis. This crisis of confidence can impair the liquidity and ultimate viability of an institution, with potentially broad market consequences. These concerns resulted in our issuance on September 17 of this year of an emergency order under section 12(k) of the Exchange Act (the ''September Emergency Order'').[4] Pursuant to that emergency order we imposed enhanced delivery requirements on sales of all equity securities by adding and making immediately effective a temporary rule to Regulation SHO, Rule 204T.[5]

To further our goal of preventing substantial disruption in the securities markets, we are adopting Rule 204T as an interim final temporary rule, with some modifications to address operational and technical concerns resulting from the requirements of the temporary rule as adopted in the September Emergency Order. We intend that the temporary rule will address potentially abusive ''naked'' short selling by requiring that securities be purchased or borrowed to close out any fail to deliver position in an equity security by no later than the beginning of regular trading hours on the settlement day following the date on which the fail to deliver position occurred. This temporary rule should provide a powerful disincentive to those who might otherwise engage in potentially abusive ''naked'' short selling.

II. Background

Short selling involves a sale of a security that the seller does not own or a sale which is consummated by the delivery of a security borrowed by, or for the account of, the seller.[6] Short sales normally are settled by the delivery of a security borrowed by or on behalf of the seller. In a ''naked'' short sale, however, the short seller does not borrow securities in time to make delivery to the buyer within the standard three-day settlement period.[7] As a result, the seller fails to deliver securities to the buyer when delivery is due (known as a ''fail'' or ''fail to deliver'').[8] Sellers sometimes intentionally fail to deliver securities as part of a scheme to manipulate the price of a security,[9] or possibly to avoid

[1] *See* Exchange Act Release No. 58166 (July 15, 2008), 73 FR 42379 (July 21, 2008) (imposing borrowing and delivery requirements on short sales of the equity securities of certain financial institutions).

[2] *See* Exchange Act Release No. 58592 (Sept. 18, 2008), 73 FR 55169 (Sept. 24, 2008) (temporarily prohibiting short selling in the publicly traded securities of certain financial institutions); *see also* Exchange Act Release No. 58611 (Sept. 21, 2008), 73 FR 55556 (Sept. 25, 2008) (amending the Short Sale Ban Emergency Order).

[3] ''Naked'' short selling generally refers to selling short without having borrowed the securities to make delivery. *See* Exchange Act Release No. 50103 (July 28, 2004), 69 FR 48008, 48009 n.10 (Aug. 6, 2004) (''2004 Regulation SHO Adopting Release''); *see also* Commission press release, dated July 13, 2008, announcing that the Commission's Office of Compliance Inspections and Examinations, as well as the Financial Industry Regulatory Authority (''FINRA'') and New York Stock Exchange Regulation, Inc., (''NYSE'') will immediately conduct examinations aimed at the prevention of the intentional spreading of false information intended to manipulate securities prices. *See http://www.sec.gov/news/press/2008/2008-140.htm.* In addition, in April of this year, the Commission charged Paul S. Berliner, a trader, with securities fraud and market manipulation for intentionally disseminating a false rumor concerning The Blackstone Group's acquisition of Alliance Data Systems Corp (''ADS''). The Commission alleged that this false rumor caused the price of ADS stock to plummet, and that Berliner profited by short selling ADS stock and covering those sales as the false rumor caused the price of ADS stock to fall. *See http://www.sec.gov/litigation/litreleases/2008/lr20537.htm.*

[4] *See* Exchange Act Release No. 58572 (Sept. 17, 2008), 73 FR 54875 (Sept. 23, 2008).

[5] *See id.* The September Emergency Order also made immediately effective amendments to Rule 203(b)(3) of Regulation SHO that eliminate the options market maker exception from Regulation SHO's close-out requirement. It also made immediately effective Rule 10b–21, a ''naked'' short selling antifraud rule.

[6] 17 CFR 242.200(a).

[7] *See* 2004 Regulation SHO Adopting Release, 69 FR at 48009 n.10.

[8] Generally, investors complete or settle their security transactions within three settlement days. This settlement cycle is known as T+3 (or ''trade date plus three days''). T+3 means that when a trade occurs, the participants to the trade deliver and pay for the security at a clearing agency three settlement days after the trade is executed so the brokerage firm can exchange those funds for the securities on that third settlement day. The three-day settlement period applies to most security transactions, including stocks, bonds, municipal securities, mutual funds traded through a brokerage firm, and limited partnerships that trade on an exchange. Government securities and stock options settle on the next settlement day following the trade (or T+1). In addition, Rule 15c6–1 prohibits broker-dealers from effecting or entering into a contract for the purchase or sale of a security that provides for payment of funds and delivery of securities later than the third business day after the date of the contract unless otherwise expressly agreed to by the parties at the time of the transaction. 17 CFR 240.15c6–1; Exchange Act Release No. 33023 (Oct. 7, 1993), 58 FR 52891 (Oct. 13, 1993). However, failure to deliver securities on T+3 does not violate Rule 15c6–1; *see also* Exchange Act Release No. 56212 (Aug. 7, 2007), 72 FR 45544, n. 2 (Aug. 14, 2007) (''2007 Regulation SHO Final Amendments'').

[9] In 2003, the Commission settled a case against certain parties relating to allegations of manipulative short selling in the stock of a corporation. The Commission alleged that the defendants profited from engaging in massive ''naked'' short selling that flooded the market with the stock, and depressed its price. *See Rhino Advisors, Inc. and Thomas Badian,* Lit. Rel. No. 18003 (Feb. 27, 2003); *see also SEC* v. *Rhino Advisors, Inc. and Thomas Badian,* Civ. Action No. 03 civ 1310 (RO) (S.D.N.Y); *see also* Exchange Act

Continued

borrowing costs associated with short sales, especially when the costs of borrowing stock are high.

Although the majority of trades settle within the standard three-day settlement cycle (''T+3''),[10] we adopted Regulation SHO[11] on July 28, 2004, in part to address problems associated with persistent fails to deliver securities and potentially abusive ''naked'' short selling. For example, Regulation SHO requires broker-dealers to ''locate'' securities that the broker-dealer reasonably believes can be delivered within the standard three-day settlement period.[12]

Another requirement of Regulation SHO aimed at potentially abusive ''naked'' short selling and reducing fails to deliver in certain equity securities is the rule's ''close-out'' requirement. Specifically, Rule 203(b)(3) requires participants[13] of a registered clearing agency,[14] which includes broker-dealers, to purchase shares to close out fails to deliver in securities with large and persistent fails to deliver, *i.e.*, ''threshold securities.''[15] Until the position is closed out, the participant responsible for the fail to deliver position and any broker-dealer from which it receives trades for clearance and settlement may not effect further short sales in that threshold security without first borrowing or arranging to borrow the securities.[16]

As adopted, Regulation SHO included two major exceptions to the close-out requirement: The ''grandfather'' provision and the ''options market maker'' exception. The ''grandfather'' provision had provided that fails to deliver established prior to a security becoming a threshold security did not have to be closed out in accordance with Regulation SHO's thirteen consecutive settlement day close-out requirement.

Due to our concerns about the potentially negative market impact of large and persistent fails to deliver, and the fact that we continued to observe threshold securities with fail to deliver positions that are not being closed out under existing delivery and settlement requirements, effective on October 15, 2007, we adopted an amendment to Regulation SHO that eliminated the ''grandfather'' exception to Regulation SHO's close-out requirement.[17]

The options market maker exception excepted any fail to deliver position in a threshold security resulting from short sales effected by a registered options market maker to establish or maintain a hedge on options positions that were created before the underlying security became a threshold security. On September 17, 2008, as part of the September Emergency Order, we adopted and made immediately effective an amendment to Rule 203(b)(3) of Regulation SHO to eliminate the options market maker exception to the rule's close-out requirement.[18] Following the issuance of the September Emergency Order, we adopted amendments making permanent the elimination of the options market maker exception.[19] As we discussed in the 2008 Regulation SHO Final Amendments, we believe it was appropriate to eliminate the options market maker exception in part because substantial levels of fails to deliver continue to persist in threshold securities and it appears that a significant number of these fails to deliver are as a result of the options market maker exception.[20]

In addition to the actions we have taken aimed at reducing fails to deliver and addressing potentially abusive ''naked'' short selling in threshold securities, we have also taken action targeting potentially abusive ''naked'' short selling in both threshold and non-threshold securities. For example, in the September Emergency Order we adopted and made immediately effective a ''naked'' short selling anti-fraud rule, Rule 10b–21, aimed at sellers, including broker-dealers acting for their own accounts, who deceive certain specified persons about their intention or ability to deliver securities in time for settlement and that fail to deliver securities by settlement date.[21] Following the issuance of the September Emergency Order, we adopted final amendments making Rule 10b–21 permanent.[22]

Also, as mentioned above, in the July Emergency Order and the Short Sale Ban Emergency Order, we took emergency action targeting ''naked'' short selling in the securities of certain financial firms that included non-threshold securities. Specifically, on July 15, 2008, we published the July

Release No. 48709 (Oct. 28, 2003), 68 FR 62972, 62975 (Nov. 6, 2003) (''2003 Regulation SHO Proposing Release'') (describing the alleged activity in the case involving stock of Sedona Corporation); 2004 Regulation SHO Adopting Release, 69 FR at 48016, n.76.

[10] According to the National Securities Clearing Corporation (''NSCC''), 99% (by dollar value) of all trades settle within T+3. Thus, on an average day, approximately 1% (by dollar value) of all trades, including equity, debt, and municipal securities fail to settle on time.

[11] 17 CFR 242.200. Regulation SHO became effective on January 3, 2005.

[12] 17 CFR 242.203(b)(1). Rule 203(b)(1) of Regulation SHO requires that, ''A broker or dealer may not accept a short sale order in an equity security from another person, or effect a short sale in an equity security for its own account, unless the broker or dealer has: (i) Borrowed the security, or entered into a bona-fide arrangement to borrow the security; or (ii) Reasonable grounds to believe that the security can be borrowed so that it can be delivered on the date delivery is due; and (iii) Documented compliance with this paragraph (b)(1).'' This is known as the ''locate'' requirement. Market makers engaged in bona fide market making in the security at the time they effect the short sale are excepted from this requirement.

[13] For purposes of Regulation SHO, the term ''participant'' has the same meaning as in section 3(a)(24) of the Exchange Act. *See* 15 U.S.C. 78c(a)(24).

[14] The term ''registered clearing agency'' means a clearing agency, as defined in Section 3(a)(23)(A) of the Exchange Act, that is registered as such pursuant to Section 17A of the Exchange Act. *See* 15 U.S.C. 78c(a)(23)(A) and 78q–1, respectively; *see also* 2004 Regulation SHO Adopting Release, 69 FR at 48031. The majority of equity trades in the United States are cleared and settled through systems administered by clearing agencies registered with the Commission. The National Securities Clearing Corporation (''NSCC'') clears and settles the majority of equity securities trades conducted on the exchanges and in the over-the-counter market. NSCC clears and settles trades through the Continuous Net Settlement (''CNS'') system, which nets the securities delivery and payment obligations of all of its members. NSCC notifies its members of their securities delivery and payment obligations daily. In addition, NSCC guarantees the completion of all transactions and interposes itself as the contraparty to both sides of the transaction.

[15] Rule 203(c)(6) of Regulation SHO defines a ''threshold security'' as any equity security of an issuer that is registered pursuant to Section 12 of the Exchange Act (15 U.S.C. 78*l*) or for which the issuer is required to file reports pursuant to Section 15(d) of the Exchange Act (15 U.S.C. 78o(d)) for which there is an aggregate fail to deliver position for five consecutive settlement days at a registered clearing agency of 10,000 shares or more, and that is equal to at least 0.5% of the issue's total shares outstanding; and is included on a list disseminated to its members by a self-regulatory organization (''SRO''). *See* 17 CFR 242.203(c)(6).

[16] *See* 17 CFR 242.203(b)(3)(iv).

[17] *See* 2007 Regulation SHO Final Amendments, 72 FR 45544. This amendment also contained a one-time phase-in period that provided that previously-grandfathered fails to deliver in a security that was a threshold security on the effective date of the amendment must be closed out within 35 consecutive settlement days from the effective date of the amendment. The phase-in period ended on December 5, 2007.

[18] *See* September Emergency Order, *supra* note 4.

[19] *See* Exchange Act Release No. 58775 (Oct. 14, 2008) (adopting final amendments to Rule 203(b)(3) of Regulation SHO to eliminate the options market maker exception from the rule's close-out requirement) (''2008 Regulation SHO Final Amendments''); *see also* Exchange Act Release No. 56213 (Aug. 7, 2007), 72 FR 45558 (Aug. 14. 2007) (''2007 Regulation SHO Proposed Amendments); Exchange Act Release No. 54154 (July 14, 2006), 71 FR 41710 (July 21, 2006) (''2006 Regulation SHO Proposed Amendments''); Exchange Act Release No. 58107 (July 7, 2008), 73 FR 40201 (July 14, 2008) (''2008 Regulation SHO Re-Opening Release'').

[20] *See* 2008 Regulation SHO Final Amendments, *supra* note 19; *see also* 2008 Regulation SHO Re-Opening Release, 73 FR 40201.

[21] *See* September Emergency Order, *supra* note 4.

[22] *See* Exchange Act Release No. 58774 (Oct. 14, 2008) (''Anti-Fraud Rule Adopting Release''); *see also* Exchange Act Release No. 57511 (March 17, 2008), 73 FR 15376 (March 21, 2008) (''Anti-Fraud Rule Proposing Release'').

Emergency Order[23] that temporarily imposed enhanced requirements on short sales in the publicly traded securities of certain substantial financial firms. The July Emergency Order required that, in connection with transactions in the publicly traded securities of the substantial financial firms identified in Appendix A to the Emergency Order (''Appendix A Securities''), no person could effect a short sale in the Appendix A Securities using the means or instrumentalities of interstate commerce unless such person or its agent had borrowed, or arranged to borrow, the security or otherwise had the security available to borrow in its inventory, prior to effecting such short sale. The July Emergency Order also required that the short seller deliver the security on settlement date, prohibiting any fails to deliver in the Appendix A Securities.[24]

We issued the July Emergency Order because we were concerned that false rumors regarding financial institutions of significance in the U.S. may have fueled market volatility in the securities of some of these institutions. As we noted in the July Emergency Order, false rumors can lead to a loss of confidence in our markets. Such loss of confidence can lead to panic selling, which may be further exacerbated by ''naked'' short selling. As a result, the prices of securities may artificially and unnecessarily decline below the price level that would have resulted from the normal price discovery process. If significant financial institutions are involved, this chain of events can threaten disruption of our markets.[25]

On July 29, 2008, we extended the July Emergency Order after carefully reevaluating the current state of the markets in consultation with officials of the Board of Governors of the Federal Reserve System, the Department of the Treasury, and the Federal Reserve Bank of New York and remaining concerned about the ongoing threat of market disruption and effects on investor confidence.[26] Pursuant to the extension, the July Emergency Order terminated at 11:59 p.m. EDT on August 12, 2008.

Due to our continued concerns regarding recent market conditions and that short selling in the securities of a wider range of financial institutions than those subject to the July Emergency Order may be causing sudden and excessive fluctuations of the prices of such securities that could threaten fair and orderly markets, on September 18, 2008, we issued the Short Sale Ban Emergency Order.[27] The Short Sale Ban Emergency Order temporarily prohibited any person from effecting a short sale in the publicly traded securities of certain financial institutions. On October 2, 2008, we extended the Short Sale Ban Emergency Order due to our continued concerns regarding the ongoing threat of market disruption and investor confidence in the financial markets.[28] Pursuant to the extension, the Short Sale Ban Emergency Order terminated at 11:59 p.m. EDT on October 8, 2008.

Our concerns are no longer limited to just the financial institutions that were the subject of the July Emergency Order and the Short Sale Ban Emergency Order. Given the importance of confidence in our financial markets as a whole, we have become concerned about sudden and unexplained declines in the prices of equity securities generally. These concerns resulted in our adopting and making immediately effective in the September Emergency Order the enhanced delivery requirements contained in temporary Rule 204T.[29] For the reasons explained in detail herein, today we are adopting the temporary rule as set forth in the September Emergency Order, with modifications to address technical and operational concerns resulting from the requirements of the temporary rule.

III. Concerns About ''Naked'' Short Selling

We have been concerned about ''naked'' short selling and, in particular, abusive ''naked'' short selling, for some time. As discussed above, such concerns were a primary reason for our adoption of Regulation SHO in 2004, the elimination of the ''grandfather'' and options market maker exceptions to Regulation SHO's close-out requirement, the adoption of a ''naked'' short selling antifraud rule, and our recent issuance of the July Emergency Order, Short Sale Ban Emergency Order, and the September Emergency Order.

Despite these Commission actions, due to our continuing concerns about the potential impact of ''naked'' short selling on the weakened financial markets, we believe it is necessary to immediately adopt as an interim final temporary rule, temporary rule 204T, with some modifications to address technical and operational concerns resulting from the rule's requirements as set forth in the September Emergency Order. We believe that adoption of temporary rule 204T as an interim final temporary rule is necessary to further address abusive ''naked'' short selling and, therefore, fails to deliver resulting from such short sales, in all equity securities. As we have stated on several prior occasions, we believe that all sellers of securities should promptly deliver, or arrange for delivery of, securities to the respective buyer and all buyers of securities have a right to expect prompt delivery of securities purchased.[30] In addition, as we have stated on several prior occasions, we are concerned about the negative effect that fails to deliver may have on the markets and shareholders.[31]

For example, large and persistent fails to deliver may deprive shareholders of the benefits of ownership, such as voting and lending.[32] In addition, where a seller of securities fails to deliver securities on settlement date, in effect the seller unilaterally converts a securities contract (which is expected to settle within the standard three-day settlement period) into an undated futures-type contract, to which the buyer might not have agreed, or that might have been priced differently.[33] Moreover, sellers that fail to deliver securities on settlement date may attempt to use this additional freedom to engage in trading activities to improperly depress the price of a security. For example, by not borrowing securities and, therefore, not making delivery within the standard three-day settlement period, the seller does not incur the costs of borrowing.

[23] *See supra* note 1.

[24] *See id.*

[25] We delayed the effective date of the July Emergency Order to July 21, 2008 to create the opportunity to address, and to allow sufficient time for market participants to make, adjustments to their operations to implement the enhanced requirements. Moreover, in addressing anticipated operational accommodations necessary for implementation of the July Emergency Order, we issued an amendment to the July Emergency Order on July 18, 2008. *See* Exchange Act Release No. 58190 (July 18, 2008) (excepting from the July Emergency Order bona fide market makers, short sales in Appendix A Securities sold pursuant to Rule 144 of the Securities Act of 1933, and certain short sales by underwriters, or members of a syndicate or group participating in distributions of Appendix A Securities).

[26] *See* Exchange Act Release No. 58248 (July 29, 2008), 73 FR 45257 (Aug. 4, 2008).

[27] *See* supra note 2.

[28] *See* Exchange Act Release No. 58723 (Oct. 2, 2008) (stating that the Short Sale Ban Emergency Order would terminate the earlier of (i) three business days from the President's signing of the Emergency Economic Stabilization Act of 2008 (H.R. 1424), or (ii) 11:59 p.m. E.D.T. on Friday, October 17, 2008).

[29] *See* September Emergency Order, *supra* note 4.

[30] *See, e.g.*, Anti-Fraud Rule Proposing Release, 73 FR at 15376.

[31] *See, e.g.*, 2007 Regulation SHO Final Amendments, 72 FR at 45544; 2006 Regulation SHO Proposed Amendments, 71 FR at 41712; 2007 Regulation SHO Proposed Amendments, 72 FR at 45558–45559; Anti-Fraud Rule Proposing Release, 73 FR at 15378.

[32] *See id.*

[33] *See id.*

In addition, issuers and investors have repeatedly expressed concerns about fails to deliver in connection with manipulative ''naked'' short selling. For example, in response to proposed amendments to Regulation SHO in 2006 [34] designed to further reduce the number of persistent fails to deliver in certain equity securities by eliminating Regulation SHO's ''grandfather'' exception, and limiting the duration of the rule's options market maker exception, we received a number of comments that expressed concerns about ''naked'' short selling and extended delivery failures.[35] Commenters continued to express these concerns in response to proposed amendments to eliminate the options market maker exception to the close-out requirement of Regulation SHO in 2007.[36]

To the extent that fails to deliver might be part of manipulative ''naked'' short selling, which could be used as a tool to drive down a company's stock price,[37] such fails to deliver may undermine the confidence of investors.[38] These investors, in turn, may be reluctant to commit capital to an issuer they believe to be subject to such manipulative conduct.[39] In addition, issuers may believe that they have suffered unwarranted reputational damage due to investors' negative perceptions regarding fails to deliver in the issuer's security.[40] Unwarranted reputational damage caused by fails to deliver might have an adverse impact on the security's price.[41]

IV. Discussion of Temporary Rule 204T

A. Rule 204T's Close-Out Requirement

In these unusual and extraordinary times and in an effort to prevent substantial disruption to the securities markets, we have concluded that it is necessary to immediately adopt as an interim final temporary rule, temporary rule Rule 204T, with some modifications to address technical and operational concerns resulting from the rule's requirements as set forth in the September Emergency Order. We believe that adoption of the temporary rule will substantially restrict the practice of potentially abusive ''naked'' short selling in all equity securities by strengthening the delivery requirements for such securities.[42]

Specifically, temporary Rule 204T(a) provides that a participant of a registered clearing agency must deliver securities to a registered clearing agency for clearance and settlement on a long or short sale in any equity security by settlement date, or if a participant of a registered clearing agency has a fail to deliver position at a registered clearing agency in any equity security for a long or short sale transaction in that equity security, the participant shall, by no later than the beginning of regular trading hours [43] on the settlement day [44] following the settlement date, immediately close out the fail to deliver position by borrowing or purchasing securities of like kind and quantity.[45]

Temporary Rule 204T(a)'s close-out requirement requires a participant of a registered clearing agency that has a fail to deliver position at a registered clearing agency on the settlement date for a transaction to immediately borrow or purchase securities to close out the amount of the fail to deliver position by no later than the beginning of regular trading hours on the settlement day following the settlement date (the ''Close-Out Date''). This close-out requirement requires that the participant take affirmative action to purchase or borrow securities. Thus, a participant may not offset the amount of its settlement date fail to deliver position with shares that the participant receives or will receive on the Close-Out

[34] *See* 2006 Regulation SHO Proposed Amendments, 71 FR 41710.

[35] *See, e.g.*, letter from Patrick M. Byrne, Chairman and Chief Executive Officer, Overstock.com, Inc., dated Sept. 11, 2006; letter from Daniel Behrendt, Chief Financial Officer, and Douglas Klint, General Counsel, TASER International, dated Sept. 18, 2006; letter from John Royce, dated April 30, 2007; letter from Michael Read, dated April 29, 2007; letter from Robert DeVivo, dated April 26, 2007; letter from Ahmed Akhtar, dated April 26, 2007.

[36] *See, e.g.*, letter from Jack M. Wedam, dated Oct. 16, 2007; letter from Michael J. Ryan, Executive Director and Senior Vice President, Center for Capital Markets Competitiveness, U.S. Chamber of Commerce, dated Sept. 13, 2007 (''U.S. Chamber of Commerce''); letter from Robert W. Raybould, CEO Enteleke Capital Corp., dated Sept. 12, 2007 (''Raybould''); letter from Mary Helburn, Executive Director, National Coalition Against Naked Shorting, dated Sept. 11, 2007 (''NCANS'').

[37] *See supra* note 9 (discussing a case in which we alleged that the defendants profited from engaging in massive ''naked'' short selling that flooded the market with the company's stock, and depressed its price); *see also S.E.C.* v. *Gardiner,* 48 S.E.C. Docket 811, No. 91 Civ. 2091 (S.D.N.Y. March 27, 1991) (alleged manipulation by sales representative by directing or inducing customers to sell stock short in order to depress its price); *U.S.* v. *Russo,* 74 F.3d 1383, 1392 (2d Cir. 1996) (short sales were sufficiently connected to the manipulation scheme as to constitute a violation of Exchange Act Section 10(b) and Rule 10b–5).

[38] In response to the 2007 Regulation SHO Proposed Amendments, we received comment letters discussing the impact of fails to deliver on investor confidence. *See, e.g.*, letter from NCANS. Commenters expressed similar concerns in response to the 2006 Regulation SHO Proposed Amendments. *See, e.g.*, letter from Mary Helburn, Executive Director, National Coalition Against Naked Shorting, dated Sept. 30, 2006 (''NCANS (2006)''); letter from Richard Blumenthal, Attorney General, State of Connecticut, dated Sept. 19, 2006 (''Blumenthal'').

[39] In response to the 2007 Regulation SHO Proposed Amendments, we received comment letters expressing concern about the impact of potential ''naked'' short selling on capital formation, claiming that ''naked'' short selling causes a drop in an issuer's stock price and may limit the issuer's ability to access the capital markets. *See, e.g.*, letter from Robert K. Lifton, Chairman and CEO, Medis Technologies, Inc., dated Sept. 12, 2007 (''Medis''); letter from NCANS. Commenters expressed similar concerns in response to the 2006 Regulation SHO Proposed Amendments. *See, e.g.*, letter from Congressman Tom Feeney—Florida, U.S. House of Representatives, dated Sept. 25, 2006 (''Feeney''); *see also* letter from Zix Corporation, dated Sept. 19, 2006 (''Zix'') (stating that ''[m]any investors attribute the Company's frequent re-appearances on the Regulation SHO list to manipulative short selling and frequently demand that the Company ''do something'' about the perceived manipulative short selling. This perception that manipulative short selling of the Company's securities is continually occurring has undermined the confidence of many of the Company's investors in the integrity of the market for the Company's securities.'').

[40] Due in part to such concerns, some issuers have taken actions to attempt to make transfer of their securities ''custody only,'' (*i.e.*, certificating the securities and prohibiting ownership by a securities intermediary) thus preventing transfer of their stock to or from securities intermediaries such as the Depository Trust Company (''DTC'') or broker-dealers. *See* Exchange Act Release No. 48709 (Oct. 28, 2003), 68 FR 62972, at 62975 (Nov. 6, 2003). Some issuers have attempted to withdraw their issued securities on deposit at DTC in order to make the securities ineligible for book-entry transfer at a securities depository. *See id.* Withdrawing securities from DTC or requiring custody-only transfers would undermine the goal of a national clearance and settlement system designed to reduce the physical movement of certificates in the trading markets. *See id.* We note, however, that in 2003 the Commission approved a DTC rule change clarifying that its rules provide that only its participants may withdraw securities from their accounts at DTC, and establishing a procedure to process issuer withdrawal requests. *See* Exchange Act Release No. 47978 (June 4, 2003), 68 FR 35037 (June 11, 2003).

[41] *See* 2006 Regulation SHO Proposed Amendments, 71 FR at 41712; 2007 Regulation SHO Amendments, 72 FR at 45544; 2007 Regulation SHO Proposed Amendments, 72 FR at 45558–45559; Anti-Fraud Rule Proposing Release, 73 FR at 15378 (providing additional discussion of the impact of fails to deliver on the market); *see also* Exchange Act Release No. 48709 (Oct. 28, 2003), 68 FR 62972, 62975 (Nov. 6, 2003) (discussing the impact of ''naked'' short selling on the market).

[42] As noted above, in a ''naked'' short sale, the short seller does not borrow or arrange to borrow securities in time to make delivery to the buyer within the standard three-day settlement period. As a result, the seller fails to deliver securities to the buyer when delivery is due. *See supra* note 7 and supporting text.

[43] ''Regular trading hours'' has the same meaning as in Rule 600(b)(64) of Regulation NMS. Rule 600(b)(64) provides that ''*Regular trading hours* means the time between 9:30 a.m. and 4 p.m. Eastern Time, or such other time as is set forth in the procedures established pursuant to § 242.605(a)(2).''

[44] The term ''settlement day'' is defined in Rule 203(c)(5) of Regulation SHO as: ''* * * any business day on which deliveries of securities and payments of money may be made through the facilities of a registered clearing agency.'' 17 CFR 242.203(c)(5).

[45] *See* temporary Rule 204T(a).

Date.[46] To meet its close-out obligation a participant also must be able to demonstrate on its books and records that on the Close-Out Date it purchased or borrowed shares in the full quantity of its settlement date fail to deliver position and, therefore, that the participant has a net flat or net long position on its books and records in that equity security on the Close-Out Date.

The temporary rule defines a ''settlement date'' as ''the business day on which delivery of a security and payment of money is to be made through the facilities of a registered clearing agency in connection with the sale of a security.'' [47] This definition is consistent with Rule 15c6–1 that prohibits broker-dealers from effecting or entering into a contract for the purchase or sale of a security that provides for payment of funds and delivery of securities later than the third business day after the date of the contract unless otherwise expressly agreed to by the parties at the time of the transaction.[48]

Because most transactions settle by T+3 and because delivery on all sales should be made by settlement date, participants should consider having in place policies and procedures to help ensure that delivery is being made by settlement date. We intend to examine participants' policies and procedures to determine whether such policies and procedures monitor for delivery by settlement date.[49]

Similar to the existing close-out requirement of Rule 203(b)(3) of Regulation SHO, the temporary rule is based on a participant's fail to deliver position at a registered clearing agency. As noted above, the NSCC clears and settles the majority of equity securities trades conducted on the exchanges and in the over-the-counter markets. NSCC clears and settles trades through the CNS system, which nets the securities delivery and payment obligations of all of its members. NSCC notifies its members of their securities delivery and payment obligations daily. Because the temporary rule is based on a participant's fail to deliver position at a registered clearing agency, the temporary rule is consistent with current settlement practices and procedures and with the Regulation SHO framework regarding delivery of securities.[50]

In addition, similar to Rule 203(b)(3)(vi) of Regulation SHO, the temporary rule provides that a participant may reasonably allocate its responsibility to close out a fail to deliver position to another broker-dealer from which the participant receives trades for clearance or settlement.[51] Specifically, temporary Rule 204T(d) provides that if a participant of a registered clearing agency reasonably allocates a portion of a fail to deliver position to another registered broker or dealer for which it clears trades or from which it receives trades for settlement, based on such broker's or dealer's short position, the provisions of Rule 204T(a) and (b) relating to such fail to deliver position shall apply to such registered broker or dealer that was allocated the fail to deliver position, and not to the participant.[52]

Thus, participants that are able to identify the accounts of broker-dealers for which they clear or from which they receive trades for settlement, could allocate the responsibility to close out the fail to deliver position to the particular broker-dealer account(s) whose trading activities have caused the fail to deliver position provided the allocation is reasonable (*e.g.*, the allocation must be timely). Absent such identification, however, the participant would remain subject to the close-out requirement.

Unlike Rule 203(b)(3)(vi) of Regulation SHO, temporary Rule 204T(d) imposes an additional notification requirement on a broker-dealer that has been allocated responsibility for complying with the rule's requirements. Specifically, temporary Rule 204T(d) provides that a broker or dealer that has been allocated a portion of a fail to deliver position that does not comply with the provisions of temporary Rule 204T(a) must immediately notify the participant that it has become subject to the borrowing requirements of temporary Rule 204T(b).[53] We are adopting this notification requirement so that participants will know when a broker-dealer for which they clear and settle trades has become subject to the temporary rule's borrowing requirements.

The temporary rule also differs from the current close-out requirement of Regulation SHO in that it applies to fails to deliver in all equity securities rather than only to those securities with a large and persistent level of fails to deliver, *i.e.*, threshold securities. A primary purpose of the temporary rule is to prevent the use of ''naked'' short selling as part of a manipulative scheme. To achieve this purpose, the rule must apply to all equity securities, regardless of the level or persistence of any fails to deliver in such securities. In addition, as discussed above, we believe that all sellers of securities should promptly deliver, or arrange for delivery of, securities to the respective buyer and all buyers of securities have a right to expect prompt delivery of securities purchased. We believe this should be the case for sales in all equity securities and are adopting this temporary rule to further that goal.

Regulation SHO, as adopted in 2004, was a first step in trying to reduce persistent fails to deliver and address abusive ''naked'' short selling. In Regulation SHO, we took a targeted approach, imposing additional delivery requirements on securities with a substantial and persistent amount of fails to deliver. As we stated in the 2004 Regulation SHO Adopting Release, we took this targeted approach at that time in an effort not to burden the vast majority of securities where there are not similar concerns regarding settlement.[54] In addition, Regulation SHO's close-out requirement was adopted to address potential abuses that may occur with large, extended fails to deliver.[55] We also noted in the 2004 Regulation SHO Adopting Release, however, that we would pay close attention to the operation and efficacy of

[46] In determining its close-out obligation, a participant may rely on its net delivery obligation as reflected in its notification from NSCC regarding its securities delivery and payment obligations, provided such notification is received prior to the beginning of regular trading hours on the Close-Out Date.

[47] *See* temporary Rule 204T(f)(1).

[48] *See* 17 CFR 240.15c6–1.

[49] Of course, broker-dealers must comply with any applicable SRO policies and procedures requirements. For example, NASD Rule 3010 contains, among other things, written procedures requirements for member firms.

[50] *See* 17 CFR 242.203(b)(3) (Regulation SHO's close-out requirement). Consistent with current industry practice under Regulation SHO, with respect to a net syndicate short position created in connection with a distribution of a security that is part of a fail to deliver position at a registered clearing agency, the requirements of temporary Rule 204T shall not apply provided action is taken to close out the net syndicate short position by no later than the beginning of regular trading hours on the thirtieth day after commencement of sales in the distribution. *See e.g.*, Exchange Act Release No. 58190 (July 18, 2008) (amending the July Emergency Order to provide an exception from its requirements for fails to deliver in connection with syndicate offerings).

[51] *See* 17 CFR 242.203(b)(3)(vi). Rule 203(b)(3)(vi) provides that ''[i]f a participant of a registered clearing agency reasonably allocates a portion of a fail to deliver position to another registered broker or dealer for which it clears trades or for which it is responsible for settlement, based on such broker or dealer's short position, then the provisions of this paragraph (b)(3) relating to such fail to deliver position shall apply to the portion of such registered broker or dealer that was allocated the fail to deliver position, and not to the participant.''

[52] *See* temporary Rule 204T(d).

[53] *See id.*

[54] *See* 2004 Regulation SHO Adopting Release, 69 FR at 48016.

[55] *See id.* at 48017.

the provisions we were adopting at that time and would consider whether any further action was warranted.[56]

Because of continued concerns about the potentially negative market impact of fails to deliver, and the fact that through our monitoring of the efficacy of Regulation SHO's close-out requirement we continued to observe threshold securities with fail to deliver positions that are not being closed out under existing delivery and settlement requirements, we eliminated the ''grandfather'' and options market maker exceptions to Regulation SHO's close-out requirements.[57]

However, we are concerned that Regulation SHO's current provisions have not gone far enough in reducing fails to deliver and addressing potentially abusive ''naked'' short selling.[58] More is needed to reduce fails to deliver and to address potentially abusive ''naked'' short selling, especially in light of the current instability and lack of investor confidence in the financial markets.[59] In addition, because Regulation SHO's close-out requirement applies only to threshold securities, fails to deliver in non-threshold securities never have to be closed out.[60] We believe that adoption of temporary rule 204T as an interim final temporary rule is necessary to curtail fails to deliver in both threshold and non-threshold securities to further address abusive ''naked'' short selling in such securities.

As discussed above, due to our concerns about potentially abusive ''naked'' short selling in certain non-threshold securities, we recently issued the July Emergency Order to temporarily impose enhanced requirements on short sales in the Appendix A Securities. Following our issuance of the July Emergency Order, we issued the Short Sale Ban Emergency Order in which we took the additional step of prohibiting short selling in the securities of a wider range of financial institutions than those subject to the July Emergency Order. In addition, we issued the September Emergency Order which, in part, imposed enhanced delivery requirements for transactions in all equity securities and made effective immediately a ''naked'' short selling antifraud rule. We took these emergency actions because we were concerned about panic selling in securities due to a loss of confidence that could be further exacerbated by ''naked'' short selling.

Following the issuance of the July Emergency Order, members of the public have repeatedly expressed their concerns about a loss of confidence in the financial markets.[61] In addition, since the termination of the July Emergency Order and the issuance of the Short Sale Ban Emergency Order and the September Emergency Order, we have continued our evaluation of the markets and our discussions with the Federal Reserve, Treasury, and the Federal Reserve Bank of New York regarding the state of the financial markets. In light of these processes, we have determined that we must take action to adopt as an interim final temporary rule, temporary Rule 204T, to substantially restrict ''naked'' short selling in all equity securities. As with the July Emergency Order, the Short Sale Ban Emergency Order, and the September Emergency Order, we are adopting this temporary rule as a preventative step to help restore market confidence.

In addition to applying the temporary rule to fails to deliver in all equity securities, rather than just threshold securities, the temporary rule also differs from the close-out requirement of Rule 203(b)(3) of Regulation SHO in that it shortens the close-out period for such fails to deliver.[62] For the reasons discussed below, rather than requiring close out of a fail to deliver position within thirteen consecutive settlement days (or 10 days after settlement date), temporary Rule 204T requires a participant to immediately purchase or borrow shares to close out a fail to deliver position by no later than the beginning of regular trading hours on the settlement day following the day on which the fail to deliver position occurs.

As noted above, trades in most securities generally settle within a three-day settlement cycle, known as T+3 (or ''trade date plus three days''). T+3 means that when a trade occurs, the participants to the trade are expected to deliver and pay for the security at a clearing agency three settlement days after the trade is executed so the brokerage firm can exchange those funds for the securities on that third business day. The three-day settlement period applies to most security transactions, including stocks, bonds, municipal securities, mutual funds traded through a brokerage firm, and limited partnerships that trade on an exchange. Government securities and stock options typically settle on the next business day following the trade (or T+1).[63] We believe that delivery on all sales should be made by settlement date and, therefore, in temporary Rule 204T we are requiring that fails to deliver in all equity securities be closed out by no later than the beginning of regular trading hours on the Close-Out Date.

In the 2004 Regulation SHO Adopting Release we stated we were adopting a thirteen consecutive settlement day close-out requirement in part because the close-out requirement applied to fails to deliver resulting from long and short sales in threshold securities, and extending the time period to ten days after settlement date for a transaction would make the close-out requirement consistent with Rule 15c3–3(m).[64] In addition, we noted in that release that ten days after settlement was also the timeframe used at that time in NASD Rule 11830.[65] We also acknowledged that a shorter timeframe, such as two days after settlement, may capture many

[56] *See id.* at 48018.

[57] On June 13, 2007, we adopted amendments to eliminate the ''grandfather'' exception to Regulation SHO's close-out requirement. On September 17, 2008, in the September Emergency Order, we adopted amendments to eliminate the options market maker exception, which amendments were subsequently made permanent. *See supra* notes 17, 18 and 19.

[58] *See, e.g.*, 2007 Regulation SHO Final Amendments, 72 FR 45544 (eliminating the ''grandfather'' exception to Regulation SHO's close-out requirement due to our observing continued fails to deliver in threshold securities); 2008 Regulation SHO Final Amendments, *supra* note 19 (eliminating the options market maker exception to Regulation SHO's close-out requirement due to substantial levels of fails to deliver continuing to persist in optionable threshold securities).

[59] *See, e.g.*, letter from Leland Chan, General Counsel, California Bankers Association, dated Aug. 21, 2008; letter from Eric C. Jensen, Esq., Cooley Godward Kronish L.P., dated Aug. 21, 2008; letter from Steven B. Boehm and Cynthia M. Krus, Sutherland Asbill Brennan LLP, dated July 31, 2008; letter from James J. Angel, Professor of Finance, Georgetown University, McDonough School of Business, dated Aug. 20, 2008; letter from Tuan Nguyen, dated Aug. 8, 2008.

[60] OEA estimates that fails to deliver in non-threshold securities averaged approximately 624 million shares or $4.6 billion in value per day from January to July 2008. These fails account for approximately 54.5% (56.6%) of all fail to deliver shares (by dollar value).

[61] *See, e.g.*, letter from Tom Donohue, President, U.S. Chamber of Commerce, dated July 15, 2008; letter from Ron Heller, dated July 21, 2008; letter from Ronald L. Rourk, dated July 21, 2008; letter from Wayne Jett, Managing Principal and Chief Economist at Classical Capital, LLC, dated July 24, 2008; letter from Edward Herlilhy and Theodore Levine, Wachtell, Lipton, Rosen and Katz, LLP, dated Sept. 16, 2008; letter from Sen. Hillary Rodham Clinton, dated Sept. 17, 2008; letter from Representative D. Burton, dated Sept. 18, 2008; letter from Elliott Bossen, Chief Investment Officer at Silverback Asset Management, dated Sept. 24, 2008.

[62] Rule 203(b)(3) of Regulation SHO provides: ''If a participant of a registered clearing agency has a fail to deliver position at a registered clearing agency in a threshold security for thirteen consecutive settlement days, the participant shall immediately thereafter close out the fail to deliver position by purchasing securities of like kind and quantity.'' *See* 17 CFR 242.203(b)(3).

[63] *See supra* note 8.

[64] *See* 17 CFR 240.15c3–3(m).

[65] *See* 2004 Regulation SHO Adopting Release, 69 FR at 48017, n.93.

instances of ordinary course settlement delays.[66]

In addition, we have stated previously that the vast majority of fails to deliver are closed out within five days after T+3.[67] In addition, a recent analysis by our Office of Economic Analysis found that more than half of all fails to deliver and more than 70% of all fail to deliver positions are closed out within two settlement days after T+3.[68] Although this information shows that delivery is being made, it demonstrates that often delivery is not being made until several days following the standard three-day settlement cycle. In addition, the current close-out requirement for threshold securities under Regulation SHO and the lack of any close-out requirement for non-threshold securities under Regulation SHO enables fails to deliver to persist for many days beyond settlement date. We believe that allowing fails to deliver to extend out beyond settlement date for a transaction is too long.

We have continuously monitored the extent of fails to deliver and abusive ''naked'' short selling in the markets. We believe that allowing fails to deliver in all equity securities to persist for thirteen consecutive settlement days (10 days after settlement date) if such securities are threshold securities, or indefinitely if such securities are not threshold securities, is too long. As discussed above, fails to deliver may be indicative of a scheme to manipulate the price of a security. In addition, we are concerned about the negative effect that fails to deliver and potentially abusive ''naked'' short selling may have on the market and the broader economy, including on investor confidence. Temporary Rule 204T addresses these concerns by requiring a participant to immediately close out a fail to deliver position by purchasing or borrowing securities by no later than the beginning of regular trading hours on the Close-Out Date.

We believe we should act to require earlier close out so that more sales settle by settlement date. Indeed, we believe that delivery on all sales should be made by settlement date. As we discuss above, and as we have stated on several prior occasions, we believe that all sellers of securities should promptly deliver, or arrange for delivery of, securities to the respective buyer and all buyers of securities have a right to expect prompt delivery of securities purchased.[69] Although the temporary rule's close-out requirement may capture some instances of ordinary course settlement delays, we believe that the temporary rule's close-out requirement is necessary to help ensure that fails to deliver in all equity securities settle by settlement date. In addition, as discussed above, due to our belief that delivery should be made by settlement date, participants should consider having policies and procedures in place to monitor for the delivery of securities by settlement date.

We understand, however, that fails to deliver may occur from long sales within the first two settlement days after settlement date for legitimate reasons. For example, human or mechanical errors or processing delays can result from transferring securities in custodial or other form rather than book-entry form, thereby causing a fail to deliver on a long sale within the normal three-day settlement period.

Thus, temporary Rule 204T(a)(1) includes an exception from the temporary rule's close-out requirement for fail to deliver positions resulting from long sales of all equity securities. Specifically, temporary Rule 204T(a)(1) provides that if a participant of a registered clearing agency has a fail to deliver position at a registered clearing agency in any equity security and the participant can demonstrate on its books and records that such fail to deliver position resulted from a long sale, the participant shall by no later than the beginning of regular trading hours on the third consecutive settlement day following the settlement date, immediately close out the fail to deliver position by purchasing securities of like kind and quantity.[70]

B. Borrowing Requirements

If a participant does not purchase or borrow shares, as applicable, to close out a fail to deliver position in accordance with temporary Rule 204T, the participant violates the close-out requirement of the temporary rule. In addition, the temporary rule imposes on the participant for its own trades and on all broker-dealers from which that participant receives trades for clearance and settlement (including introducing and executing brokers), a requirement to borrow or arrange to borrow securities prior to accepting or effecting further short sales in that security.

Specifically, temporary Rule 204T(b) provides that the participant and any broker or dealer from which it receives trades for clearance and settlement, including any market maker that is otherwise entitled to rely on the exception provided in Rule 203(b)(2)(iii) of Regulation SHO,[71] may not accept a short sale order in an equity security from another person, or effect a short sale order in such equity security for its own account, to the extent that the broker or dealer submits its short sales to that participant for clearance and settlement, without first borrowing the security, or entering into a bona-fide arrangement to borrow the security, until the participant closes out the fail to deliver position by purchasing securities of like kind and quantity and that purchase has cleared and settled at a registered clearing agency.[72]

The borrow requirements of temporary Rule 204T(b) are consistent with the requirements of Rule 203(b)(3)(iv) of Regulation SHO for a participant that has not closed out a fail to deliver position in a threshold security that has persisted for thirteen consecutive settlement days.[73] Similar to Regulation SHO, the temporary rule is aimed at addressing potentially abusive ''naked'' short selling. To that end, we believe it is appropriate to include in the temporary rule borrow requirements for broker-dealers,

[66] *See id.*

[67] *See, e.g.*, 2007 Regulation SHO Final Amendments, 72 FR at 45544, n.5.

[68] OEA's analysis examined the period from January to July 2008 and used the age of the fail to deliver position as reported by the NSCC. The NSCC data included only securities with at least 10,000 shares in fails to deliver. We note that these numbers included securities that were not subject to the close-out requirement in Rule 203(b)(3) of Regulation SHO, which applies only to ''threshold securities'' as defined in Rule 203(c)(6) of Regulation SHO.

[69] *See supra* note 30.

[70] *See* temporary Rule 204T(a)(1). We note that if a person that has loaned a security to another person sells the security and a bona fide recall of the security is initiated within two business days after trade date, the person that has loaned the security will be ''deemed to own'' the security for purposes of Rule 200(g)(1) of Regulation SHO, and such sale will not be treated as a short sale for purposes of temporary Rule 204T. In addition, a broker-dealer may mark such orders as ''long'' sales provided such marking is also in compliance with Rule 200(c) of Regulation SHO. Thus, the close-out requirement of temporary Rule 204T(a)(1) applies to sales of such securities.

[71] *See* 17 CFR 242.203(b)(2)(iii) (providing an exception from Regulation SHO's ''locate'' requirement for short sales effected by a market maker in connection with bona fide market making activities in the securities for which the exception is claimed).

[72] *See* temporary Rule 204T(b).

[73] *See* 17 CFR 242.203(b)(3)(iv). Rule 203(b)(3)(iv) of Regulation SHO provides that ''[i]f a participant of a registered clearing agency has a fail to deliver position at a registered clearing agency in a threshold security for thirteen consecutive settlement days, the participant and any broker or dealer for which it clears transactions, including any market maker that would otherwise be entitled to rely on the exception provided in paragraph (b)(2)(iii) of this section, many not accept a short sale order in the threshold security from another person, or effect a short sale in the threshold security for its own account, without borrowing the security or entering into a bona fide arrangement to borrow the security, until the participant closes out the fail to deliver position by purchasing securities of like kind and quantity.''

including participants, that sell short a security that has a fail to deliver position that has not been closed out in accordance with the requirements of the temporary rule. We believe that the borrow requirements of temporary Rule 204T(b) will further our goal of limiting fails to deliver and addressing abusive ''naked'' short selling by promoting the prompt and accurate clearance and settlement of securities transactions. By requiring that participants and broker-dealers from which they receive trades for clearance and settlement borrow or arrange to borrow securities prior to accepting or effecting short sales in the security that has a fail to deliver position that has not been closed out, the temporary rule will help to ensure that shares will be available for delivery on the short sale by settlement date and, thereby, help to avoid additional fails to deliver occurring in the security.

Unlike the borrow requirements of Rule 203(b)(3)(iv) of Regulation SHO, however, the borrow requirements of the temporary rule specify that participants must notify all broker-dealers from which they receive trades for clearance and settlement that a fail to deliver position has not been closed out in accordance with temporary Rule 204T. Specifically, temporary Rule 204T(c) provides that the participant must notify any broker or dealer from which it receives trades for clearance and settlement, including any market maker that is otherwise entitled to rely on the exception provided in Rule 203(b)(2)(iii) of Regulation SHO,[74] (a) that the participant has a fail to deliver position in an equity security at a registered clearing agency that has not been closed out in accordance with the requirements of temporary Rule 204T, and (b) when the purchase that the participant has made to close out the fail to deliver position has cleared and settled at a registered clearing agency.[75]

We are including this notification requirement in temporary Rule 204T(c) so that all broker-dealers that submit trades for clearance and settlement to a participant that has a fail to deliver position in a security that has not been closed out in accordance with temporary Rule 204T will be on notice that short sales in that security to be cleared or settled through that participant will be subject to the borrow requirements of temporary Rule 204T(b) until the fail to deliver position has been closed out.

The temporary rule, however, includes an exception from the borrowing requirements for any broker-dealer that can demonstrate that it was not responsible for any part of the fail to deliver position of the participant. Specifically, temporary Rule 204T(b)(1) provides that a broker or dealer shall not be subject to the requirements of temporary Rule 204T(b) if the broker or dealer timely certifies to the participant that it has not incurred a fail to deliver position on settlement date for a long or short sale in an equity security for which the participant has a fail to deliver position at a registered clearing agency or that the broker or dealer is in compliance with the requirements of temporary Rule 204T(e).[76] We have included this exception because we do not believe that a broker-dealer should be subject to the borrowing requirements of the temporary rule if the broker-dealer can demonstrate that it did not incur a fail to deliver position in the security on settlement date.

In addition, as noted above, the temporary rule provides that a participant may reasonably allocate (*e.g.*, the allocation must be timely) its responsibility to close out a fail to deliver position to another broker-dealer for which the participant clears or from which the participant receives trades for settlement. Thus, to the extent that the participant can identify the broker-dealer(s) that have contributed to the fail to deliver position, and the participant has reasonably allocated the close-out obligation to the broker-dealer(s), the requirement to borrow or arrange to borrow prior to effecting further short sales in that security will apply to only those particular broker-dealer(s).

C. Pre-Fail Credit

To avoid the borrow or arrangement to borrow requirement of temporary Rule 204T(a), a participant could close-out the fail by borrowing and delivering securities sufficient to close-out the fail to deliver position prior to the beginning of regular trading hours on the Close-Out Date. If, however, the participant does not succeed in eliminating the fail to deliver position the participant can only close out that position by immediately borrowing or purchasing securities to close out the fail to deliver position by no later than the beginning of regular trading hours on the Close-Out Date in accordance with temporary Rule 204T.

To encourage close outs of fail to deliver positions prior to the Close-Out Date, similar to the September Emergency Order,[77] temporary Rule 204T(e) provides that a broker-dealer can satisfy the temporary rule's close-out requirement by purchasing securities in accordance with the conditions of that provision (*i.e.*, broker-dealers will receive ''pre-fail credit'' for the purchase). Specifically, temporary Rule 204T(e) provides that even if a participant of a registered clearing agency has not closed out a fail to deliver position at a registered clearing agency in accordance with temporary Rule 204T(a), or has not allocated a fail to deliver position to a broker or dealer in accordance with temporary Rule 204T(d), a broker or dealer shall not be subject to the requirements of paragraphs (a) or (b) of the temporary rule if the broker or dealer purchases securities prior to the beginning of regular trading hours on the Close-Out Date for a long or short sale to close out an open short position, and if:

(1) The purchase is bona fide;

(2) The purchase is executed on, or after, trade date but by no later than the end of regular trading hours on settlement date for the transaction;

(3) The purchase is of a quantity of securities sufficient to cover the entire amount of the open short position; and

(4) The broker or dealer can demonstrate that it has a net long position or net flat position on its books and records on the settlement day for which the broker or dealer is seeking to demonstrate that it has purchased shares to close out its open short position.

To receive pre-fail credit under temporary Rule 204T(e), the purchase must be ''bona fide.'' Thus, where a broker-dealer enters into an arrangement with another person to purchase securities, and the broker-dealer knows or has reason to know that the other person will not deliver securities in settlement of the transaction, the purchase will not be considered to be ''bona fide.''[78] In addition, the purchase

[74] *See* 17 CFR 203(b)(2)(iii) (providing for an exception from the ''locate'' requirement for market makers engaged in bona fide market making in that security at the time of the short sale).

[75] *See* temporary Rule 204T(c).

[76] *See* temporary Rule 204T(b)(1). Temporary Rule 204T(e) is discussed in detail below in Section IV.C.

[77] *See* Exchange Act Release No. 58711 (Oct. 1, 2008) (stating that in connection with extending the September Emergency Order, the Commission incorporates and adopts the Division of Trading and Markets: Guidance Regarding the Commission's Emergency Order Concerning Rules to Protect Investors Against ''Naked'' Short Selling Abuses and the Division of Trading and Markets Guidance Regarding Sale of Loaned but Recalled Securities).

[78] *See* 17 CFR 203(b)(3)(vii) (discussing bona fide purchases for purposes of Regulation SHO). It is possible under Regulation SHO that a close out by a participant of a registered clearing agency may result in a fail to deliver position at another participant if the counterparty from which the participant purchases securities fails to deliver. However, Regulation SHO prohibits a participant of

must be of a quantity of securities sufficient to cover the entire amount of the open short position.[79]

Temporary Rule 204T(e) also requires that to receive pre-fail credit, the purchase must be executed on, or after, trade date but by no later than the end of regular trading hours on the settlement date of the transaction that resulted in the fail to deliver position at a registered clearing agency.[80] The purpose of this provision is to encourage broker-dealers to close out fail to deliver positions prior to the beginning of regular trading hours on the Close-Out Date.

In addition, to help ensure that broker-dealers purchase sufficient shares to close out their fail to deliver positions, temporary Rule 204T(e) requires that the broker-dealer claiming pre-fail credit be net long or net flat on the settlement day on which the broker-dealer is claiming pre-fail credit.[81] In addition, the temporary Rule 204T(e) requires that the broker-dealer be able to demonstrate that it has complied with this requirement.[82] This requirement will enable the Commission and SROs to monitor more effectively whether or not a broker-dealer has complied with the requirements of temporary Rule 204T(e).

D. Market Makers

To allow market makers to facilitate customer orders in a fast moving market, similar to the September Emergency Order,[83] temporary rule includes a limited exception from the rule's close-out and borrowing requirements for fails to deliver attributable to bona fide market making activities by registered market makers, options market makers, or other market makers obligated to quote in the over-the-counter market. Specifically, temporary Rule 204T(a)(3) provides that if a participant of a registered clearing agency has a fail to deliver position at a registered clearing agency in any equity security that is attributable to bona fide market making activities by a registered market maker, options market maker, or other market maker obligated to quote in the over-the-counter market (individually a ''Market Maker,'' collectively ''Market Makers''), the participant shall by no later than the beginning of regular trading hours on the third consecutive settlement day following the settlement date, immediately close out the fail to deliver position by purchasing securities of like kind and quantity.[84]

In addition, similar to the September Emergency Order,[85] the temporary rule excepts Market Makers from the borrowing requirements of temporary Rule 204T(b) if the Market Maker can demonstrate that it does not have an open fail to deliver position at the time of any additional short sales. The borrowing requirements of the temporary rule apply to all broker-dealers from which a participant of a registered clearing agency receives trades for clearance and settlement. To allow Market Makers to facilitate customer orders, we do not believe that a Market Maker should be subject to the temporary rule's borrowing requirements if the Market Maker does not have an open fail to deliver at the time of any additional short sales.

E. Sales Pursuant to Rule 144

The temporary rule includes an exception for sales of all equity securities pursuant to Rule 144 under the Securities Act of 1933 (''Securities Act'').[86] Specifically, temporary Rule 204T(a)(2) provides that if a participant of a registered clearing agency has a fail to deliver position at a registered clearing agency in an equity security sold pursuant to Rule 144 for thirty-five consecutive settlement days after the settlement date for a sale in that equity security, the participant shall, by no later than the beginning of regular trading hours on the thirty-sixth consecutive settlement day following the settlement date for the transaction, immediately close out the fail to deliver position by purchasing securities of like kind and quantity.[87]

Regulation SHO provides an exception from the ''locate'' requirement of Rule 203(b)(1) for situations where a broker-dealer effects a short sale on behalf of a customer that is deemed to own the security pursuant to Rule 200 of Regulation SHO, although, through no fault of the customer or broker-dealer, it is not reasonably expected that the security will be in the physical possession or control of the broker-dealer by settlement date and, therefore, is a ''short'' sale under the marking requirements of Rule 200(g).[88] Rule 203(b)(2)(ii) of Regulation SHO provides that in such circumstances, delivery must be made on the sale as soon as all restrictions on delivery have been removed, and in any event no later than 35 days after trade date, at which time the broker-dealer that sold on behalf of the person must either borrow securities or close out the open position by purchasing securities of like kind and quantity.[89] In addition, recently we adopted amendments to the close-out requirement of Regulation SHO to allow fails to deliver resulting from sales of threshold securities pursuant to Rule 144 to be closed out within 35 rather than 13 consecutive settlement days.[90]

Securities sold pursuant to Rule 144 under the Securities Act are formerly restricted securities that a seller is ''deemed to own,'' as defined by Rule 200(a) of Regulation SHO.[91] The securities, however, may not be capable of being delivered on the settlement date due to processing delays related to removal of the restricted legend and, therefore, sales of these securities frequently result in fails to deliver.

a registered clearing agency, or a broker-dealer for which it clears transactions, from engaging in ''sham close outs'' by entering into an arrangement with a counterparty to purchase securities for purposes of closing out a fail to deliver position and the purchaser knows or has reason to know that the counterparty will not deliver the securities, and which thus creates another fail to deliver position. *See id.* at (b)(3)(vii); 2004 Regulation SHO Adopting Release, 69 FR at 48018 n.96. In addition, we note that borrowing securities, or otherwise entering into an arrangement with another person to create the appearance of a purchase would not satisfy the close-out requirement of Regulation SHO. For example, the purchase of paired positions of stock and options that are designed to create the appearance of a bona fide purchase of securities but that are nothing more than a temporary stock lending arrangement would not satisfy Regulation SHO's close-out requirement.

[79] *See* temporary Rule 204T(e)(3).

[80] *See* temporary Rule 204T(e)(2).

[81] *See* temporary Rule 204T(e)(4).

[82] *See id.*

[83] *See supra* note 77.

[84] *See* temporary Rule 204T(a)(3). Unlike the September Emergency Order, however, the temporary rule does not require a Market Maker to which a fail to deliver position at a registered clearing agency is attributable to attest in writing to the market on which it is registered that the fail to deliver position at issue was established solely for the purpose of meeting its bona fide market making obligations and the steps the Market Maker has taken in an effort to deliver securities to its registered clearing agency. We believe the costs of such a requirement would outweigh the benefits. We note, however, that as with any exception, a broker-dealer would have to evidence eligibility for, and compliance with, the requirements of the exception.

[85] *See supra* note 77.

[86] *See* 17 CFR 230.144.

[87] *See* temporary Rule 204T(a)(2).

[88] Pursuant to Rule 200(g)(2) of Regulation SHO, as adopted in August 2004, generally these sales were marked ''short exempt.'' *See* 2004 Regulation SHO Adopting Release, 69 FR at 48030–48031; *but cf.* Exchange Act Release No. 55970 (June 28, 2007), 72 FR 36348 (July 3, 2007) (removing the ''short exempt'' marking requirement).

[89] *See* 17 CFR 242.203(b)(2)(ii). In the 2004 Regulation SHO Adopting Release, the Commission stated that it believed that 35 calendar days is a reasonable outer limit to allow for restrictions on a security to be removed if ownership is certain. In addition, the Commission noted that Section 220.8(b)(2) of Regulation T of the Federal Reserve Board allows 35 calendar days to pay for securities delivered against payment if the delivery delay is due to the mechanics of the transactions. *See* 2004 Regulation SHO Adopting Release, 69 FR at 48015, n.72.

[90] *See* 2007 Regulation SHO Final Amendments, 72 FR at 45550–45551.

[91] *See* 17 CFR 242.200(a).

Consistent with our statements in connection with our recent amendments to Regulation SHO in connection with closing out fails to deliver in threshold securities sold pursuant to Rule 144, we believe that a close-out requirement of 35 consecutive settlement days from settlement date for fails to deliver resulting from sales of all equity securities sold pursuant to Rule 144, will permit the orderly settlement of such sales without the risk of causing market disruption due to unnecessary purchasing activity (particularly if the purchases are for sizable quantities of stock). Because the security being sold will be received as soon as all processing delays have been removed, this additional time will allow participants to close out fails to deliver resulting from the sale of the security with the security sold, rather than having to close out such fail to deliver position by purchasing securities in the market.[92]

If, however, a fail to deliver position resulting from the sale of an equity security pursuant to Rule 144 is not closed out in accordance with temporary Rule 204T(a)(2), the borrowing requirements of temporary Rule 204T(b) will apply. Thus, if a participant does not close out a fail to deliver position at a registered clearing agency in accordance with temporary Rule 204T(a)(2), the temporary rule prohibits the participant, and any broker-dealer from which it receives trades for clearance and settlement, including market makers, from accepting any short sale orders or effecting further short sales in the particular security without borrowing, or entering into a bona-fide arrangement to borrow, the security until the participant closes out the entire fail to deliver position by purchasing securities of like kind and quantity and that purchase has cleared and settled at a registered clearing agency.[93]

[92] We understand that sellers that own restricted equity securities that wish to sell pursuant to an effective resale registration statement under Rule 415 under the Securities Act experience similar types of potential settlement delays as sales of securities pursuant to Rule 144 under the Securities Act. Thus, fails to deliver in such securities may be closed out in accordance with temporary Rule 204T(a)(2) if the fails to deliver resulted from sales of securities that were outstanding at the time they were sold and the sale occurred after a registration has become effective. In addition, we understand that sales pursuant to broker-assisted cashless exercises of compensatory options to purchase a company's stock, may result in potential settlement delays and, therefore, fails to deliver. Such fails to deliver may be closed out in accordance with temporary Rule 204T(a)(2).

[93] *See* temporary Rule 204T(b).

V. Other Matters

The Administrative Procedure Act generally requires an agency to publish notice of a proposed rulemaking in the **Federal Register**.[94] This requirement does not apply, however, if the agency ''for good cause finds * * * that notice and public procedure are impracticable, unnecessary, or contrary to the public interest.'' [95] Further, the Administrative Procedure Act also generally requires that an agency publish an adopted rule in the **Federal Register** 30 days before it becomes effective.[96] This requirement, however, does not apply if the agency finds good cause for making the rule effective sooner.[97]

For the reasons discussed throughout this release, we believe that we have good cause to act immediately to adopt this rule on an interim final temporary basis. The September Emergency Order, in which we adopted and made immediately effective temporary Rule 204T expires at 11:59 p.m. EDT on October 17, 2008. As discussed throughout this release, we have determined it is necessary to act immediately and adopt this rule on an interim final temporary basis so that temporary rule 204T remains in effect in the form set forth herein following the expiration of the September Emergency Order.

This temporary rule takes effect on October 17, 2008. For the reasons discussed above, we have acted on an interim final temporary basis. We emphasize that we are requesting comments on the temporary rule and will carefully consider the comments we receive and respond to them in a subsequent release. Moreover, this is a temporary rule, and will expire on July 31, 2009. Setting a termination date for the rule will necessitate further Commission action no later than the end of that period if the Commission intends to continue the same, or similar, requirements contained in the temporary rule.

The sunset provision will enable the Commission to assess the operation of the temporary rule and intervening developments, including a restoration of stability to the financial markets, as well as public comments, and consider whether to continue the rule with or without modification or not at all.

We find that there is good cause to have the temporary rule take effect on October 17, 2008 and that notice and public procedure in advance of effectiveness of the rule are impracticable, unnecessary, and contrary to the public interest.[98]

[94] *See* 5 U.S.C. § 553(b).

[95] *Id.*

[96] *See* 5 U.S.C. § 553(d).

[97] *Id.*

VI. Request for Comment

We are requesting comments from all members of the public. We will carefully consider the comments that we receive and intend to respond to them in a subsequent release. We seek comment generally on all aspects of the temporary rule. In addition, we seek comment on the following:

○ The temporary rule requires participants to immediately close out a fail to deliver position by no later than the beginning of regular trading hours on the Close-Out Date. Should we narrow the close-out requirement further? Should we allow a longer or shorter period of time within which to close out a fail to deliver position? What would be the justifications for allowing a shorter or longer close-out period?

○ Are there any operational or compliance issues related to complying with the requirement in temporary Rule 204T(a) to immediately purchase or borrow securities ''by no later than the beginning of regular trading hours''? Should we allow a participant to take steps to purchase or borrow securities after the beginning of regular trading hours on the Close-Out Date to satisfy temporary Rule 204T(a)? If so, how much time after the beginning of regular trading hours should we provide? For example, should we allow trading during an opening auction that commences after the beginning of regular trading hours or should we provide until noon? Alternatively, should we allow participants to purchase or borrow securities at any time on the Close-Out Date to satisfy the temporary rule's close-out requirement? What would be the costs and benefits of allowing additional time beyond the beginning of regular trading hours on the Close-Out Date for the participant to purchase or borrow securities to close out a fail to deliver position?

○ Temporary Rule 204T(f)(1) defines ''settlement date'' as ''the business day on which delivery of a security and payment of money is to be made through the facilities of a registered clearing agency in connection with the sale of a security.'' Is this an appropriate definition of ''settlement date''?

○ Due to our expectation that delivery of securities on all sales should be made

[98] This finding also satisfies the requirements of 5 U.S.C. 808(2), allowing the rules to become immediately effective notwithstanding the requirements of 5 U.S.C. 801 (if a Federal agency finds that notice and public comment are ''impractical, unnecessary, or contrary to the public interest,'' a rule ''shall take effect at such time as the Federal agency promulgating the rule determines.'').

by settlement date, we state in the release that participants should consider having in place policies and procedures to monitor for the delivery of securities by settlement date. Should we adopt a rule requiring that participants have in place such policies and procedures?

○ Should a *de minimus* amount of fails to deliver be excepted from the close-out requirements of the temporary rule? If so, what should be the *de minimus* amount?

○ Should the temporary rule be expanded to apply to debt as well as equity securities? Please explain.

○ The temporary rule requires that a participant purchase securities by no later than the beginning of regular trading hours on the third settlement day after the settlement date for a fail to deliver position resulting from a long sale transaction. What are the costs associated with purchasing versus borrowing securities to close out a fail to deliver position? Should we permit participants to close out a fail to deliver position for long sale transactions by borrowing as well as purchasing securities? Please explain.

○ The temporary rule allows a participant to close out a fail to deliver position attributable to bona fide market making activity by a registered market maker, options market maker, or other market maker obligated to quote in the over-the-counter market by purchasing securities of like kind and quantity by no later than the beginning of regular trading hours on the third settlement day after the settlement date. Should this close-out period be a shorter or longer time-frame? Please explain. What would be the costs and benefits of a longer or shorter close-out period for such fails to deliver?

○ The temporary rule does not include a complete exception from its close-out requirement for options market makers with fails to deliver resulting from short sales effected to establish or maintain a hedge on options positions. We seek comment regarding the impact of the temporary rule on options market makers that are subject to the close-out requirement of the temporary rule. For example, we seek comment regarding the impact of the temporary rule, if any, on liquidity, spread widths, and quote depth in the securities that are subject to the temporary rule.

○ The temporary rule allows a participant to close out a fail to deliver position resulting from a sale of an equity security pursuant to Rule 144 of the Securities Act by no later than the beginning of regular trading hours on the thirty-sixth consecutive settlement day after the settlement date. Are there other types of sales that encounter settlement delays due to processing requirements similar to sales of Rule 144 securities that should have an exception from the close-out requirements of temporary Rule 204T(a)? Please explain.

○ What impact will the temporary rule have on borrowing costs? Please explain. What impact will the temporary rule have on legitimate short selling and market efficiency?

○ An arrangement to borrow means a bona fide agreement to borrow the security such that the security being borrowed is set aside at the time of the arrangement solely for the person requesting the security. Should we define ''arrangement to borrow'' as requiring a contract between the broker-dealer and the lending source?

○ Should temporary Rule 204T(b) require that participants and broker-dealers from which participants receive trades for clearance and settlement borrow securities prior to effecting further short sales, rather than allowing for either an arrangement to borrow or a borrow? If a fail to deliver position has not been closed out in accordance with temporary Rule 204T, should we prohibit the participant, and any broker-dealer from which it receives trades for clearance and settlement, from effecting any further short sales until the fail to deliver position has been closed out?

○ If a participant becomes subject to the requirements of temporary Rule 204T(b), the participant will be required to borrow or arrange to borrow securities prior to settlement at a registered clearing agency of the purchase to close out the fail to deliver position. What are the costs associated with this requirement?

○ Temporary Rule 204T(c) imposes a notification requirement on participants. Will such a notification requirement impose operational or systems costs on participants? What types of communication mechanisms will participants use to comply with this requirement of the temporary rule? What will be the costs and benefits of this notification requirement?

○ The temporary rule allows a broker-dealer to obtain pre-fail credit if it purchases securities in accordance with the conditions specified in temporary Rule 204T(e). Are there any operational or compliance concerns associated with the conditions of temporary Rule 204T(e)? To what extent, if any, will temporary Rule 204T(e) encourage broker-dealers to close out a fail to deliver position prior to the Close-Out Date?

○ The temporary rule does not propose amendments to the ''locate'' requirement of Rule 203(b)(1) of Regulation SHO. In addition to the temporary rule, should we also require that broker-dealers arrange to borrow, or borrow, equity securities prior to effecting short sales in those equity securities? How would this impact the liquidity and availability of such equity securities overall? How would this affect lending rates for such equity securities?

○ The temporary rule imposes a close-out requirement on fails to deliver for all equity securities. Due to this hard delivery requirement is it necessary to retain the ''locate'' requirement of Regulation SHO for short sales? What are the benefits of continuing to require that broker-dealers have a reasonable grounds to believe that a security can be borrowed so that it can be delivered by settlement date if a participant is required to immediately close out a fail to deliver position by no later than the beginning of regular trading hours on the Close-Out Date?

○ The temporary rule does not allow any exceptions for fails to deliver due to mechanical aspects of corporate events, such as equity offers, including initial public offerings (''IPOs''),[99] and tender offers. Will the temporary rule cause any disruption to these corporate events? For example, will the temporary rule interfere with the ability of underwriters to provide price support? Would any disruption warrant an exception for certain corporate events? If so, should the exception focus on particular corporate events and why? How much time is needed for securities subject to such corporate events to be delivered? Would providing exceptions for such securities create opportunities for price manipulation?

VII. Paperwork Reduction Act

A. Background

Temporary Rule 204T contains ''collection of information'' requirements within the meaning of the Paperwork Reduction Act of 1995 (''Paperwork Reduction Act'').[100] We submitted these requirements to the

[99] *See* Amy Edwards and Kathleen Weiss Hanley, Short Selling in Initial Public Offerings (2008) *http://ssrn.com/abstract=981242* showing that fails to deliver in IPOs are not from ''naked'' short selling but instead seem to be related to fails to deliver resulting from long sales that result from underwriter price support. The aggregate fails to deliver in these stocks seem to persist for the typical price support period. Thus, the temporary rule's close-out requirement could apply to a high proportion of such fails to deliver, potentially as much as 2.5% of the shares offered on average. Edwards and Hanley believe that such a result could have a substantial impact on the aftermarket of IPOs.

[100] 44 U.S.C. 3501 *et seq.*

Office of Management and Budget (''OMB'') for review and approval in accordance with 44 U.S.C. 3507(j) and 5 CFR 1320.13. Separately, we have submitted the collection of information to OMB for review and approval in accordance with 44 U.S.C. 3507(d) and 5 CFR 1320.11. The OMB has approved the collection of information on an emergency basis with an expiration date of April 30, 2009. 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 title for the collection of information is: ''Temporary Rule 204T'' and the OMB control number for the collection of information is 3235–0647.

Temporary Rule 204T will substantially restrict the practice of ''naked'' short selling in all equity securities by strengthening the delivery requirements for such securities.[101] Temporary Rule 204T(a) amends Regulation SHO to require that participants of a clearing agency registered with the Commission deliver securities by settlement date, or if the participants have not delivered shares by settlement date, the participants must, by no later than the beginning of regular trading hours on the settlement day following the settlement date (the ''Close-Out Date''), immediately close out the fail to deliver position by borrowing or purchasing securities of like kind and quantity.

A participant that does not comply with the temporary rule's close-out requirements will have violated temporary Rule 204T. In addition, the participant and any broker-dealer from which it receives trades for clearance and settlement, will not be able to short sell the security either for itself or for the account of another, unless it has previously arranged to borrow or has borrowed the security, until the participant closes out the fail to deliver position by purchasing securities of like kind and quantity and that purchase has cleared and settled at a registered clearing agency.[102]

Several provisions under temporary Rule 204T will impose a new ''collection of information'' within the meaning of the Paperwork Reduction Act. These collections of information are mandatory for broker-dealers relying on the rule. The information collected will be retained and/or provided to other entities pursuant to the specific rule provisions and will be available to the Commission and SRO examiners upon request. The information collected will aid the Commission and SROs in monitoring compliance with the rule's requirements.

1. Allocation Notification Requirement

Similar to Rule 203(b)(3)(vi) of Regulation SHO, temporary Rule 204T(d) provides that a participant may reasonably allocate its responsibility to close out a fail to deliver position to another broker-dealer for which the participant clears or from which the participant receives trades for settlement.[103] Unlike Rule 203(b)(3)(vi) of Regulation SHO, however, temporary Rule 204T(d) imposes an additional notification requirement on a broker-dealer that has been allocated responsibility for complying with the rule's requirements (the ''allocation notification requirement'').[104]

Specifically, temporary Rule 204T(d) provides that a broker or dealer that has been allocated a portion of a fail to deliver position that does not comply with the provisions of temporary Rule 204T(a) must immediately notify the participant that it has become subject to the borrowing requirements of temporary Rule 204T(b).[105] This allocation notification requirement is designed to help ensure that participants that receive trades for clearance and settlement from broker-dealers will be on notice that the broker-dealer is subject to the borrow requirements of temporary Rule 204T(b) until the fail to deliver position has been closed out.

Such notification will require a broker-dealer to determine that it has a fail to deliver that does not comply with the provisions of temporary Rule 204T(a) and, therefore, has become subject to the requirements of temporary Rule 204T(b). After making such determination, the temporary rule requires that the broker-dealer notify such participant regarding this information.

We estimate that such procedures will take a broker-dealer no more than approximately 0.16 hours (10 minutes) to complete. We base this estimate in part on the fact that, in accordance with Rule 203(b)(3)(vi) of Regulation SHO, participants are permitted to allocate responsibility to close out a portion of a fail to deliver position to a broker-dealer that is responsible for the fail to deliver position; the fact that most broker-dealers already have the necessary communication mechanisms in place and are already familiar with notification processes and procedures to comply with the borrowing requirements of Rule 203(b)(3)(iv) of Regulation SHO for threshold securities; and the fact that broker-dealers will be able to continue to use the same communication mechanisms, processes and procedures to comply with the notification requirement of temporary Rule 204T(b). On average, participants estimate that currently it takes approximately 0.16 hours (10 minutes) to notify broker-dealers pursuant to Rule 203(b)(3)(iv) of Regulation SHO.[106]

If a broker-dealer has been allocated a portion of a fail to deliver position in an equity security and after the beginning of regular trading hours on the Close-Out Date, the broker-dealer has to determine whether or not that portion of the fail to deliver position was not closed out in accordance with temporary Rule 204T(a), we estimate that a broker-dealer will have to make such determination with respect to approximately 1.76 equity securities per day.[107]

As of December 31, 2007, there were 5,561 registered broker-dealers. Each of these broker-dealers could clear trades through a participant of a registered clearing agency and, therefore, become subject to the notification requirements of temporary Rule 204T(b). We estimate a total of 2,466,415 notifications in accordance with temporary Rule 204T(b) across all broker-dealers (that were allocated responsibility to close out a fail to deliver position) per year

[101] As noted above, in a ''naked'' short sale, the short seller does not borrow or arrange to borrow securities in time to make delivery to the buyer within the standard three-day settlement period. As a result, the seller fails to deliver securities to the buyer when delivery is due.

[102] *See* temporary Rule 204T(b).

[103] *See* 17 CFR 242.203(b)(3)(vi). Rule 203(b)(3)(vi) provides that ''[i]f a participant of a registered clearing agency reasonably allocates a portion of a fail to deliver position to another registered broker or dealer for which it clears trades or for which it is responsible for settlement, based on such broker or dealer's short position, then the provisions of this paragraph (b)(3) relating to such fail to deliver position shall apply to the portion of such registered broker or dealer that was allocated the fail to deliver position, and not to the participant.''

[104] *See* temporary Rule 204T(d).

[105] *See id.*

[106] We base this estimate on information provided to our staff by three small, three medium, and three large registered clearing agency participants.

[107] OEA estimates that there are approximately 9,809 fail to deliver positions per settlement day. Across 5,561 broker-dealers, the number of securities per broker-dealer per day is approximately 1.76 equity securities. During the period from January to July 2008, approximately 4,321 new fail to deliver positions occurred per day. The NSCC data for this period includes only securities with at least 10,000 shares in fails to deliver. To account for securities with fails to deliver below 10,000 shares, the figure is multiplied by a factor of 2.27. The factor is estimated from a more complete data set obtained from NSCC during the period from September 16, 2008 to September 22, 2008. It should be noted that these numbers include securities that were not subject to the close-out requirement of Rule 203(b)(3) of Regulation SHO.

(5,561 broker-dealers notifying participants once per day [108] on 1.76 securities, multiplied by 252 trading days in a year). The total estimated annual burden hours per year will be approximately 394,626 burden hours (2,466,415 multiplied by 0.16 hours/notification). We estimate that the paperwork compliance for the allocation notification requirement for each broker-dealer will be approximately 71.0 burden hours per year.

2. Demonstration Requirement for Fails To Deliver on Long Sales

Temporary Rule 204T(a)(1) includes an exception from temporary rule's close-out requirement for fail to deliver positions resulting from long sales of all equity securities. Under this exception, if a participant has a fail to deliver position at a registered clearing agency in an equity security and can demonstrate on its books and records that such fail to deliver position resulted from a long sale (the ''demonstration requirement for fails to deliver on long sales''), such participant will have until no later than the beginning of regular trading hours on the third consecutive settlement day following the settlement date to immediately close out the fail to deliver position by purchasing securities of like kind and quantity.[109]

This provision allows a participant an additional two settlement days in which to close out the fail to deliver position that resulted from a long sale, provided that the participant's books and records reflect the fact that the fail to deliver resulted from a long sale.[110]

The demonstration requirement will require a participant of a registered clearing agency to determine whether it has a fail to deliver position at a registered clearing agency in an equity security that resulted from a long sale. After making such determination, the temporary rule requires that the participant demonstrate or reflect this information in its books and records. We estimate that such procedures will take a participant of a registered clearing agency no more than approximately 0.16 hours (10 minutes) to complete.

We base this estimate on the fact that, to comply with Regulation SHO's marking requirements, broker-dealers are already required to ascertain whether a customer is ''deemed to own'' the securities being sold before marking a sell order ''long'' and, if the securities are not in the broker-dealer's physical possession or control, whether the broker-dealer reasonably expects that the shares will be in the broker-dealer's physical possession or control by settlement date.[111] This reasonableness determination includes consideration of whether or not a prior sale resulted in a fail to deliver position. In addition, broker-dealers already must comply with the documentation requirement contained in the ''locate'' requirement of Rule 203(b)(1) of Regulation SHO. Participants will be able to use similar mechanisms, processes and procedures to demonstrate compliance with the temporary rule's close-out requirement for fails to deliver resulting from long sales as they use for compliance with the current requirements of Regulation SHO.

If a participant of a registered clearing agency has a fail to deliver position in an equity security at a registered clearing agency and determined that such fail to deliver position resulted from a long sale, we estimate that a participant of a registered clearing agency will have to make such determination with respect to approximately 34 securities per day.[112]

As of July 31, 2008, there were 197 participants of NSCC, the primary registered clearing agency responsible for clearing U.S. transactions that were registered as broker-dealers. We estimate a total of 1,687,896 demonstrations in accordance with temporary Rule 204T(a)(1) across all participants per year (197 participants checking for compliance once per day on 34 securities, multiplied by 252 trading days in a year). The total approximate estimated annual burden hour per year will be approximately 270,063 burden hours (1,687,896 multiplied by 0.16 hours/documentation). We estimate that the paperwork burden for the temporary demonstration provision for each participant will be approximately 1,371 burden hours per year.

3. Pre-Borrow Notification Requirement

The borrowing requirements of temporary Rule 204T(b) are similar to the requirements of Rule 203(b)(3)(iv) of Regulation SHO for a participant that has failed to close out a fail to deliver position in a threshold security that has persisted for thirteen consecutive settlement days.[113] Unlike the current borrow requirements of Rule 203(b)(3)(iv) of Regulation SHO, however, temporary Rule 204T(c) specifies that participants must notify all broker-dealers from which they receive trades for clearance and settlement that a fail to deliver position has not been closed out in accordance with temporary Rule 204T(a) (the ''pre-borrow notification requirement'').

Specifically, temporary Rule 204T(c) provides that the participant must notify any broker or dealer from which it receives trades for clearance and settlement, including any market maker that would otherwise be entitled to rely on the exception provided in Rule 203(b)(2)(iii) of Regulation SHO,[114] (1) that the participant has a fail to deliver position in an equity security at a registered clearing agency that has not been closed out in accordance with the requirements of temporary Rule 204T(a), and (2) when the purchase that the participant has made to close out the fail to deliver position has cleared and settled at a registered clearing agency.[115]

The notification requirement will involve a participant of a registered clearing agency determining whether it has a fail to deliver position in an equity security at a registered clearing agency that has not been closed out in accordance with the requirements of temporary Rule 204T(a), and when the purchase that the participant has made to close out the fail to deliver position has cleared and settled at a registered clearing agency. After making such determinations, the temporary rule requires that the participant notify such broker-dealer regarding this information.

We estimate that such procedures will take a participant of a registered clearing

[108] Because failure to comply with the close-out requirements of temporary Rule 204T(a) is a violation of the temporary rule, we believe that a broker-dealer would make the notification to a participant that it is subject to the borrowing requirements of temporary Rule 204T(b) at most once per day.

[109] *See* temporary Rule 204T(a)(1).

[110] *See id.*

[111] *See* 17 CFR 242.200(g)(1).

[112] OEA estimates approximately 68% of trades are long sales and applies this percentage to the number of fail to deliver positions per day. 68% of 50 securities per day is 34 securities per day. The 68% figure is estimated as 100% minus the proportion of short sale trades found in the Regulation SHO Pilot Study. *See http://www.sec.gov/news/studies/2007/regshopilot020607.pdf.*

[113] *See* 17 CFR 242.203(b)(3)(iv). Rule 203(b)(3)(iv) of Regulation SHO provides that ''[i]f a participant of a registered clearing agency has a fail to deliver position at a registered clearing agency in a threshold security for thirteen consecutive settlement days, the participant and any broker or dealer for which it clears transactions, including any market maker that would otherwise be entitled to rely on the exception provided in paragraph (b)(2)(iii) of this section, may not accept a short sale order in the threshold security from another person, or effect a short sale in the threshold security for its own account, without borrowing the security or entering into a bona fide arrangement to borrow the security, until the participant closes out the fail to deliver position by purchasing securities of like kind and quantity.''

[114] *See* 17 CFR 203(b)(2)(iii) (providing for an exception from the ''locate'' requirement for market makers engaged in bona fide market making in that security at the time of the short sale).

[115] *See* temporary Rule 204T(c).

agency no more than approximately 0.16 hours (10 minutes) to complete.[116] We base this estimate in part on the fact that most participants already notify broker-dealers for which they receive orders for clearance and settlement that the participant has a fail to deliver position in a threshold security that has not been closed out in order to comply with the borrow requirements of Rule 203(b)(3)(iv) of Regulation SHO for threshold securities; the fact that most participants already have the necessary communication mechanisms in place and are already familiar with notification processes and procedures to comply with the borrow requirements of Rule 203(b)(3)(iv) of Regulation SHO for threshold securities; and the fact that participants will be able to continue to use the same communication mechanisms, processes and procedures to notify any broker-dealers from which they receive trades for clearance and settlement of the information required by the temporary rule's notification requirement as they use for compliance with Regulation SHO.

If a participant of a registered clearing agency has a fail to deliver position in an equity security and after the beginning of regular trading hours on the Close-Out Date (or, in the case of a fail to deliver that resulted from a long sale, on the third consecutive settlement day following the settlement date), the participant has to determine whether or not the fail to deliver position was closed out in accordance with temporary Rule 204T(a), we estimate that a participant of a registered clearing agency will have to make such determination with respect to approximately 50 equity securities per day.[117]

As of July 31, 2008, there were 197 participants of NSCC, the primary registered clearing agency responsible for clearing U.S. transactions that were registered as broker-dealers.[118] We estimate a total of 2,482,200 notifications in accordance with temporary Rule 204T(c) across all participants per year (197 participants notifying broker-dealers once per day on 50 securities, multiplied by 252 trading days in a year). The total estimated annual burden hours per year will be approximately 397,152 burden hours (2,482,200 @ 0.16 hours/documentation). We estimate that the paperwork burden for the notification requirement for each participant will be approximately 2,016 burden hours per year.

4. Certification Requirement

The temporary rule includes an exception from the borrowing requirements for any broker-dealer that can demonstrate that it was not responsible for any part of the fail to deliver position of the participant. Specifically, temporary Rule 204T(b)(1) provides that a broker or dealer shall not be subject to the requirements of temporary Rule 204T(b) if the broker or dealer timely certifies to the participant that it has not incurred a fail to deliver position on settlement date for a long or short sale in an equity security for which the participant has a fail to deliver position at a registered clearing agency or that the broker or dealer is in compliance with the requirements of temporary Rule 204T(e) (the ''certification requirement'').[119]

This certification requirement will allow a broker-dealer to avoid being subject to the temporary rule's borrowing requirements if it can demonstrate that it did not incur a fail to deliver position in the security on settlement date. Also, by requiring the broker-dealer to demonstrate that it was not responsible for any part of the fail to deliver position of the participant, the information collected will help ensure that broker-dealers are complying with the requirements of the temporary rule.

This certification requirement will require a broker-dealer to determine that it has not incurred a fail to deliver position on settlement date in an equity security for which the participant has a fail to deliver position at a registered clearing agency or that the broker-dealer is in compliance with the requirements set forth in the Pre-Fail Credit provision of temporary Rule 204T(e). After making such determinations, the broker-dealer will have to certify this information to the participant. We estimate that such procedures will take a broker-dealer no more than approximately 0.16 hours (10 minutes) to complete.

We base this estimate, in part, on the fact that, to comply with the close-out requirements of Rule 203(b) of Regulation SHO, current industry practice for some participants that are registered broker-dealers is to document purchases made on settlement days 11, 12, and 13 to demonstrate that such participants do not have a close-out obligation under Regulation SHO. On average, participants informed us that such documentation takes approximately 0.16 hours (10 minutes).[120]

If the broker-dealer determines that it has not incurred a fail to deliver position on settlement date in an equity security for which the participant has a fail to deliver position at a registered clearing agency or has purchased securities in accordance with the conditions specified in temporary Rule 204T(e), we estimate that a broker-dealer will have to make such determinations with respect to approximately 1.76 securities per day. As of December 31, 2007, there were 5,561 registered broker-dealers. Each of these broker-dealers may clear trades through a participant of a registered clearing agency. We estimate that on average, a broker-dealer will have to certify to the participant that it has not incurred a fail to deliver position on settlement date in an equity security for which the participant has a fail to deliver position at a registered clearing agency or, alternatively, that it is in compliance with the requirements set forth in the Pre-Fail Credit provision of the temporary Rule 204T(e), 2,466,415 times per year (5,561 broker-dealers certifying once per day on 1.76 securities, multiplied by 252 trading days in a year). The total approximate estimated annual burden hour per year will be approximately 394,626 burden hours (2,466,415 multiplied by 0.16 hours/certification). We estimate that the paperwork burden for the certification provision for each broker-

[116] We base this estimate on information provided to our staff by three small, three medium, and three large registered clearing agency participants.

[117] OEA estimates that there are approximately 9,809 fail to deliver positions per day. Across 197 broker-dealer participants of the NSCC, the number of securities per participant per day is approximately 50 equity securities. During the period from January to July 2008, approximately 4,321 new fail to deliver positions occurred per day. The NSCC data for this period includes only securities with at least 10,000 shares in fails to deliver. To account for securities with fails to deliver below 10,000 shares, the figure is grossed-up by a factor of 2.27. The factor is estimated from a more complete data set obtained from NSCC during the period from September 16, 2008 to September 22, 2008. It should be noted that these numbers include securities that were not subject to the close-out requirement of Rule 203(b)(3) of Regulation SHO.

[118] Those participants not registered as broker-dealers include such entities as banks, U.S.-registered exchanges, and clearing agencies. Although these entities are participants of a registered clearing agency, generally these entities do not engage in the types of activities that will implicate the close-out requirements of the temporary rule. Such activities of these entities include creating and redeeming Exchange Traded Funds, trading in municipal securities, and using NSCC's Envelope Settlement Service or Inter-city Envelope Settlement Service. These activities rarely lead to fails to deliver and, if fails to deliver do occur, they are small in number and are usually closed out within a day. Thus, such fails to deliver will not trigger the close-out requirement of the temporary rule.

[119] *See* temporary Rule 204T(b)(1).

[120] We base this estimate on information provided to our staff by three small, three medium, and three large registered clearing agency participants.

dealer will be approximately 71.0 burden hours per year.

5. Pre-Fail Credit Demonstration Requirement

To encourage close outs of fail to deliver positions prior to the Close-Out Date, temporary Rule 204T(e) provides that a broker-dealer can satisfy the temporary rule's close-out requirement by purchasing securities in accordance with the conditions of that provision (*i.e.*, broker-dealers will receive ''pre-fail credit'' for the purchase), including a condition that the broker-dealer demonstrate that it has a net long position or net flat position on its books and records on the settlement day for which the broker or dealer is claiming credit (the ''Pre-Fail Credit demonstration requirement'').

Temporary Rule 204T(e) provides that even if a participant of a registered clearing agency has not closed out a fail to deliver position at a registered clearing agency in accordance with temporary Rule 204T(a), or has not allocated a fail to deliver position to a broker-dealer in accordance with temporary Rule 204T(d), a broker or dealer may receive credit for purchasing securities prior to the beginning of regular trading hours on the Close-Out Date if, among other things, the purchase is executed on, or after, trade date but by no later than the end of regular trading hours on settlement date and the broker or dealer can demonstrate that it has a net long position or net flat position on its books and records on the settlement day for which the broker or dealer is claiming credit.[121]

The Pre-Fail Credit provision is intended to encourage broker-dealers to close out fail to deliver positions prior to the beginning of regular trading hours on the Close-Out Date. By requiring, among other things, that the broker-dealer demonstrate that it has a net long position or net flat position on its books and records on the settlement day for which the broker-dealer is claiming credit, the information collected will help ensure that broker-dealers purchase sufficient shares to close out their fail to deliver position prior to the beginning of regular trading hours on the Close-Out Date.

Such demonstration requirement will require a broker-dealer that purchased securities in accordance with the conditions specified in temporary Rule 204T(e) to determine that it has a net long position or net flat position on the settlement day for which the broker-dealer is claiming credit. After making such determination, the temporary rule requires that the broker-dealer demonstrate such information on its books and records. We estimate that such procedures will take a broker-dealer no more than approximately 0.16 hours (10 minutes) to complete.

We base this estimate on the fact that, to comply with the close-out requirement of Rule 203(b)(3) of Regulation SHO, current industry practice for some participants that are registered broker-dealers is to document purchases made on settlement days 11, 12, and 13 to demonstrate that such participants do not have a close-out obligation under Regulation SHO. On average, participants informed us that such documentation takes approximately 0.16 hours (10 minutes).[122]

If a broker-dealer purchased securities in accordance with the conditions specified in temporary Rule 204T(e) and determined that it has a net long position or net flat position on the settlement day for which the broker-dealer is claiming credit, we estimate that a broker-dealer will have to make such determination with respect to approximately 1.76 securities per day.[123]

As of December 31, 2007, there were 5,561 registered broker-dealers. We estimate that on average, a broker-dealer will have to demonstrate in its books and records that it has a net long position or net flat position on the settlement day for which the broker-dealer is claiming credit, 2,466,415 times per year (5,561 broker-dealers checking for compliance once per day on 1.76 securities, multiplied by 252 trading days in a year). The total approximate estimated annual burden hour per year will be approximately 394,626 burden hours (2,466,415 multiplied by 0.16 hours/demonstration). We estimate that the paperwork burden for the temporary Pre-Fail Credit provision for each broker-dealer will be approximately 71.0 burden hours per year.

6. Market Maker Demonstration Requirement

To allow market makers to facilitate customer orders in a fast moving market, the temporary rule includes a limited exception from the rule's close-out requirement for fails to deliver attributable to bona fide market making activities by registered market makers, options market makers, or other market makers obligated to quote in the over-the-counter market (collectively, ''Market Makers''). Under this exception, a participant must close out the fail to deliver position attributable to a Market Maker by no later than the beginning of regular trading hours on the morning of the third settlement day after the settlement date for the transaction that resulted in the fail to deliver position. The borrowing requirements of the temporary rule do not apply to Market Makers provided the Market Maker can demonstrate that it does not have an open fail to deliver position at the time of any additional short sales (the ''Market Maker demonstration requirement'').

By requiring a Market Maker to demonstrate that it does not have an open fail to deliver position at the time of any additional short sales and, thus, avoid being subject to the temporary rule's pre-borrow requirements, the information collected will help ensure that Market Makers are complying with the requirements of temporary Rule 204T(b)(2).

This requirement will require a Market Maker to determine whether it has an open fail to deliver position at the time of any additional short sales in the particular equity security in which there is a fail to deliver position at a registered clearing agency. After making such a determination, the temporary rule requires that the Market Maker demonstrate that it does not have an open fail to deliver position in that equity security. We estimate that such procedures will take a Market Maker no more than approximately 0.16 hours (10 minutes) to complete.[124]

If a participant of a registered clearing agency has a fail to deliver position in an equity security at a registered clearing agency that is attributable to a Market Maker and the Market Maker, in seeking to avoid the borrowing requirements of temporary Rule 204T(b), has determined that it does not have an open fail to deliver position, we estimate that such Market Maker will have to make such determination with respect to approximately 15 securities per day.[125]

[121] *See* temporary Rule 204T(e).

[122] We base this estimate on information provided to our staff by three small, three medium, and three large registered clearing agency participants.

[123] *See supra*, note 107.

[124] We base this estimate on information provided to our staff by three large, three medium, and three small firms that engage in market making activities currently complying with temporary Rule 204T, pursuant to the September Emergency Order, which has similar requirements to temporary Rule 204(T)(b)(2) of this release.

[125] OEA estimates that there are approximately 9,809 fail to deliver positions per day. An upper bound on the number of fail to deliver positions per day due to market makers is 9,809. Across 656 market makers, the number of securities per market maker per day is approximately 15 equity

Continued

As of December 31, 2007, there were 656 Market Makers.[126] We estimate a total of 2,479,680 written demonstrations in accordance with temporary Rule 204T(b)(1) across all Market Makers per year (656 Market Makers demonstrating once per day on 15 securities, multiplied by 252 trading days in a year). The total estimated annual burden hour per year will be approximately 396,749 burden hours (2,479,680 multiplied by 0.16 hours/demonstration). We estimate that the paperwork burden for the Market Maker demonstration requirements for each Market Maker will be approximately 604.8 burden hours per year.

B. Request for Comment

We invite comment on these estimates and assumptions. Pursuant to 44 U.S.C. 3506(c)(2)(B), we request comment in order to: (a) Evaluate whether the collection of information is necessary for the proper performance of our functions, including whether the information will have practical utility; (b) evaluate the accuracy of our estimate of the burden of the collection of information; (c) determine whether there are ways to enhance the quality, utility and clarity of the information to be collected; and (d) evaluate whether there are ways to minimize the burden of the collection of information on those who respond, including through the use of automated collection techniques or other forms of information technology.

Persons submitting comments on the collection of information requirements should direct them to the Office of Management and Budget, Attention: Desk Officer for the Securities and Exchange Commission, Office of Information and Regulatory Affairs, Washington, DC 20503, and should also send a copy of their comments to Florence E. Harmon, Acting Secretary, Securities and Exchange Commission, 100 F Street, NE., Washington, DC 20549–1090, with reference to File No. S7–30–08. Requests for materials submitted to OMB by the Commission with regard to this collection of information should be in writing, with reference to File No. S7–30–08, and be submitted to the Securities and Exchange Commission, Records Management, Office of Filings and Information Services, 100 F Street, NE., Washington, DC 20549–1090. As OMB is required to make a decision concerning the collections of information between 30 and 60 days after publication, a comment to OMB is best assured of having its full effect if OMB receives it within 30 days of publication.

VIII. Cost-Benefit Analysis

A. Summary

The Commission is sensitive to the costs and benefits of its rules. Commenters should provide analysis and data to support their views on the costs and benefits associated with the temporary rule.

We are adopting, as an interim final temporary rule, Rule 204T, under the Exchange Act. The temporary rule is intended to address abusive ''naked'' short selling in all equity securities by requiring that participants of a registered clearing agency deliver securities by settlement date, or if the participants have not delivered shares by settlement date, the participants must, by no later than the beginning of regular trading hours on the Close-Out Date, immediately close out the fail to deliver position by borrowing or purchasing securities of like kind and quantity.

If a participant does not purchase or borrow shares, as applicable, to close out a fail to deliver position in accordance with temporary Rule 204T(a), the participant will have violated the temporary rule. In addition, the temporary rule imposes on the participant for its own trades and on all broker-dealers from which that participant receives trades for clearance and settlement (including introducing and executing brokers), a requirement to borrow or arrange to borrow securities prior to accepting or effecting further short sales in that security.[127]

To the extent that a participant becomes subject to the borrowing requirements of temporary Rule 204T(b), a broker-dealer that clears through the participant can avoid being subject to the borrowing requirements of temporary Rule 204T(b) if the broker-dealer can demonstrate that it was not responsible for any part of the fail to deliver position of the participant. Moreover, to allow Market Makers to facilitate customer orders in a fast moving market without possible delays associated with complying with the pre-borrow penalty provision of temporary Rule 204T(b), the borrowing requirements of the temporary rule do not apply to Market Makers provided the Market Maker can show that it does not have an open fail to deliver position at the time of any additional short sales.[128]

Similar to Rule 203(b)(3)(vi) of Regulation SHO, temporary Rule 204(d) provides that a participant may reasonably allocate its responsibility to close out a fail to deliver position to another broker-dealer for which the participant clears trades, or from which it receives trades for settlement.[129] Unlike Rule 203(b)(3)(vi) of Regulation SHO, however, temporary Rule 204T(d) imposes a notification requirement on a broker-dealer that has been allocated responsibility for complying with the rule's requirements.[130]

In addition, the temporary rule provides that if a participant has a fail to deliver position at registered clearing agency in an equity security and can demonstrate on its books and records that such fail to deliver position resulted from a long sale, such participant has until no later than the beginning of regular trading hours on the third consecutive settlement day following the settlement date to immediately close out the fail to deliver position by purchasing securities of like kind and quantity.

The temporary rule also extends the close-out requirement for fails to deliver attributable to bona fide market making activities by Market Makers by requiring a participant to close out the fail to deliver position attributable to a Market Maker by no later than the beginning of regular trading hours on the third settlement day after the settlement date for the transaction that resulted in the fail to deliver position.

In addition, consistent with Rule 203(b)(3)(ii) of Regulation SHO, the temporary rule includes an exception for sales of securities pursuant to Rule 144 of the Securities Act.[131]

securities. During the period from January to July 2008, approximately 4,321 new fail to deliver positions occurred per day. The NSCC data for this period includes only securities with at least 10,000 shares in fails to deliver. To account for securities with fails to deliver below 10,000 shares, the figure is grossed-up by a factor of 2.27. The factor is estimated from a more complete data set obtained from NSCC during the period from September 16, 2008 to September 22, 2008. It should be noted that these numbers include securities that were not subject to the close-out requirement of Rule 203(b)(3) of Regulation SHO.

[126] These numbers are based on OEA's review of 2007 FOCUS Report filings reflecting registered broker-dealers. This number does not include broker-dealers that are delinquent on FOCUS Report filings.

[127] *See* temporary Rule 204T(b).

[128] *See* temporary Rule 204T(b)(2).

[129] *See* 17 CFR 242.203(b)(3)(vi). Rule 203(b)(3)(vi) provides that ''[i]f a participant of a registered clearing agency reasonably allocates a portion of a fail to deliver position to another registered broker or dealer for which it clears trades or for which it is responsible for settlement, based on such broker or dealer's short position, then the provisions of this paragraph (b)(3) relating to such fail to deliver position shall apply to the portion of such registered broker or dealer that was allocated the fail to deliver position, and not to the participant.''

[130] *See* temporary Rule 204T(d).

[131] *See* 17 CFR 242.203(b)(3)(ii).

Specifically, temporary Rule 204T(a)(2) provides that if a participant of a registered clearing agency has a fail to deliver position at a registered clearing agency in any equity security sold pursuant to Rule 144 for thirty-five consecutive settlement days after the settlement date for a sale in that equity security, the participant shall, by no later than the beginning of regular trading hours on the thirty-sixth consecutive settlement day following the settlement date for the transaction, immediately close out the fail to deliver position by purchasing securities of like kind and quantity.[132]

If, however, a fail to deliver position resulting from the sale of an equity security pursuant to Rule 144 is not closed out in accordance with temporary Rule 204T(a)(2), the participant is subject to the borrow requirements in temporary Rule 204T(b). Thus, if the fail to deliver position persists beyond thirty-five consecutive settlement days, the temporary rule prohibits a participant of a registered clearing agency, and any broker-dealer from which it receives trades for clearance and settlement, from accepting any short sale orders or effecting further short sales in the particular security without borrowing, or entering into a bona-fide arrangement to borrow, the security until the participant closes out the entire fail to deliver position by purchasing securities of like kind and quantity and that purchase has cleared and settled at a registered clearing agency.[133]

Although we recognize the temporary rule may impose increased borrowing costs to assure settlement in accordance with the requirements of the temporary rule, which may increase the costs of legitimate short selling, we believe that the requirements of the temporary rule are necessary to achieve our goal of further reducing fails to deliver and addressing abusive ''naked'' short selling.

B. Benefits

The temporary rule will substantially restrict the practice of ''naked'' short selling in all equity securities by strengthening the delivery requirements for such securities. By requiring that participants of a registered clearing agency deliver securities by settlement date, or if the participants have not delivered shares by settlement date, immediately close out the fail to deliver position by borrowing or purchasing securities of like kind and quantity, the temporary rule also furthers our goals of limiting fails to deliver and helping to reduce the possibility that abusive ''naked'' short selling may contribute to disruption in the securities markets. This, in turn, will help to ensure that investors remain confident that trading can be conducted without the influence of illegal manipulation. The temporary rule also furthers the goals of helping to maintain fair and orderly markets against the threat of sudden and excessive fluctuations of securities prices and substantial disruption in the functioning of the securities markets. The temporary rule also promotes the prompt and accurate clearance and settlement of transactions in equity securities.

In addition, the temporary rule will help to further reduce the number of fails to deliver. These fails may create a misleading impression of the market for these securities. Large and persistent fails to deliver may have a negative effect on shareholders, potentially depriving them of the benefits of ownership, such as voting and lending. Thus, by facilitating the prompt receipt of shares, the temporary rule will help enable investors to receive the benefits associated with share ownership.

Persistent fails to deliver in a security may also be perceived by potential investors negatively and may affect their decision about making a capital commitment. Thus, by providing greater assurance that securities will be delivered and, thereby, alleviating investor apprehension as they make investment decisions, the temporary rule will benefit issuers in that an increase in investor confidence in the market for their securities will facilitate investment in their securities.

1. Close-Out Requirements

By requiring that participants of a registered clearing agency deliver securities by settlement date, or if the participants have not delivered shares by settlement date, immediately close out the fail to deliver position by borrowing or purchasing securities of like kind and quantity, the temporary rule will help restore, maintain, and enhance investor confidence in the securities markets. It will also help reduce manipulative schemes involving ''naked'' short selling in equity securities. Sellers that fail to deliver securities on settlement date may enjoy fewer restrictions than if they were required to deliver the securities within a reasonable period of time, and such sellers may attempt to use this additional freedom to engage in trading activities that deliberately depress the price of a security. Thus, the temporary rule's close-out requirements are expected to remove a potential means of manipulation, thereby decreasing the possibility of artificial market influences and contributing to price efficiency.

Under temporary Rule 204T(a)(1), a participant that has a fail to deliver position at a registered clearing agency in an equity security and can demonstrate on its books and records that such fail to deliver position resulted from a long sale, will have until no later than the beginning of regular trading hours on the third consecutive settlement day following the settlement date to immediately close out the fail to deliver position by purchasing securities of like kind and quantity. This provision allows participants an additional two settlement days to close out fail to deliver positions that result from long sales, provided that the participant's books and records reflect the fact that the fail to deliver resulted from a long sale.[134] We believe this exception to temporary Rule 204T(a)'s close-out requirement benefits participants because the two additional days to close-out these fail to deliver positions may reduce close-out costs for such participants.

The temporary rule also extends temporary Rule 204T(a)'s close-out requirement for fails to deliver attributable to bona fide market making activities by Market Makers by requiring a participant to close out the fail to deliver position attributable to a Market Maker by no later than the beginning of regular trading hours on the third settlement day after the settlement date. We believe this exception to temporary Rule 204T(a)'s close-out requirement benefits participants because the two additional days to close-out these fail to deliver positions may reduce close-out costs for such participants.

Similar to Rule 203(b)(3)(vi) of Regulation SHO, temporary Rule 204(d) allows a participant to reasonably allocate its responsibility to close out a fail to deliver position to another broker-dealer for which the participant clears trades, or from which it receives trades for settlement. This allocation provision benefits participants because if a participant can identify the accounts of broker-dealers for which they clear or from which they receive trades for settlement, the participant can allocate the responsibility to close out the fail to deliver position to the particular broker-dealer account(s) whose trading activities caused the fail to deliver position provided the allocation is reasonable and, therefore, the allocated broker-dealer rather than the participant

[132] *See* temporary Rule 204T(a)(2).

[133] *See* temporary Rule 204T(b).

[134] *See* temporary Rule 204T(a)(1).

will incur any costs associated with the temporary rule's close-out requirement.

In addition, temporary Rule 204T(d) imposes a notification requirement on a broker-dealer that has been allocated responsibility for complying with the rule's requirements. Thus, under the temporary rule's allocation provision, if the broker-dealer does not comply with the provisions of temporary Rule 204T(a), it must immediately notify the participant that it has become subject to the borrowing requirements of temporary Rule 204T(b).[135] This allocation notification requirement is intended to let participants know when a broker-dealer from which the participant receives trades for clearance and settlement has become subject to the temporary rule's borrowing requirements. The notification requirement furthers the Commission's goals of limiting fails to deliver and addressing abusive ''naked'' short selling by promoting the prompt and accurate clearance and settlement of transactions involving equity securities. The notification requirement will also help ensure that participants that receive trades for clearance and settlement from broker-dealers will be on notice that the broker-dealer is subject to the borrow requirements of temporary Rule 204T(b) until the fail to deliver position has been closed out.

Moreover, under the temporary rule's Pre-Fail Credit provision, a broker or dealer may receive credit for purchasing securities prior to the beginning of regular trading hours on the Close-Out Date if, among other things, the purchase is executed on, or after, trade date but by no later than the end of regular trading hours on settlement date and the broker or dealer can demonstrate that it has a net long position or net flat position on its books and records on the settlement day for which the broker or dealer is claiming credit. The Pre-Fail Credit provision is intended to encourage earlier close out of fails to deliver in all equity securities and, therefore, to the extent used could result in a reduction of persistent fails to deliver.

2. Borrowing Requirements

The borrowing requirements of temporary Rule 204T(b) are similar to the requirements of Rule 203(b)(3)(iv) of Regulation SHO for a participant that has not closed out a fail to deliver position in a threshold security that has persisted for thirteen consecutive settlement days.[136] Similar to Regulation SHO, the temporary rule is aimed in part at addressing potentially abusive ''naked'' short selling in equity securities. To that end, we believe it is appropriate to include in the temporary rule borrowing requirements for broker-dealers, including participants, that sell short a security that has a fail to deliver position that has not been closed out in accordance with the requirements of the temporary rule. We believe that the borrowing requirements of temporary Rule 204T(b) will further our goal of limiting fails to deliver and addressing abusive ''naked'' short selling by promoting the prompt and accurate clearance and settlement of transactions in equity securities. By requiring that participants and broker-dealers from which they receive trades for clearance and settlement borrow or arrange to borrow securities prior to accepting or effecting short sales in the security that has a fail to deliver position that has not been closed out, the temporary rule will help to ensure that shares will be available for delivery on the short sale by settlement date and, thereby, help to avoid additional fails to deliver occurring in the security.

Unlike the current borrow requirements of Rule 203(b)(3)(iv) of Regulation SHO, however, the borrow requirements of the temporary rule specify that participants must notify all broker-dealers from which they receive trades for clearance and settlement that a fail to deliver position in an equity security has not been closed out in accordance with temporary Rule 204T(a).[137] This notification requirement in temporary Rule 204T(c) is intended to ensure that all broker-dealers that submit trades for clearance and settlement to a participant that has a fail to deliver position in an equity security that has not been closed out in accordance with temporary Rule 204T(a) are on notice that all short sales in that security will be subject to the borrowing requirements of temporary Rule 204T(b) until the fail to deliver position has been closed out.

However, if a participant becomes subject to the borrowing requirements of temporary Rule 204T(b) because it did not close out a fail to deliver position by no later than the beginning of regular trading hours on the settlement date for the transaction, a broker-dealer that clears through the participant will not also be subject to the borrowing requirements of temporary Rule 204T(b) if the broker-dealer can demonstrate that it was not responsible for any part of the fail to deliver position of the participant.[138] This exception allows a broker-dealer to avoid being subject to the borrowing requirements of the temporary rule if the broker-dealer can demonstrate that it did not incur a fail to deliver position in the security on settlement date.

Moreover, the borrowing requirements of the temporary rule will not apply to Market Makers, provided that the Market Maker can show that it does not have an open fail to deliver position at the time of any additional short sales.[139] This provision is intended to allow Market Makers to facilitate customer orders in a fast moving market without possible delays associated with complying with the pre-borrow penalty provision of temporary Rule 204T(b).

3. Sales of Securities Pursuant to Rule 144

Securities sold pursuant to Rule 144 of the Securities Act are formerly restricted securities that a seller is ''deemed to own,'' as defined by Rule 200(a) of Regulation SHO.[140] The securities, however, may not be capable of being delivered on the settlement date due to processing delays related to removal of the restricted legend and, therefore, sales of these securities frequently result in fails to deliver. Consistent with our statements in connection with our recent amendments to Regulation SHO in connection with closing out fails to deliver in threshold securities sold pursuant to Rule 144,[141] we believe that a close-out requirement of thirty-five consecutive settlement days from settlement date for fails to deliver resulting from sales of equity securities sold pursuant to Rule 144, will permit the orderly settlement of such sales without the risk of causing market disruption due to unnecessary purchasing activity (particularly if the purchases are for sizable quantities of stock). Because the Rule 144 security sold will be received as soon as all processing delays have been removed, this additional time will allow participants to close out fails to deliver resulting from the sale of the security with the security sold, rather than having to close out such fail to deliver position by purchasing securities in the market. Thus, the amendments will

[135] *See* temporary Rule 204T(d).

[136] *See* 17 CFR 242.203(b)(3)(iv).

[137] *See* temporary Rule 204T(c).

[138] *See* temporary Rule 204T(b)(1).

[139] *See* temporary Rule 204T(b)(2).

[140] *See* 17 CFR 242.200(a).

[141] As mentioned above, we recently adopted amendments to the close-out requirement of Regulation SHO to allow fails to deliver resulting from sales of threshold securities pursuant to Rule 144 to be closed out within 35 rather 13 consecutive settlement days. *See* 2007 Regulation SHO Final Amendments, 72 FR at 45550–45551.

reduce costs to participants and, in turn, investors.

Although the temporary rule allows fails to deliver resulting from sales of equity securities sold pursuant to Rule 144 of the Securities Act thirty-five consecutive settlement days after the settlement date before a participant must take action to close out the fail to deliver position, these fails to deliver must be closed out by no later than the beginning of regular trading hours on the thirty-sixth settlement day and, therefore, these fails to deliver cannot continue indefinitely. Thus, we believe that the temporary rule is consistent with our goal of further reducing fails to deliver in equity securities, while balancing the concerns associated with closing out fails to deliver resulting from sales of securities pursuant to Rule 144 of the Securities Act.

C. Costs

We recognize that the temporary rule may result in increased short selling costs for participants that may impact legitimate short selling activities; however, we believe such costs will be limited. For example, it might result in participants incurring borrowing costs where they borrow securities to close out a fail to deliver position that might have been closed out soon thereafter with shares received from the customer. Such actions might result in added demand in the lending market which in turn might exert upward pressure on securities lending rates, potentially making short selling more expensive for all market participants. For example, it is estimated that about $700 billion in U.S. equity securities are lent out per year. Preliminary input from industry participants suggests that lending rates increased significantly after the September Emergency Order for stocks not covered by the ban on short selling. While results from the period after the September Emergency Order may be confounded by the unusual circumstances of the continued credit crisis, an increase of 10 basis points in lending rates would result in an annual cost increase to securities borrowers of $700 million and the new revenue for securities lenders increasing by the corresponding amount of $700 million. Therefore, if lending increased by 10 basis points, the annual impact on the securities lending market would be about $1,400 million (or $1,050 million for nine months).

To the extent that the requirements of the temporary rule will result in increased costs to short selling in equity securities, it may lessen some of the benefits of legitimate short selling and, thereby, result in a reduction in short selling generally. Such a reduction may lead to a decrease in market efficiency and price discovery, less protection against upward stock price manipulations, a less efficient allocation of capital, an increase in trading costs, and a decrease in liquidity. We also recognize that requiring that participants purchase securities to close out fails to deliver in equity securities in accordance with the temporary rule, may potentially impact the willingness of participants to provide liquidity.

As a likely result of the temporary rule as contained in the September Emergency Order, bid-ask spreads on equity securities have increased. Preliminary input from industry participants suggests that bid-ask spreads have increased after the September Emergency Order for stocks not covered by the ban on short selling. While results from the period after the September Emergency Order may be confounded by the unusual circumstances of the continued credit crisis, an increase of 1 basis point in bid-ask spreads would result in an annual cost to investors of about $6,048 million. To calculate the annual cost, we assume that 12 billion shares trade on a daily basis. At an average share price of approximately $20, this constitutes $240 billion in dollar volume per day. Based on this total, an increase in transaction costs of one basis point would result in a daily increase in realized transaction costs of approximately $24 million a day. At this rate, investors would experience increased total transaction costs of over $100 million within the first five trading days of the rule or about $6,048 million annually ($24 million times 252 trading days) (or $4,536 million for nine months).

We believe, however, that strengthening rules against potentially abusive ''naked'' short selling will provide increased confidence in the securities markets. Thus, although we recognize that the temporary rule may result in increased short selling costs, we believe such costs are justified by the fact that the temporary rule may help restore, maintain, and enhance investor confidence in the markets by preventing potentially abusive ''naked'' short selling.

1. Close-Out Requirements

We also recognize that requiring that participants purchase securities to close-out fails to deliver in any equity security in accordance with the temporary rule, may potentially impact the willingness of participants to provide liquidity. However, we believe that any such potential effect will be minimal because participants will still have some flexibility by having two additional settlement days in which to purchase securities to close-out their fail to deliver positions that either result from long sales or are attributable to bona fide market making activities by Market Makers.

In addition, we recognize that the temporary rule's close-out requirement may result in some additional costs for participants of a registered clearing agency in terms of systems and surveillance modifications, as well as changes to processes and procedures. However, we believe any additional costs incurred in implementing temporary Rule 204T's close-out requirement in terms of these modifications will be minimal. The close-out requirement of the temporary rule is consistent with the current settlement practices and procedures and with the close-out requirement of Regulation SHO. For example, because most transactions settle by T+3, participants should already have in place policies and procedures to help ensure that delivery is being made by settlement date. Nevertheless, participants will incur costs for each close-out and these costs could accumulate to significant amounts over time and across participants.

Moreover, similar to the existing close-out requirement of Rule 203(b)(3) of Regulation SHO, the temporary rule is based on a participant's fail to deliver position at a registered clearing agency. As noted above, the NSCC clears and settles the majority of equity securities trades conducted on the exchanges and in the over-the-counter markets. The NSCC clears and settles trades through the CNS system, which nets the securities delivery and payment obligations of all of its members. The NSCC notifies its members of their securities delivery and payment obligations daily. Thus, because the temporary rule is based on a participant's fail to deliver position at a registered clearing agency, it is consistent with current settlement practices and procedures and with the Regulation SHO framework regarding delivery of securities.[142] As such, we anticipate that most participants will already have systems, processes and procedures in place in order to comply with the temporary rule's close-out requirements and, therefore, that any additional implementation costs associated with the temporary rule will be minimal.

In addition, to comply with Regulation SHO's close-out requirement

[142] *See* 17 CFR 242.203(b)(3).

when it became effective in January 2005, participants needed to modify their recordkeeping systems and surveillance mechanisms. Participants also should have retained and trained the necessary personnel to ensure compliance with the rule's close-out requirements. Thus, most of the infrastructure necessary to comply with the temporary rule's close-out requirement should already be in place. Thus, we believe that any changes to personnel, computer hardware and software, recordkeeping or surveillance costs will be minimal.

We recognize that the requirements of temporary Rule 204T(a)(1) may also impose additional costs on participants of a registered clearing agency. As discussed above, under temporary Rule 204T(a)(1), a participant of a registered clearing agency that has a fail to deliver position at a registered clearing agency in an equity security and can demonstrate on its books and records that the fail to deliver position resulted from a long sale, will have until no later than the beginning of regular trading hours on the third consecutive settlement day following the settlement date to immediately close out the fail to deliver position by purchasing securities of like kind and quantity. Thus, to qualify for this additional time to close out a fail to deliver position, the temporary rule requires the participant to demonstrate on their books and records that the fail to deliver position resulted from a long sale.

This demonstration requirement may result in participants incurring costs related to personnel, recordkeeping, systems, and surveillance mechanisms. For example, as discussed in detail in section VII above, for purposes of the Paperwork Reduction Act, we estimate that it will take each participant of a registered clearing agency no more than approximately 0.16 hours (10 minutes) to comply with the demonstration requirement of the temporary Rule 204T(a)(1). In addition, we estimate that the total annual hour burden per year for each participant subject to the documentation requirement will be 1,371 hours.

The allocation notification requirement of temporary Rule 204T(d) will impose costs on broker-dealers that have been allocated responsibility for the close-out requirement under the temporary rule. As discussed above, temporary Rule 204T(d) requires a broker or dealer that has been allocated a portion of a fail to deliver position that has not complied with the close-out provisions under the temporary rule to notify the participant that it has become subject to the borrowing requirements of temporary Rule 204T(b). This notification requirement may result in broker-dealers incurring costs related to personnel, recordkeeping, systems, and surveillance mechanisms. For example, as discussed in detail in section VII, above, for purposes of the Paperwork Reduction Act, we estimate that it will take each broker-dealer no more than approximately 0.16 hours (10 minutes) to comply with the notification requirements of temporary Rule 204T(d). In addition, we estimate that the total annual hour burden per year for each broker-dealer subject to the notification requirement will be 71.0 hours.

We also recognize that the requirements of temporary Rule 204T(e) may impose additional costs on broker-dealers. As discussed above, temporary Rule 204T(e) allows a broker-dealer to obtain pre-fail credit if it purchases securities in accordance with the conditions specified in the temporary rule. To receive pre-fail credit, the temporary rule requires, among other things, that a broker-dealer demonstrate that it has a net long position or net flat position on its books and records on the settlement day for which the broker or dealer is claiming credit.

This demonstration requirement may result in participants incurring costs related to personnel, recordkeeping, systems, and surveillance mechanisms. For example, as discussed in detail in section VII above, for purposes of the Paperwork Reduction Act, we estimate that it will take each broker-dealer no more than approximately 0.16 hours (10 minutes) to comply with the demonstration requirements of the temporary rule. In addition, we estimate that the total annual hour burden per year for each broker-dealer subject to the demonstration requirement will be 71.0 hours.

2. Borrowing Requirements

We believe that temporary Rule 204T's borrow requirements for fail to deliver positions that are not closed out in accordance with the temporary rule will result in limited, if any, implementation costs to participants of a registered clearing agency, and broker-dealers from which they receive trades for clearance and settlement. These entities must already comply with the borrow requirements of Rule 203(b)(3)(iv) of Regulation SHO if a fail to deliver position has not been closed out in accordance with Regulation SHO's mandatory close-out requirement. Accordingly, these entities should already have in place the personnel, recordkeeping, systems, and surveillance mechanisms necessary to comply with the temporary rule's borrow requirements. Nevertheless, we recognize that each pre-borrow will impose costs on participants, broker-dealers, and investors and these costs can accumulate to significant amounts if the borrow requirement is imposed often.

The pre-borrow notification requirement of temporary Rule 204T(c) will impose costs on participants of a registered clearing agency. Temporary Rule 204T(c) requires a participant to notify any broker or dealer from which it receives trades for clearance and settlement, including any market maker that would otherwise be entitled to rely on the exception provided in Rule 203(b)(2)(iii) of Regulation SHO,[143] (1) that the participant has a fail to deliver position in an equity security at a registered clearing agency that has not been closed out in accordance with the requirements of temporary Rule 204T(a), and (2) when the purchase that the participant has made to close out the fail to deliver position has cleared and settled at a registered clearing agency.[144] This notification requirement may result in participants incurring costs related to personnel, recordkeeping, systems, and surveillance mechanisms. For example, as discussed in detail in section VII, above, for purposes of the Paperwork Reduction Act, we estimate that it will take each participant of a registered clearing agency no more than approximately 0.16 hours (10 minutes) to comply with the pre-borrow notification requirements of temporary Rule 204T(b). In addition, we estimate that the total annual hour burden per year for each participant subject to the notification requirement will be 2,016 hours.

Moreover, we believe any additional costs incurred in connection with the borrowing requirements of temporary Rule 204T(b) will be limited by the fact that if a participant becomes subject to the borrowing requirements of temporary Rule 204T(b), a broker-dealer that clears through the participant will not also be subject to the borrowing requirements of temporary Rule 204T(b) if the broker-dealer can demonstrate that it was not responsible for any part of the fail to deliver position of the participant. This provision allows a broker-dealer to avoid the costs of being subject to the temporary rule's borrowing requirements, provided that the broker-dealer can demonstrate that it

[143] *See* 17 CFR 203(b)(2)(iii) (providing for an exception from the ''locate'' requirement for market makers engaged in bona fide market making in that security at the time of the short sale).

[144] *See* temporary Rule 204T(c).

did not incur a fail to deliver position in the security on settlement date.

The certification requirement of temporary Rule 204T(b)(1) may impose some costs on broker-dealers having to demonstrate that it was not responsible for any part of the fail to deliver position of the participant. As discussed above, temporary Rule 204T(b)(1) requires the broker-dealer to timely certify to the participant that it has not incurred a fail to deliver position on settlement date in an equity security for which the participant has a fail to deliver position at a registered clearing agency or the broker-dealer is in compliance with the requirements set forth in the temporary rule's Pre-Fail Credit provision. This certification requirement may result in broker-dealers incurring costs related to personnel, recordkeeping, systems, and surveillance mechanisms. For example, as discussed in detail in section VII, above, for purposes of the Paperwork Reduction Act, we estimate that it will take each broker-dealer no more than approximately 0.16 hours (10 minutes) to comply with the certification requirement of temporary Rule 204T(b)(1). In addition, we estimate that the total annual hour burden per year for each broker-dealer subject to the certification requirement will be 71.0 hours.

Any potential additional costs associated with the temporary borrowing requirements will be limited by the fact that the temporary rule's borrowing requirements will not apply to Market Makers, provided that the Market Maker can demonstrate that it does not have an open fail to deliver position at the time of any additional short sales. This allows Market Makers to facilitate customer orders in a fast moving market without possible delays and added costs associated with complying with the pre-borrow penalty provision of temporary Rule 204T(b).

The demonstration requirement of temporary Rule 204T(b)(2) may impose costs on Market Makers. This demonstration requirement may result in Market Makers incurring costs related to personnel, recordkeeping, systems, and surveillance mechanisms. For example, as discussed in detail in section VII, above, for purposes of the Paperwork Reduction Act, we estimate that it will take each Market Maker no more than approximately 0.16 hours (10 minutes) to comply with the demonstration requirement of temporary Rule 204T(b)(2). In addition, we estimate that the total annual hour burden per year for each Market Maker subject to this demonstration requirement will be 604.8 hours.

3. Sales of Securities Pursuant to Rule 144

Consistent with our statements in connection with our recent amendments to Regulation SHO in connection with closing out fails to deliver in threshold securities sold pursuant to Rule 144,[145] we do not believe the temporary rule's close-out requirement will impose any significant burden or cost on market participants. We believe that a close-out requirement of thirty-five consecutive settlement days from settlement date for fails to deliver resulting from sales of equity securities sold pursuant to Rule 144 will reduce costs by allowing participants of a registered clearing agency with a fail to deliver position additional time for delivery of these securities.

Participants may incur, however, some added costs for minor changes to their current systems to reflect the application of the temporary rule's close-out requirement to fails to deliver resulting from sales of all equity securities, rather than just threshold securities, sold pursuant to Rule 144 of the Securities Act.

D. Request for Comment

The Commission is sensitive to the costs and benefits of the temporary rule, and encourages commenters to discuss any additional costs or benefits beyond those discussed herein, as well as any reduction in costs. Commenters should provide analysis and data to support their views of the costs and benefits associated with the temporary rule.

- What, if any, additional benefits are involved in complying with the temporary rule? Should the temporary rule be modified in any way to increase the benefits of the temporary rule? If so, how?
- What, if any, additional costs are involved in complying with the temporary rule? What are the types of costs, and what are the amounts? Should the temporary rule be modified in any way to mitigate costs? If so, how?
- The temporary rule requires that participants of a registered clearing agency deliver securities by settlement date, or if the participants have not delivered shares by settlement date, borrow or purchase securities to close out the fail to deliver position by no later than the beginning of regular trading hours on the settlement day following the day the participant incurred the fail to deliver position. What are the costs and benefits associated with purchasing versus borrowing securities to close out a fail to deliver position?
- What impact will the temporary rule have on borrowing costs? Please explain. What effect will the temporary rule have on the availability of equity securities for lending and borrowing?
- The temporary rule will allow a participant that has a fail to deliver position at a registered clearing agency in an equity security and can demonstrate that such fail to deliver position resulted from a long sale, two additional settlement days in which to close out that fail to deliver position by purchasing securities of like kind and quantity. What costs and benefits are associated with the long sale documentation requirement? Are there any operational or compliance concerns associated with this provision of the temporary rule?
- The temporary rule will allow a participant of a registered clearing agency two additional settlement days to close out any fail to deliver positions attributable to a Market Maker. What are the costs and benefits of allowing this additional time to close-out fails to deliver attributable to Market Makers? Are there any operational or compliance concerns associated with this provision of the temporary rule?
- Will the temporary rule create any additional implementation or operational costs associated with systems (including computer hardware and software), surveillance, procedural, recordkeeping, or personnel modifications?
- To comply with the temporary rule, will broker-dealers be required to purchase new systems or implement changes to existing systems? Will changes to existing systems be significant? What are the costs and benefits associated with acquiring new systems or making changes to existing systems? What, if any, changes will need to be made to existing records? What are the costs and benefits associated with any changes?
- Will there be any increases in staffing and associated overhead costs? What are the costs and benefits associated with hiring new staff or retraining existing staff? Will other resources need to be re-dedicated to comply with the temporary rule?
- How much, if any, will the temporary rule affect compliance costs for small, medium, and large broker-dealers (*e.g.*, personnel or system changes)? We seek comment on the costs of compliance that may arise.
- We solicit comment on whether the costs will be incurred on a one-time or ongoing basis, as well as cost estimates. In addition, we seek comment as to

[145] *See* 2007 Regulation SHO Final Amendments, 72 FR at 45550–45551.

whether the temporary rule will decrease any costs for any market participants. We seek comment about any other costs and cost reductions associated with the temporary rule.

• We recognize that the temporary rule may increase the costs of legitimate short selling and lessen some of the benefits of legitimate short selling, which, in turn, could result in a reduction of short selling. To what extent, if any, will the temporary rule impact legitimate short selling and market efficiency?

• The temporary rule does not allow any exceptions for fails to deliver due to mechanical aspects of corporate events, such as equity offers, including initial public offerings, and tender offers. Will the temporary rule cause any disruption to these corporate events? Can the costs of any disruption be quantified?

• What, if any, additional costs are involved in complying with the borrowing requirements under temporary Rule 204T(b)? What are the types of costs, and what are the amounts? Should the temporary rule be modified in any way to mitigate costs? If so, how? Are there any operational or compliance concerns associated with the borrowing requirements under temporary Rule 204T(b)?

• The temporary rule will allow a broker-dealer that clears through a participant that becomes subject to the borrowing requirements of temporary Rule 204T(b) to avoid being subject to the temporary rule's borrowing requirements if the broker-dealer can demonstrate that it was not responsible for any part of the fail to deliver position of the participant. What costs and benefits are associated with the certification requirement? Are there any operational or compliance concerns associated with this provision of the temporary rule?

• Temporary Rule 204T(c) imposes a pre-borrow notification requirement on participants. Will such a notification requirement impose operational or systems costs on participants? What types of communication mechanisms do participants use to comply with this requirement of the temporary rule? What are the costs and benefits of this notification requirement?

• What, if any, additional costs are associated with extending the close-out requirement for Rule 144 securities? What are the types of costs, and what are the amounts? Who bears these costs? Should the exception be modified in any way to mitigate costs? If so, how?

• Please identify any other costs, including reductions in costs, associated with sales of Rule 144 restricted securities not already discussed.

IX. Consideration of Burden on Competition and Promotion of Efficiency, Competition, and Capital Formation

Section 3(f) of the Exchange Act requires the Commission, whenever it engages in rulemaking and whenever it is required to consider or determine if an action is necessary or appropriate in the public interest, to consider whether the action would promote efficiency, competition, and capital formation.[146] In addition, section 23(a)(2) of the Exchange Act requires the Commission, when adopting rules under the Exchange Act, to consider the impact such rules would have on competition.[147] Exchange Act section 23(a)(2) prohibits the Commission from adopting any rule that would impose a burden on competition not necessary or appropriate in furtherance of the purposes of the Exchange Act.

We believe the temporary rule will have minimal impact on the promotion of efficiency. The temporary rule is intended to further reduce fails to deliver and address abusive ''naked'' short selling in equity securities by requiring that participants of a registered clearing agency deliver securities by settlement date, or if the participants have not delivered shares by settlement date, the participants must, by no later than the beginning of regular trading hours on the Close-Out Date, immediately close out the fail to deliver position by borrowing or purchasing securities of like kind and quantity. A participant that does not comply with this close-out requirement, and any broker-dealer from which it receives trades for clearance and settlement, will not be able to short sell the security either for itself or for the account of another, unless it has first arranged to borrow the security, until the fail to deliver position is closed out.

The temporary rule is designed to ensure that buyers of equity securities receive delivery of their shares, thereby helping to reduce persistent fails to deliver, which may have a negative effect on the securities markets and investors and also may be used to facilitate some manipulative strategies. By requiring that participants of a registered clearing agency deliver securities by settlement date and to the extent that participants have not delivered shares by settlement date, borrow or purchase securities to close out the fail to deliver position by no later than the beginning of regular trading hours on the Close-Out Date, the temporary rule will promote the prompt clearance and settlement of securities transactions. By doing so, the temporary rule will further our goals of helping to eliminate any possibility that abusive ''naked'' short selling, as well as persistent fails to deliver, will contribute to the disruption of markets in equity securities and, thereby, will help ensure that investors remain confident that trading can be conducted without the illegal influence of manipulation. A loss of confidence in the market for these securities can lead to panic selling, which may be further exacerbated by potentially abusive ''naked'' short selling. As a result, prices of these securities may artificially and unnecessarily decline below the price level that would have resulted from the normal price discovery process, threatening the disruption of the markets for these securities. We seek comment regarding whether the temporary rule may adversely impact liquidity, disrupt markets, or unnecessarily increase risks or costs to participants of a registered clearing agency.

In addition, we believe that the temporary rule will have minimal impact on the promotion of capital formation. Issuers and investors have repeatedly expressed concerns about fails to deliver in connection with manipulative ''naked'' short selling.[148] The perception that abusive ''naked'' short selling is occurring in securities could undermine the confidence of investors. These investors, in turn, may be reluctant to commit capital to an issuer they believe to be subject to such manipulative conduct.[149] To the extent that ''naked'' short selling and fails to deliver result in an unwarranted decline in investor confidence about a security, the temporary rule will improve investor confidence about the security. In addition, the temporary rule may lead to a greater certainty in the settlement of these securities which should

[146] 15 U.S.C. 78c(f).

[147] 15 U.S.C. 78w(a)(2).

[148] *See, e.g.*, 2008 Regulation SHO Final Amendments, *supra* note 19.

[149] In connection with prior proposed amendments to Regulation SHO aimed at reducing fails to deliver and addressing potentially abusive ''naked'' short selling, such as the 2007 Regulation SHO Proposed Amendments, we sought comment on whether such proposed amendments would promote capital formation, including whether the proposed increased short sale restrictions would affect investors' decisions to invest in certain equity securities. In response, commenters expressed concern about the potential impact of ''naked'' short selling on capital formation claiming that ''naked'' short selling causes a drop in an issuer's stock price that may limit the issuer's ability to access the capital markets. *See, e.g.*, letter from Robert K. Lifton, Chairman and CEO, Medis Technologies, Inc., dated Sept. 12, 2007; letter from NCANS.

strengthen investor confidence in the settlement process.

We also believe that the temporary rule will not impose any burden on competition not necessary or appropriate in furtherance of the purposes of the Exchange Act. By requiring that participants of a registered clearing agency deliver securities by settlement date, and to the extent that participants have not delivered shares by settlement date, borrow or purchase securities to close out the fail to deliver position by no later than the beginning of regular trading hours on the Close-Out Date, we believe the temporary rule will promote competition by requiring similarly situated participants of a registered clearing agency, including broker-dealers from which they receive trades for clearance and settlement, to close out fail to deliver positions in any equity securities within similar time-frames. Moreover, the requirements of the temporary rule will help to eliminate any possibility that abusive ''naked'' short selling may contribute to the disruption of markets in equity securities and, therefore, will help ensure that all investors remain confident that trading in these securities can be conducted without the influence of illegal manipulation. We also believe that the temporary rule will promote competition by protecting and enhancing the operation, integrity, and stability of the markets. At the same time, the temporary rule will help to maintain fair and orderly markets without unduly restricting legitimate short selling.

In addition, by providing a close-out requirement of 35 consecutive settlement days from settlement date for fails to deliver resulting from sales of equity securities sold pursuant to Rule 144 of the Securities Act, we believe the temporary rule will promote competition by requiring similarly situated participants to close out fail to deliver positions in any equity securities resulting from sales of Rule 144 securities within the same time-frame.

Similarly, an extended close-out requirement for fails to deliver resulting from long sales that are attributable to a Market Maker, will promote competition by requiring similarly situated participants to close out these fail to deliver positions within the same time-frame.

We request comment on whether the temporary rule is likely to promote efficiency, capital formation, and competition.

X. Final Regulatory Flexibility Analysis

The Final Regulatory Flexibility Analysis (''FRFA'') has been prepared in accordance with 5 U.S.C. 604. This FRFA relates to the amendments that add temporary Rule 204T to Regulation SHO, which we are adopting in this release.[150]

A. Need for and Objectives of the Rule

Sections I through VI of this release describe the reasons for and objectives of temporary Rule 204T. As we discuss in detail above, we have become concerned that there is a substantial threat of sudden and excessive fluctuations of securities prices and disruption in the functioning of the securities markets that could threaten fair and orderly markets.

B. Small Entities Affected by the Rule

The entities covered by the temporary rule will include small entities that are participants of a registered clearing agency and small broker-dealers from which participants receive trades for clearance and settlement. In addition, the entities covered by the temporary rule will include small entities that are market participants that effect sales subject to the requirements of Regulation SHO. Although it is impossible to quantify every type of small entity covered by the temporary rule, Paragraph (c)(1) of Rule 0–10 under the Exchange Act[151] states that the term ''small business'' or ''small organization,'' when referring to a broker-dealer, means a broker or dealer that had total capital (net worth plus subordinated liabilities) of less than $500,000 on the date in the prior fiscal year as of which its audited financial statements were prepared pursuant to § 240.17a–5(d); and is not affiliated with any person (other than a natural person) that is not a small business or small organization. We estimate that as of 2007 there were approximately 896 broker-dealers that qualified as small entities as defined above.[152]

As noted above, the entities covered by the temporary rule will include small entities that are participants of a registered clearing agency. As of July 31, 2008, approximately 91% of participants of the NSCC, the primary registered clearing agency responsible for clearing U.S. transactions, were registered as broker-dealers. Participants not registered as broker-dealers include such entities as banks, U.S.-registered exchanges, and clearing agencies. Although these entities are participants of a registered clearing agency, generally these entities do not engage in the types of activities that would implicate the close-out requirements of Regulation SHO. Such activities of these entities include creating and redeeming Exchange Traded Funds, trading in municipal securities, and using NSCC's Envelope Settlement Service or Inter-city Envelope Settlement Service. These activities rarely lead to fails to deliver and, if fails to deliver do occur, they are small in number and are usually cleaned up within a day. Thus, such fails to deliver would not trigger the close-out provisions of Regulation SHO.

The federal securities laws do not define what is a ''small business'' or ''small organization'' when referring to a bank. The Small Business Administration regulations define ''small entities'' to include banks and savings associations with total assets of $165 million or less.[153] As of July 31, 2008, no bank that was a participant of the NSCC was a small entity because none met these criteria.

Paragraph (e) of Rule 0–10 under the Exchange Act[154] states that the term ''small business'' or ''small organization,'' when referring to an exchange, means any exchange that: (1) Has been exempted from the reporting requirements of Rule 11Aa3–1 under the Exchange Act; and (2) is not affiliated with any person (other than a natural person) that is not a small business or small organization, as defined by Rule 0–10. No U.S. registered exchange is a small entity because none meets these criteria.

Paragraph (d) of Rule 0–10 under the Exchange Act[155] states that the term ''small business'' or ''small organization,'' when referring to a clearing agency, means a clearing agency that: (1) Compared, cleared and settled less than $500 million in securities transactions during the preceding fiscal year (or in the time that it has been in business, if shorter); (2) had less than $200 million in funds and securities in its custody or control at all times during the preceding fiscal year (or in the time that it has been in business, if shorter); and (3) is not affiliated with any person (other than a

[150] Although the requirements of the Regulatory Flexibility Act are not applicable to rules adopted under the Administrative Procedure Act's ''good cause'' exception, see 5 U.S.C. 601(2) (defining ''rule'' and notice requirements under the Administrative Procedures Act), we nevertheless prepared a FRFA.

[151] 17 CFR 240.0–10(c)(1).

[152] These numbers are based on OEA's review of 2007 FOCUS Report filings reflecting registered broker-dealers. This number does not include broker-dealers that are delinquent on FOCUS Report filings.

[153] *See* 13 CFR 121.201.

[154] 17 CFR 240.0–10(e).

[155] 17 CFR 240.0–10(d).

natural person) that is not a small business or small organization as defined by Rule 0–10. No clearing agency that is subject to the requirements of Regulation SHO is a small entity because none meets these criteria.

C. Projected Reporting, Recordkeeping and Other Compliance Requirements

The temporary rule may impose some new or additional reporting, recordkeeping, or compliance costs on small entities that are participants of a clearing agency registered with the Commission and small broker-dealers from which the participant receives trades for clearance and settlement. We do not believe, at this time, that any specialized professional skills will be necessary to comply with the temporary rule.

D. Agency Action To Minimize Effect on Small Entities

As required by the Regulatory Flexibility Act, we have considered alternatives that would accomplish our stated objectives, while minimizing any significant adverse impact on small entities. Temporary Rule 204T should not adversely affect small entities because it imposes minimal new reporting, recordkeeping, or compliance requirements. Moreover, it is not appropriate to develop separate requirements for small entities because we think all small entities that are broker-dealers should be subject to the enhanced delivery requirements imposed by the temporary rule.

E. Duplicative, Overlapping, or Conflicting Federal Rules

The Commission believes that there are no rules that duplicate, overlap, or conflict with temporary Rule 204T. The Commission has designed the temporary rule so that it is consistent with the close-out requirements of Rule 203(b)(3) of Regulation SHO.

F. Significant Alternatives

The Regulatory Flexibility Act directs us to consider significant alternatives that would accomplish our stated objective, while minimizing any significant adverse impact on small entities.[156] In connection with the temporary rule, we considered the following alternatives: (1) Establishing different compliance or reporting standards or timetable that take into account the resources available to small entities; (2) clarifying, consolidating, or simplifying compliance requirements under the rule for small entities; (3) using performance rather than design standards; and (4) exempting small entities from coverage of the rule, or any part of the rule.

The temporary rule furthers the Commission's stated goal of helping to eliminate any possibility that abusive ''naked'' short selling may contribute to the substantial disruption in the securities markets and, therefore, to help ensure that investors remain confident that trading in equity securities can be conducted without the illegal influence of manipulation. The temporary rule also furthers the goals of helping to maintain fair and orderly markets against the threat of sudden and excessive fluctuations of securities prices generally and disruption in the functioning of the securities markets.

The temporary rule should not adversely affect small entities because the rule may impose only minimal new compliance requirements. Moreover, it is not appropriate to develop different compliance requirements for small entities with respect to the temporary rule because we think all entities, including small entities, should be subject to the requirements of the temporary rule. We believe that imposing different compliance requirements, and possibly a different timetable for implementing compliance requirements, for small entities would undermine the Commission's goal of addressing abusive ''naked'' short selling. We have concluded similarly that it is not consistent with the goal of the temporary rule to further clarify, consolidate or simplify the temporary rule for small entities. The Commission also believes that it is inconsistent with the purposes of the Exchange Act to use performance standards to specify different requirements for small entities or to exempt small entities from having to comply with the temporary rule.

G. General Request for Comments

We solicit written comments regarding our analysis. We request comment on whether the temporary rule will have any effects that we have not discussed. We request that commenters describe the nature of any impact on small entities and provide empirical data to support the extent of the impact.

XI. Statutory Authority

Pursuant to the Exchange Act and, particularly, Sections 2, 3(b), 6, 9(h), 10, 11A, 15, 15A, 17, 17A, 19 and 23(a) thereof, 15 U.S.C. 78b, 78c(b), 78f, 78i(h), 78j, 78k–1, 78o, 78o–3, 78q, 78q–1, 78s and 78w(a), the Commission is adopting, as an interim final temporary rule, Rule 204T, amendments to Regulation SHO.

XII. Text of the Amendments to Regulation SHO

List of Subjects in 17 CFR Part 242

Brokers, Fraud, Reporting and recordkeeping requirements, Securities.

■ For the reasons set out in the preamble, Title 17, Chapter II, Part 242, of the Code of Federal Regulations is amended as follows.

PART 242—REGULATIONS M, SHO, ATS, AC, AND NMS, AND CUSTOMER MARGIN REQUIREMENTS FOR SECURITY FUTURES

■ 1. The authority citation for part 242 continues to read as follows:

Authority: 15 U.S.C. 77g, 77q(a), 77s(a), 78b, 78c, 78g(c)(2), 78i(a), 78j, 78k–1(c), 78*l*, 78m, 78n, 78o(b), 78o(c), 78o(g), 78q(a), 78q(b), 78q(h), 78w(a), 78dd–1, 78mm, 80a–23, 80a–29, and 80a–37.

■ 2. Section 242.204T is added to read as follows:

§ 242.204T Short sales.

(a) A participant of a registered clearing agency must deliver securities to a registered clearing agency for clearance and settlement on a long or short sale in any equity security by settlement date, or if a participant of a registered clearing agency has a fail to deliver position at a registered clearing agency in any equity security for a long or short sale transaction in that equity security, the participant shall, by no later than the beginning of regular trading hours on the settlement day following the settlement date, immediately close out its fail to deliver position by borrowing or purchasing securities of like kind and quantity; *Provided, however:*

(1) If a participant of a registered clearing agency has a fail to deliver position at a registered clearing agency in any equity security and the participant can demonstrate on its books and records that such fail to deliver position resulted from a long sale, the participant shall by no later than the beginning of regular trading hours on the third consecutive settlement day following the settlement date, immediately close out the fail to deliver position by purchasing securities of like kind and quantity;

(2) If a participant of a registered clearing agency has a fail to deliver position at a registered clearing agency in any equity security sold pursuant to § 230.144 of this chapter for thirty-five consecutive settlement days after the settlement date for a sale in that equity security, the participant shall, by no later than the beginning of regular trading hours on the thirty-sixth

[156] *See* 5 U.S.C. 603(c).

consecutive settlement day following the settlement date for the transaction, immediately close out the fail to deliver position by purchasing securities of like kind and quantity; or

(3) If a participant of a registered clearing agency has a fail to deliver position at a registered clearing agency in any equity security that is attributable to bona fide market making activities by a registered market maker, options market maker, or other market maker obligated to quote in the over-the-counter market (individually a ''Market Maker,'' collectively ''Market Makers''), the participant shall by no later than the beginning of regular trading hours on the third consecutive settlement day following the settlement date, immediately close out the fail to deliver position by purchasing securities of like kind and quantity.

(b) If a participant of a registered clearing agency has a fail to deliver position in any equity security at a registered clearing agency and does not close out such fail to deliver position in accordance with the requirements of paragraph (a) of this section, the participant and any broker or dealer from which it receives trades for clearance and settlement, including any market maker that would otherwise be entitled to rely on the exception provided in § 242.203(b)(2)(iii), may not accept a short sale order in the equity security from another person, or effect a short sale in the equity security for its own account, to the extent that the broker or dealer submits its short sales to that participant for clearance and settlement, without first borrowing the security, or entering into a bona fide arrangement to borrow the security, until the participant closes out the fail to deliver position by purchasing securities of like kind and quantity and that purchase has cleared and settled at a registered clearing agency; *Provided, however:*

(1) A broker or dealer shall not be subject to the requirements of paragraph (b) of this section if the broker or dealer timely certifies to the participant of a registered clearing agency that it has not incurred a fail to deliver position on settlement date for a long or short sale in an equity security for which the participant has a fail to deliver position at a registered clearing agency or that the broker or dealer is in compliance with paragraph (e) of this section.

(2) The requirements of paragraph (b) of this section shall not apply to Market Makers provided the Market Maker can demonstrate that it does not have an open short position in the equity security at the time of any additional short sales.

(c) The participant must notify any broker or dealer from which it receives trades for clearance and settlement, including any market maker that would otherwise be entitled to rely on the exception provided in § 242.203(b)(2)(iii):

(1) That the participant has a fail to deliver position in an equity security at a registered clearing agency that has not been closed out in accordance with the requirements of paragraph (a) of this section; and

(2) When the purchase that the participant has made to close out the fail to deliver position has cleared and settled at a registered clearing agency.

(d) If a participant of a registered clearing agency reasonably allocates a portion of a fail to deliver position to another registered broker or dealer for which it clears trades or from which it receives trades for settlement, based on such broker's or dealer's short position, the provisions of paragraphs (a) and (b) of this section relating to such fail to deliver position shall apply to such registered broker or dealer that was allocated the fail to deliver position, and not to the participant. A broker or dealer that has been allocated a portion of a fail to deliver position that does not comply with the provisions of paragraph (a) of this section must immediately notify the participant that it has become subject to the requirements of paragraph (b) of this section.

(e) Even if a participant of a registered clearing agency has not closed out a fail to deliver position at a registered clearing agency in accordance with paragraph (a) of this section, or has not allocated a fail to deliver position to a broker or dealer in accordance with paragraph (d) of this section, a broker or dealer shall not be subject to the requirements of paragraph (a) or (b) of this section if the broker or dealer purchases securities prior to the beginning of regular trading hours on the settlement day after the settlement date for a long or short sale to close out an open short position, and if:

(1) The purchase is bona fide;

(2) The purchase is executed on, or after, trade date but by no later than the end of regular trading hours on settlement date for the transaction;

(3) The purchase is of a quantity of securities sufficient to cover the entire amount of the open short position; and

(4) The broker or dealer can demonstrate that it has a net long position or net flat position on its books and records on the settlement day for which the broker or dealer is seeking to demonstrate that it has purchased shares to close out its open short position.

(f) *Definitions.* (1) For purposes of this section, the term *settlement date* shall mean the business day on which delivery of a security and payment of money is to be made through the facilities of a registered clearing agency in connection with the sale of a security.

(2) For purposes of this section, the term *regular trading hours* has the same meaning as in Rule 600(b)(64) of Regulation NMS (17 CFR 242.600(b)(64)).

(g) This temporary section will expire and no longer be effective on July 31, 2009.

By the Commission.

Dated: October 14, 2008.

Florence E. Harmon,

Acting Secretary.

[FR Doc. E8–24785 Filed 10–16–08; 8:45 am]

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DEPARTMENT OF LABOR

Employee Benefits Security Administration

29 CFR Part 2509

RIN 1210–AB28

Interpretive Bulletin Relating to Exercise of Shareholder Rights

AGENCY: Employee Benefits Security Administration.

ACTION: Interpretive bulletin.

SUMMARY: This document sets forth the views of the Department of Labor concerning the legal standards imposed by sections 402, 403 and 404 of Title I of the Employee Retirement Income Security Act (ERISA) with respect to the exercise of shareholder rights and written statements of investment policy, including proxy voting policies or guidelines. These guidelines affect fiduciaries of employee benefit plans, including trustees, investment managers and others responsible for the management of employee benefit plan assets.

DATES: This interpretive bulletin is effective on October 17, 2008.

FOR FURTHER INFORMATION CONTACT: Office of Regulations and Interpretations, Employee Benefits Security Administration, (202) 693–8500. This is not a toll-free number.

SUPPLEMENTARY INFORMATION: On July 29, 1994, the Department of Labor (the Department) issued guidance with respect to the duties of employee benefit plan fiduciaries under sections 402, 403 and 404 of Title I of the Employee Retirement Income Security Act (ERISA)

to vote proxies appurtenant to shares of corporate stock held by their plans (29 CFR 2509.94–2). The guidance set forth in this document, Interpretive Bulletin 08–2, includes clarifications of the earlier guidance, as well as interpretive positions issued by the Department since 1994 on shareholder activism and socially directed proxy voting initiatives. The guidance modifies and supersedes the guidance set forth in interpretive bulletin 94–2 (29 CFR 2509.94–2).

List of Subjects in 29 CFR Part 2509

Employee benefit plans, Pensions.

■ For the reasons set forth in the preamble, the Department is amending Subchapter A, Part 2509 of Title 29 of the Code of Federal Regulations as follows:

Subchapter A—General

PART 2509—INTERPRETIVE BULLETINS RELATING TO THE EMPLOYEE RETIREMENT INCOME SECURITY ACT OF 1974

■ 1. The authority citation for part 2509 continues to read as follows:

Authority: 29 U.S.C. 1135. Secretary of Labor's Order No. 1–2003, (68 FR 5374 Feb. 3, 2003). Sections 2509.75–10 and 2509.75–2 are also issued under 29 U.S.C. 1052, 1053, 1054. Section 2509.75–5 is also issued under 29 U.S.C. 1002.

§ 2509.94–2 [Removed]

■ 2. Part 2509 is amended by removing § 2509.94–2.

■ 3. Part 2509 is further amended by adding new § 2509.08–2 to read as follows:

§ 2509.08–2 Interpretive bulletin relating to the exercise of shareholder rights and written statements of investment policy, including proxy voting policies or guidelines.

This interpretive bulletin sets forth the Department of Labor's (the Department) interpretation of sections 402, 403 and 404 of the Employee Retirement Income Security Act of 1974 (ERISA) as those sections apply to voting of proxies on securities held in employee benefit plan investment portfolios and the maintenance of and compliance with statements of investment policy, including proxy voting policy. In addition, this interpretive bulletin provides guidance on the appropriateness under ERISA of active monitoring of corporate management by plan fiduciaries. The guidance set forth in this interpretive bulletin modifies and supersedes the guidance set forth in interpretive bulletin 94–2 (29 CFR 2509.94–2).

(1) Proxy Voting

The fiduciary act of managing plan assets that are shares of corporate stock includes the management of voting rights appurtenant to those shares of stock.[1] As a result, the responsibility for voting or deciding not to vote proxies lies exclusively with the plan trustee except to the extent that either (1) the trustee is subject to the direction of a named fiduciary pursuant to ERISA Sec. 403(a)(1); or (2) the power to manage, acquire or dispose of the relevant assets has been delegated by a named fiduciary to one or more investment managers pursuant to ERISA Sec. 403(a)(2). Where the authority to manage plan assets has been delegated to an investment manager pursuant to Sec. 403(a)(2), no person other than the investment manager has authority to make voting decisions for proxies appurtenant to such plan assets except to the extent that the named fiduciary has reserved to itself (or to another named fiduciary so authorized by the plan document) the right to direct a plan trustee regarding the voting of proxies. In this regard, a named fiduciary, in delegating investment management authority to an investment manager, could reserve to itself the right to direct a trustee with respect to the voting of all proxies or reserve to itself the right to direct a trustee as to the voting of only those proxies relating to specified assets or issues.

If the plan document or investment management agreement provides that the investment manager is not required to vote proxies, but does not expressly preclude the investment manager from voting proxies, the investment manager would have exclusive responsibility for proxy voting decisions. Moreover, an investment manager would not be relieved of its own fiduciary responsibilities by following directions of some other person regarding the voting of proxies, or by delegating such responsibility to another person. If, however, the plan document or the investment management contract expressly precludes the investment manager from voting proxies, the responsibility for voting proxies would lie exclusively with the trustee. The trustee, however, consistent with the requirements of ERISA Sec. 403(a)(1), may be subject to the directions of a named fiduciary if the plan so provides.

The fiduciary duties described at ERISA Sec. 404(a)(1)(A) and (B), require that, in voting proxies, regardless of whether the vote is made pursuant to a statement of investment policy, the responsible fiduciary shall consider only those factors that relate to the economic value of the plan's investment and shall not subordinate the interests of the participants and beneficiaries in their retirement income to unrelated objectives. Votes shall only be cast in accordance with a plan's economic interests. If the responsible fiduciary reasonably determines that the cost of voting (including the cost of research, if necessary, to determine how to vote) is likely to exceed the expected economic benefits of voting, or if the exercise of voting results in the imposition of unwarranted trading or other restrictions, the fiduciary has an obligation to refrain from voting.[2] In making this determination, objectives, considerations, and economic effects unrelated to the plan's economic interests cannot be considered. The fiduciary's duties under ERISA Sec. 404(a)(1)(A) and (B) also require that the named fiduciary appointing an investment manager periodically monitor the activities of the investment manager with respect to the management of plan assets, including decisions made and actions taken by the investment manager with regard to proxy voting decisions. The named fiduciary must carry out this responsibility solely in the participants' and beneficiaries' interest in the economic value of the plan assets and without regard to the fiduciary's relationship to the plan sponsor.

It is the view of the Department that compliance with the duty to monitor necessitates proper documentation of the activities that are subject to monitoring. Thus, the investment manager or other responsible fiduciary would be required to maintain accurate records as to proxy voting decisions, including, where appropriate, cost-benefit analyses.[3] Moreover, if the named fiduciary is to be able to carry out its responsibilities under ERISA Sec. 404(a) in determining whether the investment manager is fulfilling its fiduciary obligations in investing plans assets in a manner that justifies the continuation of the management appointment, the proxy voting records must enable the named fiduciary to review not only the investment manager's voting procedure with respect to plan-owned stock, but also to review the actions taken in individual proxy voting situations.

[1] *See* letter from the Department of Labor to Helmut Fandl, Chairman of the Retirement Board of Avon Products, Inc., dated February 23, 1988.

[2] *See* Advisory Opinion No. 2007–07A (December 21, 2007).

[3] *See* letter from the Department of Labor to Robert A.G. Monks, Institutional Shareholder Services, Inc., January 23, 1990.

The fiduciary obligations of prudence and loyalty to plan participants and beneficiaries require the responsible fiduciary to vote proxies on issues that may affect the economic value of the plan's investment. However, fiduciaries also need to take into account costs when deciding whether and how to exercise their shareholder rights, including the voting of shares. Such costs include, but are not limited to, expenditures related to developing proxy resolutions, proxy voting services and the analysis of the likely net effect of a particular issue on the economic value of the plan's investment. Fiduciaries must take all of these factors into account in determining whether the exercise of such rights (*e.g.*, the voting of a proxy), independently or in conjunction with other shareholders, is expected to have an effect on the economic value of the plan's investment that will outweigh the cost of exercising such rights. With respect to proxies appurtenant to shares of foreign corporations, a fiduciary, in deciding whether to purchase shares of a foreign corporation, should consider whether any additional difficulty and expense in voting such shares is reflected in their market price.

(2) Statements of Investment Policy

The maintenance by an employee benefit plan of a statement of investment policy designed to further the purposes of the plan and its funding policy is consistent with the fiduciary obligations set forth in ERISA section 404(a)(1)(A) and (B). Because the fiduciary act of managing plan assets that are shares of corporate stock includes the voting, where appropriate, of proxies appurtenant to those shares of stock, a statement of proxy voting policy would be an important part of any comprehensive statement of investment policy. For purposes of this document, the term ''statement of investment policy'' means a written statement that provides the fiduciaries who are responsible for plan investments with guidelines or general instructions concerning various types or categories of investment management decisions, which may include proxy voting decisions. A statement of investment policy is distinguished from directions as to the purchase or sale of a specific investment at a specific time or as to voting specific plan proxies.

In plans where investment management responsibility is delegated to one or more investment managers appointed by the named fiduciary pursuant to ERISA Sec. 402(c)(3), inherent in the authority to appoint an investment manager, the named fiduciary responsible for appointment of investment managers has the authority to condition the appointment on acceptance of a statement of investment policy. Thus, such a named fiduciary may expressly require, as a condition of the investment management agreement, that an investment manager comply with the terms of a statement of investment policy that sets forth guidelines concerning investments and investment courses of action that the investment manager is authorized or is not authorized to make. Such investment policy may include a policy or guidelines on the voting of proxies on shares of stock for which the investment manager is responsible. Such guidelines must be consistent with the fiduciary obligations set forth in ERISA Sec. 404(a)(1)(A) and (B) and this Interpretive Bulletin, and may not subordinate the economic interests of the plan participants to unrelated objectives. In the absence of such an express requirement to comply with an investment policy, the authority to manage the plan assets placed under the control of the investment manager would lie exclusively with the investment manager. Although a trustee may be subject to the direction of a named fiduciary pursuant to ERISA Sec. 403(a)(1), an investment manager who has authority to make investment decisions, including proxy voting decisions, would never be relieved of its fiduciary responsibility if it followed the direction as to specific investment decisions from the named fiduciary or any other person.

Statements of investment policy issued by a named fiduciary authorized to appoint investment managers would be part of the ''documents and instruments governing the plan'' within the meaning of ERISA Sec. 404(a)(1)(D). An investment manager to whom such investment policy applies would be required to comply with such policy, pursuant to ERISA Sec. 404(a)(1)(D) insofar as the policy directives or guidelines are consistent with titles I and IV of ERISA. Therefore, if, for example, compliance with the guidelines in a given instance would be imprudent, then the investment manager's failure to follow the guidelines would not violate ERISA Sec. 404(a)(1)(D). Moreover, ERISA Sec. 404(a)(1)(D) does not shield the investment manager from liability for imprudent actions taken in compliance with a statement of investment policy.

The plan document or trust agreement may expressly provide a statement of investment policy to guide the trustee or may authorize a named fiduciary to issue a statement of investment policy applicable to a trustee. Where a plan trustee is subject to an investment policy, the trustee's duty to comply with such investment policy would also be analyzed under ERISA Sec. 404(a)(1)(D). Thus, the trustee would be required to comply with the statement of investment policy unless, for example, it would be imprudent to do so in a given instance.

Maintenance of a statement of investment policy by a named fiduciary does not relieve the named fiduciary of its obligations under ERISA Sec. 404(a) with respect to the appointment and monitoring of an investment manager or trustee. In this regard, the named fiduciary appointing an investment manager must periodically monitor the investment manager's activities with respect to management of the plan assets. Moreover, compliance with ERISA Sec. 404(a)(1)(B) would require maintenance of proper documentation of the activities of the investment manager and of the named fiduciary of the plan in monitoring the activities of the investment manager. In addition, in the view of the Department, a named fiduciary's determination of the terms of a statement of investment policy is an exercise of fiduciary responsibility and, as such, statements may need to take into account factors such as the plan's funding policy and its liquidity needs as well as issues of prudence, diversification and other fiduciary requirements of ERISA.

An investment manager of a pooled investment vehicle that holds assets of more than one employee benefit plan may be subject to a proxy voting policy of one plan that conflicts with the proxy voting policy of another plan. If the investment manager determines that compliance with one of the conflicting voting policies would violate ERISA Sec. 404(a)(1), for example, by being imprudent or not solely in the economic interest of plan participants, the investment manager would be required to ignore the policy and vote in accordance with ERISA's obligations. If, however, the investment manager reasonably concludes that application of each plan's voting policy is consistent with ERISA's obligations, such as when the policies reflect different but reasonable judgments or when the plans have different economic interests, ERISA Sec. 404(a)(1)(D) would generally require the manager, to the extent permitted by applicable law, to vote the proxies in proportion to each plan's interest in the pooled investment vehicle. An investment manager may also require participating investors to accept the investment manager's own investment policy statement, including

any statement of proxy voting policy, before they are allowed to invest, which may help to avoid such potential conflicts. As with investment policies originating from named fiduciaries, a policy initiated by an investment manager and adopted by the participating plans would be regarded as an instrument governing the participating plans, and the investment manager's compliance with such a policy would be governed by ERISA Sec. 404(a)(1)(D).

(3) Shareholder Activism

An investment policy that contemplates activities intended to monitor or influence the management of corporations in which the plan owns stock is consistent with a fiduciary's obligations under ERISA where the responsible fiduciary concludes that there is a reasonable expectation that such monitoring or communication with management, by the plan alone or together with other shareholders, will enhance the economic value of the plan's investment in the corporation, after taking into account the costs involved. Such a reasonable expectation may exist in various circumstances, for example, where plan investments in corporate stock are held as long-term investments or where a plan may not be able to easily dispose such an investment. Active monitoring and communication activities would generally concern such issues as the independence and expertise of candidates for the corporation's board of directors and assuring that the board has sufficient information to carry out its responsibility to monitor management. Other issues may include such matters as consideration of the appropriateness of executive compensation, the corporation's policy regarding mergers and acquisitions, the extent of debt financing and capitalization, the nature of long-term business plans, the corporation's investment in training to develop its work force, other workplace practices and financial and non-financial measures of corporate performance that are reasonably likely to affect the economic value of the plan. Active monitoring and communication may be carried out through a variety of methods including by means of correspondence and meetings with corporate management as well as by exercising the legal rights of a shareholder. In creating an investment policy, a fiduciary shall consider only factors that relate to the economic interest of participants and their beneficiaries in plan assets, and shall not use an investment policy to promote myriad public policy preferences.[4]

(4) Socially-Directed Proxy Voting, Investment Policies and Shareholder Activism.

Plan fiduciaries risk violating the exclusive purpose rule when they exercise their fiduciary authority in an attempt to further legislative, regulatory or public policy issues through the proxy process. In such cases, the Department would expect fiduciaries to be able to demonstrate in enforcement actions their compliance with the requirements of section 404(a)(1)(A) and (B). The mere fact that plans are shareholders in the corporations in which they invest does not itself provide a rationale for a fiduciary to spend plan assets to pursue, support, or oppose such proxy proposals. Because of the heightened potential for abuse in such cases, the fiduciaries must be prepared to articulate a clear basis for concluding that the proxy vote, the investment policy, or the activity intended to monitor or influence the management of the corporation is more likely than not to enhance the economic value of the plan's investment before expending plan assets.

The use of pension plan assets by plan fiduciaries to further policy or political issues through proxy resolutions that have no connection to enhancing the economic value of the plan's investment in a corporation would, in the view of the Department, violate the prudence and exclusive purpose requirements of section 404(a)(1)(A) and (B). For example, the likelihood that the adoption of a proxy resolution or proposal requiring corporate directors and officers to disclose their personal political contributions would enhance the economic value of a plan's investment in the corporation appears sufficiently remote that the expenditure of plan assets to further such a resolution or proposal clearly raises compliance issues under section 404(a)(1)(A) and (B).[5]

Signed at Washington, DC, this 9th day of October, 2008.

Bradford P. Campbell,

Assistant Secretary, Employee Benefits Security Administration, Department of Labor.

[FR Doc. E8–24552 Filed 10–16–08; 8:45 am]

BILLING CODE 4510–29–P

[4] See Advisory Opinion No. 2008–05A (June 27, 2008) and letter from Department of Labor to Jonathan P. Hiatt, General Counsel, AFL–CIO (May 3, 2005).

[5] *See* Advisory Opinion No. 2007–07A (December 21, 2007).

DEPARTMENT OF LABOR

Employee Benefits Security Administration

29 CFR Part 2509

RIN 1210–AB29

Interpretive Bulletin Relating to Investing in Economically Targeted Investments

AGENCY: Employee Benefits Security Administration, Labor.

ACTION: Interpretive bulletin.

SUMMARY: This document sets forth the views of the Department of Labor concerning the legal standards imposed on fiduciaries of employee benefit plans by sections 403 and 404 of Title I of the Employee Retirement Income Security Act (ERISA) when considering investments in ''economically targeted investments.'' These guidelines affect fiduciaries of employee benefit plans, including trustees, investment managers and others responsible for the management of employee benefit plan assets.

DATES: This interpretive bulletin is effective on October 17, 2008.

FOR FURTHER INFORMATION CONTACT: Office of Regulations and Interpretations, Employee Benefits Security Administration, (202) 693–8500. This is not a toll free number.

SUPPLEMENTARY INFORMATION: On June 23, 1994, the Department of Labor (the Department) published Interpretive Bulletin § 2509.94–1 (29 CFR 2509.94–1) addressing the limited circumstances under which fiduciaries, consistent with the requirements of sections 404 and 404 of Title I of the Employee Retirement Income Security Act (ERISA), may, in connection with investment decisions, take into account factors other than the economic interests of the plan. The guidance provided in this document, Interpretive Bulletin § 2509.08–1, clarifies, through explanation and examples, that fiduciary consideration of non-economic factors should be rare and, when considered, should be documented in a manner that demonstrates compliance with ERISA's rigorous fiduciary standards. This guidance modifies and supersedes the guidance provided in interpretive bulletin 94–1.

List of Subjects in 29 CFR Part 2509

Employee benefit plans, Pensions.

■ For the reasons set forth in the preamble, the Department is amending Subchapter A, Part 2509 of Title 29 of

the Code of Federal Regulations as follows:

Subchapter A—General

PART 2509—INTERPRETIVE BULLETINS RELATING TO THE EMPLOYEE RETIREMENT INCOME SECURITY ACT OF 1974

■ 1. The authority citation for part 2509 continues to read as follows:

Authority: 29 U.S.C. 1135. Secretary of Labor's Order No. 1–2003, 68 FR 5374 Feb. 3, 2003). Sections 2509.75–10 and 2509.75–2 are also issued under 29 U.S.C. 1052, 1053, 1054. Section 2509.75–5 is also issued under 29 U.S.C. 1002.

§ 2509.94–1 [Removed]

■ 2. Part 2509 is amended by removing § 2509.94–1.

■ 3. Part 2509 is further amended by adding new § 2509.08–1 to read as follows:

§ 2509.08–1 Supplemental guidance relating to fiduciary responsibility in considering economically targeted investments.

This Interpretive Bulletin sets forth the Department of Labor's interpretation of sections 403 and 404 of the Employee Retirement Income Security Act of 1974 (ERISA), as applied to employee benefit plan investments in ''economically targeted investments,'' that is, investments selected for the economic benefits they create apart from their investment return to the employee benefit plan. The guidance set forth in this interpretive bulletin modifies and supersedes the guidance set forth in interpretive bulletin 94–1 (29 CFR 2509.94–1).

ERISA requires that a fiduciary act solely in the interest of the plan's participants and beneficiaries and for the exclusive purpose of providing benefits to their participants and beneficiaries. The Act specifically states, in relevant part, that:

• ''[A]ssets of a plan shall never inure to the benefit of any employer and shall be held for the exclusive purposes of providing benefits to participants in the plan and their beneficiaries.* * *'' [1]

• ''[A] fiduciary shall discharge his duties with respect to a plan solely in the interest of the participants and beneficiaries and for the exclusive purpose of providing benefits to participants and their beneficiaries.'' [2]

ERISA's plain text thus establishes a clear rule that in the course of discharging their duties, fiduciaries may never subordinate the economic interests of the plan to unrelated objectives, and may not select investments on the basis of any factor outside the economic interest of the plan except in very limited circumstances enumerated below.

With regard to investing plan assets, the Department has issued a regulation, at 29 CFR 2550.404a–1, interpreting the prudence requirements of ERISA as they apply to the investment duties of fiduciaries of employee benefit plans. The regulation provides that the prudence requirements of section 404(a)(1)(B) are satisfied if (1) the fiduciary making an investment or engaging in an investment course of action has given appropriate consideration to those facts and circumstances that, given the scope of the fiduciary's investment duties, the fiduciary knows or should know are relevant, and (2) the fiduciary acts accordingly. This includes giving appropriate consideration to the role that the investment or investment course of action plays (in terms of such factors as diversification, liquidity and risk/return characteristics) with respect to that portion of the plan's investment portfolio within the scope of the fiduciary's responsibility.

Other facts and circumstances relevant to an investment or investment course of action would, in the view of the Department, include consideration of the expected return on alternative investments with similar risks available to the plan. It follows that, because every investment necessarily causes a plan to forgo other investment opportunities, an investment will not be prudent if it would be expected to provide a plan with a lower rate of return than available alternative investments with commensurate degrees of risk or is riskier than alternative available investments with commensurate rates of return.

ERISA's plain text does not permit fiduciaries to make investment decisions on the basis of any factor other than the economic interest of the plan. Situations may arise, however, in which two or more investment alternatives are of equal economic value to a plan. The Department has recognized in past guidance that under these limited circumstances, fiduciaries can choose between the investment alternatives on the basis of a factor other than the economic interest of the plan. The Department has interpreted the statute to permit this selection because (1) ERISA requires fiduciaries to invest plan assets and to make choices between investment alternatives, (2) ERISA does not itself specifically provide a basis for making the investment choice in this circumstance, and (3) the economic interests of the plan are fully protected by the fact that the available investment alternatives are, from the plan's perspective, economically indistinguishable.

Given the significance of ERISA's requirement that fiduciaries act ''solely in the interest of participants and beneficiaries,'' the Department believes that, before selecting an economically targeted investment, fiduciaries must have first concluded that the alternative options are truly equal, taking into account a quantitative and qualitative analysis of the economic impact on the plan. ERISA's fiduciary standards expressed in sections 403 and 404 do not permit fiduciaries to select investments based on factors outside the economic interests of the plan until they have concluded, based on economic factors, that alternative investments are equal. A less rigid rule would allow fiduciaries to act on the basis of factors outside the economic interest of the plan in situations where reliance on those factors might compromise or subordinate the interests of plan participants and their beneficiaries. The Department rejects a construction of ERISA that would render the Act's tight limits on the use of plan assets illusory, and that would permit plan fiduciaries to expend ERISA trust assets to promote myriad public policy preferences.[3]

A plan fiduciary's analysis is required to comply with, but is not necessarily limited to, the requirements set forth in 29 CFR 2550.404a–1(b). In evaluating the plan portfolio, as well as portions of the portfolio, the fiduciary is required to examine the level of diversification, degree of liquidity, and the potential risk/return in comparison with available alternative investments. The same type of analysis must also be applied when choosing between investment alternatives. Potential investments should be compared to other investments that would fill a similar role in the portfolio with regard to diversification, liquidity, and risk/return.

In light of the rigorous requirements established by ERISA, the Department believes that fiduciaries who rely on factors outside the economic interests of the plan in making investment choices and subsequently find their decision challenged will rarely be able to demonstrate compliance with ERISA absent a written record demonstrating that a contemporaneous economic

[1] Sec. 403(c)(1), 29 U.S.C.A. 1103(c)(1).

[2] Sec. 404(a)(1)(A)(i), 29 U.S.C.A. 1104(a)(1)(A)(i).

[3] See letters from the Department of Labor to Jonathan Hiatt dated May 3, 2005; to Thomas Donahue dated December 21, 2007 (A.O. 2007–07A); and to David Chavern dated June 27, 2008 (A.O. 2008–05A).

analysis showed that the investment alternatives were of equal value.

Examples:

A plan owns an interest in a limited partnership that is considering investing in a company that competes with the plan sponsor. The fiduciaries may not replace the limited partnership investment with another investment based on this fact unless they prudently determine that a replacement investment is economically equal or superior to the limited partnership investment and would not adversely affect the plan's investment portfolio, taking into account factors including diversification, liquidity, risk and expected return. The competition of the limited partnership with the plan sponsor is a factor outside the economic interests of the plan, and thus cannot be considered unless an alternative investment is equal or superior to the limited partnership.

A multiemployer plan covering employees in a metropolitan area's construction industry wants to invest in a large loan for a construction project located in the same area because it will create local jobs. The plan has taken steps to ensure that the loan poses no prohibited transaction issues. The loan carries a return fully commensurate with the risk of nonpayment. Moreover, the loan's expected return is equal to or greater than construction loans of similar quality that are available to the plan. However, the plan has already made several other loans for construction projects in the same metropolitan area, and this loan could create a risk of large losses to the plan's portfolio due to lack of diversification. The fiduciaries may not choose this investment on the basis of the local job creation factor because, due to lack of diversification, the investment is not of equal economic value to the plan.

A plan is considering an investment in a bond to finance affordable housing for people in the local community. The bond provides a return at least as favorable to the plan as other bonds with the same risk rating. However, the bond's size and lengthy duration raises a potential risk regarding the plan's ability to meet its predicted liquidity needs. Other available bonds under consideration by the plan do not pose this same risk. The return on the bond, although equal to or greater than the alternatives, would not be sufficient to offset the additional risk for the plan created by the role that this bond would play in the plan's portfolio. The plan's fiduciaries may not make this investment based on factors outside the economic interest of the plan because it is not of equal or greater economic value to other investment alternatives.

A plan sponsor adopts an investment policy that favors plan investment in companies meeting certain environmental criteria (so-called ''green'' companies). In carrying out the policy, the plan's fiduciaries may not simply consider investments only in green companies. They must consider all investments that meet the plan's prudent financial criteria. The fiduciaries may apply the investment policy to eliminate a company from consideration only if they appropriately determine that other available investments provide equal or better returns at the same or lower risks, and would play the same role in the plan's portfolio.

A collective investment fund, which holds assets of several plans, is designed to invest in commercial real estate constructed or renovated with union labor. Fiduciaries of plans that invest in the fund must determine that the fund's overall risk and return characteristics are as favorable, or more favorable, to the plans as other available investment alternatives that would play a similar role in their plans' portfolios. The fund's managers may select investments constructed or improved with union labor, after an economic analysis indicates that these investment options are equal or superior to their alternatives. The managers will best be able to justify their investment choice by recording their analysis in writing. However, if real estate investments that satisfy both ERISA's fiduciary requirements and the union labor criterion are unavailable, the fund managers may have to select investments without regard to the union labor criterion.

Signed at Washington, DC, this 9th day of October 2008.

Bradford P. Campbell,

Assistant Secretary, Employee Benefits Security Administration, Department of Labor.

[FR Doc. E8–24551 Filed 10–16–08; 8:45 am]

BILLING CODE 4510–29–P

DEPARTMENT OF VETERANS AFFAIRS

38 CFR Part 3

RIN 2900–AM28

Accrued Benefits; Correction

AGENCY: Department of Veterans Affairs.

ACTION: Correcting amendment.

SUMMARY: This document contains a minor correction to the final regulations that the Department of Veterans Affairs (VA) published in 71 FR 78368 on December 29, 2006. The regulation relates to the Payment of Benefits to Survivors of Estates of Deceased Beneficiaries. No substantive change to the content of the regulation is being made by correcting this amendment.

DATES: *Effective Date:* October 17, 2008.

FOR FURTHER INFORMATION CONTACT: Denise Kemp-Nichols, Regulations Staff (211D), Compensation and Pension Service, Veterans Benefits Administration, Department of Veterans Affairs, 810 Vermont Avenue, NW., Washington, DC 20420, (202) 461–9724.

SUPPLEMENTARY INFORMATION: VA published a final rule in the **Federal Register** on December 29, 2006 (See 71 FR 78368) revising its final rule eliminating the 2-year limitation on accrued benefits. In that document, VA failed to amend 38 CFR 3.816(f)(2). This document corrects that error by removing the entire first sentence of 38 CFR 3.816(f)(2) and in the second sentence, by removing the word ''also'' after words ''accrued benefits.''

List of Subjects in 38 CFR Part 3

Administrative, practice and procedures, Claims, Disability benefits, Health care, Pensions, Veterans, Vietnam.

Approved: October 10, 2008.

William F. Russo,

Director of Regulations Management.

■ For the reason set out in the preamble, VA is correcting 38 CFR part 3 as follows.

PART 3—ADJUDICATION

■ 1. The authority citation for part 3, subpart A continues to read as follows:

Authority: 38 U.S.C. 501(a), unless otherwise noted.

§ 3.816 [Corrected]

■ 2. In § 3.816, paragraph (f)(2) is amended by removing the entire first sentence and in the second sentence removing the word ''also''.

[FR Doc. E8–24650 Filed 10–16–08; 8:45 am]

BILLING CODE 8320–01–P

ENVIRONMENTAL PROTECTION AGENCY

40 CFR Part 3

[EPA–HQ–OEI–2003–0001; FRL–8730–8]

RIN 2025–AA23

Extension of Cross-Media Electronic Reporting Rule Deadline for Authorized Programs

AGENCY: Environmental Protection Agency (EPA).

ACTION: Direct final rule.

SUMMARY: EPA is taking direct final action to amend the Final Cross-Media Electronic Reporting Rule (CROMERR) deadline for authorized programs (states, tribes, or local governments) with existing electronic document receiving systems to submit an application for EPA approval to revise or modify their authorized programs. This action will extend the current October 13, 2008, deadline until January 13, 2010.

DATES: This rule is effective on December 1, 2008 without further notice, unless EPA receives relevant adverse comment by November 3, 2008. If EPA receives relevant adverse comment, the Agency will publish a timely withdrawal in the **Federal Register** informing the public that the rule will not take effect.

ADDRESSES: Submit your comments, identified by Docket ID No. EPA–HQ–OEI–2003–0001, by one of the following methods:

- *www.regulations.gov:* Follow the on-line instructions for submitting comments.
- *E-mail: oei.docket@epa.gov.*
- *Mail:* CROMERR Docket, Environmental Protection Agency, Mailcode: 2822T, 1200 Pennsylvania Avenue, NW., Washington, DC 20460. Hand Delivery: EPA Docket Room, EPA West, Room 3334, 1301 Constitution Avenue, 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–OEI–2003–0001. EPA's policy is that all comments received will be included in the public docket without change and may be made available online at *www.regulations.gov*, including any personal information provided, unless the comment includes information claimed to be Confidential Business Information (CBI) or other information whose disclosure is restricted by statute. Do not submit information that you consider to be CBI or otherwise protected through *www.regulations.gov* or e-mail. The *www.regulations.gov* Web site is an ''anonymous access'' system, which means EPA will not know your identity or contact information unless you provide it in the body of your comment. If you send an e-mail comment directly to EPA without going through *www.regulations.gov* your e-mail address will be automatically captured and included as part of the comment that is placed in the public docket and made available on the Internet. If you submit an electronic comment, EPA recommends that you include your name and other contact information in the body of your comment and with any disk or CD–ROM you submit. If EPA cannot read your comment due to technical difficulties and cannot contact you for clarification, EPA may not be able to consider your comment. Electronic files should avoid the use of special characters, any form of encryption, and be free of any defects or viruses. 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 docket are listed in the *www.regulations.gov* index. Although listed in the index, some information is not publicly available, e.g., CBI or other information whose disclosure is restricted by statute. Certain other material, such as copyrighted material, will be publicly available only in hard copy. Publicly available docket materials are available either electronically in *www.regulations.gov* or in hard copy at the CROMERR Docket, EPA/DC, EPA West, Room 3334, 1301 Constitution Avenue, NW., Washington, DC. The Public Reading Room is open from 8:30 a.m. to 4:30 p.m., Monday through Friday, excluding legal holidays. The telephone number for the Public Reading Room is (202) 566–1744, and the telephone number for the CROMERR Docket is (202) 566–1752.

FOR FURTHER INFORMATION CONTACT: Evi Huffer, Office of Environmental Information (2823T), Environmental Protection Agency, 1200 Pennsylvania Avenue, NW., Washington, DC 20460; (202) 566–1697; *huffer.evi@epa.gov*, or David Schwarz, Office of Environmental Information (2823T), Environmental Protection Agency, 1200 Pennsylvania Avenue, NW., Washington, DC 20460; (202) 566–1704; *schwarz.david@epa.gov*.

SUPPLEMENTARY INFORMATION:

I. What Does This Rule Do?

This rule provides temporary regulatory relief to states, tribes, and local governments with ''authorized programs'' as defined in 40 Code of Federal Regulations (CFR) 3.3. Any such authorized program that operates an ''existing electronic document receiving system'' as defined in 40 CFR 3.3 will have an additional 15 months to submit an application to revise or modify its authorized program to meet the requirements of 40 CFR Part 3. Specifically, this direct final rule amends 40 CFR 3.1000(a)(3) by extending the October 13, 2008, deadline to January 13, 2010.

II. Why Is EPA Using a Direct Final Rule?

EPA is publishing this rule without a prior proposed rule because the Agency views this as a noncontroversial action and anticipates no adverse comment. This action merely extends the current due date for submitting applications under CROMERR for authorized programs with existing electronic document receiving systems, and imposes no additional requirements beyond those imposed by the underlying final rule (70 FR 59848, October 13, 2005). After setting the current deadline, EPA learned that some states and local agencies currently working to comply with CROMERR have experienced an unanticipated delay in the completion of necessary upgrades to their electronic document receiving systems. EPA believes it is appropriate to extend the submission deadline for applications related to existing systems by an additional 15 months.

Additionally, in the ''Proposed Rules'' section of today's **Federal Register**, EPA is publishing a separate proposed rule to consider adoption of the time extension contained in this direct final rule should the Agency receive relevant adverse comments regarding this direct final rule. EPA will not institute a second comment period on this action. Any parties interested in commenting on this direct final rule or the proposed rule listed elsewhere in today's **Federal Register** must do so at this time. For further information about commenting on this rule, see the **ADDRESSES** section of this document.

If EPA receives relevant adverse comment, the Agency will publish a timely withdrawal in the **Federal Register** informing the public that this direct final rule will not take effect. EPA will address all public comments in any subsequent final rule based on the proposed rule.

III. Does This Action Apply to Me?

This action will affect states, tribes, and local governments that have an authorized program as defined in 40 CFR 3.3 and also have an existing electronic document receiving system, as defined in 40 CFR 3.3. For purposes of this rulemaking, the term ''state'' includes the District of Columbia and the United States territories, as specified in the applicable statutes. That is, the term ''state'' includes the District of Columbia, the Commonwealth of Puerto Rico, the Virgin Islands, Guam, American Samoa, the Commonwealth of Northern Mariana Islands, and the Trust Territory of the Pacific Islands, depending on the statute.

Category	Examples of affected entities
Local government	Publicly owned treatment works, owners and operators of treatment works treating domestic sewage, local and regional air boards, local and regional waste management authorities, and municipal and other drinking water authorities.
Tribe and State governments	States, tribes or territories that administer any federal environmental programs delegated, authorized, or approved by EPA under Title 40 of the CFR.

This table is not intended to be exhaustive, but rather provides a guide for readers regarding entities likely to be affected by this action. If you have questions regarding the applicability of this action to a particular entity, consult the person listed in the preceding **FOR FURTHER INFORMATION CONTACT** section.

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

A. *Submitting CBI.* Do not submit this information to EPA through *www.regulations.gov* or e-mail. Clearly mark the part or all of the information that you claim to be CBI. For CBI in a disk or CD–ROM that you mail to EPA, mark the outside of the disk or CD–ROM as CBI and then identify electronically within the disk or CD–ROM the specific information that is claimed as CBI. In addition to one complete version of the comment that includes information claimed as CBI, a copy of the comment that does not contain the information claimed as CBI must be submitted for inclusion in the public docket. Information so marked will not be disclosed except in accordance with procedures set forth in 40 CFR part 2.

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

- Identify the rulemaking by docket number and other identifying information (subject heading, **Federal Register** date and page number).
- Follow directions—The agency may ask you to respond to specific questions or organize comments by referencing a Code of Federal Regulations (CFR) part or section number.
- Explain why you agree or disagree; suggest alternatives and substitute language for your requested changes.
- Describe any assumptions and provide any technical information and/or data that you used.
- If you estimate potential costs or burdens, explain how you arrived at your estimate in sufficient detail to allow for it to be reproduced.
- Provide specific examples to illustrate your concerns, and suggest alternatives.
- Explain your views as clearly as possible, avoiding the use of profanity or personal threats.
- Make sure to submit your comments by the comment period deadline identified.

V. 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 (EO) 12866 (58 FR 51735, October 4, 1993) and is, therefore, not subject to review under the EO.

B. Paperwork Reduction Act

This action does not impose any information collection burden. This action merely extends the current due date for submitting applications under CROMERR for authorized programs with existing electronic document receiving systems, and imposes no additional requirements. However, the Office of Management and Budget (OMB) has previously approved the information collection requirements contained in the existing regulations (40 CFR part 3) under the provisions of the Paperwork Reduction Act, 44 U.S.C. 3501 *et seq.* and has assigned OMB control number 2025–0003, EPA ICR number 2002.03. A copy of the OMB approved Information Collection Request (ICR) may be obtained from Susan Auby, Collection Strategies Division; U.S. Environmental Protection Agency (2822T); 1200 Pennsylvania Avenue, NW., Washington, DC 20460 or by calling (202) 566–1672. The ICR is also available electronically in *www.regulations.gov.*

Burden means the total time, effort, or financial resources expended by persons to generate, maintain, retain, or disclose or provide information to or for a federal agency. This includes the time needed to review instructions; develop, acquire, install, and utilize technology and systems for the purposes of collecting, validating, and verifying information, processing and maintaining information, and disclosing and providing information; adjust the existing ways to comply with any previously applicable instructions and requirements; train personnel to be able to respond to a collection of information; search data sources; complete and review the collection of information; and transmit or otherwise disclose the information.

An agency may not conduct or sponsor, and a person is not required to respond to, a collection of information unless it displays a currently valid OMB control number. The OMB control numbers for EPA's regulations in 40 CFR are listed in 40 CFR part 9.

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 final rule on small entities, a small entity is defined as: (1) A small business that meets the definition for small businesses based on SBA size standards at 13 CFR 121.201; (2) a small governmental jurisdiction that is a government of a city, county, town, school district or special district with a population of less than 50,000 (Under the RFA definition, States and tribal governments are not considered small governmental jurisdictions.); 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 possibility of economic impacts of today's final rule on small entities, I certify that this action will not have a significant economic impact on a substantial number of small entities. The small entities directly regulated by this direct final rule are small governmental jurisdictions. In determining whether a rule has a significant economic impact on a substantial number of small entities, the impact of concern is any significant adverse economic impact on small entities, since the primary purpose of the regulatory flexibility analyses is to identify and address regulatory alternatives ''which minimize any significant economic impact of the rule on small entities.'' Thus, an agency may certify that a rule will not have a significant economic impact on a substantial number of small entities if the rule relieves regulatory burden, or otherwise has a positive economic effect on all of the small entities subject to the rule.

This direct final rule merely extends the current regulatory schedule for submitting applications under CROMERR for authorized programs with existing electronic document receiving systems. EPA has therefore concluded that today's final rule will relieve regulatory burden for all affected small entities.

D. Unfunded Mandates Reform Act

This action contains no Federal mandates under the provisions of Title II of the Unfunded Mandates Reform Act of 1995 (UMRA), 2 U.S.C. 1531–1538 for state, tribe, or local governments or the private sector. This action merely extends the current due date for submitting applications under CROMERR for authorized programs with existing electronic document receiving systems, and imposes no additional requirements. EPA has determined that this rule does not contain a federal mandate that may result in expenditures of $100 million or more for states, tribes, and local governments, in the aggregate, or the private sector in any one year. Thus, today's action is not subject to the requirements of sections 202 and 205 of UMRA.

This action is also not subject to the requirements of section 203 of UMRA because it contains no regulatory requirements that might significantly or uniquely affect small governments. This action merely extends the current due date for submitting applications under CROMERR for authorized programs with existing electronic document receiving systems, and imposes no additional requirements.

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 action does not have federalism implications. It will not have substantial direct effects on the states, on the relationship between the national government and the states, or on the distribution of power and responsibilities among the various levels of government, as specified in Executive Order 13132. This action merely extends the current due date for submitting applications under CROMERR for authorized programs with existing electronic document receiving systems, and imposes no additional requirements. Thus, Executive Order 13132 does not apply to this rule.

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

This action does not have tribal implications, as specified in Executive Order 13175 (65 FR 67249, November 9, 2000). It will neither impose substantial direct compliance costs on tribal governments, nor preempt Tribal law. This action merely extends the current due date for submitting applications under CROMERR for authorized programs with existing electronic document receiving systems, and imposes no additional requirements. Thus, Executive Order 13175 does not apply to this action.

G. Executive Order 13045: Children's Health Protection

Executive Order 13045, Protection of Children from Environmental Health Risks and Safety Risks (62 FR 19885, April 23, 1997) applies to any rule that (1) is determined to be ''economically significant'' as defined under Executive Order 12866, and (2) concerns an environmental health or safety risk that EPA has reason to believe may have a disproportionate effect on children. If the regulatory action meets both criteria, the Agency must evaluate the environmental health or safety effects of the planned rule on children, and explain why the planned regulation is preferable to other potentially effective and reasonably feasible alternatives considered by the Agency. EPA interprets Executive Order 13045 as applying only to those regulatory actions that are based on health or safety risks, such that the analysis required under section 5–501 of the Order has the potential to influence the regulation.

This final rule is not subject to Executive Order 13045 because it is not an economically significant action as defined by Executive Order 12866 and it does not establish an environmental standard intended to mitigate health or safety risks. This action merely extends the current regulatory schedule for submitting applications under CROMERR for authorized programs with existing electronic document receiving systems, and imposes no additional requirements.

H. Executive Order 13211: Energy Effects

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 104–113, section 12(d) (15 U.S.C. 272 note) directs EPA to use voluntary consensus standards in its regulatory activities unless to do so would be inconsistent with applicable law or otherwise impractical. Voluntary consensus standards are technical standards (e.g., materials specifications, test methods, sampling procedures, and business practices) that are developed or adopted by voluntary consensus standards bodies. The NTTAA directs EPA to provide Congress, through OMB, with explanations when the Agency decides not to use available and applicable voluntary consensus standards.

Today's action does not involve technical standards. EPA's compliance with section 12(d) of the National Technology Transfer and Advancement Act of 1995 (Pub. L. 104–113, section 12(d) (15 U.S.C. 272 note)) has been addressed in the preamble of the underlying final rule (70 FR 59848, October 13, 2007).

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

Executive Order (EO) 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 direct final rule merely extends the current regulatory schedule for submitting applications under CROMERR for authorized programs with existing electronic document receiving systems.

K. Congressional Review Act

The Congressional Review Act, 5 U.S.C. section 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. section 804(2). This rule will become effective on December 1, 2008.

List of Subjects in 40 CFR Part 3

Environmental protection, Conflict of interests, Electronic records, Electronic reporting requirements, Electronic reports, Intergovernmental relations.

Dated: October 10, 2008.

Stephen L. Johnson,

Administrator.

■ Therefore, title 40, chapter I of the Code of Federal Regulations is amended as follows:

PART 3—ELECTRONIC REPORTING

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

Authority: 7 U.S.C. 136 to 136y; 15 U.S.C. 2601 to 2692; 33 U.S.C. 1251 to 1387; 33 U.S.C. 1401 to 1445; 33 U.S.C. 2701 to 2761; 42 U.S.C. 300f to 300j–26; 42 U.S.C. 4852d; 42 U.S.C. 6901–6992k; 42 U.S.C. 7401 to 7671q; 42 U.S.C. 9601 to 9675; 42 U.S.C. 11001 to 11050; 15 U.S.C. 7001; 44 U.S.C. 3504 to 3506.

Subpart D—Electronic Reporting Under EPA-Authorized State, Tribe, and Local Programs

■ 2. Section 3.1000 is amended by revising paragraph (a)(3) to read as follows:

§ 3.1000 How does a state, tribe, or local government revise or modify its authorized program to allow electronic reporting?

(a) * * *

(3) *Programs already receiving electronic documents under an authorized program:* A state, tribe, or local government with an existing electronic document receiving system for an authorized program must submit an application to revise or modify such authorized program in compliance with paragraph (a)(1) of this section no later than January 13, 2010. On a case-by-case basis, this deadline may be extended by the Administrator, upon request of the state, tribe, or local government, where the Administrator determines that the state, tribe, or local government needs additional time to make legislative or regulatory changes in order to meet the requirements of this part.

* * * * *

[FR Doc. E8–24824 Filed 10–16–08; 8:45 am]

BILLING CODE 6560–50–P

ENVIRONMENTAL PROTECTION AGENCY

40 CFR Part 49

[EPA–R10–OAR–2008–0498; FRL–8729–3]

Announcement of the Delegation of Partial Administrative Authority for Implementation of Federal Implementation Plan for the Coeur d'Alene Reservation to the Coeur d'Alene Tribe

AGENCY: Environmental Protection Agency (EPA).

ACTION: Final rule; technical amendment.

SUMMARY: This action announces that on August 26, 2008, EPA Region 10, and the Coeur d'Alene Tribe, entered into a Partial Delegation of Administrative Authority to carry out certain day-to-day activities associated with implementation of the Federal Implementation Plan for the Coeur d'Alene Reservation (Coeur d'Alene FIP). A note of this partial delegation is being added to the Coeur d'Alene FIP.

DATES: This rule is effective October 17, 2008. The partial delegation of administrative authority was effective August 26, 2008.

ADDRESSES: EPA has established a docket for this action under Docket ID No. EPA–R10–OAR–2008–0130. The delegation agreement and other docket materials are available electronically at EPA's electronic public docket and comment system, found at *http://www.regulations.gov* or in hard copy from Steve Body, Office of Air Waste and Toxics, AWT–107, EPA Region 10, Suite 900, 1200 Sixth Avenue, Seattle, WA 98101, or via e-mail at *body.steve@epa.gov*. Additional information may also be obtained from the Coeur d'Alene Tribe by contacting Les Higgins, Coeur d'Alene Tribe, P.O. Box 408, Plummer, Idaho, 83851–9703 or via e-mail at *lhiggins@cdatribe-nsn.gov*.

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 during normal business hours at the Office of Air, Waste and Toxics, EPA Region 10, 1200 Sixth Avenue, Seattle, Washington 98101.

FOR FURTHER INFORMATION CONTACT: Steve Body at telephone number (206) 553–0782, e-mail address: *body.steve@epa.gov*, or the EPA Region 10 address.

SUPPLEMENTARY INFORMATION: The purpose of this action is to announce that on August 26, 2008, EPA Region 10, delegated partial administrative authority for implementation of certain provisions of the Coeur d'Alene FIP to the Coeur d'Alene Tribe. See 40 CFR part 49, subpart M, §§ 9921 through 9930, as authorized by 40 CFR 49.122 of the Federal Air Rules for Reservations (FARR), 40 CFR part 49, subpart C.

I. Authority To Delegate

Federal regulation 40 CFR 49.122 provides EPA authority to delegate to

Indian Tribes partial administrative authority to implement provisions of the Federal Air Rules for Reservations (FARR), 40 CFR part 49, subpart C. Tribes must submit a request to the Regional Administrator that meets the requirements of 40 CFR 49.122.

II. Request for Delegation

On October 4, 2007, Chief J. Allen, Chairman of the Coeur d'Alene Tribal Council submitted to the Regional Administrator a request for delegation of certain provision of the Coeur d'Alene FIP. That request included all the information and demonstrations required by the FARR for delegation. A copy of all documentation is on file at EPA Region 10, Seattle, Washington (see **ADDRESSES** above).

The Coeur d'Alene Tribe requested delegation for the following provisions; 40 CFR 49.9930 (b) Rule for limiting visible emissions, 40 CFR 49.9930 (g) General rule for open burning, and 40 CFR 49.9930 (i) Rule for air pollution episodes.

III. EPA Response to the Request for Delegation

EPA and the Coeur d'Alene Tribe signed the Delegation Agreement that specifies the provisions and authorities delegated. The Coeur d'Alene Tribe is delegated the following provisions: 40 CFR 49.9930 (b) Rule for limiting visible emissions, 40 CFR 49.9930 (g) General rule for open burning, and 40 CFR 49.9930 (i) Rule for air pollution episodes. In addition, the agreement delegates to the Tribe authority to investigate complaints and assist EPA in inspections. The Agreement also includes terms and conditions applicable to the delegation. A copy of the Agreement is kept at EPA Region 10 at the address above.

EPA solicited by letter, advice and insight from the State of Idaho, the State of Washington, Kootenai County, Benewah County, cities of St. Maries and Worley, and St. Joe National Forest on the Coeur d'Alene Tribe's request for delegation. In general the comments received supported delegation. Adverse comments were received from Kootenai and Benewah Counties. A response to those comments was prepared and is included in the docket for this action.

Section 553 of the Administrative Procedure Act, 5 U.S.C. 553 (b)(B), provides that, when an agency for good cause finds that notice and public procedure are impracticable, unnecessary or contrary to the public interest, the agency may issue a rule without providing notice and an opportunity for public comment. EPA has determined that there is good cause for making today's rule final without prior proposal and opportunity for comment because EPA is merely informing the public of partial delegation of administrative authority to the Coeur d'Alene Tribe and making a technical amendment to the Code of Federal Regulations (CFR) by adding a note announcing the partial delegation. Thus, notice and public procedure are unnecessary. EPA finds that this constitutes good cause under 5 U.S.C. 553(b)(B).

Moreover, since today's action does not create any new regulatory requirements, EPA finds that good cause exists to provide for an immediate effective date pursuant to 5 U.S.C. 553(d)(3).

IV. Statutory and Executive Order Reviews

Under Executive Order 12866 (58 FR 51735, October 4, 1993), this action is not a ''significant regulatory action'' and therefore is not subject to review by the Office of Management and Budget. For this reason, this action is also not subject to Executive Order 13211, ''Actions Concerning Regulations That Significantly Affect Energy Supply, Distribution, or Use'' (66 FR 28355, May 22, 2001). This action merely makes a technical amendment and gives notice of a partial delegation of administrative authority. Accordingly, the Administrator certifies that this rule will not have a significant economic impact on a substantial number of small entities under the Regulatory Flexibility Act (5 U.S.C. 601 *et seq.*). This rule 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).

Executive Order 13175, entitled ''Consultation and Coordination with Indian Tribal Governments'' (65 FR 67249, November 6, 2000), requires EPA to develop an accountable process to ensure ''meaningful and timely input by tribal officials in the development of regulatory policies that have tribal implications.'' ''Policies that have tribal implications'' is defined in the Executive Order to include regulations that have ''substantial direct effects on one or more Indian tribes, on the relationship between the Federal government and the Indian tribes, or on the distribution of power and responsibilities between the Federal government and Indian tribes.'' Under section 5(b) of Executive Order 13175, EPA may not issue a regulation that has tribal implications, that imposes substantial direct compliance costs, and that is not required by statute, unless the Federal government provides the funds necessary to pay the direct compliance costs incurred by tribal governments, or EPA consults with tribal officials early in the process of developing the proposed regulation. Under section 5(c) of Executive Order 13175, EPA may not issue a regulation that has tribal implications and that preempts tribal law, unless the Agency consults with tribal officials early in the process of developing the regulation. EPA has concluded that this rule may have tribal implications. EPA's action fulfills a requirement to publish a notice announcing partial delegation of administrative authority to the Coeur d'Alene Tribe and noting the partial delegation in the CFR. However, it will neither impose substantial direct compliance costs on tribal governments, nor preempt tribal law. Thus, the requirements of sections 5(b) and 5(c) of the Executive Order do not apply to this rule.

This action also does not have Federalism implications because it does not have substantial direct effects on the states, on the relationship between the national government and the states, or on the distribution of power and responsibilities among the various levels of government, as specified in Executive Order 13132 (64 FR 43255, August 10, 1999). This technical amendment merely notes that partial delegation of administrative authority to the Coeur d'Alene Tribe is in effect. This rule also is not subject to Executive Order 13045, ''Protection of Children from Environmental Health Risks and Safety Risks'' (62 FR 19885, April 23, 1997), because it is not economically significant.

This action does not involve technical standards; thus, the requirements of section 12(d) of the National Technology Transfer and Advancement Act of 1995 (15 U.S.C. 272 note) do not apply. This rule does not impose an information collection burden under the provisions of the Paperwork Reduction Act of 1995 (44 U.S.C. 3501 *et seq.*).

The Congressional Review Act, 5 U.S.C. 801 *et seq.*, as added by the Small Business Regulatory Enforcement Fairness Act of 1996, generally provides that before a rule may take effect, the agency promulgating the rule must submit a rule report, which includes a copy of the rule, to each House of the Congress and to the Comptroller General of the United States. EPA will submit a report containing this rule and other required information to the U.S. Senate, the U.S. House of Representatives, and the Comptroller General of the United States prior to publication of the rule in the **Federal Register**. A major rule

cannot take effect until 60 days after it is published in the **Federal Register**. This action is not a ''major rule'' as defined by 5 U.S.C. 804(2).

Under section 307(b)(1) of the Clean Air Act, petitions for judicial review of this action must be filed in the United States Court of Appeals for the appropriate circuit by December 16, 2008. Filing a petition for reconsideration by the Administrator of this final rule does not affect the finality of this rule for the purposes of judicial review nor does it extend the time within which a petition for judicial review may be filed, and shall not postpone the effectiveness of such rule or action. This action may not be challenged later in proceedings to enforce its requirements. (See section 307(b)(2).)

List of Subjects in 40 CFR Part 49

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

Dated: September 22, 2008.

Michelle Pirzadeh,

Acting Regional Administrator, Region 10.

■ Chapter I, title 40 of the Code of Federal Regulations is amended as follows:

PART 49—[AMENDED]

■ 1. The authority citation for part 49 continues to read as follows:

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

Subpart M—[Amended]

■ 2. Section 49.9930 is amended by adding a note to the end of the section to read as follows:

§ 49.9930 Federally-promulgated regulations and Federal implementation plans.

* * * * *

Note to § 49.9930: EPA entered into a Partial Delegation of Administrative Authority with the Coeur d'Alene Tribe on August 26, 2008 for the rules listed in paragraphs (b), (g), and (i) of this section.

[FR Doc. E8–24428 Filed 10–16–08; 8:45 am]

BILLING CODE 6560–50–P

FEDERAL COMMUNICATIONS COMMISSION

47 CFR Part 76

[CS Docket No. 98–120; FCC 08–193]

Carriage of Digital Television Broadcast Signals: Amendment to Part 76 of the Commission's Rules

AGENCY: Federal Communications Commission.

ACTION: Final rule.

SUMMARY: The Commission addresses the obligations of small cable systems, and grants them an exemption from the material degradation requirement to carry high definition broadcast signals under the Commission's rules. The Commission holds that cable systems that either have 2,500 or fewer subscribers and are not affiliated with a large cable operator, or have an activated channel capacity of 552 MHz or less, are exempt from the requirement to carry high definition versions of broadcast signals. This exemption will sunset three years after the conclusion of the digital television (DTV) Transition. The Commission notes that the signals of all must-carry stations must continue to be made viewable to all subscribers pursuant to the Commission's rules.

DATES: Effective November 17, 2008.

FOR FURTHER INFORMATION CONTACT: For additional information on this proceeding, please contact *Lyle Elder, Lyle.Elder@fcc.gov* of the Policy Division, Media Bureau, (202) 418–2120, or Eloise Gore, *Eloise.Gore@fcc.gov,* of the Media Bureau, (202) 418–7200.

SUPPLEMENTARY INFORMATION: This is a summary of the Federal Communications Commission's Fourth Report and Order in CS Docket No. 98–120, FCC 08–193, adopted August 20, 2008, and released September 4, 2008. The full text of this document is available for public inspection and copying during regular business hours in the FCC Reference Center, Federal Communications Commission, 445 12th Street, SW., CY–A257, Washington, DC 20554. These documents will also be available via ECFS (*http://www.fcc.gov/cgb/ecfs/*). (Documents will be available electronically in ASCII, Word 97, and/or Adobe Acrobat.) The complete text may be purchased from the Commission's copy contractor, 445 12th Street, SW., Room CY–B402, Washington, DC 20554. To request this document in accessible formats (computer diskettes, large print, audio recording, and Braille), send an e-mail to *fcc504@fcc.gov* or call the Commission's Consumer and Governmental Affairs Bureau at (202) 418–0530 (voice), (202) 418–0432 (TTY).

Summary of the Final Rule

I. Introduction

1. In the *Third Report and Order,* 73 FR 6043, February 1, 2008, and *Third Further Notice of Proposed Rulemaking,* 73 FR 6099, February 1, 2008, we established rules governing the viewability of broadcast signals, retained and reaffirmed the standard governing material degradation of broadcast signals, and sought comment on the effect of these rules on small cable systems, and other issues. In this *Fourth Report and Order,* we address the obligations of small cable systems, and grant them an exemption from the material degradation requirement to carry high definition (HD) broadcast signals under the Commission's rules, as discussed below.

2. We hold that cable systems that either have 2,500 or fewer subscribers and are not affiliated with a large cable operator, or have an activated channel capacity of 552 MHz or less, are exempt from the requirement to carry high definition versions of broadcast signals for three years following the digital television (DTV) Transition. We emphasize, however, that no exemption from the viewability requirements is necessary; nor, indeed, would it be appropriate. The mandatory carriage rules serve their purpose only when must-carry stations are viewable by all cable subscribers. We therefore remind cable operators that the signals of all must-carry stations must be made viewable to all subscribers pursuant to the Commission's rules, and acknowledge the continued pledges of cable industry commenters, including the operators of small systems, to ensure viewability.

II. Discussion

3. The Communications Act of 1934, as amended (the ''Act''), at section 614(b)(4)(A), requires that cable operators carry broadcast signals ''without material degradation,'' and, in particular, instructs the Commission to ''adopt carriage standards to ensure that, to the extent technically feasible, the quality of signal processing and carriage provided by a cable system for the carriage of local commercial television stations will be no less than that provided by the system for carriage of any other type of signal.'' In 2001, the *First Report and Order*, 66 FR 16533, March 26, 2001, in this docket

established the following requirement to avoid material degradation of digital signals: ''A cable operator may not provide a digital broadcast signal in a lesser format or lower resolution than that afforded to any digital programmer (e.g., non-broadcast cable programming, other broadcast digital program, etc.) carried on the cable system, provided, however, that a broadcast signal delivered in HDTV [i.e., high definition] must be carried in HDTV.'' The *Third Report and Order* retained and reaffirmed this standard. The Commission also adopted rules requiring that broadcast signals carried pursuant to the must-carry rules be made viewable to all subscribers. In the *Third FNPRM,* we expressed concern about the impact these rules might have on small cable operators, and sought comment on ways to minimize any harms. In particular, we sought comment on a number of proposals offered by cable commenters, including a waiver or revision of the Commission's 2001 decision to require carriage of HD signals in HD. We also asked for comment on ''system characteristics'' for the purposes of any changes to the rules that came in response to the *Third FNPRM.*

4. Both the National Cable and Telecommunications Association (NCTA) and the American Cable Association (ACA), as well as individual cable operators, filed comments and replies on these questions, along with a number of *ex parte* filings and presentations. Taken together, the cable commenters do not lodge strong objections to the requirement to ''provide *all* subscribers with a viewable signal,'' but rather ask the Commission to exempt ''small systems from any requirement to *also* provide a digital signal under the FCC's interpretation of the 'no material degradation' provisions of section 614.''

5. First, we clarify that our rules do not require cable operators, irrespective of system size, to carry an SD digital version of a broadcast station's signal, in addition to the analog version, to satisfy the material degradation requirement retained in the Third Report and Order. This is because both an SD digital version and an analog version of the digital broadcast signal received at the headend should have the same resolution—480i—and thus there should be no perceivable difference between the two versions of the signal. We also reiterate that, for purposes of the Viewability requirements, any cable operator, irrespective of system size, may be required to carry an SD version of a must carry station's signal if there are digital subscribers to the system who would otherwise be unable to view the analog version of that station's signal. Therefore, cable systems subject to the exemption in this order, which exempts certain cable systems as described herein from carrying broadcast signals in HD or any other digital format, would not be required to carry an HD or an SD version as long as all subscribers can receive and view the downconverted analog signal.

6. Commenters state that, without an exemption from the material degradation rules, ''small systems will be forced to absorb or impose significant and unsustainable price increases, or in some instances to shut down altogether.'' The National Association of Broadcasters and Maximum Service Television (NAB), in a joint comment and joint reply, expressed opposition to this small system exemption. Section 614(b)(4)(A) of the Act directs the Commission to adopt material degradation standards ensuring that ''to the extent technically feasible, the quality of signal processing and carriage provided by a cable system for the carriage of local commercial television stations will be no less than that provided by the system for carriage for any other type of signal.''

7. We are persuaded by the comments filed by cable operators that requiring small systems with certain characteristics to carry HD versions of all broadcast television stations' HD signals would not be appropriate. Regarding the question of what system characteristics are appropriate under this exemption, we will first use the technical standard originally adopted for waivers of these rules, and apply the exemption to systems of 552 MHz or less. We will also exempt systems with 2,500 or fewer subscribers that are not affiliated with a cable operator serving more than 10% of all multichannel video programming distributor (MVPD) customers. The Rural Independent Competitive Alliance (RICA) argues that ''pressing uneconomic digital carriage upon small * * * rural systems may well * * * limit access to broadcast signals for rural consumers generally by creating a regime in which the required carriage is too expensive to operate.'' The Organization for the Promotion and Advancement of Small Telecommunications Companies (OPASTCO) expresses a similar concern, stating that this could lead to the loss of lower-priced video offerings in many markets, thus reducing consumer choice. Charter Communications, Inc. (Charter), operator of a number of small systems, provides specific examples of systems with very few subscribers, where per-subscriber upgrade costs would be so high as to make it not worthwhile to continue operating the system. As even NAB and MSTV acknowledge, in some markets there is no local-into-local Direct Broadcast Satellite (DBS) service, so the loss of a small cable system could mean the effective loss of all MVPD service for some customers. Indeed, in some areas, due to poor over-the-air reception, loss of a small cable system could mean loss of any access to some or all broadcast signals as well. The Commission will review these exemptions between February 18, 2011 and February 17, 2012, and they will expire at the conclusion of that period if not renewed. We note that as with all Commission rules, systems that do not fall within either of these exemption categories may still file for individual waivers. We will expedite the review process for cable operators that are requesting a waiver for systems with 5,000 or fewer subscribers, which could require shortening the comment and reply period to 10 days for comment and 5 days for reply, so that the Bureau will resolve the request no later than 30 days after it is received by the commission.

8. Cable commenters, including NCTA, argue that because all must-carry stations will remain viewable and available to all cable subscribers even after the grant of a material degradation exemption, any harm to broadcasters will be less than the harm that would be suffered by small cable system operators if these exemptions were not granted. This argument is not directly contradicted by NAB and MSTV.

9. ACA proposed also looking to the number of subscribers served by a system to determine the scope of the exemption. Based on the record in this proceeding, we find that for some systems with a small number of subscribers, the cost of mandatory HD carriage warrants an exemption from compliance. Therefore, we will also exempt systems with 2,500 or fewer subscribers that are not affiliated with a cable operator serving more than 10% of all multichannel video programming distributor (MVPD) customers. In systems with 2,500 or fewer subscribers, the cost-per-subscriber could be significant, even if costs were borne in part by analog subscribers (who would receive no direct benefit from the HD carriage). We recognize, however, that small cable systems may be part of larger, multiple-cable-system, networks. This potentially allows even very high costs to be spread over large numbers of subscribers, easing the upgrade cost burden even in systems with small numbers of subscribers. Therefore, we

exclude from this exemption any system affiliated with a cable operator serving more than 10% of all multichannel video programming distributor (MVPD) subscribers.

10. In their comments to the *Second FNPRM,* 72 FR 31244, June 6, 2007, ACA proposed that must-carry broadcasters should be required to pay the cost of downconverting their signals for carriage in analog. The Commission declined to adopt this proposal for all cable operators, noting that ''post-transition downconversion will be undertaken by operators, at their discretion, in order to comply with the Act.'' We raised this issue for comment in the *Third FNPRM,* asking whether must-carry stations should be required to pay the costs associated with downconversion by small cable operators in particular. No commenters supported this proposal, and we decline to adopt it.

11. The exemptions adopted in this Fourth Report and Order shall be in force for three years from the date of the digital transition, subject to review by the Commission during the last year of this period (i.e., between February 2011 and February 2012). In light of the numerous issues associated with the transition, it is important to retain flexibility as we deal with emerging concerns. A three-year sunset provides the Commission with the opportunity after the transition to review these rules in light of the potential cost and service disruption to consumers, and the state of technology and the marketplace. Additionally, providing a window of time to phase in new technology gives systems a clear opportunity to come into compliance with the rules by spreading their effort and costs over an extended period.

12. In conclusion, we are granting relief to operators of cable systems with 2,500 or fewer subscribers that are not affiliated with a cable operator serving more than 10% of all MVPD subscribers, and to those with an activated channel capacity of 552 MHz or less, from the requirement to carry HD versions of broadcast signals. The Commission will review these material degradation exemptions simultaneously with the viewability rules adopted in the *Viewability Order,* and they will expire on February 17, 2012 if not renewed. All operators must continue to ensure that every subscriber to a cable system is able to view every must-carry signal, by downconverting it if necessary and carrying it in a format or formats that can be viewed by all subscribers. We find that the record in this case supports the cable commenters' suggestion that this exemption will best ensure the continued viability and competitiveness of small cable systems in markets throughout the country, thereby ensuring the broadest possible cable carriage after the transition.

III. Procedural Matters

A. Final Regulatory Flexibility Act Analysis

13. As required by the Regulatory Flexibility Act of 1980, as amended (RFA), an Initial Regulatory Flexibility Analysis (IRFA) was incorporated in the *Third Further Notice of Proposed Rulemaking* (*Third FNPRM*). The Commission sought written public comment on the proposals in the *Third FNPRM,* including comment on the IRFA. This present Final Regulatory Flexibility Analysis (FRFA) conforms to the RFA.

1. Need for, and Objectives of, the Fourth Report and Order

This *Fourth Report and Order* exempts certain cable systems from the material degradation requirement to carry HD versions of HD broadcast signals that was reaffirmed in the *Third Report and Order.* We are granting relief to operators of cable systems with 2,500 or fewer subscribers that are not affiliated with a cable operator serving more than 10% of all MVPD subscribers, and to those with an activated capacity of 552 MHz or less. The Commission will review these material degradation exemptions simultaneously with the viewability rules adopted in the *Viewability Order* (*i.e.*, between February 18, 2011 and February 17, 2012), and they will expire on February 17, 2012 if not renewed. All operators must continue to ensure that every subscriber to a cable system is able to view every must-carry signal, by downconverting it if necessary and carrying it in a format or formats that can be viewed by all subscribers.

2. Summary of Significant Issues Raised by Public Comments in Response to the IRFA

14. No comments were filed in response to the IRFA.

3. Description and Estimate of the Number of Small Entities to Which the *Report and Order* Will Apply

15. The RFA directs the Commission to provide a description of and, where feasible, an estimate of the number of small entities that will be affected by the rules adopted herein. The RFA 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''). The decision of the Commission in this *Fourth Report and Order* primarily affects cable operators and television stations. A description of these small entities, as well as an estimate of the number of such small entities, is provided below.

16. *Cable Television Distribution Services.* Since 2007, these services have been defined within the broad economic census category of Wired Telecommunications Carriers; that category is defined as follows: ''This industry comprises establishments primarily engaged in operating and/or providing access to transmission facilities and infrastructure that they own and/or lease for the transmission of voice, data, text, sound, and video using wired telecommunications networks. Transmission facilities may be based on a single technology or a combination of technologies.'' The SBA has developed a small business size standard for this category, which is: All such firms having 1,500 or fewer employees. To gauge small business prevalence for these cable services we must, however, use current census data that are based on the previous category of Cable and Other Program Distribution and its associated size standard; that size standard was: All such firms having $13.5 million or less in annual receipts. According to Census Bureau data for 2002, there were a total of 1,191 firms in this previous category that operated for the entire year. Of this total, 1,087 firms had annual receipts of under $10 million, and 43 firms had receipts of $10 million or more but less than $25 million. Thus, the majority of these firms can be considered small.

17. *Cable Companies and Systems.* The Commission has also developed its own small business size standards, for the purpose of cable rate regulation. Under the Commission's rate regulation rules, a ''small cable company'' is one serving 400,000 or fewer subscribers, nationwide. Industry data indicate that, of 1,076 cable operators nationwide, all but eleven are small under this size standard. In addition, under the Commission's rate regulation rules, a ''small system'' is a cable system serving 15,000 or fewer subscribers. Industry data indicate that, of 7,208 systems nationwide, 6,139 systems have under 10,000 subscribers, and an additional 379 systems have 10,000–19,999

subscribers. Thus, under this rate regulation size standard, most cable systems are small.

18. *Cable System Operators.* The Communications Act of 1934, as amended, also contains a separate size standard for small cable system operators with respect to rate regulation requirements, which is ''a cable operator that, directly or through an affiliate, serves in the aggregate fewer than 1 percent of all subscribers in the United States and is not affiliated with any entity or entities whose gross annual revenues in the aggregate exceed $250,000,000.'' The Commission has determined that an operator serving fewer than 677,000 subscribers shall be deemed a small operator, if its annual revenues, when combined with the total annual revenues of all its affiliates, do not exceed $250 million in the aggregate. Industry data indicate that, of 1,076 cable operators nationwide, all but ten are small under this rate regulation size standard. We note that the Commission neither requests nor collects information on whether cable system operators are affiliated with entities whose gross annual revenues exceed $250 million, and therefore we are unable to estimate more accurately the number of cable system operators that would qualify as small under this size standard.

19. *Television Broadcasting.* This Economic Census category ''comprises establishments primarily engaged in broadcasting images together with sound. These establishments operate television broadcasting studios and facilities for the programming and transmission of programs to the public.'' The SBA has created the following small business size standard for Television Broadcasting firms: Those having $14 million or less in annual receipts. The Commission has estimated the number of licensed commercial television stations to be 1,379. In addition, according to Commission staff review of the BIA Publications, Inc., Master Access Television Analyzer Database (BIA) on March 30, 2007, about 986 of an estimated 1,374 commercial television stations (or approximately 72 percent) had revenues of $13 million or less. We therefore estimate that the majority of commercial television broadcasters are small entities.

20. We note, however, that in assessing whether a business concern qualifies as small under the above definition, business (control) affiliations must be included. Our estimate, therefore, likely overstates the number of small entities that might be affected by our action, because the revenue figure on which it is based does not include or aggregate revenues from affiliated companies. In addition, an element of the definition of ''small business'' is that the entity not be dominant in its field of operation. We are unable at this time to define or quantify the criteria that would establish whether a specific television station is dominant in its field of operation. Accordingly, the estimate of small businesses to which rules may apply does not exclude any television station from the definition of a small business on this basis and is therefore possibly over-inclusive to that extent.

4. Description of Projected Reporting, Recordkeeping, and Other Compliance Requirements for Small Entities

21. So long as cable operators already maintain accurate business and technical records that would allow them to determine whether or not they fall within one of the two exemption classes, the *Fourth Report and Order* creates no additional reporting, recordkeeping, or compliance requirements for small cable operators. Small broadcast stations will also be affected by the rules in the *Fourth Report and Order*, but we do not have any reason to expect that the compliance burden will be any greater than under the prior rules.

5. Steps Taken To Minimize Significant Economic Impact on Small Entities, and Significant Alternatives Considered

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

23. Because the requirements in this Order are in the manner of an exemption from existing cable rules, they do not impose a negative economic impact on any small cable operators, and provide a positive economic impact to any operator that operates a system that is exempted. Although we sought comment on whether there was a specific legal basis for affording relief to small cable operators, we have declined to adopt exemptions based on such grounds. Instead, we extend the exemptions to specific cable systems with certain characteristics. Many of these systems are owned by small entities, who, as noted, will receive positive economic impact from the exemptions. The rules do not impose any significant burdens on small television stations.

B. Report to Congress

24. The Commission will send a copy of the *Fourth Report and Order*, including this FRFA, in a report to be sent to Congress pursuant to the Congressional Review Act. In addition, the Commission will send a copy of the *Fourth Report and Order*, including this FRFA, to the Chief Counsel for Advocacy of the SBA. The *Fourth Report and Order* and FRFA (or summaries thereof) will also be published in the **Federal Register**.

C. Paperwork Reduction Act of 1995 Analysis

25. The *Fourth Report and Order* has been analyzed with respect to the Paperwork Reduction Act of 1995 (PRA). This document does not contain new or modified information collection requirements subject to the 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).

D. Congressional Review Act

26. The Commission will include a copy of this *Fourth Report and Order* in a report to be sent to Congress and the Government Accountability Office pursuant to the Congressional Review Act, *see* 5 U.S.C. 801(a)(1)(A).

E. Additional Information

27. For more information on this *Fourth Report and Order*, please contact Lyle Elder, *Lyle.Elder@fcc.gov*, of the Media Bureau, Policy Division, 202–418–2120, or Eloise Gore, *Eloise.Gore@fcc.gov*, of the Media Bureau, 202–418–7200.

IV. Ordering Clauses

28. Accordingly, *it is ordered*, that, pursuant to authority found in sections 4(i), 4(j), 303(r), 614, and 615 of the Communications Act of 1934, as amended, 47 U.S.C. 154(i), 154(j), 303(r), 534, and 535, and § 1.3 of the Commission's rules, 47 CFR 1.3, this *Fourth Report and Order* is *hereby adopted* and shall become effective November 17, 2008.

29. *It is further ordered* that cable systems with (1) 2,500 or fewer subscribers that are not affiliated with a cable operator serving more than 10% of all MVPD subscribers, or (2) an activated channel capacity of 552 MHz or less, are exempt, from February 18, 2009 through February 17, 2012, from the requirement, under 47 CFR 76.62, to carry high definition versions of broadcast stations' signals.

30. *It is further ordered* that the Consumer and Governmental Affairs Bureau, Reference Information Center, *shall send* a copy of this *Fourth Report and Order*, including the Final Regulatory Flexibility Analysis, to the Chief Counsel for Advocacy of the Small Business Administration.

31. *It is further ordered* that the Commission shall send a copy of this *Fourth Report and Order* in a report to be sent to Congress and the General Accountability Office pursuant to the Congressional Review Act, *see* 5 U.S.C. 801(a)(1)(A).

List of Subjects in 47 CFR Part 76

Cable television.

Federal Communications Commission.

Marlene H. Dortch,

Secretary.

[FR Doc. E8–24317 Filed 10–16–08; 8:45 am]

BILLING CODE 6712–01–P

Proposed Rules

Federal Register
Vol. 73, No. 202
Friday, October 17, 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–2008–1103; Directorate Identifier 2008–NM–048–AD]

RIN 2120–AA64

Airworthiness Directives; Boeing Model 727–100 and 727–200 Series Airplanes

AGENCY: Federal Aviation Administration (FAA), DOT.

ACTION: Notice of proposed rulemaking (NPRM).

SUMMARY: We propose to adopt a new airworthiness directive (AD) for certain Boeing Model 727–100 and 727–200 series airplanes. This proposed AD would require repetitive internal and external high frequency eddy current, mid frequency eddy current, low frequency eddy current, and magneto optic imaging inspections to detect cracks, corrosion, delamination, and materials loss in the lower fastener row of the lower skin and the upper fastener row of the upper skin, and corrective actions if necessary. This proposed AD results from a report of decompression in a Boeing Model 737 airplane at flight level 290. We are proposing this AD to detect and correct scratches and excessive reduction in material thickness from excessive blend-out or corrosion, which could lead to premature cracking in the lap joint. Such cracking could adversely affect the structural integrity of the airplane.

DATES: We must receive comments on this proposed AD by December 1, 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: Berhane Alazar, Aerospace Engineer, Airframe Branch, ANM–120S, FAA, Seattle Aircraft Certification Office, 1601 Lind Avenue, SW., Renton, Washington 98057–3356; telephone (425) 917–6577; fax (425) 917–6590.

SUPPLEMENTARY INFORMATION:

Comments Invited

We invite you to send any written relevant data, views, or arguments about this proposed AD. Send your comments to an address listed under the **ADDRESSES** section. Include ''Docket No. FAA–2008–1103; Directorate Identifier 2008–NM–048–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 received a report of decompression in a Boeing Model 737 airplane at flight level (FL) 290. An investigation revealed that the skin flapped between stringer (S)–4R and S–5R from body station (BS) 300 to BS 328. Examination of the skin showed cracks initiating at scratches in the lower skin of a lap joint that was cold-bonded in production. The lap splice had been separated for rework. These conditions, if not corrected, may result in scratches and excessive reduction in material thickness from excessive blend out or corrosion, which could lead to premature cracking in the lap joint. Such cracking could adversely affect the structural integrity of the airplane.

The cold-bonded lap joints on certain Boeing Model 727 airplanes are similar to those on the affected Model 737 and Model 747 airplanes. Therefore, all of these models may be subject to the same unsafe condition.

Other Relevant Rulemaking

On November 7, 2003, we issued AD 2003–23–03, amendment 39–13367 (68 FR 64980, dated November 18, 2003), for certain Boeing Model 737–100, –200, and –200C series airplanes. That AD requires repetitive inspections to detect discrepancies in the upper and lower skins of the fuselage lap joint and circumferential joint, and repair if necessary. That AD requires a terminating modification for the repetitive inspections.

On June 9, 2004, we issued AD 2004–13–02, amendment 39–13682 (69 FR 35237, June 24, 2004), for certain Boeing Model 747–100, –200B, and –200F series airplanes. That AD requires initial and repetitive inspections to find discrepancies in the upper and lower skins of the fuselage lap joints, and repair if necessary.

Relevant Service Information

We have reviewed Boeing Alert Service Bulletin 727–53A0223, dated March 28, 2002. The service bulletin describes procedures for repetitive internal and external high frequency eddy current (HFEC), mid frequency eddy current (MFEC), low frequency eddy current (LFEC), and magneto optic imaging (MOI) inspections to detect cracks, corrosion, delamination, and materials loss in the lower fastener row of the lower skin and the upper fastener

row of the upper skin, and corrective actions if necessary. The corrective actions include repairing all cracks; repairing skin material loss that is greater than 10%; separating, cleaning, and refastening corroded areas where skin loss is less than 10%; and replacing remaining fasteners with serviceable fasteners, if necessary.

The service bulletin also specifies compliance times for initial HFEC, MFEC, LFEC, and MOI inspections ranging between 9 months or 1,500 flight cycles, whichever is earlier, and 60 months or 7,500 flight cycles, whichever is earlier, depending on number of flight cycles on the airplane. The service bulletin also specifies repetitive intervals for HFEC, MFEC, LFEC, and MOI inspections every 2,000 or 7,000 flight cycles, or every 4 years, depending on inspection area and type.

FAA's Determination and Requirements of This Proposed AD

We are proposing this AD because we evaluated all relevant information and determined the unsafe condition described previously is likely to exist or develop in other products of the same type design. This proposed AD would require accomplishing the actions specified in the service information described previously, except as discussed under ''Differences Between the Proposed Rule and Referenced Service Bulletin.''

Differences Between the Proposed Rule and Referenced Service Bulletin

Operators should note that, although the Accomplishment Instructions of Boeing Alert Service Bulletin 727–53A0223, dated March 28, 2002, describes procedures for reporting all cracks and evidence of corrosion to Boeing, this proposed AD would not require that action.

Costs of Compliance

We estimate that this proposed AD would affect 73 airplanes of U.S. registry. We also estimate that it would take about 56 work hours per product to comply with this proposed AD. The average labor rate is $80 per work hour. Based on these figures, we estimate the cost of this proposed AD to the U.S. operators to be $327,040, or $4,480 per product, per inspection cycle.

Authority for This Rulemaking

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

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

Regulatory Findings

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

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

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

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

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

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

List of Subjects in 14 CFR Part 39

Air transportation, Aircraft, Aviation safety, Safety.

The Proposed Amendment

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

PART 39—AIRWORTHINESS DIRECTIVES

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

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

§ 39.13 [Amended]

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

Boeing: Docket No. FAA–2008–1103; Directorate Identifier 2008–NM–048–AD.

Comments Due Date

(a) We must receive comments by December 1, 2008.

Affected ADs

(b) None.

Applicability

(c) This AD applies to Boeing Model 727–100 and 727–200 series airplanes, certificated in any category; as identified in Boeing Alert Service Bulletin 727–53A0223, dated March 28, 2002.

Unsafe Condition

(d) This proposed AD results from a report of decompression in a Boeing Model 737 airplane at flight level 290. We are proposing this AD to detect and correct scratches and excessive reduction in material thickness from excessive blend-out or corrosion, which could lead to premature cracking in the lap joint. Such cracking could adversely affect the structural integrity of the airplane.

Compliance

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

Inspections and Corrective Actions

(f) Except as provided by paragraphs (f)(1), (f)(2), and (f)(3)of this AD, at the applicable compliance times and repeat intervals listed in paragraph 1.E., ''Compliance,'' of Boeing Alert Service Bulletin 727–53A0223, dated March 28, 2002: Do repetitive internal and external high frequency eddy current, mid frequency eddy current, low frequency eddy current, and magneto optic imaging inspections to detect cracks, corrosion, delamination, and materials loss in the lower fastener row of the lower skin and the upper fastener row of the upper skin, and corrective actions by accomplishing all the applicable actions specified in the Accomplishment Instructions of the service bulletin. The applicable corrective actions must be done before further flight.

(1) Where paragraph 1.E., ''Compliance,'' of the service bulletin identifies airplanes, ''Airplane Fight Cycles (f/c) at time of SB Release,'' this AD affects those airplanes with the specified flight cycles as of the effective date of this AD.

(2) Where paragraph 1.E., ''Compliance,'' of the service bulletin specifies ''Initial Inspection Threshold From SB Rel Upper and Lower Skin,'' the AD requires compliance within the specified compliance times after the effective date of this AD.

(3) Where paragraph 1.E., ''Compliance,'' of the service bulletin specifies ''Repeat every * * *,'' this AD requires compliance at intervals not to exceed the specified flight cycles or years.

No Reporting

(g) Although Boeing Alert Service Bulletin 727–53A0223, dated March 28, 2002, specifies to submit information to the manufacturer, this AD does not include that requirement.

Alternative Methods of Compliance (AMOCs)

(h)(1) The Manager, Seattle Aircraft Certification Office, FAA, ATTN: Berhane Alazar, Aerospace Engineer, Airframe Branch, ANM–120S, FAA, Seattle Aircraft Certification Office, 1601 Lind Avenue, SW., Renton, Washington 98057–3356; telephone (425) 917–6577; fax (425) 917–6590; has the authority to approve AMOCs for this AD, if requested using the procedures found in 14 CFR 39.19.

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

(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 September 29, 2008.

Ali Bahrami,

Manager, Transport Airplane Directorate, Aircraft Certification Service.

[FR Doc. E8–24763 Filed 10–16–08; 8:45 am]

BILLING CODE 4910–13–P

DEPARTMENT OF TRANSPORTATION

Federal Aviation Administration

14 CFR Part 71

[Docket No. FAA–2008–0998; Airspace Docket No. 08–AAL–29]

Proposed Revision of Class E Airspace; Ketchikan, AK

AGENCY: Federal Aviation Administration (FAA), DOT.

ACTION: Notice of proposed rulemaking.

SUMMARY: This action proposes to revise Class E airspace at Ketchikan, AK. Seven Standard Instrument Approach Procedures (SIAPs), two Standard Instrument Departure Procedures (SIDs) and a textual Obstacle Departure Procedure (ODP) are either being drafted or amended for the Ketchikan International Airport at Ketchikan, AK. Three of the SIAPs and one SID are Special procedures for private use and are funded privately. Adoption of this proposal would result in revision of Class E airspace upward from 700 feet (ft.) and 1,200 ft. above the surface at the Ketchikan International Airport, Ketchikan, AK.

DATES: Comments must be received on or before December 1, 2008.

ADDRESSES: Send comments on the proposal to the Docket Management Facility, U.S. Department of Transportation, 1200 New Jersey Avenue, SE., West Building, Ground Floor, Room W12–140, Washington, DC 20590–0001. You must identify the docket number FAA–2008–0998/ Airspace Docket No. 08–AAL–29, at the beginning of your comments. You may also submit comments on the Internet at *http://www.regulations.gov.* You may review the public docket containing the proposal, any comments received, and any final disposition in person in the Dockets Office between 9 a.m. and 5 p.m., Monday through Friday, except Federal holidays. The Docket Office (telephone 1–800–647–5527) is on the plaza level of the Department of Transportation NASSIF Building at the above address.

An informal docket may also be examined during normal business hours at the office of the Manager, Safety, Alaska Flight Service Operations, Federal Aviation Administration, 222 West 7th Avenue, Box 14, Anchorage, AK 99513–7587.

FOR FURTHER INFORMATION CONTACT: Gary Rolf, Federal Aviation Administration, 222 West 7th Avenue, Box 14, Anchorage, AK 99513–7587; telephone number (907) 271–5898; fax: (907) 271–2850; e-mail: *gary.ctr.rolf@faa.gov.* Internet address: *http://www.alaska.faa.gov/at.*

SUPPLEMENTARY INFORMATION:

Comments Invited

Interested parties are invited to participate in this proposed rulemaking by submitting such written data, views, or arguments as they may desire. Comments that provide the factual basis supporting the views and suggestions presented are particularly helpful in developing reasoned regulatory decisions on the proposal. Comments are specifically invited on the overall regulatory, aeronautical, economic, environmental, and energy-related aspects of the proposal. Communications should identify both docket numbers and be submitted in triplicate to the address listed above. Commenters wishing the FAA to acknowledge receipt of their comments on this notice must submit with those comments a self-addressed, stamped postcard on which the following statement is made: ''Comments to Docket No. FAA–2008–0998/Airspace Docket No. 08–AAL–29.'' The postcard will be date/time stamped and returned to the commenter.

All communications received on or before the specified closing date for comments will be considered before taking action on the proposed rule. The proposal contained in this notice may be changed in light of comments received. All comments submitted will be available for examination in the public docket both before and after the closing date for comments. A report summarizing each substantive public contact with FAA personnel concerned with this rulemaking will be filed in the docket.

Availability of Notice of Proposed Rulemakings (NPRMs)

An electronic copy of this document may be downloaded through the Internet at *http://www.regulations.gov.* Recently published rulemaking documents can also be accessed through the FAA's Web page at *http://www.faa.gov* or the Superintendent of Document's Web page at *http://www.access.gpo.gov/nara/index.html.*

Additionally, any person may obtain a copy of this notice by submitting a request to the Federal Aviation Administration, Office of Air Traffic Airspace Management, ATA–400, 800 Independence Avenue, SW., Washington, DC 20591 or by calling (202) 267–8783. Communications must identify both docket numbers for this notice. Persons interested in being placed on a mailing list for future NPRMs should contact the FAA's Office of Rulemaking, (202) 267–9677, to request a copy of Advisory Circular No. 11–2A, Notice of Proposed Rulemaking Distribution System, which describes the application procedure.

The Proposal

The FAA is considering an amendment to the Code of Federal Regulations (14 CFR Part 71), which would revise Class E airspace at the Ketchikan International Airport, in Ketchikan, AK. The intended effect of this proposal is to revise Class E airspace upward from from 700 ft. and 1,200 ft. above the surface to contain Instrument Flight Rules (IFR) operations at the Ketchikan International Airport, Ketchikan, AK.

The FAA Instrument Flight Procedures Production and Maintenance Branch has amended seven SIAPs, two SIDs and a DP for the Ketchikan International Airport. The Special procedures are identified below. The approaches are (1) the Area Navigation (RNAV) Global Positioning System (GPS) B, Original (Orig), (2) the RNAV (GPS) C, Amendment (Amdt) 1

(Special), (3) the RNAV (GPS) Runway (RWY) 11, Orig, (4) the Localizer (LOC)/Distance Measuring Equipment (DME) X RWY 11, Orig, (5) the Instrument Landing System (ILS) or LOC/DME Y RWY 11, Amdt 7, (6) the ILS or LOC/DME Z RWY 11, Amdt 7 (Special), and (7) the Very High Frequency Omni-directional Range (VOR)/DME A, Amdt 1 (Special). The SIDs are (1) the COBSU TWO RNAV SID (Special) and (2) the Ketchikan 4 SID. The Textual ODP is unnamed and will be published in the front of the U.S. Terminal Procedures for Alaska. Class E controlled airspace extending upward from 700 ft. and 1,200 ft. above the surface in the Ketchikan International Airport area would be revised by this action. There is no proposed change to the present Class E2 surface area currently charted. The proposed airspace is sufficient in size to contain aircraft executing the instrument procedures at the Ketchikan International Airport, Ketchikan, AK.

The area would be depicted on aeronautical charts for pilot reference. The coordinates for this airspace docket are based on North American Datum 83. The Class E airspace areas designated as 700/1200 foot transition areas are published in paragraph 6005 in FAA Order 7400.9R, *Airspace Designations and Reporting Points*, signed August 15, 2007, and effective September 15, 2007, which is incorporated by reference in 14 CFR 71.1. The Class E airspace designations listed in this document would be published subsequently in the Order.

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

The FAA's authority to issue rules regarding aviation safety is found in Title 49 of the United States Code. Subtitle 1, Section 106 describes the authority of the FAA Administrator. Subtitle VII, Aviation Programs, describes in more detail the scope of the agency's authority.

This rulemaking is promulgated under the authority described in Subtitle VII, Part A, Subpart 1, Section 40103, Sovereignty and use of airspace. Under that section, the FAA is charged with prescribing regulations to ensure the safe and efficient use of the navigable airspace. This regulation is within the scope of that authority because it proposes to create Class E airspace sufficient in size to contain aircraft executing instrument procedures at the Ketchikan International Airport, AK, and represents the FAA's continuing effort to safely and efficiently use the navigable airspace.

List of Subjects in 14 CFR Part 71

Airspace, Incorporation by reference, Navigation (air).

The Proposed Amendment

In consideration of the foregoing, the Federal Aviation Administration proposes to amend 14 CFR part 71 as follows:

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

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

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

§ 71.1 [Amended]

2. The incorporation by reference in 14 CFR 71.1 of Federal Aviation Administration Order 7400.9R, *Airspace Designations and Reporting Points,* signed August 15, 2007, and effective September 15, 2007, is to be amended as follows:

* * * * *

Paragraph 6005 Class E Airspace Extending Upward From 700 Feet or More Above the Surface of the Earth.

* * * * *

AAL AK E5 Ketchikan, AK [Revised]

Ketchikan, Ketchikan International Airport, AK (lat. 55°21′20″ N., long. 131°42′50″ W.)

Ketchikan Localizer (lat. 55°20′41″ N., long. 131°41′43″ W.)

That airspace extending upward from 700 feet above the surface within 2 miles either side of the Ketchikan Localizer southeast course extending from the Ketchikan International Airport, AK, to 9 miles southeast of the Ketchikan International Airport, AK, and within 1.9 miles either side of the Ketchikan Localizer northwest course extending from the Ketchikan International Airport, AK, to 10 miles northwest of the Ketchikan International Airport, AK.

* * * * *

Issued in Anchorage, AK, on October 6, 2008.

Anthony M. Wylie

Manager, Alaska Flight Services Information Area Group.

[FR Doc. E8–24688 Filed 10–16–08; 8:45 am]

BILLING CODE 4910–13–P

DEPARTMENT OF TRANSPORTATION

Federal Aviation Administration

14 CFR Part 71

[Docket No. FAA–2008–0999; Airspace Docket No. 08–AAL–30]

Proposed Revision of Class E Airspace; Toksook Bay, AK

AGENCY: Federal Aviation Administration (FAA), DOT.

ACTION: Notice of proposed rulemaking.

SUMMARY: This action proposes to revise Class E airspace at Toksook Bay, AK. One Standard Instrument Approach Procedure (SIAP) is being amended for the Toksook Bay Airport at Toksook Bay, AK. Additionally, one textual Obstacle Departure Procedure (ODP) is being amended. Adoption of this proposal would result in revising Class E airspace upward from 700 feet (ft.) and 1,200 ft. above the surface at the Toksook Bay Airport, Toksook Bay, AK.

DATES: Comments must be received on or before December 1, 2008.

ADDRESSES: Send comments on the proposal to the Docket Management Facility, U.S. Department of Transportation, 1200 New Jersey Avenue, SE., West Building, Ground Floor, Room W12–140, Washington, DC 20590–0001. You must identify the docket number FAA–2008–0999/Airspace Docket No. 08–AAL–30, at the beginning of your comments. You may also submit comments on the Internet at *http://www.regulations.gov.* You may review the public docket containing the proposal, any comments received, and any final disposition in person in the Dockets Office between 9 a.m. and 5 p.m., Monday through Friday, except Federal holidays. The Docket Office (telephone 1–800–647–5527) is on the plaza level of the Department of Transportation NASSIF Building at the above address.

An informal docket may also be examined during normal business hours at the office of the Manager, Safety, Alaska Flight Service Operations, Federal Aviation Administration, 222

West 7th Avenue, Box 14, Anchorage, AK 99513–7587.

FOR FURTHER INFORMATION CONTACT: Gary Rolf, Federal Aviation Administration, 222 West 7th Avenue, Box 14, Anchorage, AK 99513–7587; telephone number (907) 271–5898; fax: (907) 271–2850; e-mail: *gary.ctr.rolf@faa.gov.* Internet address: *http://www.alaska.faa.gov/at.*

SUPPLEMENTARY INFORMATION:

Comments Invited

Interested parties are invited to participate in this proposed rulemaking by submitting such written data, views, or arguments as they may desire. Comments that provide the factual basis supporting the views and suggestions presented are particularly helpful in developing reasoned regulatory decisions on the proposal. Comments are specifically invited on the overall regulatory, aeronautical, economic, environmental, and energy-related aspects of the proposal. Communications should identify both docket numbers and be submitted in triplicate to the address listed above. Commenters wishing the FAA to acknowledge receipt of their comments on this notice must submit with those comments a self-addressed, stamped postcard on which the following statement is made: ''Comments to Docket No. FAA–2008–0999/Airspace Docket No. 08–AAL–30.'' The postcard will be date/time stamped and returned to the commenter.

All communications received on or before the specified closing date for comments will be considered before taking action on the proposed rule. The proposal contained in this notice may be changed in light of comments received. All comments submitted will be available for examination in the public docket both before and after the closing date for comments. A report summarizing each substantive public contact with FAA personnel concerned with this rulemaking will be filed in the docket.

Availability of Notice of Proposed Rulemakings (NPRMs)

An electronic copy of this document may be downloaded through the Internet at *http://www.regulations.gov.* Recently published rulemaking documents can also be accessed through the FAA's Web page at *http://www.faa.gov* or the Superintendent of Document's Web page at *http://www.access.gpo.gov/nara/index.html.*

Additionally, any person may obtain a copy of this notice by submitting a request to the Federal Aviation Administration, Office of Air Traffic Airspace Management, ATA–400, 800 Independence Avenue, SW., Washington, DC 20591 or by calling (202) 267–8783. Communications must identify both docket numbers for this notice. Persons interested in being placed on a mailing list for future NPRMs should contact the FAA's Office of Rulemaking, (202) 267–9677, to request a copy of Advisory Circular No. 11–2A, Notice of Proposed Rulemaking Distribution System, which describes the application procedure.

The Proposal

The FAA is considering an amendment to the Code of Federal Regulations (14 CFR Part 71), which would revise Class E airspace at the Toksook Bay Airport, in Toksook Bay, AK. The intended effect of this proposal is to revise existing Class E airspace upward from 700 ft. and 1,200 ft. above the surface to contain Instrument Flight Rules (IFR) operations at the Toksook Bay Airport, Toksook Bay, AK.

The FAA Instrument Flight Procedures Production and Maintenance Branch has amended one SIAP and one ODP for the Toksook Bay Airport. The amended SIAP is the Area Navigation (RNAV) Global Positioning System (GPS) Runway (RWY) 34, Amendment 1. The Textual ODP is unnamed and will be published in the front of the U.S. Terminal Procedures for Alaska. Class E controlled airspace extending upward from 700 ft. and 1,200 ft. above the surface in the Toksook Bay Airport area would be revised by this action. The proposed airspace is sufficient in size to contain aircraft executing the instrument procedures at the Toksook Bay Airport, Toksook Bay, AK.

The area would be depicted on aeronautical charts for pilot reference. The coordinates for this airspace docket are based on North American Datum 83. The Class E airspace areas designated as 700/1200 foot transition areas are published in paragraph 6005 in FAA Order 7400.9R, *Airspace Designations and Reporting Points,* signed August 15, 2007, and effective September 15, 2007, which is incorporated by reference in 14 CFR 71.1. The Class E airspace designations listed in this document would be published subsequently in the Order.

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

The FAA's authority to issue rules regarding aviation safety is found in Title 49 of the United States Code. Subtitle 1, Section 106 describes the authority of the FAA Administrator. Subtitle VII, Aviation Programs, describes in more detail the scope of the agency's authority.

This rulemaking is promulgated under the authority described in Subtitle VII, Part A, Subpart 1, Section 40103, Sovereignty and use of airspace. Under that section, the FAA is charged with prescribing regulations to ensure the safe and efficient use of the navigable airspace. This regulation is within the scope of that authority because it proposes to create Class E airspace sufficient in size to contain aircraft executing instrument procedures at the Toksook Bay Airport, AK, and represents the FAA's continuing effort to safely and efficiently use the navigable airspace.

List of Subjects in 14 CFR Part 71

Airspace, Incorporation by reference, Navigation (air).

The Proposed Amendment

In consideration of the foregoing, the Federal Aviation Administration proposes to amend 14 CFR part 71 as follows:

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

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

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

§ 71.1 [Amended]

2. The incorporation by reference in 14 CFR 71.1 of Federal Aviation Administration Order 7400.9R, *Airspace Designations and Reporting Points,* signed August 15, 2007, and effective September 15, 2007, is to be amended as follows:

* * * * *

Paragraph 6005 Class E Airspace Extending Upward from 700 Feet or More Above the Surface of the Earth.

* * * * *

AAL AK E5 Toksook Bay, AK [Revised]

Toksook Bay, Toksook Bay Airport, AK (lat. 60°32′29″ N., long. 165°05′14″ W)

That airspace extending upward from 700 feet above the surface within a 6.3-mile radius of the Toksook Bay Airport, AK; and that airspace extending upward from 1,200 feet above the surface within a 73-mile radius of the Toksook Bay Airport, AK.

* * * * *

Issued in Anchorage, AK, on October 6, 2008.

Anthony M. Wylie,

Manager, Alaska Flight Services Information Area Group.

[FR Doc. E8–24687 Filed 10–16–08; 8:45 am]

BILLING CODE 4910–13–P

DEPARTMENT OF TRANSPORTATION

Federal Aviation Administration

14 CFR Part 71

[Docket No. FAA–2008–1018; Airspace Docket No. 08–AAL–31]

Proposed Revocation of Class E Airspace; Metlakatla, AK

AGENCY: Federal Aviation Administration (FAA), DOT.

ACTION: Notice of proposed rulemaking.

SUMMARY: This action proposes to revoke the Class E airspace at Metlakatla, AK. The privately funded Special instrument approaches serving Metlakatla, AK have been removed. There is no longer a requirement for the controlled airspace. Adoption of this proposal would result in revoking the Class E airspace upward from 700 feet (ft.) above the surface at the Metlakatla Airport, Metlakatla, AK.

DATES: Comments must be received on or before December 1, 2008.

ADDRESSES: Send comments on the proposal to the Docket Management Facility, U.S. Department of Transportation, 1200 New Jersey Avenue, SE., West Building Ground Floor, Room W12–140, Washington, DC 20590–0001. You must identify the docket number FAA–2008–1018/ Airspace Docket No. 08–AAL–31, at the beginning of your comments. You may also submit comments on the Internet at *http://www.regulations.gov.* You may review the public docket containing the proposal, any comments received, and any final disposition in person in the Dockets Office between 9 a.m. and 5 p.m., Monday through Friday, except Federal holidays. The Docket Office (telephone 1–800–647–5527) is on the plaza level of the Department of Transportation NASSIF Building at the above address.

An informal docket may also be examined during normal business hours at the office of the Manager, Safety, Alaska Flight Service Operations, Federal Aviation Administration, 222 West 7th Avenue, Box 14, Anchorage, AK 99513–7587.

FOR FURTHER INFORMATION CONTACT: Gary Rolf, Federal Aviation Administration, 222 West 7th Avenue, Box 14, Anchorage, AK 99513–7587; telephone number (907) 271–5898; fax: (907) 271–2850; e-mail: *gary.ctr.rolf@faa.gov.* Internet address: *http://www.alaska.faa.gov/at.*

SUPPLEMENTARY INFORMATION:

Comments Invited

Interested parties are invited to participate in this proposed rulemaking by submitting such written data, views, or arguments as they may desire. Comments that provide the factual basis supporting the views and suggestions presented are particularly helpful in developing reasoned regulatory decisions on the proposal. Comments are specifically invited on the overall regulatory, aeronautical, economic, environmental, and energy-related aspects of the proposal. Communications should identify both docket numbers and be submitted in triplicate to the address listed above. Commenters wishing the FAA to acknowledge receipt of their comments on this notice must submit with those comments a self-addressed, stamped postcard on which the following statement is made: ''Comments to Docket No. FAA–2008–1018/Airspace Docket No. 08–AAL–31.'' The postcard will be date/time stamped and returned to the commenter.

All communications received on or before the specified closing date for comments will be considered before taking action on the proposed rule. The proposal contained in this notice may be changed in light of comments received. All comments submitted will be available for examination in the public docket both before and after the closing date for comments. A report summarizing each substantive public contact with FAA personnel concerned with this rulemaking will be filed in the docket.

Availability of Notice of Proposed Rulemakings (NPRMs)

An electronic copy of this document may be downloaded through the Internet at *http://www.regulations.gov.* Recently published rulemaking documents can also be accessed through the FAA's Web page at *http://www.faa.gov* or the Superintendent of Document's Web page at *http://www.access.gpo.gov/nara/index.html.*

Additionally, any person may obtain a copy of this notice by submitting a request to the Federal Aviation Administration, Office of Air Traffic Airspace Management, ATA–400, 800 Independence Avenue, SW., Washington, DC 20591 or by calling (202) 267–8783. Communications must identify both docket numbers for this notice. Persons interested in being placed on a mailing list for future NPRMs should contact the FAA's Office of Rulemaking, (202) 267–9677, to request a copy of Advisory Circular No. 11–2A, Notice of Proposed Rulemaking Distribution System, which describes the application procedure.

The Proposal

The FAA is considering an amendment to the Code of Federal Regulations (14 CFR part 71), which would revoke the Class E airspace at the Metlakatla Airport, in Metlakatla, AK. The intended effect of this proposal is to revoke Class E airspace due to the removal of the instrument approaches at the Metlakatla Airport, Metlakatla, AK.

Class E controlled airspace extending upward from 700 ft. and 1,200 ft. above the surface in the Metlakatla Airport area would be revoked by this action.

This action would result in the removal of Class E airspace depicted on affected aeronautical charts. The coordinates for this airspace docket are based on North American Datum 83. The Class E airspace areas designated as 700/1200 foot transition areas are published in paragraph 6005 in FAA Order 7400.9R, *Airspace Designations and Reporting Points,* signed August 15, 2007, and effective September 15, 2007, which is incorporated by reference in 14 CFR 71.1. The Class E airspace designations listed in this document would be subsequently removed from the Order.

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

Since this is a routine matter that will only affect air traffic procedures and air navigation, it is certified that this rule, when promulgated, will not have a significant economic impact on a substantial number of small entities under the criteria of the Regulatory Flexibility Act.

The FAA's authority to issue rules regarding aviation safety is found in Title 49 of the United States Code. Subtitle 1, Section 106 describes the authority of the FAA Administrator. Subtitle VII, Aviation Programs, describes in more detail the scope of the agency's authority.

This rulemaking is promulgated under the authority described in Subtitle VII, Part A, Subpart 1, Section 40103, Sovereignty and use of airspace. Under that section, the FAA is charged with prescribing regulations to ensure the safe and efficient use of the navigable airspace. This regulation is within the scope of that authority because it proposes to remove Class E airspace at the Metlakatla Airport, AK, and represents the FAA's continuing effort to safely and efficiently use the navigable airspace.

List of Subjects in 14 CFR Part 71

Airspace, Incorporation by reference, Navigation (air).

The Proposed Amendment

In consideration of the foregoing, the Federal Aviation Administration proposes to amend 14 CFR part 71 as follows:

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

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

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

§ 71.1 [Amended]

2. The incorporation by reference in 14 CFR 71.1 of Federal Aviation Administration Order 7400.9R, *Airspace Designations and Reporting Points,* signed August 15, 2007, and effective September 15, 2007, is to be amended as follows:

* * * * *

Paragraph 6005 Class E Airspace Extending Upward From 700 Feet or More Above the Surface of the Earth.

* * * * *

AAL AK E5 Metlakatla, AK [Revoked]

* * * * *

Issued in Anchorage, AK, on October 6, 2008.

Anthony M. Wylie,

Manager, Alaska Flight Services Information Area Group.

[FR Doc. E8–24689 Filed 10–16–08; 8:45 am]

BILLING CODE 4910–13–P

SECURITIES AND EXCHANGE COMMISSION

17 CFR Parts 230 and 240

[Release Nos. 33–8976, 34–58769; File No. S7–14–08]

RIN 3235–AK16

Indexed Annuities and Certain Other Insurance Contracts

AGENCY: Securities and Exchange Commission.

ACTION: Proposed rule; reopening of comment period.

SUMMARY: The Securities and Exchange Commission is reopening the period for public comment on new rules that it originally proposed in Securities Act Release No. 8933 (June 25, 2008) [73 FR 37752 (July 1, 2008)]. The Commission proposed a rule that would, if adopted, define the terms ''annuity contract'' and ''optional annuity contract'' under the Securities Act of 1933. The proposed rule is intended to clarify the status under the federal securities laws of indexed annuities. The Commission also proposed to exempt insurance companies from filing reports under the Securities Exchange Act of 1934 with respect to indexed annuities and other securities that are registered under the Securities Act, provided that the securities are regulated under state insurance law, the issuing insurance company and its financial condition are subject to supervision and examination by a state insurance regulator, and the securities are not publicly traded.

DATES: Comments should be received on or before November 17, 2008.

ADDRESSES: Comments may be submitted by any of the following methods:

Electronic Comments

- Use the Commission's Internet comment form (*http://www.sec.gov/rules/proposed.shtml*);
- Send an e-mail to *rule-comments@sec.gov.* Please include File No. S7–14–08 on the subject line; or
- Use the Federal eRulemaking Portal (*http://www.regulations.gov*). Follow the instructions for submitting comments.

Paper Comments

- Send paper comments in triplicate to Florence E. Harmon, Acting Secretary, Securities and Exchange Commission, 100 F Street, NE., Washington, DC 20549–1090.

All submissions should refer to File No. S7–14–08. This file number should be included on the subject line if e-mail is used. To help us process and review your comments more efficiently, please use only one method. The Commission will post all comments on the Commission's Internet Web site (*http://www.sec.gov*). Comments are also available for public inspection and copying in the Commission's Public Reference Room, 100 F Street, NE., Washington, DC 20549, on official business days between the hours of 10 a.m. and 3 p.m. All comments received will be posted without change; we do not edit personal identifying information from submissions. You should submit only information that you wish to make available publicly.

FOR FURTHER INFORMATION CONTACT: Keith E. Carpenter, Senior Special Counsel, Office of Disclosure and Insurance Product Regulation, Division of Investment Management, at (202) 551–6795, Securities and Exchange Commission, 100 F Street, NE., Washington, DC 20549–5720.

SUPPLEMENTARY INFORMATION: The Securities and Exchange Commission (''Commission'') is reopening the period for public comment on a proposed rule that would define the terms ''annuity contract'' and ''optional annuity contract'' under the Securities Act of 1933. The proposed rule is intended to clarify the status under the federal securities laws of indexed annuities, under which payments to the purchaser are dependent on the performance of a securities index. The Commission is also reopening the period for public comment on a proposed rule that would, if adopted, exempt insurance companies from filing reports under the Securities Exchange Act of 1934 with respect to indexed annuities and other securities that are registered under the Securities Act, provided that the securities are regulated under state insurance law, the issuing insurance company and its financial condition are subject to supervision and examination by a state insurance regulator, and the securities are not publicly traded. The rules were proposed on June 25, 2008,[1]

[1] Indexed Annuities and Certain Other Insurance Contracts, Securities Act Release No. 8933 (June 25, 2008) [73 FR 37752 (July 1, 2008)].

and the comment period initially closed on September 10, 2008.

The Commission has received numerous letters, including from state insurance commissioners, members of Congress, and others, requesting that the comment period be extended.[2] In general, these commenters indicated that an extension would help them analyze the proposal and prepare meaningful comments. In order to provide additional time for the public to thoroughly consider the proposal, and in view of the significant continuing public interest in the proposal, the Commission believes that it is appropriate to reopen the comment period. Accordingly, we will reopen the comment period for an additional 30 days.

By the Commission.

Dated: October 10, 2008.

Florence E. Harmon,

Acting Secretary.

[FR Doc. E8–24625 Filed 10–16–08; 8:45 am]

BILLING CODE 8011–01–P

[2] Comments on the proposal are available at *http://www.sec.gov/comments/s7-14-08/s71408.shtml.*

DEPARTMENT OF HOUSING AND URBAN DEVELOPMENT

24 CFR Part 30

[Docket No. FR–5081–P–01]

RIN 2501–AD23

Civil Money Penalties: Certain Prohibited Conduct

AGENCY: Office of General Counsel, HUD.

ACTION: Proposed rule.

SUMMARY: This rule would revise HUD's regulations that govern the imposition of civil money penalties. Specifically, the rule would revise the definition of ''material or materially'' and add a definition of ''ability to pay,'' which is one factor used in determining the appropriateness of the amount of any civil money penalty. Additionally, the proposed rule would require respondents, in their responses to the prepenalty notice, to specifically address the factors used in determining the appropriateness and amount of civil money penalty. This rule would also allow Government Counsel to file complaints on behalf of the Mortgagee Review Board and departmental officials. Finally, this rule would make other minor clarifying changes.

DATES: *Comment Due Date:* December 16, 2008.

ADDRESSES: Interested persons are invited to submit comments regarding this rule to the Regulations Division, Office of General Counsel, Department of Housing and Urban Development, 451 7th Street, SW., Room 10276, Washington, DC 20410–0500. Interested persons also may submit comments electronically through The Federal eRulemaking Portal at *www.regulations.gov.* HUD strongly encourages commenters to submit comments electronically in order to make them immediately available to the public. Commenters should follow the instructions provided on that site to submit comments electronically. Facsimile (FAX) comments are not acceptable. In all cases, communications must refer to the docket number and title. All comments and communications submitted to HUD will be available for public inspection and copying between 8 a.m. and 5 p.m. weekdays at the above address. Due to security measures at the HUD Headquarters building, an advance appointment to review the public comments must be scheduled by calling the Regulations Division at 202–708–3055 (this is not a toll-free number). Copies of all comments submitted are available for inspection and downloading at *www.regulations.gov.*

FOR FURTHER INFORMATION CONTACT: Dane Narode, Acting Associate General Counsel for Program Enforcement, Department of Housing and Urban Development, 1250 Maryland Avenue, SW., Suite 200, Washington, DC 20024–0500; telephone number 202–708–2350 (this is not a toll-free number), or e-mail address *Dane.M.Narode@hud.gov.* Hearing- or speech-impaired individuals may access the telephone number listed above by calling the toll-free Federal Information Relay Service at 800–877–8339.

SUPPLEMENTARY INFORMATION:

I. Proposed Rule

HUD's civil money penalties regulations are located in 24 CFR part 30. In general, 24 CFR part 30 outlines the procedures and requirements that concern violations, prepenalty notices, and complaints. This proposed rule would make several revisions in 24 CFR part 30.

First, ''ability to pay'' is one of the factors used in determining the appropriateness of civil money penalties under § 30.80(c). To provide more clarity with respect to this factor, HUD proposes to define ''ability to pay'' in § 30.10. As defined, ''ability to pay'' would be determined based on the respondent's resources available presently and prospectively, from which the Department could ultimately recover the total award. The definition would also allow for the consideration of respondent's resources to be based on historical evidence. This would include an analysis of the resources available to the respondent from which the respondent could pay the judgment in one lump sum, over time, or at some point in the future. This analysis would also examine the resources from which the Department could obtain enforced collection or administrative offset. A second modification would revise the definition of ''Material'' or ''Materially'' to mean anything having the natural tendency or potential to influence, or, considering the totality of the circumstances, in some significant respect or to some significant degree. To rise to the level of material, acts or conduct would not be required to actually influence a decision or course of action by the Department, but merely to have the potential to do so. Therefore, this revised definition would not require ''but for'' or actual causation for an act or conduct to be material. Moreover, after revision, the definition of material would no longer require consideration of any factor listed in § 30.80, which are generally to be used only to determine the amount of the civil money penalty imposed, if any, but would permit the Department to introduce evidence of the relevant factors to establish the significance of a violation in light of the totality of the circumstances.

Additionally, this proposed rule would revise § 30.35, the section that lists the actions authorized against a mortgagee or lender. Currently, § 30.35(a)(14) includes failure to comply with ''the terms of a settlement agreement with HUD'' among the list of actions for which the Mortgagee Review Board may initiate a civil money penalty action. The proposed revision would delete this provision as a basis upon which HUD may initiate a civil money penalty action against a mortgagee or lender.

HUD is seeking to clarify some apparent ambiguity in §§ 30.45 and 30.68. First, this proposed rule would revise § 30.45(d) to clarify that the violation of programmatic procedures and standards are indicators of unsatisfactory management. In addition, this proposed rule would modify § 30.68(b) to clarify that any violation of a housing assistance payments contract may result in the imposition of a civil money penalty. HUD has learned that some confusion exists about whether the violations in § 30.68(b)(1) and (b)(2) are exhaustive. The proposed rule

would establish that the specific violations listed are merely examples and not an exhaustive list.

This proposed rule would revise section 30.70 to require the prepenalty notice to inform the respondent that if a determination is made to seek civil penalties and a complaint is issued under § 30.85, the respondent will have the ability to request a hearing. Additionally, this proposed rule would require both the Department and respondent to preserve documents related to the matters contained in the prepenalty notice, upon receipt of the notice by the respondent.

In order to enable adequate consideration of the factors used in determining the appropriateness and amount of any penalty, this proposed rule would also revise § 30.75, which establishes the procedures for responding to prepenalty notices. As revised, § 30.75 would require that a response to a prepenalty notice address the factors set forth in § 30.80 and include any argument opposing the imposition of a civil money penalty. Additionally, this proposed rule would require the respondent to provide documentary support as part of its response in any case in which the respondent seeks to raise ability to pay as an affirmative defense or argument in mitigation.

Further, § 30.80 is revised to clarify that the factors listed are to be considered after a determination has been made that a knowing and material violation has occurred subjecting the respondent to liability for a civil money penalty. Additionally, § 30.80 is revised to clarify that consideration may be given to any prior offenses and would delete references to the effective dates of specific sections of this part. The proposed rule would also clarify that the respondent's ability to pay need not be proven by the Department, but is presumed unless specifically raised by the respondent as an affirmative defense or mitigating factor. As such, the respondent bears the burden of proof for the affirmative defense or mitigating factor in accordance with the Department's regulations at 24 CFR 26.45(e).

This proposed rule would also revise § 30.85(b) and (d) and add subsection (e) to clarify the complaint requirements. First, § 30.85(b) would be revised to state that the complaint under § 30.85 will be issued by government counsel on behalf of the government officials authorized to issue such complaints. In addition, under section 536 of the National Housing Act (12 U.S.C. 1735f–14(b)(3)), HUD is required to inform the Attorney General before taking action to impose a civil money penalty under §§ 30.35, 30.36, or 30.50. The requirement for notifying the Attorney General, currently in § 30.85(d), is being revised by codifying this provision at § 30.85(e). The revised § 30.85(e) more closely conforms to the statutory requirement and adds a requirement that the complaint state that this action has been taken.

This proposed rule would revise § 30.90 to state that the respondent may request a hearing within 15 days of receipt of the complaint and that if such a hearing is requested, the respondent's answer to the complaint would be due 30 days from receipt of the complaint.

Finally, this proposed rule would revise § 30.100 to clarify that it applies only to the settlement of an action that could be brought under part 30 and to permit the execution of a settlement agreement by a designee of the Mortgagee Review Board.

II. Solicitation of Specific Comments

HUD welcomes comments on all aspects of this proposed rule. HUD is also soliciting comments on whether to remove from the regulations the provisions concerning the issuance of a prepenalty notice, and to instead codify in this proposed rule only those procedures beginning with the issuance of a determination to seek civil money penalties. The authorizing statutes do not require the issuance of such prepenalty notices, and HUD is interested in commenters' views as to whether the formal codification of the issuance of prepenalty notices is necessary. Were the Department to remove the prepenalty provisions from any final regulation, the regulatory process would begin with the issuance of a notice of determination and complaint by the authorized official, as required by § 30.85, notifying the respondent of the Department's intent to seek civil money penalties.

Should the Department decide to remove the prepenalty notice provisions from any final rule, the Department still would be favorably disposed to utilizing a more informal pre-complaint process that, though not specifically set forth in regulation, would allow the Department to discuss allegations with respondents before moving to the formal issuance of a determination and complaint. HUD is, therefore, also requesting comments as to whether any type of prepenalty process, be it regulatory or informal in nature, is desirable or if it represents an unnecessary additional burden for respondents.

III. Findings and Certifications

Regulatory Flexibility Act

The Regulatory Flexibility Act (5 U.S.C. 601 *et seq.*) (RFA) generally requires an agency to conduct a regulatory flexibility analysis of any rule subject to notice and comment rulemaking requirements, unless the agency certifies that the rule will not have a significant economic impact on a substantial number of small entities. All entities, small or large, will be subject to the same potential penalties as established by statute and implemented by this rule. The statute does not provide an exemption for small entities. Accordingly, the undersigned certifies that this rule will not have a significant economic impact on a substantial number of small entities.

Notwithstanding HUD's determination that this rule will not have a significant economic impact on a substantial number of small entities, HUD specifically invites comments regarding less burdensome alternatives to this rule that will meet HUD's objectives as described in this preamble.

Environmental Impact

In accordance with 24 CFR 50.19(c)(6) of HUD's regulations, this rule involves the Department's regulations implementing civil money penalty statutes. In accordance with 24 CFR 50.19(c)(1) of HUD's regulations, this proposed rule does not direct, provide for assistance or loan and mortgage insurance for, or otherwise govern or regulate, real property acquisition, disposition, leasing, rehabilitation, alteration, demolition, or new construction, or establish, revise, or provide for standards for construction or construction materials, manufactured housing, or occupancy. Therefore, this proposed rule is categorically excluded from the requirements of the National Environmental Policy Act (42 U.S.C. 4321 *et seq.*).

Executive Order 13132, Federalism

Executive Order 13132 (entitled ''Federalism'') prohibits, to the extent practicable and permitted by law, an agency from promulgating a regulation that has federalism implications and either imposes substantial direct compliance costs on state and local governments and is not required by statute, or preempts state law, unless the relevant requirements of Section 6 of the Executive Order are met. This rule affects only persons who fail to comply with the Department's requirements, does not have federalism implications, and does not impose substantial direct compliance costs on state and local

governments or preempt state law within the meaning of the Executive Order.

Unfunded Mandates Reform Act

Title II of the Unfunded Mandates Reform Act of 1995 (UMRA) (2 U.S.C. 1531–1538) establishes requirements for federal agencies to assess the effects of their regulatory actions on state, local, and tribal governments and the private sector. This rule does not impose any federal mandate on any state, local, or tribal government or the private sector within the meaning of UMRA.

Small Business Concerns Related to Board Enforcement Actions

With respect to enforcement actions undertaken by the Board against a mortgagee, and, as noted in the March 28, 2008, proposed rule, HUD is cognizant that section 222 of the Small Business Regulatory Enforcement Fairness Act of 1996 (Pub. L. 104–121) (SBREFA) requires the Small Business and Agriculture Regulatory Enforcement Ombudsman to ''work with each agency with regulatory authority over small businesses to ensure that small business concerns that receive or are subject to an audit, on-site inspection, compliance assistance effort, or other enforcement related communication or contact by agency personnel are provided with a means to comment on the enforcement activity conducted by this personnel.'' To implement this statutory provision, the Small Business Administration has requested that federal agencies include the following language on agency publications and notices that are provided to small business concerns at the time the enforcement action is undertaken. The language is as follows:

Your Comments Are Important

The Small Business and Agriculture Regulatory Enforcement Ombudsman and 10 Regional Fairness Boards were established to receive comments from small businesses about federal agency enforcement actions. The Ombudsman will annually evaluate the enforcement activities and rate each agency's responsiveness to small business. If you wish to comment on the enforcement actions of [insert agency name], you will find the necessary comment forms at *www.sba.gov/ombudsman* or call 1–888–REG–FAIR (1–888–734–3247).

In accordance with its notice describing HUD's actions on the implementation of SBREFA, which was published on May 21, 1998 (63 FR 28214), HUD will include the language cited above on notices implementing enforcement actions, to ensure that small entities have the full means to comment on the enforcement activity conducted by HUD.

List of Subjects in 24 CFR Part 30

Administrative practice and procedure, Grant programs-housing and community development, Loan programs-housing and community development, Mortgages, Penalties.

For the reasons discussed in the preamble, HUD proposes to amend 24 CFR part 30 to read as follows:

PART 30—CIVIL MONEY PENALTIES: CERTAIN PROHIBITED CONDUCT

1. The authority citation for 24 CFR part 30 continues to read as follows:

Authority: 12 U.S.C. 1701q–1, 1703, 1723i, 1735f–14, 1735f–15; 15 U.S.C. 1717a; 28 U.S.C. 2461 note; 42 U.S.C. 1437z–1 and 3535(d).

2. Revise § 30.1 to read as follows:

§ 30.1 Purpose and scope.

Unless provided for elsewhere in this title or under separate authority, this part implements HUD's civil money penalty provisions. The procedural rules for hearings under this part are those applicable to hearings in accordance with the Administrative Procedure Act, as set forth in 24 CFR part 26.

3. Amend § 30.10 by adding, in alphabetical order, the definition of Ability to Pay and revising the definition of Material or Materially, to read as follows:

§ 30.10 Definitions.

* * * * *

Ability to pay. Determined based on an assessment of the respondent's resources available both presently and prospectively from which the Department could ultimately recover the total award, which may be predicted based on historical evidence.

* * * * *

Material or Materially. Having the natural tendency or potential to influence, or when considering the totality of the circumstances, in some significant respect or to some significant degree.

* * * * *

§ 30.35 [Amended]

4. Amend § 30.35 by removing paragraph (a)(14) and by redesignating paragraph (a)(15) as (a)(14).

5. Revise § 30.45(d) to read as follows:

§ 30.45 Multifamily and section 202 or 811 mortgagors.

* * * * *

(d) *Acceptable management.* For purposes of this rule, management acceptable to the Secretary under 12 U.S.C. 1735f–15(c)(1)(B)(xiv) shall include:

(1) Fiscal management in accordance with HUD regulations and requirements;

(2) Handling of vacancies and tenanting in accordance with HUD regulations and requirements;

(3) Handling of rent collection in accordance with HUD regulations and requirements;

(4) Maintenance in accordance with HUD regulations and requirements;

(5) Compliance with HUD regulations and requirements on tenant organization; and

(6) Any other matters that pertain to proper management in accordance with HUD regulations and requirements.

* * * * *

6. In § 30.68, revise paragraph (b) introductory text to read as follows:

§ 30.68 Section 8 owners.

* * * * *

(b) *General.* The Assistant Secretary for Housing—Federal Housing Commissioner, or his or her designee, or the Assistant Secretary for Public and Indian Housing, or his or her designee, may initiate a civil money penalty against any owner, any general partner of a partnership owner, or any agent employed to manage the property that has an identity of interest with the owner or the general partner of a partnership owner of a property receiving project-based assistance under section 8 of the United States Housing Act of 1937 (42 U.S.C. 1437f) for a knowing and material breach of a housing assistance payments contract. Examples of covered violations include, but are not limited to, the following:

* * * * *

7. Revise § 30.70 to read as follows:

§ 30.70 Prepenalty notice.

(a) Prior to determining whether to issue a complaint under § 30.85, the official designated in subpart B of this part, or his or her designee (or the chairperson of the Mortgagee Review Board, or his or her designee, in actions under § 30.35), shall issue a written notice to the respondent. This prepenalty notice shall include the following:

(1) That HUD is considering seeking a civil money penalty;

(2) The specific violations alleged;

(3) The maximum civil money penalty that may be imposed;

(4) The opportunity to reply in writing to the designated program official within 30 days after receipt of the notice;

(5) That failure to respond within the 30-day period may result in issuance of a complaint under § 30.85 without consideration of any information that

the respondent may wish to provide; and

(6) That if a complaint is issued under § 30.85, the respondent may request a hearing before an administrative law judge in accordance with § 30.95.

(b) *Obligation to preserve documents.* Upon receipt of the prepenalty notice, the respondent is required to preserve and maintain all documents or data, including electronically stored data, within his or her possession or control that may relate to the violations alleged in the prepenalty notice. The Department shall also preserve such documents or data upon the issuance of the prepenalty notice.

8. Revise § 30.75 to read as follows:

§ 30.75 Response to prepenalty notice.

(a) The response shall be in a format prescribed in the prepenalty notice. The response shall address the factors set forth in § 30.80 and include any arguments opposing the imposition of a civil money penalty that the respondent may wish to present.

(b) In any case where respondent seeks to raise ability to pay as an affirmative defense or argument in mitigation, the respondent shall provide documentary evidence as part of its response.

9. Revise § 30.80 to read as follows:

§ 30.80 Factors in determining amount of civil money penalty.

After determining that a respondent has committed a violation as described in Subpart B of this part that subjects the respondent to liability under this part, the officials designated in subpart B of this part shall consider the following factors to determine the amount of penalty to seek against a respondent, if any.

(a) The gravity of the offense;

(b) Any history of prior offenses;

(c) The ability to pay the penalty, which ability shall be presumed unless specifically raised as an affirmative defense or mitigating factor by the respondent;

(d) The injury to the public;

(e) Any benefits received by the violator;

(f) The extent of potential benefit to other persons;

(g) Deterrence of future violations;

(h) The degree of the violator's culpability;

(i) With respect to Urban Homestead violations under § 30.30, the expenditures made by the violator in connection with any gross profit derived; and

(j) Such other matters as justice may require.

(k) In addition to the above factors, with respect to violations under §§ 30.45, 30.55, 30.60, and 30.68, the Assistant Secretary for Housing—Federal Housing Commissioner, or his or her designee, or the Assistant Secretary for Public and Indian Housing, or his or her designee, shall also consider:

(1) Any injury to tenants; and/or

(2) Any injury to lot owners.

(l) HUD may consider the factors listed in paragraphs (a) through (k) of this section to determine the appropriateness of imposing a penalty under § 30.35(c)(2); however, HUD cannot change the amount of the penalty under § 30.35(c)(2).

10. In § 30.85, revise paragraphs (b) introductory text, (c), and (d) and add paragraph (e) to read as follows:

§ 30.85 Complaint.

* * * * *

(b) If a determination is made to seek a civil money penalty, government counsel shall issue a complaint to the respondent on behalf of the officials listed at subpart B of this part or the Mortgagee Review Board for violations under § 30.35. The complaint shall be served upon respondent and simultaneously filed with the Office of Administrative Law Judges, and shall state the following:

* * * * *

(c) A copy of this part and of 24 CFR part 26, subpart B, shall be included with the complaint.

(d) *Service of the complaint.* The complaint shall be served on the respondent by first class mail, personal delivery, or other means.

(e) Before taking an action under §§ 30.35 for violation of 12 U.S.C. § 1735f–14(b)(1)(D) or (F), 30.36, or 30.50 for violation of 12 U.S.C. 1723i(b)(1)(G) or (I), the Secretary shall inform the Attorney General of the United States, which may be accomplished by providing a copy of the complaint. The Secretary shall include in the body of the complaint a statement confirming that this action was taken.

11. In § 30.90, revise paragraph (a), redesignate paragraph (b) as (c), and revise the new paragraph (b) to read as follows:

§ 30.90 Response to the complaint.

(a) *Request for a hearing.* If the respondent desires a hearing before an administrative law judge, the respondent shall submit a request for a hearing to HUD and the Office of Administrative Law Judges no later than 15 days following receipt of the complaint, as required by statute. This mandated period cannot be extended.

(b) *Answer.* In any case in which the respondent has requested a hearing, the respondent shall serve upon HUD and file with the Office of Administrative Law Judges a written answer to the complaint within 30 days of receipt of the complaint, unless such time is extended by the administrative law judge for good cause. The answer shall include the admission or denial of each allegation of liability made in the complaint; any defense on which the respondent intends to rely; any reasons why the civil money penalty should be less than the amount sought in the complaint, based on the factors listed at § 30.80; and the name, address, and telephone number of the person who will act as the respondent's representative, if any.

* * * * *

12. Revise § 30.95 to read:

§ 30.95 Hearings.

Hearings under this part shall be conducted in accordance with the procedures applicable to hearings in accordance with the Administrative Procedure Act, set forth in 24 CFR part 26.

13. Revise § 30.100 to read as follows:

§ 30.100 Settlement of a civil money penalty action.

The officials listed at subpart B of this part, or their designees (or the Mortgagee Review Board, or designee, for violations under § 30.35), are authorized to enter into settlement agreements resolving civil money penalty actions that may be brought under part 30.

Dated: September 23, 2008.

Roy A. Bernardi,

Deputy Secretary.

[FR Doc. E8–24574 Filed 10–16–08; 8:45 am]

BILLING CODE 4210–67–P

DEPARTMENT OF HOUSING AND URBAN DEVELOPMENT

24 CFR Part 570

[Docket No. FR–5181–P–01]

RIN 2506–AC22

State Community Development Block Grant Program: Administrative Rule Changes

AGENCY: Office of the Assistant Secretary for Community Planning and Development, HUD.

ACTION: Proposed rule.

SUMMARY: This proposed rule would make changes to several sections of the regulations for the Community

Development Block Grant (CDBG) program for states (State CDBG). This proposed rule would streamline and update the regulations to reflect statutory changes, clarify the program income requirements, provide other clarifications to the State CDBG regulations, and make a conforming change to the regulations applicable to the CDBG Entitlement program. This proposed rule would also provide states additional flexibility in their administration of the program.

DATES: *Comment Due Date:* December 16, 2008.

ADDRESSES: Interested persons are invited to submit comments regarding this proposed rule to the Regulations Division, Office of General Counsel, Department of Housing and Urban Development, 451 Seventh Street, SW., Room 10276, Washington, DC 20410–0500. Communications must refer to the above docket number and title. There are two methods for submitting public comments. All submissions must refer to the above docket number and title.

1. Submission of Comments by Mail. Comments may be submitted by mail to the Regulations Division, Office of General Counsel, Department of Housing and Urban Development, 451 Seventh Street, SW., Room 10276, Washington, DC 20410–0500.

2. Electronic Submission of Comments. Interested persons may submit comments electronically through the Federal eRulemaking Portal at *http://www.regulations.gov.* HUD strongly encourages commenters to submit comments electronically. Electronic submission of comments allows the commenter maximum time to prepare and submit a comment, ensures timely receipt by HUD, and enables HUD to make them immediately available to the public. Comments submitted electronically through the *http://www.regulations.gov* Web site can be viewed by other commenters and interested members of the public. Commenters should follow the instructions provided on that site to submit comments electronically.

Note: To receive consideration as public comments, comments must be submitted through one of the two methods specified above. Again, all submissions must refer to the docket number and title of the rule.

No Facsimile Comments. Facsimile (FAX) comments are not acceptable.

Public Inspection of Public Comments. All properly submitted comments and communications submitted to HUD will be available for public inspection and copying between 8 a.m. and 5 p.m. weekdays at the above address. Due to security measures at the HUD Headquarters building, an advance appointment to review the public comments must be scheduled by calling the Regulations Division at 202–708–3055 (this is not a toll-free number). Individuals with speech or hearing impairments may access this number via TTY by calling the Federal Information Relay Service at 800–877–8339. Copies of all comments submitted are available for inspection and downloading at *http://www.regulations.gov.*

FOR FURTHER INFORMATION CONTACT: Steven Higginbotham, Community Planning and Development Specialist, Office of Community Planning and Development, Department of Housing and Urban Development, 451 Seventh Street, SW., Room 7184, Washington, DC 20410; telephone number 202–708–1322 (this number is not toll-free). Individuals with speech or hearing impairments may access this number through TTY by calling the toll-free Federal Information Relay Service at 800–877–8339. FAX inquiries (but not comments on this proposed rule) may be sent to Mr. Higginbotham at 202–401–2044 (this is not a toll-free number).

SUPPLEMENTARY INFORMATION:

I. Background

This proposed rule would revise the regulations for the CDBG program for states (State CDBG) in 24 CFR part 570, subpart I, to respond to issues HUD has identified in the program, to conform the regulations to current statutory requirements concerning program income, and to provide additional flexibility to states in implementing their programs.

Specifically, this proposed rule would revise requirements related to the following matters: (1) Interest on federal grant payments to states; (2) program income, including the situations in which income earned on grant funds must be remitted to the Department of the Treasury; (3) flexibility for a state to use up to 3 percent of its allocation, program income, and recaptured funds for state administrative expenses and technical assistance; (4) revolving funds; (5) the use of CDBG funds outside the jurisdiction of the recipient; (6) states' administrative flexibility to impose additional requirements on recipients; (7) allowability of costs incurred by states prior to execution of a grant agreement; (8) audits; (9) states' disbursement of grant funds to units of general local government only; (10) applicability of cost principles and the requirement for prior approval of certain costs by HUD; (11) fiscal controls and administrative procedures; (12) exclusion from program income of amounts generated by certain activities financed with section 108 loan guarantees; and (13) reporting. HUD is also requesting public comments on whether HUD should promulgate State CDBG regulations that mirror existing CDBG Entitlement program regulations (24 CFR part 570, subpart J) on lump-sum drawdowns and the use of escrow accounts for rehabilitation of residential properties.

II. This Proposed Rule

Each of the proposed changes is described below.

A. Interest on Federal Grant Payments to States

Section 570.489(c) of the current regulations describes the requirements concerning federal grant payments to states. Section 570.489(c)(1) provides that states and units of general local government must minimize the elapsed time between receipt of federal funds from the state's line of credit and their disbursement for grant activities. Section 570.489(c)(2) provides that interest earned by units of general local government on funds held pending disbursement is not program income and must generally be returned to the Department of the Treasury. It further provides that states generally do not have to return interest earned during the time between receipt of funds and disbursement to local governments. These provisions of the State CDBG regulations were based in part on the Intergovernmental Cooperation Act (31 U.S.C. 6503) and pre-1993 implementing regulations at 31 CFR part 205.

The Cash Management Improvement Act of 1990 (CMIA) (31 U.S.C. 3335, 6503), as amended in 1992, made several fundamental changes to the manner in which payments between federal and state governments are made. The Treasury Department's regulations implementing the CMIA are located in 31 CFR part 205. Under the current regulations, states and the Treasury Department enter into agreements covering all federal programs over a certain funding level. Through these agreements, states select payment techniques that are designed to prevent delays between drawdown and disbursement of funds, and the agreements provide for the calculation at stated interest rates of states' net interest liabilities to the federal government. For programs whose funding levels are below the applicable threshold or otherwise not subject to an agreement, states and federal agencies

must comply with subpart B of 31 CFR part 205, which provides requirements for minimizing the time between drawdown and disbursement of funds.

The current requirements at 31 CFR part 205 render some aspects of § 570.489(c) obsolete. Therefore, rather than repeat the requirements for states in the State CDBG regulations, this proposed rule would revise § 570.489(c) by cross-referencing the requirements in 31 CFR part 205. This proposed rule would retain the existing requirement that units of general local government minimize the time between receipt of CDBG funds and their disbursement, and would clarify that the state is required to ensure that units of local government are in compliance with this requirement.

B. Program Income Requirements

The proposed changes to the program income provisions that are described in this section respond to the amendments made by the Housing and Community Development Act of 1992 (the 1992 Act) (Pub. L. 102–550, approved October 28, 1992) and an opinion issued by the Comptroller General of the United States.

1. Implementation of 1992 Statutory Amendments

The existing State CDBG regulations provide in § 570.489(e)(3)(ii)(B) that program income received by a unit of general local government after closeout of its grant from the state is generally not subject to the program income requirements in § 570.489(e). However, the 1992 Act amended section 104(j) (42 U.S.C. 5304(j)) of the Housing and Community Development Act of 1974 (the Act) to provide that the use of program income is governed by CDBG program requirements for as long as program income remains.

Several regulatory initiatives were reflected in the CDBG Program Economic Development Guidelines final rule, published on January 5, 1995 (60 FR 1922). At that time, HUD noted that further regulatory changes were forthcoming to implement fully the 1992 Act. However, HUD recognized the need to provide guidance to grantees in the interim. On October 27, 2004, HUD published CPD Notice 04–11, ''Program Income Requirements in the State CDBG Program.'' The notice described the changes that occurred in 1992 and provided guidance to states on how to deal with their increased record-keeping responsibilities.

A major challenge that states face in implementing the 1992 Act is that a unit of general local government may continue to generate and use program income long after the originally funded activities are completed and closed out. The statutory provision significantly extended states' responsibilities to track program income. To provide as much flexibility as possible within the constraints of the law, this proposed rule would revise § 570.489(e)(3)(ii)(B) by allowing states to demonstrate compliance with this requirement in any of the following ways:

(a) States may maintain contractual relationships with units of general local government for as long as there is program income to be tracked. Since, in some cases, receipts of program income by a local government may be sporadic, a state could craft its contractual agreements so that obligations would not be imposed once a local government has exhausted its program income and would arise again only upon receipt of new program income.

(b) States may require, as a condition of closeout, that local governments agree to obtain advance state approval of a local plan to expend program income, or of individual expenditures of program income, in the absence of a continuing contractual relationship. This arrangement may be beneficial to states that presently use a ''conditional closeout'' process, in which a grant recipient has program income on hand at the time of grant closeout or receives program income after closeout of the grant that generated the program income.

(c) States may require, as a condition of closeout, that the unit of general local government agree to notify the state when new program income is received by the unit of general local government. This option may be especially useful when dealing with local revolving loan funds, or when states and units of local governments are not able to project future needs to be addressed with activities funded by program income.

(d) States may seek HUD approval of an alternative method for demonstrating compliance. HUD intends that field offices, not Headquarters, would grant such approval.

States may select different approaches for different types of grant recipients. For example, a state that distributes some of its funds on a formula basis and some on a competitive basis might select option (a), above, for those units of general local government that receive funding every year, and option (c) for other grant recipients. A state might also blend the first two options by requiring a plan for the use of program income by local governments as part of its contractual agreement with units of general local government.

Program income is a significant resource in the State CDBG, and it constitutes a major multiplier of the benefits that the CDBG program provides to citizens and beneficiaries. For example, in Fiscal Year (FY) 2007, states cumulatively receipted $37.3 million in program income. The $37.3 million represents only that portion of program income that was returned to the states by units of general local government. Although HUD has issued guidance in the past on how to report on program income retained at the local level, many states have not complied with all of HUD's recommendations. This proposed rule would revise § 570.490(a)(3) to require reporting of data that will include program income retained at the local level. Also, consistent with the 1992 Act's requirement to account for program income as long as the program income remains, this proposed rule would revise § 570.489(e)(4) to require the annual Performance and Evaluation Reports (PERs) of states to include the use of program income retained by local governments.

2. Uniform Treatment of Program Income

Over the years, there has been a succession of regulatory changes to the State CDBG program income requirements. Program income received from grants made prior to December 9, 1992, was subject to the requirements in a final rule published in the **Federal Register** on November 9, 1992 (57 FR 53397). Program income generated from grants made by states with FY 1993 and later funds is subject to the requirements of the 1992 Act as well as the requirements of the November 9, 1992, final rule. Finally, the January 5, 1995, CDBG Program Economic Development Guidelines final rule included an expanded list of revenues that are not considered program income.

States have reported that tracking different requirements as they apply to different funding years is complicated and time-consuming, especially for program income retained at the local level. Repayments of loans made from one grant to a given community may be subject to different requirements than repayments of loans made from a subsequent year's grant to the same community. This results in an increased record-keeping burden on both the state and local governments. The complexity and burden are compounded when program income is used to make additional loans, which, in turn, generate more program income. Some states have expressed confusion about whether program income is subject to

the requirements in effect at the time the state awarded the initial grant to the locality, or to the requirements in effect when the program income is received.

This proposed rule would revise § 570.489(e)(1) to apply the tracking requirements to all program income received and retained by localities, regardless of the fiscal year in which the state grant funds that generate the program income were appropriated. HUD does not believe that significant amounts of program income are likely to be generated by funds appropriated before FY 1993, since in most cases the funded activities ended years ago. Furthermore, this proposed rule would also clarify in § 570.489(e)(2)(v) that proceeds received from the sale of real property acquired or improved in whole or part with CDBG funds would not be considered program income if the proceeds are received more than 5 years after expiration of the grant agreement. For these reasons, making all program income subject to post-FY 1992 requirements should have little effect on grantees. However, HUD specifically requests comment from grantees that might be adversely affected.

It is noted that for the purpose of determining the administrative expense, technical assistance, and public service caps, program income is counted in the year that it is received by the unit of general local government, or by the unit of general local government's subgrantee.

3. Miscellaneous Improvements and Updates

States have requested several clarifications of the program income requirements, and HUD has discovered other requirements that call for clarification. In substantially updating the program income requirements contained in § 570.489(e), this proposed rule would incorporate the following changes:

(a) Selling Off Loan Portfolios in Order To Expedite the Receipt of Program Income

In order to maximize available financial resources, communities are increasingly selling portfolios of loans on the secondary market or selling obligations secured by loan portfolios. Several communities have requested HUD's approval to ''net out'' of the proceeds from such sales the various legal and other costs that are incurred when a grantee sells or securitizes a portfolio. Exclusion of such costs from program income would be analogous to the current provision under which costs incidental to the generation of program income from the rental or use of CDBG-assisted real or personal property may be netted out of the gross income received. Therefore, this proposed rule would amend § 570.489(e)(1)(vi) and (vii) to allow legal and other costs associated with the sale or securitization of CDBG-funded loans to be netted out before the amount of program income is determined. This provision does not allow to be netted out those costs that are eligible as general administrative costs of either the state or the unit of general local government.

(b) Annual Threshold for Program Income

Section 104(j) of the Act allows HUD to promulgate regulations excluding from the program income requirements amounts that are so small that tracking them would pose an unreasonable administrative burden on the unit of general local government. In the CDBG Program Economic Development Guidelines final rule published on January 5, 1995, HUD raised the threshold in § 570.489(e)(2)(i) from $10,000 to $25,000 per year per unit of general local government. Income that would otherwise be considered program income, but which totals less than the current $25,000 threshold, is excluded from the definition of program income and is therefore not subject to CDBG requirements. If the total income that would otherwise be considered program income exceeds the threshold, then none of it is excluded from CDBG requirements. In order to account for inflation, this proposed rule would raise the threshold to $35,000 per year per unit of general local government.

In addition, this proposed rule would revise § 570.489(e)(2)(i) to match the language found in the Entitlement CDBG regulations at § 570.500(a)(4)(i). The Entitlement CDBG regulations exclude income that ''does not exceed'' the applicable threshold, while the State CDBG regulations exempt income ''which is less than'' the applicable threshold. This proposed rule would revise the State CDBG regulations so that total income that ''does not exceed'' the applicable threshold would be excluded from the definition of program income. The Entitlement threshold of $25,000 is not being proposed for change at this time.

This proposed rule would also revise § 570.489(e)(2)(i) to clarify that the exclusion of total income that does not exceed the threshold applies only to program income retained by a unit of general local government and its subgrantees, and that the threshold applies separately to each unit of general local government. As with the current regulation, the exclusion would not apply to program income that a unit of general local government earns but returns to the state. It is HUD's policy, communicated to states in the past, that the exclusion does not apply to program income received into local revolving loan funds (RLFs). The proposed rule would codify this policy. Income received into an RLF is always included in program income and subject to CDBG requirements.

This proposed rule would also codify HUD's policy that income received into an RLF is not added to ''regular'' program income received by the local government in applying the threshold, which this proposed rule would increase to $35,000. For example, assume that the proposed threshold increase becomes effective, and a unit of general local government maintains an RLF that receives $10,000 in one program year. In that same program year, it receives $30,000 in non-RLF income that, if not for the exclusion in § 570.489(e)(2)(i), would be considered program income. In this example, the $30,000 in non-RLF income would be excluded from program income (and, as a result, CDBG requirements would not apply to it), even though the total amount of program income under control by the local government is $40,000. The $10,000 that the RLF received would be considered program income. In another example, the unit of general local government maintains the same $10,000 in its RLF, but receives $35,001 in non-RLF program income. In this example, neither the RLF nor non-RLF program income would be exempted from CDBG requirements.

(c) Remission of Interest

This proposed rule would add § 570.489(e)(2)(iv), listing three types of interest income that are not considered program income and must be remitted to the Treasury Department. The first type, which would be defined in § 570.489(e)(2)(iv)(A), would respond to an opinion of the Comptroller General of the United States that income generated by an ineligible CDBG-assisted activity must be remitted to the U.S. Treasury. According to the Comptroller General opinion, eligibility includes meeting a national objective. Therefore, interest generated from CDBG-funded loans could be kept by the grantee only when the assisted activities meet the national objective requirements.

A second type of interest that is excluded from program income would be defined at § 570.489(e)(2)(iv)(B). Interest income on funds reimbursed to a state's CDBG program account prior to the state's disbursement of the funds for

eligible purposes would have to be returned to the Treasury Department.

A third type of interest that is excluded from program income and must be remitted to the U.S. Treasury would be defined at § 570.489(e)(2)(iv)(C). All interest in excess of $100 earned by units of general local government on grant advances prior to disbursement of the funds for activities must be returned to the Treasury Department under the current provision at § 570.489(c)(2). Consistent with the proposed revision of § 570.489(c), described above, this proposed rule would move the requirement to § 570.489(e)(2)(iv), in order to complete the listing of what is not program income.

HUD issued comparable provisions in a final rule for the Entitlement CDBG program, published on November 9, 1995 (60 FR 56892). In responding to public comments in that rulemaking, HUD provided guidance on the extent and applicability of those provisions. Readers with a particular interest in those provisions may wish to read the preamble to the November 9, 1995, final rule (60 FR 56892).

(d) Program Income Generated by Loans to State Grant Recipients

This proposed rule would add a provision in § 570.489(e)(2)(iii) to prevent double-counting of program income received by a subgrantee and subsequently used to make payments on a loan from a unit of general local government. To the extent that the funds used by a subgrantee to make principal or interest payments on a CDBG loan it received from a unit of general local government consist solely of program income received by the subgrantee, no amount of those payments represents ''new income'' to the unit of general local government's CDBG program as a whole. Since revenue is already counted as program income at the time it is received by the subgrantee, this provision would prevent double-counting of program income. To the extent, however, that the subgrantee uses non-CDBG funds to make the principal or interest payments, those payments to the local government are new program income to the CDBG program. This proposed rule would not affect the treatment of such payments under existing practice. HUD added a similar provision to the Entitlement program regulations in the November 9, 1995, final rule (60 FR 56893).

For example, if Apple Borough provided funds to the Apple Development Authority as a subgrantee to run its economic development loan program, and the Apple Development Authority provided a $50,000 loan to Apple Dairies for a business expansion, Apple Dairies' repayment of the $50,000 to the Apple Development Authority would be program income. The Apple Development Authority's repayment of the $50,000 to Apple Borough would not be program income, since it would be the same $50,000 transferred from Apple Dairies to the Apple Development Authority and such program income should not be counted twice.

(e) Program Income Retained at the Local Level

Section 104(j) of the Act allows a state to require that a unit of general local government return any program income that it collects to the state, to be used by the state to fund additional eligible community development activities. However, the state must waive this requirement ''to the extent such income is applied to continue the activity from which such income was derived.''

HUD gives states flexibility to determine whether program income received by a unit of general local government is being ''applied to continue the activity from which such income was derived.'' HUD is aware of situations in which states found that a unit of general local government failed to use program income in accordance with other program requirements or was not making sufficient efforts to expend its program income to continue the activity. HUD does not believe that the statutory language prohibits states from requiring a unit of general local government to return program income if it is expending the program income in violation of other CDBG requirements or delays expenditure for an unreasonable period of time. Inasmuch as local retention of program income is required only ''to the extent such income is applied to continue the activity from which such income was derived,'' HUD believes the statute necessarily contemplates that the funds will be used for eligible activities in a timely manner and in compliance with applicable requirements. This proposed rule would revise § 570.489(e)(3)(ii)(A) to provide that a state's determination of whether program income is being ''applied to continue the activity from which such income was derived'' can include consideration of whether the program income is not being used (or is unlikely to be used) within a reasonable time and in accordance with program requirements to continue the activity.

In some situations, a state may determine that a unit of general local government will apply program income to continue the activity from which the income is derived, but that the amount of program income on hand exceeds projected cash needs for the reasonably near future. For example, a community has a demand for two housing rehabilitation loans per month, but has enough program income on hand to fund 25 loans. A state could require the unit of general local government to return some or all of the program income to the state's CDBG program income account until such time as it is needed by the unit of general local government. The state could disburse these funds to other units of general local government in the meantime rather than drawing funds from its line of credit. When the local government needs its program income, the state could disburse the funds from the program income account or, as necessary, draw an equivalent amount from the state's line of credit for disbursement to the local government.

In other situations, a state may determine that a unit of local government is not likely to apply any significant amount of program income to continue the activity within any reasonable amount of time, or that it will not apply the program income in accordance with applicable requirements. In such cases, a state could require the unit of general local government to return all of the program income to the state's CDBG program income account for disbursement to other units of local government.

This proposed rule would increase the effective ''buying power'' of a state's CDBG funds, by making otherwise idle CDBG funds available to support current needs elsewhere in the state. Reduced interest costs to the Treasury Department from prematurely drawn funds would be another benefit, because states would need to draw funds from their line of credit somewhat less frequently. States would have the flexibility to define the time period over which cash needs for program income would be projected and the appropriate level of program income that could be retained in the local government's own program account. If a state plans to manage program income in this manner, its approach must be described in the state's action plan submitted in accordance with § 91.320 of this title.

(f) New Entitlement Grantees

This rule would clarify requirements for new Entitlement grantees that possess program income that they received when they were participating in the State CDBG program. Any such program income would continue to be treated as State CDBG program income, unless the state approves the transfer of

the program income to the Entitlement program. States and units of local government may prefer to transfer such State CDBG program income to the Entitlement program, since doing so would reduce states' monitoring burdens and require new Entitlement grantees to comply with only one set of program income requirements.

Conversely, on rare occasions a state may be faced with the return to the State CDBG program of a grantee that has recently lost or relinquished its Entitlement status. This proposed rule would provide that, in such a case, the unit of general local government may elect to transfer the program income to the State CDBG program. Program income that is not transferred would continue to be subject to Entitlement program requirements, and closeout of the community's Entitlement grants with HUD could be delayed. While guidance has been given to individual grantees on these issues in the past, HUD recognizes the need to provide for these options through regulations.

This proposed rule would add at § 570.489(e)(3)(iii) a list of conditions that must be met by a new Entitlement grantee before the state may approve the transfer of the State CDBG grant-generated program income to the locality's new Entitlement program. The grantee would have to elect to participate in the Entitlement program, agree to use the program in accordance with Entitlement program requirements, set up access to HUD's Integrated Disbursement and Information System (IDIS), and agree to enter the transferred program income into IDIS. The proposed rule would also add at § 570.489(e)(3)(iv) the options for a former Entitlement community's handling of program income when joining the State CDBG program. The proposed rule would also make a conforming change to the Entitlement program regulations by adding the same language at § 570.504(e).

(g) Administering the State CDBG Program

Section 106(d)(2)(A) of the Act (42 U.S.C. 5306(d)(2)(A)) provides that a state may elect to distribute State CDBG funds to its non-entitlement areas and also provides that any such election is permanent and final. Forty-nine states and the Commonwealth of Puerto Rico have elected to administer the State CDBG program, and only Hawaii's non-entitlement program is administered by HUD. The proposed rule would revise § 570.480(a) to clarify that, consistent with the Act, the requirements of subpart I of part 570 are applicable to states that have permanently elected to distribute funds to their non-entitlement areas. Revised § 570.480(a) would also cross-reference requirements outside of part 570, subpart I, that apply to the State CDBG program.

C. Flexibility for States To Allocate Funds for Administrative Expenses and Technical Assistance

This proposed rule would revise § 570.489(a)(1) to reflect a statutory amendment that provides states flexibility to allocate an increased portion of CDBG funds between state administrative expenses and costs of providing technical assistance to units of local governments and nonprofit program recipients. The 2004 Consolidated Appropriations Act amended section 106(d) of the Act to allow states to use up to 3 percent of their allocations on administrative expenses, technical assistance, or a combination thereof, in addition to the $100,000 base amount that states may use for administrative expenses. A maximum of 50 percent of administrative expenses in excess of $100,000 may be paid for with CDBG funds, and the remainder must be paid for with states' own funds. Prior to the amendment, states could allocate up to 2 percent of CDBG funds (in addition to the $100,000 base amount) for state administrative expenses, and up to one percent for technical assistance. This proposed rule would revise the corresponding regulation to reflect states' increased flexibility to allocate up to 3 percent of CDBG funds between administrative expenses and technical assistance according to the states' preferences.

For instance, a state could increase the percentage of CDBG funds for state administrative expenses to $100,000, plus 2.5 percent of its total allocation, in which case it would have only 0.5 percent available to use for technical assistance activities. Or the state could spend 2 percent of its allocation on technical assistance activities, leaving only $100,000 plus one percent of its total allocation to spend on state administrative expenses. In either case, the state will still have to match, dollar-for-dollar, any CDBG funds used for administrative expenses in excess of $100,000.

Under the current regulations, a state is allowed to add amounts reallocated by HUD to the state, as well as program income received by units of general local government, to the amount of the state's annual grant in calculating its state administrative expense cap. This proposed rule would provide in § 570.489(a)(1)(ii) that a state may make the same additions to the amount of the state's annual grant in calculating the technical assistance cap. This proposed rule would also add clarifying provisions at § 570.489(a)(1)(iv) to reflect that increased amounts of CDBG funds for state administrative costs are available only for periods following the enactment of the statutory amendment.

D. Determining Compliance With Administrative Expense Cap

This proposed rule would revise § 570.489(a)(1)(v)(A), which describes the cumulative accounting method to determine compliance with the administrative expense cap. The revisions would ensure that terms are used in a manner consistent with section 106(d) of the Act, as amended, and with § 570.489(a)(1)(v). This rule would also correct the description of the matching requirement to clarify that the amount the state must contribute is logically a minimum, rather than a maximum, amount. This proposed rule would also clarify that if a grant for any year during the Consolidated Planning period considered has been closed out, then aggregate amounts will be reduced by amounts attributable to the closed-out grant in order to make the required comparisons.

This proposed rule would also revise § 570.489(a)(1)(v)(B) to clarify the year-to-year accounting method for determining compliance with the administrative expense cap, which is an alternative to the cumulative approach for determining compliance. The current regulation refers to ''an accounting process developed and implemented by the state which provides sufficient information to demonstrate that the requirements of this subsection are met.'' This proposed rule would replace the current provision with a defined alternative to the cumulative approach. It would specifically describe the process for tracking administrative costs on a yearly basis, and permit a state to draw down funds for administrative expenses (after the expenditure of the initial $100,000 for state administrative expenses) only upon expending an equal or greater amount of its own funds for administrative expenses. HUD does not anticipate that this change will have any material effect on state CDBG grantees.

E. State Revolving Funds

Revolving funds are typically established and administered in the following manner: A loan is made by a unit of general local government with CDBG funds (e.g., to a business to expand). Payments on the loan (i.e., principal, interest, or both) are accounted for as CDBG program income

on the local government's books and held in a separate account independent of other program accounts. The program income in that account, including interest earned on the funds while on deposit pending their reuse, becomes the source of financing for additional loans of the same type. Hence, the term ''revolving fund'' has been used to describe such a fund. Revolving funds are used most frequently in connection with housing rehabilitation and economic development projects that involve loans.

A number of states have found regional revolving loan funds to be an efficient means of collecting and redistributing program income held at the local level. Such loan funds are often operated by a non- or quasi-governmental organization that administers programs as a subgrantee of several units of general local government to which the state awarded the grants. (Since these subgrantees are usually not units of general local government, they may not directly receive CDBG funding.) Any program income the subgrantee administers belongs to the unit of general local government whose grant generated the program income, and successive reuses of program income must be traceable back to an individual locality's grant. This presents an obstacle for regional loan fund operators that wish to use program income to fund activities anywhere in their service area, regardless of which community the program income belongs to. While a unit of general local government may use CDBG funds for activities outside its jurisdictional boundaries, it must first determine that doing so will meet its community development needs. It may be difficult for community A to reasonably conclude that its citizens benefit by having its program income used for an activity in community B, 60 miles away.

To address these obstacles, HUD supports efforts to establish regional state revolving funds (SRFs). Economies of scale can often be achieved in the administration of such programs. Regional economic development efforts may be more cognizant of the regional nature of rural economies and be better positioned to act accordingly. Assessing the benefits of individual economic development projects may also make sense from a regional perspective, because employees of businesses in rural communities frequently commute from residences in other communities that are a significant distance away from their jobs.

To provide administrative flexibility, the Act and current State CDBG regulations in § 570.489(f) offer three options regarding revolving funds. First, section 106(d)(4) of the Act provides that states may make awards to combinations of governments. Under such an arrangement, program income can be reused within the jurisdiction of any of the participating local governments. Second, if both the activities and the regional entity that carries out the activities qualify under section 105(a)(15) of the Act (42 U.S.C. 5305(a)(15)) (assistance to a neighborhood-based nonprofit organization), repayments generated from these activities are not within the definition of ''program income'' at § 570.489(e)(2)(ii) and thus are not subject to program requirements. Third, a state may operate a statewide revolving fund to redistribute program income returned to the state, in the form of grants to units of general local government, as provided at 570.489(f)(2).

This proposed rule would expand upon this third option by clarifying in § 570.489(f)(2) that a state may operate one or more revolving funds on a regional or statewide basis. Provided that the state determines that the program income will not be used to continue the activity that generated it, section 104(j) permits a state to require program income generated from grant-funded activities to be returned to the state, regardless of whether the amount falls below the $25,000 threshold (which this proposed rule would increase to $35,000). With the proposed change, a state could designate a regional revolving fund as an SRF and require units of general local government to pay their program income directly to it. The state could then contract with a regional entity to administer the fund (including the distribution of program income to local governments) on behalf of the state. Because the program income belongs to the state, the regional entity could distribute it to any other eligible unit of general local government covered by the regional SRF on behalf of the state and in accordance with the state's method of distribution. The community whose initial grant generated the program income would have no further responsibility for the program income, once the program income is paid into the regional SRF. Payments of program income to the regional SRF would belong to the state, rather than to a unit of general local government, and the regional SRF entity could award the funds, on behalf of the state, to units of general local government anywhere within the region. While this arrangement is similar to a revolving loan fund, it is important to note that the regional entity administering the SRF, as an agent of the state, could make grants only to units of general local government. Any state choosing this approach would be required to describe its process in the method of distribution contained in its action plan.

F. Spending Funds Outside the Jurisdiction of the Recipient

This proposed rule would revise § 570.486(b) and add a new § 570.486(c) to place conditions on CDBG-funded projects that benefit residents outside the recipient's jurisdiction. Under the existing regulations, CDBG-funded activities may serve beneficiaries living outside the jurisdiction of the unit of general local government that receives the grant, so long as the jurisdiction determines that the activity meets its community's needs, in accordance with section 106(d)(2)(D) of the Act. HUD has identified two emerging trends that require further regulation. In both situations, funds do not always benefit the community that received the grant.

First, states and units of general local government are increasingly using regional organizations to administer revolving loan funds on behalf of local governments. These regional entities, which may administer grants from multiple localities, often seek the flexibility to use program income generated from these grants anywhere within their service area, regardless of which community's grant generated the program income. As discussed above in section II.E, this presents a challenge for units of general local government, which are responsible for ensuring that program income generated from their grant is used to meet the community's needs. HUD has concluded that the current regulations should be revised to clarify the extent to which funded activities must benefit residents of the jurisdiction whose grant generated the program income.

Second, HUD is aware of a number of situations in which states awarded a grant to one community, but the benefits of the activities occurred in a different community or throughout a much larger area. In some cases, one small community would receive a grant for an activity that would be carried out on a regional or even statewide basis. In other cases, suburban communities would receive funding for projects that principally benefitted a nearby Entitlement community. HUD does not believe it is appropriate for one community to serve as a primary grant recipient when the funded activity will not provide a significant benefit to

residents of that jurisdiction. In such situations, the more appropriate approach is for a state to make a grant to a ''combination of governments,'' as is specifically provided for in the Act.

This proposed rule would add to § 570.486(b) the requirement that all State CDBG-funded activities must significantly benefit residents of the grant recipient's jurisdiction. HUD is aware that some projects (e.g., one that provides assistance to a business that will provide 200 jobs in a locality with a population of 500) will provide benefits to residents of surrounding jurisdictions. Because the project significantly benefits residents of the grant recipient's jurisdiction, the project would meet this proposed requirement of the proposed rule. (Another proposed requirement, described below in this section, would permit the expenditure of CDBG funds in this example only if it provides no more than an incidental benefit to any surrounding Entitlement jurisdictions.)

In making a determination that a project will ''significantly benefit'' residents of the recipient's jurisdiction, the community must determine that the benefits to its residents will be sufficient to justify the amount of CDBG funds it will expend on the project. HUD would not challenge the determination (or the state's acceptance thereof) unless it is clearly unreasonable. This proposed rule would not limit the amount or percentage of funds that may assist an activity in non-entitlement jurisdictions, so long as the magnitude of the benefit to recipient jurisdiction residents is not unreasonably outweighed by the recipient jurisdiction's expenditure of CDBG funds. HUD does not anticipate that this proposed rule would inhibit joint efforts by cities and counties to benefit their residents.

This proposed rule would also add a new requirement at § 570.486(c) that residents of Entitlement jurisdictions may not receive more than an incidental benefit from the state grantee's expenditure of funds. In situations involving activities located in or benefiting residents of Entitlement communities, HUD believes it is appropriate for Entitlement communities to participate in funding such projects at levels commensurate with the benefits their citizens receive, since Entitlement communities receive a separate source of funding. HUD realizes that addressing the community development and housing needs of nonentitlement area residents may necessarily involve serving residents of Entitlement communities. In some cases, the most feasible or practical location for an activity may be within the boundaries of an Entitlement community (such as for reasons of public transportation accessibility, maximizing accessibility to the greatest number of beneficiaries, operational cost-effectiveness, land/building availability, or engineering considerations). Also, state or local law may prohibit a nonentitlement county from limiting the benefits of an activity to residents of the nonentitlement area of the county. In such cases, the prohibition against using State CDBG funds to provide more than an incidental benefit to Entitlement area residents would apply. However, if the Entitlement community is participating financially in proportion to the share of expected benefits its residents will receive, it would be appropriate for the state to conclude that the Entitlement community residents are receiving no benefit, or only an incidental benefit, from the State CDBG funds contributed to the activity. The recipient would be responsible for determining the magnitude of the benefits in such cases and the appropriate financial contribution by the entitlement community. Comparable language is contained in the CDBG Entitlement program regulations at § 570.309.

G. Program Income Exclusion for Activities Financed by Section 108 Loan Guarantees in Areas That Meet Empowerment Zone Eligibility Requirements

This proposed rule would remove § 570.489(e)(2)(iii). This paragraph excludes from the definition of program income revenue generated from Section 108 loan guarantees that meet one or more of the public benefit standards of § 570.482(f)(3)(v) or that are implemented in conjunction with an Economic Development Initiative grant under Section 108(q) of the 1974 Act, as amended, and which are located in an area that meets the Empowerment Zone eligibility requirement from the definition of program income. It is HUD's belief that this paragraph has been of limited use by grantees.

H. State Authority To Impose Additional Provisions

This proposed rule would add a new provision at § 570.480(f) to expand states' administrative flexibility. This new provision would authorize states to impose on participating units of general local government additional requirements or requirements that are more restrictive than those established by HUD. Such authority is implied in the states' authority to administer the CDBG program, but HUD has never expressly provided for it in the regulations. States would not be authorized to impose requirements that would be inconsistent with the Act or with other statutory or regulatory provisions that apply to the State CDBG program. HUD proposes this provision to clarify states' responsibilities and authorities.

I. Pre-Agreement Costs

This proposed rule would revise § 570.489(b) to clarify that states may charge to the grant certain pre-agreement costs that they incur, to the extent that the activities that generate the costs are eligible. Such activities would have to be in conformance with the environmental review provisions of part 58 and the citizen participation requirements of part 91, as is the case for other costs incurred by a state. The current regulation provides that states may permit units of general local government to charge certain pre-agreement costs to the grant, but does not expressly state that states may also charge to the grant certain pre-agreement costs that they incur. As discussed below in section L, this proposed rule would also require states and their recipients of CDBG funds to comply with applicable cost principles. However, it would permit certain costs, including pre-agreement costs, to be charged to the grant without the prior approval by HUD that would otherwise be required under Appendix B of 2 CFR part 225.

J. Audits

This proposed rule would correct an outdated regulatory citation within § 570.489(m). Currently, the paragraph states that audits of the state and units of general local government must be conducted in accordance with 24 CFR part 44, which used to implement the Single Audit Act. However, the Single Audit Act requirements applicable to states and local governments are now at § 85.26. Although part 85 as a whole only applies to states that adopt it, this proposed rule would require states to adhere to one specific provision within that part. This proposed rule would revise § 570.489(m) to require that audits be conducted in accordance with § 85.26(a), which in turn incorporates by reference the provisions of OMB Circular A–133.

K. Grant-Making

This proposed rule would add a new paragraph at § 570.480(g) to clarify the long-standing statutory requirement, found at section 106(d)(2)(A) of the Act, that states must distribute CDBG funds in the form of grants only to units of general local government. Another

statutory provision, found at section 106(d)(3)(A) and (6) of the Act, permits states to deduct and expend limited amounts of CDBG funds for administrative expenses and technical assistance to local governments and nonprofit program recipients. States may find it necessary to procure such administrative services and technical assistance from third parties and, accordingly, to make payments to them. This proposed rule would clarify that the requirement for a state to disburse CDBG funds to units of general local government does not prohibit it from making payments to other entities to procure goods and services to support the state's administrative and technical assistance activities.

L. Cost Principles and Prior Approval of Certain Costs by HUD

This proposed rule would add a new paragraph (n)(1) to § 570.489 to require that State CDBG funds must be expended in compliance with applicable cost principles that are now codified in title 2 of the CFR. (Prior to codification, these cost principles were referred to by the name of the OMB circular through which they were issued.) The cost principles that apply depend on whether a given cost is incurred by a government entity, nonprofit organization, or educational institution. Application of the cost principles to expenditures would ensure that HUD bears its fair share of costs in a consistent manner across all states, thereby ensuring a level playing field.

The cost principles that apply to state, local, and Indian tribal governments are codified at 2 CFR part 225. Appendix B of part 225 provides that a number of cost items are allowable only if approved by the cognizant federal agency. For example, section 31 of Appendix B of part 225 requires prior approval of pre-agreement costs, which are further discussed in section I of this preamble. HUD's regulations for the Entitlement program provide at § 570.200(a)(5) that HUD's prior approval is not required to the extent that cost items otherwise comply with the cost principles and other requirements. This proposed rule would add a similar provision at § 570.489(n)(2) for the State CDBG program. Cost items that require federal agency approval under Appendix B of part 225 would be allowable without HUD's prior approval, so long as they otherwise comply with 2 CFR part 225 and subpart I of 24 CFR 570. Approval on a case-by-case basis would still be required under cost principles that are applicable to educational institutions and nonprofit organizations.

M. Fiscal Controls and Administrative Procedures

This proposed rule would also provide clarification at § 570.489(d)(2)(iii) for states that opt to apply part 85 in order to comply with the requirement at 570.489(d)(1) for fiscal controls and administrative procedures. Such states would be required to comply with all of the provisions of part 85, and would also be required to ensure that recipients of their State CDBG funds comply with part 84, ''Uniform Administrative Requirements for Grants and Agreements with Institutions of Higher Education, Hospitals, and Other Non-profit Organizations,'' as applicable. This requirement would ensure that there will be no inconsistencies or accountability gaps between the practices of those states that adopt HUD's administrative standards and the practices of their recipients.

N. Reporting

This proposed rule would add a new paragraph at § 570.490(a)(3) that would require states to make entries into the Integrated Disbursement Information System (IDIS) in a form prescribed by HUD, to accurately capture the state's accomplishment and funding data during each program year. It is recommended that the data be entered on a quarterly basis, and states would be required to enter the data at least annually. This change would better enable HUD and grantees to report accomplishments to community development stakeholders.

III. Request for Public Comments on Whether Other Changes Are Needed

HUD requests public comments on whether regulations are needed on the matters described below. Any such regulations would be published under a separate proposed rule.

A. Lump Sum Drawdowns

Section 104(h) of the Act allows units of general local government to make lump-sum drawdowns of CDBG funds to establish revolving loan funds for property rehabilitation activities. It also provides for HUD to establish standards governing lump-sum drawdowns. Such standards exist in the CDBG Entitlement program regulations in § 570.513, but HUD has not promulgated comparable regulations for the State CDBG program. HUD is inviting public comments on whether separate regulations are needed to address situations not covered by the Entitlement regulations.

B. Use of Escrow Accounts for Rehabilitation

Section 570.511 of the Entitlement program regulations allows Entitlement communities to establish escrow accounts for funding loans and grants for the rehabilitation of privately owned residential property. HUD has never created comparable regulations for the State CDBG program. HUD is inviting public comments on whether separate regulations are needed to address situations not covered by the Entitlement regulations.

IV. Findings and Certifications

Paperwork Reduction Act

The information collection requirements contained in this proposed rule have been submitted to the Office of Management and Budget (OMB) under the Paperwork Reduction Act of 1995 (44 U.S.C. 3501–3520). In accordance with the Paperwork Reduction Act, an agency may not conduct or sponsor, and a person is not required to respond to, a collection of information, unless the collection displays a currently valid OMB control number.

The burden of the information collections in this proposed rule is estimated as follows:

Reporting and Recordkeeping Burden:

Section reference	Number of respondents	Number of responses per respondent	Estimated average time for requirement (in hours)	Estimated annual burden (in hours)
§ 570.489(e)(4)	550	Ongoing	27	15,000
§ 570.490(a)(3)	50	10	2	1,000
Totals	600	NA	29	16,000

In accordance with 5 CFR 1320.8(d)(1), HUD is soliciting comments from members of the public and affected agencies concerning this 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.

Interested persons are invited to submit comments regarding the information collection requirements in this rule. Comments must refer to the proposal by name and docket number (FR–5181–P–01) and must be sent to:

HUD Desk Officer, Office of Management and Budget, New Executive Office Building, Washington, DC 20503, Fax number: (202) 395–6947; and

Laruth Harper, Reports Liaison Officer, Office of Community Planning and Development, Department of Housing and Urban Development, 451 Seventh Street, SW., Room 7233, Washington, DC 20410.

Environmental Impact

A Finding of No Significant Impact with respect to the environment has been made in accordance with HUD regulations in 24 CFR part 50 that implement section 102(2)(C) of the National Environmental Policy Act of 1969 (42 U.S.C. 4332(2)(C)). The Finding is available for public inspection during regular business hours in the Regulations Division, Office of General Counsel, Department of Housing and Urban Development, 451 Seventh Street, SW., Room 10276, Washington, DC 20410–0500. Due to security measures at the HUD Headquarters building, please schedule an appointment to review the Finding by calling the Regulations Division at 202–402–3055 (this is not a toll-free number). Individuals with speech or hearing impairments may access this number via TTY by calling the Federal Information Relay Service at 800–877–8339.

Executive Order 13132, Federalism

Executive Order 13132 (entitled ''Federalism'') prohibits an agency from publishing any rule that has federalism implications if the rule either imposes substantial direct compliance costs on state and local governments and is not required by statute, or the rule preempts state law, unless the agency meets the consultation and funding requirements of section 6 of the Order. This proposed rule does not have federalism implications and would not impose substantial direct compliance costs on state and local governments nor preempt state law within the meaning of the Order.

Unfunded Mandates Reform Act

Title II of the Unfunded Mandates Reform Act of 1995 establishes requirements for federal agencies to assess the effects of their regulatory actions on state, local, and tribal governments and the private sector. This final rule does not impose a federal mandate on any state, local, or tribal government, or the private sector within the meaning of the Unfunded Mandates Reform Act of 1995.

Regulatory Flexibility Act

The Regulatory Flexibility Act (RFA) (5 U.S.C. 601 *et seq.*) generally requires an agency to conduct a regulatory flexibility analysis of any rule subject to notice and comment rulemaking requirements, unless the agency certifies that the rule will not have a significant economic impact on a substantial number of small entities. This rule would revise certain requirements that apply to the management of CDBG funds, program income, and other administrative matters by state governments. In many instances, the changes would codify existing HUD policy, update obsolete provisions, or revise regulations to reflect statutory language. Therefore, the undersigned certifies that this rule will not have a significant impact on a substantial number of small entities.

Notwithstanding HUD's view that this rule will not have a significant effect on a substantial number of small entities, HUD specifically invites comments regarding any less burdensome alternatives to this rule that will meet HUD's objectives, as described in this preamble.

Catalog of Federal Domestic Assistance

The Catalog of Federal Domestic Assistance (CFDA) program number for the State CDBG program is 14.228 and the CFDA program number for the Entitlement program is 14.218.

List of Subjects in 24 CFR Part 570

Administrative practice and procedure, American Samoa, Community Development Block Grants, Grant programs—education, Grant programs—housing and community development, Guam, Indians, Loan programs—housing and community development, Low and moderate income housing, Northern Mariana Islands, Pacific Islands Trust Territory, Puerto Rico, Reporting and recordkeeping requirements, Student aid, Virgin Islands.

Accordingly, for the reasons described in the preamble, HUD proposes to amend 24 CFR part 570 as follows:

PART 570—COMMUNITY DEVELOPMENT BLOCK GRANTS

1. The authority citation for 24 part 570 continues to read as follows:

Authority: 42 U.S.C. 5300–5320.

2. In § 570.480, revise paragraph (a) and add paragraphs (f) and (g), to read as follows:

§ 570.480 General.

(a) This subpart describes policies and procedures applicable to states that have permanently elected to receive Community Development Block Grant funds for distribution to units of general local government in the state's nonentitlement areas under the Housing and Community Development Act of 1974, as amended (the Act). Other subparts of part 570 are not applicable to the State CDBG program, except as expressly provided otherwise. Regulations of part 570 outside of this subpart that apply to the State CDBG program include §§ 570.200(j) and 570.606.

* * * * *

(f) In administering the CDBG program, a state may impose additional or more restrictive provisions on units of general local government participating in the state's program, provided that such provisions are not inconsistent with the Act or other statutory or regulatory provisions that are applicable to the State CDBG program.

(g) States shall make CDBG grants only to units of general local government. This restriction does not limit a state's authority to make payments to other parties for state administrative expenses and technical assistance activities authorized in section 106(d) of the Act.

3. In § 570.486, revise paragraph (b) and add paragraph (c), to read as follows:

§ 570.486 Local government requirements.

* * * * *

(b) *Activities serving beneficiaries outside the jurisdiction of the unit of general local government.* Any activity carried out by a recipient of State CDBG funds must significantly benefit residents of the jurisdiction of the grant recipient, and the unit of general local government must determine that the activity is meeting its needs in accordance with section 106(d)(2)(D) of the Act. For an activity to significantly benefit residents of the recipient jurisdiction, the CDBG funds expended by the unit of general local government must not be unreasonably disproportionate to the benefits to its residents.

(c) *Activities located in Entitlement jurisdictions.* State grant recipients may not expend State CDBG funds for activities located in or serving Entitlement jurisdictions, unless Entitlement residents receive only an incidental benefit from State CDBG expenditures for the activity.

4. Amend § 570.489 as follows:

a. Revise paragraphs (a)(1), (b), (c), (e)(1), (2), and (3)(i) and (ii), and (m);

b. Add paragraphs (d)(2)(iii)(A) and (B), (e)(3)(iii), (iv), and (4), and (n); and

c. Revise the first sentence of paragraph (f)(2), to read as follows:

§ 570.489 Program administrative requirements.

(a) *Administrative and planning costs*—(1) *State administrative and technical assistance costs.* (i) The state is responsible for the administration of all CDBG funds. The state shall pay from its own resources all administrative expenses incurred by the state in carrying out its responsibilities under this subpart, except as provided in this paragraph (a)(1)(i) of this section, which is subject to the time limitations in paragraph (a)(1)(iv) of this section. To pay administrative expenses, the state may use CDBG funds not to exceed $100,000, plus 50 percent of administrative expenses incurred in excess of $100,000. Amounts of CDBG funds used to pay administrative expenses in excess of $100,000 shall not, subject to paragraph (a)(1)(iii) of this section, exceed 3 percent of the sum of the state's annual grant, program income received by units of general local government during each program year (whether retained by units of general local government or paid to the state), and of funds reallocated by HUD to the state.

(ii) To pay the costs of providing technical assistance to local governments and nonprofit program recipients, a state may, subject to paragraph (a)(1)(iii) of this section, use CDBG funds received on or after January 23, 2004, in an amount not to exceed 3 percent of the sum of its annual grant, program income received by units of general local government during each program year (whether retained by units of general local government or paid to the state), and funds reallocated by HUD to the state during each program year.

(iii) The amount of CDBG funds used to pay the sum of administrative costs in excess of $100,000 paid pursuant to paragraph (a)(1)(i) of this section and technical assistance costs paid pursuant to paragraph (a)(1)(ii) of this section must not exceed 3 percent of the sum of a state's annual grant, program income received by units of general local government during each program year (whether retained by the unit of general local government or paid to the state), and funds reallocated by HUD to the state.

(iv) In calculating the amount of CDBG funds that may be used to pay state administrative expenses prior to January 23, 2004, the state may include in the calculation the following elements only to the extent they are within the following time limitations:

(A) $100,000 per annual grant beginning with FY 1984 allocations;

(B) Two percent of the sum of a state's annual grant and funds reallocated by HUD to the state within a program year, without limitation based on when such amounts were received;

(C) Two percent of program income returned by units of general local government to states after August 21, 1985; and

(D) Two percent of program income received and retained by units of general local government after February 11, 1991.

(v) In regard to its administrative costs, the state has the option of selecting its approach for demonstrating compliance with the requirements of this paragraph (a)(1) of this section. Any state whose matching costs contributions toward state administrative expense matching requirements are in arrears must bring matching cost contributions up to the level of CDBG funds expended for such costs. A state grant may not be closed out if the state's matching cost contribution is not at least equal to the amount of CDBG funds in excess of $100,000 expended for administration. Funds from any year's grant may be used to pay administrative costs associated with any other year's grant. The two approaches for demonstrating compliance with this paragraph (a)(1) of this section are:

(A) *Cumulative accounting of administrative costs incurred by the state since its assumption of the CDBG program.* Under this approach, the state will identify, for each grant it has received, the CDBG funds eligible to be used for state administrative expenses, as well as the minimum amount of matching funds that the state is required to contribute. The amounts will then be aggregated for all grants received. The state must keep records demonstrating the actual amount of CDBG funds from each grant received that were used for state administrative expenses, as well as matching amounts that were contributed by the state. The state will be considered to be in compliance with the applicable requirements if the aggregate of actual amounts of CDBG funds spent on state administrative expenses does not exceed the aggregate maximum allowable amount and if the aggregate amount of matching funds that the state has expended is equal to or greater than the aggregate amount of CDBG funds in excess of $100,000 (for each annual grant within the subject period) spent on administrative expenses during its 3- to 5-year Consolidated Planning period. If the state grant for any grant year within the 3-to 5-year period has been closed out, the aggregate amount of CDBG funds spent on state administrative expenses, the aggregate maximum allowable amount, the aggregate matching funds expended, and the aggregate amount of CDBG funds in excess of $100,000 (for each annual grant within the subject period) will be reduced by amounts attributable to the grant year for which the state grant has been closed out.

(B) *Year-to-year tracking and limitation on drawdown of funds.* For each grant year, the state will calculate the maximum allowable amount of CDBG funds that may be used for state administrative expenses, and will draw down amounts of those funds only upon its own expenditure of an equal or greater amount of matching funds from its own resources after the expenditure of the initial $100,000 for state administrative expenses. The state will be considered to be in compliance with the applicable requirements if the actual amount of CDBG funds spent on state administrative expenses does not exceed the maximum allowable amount, and if the amount of matching funds that the state has expended for that grant year is equal to or greater than the amount of CDBG funds in excess of $100,000 spent during that same grant year. Under this approach, the state must demonstrate that it has paid from its own funds at least 50 percent of its

administrative expenses in excess of $100,000 by the end of each grant year.

(b) *Reimbursement of pre-agreement costs.* The state may permit, in accordance with such procedures as the state may establish, a unit of general local government to incur costs for CDBG activities before the establishment of a formal grant relationship between the state and the unit of general local government and to charge these pre-agreement costs to the grant, provided that the activities are eligible and undertaken in accordance with the requirements of this part and 24 CFR part 58. A state may incur costs prior to entering into a grant agreement with HUD and charge those pre-agreement costs to the grant, provided that the activities are eligible and are undertaken in accordance with the requirements of this part, part 58 of this title, and the citizen participation requirements of part 91 of this title.

(c) *Federal grant payments.* The state's requests for payment, and the Federal Government's payments upon such requests, must comply with 31 CFR part 205. The state must use procedures to minimize the time elapsing between the transfer of grant funds and disbursement of funds by the state to units of general local government. States must also have procedures in place and units of general local government must use these procedures to minimize the time elapsing between the transfer of funds by the state and disbursement for CDBG activities.

(d) * * *

(2) * * *

(iii) * * *

(A) A state that opts to satisfy this requirement for fiscal controls and administrative procedures by applying the provisions of part 85 must comply with the requirements therein.

(B) A state that opts to satisfy this requirement for fiscal controls and administrative procedures by applying the provisions of part 85 of this title must also ensure that recipients of the state's CDBG funds comply with part 84 of this title, ''Uniform Administrative Requirements for Grants and Agreements with Institutions of Higher Education, Hospitals, and Other Non-Profit Organizations,'' as applicable.

(e) *Program income.* (1) For the purposes of this subpart, ''program income'' is defined as gross income received by a state, a unit of general local government, or subgrantee of the unit of general local government that was generated from the use of CDBG funds, regardless of when the CDBG funds were appropriated and whether the activity has been closed out, except as provided in paragraph (e)(2) of this section. When income is generated by an activity that is only partially assisted with CDBG funds, the income must be prorated to reflect the percentage of CDBG funds used (e.g., a single loan supported by CDBG funds and other funds; a single parcel of land purchased with CDBG funds and other funds). Program income includes, but is not limited to, the following:

(i) Proceeds from the disposition by sale or long-term lease of real property purchased or improved with CDBG funds, except as provided in paragraph (e)(2)(v) of this section;

(ii) Proceeds from the disposition of equipment purchased with CDBG funds;

(iii) Gross income from the use or rental of real or personal property acquired by the unit of general local government or subgrantee of the unit of general local government with CDBG funds, less the costs incidental to the generation of the income;

(iv) Gross income from the use or rental of real property, owned by the unit of general local government or other entity carrying out a CDBG activity that was constructed or improved with CDBG funds, less the costs incidental to the generation of the income;

(v) Payments of principal and interest on loans made using CDBG funds, except as provided in paragraph (e)(2)(iii) of this section;

(vi) Proceeds from the sale of loans made with CDBG funds, less reasonable legal and other costs incurred in the course of such sale that are not otherwise eligible costs under sections 105(a)(13) or 106(d)(3)(A) of the Act;

(vii) Proceeds from the sale of obligations secured by loans made with CDBG funds, less reasonable legal and other costs incurred in the course of such sale that are not otherwise eligible costs under sections 105(a)(13) or 106(d)(3)(A) of the Act;

(viii) Interest earned on funds held in a revolving fund account;

(ix) Interest earned on program income pending disposition of the income;

(x) Funds collected through special assessments made against non-residential properties and properties owned and occupied by households not of low and moderate income, if the special assessments are used to recover all or part of the CDBG portion of a public improvement; and

(xi) Gross income paid to a unit of general local government or subgrantee of the unit of general local government from the ownership interest in a for-profit entity acquired in return for the provision of CDBG assistance.

(2) ''Program income'' does not include the following:

(i) The total amount of funds, which does not exceed $35,000 received in a single year from activities, other than revolving loan funds that is retained by a unit of general local government and its subgrantees (all funds received from revolving loan funds are considered program income, regardless of amount);

(ii) Amounts generated by activities eligible under section 105(a)(15) of the Act and carried out by an entity under the authority of section 105(a)(15) of the Act;

(iii) Payments of principal and interest made by a subgrantee carrying out a CDBG activity for a unit of general local government, toward a loan from the local government to the subgrantee, to the extent that program income received by the subgrantee is used for such payments;

(iv) The following classes of interest, which must be remitted to HUD for transmittal to the Department of the Treasury, and will not be reallocated under section 106(c) or (d) of the Act:

(A) Interest income from loans or other forms of assistance provided with CDBG funds that are used for activities determined by HUD to be not eligible under § 570.482 or section 105(a) of the Act, to fail to meet a national objective in accordance with the requirements of § 570.483, or to fail substantially to meet any other requirement of this subpart or the Act;

(B) Interest income from deposits of amounts reimbursed to a state's CDBG program account prior to the state's disbursement of the reimbursed funds for eligible purposes; and

(C) Interest income received by units of general local government on deposits of grant funds before disbursement of the funds for activities, except that the unit of general local government may keep interest payments of up to $100 per year for administrative expenses otherwise permitted to be paid with CDBG funds.

(v) Proceeds from the sale of real property purchased or improved with CDBG funds, if the proceeds are received more than 5 years after expiration of the grant agreement.

(3) * * *

(i) *Program income paid to the state.* Except as described in paragraph (e)(3)(ii)(A) of this section, the state may require the unit of general local government that receives or will receive program income to return the program income to the state. Program income that is paid to the state is treated as additional CDBG funds subject to the requirements of this subpart. Except for program income retained and used by

the state for administrative costs or technical assistance under paragraph (a) of this section, program income paid to the state must be distributed to units of general local government in accordance with the method of distribution in the action plan under § 91.320(k)(1)(i) of this title that is in effect at the time the program income is distributed. To the maximum extent feasible, the state must distribute program income before it makes additional withdrawals from the Department of the Treasury, except as provided in paragraph (f) of this section.

(ii) *Program income retained by a unit of general local government.* A state may permit a unit of general local government that receives or will receive program income to retain the program income. Alternatively, subject to the exception in paragraph (e)(3)(ii)(A) of this section, a state may require that the unit of general local government pay any such income to the state.

(A) A state must permit the unit of general local government to retain the program income to the extent that the program income is applied to continue the activity from which it was derived. A state will determine whether a unit of general local government is likely to apply funds to continue the activity from which the funds were derived, and HUD will give maximum feasible deference to a state's determination, in accordance with § 570.480(c). In making such a determination, a state may consider whether the unit of general local government is or will be unable to comply with the requirements of paragraph (e)(3)(ii)(B) of this section or other requirements of this part, and the extent to which the program income is unlikely to be applied to continue the activity within the reasonably near future. When a state determines that the program income will be applied to continue the activity from which it was derived, but that the amount of program income held by the unit of general local government exceeds projected cash needs for the reasonably near future, the state may require the local government to return all or part of the program income to the state until such time as the program income is needed by the unit of general local government. When a state determines that a unit of local government is not likely to apply any significant amount of program income to continue the activity within a reasonable amount of time, or that it will not likely apply the program income in accordance with applicable requirements, the state may require the unit of general local government to return all of the program income to the state for disbursement to other units of local government. A state that intends to require units of general local government to return program income in accordance with this paragraph (e)(3)(ii)(A) of this section must describe its approach in the state's action plan required under § 91.320 of this title.

(B) Program income that is received and retained by the unit of general local government is treated as additional CDBG funds and is subject to all applicable requirements of this subpart, regardless of whether the activity that generated the program income has been closed out. If the grant that generated the program income is still open when the program income is generated, program income permitted to be retained will be considered part of the unit of general local government's grant that generated the program income. If the grant is closed, program income permitted to be retained will be considered to be part of the unit of general local government's most recently awarded open grant. If the unit of general local government has no open grants, the program income retained by the unit of general local government will be counted as part of the state's grant year in which the program income was generated. A state must employ one or more of the following methods to ensure that units of general local government comply with applicable program income requirements:

(*1*) Maintaining contractual relationships with units of general local government for the duration of the existence of the program income;

(*2*) Closing out the underlying activity, but requiring as a condition of closeout that the unit of general local government obtain advance state approval of either a unit of general local government's plan for the use of program income, or of each use of program income by grant recipients via regularly occurring reports and requests for approval;

(*3*) Closing out the underlying activity, but requiring as a condition of closeout that the unit of general local government notify the state when new program income is received; or

(*4*) With prior HUD approval, other approaches that demonstrate that the state will ensure compliance with the requirements of this subpart by units of general local government.

(C) The state must require units of general local government, to the maximum extent feasible, to disburse program income that is subject to the requirements of this subpart before requesting additional funds from the state for activities, except as provided in paragraph (f) of this section.

(iii) *Transfer of program income to Entitlement program.* A unit of general local government that becomes eligible to be an Entitlement grantee may request the state's approval to transfer State CDBG grant-generated program income to the unit of general local government's Entitlement program. A state may approve the transfer, provided the unit of general local government:

(A) Has officially elected to participate in the Entitlement grant program;

(B) Agrees to use such program income in accordance with Entitlement program requirements; and

(C) Has set up Integrated Disbursement Information System (IDIS) access and agrees to enter receipt of program income into IDIS.

(iv) *Transfer of program income of grantees losing Entitlement status.* Upon entry into the State CDBG program, a unit of general local government that has lost or relinquished its Entitlement status must, with respect to program income that a unit of general local government would otherwise be permitted to retain, either:

(A) Retain program income generated under Entitlement grants and continue to comply with Entitlement program requirements for program income; or

(B) Retain the program income and transfer it to the State CDBG program, in which case the unit of general local government must comply with the state's rules for program income and the requirements of this paragraph (e).

(4) The state must report on the receipt and use of all program income (whether retained by units of general local government or paid to the state) in its annual performance and evaluation report.

(f) * * *

(1) * * *

(2) The state may establish one or more state revolving funds to distribute grants to units of general local government throughout a state or a region of the state to carry out specific, identified activities. * * *

* * * * *

(m) *Audits.* Notwithstanding any other provision of this title, audits of a state and units of general local government shall be conducted in accordance with § 85.26 of this title, which implements the Single Audit Act (31 U.S.C. 7501–07) and incorporates OMB Circular A–133. States shall develop and administer an audits management system to ensure that audits of units of general local government are conducted in accordance with OMB Circular A–133, if applicable.

(n) Cost principles and prior approval. (1) A state must ensure that costs

incurred by the state and by its recipients are in conformance with the following cost principles, as applicable:

(i) ''Cost Principles for State, Local, and Indian Tribal Governments (OMB Circular A–87),'' which is codified at 2 CFR part 225;

(ii) ''Cost Principles for Non-Profit Organizations (OMB Circular A–122),'' which is codified at 2 CFR part 230; and

(iii) ''Cost Principles for Educational Institutions (OMB Circular A–21),'' which is codified at 2 CFR part 220.

(2) All cost items described in Appendix B of 2 CFR part 225 that require federal agency approval are allowable without prior approval of HUD to the extent they otherwise comply with the requirements of 2 CFR part 225 and are otherwise eligible under this subpart I, except for the following:

(i) Depreciation methods for fixed assets shall not be changed without the express approval of HUD or, if charged through a cost allocation plan, the cognizant federal agency.

(ii) Fines and penalties (including punitive damages) are unallowable costs to the CDBG program.

5. Add § 570.490(a)(3) to read as follows:

§ 570.490 Recordkeeping requirements.

(a) * * *

(3) *Integrated Disbursement and Information System (IDIS).* The state shall make entries into IDIS in a form prescribed by HUD to accurately capture the state's accomplishment and funding data, including program income, for each program year. It is recommended that the state enter IDIS data on a quarterly basis and it is required to be entered annually.

* * * * *

6. Add § 570.504(e) to read as follows:

§ 570.504 Program income.

* * * * *

(e)(1) *Transfer of program income to Entitlement program.* A unit of general local government that becomes eligible to be an Entitlement grantee may request the state's approval to transfer State CDBG grant-generated program income to the unit of general local government's Entitlement program. A state may approve the transfer, provided the unit of general local government:

(i) Has officially elected to participate in the Entitlement grant program;

(ii) Agrees to use such program income in accordance with Entitlement program requirements;

(iii) Has set up Integrated Disbursement and Information System (IDIS) access and agrees to enter receipt of program income into IDIS.

(2) *Transfer of program income of grantees losing Entitlement status.* Upon entry into the State CDBG program, a unit of general local government that has lost or relinquished its Entitlement status must, with respect to program income that a unit of general local government would otherwise be permitted to retain, either:

(1) Retain the program income generated under Entitlement grants and continue to comply with Entitlement program requirements for program income; or

(2) Retain the program income and transfer it to the State CDBG program, in which case the unit of general local government must comply with the state's rules for program income and the requirements of § 570.489(e).

Dated: September 23, 2008.

Susan D. Peppler,

Assistant Secretary for Community Planning and Development.

[FR Doc. E8–24572 Filed 10–16–08; 8:45 am]

BILLING CODE 4210–67–P

DEPARTMENT OF THE TREASURY

Internal Revenue Service

26 CFR Part 1

[REG–103146–08]

RIN 1545–BH69

Information Reporting Requirements Under Internal Revenue Code Section 6039; Hearing

AGENCY: Internal Revenue Service (IRS), Treasury.

ACTION: Notice of public hearing on proposed rulemaking.

SUMMARY: This document provides notice of public hearing on a notice of proposed rulemaking relating to the return and information statement requirements under section 6039 of the Internal Revenue Code. These regulations reflect changes to section 6039 made by section 403 of the Tax Relief and Health Care Act of 2006. These proposed regulations affect corporations that issue statutory stock options and provide guidance to assist corporations in complying with the return and information statement requirements under section 6039.

DATES: The public hearing is being held on October 30, 2008, at 10 a.m. The IRS must receive outlines of the topics to be discussed at the hearing by October 23, 2008.

ADDRESSES: The public hearing is being held in room 2116, Internal Revenue Building, 1111 Constitution Avenue, NW., Washington, DC. Send submissions to: CC:PA:LPD:PR (REG–103146–08), room 5203, Internal Revenue Service, P.O. Box 7604, Ben Franklin Station, Washington, DC 20044. Submissions may be hand-delivered Monday through Friday between the hours of 8 a.m. and 4 p.m. to CC:PA:LPD:PR (REG–103146–08), Courier's Desk, Internal Revenue Service, 1111 Constitution Avenue, NW., Washington, DC. Alternatively, taxpayers may submit electronic outlines of oral comments via the Federal eRulemaking Portal at *http://www.regulations.gov.*

FOR FURTHER INFORMATION CONTACT: Concerning the regulations, Thomas Scholz at (202) 622–6030 (not a toll-free number); concerning submissions of comments, the hearing, and/or to be placed on the building access list to attend the hearing, Richard A. Hurst at *Richard.A.Hurst@irscounsel.treas.gov.*

SUPPLEMENTARY INFORMATION: The subject of the public hearing is the notice of proposed rulemaking (REG–103146–08) that was published in the **Federal Register** on Thursday, July 17, 2008 (73 FR 40999).

Persons who wish to present oral comments at the hearing that submitted written comments, must submit an outline of the topics to be discussed and the amount of time to be devoted to each topic (signed original and eight (8) copies) by October 23, 2008.

A period of 10 minutes is allotted to each person for presenting oral comments. After the deadline for receiving outlines has passed, the IRS will prepare an agenda containing the schedule of speakers. Copies of the agenda will be made available, free of charge, at the hearing or in the Freedom of Information Reading Room (FOIA RR) (Room 1621) which is located at the 11th and Pennsylvania Avenue, NW., entrance, 1111 Constitution Avenue, NW., Washington, DC.

Because of access restrictions, the IRS will not admit visitors beyond the immediate entrance area more than 30 minutes before the hearing starts. For information about having your name placed on the building access list to attend the hearing, see the **FOR FURTHER INFORMATION CONTACT** section of this document.

Cynthia Grigsby,

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

[FR Doc. E8–24653 Filed 10–16–08; 8:45 am]

BILLING CODE 4830–01–P

OFFICE OF THE DIRECTOR OF NATIONAL INTELLIGENCE

32 CFR Part 1702

Procedures Governing the Acceptance of Service of Process Upon the Office of the Director of National Intelligence and Its Employees in Their Official, Individual or Combined Official and Individual Capacities

AGENCY: Office of the Director of National Intelligence.

ACTION: Proposed regulation.

SUMMARY: The ODNI is publishing this proposed regulation to invite public comment prior to final adoption of the regulation governing the procedures it will follow for the acceptance of service of process upon the ODNI and its employees in their official, individual or combined official and individual capacities.

DATES: Submit comments on or before November 17, 2008.

ADDRESSES: You may submit comments by either of the following methods:

Mail: Office of the Director of National Intelligence—Office of the General Counsel, Washington, DC 20511, Attention: Tricia Wellman.

Federal eRulemaking Portal: http://www.regulations.gov. Follow the instructions for submitting comments.

FOR FURTHER INFORMATION CONTACT: Tricia Wellman, 703–275–2527.

SUPPLEMENTARY INFORMATION: The Office of the Director of National Intelligence (ODNI) was created by the Intelligence Reform and Terrorism Prevention Act of 2004, Public Law 108–458, 118 Stat.3638. The ODNI began operations on April 22, 2005, the day after the first Director of National Intelligence took office. Since that time the ODNI has been working to publish regulations for matters that may affect the public.

This proposed regulation establishes the procedures for acceptance of service of process upon the ODNI and its employees.

Lists of Subjects in 32 CFR Part 1702

Courts, government employees.

Title 32 of the Code of Federal Regulations is amended by adding Part 1702 to read as follows:

PART 1702–PROCEDURES GOVERNING THE ACCEPTANCE OF SERVICE OF PROCESS

Sec.

1702.1 Scope and purpose.
1702.2 Definitions.
1702.3 Procedures governing acceptance of service of process.
1702.4 Notification to Office of General Counsel.
1702.5 Interpretation.

Authority: The Intelligence Reform and Terrorism Prevention Act of 2004, Pub. L. No. 108–458, 118 Stat. 3638 (2004); National Security Act of 1947, as amended, 50 U.S.C. 401 *et seq.*; Executive Order 12333, as amended.

§ 1702.1 Scope and purpose.

This part sets forth the ODNI policy concerning service of process upon the ODNI and ODNI employees in their official, individual or combined official and individual capacities. This Part is intended to ensure the orderly execution of ODNI affairs and is not intended to impede the legal process.

§ 1702.2 Definitions.

For purposes of this Part the following terms have the following meanings:

DNI. The Director of National Intelligence.

General Counsel. The ODNI's General Counsel, Acting General Counsel or Deputy General Counsel.

ODNI. The Office of the Director of National Intelligence and all of its components, including, but not limited to, the National Counterintelligence Executive, the National Counterterrorism Center, the National Counterproliferation Center, the Program Manager for the Information Sharing Environment, and all national intelligence centers and program managers the DNI may establish.

ODNI Employee. Any current or former employee, contractor, independent contractor, assignee or detailee to the ODNI.

OGC. The Office of the General Counsel of the ODNI.

Process. A summons, complaint, subpoena or other document properly issued by or under the authority of, a federal, state, local or other government entity of competent jurisdiction.

§ 1702.3 Procedures governing acceptance of service of process.

(a) Service of process upon the ODNI or an ODNI employee in the employee's official capacity.

(1) Personal service. Unless otherwise expressly authorized by the General Counsel, personal service of process upon the ODNI or an ODNI employee in the employee's official capacity, may be accepted only by an OGC attorney at ODNI Headquarters. The OGC attorney shall write or stamp ''Service Accepted In Official Capacity Only'' on the return of service form.

(2) Mail service. Where service of process by registered or certified mail is authorized by law, only an OGC attorney may accept such service of process upon the ODNI or an ODNI employee in the employee's official capacity, unless otherwise expressly authorized by the General Counsel. The OGC attorney shall write or stamp, ''Service Accepted In Official Capacity Only,'' on the waiver of personal service form. Service of process by mail must be addressed to the Office of the Director of National Intelligence, Office of General Counsel, Washington, DC 20511, and the envelope must be conspicuously marked ''Service of Process.''

(b) Service of process upon an ODNI employee solely in the employee's individual capacity.

(1) *Generally.* ODNI employees will not be required to accept service of process in their purely individual capacity on ODNI facilities or premises.

(2) *Personal Service.* Subject to the sole discretion of the General Counsel, process servers generally will not be allowed to enter ODNI facilities or premises for the purpose of serving process upon an ODNI employee solely in the employee's individual capacity. Except for the DNI, the Principal Deputy Director of National Intelligence, and the Director of the Intelligence Staff, the OGC is not authorized to accept service of process on behalf of any ODNI employee in the employee's individual capacity.

(3) *Mail Service.* Unless otherwise expressly authorized by the General Counsel, ODNI employees are not authorized to accept or forward mailed service of process directed to another ODNI employee in that employee's individual capacity. Any such process will be returned to the sender via appropriate postal channels.

(c) Service of Process Upon an ODNI employee in a combined official and individual capacity. Unless otherwise expressly authorized by the General Counsel, service of process, in person or by mail, upon an ODNI employee in the employee's combined official and individual capacity, may be accepted only for the ODNI employee in the employee's official capacity by an OGC attorney at ODNI Headquarters. The OGC attorney shall write or stamp, ''Service Accepted In Official Capacity Only,'' on the return of service form.

(d) Acceptance of service of process shall not constitute an admission or waiver with respect to jurisdiction, propriety of service, improper venue or any other defense in law or equity available under the laws or rules applicable to the service of process.

§ 1702.4 Notification to Office of General Counsel.

An ODNI employee who receives or has reason to expect to receive, service of process in an official, individual or combined individual and official capacity in a matter that may involve testimony or the furnishing of documents that could reasonably be expected to involve ODNI interests, shall promptly notify the OGC ((703) 275–2527) prior to responding to the service in any manner, and if possible, before accepting service.

§ 1702.5 Interpretation.

Any questions concerning interpretation of this regulation shall be referred to the Office of General Counsel for resolution.

Dated: October 2, 2008.

Corin R. Stone,

Deputy General Counsel, Office of the Director of National Intelligence.

[FR Doc. E8–24744 Filed 10–16–08; 8:45 am]

BILLING CODE 3910–A7–P

OFFICE OF THE DIRECTOR OF NATIONAL INTELLIGENCE

32 CFR Part 1703

Regulations Governing the Production of Office of the Director of National Intelligence Information or Material in Proceedings Before Federal, State, Local or Other Government Entity of Competent Jurisdiction

AGENCY: Office of the Director of National Intelligence.

ACTION: Proposed regulation.

SUMMARY: The ODNI is publishing this proposed regulation to invite public comment prior to final adoption of the regulation governing the procedures it will follow for the production of ODNI information or material in proceedings before federal, state, local or other government entity of competent jurisdiction.

DATES: Submit comments on or before November 17, 2008.

ADDRESSES: You may submit comments by either of the following methods:

Mail: Office of the Director of National Intelligence—Office of the General Counsel, Washington, DC 20511, Attention: Tricia Wellman.

Federal eRulemaking Portal: http://www.regulations.gov. Follow the instructions for submitting comments.

FOR FURTHER INFORMATION CONTACT: Tricia Wellman, (703) 275–2527.

SUPPLEMENTARY INFORMATION: The Office of the Director of National Intelligence (ODNI) was created by the Intelligence Reform and Terrorism Prevention Act of 2004, Public Law 108–458, 118 Stat.3638. The ODNI began operations on April 22, 2005, the day after the first Director of National Intelligence took office. Since that time the ODNI has been working to publish regulations for matters that may affect the public.

This regulation outlines the procedures current and former ODNI employees must follow when they receive a demand for ODNI information or material in connection with proceedings before federal, state, local or other government entity of competent jurisdiction. These regulations are typically called Touhy regulations because of the Supreme Court's decision in *United States ex rel. Touhy* v. *Ragen,* 340 U.S. 462 (1951), in which the Court held that an agency employee could not be held in contempt for refusing to disclose agency records or information when following the instructions of his or her supervisor.

Lists of Subjects in 32 CFR Part 1703

Courts, government employees.

Title 32 of the Code of Federal Regulations is amended by adding Part 1703 to read as follows:

PART 1703—PRODUCTION OF ODNI INFORMATION OR MATERIAL IN PROCEEDINGS BEFORE FEDERAL, STATE, LOCAL OR OTHER GOVERNMENT ENTITY OF COMPETENT JURISDICTION

Sec.
1703.1 Scope and purpose.
1703.2 Definitions.
1703.3 General.
1703.4 Procedure for production.
1703.5 Interpretation.

Authority: The Intelligence Reform and Terrorism Prevention Act of 2004, Public Law No. 108–458, 118 Stat. 3638 (2004); National Security Act of 1947, as amended, 50 U.S.C. sec. 401 *et seq.*; Executive Order 12333, as amended; and *United States ex rel. Touhy* v. *Ragen,* 340 U.S. 462 (1951).

§ 1703.1 Scope and purpose.

This Part sets forth the policy and procedures with respect to the production or disclosure of material contained in the files of the ODNI, information relating to or based upon material contained in the files of the ODNI, and information acquired by any person while such person was an employee of the ODNI as part of the performance of that person's official duties or because of that person's association with the ODNI.

§ 1703.2 Definitions.

The following definitions apply to this Part:

Defenses: Any and all legal defenses, privileges or objections available to the ODNI in response to a demand.

Demand:

(1) Any subpoena, order or other legal summons issued by a federal, state, local or other government entity of competent jurisdiction with the authority to require a response on a particular matter or a request for appearance of an individual where a demand could issue.

(2) Any request for production or disclosure which may result in the issuance of a subpoena, order, or other legal process to compel production or disclosure.

DNI: The Director of National Intelligence.

General Counsel: The ODNI's General Counsel, Acting General Counsel or Deputy General Counsel.

ODNI: The Office of the Director of National Intelligence and all of its components, including, but not limited to, the Office of the National Counterintelligence Executive, the National Counterterrorism Center, the National Counterproliferation Center, the Program Manager for the Information Sharing Environment, and all national intelligence centers and program managers the DNI may establish.

ODNI Employee: Any current or former employee, contractor, independent contractor, assignee or detailee to the ODNI.

ODNI Information or Material: Information or material that is contained in ODNI files, related to or based upon material contained in ODNI files or acquired by any ODNI employee as part of that employee's official duties or because of that employee's association with the ODNI.

OGC: The Office of the General Counsel of the ODNI.

OGC Attorney: Any attorney in the OGC.

Proceeding: Any matter before a court of law, administrative law judge, administrative tribunal or commission or other body that conducts legal or administrative proceedings, and includes all phases of the proceeding.

Production or Produce: The disclosure of ODNI information or material in response to a demand.

§ 1703.3 General.

(a) No ODNI employee shall respond to a demand for ODNI information or material without prior authorization as set forth in this Part.

(b) This part is intended only to provide procedures for responding to

demands for production of documents or information, and does not create any right or benefit, substantive or procedural, enforceable by any party against the United States.

§ 1703.4 Procedure for production.

(a) Whenever a demand is made for ODNI information or material, the employee who received the demand shall immediately notify OGC ((703) 275–2527). The OGC and the ODNI employee shall then follow the procedures set forth in this section.

(b) The OGC may assert any and all defenses before any search for potentially responsive ODNI information or material begins. Further, in its sole discretion the ODNI may decline to begin a search for potentially responsive ODNI information or material until a final and non-appealable disposition of any or all of the asserted defenses is made by the federal, state, local or government entity of competent jurisdiction. When the OGC determines that it is appropriate to search for potentially responsive ODNI information and material, the OGC will forward the demand to the appropriate ODNI offices or entities with responsibility for the ODNI information or material sought in the demand. Those ODNI offices or entities shall then search for and provide to the OGC all potentially responsive ODNI information and material. The OGC may then assert any and all defenses to the production of what it determines is responsive ODNI information or material.

(c) In reaching a decision on whether to produce responsive ODNI information or material, or to object to the demand, the OGC shall consider whether:

(1) Any relevant privileges are applicable;

(2) The applicable rules of discovery or procedure require production;

(3) Production would violate a statute, regulation, executive order or other provision of law;

(4) Production would violate a non-disclosure agreement;

(5) Production would be inconsistent with the DNI's responsibility to protect intelligence sources and methods, or reveal classified information or state secrets;

(6) Production would violate a specific ODNI policy issuance or instruction; and

(7) Production would unduly interfere with the orderly conduct of ODNI functions.

(d) If oral or written testimony is sought by a demand in a case or matter in which the ODNI is not a party, a reasonably detailed description of the testimony sought in the form of an affidavit, or a written statement if that is not feasible, by the party seeking the testimony or its attorney must be furnished to the OGC.

(e) The OGC shall notify the appropriate employees of all decisions regarding responses to demands and provide advice and counsel for the implementation of the decisions.

(f) If response to a demand is required before a decision is made whether to provide responsive ODNI information or material, an OGC attorney will request that a Department of Justice attorney appear with the ODNI employee upon whom that demand has been made before the court or other competent authority and provide it with a copy of this regulation and inform the court or other authority as to the status of the demand. The court will be requested to stay the demand pending resolution by the ODNI. If the request for a stay is denied or there is a ruling that the demand must be complied with irrespective of instructions rendered in accordance with this Part, the employee upon whom the demand was made shall, if directed to do so by the General Counsel or its designee, respectfully decline to comply with the demand under the authority of *United States ex rel. Touhy* v. *Ragen*, 340 U.S. 462 (1951), and this regulation.

(g) ODNI officials may delegate in writing any authority given to them in this Part to subordinate officials.

(h) Any individual or entity not an ODNI employee as defined in this Part who receives a demand for the production or disclosure of ODNI information or material acquired because of that person's or entity's association with the ODNI should notify the OGC ((703) 275–2527) for guidance and assistance. In such cases the provisions of this regulation shall be applicable.

§ 1703.5 Interpretation.

Any questions concerning interpretation of this Regulation shall be referred to the OGC for resolution.

Dated: October 2, 2008.

Corin R. Stone,

Deputy General Counsel, Office of the Director of National Intelligence.

[FR Doc. E8–24747 Filed 10–16–08; 8:45 am]

BILLING CODE 3910–A7–P

ENVIRONMENTAL PROTECTION AGENCY

40 CFR Part 3

[EPA–HQ–OEI–2003–0001; FRL–8730–7]

RIN 2025–AA23

Extension of Cross-Media Electronic Reporting Rule Deadline for Authorized Programs

AGENCY: Environmental Protection Agency (EPA).

ACTION: Proposed rule.

SUMMARY: EPA is proposing to amend the Final Cross-Media Electronic Reporting Rule (CROMERR) deadline for authorized programs (states, tribes, or local governments) with existing electronic document receiving systems to submit an application for EPA approval to revise or modify their authorized programs. This action proposes to extend the current October 13, 2008, deadline until January 13, 2010. Additionally, in the ''Rules and Regulations'' section of this **Federal Register**, EPA is making this revision as a direct final rule without a prior proposed rule. If the Agency receives no relevant adverse comment, EPA will not take further action on this proposed rule.

DATES: Written comments must be received by November 3, 2008.

ADDRESSES: Submit your comments, identified by Docket ID No. EPA-HQ-OEI–2003–0001, by one of the following methods:

- *www.regulations.gov*: Follow the on-line instructions for submitting comments.
- *E-mail*: *oei.docket@epa.gov.*
- *Mail*: CROMERR Docket, Environmental Protection Agency, Mailcode: 2822T, 1200 Pennsylvania Avenue, NW., Washington, DC 20460. Hand Delivery: EPA Docket Room, EPA West, Room 3334, 1301 Constitution Avenue, 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–OEI–2003–0001. EPA's policy is that all comments received will be included in the public docket without change and may be made available online at *www.regulations.gov*, including any personal information provided, unless the comment includes information claimed to be Confidential Business Information (CBI) or other information whose disclosure is restricted by statute. Do not submit information that you

consider to be CBI or otherwise protected through *www.regulations.gov* or e-mail. The *www.regulations.gov* Web site is an ''anonymous access'' system, which means EPA will not know your identity or contact information unless you provide it in the body of your comment. If you send an e-mail comment directly to EPA without going through *www.regulations.gov* your e-mail address will be automatically captured and included as part of the comment that is placed in the public docket and made available on the Internet. If you submit an electronic comment, EPA recommends that you include your name and other contact information in the body of your comment and with any disk or CD–ROM you submit. If EPA cannot read your comment due to technical difficulties and cannot contact you for clarification, EPA may not be able to consider your comment. Electronic files should avoid the use of special characters, any form of encryption, and be free of any defects or viruses. 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 docket are listed in the *www.regulations.gov* index. Although listed in the index, some information is not publicly available, e.g., CBI or other information whose disclosure is restricted by statute. Certain other material, such as copyrighted material, will be publicly available only in hard copy. Publicly available docket materials are available either electronically in *www.regulations.gov* or in hard copy at the CROMERR Docket, EPA/DC, EPA West, Room 3334, 1301 Constitution Avenue, NW., Washington, DC. The Public Reading Room is open from 8:30 a.m. to 4:30 p.m., Monday through Friday, excluding legal holidays. The telephone number for the Public Reading Room is (202) 566–1744, and the telephone number for the CROMERR Docket is (202) 566–1752.

FOR FURTHER INFORMATION CONTACT: Evi Huffer, Office of Environmental Information (2823T), Environmental Protection Agency, 1200 Pennsylvania Avenue, NW., Washington, DC 20460; (202) 566–1697; *huffer.evi@epa.gov*, or David Schwarz, Office of Environmental Information (2823T), Environmental Protection Agency, 1200 Pennsylvania Avenue, NW., Washington, DC 20460; (202) 566–1704; *schwarz.david@epa.gov.*

SUPPLEMENTARY INFORMATION:

I. What Does This Rule Do?

This rule proposes to provide temporary regulatory relief to states, tribes, and local governments with ''authorized programs'' as defined in 40 Code of Federal Regulations (CFR) 3.3. Any such authorized program that operates an ''existing electronic document receiving system'' as defined in 40 CFR 3.3 will have an additional 15 months to submit an application to revise or modify its authorized program to meet the requirements of 40 CFR part 3. Specifically, this rule proposes to amend 40 CFR 3.1000(a)(3) by extending the October 13, 2008, deadline to January 13, 2010.

II. Why Is EPA Issuing This Proposed Rule?

EPA proposes to extend the current due date for submitting applications under CROMERR for authorized programs with existing electronic document receiving systems, and imposes no additional requirements beyond those imposed by the underlying final rule (70 FR 59848, October 13, 2005). EPA has published a direct final rule in the ''Rules and Regulations'' section of this **Federal Register** because EPA views this as a noncontroversial action and anticipates no adverse comment. We have explained our reasons for this action in the preamble to the direct final rule.

If EPA receives no adverse comment, the Agency will not take further action on this proposed rule. If EPA receives adverse comment, the Agency will withdraw the direct final rule and it will not take effect. EPA will address all relevant public comments in any subsequent final rule based on this proposed rule.

EPA will not institute a second comment period on this action. Any parties interested in commenting on this proposed rule or the direct final rule listed elsewhere in today's **Federal Register** must do so at this time. For further information about commenting, please see the **ADDRESSES** section of this document.

III. Does This Action Apply to Me?

This action will affect states, tribes, and local governments that have an authorized program as defined in 40 CFR 3.3 and also have an existing electronic document receiving system, as defined in 40 CFR 3.3. For purposes of this rulemaking, the term ''state'' includes the District of Columbia and the United States territories, as specified in the applicable statutes. That is, the term ''state'' includes the District of Columbia, the Commonwealth of Puerto Rico, the Virgin Islands, Guam, American Samoa, the Commonwealth of Northern Mariana Islands, and the Trust Territory of the Pacific Islands, depending on the statute.

Category	Examples of affected entities
Local government	Publicly owned treatment works, owners and operators of treatment works treating domestic sewage, local and regional air boards, local and regional waste management authorities, and municipal and other drinking water authorities.
Tribe and State governments	States, tribes or territories that administer any federal environmental programs delegated, authorized, or approved by EPA under Title 40 of the CFR.

This table is not intended to be exhaustive, but rather provides a guide for readers regarding entities likely to be affected by this action. If you have questions regarding the applicability of this action to a particular entity, consult the person listed in the preceding **FOR FURTHER INFORMATION CONTACT** section.

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

A. *Submitting CBI.* Do not submit this information to EPA through *www.regulations.gov* or e-mail. Clearly mark the part or all of the information that you claim to be CBI. For CBI in a disk or CD–ROM that you mail to EPA, mark the outside of the disk or CD–ROM as CBI and then identify electronically within the disk or CD–ROM the specific information that is claimed as CBI. In addition to one complete version of the comment that includes information claimed as CBI, a copy of the comment that does not contain the information claimed as CBI must be submitted for inclusion in the public docket. Information so marked will not be disclosed except in accordance with procedures set forth in 40 CFR part 2.

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

- Identify the rulemaking by docket number and other identifying information (subject heading, **Federal Register** date and page number).
- Follow directions—The agency may ask you to respond to specific questions or organize comments by referencing a Code of Federal Regulations (CFR) part or section number.
- Explain why you agree or disagree; suggest alternatives and substitute language for your requested changes.
- Describe any assumptions and provide any technical information and/or data that you used.
- If you estimate potential costs or burdens, explain how you arrived at your estimate in sufficient detail to allow for it to be reproduced.
- Provide specific examples to illustrate your concerns, and suggest alternatives.
- Explain your views as clearly as possible, avoiding the use of profanity or personal threats.
- Make sure to submit your comments by the comment period deadline identified.

V. Summary of Rule

This proposed rule would amend 40 CFR 3.1000(a)(3) by extending the current October 13, 2008 deadline for authorized programs with existing electronic document receiving systems to submit applications to January 13, 2010.

For additional discussion of the proposed rule change, see the direct final rule EPA has published in the ''Rules and Regulations'' section of today's **Federal Register**. This proposal incorporates by reference all the reasoning, explanation, and regulatory text from the direct final rule.

VI. 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 (E.O.) 12866 (58 FR 51735, October 4, 1993) and is therefore not subject to review under the E.O.

B. Paperwork Reduction Act

This action does not impose any information collection burden. This action merely extends the current due date for submitting applications under CROMERR for authorized programs with existing electronic document receiving systems, and imposes no additional requirements. However, the Office of Management and Budget (OMB) has previously approved the information collection requirements contained in the existing regulations (40 CFR part 3) under the provisions of the Paperwork Reduction Act, 44 U.S.C. 3501 *et seq.* and has assigned OMB control number 2025–0003, EPA ICR number 2002.03. A copy of the OMB approved Information Collection Request (ICR) may be obtained from Susan Auby, Collection Strategies Division; U.S. Environmental Protection Agency (2822T); 1200 Pennsylvania Avenue, NW., Washington, DC 20460 or by calling (202) 566–1672. The ICR is also available electronically in *www.regulations.gov.*

Burden means the total time, effort, or financial resources expended by persons to generate, maintain, retain, or disclose or provide information to or for a federal agency. This includes the time needed to review instructions; develop, acquire, install, and utilize technology and systems for the purposes of collecting, validating, and verifying information, processing and maintaining information, and disclosing and providing information; adjust the existing ways to comply with any previously applicable instructions and requirements; train personnel to be able to respond to a collection of information; search data sources; complete and review the collection of information; and transmit or otherwise disclose the information.

An agency may not conduct or sponsor, and a person is not required to respond to a collection of information unless it displays a currently valid OMB control number. The OMB control numbers for EPA's regulations in 40 CFR are listed in 40 CFR part 9.

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 proposed rule on small entities, a small entity is defined as: (1) A small business that meets the definition for small businesses based on SBA size standards at 13 CFR 121.201; (2) a small governmental jurisdiction that is a government of a city, county, town, school district or special district with a population of less than 50,000 (Under the RFA definition, States and tribal governments are not considered small governmental jurisdictions.); 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 possibility of economic impacts of today's proposed rule on small entities, I certify that this action will not have a significant economic impact on a substantial number of small entities. The small entities directly regulated by this proposed rule are small governmental jurisdictions. In determining whether a rule has a significant economic impact on a substantial number of small entities, the impact of concern is any significant adverse economic impact on small entities, since the primary purpose of the regulatory flexibility analyses is to identify and address regulatory alternatives ''which minimize any significant economic impact of the rule on small entities.'' Thus, an agency may certify that a rule will not have a significant economic impact on a substantial number of small entities if the rule relieves regulatory burden, or otherwise has a positive economic effect on all of the small entities subject to the rule.

This proposed rule merely extends the current due date for submitting applications under CROMERR for authorized programs with existing electronic document receiving systems. EPA has therefore concluded that today's action will relieve regulatory burden for all affected small entities. We continue to be interested in the potential impacts of the proposed rule on small entities and welcome comments on issues related to such impacts.

D. Unfunded Mandates Reform Act

This action contains no Federal mandates under the provisions of Title II of the Unfunded Mandates Reform Act of 1995 (UMRA), 2 U.S.C. 1531–1538 for state, tribe, or local governments or the private sector. This action merely extends the current due date for submitting applications under CROMERR for authorized programs with existing electronic document receiving systems, and imposes no additional requirements. EPA has determined that this rule does not contain a federal mandate that may result in expenditures of $100 million or more for states, tribes, and local governments, in the aggregate, or the private sector in any one year. Therefore, this action is not subject to

the requirements of sections 202 and 205 of the UMRA.

This action is also not subject to the requirements of section 203 of UMRA because it contains no regulatory requirements that might significantly or uniquely affect small governments. This action merely extends the current due date for submitting applications under CROMERR for authorized programs with existing electronic document receiving systems, and imposes no additional requirements.

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 action does not have federalism implications. It will not have substantial direct effects on the states, on the relationship between the national government and the states, or on the distribution of power and responsibilities among the various levels of government, as specified in Executive Order 13132. This action merely extends the current due date for submitting applications under CROMERR for authorized programs with existing electronic document receiving systems, and imposes no additional requirements. Thus, Executive Order 13132 does not apply to this rule.

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

This action does not have tribal implications, as specified in Executive Order 13175 (65 FR 67249, November 9, 2000). It will neither impose substantial direct compliance costs on tribal governments, nor preempt Tribal law. This action merely extends the current due date for submitting applications under CROMERR for authorized programs with existing electronic document receiving systems, and imposes no additional requirements. Thus, Executive Order 13175 does not apply to this action.

G. Executive Order 13045: Children's Health Protection

Executive Order 13045, Protection of Children from Environmental Health Risks and Safety Risks (62 FR 19885, April 23, 1997) applies to any rule that (1) is determined to be ''economically significant'' as defined under Executive Order 12866, and (2) concerns an environmental health or safety risk that EPA has reason to believe may have a disproportionate effect on children. If the regulatory action meets both criteria, the Agency must evaluate the environmental health or safety effects of the planned rule on children, and explain why the planned regulation is preferable to other potentially effective and reasonably feasible alternatives considered by the Agency. EPA interprets Executive Order 13045 as applying only to those regulatory actions that are based on health or safety risks, such that the analysis required under section 5–501 of the Order has the potential to influence the regulation.

This proposed rule is not subject to Executive Order 13045 because it is not an economically significant action as defined by Executive Order 12866 and it does not establish an environmental standard intended to mitigate health or safety risks. This action merely extends the current due date for submitting applications under CROMERR for authorized programs with existing electronic document receiving systems, and imposes no additional requirements.

H. Executive Order 13211: Energy Effects

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 104–113, section 12(d) (15 U.S.C. 272 note) directs EPA to use voluntary consensus standards in its regulatory activities unless to do so would be inconsistent with applicable law or otherwise impractical. Voluntary consensus standards are technical standards (e.g., materials specifications, test methods, sampling procedures, and business practices) that are developed or adopted by voluntary consensus standards bodies. The NTTAA directs EPA to provide Congress, through OMB, with explanations when the Agency decides not to use available and applicable voluntary consensus standards.

Today's action does not involve technical standards. EPA's compliance with section 12(d) of the National Technology Transfer and Advancement Act of 1995 (Pub. L. 104–113, 12(d) (15 U.S.C. 272 note)) has been addressed in the preamble of the underlying final rule [70 FR 59848, October 13, 2007].

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

Executive Order (EO) 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 proposed 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 proposed rule merely extends the current regulatory schedule for submitting applications under CROMERR for authorized programs with existing electronic document receiving systems.

List of Subjects in 40 CFR Part 3

Environmental protection, Conflict of interests, Electronic records, Electronic reporting requirements, Electronic reports, Intergovernmental relations.

Dated: October 10, 2008.

Stephen L. Johnson,

Administrator.

[FR Doc. E8–24825 Filed 10–16–08; 8:45 am]

BILLING CODE 6560–50–P

Notices

Federal Register

Vol. 73, No. 202

Friday, October 17, 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.

ADVISORY COUNCIL ON HISTORIC PRESERVATION

Notice Seeking Public Input on Advisory Council on Historic Preservation Formal Comments Regarding the Bureau of Land Management's Mohave Valley Shooting Range (AZA–31733) Proposed Resource Management Plan Amendment and Recreation and Public Purpose Act Disposal Near Bullhead City, AZ

AGENCY: Advisory Council on Historic Preservation.

ACTION: Notice Seeking Public Input on Advisory Council on Historic Preservation Formal Comments Regarding the Bureau of Land Management's Mohave Valley Shooting Range (AZA–31733) Proposed Resource Management Plan Amendment and Recreation and Public Purpose Act Disposal Near Bullhead City, Arizona.

SUMMARY: The Advisory Council on Historic Preservation is soliciting public comment in preparation for issuing formal comments, under the National Historic Preservation Act, to the Bureau of Land Management regarding its intent to amend a land use management plan to allow for the disposal of the land under the authority of the Recreation and Public Purpose Act for the construction of a shooting range near Bullhead City, Arizona.

DATES: Comments must be received on or before October 28, 2008.

ADDRESSES: Address all comments to John L. Nau, III, Chairman, c/o Nancy Brown, Advisory Council on Historic Preservation, 1100 Pennsylvania Avenue, NW., Room 803, Washington, DC 20004. Comments may also be submitted by electronic mail to *TSProject@achp.gov.* Please include ''BLM Mohave Valley Shooting Range'' in the subject line of the message.

FOR FURTHER INFORMATION CONTACT: Nancy Brown, (202) 606–8582. E-mail: *Nbrown@achp.gov.* Further information may be found on the ACHP Web site: *http://www.achp.gov.*

SUPPLEMENTARY INFORMATION: The Advisory Council on Historic Preservation (ACHP) is an independent federal agency, established by the National Historic Preservation Act (NHPA), which promotes the preservation, enhancement, and productive use of our nation's historic resources, and advises the President and Congress on national historic preservation policy. Among other things, the ACHP issues formal comments to federal agencies per Section 106 of the NHPA.

Section 106 of the NHPA requires federal agencies to take into account the effects of their undertakings on historic properties and afford the ACHP a reasonable opportunity to comment on such undertakings. The procedures in 36 CFR part 800 define how federal agencies meet these statutory responsibilities. When a federal agency is unable to reach an agreement to avoid, minimize, or mitigate the adverse effects of its undertaking, it must seek the formal comments from the ACHP per 36 CFR part 800.

On September 18, 2008, the ACHP received a letter from the Bureau of Land Management (BLM) informing the ACHP that the BLM has terminated the consultation toward reaching such an agreement with regard to the undertaking described below, and has requested the formal comments of the ACHP. The ACHP by regulation has 45 days from receipt of a notice of termination to provide its comments to the director of the BLM and other consulting parties. This notice seeks public input on the ACHP formal comments that will be sent to the BLM.

Undertaking Summary

The Bureau of Land Management has proposed to authorize the construction of a firearm shooting range (undertaking) on BLM-managed land near Bullhead City, Arizona. The shooting range, referred to as the Mohave Valley or Tri-State Shooting Range, has been proposed by the Arizona Department of Game and Fish (AZDGF) and would be constructed after BLM amends its land use plan to allow for the disposal and transfers ownership of the proposed land to AZDGF through a patent issued under the Recreation and Public Purposes Act. The land use plan amendment, transfer of land, and construction of the shooting range is the undertaking that has been the subject of Section 106 review and will be the subject of the ACHP formal comments. Consultation on the undertaking has not resulted in an agreement on the resolution of the effects, and BLM has determined that further consultation would be unproductive. BLM has notified the ACHP that it is terminating consultation and requesting ACHP comment as provided in regulation 36 CFR 800.7(a)(1). Following the 45-day comment period, the ACHP will provide its comments to the director of BLM by November 3, 2008.

Affected Historic Properties

Boundary Cone Butte is a geologic promontory located in the western foothills of the Black Mountain Range, Mohave County, Arizona. Several Indian tribes attach religious and cultural significance to the butte as well as much of the surrounding landscape. In March 2006, the BLM determined and the Arizona State Historic Preservation Officer (AZ SHPO) concurred that Boundary Cone Butte is eligible for inclusion on the National Register of Historic Places for its associative values (National Register Criteria A and B) as a property of traditional, religious, and cultural importance to several Indian tribes. The determination of eligibility was limited to Boundary Cone Butte and did not encompass any of the associated landscape of the Mohave Valley or other landscape features to which Indian tribes may also attach religious and cultural significance. BLM has found that this undertaking will have an adverse effect on Boundary Cone Butte. Effects to Boundary Cone Butte, which is located approximately two miles to the east, include visual, auditory, and other impacts, and there are direct impacts to the broader surrounding landscape to which Indian tribes attach cultural and religious significance.

History of Consultation

In October 2002, AZDFG submitted a land use application under the Recreation and Public Purposes Act requesting the transfer of land through patent for the purpose of constructing a shooting range. Soon after, BLM began

consultation through National Environmental Policy Act (NEPA) on the proposal to authorize the AZDGF to build the proposed Mohave Valley Shooting Range, which also required an amendment to the land use plan to allow for the disposal. After considering several other locations, BLM identified two alternatives, the Boundary Cone Road and Willow Road alternatives. Several years of consultation between the BLM, Indian tribes, and local community organizations within the NEPA process followed, including a formal Alternative Dispute Resolution (ADR) process with the tribes and other parties that ended in 2005. The BLM determined that the undertaking had the potential to cause adverse effects to a property of cultural and religious significance to several Native American tribes. In March 2006, in consultation with the AZ SHPO, BLM formally determined the Boundary Cone Butte eligible for the NRHP and began consultation to resolve effects. The BLM also invited the AZ SHPO and the ACHP to formally consult on the undertaking in August 2006.

In March 2007, BLM identified the Boundary Cone alternative as the only viable location for the proposed shooting range in part due to access issues with the Willow Road location. In April 2007, BLM held a field visit attended by representatives of the ACHP, SHPO, AZDGF, Hualapai Tribe, Fort Mojave Tribe, proponents, and others. Tribal representatives noted early in the process and again at the field visit the role of the Boundary Cone Butte, the sacred landscape of the broader Mojave Valley, and the adverse effects that would occur to these places if a shooting range were constructed at the Boundary Cone Road location. They asserted that mitigation measures cannot mitigate the damage to their places of religious and cultural significance that would occur as the result of constructing a shooting range at this location. On September 18, 2008, BLM notified the ACHP of its decision to terminate consultation and seek the formal comments from the ACHP on this undertaking.

Again, the ACHP seeks public input on those formal comments that it will send to the BLM.

Authority: 16 U.S.C. 470s.

Dated: October 8, 2008.

John M. Fowler,

Executive Director.

[FR Doc. E8–24676 Filed 10–16–08; 8:45 am]

BILLING CODE 4310–K6–P

DEPARTMENT OF AGRICULTURE

Food and Nutrition Service

Agency Information Collection Activities: Proposed Collection, Comment Request—Commodity Supplemental Food Program, the Food Distribution Program on Indian Reservations, and the Supplemental Nutrition Assistance Program: Title VI Civil Rights Collection Reports

AGENCY: Food and Nutrition Service, USDA.

ACTION: Notice.

SUMMARY: In accordance with the Paperwork Reduction Act of 1995, this notice invites the general public and other public agencies to comment on a proposed information collection. The collection is a revision of a collection currently approved under OMB No. 0584–0025, Civil Rights Title VI Collection Reports—Forms FNS–191 and FNS–101, for the Commodity Supplemental Food Program, the Food Distribution Program on Indian Reservations, and the Supplemental Nutrition Assistance Program.

DATES: Written comments on this notice must be received by December 16, 2008.

ADDRESSES: Comments are invited on: (a) Whether the proposed collection of information is necessary for the proper performance of the functions of the Agency, including whether the information will have practical utility; (b) the accuracy of the Agency's estimate of the burden of the proposed collection of information including the validity of the methodology and assumptions used; (c) ways to enhance the quality, utility, and clarity of the information to be collected; and (d) ways to minimize the burden of the collection of information on 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.

Comments may be sent to Jane Duffield, Chief, State Administration Branch, Supplemental Nutrition Assistance Program, Food and Nutrition Service, U.S. Department of Agriculture, 3101 Park Center Drive, Room 818, Alexandria, VA 22302. Comments may also be submitted via fax to the attention of Ms. Duffield at 703–605–0795 or via e-mail to *PADMAILBOX@fns.usda.gov* Comments will also be accepted through the Federal eRulemaking Portal. Go to *http://www.regulations.gov.* and follow the online instructions for submitting comments electronically.

All written comments will be open for public inspection at the office of the Food and Nutrition Service during regular business hours (8:30 a.m. to 5 p.m. Monday through Friday) at 3101 Park Center Drive, Room 818, Alexandria, Virginia 22302.

All responses to this notice will be summarized and included in the request for Office of Management and Budget (OMB) approval of the information collection. All comments will become a matter of public record.

FOR FURTHER INFORMATION CONTACT: Requests for additional information or copies of this information collection should be directed to Jane Duffield at (703) 605–4365.

SUPPLEMENTARY INFORMATION:

Title: Civil Rights Title VI Collection Reports—FNS–191 and FNS–101.

OMB Number: 0584–0025.

Expiration Date: March 2009.

Type of Request: Revision of a currently approved collection.

Abstract: Title VI of the Civil Rights Act of 1964, 42 U.S.C. 2000d to 2000d–7, prohibits discrimination on the basis of race, color, and national origin in programs receiving Federal financial assistance. Department of Justice (DOJ) regulations, 28 CFR 42.406, require all Federal agencies to provide for the collection of racial/ethnic data and information from applicants for and recipients of Federal assistance sufficient to permit effective enforcement of Title VI.

For purposes of the Information Collection Notice only, the Food and Nutrition Service (FNS) employs program terminology in place of the standard Title VI terminology adopted by the U.S. Department of Agriculture (USDA) and codified at 7 CFR 15.2.

Thus, ''State agencies,'' ''local agencies,'' and/or ''operators'' are the program entities responsible for fulfilling the data collection requirements associated with ''primary recipients'' and/or ''recipients'' as defined by Title VI. Moreover, the program terms ''respondents,'' ''applicants,'' and/or ''participants'' refer to the ''potential beneficiaries,'' ''applicant beneficiaries,'' and/or ''actual beneficiaries'' of Federal financial assistance as defined by Title VI.

In order to conform with the statutory mandates of Title VI of the Civil Rights Act of 1964, DOJ regulations, and USDA regulations on nondiscrimination in Federally assisted programs, the USDA's Food and Nutrition Service (FNS) requires State agencies to submit data on the racial/ethnic categories of persons receiving benefits from FNS food assistance programs.

In all three programs, State and local agencies collect racial/ethnic information on the benefits application form that applicants may complete and file manually or electronically. The application form must clearly indicate that the information is voluntary and that the race and ethnic information will not affect an applicant's eligibility or level of benefits. It must also state that the reason for the collection of the information is to assure that program benefits are distributed without regard to race, color or national origin. All three programs allow the individual to self-identify his or her racial/ethnic status on the application. Visual observation by a program representative is used to collect the data when the individual does not self-identify. In either case the information is recorded on the application form and entered into the agency's information system. The Federal reporting forms do not identify individual participants.

Local agencies use the two forms referenced above (i.e., the FNS–191 and FNS–101) to report data on the Commodity Supplemental Food Program (CSFP), the Food Distribution Program on Indian Reservations (FDPIR), and the Supplemental Nutrition Assistance Program (SNAP) to FNS as explained below. FNS' data collection requirement for operators is found in the regulations for the CSFP at 7 CFR 247.29(b), and for the SNAP at 7 CFR 272.6(g); the requirement for the FDPIR is found in FNS Handbook 501.

On October 1, 2008, the Supplemental Nutrition Assistance Program (SNAP) became the new name for the Federal Food Stamp Program. This change is mandated under the Food, Conservation and Energy Act of 2008. The new name reflects the program's focus on nutrition and putting healthy food within reach for low-income households. This program name change does not affect the need to continue the information collection for the program.

All State or local agencies must submit the appropriate form in order to receive Federal assistance and comply with applicable legislation. If a State or local agency does not comply voluntarily, the State or local agency is subject to fund termination, suspension, or denial, or to judicial action.

CSFP local agencies complete the FNS–191. FNS requires local agencies to provide annually the actual number and racial/ethnic designations of participants who receive CSFP benefits during the month of April.

SNAP and FDPIR State, local or Tribal agencies complete the FNS–101. FNS requires State, local or Tribal agencies to report annually the actual number and racial/ethnic designation of household contacts who receive FDPIR and/or SNAP benefits in the month of July.

Burden Estimates

Respondents: Local agencies that administer the CSFP, FDPIR, and SNAP.

Number of Respondents: 2,863 (144 for CSFP, 111 for FDPIR, and 2,608 for SNAP).

Estimated Number of Responses per Respondent:

Form FNS–191: 144 local CSFP agencies once a year.

Form FNS–101: 111 local FDPIR agencies and 2,608 local SNAP agencies once a year.

Estimate of Burden:

Form FNS–191: The local CSFP agencies submit Form FNS–191 at an estimate of 1.92 hours per respondent, or 276.48 total hours. There is an additional recordkeeping burden of.08 hours per respondent for maintaining the responses, or 11.52 hours. Total burden is 288 hours.

Form FNS–101: The local FDPIR and SNAP agencies submit Form FNS–101 at an estimate of 1.92 hours per respondent, or 5,220.48 hours. There is an additional burden of.08 hours per respondent for maintaining the responses, or 217.52 hours. Total burden is 5,438 hours.

Estimated Total Annual Burden on Respondents: The revised annual reporting and recordkeeping burden for OMB No. 0584–0025 is estimated to be 5,726 hours, a reduction of 20 hours. The burden reduction is due to the decrease in the number of CSFP, FDPIR, and SNAP agencies that will complete a report.

Dated: October 9, 2008.

Roberto Salazar,

Administrator.

[FR Doc. E8–24784 Filed 10–16–08; 8:45 am]

BILLING CODE 3410–30–P

COMMITTEE FOR PURCHASE FROM PEOPLE WHO ARE BLIND OR SEVERELY DISABLED

Procurement List: Proposed Deletion

AGENCY: Committee for Purchase From People Who Are Blind or Severely Disabled.

ACTION: Proposed deletion from Procurement List.

SUMMARY: The Committee is proposing to delete a product from the Procurement List previously furnished by nonprofit agencies employing persons who are blind or have other severe disabilities.

Comments Must Be Received on or Before: 11/16/2008.

ADDRESSES: Committee for Purchase From People Who Are Blind or Severely Disabled, Jefferson Plaza 2, Suite 10800, 1421 Jefferson Davis Highway, Arlington, Virginia 22202–3259.

FOR FURTHER INFORMATION OR TO SUBMIT COMMENTS CONTACT: Barry S. Lineback, Telephone: (703) 603–7740, Fax: (703) 603–0655, or e-mail *CMTEFedReg@AbilityOne.gov.*

SUPPLEMENTARY INFORMATION: This notice is published pursuant to 41 U.S.C. 47(a)(2) and 41 CFR 51–2.3. Its purpose is to provide interested persons an opportunity to submit comments on the proposed actions.

Deletions

Regulatory Flexibility Act Certification

I certify that the following action will not have a significant impact on a substantial number of small entities. The major factors considered for this certification were:

1. If approved, the action may result in additional reporting, recordkeeping or other compliance requirements for small entities.

2. If approved, the action may result in authorizing small entities to furnish the product to the Government.

3. There are no known regulatory alternatives which would accomplish the objectives of the Javits-Wagner-O'Day Act (41 U.S.C. 46–48c) in connection with the product proposed for deletion from the Procurement List.

End of Certification

The following product is proposed for deletion from the Procurement List:

Product

Cloth, Abrasive

NSN: 5350–00–187–6285—Cloth, Abrasive.
NPA: Louisiana Association for the Blind, Shreveport, LA.
Contracting Activity: GSA/FAS Southwest Supply Center (QSDAC), Fort Worth, TX.

Barry S. Lineback,

Acting Director, Program Operations.

[FR Doc. E8–24673 Filed 10–16–08; 8:45 am]

BILLING CODE 6353–01–P

COMMITTEE FOR PURCHASE FROM PEOPLE WHO ARE BLIND OR SEVERELY DISABLED

Procurement List: Additions and Deletions

AGENCY: Committee for Purchase From People Who Are Blind or Severely Disabled.

ACTION: Additions to and deletion from procurement list.

SUMMARY: This action adds services to the Procurement List to be furnished by nonprofit agencies employing persons who are blind or have other severe disabilities, and deletes a product from the Procurement List previously furnished by such agencies.

DATES: *Effective Date:* November 17, 2008.

ADDRESSES: Committee for Purchase From People Who Are Blind or Severely Disabled, Jefferson Plaza 2, Suite 10800, 1421 Jefferson Davis Highway, Arlington, Virginia 22202–3259.

FOR FURTHER INFORMATION CONTACT: Barry S. Lineback, Telephone: (703) 603–7740, Fax: (703) 603–0655, or e-mail *CMTEFedReg@AbilityOne.gov.*

SUPPLEMENTARY INFORMATION:

Additions

On August 8, 2008, the Committee for Purchase From People Who Are Blind or Severely Disabled published notice (73 FR 46245) of proposed additions to the Procurement List.

After consideration of the material presented to it concerning capability of qualified nonprofit agencies to provide the services and impact of the additions on the current or most recent contractors, the Committee has determined that the services listed below are suitable for procurement by the Federal Government under 41 U.S.C. 46–48c and 41 CFR 51–2.4.

Regulatory Flexibility Act Certification

I certify that the following action will not have a significant impact on a substantial number of small entities. The major factors considered for this certification were:

1. The action will not result in any additional reporting, recordkeeping or other compliance requirements for small entities other than the small organizations that will furnish the services to the Government.

2. The action will result in authorizing small entities to furnish the services to the Government.

3. There are no known regulatory alternatives which would accomplish the objectives of the Javits-Wagner-O'Day Act (41 U.S.C. 46–48c) in connection with the services proposed for addition to the Procurement List.

End of Certification

Accordingly, the following services are added to the Procurement List:

Services

Service Type/Location: Combined Facilities Maintenance, Armed Forces Reserve Center, 251 Rudy Chase Drive, Glenville, NY;
Naval & Marine Corps Reserve Center, 439 Paul Road, Rochester, NY;
Naval & Marine Corps Reserve Center, 3 Porter Avenue, Buffalo, NY;
Naval Reserve Center Syracuse, 5803 East Molloy Road, Mattydale, NY.
NPA: Human Technologies Corporation, Utica, NY.
Contracting Activity: Dept of the Navy, U.S. Fleet Forces Command.

Deletions

On September 5, 2008, the Committee for Purchase From People Who Are Blind or Severely Disabled published notice (73 FR 51787) of proposed deletion to the Procurement List.

After consideration of the relevant matter presented, the Committee has determined that the product listed below is no longer suitable for procurement by the Federal Government under 41 U.S.C. 46–48c and 41 CFR 51–2.4.

Regulatory Flexibility Act Certification

I certify that the following action will not have a significant impact on a substantial number of small entities. The major factors considered for this certification were:

1. The action may result in additional reporting, recordkeeping or other compliance requirements for small entities.

2. The action may result in authorizing small entities to furnish the product to the Government.

3. There are no known regulatory alternatives which would accomplish the objectives of the Javits-Wagner-O'Day Act (41 U.S.C. 46–48c) in connection with the product deleted from the Procurement List.

End of Certification

Accordingly, the following product is deleted from the Procurement List:

Product

Label, Pressure-Sensitive Adhesive

NSN: 7530–00–054–1575—Label, Pressure-Sensitive Adhesive.
NPA: North Central Sight Services, Inc., Williamsport, PA.
Contracting Activity: GSA/FSS Ofc Sup Ctr—Paper Products, New York, NY.

Barry S. Lineback,

Acting Director, Program Operations.

[FR Doc. E8–24674 Filed 10–16–08; 8:45 am]

BILLING CODE 6353–01–P

DEPARTMENT OF COMMERCE

Foreign-Trade Zones Board

[Docket 58–2008]

Foreign-Trade Zone 163—Ponce, PR; Application for Expansion

An application has been submitted to the Foreign-Trade Zones (FTZ) Board (the Board) by CODEZOL, C.D., grantee of FTZ 163, requesting authority to expand its zone in the Ponce, Puerto Rico, area, adjacent to the Ponce Customs and Border Protection port of entry. The application was submitted pursuant to the provisions of the Foreign-Trade Zones Act, as amended (19 U.S.C. 81a–81u), and the regulations of the Board (15 CFR Part 400). It was formally filed on October 8, 2008.

FTZ 163 was approved on October 18, 1989 (Board Order 443, 54 FR 46097, 11/01/89) and expanded on April 18, 2000 (Board Order 1091, 65 FR 24676, 4/27/00), on June 9, 2005 (Board Order 1397, 70 FR 36117, 6/22/05), on July 26, 2006 (Board Order 1467, 71 FR 44996, 8/8/06), and on November 9, 2006 (Board Order 1487, 71 FR 67098, 11/20/06).

The zone project currently consists of the following sites in Puerto Rico: Site 1 (106 acres)—within the Port of Ponce area, including a site (11 acres) located at 3309 Avenida Santiago de Los Caballeros, Ponce; Site 2 (191 acres, 5 parcels)—Peerless Oil & Chemicals, Inc., Petroleum Terminal Facilities located at Rt. 127, Km. 17.1, Penuelas; Site 3 (13 acres, 2 parcels)—Rio Piedras Distribution Center located within the central portion of the Quebrada Arena Industrial Park, and the Hato Rey Distribution Center located within the northeastern portion of the Tres Monjitas Industrial Park, San Juan; Site 4 (14 acres)—warehouse facility located at State Road No. 3, Km. 1401, Guayama; Site 5 (256 acres, 34 parcels)—located at Mercedita Industrial Park at the intersection of Route PR–9 and Las Americas Highway, Ponce; Site 6 (86 acres)—Coto Laurel Industrial Park located at the southwest corner of the intersection of Highways PR–56 and PR–52, Ponce; Site 7 (17 acres)—warehouse facility located at State Road No. 1, Km. 21.1, Guaynabo; Site 8 (5 acres)—warehouse facility located at 42 Salmon Street, Ponce; and, Site 9 (6 acres)—warehouse facility located on PR Highway 2, at Km. 165.2, Hormigueros.

The applicant is now requesting authority to expand the general-purpose zone to include an additional site: Proposed Site 10 (6 acres)—warehouse facility at Centro de Distribucion, Playa

de Ponce, Building 7, Avenue de los Caballeros, Ponce. The site will provide public warehousing and distribution services to area businesses. No specific manufacturing authority is being requested at this time. Such requests would be made to the Board on a case-by-case basis.

In accordance with the Board's regulations, Kathleen Boyce of the FTZ Staff is designated examiner to investigate the application and report to the Board.

Public comment is invited from interested parties. Submissions (original and 3 copies) shall be addressed to the Board's Executive Secretary at the address below. The closing period for their receipt is December 16, 2008. Rebuttal comments in response to material submitted during the foregoing period may be submitted during the subsequent 15-day period (to December 31, 2008).

A copy of the application and accompanying exhibits will be available for public inspection at each of the following locations: CODEZOL, C.D, Tourist Pier Offices, Avenida of the Caballeros, Ponce, Puerto Rico 00716–2009; and, the Office of the Executive Secretary, Foreign-Trade Zones Board, Room 2111, U.S. Department of Commerce, 1401 Constitution Avenue, NW., Washington, DC 20230.

For further information, contact Kathleen Boyce at 202–482–1346 or *Kathleen_Boyce@ita.doc.gov*.

Dated: October 8, 2008.

Andrew McGilvray,

Executive Secretary.

[FR Doc. E8–24759 Filed 10–16–08; 8:45 am]

BILLING CODE 3510–DS–P

DEPARTMENT OF COMMERCE

Foreign-Trade Zones Board

[Docket 57–2008]

Foreign-Trade Zone 21—Charleston, SC; Application for Subzone Status; William Powell Company dba Starflo Corporation; (Industrial Valves); Manning, SC

An application has been submitted to the Foreign-Trade Zones (FTZ) Board (the Board) by the South Carolina State Ports Authority, grantee of FTZ 21, requesting special-purpose subzone status for the industrial valve warehousing and distribution facility of William Powell Company (Powell) dba Starflo Corporation, located in Manning, South Carolina. The application was submitted pursuant to the provisions of the Foreign-Trade Zones Act, as amended (19 U.S.C. 81a–81u), and the regulations of the Board (15 CFR Part 400). It was formally filed on October 8, 2008.

The proposed subzone would include Powell's warehousing facility (10 employees, 96,000 sq. ft., 25 acres) located at 1568 JD Rogers Boulevard in Manning, South Carolina. The facility is used for the warehousing, distribution, and repair of foreign-origin and domestic industrial valve equipment (duty rates range from 3 percent to 5.6 percent) for the U.S. market and export. FTZ procedures would be utilized to support Powell's distribution activity that competes with facilities located abroad.

FTZ procedures would exempt Powell from Customs duty payments on foreign products that are re-exported. Some ten percent of the facility's shipments are exported. On domestic sales, the company would be able to defer payment until merchandise is shipped from the facility and entered for U.S. consumption. Powell also plans to realize logistical benefits through the use of weekly customs entry procedures. The application indicates that all of the above-cited savings from FTZ procedures would help improve the facility's international competitiveness.

In accordance with the Board's regulations, Kathleen Boyce of the FTZ Staff is designated examiner to investigate the application and report to the Board.

Public comment is invited from interested parties. Submissions (original and 3 copies) shall be addressed to the Board's Executive Secretary at the address below. The closing period for their receipt is December 16, 2008. Rebuttal comments in response to material submitted during the foregoing period may be submitted during the subsequent 15-day period (to December 31, 2008).

A copy of the application and accompanying exhibits will be available for public inspection at each of the following locations: U.S. Department of Commerce Export Assistance Center, 1362 McMillan Avenue, Suite 100, North Charleston, South Carolina 29405; and, the Office of the Executive Secretary, Foreign-Trade Zones Board, Room 2111, U.S. Department of Commerce, 1401 Constitution Avenue, NW., Washington, DC 20230.

For further information, contact Kathleen Boyce at 202–482–1346 or *Kathleen_Boyce@ita.doc.gov*.

Dated: October 8, 2008.

Andrew McGilvray,

Executive Secretary.

[FR Doc. E8–24756 Filed 10–16–08; 8:45 am]

BILLING CODE 3510–DS–P

DEPARTMENT OF COMMERCE

Foreign-Trade Zones Board

[Order No. 1579]

Expansion of Foreign-Trade Zone 64—Jacksonville, FL

Pursuant to its authority under the Foreign-Trade Zones Act of June 18, 1934, as amended (19 U.S.C. 81a–81u), the Foreign-Trade Zones Board (the Board) adopts the following Order:

Whereas, the Jacksonville Port Authority, grantee of Foreign-Trade Zone 64, submitted an application to the Board for authority to expand its zone to include an additional site located at the Westlake Industrial Park in Jacksonville (Site 7–47 acres), to make permanent and designate Site 1A as Site 8, and to clarify the boundary of Site 3 (delete 47 acres), adjacent to the Jacksonville Customs and Border Protection port of entry (FTZ Docket 10–2008, filed 2/21/08, corrected 7/11/08);

Whereas, notice inviting public comment was given in the **Federal Register** (73 FR 12374, 3/7/08; corrected 73 FR 41315, 7/18/08), and the application has been processed pursuant to the FTZ Act and the Board's regulations; and,

Whereas, the Board adopts the findings and recommendations of the examiner's report, and finds that the requirements of the FTZ Act and Board's regulations are satisfied, and that the proposal is in the public interest;

Now, therefore, the Board hereby orders:

The application to expand FTZ 64 is approved, subject to the FTZ Act and the Board's regulations, including Section 400.28, and subject to a sunset provision that would terminate authority on September 30, 2013 for Site 7 if no activity has occurred under FTZ procedures before that date.

Signed at Washington, DC, this 7th day of October 2008.

David M. Spooner,

Assistant Secretary of Commerce, for Import Administration, Alternate Chairman, Foreign-Trade Zones Board.

Attest:

Andrew McGilvray,

Executive Secretary.

[FR Doc. E8–24750 Filed 10–16–08; 8:45 am]

BILLING CODE 3510–DS–P

DEPARTMENT OF COMMERCE

Foreign-Trade Zones Board

[Order No. 1578]

Grant of Authority for Subzone Status; Euromarket Designs, Inc. d/b/a Crate & Barrel; (Home Furnishings); Naperville, IL

Pursuant to its authority under the Foreign-Trade Zones Act of June 18, 1934, as amended (19 U.S.C. 81a–81u), the Foreign-Trade Zones Board (the Board) adopts the following Order:

Whereas, the Foreign-Trade Zones Act provides for ''* * * the establishment * * * of foreign-trade zones in ports of entry of the United States, to expedite and encourage foreign commerce, and for other purposes,'' and authorizes the Foreign-Trade Zones Board to grant qualified corporations the privilege of establishing foreign-trade zones in or adjacent to U.S. Customs and Border Protection ports of entry;

Whereas, the Board's regulations (15 CFR part 400) provide for the establishment of special-purpose subzones when existing zone facilities cannot serve the specific use involved, and when the activity results in significant public benefit and is in the public interest;

Whereas, the Illinois International Port District, grantee of Foreign-Trade Zone 22, has made application to the Board for authority to establish a special-purpose subzone at the home furnishings distribution and processing facilities of Euromarket Designs, Inc. d/b/a Crate & Barrel, located in Naperville, Illinois (FTZ Docket 1–2008, filed 1/8/08);

Whereas, notice inviting public comment was given in the **Federal Register** (73 FR 2442, 1/15/08); and,

Whereas, the Board adopts the findings and recommendations of the examiner's report, and finds the requirements of the FTZ Act and the Board's regulations are satisfied, and that approval of the application would be in the public interest;

Now, therefore, the Board hereby grants authority for subzone status for activity related to home furnishings distribution and processing at the facilities of Euromarket Designs, Inc. d/b/a Crate & Barrel, located in Naperville, Illinois (Subzone 22R), as described in the application and **Federal Register** notice, and subject to the FTZ Act and the Board's regulations, including section 400.28.

Signed at Washington, DC, this 7th day of October 2008.

David M. Spooner,

Assistant Secretary of Commerce for Import Administration, Alternate Chairman, Foreign-Trade Zones Board.

Attest:

Andrew McGilvray,

Executive Secretary.

[FR Doc. E8–24751 Filed 10–16–08; 8:45 am]

BILLING CODE 3510–DS–P

DEPARTMENT OF COMMERCE

Foreign–Trade Zones Board

Order No. 1580

Voluntary Relinquishment of The Grant of Authority; Foreign–Trade Zone 48; Tuscon, AZ

Pursuant to its authority under the Foreign–Trade Zones Act of June 18, 1934, as amended (19 U.S.C. 81a–81u), the Foreign–Trade Zones Board (the Board) adopts the following Order:

WHEREAS, on March 28, 1979, the Board issued a grant of authority to the Papago–Tucson Development Authority (PTDA), authorizing the establishment of Foreign–Trade Zone 48 at the San Xavier Industrial Park in Tucson, Arizona (Board Order 145);

WHEREAS, the San Xavier Development Authority, which has since merged with the PTDA has made a request (FTZ Docket 3–2008, 1–18–08) to the FTZ Board for voluntary relinquishment of the grant of authority for FTZ 48, and;

WHEREAS, the FTZ Board, noting the concurrence of U.S. Customs and Border Protection, adopts the findings of the FTZ staff report and concludes that approval of the request is in the public interest;

NOW, THEREFORE, the Foreign–Trade Zones Board terminates the FTZ status of Foreign–Trade Zone No. 48, effective this date.

Signed at Washington, DC, this 7th day of October 2008.

David M. Spooner,

Assistant Secretary of Commerce for Import Administration, Alternate Chairman Foreign–Trade Zones Board.

ATTEST:

Andrew McGilvray,

Executive Secretary.

[FR Doc. E8–24748 Filed 10–16–08; 8:45 am]

BILLING CODE 3510–DS–S

DEPARTMENT OF COMMERCE

International Trade Administration

(A–570–848)

Crawfish Tail Meat from the People's Republic of China: Notice of Court Decision Not in Harmony with Final Results of Administrative Review

AGENCY: Import Administration, International Trade Administration, Department of Commerce.

SUMMARY: On September 12, 2008, the United States Court of International Trade (CIT) sustained the Department of Commerce's (the Department) results of redetermination pursuant to the CIT's remand in *China Kingdom Import & Export Co., Ltd.; Yancheng Yaou Seafood Co., Ltd.; and Qingdao Zhengri Seafood Co., Ltd. v. United States*, Consol. Ct. No. 03–00302, Slip Op. 08–96 (CIT September 12, 2008) (*China Kingdom v. United States II*). *See* Results of Redetermination Pursuant to Remand, dated March 3, 2008 (available at *http://ia.ita.doc.gov/remands*). Consistent with the decision of the United States Court of Appeals for the Federal Circuit (CAFC) in *Timken Co. v. United States*, 893 F.2d 337 (Fed. Cir. 1990) (*Timken*), the Department is notifying the public that the final judgment in this case is not in harmony with the Department's final results of the administrative review of the antidumping duty order on certain crawfish tail meat from the People's Republic of China (PRC) covering the period of review (POR) of September 1, 2000, through August 31, 2001. *See Freshwater Crawfish Tail Meat from the People's Republic of China; Notice of Final Results of Antidumping Duty Administrative Review*, 68 FR 19504 (April 21, 2003) (*Final Results*).

EFFECTIVE DATE: September 22, 2008.

FOR FURTHER INFORMATION CONTACT: Scott Lindsay, AD/CVD Operations, Office 6, Import Administration, International Trade Administration, U.S. Department of Commerce, 14th Street and Constitution Avenue, NW, Washington, DC, 20230; telephone (202) 482–0780.

SUPPLEMENTARY INFORMATION:

Background

On April 21, 2003, the Department issued its final results in the antidumping duty administrative review of crawfish tail meat from the PRC covering the POR of September 1, 2000, through August 31, 2001. *See Final Results*. In the *Final Results*, the Department found that the use of facts otherwise available, with adverse

inferences, was warranted because the evidence gathered at verification established that China Kingdom Import & Export Co. Ltd. (China Kingdom) failed to report its total tail meat production for the POR and eight of its eleven factors of production for the POR. *Id.* In applying total adverse facts available, the Department chose to assign to China Kingdom the highest calculated rate from any segment of the proceeding as the Department found that China Kingdom failed to cooperate to the best of its ability. *Id.* Therefore, China Kingdom was assigned a rate of 223.01 percent the highest rate calculated in any previous segment of this proceeding. *Id.*

In *China Kingdom Import & Export Co., Ltd. v. United States*, Consol. Ct. No. 03–00302, Slip Op. 07–135 (CIT September 4, 2007) (*China Kingdom vs. United States I*), the CIT remanded the *Final Results*, holding that the Department's application of the ''facts otherwise available'' and ''adverse inference'' provisions was not supported by substantial record evidence and was otherwise not in accordance with law. The CIT directed the Department to calculate and assign China Kingdom a new antidumping duty assessment rate using facts available and adverse facts available only to a limited extent. On March 3, 2008, the Department issued its final results of redetermination pursuant to *China Kingdom vs. United States I. See Results of Redetermination on Remand Pursuant to China Kingdom Import & Export Co. Ltd. v. United States* (March 3, 2008). The remand redetermination explained that, in accordance with the CIT's instructions, the Department recalculated the assessment rate for China Kingdom using a rate other than the PRC–wide rate as total adverse facts available. Specifically, the Department calculated a dumping margin for China Kingdom, utilizing the factor for each of the eight erroneously reported factor values (choosing between China Kingdom's February 27, 2002, and November 16, 2007, responses) that is adverse to China Kingdom. The Department also utilized in its calculations the three factors that China Kingdom correctly reported. The Department then compared U.S. sales price to normal value, and calculated a dumping margin for China Kingdom utilizing information on the record. The Department's redetermination resulted in a change in the *Final Results* weighted–average margin for China Kingdom from 223.01 percent to 90.66 percent.

Timken Notice

In its decision in *Timken*, 893 F.2d at 341, the CAFC held that, pursuant to section 516A(e) of the Tariff Act of 1930, as amended (the Act), the Department must publish a notice of a court decision that is not ''in harmony'' with a Department determination and must suspend liquidation of entries pending a ''conclusive'' court decision. The CIT's decision in *China Kingdom v. United States II* on September 12, 2008, constitutes a final decision of that court that is not in harmony with the Department's *Final Results*. This notice is published in fulfillment of the publication requirements of *Timken*. Accordingly, the Department will continue the suspension of liquidation of the subject merchandise pending the expiration of the period of appeal or, if appealed, pending a final and conclusive court decision. In the event the CIT's ruling is not appealed or, if appealed, upheld by the CAFC, the Department will instruct U.S. Customs and Border Protection to assess antidumping duties on entries of the subject merchandise during the POR from China Kingdom based on the revised assessment rates calculated by the Department.

This notice is issued and published in accordance with section 516A(c)(1) of the Act.

Dated: October 8, 2008.

David M. Spooner,

Assistant Secretary for Import Administration.

[FR Doc. E8–24745 Filed 10–16–08; 8:45 am]

BILLING CODE 3510–DS–S

DEPARTMENT OF COMMERCE

International Trade Administration

[Application No. 08–00008]

Export Trade Certificate of Review

ACTION: Notice of Withdrawal of an Application for an Export Trade Certificate of Review Submitted by the American Sugar Export Company LLC.

SUMMARY: On June 12, 2008, Export Trading Company Affairs published a notice in the **Federal Register** (73 FR 3394) of an application for an Export Trade Certificate of Review submitted by the American Sugar Export Company LLC (ASEC). On October 8, 2008, ASEC withdrew its application.

FOR FURTHER INFORMATION CONTACT: Jeffrey Anspacher, Director, Export Trading Company Affairs, International Trade Administration, by telephone at (202) 482–5131 (this is not a toll-free number) or e-mail at *oetca@ita.doc.gov.*

SUPPLEMENTARY INFORMATION: Title III of the Export Trading Company Act of 1982 (15 U.S.C. 4001–21) authorizes the Secretary of Commerce to issue Export Trade Certificates of Review. Under the regulations implementing Title III, an applicant may withdraw an application by written request at any time before the Secretary has determined whether to issue a certificate. 15 CFR 325.3(f).

Dated: October 14, 2008.

Jeffrey Anspacher,

Director, Export Trading Company Affairs.

[FR Doc. E8–24760 Filed 10–16–08; 8:45 am]

BILLING CODE 3510–DR–P

DEPARTMENT OF COMMERCE

National Institute of Standards and Technology

[Docket No.: 070413090–8543–02]

Announcing Approval of Federal Information Processing Standard (FIPS) Publication 180–3, Secure Hash Standard, a Revision of FIPS 180–2, Secure Hash Standard

AGENCY: National Institute of Standards and Technology (NIST), Commerce Department.

ACTION: Notice.

SUMMARY: This notice announces the Secretary of Commerce's approval of Federal Information Processing Standard (FIPS) Publication 180–3, Secure Hash Standard, a revision of FIPS 180–2, Secure Hash Standard. The FIPS specifies five secure hash algorithms for use in computing a condensed representation of electronic data, or a message digest. Secure hash algorithms are used with other cryptographic algorithms, such as digital signature algorithms and keyed hash message authentication codes.

The revised FIPS incorporates the four hash algorithms that had been specified in FIPS 180–2, and includes an additional algorithm that had been specified in Change Notice 1 to FIPS 180–2. In addition, a basic description of a truncation method that was provided in the Change Notice has been incorporated into the standard. Some technical information in FIPS 180–2 about the security of the hash algorithms may no longer be accurate, as shown by recent research results, and it is possible that further research may indicate additional changes. Therefore, the technical information has been removed from the revised standard, and will be provided in Special Publications

(SPs) 800–107 and 800–57, which can be updated in a timely fashion as the technical conditions change.

DATES: The approved changes are effective as of October 17, 2008.

FOR FURTHER INFORMATION CONTACT: Elaine Barker, (301) 975–2911, National Institute of Standards and Technology, 100 Bureau Drive, STOP 8930, Gaithersburg, MD 20899–8930, e-mail: *elaine.barker@nist.gov*, or Quynh Dang, (301) 975–3610, e-mail: *quynh.dang@nist.gov*. FIPS 180–3 is available electronically from the NIST Web site at: *http://csrc.nist.gov/publications/PubsFIPS.html.* NIST Special Publications (SPs) are available electronically from the NIST Web site at: *http://csrc.nist.gov/publications/PubsSPs.html.*

SUPPLEMENTARY INFORMATION: On June 12, 2007, NIST published a notice in the **Federal Register** (72 FR 32282) announcing draft FIPS 180–3, and soliciting comments on the draft standard from the public, research communities, manufacturers, voluntary standards organizations and Federal, State and local government organizations. In addition to being published in the **Federal Register**, the notice was posted on the NIST web pages. Information was provided about the submission of electronic comments, and an email address was provided for the submission of comments.

Comments, responses, and questions were received from two federal government organizations, three private sector organizations and one individual. The comments that were received asked for clarification of the text of the standard, recommended editorial and formatting changes, or raised issues unrelated to the revision of the FIPS. All of the suggestions and recommendations were carefully reviewed, and changes were made to the standard, where appropriate. None of the comments opposed the approval of the revised standard. The following is a summary of the specific comments and NIST's responses to them:

Comment: A number of editorial changes were suggested.

Response: NIST made the appropriate editorial changes such as page numbering style changes for the preface and the main body of the FIPS and adding a page break before the appendix section.

Comment: Was the specification for SHA–1 changed in FIPS 180–3?

Response: The SHA–1 algorithm remains the same in the FIPS 180–3.

Comment: What are the changes between FIPS 180–2 and 180–3?

Response: There are two main technical changes in FIPS 180–3 from FIPS 180–2. The first change is that security strengths of the five secure hash algorithms are not described in the FIPS because they could change. Instead, the security strengths are discussed in NIST Special Publication 800–107. A reference to the NIST Publication 800–107 was added in Appendix A. The second change is that examples of the hash values generated by the five hash algorithms were removed from the FIPS and posted on a Web site so that they can be conveniently updated. The link to the Web site was added in the FIPS under Implementation Notes in the FIPS.

Comment: One commenter preferred having the examples of the five hash algorithms included in the FIPS.

Response: The FIPS contains only the technical specifications for the hash algorithms. NIST will provide examples on its Web site for illustrative purposes only. Since NIST is providing a link to the Web site within the standard, finding the examples should be no more onerous than if they were included in the standard.

Comment: Add a footnote to describe the compromised security status of SHA–1.

Response: This type of information will be provided in NIST Special Publication 800–107; a reference to SP 800–107 is provided in the FIPS.

Authority: In accordance with the Information Technology Management Reform Act of 1996 (Pub. L. 104–106) and the Federal Information Security Management Act (FISMA) of 2002 (Pub. L. 107–347), the Secretary of Commerce is authorized to approve Federal Information Processing Standards (FIPS). NIST activities to develop computer security standards to protect Federal sensitive (unclassified) information systems are undertaken pursuant to specific responsibilities assigned to NIST by section 20 of the National Institute of Standards and Technology Act (5 U.S.C. 278g–3), as amended by section 303 of the Federal Information Security Management Act of 2002.

E.O. 12866: This notice has been determined not to be significant for the purposes of E.O. 12866.

Dated: October 9, 2008.

Patrick Gallagher,

Deputy Director.

[FR Doc. E8–24743 Filed 10–16–08; 8:45 am]

BILLING CODE 3510–13–P

DEPARTMENT OF COMMERCE

National Oceanic and Atmospheric Administration

Proposed Information Collection; Comment Request; Application and Reports for Scientific Research and Enhancement Permits Under the Endangered Species Act

AGENCY: National Oceanic and Atmospheric Administration (NOAA), Commerce.

ACTION: Notice.

SUMMARY: The Department of Commerce, as part of its continuing effort to reduce paperwork and respondent burden, invites the general public and other Federal agencies to take this opportunity to comment on proposed and/or continuing information collections, as required by the Paperwork Reduction Act of 1995.

DATES: Written comments must be submitted on or before December 16, 2008.

ADDRESSES: Direct all written comments to Diana Hynek, Departmental Paperwork Clearance Officer, Department of Commerce, Room 6625, 14th and Constitution Avenue, NW., Washington, DC 20230 (or via the Internet at *dHynek@doc.gov*).

FOR FURTHER INFORMATION CONTACT: Requests for additional information or copies of the information collection instrument and instructions should be directed to Gary Rule, (503) 230–5424 or *Gary.Rule@noaa.gov.*

SUPPLEMENTARY INFORMATION:

I. Abstract

The Endangered Species Act of 1973 (ESA; 16 U.S.C. 1531 *et seq.*) imposed prohibitions against the taking of endangered species. Section 10 of the ESA allows permits authorizing the taking of endangered species for research/enhancement purposes. The corresponding regulations established procedures for persons to apply for such permits. In addition, the regulations set forth specific reporting requirements for such permit holders. The regulations contain two sets of information collections: (1) Applications for research/enhancement permits, and (2) reporting requirements for permits issued.

The required information is used to evaluate the impacts of the proposed activity on endangered species, to make the determinations required by the ESA prior to issuing a permit, and to establish appropriate permit conditions. To issue permits under ESA Section 10(a)(1)(A), the National Marine

Fisheries Service (NMFS) must determine that (1) such exceptions were applied for in good faith, (2) if granted and exercised, will not operate to the disadvantage of such endangered species, and (3) will be consistent with the purposes and policy set forth in Section 2 of the ESA.

The currently approved application and reporting requirements are being revised to apply only to Pacific salmon and steelhead, as requirements regarding other species are being addressed in a separate information collection. Clarification of some of the instructions will also be provided, based on previous applicants' responses and submitted applications and reports.

II. Method of Collection

Respondents have a choice of either electronic or paper forms. Methods of submittal include e-mail of electronic forms, and mail and facsimile transmission of paper forms.

III. Data

OMB Control Number: 0648–0402.

Form Number: None.

Type of Review: Regular submission.

Affected Public: Non-profit institutions; State, local, or tribal government; business or other for-profit organizations.

Estimated Number of Respondents: 131.

Estimated Time per Response: Permit applications, 20 hours; permit modification requests and final reports, 10 hours; and annual reports, 5 hours.

Estimated Total Annual Burden Hours: 865.

Estimated Total Annual Cost to Public: $18,646.

IV. Request for Comments

Comments are invited on: (a) Whether the proposed collection of information is necessary for the proper performance of the functions of the agency, including whether the information shall have practical utility; (b) the accuracy of the agency's estimate of the burden (including hours and cost) of the proposed collection of information; (c) ways to enhance the quality, utility, and clarity of the information to be collected; and (d) ways to minimize the burden of the collection of information on respondents, including through the use of automated collection techniques or other forms of information technology.

Comments submitted in response to this notice will be summarized and/or included in the request for OMB approval of this information collection; they also will become a matter of public record.

Dated: October 6, 2008.

Gwellnar Banks,

Management Analyst, Office of the Chief Information Officer.

[FR Doc. E8–24028 Filed 10–16–08; 8:45 am]

BILLING CODE 3510–22–P

DEPARTMENT OF COMMERCE

National Oceanic and Atmospheric Administration

RIN 0648–XJ61

Atlantic Striped Bass Conservation Act; Atlantic Coastal Fisheries Cooperative Management Act; Magnuson-Stevens Fishery Conservation and Management Act; Executive Order 13449; Protection of Striped Bass and Red Drum Populations

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

ACTION: Notice of agency finding.

SUMMARY: This notice announces that NMFS has determined that the regulatory requirements of Executive Order (E.O.) 13449, ''Protection of Striped Bass and Red Drum Fish Populations'' are fulfilled. The E.O. authorized the Secretary of Commerce to revise regulations as appropriate, to include the prohibition of sale of striped bass and red drum caught within the U.S. exclusive economic zone (EEZ) of the Atlantic Ocean and the Gulf of Mexico. Upon review of existing regulations, NMFS has determined that current prohibitions on the possession and sale of striped bass and red drum caught in the EEZ achieve the intent of the E.O., thus no further action is warranted at this time.

ADDRESSES: Questions regarding this notice may be directed to: Alan Risenhoover, Director, Office of Sustainable Fisheries, 1315 East-West Highway, Silver Spring, MD 20910. Mark the outside envelope, ''Red Drum and Striped Bass.'' Copies of the E.O. are available online at: *http://www.nmfs.noaa.gov/sfa/state__federal/regulatory__activities.htm.*

FOR FURTHER INFORMATION CONTACT: Alan Risenhoover, 301–713–2334.

SUPPLEMENTARY INFORMATION:

Background

On October 20, 2007, the President signed E.O. 13449, which states it is the policy of the United States to conserve striped bass and red drum for the recreational, economic, and environmental benefit, based on sound science and in cooperation with State, territorial, local, and tribal governments. The E.O. contains a provision calling on the Secretary of Commerce to revise current regulations, as appropriate, to include a prohibition of sale of striped bass and red drum caught within the EEZ of the Atlantic and Gulf of Mexico. Striped bass and red drum are managed under the authorities of Magnuson-Stevens Fishery Conservation and Management Act (Magnuson-Stevens Act) and the provisions of the Atlantic Coastal Fisheries Cooperative Management Act (Atlantic Coastal Act) and the Atlantic Striped Bass Conservation Act (Striped Bass Act). At present, striped bass regulations at 50 CFR 697.7(b) already prohibit anyone from fishing for, harvesting, or possessing Atlantic striped bass in the EEZ, with the exception for possession of Atlantic striped bass near Block Island Sound, RI, and Montauk Point, NY (§ 697.7(b)(3)). Similarly, red drum regulations at 50 CFR 622.32(b)(2)(iii) (for red drum in the Gulf of Mexico), and § 697.7(f) (for red drum in the Atlantic Ocean, regulations which were formerly located at § 622.32(b)(3) and § 622.32(b)(4)(iii)) also prohibit harvest and possession of red drum from the EEZ. In addition to these species specific prohibitions, the general prohibitions at 50 CFR 600.725(a) state that it is unlawful to offer for sale or sell any fish taken or retained in violation of the Magnuson-Stevens Act or any other statute administered by NOAA.

NMFS published a final rule on October 6, 2008 (73 FR 58059) repealing the Atlantic Coast Red Drum Fishery Management Plan and transferring management authority of Atlantic red drum in the EEZ from the South Atlantic Fishery Management Council, under the Magnuson-Stevens Act to the Atlantic States Marine Fisheries Commission, under the Atlantic Coastal Act. Under this final rule, the current prohibitions remain in effect in a different section of the Code of Federal Regulations. Thus, this notice does not impact the final rule, nor are findings of this notice changed as a result of the final rule.

Findings

NMFS has determined that the current prohibitions on the possession of striped bass and red drum caught in the EEZ, in concert with the prohibition on sale of fish taken in violation of statutes administered by NOAA, constitutes fulfillment of the requirements of E.O. 13449.

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

Dated: October 10, 2008.

Samuel D. Rauch III,

Deputy Assistant Administrator For Regulatory Programs, National Marine Fisheries Service.

[FR Doc. E8–24795 Filed 10–16–08; 8:45 am]

BILLING CODE 3510–22–S

DEPARTMENT OF COMMERCE

National Oceanic and Atmospheric Administration

Draft NOAA Deep-Sea Coral and Sponge Research and Management Strategic Plan

AGENCY: Coral Reef Conservation Program, NOAA, Department of Commerce.

ACTION: Notice of Availability; request for comments.

SUMMARY: The National Oceanic and Atmospheric Administration (NOAA) publishes this notice to announce the availability of the Draft NOAA Deep-Sea Coral and Sponge Research and Management Strategic Plan for public comment. The Draft NOAA Deep-Sea Coral and Sponge Research and Management Strategic Plan identifies objectives, priorities and approaches that will guide NOAA's research, management, and international activities from Fiscal Year 2009 through 2013 as they relate to deep coral and sponge ecosystems.

DATES: Comments on this draft must be received no later than 5 p.m., Eastern Standard Time, January 15, 2009.

ADDRESSES: The Draft NOAA Deep-Sea Coral and Sponge Research and Management Strategic Plan will be available at the following location: *http://www.coralreef.noaa.gov/Library/Publications/deepcstratplan.pdf.*

The public is encouraged to submit comments on the Draft NOAA Deep-Sea Coral and Sponge Research and Management Strategic Plan electronically to: *deepseacoral.strategicplan.gov.* For commenters who do not have access to a computer, comments on the document may be submitted in writing to: NOAA National Marine Fisheries Service, c/o Karen Palmigiano, NOAA's Deep-Sea Coral Program, 1315 East-West Highway, Room 15828, Silver Spring, Maryland 20910.

FOR FURTHER INFORMATION CONTACT: Karen Palmigiano by mail at NOAA National Marine Fisheries Service, c/o Karen Palmigiano, NOAA's Deep-Sea Coral Program, 1315 East-West Highway, Room 15828, Silver Spring, Maryland 20910 or phone at 301–713–3459 or e-mail at *karen.palmigiano@noaa.gov.*

SUPPLEMENTARY INFORMATION: The National Oceanic and Atmospheric Administration (NOAA) announces that the Draft NOAA Deep-Sea Coral and Sponge Research and Management Strategic Plan is available for public review and comment. All interested parties are encouraged to provide comments. The Draft NOAA Deep-Sea Coral and Sponge Management and Strategic Plan is being issued for comment only and is not intended for interim use. Suggested changes will be considered for incorporation into the final version, where appropriate.

The Draft NOAA Deep-Sea Coral and Sponge Research and Management Strategic Plan identifies objectives, priorities, and approaches that will guide NOAA's research, management, and international activities from Fiscal Year 2009 through Fiscal Year 2013 as they relate to deep coral and sponge ecosystems. It is intended to integrate research and conservation needs and to be a flexible, evolving document that allows NOAA and its partners to address our growing understanding of management challenges and allow new issues and priorities to be addressed as appropriate. NOAA is soliciting review and comment from the public and all interested parties on the Draft Deep-Sea Coral and Sponge Research and Management Strategic Plan.

The Draft NOAA Deep-Sea Coral and Sponge Research and Management Strategic Plan is presented in three sections: (I) Exploration and Research; (II) Conservation and Management; and (III) International Cooperation.

Section I identifies the role of research in management, including NOAA's priorities and objectives for research and exploration of deep-sea coral and sponge ecosystems and anticipated deliverables for each objective. Section II provides objectives and approaches that NOAA will undertake to enhance protection of deep-sea coral and sponge communities working with the Councils, other Federal agencies and interested partners. NOAA's strategy for managing deep-sea coral and sponge ecosystems is centered on the authority provided to NOAA through the Magnuson-Stevens Fisheries Conservation and Management Act as amended January 12, 2007, and the National Marine Sanctuary Act. Section III describes NOAA's participation in international activities to protect and/or conserve deep-sea coral and sponge ecosystems.

NOAA welcomes all comments on the content of the Draft NOAA Deep-Sea Coral and Sponge Research and Management Strategic Plan. We also request commenters to acknowledge areas where more language may be needed and to provide specific language for those areas.

Using the format guidance described below will facilitate the processing of reviewer comments and assure that all comments are appropriately considered; however, all comments received will be considered. Please format your comments into the following three sections: (1) Background information about yourself (optional); (2) overview or general comments; and (3) specific comments. Section one may include the following background information about yourself on the first page of your comments: Your name(s), organization(s), area(s) of expertise, and contact information such as mailing address, telephone and fax numbers, and e-mail address(s). Section two should consist of overview comments, and each should be numbered. Section three should consist of comments that are specific to particular pages, paragraphs, or lines in the document, and each comment should identify the page and line numbers to which it applies. Please number and print identifying information at the top of all pages.

Public comments may be submitted from October 17, 2008, through January 15, 2009.

Dated: October 2, 2008.

David Kennedy,

Director, Ocean and Coastal Resource Management.

[FR Doc. E8–24469 Filed 10–16–08; 8:45 am]

BILLING CODE 3510–22–M

DEPARTMENT OF COMMERCE

National Oceanic and Atmospheric Administration

RIN 0648–XL14

Endangered and Threatened Species; Take of Anadromous Fish

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

ACTION: Notice of decision and availability for permit 13537.

SUMMARY: This notice advises the public that a scientific research permit has been issued to the Washington Department of Fish and Wildlife, pursuant of the Endangered Species Act of 1973 (ESA), and that the decision documents are available upon request.

DATES: Permit 13537 was issued on September 23, 2008, subject to certain conditions set forth therein. The permit expires on December 31, 2017.

ADDRESSES: Requests for copies of the decision documents or any of the other associated documents should be directed to the Salmon Recovery Division, NOAA's National Marine Fisheries Service, 1201 N.E. Lloyd Blvd., Suite 1100, Portland, OR 97232. The documents are also available on the Internet at *www.nwr.noaa.gov*.

FOR FURTHER INFORMATION CONTACT: Rich Turner, Portland, OR, at phone number: (503) 736–4737, e-mail: *rich.turner@noaa.gov*

SUPPLEMENTARY INFORMATION: This notice is relevant to the following species and evolutionarily significant units (ESUs):

Chinook salmon (*Oncorhynchus tshawytscha*): threatened Lower Columbia River

Coho salmon (*Oncorhynchus kisutch*): threatened Lower Columbia River

Chum salmon (*Oncorhynchus keta*): threatened Columbia River.

Dated: October 14, 2008.

Angela Somma,

Chief, Endangered Species Division, Office of Protected Resources, National Marine Fisheries Service.

[FR Doc. E8–24799 Filed 10–16–08; 8:45 am]

BILLING CODE 3510–22–S

DEPARTMENT OF COMMERCE

National Oceanic and Atmospheric Administration

RIN 0648–XL13

Endangered and Threatened Species; Take of Anadromous Fish

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

ACTION: Notice, issuance of permit.

SUMMARY: Notice is hereby given that East Bay Municipal Utility District (EBMUD), 1 Winemasters Way, Lodi, CA 95240, has been issued a permit to take Central Valley, California steelhead (*Oncorhynchus mykiss*) for purposes of scientific research.

ADDRESSES: The permit 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; and NMFS, Protected Resources Division, 650 Capitol Mall, Suite 8–300, Sacramento, CA 95814–4706; phone (916) 930–3600; fax (916) 930–3629.

FOR FURTHER INFORMATION CONTACT: Shirley Witalis, phone (916) 930–3606.

SUPPLEMENTARY INFORMATION: On June 27, 2008, notice was published in the **Federal Register** (73 FR 36494), that a request for a scientific research permit to take Central Valley steelhead had been submitted by the above-named organization. The requested permit has been issued 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 parts 222–226). Researchers will annually capture, tag, and release adult and juvenile Central Valley steelhead in the Lower Mokelumne River through various sampling methods described in the permit application (e.g., trapping, seining, electrofishing, etc.). The purpose of the study is to conduct monitoring and research of anadromous and resident fishes to measure the success of the Lower Mokelumne River Restoration Program and to determine if the modifications of the Lower Mokelumne River Project are appropriate for conserving fish and wildlife resources in the Lower Mokelumne River. This permit also authorizes EBMUD lethal take of wild and hatchery adult and juvenile Central Valley steelhead in the Lower Mokelumne River for purposes of otolith extraction and analysis, to measure the expression of resident life history among natural and hatchery (*O. mykiss*) and assist the development of the Mokelumne River Hatchery steelhead Hatchery and Genetic Management Plan. The permit is issued for 5 years.

Issuance of this permit, 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 any endangered or threatened species, and (3) is consistent with the purposes and policies set forth in section 2 of the ESA.

Dated: October 14, 2008.

Angela Somma,

Chief, Endangered Species Division, Office of Protected Resources, National Marine Fisheries Service.

[FR Doc. E8–24800 Filed 10–16–08; 8:45 am]

BILLING CODE 3510–22–S

DEPARTMENT OF COMMERCE

National Oceanic and Atmospheric Administration

Federal Consistency Appeal by the Northeast Massachusetts Mosquito Control and Wetlands Management District

AGENCY: National Oceanic and Atmospheric Administration (NOAA), U.S. Department of Commerce.

ACTION: Notice of appeal.

SUMMARY: This announcement provides notice that the Northeast Massachusetts Mosquito Control and Wetlands Management District (the District) has filed an administrative appeal with the U.S. Department of Commerce (the Department), asking that the Department override an objection by the Massachusetts Office of Coastal Zone Management (Massachusetts). Massachusetts objects to the District's proposed Open Marsh Water Management (OMWM) program.

ADDRESSES: Materials from the appeal record will be available at the NOAA Office of General Counsel for Ocean Services, 1305 East-West Highway, SSMC4, Room 6111, Silver Spring, Maryland 20910, and on the following Web site: *http://www.ogc.doc.gov/czma.htm.*

FOR FURTHER INFORMATION CONTACT: Jamon Bollock, Attorney-Advisor, NOAA Office of General Counsel for Ocean Services, at (301) 713–7393 or *gcos.inquiries@noaa.gov.*

SUPPLEMENTARY INFORMATION:

I. Notice of Appeal

On September 17, 2008, the District filed a notice of appeal with the Department, pursuant to the Coastal Zone Management Act of 1972 (CZMA), 16 U.S.C. 1451 et seq., and implementing regulations found at 15 CFR Part 930, Subpart H. The District appealed an objection by Massachusetts to the District's proposed OMWM program, which is a mosquito abatement practice that involves increasing access of predacious fish to mosquito breeding habitat by converting vegetated salt marsh areas into larger, deeper pools of standing water connected through a network of ditches.

Under the CZMA, the Department may override Massachusetts's objection on grounds that the project is consistent with the objectives or purposes of the CZMA or otherwise necessary in the interest of national security. To make the determination that the proposed activity is ''consistent with the objectives or purposes of the CZMA,''

the Department must find that: (1) The proposed activity furthers the national interest as articulated in sections 302 or 303 of the CZMA, in a significant or substantial manner; (2) the adverse effects of the proposed activity do not outweigh its contribution to the national interest, when those effects are considered separately or cumulatively; and (3) no reasonable alternative is available that would permit the activity to be conducted in a manner consistent with enforceable policies of the applicable coastal management program. 15 CFR 930.121.

II. Opportunity for Federal Agency and Public Comment and Public Hearing

Pursuant to NOAA regulations, 15 CFR 930.128, the public and interested Federal Agencies may submit any comment on this appeal from January 12 to February 11, 2009. All comments should be directed in writing to the NOAA Office of General Counsel for Ocean Services, 1305 East-West Highway, SSMC4, Room 6111, Silver Spring, Maryland 20910, or via e-mail to *gcos.inquiries@noaa.gov.*

Federal regulations also allow for a public hearing of this appeal, on the initiative of the Secretary of Commerce or upon written request. A request for public hearing must be filed with the Department within 30 days of the date of publication of this notice in the **Federal Register**. Such requests should be directed, in writing, to the following address: Jamon Bollock, Attorney-Advisor, NOAA Office of General Counsel, 1305 East-West Highway, SSMC4, Room 6111, Silver Spring, Maryland 20910.

III. Availability of Appeal Documents

NOAA intends to provide the public with access to all publicly available materials and related documents comprising the appeal record during business hours at the NOAA Office of General Counsel for Ocean Services and on the following Web site: *http://www.ogc.doc.gov/czma.htm.*

For additional information about this appeal, please contact Jamon Bollock, Attorney-Advisor, NOAA Office of General Counsel, at (301) 713–7393 or *gcos.inquiries@noaa.gov.*

Dated: October 14, 2008.

Joel La Bissonniere,

Assistant General Counsel for Ocean Services, NOAA.

[FR Doc. E8–24788 Filed 10–16–08; 8:45 am]

BILLING CODE 3510–08–P

DEPARTMENT OF COMMERCE

National Oceanic and Atmospheric Administration

RIN: 0648–XL31

Mid-Atlantic Fishery Management Council; Public Meeting

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

ACTION: Notice of public meeting.

SUMMARY: The Mid-Atlantic Fishery Management Council (MAFMC) Dogfish Monitoring Committee will hold a public meeting.

DATES: The meeting will be held on Friday, October 31, 2008, from 1 p.m. to 3 p.m.

ADDRESSES: The meeting will be held via conference call originating from the MAFMC office. The address for the MAFMC office is provided below. For those who cannot attend a call-in option is available. The call-in number is 1–866–422–9305. After dialing in, participants will be prompted to enter a ''participant code''. That code is: 863 783 105 4. Members of the public are invited to listen in, however, the function of the meeting will be a technical review of scientific information. As such, the extent to which public remarks will be allowed will be limited by the moderator.

Council address: Mid-Atlantic Fishery Management Council, 300 S. New Street, Room 2115, Dover, DE 19904; telephone: (302) 674–2331.

FOR FURTHER INFORMATION CONTACT: Daniel T. Furlong, Executive Director, Mid-Atlantic Fishery Management Council, 300 S. New Street, Room 2115, Dover, DE 19904; telephone: (302) 674–2331, extension 19.

SUPPLEMENTARY INFORMATION: The purpose of this meeting is to review the ASMFC Technical Committee's recommendations for annual catch limits and accountability measures regarding specifying quotas and management measures for the upcoming 2009 fishing year for spiny dogfish. Management measures that will be discussed may include, but not necessarily be limited to, quotas and daily landings limits. Multiple-year management measures for fishing years 2010 and 2011 may also be addressed.

Although non-emergency issues not contained in this agenda may come before this group for discussion, in accordance with the Magnuson-Stevens Fishery Conservation and Management Act (Magnuson-Stevens Act), those issues may not be the subject of formal action during this meeting. Actions will be restricted to those issues specifically identified in this notice and any issues arising after publication of this notice that require emergency action under Section 305 (c) of the Magnuson-Stevens Act, provided the public has been notified of the Council's intent to take final action to address the emergency.

Dated: October 14, 2008.

Tracey L. Thompson,

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

[FR Doc. E8–24715 Filed 10–16–08; 8:45 am]

BILLING CODE 3510–22–S

DEPARTMENT OF COMMERCE

National Oceanic and Atmospheric Administration

RIN: 0648–XL32

New England Fishery Management Council; Public Meeting

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

ACTION: Notice of a public meeting.

SUMMARY: The New England Fishery Management Council (Council) is scheduling a public meeting of its Scallop Committee in November, 2008 to consider actions affecting New England fisheries in the exclusive economic zone (EEZ). Recommendations from this group will be brought to the full Council for formal consideration and action, if appropriate.

DATES: This meeting will be held on Monday, November 3, 2008 at 9:30 a.m.

ADDRESSES: This meeting will be held at the Hilton Garden Inn, One Thurber Street, Warwick, RI 02886; telephone: (401) 734–9600; fax: (401) 734–9700

Council address: New England Fishery Management Council, 50 Water Street, Mill 2, Newburyport, MA 01950.

FOR FURTHER INFORMATION CONTACT: Paul J. Howard, Executive Director, New England Fishery Management Council; telephone: (978) 465–0492.

SUPPLEMENTARY INFORMATION: The committee will review analyses prepared for Council response to Section 7 Endangered Species Act Consultation for the Scallop Fishery Management Plan (Biological Opinion) and discuss potential management measures to comply with findings of biological opinion that would be developed in Framework Adjustment 21. The committee will also review measures already under consideration

and develop any new alternatives needed to complete the range of options under consideration for Amendment 15. The primary management topic left to develop is the implementation of annual catch limits (ACLs). Other alternatives that may be revisited or revised at this meeting include: measures to rationalize the limited access scallop fishery; revision of the overfishing definition; modifications to specific aspects of the general category limited entry program implemented by Amendment 11; measures to address essential fish habitat (EFH) closed areas in the Scallop FMP if the EFH Omnibus Amendment is delayed; alternatives to improve the research set-aside program; and modifying the start date of the scallop fishing year. The committee may discuss other topics at their discretion.

Special Accommodations

This meeting is physically accessible to people with disabilities. Requests for sign language interpretation or other auxiliary aids should be directed to Paul J. Howard, Executive Director, at (978) 465–0492, at least 5 days prior to the meeting date.

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

Dated: October 14, 2008.

Tracey L. Thompson,

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

[FR Doc. E8–24716 Filed 10–16–08; 8:45 am]

BILLING CODE 3510–22–S

DEPARTMENT OF COMMERCE

Patent and Trademark Office

Fastener Quality Act Insignia Recordal Process

ACTION: Proposed collection; comment request.

SUMMARY: The United States Patent and Trademark Office (USPTO), as part of its continuing effort to reduce paperwork and respondent burden, invites the general public and other Federal agencies to take this opportunity to comment on the extension of a continuing information collection, as required by the Paperwork Reduction Act of 1995, Public Law 104–13 (44 U.S.C. 3506(c)(2)(A)).

DATES: Written comments must be submitted on or before December 16, 2008.

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

- *E-mail: Susan.Fawcett@uspto.gov.* Include ''0651–0028 comment'' in the subject line of the message.
- *Fax:* 571–273–0112, marked to the attention of Susan K. Fawcett.
- *Mail:* Susan K. Fawcett, Records Officer, Office of the Chief Information Officer, Customer Information Services Group, Public Information Services Division, United States Patent and Trademark Office, P.O. Box 1451, Alexandria, VA 22313–1450.
- *Federal Rulemaking Portal: http://www.regulations.gov.*

FOR FURTHER INFORMATION CONTACT: Requests for additional information should be directed to the attention of Sharon R. Marsh, Deputy Commissioner for Trademark Examination Policy, Office of the Commissioner for Trademarks, U.S. Patent and Trademark Office, P.O. Box 1451, Alexandria, VA 22313–1451; by telephone at 571–272–7140; or by e-mail at *Sharon.Marsh@uspto.gov.*

SUPPLEMENTARY INFORMATION:

I. Abstract

Under Section 5 of the Fastener Quality Act of 1999 (FQA), 15 U.S.C. 5401 *et seq.*, certain industrial fasteners must bear an insignia identifying the manufacturer. The manufacturer must record this fastener insignia with the United Stated Patent and Trademark Office (USPTO). The procedures for the recordal of fastener insignia under the FQA are set forth in 15 CFR 280.300 *et seq.*

Manufacturers of certain fasteners are required to record their insignia. The purpose of this collection is to ensure that certain fasteners can be traced to their manufacturers. It is mandatory for manufacturers of fasteners covered by the FQA to submit an application to the USPTO for recordal of an insignia on the Fastener Insignia Register.

The insignia may be either a unique alphanumeric designation that the USPTO will issue upon request, or a trademark that is either registered at the USPTO or is the subject of an application to obtain a registration. After a manufacturer submits a complete application for recordal, the USPTO issues a Certificate of Recordal. These certificates remain active for five years. Applications to maintain the certificates must be filed within six months of the expiration date or upon payment of an additional surcharge, within six months following the expiration date. If a recorded alphanumeric designation is assigned by the manufacturer, the designation becomes ''inactive,'' and the new owner must submit an application to reactivate the designation within six months of assignment. If the recordal is based on a trademark application or registration, and that registration is assigned, the recordal becomes ''inactive'' and cannot be reactivated. Instead, the new owner of the trademark application or registration must apply for a new recordal. Manufacturers who record insignia must notify the USPTO of any changes of address.

This information collection includes one form, the Application for Recordal of Insignia or Renewal/Reactivation of Recordal Under the Fastener Quality Act (PTO–1611), which provides manufacturers with a convenient way to submit a request for the recordal of a fastener insignia or to renew or reactivate an existing Certificate of Recordal. Use of Form PTO–1611 is not mandatory, and applicants may instead prepare requests for recordal using their own format. In October of 2007 OMB approved a Change Worksheet to update the design of Form PTO–1611 and to include instructions for submitting the completed form by electronic mail.

The public uses this information collection to comply with the insignia recordal provisions of the FQA. The USPTO uses the information in this collection to maintain the Fastener Insignia Register, which is open to public inspection. The public may download the Fastener Insignia Register from the USPTO Web site or purchase printed copies from the USPTO.

II. Method of Collection

By mail, facsimile, hand delivery, or electronically to the USPTO.

III. Data

OMB Number: 0651–0028.

Form Number(s): PTO–1611.

Type of Review: Extension of a currently approved collection.

Affected Public: Businesses or other for-profits.

Estimated Number of Respondents: 130 responses per year.

Estimated Time per Response: The USPTO estimates that it will take the public approximately 15 minutes (0.25 hours) to gather the necessary information, prepare the form, and submit the request for recordal or renewal of a fastener insignia to the USPTO.

Estimated Total Annual Respondent Burden Hours: 33 hours per year.

Estimated Total Annual Respondent Cost Burden: $3,300 per year. The USPTO expects that the information in this collection will be prepared by paraprofessionals at an estimated rate of $100 per hour. Therefore, the USPTO estimates that the respondent cost burden for this collection will be $3,300 per year.

Item	Estimated time for response	Estimated annual responses	Estimated annual burden hours
Application for Recordal of Insignia or Renewal/Reactivation of Recordal Under the Fastener Quality Act (PTO–1611).	15 minutes	130	33
Total		130	33

Estimated Total Annual Non-hour Respondent Cost Burden: $2,845. There are no capital start-up costs, recordkeeping costs, or maintenance costs associated with this information collection. However, this collection does have annual (non-hour) costs in the form of filing fees and postage costs.

Under 37 CFR 2.7, the filing fee for a recordal of fastener insignia is $20, whether it be a new recordal, renewal, or a request for reactivation. The USPTO estimates that it will receive 125 new recordals or renewals of fastener insignia per year for a total of $2,500 in filing fees. If a manufacturer submits a renewal after the expiration date but within six months of that date, then the manufacturer must pay an additional $20 late renewal surcharge. The USPTO estimates that approximately 10 of the estimated 125 responses per year will be late renewals that incur the surcharge, for a total of $200 in additional charges. If a manufacturer fails to renew or assigns an alphanumeric designation assigned by the USPTO to a new owner, the current owner may submit a request for reactivation of that same alphanumeric designation for a fee of $20. The USPTO estimates approximately 5 reactivation requests will be received per year, for a total of $100. Therefore, the total estimated filing costs for this collection will be $2,800 per year.

The public may submit the information for this collection to the USPTO by mail through the United States Postal Service. The USPTO estimates that approximately 60 of the 130 responses per year will be submitted to the USPTO by mail at an average first-class postage cost of 75 cents per response, for a total postage cost of $45 per year.

The total non-hour respondent cost burden for this collection in the form of filing fees ($2,800) and postage costs ($45) is estimated to be $2,845 per year.

IV. Request for Comments

Comments are invited on: (a) Whether the proposed collection of information is necessary for the proper performance of the functions of the agency, including whether the information shall have practical utility; (b) the accuracy of the agency's estimate of the burden (including hours and cost) of the proposed collection of information; (c) ways to enhance the quality, utility, and clarity of the information to be collected; and (d) ways to minimize the burden of the collection of information on respondents, *e.g.* , the use of automated collection techniques or other forms of information technology.

Comments submitted in response to this notice will be summarized or included in the request for OMB approval of this information collection; they also will become a matter of public record.

Dated: October 10, 2008.

Susan K. Fawcett,

Records Officer, USPTO, Office of the Chief Information Officer, Customer Information Services Group, Public Information Services Division.

[FR Doc. E8–24680 Filed 10–16–08; 8:45 am]

BILLING CODE 3510–16–P

DEPARTMENT OF DEFENSE

Office of the Secretary

[Transmittal Nos. 08–96]

36(b)(1) Arms Sales Notification

AGENCY: Department of Defense, Defense Security Cooperation Agency.

ACTION: Notice.

SUMMARY: The Department of Defense is publishing the unclassified text of a section 36(b)(1) arms sales notification. This is published to fulfill the requirements of section 155 of Public Law 104–164 dated 21 July 1996.

FOR FURTHER INFORMATION CONTACT: Ms. B. English, DSCA/DBO/CFM, (703) 601–3740.

The following is a copy of a letter to the Speaker of the House of Representatives, Transmittals 08–96 with attached transmittal, policy justification, Sensitivity of Technology, and Section 620C(d).

Dated: October 7, 2008.

Patricia L. Toppings,

OSD Federal Register Liaison Officer, Department of Defense.

BILLING CODE 5001–06–M

DEFENSE SECURITY COOPERATION AGENCY
2800 DEFENSE PENTAGON
WASHINGTON, DC 20301-2800

SEP 26 2008

In reply refer to:
USP011118-08

The Honorable Nancy Pelosi
Speaker of the House of Representatives
Washington, DC 20515-6501

Dear Madam Speaker:

Pursuant to the reporting requirements of Section 36(b)(1) of the Arms Export Control Act, as amended, we are forwarding herewith Transmittal No. 08-96, concerning the Department of the Air Force's proposed Letters(s) of Offer and Acceptance to Turkey for defense articles and services estimated to cost $157 million. After this letter is delivered to your office, we plan to issue a press statement to notify the public of this proposed sale.

You will also find attached a certification as required by Section 620C(d) of the Foreign Assistance Act of 1961, as amended, that this action is consistent with the principles set forth in subsection 620C(b) of that Act as codified in section 2373 of title 22, United States Code.

Sincerely,

Jeffrey A. Wieringa
Vice Admiral, USN
Director

Enclosures:
1. Transmittal
2. Policy Justification
3. Sensitivity of Technology
4. Section 620C(d)

Same ltr to:

House	Senate
Committee on Foreign Affairs	Committee on Foreign Relations
Committee on Armed Services	Committee on Armed Services
Committee on Appropriations	Committee on Appropriations

Transmittal No. 08-96

Notice of Proposed Issuance of Letter of Offer
Pursuant to Section 36(b)(1)
of the Arms Export Control Act, as amended

(i) **Prospective Purchaser:** Turkey

(ii) **Total Estimated Value:**

Major Defense Equipment*	$144 million
Other	$ 13 million
TOTAL	$157 million

(iii) **Description and Quantity or Quantities of Articles or Services under Consideration for Purchase:** 107 AIM-120C-7 Advanced Medium Range Air-to-Air Missiles (AMRAAM), 2 Missile Guidance Sections, missile containers, spare and repair parts, support and test equipment, publications and technical documentation, personnel training and training equipment, U.S. Government and contractor engineering, technical and logistics support services, and other related elements of logistical and program support.

(iv) **Military Department:** Air Force (YAE)

(v) **Prior Related Cases, if any:** none.

(vi) **Sales Commission, Fee, etc., Paid, Offered, or Agreed to be Paid:** none

(vii) **Sensitivity of Technology Contained in the Defense Article or Defense Services Proposed to be Sold:** See Annex attached.

(viii) **Date Report Delivered to Congress:** SEP 26 2008

* as defined in Section 47(6) of the Arms Export Control Act.

POLICY JUSTIFICATION

Turkey – AIM-120C-7 AMRAAM Missiles

The Government of Turkey has requested a possible sale of 107 AIM-120C-7 Advanced Medium Range Air-to-Air Missiles (AMRAAM), 2 Missile Guidance Sections, missile containers, spare and repair parts, support and test equipment, publications and technical documentation, personnel training and training equipment, U.S. Government and contractor engineering, technical and logistics support services, and other related elements of logistical and program support. The estimated cost is $157 million.

Turkey is a partner of the United States in ensuring peace and stability in the region. It is vital to the U.S. national interest to assist our North Atlantic Treaty Organization (NATO) Ally in developing and maintaining a strong and ready self-defense capability that will contribute to an acceptable military balance in the area. This proposed sale is consistent with those objectives.

Turkey needs these capabilities for self defense modernization, regional security, and U.S. and NATO interoperability. This modernization will enhance the Turkish Air Force's ability to defend Turkey while patrolling the nation's extensive coastline and borders to protect against future threats. The proposed sale will also enhance Turkey's ability to contribute to Global War on Terrorism efforts and NATO operations. The Turkish Air Force will have no difficulty absorbing these missiles into its armed forces.

The prime contractor will be Raytheon Electronic and Missile Systems of Tucson, Arizona. There are no known offset agreements proposed in connection with this potential sale.

Implementation of this sale will not require the assignment of any additional U. S. Government personnel in-country.

There will be no adverse impact on U.S. defense readiness as a result of this proposed sale.

Transmittal No. 08-96

Notice of Proposed Issuance of Letter of Offer
Pursuant to Section 36(b)(1)
of the Arms Export Control Act, as amended

Annex
Item No. vii

(vii) Sensitivity of Technology:

1. The AIM-120C-7 Advanced Medium Range Air-to-Air Missile (AMRAAM) is a new generation air-to-air missile. The AIM-120C-7 AMRAAM hardware, including the Missile Guidance Section, is classified Confidential. State-of-the-art technology is used in the missile to provide it with unique beyond-visual-range capability. Significant AIM-120C-7 features include a target detection device with embedded electronic countermeasures, an electronics unit within the guidance section that performs all radar signal processing, mid-course and terminal guidance, flight control, target detection and warhead burst point determination. Anti-tampering security measures have been incorporated into the AIM-120C-7 to prevent exploitation of the AMRAAM software.

2. If a technologically advanced adversary were to obtain knowledge of the specific hardware and software elements, the information could be used to develop countermeasures which might reduce weapon systems effectiveness or could be used in the development of a system with similar or advanced capabilities.

CERTIFICATION PURSUANT TO SECTION 620C(d) OF THE FOREIGN ASSISTANCE ACT OF 1961, AS AMENDED

Pursuant to Section 620C(d) of the Foreign Assistance Act of 1961, as amended (the Act), Executive Order 12163 and State Department Delegation of Authority No. 145, I hereby certify that the sale of defense articles and defense services, to include 107 AIM-120C-7 Advanced Medium Range Air-to-Air Missiles (AMRAAM), 2 Missile Guidance Sections, missile containers, spare and repair parts, logistical and program support to the Government of Turkey is consistent with the principles set forth in Section 620C(b) of the Act.

This certification will be made part of the notification to Congress in accordance with Section 36(b) of the Arms Export Control Act, as amended, regarding the proposed sale of the above-named articles and services and is based on the justification accompanying said notification, of which said justification constitutes a full explanation.

John Rood
Acting Under Secretary of State
For Arms Control and
International Security

[FR Doc. E8–24431 Filed 10–16–08; 8:45 am]
BILLING CODE 5001–06–C

DEPARTMENT OF DEFENSE

Office of the Secretary

[Transmittal Nos. 08–90]

36(b)(1) Arms Sales Notification

AGENCY: Department of Defense, Defense Security Cooperation Agency.

ACTION: Notice.

SUMMARY: The Department of Defense is publishing the unclassified text of a section 36(b)(1) arms sales notification. This is published to fulfill the requirements of section 155 of Public Law 104–164 dated 21 July 1996.

FOR FURTHER INFORMATION CONTACT: Ms. B. English, DSCA/DBO/CFM, (703) 601–3740.

The following is a copy of a letter to the Speaker of the House of Representatives, Transmittals 08–90 with attached transmittal, and policy justification.

Dated: October 7, 2008.

Patricia L. Toppings,

OSD Federal Register Liaison Officer, Department of Defense.

BILLING CODE 5001–06–M

DEFENSE SECURITY COOPERATION AGENCY
2800 DEFENSE PENTAGON
WASHINGTON, DC 20301-2800

SEP 26 2008

In reply refer to:
USP010414-08

The Honorable Nancy Pelosi
Speaker of the House of Representatives
Washington, DC 20515-6501

Dear Madam Speaker:

Pursuant to the reporting requirements of Section 36(b)(1) of the Arms Export Control Act, as amended, we are forwarding herewith Transmittal No. 08-90, concerning the Department of the Air Force's proposed Letter(s) of Offer and Acceptance to Saudi Arabia for defense articles and services estimated to cost $145 million. After this letter is delivered to your office, we plan to issue a press statement to notify the public of this proposed sale.

Sincerely,

Jeffrey A. Wieringa
Vice Admiral, USN
Director

Enclosures:
1. Transmittal
2. Policy Justification

Same ltr to:

House	Senate
Committee on Foreign Affairs	Committee on Foreign Relations
Committee on Armed Services	Committee on Armed Services
Committee on Appropriations	Committee on Appropriations

Transmittal No. 08-90

Notice of Proposed Issuance of Letter of Offer
Pursuant to Section 36(b)(1)
of the Arms Export Control Act, as amended

(i) **Prospective Purchaser:** Saudi Arabia

(ii) **Total Estimated Value:**

Major Defense Equipment*	$ 0 million
Other	$145 million
TOTAL	$145 million

(iii) **Description and Quantity or Quantities of Articles or Services under Consideration for Purchase:** equipment upgrade of 17 AN/FPS-117 radars, which includes installation and checkout, engineering, calibration, reintegration, testing, support equipment, spare and repair parts, personnel training, publications and technical data, U.S. Government and contractor technical assistance and other related elements of logistics support.

(iv) **Military Department:** Air Force (DAB)

(v) **Prior Related Cases, if any:** none

(vi) **Sales Commission, Fee, etc., Paid, Offered, or Agreed to be Paid:** none

(vii) **Sensitivity of Technology Contained in the Defense Article or Defense Services Proposed to be Sold:** none

(viii) **Date Report Delivered to Congress:** SEP 26 2008

* as defined in Section 47(6) of the Arms Export Control Act.

POLICY JUSTIFICATION

Saudi Arabia – AN/FPS-117 Long Range Radar Upgrade

The Government of Saudi Arabia has requested a possible equipment upgrade of 17 AN/FPS-117 radars, which includes installation and checkout, engineering, calibration, reintegration, testing, support equipment, spare and repair parts, personnel training, publications and technical data, U.S. Government and contractor technical assistance and other related elements of logistics support. The estimated cost is $145 million.

This proposed sale will contribute to the foreign policy and national security of the United States by helping to improve the security of a friendly country which has been and continues to be an important force for political stability and economic progress in the Middle East.

The proposed upgrade of this radar will extend the operational life of the existing radars and will lower operation and maintenance requirements and lower cost by reducing the number of line replaceable units.

The proposed sale of this equipment and support will not affect the basic military balance in the region.

The prime contractor will be Lockheed-Martin Aeronautics Company of Syracuse, New York. There are no known offset agreements proposed in connection with this potential sale.

Implementation of this sale will involve up to six U.S. government and four contractor personnel to participate in program reviews at the contractor's facility every six months. There will be approximately two contractors in Saudi Arabia providing technical assistance and routine maintenance on a full-time basis until first installation and checkout.

There will be no adverse impact on U.S. defense readiness as a result of this proposed sale.

[FR Doc. E8–24452 Filed 10–16–08; 8:45 am]
BILLING CODE 5001–06–C

DEPARTMENT OF DEFENSE

Office of the Secretary

[Transmittal Nos. 08–88]

36(b)(1) Arms Sales Notification

AGENCY: Department of Defense, Defense Security Cooperation Agency.

ACTION: Notice.

SUMMARY: The Department of Defense is publishing the unclassified text of a section 36(b)(1) arms sales notification. This is published to fulfill the requirements of section 155 of Public Law 104–164 dated 21 July 1996.

FOR FURTHER INFORMATION CONTACT: Ms. B. English, DSCA/DBO/CFM, (703) 601–3740.

The following is a copy of a letter to the Speaker of the House of Representatives, Transmittals 08–88 with attached transmittal, policy justification, and Sensitivity of Technology.

Dated: October 7, 2008.

Patricia L. Toppings,

OSD Federal Register Liaison Officer, Department of Defense.

BILLING CODE 5001–06–M

DEFENSE SECURITY COOPERATION AGENCY
2800 DEFENSE PENTAGON
WASHINGTON, DC 20301-2800

SEP 26 2008

In reply refer to:
USP010144-08

The Honorable Nancy Pelosi
Speaker of the House of Representatives
Washington, DC 20515-6501

Dear Madam Speaker:

Pursuant to the reporting requirements of Section 36(b)(1) of the Arms Export Control Act, as amended, we are forwarding herewith Transmittal No. 08-88, concerning the Department of the Navy's proposed Letter(s) of Offer and Acceptance to Saudi Arabia for defense articles and services estimated to cost $164 million. After this letter is delivered to your office, we plan to issue a press statement to notify the public of this proposed sale.

Sincerely,

Jeffrey A. Wieringa
Vice Admiral, USN
Director

Enclosures:
1. **Transmittal**
2. **Policy Justification**
3. **Sensitivity of Technology**

Same ltr to:

House	Senate
Committee on Foreign Affairs	Committee on Foreign Relations
Committee on Armed Services	Committee on Armed Services
Committee on Appropriations	Committee on Appropriations

Transmittal No. 08-88

Notice of Proposed Issuance of Letter of Offer
Pursuant to Section 36(b)(1)
of the Arms Export Control Act, as amended

(i) **Prospective Purchaser:** Saudi Arabia

(ii) **Total Estimated Value:**

Major Defense Equipment*	$149 million
Other	$ 15 million
TOTAL	$164 million

(iii) **Description and Quantity or Quantities of Articles or Services under Consideration for Purchase:** 250 All-Up-Round AIM-9X SIDEWINDER Missiles, 84 AIM-9X SIDEWINDER Captive Air Training Missiles (CATMs), 12 AIM-9X SIDEWINDER Dummy Air Training Missiles (DATMs), missile containers, missile modifications, test sets and support equipment, spare and repair parts, publications and technical data, maintenance, personnel training and training equipment, contractor engineering and technical support services, and other related elements of logistics support.

(iv) **Military Department:** Navy (ABQ)

(v) **Prior Related Cases, if any:** none

(vi) **Sales Commission, Fee, etc., Paid, Offered, or Agreed to be Paid:** none

(vii) **Sensitivity of Technology Contained in the Defense Article or Defense Services Proposed to be Sold:** See Annex attached

(viii) **Date Report Delivered to Congress:** SEP 26 2008

* as defined in Section 47(6) of the Arms Export Control Act.

POLICY JUSTIFICATION

Saudi Arabia – AIM-9X SIDEWINDER Missiles

The Government of Saudi Arabia has requested a possible sale of 250 All-Up-Round AIM-9X SIDEWINDER Missiles, 84 AIM-9X SIDEWINDER Captive Air Training Missiles (CATMs), 12 AIM-9X SIDEWINDER Dummy Air Training Missiles (DATMs), missile containers, missile modifications, test sets and support equipment, spare and repair parts, publications and technical data, maintenance, personnel training and training equipment, contractor engineering and technical support services, and other related elements of logistics support. The estimated cost is $164 million.

This proposed sale will contribute to the foreign policy and national security of the United States by helping to improve the security of a friendly country which has been and continues to be an important force for political stability and economic progress in the Middle East.

The sale of the AIM-9X SIDEWINDER missile system will significantly enhance the Royal Saudi Arabia Air Force's current air-to-air intercept capability. Saudi Arabia will have no difficulty absorbing these additional missiles into its armed forces.

The prime contractor will be Raytheon Missile Systems Company of Tucson, Arizona. There are no known offset agreements proposed in connection with this potential sale.

Implementation of this proposed sale will require temporary travel to the Kingdom of Saudi Arabia to conduct an initial and/or follow-up Enhanced End-Use-Monitoring (EEUM) Site Survey and in-country training. Also, this program will require U.S government and contractor personnel to conduct annual, one-week Program Management Reviews in Saudi Arabia.

There will be no adverse impact on U.S. defense readiness as a result of this proposed sale.

Transmittal No. 08-88

Notice of Proposed Issuance of Letter of Offer
Pursuant to Section 36(b)(1)
of the Arms Export Control Act

Annex
Item No. vii

(vii) Sensitivity of Technology:

1. The AIM-9X represents a substantial increase in missile acquisition and kinematics performance over previous AIM-9 variants. The missile includes a high off bore-sight seeker, enhanced countermeasure rejection capability, low drag/high angle of attack airframe, and the ability to integrate the Joint Helmet Mounted Cueing System. The software algorithms are the most sensitive portions of the AIM-9X missile. The software continues to be modified during the testing phase in order to improve its counter-countermeasures capabilities. No software source code or algorithms will be released. Sensitive and/or classified (up to Secret) elements of the AIM-9X missiles include equipment/hardware, and software, and classified portions of operational performance. Maintenance training documentation is Unclassified up to and including missile sectionalization training.

2. The external view of the AIM-9X Sidewinder Missile is Unclassified and is not sensitive. The seeker/guidance and control section and the target detector are Confidential and contain sensitive state-of-the-art technology. Specifically, the infrared seeker sensitivity is a significant improvement over the previous AIM-9 variants. Manuals and technical documents for the AIM-9X that support the ability to integrate with aircraft sensors are classified up to Secret. Performance and operating logic of the counter-countermeasures circuits are Secret. The hardware, software, and data identified are classified to protect vulnerabilities, design and performance parameters and similar critical information.

3. If a technologically advanced adversary were to obtain knowledge of the specific hardware and software elements, the information could be used to develop countermeasures, which might reduce weapon systems effectiveness or could be used in the development of a system with similar or advanced capabilities.

[FR Doc. E8–24453 Filed 10–16–08; 8:45 am]
BILLING CODE 5001–06–C

DEPARTMENT OF DEFENSE

Office of the Secretary

[Transmittal Nos. 08–99]

36(b)(1) Arms Sales Notification

AGENCY: Department of Defense, Defense Security Cooperation Agency.

ACTION: Notice.

SUMMARY: The Department of Defense is publishing the unclassified text of a section 36(b)(1) arms sales notification. This is published to fulfill the requirements of section 155 of Public Law 104–164 dated 21 July 1996.

FOR FURTHER INFORMATION CONTACT: Ms. B. English, DSCA/DBO/CFM, (703) 601–3740.

The following is a copy of a letter to the Speaker of the House of Representatives, Transmittals 08–99 with attached transmittal, policy justification, and Sensitivity of Technology.

Dated: October 7, 2008.

Patricia L. Toppings,

OSD Federal Register Liaison Officer, Department of Defense.

BILLING CODE 5001–06–M

DEFENSE SECURITY COOPERATION AGENCY
2800 DEFENSE PENTAGON
WASHINGTON, DC 20301-2800

SEP 26 2008

In reply refer to:
USP012066-08

The Honorable Nancy Pelosi
Speaker of the House of Representatives
Washington, DC 20515-6501

Dear Madam Speaker:

Pursuant to the reporting requirements of Section 36(b)(1) of the Arms Export Control Act, as amended, we are forwarding herewith Transmittal No. 08-99, concerning the Department of the Army's proposed Letter(s) of Offer and Acceptance to Pakistan for defense articles and services estimated to cost $115 million. After this letter is delivered to your office, we plan to issue a press statement to notify the public of this proposed sale.

Sincerely,

Jeffrey A. Wieringa
Vice Admiral, USN
Director

Enclosures:
1. Transmittal
2. Policy Justification
3. Sensitivity of Technology

Same ltr to:

House	Senate
Committee on Foreign Affairs	Committee on Foreign Relations
Committee on Armed Services	Committee on Armed Services
Committee on Appropriations	Committee on Appropriations

Transmittal No. 08-99

Notice of Proposed Issuance of Letter of Offer
Pursuant to Section 36(b)(1)
of the Arms Export Control Act, as amended

(i) **Prospective Purchaser:** Pakistan

(ii) **Total Estimated Value:**

Major Defense Equipment*	$ 0 million
Other	$115 million
TOTAL	$115 million

(iii) **Description and Quantity or Quantities of Articles or Services under Consideration for Purchase:** refurbishment of eight AH-1F Cobra Helicopters. The Government of Pakistan has also requested warranties, system integration, spare and repairs parts, including transportation for the parts, support equipment, personnel training and training equipment, publications and technical data, U.S. Government and contractor engineering and logistics support services, and other related elements of logistics support.

(iv) **Military Department:** Army (IAA, Amd #3)

(v) **Prior Related Cases, if any:**
FMS case IAC - $ 2 million – 19Mar04
FMS case IAA - $49 million - 12Apr04

(vi) **Sales Commission, Fee, etc., Paid, Offered, or Agreed to be Paid:** none

(vii) **Sensitivity of Technology Contained in the Defense Article or Defense Services Proposed to be Sold:** See Annex attached

(viii) **Date Report Delivered to Congress:** SEP 26 2008

* as defined in Section 47(6) of the Arms Export Control Act.

POLICY JUSTIFICATION

Pakistan – AH-1F Cobra Helicopter Refurbishment

The Government of Pakistan has requested a possible sale of refurbishment and maintenance of eight AH-1F Cobra Helicopters. The Government of Pakistan has also requested warranties, system integration, spare and repairs parts, including transportation for the parts, support equipment, personnel training and training equipment, publications and technical data, U.S. Government and contractor engineering and logistics support services, and other related elements of logistics support. The estimated cost is $115 million.

This proposed sale will contribute to the foreign policy and national security of the United States by helping to improve the security of a friendly country that has been and continues to be an important force for economic progress in South Asia and a partner in the Global War on Terrorism. In addition, the Cobra helicopters are a very important part of Pakistan's ongoing efforts to defeat the Taliban and Al Qaeda in the Federally Administered Tribal Areas and the Northwest Frontier Province. The Pakistan Army uses the Cobras to conduct and support counterinsurgency and counterterrorism operations.

The proposed sale of this equipment and support will not affect the basic military balance in the region.

The prime contractor will be US Helicopter in Ozark, Alabama. There are no known offset agreements proposed in connection with this potential sale.

Implementation of this proposed sale will require multiple U.S. Government and contractor representatives in Pakistan for approximately three weeks to ensure delivery and operability of the equipment. Also, a three person Field Office will be established for three years to provide technical assistance and contract administration for the Pakistan Army.

There will be no adverse impact on U.S. defense readiness as a result of this proposed sale.

Transmittal No. 08-99

Notice of Proposed Issuance of Letter of Offer
Pursuant to Section 36(b)(1)
of the Arms Export Control Act

Annex
Item No. vii

(vii) Sensitivity of Technology:

1. The AH-1F drawings, specifications, hardware, and operating characteristics are Unclassified. The degree of sensitivity is low. Sensitive items consist of the aircraft survivability equipment listed below. The software loaded into the Threat Data Package on each aircraft is also sensitive.

a. The AN/ALQ-144A(V)3 Infrared Jammer is an active, continuous operating, omni-directional, electrically fired infrared (IR) jammer system designed to confuse or decoy threat IR missile systems, in conjunction with low reflective paint and engine suppressors. The hardware is classified Confidential. Releasable technical manuals for operation and maintenance are classified Secret. Reverse engineering and development of counter countermeasures are concerns if the hardware and releasable technical data are compromised to a competent adversary.

b. The AN/APR-39A(V)3 Radar Signal Detecting Set provides warning of a radar directed air defense threat to allow appropriate countermeasures. The hardware is classified Confidential when programmed with U.S. threat data, and releasable technical manuals for operation and maintenance are classified Confidential. Releasable technical data pertaining to performance is classified Secret. The system can be programmed with threat data provided by the purchasing country.

c. The AN/AVR-2 Laser Warning Set is a passive laser warning system that receives, processes, and displays threat information resulting from aircraft illumination by lasers. The hardware is classified Confidential. Releasable technical manuals for operation and maintenance are classified Secret.

d. The Talon RT 8303 Series Radio combining FM, UHF, and VHF capabilities on each helicopter is sensitive. Both the hardware and software are Unclassified. Reverse engineering is very possible, but will reveal no new technology.

2. If a technologically advanced adversary were to obtain knowledge of the specific hardware and software elements, the information could be used to develop countermeasures which might reduce weapon system effectiveness or be used in the development of a system with similar or advanced capabilities.

[FR Doc. E8–24454 Filed 10–16–08; 8:45 am]
BILLING CODE 5001–06–C

DEPARTMENT OF DEFENSE

Office of the Secretary

[Transmittal Nos. 08–41]

36(b)(1) Arms Sales Notification

AGENCY: Department of Defense, Defense Security Cooperation Agency.

ACTION: Notice.

SUMMARY: The Department of Defense is publishing the unclassified text of a section 36(b)(1) arms sales notification. This is published to fulfill the requirements of section 155 of Public Law 104–164 dated 21 July 1996.

FOR FURTHER INFORMATION CONTACT: Ms. B. English, DSCA/DBO/CFM, (703) 601–3740.

The following is a copy of a letter to the Speaker of the House of Representatives, Transmittals 08–41 with attached transmittal, policy justification, and Sensitivity of Technology.

Dated: October 7, 2008.

Patricia L. Toppings,

OSD Federal Register Liaison Officer, Department of Defense.

BILLING CODE 5001–01–M

DEFENSE SECURITY COOPERATION AGENCY
WASHINGTON, DC 20301-2800

OCT 0 3 2008
In reply refer to:
USP002602-08

The Honorable Nancy Pelosi
Speaker of the House of Representatives
Washington, DC 20515-6501

Dear Madam Speaker:

Pursuant to the reporting requirements of Section 36(b)(1) of the Arms Export Control Act, as amended, we are forwarding herewith Transmittal No. 08-41, concerning the Department of the Army's proposed Letter(s) of Offer and Acceptance to Taipei Economic and Cultural Representative Office in the United States for defense articles and services estimated to cost $2.532 billion. After this letter is delivered to your office, we plan to issue a press statement to notify the public of this proposed sale.

Sincerely,

Jeffrey A. Wieringa
Vice Admiral, USN
Director

Enclosures:
1. **Transmittal**
2. **Policy Justification**
3. **Sensitivity of Technology**

Same ltr to:

House	**Senate**
Committee on Foreign Affairs	**Committee on Foreign Relations**
Committee on Armed Services	**Committee on Armed Services**
Committee on Appropriations	**Committee on Appropriations**

Transmittal No. 08-41

Notice of Proposed Issuance of Letter of Offer
Pursuant to Section 36(b)(1)
of the Arms Export Control Act

(i) **Prospective Purchaser:** Taipei Economic and Cultural Representative Office in the United States pursuant to P.L. 96-8

(ii) **Total Estimated Value:**

Major Defense Equipment*	$1.532 billion
Other	$1.000 billion
TOTAL	$2.532 billion

(iii) **Description and Quantity or Quantities of Articles or Services under Consideration for Purchase:** 30 AH-64D Block III APACHE Longbow Attack Helicopters equipped with 30 Modernized Target Acquisition Designation Sight/Pilot Night Vision Sensor (MTADS/PNVS), 17 AN/APG-78 Fire Control Radar and AN/APR-48 Radar Frequency Interferometer (FCR/RFI), 69 T700-GE-701D Turbine Engines, 173 STINGER Block I Air-to-Air Missiles, 35 STINGER Missile Captive Flight Trainers, 1,000 AGM-114L HELLFIRE Longbow Missiles, and 66 M299 HELLFIRE Longbow Missile Launchers. Also included: composite horizontal stabilators, crew and maintenance trainers, depot maintenance, all necessary support equipment, tools and test equipment, integration and checkout, spares and repair parts, training and training equipment, ferry and fuel support, publications and technical documents, U.S. Government and contractor technical assistance, Quality Assurance Team, and other related elements of logistics and program support.

(iv) **Military Department:** Army (YYZ)

(v) **Prior Related Cases, if any:** none

(vi) **Sales Commission, Fee, etc., Paid, Offered, or Agreed to be Paid:** none

(vii) **Sensitivity of Technology Contained in the Defense Article or Defense Services Proposed to be Sold:** See Annex attached

(viii) **Date Report Delivered to Congress:** OCT 03 2008

* as defined in Section 47(6) of the Arms Export Control Act.

POLICY JUSTIFICATION

Taipei Economic and Cultural Representative Office in the United States – AH-64D APACHE Helicopters and Related Weapons

The Taipei Economic and Cultural Representative Office in the United States has requested a possible sale of 30 AH-64D Block III APACHE Longbow Attack Helicopters equipped with 30 Modernized Target Acquisition Designation Sight/Pilot Night Vision Sensor (MTADS/PNVS), 17 AN/APG-78 Fire Control Radar and AN/APR-48 Radar Frequency Interferometer (FCR/RFI), 69 T700-GE-701D Turbine Engines, 173 STINGER Block I Air-to-Air Missiles, 35 STINGER Missile Captive Flight Trainers, 1,000 AGM-114L Longbow HELLFIRE Missiles, and 66 M299 HELLFIRE Longbow Missile Launchers. Also included: composite horizontal stabilators, crew and maintenance trainers, depot maintenance, all necessary support equipment, tools and test equipment, integration and checkout, spares and repair parts, training and training equipment, ferry and fuel support, publications and technical documents, U.S. Government and contractor technical assistance, Quality Assurance Team, and other related elements of logistics and program support. The estimated cost is $2.532 billion.

This sale is consistent with United States law and policy as expressed in Public Law 96-8.

This proposed sale serves U.S. national economic and security interests by supporting the recipient's continuing efforts to modernize its armed forces and enhance its defensive capability. The proposed sale will help improve the security of the recipient and assist in maintaining political stability, military balance, and economic progress in the region.

The proposed sale will provide for a more advanced targeting and engagement capability with the addition of the AH-64D with AN/APG-78 Fire Control Radar and its "fire and forget" capability with HELLFIRE missiles. The proposed sale will upgrade the anti-armor day/night missile capability, provide for the defense of vital installations, and provide close air support for the military ground forces. The Taiwan Army will have no difficulty absorbing these helicopters, and weapon systems into its armed forces.

Implementation of this proposed sale will require the assignment of two U.S. Government personnel for a period of six years to provide intensive coordination, monitoring, and technical assistance to assure smooth introduction of the AH-64D Block III APACHE system. Six contractor representatives will be in country serving

as Contractor Field Service Representatives for a period of five years, with the possibility of a five-year extension.

The principal contractors will be:

The Boeing Company	**Mesa, AZ**
(two locations)	**St Louis, MO**
General Electric	**Lynn, MA**
Lockheed Martin Missiles and Fire Control	**Orlando, FL**
Lockheed Martin Systems Integration	**Owega, NY**
Northrop Grumman Corporation	**Baltimore, MD**
Raytheon Company	**Tucson, AZ**
Inter-Coastal Electronics	**Mesa, AZ**
BAE Systems	**Rockville, MD**

The purchaser requested offsets; agreements are undetermined and will be defined in negotiations between the purchaser and contractor.

There will be no adverse impact on U.S. defense readiness as a result of this proposed sale.

Transmittal No. 08-41

Notice of Proposed Issuance of Letter of Offer
Pursuant to Section 36(b)(1)
of the Arms Export Control Act

Annex
Item No. vii

(vii) Sensitivity of Technology:

1. AH-64D APACHE Longbow Helicopter weapon system contains communications and target identification equipment, navigation equipment, aircraft survivability equipment, displays, and sensors. The airframe itself does not contain sensitive technology; however, the pertinent equipment listed below will either be installed on the aircraft or included in the sale.

a. AN/APG-78 Fire Control Radar (FCR) is an active, low-probability of intercept, millimeter-wave radar, combined with a passive Radar Frequency Interferometer (RFI) mounted on top of the helicopter mast. The FCR Ground Targeting Mode detects, locates, classifies, and prioritizes stationary or moving armored vehicles, tanks, and mobile air defense systems as well as hovering helicopters, and helicopters and fixed wing aircraft in normal flight. The AN/APR-48 Radar Frequency Interferometer (RFI) is a passive radar detection and direction finding system, which utilizes a detachable User Data Module (UDM) on the RFI processor, which contains the RF threat library. The RFI detects threat radar emissions and determines the type of radar and mode of operation. The FCR data and RFI data are fused for maximum synergism. If desired, the radar data can be used to refer targets to the regular electro-optical Target Acquisition and Designation Sight (TADS) or Modernized Target Acquisition and Designation Sight (M-TADS), permitting additional visual/infrared imagery and control of weapons, including the semi-active laser version of the HELLFIRE. M-TADS also provides second generation day, night, and limited adverse weather target information, as well as night navigation capabilities. Critical system information is stored in the FCR in the form of mission executable code, target detection, classification algorithms and coded threat parametrics. This information is provided in a form that cannot be extracted by the foreign user via anti-tamper provisions built into the system. The content of these items is classified Secret.

b. AN/ALQ-144A(V)3 Infrared Jammer is an active, continuous operating, omni-directional, electrically fired infrared (IR) jammer system designed to confuse or decoy threat IR missile systems, in conjunction with low reflective paint and engine suppressors. The hardware is classified Confidential. Releasable technical manuals for operation and maintenance are classified Secret.

c. AN/APR-39BA(V)2 Radar Signal Detecting Set provides warning of a radar directed air defense threat to allow appropriate countermeasures. This is the 1553 data bus compatible configuration. The hardware is classified Confidential when programmed with U.S. threat data, and releasable technical manuals for operation and maintenance are classified Confidential. Releasable technical data pertaining to performance is classified Secret. The system can be programmed with threat data provided by the purchasing country.

d. AN/ALQ-136(V)5 Radar Jammer is an automatic radar jammer that analyzes various incoming radar signals. When threat signals are identified and verified, jamming automatically begins and continues until the threat radar breaks lock. The hardware is classified Confidential. Releasable technical manuals and data for operation and maintenance and performance are classified Secret.

e. AN/AVR-2B Laser Warning Set is a passive laser warning system that receives, processes and displays threat information resulting from aircraft illumination by lasers, on the multi-functional display. The hardware is classified Confidential. Releasable technical manuals for operation and maintenance are classified Secret.

f. AAR-57(V)3/5 Common Missile Warning System detects threat missiles in flight, evaluates potential false alarms, declares validity of threat and selects appropriate Infra-Red Counter Measures (IRCM). Includes Electro-Optical Missile Sensors, Electronic Control Unit ECU, Sequencer and Improved Countermeasures Dispenser (ICMD). The hardware is classified Confidential. Releasable technical manuals for operation and maintenance are classified Secret.

g. Improved Counter Measures Dispenser (ICMD) is an integral part of the Common Missile Warning System (CMWS). The Dispenser Assembly and the Payload Module dispense decoy expendable objects (chaff, flare, etc) to confuse threat radar devices. Radar cross-section and frequency coverage are sensitive elements. The hardware and releasable technical manuals are Unclassified. Aircraft optimization is the critical element; reverse engineering is not a major concern. Additional components are the Control Panel and Electronics Module that have been integrated in the Weapons Management and Control software.

h. The STINGER Block I Missile is classified Confidential. Associated hardware, software, and documentation that will be provided with this sale are considered sensitive. STINGER training hardware contains operational STINGER seeker hardware and firmware and must be protected by the same levels of controls as the operational hardware. STINGER critical technology is primarily in the area of design and production know-how and not end items. Information on vulnerability to electronic countermeasures and countermeasures, system performance capabilities and effectiveness, and test data are classified up to Secret.

i. AGM-114L Longbow HELLFIRE Missile provides an adverse weather, fire-and-forget missile version of the HELLFIRE missile system, which incorporates a millimeter wave radar seeker on a HELLFIRE II aft section bus. Primary advantages over its predecessor are: adverse weather combat capabilities, millimeter wave countermeasures survivability, fire-and-forget guidance, and advanced warhead capable of defeating all projected armor threats and mission requirements. The highest level for release of the HELLFIRE II and HELLFIRE Longbow is Secret, based upon the software. The highest level of classified information that could be disclosed by a proposed sale or by testing of the end item is Secret; the highest level that must be disclosed for production, maintenance, or training is Confidential. Reverse engineering could reveal Confidential information. Vulnerability data, countermeasures, vulnerability/susceptibility analyses, and threat definitions are classified Secret or Confidential. Susceptibility of HELLFIRE II to diversion or exploitation is considered low risk. Components of the system are also considered highly resistant to reverse engineering.

2. If a technologically advanced adversary were to obtain knowledge of the specific hardware and software elements, the information could be used to develop countermeasures that might reduce weapon system effectiveness or be used in the development of a system with similar or advanced capabilities.

[FR Doc. E8–24455 Filed 10–16–08; 8:45 am]
BILLING CODE 5001–06–C

DEPARTMENT OF DEFENSE

Office of the Secretary

[Transmittal Nos. 08–89]

36(b)(1) Arms Sales Notification

AGENCY: Department of Defense, Defense Security Cooperation Agency.

ACTION: Notice.

SUMMARY: The Department of Defense is publishing the unclassified text of a section 36(b)(1) arms sales notification. This is published to fulfill the requirements of section 155 of Public Law 104–164 dated 21 July 1996.

FOR FURTHER INFORMATION CONTACT: Ms. B. English, DSCA/DBO/CFM, (703) 601–3740.

The following is a copy of a letter to the Speaker of the House of Representatives, Transmittals 08–89 with attached transmittal, policy justification, and Sensitivity of Technology.

Dated: October 7, 2008.

Patricia L. Toppings,

OSD Federal Register Liaison Officer, Department of Defense.

BILLING CODE 5001–06–M

DEFENSE SECURITY COOPERATION AGENCY
2800 DEFENSE PENTAGON
WASHINGTON, DC 20301-2800

OCT 0 2 2008

In reply refer to:
USP010410-08

The Honorable Nancy Pelosi
Speaker of the House of Representatives
Washington, DC 20515-6501

Dear Madam Speaker:

Pursuant to the reporting requirements of Section 36(b)(1) of the Arms Export Control Act, as amended, we are forwarding herewith Transmittal No. 08-89, concerning the Department of the Air Force's proposed Letter(s) of Offer and Acceptance to the United Kingdom for defense articles and services estimated to cost $1.068 billion. After this letter is delivered to your office, we plan to issue a press statement to notify the public of this proposed sale.

Sincerely,

Jeffrey A. Wieringa
Vice Admiral, USN
Director

Enclosures:
1. Transmittal
2. Policy Justification
3. Sensitivity of Technology

Same ltr to:

House	Senate
Committee on Foreign Affairs	Committee on Foreign Relations
Committee on Armed Services	Committee on Armed Services
Committee on Appropriations	Committee on Appropriations

Transmittal No. 08-89

Notice of Proposed Issuance of Letter of Offer
Pursuant to Section 36(b)(1)
of the Arms Export Control Act, as amended

(i) **Prospective Purchaser:** United Kingdom

(ii) **Total Estimated Value:**

Major Defense Equipment*	$ .046 billion
Other	$1.022 billion
TOTAL	$1.068 billion

(iii) **Description and Quantity or Quantities of Articles or Services under Consideration for Purchase:** convert 3 United States Air Force KC-135R aircraft into RC-135V/W Rivet Joint aircraft, 3 APX-119 Identification Friend or Foe Systems, 3 LN-100GT Inertial Reference Units, 5 Joint Tactical Information Distribution System terminals, 18 ARC-210 Radios, and 28 ARC-210 Radio control heads, modification kits, integration and installation, Ground Distributed Processing Station, Modular Processing System, Airborne Capability Extension System, mission trainer, tools and test equipment, spare and repair parts, publications, personnel training and training equipment, support equipment, U.S. government and contractor representative technical and logistics personnel services, and other related elements of logistics support.

(iv) **Military Department:** Air Force (SAI)

(v) **Prior Related Cases, if any:** none.

(vi) **Sales Commission, Fee, etc., Paid, Offered, or Agreed to be Paid:** none

(vii) **Sensitivity of Technology Contained in the Defense Article or Defense Services Proposed to be Sold:** See Annex attached

(viii) **Date Report Delivered to Congress:** OCT 02 2008

* as defined in Section 47(6) of the Arms Export Control Act.

POLICY JUSTIFICATION

United Kingdom – RC-135V/W Rivet Joint Aircraft

The Government of the United Kingdom has requested a possible sale to convert 3 United States Air Force KC-135R aircraft into RC-135V/W Rivet Joint aircraft, 3 APX-119 Identification Friend or Foe Systems, 3 LN-100GT Inertial Reference Units, 5 Joint Tactical Information Distribution System terminals, 18 ARC-210 Radios, and 28 ARC-210 Radio control heads, modification kits, integration and installation, Ground Distributed Processing Station, Modular Processing System, Airborne Capability Extension System, mission trainer, tools and test equipment, spare and repair parts, publications, personnel training and training equipment, support equipment, U.S. government and contractor representative technical and logistics personnel services, and other related elements of logistics support. The estimated cost is $1.068 billion.

The United Kingdom is a major political and economic power in NATO and a key democratic partner of the U.S. in ensuring peace and stability in this region and around the world.

The United Kingdom requests this capability to provide for the defense of its deployed troops, regional security, and interoperability with the United States. This program will ensure the United Kingdom can effectively operate in hazardous areas and enhance the United Kingdom's interoperability with U.S. forces. The United Kingdom is a staunch supporter of the U.S. in Iraq and Afghanistan and in the Global War on Terror. The United Kingdom's troops are deployed in support of IRAQI FREEDOM and ENDURING FREEDOM, where U.S. assets currently provide this proposed capability. By acquiring this capability, the United Kingdom will be able to provide the same level of protection for its own forces and those of the United States.

The proposed sale of this equipment and support will not affect the basic military balance in the region. The United Kingdom will have no difficulty absorbing these aircraft into its armed forces.

The principal contractor will be L3 Communications of Greenville, Texas. There are no known offset agreements proposed in connection with this potential sale.

Implementation of this proposed sale will not require the assignment of any additional U.S. Government or contractor representatives to the United Kingdom.

There will be no adverse impact on U.S. defense readiness as a result of this proposed sale.

Transmittal No. 08-89

Notice of Proposed Issuance of Letter of Offer Pursuant to Section 36(b)(1) of the Arms Export Control Act

Annex
Item No. vii

(vii) Sensitivity of Technology:

1. The RC-135 Rivet Joint is an air refuelable, globally deployable aircraft that can be used for SIGINT missions. Rivet Joint provides near-real-time intelligence information, derived from SIGINT, to tactical forces, combatant commanders, and national-level authorities across the spectrum of conflict. As the global SIGINT environment changes, technology is updated to ensure continued capability to accomplish this mission. Most hardware used in Rivet Joint systems is generic and commercially available. However, if any of the specialized hardware or publications are lost, the information could provide insight into many critical US capabilities. Information gained could be used to develop countermeasures as well as offensive and defensive counter-tactics.

2. Rivet Joint utilizes ground support systems for mission data preparation and post-mission data processing, for real-time augmentation of the in-flight crew, and also for training. Mission preparation and processing are accomplished in the Ground Data Processing System (GDPS). Mission crew augmentation is accomplished using the Satcom link as a tether from the aircraft to a system referred to as the Airborne Capability Extension System (ACES). Training is accomplished on one of two primary systems; one is the Rivet Joint Mission Trainer (RJMT) and the other is referred to as the Field Exportable Training System (FETS).

3. The Multi-Spectral Targeting System (MTS-B) is a multi-use infrared (IR), electro-optical (EO), and laser detecting ranging-tracking set, developed and produced for use by the USAF in the MQ-9 This advanced EO and IR system provides long-range surveillance, high altitude, target acquisition, tracking, range finding, and laser designation for the HELLFIRE missile and for all tri-service and NATO laser-guided munitions.

4. If a technologically advanced adversary were to obtain knowledge of the specific hardware and software elements, the information could be used to develop countermeasures which might reduce weapon system effectiveness or be used in the development of a system with similar or advanced capabilities.

[FR Doc. E8–24456 Filed 10–16–08; 8:45 am]
BILLING CODE 5001–06–C

DEPARTMENT OF DEFENSE

Office of the Secretary

[Transmittal Nos. 08–94]

36(b)(1) Arms Sales Notification

AGENCY: Department of Defense, Defense Security Cooperation Agency.

ACTION: Notice.

SUMMARY: The Department of Defense is publishing the unclassified text of a section 36(b)(1) arms sales notification. This is published to fulfill the requirements of section 155 of Public Law 104–164 dated 21 July 1996.

FOR FURTHER INFORMATION CONTACT: Ms. B. English, DSCA/DBO/CFM, (703) 601–3740.

The following is a copy of a letter to the Speaker of the House of Representatives, Transmittals 08–94 with attached transmittal, policy justification, and Sensitivity of Technology.

Dated: October 7, 2008.

Patricia L. Toppings,

OSD Federal Register Liaison Officer, Department of Defense.

BILLING CODE 5001–06–M

DEFENSE SECURITY COOPERATION AGENCY
2800 DEFENSE PENTAGON
WASHINGTON, DC 20301-2800

SEP 26 2008
In reply refer to:
USP011023-08

The Honorable Nancy Pelosi
Speaker of the House of Representatives
Washington, DC 20515-6501

Dear Madam Speaker:

Pursuant to the reporting requirements of Section 36(b)(1) of the Arms Export Control Act, as amended, we are forwarding herewith Transmittal No. 08-94, concerning the Department of the Air Force's proposed Letters(s) of Offer and Acceptance to Turkey for defense articles and services estimated to cost $200 million. After this letter is delivered to your office, we plan to issue a press statement to notify the public of this proposed sale.

You will also find attached a certification as required by Section 620C(d) of the Foreign Assistance Act of 1961, as amended, that this action is consistent with the principles set forth in subsection 620C(b) of that Act as codified in section 2373 of title 22, United States Code.

Sincerely,

Jeffrey A. Wieringa
Vice Admiral, USN
Director

Enclosures:
1. Transmittal
2. Policy Justification
3. Sensitivity of Technology
4. Section 620C(d)

Same ltr to:

House	Senate
Committee on Foreign Affairs	Committee on Foreign Relations
Committee on Armed Services	Committee on Armed Services
Committee on Appropriations	Committee on Appropriations

Transmittal No. 08-94

Notice of Proposed Issuance of Letter of Offer
Pursuant to Section 36(b)(1)
of the Arms Export Control Act, as amended

(i) **Prospective Purchaser:** Turkey

(ii) **Total Estimated Value:**

Major Defense Equipment*	$180 million
Other	$ 20 million
TOTAL	$200 million

(iii) **Description and Quantity or Quantities of Articles or Services under Consideration for Purchase:** 30 AN/AAQ-33 SNIPER Extended Range Targeting Pods, 30 AN/AAQ-13 LANTIRN Extended Range Navigation Pods, containers, flight tests, integration, digital cartridge interface, spare and repair parts, support equipment, publications and technical documentation, personnel training and training equipment, U.S. government and contractor representative technical and logistics personnel services, and other related elements of program support.

(iv) **Military Department:** Air Force (QAJ)

(v) **Prior Related Cases, if any:** none

(vi) **Sales Commission, Fee, etc., Paid, Offered, or Agreed to be Paid:** none

(vii) **Sensitivity of Technology Contained in the Defense Article or Defense Services Proposed to be Sold:** See Annex attached.

(viii) **Date Report Delivered to Congress:** SEP 26 2008

* as defined in Section 47(6) of the Arms Export Control Act.

POLICY JUSTIFICATION

Turkey – AN/AAQ-33 SNIPER Targeting Pods and AN/AAQ-13 LANTIRN Navigation Pods

The Government of Turkey has requested a possible sale of 30 AN/AAQ-33 SNIPER Extended Range Targeting Pods, 30 AN/AAQ-13 LANTIRN Extended Range Navigation Pods, containers, flight tests, integration, digital cartridge interface, spare and repair parts, support equipment, publications and technical documentation, personnel training and training equipment, U.S. government and contractor representative technical and logistics personnel services, and other related elements of program support. The estimated cost is $200 million.

Turkey is a partner of the United States in ensuring peace and stability in the region. It is vital to the U.S. national interest to assist our North Atlantic Treaty Organization (NATO) Ally in developing and maintaining a strong and ready self-defense capability that will contribute to an acceptable military balance in the area. This proposed sale is consistent with those objectives.

Turkey needs these capabilities for self defense modernization, regional security, and U.S. and NATO interoperability. This modernization will enhance the Turkish Air Force's ability to defend Turkey while patrolling the nation's extensive coastline and borders against future threats and contribute to Global War on Terrorism and NATO operations. The proven reliability and compatibility of like-systems in association with numerous platforms will foster increased interoperability with NATO and U.S. forces, and expand regional defenses to counter common threats to air, border, and shipping assets in the region. The Turkish Air Force will have no difficulty absorbing these systems into its armed forces.

The proposed sale of this equipment and support will not affect the basic military balance in the region.

The prime contractor will be Lockheed Martin Missile and Fire Control Company in Orlando, Florida. There are no known offset agreements proposed in connection with this potential sale.

Implementation of this proposed sale may require the assignment of U.S. Government and contractor representatives to Turkey for integration efforts. Also, this program will require U.S. government and contractor personnel to conduct annual, one-week Program Management Reviews in Turkey.

There will be no adverse impact on U.S. defense readiness as a result of this proposed sale.

Transmittal No. 08-94

Notice of Proposed Issuance of Letter of Offer
Pursuant to Section 36(b)(1)
of the Arms Export Control Act

Annex
Item No. vii

(vii) Sensitivity of Technology:

1. The SNIPER (AN/AAQ-33) Extended Range Targeting Pod is an advanced pod that incorporates a third generation targeting Forward Looking Infrared Radar, a laser tracker, a laser marker, a dual mode laser, and a CCD-TV providing superior image quality. The lightweight SNIPER provides target identification and targeting capabilities at greater ranges compared to existing targeting pods. It also features lower life cycle costs due to its modular architecture. Advanced sensors combined with advanced image processing algorithms and steady stabilization produce target identification ranges that permit operations minimizing exposure to many threat systems. The dual-mode laser offers an eye safe mode for urban combat training operations, along with a laser-guided bomb designation laser for guiding precision munitions.

2. The LANTIRN (AN/AAQ-13) Extended Range Navigation Pod provides high-speed penetration and precision attack on tactical targets at night and in adverse weather. The navigation pod also contains a terrain-following radar and a fixed infrared sensor, which provides a visual cue and input to the aircraft's flight control system, enabling it to maintain a pre-selected altitude above the terrain and avoid obstacles. The pod enables the pilot to fly along the general contour of the terrain at high speed, using mountains, valleys, and the cover of darkness to avoid detection.

2. If a technologically advanced adversary were to obtain knowledge of the specific hardware and software elements, the information could be used to develop countermeasures which might reduce weapon system effectiveness or be used in the development of a system with similar or advanced capabilities.

CERTIFICATION PURSUANT TO SECTION 620C(d) OF THE FOREIGN ASSISTANCE ACT OF 1961, AS AMENDED

Pursuant to Section 620C(d) of the Foreign Assistance Act of 1961, as amended (the Act), Executive Order 12163 and State Department Delegation of Authority No. 145, I hereby certify that the sale of defense articles and defense services, to include 30 AN/AAQ-33 SNIPER Extended Range Targeting Pods, 30 AN/AAQ-13 LANTIRN Extended Range Navigation Pods, containers, flight tests, integration, digital cartridge interface, spare and repair parts, and related program support, to the Government of Turkey is consistent with the principles set forth in Section 620C(b) of the Act.

This certification will be made part of the notification to Congress in accordance with Section 36(b) of the Arms Export Control Act, as amended, regarding the proposed sale of the above-named articles and services and is based on the justification accompanying said notification, of which said justification constitutes a full explanation.

John C. Rood
Acting Under Secretary of State for Arms Control and International Security

[FR Doc. E8–24457 Filed 10–16–08; 8:45 am]
BILLING CODE 5001–06–C

DEPARTMENT OF DEFENSE

Office of the Secretary

Defense Task Force on Sexual Assault in the Military Services

AGENCY: Office of the Assistant Secretary of Defense (Personnel and Readiness); DoD.

ACTION: Committee Meeting Change.

SUMMARY: Pursuant to 41 CFR 102–3.160 (b), a change announcement is made to a previously announced committee meeting of the Defense Task Force on Sexual Assault in the Military Services (hereafter referred to as the Task Force).

DATES: October 29, 2008, through October 31, 2008, (8 a.m. to 5 p.m. Central Standard Time, hereafter referred to as CST, October 29 and 30, 2008, and 8 a.m. to 12 p.m. CST October 31, 2008).

ADDRESSES: Lincolnshire Marriott Resort, Salon A, 10 Marriott Drive, Lincolnshire, Illinois 60069.

FOR FURTHER INFORMATION CONTACT: Colonel Jackson-Chandler, Designated Federal Officer, Defense Task Force on Sexual Assault in the Military Services, 2850 Eisenhower Avenue, Suite 100, Alexandria, Virginia 22314, Telephone: (703) 325–6640, DSN# 221, Fax: (703) 325–6710/6711, E-mail: *cora.chandler@wso.whs.mil.*

SUPPLEMENTARY INFORMATION: The Task Force will meet from October 29 to 31, 2008. The previously announced public meeting on October 30, 2008, remains unchanged. However, the task force has added two additional administrative working meetings to its scheduled visit to Naval Training Center and Naval Station Great Lakes, Illinois. The purpose of these administrative working meetings on October 29 and 31, 2008 are to discuss administrative matters that relate to the task force. Pursuant to 41 CFR 102–3(b), administrative working meetings are closed to the public. Previously published guidance remains in effect.

Dated: October 10, 2008.

Robert L. Cushing, Jr.,

Alternate OSD Federal Register Liaison Officer, Department of Defense.

[FR Doc. E8–24690 Filed 10–16–08; 8:45 am]
BILLING CODE 5001–06–P

DEPARTMENT OF DEFENSE

Department of the Army

Notice of Availability of the Draft Environmental Impact Statement (DEIS) for the Disposal and Reuse of Fort McPherson, GA; Correction

AGENCY: Department of the Army, DoD.

ACTION: Notice; correction.

SUMMARY: The Department of the Army published a Notice of Availability in the **Federal Register** of October 10, 2008, concerning the DEIS for Disposal and Reuse of Fort McPherson, Georgia. The Notice of Availability contained incorrect information.

Correction

In the **Federal Register** of October 10, 2008, in FR Doc. E8–23995, on page

60246, the third column correct the **DATES** section to read:

DATES: The public comment period for the DEIS will end 70 days after publication of an NOA in the **Federal Register** by the U.S. Environmental Protection Agency.

On page 60247, first column, lines 25–26, correct to read: *www.mcphersonredevelopment.com.*

On page 60247, second column, lines 24–27, correct to read: at *http://www.mcphersonredevelopment.com* and *http://www.hqda.army.mil/acsimweb/brac/nepa_eis_docs.htm.*

Dated: October 10, 2008.

H.E. Wolfe,

Principal Assistant, Deputy Assistant Secretary of the Army (Environment, Safety and Occupational Health).

[FR Doc. E8–24717 Filed 10–16–08; 8:45 am]

BILLING CODE 3710–08–M

DEPARTMENT OF DEFENSE

Department of the Army; Corps of Engineers

Intent To Prepare an Environmental Impact Statement on an Application for a Department of the Army Permit under Section 404 of the Clean Water Act by the Upper Trinity Regional Water District for the Construction of Lake Ralph Hall, a Proposed 7,605-Surface-Acre Water Supply Reservoir in Fannin County, TX

AGENCY: Department of the Army, U. S. Army Corps of Engineers, DoD.

ACTION: Notice of intent.

SUMMARY: The U.S. Army Corps of Engineers, Fort Worth District (USACE) has received an application for a Department of the Army permit under Section 404 of the Clean Water Act (CWA) from the Upper Trinity Regional Water District (UTRWD) to construct Lake Ralph Hall. In accordance with the National Environmental Policy Act (NEPA) of 1969 (42 U.S.C. 4321 et seq.), the USACE has determined that issuance of such a permit may have a significant impact on the quality of the human environment and, therefore, requires the preparation of an Environmental Impact Statement (EIS).

The USACE intends to prepare an EIS to assess the environmental, social, and economic effects of issuance of a Department of the Army permit under Section 404 of the CWA for discharges of dredged and fill material into waters of the United States (U.S.) associated with the construction of the proposed water supply reservoir. In the EIS, the USACE will assess potential impacts associated with a range of alternatives.

DATES: A public scoping meeting was held on Tuesday, April 15, 2008, from 4 p.m. to 8:30 p.m. The purpose of this meeting was to disseminate information about the proposed project and its potential effects to the human environment, and to seek public comments on the proposed project.

ADDRESSES: The public scoping meeting was held at the Fannindel High School, Located at 601 West Main Street, Ladonia, Fannin County, TX.

FOR FURTHER INFORMATION CONTACT: For further information and/or questions about the proposed action and EIS, please contact Ms. Mary J. Flores, Regulatory Project Manager, by letter at Regulatory Branch, CESWF–PER–R, U.S. Army Corps of Engineers, P.O. Box 17300, Fort Worth, TX 76102–0300 or by telephone at (817) 886–1739.

SUPPLEMENTARY INFORMATION:

1. *Description of the Proposed Project:* The proposed Lake Ralph Hall would be located north of the City of Ladonia, Fannin County, TX. The proposed project site consists of approximately 11,200 acres, including approximately 505 acres associated with the proposed dam, principal spillway, emergency spillway, raw water intake structure and pump station, and approximately 7,605 acres associated with the proposed conservation pool. The proposed dam would be located on the North Sulphur River approximately 4.8 miles northeast of the City of Ladonia and 22.5 miles southeast of the City of Bonham, between State Highway 34 and Farm-to-Market Road 904 in Fannin County, TX. The proposed project would involve the discharge of dredged and fill material into approximately 14.3 acres of waters of the U.S. associated with the construction of the proposed Lake Ralph Hall dam, principal spillway, and emergency spillway. The proposed project would inundate approximately 325 acres of the North Sulphur River and its tributaries associated with the establishment of an approximately 7,603-acre conservation pool with an elevation of 551 feet mean sea level. Overall, the proposed project would adversely impact approximately 339.3 acres of waters of the U.S. associated with filling, clearing, excavation, and inundation.

The purpose of the proposed project is to provide water for approximately 33 towns, cities, and utility districts in portions of Collin, Cooke, Dallas, Denton, Fannin, Grayson and Wise Counties. The UTRWD has requested the right to impound up to 180,000 acre-feet of water. The Lake Ralph Hall conservation pool would impound approximately 160,235 acre-feet of water and would provide a firm yield of up to 45,000 acre-feet per year.

The proposed project would likely adversely impact 339.3 acres of waters of the U.S. as a result of dam construction and inundation of areas within the conservation pool. Waters of the U.S. affected would include the following: Approximately 57,858 linear feet (135 acres) along intermittent reaches of the North Sulphur River, 549,009 linear feet (131.8 acres) of named and unnamed ephemeral tributaries of the North Suphur River, and 72.5 acres of on-channel ponds. Approximately 1,900 acres of young and mature upland forested areas are present within the approximately 11,200-acre proposed project site. The Caddo-Lyndon B. Johnson (CLBJ) National Grasslands—Ladonia Unit, which is comprised of 2,780 acres, is located within the vicinity of the proposed project site. The proposed conservation pool would inundate approximately 254 acres within this unit. The CLBJ National Grasslands are administered by the U.S. Forest Service and managed under a cooperative agreement with the Texas Parks and Wildlife Department.

2. *Alternatives:* Alternatives available to the USACE are to: (1) Issue the Department of the Army permit; (2) issue the Department of the Army permit with special conditions; or (3) deny the Department of the Army permit. Alternatives available to UTRWD include: (1) Constructing Lake Ralph Hall as proposed by UTRWD; (2) constructing Lake Ralph Hall as proposed by UTRWD, with modifications; (3) developing or acquiring other water supply sources; or (4) no action.

3. *Scoping and Public Involvement Process:* A public scoping meeting to disseminate information about the proposed project and its potential effects to the human environment, and to seek public comments on the proposed project was conducted (see **DATES** & **ADDRESSES**). A Public Notice was issued on October 10, 2008, to extend the opportunity for federal, state, and local agencies and officials, and interested individuals to further comment on the proposed project and the scope of the EIS.

4. *Significant Issues:* Issues to be given significant analysis in the EIS are likely to include, but will not be limited to: the effects of the lake on the immediate and adjacent property owners, nearby communities, downstream hydraulics and hydrology, streams, wetlands, surface water quantity and quality, groundwater

quantity and quality, geologic resources, vegetation, fish and wildlife, threatened and endangered species, soils, prime farmland, noise, light, aesthetics, historic and pre-historic cultural resources, socioeconomics, land use, public roads, and air quality.

5. *Cooperating Agencies:* At this time, no other federal or state agencies have been established as cooperating agencies in preparation of the EIS. However, numerous federal and state agencies, including the U.S. Environmental Protection Agency, the U.S. Fish and Wildlife Service, the Texas Commission on Environmental Quality, the Texas Parks and Wildlife Department, the Texas Historical Commission, and the U.S. Forest Service are expected to be involved in the preparation of, and provide comments on, the EIS.

6. *Additional Review and Consultation:* Compliance with other federal and state requirements that will be addressed in the EIS include, but will not be limited to, state water quality certification under Section 401 of the Clean Water Act, protection of water quality under the Texas Pollutant Discharge Elimination System, protection of air quality under the Texas Air Quality Act, protection of endangered and threatened species under Section 7 of the Endangered Species Act, and protection of cultural resources under Section 106 of the National Historic Preservation Act.

7. *Availability of the Draft EIS:* The Draft EIS is projected to be available by June 2009. A public hearing will be conducted following the release of the Draft EIS.

Brenda S. Bowen,

Army Federal Register Liaison Officer.

[FR Doc. E8–24818 Filed 10–16–08; 8:45 am]

BILLING CODE 3720–58–P

DEPARTMENT OF DEFENSE

Department of the Army; Corps of Engineers

Inland Waterways Users Board

AGENCY: Department of the Army, U.S. Army Corps of Engineers, DoD.

ACTION: Notice of open meeting.

SUMMARY: In Accordance with 10(a)(2) of the Federal Advisory Committee Act (Pub. L. 92–463), announcement is made of the forthcoming meeting.

Name of Committee: Inland Waterways Users Board (Board).

Date: November 18, 2008.

Location: Chicago Marriott O'Hare, 8535 West Higgins Road, Chicago, Illinois 60631, (773–693–4444 or 800–228–9290).

Time: Registration will begin at 8:30 a.m. and the meeting is scheduled to adjourn at 1 p.m.

Agenda: The Board will hear briefings on the status of the funding for inland navigation projects and studies, an assessment of the Inland Waterways Trust Fund, and a preliminary plan for a future business model for inland waterways projects.

FOR FURTHER INFORMATION CONTACT: Mr. Mark R. Pointon, Headquarters, U.S. Army Corps of Engineers, CECW–IP, 441 G Street, NW., Washington, DC 20314–1000; Ph: 202–761–4258.

SUPPLEMENTARY INFORMATION: The meeting is open to the public. Any interested person may attend, appear before, or file statements with the committee at the time and in the manner permitted by the committee.

Brenda S. Bowen,

Army Federal Register Liaison Officer.

[FR Doc. E8–24679 Filed 10–16–08; 8:45 am]

BILLING CODE 3720–58–P

DEPARTMENT OF EDUCATION

Title III of the Elementary and Secondary Education Act of 1965 (ESEA), as Amended by the No Child Left Behind Act of 2001 (NCLB)

AGENCY: Office of English Language Acquisition, U.S. Department of Education.

ACTION: Notice of final interpretations.

SUMMARY: In a notice of proposed interpretations published on May 2, 2008, the Secretary of Education (Secretary) proposed interpretations of several provisions of Title III of the ESEA regarding the annual administration of English language proficiency (ELP) assessments to limited English proficient (LEP) students served by Title III, the establishment and implementation of annual measurable achievement objectives (AMAOs) for States and subgrantees receiving Title III funds, and State and local implementation of Title III accountability provisions. This notice of final interpretations provides the Secretary's final interpretation for each of the ten proposed interpretations.

DATES: These final interpretations are effective November 17, 2008.

FOR FURTHER INFORMATION CONTACT: Richard L. Smith, Office of English Language Acquisition, U.S. Department of Education, 400 Maryland Avenue, SW., room 5C–132, Washington, DC 20202. Telephone: (202) 401–1402.

If you use a telecommunications device for the deaf (TDD), you may call the Federal Relay Service (FRS) at 1–800–877–8339.

Individuals with disabilities may obtain this document in an alternative format (e.g., Braille, large print, audiotape, or computer diskette) on request to the contact person listed under **FOR FURTHER INFORMATION CONTACT**.

SUPPLEMENTARY INFORMATION:

Background

General. The intent of this notice of final interpretations (notice) is to ensure that all States understand and implement the requirements of Title III in accordance with the Secretary's ''bright-line'' principles of NCLB—including annual assessments of and accountability for all students—as they apply to the implementation of Title III of the ESEA.

One of the key goals of Title III of the ESEA is to ensure that LEP students attain English language proficiency, attain high levels of academic achievement in English, and meet the same challenging State academic content and student academic achievement standards that all children are expected to meet. To achieve this goal, Title III grants provide States and their subgrantees [1] with funds to implement language instruction educational programs to help LEP students acquire English and achieve at high levels in the core academic subjects.

Title III subgrantees are required to use Title III funds to support (1) high-quality professional development designed to improve services to LEP students, and (2) high-quality language instruction educational programs that are designed to increase the English proficiency and academic achievement of LEP students. Title III does not require subgrantees to use a specific or particular curriculum or approach to language instruction, except that the language instruction must be, as required in section 3113(b)(6) of the ESEA, tied to scientifically based research on teaching LEP students and demonstrated to be effective.

With the enactment of NCLB, States for the first time were required to

[1] This notice refers to ''subgrantees'' throughout, consistent with the language in Title III of the ESEA, to refer to entities receiving Title III, Part A subgrants. The vast majority of subgrantees under Title III are local educational agencies (LEAs). However, subgrantees may also include groups of LEAs in which one or more LEAs is too small to be individually eligible to apply for a Title III grant; such LEAs may join together to form consortia in order to qualify to receive the minimum amount of a Title III subgrant, $10,000.

establish ELP standards for LEP students. Under the ESEA, States also must assess, on an annual basis, the progress of LEP students served by language instruction educational programs funded under Title III.[2] States must also set targets for three separate annual measurable achievement objectives (AMAOs) and measure improvements in the development and attainment of English proficiency by LEP students served by Title III.

As States have implemented Title III assessment and accountability requirements, they have faced numerous challenges and posed a number of questions to the Department about the law's requirements. The final interpretations in this notice are intended to help States address those challenges by answering their questions and providing them with guidance on the implementation of Title III consistent with the basic tenets and goals of NCLB. In developing this notice, the Department examined current State policies and practices regarding the implementation of Title III assessment and accountability requirements, and the extent to which these may have been implemented inconsistently or incorrectly.[3] The Department also considered issues and concerns submitted during the public comment period for this notice, as well as issues raised in our consultations with Congressional staff, State Title III and Title I representatives, and assessment and accountability experts since the implementation of NCLB.

Defining Title III-Served LEP Students. The Department recognizes that the specific meaning of the term ''LEP students served by programs funded under Title III'' and similar terms used throughout this notice may vary across States and subgrantees based on the design of particular language instruction educational programs and professional development programs implemented using Title III funds, as well as the design and capacity of State Title III data and accountability systems.

However, at a minimum, under the ESEA, States and subgrantees must define ''Title III-served LEP students'' as those LEP students within a State's and subgrantee's jurisdiction, respectively, who directly receive Title III-funded services. The Department recognizes that, for practical reasons, including data system capacity and the nature of language instruction educational programs and professional development funded under Title III, many States include, in their Title III accountability determinations, all LEP students attending public schools in their States or all LEP students attending public schools within subgrantees' jurisdictions to be Title III-served for the purposes of making AMAO determinations. The Department intends that the interpretations established in this notice apply to both narrow and broad definitions of ''Title III-served LEP students.''

The final interpretations are neither meant to expand beyond the statutory requirements in Title III nor in any way restrict a State's discretion in defining broadly which students it considers ''Title III-served LEP students'' for purposes of Title III accountability.

The Department requires, however, that each State have a consistent policy regarding the methods by which it will make AMAO determinations for the State and its subgrantees. The Department also requires each State to have consistent guidelines or ''decision rules'' for how subgrantees within each State define which students are considered ''Title III-served LEP students'' for Title III accountability purposes.[4]

Overview of Title III Assessment and Accountability Requirements. The following is a brief summary of the basic requirements of Title III to which the final interpretations apply. First, each State's Title III ELP standards must be based on four language domains—speaking, listening, reading, and writing—and be aligned with the achievement of challenging academic content and student achievement standards (section 3113(b)(2)). In addition, each State's ELP assessment must be administered annually to Title III-served LEP students (section 3113(b)(3)(D)), be valid and reliable (section 3122(a)(3)(A)(ii)), and provide for the evaluation of LEP students' levels of speaking, reading, writing, listening, and comprehension in English (section 3121(d)(1)).[5] Title III requires States to ensure that all subgrantees comply with the requirement to annually assess the English proficiency of all Title III-served LEP students, consistent with the ELP assessment requirements in section 1111(b)(7) of the ESEA.

Under Title III, States and their subgrantees are accountable for meeting AMAOs that relate to Title III-served LEP students' development and attainment of English proficiency and academic achievement. Each State must set AMAO targets, make determinations on whether subgrantees are meeting those targets, and report annually on subgrantees' performance in meeting those targets.

Title III accountability provisions apply to each State and its subgrantees. Title III accountability requirements do not, in general, apply to individual schools and do not apply to individual LEP students.

The first required AMAO (AMAO 1) focuses on the extent to which Title III-served LEP students in a State and its subgrantee jurisdictions are making progress in learning English. The second AMAO (AMAO 2) focuses on the extent to which Title III-served LEP students in a State and its subgrantee jurisdictions are attaining proficiency in English. Both of these AMAOs are based on measures derived, in large part, from the results of the annual State ELP assessment required under section 3113(b)(3)(D) in Title III of the ESEA. The third AMAO (AMAO 3) is based on whether the State and its subgrantees meet the State's adequate yearly progress (AYP) targets for the LEP subgroup in reading/language arts and mathematics, as defined by the State under section 1111(b)(2)(B) in Title I of the ESEA.[6]

Title III requires subgrantees to notify parents of LEP students participating in language instruction educational programs funded under Title III if the subgrantee does not meet one or more of the State's three required AMAO targets. If a subgrantee does not meet all

[2] In addition to the ELP assessment provisions in Title III, Title I of the ESEA requires an annual assessment of all LEP-designated students that measures LEP students' oral language (speaking and listening), reading, and writing skills in English.

[3] Under 34 CFR 80.40(a), States are responsible for oversight and monitoring of their subgrantees' performance. For more information, *see http://www.ed.gov/policy/fund/reg/edgarReg/edgar.html.*

[4] The Department recognizes that the particular LEP students designated as Title III-served may differ among subgrantees based on the unique designs of the language education instructional programs implemented by subgrantees. State decision rules, therefore, do not have to yield a single definition of Title III-served LEP students that is uniform for every subgrantee. However, States must have consistent guidelines so that subgrantees that employ the same kinds of program models define their Title III-served LEP student population in the same manner. This will help ensure that subgrantees are accurately identifying their Title III-served LEP student population and that State data and AMAO determinations are accurate.

[5] The Department permits States to derive a score to reflect LEP student performance in the domain of comprehension based on the other four assessment domains required by both Title I (section 1111(b)(7)) and Title III (section 3113(b)(3)(D))—speaking, listening, reading, and writing—rather than testing the performance of LEP students separately in the domain of comprehension. Throughout this notice, the Department refers to four domains when discussing assessment requirements under Title I and Title III.

[6] For Title III accountability purposes, AMAO 3—or AYP—is calculated at the subgrantee/LEA and State levels. For Title I accountability purposes, AYP is also calculated at the school level.

of the State's AMAO targets for two consecutive years, the subgrantee must develop and submit an improvement plan to the State and the State must provide technical assistance to the subgrantee in developing the improvement plan. If a subgrantee does not meet all three AMAO targets for four consecutive years, the subgrantee must undertake corrective actions.

Implementation Timeline. State Title III assessment and accountability systems must be consistent with the final interpretations presented in this notice effective with the assessments administered in the 2009–2010 school year and AMAO determinations made based on those assessments.

The Department requires States to revise their Consolidated State Plans to reflect changes in their Title III assessment or accountability systems. To the extent that the final interpretations presented in this notice require States to make changes to their Title III assessment and accountability systems, the Department requires States to use the amendment process already in place to request such changes.

Prior to implementing any revisions, a State must submit its proposed amendments to the Secretary for review and approval. We strongly encourage States to submit amendments that are either (1) necessary to bring State Title III accountability systems into compliance with current law, or (2) required to accurately reflect current State practices in implementing Title III assessment and accountability requirements.

The Department intends to follow this notice with a letter to Chief State School Officers, State Title III directors, and State Title I directors providing more specific details on amendment requests and the deadline for making such requests. Amendment requests for the 2008–2009 school year were due to the Department no later than February 15, 2008. We expect a similar deadline to be in place for the 2009–2010 amendments and will establish that deadline in the forthcoming letter.

Public Comments

In response to the Secretary's invitation for public comment in the notice of proposed interpretations, 74 parties submitted comments. A summary of these comments is provided in the following section. There are several differences between the notice of proposed interpretations and this notice of final interpretations. We discuss these changes in greater detail in the following section. Generally, we do not address technical or minor changes, and suggested changes that we are not authorized to make under the law.

Final Interpretations

1. *Annual ELP Assessments of LEP Students. Background*. Section 3113(b)(3)(D) of the ESEA requires SEAs receiving grants under Title III, Part A to ensure that eligible entities receiving a subgrant annually assess the English proficiency of all LEP students participating in a Title III-funded program, consistent with section 1111(b)(7) of Title I of the ESEA. Section 1111(b)(7) requires States, in their plans under Title I, to demonstrate that LEAs in the State provide an annual assessment of English proficiency that measures the oral language (speaking and listening), reading, and writing skills of all LEP students in the schools served by the SEA.

This interpretation addresses inquiries that the Department received regarding whether States and subgrantees are permitted to exempt a LEP student from an annual ELP assessment in any domain in which the student has received a proficient score. For example, States have requested that, with respect to Title III-served LEP students who score proficient in the domains of speaking and listening, but not in reading or writing, the State be required to continue to annually assess those students only in reading and writing, but not in speaking and listening, until such time as the students become proficient in all domains.

In the notice of proposed interpretations, the Secretary proposed to interpret Title III to require that all LEP students be assessed annually with an assessment or assessments that measure each and every one of the language domains of speaking, listening, reading, and writing. We explained in the notice of proposed interpretations that States could not exempt a student from an annual ELP assessment in any domain or ''bank'' the proficient scores of a LEP student.

Analysis of Comments and Changes

Comments: A number of commenters expressed support for the proposed interpretation to disallow ''banking'' of proficient ELP scores in a particular domain until such time as a student is proficient in all domains. These commenters noted that because academic demands increase with each successive grade, language proficiency at one grade level in any domain may not be adequate for higher grade levels.

However, a number of commenters, including several States, supported ''banking'' proficient scores in a particular domain. The commenters stated that administering annual ELP assessments in all four domains is time consuming, detracts from instructional time, and adds administrative burden to schools, districts, and States. The commenters noted that no purpose is served by retesting students in areas that they have already mastered. Some commenters also asserted that student motivation decreases with repeated testing. Other commenters suggested that States should not have to reassess speaking and listening skills if a student demonstrates proficiency, but should annually reassess reading and writing skills.

Several commenters suggested clarifying in the notice of final interpretations whether banking scores within a grade span is also prohibited.

Discussion: The Secretary shares the commenters' concerns that LEP students could be considered proficient in English without having grade-level language proficiency in each domain if ''banking'' of proficient scores was permitted. We recognize, as some commenters noted, that language development does not necessarily progress evenly, and that students may indeed become proficient in some language domains (such as listening and speaking) before becoming proficient in other domains (such as reading and writing). However, the ELP annual assessment requirements in both Title I (section 1111(b)(7)) and Title III (section 3113(b)(3)(D)) of the ESEA are explicit in requiring an annual assessment of LEP students in each of the language domains. The research suggesting that some language skills (e.g., speaking and listening) may develop before others (e.g., reading and writing) does not necessarily mean that banking proficient scores in some domains is an appropriate practice. Even if the development of language is sequential across domains, language demands increase as development progresses. Therefore, it would not be appropriate to ''bank'' a student's listening and speaking scores, for example, in an early grade when the student may require language instruction services for a number of years before the student becomes proficient in reading and writing—over which time the demands of demonstrating age- and grade-appropriate listening and speaking skills will also change. While students may not lose acquired language skills over time, the annual ELP assessment of LEP students will ensure that LEP students do not lose ground in any of the domains as language demands increase in academic areas in each successive grade.

We believe that our explanation of this interpretation in the notice of proposed interpretations was clear that the banking of proficient scores in a particular domain for any period, including banking of scores within grade spans, would not be permitted. However, we are revising the interpretation to provide this clarification.

Changes: We have revised the interpretation to state specifically that the banking of the proficient scores of LEP students in particular domains in any given year, including banking of scores within grade spans, is not permitted.

Comments: One commenter contended that Title III does not require an assessment of each of the four domains of listening, speaking, reading, and writing.

Discussion: We disagree with the commenter. Section 3113(b)(3)(D) of the ESEA requires SEAs receiving grants under Title III, Part A to ensure that eligible entities receiving a Title III subgrant annually assess the English proficiency of all LEP students participating in a Title III-funded program, consistent with section 1111(b)(7) of Title I of the ESEA. Section 1111(b)(7) requires each State, in its plan under Title I, to demonstrate that LEAs in the State provide an annual assessment of English proficiency that measures the oral language (speaking and listening), reading, and writing skills of all LEP-designated students in the schools served by the SEA. We have added language to the interpretation to make this clear.

Changes: We have added a statement to the final interpretation that makes clear that the interpretation is consistent with the language of Title I and Title III of the ESEA.

Comments: A few commenters questioned whether recently-arrived LEP students and LEP students in the early grades should participate in an ELP assessment or be tested in all language domains. The commenters suggested that recently-arrived LEP students should not be tested in reading and writing, and that their scores should not be included in AMAOs until they can demonstrate speaking and listening skills. Another commenter suggested that children in the early grades should be assessed only in the domains of listening and speaking.

Discussion: The clearest reading of the plain language in section 3113(b)(3)(D) of the ESEA is that all Title III-served LEP students must be assessed each year in each domain. Moreover, section 1111(b)(7) in Title I requires an annual assessment of all LEP-designated students in oral language (listening and speaking), reading, and writing. Therefore, it would be inconsistent with the ESEA to permit exemptions from testing in certain domains based on a student's age, grade level, proficiency level, or length of time in the United States. We have made this clear in the final interpretation.

The purpose of an ELP assessment is to monitor student progress in attaining English language proficiency in each of the required domains. Under § 200.6(b)(4), a State may exempt a recently-arrived LEP student (a LEP student who has attended school in the United States for less than 12 months) from one administration of a State's content assessment in reading/language arts.[7] However, a recently-arrived LEP student, like all LEP students, is required to take the State's annual ELP assessment. Similarly, any LEP student receiving language instruction educational services funded by Title III must participate in an annual ELP assessment. (*See* sections 3113(b)(3)(D) and 1111(b)(7) of the ESEA).

Changes: We have revised the interpretation to clarify that a State may not exempt a LEP student from any portion of an annual ELP assessment.

Comments: Several commenters suggested that the final interpretation address exceptions to assessing all four domains for students with disabilities whose individualized education program (IEP) or 504 plan (under section 504 of the Rehabilitation Act of 1973, as amended) includes a recommendation for the student to be exempt from testing. The commenters stated that certain disabilities, such as a hearing impairment, are particularly relevant to second language learning.

Discussion: Title III does not provide exemptions from annual ELP assessments for any Title III-served LEP student. The requirement that all LEP students served by Title III participate in an annual ELP assessment does not preclude providing appropriate accommodations for assessing a LEP student who is also a student with disabilities under the Individuals with Disabilities Education Act (IDEA). For example, a student with a hearing impairment might need to be assessed in listening with the same accommodations that the student receives in the regular classroom (e.g., an assistive listening device). States and LEAs should provide appropriate accommodations for LEP students with disabilities to annually assess their language needs and ensure they attain English language proficiency in each of the required domains consistent with 34 CFR 200.6.

Changes: None.

Final Interpretation. The Secretary interprets section 3113(b)(3)(D) of the ESEA to require that all LEP students served by programs funded under Title III be assessed annually with an assessment or assessments that measure each of the language domains of speaking, listening, reading, and writing. States may not exempt LEP students from any portion of an annual ELP assessment, nor ''bank'' the proficient scores of LEP students in particular domains in any given year or within a specific grade span until such time as a student is proficient in all domains. This interpretation is consistent with the clear language of both Title I and Title III of the ESEA, which requires, without exception, that LEP students be assessed annually with an assessment that measures listening, speaking, reading, and writing skills.

2. *Use of Annual ELP Assessment Scores for AMAOs 1 and 2.*

Background. Section 3121(d)(1) in Title III requires States to evaluate the progress of LEP students toward attaining English proficiency, including LEP students' levels of comprehension, speaking, listening, reading, and writing in English. Section 3122(a)(3)(A)(i) and (ii) in Title III requires that States develop AMAOs that include annual increases in the number or percentage of children making progress in learning English and annual increases in the number or percentage of students attaining English proficiency by the end of each school year.

States have asked the Department to provide guidance on how they may take into account student performance in each of the English language domains when setting the accountability targets for making progress in learning English (AMAO 1) and demonstrating proficiency in English (AMAO 2) under Title III. Specifically, States have asked (1) whether students must make progress in and attain proficiency in each language domain required under Title III to be considered to have made progress or to attain proficiency overall for AMAO 1 and AMAO 2, respectively, and (2) whether a State may use a ''composite'' score across English language domains to demonstrate student progress and proficiency on State ELP assessments.

In the notice of proposed interpretations, the Secretary proposed to interpret Title III to allow States flexibility in determining whether

[7] For more information on the regulations related to recently-arrived LEP students *see: http://www.ed.gov/legislation/FedRegister/Finrule/2006-3/091306a.html.*

students who make progress in some (but not all) domains can be considered to have demonstrated progress for AMAO 1 purposes, but to require that students demonstrate proficiency in each and every language domain in order to be considered to have attained proficiency for AMAO 2 purposes. The proposed interpretation also allowed States to base their student performance expectations and accountability (i.e., AMAO 1 and AMAO 2 targets) on assessment results derived from either (1) separate student performance levels or scores in each of the language domains or (2) a single composite score or performance level derived by combining performance across domains, so long as such a composite score could be demonstrated to be a valid and effective measure of a student's progress and proficiency in each of the English language proficiency domains.

Analysis of Comments and Changes

Comments: None.

Discussion: In the notice of proposed interpretations, we included separate interpretations for AMAO 1 and AMAO 2. In our review of the proposed interpretations, we decided it was unnecessary to separate them and have combined them in the final interpretation.

Changes: We have consolidated the interpretations for AMAO 1 and AMAO 2 into one interpretation.

Comments: Several commenters opposed our proposal to allow States to use a composite score to measure English language progress or proficiency for Title III-served LEP students. The commenters expressed concern that a composite score may mask important information about a student's strengths and weaknesses and permit a student who is very weak in some domains, but strong in others, to obtain a proficient composite score on an ELP assessment. Some commenters expressed concern that the proposed interpretation was intended to allow States to disregard one or more domains or use one domain to define AMAOs and set targets. Other commenters expressed concern that progress in all domains would not be required to meet AMAO 1 under the proposed interpretation.

Discussion: The Secretary's interpretation should not be read as suggesting that States can disregard performance in any domain in measuring progress or in defining English language proficiency. Such an interpretation would be inconsistent with the ESEA and counterproductive; a State that defined AMAO 1 (progress) without considering all domains would likely find it difficult to ensure that students meet AMAO 2 (attainment of proficiency). The Secretary agrees that, in general, AMAO 1 determinations should be made with attention to progress in all of the language domains required by Title III. However, in recognition of the evidence that language development does not necessarily proceed at the same pace across all of the language domains, we wanted to provide each State with the flexibility to define its progress goals accordingly. It was our understanding that some States may have been advised that they were prohibited from counting a Title III-served LEP student as making progress for AMAO 1 purposes if the student had not made progress in each and every domain in a given school year.

The Department is not encouraging States to change their AMAO 1 determinations if those determinations are based on requiring student progress in all domains on annual State ELP assessments. The Department is simply recognizing that, given the nature of language acquisition, some LEP students may make meaningful progress in learning English without necessarily making progress in each and every domain in a given school year.

The Department's final interpretation gives each State discretion in how it defines progress and sets accountability targets for AMAO 1, so long as the targets provide for (1) meaningful progress toward attaining English language proficiency and (2) improvement in overall student performance on the State's ELP assessment. The final interpretation makes it clear that AMAO 1 targets must meet these two conditions.

With regard to the use of a composite score to demonstrate proficiency in English for AMAO 2 purposes, the Department recognizes the technical demands and testing burdens, described by numerous testing experts and States, of requiring States to have an independently valid and reliable ELP assessment score for each of the four language domains (plus comprehension, required under section 3121(d)(1)). With regard to the specific concern about composite scores masking very weak performance in some domains, the final interpretation is clear that—whether or not a State's ELP assessment yields separate domain scores or a composite score—the ELP assessment must meaningfully measure student proficiency in each of the language domains and, overall, be a valid and reliable measure of student progress and proficiency in English. Even if represented by a composite score, AMAO 2 must be a measure that demonstrates sufficient student performance in all required domains to consider a LEP student to have attained proficiency in English.

Changes: The Department added language to the final interpretation, which was included in the explanation section of the proposed interpretation, stating that AMAO targets must provide for (1) meaningful progress toward attaining English language proficiency and (2) improvement in overall student performance on the State's ELP assessment.

Comment: Several commenters noted that the proposed interpretation appears to prohibit States from using a ''compensatory model'' in defining English language proficiency and to require States to use a ''conjunctive model'' in which English language proficiency is determined by separate scores in each and every domain.

Discussion: The proposed interpretation was not meant to require a conjunctive model such that State ELP assessments would be required to generate separate and independently valid scores for each domain. We have changed the interpretation to make this clear. The proposed interpretation also was not necessarily meant to prohibit States from using a compensatory model, although the Secretary is concerned that compensatory models could be used to allow LEP students with weak performance in one or more English language domains—such as reading or writing—to still be considered to have attained proficiency in English.

The Secretary intends with this final interpretation to ensure that all English language domains required under Title I and Title III are assessed and that each State is prepared to provide evidence that its State ELP assessment provides valid and reliable measures of LEP student progress and proficiency, consistent with the purpose for which the assessment is used. For Title III, the purpose of the State ELP assessment is to evaluate subgrantee performance in ensuring that Title III-served LEP students are making progress toward and ultimately attaining proficiency in English by demonstrating performance in each of the English language domains that is sufficient to permit LEP students to participate effectively in grade-level instruction in academic content areas in English.

The Department recognizes that most States use some combination or composite of domain scores to define overall proficiency goals and targets for Title III accountability purposes. The Department also recognizes that there are a number of very important

technical issues related to how States develop and analyze individual test items, and combine, average, and weight scores across ELP domains to define progress and proficiency and set performance expectations (i.e., AMAO targets) for LEP students—whether they use individual domain scores or composite scores. While these numerous technical issues are not specifically addressed in this notice, the final interpretation is clear that, under the ESEA, each State must be prepared to provide evidence that the various technical aspects of its ELP assessment are consistent with the requirements in Title III and valid for the purposes for which the assessment is being used. This includes demonstrating that its ELP assessment measures all required domains and yields reliable information on a student's progress and proficiency in each of those domains.

Changes: To clarify that States are not required to use a conjunctive model with respect to their ELP assessments, we have made clear in the final interpretation that a State can use a composite score so long as the State can demonstrate that the composite score meaningfully measures student progress and proficiency in each of the language domains and, overall, is a valid and reliable measure of student progress and proficiency in English, consistent with the purpose for which the assessment is used.

We have also removed language in the proposed interpretation for AMAO 2, which stated that, ''In setting student performance expectations and accountability targets for attaining proficiency in English (AMAO 2), it is the Secretary's proposed interpretation of Title III that a LEP student must score proficient or above in each and every language domain required under Title III in order to be considered to have 'attained proficiency' on a State's ELP assessment.'' This specific language appeared to signal to some commenters that the Department was systematically rejecting both compensatory models and composite scores by requiring ELP assessments to generate a separate and valid score for each language domain. Instead, the Department is requiring that each State be able to demonstrate that its ELP assessment meaningfully measures student progress and proficiency in each of the language domains, and, overall, is a valid and reliable measure of student progress and proficiency in English, consistent with the purpose for which the assessment is used.

Comments: One commenter noted that section 1111(b)(7) in Title I of the ESEA lists listening and speaking together under ''oral language'' rather than as separate domains and asked if States can treat these two domains as one domain.

Discussion: Consistent with the Secretary's interpretation, which allows States to use a composite score on ELP assessments to define progress and proficiency, there is nothing that would prohibit a State from treating oral language as a composite of listening and speaking. However, as noted earlier, each State must be able to demonstrate, with data and evidence, that its ELP assessment measures skills in each of the required domains, including listening and speaking, and that its score for ELP proficiency represents the acquisition of skills in each domain required under the law.

Changes: None.

Comments: A number of commenters cited the technical challenges States would have if the Department required separate performance standards for each domain. The commenters stated that separate standards for each domain would require States to redesign their assessments and include significantly larger samples and more items within each subdomain, which would result in a long and costly assessment. The commenters expressed preference for a more ''holistic'' judgment across all four subdomains in defining progress and proficiency under Title III.

Discussion: The Department is not requiring States that use composite ELP assessment scores for accountability determinations to redesign their assessments to generate separate valid and reliable ELP domain scores. States using composite ELP assessment scores must be able to demonstrate, with data and evidence, that their ELP assessment measures knowledge and skills in each of the required domains and that ELP proficiency scores reflect the acquisition of skills in each domain required under the law.

We recognize that the language in the notice of proposed interpretations may have been misinterpreted to mean that States may not use a composite score to define English language proficiency. Therefore, as stated above, we have removed this language from the final interpretation.

Changes: We have revised the interpretation to remove the language suggesting that States must have a separate, independent and valid score for each language domain in order to determine a student's English language proficiency.

Final Interpretation. The Secretary interprets Title III to allow States to base student performance expectations and accountability targets for progress and proficiency (i.e., AMAOs 1 and 2, respectively) on ELP assessments that provide either (1) separate student performance levels or scores in each of the language domains or (2) a single composite score. In either case, a State must be able to demonstrate that its ELP assessment meaningfully measures student progress and proficiency in each language domain and, overall, is a valid and reliable measure of student progress and proficiency in English, consistent with the purpose for which the assessment is used.

With regard to AMAO 1, the Secretary interprets Title III to allow States to determine AMAO 1 targets, where appropriate, based on progress in one or more of the language domains, rather than requiring student progress separately in each and every one of the language domains, so long as the targets provide for meaningful progress toward attaining English language proficiency and student performance on the State's ELP assessment, overall, is improving.

With regard to AMAO 2, the Secretary interprets Title III to require—regardless of whether a State uses separate or composite domain scores—that ELP assessments meaningfully measure student proficiency in all language domains and, overall, provide for valid and reliable measures of student proficiency in English across the required domains.

3. *Students Included in Title III Accountability. Background.* Section 3122(a)(1) of the ESEA requires States to develop AMAOs for Title III-served LEP students. The AMAOs relate to students' progress and attainment of English proficiency and students' ability to meet challenging State academic content and student academic achievement standards required in section 1111(b)(1) of Title I of the ESEA. The AMAOs must include—(1) at a minimum, annual increases in the number or percentage of Title III-served LEP children making progress in learning English (AMAO 1); (2) at a minimum, annual increases in the number or percentage of Title III-served LEP children attaining English proficiency by the end of each school year, as determined through a valid and reliable assessment of English proficiency, consistent with section 1111(b)(7) of Title I of the ESEA (AMAO 2); and (3) making AYP for the LEP subgroup, as described in section 1111(b)(2)(B) of Title I of the ESEA (AMAO 3). States must set annual targets for each AMAO and determine whether each subgrantee is meeting the targets.

The Department is aware that some States systematically exclude Title III-served LEP students from Title III

accountability determinations in ways that are inconsistent with the law. For example, some States treat AMAO 1 and AMAO 2 as mutually exclusive, such that a Title III-served LEP student is included in either AMAO 1 or AMAO 2, but not both. The Department is also aware that some States identify a subgroup of Title III-served students as ''eligible'' to be included in AMAOs based on their expected performance on ELP assessments, which systematically excludes some Title III-served LEP students from AMAO targets, calculations, and determinations. Such practices are inconsistent with the AMAO provisions in Title III.

In the notice of proposed interpretations, the Secretary proposed to interpret Title III to require that all Title III-served LEP students be included in *all* AMAO targets, calculations, and determinations.

Analysis of Comments and Changes

Comments: A number of commenters expressed concern that the proposed interpretation would require all LEP students, not just Title III-served LEP students, to be included in AMAOs. However, another commenter stated that the Department was being overly restrictive and seemed to be prohibiting States from including LEP students not served by Title III in AMAOs.

Discussion: We acknowledge that the proposed interpretation was not clear and therefore, have revised the interpretation to make clear that AMAOs are only required to be applied to Title III-served LEP students. That said, and as discussed previously in this notice, the Department recognizes that States and districts vary in how they designate LEP students as ''Title III-served students.'' In many jurisdictions all LEP students are counted as Title III-served students because Title III funds are used for activities that benefit all LEP students. In other jurisdictions, it may be less burdensome to count all LEP students as Title III-served students than to track a subset of students receiving direct services under Title III. Regardless of how States and subgrantees designate students as Title III-served, AMAOs are only required to be applied to LEP students who are receiving Title III services. Accordingly, we have revised the interpretation to clarify that Title III requirements apply to States and subgrantees receiving Title III funds, and LEP students receiving Title III services. We note that by clarifying this language in this interpretation and elsewhere in this notice, the Department does not intend to prohibit or to discourage States from more broadly including all LEP students in AMAOs.

Changes: We have clarified in this interpretation and in other interpretations in this notice, where appropriate, that Title III requirements apply to States, to subgrantees receiving Title III funds, and to students served by Title III.

Comments: A few commenters expressed concern that the proposed interpretation would require AMAO calculations to include LEP students in non-public schools and schools and districts not receiving Title III funds.

Discussion: States are only required to make AMAO determinations for subgrantees that receive Title III funds. However, as noted earlier, some States include, in AMAO determinations, LEP students who are not in districts receiving Title III funds or students not directly served by Title III-funded programs. Regarding students in non-public schools, Title III AMAOs do *not* apply to LEP students served under that program through the equitable services provisions that attend non-public schools.

Changes: None.

Comments: A number of commenters argued that Title III-served LEP students who are not expected to reach proficiency in a given year should not be included in AMAO 2 calculations or that the performance of such students should be ''weighted'' so that their scores do not count as much as the scores of other students in AMAO determinations.

Discussion: As noted earlier, the Department is aware that some States treat AMAO 1 and AMAO 2 as mutually exclusive, such that Title III-served LEP students are included in either AMAO 1 or AMAO 2, but not both. We also understand that some States identify a subset of Title III-served students as ''eligible'' to be included in AMAOs and exclude some Title III-served LEP students from AMAO targets, calculations, and determinations.

The Secretary finds no justification or support in the statute for excluding a Title III-served student from AMAO 2 based on the student's current proficiency levels or on expectations for how long it will take the student to become proficient in English. In addition, the Secretary finds no justification or support in the statute for ''weighting'' student ELP assessment results so that students at lower English proficiency levels are discounted in accountability determinations. The final interpretation is consistent with the plain language of Title III, which makes no provision for defining AMAOs in ways that systematically exclude from or discount certain Title III-served LEP students in AMAO targets, calculations, and determinations.

Changes: None.

Comments: Several States pointed out that using Title I AYP determinations for AMAO 3 will not necessarily mean that all LEP students are included in AMAO 3 because, under Title I, the scores of some students (e.g., students who have not been in a school for a full academic year, recently-arrived LEP students) are excluded from AYP determinations. In addition, one State noted that it could not include all LEP students in AMAO 3 because it could only include in its AYP determination those LEP students in tested grades.

Discussion: The commenters are correct. In the final interpretation, we acknowledge that there are several exceptions to the requirement that *all* Title III-served LEP students be included in *all* AMAO targets, calculations, and determinations.

Changes: We have clarified in the final interpretation that the requirement to include all LEP students in AMAO 3 is subject to the exclusions permitted under Title I of the ESEA.[8] In addition, the final interpretation regarding AMAO 3 (Interpretation 7) allows States to make AMAO 3 determinations based on the entire LEP subgroup as defined by Title I or the group of Title III-served LEP students only.

Comments: One commenter questioned why the Department would require that a Title III subgrantee be held accountable for the whole LEP subgroup, in measuring AMAO 3, when the Title III program serves only a subset of LEP students.

Discussion: The statute is unclear about whether AMAO 3 must include the scores of all LEP students or only Title III-served LEP students. As a practical matter, the Department understands that most States calculate AMAO 3 based on all LEP students in

[8] We note that under our Title I regulations in 34 CFR 200.20(f), some LEP students may not be included in AYP determinations because of their recently-arrived status. Furthermore, for example, if a student has not been enrolled in the same school or LEA for a full academic year as defined by the State, such a student may be excluded from AYP calculations. For more information on recently-arrived LEP students *see* 34 CFR 200.20(f)(2)(i)(A) at: *http://www.ed.gov/legislation/FedRegister/finrule/2006-3/091306a.html* and the Department's guidance on the regulations at: *http://www.ed.gov/policy/elsec/guid/lepguidance.doc.* The same regulations also include information on how States may choose to include former LEP students in AYP calculations for the LEP subgroup for up to two years after such students have exited the LEP subgroup. For more information on other exceptions permitted in AYP calculations, such as full academic year enrollment, *see* the Title I guidance at *http://www.ed.gov/policy/landing.jhtml.*

the State because it is not practical or cost effective to make a separate AYP determination for only Title III-served LEP students. However, the Secretary will permit, but not require, a State to base AMAO 3 on the performance of Title III-served LEP students, if a State is able and willing to calculate separate subgrantee- and State-level AYP determinations for this subgroup of students.

Changes: We have revised this interpretation, as well as Interpretation 7, to permit, but not require, a State to calculate separate subgrantee- and State-level AYP determinations for Title III-served LEP students for AMAO 3.

Comments: None.

Discussion: In clarifying the Department's intent with regard to Interpretation 4 to allow the exclusion, from AMAO 1 calculations, of students who have not participated in two administrations of the State's ELP assessment, the Department determined that this situation constitutes another exception to the general requirement that all Title III-served LEP students be included in all AMAOs. As discussed previously, the Department recognizes that our Title I regulations governing AYP calculations (such as full academic year) permit the exclusion of some students, including potentially some Title III-served LEP students, from AMAO 3 calculations. We, therefore, have revised the interpretations accordingly.

Changes: We have revised this interpretation to explain exceptions to the requirement to include all Title III-served students in all AMAO targets, calculations, and determinations. These exceptions are discussed in greater detail in Interpretations 4 and 7.

Final Interpretation. The Secretary interprets Title III to require that, in general, all Title III-served LEP students be included in all AMAO targets, calculations, and determinations. This interpretation is consistent with the plain language in Title III, which makes no provision for defining AMAOs in ways that systematically exclude any Title III-served LEP students from any AMAO targets, calculations, and determinations.

However, the Department acknowledges that, for certain Title III-served LEP students who have had limited participation in language instruction educational programs and State ELP assessments, or based on how States make AYP determinations, States may not have the requisite student assessment data to include these students in AMAO calculations. Therefore, there are two exceptions to the general requirement in this interpretation. First, a State is not required to include in its AMAO 1 calculation Title III-served LEP students who have not participated in two administrations of a State's annual ELP assessment consistent with Interpretation 4. Second, a State is not required to include in its AMAO 3 calculation the scores of Title III-served LEP students whose scores are excluded from the State's AYP determination under Title I and § 200.20(f).[9]

4. *Exclusion of Title III-Served LEP Students ''Without Two Data Points'' from AMAO 1.*

Background. Section 3122(a)(3)(A)(i) of the ESEA requires States to develop an AMAO that measures Title III-served LEP student progress in learning English. Thus, AMAO 1 requires that States and subgrantees, at a minimum, show annual increases in the number or percentage of Title III-served LEP children making progress in learning English.

In Interpretation 3 of this notice, the Department's final interpretation is that all LEP students served by Title III must be included in Title III accountability determinations, subject to two exceptions. Interpretation 4 addresses one of these exceptions, i.e., the question of whether States are permitted to exclude from AMAO 1 calculations and determinations Title III-served LEP students who do not have ''two data points'' that can be used to measure progress; that is, students who have not participated in two administrations of a State's annual ELP assessment required under Title III.

States have, in general, operationalized AMAO 1 as a measure of individual student growth in English language proficiency. Therefore, States typically include in AMAO 1 determinations only Title III-served LEP students for whom States have at least two scores or data points from comparable assessments, so that ''progress'' or growth can be demonstrated for individual students over time.

In the notice of proposed interpretations, the Secretary proposed to interpret Title III to include all Title III-served LEP students in measures of student progress in learning English (AMAO 1), regardless of whether the students participated in at least two consecutive and consistent annual administrations of an ELP assessment required under section 3113 of the ESEA. For students who did not participate in two consecutive and consistent annual administrations of an ELP assessment, the proposed interpretation would have, in effect, required States to propose to the Department an alternative method of measuring progress in order to include such students in AMAO 1 determinations. The proposed interpretation also would have allowed States to include additional criteria, over and above ELP assessment results, in AMAO determinations.

Analysis of Comments and Changes

Comments: Several commenters expressed support for the opportunity to propose to the Department an alternative method of measuring student progress in learning English in order to calculate AMAO 1 for Title III-served LEP students who do not have scores from two administrations of the State's ELP assessment. The commenters noted, for example, that States should receive credit for the progress of LEP students in kindergarten and newly enrolled LEP students who make progress in language proficiency. However, the vast majority of commenters opposed including, in AMAO 1 determinations, students who do not have at least two scores on the State's annual ELP assessment. The commenters stated that using measures other than the State's ELP assessment to make accountability decisions may result in unreliable data from non-comparable assessments and may force States to misuse assessments for purposes for which they were not designed.

Discussion: The Department did not intend to suggest that States use unreliable, invalid, or inappropriate assessment data to make accountability determinations. The purpose of this interpretation is to ensure that States include as many Title III-served LEP students in AMAO 1 determinations as possible. The Department believes that some States were advised that they were prohibited from including in AMAO 1 determinations any student for whom the State did not have scores from two State ELP assessments, and we wanted to correct this misunderstanding.

The Department's intent was to ensure that States are measuring the

[9] We note that under our Title I regulations in 34 CFR 200.20(f), some LEP students may not be included in AYP determinations because of their recently-arrived status. Furthermore, if a student has not been enrolled in the same school or LEA for a full academic year as defined by the State, such a student may be excluded from AYP calculations. However, other than these exceptions permitted in calculating AYP under Title I, this interpretation provides that all LEP students must be included in Title I accountability determinations and, therefore, in AMAO 3 determinations. For more information on recently-arrived LEP students *see* 34 CFR 200.20(f)(2)(i)(A); *http://www.ed.gov/legislation/FedRegister/finrule/2006-3/091306a.html.* For more information on other exceptions permitted in AYP calculations, such as full academic year enrollment, *see* Title I guidance at *http://www.ed.gov/policy/landing.jhtml.*

progress of all Title III-served LEP students in acquiring English and to address the large numbers of Title III-served LEP students who are not included in AMAO 1 calculations because States report them as not having participated in two administrations of the State's ELP assessment. We expect that some students will legitimately have only ''one data point'' on the State ELP assessment. For example, LEP students in kindergarten, or LEP students who are recent arrivals to the United States would likely only have participated in one administration of a State's ELP assessment. However, States should not exclude from AMAO 1 determinations, students who transfer across districts within States, for example, or are absent for an assessment without adequate opportunities for a make-up exam. According to data submitted by States for the 2007 Consolidated State Performance Report (CSPR), an average of 30 percent of Title III-served LEP students had only one State ELP assessment score, and therefore were not included in AMAO 1 determinations. Twelve States were unable to measure progress for 35 percent or more of their Title III-served LEP students. Nine States could not include 40 percent or more of their Title III-served LEP students in AMAO 1 because they did not have scores from two administrations of the State's ELP assessment.

These concerns remain. However, the Department is persuaded by the commenters' arguments and has changed this interpretation to require that States include in AMAO 1 the scores of Title III-served LEP students who have participated in at least two administrations of the State's annual ELP assessment. States also may include, in AMAO 1 determinations, progress measures for Title III-served LEP students who have participated in fewer than two administrations of the ELP assessment but are not required to do so. The final interpretation provides that States may propose to the Secretary alternative measures of progress for students who do not have scores from two administrations of the annual ELP assessment so that such students can be included in AMAO 1 determinations.

Regardless of whether a student has scores from two administrations of the State's ELP assessment, we note that under Title III States are accountable for all Title III-served LEP students. We will continue to require States to report the number of Title III-served LEP students who do not have two data points on the State's annual ELP assessment. States must be able to account for and explain to the Department during its regular Title III monitoring activities, the specific reasons why students' scores were not included in AMAO 1.

Changes: We have revised the interpretation to require States, in calculating AMAO 1, to include only the scores of Title III-served LEP students who have participated in two administrations of the State's ELP assessment. We also have revised the interpretation to provide that if a State does not have results from two administrations of the State's annual ELP assessment for some Title III-served LEP students, but wants to include those students in its AMAO 1 accountability determinations, the State may propose to the Secretary an alternative measure of progress for those students. The final interpretation specifies that an alternative measure of progress must be based on research on how LEP children acquire proficiency in English and be a reliable measure of growth in English language proficiency.

Comments: Several commenters stated that it was inappropriate for the Department to require States to make AMAO 2 determinations based on only ''one data point.''

Discussion: The Department wants to be clear that the lack of ''two data points'' does not affect AMAO 2 calculations of proficiency. AMAO 2 is not a progress measure, nor does it require multiple measures of student growth. Any Title III-served LEP student who participates in one administration of the State's ELP assessment must be included in AMAO 2 (proficiency) calculations.

Changes: None.

Comments: Numerous commenters expressed concern about including in AMAO 1 Title III-served LEP students who have received Title III services for less than a full academic year.

Discussion: There is no provision in Title III (unlike the explicit provision in section 1111(b)(3)(C)(xi) in Title I regarding AYP determinations) that provides for Title III-served LEP students to be excluded from AMAO determinations based on whether such students have attended a school or schools in a subgrantee's jurisdiction for less than a full academic year. Therefore, States may not apply Title I's full academic year policies to AMAO 1 and AMAO 2 determinations.

Changes: None.

Comments: None.

Discussion: The proposed interpretation allowed States discretion to use criteria in addition to performance on the State's ELP assessment in calculating AMAO 1 (*e.g.*, performance on State content assessments or other criteria similar to the criteria States use to define English language proficiency, which may involve data or information from multiple sources). While the Department recognizes that including additional criteria is not standard practice in States, it should be allowed as an option, just as the Department allows criteria, in addition to ELP assessment results, to be considered in AMAO 2 determinations so that ''attaining proficiency'' under Title III corresponds to how proficiency is defined for the purposes of exiting students from the LEP subgroup in Title I (see Interpretation 5).

Changes: We have clarified in the final interpretation that if a State uses additional criteria in calculating AMAO 1, such criteria may only be applied to Title III-served LEP students who have participated in two administrations of the State's annual ELP assessment and have demonstrated progress in learning English.

Comments: None.

Discussion: The proposed interpretation indicated that AMAO 1 determinations typically are made for Title III-served LEP students based on the results of two ''consecutive and consistent'' administrations of a State's ELP assessment.

Upon further review of this language, the Department has determined that it is not necessary for the ELP assessments to be ''consecutive'' to measure Title III-served LEP student growth in English language proficiency. So long as a Title III-served LEP student has participated in two administrations of a State's annual ELP assessment, whether or not those assessments are administered consecutively, progress can be measured and included in AMAO 1 determinations.

We also determined that the reference to two ''consistent'' administrations of a State's ELP assessment was vague and should be removed from the final interpretation. States change and improve their assessments over time and we do not want to imply that scores must be from the exact same test from one year to the next in order to be included in AMAO 1 determinations.[10]

[10] That said, the Department recognizes that States need to have a certain level of comparability in their ELP assessments each year in order to have valid and reliable measures of individual student progress. If a State makes significant changes to its assessment or adopts a new ELP assessment, such that the State faces difficulties in making AMAO 1 determinations, the State must propose to the Department how it will make required AMAO determinations during such assessment transition periods. *See* letter to States at: *http://www.ed.gov/about/offices/list/oela/funding.html* regarding the requirements that States make AMAO determinations each and every year and the

Changes: In the final interpretation we have removed the reference to two ''consecutive and consistent'' annual administrations of an ELP assessment in describing the type of ELP assessment in which a Title III-served LEP student must participate in order to be included in AMAO 1 determinations.

Final Interpretation. The Secretary interprets the requirement in section 3122(a)(3)(A)(i) of the ESEA to require States to include in AMAO 1, at a minimum, the scores of all Title III-served LEP students who have participated in at least two administrations of the State's annual ELP assessment. If a State does not have results from two administrations of the State's annual ELP assessment for some Title III-served LEP students, but wants to include such students in AMAO 1 accountability determinations, the State may propose to the Secretary an alternative method of measuring progress. The alternative method for measuring progress under AMAO 1 must be a valid and reliable measure of growth in English language proficiency.

The Secretary also interprets section 3122(a)(3)(A)(i) of the ESEA to permit States to allow criteria such as performance on local ELP assessments or content assessments—in addition to progress on an annual ELP assessment—to be factored into progress determinations for AMAO 1. However, if a State uses additional criteria, such criteria may not substitute for performance on the State's ELP assessment. Additional criteria are to be considered only over and above the basic AMAO 1 expectation that a subgrantee's Title III-served LEP students who have participated in two administrations of the State's annual ELP assessment have made progress.

5. *Attainment of English Language Proficiency and ''Exiting'' the LEP Subgroup.*

Background. Section 3122(a)(3)(A)(ii) of the ESEA requires States to develop AMAOs for Title III-served LEP students' attainment of proficiency in English, as determined through an assessment that meaningfully measures student proficiency in each language domain and, overall, is a valid and reliable measure of student proficiency in English. AMAO 2 requires that States and subgrantees, at a minimum, show annual increases in the number or percentage of Title III-served LEP students attaining English proficiency.

Notwithstanding the requirement in section 9101(25) of the ESEA for each State to adopt a single definition of limited English proficient, the Department understands that many States have two definitions of language proficiency for LEP students. In most cases, States use one definition of proficiency for purposes of Title III accountability determinations that is different than the definition of proficiency used under Title I to ''exit'' a student from the LEP subgroup. As a result, many students remain designated as LEP despite the fact that, by Title III standards, they have attained English language proficiency.

In the notice of proposed interpretations, the Secretary proposed to interpret Title III to require that a State's definition of English language proficiency for the purpose of setting targets for attaining English language proficiency (AMAO 2) be consistent with and reflect the same criteria the State uses to determine that students from the LEP subgroup no longer need language instruction educational services and will exit the LEP subgroup. In other words, a student considered to have attained proficiency in English for the purposes of AMAO 2 would also be considered ready to exit the LEP subgroup for Title I purposes under the proposed interpretation.

The purpose of the proposed interpretation was to ensure that all LEP students receive Title III services until such time that they are no longer designated LEP and that States do not prematurely designate a student as having ''attained proficiency in English'' for Title III accountability purposes before such students are truly considered proficient in English. As such, the proposed interpretation would have required any additional criteria a State uses under Title I for determining when a LEP student exits the LEP subgroup, to be incorporated into that State's criteria for AMAO 2. The Secretary believes that the lack of consistent criteria for determining proficiency across Title III and Title I creates confusion about eligibility for Title III services and results in improper implementation of Title I and Title III ELP assessment requirements and Title III accountability requirements.

Analysis of Comments and Changes

Comments: Many commenters opposed our proposal to require that a State's definition of attaining proficiency (AMAO 2) for Title III purposes be the same as the State's definition for exiting the LEP subgroup under Title I. The commenters' major concern was that LEP students would be exited from LEP status prematurely or made ineligible for language instruction educational services based solely on the results of a State's ELP assessment. Some commenters argued that Title III resources would be spread too thin and that subgrantees would be forced to serve too many students if subgrantees were required to serve Title III-served LEP students until those students meet a State's criteria for exiting students from the LEP subgroup under Title I. Other commenters expressed concern that States would relax their criteria to exit students from the LEP subgroup in order to meet AMAO 2 proficiency targets. One commenter argued that the statutory language in Title III does not require AMAO 2 to be linked to the criteria for exiting LEP students from the LEP subgroup under Title I.

Discussion: The purpose of the proposed interpretation was to ensure that all LEP students receive Title III services until such time that students are no longer designated LEP. The Department did not intend to require States to change their definition of students who are considered LEP (as per section 9101(25) of the ESEA) under Title I, prematurely exit students from the LEP subgroup, or change in any way the requirements for determining a student's eligibility for Title III or other language instruction educational services. Indeed, the Department proposed that States adopt a single and consistent definition of attaining proficiency in English so as to ensure that a LEP student receives the language instruction educational services needed to acquire proficiency in English as long as the student is identified as LEP.

As illustrated by many of the comments we received, the lack of consistent criteria across Title III and Title I results in confusion about who is eligible for services under Title III, obscures who ought to receive services under Title III, and has led to questions about how a LEP student who has ''attained proficiency'' under Title III is to be included in both Title III and Title I assessments and accountability determinations. For example, through its monitoring of Title III programs, the Department has found that a number of States fail to administer the annual ELP assessment required under Title I once a LEP student has scored proficient and met AMAO 2 under Title III, even though the student continues to be designated as LEP under Title I. In these States, a student who scores proficient on the State's ELP assessment does not continue to be assessed for Title III purposes. However, section 1111(b)(7) of the ESEA requires that as long as a student is LEP, the student must participate in an annual ELP assessment. In addition, a number of

procedures for States to propose to the Department how AMAO determinations will be made when there is a significant change in a State's ELP assessment.

States fail to include Title III-served LEP students in AMAO determinations once a student has ''attained proficiency'' on the State's ELP assessment. However, as long as a LEP student is receiving Title III services, such a student must be included in the annual assessment and accountability requirements in Title III.

The commenters who argued that Title III resources would be spread too thin if students were required to meet a State's criteria for exiting students from the LEP subgroup under Title I in order to be considered proficient under AMAO 2 appear to be confused about the requirements under Title I and Title III. A student is eligible for Title III services as long as the student is designated LEP. Accordingly, the fact that a student is considered to have ''attained proficiency'' under Title III is not the determining factor for whether the student is eligible for Title III services.

The Secretary believes that attaining proficiency in English for Title III purposes should not be a separate or lower standard than the criteria a State uses to determine that a student no longer needs to be designated LEP. However, given the overwhelming misunderstanding of and opposition to the proposed interpretation, as well as concerns raised by Congressional staff and other commenters that the intent of the law, despite the inconsistencies it may cause, is to allow separate measures of accountability for Title I and Title III, we have changed the interpretation. The final interpretation permits States to use a definition of ''attaining proficiency'' for AMAO 2 that differs from the definition the State uses to exit students from the LEP subgroup for Title I accountability purposes.

However, the Secretary wants to make clear that, consistent with the statutory language, students who remain in the LEP subgroup under Title I (regardless of whether they ''attain proficiency'' for AMAO 2 purposes) must continue to be eligible for Title III services and must participate in the State's annual ELP assessment, as required under Title I. The scores of Title III-served LEP students cannot be ''banked'' until such students meet other State or local criteria for exiting the LEP subgroup and must be included in all AMAO determinations as long as the student receives Title III services or is included in the State's or subgrantee's definition of Title III-served LEP students for accountability purposes.

The Secretary also urges Congress to carefully consider and address, during reauthorization of the ESEA, the inconsistency of English language proficiency definitions across Title I and Title III.

Changes: We have revised the interpretation to encourage, but not require, a State's definition of attaining English language proficiency, and its AMAO 2 targets, calculations, and determinations to be consistent with the criteria the State uses to determine that students are ready to exit the LEP subgroup under Title I.

We also have revised the interpretation to clarify that as long as a student is designated LEP, the student is eligible for Title III services, regardless of whether the student has ''attained proficiency'' based on the definition of AMAO 2 under Title III.

In addition, the final interpretation includes language providing that all students designated LEP are required, under Title I, to participate in an annual ELP assessment, regardless of whether, for Title III purposes, such students have ''attained proficiency'' in English and that every LEP student who is receiving Title III services must be included in AMAO determinations, regardless of whether the student has ''attained proficiency'' in English on the State's ELP assessment.

Comments: Several commenters asked whether the criteria States use to exit students from the LEP subgroup under Title I could include criteria in addition to performance on a State's annual ELP assessment. Many commenters expressed concern that if States were required to use only the results of the State ELP assessment to exit students from the LEP subgroup, many LEP students would be inappropriately exited from the LEP subgroup.

Discussion: Section 9101(25) of the ESEA provides States with flexibility in the criteria they use to define a LEP student. The Department requires States to submit their definitions of LEP and their criteria for exiting students from the LEP subgroup as part of their Title I Accountability Workbook. The Department has approved numerous States' definitions that include criteria in addition to performance on the State's ELP assessment, to exit students from the LEP subgroup. For example, some States use judgments from teachers and parents; other States use student performance on other assessments, including State content assessments in reading required under Title I. Neither the proposed nor the final interpretation challenges States' approved definitions of LEP students or suggests that States should use performance on a State's annual ELP assessment alone to exit students from the LEP subgroup; the proposal was to use the same approved criteria under Title I to define proficiency for Title III purposes.

Changes: None.

Comments: Several commenters expressed concern that the proposed interpretation excluded parents from the decision-making process regarding a student's LEP status.

Discussion: We did not intend in the proposed interpretation to challenge or change any requirements regarding the array of student performance data or teacher and parent judgments used to make decisions about students' need for language instruction educational services or exiting students from the LEP subgroup; nor does the final interpretation. The final interpretation focuses only on how States define, for the purposes of Title III accountability determinations, whether a student has ''attained English proficiency'' under AMAO 2.

Changes: None.

Final Interpretation. It is the Secretary's interpretation of section 3122(a)(3)(A)(ii) of the ESEA that a State may use a definition of attaining English language proficiency for purposes of Title III accountability determinations under AMAO 2 that differs from the definition of English language proficiency that the State uses to determine that students should exit the LEP subgroup for Title I accountability purposes. If a State uses different definitions, students who remain in the LEP subgroup—regardless of whether they ''attain proficiency'' for AMAO 2 purposes—continue to be eligible for Title III services, and must participate in the State's annual ELP assessment, as required under section 1111(b)(7) of the ESEA. In addition, any LEP student who continues to receive Title III services—regardless of whether they ''attain proficiency'' for AMAO 2 purposes—must be included in all AMAO determinations.[11]

However, the Secretary strongly encourages States to have a definition of attaining proficiency (AMAO 2) for Title III purposes that is consistent with the State's definition for exiting the LEP subgroup under Title I. A single definition of English language proficiency would result in a State setting its targets for AMAO 2 that are consistent with and reflect the same criteria it uses to determine that students are prepared to exit the LEP subgroup for Title I accountability purposes.

[11] However, AMAO 2 calculations do not include former LEP students who, while they have exited the LEP subgroup, may still be included in the subgroup for two years for the purposes of Title I AYP calculations.

The final interpretation has no bearing on the substance of the criteria States use to exit students from the LEP subgroup under Title I. The Secretary continues to permit States and subgrantees to use criteria in addition to performance on the State's annual ELP assessment to determine a student's LEP status, consistent with States' definitions of LEP in their Title I Accountability Workbooks, as long as those criteria are applied consistently across all subgrantees in a State.

6. *Use of Minimum Group Size in Title III Accountability.*

Background. Section 3122(a)(3)(A)(ii) of Title III requires that States' AMAOs be determined using a valid and reliable assessment of English proficiency consistent with section 1111(b)(7) of Title I of the ESEA.

States have asked the Department to provide guidance on whether they may apply their minimum group size, used in Title I AYP determinations, to AMAO calculations and determinations. It is the Department's understanding that numerous States are already implementing minimum group size policies as part of their AMAO determinations.

In the notice of proposed interpretations, the Secretary proposed to interpret Title III to permit a State to apply the same minimum group size to AMAO calculations and determinations that the State applies to AYP determinations and that have been approved by the Department in the State's Accountability Workbook for purposes of Title I of the ESEA. This interpretation was based on the statutory requirement that AMAO determinations be made based on valid and reliable measures of student performance on ELP assessments. In this context, a minimum group size reflects the number of Title III-served LEP students enrolled in a district who participate in the State's annual ELP assessment in order for the ELP assessment scores of those students, taken together, to be a reliable basis for making judgments about how a subgrantee is performing.

Analysis of Comments and Changes

Comments: None.

Discussion: In the course of our internal review of the proposed interpretations, we determined that we should refer to ''minimum group size'' rather than ''minimum subgroup size'' because AYP determinations are made for student subgroups and the ''all students group,'' which is not considered a subgroup.

Changes: We have changed the reference from ''minimum subgroup size'' to ''minimum group size'' throughout the interpretation.

Comments: The majority of commenters supported the proposed interpretation that would permit a State to apply a minimum group size to AMAO calculations and determinations under Title III, consistent with the minimum group size policies that the State applies to AYP determinations under Title I and that has been approved by the Department in the State's Accountability Workbook under Title I. However, a few commenters expressed concern that permitting a State to use its minimum group size would mean that some districts would not be held accountable under Title III.

Discussion: AMAO determinations must be made for all subgrantees receiving Title III funds. We share the commenters' concerns that the use of a minimum group size may mean that the scores of some students would not be included in AMAO determinations. We believe that this is a particular concern for subgrantees that use cohorts in making their AMAO determinations or are members of a consortium for Title III funding purposes.

In order to ensure that using a minimum group size in AMAO determinations does not render subgrantees unaccountable under Title III, we have clarified in the final interpretation that a State cannot apply its minimum group size to individual cohorts of LEP students in the State or in subgrantee jurisdictions for which the State has set separate AMAO targets for cohorts. Similarly, if a State's subgrantees have formed a consortium for funding purposes, a State's minimum group size may not be applied to an individual consortium member if it means that AMAO determinations would not be made for that member of the consortium or for the consortium as a whole. In such cases, the data must be aggregated and combined across some or all members in the consortium in order to make AMAO determinations.

Changes: We have revised the interpretation to make clear that a State's minimum group size may be applied to State-level AMAO determinations and to subgrantees' Title III-served LEP group—but not to AMAO determinations for separate ''cohorts'' of Title III-served LEP students for which the State has set separate AMAO targets for itself and its subgrantees.[12]

We also have clarified that if a State's subgrantees have formed consortia for the purposes of receiving Title III funding, a State's minimum group size may be applied to each consortium member only if AMAO determinations can be made for each member of the consortium; otherwise, the minimum group size may not be applied to an individual consortium member. Instead, data from at least some other members of the consortium must be aggregated to meet minimum group size requirements and make AMAO determinations.

Comments: Several commenters stated that the proposed interpretation seems inconsistent with our interpretation that requires all students to be included in AMAOs.

Discussion: A major purpose of these interpretations is to ensure that no State systematically excludes Title III-served LEP students from Title III accountability determinations. This is very different from supporting district and State efforts to ensure that accountability determinations are based on sound, stable, and reliable data. In fact, section 3122(a)(3)(A)(ii) of the ESEA specifically requires States' AMAOs for LEP student proficiency in English to be determined by a valid and reliable assessment of English proficiency consistent with section 1111(b)(7) of Title I of the ESEA.

The Department believes that in most cases, it is not necessary for States to apply a minimum group size to AMAO determinations because Title III accountability requirements apply only at the LEA/subgrantee and State levels. Title III accountability requirements do not apply to individual schools, where there are typically smaller numbers of LEP students or frequent fluctuations in student populations that make it necessary to use a minimum group size. However, we will permit a State to apply its minimum group size to AMAO determinations to ensure that judgments about a subgrantee's performance in serving LEP students are based on valid and reliable data. If a State uses a minimum group size in AMAO determinations, it must report this information as part of its Title III State plan.

Changes: As noted previously, we have clarified that a State's minimum group size may not be applied to AMAO determinations for separate cohorts. Likewise, a State's minimum group size

[12] Interpretation 8 addresses State use of ''cohorts'' in making AMAO determinations for Title III accountability purposes. In the end, a State is required to make a single AMAO determination for itself and for each subgrantee, regardless of how many ''cohorts'' it uses or separate AMAO determinations it makes for groups of Title III-served LEP students. For this reason, the Department believes it is appropriate to restrict the application of minimum group size criteria to the overall State or subgrantee AMAO determination, rather than to each individual cohort, which would severely restrict Title III accountability at the subgrantee level.

may be applied to each member of a consortium only if AMAO determinations can be made for each member. If AMAO determinations cannot be made for an individual consortium member, the State must not apply its minimum group size to the individual consortium member but must combine AMAO data with some or all consortium members for some or all AMAOs in order that AMAO determinations can be made for every member in a consortium.

Comments: None.

Discussion: In our explanation in the notice of proposed interpretations, we noted that the Department is not encouraging States to adopt minimum group size policies for purposes of complying with Title III's accountability requirements and that the Department does not believe it will be necessary for most States to adopt such policies. As we have stated previously in this notice, Title III accountability requirements apply only at the LEA/subgrantee and State levels, not to individual schools, where there are typically smaller numbers of LEP students or frequent fluctuations in student populations that might make use of a minimum group size necessary. Furthermore, LEAs with very small numbers of LEP students are not typically eligible for Title III grants, so they are unlikely to be affected by the final interpretation.

We emphasize that policies designed to ensure that assessment results are used to make valid and reliable accountability determinations must be applied consistently across the State for Title III subgrantees. Therefore, under no circumstances may a State allow one subgrantee to use a different minimum group size than another subgrantee in the State for Title III accountability purposes.

Changes: None.

Final Interpretation. The Secretary interprets section 3122(a)(3)(A) of the ESEA to permit a State to apply a minimum group size to AMAO calculations and determinations under Title III that is consistent with the minimum group size that the State applies to AYP determinations and that has been approved by the Department in the State's Accountability Workbook under Title I.

In order to ensure that a State's minimum group size does not decrease accountability for subgrantees receiving Title III funds, a State may apply its minimum group size only to the State's and subgrantees' Title III-served LEP students as a whole and not to separate ''cohorts'' of Title III-served LEP students if the State has established cohorts and has set separate AMAO targets for them.

If a State's subgrantees have formed a consortium for the purposes of Title III funding, a State's minimum group size may be applied to each consortium member only if AMAO determinations can be made for each member. If AMAO determinations cannot be made using the State's minimum group size for any member of the consortium, the State must not apply its minimum group size to the individual consortium member and instead must combine AMAO data across some or all consortia members for some or all AMAO determinations so that minimum group size requirements are met and AMAO determinations are made for every consortium member receiving Title III funds.

7. *All LEP Students, Adequate Yearly Progress, and AMAO 3.*

Background. Section 3122(a)(3)(A)(iii) of the ESEA requires States to develop an AMAO for making AYP for LEP students as described in section 1111(b)(2)(B) of Title I of the ESEA.

In Interpretation 3 of this notice, the Department has set forth its final interpretation that all LEP students served by Title III must be included in Title III accountability determinations. Interpretation 7 addresses the more specific question of whether States must include all LEP students—whether or not served by Title III—in determining whether a State or its subgrantees have met AMAO 3.

In the notice of proposed interpretations, the Secretary proposed to interpret Title III to require that the LEP students included in AMAO 3 be the same LEP students referred to in section 1111(b)(2)(B) of Title I of the ESEA—that is, all students counted in the LEP subgroup for AYP purposes. The setting of targets, calculations, and determinations of AMAO 3, under this interpretation, would not be limited to, or based on, only the expectations for Title III-served LEP students.

Analysis of Comments and Changes

Comments: Many commenters supported the proposed interpretation to require that LEP students included in AMAO 3 be the same LEP students counted in the LEP subgroup for AYP purposes under Title I. Most of the commenters representing State Departments of Education acknowledged that the current practice for calculating AMAO 3 is to use the AYP calculation under Title I and include all LEP students in Title III-funded districts or all LEP students in the State. However several commenters questioned the Department's authority to require States to include in AMAO 3 all LEP students when section 3122(a)(1) in Title III of the ESEA clearly refers to LEP students ''served under this part.'' Some commenters also expressed concern about holding Title III programs accountable for the academic performance of all LEP students.

Discussion: We do not agree that Title III clearly addresses the issue of which LEP students are expected to be included in AMAO 3. Section 3122(a)(1) of the ESEA specifically notes that AMAOs apply to ''children served under this part.'' However, section 3122(a)(3)(A)(iii) of the ESEA requires States to develop an AMAO ''for making adequate yearly progress for limited English proficient children as described in section 1111(b)(2)(B) [of Title I of the ESEA].'' Because of this ambiguity, we have revised the interpretation to permit a State and its LEAs to meet AMAO 3 if the State's AYP achievement targets for reading and mathematics are met by the LEP subgroup as a whole (the same AYP determination under Title I) or by the subgroup of Title III-served LEP students. If a State has the capacity and ability to reliably and accurately make AYP determinations at the LEA and State levels specifically for Title III-served LEP students, the State may do so. If, for practical reasons, a State decides to calculate AMAO 3 based on all LEP students in the State or based on all LEP students in Title III-funded subgrantee jurisdictions, the State may do so.

Changes: We have changed the interpretation to permit, but not require, States to calculate AMAO 3 using (1) the LEP subgroup as a whole or (2) the Title III-served LEP students if the State has the capacity and ability to reliably and accurately make AYP determinations at the LEA and State levels specifically for the Title III-served LEP students. In the final interpretation, we clarify that States must explain to the Department which method they are using to calculate AMAO 3 and apply the method consistently in making AMAO determinations for subgrantees.

Comments: A number of commenters noted that AMAOs are based on district, not school, performance and asked how they would use district-level AYP for AMAO 3. Specifically, the commenters asked how AMAO 3 should be determined when States calculate AYP for grade spans within districts and whether Title III subgrantees must meet AYP targets for LEP students in both language arts and mathematics to be considered to have met AMAO 3.

Discussion: In order to meet AMAO 3, the Title III-served LEP students or the LEP subgroup in general must meet

district-level AYP targets for all grade spans (if grade spans are used) for both mathematics and reading/language arts, as well as meet AYP participation requirements. We have added language to make this clear in the final interpretation.

Changes: We have revised the interpretation to clarify that meeting AMAO 3 requires States and subgrantees to meet State AYP targets for both reading and mathematics for the Title III-served LEP students or the LEP subgroup as defined under Title I. The final interpretation also clarifies that a State and its subgrantees must meet State AYP targets for both reading and mathematics, as well as the participation rates, for the Title III-served LEP students or the LEP subgroup under Title I in order to be considered to have met AMAO 3.

Comments: None.

Discussion: The Secretary believes that one of the key purposes of AMAO 3 is to tie accountability for English language acquisition under Title III to accountability for ensuring that all LEP students achieve to the same high standards as all students are expected to meet in the core content areas under Title I. Therefore, the Secretary's strong preference is that a State uses the same criteria for determining AYP under AMAO 3 as it uses to determine AYP for the LEP subgroup at the State and LEA levels under Title I. We have made this clear in the final interpretation.

However, given the lack of clarity in the statutory language, the final interpretation allows States the option, in calculating AMAO 3, to include (1) all LEP students—that is, the entire LEP subgroup as defined under Title I—in the subgrantee's jurisdiction or (2) only Title III-served LEP students.

Changes: The final interpretation notes the Secretary's strong preference that a State uses the same criteria for determining AYP under AMAO 3 as it uses to determine AYP for the LEP subgroup at the State and LEA levels under Title I.

Final Interpretation: The Secretary interprets section 3122(a)(3)(A)(iii) of the ESEA to permit a State and its subgrantees to meet AMAO 3 if the State's AYP achievement targets for reading and mathematics are met by the LEP group as a whole (the same AYP determination under Title I) or by the subgroup of Title III-served LEP students, if the State has the capacity and ability to reliably and accurately make AYP determinations at the State and LEA/subgrantee levels specifically for the Title III-served LEP subgroup. In either case, each State is required to provide information in its State Title III plan on how AMAO 3, as well as the other AMAOs, will be defined and determined consistently for all subgrantees in the State. However, the Secretary's strong preference is that the LEP students included in AMAO 3 be the same LEP students referenced in section 1111(b)(2)(B) of Title I of the ESEA—that is, all students included in the LEP subgroup at the State and LEA levels for AYP purposes under Title I.[13]

8. *AMAOs and the Use of Cohorts.*

Background: Section 3122(a)(2)(A) of the ESEA requires that AMAOs be developed in a manner that reflects the amount of time an individual student has been enrolled in a language instruction educational program.

States have some discretion in how to consider the amount of time a student has had access to a language instruction educational program when developing AMAO targets. Some States have appropriately considered empirical data and instructional practices in setting overall AMAO targets for English language acquisition by Title III-served LEP students. To date, the Department also has allowed States to establish different AMAO targets for different ''cohorts'' of LEP students. The Department's intent in allowing cohorts was to help States implement AMAOs that reflect the amount of time students are enrolled in a language instruction educational program. However, we have learned that some States have implemented AMAO targets for cohorts based on characteristics of LEP students other than their access to English language instruction educational programs. For example, some States have established cohorts based on student performance on ELP assessments, the number of years students have been in the United States, or on the likelihood a student will reach proficiency in English in a given year. The Secretary believes that such practices are inconsistent with Title III and NCLB.

In the notice of proposed interpretations, the Secretary proposed to interpret Title III to mean that (a) States may, but are not required to, establish ''cohorts'' for AMAO targets, calculations, and determinations; and (b) States may only set separate AMAO targets for separate groups or ''cohorts'' of LEP students served by Title III based on the amount of time (for example, number of years) such students have had access to language instruction educational programs. Under the proposed interpretation, States could not set separate AMAO targets for cohorts of LEP students based on a student's current language proficiency, time in the United States, or any criteria other than time in a language instruction educational program.

Analysis of Comments and Changes.

Comments: There was general opposition to the proposed interpretation which would allow States to set separate AMAO targets for separate groups or ''cohorts'' of LEP students served by Title III based only on the amount of time (for example, number of years) such students have had access to language instruction educational programs. Most commenters argued that States should be allowed to use other criteria, such as students' current proficiency levels, to establish cohorts and set different expectations for students based on such criteria. Some commenters argued that States should be permitted to establish different cohorts and expectations based on a student's current proficiency levels so that States could hold districts accountable for higher rates of growth for students with the least proficiency in English.

Discussion: Section 3122(a)(2)(A) of the ESEA requires AMAOs to be developed in a manner that reflects the amount of time an individual student has been enrolled in a language instruction educational program. States have some discretion in how to consider the amount of time a student has had access to a language instruction educational program when developing AMAO targets. Some States, for example, have appropriately considered empirical data and instructional practices in setting overall AMAO targets for English language acquisition by LEP students served under Title III.

Title III does not, however, support setting separate accountability targets for language proficiency based on a student's current proficiency level in English. Although some commenters argued that separate targets based on language proficiency levels would allow States to hold districts accountable for higher rates of growth for students with the least proficiency in English, the Department has no evidence that cohorts defined by variables other than the number of years of access to Title III services are being used by States to hold districts to higher standards for their LEP students at the lowest levels of English proficiency.

Changes: None.

Comments: Some commenters urged the Department to allow States to ''weight'' the scores of LEP students at the lowest proficiency levels in AMAO

[13] This includes former LEP students if a State chooses to use the flexibility granted to States by the Secretary to include former LEP students for up to two years in AYP calculations.

calculations because such students cannot be expected to attain proficiency.

Discussion: Section 3122(a)(1) is clear that all Title III-served LEP students must be included in AMAO determinations. It would be contrary to the goals and purpose of NCLB to weight students differently based on their abilities or to assume that some students cannot reach proficiency in English.

Changes: None.

Comments: Numerous commenters expressed concern that with this proposed interpretation, it appears the Department expects all students to learn English in the same amount of time.

Discussion: AMAOs are district- and State-level targets for the overall progress and attainment of proficiency in English among Title III-served LEP students. The interpretation does not address the pace at which any individual student will learn English or make predictions or assumptions about individual growth in English language acquisition. Furthermore, because Title III requires that AMAOs reflect students' access and time in language instruction educational programs, the interpretation expressly does not demand uniform language acquisition expectations for all students. Rather it recognizes that the amount of time LEP students participate in language instruction educational programs is an essential element to consider in Title III accountability determinations.

Changes: None.

Comments: One commenter expressed concern that the proposed interpretation would permit States to decide whether or not to factor time in a language instruction educational program into AMAO determinations.

Discussion: Section 3122(a)(2)(A) of the ESEA is clear that States *must* develop AMAOs in a manner that reflects the amount of time an individual student has been enrolled in a language instruction educational program. The Department requires States to implement this provision and the final interpretation should not be interpreted otherwise.

Changes: None.

Comments: One commenter asked whether cohorts can be established by grade level for AMAO 1 and AMAO 2.

Discussion: AMAOs 1 and 2 reflect overall LEA and State targets for the percent of students making progress and attaining English proficiency, respectively, each year. Under Title III, grade level is not considered in AMAO definitions and determinations and the Department sees no justification for creating grade-level cohorts for making AMAO determinations.

Changes: None.

Comments: None.

Discussion: In reviewing the proposed interpretation, we determined that it would be helpful to include information in the text of the final interpretation regarding the need for States and subgrantees using cohorts to meet all AMAO targets applied to each cohort in order to meet AMAOs for the State or subgrantee overall. For example, if a State chooses to set two separate AMAO targets for progress (AMAO 1)—one for students with less than three years of access to a language instruction educational program and one for students with three or more years of access to a language instruction educational program—the State and subgrantees would have to meet both targets (i.e., both the target for students with less than three years of language instruction and the target for students with more than three years of language instruction) for that entity to meet AMAO 1. For a subgrantee to meet an AMAO overall, all cohorts for which the State has set separate targets would have to meet the AMAO targets. We have included this information in the final interpretation.

Changes: We have revised the interpretation to incorporate language, originally included in the explanation of the proposed interpretation, indicating that States and subgrantees using cohorts must meet all AMAO targets for each cohort in order to meet the AMAOs for the State or subgrantee overall.

Final Interpretation. The Secretary interprets Title III to mean that (a) States may, but are not required to, establish ''cohorts'' for AMAO targets, calculations, and determinations; and (b) if States set separate AMAO targets for separate groups or ''cohorts'' of LEP students served by Title III they may do so based only on the amount of time (for example, number of years) such students have had access to language instruction educational programs. The plain language in section 3122(a)(2)(A) of the ESEA specifically provides that, in developing AMAOs, States must take into account the time a student has spent in a language instruction educational program. It is the Secretary's interpretation that it would be inconsistent with this statutory language to set different expectations for different Title III-served LEP students on any other basis, such as students' current language proficiency, individual abilities, or time residing in the United States.

To the extent that States choose to define ''cohorts'' of LEP students based on their time in language instruction educational programs to set, calculate, and determine AMAO 1 or AMAO 2, the State and subgrantees must meet all of the AMAO targets applied to each cohort of LEP students in order to be considered to have met AMAOs for the State or subgrantee overall.

9. *Determining AMAOs for Consortia.*

Background. Section 3113(b)(5)(A) of Title III requires States to submit a plan to the Secretary describing how the agency will hold eligible entities accountable for meeting all AMAOs described in section 3122 of the ESEA.

Under Title III, an SEA can make subgrants to eligible entities, which include LEAs applying individually or as part of a group or consortium. Because section 3114(b) of the ESEA does not permit States to award Title III grants in amounts smaller than $10,000, a consortium arrangement can be used by a group of LEAs that are not individually eligible for Title III funds due to the small number of LEP students in their LEAs.

To date, some Department officials have communicated to States that AMAOs must be calculated for consortia by compiling all ELP assessment data and other applicable data from each of the members in a consortium and determining, based on those data, whether the consortium has met the State's AMAOs. In the case of AMAO 3 (i.e., AYP for the LEP subgroup), Department staff, in a number of cases, have required States to aggregate and compile results across LEAs and compute a new ''consortium-wide AYP.'' The Department is also aware that some States use different methods to calculate AMAOs for various consortia within their States.

In the notice of proposed interpretations, the Secretary stated that States are required to hold consortia, like any other eligible subgrantee, accountable for meeting AMAOs. However, the Secretary proposed to interpret Title III to allow States discretion about whether to treat subgrantees that consist of more than one LEA as a single entity or separate entities for the purpose of calculating each of the three AMAOs required under Title III.

Analysis of Comments and Changes

Comments: The vast majority of commenters supported the proposed interpretation to give States discretion about whether to treat subgrantees that consist of more than one LEA as a single entity or as separate entities for the purpose of calculating the three AMAOs required under Title III. However, commenters requested clarification regarding whether a State can pool data for some AMAOs and not others, and

whether States can use a ''small district review,'' similar to what States are permitted to use under Title I, for LEAs that do not have enough LEP students to make separate AMAO determinations.

Discussion: The Department requires that States make AMAO determinations for all subgrantees, including all LEAs that are members of a consortium. This interpretation gives States discretion about whether to make ''stand alone'' AMAO determinations for some LEAs within a consortium and whether and how to combine data for consortium-wide AMAO determinations.

Under the final interpretation, States must adopt ''decision rules'' for making AMAO determinations for consortia. These decision rules need not be uniform across all consortia, but must be consistent for consortia that are made up of similar types of LEAs. That is, we would expect the same decision rules to apply, for example, to consortia made up of several small LEAs, or to consortia made up of one or more large LEAs with several small LEAs. States must be able to demonstrate that the decision rules maximize accountability for consortia in the State. If AMAOs can be calculated separately for some LEAs in a consortium, States may calculate AMAOs for those LEAs individually. For consortia in which some or all of the LEAs are too small to make individual AMAO determinations, States have the option of combining all data within the consortium or combining the data for all of the LEAs that are too small to calculate separate AMAO determinations. States also may propose, when appropriate, to combine data for some AMAOs but not others within a consortium. Note that, as described in Interpretation 6, in cases where use of a State's minimum group size renders AMAO determinations impossible for a consortium member, a State must not apply the State's minimum group size to an individual member and, instead, must combine or aggregate data with other LEAs in the consortium to ensure that AMAO determinations are made.

A State with consortia must include in its Title III State plans, the decision rules for how it makes AMAO determinations for consortia.

Finally, the Department is not permitting, with this interpretation, a small LEA review for Title III accountability purposes. It is unlikely that a district that is small enough to require a small LEA review would qualify for Title III funds. If such a small district is part of a consortium, the Department requires that AMAO determinations be made—whether that requires the district to pool AMAO data with other districts in the consortium or forgo using a minimum group size in order to make AMAO determinations.

Changes: We have added language to the final interpretation to emphasize that a State with consortia must include, in its Title III State plans, the decision rules for how it makes AMAO determinations for its consortia. We also have added language to require States to ensure that these decision rules maximize accountability under Title III.

Comments: None.

Discussion: The Department intends to ensure that consortia are held accountable for meeting AMAOs and believes this is best accomplished if States adopt a set of consistent decision rules for implementing AMAOs for consortia within each State. States should be prepared to demonstrate, with data, that the method used to calculate AMAOs for consortia will yield AMAO determinations for all subgrantees and hold all consortia members accountable for ensuring that Title III-served LEP students acquire English language skills and for making AYP.

If a State intends to, among other things, combine assessment or other data, apply a minimum group size, create a ''consortium AYP'' calculation, or treat individual LEAs separately for the purposes of calculating AMAOs, the State must describe its methods and rationale in its State Title III plan. If a State intends to change the way it computes AMAOs for consortia, or wishes to propose criteria for using different approaches based on the characteristics of consortia, the Secretary will require the State to submit, for approval, an amendment to its Consolidated State Plan, required under section 3113 of the ESEA.

Changes: We have revised the interpretation to emphasize that a State with consortia must include, in its Title III State plan, the decision rules for how it makes AMAO determinations for consortia. We also have added language to require States to ensure that these decision rules maximize accountability under Title III.

Final Interpretation: The Secretary requires States to hold consortia, like any other eligible subgrantee, accountable for meeting AMAOs. However, the Secretary interprets Title III to allow States discretion about whether to treat subgrantees that consist of more than one LEA/subgrantee as a single entity or as separate entities for the purpose of calculating the three AMAOs required under Title III. States will, for example, be permitted to combine data across LEAs in a consortium or treat LEAs within a consortium separately for the purposes of accountability determinations. States also have discretion in determining how they separate or combine data for calculating each AMAO. States must develop decision rules for making AMAO determinations for consortia that maximize accountability for consortia; these decision rules must be included in their Title III State Plans.

10. *Implementation of Corrective Actions under Title III.*

Background. Section 3122(b) of the ESEA describes the actions that a State and its subgrantee must take if a subgrantee fails to meet Title III AMAOs for two or four consecutive years. If a State determines that a subgrantee has failed to make progress toward meeting the AMAOs for two consecutive years, the State must require the subgrantee to develop an improvement plan. The improvement plan must specifically address the factors that prevented the subgrantee from meeting the AMAOs. If a State determines that an eligible subgrantee has not met the AMAOs for four consecutive years, the State must—(1) require the subgrantee to modify its curriculum, program, and method of instruction; or (2) determine whether the subgrantee should continue to receive Title III funds and require the subgrantee to replace educational personnel relevant to the subgrantee's failure to meet the objectives. Furthermore, section 3302 of Title III requires that parents of LEP students served by a subgrantee receive notice each year that a subgrantee does not meet AMAOs.

In monitoring State compliance with Title III, the Department has become aware that some States have made AMAO determinations and reported those determinations to the Department, but have neither informed subgrantees of the AMAO determinations nor implemented any measures to address subgrantees' failures to meet the AMAOs. The purpose of the proposed interpretation was to make absolutely clear that States must communicate with Title III subgrantees and the parents of students served by or identified for services by the subgrantees about student progress and achievement, as well as provide parents with information about their child's education; these requirements are central to the purposes and goals of NCLB.

In the notice of proposed interpretations, the Secretary reinforced the proper implementation of the accountability provisions of Title III, which require that all States make determinations for each of three AMAOs—making progress in English

proficiency (AMAO 1), attaining English proficiency (AMAO 2), and AYP for the LEP subgroup (AMAO 3)—for *every* Title III subgrantee in the State for *every* school year. The Secretary also proposed to clarify States' responsibilities to communicate with parents and subgrantees about AMAO results.

Analysis of Comments and Changes

Comments: One commenter stated that it was unfair for the Department to conclude that a subgrantee has not made its AMAOs if it misses only one of the three AMAO targets. The commenter questioned whether this was a statutory requirement.

Discussion: Section 3122(a)(3)(A) of the ESEA states that AMAOs must provide for, at a minimum, increases in AMAO 1 and AMAO 2, *and* making AYP for the LEP subgroup (AMAO 3). Section 3122(b)(1) requires States to hold LEAs accountable for meeting AMAOs, and to require an LEA to adopt an improvement plan if the LEA fails to meet those AMAOs for two consecutive years. This statutory language supports the Secretary's interpretation that, each year, all of the AMAOs must be met. Furthermore, increases in proficiency, without increases in students attaining proficiency or subgrantees meeting AYP, would not be sufficient to achieve the goals of Title III.

Changes: None.

Comments: One commenter expressed concern that States would be required to retroactively apply the final interpretations to districts. The commenter argued that Title III subgrantees should have the opportunity to change the way they make AMAO determinations to be consistent with the final interpretations before a State takes enforcement action. Some commenters argued that the starting point or ''year 1'' for Title III accountability determinations and requisite sanctions should start when the final interpretations are issued because it would be unfair to apply the new interpretations retroactively.

Discussion: This interpretation was included in the notice of proposed interpretations because, in the Department's monitoring of States, we found that many States (23) had not made any or all AMAO determinations since NCLB was implemented in 2003. In addition, several States made AMAO determinations, but did not provide information about the determinations to LEAs/subgrantees or parents, as required in section 3302(b) of the ESEA. The Department has made clear to States that did not correctly make AMAO determinations in the past that they must ensure that LEAs/subgrantees and parents are informed that the State did not make AMAO determinations or did not make accurate AMAO determinations; make AMAO determinations for every year using at least AMAO 3; and make complete AMAO determinations moving forward.[14] That said, we are not requiring States to retroactively implement these interpretations. For example, States are not expected to recalculate AMAOs for past years; nor would we require States to change existing AMAO determinations based on the final interpretations. The interpretations simply reiterate what Title III already requires regarding implementation of Title III accountability provisions and what we are requiring of States and subgrantees going forward.

Changes: None.

Final Interpretation. Through this notice, the Secretary reinforces the proper implementation of the requirements in section 3122(b) of the ESEA. The Secretary interprets section 3122(b) to require that *all* States comply with Title III requirements and make determinations for each of the three AMAOs—making progress in English proficiency (AMAO 1), attaining English proficiency (AMAO 2), and making AYP for the LEP subgroup (AMAO 3)—for *every* Title III subgrantee in the State for *every* school year. Not meeting any one of the three AMAO targets in a given school year constitutes not meeting AMAOs. The Secretary also interprets Title III to require that States annually inform their subgrantees when the subgrantees do not meet the State's AMAO targets—for each and every AMAO target the subgrantee does not meet. In addition, States and subgrantees must communicate AMAO determinations to the parents of LEP students served by subgrantees' Title III programs when subgrantees do not meet AMAOs.

The Department expects States, on an annual basis, to maintain evidence that (a) the State has informed a subgrantee if the subgrantee did not meet one or more AMAO, (b) the subgrantee has notified parents that it did not meet one or more AMAO, (c) the State has provided the required technical assistance to the subgrantee, and (d) the State has implemented required measures to address the subgrantee's failure to meet the AMAOs. The Department may review this evidence as part of its annual desk audits and on-site monitoring in order to ensure that Title III corrective action requirements are being appropriately and effectively implemented.

[14] *See: http://www.ed.gov/about/offices/list/oela/funding.html* for an explanation of conditions placed on State Title III, Part A grants regarding a State's failure to make AMAO determinations or making incomplete AMAO determinations for school years 2002–2003, 2003–2004, 2004–2005, and 2005–2006 and the Department's expectations for State corrective actions to ensure that all AMAO determinations are made and that all States are in compliance with the accountability requirements of Title III moving forward.

Proposed Rulemaking

Under the Administrative Procedure Act (5 U.S.C. 553) (APA), this notice is an interpretative rule and therefore is exempt from the notice-and-comment rulemaking requirements under the APA. Notwithstanding this exemption, the Department solicited public comment on these interpretations in order to consider public input, and is providing additional details and clarifications in this notice of final interpretations.

Intergovernmental Review

This program is subject to Executive Order 12372 and the regulations in 34 CFR part 79. One of the objectives of the Executive order is to foster an intergovernmental partnership and a strengthened federalism. The Executive order relies on processes developed by State and local governments for coordination and review of proposed Federal financial assistance.

Electronic Access to This Document

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Dated: October 14, 2008.

Margaret Spellings,

Secretary of Education.

[FR Doc. E8–24702 Filed 10–16–08; 8:45 am]

BILLING CODE 4000–01–P

DEPARTMENT OF ENERGY

Notice of Availability of Draft Global Nuclear Energy Partnership Programmatic Environmental Impact Statement

AGENCY: Office of Nuclear Energy, U.S. Department of Energy.

ACTION: Notice of Availability and Public Hearings.

SUMMARY: The Department of Energy (DOE) announces the availability of the *Draft Global Nuclear Energy Partnership Programmatic Environmental Impact Statement* (Draft GNEP PEIS, DOE/EIS–0396). The Draft GNEP PEIS provides an analysis of the potential environmental consequences of the reasonable alternatives to support expansion of domestic and international nuclear energy production while reducing the risks associated with nuclear proliferation and reducing the impacts associated with spent nuclear fuel disposal (e.g., by reducing the volume, thermal output, and/or radiotoxicity of waste requiring geologic disposal). Based on the GNEP PEIS and other information, DOE could decide to support the demonstration and deployment of changes to the existing commercial nuclear fuel cycle in the United States. Alternatives analyzed include the existing open fuel cycle and various alternative closed and open fuel cycles. In an open (or once-through) fuel cycle, nuclear fuel is used in a power plant one time and the resulting spent nuclear fuel is stored for eventual disposal in a geologic repository. In a closed fuel cycle, spent nuclear fuel would be recycled to recover energy-bearing components for use in new nuclear fuel.

Six programmatic domestic alternatives are assessed: No Action Alternative—Existing Once-Through Uranium Fuel Cycle (open fuel cycle); Fast Reactor Recycle Fuel Cycle Alternative (closed fuel cycle); Thermal/Fast Reactor Recycle Fuel Cycle Alternative (closed fuel cycle); Thermal Reactor Recycle Fuel Cycle Alternative (closed fuel cycle); Once-Through Fuel Cycle Alternative using Thorium (open fuel cycle); and Once-Through Fuel Cycle Alternative using Heavy Water Reactors (HWRs) or High Temperature Gas-Cooled Reactors (HTGRs) (open fuel cycle). DOE's preference is to close the nuclear fuel cycle, although it has not yet identified a specific preferred alternative.

DATES: DOE invites comments on the Draft GNEP PEIS during the 60-day public comment period, which ends on December 16, 2008. DOE will consider comments received after this date to the extent practicable as it prepares the Final GNEP PEIS. DOE will hold 13 public hearings on the Draft GNEP PEIS. The locations, dates, and times are listed in the **SUPPLEMENTARY INFORMATION** section.

ADDRESSES: Requests for additional information on the Draft GNEP PEIS, including requests for copies of the document, should be directed to: Mr. Francis G. Schwartz, GNEP PEIS Document Manager, Office of Nuclear Energy, U.S. Department of Energy, 1000 Independence Avenue, SW., Washington, DC 20585, or by telephone: 866–645–7803. Written comments on the Draft GNEP PEIS should be submitted to the above address, by facsimile to 866–489–1891, or electronically through *http://www.regulations.gov.* Instructions for commenting at *http://www.regulations.gov* are included in the **SUPPLEMENTARY INFORMATION** section. Please mark correspondence ''Draft GNEP PEIS Comments.'' Additional information on GNEP may be found at *http://www.gnep.energy.gov.*

For general information regarding the DOE NEPA process contact: Ms. Carol M. Borgstrom, Director, Office of NEPA Policy and Compliance, GC–20, U.S. Department of Energy, 1000 Independence Avenue, SW., Washington, DC 20585, telephone 202–586–4600, or leave a message at 1–800–472–2756. Additional information regarding DOE NEPA activities and access to many of DOE's NEPA documents are available on the Internet through the DOE NEPA Web site at *http://www.gc.energy.gov/NEPA.*

SUPPLEMENTARY INFORMATION:

Public Hearings and Invitation to Comment. DOE will hold 13 public hearings on the Draft GNEP PEIS. The hearings will be held at the following locations, dates, and times:

Monday, November 17, 7 p.m., Lea County Event Center, 5101 North Lovington-Hobbs Highway, Hobbs, New Mexico 88240.

Monday, November 17, 7 p.m., Red Lion Hotel, 2525 North 20th Avenue, Pasco, Washington 99301.

Tuesday, November 18, 9 a.m., Pecos River Village Conference Center, Carousel House, 711 Muscatel Avenue, Carlsbad, New Mexico 88220.

Tuesday, November 18, 7 p.m., Eastern New Mexico University-Roswell, Occupational Technology Center, Seminar Room 124, 20 West Mathis, Roswell, New Mexico 88130.

Tuesday, November 18, 7 p.m., Hood River Inn—Gorge Room, 1108 East Marina Way, Hood River, Oregon 97031.

Thursday, November 20, 7 p.m., Hilltop House Best Western, 400 Trinity Drive (at Central), Los Alamos, New Mexico 87544.

Thursday, November 20, 7 p.m., Hilton Garden Inn, 700 Lindsay Boulevard, Idaho Falls, Idaho 83402.

Monday, December 1, 7 p.m., Carson Four Rivers Center, Myre River Room, 100 Kentucky Avenue, Paducah, Kentucky 42003.

Tuesday, December 2, 7 p.m., Vern Riffe Career Technology Center, 175 Beaver Creek Road, Piketon, Ohio 45661.

Tuesday, December 2, 7 p.m., New Hope Center, 602 Scarboro Road, Corner of New Hope and Scarboro Roads, Oak Ridge, Tennessee 37830.

Thursday, December 4, 7 p.m., Holiday Inn Bolingbrook, 205 Remington Boulevard, Bolingbrook, Illinois 60440.

Thursday, December 4, 7 p.m., Aiken Technical College, Building 700—Amphitheater, 2276 Jefferson Davis Highway, Graniteville, South Carolina 29829.

Tuesday, December 9, 1 p.m., Holiday Inn Capitol, 550 C Street, SW., Washington, DC 20024.

Individuals who would like to present comments orally at these hearings must register upon arrival at the hearing. DOE will allot two to five minutes, depending upon the number of speakers, to each individual wishing to speak so as to ensure that as many people as possible have the opportunity to speak. More time may be allotted by the hearing moderator as circumstances allow. An open house will begin one hour prior to the start of each public hearing. DOE officials will be available to discuss the Draft GNEP PEIS and answer questions during this open house. DOE will then hold a plenary session at each public hearing in which officials will explain the Draft GNEP PEIS and the analyses in it. Following the plenary session, the public will have an opportunity to provide oral and written comments. Oral comments from the hearings and written comments submitted during the comment period will be considered by DOE in preparing the Final GNEP PEIS. Comments submitted after the close of the comment period will be considered to the extent practicable.

The Draft GNEP PEIS, references and additional information regarding the GNEP Program are available on the Internet at *http://www.gnep.energy.gov.* In addition, the Draft GNEP PEIS is available on the Internet at *http://www.regulations.gov* and on the DOE

NEPA Web site at *http://www.gc.energy.gov/NEPA.*

To Comment Electronically on the Internet. Visit *http://www.regulations.gov.* From the home page of *regulations.gov,* under ''More Search Options'' in the right column of the Web page, select ''Go.'' This loads a new Web page titled ''More Search Options.'' In the middle column is an option to ''Search by Agency.'' Type ''DOE'' and select ''Go.'' The left column of the new page lists options to ''Narrow Results.'' Under ''Comment Period,'' select ''Open'' and this will display all DOE documents available for public comment. Select DOE Global Nuclear Energy Partnership Programmatic Environmental Impact Statement. You can view the document in Adobe Acrobat (.pdf) or HTML format.

To submit comments on the GNEP PEIS, select ''Send a Comment or Submission'' under the title. On the ''Public Comment and Submission Form,'' enter your name, address, and other requested information. This information will be used to compile the distribution list for the Final GNEP PEIS. You can type your comments in the ''General Comments'' box provided on the comment form. There is no limit to the number of characters that you can type in this box. You also can attach electronic files with your text comments. To view the file types accepted by *regulations.gov,* select ''Learn More'' below the General Comments box. You can attach as many files as you wish. *Regulations.gov* will show a message when you have successfully uploaded a file. Individual submissions are limited to 10MB (10,000KB). To submit files greater than 5MB, please compress the attached file(s) using file compression software or submit each attachment separately using multiple submissions. After completing the form and including any attachments, you must select ''Next Step,'' under ''Action'' at the bottom of the Web page, in order for your comments to be submitted to DOE.

The Draft GNEP PEIS and references are available for review by the public at the DOE Reading Rooms and public libraries listed below:

U.S. Department of Energy, FOIA/Privacy Act Group, 1000 Independence Avenue, SW., Washington, DC 20585, Phone: (202) 586–3142.

Carlsbad Field Office, U.S. Department of Energy, WIPP Information Center, 4021 National Parks Highway, P.O. Box 2078, Carlsbad, New Mexico 88220, Phone: 1–800–336–WIPP.

Chicago Operations Office, U.S. Department of Energy, Office of Science Public Reading Room, Document Department, University Library, The University of Illinois at Chicago, 801 South Morgan Street, 3rd Floor Center, Chicago, Illinois 60607, DOE Contact: Gary Pitchford, Phone: (630) 252–2013.

Idaho Operations Office, U.S. Department of Energy, Public Reading Room, 1776 Science Center Drive, Idaho Falls, Idaho 83415–2300, Reading Room Contact: Gail Willmore, Phone: (208) 526–9162.

Paducah Gaseous Diffusion Plant, Department of Energy, Environmental Information Center and Reading Room, 115 Memorial Drive, Barkley Centre, Paducah, Kentucky 42001, Phone: (270) 554–6979.

Los Alamos Site Office, LANL Research Library, Technical Area 3, Building 207, Los Alamos, New Mexico 87545, Phone: (505) 667–5809.

Oak Ridge Operations Office, DOE Oak Ridge Information Center, 475 Oak Ridge Turnpike, Oak Ridge, Tennessee 37830, Phone: (865) 241–4780 or (toll-free) 1(800) 382–6938, option 6.

Richland Operations Office, U.S. Department of Energy, Public Reading Room, MSIN H2–53, P.O. Box 999, Richland, Washington 99352, Contact: Terri Traub, Phone: (509) 372–7443.

Savannah River Operations Office, U.S. Department of Energy, Public Reading Room, 471 University Parkway, Aiken, South Carolina 29801, Contact: Paul Lewis, Phone: (803) 641–3320.

Albuquerque Operations Office, FOIA Reading Room and DOE Reading Rooms, Government Information Department, Zimmerman Library, University of New Mexico, Albuquerque, New Mexico 87131–1466, Contact: Dan Barkley, Phone: (505) 277–7180.

Portsmouth Gaseous Diffusion Plant, Department of Energy, Environmental Information Center, 1862 Shyville Road, Room 220, Piketon, Ohio 45661.

Background

The Global Nuclear Energy Partnership (GNEP), a part of the President's Advanced Energy Initiative, is intended to support a safe, secure, and sustainable expansion of nuclear energy, both domestically and internationally. Domestically, the GNEP Program would promote technologies that support economic, sustained production of nuclear-generated electricity, while reducing the impacts associated with spent nuclear fuel disposal and reducing proliferation risks. DOE envisions changing the U.S. nuclear energy fuel cycle from an open (or once-through) fuel cycle—in which nuclear fuel is used in a power plant one time and the resulting spent nuclear fuel is stored for eventual disposal in a geologic repository—to a closed fuel cycle, in which spent nuclear fuel would be recycled to recover energy-bearing components for use in new nuclear fuel. Internationally, the U.S., through the GNEP Program, is considering various initiatives to work cooperatively with other nations to expand nuclear power to help meet growing energy demand, develop and deploy advanced nuclear recycling and reactor technologies, establish international frameworks to provide nuclear fuel supplies, and promote the development of nuclear safeguards and of more proliferation-resistant nuclear power reactors.

On March 22, 2006, DOE published an Advance Notice of Intent for the *Global Nuclear Energy Partnership Technology Demonstration Program Environmental Impact Statement* in the **Federal Register** (71 FR 14505). The Advance Notice of Intent explained the goals of the GNEP Program, three major elements of the then-proposed GNEP Technology Demonstration Program, and the purpose and need for action, and presented a list of potential environmental issues for analysis. In the notice, DOE solicited comments on the proposed scope, alternatives, and environmental issues to be analyzed in the then-planned GNEP Technology Demonstration EIS. DOE received about 800 comment documents, including comments that DOE should prepare a PEIS addressing the entire GNEP Program, not just the GNEP Technology Demonstration Program.

On August 3, 2006, DOE announced that it would issue financial assistance grants to public or commercial entities interested in hosting GNEP facilities (DOE, ''Financial Assistance Funding Opportunity Announcement Global Nuclear Energy Partnership (GNEP) Siting Studies,'' Funding Opportunity Number: DE–PS07–06ID14760). DOE reviewed the resulting grant applications and on January 30, 2007, issued grants to 11 commercial and public consortia to conduct siting studies for hosting an advanced nuclear fuel recycling center and/or an advanced recycling reactor.

On January 4, 2007, DOE published the Notice of Intent for the GNEP PEIS in the **Federal Register** (72 FR 331). That Notice of Intent explained the scope of the revised GNEP Program, identified the alternatives that were then proposed for evaluation, described the purpose and need for action, identified potential sites that could host GNEP Program facilities (including

those sites addressed by the siting study grants), and listed potential environmental issues for analysis. Subsequent to the Notice of Intent, DOE held public scoping meetings near the sites that were under consideration and in Washington, DC.

DOE received approximately 14,000 comment letters/e-mails and oral comments related to the scope of the GNEP PEIS. The major scoping comments related to the purpose and need, the alternatives that were being considered, the various resource areas that should be addressed in the PEIS, and proliferation risk.

In response to public comments and as the programmatic analysis developed, DOE determined that to make project-specific or site-specific decisions regarding any of the three originally proposed facilities would be premature. The programmatic decisions to be made would influence the size and type of facilities required for implementing an alternative fuel cycle (the originally proposed nuclear fuel recycling center and advanced recycling reactor) as well as the facility needed to support research, development, and deployment (an Advanced Fuel Cycle Facility). As a result, no project-specific or site-specific proposals are being made at this time.

The GNEP PEIS assesses the following six domestic programmatic alternatives:

No Action Alternative—Existing Once-Through Uranium Fuel Cycle: The United States would continue to rely upon a once-through or ''open'' fuel cycle, in which commercial light water reactors (LWRs) generate and store SNF until DOE could accept the SNF for disposal in a geologic repository.

Fast Reactor Recycle Fuel Cycle Alternative: The United States would pursue a domestic closed fuel cycle in a system that processes LWR SNF in one or more nuclear fuel recycling centers and would recycle some of the recovered materials in one or more fast reactors. The SNF from the advanced recycling reactors (i.e., fast reactors) would also be processed to recover materials for repeated recycle in advanced recycling reactors. High-level wastes (HLW) from separations would be disposed of in a geologic repository.

Thermal/Fast Reactor Recycle Fuel Cycle Alternative: This closed fuel cycle alternative would be similar to the Fast Reactor Recycle Alternative, but it would recycle some of the recovered materials in thermal reactors prior to recycling in advanced recycling reactors. HLW from separations would be disposed of in a geologic repository.

Thermal Reactor Recycle Fuel Cycle Alternative: The United States would pursue a domestic closed fuel cycle that processes LWR SNF and recycles some of the recovered materials in thermal reactors. The following three options are assessed: Option 1—Recycle LWR SNF to produce a mixed oxide uranium plutonium (MOX–U–Pu) fuel for use in LWRs; Option 2—Recycle LWR SNF to produce fuel for use in heavy water reactors (HWRs); and Option 3—Recycle LWR SNF to produce a transuranic fuel for use in high temperature gas-cooled reactors (HTGRs). Option 1 would be a closed fuel cycle, in which HLW would be disposed of in a geologic repository. Options 2 and 3, which include recycling of LWR SNF, would dispose of HLW and SNF in a geologic repository.

Once-Through Fuel Cycle Alternative Using Thorium: The United States would pursue a thorium once-through or ''open'' fuel cycle, in which commercial reactors would be fueled with thorium/uranium-based fuels. Because thorium-based fuels would be compatible with existing LWRs, the Thorium Alternative could also be characterized as representing a ''new fuel design.'' The SNF would be stored until DOE could accept it for disposal in a geologic repository.

Once-Through Fuel Cycle Alternative using Heavy Water Reactors (HWRs) or High Temperature Gas-Cooled Reactors (HTGRs): The United States would pursue a domestic once-through or ''open'' fuel cycle that uses either HWRs or HTGRs. For the HWR/HTGR Alternative, two options are assessed: Option 1—Use HWRs only; and Option 2—Use HTGRs only. In either case, the SNF would be stored until DOE could accept it for disposal in a geologic repository.

These domestic programmatic alternatives are not mutually exclusive. That is, DOE could decide to pursue implementation of one or more domestic programmatic alternatives.

In general, the analyses in the GNEP PEIS indicate that the closed fuel cycle alternatives offer a greater opportunity, relative to the open fuel cycle alternatives, to reduce the capacity requirements for a future geologic repository, and to reduce the hazards associated with the disposal of spent fuel or high-level radioactive waste. However, the closed fuel cycle alternatives require more disposal capacity for other radioactive wastes than is required under the open fuel cycle alternatives. Furthermore, transportation and associated health impacts from the closed fuel cycle alternatives would be generally higher during the operational period than those from the open fuel cycle alternatives (except for the Once-Through Fuel Cycle using High Temperature Gas-Cooled Reactors).

Following completion of the GNEP PEIS, DOE will be in a position to decide whether to pursue a closed fuel cycle. The GNEP PEIS is a first, important step in deciding whether and how to recycle spent nuclear fuel. A decision to go forward with recycling could trigger additional proposals and research to achieve DOE's programmatic goal. Subsequent DOE policies and actions could also affect decisions by the U.S. commercial utility industry, which would ultimately determine whether and how to implement any changes in the domestic fuel cycle. Any DOE proposals would be subject to appropriate NEPA review.

The PEIS also discusses international aspects of the GNEP Program, but does not evaluate any proposed actions or alternatives. Consequently, DOE would not make any decisions related to international activities based on the GNEP PEIS.

Issued in Washington, DC, on October 10, 2008.

Dennis R. Spurgeon,

Assistant Secretary for Nuclear Energy.

[FR Doc. E8–24669 Filed 10–16–08; 8:45 am]

BILLING CODE 6450–01–P

DEPARTMENT OF ENERGY

Federal Energy Regulatory Commission

[Project No. 12585–002]

Golden Gate Energy Company; Notice of Intent To File License Application, Filing of Draft Application, Request for Waivers of Integrated Licensing Process Regulations Necessary for Expedited Processing of a Hydrokinetic Pilot Project License Application, and Soliciting Comments

October 10, 2008.

a. *Type of Filing:* Notice of Intent to File a License Application for an Original License for a Hydrokinetic Pilot Project.

b. *Project No.:* 12585–002.

c. *Dated Filed:* September 30, 2008.

d. *Submitted By:* Golden Gate Energy Company.

e. *Name of Project:* San Francisco Bay Tidal Energy Pilot Project.

f. *Location:* Within San Francisco Bay, in San Francisco and Marin Counties, California. The Proposed project site extends from beyond the western side of the Golden Gate Bridge into the Bay and around Angel and Alcatraz Islands before ending well short of the BART tunnel. No federal lands are occupied by

the proposed project works or located within the proposed project boundary.

g. *Filed Pursuant to:* 18 CFR 5.3 of the Commission's regulations.

h. *Potential Applicant Contact:* Mike Hoover, Golden Gate Energy Company, 1785 Massachusetts Ave., NW., Suite 100, Washington, DC 20036; (202) 494–9232.

i. *FERC Contact:* Matt Buhyoff (202) 502–6824; or e-mail at *matt.buhyoff@ferc.gov*.

j. *Golden Gate Energy Company has filed with the Commission:* (1) A notice of intent to file an original hydrokinetic pilot project license application and a draft license application with monitoring plan; (2) a request for waivers of the integrated licensing process regulations necessary for expedited processing of a hydrokinetic project pilot license application; (3) a proposed process plan and schedule; (4) a request to be designated as the non-federal representative for sections 7 of the Endangered Species Act consultation; and (5) a request to be designated as the non-federal representative for section 106 consultation under the National Historic Preservation Act (collectively the Pre-Filing materials).

k. With this notice, we are soliciting comments on the Pre-Filing materials from paragraph j above, including the draft license application and monitoring plans. All comments should be sent to the address above in paragraph h. In addition, all comments (original and eight copies) must be filed with the Commission at the following address: Kimberly D. Bose, Secretary, Federal Energy Regulatory Commission, 888 First Street, NE., Washington, DC 20426. All filings with the Commission must include on the first page, the project name (San Francisco Bay Tidal Energy Pilot Project) and number (P–12585–002), and bear the heading ''Comments on the proposed San Francisco Bay Tidal Energy Pilot Project.'' Any individual or entity interested in submitting comments on the Pre-filing Materials must do so by October 30, 2008.

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.

l. This notice does not constitute the Commission's approval of Golden Gate Energy Company's request to use the Pilot Project Licensing Procedures. Upon its review of the project's overall characteristics relative to the pilot project criteria, the draft application contents, and any comments filed, the Commission may seek additional information needed to continue processing the Pilot Project or reject the NOI, draft application, and Golden Gate Energy Company's request for waiver/process plan for an original hydrokinetic pilot project license.

m. The proposed San Francisco Bay Tidal Energy Pilot Project would be implemented in a four-phase deployment, including removal of hydrokinetic electrical power generators and associated hardware in San Francisco Bay, California. The final design of each phase would be dependent upon results of the previous phase. In Phase 1, dependent upon final design, the project would consist of: (1) A 51-foot-long floating barge supporting; (2) up to three experimental hydrokinetic units approximately 2–3 meters in diameter; and (3) appurtenant facilities. Phase 2 would consist of: (1) An anchored jack-up barge supporting; (2) hydrokinetic units approximately 5–7 meters in diameter; and (3) appurtenant facilities. Phase 3 would consist of (1) a 12kV transmission cable approximately 1.25 miles in total length. Approximately 0.75 mile of the cable would be buried in the marine environment and the remaining 0.5 mile of the cable would follow an existing on shore right-of-way; and (2) appurtenant facilities. Phase 4 consists of project removal and site restoration. The applicant estimates that the total average capacity of less than 1 megawatt.

n. A copy of the draft application and all Pre-filing Materials are available for review at the Commission in the Public Reference Room or may be viewed on the Commission's Web site (*http://www.ferc.gov*), using the ''eLibrary'' link. Enter the docket number, excluding the last three digits in the docket number field to access the document. For assistance, contact FERC Online Support at *FERCONlineSupport@ferc.gov* or toll free at 1–866–208–3676, of for TTY, (202) 502–8659. A copy is also available for inspection and reproduction at the address in paragraph h.

o. Pre-filing process schedule. The pre-filing process will be conducted pursuant to the following tentative schedule. Revisions to the schedule may be made as appropriate.

Milestone	Date
Comments on Pre-filing Materials due.	Oct. 30, 2008.
Issuance of Meeting Notice (if appropriate).	Nov. 14, 2008.
Public Meeting/technical Conference (if appropriate).	Dec. 12, 2008.
Issuance of notice concluding Pre-filing process.	Dec. 29, 2008.
Issuance of ILP Waiver request determination.	Dec. 29, 2008.

p. Register online at *http://ferc.gov/esubscribenow.htm* to be notified via e-mail of new filing and issuances related to this or other pending projects. For assistance, contact FERC Online Support.

Kimberly D. Bose,

Secretary.

[FR Doc. E8–24664 Filed 10–16–08; 8:45 am]

BILLING CODE 6717–01–P

DEPARTMENT OF ENERGY

Federal Energy Regulatory Commission

Combined Notice of Filings #1

October 9, 2008.

Take notice that the Commission received the following electric corporate filings:

Docket Numbers: EC09–2–000.

Applicants: Black Hills Wyoming, Inc.

Description: Black Hills Wyoming Inc submits an application for approval for transaction to sell a 23.5% undivided ownership interest in an electric generating facility etc.

Filed Date: 10/06/2008.

Accession Number: 20081008–0154.

Comment Date: 5 p.m. Eastern Time on Monday, October 27, 2008.

Take notice that the Commission received the following electric rate filings:

Docket Numbers: ER01–1071–012; ER06–9–007; ER05–1281–007; ER03–34–011; ER06–1261–006; ER03–1104–008; ER03–1105–008; ER06–1392–005; ER08–197–005; ER07–904–003; ER98–3566–017; ER98–4222–013; ER98–2076–015; ER08–250–002; ER07–174–006.

Applicants: Badger Windpower, LLC; FPL Energy Burleigh County Wind, LLC; FPL Energy Duane Arnold, LLC; FPL Energy Hancock County Wind, LLC; FPL Energy Mower County, LLC; FPL Energy North Dakota Wind, LLC; FPL Energy North Dakota Wind II, LLC; FPL Energy Oliver Wind, LLC; FPL Energy Oliver Wind II, LLC; FPL Energy Point Beach, LLC; FPL Energy Power Marketing, Inc.; Hawkeye Power Partners, LLC; Lake Benton Power Partners II, LLC; Langdon Wind, LLC; Osceola Windpower, LLC

Description: Notice of Non-Material Change in Status of Badger Windpower, LLC *et al.* under ER01–1071, *et al.*

Filed Date: 10/08/2008.

Accession Number: 20081008–5085.

Comment Date: 5 p.m. Eastern Time on Wednesday, October 29, 2008.

Docket Numbers: ER06–274–013; EL05–151–004.

Applicants: Southwestern Public Service Company.

Description: Southwestern Public Service Company *et al.* submits an executed Amendment 1 to Settlement Agreement with Public Service Company of New Mexico under ER06–274 *et al.*

Filed Date: 10/06/2008.

Accession Number: 20081008–0135.

Comment Date: 5 p.m. Eastern Time on Monday, October 27, 2008.

Docket Numbers: ER08–1393–001.

Applicants: PJM Interconnection, L.L.C.

Description: PJM Interconnection, LLC submits revisions to the Amended and Restated Operating Agreement under ER08–1393.

Filed Date: 10/08/2008.

Accession Number: 20081009–0097.

Comment Date: 5 p.m. Eastern Time on Wednesday, October 29, 2008.

Docket Numbers: ER08–1523–001.

Applicants: Coburn Energy, LLC.

Description: Coburn Energy LLC submits a Petition for Acceptance of Initial Tariff, Waivers and Blanket Authority under ER08–1523.

Filed Date: 10/08/2008.

Accession Number: 20081009–0096.

Comment Date: 5 p.m. Eastern Time on Wednesday, October 29, 2008.

Docket Numbers: ER08–1571–000.

Applicants: Bridgeport Energy II, LLC.

Description: Bridgeport Energy II, LLC Motion to Withdraw Filing under ER08–1571–000.

Filed Date: 10/09/2008.

Accession Number: 20081009–5011.

Comment Date: 5 p.m. Eastern Time on Thursday, October 30, 2008.

Docket Numbers: ER09–20–000.

Applicants: Dynegy Marketing and Trade.

Description: Dynegy Marketing and Trade submits an application for market-based rate authorization under Section 205 of the Federal Power Act and request for waivers and blanket authorizations.

Filed Date: 10/06/2008.

Accession Number: 20081008–0158.

Comment Date: 5 p.m. Eastern Time on Monday, October 27, 2008.

Docket Numbers: ER09–30–000.

Applicants: Elm Creek Wind, LLC.

Description: Application of Elm Creek Wind, LLC for order accepting initial tariff (FERC Electric Tariff, Original Volume 1), waiving regulations, and granting blanket approvals, including blanket approval under 18 CFR Part 34 etc.

Filed Date: 10/06/2008.

Accession Number: 20081008–0141.

Comment Date: 5 p.m. Eastern Time on Monday, October 27, 2008.

Docket Numbers: ER09–31–000.

Applicants: Farmers City Wind, LLC.

Description: Application of Farmers City Wind, LLC for order acceptintg initial tariff, waiving regulations, and granting blanket approvals etc. under ER09–31.

Filed Date: 10/06/2008.

Accession Number: 20081008–0138.

Comment Date: 5 p.m. Eastern Time on Monday, October 27, 2008.

Docket Numbers: ER09–33–000.

Applicants: MidAmerican Energy Company.

Description: Barton Windpower II, LLC requests acceptance of FERC Electric Tariff, Original Volume 1.

Filed Date: 10/06/2008.

Accession Number: 20081008–0140.

Comment Date: 5 p.m. Eastern Time on Monday, October 27, 2008.

Docket Numbers: ER09–37–000.

Applicants: ISO New England Inc.

Description: ISO New England Inc *et al.* submits their compliance filing with FERC's Order 890–B under ER09–37.

Filed Date: 10/06/2008.

Accession Number: 20081008–0134.

Comment Date: 5 p.m. Eastern Time on Monday, October 27, 2008.

Take notice that the Commission received the following open access transmission tariff filings:

Docket Numbers: OA07–107–001.

Applicants: Tucson Electric Power Company.

Description: Tucson Electric Power Company supplements its Attachment C Compliance Filing made on 4/23/08 under OA07–107.

Filed Date: 10/06/2008.

Accession Number: 20081008–0198.

Comment Date: 5 p.m. Eastern Time on Monday, October 27, 2008.

Docket Numbers: OA08–20–001.

Applicants: Tampa Electric Company.

Description: Tampa Electric Company submits Second Revised Sheet 116 *et al.* to FERC Electric Tariff, Third Revised Volume 4 for inclusion in their open access transmission tariff as directed by the Commission's 7/9/08 Order under OA08–20.

Filed Date: 10/07/2008.

Accession Number: 20081009–0042.

Comment Date: 5 p.m. Eastern Time on Tuesday, October 28, 2008.

Docket Numbers: OA09–3–000.

Applicants: New York Independent System Operator, Inc.

Description: New York Independent System Operator, Inc submits Sixth Revised Sheet 39 *et al.* to FERC Electric Tariff, Original Volume 1 in Compliance with FERC's Order 890–B under OA09–3.

Filed Date: 10/06/2008.

Accession Number: 20081008–0137.

Comment Date: 5 p.m. Eastern Time on Monday, October 27, 2008.

Docket Numbers: OA09–5–000.

Applicants: Southwest Power Pool, Inc.

Description: Southwest Power Pool, Inc submits revisions to its Open Access Transmission Tariff incorporating specific changes to the Order 890 pro forma OATT etc. under OA09–5.

Filed Date: 10/06/2008.

Accession Number: 20081008–0136.

Comment Date: 5 p.m. Eastern Time on Monday, October 27, 2008.

Docket Numbers: OA09–7–000.

Applicants: Midwest Independent Transmission System.

Description: Midwest Independent Transmission System Operator submits their compliance filing revising the non-rate terms and conditions of their Open Access Transmission and Energy Markets Tariff pursuant to Order 890–B under OA09–7.

Filed Date: 10/06/2008.

Accession Number: 20081008–0132.

Comment Date: 5 p.m. Eastern Time on Monday, October 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 dockets(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. E8–24636 Filed 10–16–08; 8:45 am]

BILLING CODE 6717–01–P

DEPARTMENT OF ENERGY

Federal Energy Regulatory Commission

Combined Notice of Filings

October 9, 2008.

Take notice that the Commission has received the following Natural Gas Pipeline Rate and Refund Report filings:

Docket Numbers: RP96–272–082.

Applicants: Northern Natural Gas Company.

Description: Northern Natural Gas Company submits 11 Revised Sheet 66B.01 et al. to FERC Gas Tariff, Fifth Revised Volume 1, to be effective 10/4/08.

Filed Date: 10/03/2008.

Accession Number: 20081003–0306.

Comment Date: 5 p.m. Eastern Time on Wednesday, October 15, 2008.

Docket Numbers: RP08–233–001; RP08–394–001.

Applicants: Colorado Interstate Gas Company.

Description: Colorado Interstate Gas Company submits Fifth Revised Sheet 380H to its FERC Gas Tariff, First Revised Volume 1, to be effective 8/28/08.

Filed Date: 09/10/2008.

Accession Number: 20080912–0078.

Comment Date: 5 p.m. Eastern Time on Tuesday, October 14, 2008.

Docket Numbers: RP09–15–000.

Applicants: PetroLogistics Natural Gas Storage, LLC.

Description: PetroLogistics Natural Gas Storage LLC submits Appendix A—List of Tariff Sheets to FERC Gas Tariff, Original Volume 1, to be effective 11/1/08.

Filed Date: 10/02/2008.

Accession Number: 20081006–0167.

Comment Date: 5 p.m. Eastern Time on Tuesday, October 14, 2008.

Docket Numbers: RP09–16–000.

Applicants: Cimarron River Pipeline, LLC.

Description: Cimarron River Pipeline, LLC submits First Revised Sheet 18 et al. to FERC Gas Tariff, Original Volume 1, to be effective 10/9/08.

Filed Date: 10/08/2008.

Accession Number: 20081009–0019.

Comment Date: 5 p.m. Eastern Time on Monday, October 20, 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. E8–24648 Filed 10–16–08; 8:45 am]

BILLING CODE 6717–01–P

DEPARTMENT OF ENERGY

Federal Energy Regulatory Commission

[Project No. 13287–000]

City of New York; Notice of Competing Preliminary Permit Application Accepted for Filing, and Soliciting Comments, and Motions To Intervene

October 9, 2008.

On September 15, 2008, the city of New York filed a competing application, pursuant to section 4(f) of the Federal Power Act, proposing to study the feasibility of the West of Hudson Hydroelectric Project, which comprises four development sites, Schoharie, Cannonsville, Pepacton and Neversink, located on the Schoharie Creek, West Branch Delaware River, East Branch Delaware River, and the Neversink River, in Schoharie, Delaware and Sullivan Counties, New York.

The proposed West of Hudson Hydroelectric Project would consist of the following developments:

Cannonsville Development

(1) An existing 2,800-feet-long, 175-foot-high earthen Cannonsville Dam; (2) an existing reservoir having a surface area of 4,800 acres and a storage capacity of 300,000 acre-feet and normal water surface elevation of 1,150 feet mean sea level; (3) a proposed 78-inch-diameter penstock; (4) a proposed powerhouse containing four new generating units having an installed capacity of 12.1-megawatts; (5) a proposed tailrace; (6) a proposed 750-foot-long, 46-kilovolt transmission line; and (7) appurtenant facilities. The proposed Cannonsville Development would have an average annual generation of 25.46-gigawatt-hours.

Neversink Development

(1) An existing 2,830-foot-long, 195-foot-high earthen Neversink Dam; (2) an existing reservoir having a surface area of 1,477.8 acres and a storage capacity of 112,000 acre-feet and normal water surface elevation of 1,440 feet mean sea level; (3) a proposed powerhouse containing two new generating units having an installed capacity of 1.65-megawatts; (4) a proposed tailrace; (5) a proposed 2,400-foot-long, 4.8-kilovolt transmission line; and (6) appurtenant facilities. The proposed Neversink Development would have an average annual generation of 7.79-gigawatt-hours.

Pepacton Development

(1) An existing 2,450-foot-long, 204-foot-high earthen Downsville Dam; (2) an existing reservoir having a surface area of 5,700 acres and a storage capacity of 441,000 acre-feet and normal water surface elevation of 1,280 feet mean sea level; (3) a proposed powerhouse containing two new generating units having an installed capacity of 3.1-megawatts; (4) a proposed tailrace; (5) an existing 800-feet-long, 46-kilovolt transmission line; and (6) appurtenant facilities. The proposed Pepacton Development would have an average annual generation of 9.04-gigawatt-hours.

Schoharie Development

(1) An existing 2,273-foot-long, 183-foot-high earthen Gilboa Dam; (2) an existing reservoir having a surface area of 1,130 acres and a storage capacity of 58,800 acre-feet and normal water surface elevation of 1,130 feet mean sea level; (3) four penstocks; (4) a powerhouse containing three new generating units having an installed capacity of 12.9-megawatts; (5) a tailrace; (6) a proposed 15,000-feet-long, 13.8-kilovolt transmission line; and (7) appurtenant facilities. The proposed Schoharie Development would have an average annual generation of 31.8-gigawatt-hours.

Applicant Contact: For West of Hudson Hydroelectric Project, Mr. Robert M. Loughney, Esq., Couch White, LLP, 540 Broadway, P.O. Box 22222, Albany, NY 12201, phone (518) 426–4600.

FERC Contact: Patricia W. Gillis, (202) 502–8735.

Competing Application: This application competes with Project No. 13222–000 filed May 9, 2008. Competing applications were required to be filed on or before September 18, 2008.

Deadline for filing comments, motions to intervene: 60 days from the issuance of this notice. Comments and motions to intervene may be filed electronically via the Internet. See 18 CFR 385.2001(a)(1)(iii) and the instructions on the Commission's Web site under the ''e-Filing'' link. If unable to be filed electronically, documents may be paper-filed. To paper-file, an original and eight copies should be mailed to: Kimberly D. Bose, Secretary, Federal Energy Regulatory Commission, 888 First Street, NE., Washington, DC 20426. For more information on how to submit these types of filings please go to the Commission's Web site located at *http://www.ferc.gov/filing-comments.asp*. More information about this project can be viewed or printed on the ''eLibrary'' link of Commission's Web site at *http://www.ferc.gov/docs-filing/elibrary.asp*.

Enter the docket number (P–13287–000) in the docket number field to access the document. For assistance, call toll-free 1–866–208–3372.

Kimberly D. Bose,

Secretary.

[FR Doc. E8–24706 Filed 10–16–08; 8:45 am]

BILLING CODE 6717–01–P

DEPARTMENT OF ENERGY

Federal Energy Regulatory Commission

[Docket No. EL09–3–000]

Ashburnham Municipal Light Plant; Boylston Municipal Light Department; Chester Municipal Electric Light Department; Groton Electric Light; Holden Municipal Light Department; Holyoke Gas & Electric Department; Paxton Municipal Light Department; Princeton Municipal Light Department; Shrewsbury Electric Light and Cable; Sterling Municipal Light Department; Templeton Municipal Light; West Boylston Municipal Light Plant; Westfield Gas & Electric; Chicopee Municipal Lighting Plant; Hudson Light & Power Department; South Hadley Electric Light Department; Massachusetts Municipal Wholesale Electric Company, Complainants v. Berkshire Power Company, LLC ISO New England Inc., Respondents; Notice of Complaint

October 9, 2008.

Take notice that on October 8, 2008, Ashburnham Municipal Light Plant, Boylston Municipal Light Department, Chester Municipal Electric Light Department, Groton Electric Light, Holden Municipal Light Department, Holyoke Gas & Electric Department, Paxton Municipal Light Department, Princeton Municipal Light Department, Shrewsbury Electric Light and Cable, Sterling Municipal Light Department, Templeton Municipal Light, West Boylston Municipal Light Plant, Westfield Gas & Electric, Chicopee Municipal Lighting Plant, Hudson Light & Power Department, South Hadley Electric Light Department, and Massachusetts Municipal Wholesale Electric Company (Complainants) filed, pursuant to section 206 of the Federal Power Act, 16 U.S.C. 824(e), 825(e), and Rule 206 of the Rules of Practice and Procedure of the Federal Energy Regulatory Commission, 18 CFR 385.206, a complaint against Berkshire Power Company (Berkshire) and ISO New England Inc. (ISO) alleging that Berkshire was no longer eligible to receive a Reliability Must Run agreement (RMR) and that the RMR agreement between Berkshire and the ISO should be terminated immediately.

The Complainants request fast track processing of the complaint.

The Complainants certifies that copies of the complaint were served on the contacts for Berkshire and the ISO.

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. The Respondent's answer and all interventions, or protests must be filed on or before the comment date. The Respondent's answer, motions to intervene, and protests must be served on the Complainants.

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 November 7, 2008.

Kimberly D. Bose,

Secretary.

[FR Doc. E8–24707 Filed 10–16–08; 8:45 am]

BILLING CODE 6717–01–P

DEPARTMENT OF ENERGY

Federal Energy Regulatory Commission

[Project No. 2210–175–VA]

Appalachian Power Company; Notice of Availability of Environmental Assessment

October 10, 2008.

In accordance with the National Environmental Policy Act of 1969 and the Federal Energy Regulatory Commission's regulations, 18 CFR part 380 (Order No. 486, 52 FR 47879), the Office of Energy Projects has reviewed Appalachian Power Company's proposed water withdraw for the Smith Mountain Hydroelectric Project, located on the Roanoke River in Bedford, Campbell, Franklin, and Pittsylvania Counties, Virginia and has prepared an Environmental Assessment (EA).

On May 27, 2008 Appalachian Power Company (licensee), filed an application with the Federal Energy Regulatory Commission (Commission) for non-project use of project lands and waters. The EA contains the staff's analysis of the potential environmental effects of the proposed project and concludes that approval of the Proposed Action, with appropriate environmental protective measures, would not constitute a major federal action that would significantly affect the quality of the human environment.

Copies of the EA are available for review in Public Reference Room 2–A of the Commission's offices at 888 First Street, NE., Washington, DC. The EA may also be viewed on the Commission's Web site at *http://www.ferc.gov* using the ''eLibrary'' link. Enter the docket number (P–2210) 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.

Kimberly D. Bose,

Secretary.

[FR Doc. E8–24658 Filed 10–16–08; 8:45 am]

BILLING CODE 6717–01–P

DEPARTMENT OF ENERGY

Federal Energy Regulatory Commission

[Docket Nos. ER96–1947–023 Docket Nos. ER96–1947–023 ER07–1000–002 ER02–1052–009]

LS Power Marketing, LLC, Las Vegas Power Company, West Georgia Generating Company, LLC; Notice of Filing

October 9, 2008.

Take notice that on June 30, 2008, LS Power Marketing, LLC; Las Vegas Power Company, and West Georgia Generating Company, LLC (collectively LS MBR Sellers) submit for filing a letter notifying the Commission that it will not be filing an updated power analysis for the Northeast Region, because none of the LS MBR Sellers own or control electric generation facilities or makes sales in the Northeast Region.

Any person desiring to intervene or to protest this filing must file in accordance with Rules 211 and 214 of the Commission's Rules of Practice and Procedure (18 CFR 385.211, 385.214). Protests will be considered by the Commission in determining the appropriate action to be taken, but will not serve to make protestants parties to the proceeding. Any person wishing to become a party must file a notice of intervention or motion to intervene, as appropriate. Such notices, motions, or protests must be filed on or before the comment date. Anyone filing a motion to intervene or protest must serve a copy of that document on the Applicant and all the parties in this proceeding.

The Commission encourages electronic submission of protests and interventions in lieu of paper using the ''eFiling'' link at *http://www.ferc.gov.* Persons unable to file electronically should submit an original and 14 copies of the protest or intervention to the Federal Energy Regulatory Commission, 888 First Street, NE., Washington, DC 20426.

This filing is accessible on-line at *http://www.ferc.gov,* using the ''eLibrary'' link and is available for review in the Commission's Public Reference Room in Washington, DC. There is an ''eSubscription'' link on the Web site that enables subscribers to receive e-mail notification when a document is added to a subscribed docket(s). For assistance with any FERC Online service, please e-mail *FERCOnlineSupport@ferc.gov,* or call (866) 208–3676 (toll free). For TTY, call (202) 502–8659.

Comment Date: 5 p.m. Eastern Time on October 20, 2008.

Kimberly D. Bose,

Secretary.

[FR Doc. E8–24708 Filed 10–16–08; 8:45 am]

BILLING CODE 6717–01–P

DEPARTMENT OF ENERGY

Federal Energy Regulatory Commission

[Docket No. ER09–33–000]

Barton Windpower II, LLC; Supplemental Notice That Initial Market-Based Rate Filing Includes Request for Blanket Section 204 Authorization

October 10, 2008.

This is a supplemental notice in the above-referenced proceeding of Barton Windpower II, LLC's application for market-based rate authority, with an accompanying rate tariff, noting that such application includes a request for blanket authorization, under 18 CFR part 34, of future issuances of securities and assumptions of liability.

Any person desiring to intervene or to protest should file 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 and 385.214). Anyone filing a motion to intervene or protest must serve a copy of that document on the Applicant.

Notice is hereby given that the deadline for filing protests with regard to the applicant's request for blanket authorization, under 18 CFR part 34, of future issuances of securities and assumptions of liability, is October 30, 2008.

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-referenced proceeding 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 dockets(s). For assistance with any FERC Online service, please e-mail *FERCOnlineSupport@ferc.gov.* or call (866) 208–3676 (toll free). For TTY, call (202) 502–8659.

Kimberly D. Bose,

Secretary.

[FR Doc. E8–24663 Filed 10–16–08; 8:45 am]

BILLING CODE 6717–01–P

DEPARTMENT OF ENERGY

Federal Energy Regulatory Commission

[Docket No. ER09–20–000]

Dynegy Marketing and Trade; Supplemental Notice That Initial Market-Based Rate Filing Includes Request for Blanket Section 204 Authorization

October 10, 2008.

This is a supplemental notice in the above-referenced proceeding of Dynegy Marketing and Trade's application for market-based rate authority, with an accompanying rate tariff, noting that such application includes a request for blanket authorization, under 18 CFR part 34, of future issuances of securities and assumptions of liability.

Any person desiring to intervene or to protest should file 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 and 385.214). Anyone filing a motion to intervene or protest must serve a copy of that document on the Applicant.

Notice is hereby given that the deadline for filing protests with regard to the applicant's request for blanket authorization, under 18 CFR part 34, of future issuances of securities and assumptions of liability, is October 30, 2008.

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-referenced proceeding 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.

Kimberly D. Bose,

Secretary.

[FR Doc. E8–24660 Filed 10–16–08; 8:45 am]

BILLING CODE 6717–01–P

DEPARTMENT OF ENERGY

Federal Energy Regulatory Commission

[Docket No. ER09–30–000]

Elm Creek Wind, LLC; Supplemental Notice That Initial Market-Based Rate Filing Includes Request for Blanket Section 204 Authorization

October 10, 2008.

This is a supplemental notice in the above-referenced proceeding of Elm Creek Wind, LLC's application for market-based rate authority, with an accompanying rate tariff, noting that such application includes a request for blanket authorization, under 18 CFR part 34, of future issuances of securities and assumptions of liability.

Any person desiring to intervene or to protest should file 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 and 385.214). Anyone filing a motion to intervene or protest must serve a copy of that document on the Applicant.

Notice is hereby given that the deadline for filing protests with regard to the applicant's request for blanket authorization, under 18 CFR part 34, of future issuances of securities and assumptions of liability, is October 30, 2008.

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-referenced proceeding 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 dockets(s). For assistance with any FERC Online service, please e-mail *FERCOnlineSupport@ferc.gov* or call (866) 208–3676 (toll free). For TTY, call (202) 502–8659.

Kimberly D. Bose,

Secretary.

[FR Doc. E8–24661 Filed 10–16–08; 8:45 am]

BILLING CODE 6717–01–P

DEPARTMENT OF ENERGY

Federal Energy Regulatory Commission

[Docket No. ER09–31–000]

Farmers City Wind, LLC; Supplemental Notice That Initial Market-Based Rate Filing Includes Request for Blanket Section 204 Authorization

October 10, 2008.

This is a supplemental notice in the above-referenced proceeding of Farmers City Wind, LLC's application for market-based rate authority, with an accompanying rate tariff, noting that such application includes a request for blanket authorization, under 18 CFR part 34, of future issuances of securities and assumptions of liability.

Any person desiring to intervene or to protest should file 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 and 385.214). Anyone filing a motion to intervene or protest must serve a copy of that document on the Applicant.

Notice is hereby given that the deadline for filing protests with regard to the applicant's request for blanket authorization, under 18 CFR part 34, of future issuances of securities and assumptions of liability, is October 30, 2008.

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-referenced proceeding 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.

Kimberly D. Bose,

Secretary.

[FR Doc. E8–24662 Filed 10–16–08; 8:45 am]

BILLING CODE 6717–01–P

DEPARTMENT OF ENERGY

Federal Energy Regulatory Commission

[Docket No. ER08–1574–000]

ORNI 18, LLC; Supplemental Notice That Initial Market-Based Rate Filing Includes Request for Blanket Section 204 Authorization

October 10, 2008.

This is a supplemental notice in the above-referenced proceeding of ORNI 18, LLC's application for market-based rate authority, with an accompanying rate tariff, noting that such application includes a request for blanket authorization, under 18 CFR part 34, of future issuances of securities and assumptions of liability.

Any person desiring to intervene or to protest should file 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 and 385.214). Anyone filing a motion to intervene or protest must serve a copy of that document on the Applicant.

Notice is hereby given that the deadline for filing protests with regard to the applicant's request for blanket authorization, under 18 CFR part 34, of future issuances of securities and assumptions of liability, is October 30, 2008.

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-referenced proceeding 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 dockets(s). For assistance with any FERC Online service, please e-mail *FERCOnlineSupport@ferc.gov*. or call (866) 208–3676 (toll free). For TTY, call (202) 502–8659.

Kimberly D. Bose,

Secretary.

[FR Doc. E8–24659 Filed 10–16–08; 8:45 am]

BILLING CODE 6717–01–P

DEPARTMENT OF ENERGY

Federal Energy Regulatory Commission

[Docket No. AD08–13–000]

Transmission Barriers to Entry; Supplemental Notice of Technical Conference

October 10, 2008.

On October 3, 2008, the Commission issued a Supplemental Notice of the technical conference in the above-captioned proceeding, with an agenda attached. The technical conference will be held on October 14, 2008, from 1 p.m. to 5 p.m. (EST), in the Commission Meeting Room at the Federal Energy Regulatory Commission, 888 First Street, NE., Washington, DC 20426. The conference will be open for the public to attend and advance registration is not required. Members of the Commission may attend the conference.

An updated agenda for this conference is attached. In addition, this conference will be transcribed as described below.

Transcripts of the conference will be available immediately for a fee from Ace Reporting Company (202–347–3700 or 1–800–336–6646). They will be available for free on the Commission's eLibrary system and on the Calendar of Events approximately one week after the conference.

A free webcast of this event is available through *http://www.ferc.gov.* Anyone with Internet access who desires to view this event can do so by navigating to the Calendar of Events at *http://www.ferc.gov* and locating this event in the Calendar. The event will contain a link to its webcast. The Capitol Connection provides technical support for the free webcasts. It also offers access to this event via television in the Washington, DC area and via phone-bridge for a fee. If you have any questions, visit *http://www.CapitolConnection.org* or contact Danelle Springer or David Reininger at (703) 993–3100.

All interested persons may file written comments following the technical conference on or before November 13, 2008.

Commission conferences are accessible under section 508 of the Rehabilitation Act of 1973. For accessibility accommodations, please send an e-mail to *accessibility@ferc.gov* or call toll free 1–866–208–3372 (voice) or 202–208–1659 (TTY), or send a FAX to 202–208–2106 with the required accommodations.

For more information about this conference, please contact: Katie Detweiler, 202–502–6424, *katie.detweiler@ferc.gov* or Sarah McKinley, 202–502–8368, *sarah.mckinley@ferc.gov.*

Kimberly D. Bose,

Secretary.

Attachment

Transmission Barriers to Entry Technical Conference; October 14, 2008

Agenda

The purpose of this conference is to hear from transmission developers, transmission owners, and others on the issues they encounter when trying to build transmission. In particular, the Commission is interested in hearing from persons involved with various forms of transmission including independent transmission, merchant transmission, joint ownership arrangements, and long-distance transmission projects crossing multiple corporate boundaries or that are regional in nature regarding the barriers to transmission entry due to the Commission's tariffs, policies, and regulations.

In response to the nation's growing transmission needs, the Commission not only supports more ''traditional'' forms of investment, such as that of investor-owned utilities, but also encourages the formation of ''alternative'' transmission models. In the June 2005 Policy Statement Regarding Evaluation of Independent Ownership and Operation of Transmission, the Commission clarified its willingness to accept proposals from independent transmission companies, including those that have market participants as passive minority equity owners, and stated its willingness to allow innovative rate treatments both to facilitate the creation of independent transmission companies and to stimulate investment in transmission infrastructure.[1] Furthermore, in recent years new entities have emerged to build transmission, such as merchant transmission companies. There is increased interest in joint (i.e., public-private) transmission development. As more states have adopted renewable portfolio standards, proposals have arisen to move remote generation long distances to load.

In Order No. 890, the Commission stated its belief that there are benefits to joint ownership of transmission facilities, particularly large backbone facilities, both in terms of increasing opportunities for investment as well as ensuring nondiscriminatory access. Order No. 890 also required all transmission providers to submit processes for regional planning. However, questions have been raised as to incumbent and new entrant rights, whether merchant transmission projects should be required to coordinate with an Order No. 890 regional planning process and coordination across boundaries.

Since 2005, the Commission has acted on a number of requests regarding affiliated or independent transmission; merchant transmission; and joint ownership. Among other things, the Commission is interested in gaining a better understanding of the rights, obligations, and challenges afforded these entities as compared to traditional transmission investment and whether there are barriers to comparable treatment of these entities in the wholesale/interstate transmission market.

Panel Discussions:

While there may be common obstacles to the building of transmission, at the same time it appears that the challenges may differ in some respects regionally. Thus, the panels of this conference will be divided geographically. While the basic topics of discussion will be the same in both panels, the individual problems and solutions identified may vary by region, e.g., Eastern and Western Interconnection.

The Commission hopes to learn from each panel of the experiences parties have faced in trying to build transmission, with particular focus on regulatory and economic issues, and discuss how they differ by transmission business model. With regard to both problems and solutions, the focus should also be on matters that are within the Commission's control or ability to affect. The discussion should focus on specific areas of the Commission's regulations and policies that may present barriers to comparable treatment. Among the issues of interest to the Commission are:

- The impact on transmission providers regarding rights of first refusal to build and own transmission;
- Whether all transmission investment (e.g., upgrades, greenfield lines) are treated comparably in the award of rights (e.g., financial or physical rights);
- Whether the Commission's policies regarding the provision of ancillary services are appropriate as applied to transmission-only entities;
- Whether there are specific processes in RTO/ISO rules and markets that present barriers to alternative transmission business models;
- Development opportunities for the different transmission business models;
- The benefits of and the peculiar challenges faced by alternative business models (e.g., merchant transmission doesn't have a rate base from which to obtain cost recovery); and
- Whether there should be different approaches to projects with differing scope, e.g., long-distance backbone projects with long lead lines vs. incremental upgrades to existing facilities.

Transmission Barriers to Entry Technical Conference; October 14, 2008

Agenda

Opening Remarks

1 p.m.–1:15 p.m.

Panel I: Western Interconnect

1:15 p.m.–3 p.m.

Richard Hayslip, *Associate General Manager,* SALT RIVER PROJECT, representing the LARGE PUBLIC POWER COUNCIL

Tom Wray, *Project Manager,* SUNZIA TRANSMISSION PROJECT

Robert van Beers, *Chief Operating Officer,* TONBRIDGE POWER INC., representing Montana Alberta Tie Ltd.

Paul McCoy, *President,* TRANS-ELECT

Marc S. Lipschultz, *Member,* KOHLBERG KRAVIS ROBERTS & CO.

Karl ''Fritz'' Schlopy, *Managing Director,* MERRILL LYNCH & CO. GLOBAL ENERGY & POWER, representing Real Estate Investment Trusts

Roy Jones, *Vice President,* Transmission Development, LS POWER DEVELOPMENT

Break

3 p.m.–3:15 p.m.

Panel II: Eastern Interconnect

3:15 p.m.–5 p.m.

Sharon M. Reishus, *Chairman,* MAINE PUBLIC UTILITIES COMMISSION

Roy Thilly, *President & CEO,* WISCONSIN PUBLIC POWER INC., representing the Transmission Access Policy Study Group

Susan Tomasky, *President—AEP Transmission,* AMERICAN ELECTRIC POWER

[1] *Policy Statement Regarding Evaluation of Independent Ownership and Operation of Transmission,* 111 FERC ¶ 61,473 (2005).

Joseph L. Welch, *Chairman, President & CEO,* ITC HOLDINGS
Raymond Hepper, *Vice President, General Counsel & Corporate Secretary,* ISO NEW ENGLAND INC.
Edward M. Stern, *President & CEO,* NEPTUNE REGIONAL TRANSMISSION SYSTEM *& CEO*, HUDSON TRANSMISSION PARTNERS
Robert J. Patrylo, *CEO,* STRATEGIC TRANSMISSION LLC

[FR Doc. E8–24665 Filed 10–16–08; 8:45 am]

BILLING CODE 6717–01–P

DEPARTMENT OF ENERGY

Federal Energy Regulatory Commission

[Project No. 12585–001]

Golden Gate Energy Company; Notice of Preliminary Permit Applications Accepted for Filing and Soliciting Comment, Motions To Intervene, and Competing Applications

October 9, 2008.

On October 1, 2008, Golden Gate Energy Company filed an application, pursuant to section 4(f) of the Federal Power Act, proposing to study the feasibility of the San Francisco Bay Tidal Project, to be located on the San Francisco Bay in San Francisco and Marin Counties, California.

The proposed San Francisco Bay Tidal Project consists of: (1) 5 to 40 proposed Tides Hydrokinetic generating units having a total installed capacity of 5 to 10 megawatts, (2) a proposed transmission line, and (3) appurtenant facilities. The Golden Gate Energy Company project would have an average annual generation of 8.7 gigawatt-hours and be sold to a local utility.

Applicant Contact: Mr. Mike Hoover, Golden Gate Energy Company, 1785 Massachusetts Avenue, NW., Suite 100, Washington, DC 20036, phone (202) 772–0099.

FERC Contact: Robert Bell, (202) 502–6062.

Deadline for filing comments, motions to intervene, competing applications (without notices of intent), or notices of intent to file competing applications: 60 days from the issuance of this notice. Comments, motions to intervene, notices of intent, and competing applications may be filed electronically via the Internet. See 18 CFR 385.2001(a)(1)(iii) and the instructions on the Commission's Web site under the ''e-Filing'' link. If unable to be filed electronically, documents may be paper-filed. To paper-file, an original and eight copies should be mailed to: Kimberly D. Bose, Secretary, Federal Energy Regulatory Commission, 888 First Street, NE., Washington, DC 20426. For more information on how to submit these types of filings please go to the Commission's Web site located at *http://www.ferc.gov/filing-comments.asp.* More information about this project can be viewed or printed on the ''eLibrary'' link of Commission's Web site at *http://www.ferc.gov/docs-filing/elibrary.asp.* Enter the docket number (P–12585) in the docket number field to access the document. For assistance, call toll-free 1–866–208–3372.

Kimberly D. Bose,

Secretary.

[FR Doc. E8–24709 Filed 10–16–08; 8:45 am]

BILLING CODE 6717–01–P

DEPARTMENT OF ENERGY

Federal Energy Regulatory Commission

[Docket No. CP08–482–000]

National Fuel Gas Supply Corporation; Notice of Request Under Blanket Authorization

October 9, 2008.

Take notice that on September 30, 2008, National Fuel Gas Supply Corporation (National Fuel), 6363 Main Street, Williamsville, New York 14221, filed in Docket No. CP08–482–000, a prior notice request pursuant to sections 157.205 and 157.208 of the Federal Energy Regulatory Commission's regulations under the Natural Gas Act for authorization to increase the certificated Maximum Allowable Operating Pressure (MAOP) of Line Y–M57, located in Allegany County, New York, and to thereafter operate this line up to and including the higher MAOP, all as more fully set forth in the application, which is on file with the Commission and open to public inspection. The filing may also be viewed on the Web 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 at *FERCOnlineSupport@ferc.gov* or call toll-free, (866) 208–3676 or TTY, (202) 502–8659.

Specifically, National Fuel proposes to uprate the MAOP of Line Y–M57 from the current MAOP of 1,000 psig to the requested MAOP of 1,260 psig. National Fuel states that the uprating of the MAOP will allow it to deliver gas to Millennium Pipeline Company, L.L.C. National Fuel estimates the cost of construction to be $25,000.

Any questions regarding the application should be directed to David W. Reitz, Deputy General Counsel, National Fuel Gas Supply Corporation, 6363 Main Street, Williamsville, New York 14221, at (716) 857–7949.

Any person may, within 60 days after the issuance of the instant notice by the Commission, file pursuant to Rule 214 of the Commission's Procedural Rules (18 CFR 385.214) a motion to intervene or notice of intervention. Any person filing to intervene or the Commission's staff may, pursuant to section 157.205 of the Commission's Regulations under the Natural Gas Act (NGA) (18 CFR 157.205) file a protest to the request. If no protest is filed within the time allowed therefore, the proposed activity shall be deemed to be authorized effective the day after the time allowed for protest. If a protest is filed and not withdrawn within 30 days after the time allowed for filing a protest, the instant request shall be treated as an application for authorization pursuant to section 7 of the NGA.

The Commission strongly encourages electronic filings of comments, protests, and interventions via the Internet in lieu of paper. 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.

Kimberly D. Bose,

Secretary.

[FR Doc. E8–24710 Filed 10–16–08; 8:45 am]

BILLING CODE 6717–01–P

DEPARTMENT OF ENERGY

Federal Energy Regulatory Commission

[Docket No. CP08–481–000]

Petal Gas Storage, LLC; Notice of Request Under Blanket Authorization

October 8, 2008.

Take notice that on September 29, 2008, Petal Gas Storage, LLC (Petal), 1100 Louisiana Street, Houston, TX 77002, filed in docket number CP08–481–000, a prior notice request pursuant to sections 157.205 and 157.214 of the Commission's Regulations under the Natural Gas Act, and Petal's blanket certificate issued in Docket No. CP95–14–000, for authorization to increase its maximum storage capacity in Cavern No. 8 of Petal's storage facility located in Forrest County, Mississippi. Petal proposes to increase the capacity of the cavern from 7.9 Bcf to 9.058 Bcf. The

change will result in an increase in the working gas capacity from 5.0 to 5.859 Bcf, and an increase in base gas capacity from 2.9 to 3.199 Bcf. Petal proposes to increase its maximum capacity without any additional construction. The current maximum storage pressure will remain unchanged at 3,200 psia, all as more fully set forth in the application which is on file with the Commission and open to public inspection. The filing may also be viewed on the Web 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, please contact FERC Online Support at *FERCOnlineSupport@ferc.gov* or toll-free at (866) 208–3676, or TTY, contact (202) 502–8659.

Any questions concerning this application may be directed to Richard Porter, Director, Rates and Regulatory Affairs, Petal Gas Storage, LLC, 1100 Louisiana Street, Houston, TX 77002, at (713)–381–2526.

Any person may, within 60 days after the issuance of the instant notice by the Commission, file pursuant to Rule 214 of the Commission's Procedural Rules (18 CFR 385.214) a motion to intervene or notice of intervention. Any person filing to intervene or the Commission's staff may, pursuant to section 157.205 of the Commission's Regulations under the Natural Gas Act (NGA) (18 CFR 157.205) file a protest to the request. If no protest is filed within the time allowed therefor, the proposed activity shall be deemed to be authorized effective the day after the time allowed for protest. If a protest is filed and not withdrawn within 30 days after the time allowed for filing a protest, the instant request shall be treated as an application for authorization pursuant to section 7 of the NGA.

The Commission strongly encourages electronic filings of comments, protests, and interventions via the Internet in lieu of paper. 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.

Kimberly D. Bose,

Secretary.

[FR Doc. E8–24496 Filed 10–16–08; 8:45 am]

BILLING CODE 6717–01–P

ENVIRONMENTAL PROTECTION AGENCY

[EPA–HQ–OW–2008–0692; FRL–8730–6]

RIN 2040–ZA02

Drinking Water: Preliminary Regulatory Determination on Perchlorate; Correction

AGENCY: Environmental Protection Agency (EPA).

ACTION: Notice; correction.

SUMMARY: The Environmental Protection Agency published a document in the **Federal Register** of October 10, 2008, concerning request for comments on the Agency's Preliminary Regulatory Determination on Perchlorate. The document contained an incorrect Docket number. The correct Docket number is EPA–HQ–OW–2008–0692.

FOR FURTHER INFORMATION CONTACT: Stephanie Flaharty, Office of Ground Water and Drinking Water, at (202) 564–5270, or e-mail: *flaharty.stephanie@epa.gov.* For general information contact the EPA Safe Drinking Water Hotline at (800) 426–4791 or e-mail: *hotline-sdwa@epa.gov.*

Correction

In the **Federal Register** (FR) of October 10, 2008, in FR Doc. FRL–8727–6, on page 60262, correct the header to read [EPA–HQ–OW–2008–0692]; and, on page 60263, correct the **ADDRESSES** section to read:

ADDRESSES: Submit your comments, identified by Docket ID No. EPA–HQ–OW–2008–0692, by one of the following methods:

- *www.regulations.gov:* Follow the on-line instructions for submitting comments.
- Mail: Water Docket, Environmental Protection Agency, Mailcode: 2822T, 1200 Pennsylvania Ave., NW., Washington, DC 20460.
- Hand Delivery: Water Docket, EPA Docket Center (EPA/DC) EPA West, Room 3334, 1301 Constitution Ave., NW., Washington, DC. Such deliveries are only accepted during the Docket's normal hours of operation, and special arrangements should be made for deliveries of boxed information.

Instructions: Direct your comments to Docket ID No. EPA–HQ–OW–2008–0692. EPA's policy is that all comments received will be included in the public docket without change and may be made available online at *www.regulations.gov,* including any personal information provided, unless the comment includes information claimed to be Confidential Business Information (CBI) or other information whose disclosure is restricted by statute. Do not submit information that you consider to be CBI or otherwise protected through *www.regulations.gov* or e-mail. The *www.regulations.gov* Web site is an ''anonymous access'' system, which means EPA will not know your identity or contact information unless you provide it in the body of your comment. If you send an e-mail comment directly to EPA without going through *www.regulations.gov* your e-mail address will be automatically captured and included as part of the comment that is placed in the public docket and made available on the Internet. If you submit an electronic comment, EPA recommends that you include your name and other contact information in the body of your comment and with any disk or CD–ROM you submit. If EPA cannot read your comment due to technical difficulties and cannot contact you for clarification, EPA may not be able to consider your comment. Electronic files should avoid the use of special characters, any form of encryption, and be free of any defects or viruses. For additional instructions on submitting comments, go to Unit I.B of the **SUPPLEMENTARY INFORMATION** section of this document.

Docket: All documents in the docket are listed in the *www.regulations.gov* index. Although listed in the index, some information is not publicly available, e.g., CBI or other information whose disclosure is restricted by statute. Certain other material, such as copyrighted material, will be publicly available only in hard copy. Publicly available docket materials are available either electronically in *www.regulations.gov* or in hard copy at the Water Docket, EPA/DC, EPA West, Room 3334, 1301 Constitution Ave., NW., Washington, DC. The Public Reading Room is open from 8:30 a.m. to 4:30 p.m., Monday through Friday, excluding legal holidays. The telephone number for the Public Reading Room is (202) 566–1744, and the telephone number for the EPA Docket Center is (202) 566–2426.

Dated: October 10, 2008.

Cynthia C. Dougherty,

Director, Office of Ground Water and Drinking Water.

[FR Doc. E8–24694 Filed 10–16–08; 8:45 am]

BILLING CODE 6560–50–P

ENVIRONMENTAL PROTECTION AGENCY

[ER–FRL–8586–7]

Environmental Impact Statements and Regulations; Availability of EPA Comments

Availability of EPA comments prepared pursuant to the Environmental Review Process (ERP), under section 309 of the Clean Air Act and Section 102(2)(c) of the National Environmental Policy Act as amended. Requests for copies of EPA comments can be directed to the Office of Federal Activities at 202–564–7146.

An explanation of the ratings assigned to draft environmental impact statements (EISs) was published in FR dated April 6, 2008 (73 FR 19833).

Draft EISs

EIS No. 20080167, ERP No. D–COE–J35011–CO, Northern Integrated Supply Project, Construction and Operation a Regional Water Supply to Serve the Current and Future Water Needs of 12 Towns and Water District, Approval of Section 404 Permit Application, Northern Colorado Water Conservancy District, Larimer and Weld Counties, CO.

Summary: EPA expressed environmental objections to the proposed action alternatives due to the potential for substantial and unacceptable impacts to the Poudre and South Platte Rivers, and expressed concern that the DEIS may not contain sufficient information to fully assess the potential water quality and wetland impacts of the proposed action alternatives. Rating EO2.

EIS No. 20080304, ERP No. D–NOA–E91025–00, Reef Fish Amendment 30B: Gag-End Overfishing and Set Management Thresholds and Targets; Red Grouper—Set Optimum Yield, Total Allowable Catch (TAC), and Management Measures: Area Closures: and Federal Regulatory Compliance, Implementation, Gulf of Mexico.

Summary: EPA does not object to the preferred alternative. Rating LO.

EIS No. 20080312, ERP No. D–FHW–E40821–SC, Southern Evacuation Lifeline Project, Proposed New Location Freeway Which Would Provide Improved Hurricane Evacuation, Congestion Relief, Improved Access to Services East and West of the Waccamaw River, Horry and Georgetown Counties, SC.

Summary: EPA expressed environmental concerns about significant wetland impacts and recommends that further measures be considered to avoid and minimize these wetland and stream impacts. In addition, more information about the mitigation approach for the remaining wetland and stream impacts was requested. Rating EC2.

EIS No. 20080227, ERP No. DA–TPT–K61154–CA, Presidio Trust Management Plan (PTMP), Updated Information on the Concept for the 120-Acre Main Post District, Area B of the Presidio of San Francisco, Implementation, City and County of San Francisco, CA.

Summary: EPA does not object to the proposed project. Rating LO.

EIS No. 20080320, ERP No. DS–NOA–K91008–00, Amendment 18 to the Fishery Management Plan, Pelagic Fisheries of the Western Pacific Region, Management Modifications for the Hawaii-based Shallow-set Longline Swordfish Fishery, Proposal to Remove Effort Limits, Eliminate the Set Certificate Program and Implement New Sea Turtle Interaction Caps.

Summary: EPA expressed environmental concerns about impacts to sea turtles and requested additional information on impact assessment methodology and how cumulative impacts to sea turtles were factored into the conclusions. Rating EC2.

Final EISs

EIS No. 20080248, ERP No. F–AFS–L65534–ID, Idaho Cobalt Project, Development of Two Underground Mines, a Waste Disposal Site and Associated Facilities, Approval of Plan-of-Operation, Salmon-Cobalt Ranger District, Salmon-Challis National Forest, Lemhi County, ID.

Summary: EPA continues to have environmental concerns about the lack of information on financial assurance that we requested be in the FEIS and about the lack of specificity on trigger levels for monitoring and mitigation measures.

EIS No. 20080307, ERP No. F–AFS–L65552–OR, East Maury Fuels and Vegetation Management Project, Proposed Fuels and Vegetation Treatments Reduce the Risk of Stand Loss, Lookout Mountain Ranger District, Ochoco National Forest, Crook County, OR.

Summary: EPA continues to have environmental concerns about the need for monitoring and maintenance of culverts on closed roads to prevent passage barriers for fish, erosion and sedimentation problems.

EIS No. 20080311, ERP No. F–FTA–J40173–CO, Denver Union Station (DUS) Project, Transportation Improvement, Multimodal Transportation Center for the Metro Denver Region, Funding and NPDES Permit, City and County Denver, CO.

Summary: EPA recommends that mitigation measures for air quality construction impacts from the proposed project be listed in the ROD as construction specification requirements and that the ROD also include measures ensuring minimization of NO_X and VOC levels.

EIS No. 20080329, ERP No. F–AFS–G65107–NM, Santa Fe National Forest Project, Settlement Land Transfers: Pueblo de San lldefonso, Pueblo of Santa Clara and Los Alamos County, Implementation, Santa Fe National Forest, Los Alamos, Rio Arriba and Santa Fe Counties, NM.

Summary: No comment letter was sent to the preparing agency.

EIS No. 20080332, ERP No. F–FHW–L40227–WA, Interstate 90 Snoqualmie Pass East Project, Proposes to Improve a 15-mile Portion of I–90 from Milepost 55.10 in Hyak to Milepost 70.3 New Easton, Funding, U.S. Army COE Section 404 Permit and NPDES Permit, Kittitas County, WA.

Summary: EPA does not object to the proposed action.

EIS No. 20080334, ERP No. F–NOA–A91074–00, North Atlantic Right Whale Ship Strike Reduction Strategy, To Implement the Operational Measures to Reduce the Occurrence and Severity of Vessel Collisions with the Right Whale, Serious Injury and Deaths Resulting from Collisions with Vessels.

Summary: EPA has no objection to the proposed action.

EIS No. 20080341, ERP No. F–AFS–L65546–ID, Idaho Roadless Area Conservation Project, To Provide State-Specific Direction for the Conservation and Management of Inventoried Roadless Areas, National Forest System Lands in Idaho.

Summary: The final EIS addressed EPA's concerns about adverse impacts to water quality, the disposition of temporary roads and the definition of significant risk.

EIS No. 20080342, ERP No. F–AFS–J65516–WY, Inyan Kara Analysis Area Vegetation Management, Proposes to Implement Best Management Livestock Grazing Practices and Activities Associated with Adaptive Management and Monitoring Strategies, Douglas Ranger District, Medicine Bow Routt National Forest and Thunder Basin National Grassland, Niobrara and Weston Counties, WY.

Summary: While the Final EIS did address EPA's environmental general concerns with water quality and adaptive management, we continue to have environmental concerns about the level of water resource protection from grazing impacts under drought conditions.

Dated: October 14, 2008.

Ken Mittelholtz,

Environmental Protection Specialist, Office of Federal Activities.

[FR Doc. E8–24811 Filed 10–16–08; 8:45 am]

BILLING CODE 6560–50–P

ENVIRONMENTAL PROTECTION AGENCY

[ER–FRL–8586–6]

Environmental Impact Statements; Notice of Availability

Responsible Agency: Office of Federal Activities, General Information (202) 564–1399 or *http://www.epa.gov/compliance/nepa/*.

Weekly receipt of Environmental Impact Statements filed 10/06/2008 through 10/10/2008. Pursuant to 40 CFR 1506.9.

EIS No. 20080410, Second Final Supplement, FTA, CA, South Sacramento Corridor Phase 2, Improve Transit Service and Enhance Regional Connectivity, Funding, in the City and County Sacramento, CA, Wait Period Ends: 11/17/2008, Contact: Jerome Wiggins 415–744–3115.

EIS No. 20080411, Draft EIS, AFS, UT, Dixie National Forest Lands, To Identify Oil and Gas Leasing of Lands, Implementation, Garfield, Iron, Kane, Piute, Washington Counties, UT, Comment Period Ends: 12/16/2008, Contact: Susan Baughman 435–865–3703.

EIS No. 20080412, Final EIS, FRA, NJ, Portal Bridge Capacity Enhancement Project, To Replace the nearly 100-Year-Old Portal Bridge and Eliminate Capacity Constraints on the Northeast Corridor between Swift Interlocking and Secaucus Transfer Station, Funding, U.S. Army Corp Section 10 and 404 Permits, Hackensack River, Hudson County, NJ, Wait Period Ends: 11/17/2008, Contact: David Valenstein 202–493–6368.

EIS No. 20080413, Draft EIS, FHW, CA, Mid County Parkway Project, Construct a New Parkway between Interstate 15 (I–15) in the West and State Route 79 (SR–79) in the East, Funding and U.S. Army COE Section 404 Permit, Riverside County, CA, Comment Period Ends: 12/08/2008, Contact: Tay Dam 213–202–3954.

EIS No. 20080414, Draft EIS, COE, 00, PROGRAMMATIC—Oyster Restoration in Chesapeake Bay Including the Use of a Native and/or Nonnative Oyster, Implementation, Chesapeake Bay, MD and VA, Comment Period Ends: 12/15/2008, Contact: Craig Seltzer 757–201–7390.

EIS No. 20080415, Draft EIS, FHW, ID, I–90 Post Falls Access Improvements Project, Transportation Improve from Spokane Street Interchange through the State Highway 41 (SH–41) Interchange, Kootenai County, ID, Comment Period Ends: 12/01/2008, Contact: Paul C. Ziman 208–334–9180-Ext. 127.

EIS No. 20080416, Final EIS, BLM, OR, Western Oregon Bureau of Land Management Districts of Salem, Eugene, Roseburg, Coos Bay, and Medford Districts, and the Klamath Falls Resource Area of the Lakeview District, Revision of the Resource Management Plans, Implementation, OR, Wait Period Ends: 12/01/2008, Contact: Jerry Hubbard 503–808–6115.

EIS No. 20080417, Final EIS, UAF, FL, Eglin Air Force Base Program, Base Realignment and Closure (BRAC) 2005 Decisions and Related Action, Implementation, FL, Wait Period Ends: 11/17/2008, Contact: Mike Spaits 850–8820–2878.

EIS No. 20080418, Draft EIS, DOE, 00, PROGRAMMATIC—Global Nuclear Energy Partnership (GNEP) Program, To Support a Safe, Secure, and Sustainable Expansion of Nuclear Energy, both Domestically and Internationally, (DOE/EIS–0396), Comment Period Ends: 12/16/2008, Contact: Francis G. Schwartz 866–645–7803.

EIS No. 20080419, Final EIS, NHT, 00, Corporate Average Fuel Economy (CAFÉ) Proposed Standards for Model Year 2011–2015 Passenger Cars and Light Trucks, Implementation, Wait Period Ends: 11/17/2008, Contact: Carol Hammel-Smith 202–366–5206.

EIS No. 20080420, Final EIS, BLM, CA, Sunrise Powerlink Transmission Line Project, Proposed Land Use Plan Amendment, Construction and Operation of a New 91-mile 500 kilovolt (kV) Electric Transmission Line from Imperial Valley Substation (in Imperial Co. near the City of El Centro) to a New Central East Substation (in Central San Diego County) Imperial and San Diego Counties, CA, Wait Period Ends: 11/17/2008, Contact: Lynda Kastoll 760–337–4421.

EIS No. 20080421, Draft EIS, NSA, MD, Fort George G. Meade Utilities Upgrade Project, Proposes to Construct and Operate (1) North Utility Plant (2) South Generator Facility and (3) Central Boiler Plant, Fort George M. Meade, MD, Comment Period Ends: 12/01/2008, Contact: Jeffrey D. Williams 301–688–2970.

EIS No. 20080422, Draft EIS, FTA, MD, Purple Line Transit Project, Proposed 16-Mile Rapid Transit Line Extending from Bethesda in Montgomery County to New Carrollton in Prince George's County, MD , Comment Period Ends: 12/01/2008, Contact: Gail McFadden-Roberts 215–656–7100.

Amended Notices

EIS No. 20080227, Second Draft Supplement, TPT, CA, Presidio Trust Management Plan (PTMP), Updated Information on the Concept for the 120-Acre Main Post District, Area B of the Presidio of San Francisco, Implementation, City and County of San Francisco, CA, Comment Period Ends: 10/20/2008, Contact: John G. Pelka 415–561–5300.

Revision to FR Notice Published: Extending Comment Period from 09/19/2008 to 10/20/2008.

EIS No. 20080293, Draft EIS, IBR, CA, Cachuma Lake Resource Management Plan, Implementation, Cachuma Lake, Santa Barbara County, CA, Comment Period Ends: 10/31/2008, Contact: Sharon McHale 916–989–7172. Revision to FR Notice Published 08/01/2008: Extending Comment Period from 09/15/2008 to 10/31/2008.

EIS No. 20080297, Draft EIS, IBR, CA, Lake Casitas Resource Management Plan (RMP), Implementation, Cities of Los Angeles and Ventura, Western Ventura County, CA, Comment Period Ends: 10/31/2008, Contact: Sharon McHale 916–989–7172. Revision to FR Notice Published 08/08/2008: Extending Comment Period from 9/22/2008 to 10/31/2008.

Dated: October 14, 2008.

Ken Mittelholtz,

Environmental Protection Specialist, Office of Federal Activities.

[FR Doc. E8–24813 Filed 10–16–08; 8:45 am]

BILLING CODE 6560–50–P

ENVIRONMENTAL PROTECTION AGENCY

[EPA–HQ–ORD–2008–0200; FRL–8729–9]

Board of Scientific Counselors, Water Quality Mid-Cycle Subcommittee Meeting—2008

AGENCY: Environmental Protection Agency (EPA).

ACTION: Notice of meeting.

SUMMARY: Pursuant to the Federal Advisory Committee Act, Public Law 92–463, the Environmental Protection Agency (EPA), Office of Research and Development (ORD), gives notice of a meeting of the Board of Scientific Counselors (BOSC) Water Quality Mid-Cycle Subcommittee.

DATES: The meetings (teleconference calls) will be held on Monday, November 3, 2008 from 1 p.m. to 3 p.m. Eastern Standard Time. The meeting may adjourn early if all business is finished. Requests for the draft agenda or for making an oral presentation at the conference calls will be accepted up to one business day before the meeting.

ADDRESSES: Participation in the meeting will be by teleconference only—a meeting room will not be used. Members of the public may obtain the call-in number and access code for the call from Susan Peterson, the Designated Federal Officer, whose contact information is listed under the **FOR FURTHER INFORMATION CONTACT** section of this notice. Submit your comments, identified by Docket ID No. EPA–HQ–ORD–2008–0200, by one of the following methods:

- *www.regulations.gov:* Follow the on-line instructions for submitting comments.
- *E-mail:* Send comments by electronic mail (e-mail) to: *ORD.Docket@epa.gov,* Attention Docket ID No. EPA–HQ–ORD–2008–0200.
- *Fax: Fax comments to:* (202) 566–0224, Attention Docket ID) No. EPA–HQ–ORD–2008–0200.
- *Mail: Send comments by mail to:* Board of Scientific Counselors, Water Quality Mid-Cycle Subcommittee—2008 Docket, *Mailcode:* 28221T, 1200 Pennsylvania Ave., NW., Washington, DC, 20460, Attention Docket ID No. EPA–HQ–ORD–2008–0200.
- *Hand Delivery or Courier:* Deliver comments to: EPA Docket Center (EPA/DC), Room B102, EPA West Building, 1301 Constitution Avenue, NW., Washington, DC, Attention Docket ID No. EPA–HQ–ORD–2008–0200. **Note:** This is not a mailing address. Such deliveries are only accepted during the docket's normal hours of operation, and special arrangements should be made for deliveries of boxed information.

Instructions: Direct your comments to Docket ID No. EPA–HQ–ORD–2008–0200. EPA's policy is that all comments received will be included in the public docket without change and may be made available online at *www.regulations.gov,* including any personal information provided, unless the comment includes information claimed to be Confidential Business Information (CBI) or other information whose disclosure is restricted by statute. Do not submit information that you consider to be CBI or otherwise protected through *www.regulations.gov* or e-mail. The *www.regulations.gov* Web site is an ''anonymous access'' system, which means EPA will not know your identity or contact information unless you provide it in the body of your comment. If you send an e-mail comment directly to EPA without going through *www.regulations.gov,* your e-mail address will be automatically captured and included as part of the comment that is placed in the public docket and made available on the Internet. If you submit an electronic comment, EPA recommends that you include your name and other contact information in the body of your comment and with any disk or CD–ROM you submit. If EPA cannot read your comment due to technical difficulties and cannot contact you for clarification, EPA may not be able to consider your comment. Electronic files should avoid the use of special characters, any form of encryption, and be free of any defects or viruses. 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 docket are listed in the *www.regulations.gov* index. Although listed in the index, some information is not publicly available, e.g., CBI or other information whose disclosure is restricted by statute. Certain other material, such as copyrighted material, will be publicly available only in hard copy. Publicly available docket materials are available either electronically in *www.regulations.gov* or in hard copy at the Board of Scientific Counselors, Water Quality Mid-Cycle Subcommittee—2008 Docket, EPA/DC, EPA West, Room B 102, 1301 Constitution Ave., NW., Washington, DC. The Public Reading Room is open from 8:30 a.m. to 4:30 p.m., Monday through Friday, excluding legal holidays. The telephone number for the Public Reading Room is (202) 566–1744, and the telephone number for the ORD Docket is (202) 566–1752.

FOR FURTHER INFORMATION CONTACT: The Designated Federal Officer via mail at: Susan Peterson, Mail Code 8104–R, Office of Science Policy, Office of Research and Development, Environmental Protection Agency, 1200 Pennsylvania Avenue, NW., Washington, DC 20460; via phone/voice mail at: (202) 564–1077; via fax at: (202) 565–2911; or via e-mail at: *peterson.susan@epa.gov.*

SUPPLEMENTARY INFORMATION:

General Information

Proposed agenda items for the meeting include, but are not limited to, a discussion of the finalization and approval of a draft report by the subcommittee, based on its rating of the water quality research program performance and overall progress. The conference calls are open to the public.

Information on Services for Individuals with Disabilities: For information on access or services for individuals with disabilities, please contact Susan Peterson at (202) 564–1077 or *peterson.susan@epa.gov.* To request accommodation of a disability, please contact Susan Peterson, preferably at least ten days prior to the meeting, to give EPA as much time as possible to process your request.

Dated: October 8, 2008.

Fred Hauchman,

Director, Office of Science Policy.

[FR Doc. E8–24586 Filed 10–16–08; 8:45 am]

BILLING CODE 6560–50–M

FEDERAL DEPOSIT INSURANCE CORPORATION

Notice of Agency Meeting

Pursuant to the provisions of the ''Government in the Sunshine Act'' (5 U.S.C. 552b), notice is hereby given that at 6:12 p.m. on Monday, October 13, 2008, the Board of Directors of the Federal Deposit Insurance Corporation met in closed session to consider matters relating to the Corporation's Temporary Liquidity Guarantee Program and to full insurance of non-interest bearing deposit transaction accounts.

In calling the meeting, the Board determined, on motion of Director John C. Dugan (Director, Comptroller of the Currency), seconded by Director Thomas J. Curry (Appointive), and concurred in by Vice Chairman Martin J. Gruenberg, Director John M. Reich (Director, Office of Thrift Supervision), and Chairman Sheila C. Bair, that Corporation business required its consideration of the matters which were to be the subject of this meeting on less

than seven days' notice to the public; that no earlier notice of the meeting was practicable; that the public interest did not require consideration of the matters in a meeting open to public observation; and that the matters could be considered in a closed meeting by authority of subsections (c)(4), (c)(8), and (c)(9)(B) of the ''Government in the Sunshine Act'' (5 U.S.C. 552b(c)(4), (c)(8), and (c)(9)(B)).

The meeting was held in the Board Room of the FDIC Building located at 550 17th Street, NW., Washington, DC.

Dated: October 14, 2008.

Federal Deposit Insurance Corporation.

Robert E. Feldman,

Executive Secretary.

[FR Doc. E8–24725 Filed 10–16–08; 8:45 am]

BILLING CODE 6714–01–P

FEDERAL DEPOSIT INSURANCE CORPORATION

Notice of Change in Subject Matter of Agency Meeting

Pursuant to the provisions of subsection (e)(2) of the ''Government in the Sunshine Act'' (5 U.S.C. 552b(e)(2)), notice is hereby given that at its open meeting held at 10 a.m. on Tuesday, October 7, 2008, the Corporation's Board of Directors determined, on motion of Vice Chairman Martin J. Gruenberg, seconded by Director Thomas J. Curry (Appointive), concurred in by Director John M. Reich (Director, Office of Thrift Supervision), Director John C. Dugan (Comptroller of the Currency), and Chairman Sheila C. Bair, that Corporation business required the addition to the agenda for consideration at the meeting, on less than seven days' notice to the public, of the following matter:

Memorandum and resolution re: Interagency Notice of Proposed Rulemaking on Capital Treatment of Certain Claims on or Guaranteed by, the Federal National Mortgage Association (Fannie Mae) and the Federal Home Loan Mortgage Corporation (Freddie Mac).

The Board further determined, by the same majority vote, that no notice earlier than October 2, 2008, of the change in the subject matter of the meeting was practicable.

Dated: October 14, 2008.

Federal Deposit Insurance Corporation.

Robert E. Feldman,

Executive Secretary.

[FR Doc. E8–24757 Filed 10–16–08; 8:45 am]

BILLING CODE 6714–01–P

FEDERAL ELECTION COMMISSION

Sunshine Act Notices

DATE AND TIME: Tuesday, October 21, 2008 at 10 a.m.

PLACE: 999 E Street, NW., Washington, DC.

STATUS: This meeting will be closed to the public.

ITEMS TO BE DISCUSSED: Compliance matters pursuant to 2 U.S.C. 437g. Audits conducted pursuant to 2 U.S.C. 437g, 438(b), and Title 26, U.S.C. Matters concerning participation in civil actions or proceedings or arbitration. Internal personnel rules and procedures or matters affecting a particular employee.

PERSON TO CONTACT FOR INFORMATION: Mr. Robert Biersack, Press Officer, *Telephone:* (202) 694–1220.

Mary W. Dove,

Secretary of the Commission.

[FR Doc. E8–24545 Filed 10–16–08; 8:45 am]

BILLING CODE 6715–01–M

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 November 3, 2008.

A. Federal Reserve Bank of San Francisco (Kenneth Binning, Vice President, Applications and Enforcement) 101 Market Street, San Francisco, California 94105–1579:

1. NHB Holdings, Inc. and Proficio Mortgage Ventures, LLC, both of Jacksonville, Florida, to engage *de novo* in a joint venture with Home Avenue Mortgage, Clearwater, Florida, in conducting mortgage banking activities, pursuant to section 225.28(b)(1) of Regulation Y.

Board of Governors of the Federal Reserve System, October 14, 2008.

Robert deV. Frierson,

Deputy Secretary of the Board.

[FR Doc. E8–24699 Filed 10–16–08; 8:45 am]

BILLING CODE 6210–01–S

DEPARTMENT OF HEALTH AND HUMAN SERVICES

Office of the Secretary

Declaration Under the Public Readiness and Emergency Preparedness Act

October 10, 2008.

AGENCY: Office of the Secretary (OS), Department of Health and Human Services (HHS).

ACTION: Notice.

SUMMARY: Declaration pursuant to section 319F–3 of the Public Health Service Act (42 U.S.C. 247d–6d) to provide targeted liability protections for pandemic countermeasures based on a credible risk that an avian influenza virus spreads and evolves into a strain capable of causing a pandemic of human influenza.

DATES: This notice and the attached declaration are effective as of the date of signature of the declaration.

FOR FURTHER INFORMATION CONTACT: RADM W.C. Vanderwagen, Assistant Secretary for Preparedness and Response, Office of the Secretary, Department of Health and Human Services, 200 Independence Avenue, SW., Washington, DC 20201, Telephone (202) 205–2882 (this is not a toll-free number).

SUPPLEMENTARY INFORMATION: Highly pathogenic avian influenza A viruses have been spread by infected migratory birds and exports of poultry or poultry products from Asia through Europe and Africa since 2004, and could be spread into North America in 2008 or later, and have caused disease in humans with an associated high case fatality. Section

319F–3 of the Public Health Service Act (42 U.S.C. 247d–6d), which was enacted by the Public Readiness and Emergency Preparedness Act, is intended to alleviate certain liability concerns associated with pandemic countermeasures, and, therefore, ensure that the countermeasures are available and can be administered in the event an avian influenza virus spreads and evolves into a strain capable of causing a pandemic of human influenza.

HHS Secretary's Declaration for the Use of the Public Readiness and Emergency Preparedness Act for the Influenza Antivirals

Oseltamivir Phosphate (Tamiflu®) and Zanamivir (Relenza®)

Whereas highly pathogenic avian H5N1 influenza A viruses have spread, through various mechanisms, from Asia through Europe and Africa since 2004 and have caused disease in humans with an associated high case fatality. The real possibility that these viruses could be spread into North America exists as well as the possibility that these H5N1 viruses could participate directly or indirectly in development of a human pandemic strain;

Whereas avian influenza A viruses might evolve into strains capable of causing a pandemic of human influenza;

Whereas there are countermeasures to treat, identify, or prevent adverse health consequences or death from exposure to highly pathogenic avian influenza A viruses or pandemic influenza in humans;

Whereas such countermeasures include Oseltamivir Phosphate (Tamiflu®) and Zanamivir (Relenza®);

Whereas such countermeasures may be used and administered in accordance with Federal contracts, cooperative agreements, grants, interagency agreements, and memoranda of understanding, and may also be used and administered at the Regional, State, and local level in accordance with the public health and medical response of the Authority Having Jurisdiction;

Whereas, the possibility of governmental program planners obtaining stockpiles from private sector entities except through voluntary means such as commercial sale, donation, or deployment would undermine national preparedness efforts and should be discouraged as provided for in section 319F–3(b)(2)(E) of the Public Health Service Act (42 U.S.C. 247d-6d(b)) (''the Act'');

Whereas, immunity under section 319F–3(a) of the Act should be available to governmental program planners for distributions of Covered Countermeasures obtained voluntarily, such as by (1) donation; (2) commercial sale; (3) deployment of Covered Countermeasures from Federal stockpiles; or (4) deployment of donated, purchased, or otherwise voluntarily obtained Covered Countermeasures from State, local, or private stockpiles;

Whereas, the extent of immunity under section 319F–3(a) of the Act afforded to a governmental program planner that obtains Covered Countermeasures except through voluntary means is not intended to affect the extent of immunity afforded other covered persons with respect to such Covered Countermeasures;

Whereas, in accordance with section 319F–3(b)(6) of the Act, I have considered the desirability of encouraging the design, development, clinical testing or investigation, manufacturing, labeling, distribution, formulation, packaging, marketing, promotion, sale, purchase, donation, dispensing, prescribing, administration, licensing, and use of such countermeasures with respect to the category of disease and population described in sections II and IV below, and have found it desirable to encourage such activities for the covered countermeasures; and

Whereas, to encourage the design, development, clinical testing or investigation, manufacturing and product formulation, labeling, distribution, packaging, marketing, promotion, sale, purchase, donation, dispensing, prescribing, administration, licensing, and use of medical countermeasures with respect to the category of disease and population described in sections II and IV below, it is advisable, in accordance with section 319F–3(a) and (b) of the Act, to provide immunity from liability for covered persons, as that term is defined at section 319F–3(i)(2) of the Act, and to include as such covered persons such other qualified persons as I have identified in section VI of this declaration;

Therefore, pursuant to section 319F–3(b) of the Act, I have determined there is a credible risk that the spread of avian influenza viruses and resulting disease could in the future constitute a public health emergency.

I. Covered Countermeasures (As Required by Section 319F–3(b)(1) of the Act)

Covered Countermeasures are defined at section 319F–3(i) of the Act.

At this time, and in accordance with the provisions contained herein, I am recommending the manufacturing, testing, development, and distribution; and, with respect to the category of disease and population described in sections II and IV below, the administration and usage of the pandemic countermeasures, influenza antiviral drugs oseltamivir phosphate (Tamiflu®) and Zanamivir (Relenza®). The immunity specified in section 319F–3(a) of the Act shall only be in effect with respect to: (1) Present or future Federal contracts, cooperative agreements, grants, interagency agreements, or memoranda of understanding involving countermeasures that are used and administered in accordance with this declaration, and (2) activities authorized in accordance with the public health and medical response of the Authority Having Jurisdiction to prescribe, administer, deliver, distribute or dispense the Covered Countermeasure following a declaration of an emergency, as defined in section IX below. In accordance with section 319F–3(b)(2)(E) of the Act, for governmental program planners, the immunity specified in section 319F–3(a) of the Act shall be in effect to the extent they obtain Covered Countermeasures through voluntary means of distribution, such as (1) donation; (2) commercial sale; (3) deployment of Covered Countermeasures from Federal stockpiles; or (4) deployment of donated, purchased, or otherwise voluntarily obtained Covered Countermeasures from State, local, or private stockpiles. For all other covered persons, including other program planners, the immunity specified in section 319F–3(a) of the Act shall, in accordance with section 319F–3(b)(2)(E) of the Act, be in effect pursuant to any means of distribution.

This declaration shall subsequently refer to the countermeasures identified above as ''Covered Countermeasures.''

This declaration shall apply to all Covered Countermeasures administered or used during the effective period of the declaration.

II. Category of Disease (As Required by Section 319F–3(b)(2)(A) of the Act)

The category of disease, health condition, or threat to health for which I am recommending the administration or use of the Covered Countermeasures is the threat of or actual human influenza that results from the infection of humans with highly pathogenic avian influenza A viruses or other highly pathogenic influenza viruses causing a pandemic following exposure to the viruses.

III. Effective Time Period (As Required by Section 319F–3(b)(2)(B) of the Act)

With respect to Covered Countermeasures administered and used in accordance with present or future Federal contracts, cooperative agreements, grants, interagency agreements, or memoranda of understanding, the effective period of time of this Declaration commences on signature of the declaration and extends through December 31, 2015.

With respect to Covered Countermeasures administered and used in accordance with the public health and medical response of the Authority Having Jurisdiction, the effective period of time of this Declaration commences on the date of a declaration of an emergency and lasts through and includes the final day that the emergency declaration is in effect including any extensions thereof.

IV. Population (As Required by Section 319F–3(b)(2)(C) of the Act)

Section 319F–3(a)(4)(A) of the Act confers immunity to manufacturers and distributors of the Covered Countermeasure, regardless of the defined population.

Section 319F–3(a)(3)(C)(i) of the Act confers immunity to covered persons who may be a program planner or qualified persons with respect to the Covered Countermeasure only if a member of the population specified in the declaration uses the Covered Countermeasure or has the Covered Countermeasure administered to him and is in or connected to the geographic location specified in this declaration, or the program planner or qualified person reasonably could have believed that these conditions were met.

The populations specified in this declaration are all persons who use a Covered Countermeasure or to whom a Covered Countermeasure is administered in accordance with this declaration, including, but not limited to: (1) Any person conducting research and development of Covered Countermeasures directly for the Federal government or pursuant to a contract, grant, or cooperative agreement with the Federal government; (2) any person who receives a Covered Countermeasure from persons authorized in accordance with the public health and medical emergency response of the Authority Having Jurisdiction to prescribe, administer, deliver, distribute, or dispense the Covered Countermeasure, and their officials, agents, employees, contractors, and volunteers following a declaration of an emergency; (3) any person who receives a Covered Countermeasure from a person authorized to prescribe, administer or dispense the countermeasure or who is otherwise authorized under an Emergency Use Authorization; and (4) any person who receives a Covered Countermeasure in human clinical trials being conducted directly by the Federal Government or pursuant to a contract, grant, or cooperative agreement with the Federal Government.

V. Geographic Area (As Required by Section 319F–3(b)(2)(D) of the Act)

Section 319F–3(a) of the Act applies to the administration and use of a Covered Countermeasure without geographic limitation.

VI. Other Qualified Persons (As Required by Section 319F–3(i)(8)(B) of the Act)

With regard to the administration or use of a Covered Countermeasure, section 319F–3(i)(8)(A) of the Act defines the term ''qualified person'' as a licensed individual who is authorized to prescribe, administer, or dispense the Covered Countermeasure under the law of the State in which such covered countermeasure was prescribed, administered or dispensed.

Additional persons who are qualified persons pursuant to section 319F–3(i)(8)(B) are the following: (1) Any person authorized in accordance with the public health and medical emergency response of the Authority Having Jurisdiction to prescribe, administer, deliver, distribute or dispense Covered Countermeasures, and their officials, agents, employees, contractors and volunteers, following a declaration of an emergency, and (2) Any person authorized to prescribe, administer, or dispense Covered Countermeasures or who is otherwise authorized under an Emergency Use Authorization.

VII. Additional Time Periods of Coverage After Expiration of Declaration (As required by section 319F–3(b)(3)(B) of the Act)

I have determined that, upon expiration of the time period specified in section III above, an additional twelve (12) months is a reasonable period to allow for the manufacturer to arrange for disposition and covered persons to take such other actions as are appropriate to limit the administration or use of the Covered Countermeasure, and the liability protection of section 319F–3(a) of the Act shall extend for that period.

VIII. Amendments

This Declaration has not previously been amended. Any future amendment to this Declaration will be published in the **Federal Register**, pursuant to section 319F–3(b)(4) of the Act.

IX. Definitions

For the purpose of this declaration, including any claim for loss brought in accordance with section 319F–3 of the PHS Act against any covered persons defined in the Act or this declaration, the following definitions will be used:

Administration of a Covered Countermeasure: As used in section 319F–3(a)(2)(B) of the Act includes, but is not limited to, public and private delivery, distribution, and dispensing activities relating to physical administration of the countermeasures to recipients, management and operation of delivery systems, and management and operation of distribution and dispensing locations.

Authority Having Jurisdiction: Means the public agency or its delegate that has legal responsibility and authority for responding to an incident, based on political or geographical (e.g., city, county, tribal, State, or Federal boundary lines) or functional (e.g. law enforcement, public health) range or sphere of authority.

Covered Persons: As defined at section 319F–3(i)(2) of the Act, include the United States manufacturers, distributors, program planners, and qualified persons. The terms ''manufacturer,'' ''distributor,'' ''program planner,'' and ''qualified person'' are further defined at sections 319F–3(i)(3), (4), (6), and (8) of the Act.

Declaration of Emergency: A declaration by any authorized local, regional, State, or federal official of an emergency specific to events that indicate an immediate need to administer and use pandemic countermeasures, with the exception of a federal declaration in support of an emergency use authorization under section 564 of the FDCA unless such declaration specifies otherwise.

Pandemic Countermeasures: Means the neuraminidase class of Antivirals Oseltamivir Phosphate (e.g., Tamiflu® and Zanamivir (e.g., Relenza®).

This 10th day of October, 2008.

Michael O. Leavitt,

Secretary of Health and Human Services.

Appendix I

List of U.S. Government Contracts

Contract	Manufacturer	Covered countermeasure	Pub. L. 85–804 coverage*
HHSO1002006000015I	Roche	Oseltamivir Phosphate (Tamiflu®)	No.
HHSO1002006000016I	GlaxoSmithKline	Zanamivir (Relenza®)	No.
HHSO100200600015I	Roche	Acquisiton of Tamiflu, 75 mg (state purchases).	No.
HHSO100200600016I	GlaxoSmithKline	Acquisiton of Relenza, 5 mg (state purchases).	No.
797HH7282	Roche	Oseltamivir, 75 mg (Tamiflu) (SNS)	No.
797HH7283	GlaxoSmithKline	Relenza (Zanamivir) 5 mg (SNS)	No.
797HH8113	GlaxoSmithKline	Relenza (Zanamivir) 5 mg (SNS)	No.
797HH8112	Roche	Oseltamivir 75 mg (Tamiflu) (SNS) Oseltamivir 45 mg (Tamiflu). Oseltamivir 30 mg (Tamiflu).	No.

[FR Doc. E8–24733 Filed 10–14–08; 4:15 pm]

BILLING CODE 4150–37–P

DEPARTMENT OF HEALTH AND HUMAN SERVICES

Office of the Secretary

Declaration Under the Public Readiness and Emergency Preparedness Act

October 10, 2008.

AGENCY: Office of the Secretary (OS), Department of Health and Human Services (HHS).

ACTION: Notice.

SUMMARY: Declaration pursuant to section 319F–3 of the Public Health Service Act (42 U.S.C. 247d–6d) to provide targeted liability protections for *Botulism* countermeasures based on a credible risk that the threat of exposure to botulinum toxin(s) and the resulting disease(s) from a manmade or natural source constitutes a public health emergency.

DATES: This notice and the attached declaration are effective as of the date of signature of the declaration.

FOR FURTHER INFORMATION CONTACT: RADM W.C. Vanderwagen, Assistant Secretary for Preparedness and Response, Office of the Secretary, Department of Health and Human Services, 200 Independence Avenue, SW., Washington, DC 20201, Telephone (202) 205–2882 (this is not a toll-free number).

HHS Secretary's Declaration for Utilization of Public Readiness and Emergency Preparedness Act for Botulism Countermeasures

Whereas exposure to botulinum toxin(s) and the resulting disease(s) from manmade or natural sources may cause harm to the general population sufficient to constitute a public health emergency;

Whereas the Secretary of the Department of Homeland Security has determined that botulinum toxins present a material threat against the United States population sufficient to affect national security;

Whereas botulinum toxins are extremely potent and lethal;

Whereas there are covered countermeasures to treat, identify, or prevent adverse health consequences or death from botulinum toxins;

Whereas such botulism countermeasures, including antitoxins, for potential pre-exposure and for post-exposure prevention and treatment, diagnostics to identify such exposure, and additional countermeasures for treatment of adverse events arising from use of these botulism countermeasures exist, or may be the subject of research and/or development;

Whereas such countermeasures may be used and administered in accordance with Federal contracts, cooperative agreements, grants, interagency agreements, and memoranda of understanding, and may also be used and administered at the Regional, State, and local level in accordance with the public health and medical response of the Authority Having Jurisdiction;

Whereas the possibility of governmental program planners obtaining stockpiles from private sector entities except through voluntary means such as commercial sale, donation, or deployment would undermine national preparedness efforts and should be discouraged as provided for in section 319F–3(b)(2)(E) of the Public Health Service Act (42 U.S.C. 247d–6d(b)) (''the Act'');

Whereas immunity under section 319F–3(a) of the Act should be available to governmental program planners for distributions of Covered Countermeasures obtained voluntarily, such as by (1) donation; (2) commercial sale; (3) deployment of Covered Countermeasures from Federal stockpiles; or (4) deployment of donated, purchased, or otherwise voluntarily obtained Covered Countermeasures from State, local, or private stockpiles;

Whereas the extent of immunity under section 319F–3(a) of the Act afforded to a governmental program planner that obtains Covered Countermeasures except through voluntary means is not intended to affect the extent of immunity afforded other covered persons with respect to such Covered Countermeasures;

Whereas in accordance with section 319F–3(b)(6) of the Act, I have considered the desirability of encouraging the design, development, clinical testing or investigation, manufacturing, labeling, distribution, formulation, packaging, marketing, promotion, sale, purchase, donation, dispensing, prescribing, administration, licensing, and use of such countermeasures with respect to the category of disease and population described in sections II and IV below, and have found it desirable to encourage such activities for the covered countermeasure; and

Whereas to encourage the design, development, clinical testing or investigation, manufacturing and product formulation, labeling, distribution, packaging, marketing, promotion, sale, purchase, donation, dispensing, prescribing, administration, licensing, and use of medical countermeasures with respect to the category of disease and population described in sections II and IV below, it is advisable, in accordance with section 319F–3(a) and (b) of the Act, to provide immunity from liability for covered persons, as that term is defined at section 319F–3(i)(2) of the Act, and to include as such covered persons such other qualified persons as I have identified in section VI of this declaration;

Therefore pursuant to section 319F–3(b) of the Act, I have determined there is a credible risk that botulinum toxin(s) and the resulting disease(s) from a

manmade or natural sources constitutes a public health emergency.

I. Covered Countermeasures (As Required by Section 319F–3(b)(1) of the Act)

Covered countermeasures are defined at section 319F–3(i) of the Act. At this time, and in accordance with the provisions contained herein, I am recommending the manufacture, testing, development, and distribution of botulinum toxin countermeasures, as defined in section IX below; and, with respect to the category of disease and the population described in sections II and IV below, the administration and usage of botulinum toxin countermeasures.

The immunity specified in section 319F–3(a) of the Act shall only be in effect with respect to: (1) Present or future Federal contracts, cooperative agreements, grants, interagency agreements, or memoranda of understanding involving countermeasures that are used and administered in accordance with this declaration and (2) activities authorized in accordance with the public health and medical response of the Authority Having Jurisdiction to prescribe, administer, deliver, distribute or dispense the Covered Countermeasure following a declaration of an emergency, as defined in section IX below. In accordance with section 319F–3(b)(2)(E) of the Act, for governmental program planners, the immunity specified in section 319F–3(a) of the Act shall be in effect to the extent they obtain Covered Countermeasures through voluntary means of distribution, such as (1) donation; (2) commercial sale; (3) deployment of Covered Countermeasures from Federal stockpiles; or (4) deployment of donated, purchased, or otherwise voluntarily obtained Covered Countermeasures from State, local, or private stockpiles. For all other covered persons, including other program planners, the immunity specified in section 319F–3(a) of the Act shall, in accordance with section 319F–3(b)(2)(E) of the Act, be in effect pursuant to any means of distribution.

This declaration shall subsequently refer to the countermeasures identified above as ''Covered Countermeasures.''

This declaration shall apply to all Covered Countermeasures administered or used during the effective period of the declaration.

II. Category of Disease (As Required by Section 319F–3(b)(2)(A) of the Act)

The category of disease, health condition, or threat to health for which I am recommending the administration or use of the Covered Countermeasure is botulism resulting from exposure to botulinum toxin(s).

III. Effective Time Period (As Required by Section 319F–3(b)(2)(B) of the Act)

With respect to Covered Countermeasures administered and used in accordance with present or future Federal contracts, cooperative agreements, grants, interagency agreements, or memoranda of understanding, the effective period of time of this Declaration commences on signature of the declaration and extends through December 31, 2015.

With respect to Covered Countermeasures administered and used in accordance with the public health and medical response of the Authority Having Jurisdiction, the effective period of time of this Declaration commences on the date of a declaration of an emergency and lasts through and includes the final day that the emergency declaration is in effect including any extensions thereof.

IV. Population (As Required by Section 319F–3(b)(2)(C) of the Act)

Section 319F–3(a)(4)(A) of the Act confers immunity on manufacturers, and distributors of the Covered Countermeasure, regardless of the defined population.

Section 319F–3(a)(3)(C)(i) of the Act confers immunity to covered persons who may be a program planner or qualified persons with respect to the Covered Countermeasure only if a member of the population specified in the declaration as persons who use the Covered Countermeasure or to whom such a Covered Countermeasure is administered, is in or connected to the geographic location specified in this declaration, or the program planner or qualified person reasonably could have believed that these conditions are met.

The populations specified in this declaration are all persons who use a Covered Countermeasure or to whom a Covered Countermeasure is administered in accordance with this declaration, including, but not limited to: (1) Any person conducting research and development of Covered Countermeasures directly for the Federal Government or pursuant to a contract, grant, or cooperative agreement with the Federal Government; (2) any person who receives a Covered Countermeasure from persons authorized in accordance with the public health and medical emergency response of the Authority Having Jurisdiction to prescribe, administer, deliver, distribute, or dispense the Covered Countermeasure, and their officials, agents, employees, contractors, and volunteers following a declaration of an emergency; (3) any person who receives a Covered Countermeasure from a person authorized to prescribe, administer or dispense the countermeasure or who is otherwise authorized under an Emergency Use Authorization; and (4) any person who receives a Covered Countermeasure in human clinical trials being conducted directly by the Federal Government or pursuant to a contract, grant, or cooperative agreement with the Federal Government.

V. Geographic Area (As Required by Section 319F–3(b)(2)(D) of the Act)

Section 319F–3(a) of the Act applies to the administration and use of the Covered Countermeasure without geographic limitation.

VI. Qualified Persons (As Required by Section 319F–3(i)(8)(b) of the Act)

With regard to the administration or use of a Covered Countermeasure, section 319F–3(i)(8)(A) of the Act defines the term ''qualified person'' as a licensed individual who is authorized to prescribe, administer, or dispense the Covered Countermeasure under the law of the State in which such covered countermeasure was prescribed, administered or dispensed.

Additional persons who are qualified persons pursuant to section 319F–3(i)(8)(B) are the following: (1) Any person authorized in accordance with the public health and medical emergency response of the Authority Having Jurisdiction to prescribe, administer, deliver, distribute or dispense Covered Countermeasures, and their officials, agents, employees, contractors and volunteers, following a declaration of an emergency, and (2) Any person authorized to prescribe, administer, or dispense Covered Countermeasures or who is otherwise authorized under an Emergency Use Authorization.

VII. Additional Time Periods of Coverage After Expiration of Declaration (As required by section 319F–3(b)(3)(B) of the Act)

I have determined that, upon expiration of the time period specified in section III above, an additional twelve (12) months is a reasonable period to allow for manufacturers to arrange for disposition and covered persons to take such other actions as are appropriate to limit the administration or use of the Covered Countermeasure, and the liability protection of section

319F–3(a) of the Act shall extend for that period.

VIII. Amendments

This declaration has not previously been amended. Any future amendment to this declaration will be published in the **Federal Register**, pursuant to section 319F–3(b)(4) of the Act.

IX. Definitions

For the purpose of this declaration, including any claim for loss brought in accordance with section 319F–3 of the PHS Act against any covered persons defined in the Act or this declaration, the following definitions will be used:

Administration of a Covered Countermeasure or Administration: As used in section 319F–3(a)(2)(B) of the Act, includes, but is not limited to, public and private delivery, distribution, and dispensing activities relating to physical administration of the Covered Countermeasures to patients/recipients, management and operation of delivery systems, and management and operation of distribution and dispensing locations.

Authority Having Jurisdiction: The public agency or its delegate that has legal responsibility and authority for responding to an incident, based on political or geographical (e.g., city, county, tribal, State, or Federal boundary lines) or functional (e.g., law enforcement, public health) range or sphere of authority.

Botulinum Toxin Countermeasure: Any vaccine; antimicrobial/antibiotic, other drug or antitoxin; or diagnostic or device to identify, prevent or treat botulinum toxin or adverse events from such countermeasures (1) licensed under section 351 of the Public Health Service Act; (2) approved under section 505 or section 515 of the Federal Food, Drug, and Cosmetic Act (FDCA); (3) cleared under section 510(k) of the FDCA; (4) authorized for emergency use under section 564 of the FDCA ; (5) used under section 505(i) of the FDCA or section 351(a)(3) of the PHS Act, and 21 CFR Part 312; or (6) used under section 520(g) of the FDCA and 21 CFR part 812.

Covered Persons: As defined at section 319F–3(i)(2) of the Act, include the United States, manufacturers, distributors, program planners, and qualified persons. The terms ''manufacturer,'' ''distributor,'' ''program planner,'' and ''qualified person'' are further defined at sections 319F–3(i)(3), (4), (6), and (8) of the Act.

Declaration of an Emergency: A declaration by any authorized local, regional, State, or Federal official of an emergency specific to events that indicate an immediate need to administer and use botulinum toxin countermeasures, with the exception of a Federal declaration in support of an emergency use authorization under section 564 of the FDCA unless such declaration specifies otherwise.

This 10th day of October, 2008.

Michael O. Leavitt,

Secretary of Health and Human Services.

Appendix I

List of U.S. Government Contracts

Contract	Manufacturer	Covered countermeasure	Pub.L. 85–804 coverage*
HHSO0100200600017C	Cangene	Heptavalent antitoxin	No.
03FED03828	PerImmune	Heptavalent antitoxin	No.
CDC 200–2003–01010	Cangene	Heptavalent antitoxin, Monovalent A	No.
CDC 200–2004–07625	Aventis Pasteur	Monovalent E	No.
CDC 200–2003–01052	Aventis Pasteur	Bivalent A and B	No.

*Status of indemnification coverage under Pub.L. 85–804 (An Act to authorize the making, amendment and modification of contracts to facilitate the national defense.)

[FR Doc. E8–24734 Filed 10–14–08; 4:15 pm]

BILLING CODE 4150–37–P

DEPARTMENT OF HEALTH AND HUMAN SERVICES

Office of the Secretary

Declaration Under the Public Readiness and Emergency Preparedness Act

October 10, 2008.

AGENCY: Office of the Secretary (OS), Department of Health and Human Services (HHS).

ACTION: Notice.

SUMMARY: Declaration pursuant to section 319F–3 of the Public Health Service Act (42 U.S.C. 247d–6d) to provide targeted liability protections for Acute Radiation Syndrome countermeasures based on a credible risk that the threat of high dose radiation exposure following the deliberate detonation of a nuclear device, unintentional nuclear release, or other radiological events and the Acute Radiation Syndrome resulting from such exposures constitutes a public health emergency.

DATES: This notice and the attached declaration are effective as of the date of signature of the declaration.

FOR FURTHER INFORMATION CONTACT: RADM W.C. Vanderwagen, Assistant Secretary for Preparedness and Response, Office of the Secretary, Department of Health and Human Services, 200 Independence Avenue, SW., Washington, DC 20201, Telephone (202) 205–2882 (this is not a toll-free number).

SUPPLEMENTARY INFORMATION: Acute Radiation Syndrome (ARS) is an acute illness that occurs when the entire body (or most of it) receives a high dose of radiation, usually over a short period of time. Radiation exposure can adversely affect a variety of cells, tissues, and organ systems, including the hematopoietic (or blood) system, the gastrointestinal (GI) tract, skin (cutaneous) system, and, at higher radiation levels, the lung or kidney and cerebrovascular/central nervous system (CNS).

HHS Secretary's Declaration for Utilization of Public Readiness and Emergency Preparedness Act for Acute Radiation Syndrome

Whereas the risk of a deliberate detonation of a nuclear device in the United States intended to cause harm to the general population, unintentional radioactive release, or other radiological/nuclear events are considered a credible threat to public health;

Whereas the Secretary of the Department of Homeland Security has determined that radiological and nuclear agents present a material threat against the United States population sufficient to affect national security;

Whereas Acute Radiation Syndrome (ARS) resulting from such incidents could cause potentially severe adverse human health effects, including damage to the following organ systems: Hematopoietic (blood-forming),

gastrointestinal, cutaneous, pulmonary, and cerebrovascular/central nervous systems;

Whereas there are Covered Countermeasures to treat, identify, or prevent adverse health consequences or death from ARS;

Whereas such acute radiation syndrome countermeasures for pre-exposure and post-exposure prevention and treatment, diagnostics to identify such exposure, and additional countermeasures for treatment of adverse effects arising from use of these acute radiation syndrome countermeasures exist, or may be the subject of research and/or development;

Whereas such countermeasures may be used and administered in accordance with Federal contracts, cooperative agreements, grants, interagency agreements, and memoranda of understanding, and may also be used and administered at the Regional, State, and local level in accordance with the public health and medical response of the Authority Having Jurisdiction;

Whereas the possibility of governmental program planners obtaining stockpiles from private sector entities except through voluntary means such as commercial sale, donation, or deployment would undermine national preparedness efforts and should be discouraged as provided for in section 319F–3(b)(2)(E) of the Public Health Service Act (42 U.S.C. 247d–6d(b)) (''the Act'');

Whereas immunity under section 319F–3(a) of the Act should be available to governmental program planners for distributions of Covered Countermeasures obtained voluntarily, such as by (1) donation; (2) commercial sale; (3) deployment of Covered Countermeasures from Federal stockpiles; or (4) deployment of donated, purchased, or otherwise voluntarily obtained Covered Countermeasures from State, local, or private stockpiles;

Whereas the extent of immunity under section 319F–3(a) of the Act afforded to a governmental program planner that obtains Covered Countermeasures except through voluntary means is not intended to affect the extent of immunity afforded other covered persons with respect to such Covered Countermeasures;

Whereas in accordance with section 319F–3(b)(6) of the Act, I have considered the desirability of encouraging the design, development, clinical testing or investigation, manufacturing, labeling, distribution, formulation, packaging, marketing, promotion, sale, purchase, donation, dispensing, prescribing, administration, licensing, and use of such countermeasures with respect to the category of disease and population described in sections II and IV below, and have found it desirable to encourage such activities for the Covered Countermeasures; and

Whereas to encourage the design, development, clinical testing or investigation, manufacturing and product formulation, labeling, distribution, packaging, marketing, promotion, sale, purchase, donation, dispensing, prescribing, administration, licensing, and use of medical countermeasures with respect to the category of disease and population described in sections II and IV below, it is advisable, in accordance with section 319F–3(a) and (b) of the Act, to provide immunity from liability for covered persons, as that term is defined at section 319F–3(i)(2) of the Act, and to include as such covered persons such other qualified persons as I have identified in section VI of this declaration.

Therefore pursuant to section 319F–3(b) of the Act, I have determined there is a credible risk of an unintentional radioactive release, a deliberate detonation of a nuclear device, or other radiological nuclear incident and the resulting incidence of ARS constitutes a public health emergency.

I. Covered Countermeasures (As required by section 319F–3(b)(1) of the Act)

Covered countermeasures are defined at section 319F–3(i) of the Act.

At this time, and in accordance with the provisions contained herein, I am recommending the manufacture, testing, development, and distribution of ARS countermeasures, as defined in Section IX below; and, with respect to the category of disease and the population described in Sections II and IV below, the administration and usage of countermeasures against ARS. The immunity specified in section 319F–3(a) of the Act shall only be in effect with respect to: (1) Present or future Federal contracts, cooperative agreements, grants, interagency agreements, memoranda of understanding or other documented Federal cooperative arrangements involving countermeasures that are used and administered in accordance with this declaration and (2) activities authorized in accordance with the public health and medical response of the Authority Having Jurisdiction to prescribe, administer, deliver, distribute or dispense the Covered Countermeasure following a declaration of an emergency, as defined in section IX below. In accordance with section 319F–3(b)(2)(E) of the Act, for governmental program planners, the immunity specified in section 319F–3(a) of the Act shall be in effect to the extent they obtain Covered Countermeasures through voluntary means of distribution, such as (1) Donation; (2) commercial sale; (3) deployment of Covered Countermeasures from Federal stockpiles; or (4) deployment of donated, purchased, or otherwise voluntarily obtained Covered Countermeasures from State, local, or private stockpiles. For all other covered persons, including other program planners, the immunity specified in section 319F–3(a) of the Act shall, in accordance with section 319F–3(b)(2)(E) of the Act, be in effect pursuant to any means of distribution.

This declaration shall subsequently refer to the countermeasures identified above as ''Covered Countermeasures.''

This declaration shall apply to all Covered Countermeasures administered or used during the effective period of the declaration.

II. Category of Disease (As required by section 319F–3(b)(2)(A) of the Act)

The category of disease, health condition, or threat to health for which I am recommending the administration or use of the Covered Countermeasure is ARS resulting from an unintentional radioactive release, a deliberate detonation of a nuclear device, or other radiological/nuclear events.

III. Effective Time Period (As required by section 319F–3(b)(2)(B) of the Act)

With respect to Covered Countermeasures administered and used in accordance with present or future Federal contracts, cooperative agreements, grants, interagency agreements, or memoranda of understanding, the effective period of time of this Declaration commences on signature of the declaration and extends through December 31, 2015.

With respect to Covered Countermeasures administered and used in accordance with the public health and medical response of the Authority Having Jurisdiction, the effective period of time of this Declaration commences on the date of a declaration of an emergency and lasts through and includes the final day that the emergency declaration is in effect including any extensions thereof.

IV. Population (As required by section 319F–3(b)(2)(C) of the Act)

Section 319F–3(a)(4)(A) of the Act confers immunity to manufacturers and distributors of the Covered

Countermeasure, regardless of the defined population.

Section 319F–3(a)(3)(C)(i) of the Act confers immunity to covered persons who may be a program planner or qualified persons with respect to the Covered Countermeasure only if a member of the population specified in the declaration as persons who use the Covered Countermeasure or to whom such a Covered Countermeasure is administered, is in or connected to the geographic location specified in this declaration, or the program planner or qualified person reasonably could have believed that these conditions are met.

The populations specified in this declaration are all persons who use a Covered Countermeasure or to whom a Covered Countermeasure is administered in accordance with this declaration, including, but not limited to: (1) Any person conducting research and development of Covered Countermeasures directly for the Federal government or pursuant to a contract, grant, or cooperative agreement with the Federal government; (2) any person who receives a Covered Countermeasure from persons authorized in accordance with the public health and medical emergency response of the Authority Having Jurisdiction to prescribe, administer, deliver, distribute, or dispense the Covered Countermeasure, and their officials, agents, employees, contractors, and volunteers following a declaration of an emergency; (3) any person who receives a Covered Countermeasure from a person authorized to prescribe, administer or dispense the countermeasure or who is otherwise authorized under an Emergency Use Authorization; and (4) any person who receives a Covered Countermeasure in human clinical trials being conducted directly by the Federal government or pursuant to a contract, grant, or cooperative agreement with the Federal government.

V. Geographic Area (As required by section 319F–3(b)(2)(D) of the Act)

Section 319F–3(a) of the Act applies to the administration and use of a Covered Countermeasure without geographic limitation.

VI. Qualified Persons (As Required by Section 319F–3(i)(8)(b) of the Act)

With regard to the administration or use of a Covered Countermeasure, section 319F–3(i)(8)(A) of the Act defines the term ''qualified person'' as a licensed individual who is authorized to prescribe, administer, or dispense the Covered Countermeasure under the law of the State in which such Covered Countermeasure was prescribed, administered or dispensed.

Additional persons who are qualified persons pursuant to section 319F–3(i)(8)(B) are the following: (1) Any person authorized in accordance with the public health and medical emergency response of the Authority Having Jurisdiction to prescribe, administer, deliver, distribute or dispense Covered Countermeasures, and their officials, agents, employees, contractors and volunteers, following a declaration of an emergency, and (2) Any person authorized to prescribe, administer, or dispense Covered Countermeasures or who is otherwise authorized under an Emergency Use Authorization.

VII. Additional Time Periods of Coverage After Expiration of Declaration (As Required by Section 319F–3(b)(3)(B) of the Act)

I have determined that, upon expiration of the time period specified in Section III above, an additional twelve (12) months is a reasonable period to allow for manufacturers to arrange for disposition and covered persons to take such other actions as are appropriate to limit the administration or use of the Covered Countermeasure, and the liability protection of section 319F–3(a) of the Act shall extend for that period.

VIII. Amendments

This declaration has not previously been amended. Any future amendment to this declaration will be published in the **Federal Register**, pursuant to section 319F–3(b)(4) of the Act.

IX. Definitions

For the purpose of this declaration, including any claim for loss brought in accordance with section 319F–3 of the PHS Act against any covered persons defined in the Act or this declaration, the following definitions will be used:

Acute Radiation Syndrome (ARS): an acute illness that occurs when the entire body (or most of it) receives a high dose of radiation, usually over a short period of time. Radiation exposure can adversely affect a variety of cells, tissues, and organ systems, including the hematopoietic (or blood-forming) system, the gastrointestinal (GI) tract, skin (cutaneous) system, and, at higher radiation levels, the lung (pulmonary) or and cerebrovascular/central nervous system (CNS).

Acute Radiation Syndrome Countermeasure: Any vaccine; antimicrobial/antibiotic, other drug or antitoxin; or diagnostic or device to identify, prevent or treat acute radiation syndrome or adverse events from such countermeasures (1) licensed under section 351 of the Public Health Service Act; (2) approved under section 505 or section 515 of the Federal Food, Drug, and Cosmetic Act (FDCA); (3) cleared under section 510(k) of the FDCA; (4) authorized for emergency use under section 564 of the FDCA; (5) used under section 505(i) of the FDCA or section 351(a)(3) of the PHS Act, and 21 CFR Part 312; or (6) used under section 520(g) of the FDCA and 21 CFR part 812.

Administration of a Covered Countermeasure: As used in Section 319F–3(a)(2)(B) of the Act, includes, but is not limited to, public and private delivery, distribution, and dispensing activities relating to physical administration of the Covered Countermeasures to patients/recipients, management and operation of delivery systems, and management and operation of distribution and dispensing locations.

Authority Having Jurisdiction: The public agency or its delegate that has legal responsibility and authority for responding to an incident, based on political or geographical (e.g., city, county, tribal, State, or Federal boundary lines) or functional (e.g., law enforcement, public health) range or sphere of authority.

Covered Persons: As defined at section 319F–3(i)(2) of the Act, include the United States, manufacturers, distributors, program planners, and qualified persons. The terms ''manufacturer,'' ''distributor,'' ''program planner,'' and ''qualified person'' are further defined at sections 319F–3(i)(3), (4), (6), and (8) of the Act.

Declaration of an Emergency: A declaration by any authorized local, regional, State, or Federal official of an emergency specific to events that indicate an immediate need to administer and use ARS countermeasures, with the exception of a Federal declaration in support of an emergency use authorization under section 564 of the FDCA unless such declaration specifies otherwise.

This 10th day of October, 2008.

Michael O. Leavitt,

Secretary of Health and Human Services.

Appendix I

List of U.S. Government Contracts

Contract	Manufacturer	Covered countermeasure	Pub. L. 85–804 Coverage*
797BPA0013	Amgen	Neupogen	No.

* Status of indemnification coverage under Pub. L. 85–804 (An Act to authorize the making, amendment and modification of contracts to facilitate the national defense.)

[FR Doc. E8–24735 Filed 10–14–08; 4:15 pm]
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DEPARTMENT OF HEALTH AND HUMAN SERVICES

Office of the Secretary

Declaration Under the Public Readiness and Emergency Preparedness Act

October 10, 2008.

AGENCY: Office of the Secretary (OS), Department of Health and Human Services (HHS).

ACTION: Notice.

SUMMARY: Declaration pursuant to section 319F–3 of the Public Health Service Act (42 U.S.C. 247d–6d) to provide targeted liability protections for smallpox countermeasures based on a credible risk that the threat of exposure to variola virus, the causative agent of smallpox or other orthopoxvirus and the resulting disease constitutes a public health emergency.

DATES: This notice and the attached declaration are effective as of the date of signature of this declaration.

FOR FURTHER INFORMATION CONTACT: RADM W.C. Vanderwagen, Assistant Secretary for Preparedness and Response, Office of the Secretary, Department of Health and Human Services, 200 Independence Avenue, SW., Washington, DC 20201, Telephone (202) 205–2882 (this is not a toll-free number).

HHS Secretary's Declaration for Utilization of Public Readiness and Emergency Preparedness Act for Smallpox Countermeasures

Whereas significant changes in the nature, regularity and degree of threats to health posed by the use of infectious agents as weapons of biological warfare have generated increased concern for the safety of the general American population, particularly following the deliberate exposure of a biological agent in 2001;

Whereas the Secretary of the Department of Homeland Security has determined that the smallpox virus presents a material threat against the United States population sufficient to affect national security;

Whereas a release of variola virus or other orthopoxvirus in the United States which may cause harm to the general population is considered a credible threat to public health;

Whereas variola virus or other orthopox viruses are highly transmissible and may have a significant mortality rate;

Whereas a large proportion of the United States population is susceptible to infection by variola virus since routine vaccination was ended in 1972;

Whereas there are qualified countermeasures to treat, diagnose, or prevent adverse health consequences or death from exposure to variola virus or other orthopoxvirus;

Whereas such smallpox countermeasures, including vaccines, and antivirals for pre-exposure and post-exposure prevention and treatment, diagnostics to identify such exposure, and additional countermeasures for treatment of adverse events arising from use of these smallpox countermeasures exist, or may be the subject of research and/or development;

Whereas such countermeasures may be used and administered in accordance with Federal contracts, cooperative agreements, grants, interagency agreements, and memoranda of understanding, and may also be used and administered at the Regional, State, and local level in accordance with the public health and medical response of the Authority Having Jurisdiction;

Whereas the possibility of governmental program planners obtaining stockpiles from private sector entities except through voluntary means such as commercial sale, donation, or deployment would undermine national preparedness efforts and should be discouraged as provided for in section 319F–3(b)(2)(E) of the Public Health Service Act (42 U.S.C. 247d–6d(b)) (''the Act'');

Whereas immunity under section 319F–3(a) of the Act should be available to governmental program planners for distributions of Covered Countermeasures obtained voluntarily, such as by (1) Donation; (2) commercial sale; (3) deployment of Covered Countermeasures from Federal stockpiles; or (4) deployment of donated, purchased, or otherwise voluntarily obtained Covered Countermeasures from State, local, or private stockpiles;

Whereas the extent of immunity under section 319F–3(a) of the Act afforded to a governmental program planner that obtains Covered Countermeasures except through voluntary means is not intended to affect the extent of immunity afforded other covered persons with respect to such Covered Countermeasures;

Whereas in accordance with section 319F–3(b)(6) of the Act, I have considered the desirability of encouraging the design, development, clinical testing or investigation, manufacturing, labeling, distribution, formulation, packaging, marketing, promotion, sale, purchase, donation, dispensing, prescribing, administration, licensing, and use of such countermeasures with respect to the category of disease and population described in sections II and IV below, and have found it desirable to encourage such activities for the Covered Countermeasure; and

Whereas to encourage the design, development, clinical testing or investigation, manufacturing and product formulation, labeling, distribution, packaging, marketing, promotion, sale, purchase, donation, dispensing, prescribing, administration, licensing, and use of medical countermeasures with respect to the category of disease and population described in sections II and IV below, it is advisable, in accordance with section 319F–3(a) and (b) of the Act, to provide immunity from liability for covered persons, as that term is defined at section 319F–3(i)(2) of the Act, and to include as such covered persons such other qualified persons as I have identified in section VI of this declaration;

Therefore pursuant to section 319F–3(b) of the Act, I have determined there is a credible risk that the exposure to variola virus or other orthopoxvirus disease and the resulting disease constitutes a public health emergency.

I. Covered Countermeasures (As required by section 319F–3(b)(1) of the Act)

Covered countermeasures are defined at section 319F–3(i) of the Act. At this time, I am recommending the manufacture, testing, development, and

distribution of the smallpox countermeasures, as defined in section IX below; and, with respect to the category of disease and population described in sections II and IV below, the administration and usage of the smallpox countermeasures. The immunity specified in section 319F–3(a) of the Act shall only be in effect with respect to: (1) Present or future Federal contracts, cooperative agreements, grants, interagency agreements, or memoranda of understanding involving countermeasures that are used and administered in accordance with this declaration, and (2) activities authorized in accordance with the public health and medical response of the Authority Having Jurisdiction to prescribe, administer, deliver, distribute or dispense the Covered Countermeasure following a declaration of an emergency, as defined in section IX below. In accordance with section 319F–3(b)(2)(E) of the Act, for governmental program planners, the immunity specified in section 319F–3(a) of the Act shall be in effect to the extent they obtain Covered Countermeasures through voluntary means of distribution, such as (1) donation; (2) commercial sale; (3) deployment of Covered Countermeasures from Federal stockpiles; or (4) deployment of donated, purchased, or otherwise voluntarily obtained Covered Countermeasures from State, local, or private stockpiles. For all other covered persons, including other program planners, the immunity specified in section 319F–3(a) of the Act shall, in accordance with section 319F–3(b)(2)(E) of the Act, be in effect pursuant to any means of distribution.

This declaration shall subsequently refer to the countermeasures identified above as ''Covered Countermeasures.''

This declaration shall apply to all Covered Countermeasures administered or used during the effective period of the declaration.

II. Category of Disease (As required by section 319F–3(b)(2)(A) of the Act)

The category of disease, health condition, or threat for which I am recommending the administration or use of the Covered Countermeasure is the threat of smallpox resulting from exposure to variola virus and the threat of disease resulting from exposure to other orthopox viruses.

III. Effective Time Period (As required by section 319F–3(b)(2)(B) of the Act)

With respect to Covered Countermeasures administered and used in support of the Smallpox Emergency Personnel Protection Act (SEPPA) of 2003, the effective period of time of this Declaration commences on January 24, 2008.

With respect to Covered Countermeasures administered and used in accordance with present or future Federal contracts, cooperative agreements, grants, interagency agreements, or memoranda of understanding, the effective period of time of this Declaration commences on signature of the declaration and extends through December 31, 2015.

With respect to Covered Countermeasures administered and used in accordance with the public health and medical response of the Authority Having Jurisdiction, the effective period of time of this Declaration commences on the date of a declaration of an emergency and lasts through and includes the final day that the emergency declaration is in effect including any extensions thereof.

IV. Population (As required by section 319F–3(b)(2)(C) of the Act)

Section 319F–3(a)(4)(A) of the Act confers immunity to manufacturers and distributors of the Covered Countermeasure, regardless of the defined population.

Section 319F–3(a)(3)(C)(i) of the Act confers immunity to covered persons who may be a program planner or qualified persons with respect to the Covered Countermeasure only if a member of the population specified in the declaration as persons who use the Covered Countermeasure or to whom such a Covered Countermeasure is administered, is in or connected to the geographic location specified in this declaration, or the program planner or qualified person reasonably could have believed that these conditions are met.

The populations specified in this declaration are all persons who use a Covered Countermeasure or to whom a Covered Countermeasure is administered in accordance with this declaration, including, but not limited to: (1) Any person conducting research and development of Covered Countermeasures directly for the Federal government or pursuant to a contract, grant, or cooperative agreement with the Federal government; (2) any person who receives a Covered Countermeasure from persons authorized in accordance with the public health and medical emergency response of the Authority Having Jurisdiction to prescribe, administer, deliver, distribute, or dispense the Covered Countermeasure, and their officials, agents, employees, contractors, and volunteers following a declaration of an emergency; (3) any person who receives a Covered Countermeasure from a person authorized to prescribe, administer or dispense the countermeasure or who is otherwise authorized under an Emergency Use Authorization; and (4) any person who receives a Covered Countermeasure in human clinical trials being conducted directly by the Federal government or pursuant to a contract, grant, or cooperative agreement with the Federal government.

V. Geographic Area (As required by section 319F–3(b)(2)(D) of the Act)

Section 319F–3(a) of the Act applies to the administration and use of the Covered Countermeasure without geographic limitation.

VI. Qualified Persons (As required by section 319F–3(i)(8)(b) of the Act)

With regard to the administration or use of a Covered Countermeasure, section 319F–3(i)(8)(A) of the Act defines the term ''qualified person'' as a licensed individual who is authorized to prescribe, administer, or dispense the Covered Countermeasure under the law of the State in which such Covered Countermeasure was prescribed, administered or dispensed.

Additional persons who are qualified persons pursuant to section 319F–3(i)(8)(B) are the following: (1) Any person authorized in accordance with the public health and medical emergency response of the Authority Having Jurisdiction to prescribe, administer, deliver, distribute or dispense Covered Countermeasures, and their officials, agents, employees, contractors and volunteers, following a declaration of an emergency, and (2) Any person authorized to prescribe, administer, or dispense Covered Countermeasures or who is otherwise authorized under an Emergency Use Authorization.

VII. Additional Time Periods of Coverage After Expiration of Declaration (As required by section 319F–3(b)(3)(B) of the Act)

I have determined that, upon expiration of the time period specified in Section III above, an additional twelve (12) months is a reasonable period to allow for manufacturers to arrange for disposition and covered persons to take such other actions as are appropriate to limit the administration or use of the Covered Countermeasure, and the liability protection of section 319F–3(a) of the Act shall extend for that period.

VIII. Amendments

This declaration has not previously been amended. Any future amendment to this declaration will be published in the **Federal Register**, pursuant to section 319F–3(b)(4) of the Act.

IX. Definitions

For the purpose of this declaration, including any claim for loss brought in accordance with section 319F–3 of the PHS Act against any covered persons defined in the Act or this declaration, the following definitions will be used:

Administration of a Covered Countermeasure: As used in Section 319F–3(a)(2)(B) of the Act, includes, but is not limited to, public and private delivery, distribution, and dispensing activities relating to physical administration of the Covered Countermeasures to patients/recipients, management and operation of delivery systems, and management and operation of distribution and dispensing locations.

Authority Having Jurisdiction: The public agency or its delegate that has legal responsibility and authority for responding to an incident, based on political or geographical (e.g., city, county, tribal, State, or Federal boundary lines) or functional (e.g., law enforcement, public health) range or sphere of authority.

Covered Persons: As defined at section 319F–3(i)(2) of the Act, include the United States, manufacturers, distributors, program planners, and qualified persons. The terms ''manufacturer,'' ''distributor,'' ''program planner,'' and ''qualified person'' are further defined at sections 319F–3(i)(3), (4), (6), and (8) of the Act.

Declaration of an Emergency: A declaration by any authorized local, regional, State, or Federal official of an emergency specific to events that indicate an immediate need to administer and use smallpox countermeasures, with the exception of a Federal declaration in support of an emergency use authorization under section 564 of the Federal Food, Drug, and Cosmetic Act (FDCA) unless such declaration specifies otherwise.

Smallpox Countermeasure: Any vaccine; antiviral, other drug; or diagnostic or device to identify, prevent or treat smallpox or orthopoxvirus or adverse events from such countermeasures (1) Licensed under section 351 of the Public Health Service Act; (2) approved under section 505 or section 515 of the FDCA; (3) cleared under section 510(k) of the FDCA; (4) authorized for emergency use under section 564 of the FDCA; (5) used under section 505(i) of the FDCA or section 351(a)(3) of the PHS Act, and 21 CFR Part 312; or (6) used under section 520(g) of the FDCA and 21 CFR part 812.

This 10th day of October, 2008.

Michael O. Leavitt,

Secretary of Health and Human Services.

Appendix I

List of U.S. Government Contract

Contract	Manufacturer	Product	Pub. L. 85–804 coverage*
HHSO100200700034C	Bavarian Nordic	MVA	No.
200–2002–00425	Aventis Pasteur	WetVax	Yes.
200–2002–00357	Cangene	VIG	Yes.
200–2002–00004	Acambis	ACAM 2000	Yes.
200–2008–24959	Acambis	ACAM 2000 warm-base	No.
797BPA0003	Gilead	Cidofovir	No.

* Status of indemnification coverage under Pub. L. 85–804 (An Act to authorize the making, amendment and modification of contracts to facilitate the national defense.)

[FR Doc. E8–24737 Filed 10–14–08; 4:15 pm]

BILLING CODE 4150–37–P

DEPARTMENT OF HEALTH AND HUMAN SERVICES

Office of the Secretary

Pandemic Influenza Vaccine—Amendment

October 10, 2008.

AGENCY: Office of the Secretary (OS), Department of Health and Human Services (HHS).

ACTION: Notice of amendment (to the January 26, 2007 Declaration under the Public Readiness and Emergency Preparedness Act, as amended on February 1, 2007).

SUMMARY: Declaration pursuant to section 319F–3 of the Public Health Service Act (42 U.S.C. 247d–6d) to provide targeted liability protections for pandemic countermeasures based on a credible risk that avian influenza viruses spread and evolve into strains capable of causing a pandemic of human influenza.

DATES: This notice and the attached amendment are effective as of the date of signature of the declaration.

FOR FURTHER INFORMATION CONTACT: RADM W.C. Vanderwagen, Assistant Secretary for Preparedness and Response, Office of the Secretary, Department of Health and Human Services, 200 Independence Avenue, SW., Washington, DC 20201, Telephone (202) 205–2882 (this is not a toll-free number).

HHS Secretary's Amendment to the H5N1 Declaration for the Use of the Public Readiness and Emergency Preparedness Act Dated January 26, 2007

Whereas the January 26, 2007 declaration for H5N1 vaccine (''Original Declaration'') was amended on February 1, 2007 to add H7 and H9 vaccines and additional, minor modifications to that amendment are necessary to ensure internal, editorial consistency of the Original Declaration, as amended.

Whereas the H2 class of influenza viruses, which caused the human influenza pandemic of 1957 and reappeared recently in U.S. animals including swine, is viewed as a likely candidate to re-evolve into an influenza strain capable of causing a pandemic of human influenza;

Whereas the H6 class of influenza viruses, which appeared recently in animals including domestic fowl, is viewed as a likely candidate to evolve into an influenza strain capable of causing a pandemic of human influenza;

Whereas the possibility of governmental program planners obtaining stockpiles from private sector entities except through voluntary means such as commercial sale, donation, or deployment would undermine national preparedness efforts and should be discouraged as provided for in section 319F–3(b)(2)(E) of the Public Health Service Act (42 U.S.C. 247d–6d(b)) (''the Act'');

Whereas immunity under section 319F–3(a) of the Act should be available to governmental program planners for distributions of Covered

Countermeasures obtained voluntarily, such as by (1) donation; (2) commercial sale; (3) deployment of Covered Countermeasures from Federal stockpiles; or (4) deployment of donated, purchased, or otherwise voluntarily obtained Covered Countermeasures from State, local, or private stockpiles;

Whereas the extent of immunity under section 319F–3(a) of the Act afforded to a governmental program planner that obtains covered countermeasures except through voluntary means is not intended to affect the extent of immunity afforded other covered persons with respect to such covered countermeasures;

Whereas in accordance with section 319F–3(b)(6) of the Act (42 U.S.C. 247d–6d(b), I have considered the desirability of encouraging the design, development, clinical testing or investigation, manufacturing, labeling, distribution, formulation, packaging, marketing, promotion, sale, purchase, donation, dispensing, prescribing, administration, licensing, and use of additional covered countermeasures with respect to the category of disease and population described in sections II and IV of the Original Declaration, as amended, and have found it desirable to encourage such activities for these additional covered countermeasures; and

Whereas to encourage the design, development, clinical testing or investigation, manufacturing and product formulation, labeling, distribution, packaging, marketing, promotion, sale, purchase, donation, dispensing, prescribing, administration, licensing, and use of medical countermeasures with respect to the category of disease and population described in section II and IV of the Original Declaration, as amended, it is advisable, in accordance with section 319F–3(a) and (b) of the Act, to provide immunity from liability for covered persons, as that term is defined at section 319F–3(i)(2) of the Act, and to include as such covered persons such other qualified persons as I have identified in section VI of the Original Declaration, as amended;

Therefore pursuant to section 319F–3(b) of the Act, I have determined there is a credible risk that the spread of the H2 and H6 subtypes of avian influenza viruses and resulting disease could in the future constitute a public health emergency. In order to: (1) Reflect the addition of medical countermeasures specific to the H2 and H6 subtypes of influenza viruses; (2) specify the means of distribution pursuant to section 319F–3(b)(2)(E) of the Act for which immunity specified in section 319F–3(a) of the Act shall be in effect; (3) clarify the applicability of immunity for covered persons and qualified persons as those terms are defined in the Act and provided for in the Original Declaration, as amended; and (4) ensure internal, editorial consistency in the Original Declaration arising from the February 1, 2007 amendment, the Original Declaration, as amended, is hereby further amended as follows:

In the title, insert ''H2, H6, H7 and H9'' after ''H5N1'' and replace ''Vaccine'' with ''Vaccines'' to read: ''HHS Secretary's Declaration for the Use of the Public Readiness and Emergency Preparedness Act for H5N1, H2, H6, H7 and H9 Vaccines''.

In the second Whereas clause, insert ''H2, H6, H7 or H9'' after ''H5N1'', replace ''viruses'' with ''virus'', and replace ''strains'' with ''strain'' to read: ''Whereas an H5N1, H2, H6, H7 or H9 avian influenza virus * * *''.

Insert the following Whereas clauses after the first Whereas clause:

''*Whereas*, the H2 class of influenza viruses, which caused the human influenza pandemic of 1957 and reappeared recently in U.S. animals including swine, is viewed as a likely candidate to re-evolve into an influenza strain capable of causing a pandemic of human influenza;

Whereas, the H6 class of influenza viruses, which appeared recently in animals including domestic fowl, is viewed as a likely candidate to evolve into an influenza strain capable of causing a pandemic of human influenza;''

Insert the following Whereas clauses after the second Whereas clause:

''*Whereas*, the possibility of governmental program planners obtaining stockpiles from private sector entities except through voluntary means such as commercial sale, donation, or deployment would undermine national preparedness efforts and should be discouraged as provided for in section 319F–3(b)(2)(E) of the Public Health Service Act (42 U.S.C. 247d–6d(b)) (''the Act'');

Whereas, immunity under section 319F–3(a) of the Act should be available to governmental program planners for distributions of Covered Countermeasures obtained voluntarily, such as by (1) donation; (2) commercial sale; (3) deployment of Covered Countermeasures from Federal stockpiles; or (4) deployment of donated, purchased, or otherwise voluntarily obtained Covered Countermeasures from State, local, or private stockpiles;

Whereas, the extent of immunity under section 319F–3(a) of the Act afforded to a governmental program planner that obtains Covered Countermeasures except through voluntary means is not intended to affect the extent of immunity afforded other covered persons with respect to such covered countermeasures;

Whereas to encourage the design, development, clinical testing or investigation, manufacturing and product formulation, labeling, distribution, packaging, marketing, promotion, sale, purchase, donation, dispensing, prescribing, administration, licensing, and use of medical countermeasures with respect to the category of disease and population described in section II and IV of the Original Declaration, as amended, it is advisable, in accordance with section 319F–3(a) and (b) of the Act, to provide immunity from liability for covered persons, as that term is defined at section 319F–3(i)(2) of the Act, and to include as such covered persons such other qualified persons as I have identified in section VI of the Original Declaration, as amended;''

In Section I, strike the entire section and replace it with the following:

''I. Covered Countermeasures (As Required by Section 319F–3(b)(1) of the Act)

Covered Countermeasures are defined at section 319F–3(i) of the Act.

At this time, and in accordance with the provisions contained herein, I am recommending the manufacture, testing, development, distribution, dispensing; and, with respect to the category of disease and population described in sections II and IV of the Original Declaration, the administration and usage of the pandemic countermeasure influenza A (H5N1) vaccine and H2, H6, H7, and H9 vaccines. The immunity specified in section 319F–3(a) of the Act shall only be in effect with respect to: present or future Federal contracts, cooperative agreements, grants, interagency agreements, or memoranda of understanding for pandemic countermeasure influenza A (H5N1) vaccine and H2, H6, H7 and H9 vaccines used and administered in accordance with this declaration. In accordance with section 319F–3(b)(2)(E) of the Act, for governmental program planners, the immunity specified in section 319F–3(a) of the Act shall be in effect to the extent they obtain Covered Countermeasures through voluntary means of distribution, such as (1) donation; (2) commercial sale; (3) deployment of Covered Countermeasures from Federal stockpiles; or (4) deployment of donated, purchased, or otherwise

voluntarily obtained Covered Countermeasures from State, local, or private stockpiles. For all other covered persons, including other program planners, the immunity specified in section 319F–3(a) of the Act shall, in accordance with section 319F–3(b)(2)(E) of the Act, be in effect pursuant to any means of distribution.

This declaration shall subsequently refer to the countermeasures identified above as Covered Countermeasures.

This declaration shall apply to all Covered Countermeasures administered or used during the effective time period of the declaration.''

In Section II, insert ''H2, H6, H7 or H9'' following ''H5N1.'' to read ''* * * highly pathogenic avian influenza A (H5N1, H2, H6, H7 or H9) virus * * *''.

In Section VIII, strike the section in its entirety and replace it with the following: ''This Declaration has been amended twice. The Original Declaration was published in the **Federal Register** at 72 FR 4710. The first amendment to the Original Declaration was published in the **Federal Register** at 72 FR 67731. This is the second amendment to the Original Declaration. Any future amendment to this Declaration will be published in the **Federal Register**, pursuant to section 319F–3(b)(4) of the Act.''

All other provisions of the Original declaration remain in full force.

This amendment to the Declaration will be published in the **Federal Register**, pursuant to section 319F–3(b)(4) of the Act.

This 10th day of October, 2008.

Michael O. Leavitt,

Secretary of Health and Human Services.

Appendix I

List of U.S. Government Contracts

Contract	Manufacturer	Covered countermeasure	Pub. L. 85–804 Coverage*
HHSN266200700005C	St. Jude Children's Research Hospital	H5N1, H2, H6, H7, H9	No.

[FR Doc. E8–24736 Filed 10–14–08; 4:15 pm]

BILLING CODE 4150–37–P

DEPARTMENT OF HEALTH AND HUMAN SERVICES

Centers for Disease Control and Prevention

[Docket Number NIOSH–063–A]

Fire Fighter Fatality Investigation and Prevention Program (FFFIPP) Stakeholders' Meeting

AGENCY: The National Institute for Occupational Safety and Health (NIOSH) of the Centers for Disease Control and Prevention (CDC), Department of Health and Human Services (HHS).

ACTION: Notice of Public Meeting and availability for Public Comment.

SUMMARY: The National Institute for Occupational Safety and Health (NIOSH) of the Centers for Disease Control and Prevention (CDC) announces the following meeting and request for public comment on the Fire Fighter Fatality Investigation and Prevention Program (FFFIPP).

Public Meeting Time and Date: 10 a.m.–5 p.m., CST, November 19, 2008.

Place: Crowne Plaza Hotel, Chicago O'Hare, 5440 North River Road, Rosemont, Illinois 66018.

Purpose of Meeting: The public meeting will seek stakeholder input on the progress and strategic goals of the NIOSH Fire Fighter Fatality Investigation and Prevention Program (FFFIPP) to ensure that the program is meeting the needs of the stakeholders, and to identify ways in which the program can be improved to increase its impact on the safety and health of fire fighters across the United States. NIOSH will compile and consider all comments received at the meeting and through the NIOSH Docket Office and use them in making decisions on how to proceed with the FFFIPP.

Status: This meeting is hosted by NIOSH and will be open to the public, limited only by the space available. The meeting room will accommodate approximately 75 people.

Interested parties should make hotel reservations directly with the Crowne Plaza Hotel, telephone (847) 671–6350 or (800) 972–2494 and reference the NIOSH FFFIPP Stakeholders Meeting. Interested parties should confirm their attendance to this meeting by completing a registration form on the NIOSH Web site: *http://www.cdc.gov/niosh/fire/2008PublicMeetingRegistration.html*

Format of Meeting: The NIOSH Acting Director, Dr. Christine Branche, will provide opening remarks, followed by NIOSH presentations that provide an overview of the Fire Fighter Fatality Investigation and Prevention Program (FFFIPP) and summary of Program changes and improvements since March 2006. NIOSH will present and make available for stakeholder input a set of draft Strategic Goals for FFFIPP for stakeholder consideration and comment. Stakeholders who have requested an opportunity to speak prior to the meeting will present suggestions for enhancing the impact of the program and future directions. An opportunity to make oral presentations will be provided to all interested parties, given time on the agenda. Presentations will be limited to 10 minutes. The meeting will end with an interactive session providing the opportunity for clarification of stakeholder comments.

Requests to make presentations at the meeting should be made by e-mail to Paul Moore, Chief, Fatality Investigations Team, e-mail *PMoore@cdc.gov*, telephone (304) 285–6016 or Matt Bowyer, General Engineer, e-mail *MBowyer@cdc.gov*, telephone (304) 285–5991, facsimile (304) 285–5774, before November 10, 2008. All requests to present should include the name, address, telephone number, relevant business affiliations of the presenter, and a brief summary of the presentation. After reviewing the requests for presentation, NIOSH FFFIPP staff will notify each presenter of the approximate time that their presentation is scheduled to begin. If a participant is not present when their presentation is scheduled to begin, the remaining participants will be heard in order.

Written comments without an oral presentation are also encouraged, and should be submitted to the NIOSH Docket Office as outlined in the next section.

Written comments on the usefulness of the FFFIPP and products for improving fire fighter safety and health, suggestions for enhancing the impact of the program, and comments on the draft FFFIPP strategic and programmatic goals may be submitted to the NIOSH Docket Office, Robert A. Taft Laboratories, Mailstop C34, 4676 Columbia Parkway, Cincinnati, Ohio 45226, telephone (513) 533–8303, facsimile (513) 533–8285. Comments may also be submitted via e-mail to *niocindocket@cdc.gov.* All electronic comments should be formatted as Microsoft Word. Comments should be submitted to NIOSH no later than December 19, 2008, and should

reference the NIOSH Docket Number 063–A in the subject heading.

Background: NIOSH convened a similar stakeholders' meeting in March 2006 to seek input on the progress and future directions of the FFFIPP. The input provided by stakeholders at that meeting was useful in providing insight into stakeholder needs and in helping to improve the FFFIPP. The November 2008 meeting will be held to again seek stakeholder input.

Contact Person for Technical Information: Paul Moore, Chief, Fatality Investigations Team, Division of Safety Research, telephone (304) 285–6016 or Matt Bowyer, General Engineer, Fatality Investigations Team, (304) 285–5991.

Dated: October 9, 2008.

James D. Seligman,

Chief Information Officer, Centers for Disease Control and Prevention.

[FR Doc. E8–24732 Filed 10–16–08; 8:45 am]

BILLING CODE 4163–19–P

DEPARTMENT OF HEALTH AND HUMAN SERVICES

Centers for Disease Control and Prevention

[Docket Number NIOSH–144]

Notice of Request for Public To Submit Comments and Attend Meeting

AGENCY: National Institute for Occupational Safety and Health (NIOSH) of the Centers for Disease Control and Prevention (CDC), Department of Health and Human Services (HHS).

ACTION: Notice.

SUMMARY: The National Institute for Occupational Safety and Health (NIOSH) of the Centers for Disease Control and Prevention (CDC) announces the availability of the following notice of public meeting and draft document available for public comment entitled ''NIOSH Criteria Document Update: Occupational Exposure to Hexavalent Chromium.'' The document and instructions for submitting comments can be found at *http://www.cdc.gov/niosh/review/public/144/.* Comments may be provided to the NIOSH docket, as well as given orally at the following meeting.

Public Comment Period: October 15, 2008–January 31, 2009.

Public Meeting Time and Date: 9 a.m.–4 p.m. EST, January 22, 2009.

Place: Robert A. Taft Laboratories, Taft Auditorium, NIOSH, CDC, 4676 Columbia Parkway, Cincinnati, OH 45226–1998.

Purpose of Meeting: To discuss and obtain comments on the draft document, ''NIOSH Criteria Document Update: Occupational Exposure to Hexavalent Chromium.'' Special emphasis will be placed on discussion of the following:

1. Are the critical studies presented clearly and adequately?
2. Do all of the presented studies use scientifically valid methods and techniques?
3. Are there additional critical studies relevant to occupational exposure to hexavalent chromium compounds that should be included?
4. Does NIOSH have a transparent and sound basis for its revised Recommended Exposure Limit for hexavalent chromium compounds?
5. Is the new NIOSH policy of providing general exposure assessment recommendations instead of a specific Action Level scientifically justified?
6. Are the NIOSH recommendations for worker protection clear and justified?
7. Are there additional recommendations for worker protection that should be included?

Status: The forum will include scientists and representatives from various government agencies, industry, labor, and other stakeholders, and is open to the public, limited only by the space available. The meeting room accommodates 80 people. Due to limited space and security clearance requirements, notification of intent to attend the meeting must be made to the NIOSH Docket Office no later than January 7, 2009 for U.S. citizens, or no later than December 30, 2008 for non-U.S. citizens.* Persons wanting to provide oral comments at the meeting are requested to notify the NIOSH Docket Office no later than January 7, 2009 at (513) 533–8611 or by e-mail at *nioshdocket@cdc.gov.* Priority for attendance will be given to those providing oral comments. Other requests to attend the meeting will then be accommodated on a first-come basis. Unreserved walk-in attendees will not be admitted due to security clearance requirements.

Persons wanting to provide oral comments will be permitted up to 20 minutes. If additional time becomes available, presenters will be notified. Oral comments given at the meeting must also be submitted to the docket in writing in order to be considered by the Agency. Written comments will also be accepted at the meeting. Written comments may also be submitted to the NIOSH Docket Office, Robert A. Taft Laboratories, 4676 Columbia Parkway, MS C–34, Cincinnati, Ohio 45226, telephone (513) 533–8611. All material submitted to the Agency should reference Docket Number NIOSH–144 and must be submitted by January 31, 2009 to be considered by the Agency. All electronic comments should be formatted as Microsoft Word. Please make reference to Docket Number NIOSH–144.

All information received in response to this notice will be available for public examination and copying at the NIOSH Docket Office, Room 111, 4676 Columbia Parkway, Cincinnati, Ohio 45226.

*Non-U.S. Citizens: Because of CDC Security Regulations, any non-U.S. citizen wishing to attend this meeting must provide the following information in writing to the NIOSH Docket Officer at the address below no later than December 30, 2008. This information will be transmitted to the CDC Security Office for approval. Visitors will be notified as soon as approval has been obtained.

1. Name:
2. Gender:
3. Date of Birth:
4. Place of Birth (city, province, state, country):
5. Citizenship:
6. Passport Number:
7. Date of Passport Issue:
8. Date of Passport Expiration:
9. Type of Visa:
10. U.S. Naturalization Number (if a naturalized citizen)
11. U.S. Naturalization Date (if a naturalized citizen)
12. Visitor's Organization:
13. Organization Address:
14. Organization Telephone Number:
15. Visitor's Position/Title within the Organization:

Background: This draft NIOSH document provides a review of the available literature and provides an update of NIOSH policies on occupational exposure to hexavalent chromium compounds including an assessment of: (1) Critical animal, human, and in vitro studies on occupational exposure to hexavalent chromium; (2) relevant quantitative risk assessments about occupational exposure to hexavalent chromium; (3) appropriate methods for sampling and analysis of hexavalent chromium compounds in the workplace; (4) basis for the NIOSH revised Recommended Exposure Limit for hexavalent chromium compounds; and (5) other NIOSH recommendations for protecting workers from occupational exposure to hexavalent chromium. This guidance document does not have the force and effect of law.

The purpose of the public review of the draft document and public meeting

is to obtain public comments assessing whether: (1) This hazard identification is an accurate reflection of the available scientific studies; (2) the NIOSH recommendations for protecting workers from occupational exposure to hexavalent chromium compounds are appropriate and justified, and (3) NIOSH has a transparent and scientific basis for its revised Recommended Exposure Limit for hexavalent chromium compounds.

CONTACT PERSONS FOR TECHNICAL INFORMATION: Kathleen MacMahon, DVM; telephone (513) 533–8547; Mailstop C–32, Robert A. Taft Laboratories, 4676 Columbia Parkway, Cincinnati, OH 45226–1998.

Reference: ''NIOSH Criteria Document Update: Occupational Exposure to Hexavalent Chromium'' (public review draft). Web address for this document: *http://www.cdc.gov/niosh/review/public/144/.*

Dated: October 9, 2008.

James D. Seligman,

Chief Information Officer, Centers for Disease Control and Prevention.

[FR Doc. E8–24728 Filed 10–16–08; 8:45 am]

BILLING CODE 4163–19–P

DEPARTMENT OF HEALTH AND HUMAN SERVICES

Centers for Disease Control and Prevention

Notice of Public Meeting and Availability for Public Comment

AGENCY: The National Institute for Occupational Safety and Health (NIOSH) of the Centers for Disease Control and Prevention (CDC), Department of Health and Human Services (HHS).

ACTION: Notice of Public Meeting and availability for Public Comment.

SUMMARY: The National Institute for Occupational Safety and Health (NIOSH) of the Centers for Disease Control and Prevention (CDC) announces the opportunity for the public to provide input regarding the plan (protocol) for a cohort study of persons formerly employed at the IBM facility in Endicott, New York.

Public Meeting Time and Date: 9 a.m.–4 p.m., November 8, 2008.

Place: Broome County Health Department, 225 Front Street, Binghamton, New York 13905.

Status: The meeting is open to the public, limited only by the space available (the room accommodates approximately 120 people). Broad participation is desired. Former workers, representatives of professional societies, organized labor, employers, researchers, health professionals, and government officials are encouraged to attend. Those who cannot attend in person are encouraged to e-mail or mail comments to Dr. Douglas Trout (see below). Deadline for all comments is December 8, 2008.

Participants wishing to provide stakeholder comments may do so via e-mail or may request an opportunity to make a five minute presentation. Participants making a presentation at the meeting must submit their comments in writing at the time of the meeting. All participants (whether making a presentation or not) must register for the free meeting by sending an e-mail to Dr. Douglas Trout at *DTrout@cdc.gov* with their name, affiliation, whether they are requesting time to speak briefly, and, if so, the general topic(s) on which they wish to speak. Participants wishing to speak are encouraged to register early.

Background: In response to public interest in the conduct of a study of cancer among former workers at IBM—Endicott, NIOSH conducted a feasibility effort to evaluate whether employee records were adequate to conduct a research study (a retrospective cohort mortality and cancer incidence study). This study protocol being developed makes extensive use of the information gathered during the feasibility effort, as well as a follow-up review of additional industrial hygiene, medical, and personnel records.

The protocol being reviewed describes the plan for a cohort study of persons formerly employed at the IBM facility in Endicott, New York, between 1965 and 2002. The health problems to be evaluated in the proposed study include mortality and cancer incidence among workers, as well as birth defects among offspring of these workers. Approximately 28,000 workers were employed by IBM—Endicott for at least one year during the period between 1965 and 2002.

The meeting will consist of two parts: (1) External peer review of the research protocol. Peer reviewers external to CDC will be present to provide their individual technical (scientific) review comments for the project officers to maximize the relevance and quality of the proposed research; and (2) Stakeholder meeting. The latter part of the meeting will be structured to hear stakeholder comments on important occupational safety and health issues related to this research.

Contact Person for Technical Information: Dr. Douglas Trout, MD, MHS, Associate Director for Science, Division of Surveillance, Hazard Evaluations, and Field Studies, NIOSH, telephone (513) 841–4428. Comments, meeting registrations, and requests for a copy of the protocol may be e-mailed to *DTrout@cdc.gov* or sent via mail to Dr. Douglas Trout, NIOSH, 4676 Columbia Parkway, Mailstop R12, Cincinnati, Ohio 45226.

Dated: October 9, 2008.

James D. Seligman,

Chief Information Officer, Centers for Disease Control and Prevention.

[FR Doc. E8–24731 Filed 10–16–08; 8:45 am]

BILLING CODE 4163–19–P

DEPARTMENT OF HEALTH AND HUMAN SERVICES

Administration for Children and Families

Proposed Information Collection Activity; Comment Request

Proposed Project:

Title: Evaluation of the Community Healthy Marriage Initiative—Impact Evaluation Wave 2.

OMB No.: 0970–0322.

Description: The Administration for Children and Families (ACF), U.S. Department of Health and Human Services (HHS), is conducting a demonstration and evaluation called the Community Healthy Marriage Initiative (CHMI). Demonstration programs have been funded through Healthy Marriage and Responsible Fatherhood grants authorized under section 403(a)(2) of the Social Security Act to support healthy marriage directly and to encourage community changes that increase support for healthy marriages and improve child and family well-being. The objective of the evaluation is to: (1) Assess the implementation of community interventions designed to provide marriage education by examining the way the projects operate and by examining child support outcomes among low-income families in the community; and (2) evaluate the community impacts of these interventions on marital stability and satisfaction, child well-being and child support outcomes among low income families.

The purpose of this information collection is to conduct a follow-up survey of respondents from Wave 1 who live in the communities where CHMI demonstrations are operating, and a survey of CHMI program participants. The impact evaluation will assess the effects of community healthy marriage initiatives by comparing family and child well-being outcomes in the CHMI

communities with similar outcomes in comparison communities that are well matched to the demonstration project sites.

Respondents: Community members and program participants in CHMI treatment and comparison communities.

Annual Burden Estimates

Instrument	Number of respondents	Average number of responses per respondent	Average burden hours per response	Total burden hours
Wave 2 Survey	4,120	1	.75	3,090

Estimated Total Annual Burden Hours: 3,090.

Additional Information:

In compliance with the requirements of section 506(c)(2)(A) of the Paperwork Reduction Act of 1995, the Administration for Children and Families is soliciting public comment on the specific aspects of the information collection described above. Copies of the proposed collection of information can be obtained and comments may be forwarded by writing to the Administration for Children and Families, Office of Planning, Research and Evaluation, 370 L'Enfant Promenade, SW., Washington, DC 20447, Attn: OPRE Reports Clearance Officer. E-mail address: *OPREinfocollection@acf.hhs.gov.* All requests should be identified by the title of the information collection.

The Department specifically requests comments on (a) whether the proposed collection of information is necessary for the proper performance of the functions of the agency, including whether the information shall have practical utility; (b) the accuracy of the agency's estimate of the burden of the proposed collection of information; (c) the quality, utility, and clarity of the information to be collected; and (d) ways to minimize the burden of the collection of information on respondents, including through the use of automated collection techniques or other forms of information technology. Consideration will be given to comments and suggestions submitted within 60 days of this publication.

Dated: September 30, 2008.

Brendan C. Kelly,

OPRE Reports Clearance Officer.

[FR Doc. E8–24615 Filed 10–16–08; 8:45 am]

BILLING CODE 4184–01–M

DEPARTMENT OF HEALTH AND HUMAN SERVICES

Administration for Children and Families

Submission for OMB Review; Comment Request

Proposed Project:

Title: Compassion Capital Fund Impact Evaluation.

OMB No.: 0970–0293.

Description: This proposed information collection activity is an extension of the follow-up survey of faith-based and community organizations participating in the Compassion Capital Fund (CCF) Impact Evaluation. The currently approved information collection will expire on December 31, 2008. This information collection request will include the agency's request for an extension of the initial survey instruments for an additional three years.

The CCF evaluation is an important opportunity to examine the effectiveness of the Compassion Capital Fund Demonstration program in meeting its objective of improving the capacity of faith-based and community organizations. The evaluation includes selected CCF-funded intermediary organizations that provide capacity-building services and the faith-based and community organizations that sought those services. The follow-up survey will be used to collect information from the faith-based and community-based organizations on various areas of organizational capacity.

The study design includes the random assignment of faith-based and community organizations to either a treatment group that receives capacity-building services from a CCF intermediary grantee or to a control group that does not. The impact of the services provided by intermediaries, primarily through sub-awards and/or technical assistance (TA), will be determined by comparing the changes reported through the survey in organizational and service capacity of the recipient organizations with those of the control group.

Respondents: Faith-based and community organizations included in the CCF impact evaluation.

Annual Burden Estimates

Instrument	Number of respondents	Number of responses per respondent	Average burden hours per response	Total annual burden hours
Follow-up Survey	455	1	.42	191

Estimated Total Annual Burden Hours: 191.

Additional Information:

Copies of the proposed collection may be obtained by writing to the Administration for Children and Families, Office of Planning, Research and Evaluation, 370 L'Enfant Promenade, SW., Washington, DC 20447, Attn: OPRE Reports Clearance Officer. All requests should be identified by the title of the information collection. E-mail address: *OPREinfocollection@acf.hhs.gov.*

OMB Comment:

OMB is required to make a decision concerning the collection of information between 30 and 60 days after publication of this document in the **Federal Register**. Therefore, a comment is best assured of having its full effect if OMB receives it within 30 days of publication. Written comments and recommendations for the proposed information collection should be sent directly to the following: Office of Management and Budget, Paperwork Reduction Project, Fax: 202–395–6974, Attn: Desk Officer for the Administration for Children and Families.

Dated: October 9, 2008.

Brendan C. Kelly,

OPRE Reports Clearance Officer.

[FR Doc. E8–24616 Filed 10–16–08; 8:45 am]

BILLING CODE 4184–01–M

DEPARTMENT OF HEALTH AND HUMAN SERVICES

Food and Drug Administration

[Docket No. FDA–2008–N–0184]

Agency Information Collection Activities; Announcement of Office of Management and Budget Approval; Temporary Marketing Permit Applications

AGENCY: Food and Drug Administration, HHS.

ACTION: Notice.

SUMMARY: The Food and Drug Administration (FDA) is announcing that a collection of information entitled ''Temporary Marketing Permit Applications'' has been approved by the Office of Management and Budget (OMB) under the Paperwork Reduction Act of 1995.

FOR FURTHER INFORMATION CONTACT: Jonna Capezzuto, Office of Information Management (HFA–710), Food and Drug Administration, 5600 Fishers Lane, Rockville, MD 20857, 301–796–3794.

SUPPLEMENTARY INFORMATION: In the **Federal Register** of June 23, 2008 (73 FR 35402), the agency announced that the proposed information collection had been submitted to OMB for review and clearance under 44 U.S.C. 3507. An agency may not conduct or sponsor, and a person is not required to respond to, a collection of information unless it displays a currently valid OMB control number. OMB has now approved the information collection and has assigned OMB control number 0910–0133. The approval expires on August 31, 2011. A copy of the supporting statement for this information collection is available on the Internet at *http://www.reginfo.gov/public/do/PRAMain*.

Dated: October 9, 2008.

Jeffrey Shuren,

Associate Commissioner for Policy and Planning.

[FR Doc. E8–24671 Filed 10–16–08; 8:45 am]

BILLING CODE 4160–01–S

DEPARTMENT OF HEALTH AND HUMAN SERVICES

Indian Health Service

Request for Public Comment: 30-Day Proposed Information Collection: Indian Health Service Loan Repayment Program

Note: The purpose of this second announcement is to provide another opportunity for public comment. The previous **Federal Register** notice was published on August 19, 2008, FR Doc. E8–19053.

AGENCY: Indian Health Service, HHS.

ACTION: Notice.

SUMMARY: In compliance with Section 3506(c)(2)(A) of the Paperwork Reduction Act of 1995 which requires 30 days for public comment on proposed information collection projects, the Indian Health Service (IHS) has submitted to the Office of Management and Budget (OMB) a request to review and approve the information collection listed below. This proposed information collection project was previously published in the **Federal Register** (73 FR 29520) on May 21, 2008 and allowed 60 days for public comment. No public comment was received in response to the notice. The purpose of this notice is to allow 30 days for public comment to be submitted directly to OMB.

Proposed Collection: Title: 0917–0014, ''Indian Health Service Loan Repayment Program.'' *Type of Information Collection Request:* Extension, without revision, of currently approved information collection, 0917–0014, ''Indian Health Service Loan Repayment Program.'' *Form Number(s):* The IHS Loan Repayment Program Information Booklet contains the instructions and the application formats. *Need and Use of Information Collection:* The IHS Loan Repayment Program (LRP) identifies health professionals with pre-existing financial obligations for education expenses that meet program criteria and who are qualified and willing to serve at, often remote, IHS health care facilities. Under the program, eligible health professionals sign a contract under which the IHS agrees to repay part or all of their indebtedness for professional training education. In exchange, the health professionals agree to serve for a specified period of time in IHS health care facilities. This program is necessary to augment the critically low health professional staff at IHS health care facilities.

Any health professional wishing to have their health education loans repaid may apply to the IHS Loan Repayment Program. A two-year contract obligation is signed by both parties, and the individual agrees to work at an IHS location and provide health services to Native American and Alaska Native individuals.

The information collected from individuals is analyzed and a score is given to each applicant. This score will determine which applicants will be awarded each fiscal year. The administrative scoring system assigns a score to the geographic location according to vacancy rates for that fiscal year and also considers whether the location is in an isolated area. When an applicant takes employment at a location, they in turn ''pick-up'' the score of that location. *Affected Public:* Individuals and households. *Type of Respondents:* Individuals.

The table below provides: Types of data collection instruments, Estimated number of respondents, Number of responses per respondent, Annual number of responses, Average burden hour per response, and Total annual burden hour(s).

ESTIMATED BURDEN HOURS

Data collection instrument	Estimated number of respondents	Responses per respondent	Average burden hour per response	Total annual burden
Section I	510	1	18/60	153.0
Section II	510	1	30/60	255.0
Section III	510	4	15/60	128.0
Contract	510	1	20/60	170.0
Affidavit	510	1	10/60	85.0
Lender's Certification	2,000		15/60	500.0
Total	4,550			1,291.0

There are no Capital Costs, Operating Costs, and/or Maintenance Costs to report.

Request for Comments: Your written comments and/or suggestions are invited on one or more of the following points: (a) Whether the information collection activity is necessary to carry out an agency function; (b) whether the agency processes the information collected in a useful and timely fashion; (c) the accuracy of the public burden estimate (the estimated amount of time needed for individual respondents to provide the requested information); (d) whether the methodology and assumptions used to determine the estimates are logical; (e) ways to enhance the quality, utility, and clarity of the information being collected; and (f) ways to minimize the public burden through the use of automated, electronic, mechanical, or other technological collection techniques or other forms of information technology.

Direct Comments to OMB: Send your written comments and suggestions regarding the proposed information collection contained in this notice, especially regarding the estimated public burden and associated response time to: Office of Management and Budget, Office of Regulatory Affairs, New Executive Office Building, Room 10235, Washington, DC 20503, *Attention:* Desk Officer for IHS.

To request more information on the proposed collection or to obtain a copy of the data collection instrument(s) and/or instruction(s) contact: Ms. Janet Ingersoll, FOIA Coordinator, 12300 Twinbrook Parkway, Suite 450, Rockville, MD 20852–1601; call non-toll free (301) 443–6177; send via facsimile to (301) 443–2316; or send your e-mail requests, comments, and return address to: *Janet.Ingersoll@ihs.gov.*

Comment Due Date: Comments regarding this information collection are best assured of having full effect if received within 30 days of the date of this publication.

Dated: October 8, 2008.

Robert G. McSwain,

Director, Indian Health Service.

[FR Doc. E8–24587 Filed 10–16–08; 8:45 am]

BILLING CODE 4165–16–M

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, October 22, 2008, 8 a.m. to October 23, 2008, 5 p.m., Holiday Inn Express Hotel and Suites, San Francisco Fisherman's Wharf, 550 North Point Street, San Francisco, CA 94133, which was published in the **Federal Register** on September 19, 2008, 73 FR 54408–54411.

The meeting will be held one day only October 22, 2008. The meeting time and location remain the same. The meeting is closed to the public.

Dated: October 8, 2008.

Jennifer Spaeth,

Director, Office of Federal Advisory Committee Policy.

[FR Doc. E8–24448 Filed 10–16–08; 8:45 am]

BILLING CODE 4140–01–M

DEPARTMENT OF HEALTH AND HUMAN SERVICES

National Institutes of Health

National Institute of General Medical Sciences; 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: Minority Programs Review Committee, Minority Programs Review Subcommittee B.

Date: November 14, 2008.

Time: 8 a.m. to 5 a.m.

Agenda: To review and evaluate grant applications.

Place: Hilton-Rockville, 1750 Rockville Pike, Rockville, MD 20852.

Contact Person: Rebecca H. Johnson, PhD, Scientific Review Officer, Office of Scientific Review, National Institute of General Medical Sciences, National Institutes of Health, Natcher Building, Room 3AN18C, Bethesda, MD 20892, 301–594–2771, *johnsonrhnigms.nih.gov.*

(Catalogue of Federal Domestic Assistance Program Nos. 93.375, Minority Biomedical Research Support; 93.821, Cell Biology and Biophysics Research; 93.859, Pharmacology, Physiology, and Biological Chemistry Research; 93.862, Genetics and Developmental Biology Research; 93.88, Minority Access to Research Careers; 93.96, Special Minority Initiatives, National Institutes of Health, HHS)

Dated: October 7, 2008.

Jennifer Spaeth,

Director, Office of Federal Advisory Committee Policy.

[FR Doc. E8–24447 Filed 10–16–08; 8:45 am]

BILLING CODE 4140–01–M

DEPARTMENT OF HEALTH AND HUMAN SERVICES

National Institutes of Health

National Institute of General Medical Sciences; 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 General Medical Sciences Initial Review Group; Biomedical Research and Research Training Review Subcommittee A.

Date: November 13, 2008.

Time: 8 a.m. to 5 p.m.

Agenda: To review and evaluate grant applications.

Place: Residence Inn, 7335 Wisconsin Avenue, Bethesda, MD 20818.

Contact Person: Carole H. Latker, PhD, Scientific Review Officer, Office of Scientific Review, National Institute of General Medical Sciences, National Institutes of Health, Natcher Building, Room 3AN18, Bethesda, MD 20892, (301) 594–2848, *latkercnigms.nih.gov.*

(Catalogue of Federal Domestic Assistance Program Nos. 93.375, Minority Biomedical Research Support; 93821, Cell Biology and Biophysics Research; 93.859, Pharmacology, Physiology, and Biological Chemistry Research; 93.862, Genetics and Developmental Biology Research; 93.88, Minority Access to Research Careers; 93.96, Special Minority Initiatives, National Institutes of Health, HHS)

Dated: October 7, 2008.

Jennifer Spaeth,

Director, Office of Federal Advisory Committee Policy.

[FR Doc. E8–24449 Filed 10–16–08; 8:45 am]

BILLING CODE 4140–01–M

DEPARTMENT OF HEALTH AND HUMAN SERVICES

National Institutes of Health

National Institute of General Medical Sciences; 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 General Medical Sciences Special, Emphasis Panel ZGM1 BRT–X TG.

Date: November 12, 2008.

Time: 8:30 a.m. to 5 p.m.

Agenda: To review and evaluate grant applications.

Place: Hyatt Regency Bethesda, One Bethesda Metro Center, 7400 Wisconsin Avenue, Bethesda, MD 20814.

Contact Person: John J Laffan, PhD, Scientific Review Officer, Office of Scientific Review, National Institute of General Medical Sciences, National Institutes of Health, Natcher Building, Room 3AN18J, Bethesda, MD 20892 301–594–2773.

Name of Committee: National Institute of General Medical Sciences. Special Emphasis Panel Minority Biomedical Research Support.

Date: November 17–18, 2008.

Time: 8 a.m. to 5 p.m.

Agenda: To review and evaluate grant applications.

Place: Hyatt Regency Bethesda, One Bethesda Metro Center, 7400 Wisconsin Avenue, Bethesda, MD 20814.

Contact Person: Margaret J Weidman, PhD, Scientific Review Officer, Office of Scientific Review, National Institute of General Medical Sciences, National Institutes of Health, 45 Center Drive, Room 3AN18B, Bethesda, MD 20892, 301–594–3663, *weidmanmanigms.nih.gov*.

(Catalogue of Federal Domestic Assistance Program Nos. 93.375, Minority Biomedical Research Support; 93.821, Cell Biology and Biophysics Research; 93.859, Pharmacology, Physiology, and Biological Chemistry Research; 93.862, Genetics and Developmental Biology Research; 93.88, Minority Access to Research Careers; 93.96, Special Minority Initiatives, National Institutes of Health HHS)

Dated: October 7, 2008.

Jennifer Spaeth,

Director, Office of Federal Advisory Committee Policy.

[FR Doc. E8–24450 Filed 10–16–08; 8:45 am]

BILLING CODE 4140–01–M

DEPARTMENT OF HEALTH AND HUMAN SERVICES

National Institutes of Health

National Institute of Biomedical Imaging and Bioengineering; 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 Biomedical Imaging and Bioengineering Special Emphasis Panel.

Date: November 25, 2008.

Time: 1 p.m. to 5 p.m.

Agenda: To review and evaluate grant applications.

Place: National Institutes of Health, Democracy II, 6707 Democracy Blvd., 900, Bethesda, MD 20892.

Contact Person: Ruixia Zhou, PhD, Scientific Review Officer, 6707 Democracy Boulevard, Democracy Two Building, Suite 957, Bethesda, MD 20892, (301) 496–4773, *zhour@mail.nih.gov*.

Dated: October 9, 2008.

Jennifer Spaeth,

Director, Office of Federal Advisory Committee Policy.

[FR Doc. E8–24614 Filed 10–16–08; 8:45 am]

BILLING CODE 4140–01–M

DEPARTMENT OF HEALTH AND HUMAN SERVICES

National Institutes of Health

National Institute of Allergy and Infectious Diseases; 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 Allergy and Infectious Diseases, Special Emphasis Panel ''NIH, Support for Conferences and Scientific Meetings''.

Date: November 19, 2008.

Time: 1 p.m. to 5 p.m.

Agenda: To review and evaluate grant applications.

Place: National Institute of Health, 6700, 6700B Rockledge Dr, 3119, Bethesda, MD 20892.

Contact Person: Ileana M. Ponce-Gonzalez, MD, MPH, Scientific Review Officer, Scientific Review Program, Division of Extramural Activities, National Institutes of Health/NIAID, 6700B Rockledge Drive, MSC 7616, Bethesda, MD 20892–7616, 301–451–3679, *ipgonzalez@niaid.nih.gov.*

(Catalogue of Federal Domestic Assistance Program Nos. 93.855, Allergy, Immunology, and Transplantation Research; 93.856, Microbiology and Infectious Diseases Research, National Institutes of Health, HHS)

Dated: October 9, 2008.

Jennifer Spaeth,

Director, Office of Federal Advisory Committee Policy.

[FR Doc. E8–24646 Filed 10–16–08; 8:45 am]

BILLING CODE 4140–01–M

DEPARTMENT OF HEALTH AND HUMAN SERVICES

National Institutes of Health

National Institute of Allergy and Infectious Diseases; 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 Allergy and Infectious Diseases Special Emphasis Panel; Novel HIV Therapies: Integrated Preclinical/Clinical Program (IPCP).

Date: November 6–7, 2008.

Time: 8 a.m. to 5 p.m.

Agenda: To review and evaluate grant applications.

Place: Hilton Washington DC/Rockville, 1750 Rockville Pike, Rockville, MD 20852.

Contact Person: Clayton C. Huntley, PhD, Scientific Review Officer, Scientific Review Program, Division of Extramural Activities, National Institutes of Health/NIAID/DHHS, 6700B Rockledge Drive, MSC 7616, Bethesda, MD 20892–7616, 301–451–2570, *chuntley@niaid.nih.gov.*

(Catalogue of Federal Domestic Assistance Program Nos. 93.855, Allergy, Immunology, and Transplantation Research; 93.856, Microbiology and Infectious Diseases Research, National Institutes of Health, HHS)

Dated: October 8, 2008.

Jennifer Spaeth,

Director, Office of Federal Advisory Committee Policy.

[FR Doc. E8–24647 Filed 10–16–08; 8:45 am]

BILLING CODE 4140–01–M

DEPARTMENT OF HOMELAND SECURITY

Office of the Secretary

[Docket No. DHS–2008–0006]

Privacy Act of 1974; Department of Homeland Security Accounts Payable System of Records.

AGENCY: Privacy Office; DHS.

ACTION: Notice of Privacy Act system of records.

SUMMARY: In accordance with the Privacy Act of 1974 and as part of the Department of Homeland Security's ongoing effort to review and update legacy system of record notices, the Department of Homeland Security proposes to consolidate three legacy record systems: Treasury/CS.207 Reimbursable Assignment/Workticket System, October 18, 2001, Treasury/CS.249 Uniform Allowance-Unit Record, October 18, 2001, and Treasury/CS.269 Accounts Payable Voucher File, October 18, 2001. This system will allow the Department of Homeland Security to collect and maintain payment records. Categories of individuals, categories of records, and the routine uses of these legacy system of records notices have been consolidated and updated to better reflect the Department's accounts payable record systems. This consolidated system, titled Accounts Payable, will be included in the Department's inventory of record systems.

DATES: Submit comments on or before November 17, 2008.

ADDRESSES: You may submit comments, identified by docket number DHS–2008–0006 by one of the following methods:

- *Federal e-Rulemaking Portal: http://www.regulations.gov.* Follow the instructions for submitting comments.
- *Fax:* 1–866–466–5370.
- *Mail:* Hugo Teufel III, Chief Privacy Officer, Privacy Office, Department of Homeland Security, Washington, DC 20528.
- *Instructions:* All submissions received must include the agency name and docket number for this rulemaking. All comments received will be posted without change to *http://www.regulations.gov,* including any personal information provided.
- *Docket:* For access to the docket to read background documents or comments received go to *http://www.regulations.gov.*

FOR FURTHER INFORMATION CONTACT: For general questions and privacy issues please contact: Hugo Teufel III (703–235–0780), Chief Privacy Officer, Privacy Office, Department of Homeland Security, Washington, DC 20528.

SUPPLEMENTARY INFORMATION:

I. Background

Pursuant to the savings clause in the Homeland Security Act of 2002, Public Law 107–296, Section 1512, 116 Stat. 2310 (November 25, 2002), the Department of Homeland Security (DHS) and its components and offices have relied on preexisting Privacy Act systems of records notices for the collection and maintenance of records that concern the Department's accounts payable records.

As part of its efforts to streamline and consolidate its Privacy Act record systems, DHS is establishing a new agency-wide system of records under the Privacy Act (5 U.S.C. 552a) for the DHS accounts payable records. The system will consist of both electronic and paper records and will be used by DHS and its components and offices to maintain accounts payable records. The data will be collected by name or other unique personal identifier. This will ensure that all components of DHS follow the same privacy rules for collecting and handling accounts payable records. The collection and maintenance of this information will assist DHS in meeting its obligation to manage Departmental funds in order to ensure that DHS pays its creditors, including DHS employees for travel related reimbursements, and ensures that DHS has an accurate accounting of all monies which it owes and to whom.

In accordance with the Privacy Act of 1974 and as part of DHS's ongoing effort to review and update legacy system of record notices, DHS proposes to consolidate three legacy record systems: Treasury/CS.207 Reimbursable Assignment/Workticket System (66 FR 52984 October 18, 2001), Treasury/CS.249 Uniform Allowance-Unit Record (66 FR 52984 October 18, 2001), and Treasury/CS.269 Accounts Payable Voucher File (66 FR 52984 October 18, 2001). This system will allow DHS to collect and maintain payment records. Categories of individuals, categories of records, and the routine uses of these legacy system of records notices have been consolidated and updated to better reflect the Department's accounts payable record systems. This consolidated system, titled Accounts Payable, will be included in the Department's inventory of record systems.

II. Privacy Act

The Privacy Act embodies fair information principles in a statutory framework governing the means by which the United States Government collects, maintains, uses, and disseminates individuals' records. The Privacy Act applies to information that is maintained in a ''system of records.'' A ''system of records'' is a group of any records under the control of an agency for which information is retrieved by the name of an individual or by some identifying number, symbol, or other identifying particular assigned to the individual. In the Privacy Act, an individual is defined to encompass United States citizens and legal permanent residents. As a matter of policy, DHS extends administrative Privacy Act protections to all individuals where systems of records maintain information on U.S. citizens, lawful permanent residents, and visitors. Individuals may request access to their own records that are maintained in a system of records in the possession or under the control of DHS by complying with DHS Privacy Act regulations, 6 CFR Part 5.

The Privacy Act requires that each agency publish in the **Federal Register** a description denoting the type and character of each system of records in order to make agency recordkeeping practices transparent, to notify individuals about the use of their records, and to assist the individual to more easily find files within the agency.

Below is a description of the Accounts Payable System of Records.

In accordance with 5 U.S.C. 552a(r), DHS has provided a report of this revised system of records to the Office of Management and Budget and to the Congress.

System of Records:

DHS/ALL–007.

SYSTEM NAME:

Department of Homeland Security Accounts Payable Records.

SECURITY CLASSIFICATION:

Unclassified.

SYSTEM LOCATION:

Records are maintained at several Headquarters locations and in component offices of DHS, in both Washington, DC and field locations.

CATEGORIES OF INDIVIDUALS COVERED BY THE SYSTEM:

Any individual or organization who serves as a creditor to DHS, including parties in interest for whom reimbursable services are performed and employees for travel related reimbursements.

CATEGORIES OF RECORDS IN THE SYSTEM:

Categories of records in this system include:

- Individual's name;
- Tax identification number, which may be social security number in certain instances;
- Addresses;
- Importer of record number;
- Records of expenses (bills, refund checks, out-of-pocket travel expenses);
- Records of payments;
- Disbursement schedules;
- Monies owed; and
- Electronic financial institution data.

AUTHORITY FOR MAINTENANCE OF THE SYSTEM:

5 U.S.C. 301; The Federal Records Act, 44 U.S.C. 3101; The Homeland Security Act of 2002, Public Law 107–296, 6 U.S.C. 121; 19 U.S.C. 261, 267 & 1451; 19 CFR 24.16 & 24.17; Executive Order 11348, as amended by Executive Order 12107; and Executive Order 9397.

PURPOSE(S):

The purpose of this system is to collect and maintain the information from individuals in connection with reimbursable services provided to DHS to ensure the Department properly pays these individuals. This system will allow DHS to maintain payment records and record monies owed.

ROUTINE USES OF RECORDS MAINTAINED IN THE SYSTEM, INCLUDING CATEGORIES OF USERS AND THE PURPOSES OF SUCH USES:

In addition to those disclosures generally permitted under 5 U.S.C. 552a(b) of the Privacy Act, all or a portion of the records or information contained in this system may be disclosed outside DHS as a routine use pursuant to 5 U.S.C. 552a(b)(3) as follows:

A. To the Department of Justice (including United States Attorney Offices) or other Federal agency conducting litigation or in proceedings before any court, adjudicative or administrative body when it is necessary to the litigation and one of the following is a party to the litigation or has an interest in such litigation:

1. DHS or any component thereof;

2. Any employee of DHS in his/her official capacity;

3. Any employee of DHS in his/her individual capacity where the Department of Justice or DHS has agreed to represent the employee; or

4. The United States or any agency thereof, is a party to the litigation or has an interest in such litigation, and DHS determines that the records are both relevant and necessary to the litigation and the use of such records is compatible with the purpose for which DHS collected the records.

B. To a congressional office from the record of an individual in response to an inquiry from that congressional office made at the request of the individual to whom the record pertains.

C. To the National Archives and Records Administration or other Federal government agencies pursuant to records management inspections being conducted under the authority of 44 U.S.C. 2904 and 2906.

D. To an agency, organization, or individual for the purpose of performing audit or oversight operations as authorized by law, but only such information as is necessary and relevant to such audit or oversight function.

E. To appropriate agencies, entities, and persons when:

1. DHS suspects or has confirmed that the security or confidentiality of information in the system of records has been compromised;

2. The Department has determined that as a result of the suspected or confirmed compromise there is a risk of harm to economic or property interests, identity theft or fraud, or harm to the security or integrity of this system or other systems or programs (whether maintained by DHS or another agency or entity) or harm to the individual who relies upon the compromised information; and

3. The disclosure made to such agencies, entities, and persons is reasonably necessary to assist in connection with DHS's efforts to respond to the suspected or confirmed compromise and prevent, minimize, or remedy such harm.

F. To contractors and their agents, grantees, experts, consultants, and others performing or working on a contract, service, grant, cooperative agreement, or other assignment for DHS, when necessary to accomplish an agency function related to this system of records. Individuals provided information under this routine use are subject to the same Privacy Act requirements and limitations on disclosure as are applicable to DHS officers and employees.

G. To an appropriate Federal, State, tribal, local, international, or foreign law enforcement agency or other appropriate authority charged with investigating or prosecuting a violation or enforcing or implementing a law, rule, regulation, or order, where a record, either on its face or in conjunction with other information, indicates a violation or potential violation of law, which includes criminal, civil, or regulatory violations and such disclosure is proper and consistent with the official duties of the person making the disclosure.

H. To unions recognized as exclusive bargaining representatives under the Civil Service Reform Act of 1978, 5 U.S.C. 7111 and 7114.

I. To Federal servicing agencies to reimburse individuals who perform services.

J. To the Department of the Treasury to effect disbursement of authorized payments.

K. To the news media and the public, with the approval of the Chief Privacy Officer in consultation with counsel, when there exists a legitimate public interest in the disclosure of the information or when disclosure is necessary to preserve confidence in the integrity of DHS or is necessary to demonstrate the accountability of DHS's officers, employees, or individuals covered by the system, except to the extent it is determined that release of the specific information in the context of a particular case would constitute an unwarranted invasion of personal privacy.

DISCLOSURE TO CONSUMER REPORTING AGENCIES:

None.

POLICIES AND PRACTICES FOR STORING, RETRIEVING, ACCESSING, RETAINING, AND DISPOSING OF RECORDS IN THE SYSTEM:

STORAGE:

Records in this system are stored electronically or on paper in secure facilities in a locked drawer behind a locked door. The records are stored on magnetic disc, tape, digital media, and CD–ROM.

RETRIEVABILITY:

Data may be retrieved by an individual's name, tax identification number/social security number, employee identification number, by individual's importer of record number, and/or other personal identifier.

SAFEGUARDS:

Records in this system are safeguarded in accordance with applicable rules and policies, including all applicable DHS automated systems security and access policies. Strict controls have been imposed to minimize the risk of compromising the information that is being stored. Access to the computer system containing the records in this system is limited to those individuals who have a need to know the information for the performance of their official duties and who have appropriate clearances or permissions.

RETENTION AND DISPOSAL:

Records are destroyed six years and three months after final payment, in accordance with National Archives and Records Administration General Records Schedule 3, Item 3.

SYSTEM MANAGER AND ADDRESS:

For Headquarters components of DHS, the System Manager is the Director of Departmental Disclosure, Department of Homeland Security, Washington, DC 20528. For components of DHS, the System Manager can be found at *http://www.dhs.gov/foia* under ''contacts.''

NOTIFICATION PROCEDURE:

Individuals seeking notification of and access to any record contained in this system of records, or seeking to contest its content, may submit a request in writing to the Headquarters or component's FOIA Officer, whose contact information can be found at *http://www.dhs.gov/foia* under ''contacts.'' If an individual believes more than one component maintains Privacy Act records concerning him or her the individual may submit the request to the Chief Privacy Officer, Department of Homeland Security, 245 Murray Drive, SW., Building 410, STOP–0550, Washington, DC 20528.

When seeking records about yourself from this system of records or any other Departmental system of records your request must conform with the Privacy Act regulations set forth in 6 CFR Part 5. You must first verify your identity, meaning that you must provide your full name, current address and date and place of birth. You must sign your request, and your signature must either be notarized or submitted under 28 U.S.C. 1746, a law that permits statements to be made under penalty of perjury as a substitute for notarization. While no specific form is required, you may obtain forms for this purpose from the Director, Disclosure and FOIA, *http://www.dhs.gov* or 1–866–431–0486. In addition you should provide the following:

- An explanation of why you believe the Department would have information on you,
- Identify which component(s) of the Department you believe may have the information about you,
- Specify when you believe the records would have been created,
- Provide any other information that will help the FOIA staff determine which DHS component agency may have responsive records,
- If your request is seeking records pertaining to another living individual, you must include a statement from that individual certifying his/her agreement for you to access his/her records.

Without this bulleted information the component(s) may not be able to conduct an effective search, and your request may be denied due to lack of specificity or lack of compliance with applicable regulations.

RECORD ACCESS PROCEDURES:

See ''Notification procedure'' above.

CONTESTING RECORD PROCEDURES:

See ''Notification procedure'' above.

RECORD SOURCE CATEGORIES:

Information originates with DHS, its components and offices, and individuals submitting supporting documentation for reimbursement.

EXEMPTIONS CLAIMED FOR THE SYSTEM:

None.

Dated: October 7, 2008.

Hugo Teufel III,

Chief Privacy Officer, Department of Homeland Security.

[FR Doc. E8–24705 Filed 10–16–08; 8:45 am]

BILLING CODE 4410–10–P

DEPARTMENT OF HOMELAND SECURITY

Office of the Secretary

[Docket No. DHS–2008–0012]

Privacy Act of 1974; Department of Homeland Security Grievances, Appeals, and Disciplinary Action Records System of Records

AGENCY: Privacy Office; DHS.

ACTION: Notice of Privacy Act system of records.

SUMMARY: In accordance with the Privacy Act of 1974 and as part of the Department of Homeland Security's ongoing effort to review and update legacy system of record notices, the Department of Homeland Security proposes to consolidate four legacy record systems: Treasury/CS.077 Disciplinary Action Grievance and Appeal Case Files, October 18, 2001, Treasury/CS.159 Notification of Personnel Management Division When an Employee is Placed Under Investigation by the Office of Internal Affairs, October 18, 2001, FEMA/NETC–3 Records of Alleged Misconduct of Students Attending Training Courses at the National Emergency Training Center, September 7, 1990, and FEMA/PER–1 Grievance Records, September 7, 1990, into one Department of Homeland Security-wide system of records. The Department of Homeland Security also proposes to partially consolidate Treasury/USSS.002 Chief Counsel Record System, August 28, 2001, into this system. This system will allow the Department of Homeland Security to document all current and former Department of Homeland Security personnel who have been the subject of proposed or final disciplinary action, have filed a grievance or appeal, or have been suspected of misconduct. Categories of individuals, categories of records, and the routine uses of these legacy systems of records notices have been consolidated and updated to better reflect the Department's grievances, appeals, and disciplinary action record systems. DHS is issuing a Notice of Proposed Rulemaking (NPRM) concurrent with this SORN elsewhere in the **Federal Register**. The exemptions for the legacy system of records notices will continue to be applicable until the final rule for this SORN has been completed. This consolidated system, titled Grievances, Appeals, and Disciplinary Action, will be included in the Department's inventory of record systems.

DATES: Submit comments on or before November 17, 2008. This new system will be effective November 17, 2008.

ADDRESSES: You may submit comments, identified by docket number DHS–2008–0012 by one of the following methods:

- *Federal e-Rulemaking Portal: http://www.regulations.gov.* Follow the instructions for submitting comments.
- *Fax:* 1–866–466–5370.
- *Mail:* Hugo Teufel III, Chief Privacy Officer, Privacy Office, Department of Homeland Security, Washington, DC 20528.
- *Instructions:* All submissions received must include the agency name and docket number for this rulemaking. All comments received will be posted without change to *http://www.regulations.gov,* including any personal information provided.
- *Docket:* For access to the docket to read background documents or comments received go to *http://www.regulations.gov.*

FOR FURTHER INFORMATION CONTACT: For general questions and privacy issues please contact: Hugo Teufel III (703–235–0780), Chief Privacy Officer, Privacy Office, Department of Homeland Security, Washington, DC 20528.

SUPPLEMENTARY INFORMATION:

I. Background

Pursuant to the savings clause in the Homeland Security Act of 2002, Public Law 107–296, Section 1512, 116 Stat. 2310 (November 25, 2002), the Department of Homeland Security (DHS) and its components and offices have relied on preexisting Privacy Act systems of records notices for the collection and maintenance of records concerning files relating to employee grievances, appeals, and disciplinary action.

As part of its efforts to streamline and consolidate its Privacy Act record systems, DHS is establishing a new agency-wide system of records under the Privacy Act (5 U.S.C. 552a) for DHS grievances, appeals, and disciplinary actions. This will ensure that all components of DHS follow the same privacy rules for collecting and maintaining grievances, appeals, and disciplinary action records. DHS will use this system to collect and maintain records submitted to it by DHS personnel and others.

In accordance with the Privacy Act of 1974 and as part of DHS's ongoing effort to review and update legacy system of record notices, DHS proposes to consolidate four legacy record systems: Treasury/CS.077 Disciplinary Action Grievance and Appeal Case Files (66 FR 52984 October 18, 2001), Treasury/CS.159 Notification of Personnel Management Division When an Employee is Placed Under Investigation by the Office of Internal Affairs (66 FR 52984 October 18, 2001), FEMA/NETC–3 Records of Alleged Misconduct of Students Attending Training Courses at the National Emergency Training Center (55 FR 37182 September 7, 1990) and FEMA/PER–1 Grievance Records (55 FR 37182 September 7, 1990) into one DHS-wide system of records. DHS also proposes to partially consolidate Treasury/USSS.002 Chief Counsel Record System (66 FR 45362 August 28, 2001) into this system. This system will allow DHS to document all current and former DHS personnel who have been the subject of proposed or final disciplinary action, have filed a grievance or appeal, or have been suspected of misconduct. Categories of individuals, categories of records, and the routine uses of these legacy system of records notices have been consolidated and updated to better reflect the Department's grievances, appeals, and disciplinary action record systems. DHS is issuing a Notice of Proposed Rulemaking (NPRM) concurrent with this SORN elsewhere in the **Federal Register**. The exemptions for the legacy system of records notices will continue to be applicable until the final rule for this SORN has been completed. This consolidated system, titled Grievances, Appeals, and Disciplinary Action, will be included in the Department's inventory of record systems.

II. Privacy Act

The Privacy Act embodies fair information principles in a statutory framework governing the means by which the United States Government collects, maintains, uses, and disseminates individuals' records. The Privacy Act applies to information that is maintained in a ''system of records.'' A ''system of records'' is a group of any records under the control of an agency for which information is retrieved by the name of an individual or by some identifying number, symbol, or other identifying particular assigned to the individual. In the Privacy Act, an individual is defined to encompass United States citizens and legal permanent residents. As a matter of policy, DHS extends administrative Privacy Act protections to all individuals where systems of records maintain information on U.S. citizens, lawful permanent residents, and visitors. Individuals may request access to their own records that are maintained in a system of records in the possession or under the control of DHS by complying with DHS Privacy Act regulations, 6 CFR Part 5.

The Privacy Act requires that each agency publish in the **Federal Register** a description denoting the type and character of each system of records in order to make agency recordkeeping practices transparent, to notify individuals about the use of their records, and to assist the individual to more easily find files within the agency. Below is a description of the Grievances, Appeal, and Disciplinary Action System of Records.

In accordance with 5 U.S.C. 552a(r), DHS has provided a report of this revised system of records to the Office of Management and Budget and to the Congress.

System of Records:

DHS/ALL–018.

SYSTEM NAME:

Department of Homeland Security Grievances, Appeals, and Disciplinary Action Records.

SECURITY CLASSIFICATION:

Unclassified.

SYSTEM LOCATION:

Records are maintained at several Headquarters locations and in component offices of DHS, in both Washington, DC and field locations.

CATEGORIES OF INDIVIDUALS COVERED BY THE SYSTEM:

All current and former DHS personnel about whom disciplinary action has been proposed or has occurred, personnel who have filed grievances and/or appeals, and personnel suspected of misconduct.

CATEGORIES OF RECORDS IN THE SYSTEM:

Categories of records in this system include:

- Individual's name;
- Social security number;
- Addresses;
- Restriction letters;
- Reprimands;
- Suspensions;
- Adverse actions;
- Grievances;
- Appeals;
- Correspondence;
- Management requests for assistance;
- Evidentiary materials on which action is contemplated, proposed or taken;
- Regulatory materials;
- Reports of investigation into alleged employee misconduct; and
- Examiners' reports.

AUTHORITY FOR MAINTENANCE OF THE SYSTEM:

5 U.S.C. 301; the Federal Records Act, 44 U.S.C. 3101; the Homeland Security

Act of 2002, Public Law 107–296; and Executive Order 9373.

PURPOSE(S):

The purpose of this system is to document all current and former DHS personnel who have been the subject of proposed or final disciplinary action, have filed a grievance or appeal, or have been suspected of misconduct.

ROUTINE USES OF RECORDS MAINTAINED IN THE SYSTEM, INCLUDING CATEGORIES OF USERS AND THE PURPOSES OF SUCH USES:

In addition to those disclosures generally permitted under 5 U.S.C. 552a(b) of the Privacy Act, all or a portion of the records or information contained in this system may be disclosed outside DHS as a routine use pursuant to 5 U.S.C. 552a(b)(3) as follows:

A. To the Department of Justice (including United States Attorney Offices) or other Federal agency conducting litigation or in proceedings before any court, adjudicative or administrative body when it is necessary to the litigation and one of the following is a party to the litigation or has an interest in such litigation:

1. DHS or any component thereof;

2. Any employee of DHS in his/her official capacity;

3. Any employee of DHS in his/her individual capacity where the Department of Justice or DHS has agreed to represent the employee; or

4. The United States or any agency thereof, is a party to the litigation or has an interest in such litigation, and DHS determines that the records are both relevant and necessary to the litigation and the use of such records is compatible with the purpose for which DHS collected the records.

B. To an agency, organization, or individual for the purpose of performing audit or oversight operations as authorized by law, but only such information as is necessary and relevant to such audit or oversight function.

C. To appropriate agencies, entities, and persons when:

1. DHS suspects or has confirmed that the security or confidentiality of information in the system of records has been compromised;

2. The Department has determined that as a result of the suspected or confirmed compromise there is a risk of harm to economic or property interests, identity theft or fraud, or harm to the security or integrity of this system or other systems or programs (whether maintained by DHS or another agency or entity) or harm to the individual who relies upon the compromised information; and

3. The disclosure made to such agencies, entities, and persons is reasonably necessary to assist in connection with DHS's efforts to respond to the suspected or confirmed compromise and prevent, minimize, or remedy such harm.

D. To contractors and their agents, grantees, experts, consultants, and others performing or working on a contract, service, grant, cooperative agreement, or other assignment for DHS, when necessary to accomplish an agency function related to this system of records. Individuals provided information under this routine use are subject to the same Privacy Act requirements and limitations on disclosure as are applicable to DHS officers and employees.

E. To an appropriate Federal, State, tribal, local, international, or foreign law enforcement agency or other appropriate authority charged with investigating or prosecuting a violation or enforcing or implementing a law, rule, regulation, or order, where a record, either on its face or in conjunction with other information, indicates a violation or potential violation of law, which includes criminal, civil, or regulatory violations and such disclosure is proper and consistent with the official duties of the person making the disclosure.

F. To third parties during the course of a law enforcement investigation to the extent necessary to obtain information pertinent to the investigation, provided disclosure is appropriate to the proper performance of the official duties of the officer making the disclosure.

G. To the Office of Personnel Management, the Merit Systems Protection Board, Federal Labor Relations Authority, or the Equal Employment Opportunity Commission when requested in the performance of their authorized duties.

H. To any source or potential source from which information is requested in the course of an investigation concerning the retention of an employee or other personnel action (other than hiring), or the retention of a security clearance, contract, grant, license, or other benefit, to the extent necessary to identify the individual, inform the source of the nature and purpose of the investigation, and to identify the type of information requested.

I. To an appropriate Federal, State, local, tribal, foreign, or international agency, if the information is relevant and necessary to a requesting agency's decision concerning the hiring or retention of an individual, or issuance of a security clearance, license, contract, grant, or other benefit, or if the information is relevant and necessary to a DHS decision concerning the hiring or retention of an employee, the issuance of a security clearance, the reporting of an investigation of an employee, the letting of a contract, or the issuance of a license, grant or other benefit and when disclosure is appropriate to the proper performance of the official duties of the person making the request.

J. To the news media and the public, with the approval of the Chief Privacy Officer in consultation with counsel, when there exists a legitimate public interest in the disclosure of the information or when disclosure is necessary to preserve confidence in the integrity of DHS or is necessary to demonstrate the accountability of DHS's officers, employees, or individuals covered by the system, except to the extent it is determined that release of the specific information in the context of a particular case would constitute an unwarranted invasion of personal privacy.

DISCLOSURE TO CONSUMER REPORTING AGENCIES:

None.

POLICIES AND PRACTICES FOR STORING, RETRIEVING, ACCESSING, RETAINING, AND DISPOSING OF RECORDS IN THE SYSTEM:

STORAGE:

Records in this system are stored electronically or on paper in secure facilities in a locked drawer behind a locked door. The records are stored on magnetic disc, tape, digital media, and CD–ROM.

RETRIEVABILITY:

Data may be retrieved alphabetically by individual's name.

SAFEGUARDS:

Records in this system are safeguarded in accordance with applicable rules and policies, including all applicable DHS automated systems security and access policies. Strict controls have been imposed to minimize the risk of compromising the information that is being stored. Access to the computer system containing the records in this system is limited to those individuals who have a need to know the information for the performance of their official duties and who have appropriate clearances or permissions.

RETENTION AND DISPOSAL:

Records are destroyed no sooner than 2 years but no later than 7 years after a case is closed, in accordance with National Archives and Records Administration General Records Schedule 1, Civilian Personnel Records, Item 30, and General Records Schedule

18, Security and Protective Services, Item 11.

SYSTEM MANAGER AND ADDRESS:

For Headquarters and components of DHS, the System Manager is the Director of Departmental Disclosure, Department of Homeland Security, Washington, DC 20528. For components of DHS, the System Manager can be found at *http://www.dhs.gov/foia* under ''contacts.''

NOTIFICATION PROCEDURE:

Individuals seeking notification of and access to any record contained in this system of records, or seeking to contest its content, may submit a request in writing to the Headquarters' or component's FOIA Officer, whose contact information can be found at *http://www.dhs.gov/foia* under ''contacts.'' If an individual believes more than one component maintains Privacy Act records concerning him or her the individual may submit the request to the Chief Privacy Officer, Department of Homeland Security, 245 Murray Drive, SW., Building 410, STOP–0550, Washington, DC 20528.

When seeking records about yourself from this system of records or any other Departmental system of records your request must conform with the Privacy Act regulations set forth in 6 CFR Part 5. You must first verify your identity, meaning that you must provide your full name, current address and date and place of birth. You must sign your request, and your signature must either be notarized or submitted under 28 U.S.C. 1746, a law that permits statements to be made under penalty of perjury as a substitute for notarization. While no specific form is required, you may obtain forms for this purpose from the Director, Disclosure and FOIA, *http://www.dhs.gov* or 1–866–431–0486. In addition you should provide the following:

- An explanation of why you believe the Department would have information on you,
- Identify which component(s) of the Department you believe may have the information about you,
- Specify when you believe the records would have been created,
- Provide any other information that will help the FOIA staff determine which DHS component agency may have responsive records,
- If your request is seeking records pertaining to another living individual, you must include a statement from that individual certifying his/her agreement for you to access his/her records.

Without this bulleted information the component(s) may not be able to conduct an effective search, and your request may be denied due to lack of specificity or lack of compliance with applicable regulations.

RECORD ACCESS PROCEDURES:

See ''Notification procedure'' above.

CONTESTING RECORD PROCEDURES:

See ''Notification procedure'' above.

RECORD SOURCE CATEGORIES:

Information originates within DHS and its components, supervisors, union representatives, and employees who submit a grievance or appeal.

EXEMPTIONS CLAIMED FOR THE SYSTEM:

The Secretary of Homeland Security has exempted this system from subsections (c)(3) and (4); (d); (e)(1), (2), (3), (5), and (8); and (g) of the Privacy Act pursuant to 5 U.S.C. 552a(j)(2). In additional, the Secretary of Homeland Security has exempted this system from subsections (c)(3), (d), (e)(1), (e)(4)(G), (H), (I), and (f) of the Privacy Act pursuant to 5 U.S.C. 552a(k)(1), (2), (3) and (5).

Dated: October 7, 2008.

Hugo Teufel III,

Chief Privacy Officer, Department of Homeland Security.

[FR Doc. E8–24741 Filed 10–16–08; 8:45 am]

BILLING CODE 4410–10–P

DEPARTMENT OF HOMELAND SECURITY

Office of the Secretary

[Docket No. DHS–2008–0008]

Privacy Act of 1974; Department of Homeland Security Accounts Receivable System of Records

AGENCY: Privacy Office; DHS.

ACTION: Notice of Privacy Act system of records.

SUMMARY: In accordance with the Privacy Act of 1974 and as part of the Department of Homeland Security's ongoing effort to review and update legacy system of record notices, the Department of Homeland Security proposes to consolidate five legacy record systems: Treasury/CS.005 Accounts Receivable, October 18, 2001, Treasury/CS.030 Bankrupt Parties-In-Interest, October 18, 2001, Treasury/CS.031 Bills Issued Files, October 18, 2001, Treasury/CS.211 Sanction List, October 18, 2001, and FEMA/OC–2, Debt Collection Files, December 3, 1993, into one Department-wide system of records. This system will allow the Department to collect and maintain records of debts owed to the Department. Categories of individuals, categories of records, and the routine uses of these legacy system of records notices have been consolidated and updated to better reflect the Department's accounts receivable record systems. This consolidated system, titled Accounts Receivable, will be included in the Department's inventory of records systems.

DATES: Submit comments on or before November 17, 2008.

ADDRESSES: You may submit comments, identified by docket number DHS–2008–0008 by one of the following methods:

- *Federal e-Rulemaking Portal: http://www.regulations.gov.* Follow the instructions for submitting comments.
- *Fax:* 1–866–466–5370.
- *Mail:* Hugo Teufel III, Chief Privacy Officer, Privacy Office, Department of Homeland Security, Washington, DC 20528.
- *Instructions:* All submissions received must include the agency name and docket number for this rulemaking. All comments received will be posted without change to *http://www.regulations.gov,* including any personally identifiable information provided.
- *Docket:* For access to the docket to read background documents or comments received go to *http://www.regulations.gov.*

FOR FURTHER INFORMATION CONTACT: For general questions and privacy issues please contact: Hugo Teufel III (703–235–0780), Chief Privacy Officer, Privacy Office, Department of Homeland Security, Washington, DC 20528.

SUPPLEMENTARY INFORMATION:

I. Background

Pursuant to the savings clause in the Homeland Security Act of 2002, Public Law 107–296, Section 1512, 116 Stat. 2310 (November 25, 2002), the Department of Homeland Security (DHS) and its components and offices have relied on preexisting Privacy Act system of records notices for the collection and maintenance of records that concern DHS's accounts receivable records.

As part of its efforts to streamline and consolidate its Privacy Act records systems, DHS is establishing a new agency-wide system of records under the Privacy Act (5 U.S.C. 552a) for DHS accounts receivable records. This will ensure that all components of DHS follow the same privacy rules for collecting and maintaining accounts receivable records. This system will consist of both electronic and paper

records and will be used by DHS and its components and offices to collect and maintain accounts receivable records. The data will be collected and maintained by name and other unique personal identifier. The collection and maintenance of accounts receivable information assists DHS in meeting its obligation to manage Departmental funds and ensures that the Department has an accurate accounting of all the money which it is owed.

In accordance with the Privacy Act of 1974 and as part of DHS's ongoing effort to review and update legacy system of record notices, DHS proposes to consolidate five legacy record systems: Treasury/CS.005 Accounts Receivable (66 FR 52984 October 18, 2001), Treasury/CS.030 Bankrupt Parties-In-Interest (66 FR 52984 October 18, 2001), Treasury/CS.031 Bills Issued Files (66 FR 52984 October 18, 2001), Treasury/CS.211 Sanction List (66 FR 52984 October 18, 2001), and FEMA/OC–2, Debt Collection Files (Last revised as 58 FR 63986, formerly FEMA/RMA–9, Claims Collection Files, 52 FR 324 December 3, 1993) into one DHS-wide system of records. This system will allow DHS to collect and maintain records of debts owed to the Department. Categories of individuals, categories of records, and the routine uses of these legacy system of records notices have been consolidated and updated to better reflect the Department's accounts receivable record systems. This consolidated system, titled Accounts Receivable, will be included in the Department's inventory of records systems.

II. Privacy Act

The Privacy Act embodies fair information principles in a statutory framework governing the means by which the United States Government collects, maintains, uses, and disseminates individuals' records. The Privacy Act applies to information that is maintained in a ''system of records.'' A ''system of records'' is a group of any records under the control of an agency for which information is retrieved by the name of an individual or by some identifying number, symbol, or other identifying particular assigned to the individual. In the Privacy Act, an individual is defined to encompass United States citizens and legal permanent residents. As a matter of policy, DHS extends administrative Privacy Act protections to all individuals where systems of records maintain information on U.S. citizens, lawful permanent residents, and visitors. Individuals may request access to their own records that are maintained in a system of records in the possession or under the control of DHS by complying with DHS Privacy Act regulations, 6 CFR Part 5.

The Privacy Act requires that each agency publish in the **Federal Register** a description denoting the type and character of each system of records in order to make agency recordkeeping practices transparent, to notify individuals about the use of their records, and to assist the individual to more easily find files within the agency. Below is a description of the Account Receivable System of Records.

In accordance with 5 U.S.C. 552a(r), DHS has provided a report of this revised system of records to the Office of Management and Budget and to the Congress.

System of Records:

DHS/ALL–008.

SYSTEM NAME:

Department of Homeland Security Accounts Receivable Records.

SECURITY CLASSIFICATION:

Unclassified.

SYSTEM LOCATION:

Records are maintained at several Headquarters locations and in component offices of DHS, in both Washington, DC and field locations.

CATEGORIES OF INDIVIDUALS COVERED BY THE SYSTEM:

Any individual who is indebted to DHS.

CATEGORIES OF RECORDS IN THE SYSTEM:

Categories of records in this system include:

- Individual's name;
- Social security number;
- Addresses;
- Waiver of Debt Letter of Appeal;
- Receipts;
- Notices of debts;
- Invoices;
- Record of payments, including refunds and overpayments;
- Number and amount of unpaid or overdue bills;
- Record of satisfaction of debt or referral for further action;
- Correspondence and documentation with debtors and creditors; and
- Electronic financial institution data.

AUTHORITY FOR MAINTENANCE OF THE SYSTEM:

5 U.S.C. 301; The Federal Records Act, 44 U.S.C. 3101; The Homeland Security Act of 2002, Public Law 107–296, 6 U.S.C. 121; Public Law 89–508; Federal Claims Collection Act of 1966, 31 U.S.C. 3701; Executive Order 9373.

PURPOSE(S):

The purpose of this system is to keep track of debts owed to DHS.

ROUTINE USES OF RECORDS MAINTAINED IN THE SYSTEM, INCLUDING CATEGORIES OF USERS AND THE PURPOSES OF SUCH USES:

In addition to those disclosures generally permitted under 5 U.S.C. 552a(b) of the Privacy Act, all or a portion of the records or information contained in this system may be disclosed outside DHS as a routine use pursuant to 5 U.S.C. 552a(b)(3) as follows:

A. To the Department of Justice (including United States Attorney Offices) or other Federal agency conducting litigation or in proceedings before any court, adjudicative or administrative body when it is necessary to the litigation and one of the following is a party to the litigation or has an interest in such litigation:

1. DHS or any component thereof;

2. Any employee of DHS in his/her official capacity;

3. Any employee of DHS in his/her individual capacity where Department of Justice or DHS has agreed to represent the employee; or

4. The United States or any agency thereof, is a party to the litigation or has an interest in such litigation, and DHS determines that the records are both relevant and necessary to the litigation and the use of such records is compatible with the purpose for which DHS collected the records.

B. To a congressional office from the record of an individual in response to an inquiry from that congressional office made at the request of the individual to whom the record pertains.

C. To the National Archives and Records Administration or other Federal government agencies pursuant to records management inspections being conducted under the authority of 44 U.S.C. 2904 and 2906.

D. To an agency, organization, or individual for the purpose of performing audit or oversight operations as authorized by law, but only such information as is necessary and relevant to such audit or oversight function.

E. To appropriate agencies, entities, and persons when:

1. DHS suspects or has confirmed that the security or confidentiality of information in the system of records has been compromised;

2. The Department has determined that as a result of the suspected or confirmed compromise there is a risk of harm to economic or property interests, identity theft or fraud, or harm to the security or integrity of this system or other systems or programs (whether

maintained by DHS or another agency or entity) or harm to the individual who relies upon the compromised information; and

3. The disclosure made to such agencies, entities, and persons is reasonably necessary to assist in connection with DHS's efforts to respond to the suspected or confirmed compromise and prevent, minimize, or remedy such harm.

F. To contractors and their agents, grantees, experts, consultants, and others performing or working on a contract, service, grant, cooperative agreement, or other assignment for DHS, when necessary to accomplish an agency function related to this system of records. Individuals provided information under this routine use are subject to the same Privacy Act requirements and limitations on disclosure as are applicable to DHS officers and employees.

G. To an appropriate Federal, State, tribal, local, international, or foreign law enforcement agency or other appropriate authority charged with investigating or prosecuting a violation or enforcing or implementing a law, rule, regulation, or order, where a record, either on its face or in conjunction with other information, indicates a violation or potential violation of law, which includes criminal, civil, or regulatory violations and such disclosure is proper and consistent with the official duties of the person making the disclosure.

H. To a court, magistrate, or administrative tribunal in the course of presenting evidence, including disclosures to opposing counsel or witnesses in the course of civil discovery, litigation, or settlement negotiations or in connection with criminal law proceedings or in response to a subpoena from a court of competent jurisdiction.

I. To a Federal, State, or local agency so that the agency may adjudicate an individual's eligibility for a benefit.

J. To the Department of Justice or other Federal agency for further collection action on any delinquent debt when circumstances warrant.

K. To a debt collection agency for the purposes of debt collection.

L. To requesting agencies or non-Federal entities under approved computer matching efforts to improve program integrity and to collect debts and other money owed under those programs (e.g. matching for delinquent loans or other indebtedness to the Government). Computer matching efforts are limited only to those data elements considered relevant to making a determination of eligibility under a particular benefit program administered by those agencies or entities, or by the Department of Treasury, or any constituent unit of the Department.

M. To unions recognized as exclusive bargaining representatives under the Civil Service Reform Act of 1978, 5 U.S.C. 7111 and 7114, the Merit Systems Protection Board, arbitrators, the Federal Labor Relations Authority, and other parties responsible for the administration of the Federal labor-management program for the purpose of processing any corrective actions, or grievances, or conducting administrative hearings or appeals, or if needed in the performance of other authorized duties.

N. To Federal servicing agencies to record payments received;

O. To the General Accounting Office, Department of Justice, or a United States Attorney, copies of the Debt Collection Officer's file regarding the debt and actions taken to attempt to collect monies owed.

P. To the news media and the public, with the approval of the Chief Privacy Officer in consultation with counsel, when there exists a legitimate public interest in the disclosure of the information or when disclosure is necessary to preserve confidence in the integrity of DHS or is necessary to demonstrate the accountability of DHS's officers, employees, or individuals covered by the system, except to the extent it is determined that release of the specific information in the context of a particular case would constitute an unwarranted invasion of personal privacy.

DISCLOSURE TO CONSUMER REPORTING AGENCIES:

To consumer reporting agencies, as defined in the Fair Credit Reporting Act, 15 U.S.C. 1681a(f) or the Federal Claims Act of 1966, 31 U.S.C. 3701(a)(3). Disclosure to consumer reporting agencies is made pursuant to 5 U.S.C. 552a(b)(12).

POLICIES AND PRACTICES FOR STORING, RETRIEVING, ACCESSING, RETAINING, AND DISPOSING OF RECORDS IN THE SYSTEM:

STORAGE:

Records in this system are stored electronically or on paper in secure facilities in a locked drawer behind a locked door. The records are stored on magnetic disc, tape, digital media, and CD–ROM.

RETRIEVABILITY:

Data may be retrieved by an individual's name, personnel number, social security number, and/or other personal identifier.

SAFEGUARDS:

Records in this system are safeguarded in accordance with applicable rules and policies, including all applicable DHS automated systems security and access policies. Strict controls have been imposed to minimize the risk of compromising the information that is being stored. Access to the computer system containing the records in this system is limited to those individuals who have a need to know the information for the performance of their official duties and who have appropriate clearances or permissions.

RETENTION AND DISPOSAL:

Records are destroyed six years and three months after period covered by the account, in accordance with National Archives and Records Administration General Records Schedule 6, Item 1 and Item 10.

SYSTEM MANAGER AND ADDRESS:

For Headquarters components of DHS, the System Manager is the Director of Departmental Disclosure, Department of Homeland Security, Washington, DC 20528. For components of DHS, the System Manager can be found at *http://www.dhs.gov/foia* under ''contacts.''

NOTIFICATION PROCEDURE:

Individuals seeking notification of and access to any record contained in this system of records, or seeking to contest its content, may submit a request in writing to the Headquarters' or component's FOIA Officer, whose contact information can be found at *http://www.dhs.gov/foia* under ''contacts.'' If an individual believes more than one component maintains Privacy Act records concerning him or her the individual may submit the request to the Chief Privacy Officer, Department of Homeland Security, 245 Murray Drive, SW., Building 410, STOP–0550, Washington, DC 20528.

When seeking records about yourself from this system of records or any other Departmental system of records your request must conform with the Privacy Act regulations set forth in 6 CFR Part 5. You must first verify your identity, meaning that you must provide your full name, current address and date and place of birth. You must sign your request, and your signature must either be notarized or submitted under 28 U.S.C. 1746, a law that permits statements to be made under penalty of perjury as a substitute for notarization. While no specific form is required, you may obtain forms for this purpose from the Director, Disclosure and FOIA, *http://www.dhs.gov* or 1–866–431–0486.

In addition you should provide the following:

- An explanation of why you believe the Department would have information on you,
- Identify which component(s) of the Department you believe may have the information about you,
- Specify when you believe the records would have been created,
- Provide any other information that will help the FOIA staff determine which DHS component agency may have responsive records,
- If your request is seeking records pertaining to another living individual, you must include a statement from that individual certifying his/her agreement for you to access his/her records.

Without this bulleted information the component(s) may not be able to conduct an effective search, and your request may be denied due to lack of specificity or lack of compliance with applicable regulations.

RECORD ACCESS PROCEDURES:

See ''Notification procedure'' above.

CONTESTING RECORD PROCEDURES:

See ''Notification procedure'' above.

RECORD SOURCE CATEGORIES:

Information originates with DHS and its components.

EXEMPTIONS CLAIMED FOR THE SYSTEM:

None.

Dated: October 7, 2008.

Hugo Teufel III,

Chief Privacy Officer, Department of Homeland Security.

[FR Doc. E8–24749 Filed 10–16–08; 8:45 am]

BILLING CODE 4410–10–P

DEPARTMENT OF HOMELAND SECURITY

Office of the Secretary

[Docket No. DHS–2008–0022]

Privacy Act of 1974; Department of Homeland Security Emergency Personnel Location Records System of Records

AGENCY: Privacy Office; DHS.

ACTION: Notice of Privacy Act system of records.

SUMMARY: In accordance with the Privacy Act of 1974 and as part of the Department of Homeland Security's ongoing effort to review and update legacy system of record notices, the Department of Homeland Security proposes to consolidate two legacy record systems: FEMA/NP–1 Emergency Assignment Records, September 7, 1990, and FEMA/NP–2 Key Personnel Central Locator List, September 7, 1990, into one Department of Homeland Security-wide system of records. This system will allow the Department of Homeland Security and its components to contact necessary Departmental personnel, including Federal employees and contractors, and other individuals to respond to all hazards emergencies including technical, manmade or natural disasters, or to participate in exercises. Categories of individuals, categories of records, and the routine uses of these legacy system of records notices have been consolidated and updated to better reflect the Department's emergency personnel location record systems. This reclassified system, titled Emergency Personnel Location Records, will be included in the Department's inventory of record systems.

DATES: Submit comments on or before November 17, 2008.

ADDRESSES: You may submit comments, identified by docket number DHS–2008–0022 by one of the following methods:

- *Federal e-Rulemaking Portal: http://www.regulations.gov.* Follow the instructions for submitting comments.
- *Fax:* 1–866–466–5370.
- *Mail:* Hugo Teufel III, Chief Privacy Officer, Privacy Office, Department of Homeland Security, Washington, DC 20528.
- *Instructions:* All submissions received must include the agency name and docket number for this rulemaking. All comments received will be posted without change to *http://www.regulations.gov,* including any personal information provided.
- *Docket:* For access to the docket, to read background documents, or comments received go to *http://www.regulations.gov.*

FOR FURTHER INFORMATION CONTACT: For general questions and privacy issues please contact: Hugo Teufel III (703–235–0780), Chief Privacy Officer, Privacy Office, Department of Homeland Security, Washington, DC 20528.

SUPPLEMENTARY INFORMATION:

I. Background

Pursuant to the savings clause in the Homeland Security Act of 2002 Public Law 107–296, Section 1512, 116 Stat. 2310 (November 25, 2002), the Department of Homeland Security (DHS) and its components and offices have relied on preexisting Privacy Act systems of records notices for the collection and maintenance of records that concern key DHS personnel (to include Federal employees and contractors) and other individuals who may be required to respond to all hazards emergencies including technical, manmade or natural disasters, or to participate in exercises.

As part of its efforts to streamline and consolidate its Privacy Act record systems, DHS is establishing an agency-wide system of records under the Privacy Act (5 U.S.C. 552a) for DHS Emergency Personnel Location records. This will ensure that all components of DHS follow the same privacy rules for collecting and handling Emergency Personnel Location records.

In accordance with the Privacy Act of 1974 and as part of DHS's ongoing effort to review and update legacy system of record notices, DHS proposes to consolidate two legacy record systems: FEMA/NP–1 Emergency Assignment Records (55 FR 37182 September 7, 1990) and FEMA/NP–2 Key Personnel Central Locator List (55 FR 37182 September 7, 1990) into one DHS-wide system of records. This system will allow DHS and its components to contact necessary DHS personnel, including Federal employees and contractors, and other individuals to respond to all hazards emergencies including technical, manmade or natural disasters, or to participate in exercises. Categories of individuals, categories of records, and the routine uses of these legacy system of records notices have been consolidated and updated to better reflect the Department's emergency personnel location record systems. This reclassified system, titled Emergency Personnel Location Records, will be included in the Department's inventory of record systems.

II. Privacy Act

The Privacy Act embodies fair information principles in a statutory framework governing the means by which the United States Government collects, maintains, uses, and disseminates individuals' records. The Privacy Act applies to information that is maintained in a ''system of records.'' A ''system of records'' is a group of any records under the control of an agency for which information is retrieved by the name of an individual or by some identifying number, symbol, or other identifying particular assigned to the individual. In the Privacy Act, an individual is defined to encompass United States citizens and legal permanent residents. As a matter of policy, DHS extends administrative Privacy Act protections to all individuals where systems of records maintain information on U.S. citizens,

lawful permanent residents, and visitors. Individuals may request access to their own records that are maintained in a system of records in the possession or under the control of DHS by complying with DHS Privacy Act regulations, 6 CFR Part 5.

The Privacy Act requires that each agency publish in the **Federal Register** a description denoting the type and character of each system of records in order to make agency recordkeeping practices transparent, to notify individuals about the use of their records, and to assist the individual to more easily find files within the agency. Below is a description of the Emergency Personnel Location Records System of Records.

In accordance with 5 U.S.C. 552a(r), DHS has provided a report of this revised system of records to the Office of Management and Budget and to the Congress.

System of Records:

DHS/ALL–014.

SYSTEM NAME:

Department of Homeland Security Emergency Personnel Location Records.

SECURITY CLASSIFICATION:

Unclassified.

SYSTEM LOCATION:

Records are maintained at several Headquarters locations and in component offices of DHS, in both Washington, DC and field locations.

CATEGORIES OF INDIVIDUALS COVERED BY THE SYSTEM:

Key DHS personnel (to include Federal employees and contractors) and other individuals who may be required to respond to all hazards emergencies including technical, manmade or natural disasters, or to participate in exercises. Also included are individuals whom employees identify to be contacted in the event of an all hazards emergency.

CATEGORIES OF RECORDS IN THE SYSTEM:

Categories of records in this system include:

- Individual's name;
- Individual's social security number (security clearance information);
- Individual's date of birth (security clearance information);
- Individual's work address;
- Individual's title;
- Individual's position and duty status;
- Individual's supervisor;
- Individual's clearance and access level;
- Individual's skills inventory;
- Individual's (volunteered) medical information;
- Individual's home address;
- Individual's e-mail addresses;
- Individual's office phone number;
- Individual's home phone number;
- Individual's cell phone number;
- Individual's cell pin number;
- Individual's fax number;
- Individuals pager number;
- Individuals height, weight, and other personal characteristics, if applicable;
- Individual's emergency response group/non-emergency response group status;
- Emergency contact's name;
- Emergency contact's relationship to individual;
- Emergency contact's work address;
- Emergency contact's home address;
- Emergency contact's office phone number;
- Emergency contact's home phone number;
- Emergency contact's cell phone number;
- Emergency contact's e-mail addresses;
- Emergency recall rosters;
- Identification credentials for access to regulated facilities;
- Contractor's company or organization name;
- Any other phone numbers that may be needed in the event of an all hazards emergency.

AUTHORITY FOR MAINTENANCE OF THE SYSTEM:

5 U.S.C. 301; The Federal Records Act, 44 U.S.C. 3101; Homeland Security Act of 2002; Public Law 107–296, 6 U.S.C. 121; and Executive Order 9373.

PURPOSE(S):

The purpose of this system is to contact necessary DHS personnel, including Federal employees and contractors, and other individuals to respond to all hazards emergencies including technical, manmade or natural disasters, or to participate in exercises. In addition, the information in this system will facilitate the contact of DHS personnel's families or other in the event of a personal emergency such as an injury concerning the workplace.

ROUTINE USES OF RECORDS MAINTAINED IN THE SYSTEM, INCLUDING CATEGORIES OF USERS AND THE PURPOSES OF SUCH USES:

In addition to those disclosures generally permitted under 5 U.S.C. 552a(b) of the Privacy Act, all or a portion of the records or information contained in this system may be disclosed outside DHS as a routine use pursuant to 5 U.S.C. 552a(b)(3) as follows:

A. To the Department of Justice (including United States Attorney Offices) or another Federal agency conducting litigation or in proceedings before any court, adjudicative or administrative body when it is necessary to the litigation and one of the following is a party to the litigation or has an interest in such litigation:

1. DHS or any component thereof;

2. Any employee of DHS in his/her official capacity;

3. Any employee of DHS in his/her individual capacity where the Department of Justice or DHS has agreed to represent the employee; or

4. The United States or any agency thereof, is a party to the litigation or has an interest in such litigation, and DHS determines that the records are both relevant and necessary to the litigation and the use of such records is compatible with the purpose for which DHS collected the records.

B. To a congressional office from the record of an individual in response to an inquiry from that congressional office made at the request of the individual to whom the record pertains.

C. To the National Archives and Records Administration or other Federal government agencies pursuant to records management inspections being conducted under the authority of 44 U.S.C. 2904 and 2906.

D. To an agency, organization, or individual for the purpose of performing audit or oversight operations as authorized by law, but only such information as is necessary and relevant to such audit or oversight function.

E. To appropriate agencies, entities, and persons when:

1. DHS suspects or has confirmed that the security or confidentiality of information in the system of records has been compromised;

2. The Department has determined that as a result of the suspected or confirmed compromise there is a risk of harm to economic or property interests, identity theft or fraud, or harm to the security or integrity of this system or other systems or programs (whether maintained by DHS or another agency or entity) or harm to the individual who relies upon the compromised information; and

3. The disclosure made to such agencies, entities, and persons is reasonably necessary to assist in connection with DHS's efforts to respond to the suspected or confirmed compromise and prevent, minimize, or remedy such harm.

F. To contractors and their agents, grantees, experts, consultants, and others performing or working on a contract, service, grant, cooperative

agreement, or other assignment for DHS, when necessary to accomplish an agency function related to this system of records. Individuals provided information under this routine use are subject to the same Privacy Act requirements and limitations on disclosure as are applicable to DHS officers and employees.

G. To an appropriate Federal, State, tribal, local, international, or foreign law enforcement agency or other appropriate authority charged with investigating or prosecuting a violation or enforcing or implementing a law, rule, regulation, or order, where a record, either on its face or in conjunction with other information, indicates a violation or potential violation of law, which includes criminal, civil, or regulatory violations and such disclosure is proper and consistent with the official duties of the person making the disclosure.

H. To an appropriate Federal, state or local agency, including the Department of Defense and specifically the U.S. Air Force, if the information is relevant and necessary, for the requesting agency's approval on the issuance of a security clearance or for the purpose of providing support in an all hazards emergencies including technical, manmade or natural disasters.

I. To Federal, State, and local governmental agencies or executive offices, relief agencies, 501 c3s, and non-governmental organizations, when disclosure is appropriate for proper coordination of homeland security efforts or assistance, protective functions conducted pursuant to title 18 of the United States Code, section 3056 or 3056a, or the proper performance of the official duties required in response to all hazards or national security emergencies including technical, manmade or natural disasters.

J. To identified emergency contacts of:

1. DHS personnel, including Federal employees and contractors;

2. Federal employees or contractors who participate in or conduct exercises; or

3. Federal employees or contractors who respond to all hazards emergencies including technical, manmade or natural disasters.

K. To the news media and the public, with the approval of the Chief Privacy Officer in consultation with counsel, when there exists a legitimate public interest in the disclosure of the information or when disclosure is necessary to preserve confidence in the integrity of DHS or is necessary to demonstrate the accountability of DHS's officers, employees, or individuals covered by the system, except to the extent it is determined that release of the specific information in the context of a particular case would constitute an unwarranted invasion of personal privacy.

DISCLOSURE TO CONSUMER REPORTING AGENCIES:

None.

POLICIES AND PRACTICES FOR STORING, RETRIEVING, ACCESSING, RETAINING, AND DISPOSING OF RECORDS IN THE SYSTEM:

STORAGE:

Records in this system are stored electronically or on paper in secure facilities in a locked drawer behind a locked door. The records are stored on magnetic disc, tape, digital media, and CD–ROM.

RETRIEVABILITY:

Data may be retrieved by an individual's name, location, personnel number (if applicable), and/or other personal identifier.

SAFEGUARDS:

Records in this system are safeguarded in accordance with applicable rules and policies, including all applicable DHS automated systems security and access policies. Strict controls have been imposed to minimize the risk of compromising the information that is being stored. Access to the computer system containing the records in this system is limited to those individuals who have a need to know the information for the performance of their official duties and who have appropriate clearances or permissions.

RETENTION AND DISPOSAL:

Records regarding all hazard emergencies are destroyed three years after issuance of a new plan or directive, in accordance with National Archives and Records Administration General Records Schedule 18, Item 27. Records regarding supervisors' files will be destroyed within 1 year after separation or transfer of the employee, in accordance with National Archives and Records Administration General Records Schedule 1, Item 18.

SYSTEM MANAGER AND ADDRESS:

For Headquarters components of DHS, the System Manager is the Director of Departmental Disclosure, Department of Homeland Security, Washington, DC 20528. For components of DHS, the System Manager can be found at *http://www.dhs.gov/foia* under ''contacts.''

NOTIFICATION PROCEDURE:

Individuals seeking notification of and access to any record contained in this system of records, or seeking to contest its content, may submit a request in writing to the Headquarters' or component's FOIA Officer, whose contact information can be found at *http://www.dhs.gov/foia* under ''contacts.'' If an individual believes more than one component maintains Privacy Act records concerning him or her the individual may submit the request to the Chief Privacy Officer, Department of Homeland Security, 245 Murray Drive, SW., Building 410, STOP–0550, Washington, DC 20528.

When seeking records about yourself from this system of records or any other Departmental system of records your request must conform with the Privacy Act regulations set forth in 6 CFR Part 5. You must first verify your identity, meaning that you must provide your full name, current address and date and place of birth. You must sign your request, and your signature must either be notarized or submitted under 28 U.S.C. 1746, a law that permits statements to be made under penalty of perjury as a substitute for notarization. While no specific form is required, you may obtain forms for this purpose from the Director, Disclosure and FOIA, *http://www.dhs.gov* or 1–866–431–0486. In addition you should provide the following:

- An explanation of why you believe the Department would have information on you,
- Identify which component(s) of the Department you believe may have the information about you,
- Specify when you believe the records would have been created,
- Provide any other information that will help the FOIA staff determine which DHS component agency may have responsive records,
- If your request is seeking records pertaining to another living individual, you must include a statement from that individual certifying his/her agreement for you to access his/her records.

Without this bulleted information the component(s) may not be able to conduct an effective search, and your request may be denied due to lack of specificity or lack of compliance with applicable regulations.

RECORD ACCESS PROCEDURES:

See ''Notification procedure'' above.

CONTESTING RECORD PROCEDURES:

See ''Notification procedure'' above.

RECORD SOURCE CATEGORIES:

Information originates within DHS and its components and offices along with personnel who submit information such as emergency contacts.

EXEMPTIONS CLAIMED FOR THE SYSTEM:

None.

Dated: October 7, 2008.

Hugo Teufel III,

Chief Privacy Officer, Department of Homeland Security.

[FR Doc. E8–24807 Filed 10–16–08; 8:45 am]

BILLING CODE 4410–10–P

DEPARTMENT OF HOMELAND SECURITY

U.S. Citizenship and Immigration Services

Agency Information Collection Activities: Form I–687, Revision of a Currently Approved Information Collection; Comment Request

ACTION: 60-Day Notice of Information Collection Under Review: Form I–687, Application for Status as Temporary Resident under Section 245A of the Immigration and Nationality Act; OMB Control No. 1615–0090.

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 December 16, 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 1615–0090 in the subject box.

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 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 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: Revision of a currently approved information collection.*

(2) *Title of the Form/Collection:* Application for Status as Temporary Resident under Section 245A of the Immigration and Nationality Act.

(3) *Agency form number, if any, and the applicable component of the Department of Homeland Security sponsoring the collection:* Form I–687. 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 and Households. The collection of information on Form I–687 is required to verify the applicant's eligibility for temporary status, and if the applicant is deemed eligible, to grant him or her the benefit sought.

(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 1 hour and 10 minutes (1.16 hours) per response.

(6) *An estimate of the total public burden (in hours) associated with the collection:* 116,000 annual burden hours.

If you have additional comments, suggestions, or need a copy of the proposed information collection instrument with instructions, or additional information, please visit the USCIS Web site at: *http://uscis.gov/graphics/formsfee/forms/pra/index.htm.*

If additional information is required contact: USCIS, Regulatory Management Division, 111 Massachusetts Avenue, Suite 3008, Washington, DC 20529, (202) 272–8377.

Dated: October 10, 2008.

Stephen Tarragon,

Deputy Director, Regulatory Management Division, U.S. Citizenship and Immigration Services, Department of Homeland Security.

[FR Doc. E8–24692 Filed 10–16–08; 8:45 am]

BILLING CODE 9111–97–P

DEPARTMENT OF HOMELAND SECURITY

U.S. Customs and Border Protection

Assessment and Mitigation of Claims for Liquidated Damages for Nonpayment or Late Payment of Estimated Duties Under the Automated Commercial Environment (ACE) Periodic Monthly Statement Payment Process Test

AGENCY: U.S. Customs and Border Protection, Department of Homeland Security.

ACTION: General notice.

SUMMARY: This document announces guidelines for the assessment of claims for liquidated damages and the mitigation of those claims when participants in the National Customs Automation Program (NCAP) test for the Periodic Monthly Statement Payment Process fail to pay estimated duties in the time period prescribed by law. In addition, CBP may exercise the authority to suspend any bond principal (the importer of record) from participation in the Periodic Monthly Payment Statement test and require that the bond principal pay estimated duties and fees on an entry-by-entry basis. Further, CBP may exercise the authority to require the bond principal to file entry summary documentation with estimated duties and fees attached before merchandise is released from any CBP port.

DATES: *Effective Date:* The guidelines are effective on October 17, 2008.

ADDRESSES: Comments concerning this Notice should be submitted via e-mail to Jeremy Baskin at *Jeremy.Baskin@dhs.gov.*

SUPPLEMENTARY INFORMATION:

Background

On February 4, 2004, Customs and Border Protection (CBP) published a General Notice in the **Federal Register** (69 FR 5362) announcing the National Customs Automation Program (NCAP) test for the Periodic Monthly Payment Statement Process. The test, which is part of CBP's Automated Commercial Environment (ACE), benefits participants by giving them access to operational data through the ACE Secured Data Portal (''ACE Portal''), which provides them the capability to interact electronically with CBP, and by allowing them to deposit estimated duties and fees on a monthly basis based on a Periodic Monthly Statement generated by CBP.

As provided in the February 4, 2004 General Notice announcing the test,

participants in the Periodic Monthly Statement test are required to schedule entries for monthly payment. A Periodic Monthly Payment Statement will list Periodic Daily Statements that have been designated for monthly payment. The Periodic Monthly Statement can be created on a national basis by an ABI filer. If an importer chooses to file the Periodic Monthly Statement on a national basis, it must use its filer code and schedule and pay the monthly statements. The Periodic Monthly Statement will be routed under existing CBP procedures. Brokers will only view/receive information that they have filed on an importer's behalf. ACE will not route a Periodic Monthly Statement to a broker through ABI that lists information filed by another broker.

On August 8, 2005, CBP published a General Notice in the **Federal Register** (70 FR 45736) changing the time period allowed for the deposit of the duties and fees from the 15th calendar day to the 15th working day of the month following the month in which the goods are either entered or released. That change was made in order to comply with the provisions of section 2004 of the Miscellaneous Trade and Technical Corrections Act of 2004, Public Law 108–429, which extended the time of deposit of those estimated duties and fees. On January 20, 2006, CBP published a General Notice in the **Federal Register** clarifying that CBP must receive the settlement for the credit by the 15th working day in order to have the periodic monthly statement marked paid and treated as a timely payment.

On September 22, 2005, CBP published a General Notice in the **Federal Register** (70 FR 55623) establishing that if the bond principal is late with a periodic monthly statement by more than two business days, CBP will notify both the bond principal and the surety on the affected bond that the merchandise will not be released from any CBP port until the entry summary documentation is filed with estimated duties and fees attached. The bond principal will only be released from such a requirement upon full payment of any unpaid estimated duties and fees that have come due under the Periodic Monthly Payment Statement Process test. In addition, this Notice eliminated the requirement that participants in the Periodic Monthly Statement test provide a bond rider covering the periodic payment of estimated duties and fees, but in turn allowed sureties to terminate bonds with three business days' notice rather than 30 days as required by current regulation. The Notice indicated that nonpayment or untimely payment of estimated duties and fees, however, may result in action by CBP to impose sanctions on the delinquent importer of record.

The failure to pay estimated duties under Periodic Monthly Statement by the 15th working day of the month following the month in which the merchandise was entered or released is a breach of the bond condition found at 19 CFR 113.62(a)(1)(i) that requires that estimated duties be paid in the time period prescribed by law or regulation. The breach of this obligation can result in the assessment of liquidated damages against the bond principal and surety, jointly and severally.

In order for estimated duties and fees to be considered to be paid, the money must be available in the payor's account for transfer to CBP on the date that the statement filer designates for payment (which must be on or before the date that the payment is due) and funds must transfer to CBP (either pulled from the account by CBP via Automated Clearing House (ACH) Debit or pushed to CBP by the payer via ACH Credit) with sufficient information for CBP to be able to apply the money to the appropriate debt. When insufficient information is given and CBP cannot identify the debt to which the payment should be applied, the payment will be held by CBP until sufficient information is received to allow CBP to apply the payment. Delays resulting from lack of sufficient information may result in the payment being considered late.

Description of the Changes

1. Assessment of Liquidated Damages

Rather than resort to the sole remedy of requiring a bond principal who has not paid Periodic Monthly Payment Statement estimated duties in a timely fashion to file entry summary documentation with estimated duties and fees attached before its merchandise may be released from any CBP port, CBP has decided to revise the current procedure. Through implementation of these guidelines, CBP is exercising the authority to assess liquidated damages against the bond principal and surety, jointly and severally, when such a failure to pay or untimely payment occurs. This document publishes guidelines for the assessment and mitigation of these claims.

When a Periodic Monthly Statement estimated duty payment is not fully paid on or before the 15th working day after the month in which the entry or release of the merchandise occurred, CBP has the authority to assess liquidated damages against the bond principal and surety, jointly and severally, for the failure to pay those duties in a timely manner. As a matter of policy, before issuing any claim or claims, CBP will notify the statement filer (either the importer principal and/or his customs broker) electronically or by paper notice on or before the first day of the month following the month that the payment was due that those estimated duties and fees have not been paid. The statement filer will then have two working days from the date of notification to pay the estimated duties and fees or correct the situation. If the estimated duties and fees are not paid or the situation corrected after this two-working day period, then CBP will issue liquidated damages claims to bond principals and sureties, jointly and severally, for non-payment of the estimated duties and fees. If the estimated duties and fees are paid in an untimely manner, then CBP may issue liquidated damages claims or a broker penalty claim in a manner consistent with the language in the NOTE to section 2.a. under the Assessment and Mitigation Guidelines set forth later in this document. Payment of the estimated duties and fees within the two-working day period does not relieve any charged party from incurring a claim for late payment of those estimated duties and fees.

Notwithstanding the provisions of 19 CFR 172.1 and 172.4, any notification of the assessment of claims for liquidated damages for non-payment of estimated duties and fees will be considered to be a demand on surety for the unpaid estimated duties and fees. Bond principals and sureties will share concurrent petitioning time frames for this violation.

For any claim for liquidated damages assessed for untimely payment of estimated duties and fees (as opposed to non-payment of estimated duties and fees), the petitioning process as provided by current regulation will be in effect.

2. Consequences of Non-Payment of Estimated Duties and Fees; Suspension From the Test

Notwithstanding any other General Notice provision relating to removal of a party from participation in the ACE test, if estimated duties and fees due under the Periodic Monthly Payment Statement test are unpaid and a claim for liquidated damages for non-payment of estimated duties and fees is assessed, CBP may deny the bond principal the privilege of paying estimated duties and fees via the Periodic Monthly Payment Statement process. CBP will have the discretion to either require the bond principal to pay estimated duties and

fees on an entry-by-entry basis or require the bond principal to file entry summary documentation with estimated duties and fees attached before its merchandise may be released from any CBP port. Any bond principal that is denied the privilege of paying estimated duties and fees via the Periodic Monthly Payment Statement process will be so denied for a minimum of three months. If during that three-month period the bond principal establishes a record of timely payment of estimated duties and fees on an entry-by-entry basis, it may petition CBP to participate again in the periodic monthly statement test. CBP will notify the surety of any bond principals removed or reinstated to the periodic monthly statement test.

Any Customs broker who is responsible for repeated incidents of late or non-payment of estimated duties under the Periodic Monthly Payment Statement test may be subject to penalties for violation of the provisions of 19 U.S.C 1641. In the most serious cases of repeat non-compliance, license revocation or suspension actions may be brought.

Assessment and Mitigation Guidelines

1. Periodic Monthly Statement Failure To Pay Estimated Duties

a. Assessment

When duties and fees due under a periodic monthly statement payment are not paid, liquidated damages in an amount equal to two times the unpaid estimated duties and fees or $1,000 (whichever is greater) may be assessed for violation of 19 U.S.C 1505, 19 CFR 113.62(a)(1)(i), and 19 CFR 113.62(l)(4). No claim for liquidated damages can be issued for an amount in excess of the bond obligated to guarantee payment of these estimated duties and fees. CBP will provide notification of claims for liquidated damages to the bond principal and surety.

Note: The importer/bond principal is responsible for payment of estimated duties and fees and the bond amount does not limit his liability for payment of those duties and fees.

b. Petition for Relief

A petition for relief may be filed in accordance with the provisions of 19 CFR 172.2 and 172.3, except that the time period to submit the petition when estimated duties have not been paid shall be 10 days from the date of notification.

c. Mitigation of Claim

Unless a petition for relief shows that the duties and fees were not owed or that the duties and fees were paid, there will be no relief afforded from a claim for liquidated damages for failure to pay estimated duties and fees due under the Periodic Monthly Statement until the estimated duties and fees owed are paid. Once estimated duties and fees are paid, CBP will re-issue liquidated damages as a claim for untimely payment of estimated duties and fees in accordance with paragraph 2 below. Failure to pay rightfully owed estimated duties and fees will result in removal of the bond principal from the Periodic Monthly Statement test and may result in the requirement that the bond principal file entry summary documentation with estimated duties and fees attached before its merchandise may be released from any CBP port.

2. Periodic Monthly Statement Untimely Payment of Estimated Duties and Fees

a. Assessment

When duties and fees due under a periodic monthly statement payment are paid in an untimely manner, liquidated damages in an amount equal to two times the unpaid estimated duties and fees or $1,000 (whichever is greater) may be assessed for violation of 19 U.S.C. 1505, 19 CFR 113.62(a)(1)(i), and 19 CFR 113.62(l)(4). No claim can be issued for an amount in excess of the bond obligated to guarantee payment of these estimated duties and fees. Notification of the claim by CBP will be provided to the bond principal and surety. An Option 1 mitigation may be offered on the face of the notification of the claim, with Option 1 amount being calculated in accordance with these guidelines.

Note: When estimated duties and fees are paid untimely but prior to the expiration of the two-working day period afforded to ensure that appropriate monies are paid, in lieu of liquidated damages, CBP may issue a $30,000 broker penalty against a broker for failing to exercise responsible supervision and control over the customs business it conducts in violation of the provisions of 19 U.S.C. 1641(d)(1)(c) and 19 U.S.C. 1641(b)(4). If such a claim is issued, an Option 1 amount consistent with the provisions of section 2.c. may be authorized.

b. Petition for Relief

A petition for relief may be filed in accordance with the provisions of 19 CFR 172.2 and 172.3. In lieu of filing a petition for relief, an Option 1 amount, described below, may be paid in settlement of any claim resulting from the untimely payment of a periodic monthly statement payment.

c. Mitigation of Claim

i. Option 1 Offer of Payment

An offer of payment of the Option 1 amount in settlement of the claim will be authorized only after payment of estimated duties and fees.

ii. Calculation of Option 1 Payment if a Failure To Pay Claim Has Not Been Issued

If a claim for liquidated damages for failure to pay estimated duties under periodic monthly statement has not been issued to the bond principal and surety with regard to the untimely payment, the Option 1 amount will be calculated at one percent (1%) of the untimely paid duties and fees (but not less than $1,000 nor more than $4,000) plus an amount equal to interest that would have accumulated had it been calculated at the Internal Revenue Service rate beginning the time the payment was due until it is paid. The amount equal to interest charge will accrue against both the principal and surety from the date the payment was due until the date of payment.

iii. Calculation of Option 1 Payment When a Failure To Pay Claim Has Been Issued

When a failure to pay estimated duties under periodic monthly statement has been issued to the bond principal and surety with regard to the particular claim, the Option 1 amount will be calculated at one and one-half percent (1½%) of the untimely paid duties and fees (but not less than $1,500 nor more than $6,000) plus an amount equal to interest that would have accumulated had it been calculated at the Internal Revenue Service rate beginning the time the payment was due until it is paid. The amount equal to interest charge will accrue for both the principal and surety from the date the payment was due until the date of payment.

iv. Filing a Petition (Option II)

A petition may be filed in accordance with the provisions of 19 CFR part 172. CBP may remit or mitigate any claim to an amount that exceeds the Option 1 amount if the facts and circumstances so warrant.

v. Failure To Pay/Customs Brokers

If in the time period prescribed in the notice, a customs broker fails to pay the Option 1 amount or petition for relief in a 1641 assessment described in the NOTE above, liquidated damages claims will be issued against all bond principals and sureties whose bonds were breached.

3. Extraordinary Relief

In recognition that as new participants join the test that electronic system malfunctions may occur, CBP is not precluded from considering petitions for relief and granting extraordinary relief when system failure is determined to be the cause of a nonpayment or late payment.

4. Enforcement Discretion

CBP always retains the right to exercise enforcement discretion and refrain from issuing a claim for liquidated damages or penalty if circumstances warrant. These situations will be considered on a case-by-case basis.

5. Termination of Bonds

Nothing in this Notice changes any procedures or authorities regarding termination of bonds described in the Notice of September 22, 2005 (70 FR 55623).

6. Delegation of Authority

For purposes of the test, the authority to assess claims for liquidated damages resides with the Office of Finance, Revenue Division, Indianapolis, Indiana. The authority to mitigate or cancel any claim for liquidated damages arising for failure to pay or the untimely payment of estimated duties and fees under the Periodic Monthly Payment Statement test or to refrain from issuing such a claim shall reside with CBP Headquarters, Office of International Trade. Petitions for relief should be addressed to officials designated on the CF–5955A.

Dated: October 10, 2008.

Daniel Baldwin,

Assistant Commissioner, Office of International Trade.

[FR Doc. E8–24696 Filed 10–16–08; 8:45 am]

BILLING CODE 9111–14–P

DEPARTMENT OF HOUSING AND URBAN DEVELOPMENT

[Docket No. FR–5186–N–42]

Federal Property Suitable as Facilities To Assist the Homeless

AGENCY: Office of the Assistant Secretary for Community Planning and Development, HUD.

ACTION: Notice.

SUMMARY: This Notice identifies unutilized, underutilized, excess, and surplus Federal property reviewed by HUD for suitability for possible use to assist the homeless.

FOR FURTHER INFORMATION CONTACT: Kathy Ezzell, Department of Housing and Urban Development, 451 Seventh Street, SW., Room 7266, Washington, DC 20410; telephone (202) 708–1234; TTY number for the hearing- and speech-impaired (202) 708–2565 (these telephone numbers are not toll-free), or call the toll-free Title V information line at 800–927–7588.

SUPPLEMENTARY INFORMATION: In accordance with 24 CFR part 581 and section 501 of the Stewart B. McKinney Homeless Assistance Act (42 U.S.C. 11411), as amended, HUD is publishing this Notice to identify Federal buildings and other real property that HUD has reviewed for suitability for use to assist the homeless. The properties were reviewed using information provided to HUD by Federal landholding agencies regarding unutilized and underutilized buildings and real property controlled by such agencies or by GSA regarding its inventory of excess or surplus Federal property. This Notice is also published in order to comply with the December 12, 1988 Court Order in *National Coalition for the Homeless* v. *Veterans Administration,* No. 88–2503–OG (D.D.C.).

Properties reviewed are listed in this Notice according to the following categories: Suitable/available, suitable/unavailable, suitable/to be excess, and unsuitable. The properties listed in the three suitable categories have been reviewed by the landholding agencies, and each agency has transmitted to HUD: (1) Its intention to make the property available for use to assist the homeless, (2) its intention to declare the property excess to the agency's needs, or (3) a statement of the reasons that the property cannot be declared excess or made available for use as facilities to assist the homeless.

Properties listed as suitable/available will be available exclusively for homeless use for a period of 60 days from the date of this Notice. Where property is described as for ''off-site use only'' recipients of the property will be required to relocate the building to their own site at their own expense. Homeless assistance providers interested in any such property should send a written expression of interest to HHS, addressed to Theresa Rita, Division of Property Management, Program Support Center, HHS, room 5B–17, 5600 Fishers Lane, Rockville, MD 20857; (301) 443–2265. (This is not a toll-free number.) HHS will mail to the interested provider an application packet, which will include instructions for completing the application. In order to maximize the opportunity to utilize a suitable property, providers should submit their written expressions of interest as soon as possible. For complete details concerning the processing of applications, the reader is encouraged to refer to the interim rule governing this program, 24 CFR part 581.

For properties listed as suitable/to be excess, that property may, if subsequently accepted as excess by GSA, be made available for use by the homeless in accordance with applicable law, subject to screening for other Federal use. At the appropriate time, HUD will publish the property in a Notice showing it as either suitable/available or suitable/unavailable.

For properties listed as suitable/unavailable, the landholding agency has decided that the property cannot be declared excess or made available for use to assist the homeless, and the property will not be available.

Properties listed as unsuitable will not be made available for any other purpose for 20 days from the date of this Notice. Homeless assistance providers interested in a review by HUD of the determination of unsuitability should call the toll free information line at 1–800–927–7588 for detailed instructions or write a letter to Mark Johnston at the address listed at the beginning of this Notice. Included in the request for review should be the property address (including zip code), the date of publication in the **Federal Register**, the landholding agency, and the property number.

For more information regarding particular properties identified in this Notice (*i.e.*, acreage, floor plan, existing sanitary facilities, exact street address), providers should contact the appropriate landholding agencies at the following addresses: AGRICULTURE: Ms. Marsha Pruitt, Department of Agriculture, Reporters Building, 300 7th St, SW., Washington, DC 20250; (202) 720–4335; COAST GUARD: Commandant, United States Coast Guard, Attn: Teresa Sheinberg, 2100 Second St, SW., Rm 6109, Washington, DC 20593–0001; (202) 267–6142; GSA: Mr. John Smith, Deputy Assistant Commissioner, General Services Administration, Office of Property Disposal, 18th & F Streets, NW., Washington, DC 20405; (202) 501–0084; INTERIOR: Mr. Michael Wright, Acquisition & Property Management, Department of the Interior, 1849 C Street, NW., MS2603, Washington, DC 20240; (202) 208–5399; NAVY: Mrs. Mary Arndt, Acting Director, Department of the Navy, Real Estate Services, Naval Facilities Engineering Command, Washington Navy Yard,

1322 Patterson Ave., SE., Suite 1000, Washington, DC 20374–5065; (202) 685–9305. (These are not toll-free numbers.)

Dated: October 9, 2008.

Mark R. Johnston,

Deputy Assistant Secretary for Special Needs.

TITLE V, FEDERAL SURPLUS PROPERTY PROGRAM

FEDERAL REGISTER REPORT FOR 10/17/2008

Suitable/Available Properties

Buildings (by State)

Arizona

Bldg. 149
Desert View
Grand Canyon AZ 86023
Landholding Agency: Interior
Property Number: 61200830001
Status: Excess
Comments: 791 sq. ft., needs rehab, most recent use—residential, off-site use only.

Indiana

John A. Bushemi USARC
3510 W 15th Ave
Gary IN 46404
Landholding Agency: GSA
Property Number: 54200830027
Status: Excess
GSA Number: 1–D–IN–0602
Comments: 18,689 sq. ft. admin bldg & 3780 sq. ft. maintenance bldg.

Maine

Bldg. 1010
Schoodic Ed & Rsh Ctr
Acadia National Park
Hancock ME
Landholding Agency: Interior
Property Number: 61200830007
Status: Unutilized
Comments: 14200 sq. ft., presence of asbestos/lead paint, most recent use—office, off-site use only.

Bldg. 1046
Schoodic Ed & Rsh Ctr
Acadia National Park
Hancock ME
Landholding Agency: Interior
Property Number: 61200830008
Status: Unutilized
Comments: 178 sq. ft., presence of lead paint, most recent use—storage, off-site use only.

Bldg. 1172
Schoodic Ed & Rsh Ctr
Acadia National Park
Hancock ME
Landholding Agency: Interior
Property Number: 61200830009
Status: Unutilized
Comments: 1200 sq. ft., presence of asbestos/lead paint, most recent use—shed, off-site use only.

Bldg. 1210
Schoodic Ed & Rsh Ctr
Acadia National Park
Hancock ME
Landholding Agency: Interior
Property Number: 61200830011
Status: Unutilized
Comments: 108 sq. ft., most recent use—shed, off-site use only.

Bldg. 1213
Schoodic Ed & Rsh Ctr
Acadia National Park
Hancock ME
Landholding Agency: Interior
Property Number: 61200830012
Status: Unutilized
Comments: 544 sq. ft., most recent use—maintenance, off-site use only.

Bldgs. 1224, 1232
Schoodic Ed & Rsh Ctr
Acadia National Park
Hancock ME
Landholding Agency: Interior
Property Number: 61200830013
Status: Unutilized
Comments: 543/768 sq. ft., most recent use—storage, off-site use only.

Pennsylvania

Fmr Visitor Ctr/Cyclorama Bldg
National Military Park
Gettysburg PA 17325
Landholding Agency: Interior
Property Number: 61200830002
Status: Excess
Comments: needs major rehab, off-site use only.

Washington

Blaine Parking Lot
SR 543
Blaine WA 98230
Landholding Agency: GSA
Property Number: 54200830028
Status: Excess
GSA Number: 9–G–WA–1242
Comments: 2665 sq. ft., border crossing.

Unsuitable Properties

Buildings (by State)

California

2 Trailers
Mades/Skyline Buddy
Paicines CA 95043
Landholding Agency: Interior
Property Number: 61200830003
Status: Excess
Reasons: Extensive deterioration.

Bldg. 1391
Marine Corps Base
Camp Pendleton CA 92055
Landholding Agency: Navy
Property Number: 77200830025
Status: Excess
Reasons: Extensive deterioration.

Bldgs. 1211, 1213, 1214, 1216
Marine Corps Base
Camp Pendleton CA 92055
Landholding Agency: Navy
Property Number: 77200830026
Status: Excess
Reasons: Extensive deterioration.

Bldgs. 52654, 52655
Marine Corps Base
Camp Pendleton CA 92055
Landholding Agency: Navy
Property Number: 77200830027
Status: Excess
Reasons: Extensive deterioration.

3512/3518 & 2780/2786
Concord Housing
Concord CA
Landholding Agency: Coast Guard
Property Number: 88200830002
Status: Unutilized
Reasons: Extensive deterioration.

Colorado

Bldg. 782
La Poudre Pass
Larimer CO 80517
Landholding Agency: Interior
Property Number: 61200830004
Status: Unutilized
Reasons: Extensive deterioration.

Maine

Bldgs. 1008, 1009, 1140, 1155
Schoodic Ed & Rsh Ctr
Acadia National Park
Hancock ME
Landholding Agency: Interior
Property Number: 61200830010
Status: Unutilized
Reasons: Extensive deterioration.

Bldgs. 1208, 1223
Schoodic Ed & Rsh Ctr
Acadia National Park
Hancock ME
Landholding Agency: Interior
Property Number: 61200830014
Status: Unutilized
Reasons: Extensive deterioration.

Maryland

Bldg. 1675
Andrews AFB
Andrews AFB MD
Landholding Agency: Navy
Property Number: 77200830028
Status: Unutilized
Reasons: Secured Area.

Bldgs. 3000, 3093
Andrews AFB
Andrews AFB MD
Landholding Agency: Navy
Property Number: 77200830029
Status: Unutilized
Reasons: Secured Area.

Bldgs. 3150, 3157, 3164, 3165
Andrews AFB
Andrews AFB MD
Landholding Agency: Navy
Property Number: 77200830030
Status: Unutilized
Reasons: Secured Area.

Pennsylvania

4 Tracts
101–03, 101–04, 101–05, 101–06
Valley Forge NHP
King of Prussia PA 19406
Landholding Agency: Interior
Property Number: 61200830005
Status: Excess
Reasons: Extensive deterioration.

Tracts 101–28, 101–29
Valley Forge NHP
Wayne PA 19480
Landholding Agency: Interior
Property Number: 61200830006
Status: Excess
Reasons: Extensive deterioration.

Texas

Bldgs. 1414, 3190
Naval Air Station
Joint Reserve Base
Ft. Worth TX 76127
Landholding Agency: Navy

Property Number: 77200830031
Status: Unutilized
Reasons: Secured Area.

Washington

Bldgs. 986, 987
Naval Air Station
Whidbey Island
Oak Harbor WA 98278
Landholding Agency: Navy
Property Number: 77200840001
Status: Unutilized
Reasons: Secured Area.

Bldg. 94
Naval Air Station
Whidbey Island
Oak Harbor WA 98278
Landholding Agency: Navy
Property Number: 77200840002
Status: Excess
Reasons: Secured Area.

Wisconsin

Bldg. 41
Forest Products Lab
Madison WI
Landholding Agency: Agriculture
Property Number: 15200830001
Status: Excess
Reasons: Extensive deterioration.

[FR Doc. E8–24533 Filed 10–16–08; 8:45 am]

BILLING CODE 4210–67–P

DEPARTMENT OF THE INTERIOR

Fish and Wildlife Service

[FWS–R4–ES–2008–N0276; 40120–1112–0000–F2]

Receipt of Application for an Incidental Take Permit for the City Gate Project in Collier County, FL

AGENCY: Fish and Wildlife Service, Interior.

ACTION: Notice.

SUMMARY: Citygate Development, LLC and CG II, LLC (Applicants) request an incidental take permit (ITP) pursuant to section 10(a)(1)(B) of the Endangered Species Act of 1973, as amended (Act) for the take of the red-cockaded woodpecker (*Picoides borealis*) and the Florida panther (*Puma* (=*Felis*) *concolor coryi*). The Applicants propose to develop 240 acres of occupied red-cockaded woodpecker and Florida panther habitat to construct a mixed-use, nonresidential, commercial/industrial office park complex (Project) in Collier County, Florida. The modification of this habitat is expected to result in incidental take, in the form of harm, of one group of red-cockaded woodpeckers and harassment of the Florida panther. The Applicants' Habitat Conservation Plan (HCP) describes the mitigation and minimization measures proposed to address the effects of the Project on the red-cockaded woodpecker and Florida panther. These measures are outlined in the **SUPPLEMENTARY INFORMATION** section below.

DATES: Written comments on the ITP application and HCP should be sent to the Southeast Regional Office (see **ADDRESSES**) and should be received on or before December 16, 2008.

ADDRESSES: Persons wishing to review the ITP application, Environmental Assessment (EA), and HCP may obtain a copy by writing the Service's Southeast Regional Office. Please reference permit number TE145823–0 in such requests. Documents will also be available for public inspection by appointment during normal business hours at the Regional Office, 1875 Century Boulevard, Suite 200, Atlanta, Georgia 30345, or Field Supervisor, South Florida Ecological Services Office, U.S. Fish and Wildlife Service, 1339 20th Street, Vero Beach, Florida 32960–3559.

FOR FURTHER INFORMATION CONTACT: Mr. David Dell, Regional Permit Coordinator (see **ADDRESSES**), telephone: 404/679–7313; or George Dennis, Ecologist, South Florida Ecological Services Office (see **ADDRESSES**), telephone: 772/562–3909 ext. 309.

SUPPLEMENTARY INFORMATION: If you wish to comment, you may submit comments by any one of several methods. Please reference permit application number TE145823–0 in such comments. You may mail comments to the Service's Regional Office (see **ADDRESSES**). You may also comment via the internet to *david_dell@fws.gov*. Please include your name and return address in your Internet message. If you do not receive a confirmation from the Service that we have received your Internet message, contact us directly at either telephone number listed above (see **FOR FURTHER INFORMATION CONTACT**). Finally, you may hand deliver comments to either Service office listed above (see **ADDRESSES**). Our practice is to make comments, including names and home addresses of respondents, available for public review during regular business hours. Individual respondents may request that we withhold their home address from the administrative record. We will honor such requests to the extent allowable by law. There may also be other circumstances in which we would withhold from the administrative record a respondent's identity, as allowable by law. If you wish us to withhold your name and address, you must state this prominently at the beginning of your comments. We will not, however, consider anonymous comments. We will make all submissions from organizations or businesses, and from individuals identifying themselves as representatives or officials of organizations or businesses, available for public inspection in their entirety.

The red-cockaded woodpecker is the only North American woodpecker that excavates its roost and nest cavities in living trees. It is nonmigratory, territorial, and lives in cooperative breeding social units, usually comprising two to six birds, called groups. Nest and roost cavities are almost always excavated in old-age living pines. In south Florida, hydric slash pine flatwoods provide the preferred nesting and foraging habitat for red-cockaded woodpeckers. The most recent surveys estimate the rangewide population of the red-cockaded woodpecker at 4,919 active groups. The estimated breeding population of the red-cockaded woodpecker in Florida is 1,500 groups, with about 75 percent occurring in the Florida Panhandle.

The Florida panther is the last subspecies of *Puma* still surviving in the eastern United States. Historically occurring throughout the southeastern United States, today the Florida panther is restricted to less than 5 percent of its historical range in one breeding population of approximately 100 animals, located in south Florida. Florida panthers are wide ranging, secretive, and occur at low densities. They require large contiguous areas to meet their social, reproductive, and energetic needs.

Limiting factors for the Florida panther are habitat availability, prey availability, and lack of human tolerance. Habitat loss, degradation, and fragmentation are among the greatest threats to Florida panther survival, while lack of human tolerance is one of the greatest threats to Florida panther recovery.

The Project proposes construction of a mixed-use, nonresidential, commercial/industrial office park complex that will substantially modify 240 acres comprising primarily pine flatwoods, and will result in take in the form of harm to red-cockaded woodpecker and harassment of the Florida panther, incidental to the carrying out of these otherwise lawful activities. Habitat alteration associated with the proposed development activities will reduce the availability of nesting, foraging, and sheltering habitat for one group of red-cockaded woodpecker. In addition, the loss of this habitat may result in take in the form of harassment of Florida panthers. The Applicants propose to mitigate take of

red-cockaded woodpeckers by acquiring, preserving, restoring, and managing in perpetuity 102 acres of occupied habitat. In addition, 336 acres of red-cockaded woodpecker habitat at another site in south Florida will be restored and four recruitment groups established. Subadult red-cockaded woodpeckers fledged in the Project area will be translocated to the recruitment clusters for 3 consecutive years. After 3 years the remaining adult red-cockaded woodpeckers will be translocated to the established recruitment clusters.

The acquired 102 acres and restored habitat within the red-cockaded woodpecker recruitment site will benefit the Florida panther through further habitat protection and enhancement. In addition the Applicants will partially fund a study to identify wildlife crossing sites to reduce Florida panther vehicular mortality in Collier County. Finally, the Applicants will construct a Florida panther wildlife crossing along County Road 846 in the Okaloacoochee Slough at a location known for high Florida panther vehicular mortality.

The Service has made a preliminary determination that the issuance of the ITP is not a major Federal action significantly affecting the quality of the human environment within the meaning of section 102(2)(C) of the National Environmental Policy Act (NEPA). This preliminary information may be revised due to public comment received in response to this notice and is based on information contained in the EA and HCP.

The Service will evaluate the HCP and comments submitted thereon to determine whether the application meets the requirements of section 10(a) of the Act (16 U.S.C. 1531 *et seq.*). If it is determined that those requirements are met, the ITP will be issued for incidental take of the red-cockaded woodpecker and Florida panther. The Service will also evaluate whether issuance of the section 10(a)(1)(B) ITP complies with section 7 of the Act by conducting an intra-Service section 7 consultation. The results of this consultation, in combination with the above findings, will be used in the final analysis to determine whether or not to issue the ITP. This notice is provided pursuant to section 10 of the Endangered Species Act and NEPA regulations (40 CFR 1506.6).

Dated: September 26, 2008.

Sam D. Hamilton,

Regional Director.

[FR Doc. E8–24770 Filed 10–16–08; 8:45 am]

BILLING CODE 4310–55–P

DEPARTMENT OF THE INTERIOR

Fish and Wildlife Service

[FWS–R9–IA–2008–N0279; 96300–1671–0000–P5]

Receipt of Applications for Permit

AGENCY: Fish and Wildlife Service, Interior.

ACTION: Notice of receipt of applications for permit.

SUMMARY: The public is invited to comment on the following applications to conduct certain activities with endangered species.

DATES: Written data, comments or requests must be received by November 17, 2008.

ADDRESSES: Documents and other information submitted with these applications are available for review, subject to the requirements of the Privacy Act and Freedom of Information Act, by any party who submits a written request for a copy of such documents within 30 days of the date of publication of this notice to: U.S. Fish and Wildlife Service, Division of Management Authority, 4401 North Fairfax Drive, Room 212, Arlington, Virginia 22203; fax 703/358–2281.

FOR FURTHER INFORMATION CONTACT: Division of Management Authority, telephone 703/358–2104.

SUPPLEMENTARY INFORMATION:

Endangered Species

The public is invited to comment on the following application(s) for a permit to conduct certain activities with endangered species. This notice is provided pursuant to section 10(c) of the Endangered Species Act of 1973, as amended (16 U.S.C. 1531 *et. seq.*). Written data, comments, or requests for copies of these complete applications should be submitted to the Director (address above).

Applicant: U.S. Fish and Wildlife Service, Mexican Wolf Reintroduction Project, Region 2, Albuquerque, NM, PRT–104074.

The applicant requests amendment of a permit that currently authorizes export and re-export to Mexico of live Mexican or lobo wolves (*Canis lupus baileyi*), and blood, hair, and tissue specimens of captive and wild origin Mexican or lobo wolves for breeding and reintroduction. The applicant requests the addition of export and re-export of the above biological specimens worldwide for the purpose of scientific research and enhancement of the propagation or survival of the species. This notification covers activities to be conducted by the applicant over a five-year period.

Applicant: Robert D. Ray, Mansfield, TX, PRT–192764.

The applicant requests a permit to import the sport-hunted trophy of one male bontebok (*Damaliscus pygargus pygargus*) culled from a captive herd maintained under the management program of the Republic of South Africa, for the purpose of enhancement of the survival of the species.

Applicant: Dean G. Grommet, Whitefish, MT, PRT–193960.

The applicant requests a permit to import the sport-hunted trophy of one male bontebok (*Damaliscus pygargus pygargus*) culled from a captive herd maintained under the management program of the Republic of South Africa, for the purpose of enhancement of the survival of the species.

Applicant: William C. Myer Jr., Kelseyville, CA, PRT–194061.

The applicant requests a permit to import the sport-hunted trophy of one male bontebok (*Damaliscus pygargus pygargus*) culled from a captive herd maintained under the management program of the Republic of South Africa, for the purpose of enhancement of the survival of the species.

Applicant: Michael D. Jenkins, Amarillo, TX, PRT–194838.

The applicant requests a permit to import the sport-hunted trophy of one male bontebok (*Damaliscus pygargus pygargus*) culled from a captive herd maintained under the management program of the Republic of South Africa, for the purpose of enhancement of the survival of the species.

Dated: October 3, 2008.

Lisa J. Lierheimer,

Senior Permit Biologist, Branch of Permits, Division of Management Authority.

[FR Doc. E8–24726 Filed 10–16–08; 8:45 am]

BILLING CODE 4310–55–P

DEPARTMENT OF THE INTERIOR

Fish and Wildlife Service

[FWS–R3–R–2008–N00167; 30136–1265–0000–S3]

Patoka River National Wildlife Refuge, Pike and Gibson Counties, Indiana

AGENCY: Fish and Wildlife Service, Interior.

ACTION: Notice of availability: Final Comprehensive Conservation Plan and Finding of No Significant Impact for Environmental Assessment.

SUMMARY: We, the U.S. Fish and Wildlife Service (Service), announce that the Final Comprehensive Conservation Plan (CCP) and Finding of No Significant Impact (FONSI) for the

Environmental Assessment (EA) are available for Patoka River National Wildlife Refuge. Goals and objectives in the CCP describe how the agency intends to manage the refuge over the next 15 years.

ADDRESSES: Copies of the Final CCP and FONSI/EA may be viewed at the Patoka River National Wildlife Refuge Headquarters and public libraries near the refuge. You may access and download a copy via the Planning Web site at *http://www.fws.gov/midwest/Planning/PatokaRiver,* or you may obtain a copy on compact disk by contacting: U.S. Fish and Wildlife Service, Division of Conservation Planning, Bishop Henry Whipple Federal Building, 1 Federal Drive, Fort Snelling, MN 55111 (1–800–247–1247, extension 5429) or Patoka River National Wildlife Refuge, 510 1/2 West Morton St., Oakland City, IN 47660 (812–749–3199). A limited number of hardcopies will be available for distribution at the Refuge Headquarters.

FOR FURTHER INFORMATION CONTACT: Bill McCoy (812–749–3199).

SUPPLEMENTARY INFORMATION: Established in 1994, Patoka River National Wildlife Refuge lies within a 20 mile section of the Patoka River in Gibson and Pike Counties of southwest Indiana. The Refuge currently manages about 6,000 acres. Ultimately, the Refuge will include up to 6,800 acres with another 15,283 acres to be included in a Refuge administered wildlife management area. The Refuge encompasses one of the last remaining stretches of bottomland forest in Indiana. It provides some of the best wood duck production habitat in the state and is inhabited by at least forty-one species of mammals and over 200 species of birds. The Refuge provides visitor services that include hunting, fishing, wildlife observation and environmental education.

The Draft CCP/EA was released for public review October 17, 2007, the comment period lasted 45 days ending November 30, 2007. During the comment period the Refuge hosted a public meeting attended by a total of 10 people. By the conclusion of the comment period we received 18 responses and identified more than 70 individual comments. In response to these comments we made a number of minor edits and added one objective statement and two strategies.

Selected Alternative

After considering the comments received, we have selected Alternative 3 for implementation. The selected alternative will increase opportunities for wildlife dependent recreation, increase the amount of bottomland forest, maintain stopover habitat for migratory waterbirds, provide habitat for the federally endangered Interior Least Tern, increase the amount of acres under moist soil management, and consider stream channel restoration options for the Patoka River and its tributaries.

Background

The National Wildlife Refuge System Administration Act of 1966, as amended by the National Wildlife Refuge System Improvement Act of 1997 (16 U.S.C. 668dd-668ee *et seq.*), requires the Service to develop a CCP for each National Wildlife Refuge. The purpose in developing a CCP is to provide refuge managers with a 15-year strategy for achieving refuge purposes and contributing toward the mission of the National Wildlife Refuge System, consistent with sound principles of fish and wildlife management, conservation, legal mandates, and Service policies. In addition to outlining broad management direction for conserving wildlife and their habitats, the CCP identifies wildlife-dependent recreational opportunities available to the public, including opportunities for hunting, fishing, wildlife observation and photography, and environmental education and interpretation. We will review and update these CCPs at least every 15 years in accordance with the National Wildlife Refuge System Administration Act of 1966, as amended by the National Wildlife Refuge System Improvement Act of 1997, and the National Environmental Policy Act of 1969 (42 U.S.C. 4321–4370d).

Dated: July 22, 2008.

Charles M. Wooley,

Acting Regional Director, U.S. Fish and Wildlife Service, Fort Snelling, Minnesota.

[FR Doc. E8–24815 Filed 10–16–08; 8:45 am]

BILLING CODE 4310–55–P

DEPARTMENT OF THE INTERIOR

Fish and Wildlife Service

[FWS–R5–ES–2008–N0281; 50120–1112–0000–F2]

Incidental Take Permit Application for Pleasant Rifts Housing Development, Dorchester County, MD

AGENCY: Fish and Wildlife Service, Interior.

ACTION: Notice of availability: Draft environmental assessment and habitat conservation plan; receipt of application for an incidental take permit; request for comments.

SUMMARY: This notice advises the public that RB & JH Properties, LLC (applicant) has applied to the U.S. Fish and Wildlife Service (Service) for an incidental take permit under Section 10(a)(1)(B) of the Endangered Species Act of 1973 (Act), as amended. The proposed permit would authorize incidental take of the endangered Delmarva fox squirrel (*Sciurus niger cinereus*) (DFS) that is likely to occur on the Pleasant Rifts Housing Development, a 29.6-acre property owned by the applicant near Secretary, in Dorchester County, Maryland. We also announce the availability for public comment of a draft habitat conservation plan (HCP) prepared under the Act in support of the permit application and a draft environmental assessment (EA) for the action prepared in accordance with requirements of the National Environmental Policy Act (NEPA).

DATES: All comments from interested parties must be received on or before December 1, 2008.

ADDRESSES: Please address written comments to Field Office Supervisor, Chesapeake Bay Field Office, U.S. Fish and Wildlife Service, 177 Admiral Cochrane Drive, Annapolis, Maryland 21401. You may also send comments by facsimile at 410–269–0832.

FOR FURTHER INFORMATION CONTACT: Cherry Keller, Fish and Wildlife Biologist, U.S. Fish and Wildlife Service (see **ADDRESSES** above), telephone: 410–573–4532.

SUPPLEMENTARY INFORMATION:

Availability of Documents

The permit application materials, which include a draft HCP and a draft EA, are available for public inspection, by appointment between the hours of 8 a.m. and 5 p.m. at the Chesapeake Bay Field Office (see **ADDRESSES** above). You may also request copies of the documents by contacting the Service's Chesapeake Bay Field Office (see **FOR FURTHER INFORMATION CONTACT** above). Finally, you may also visit the Chesapeake Bay Field Office Web site (*http://www.fws.gov/chesapeakebay/*) to view the documents.

Background

Section 9 of the Act and Federal regulations prohibit the ''take'' of fish and wildlife species listed as endangered or threatened. Take of federally listed fish and wildlife is defined under the Act to include ''harass, harm, pursue, hunt, shoot, wound, kill, trap, capture, or collect, or

to attempt to engage in any such conduct.'' The Service may, under limited circumstances, issue permits to authorize incidental take (i.e., take that is incidental to, and not the purpose of, the carrying out of an otherwise lawful activity). Regulations governing incidental take permits for threatened and endangered species are found in 50 CFR 17.32 and 17.22.

The applicant proposes to subdivide and develop the Pleasant Rifts Housing Development on a 29.6-acre property that contains 19.8 acres of mature forest habitat. The property will be developed into 13 single-family residences, and 4.83 acres of mature forest will be cleared. Development activities on, and subsequent residential uses of, the property may result in the death of, or harm to, DFS through the loss and degradation of habitat.

The HCP will minimize take of DFS by minimizing the amount of clearing and by retaining 14.97 acres of suitable forest habitat on the project site. The habitat is retained through a declaration of covenants and restrictions, and existing State environmental requirements, which have incidental benefits to DFS and its habitat. It also commits to secure off-site compensatory mitigation for the forest clearing and degradation of this project through permanent protection of 39.2 acres of DFS habitat in close proximity to the Blackwater National Wildlife Refuge, which supports a large population of DFS. The HCP also limits activities and uses of DFS habitat retained on the site, provides for distribution of educational materials regarding DFS to construction personnel and homeowners, requires property signage to permanently designate the boundary of the authorized forest clearing area, and provides for the establishment of a homeowners' association to implement, coordinate, monitor, and enforce the provisions of the HCP following project-related construction. Finally, the HCP requires that any subsequent homeowner be subject to the provisions of the HCP and responsible for its implementation. The EA considers the environmental consequences of three alternatives, including the proposed action. The proposed action alternative is issuance of the incidental take permit and implementation of the HCP as submitted by the applicant.

Public Review

The Service invites the public to review the HCP and EA during a 60-day public comment period (see **DATES**). Before including your address, phone number, electronic mail address, or other personal indentifying 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 indentifying information from public review, we cannot guarantee that we will be able to do so.

This notice is provided pursuant to section 10(a) of the Act and the regulations for implementing NEPA, as amended (40 CFR 1506.6). We will evaluate the application, associated documents, and comments submitted thereon to determine whether the application meets the requirements of NEPA regulations and section 10(a) of the Act. If we determine that those requirements are met, we will issue a permit to the applicant for the incidental take of the DFS.

Dated: October 7, 2008.

Michael G. Thabault,

Acting Regional Director, Region 5.

[FR Doc. E8–24819 Filed 10–16–08; 8:45 am]

BILLING CODE 4310–55–P

DEPARTMENT OF THE INTERIOR

Fish and Wildlife Service

[FWS–R4–ES–2008–N0278; 40120–1112–0000–F2]

Receipt of Application for Incidental Take Permit for One Condominium Complex in Escambia County, FL

AGENCY: Fish and Wildlife Service, Interior.

ACTION: Notice.

SUMMARY: Seabreeze Properties, LLC (Applicant) requests an incidental take permit (ITP) under section 10(a)(1)(B) of the Endangered Species Act of 1973 (Act), as amended. The Applicant anticipates taking Perdido Key beach mice (*Peromyscus polionotus trissyllepsis*) incidental to developing, constructing, and human occupancy of a condominium complex in Escambia County, Florida (Project). The Applicant's Habitat Conservation Plan (HCP) describes the mitigation and minimization measures proposed to address the effects of the Project to the Perdido Key beach mouse.

DATES: Written comments on the application, environmental assessment (EA), and HCP should be sent to the Service's Regional Office (see **ADDRESSES**) and should be received on or before December 16, 2008.

ADDRESSES: Persons wishing to review the application, EA, and HCP may obtain a copy by writing the Service's Southeast Regional Office, Atlanta, Georgia, at the address below. Please reference permit number TE189611, Seabreeze, in such requests. Documents will also be available for public inspection by appointment during normal business hours at the Regional Office, 1875 Century Boulevard, Suite 200, Atlanta, GA 30345 (Attn: Endangered Species Permits); or Field Supervisor, U.S. Fish and Wildlife Service, 1601 Balboa Avenue, Panama City, FL 32405.

FOR FURTHER INFORMATION CONTACT: Mr. David Dell, Regional HCP Coordinator, (see **ADDRESSES**), telephone: 404/679–7313, or Ms. Lorna Patrick, Field Office Project Manager, at the Panama City Field Office (see **ADDRESSES**), telephone: 850/769–0552, ext. 229.

SUPPLEMENTARY INFORMATION: We announce the application for an ITP and the availability of the HCP and EA. The EA is an assessment of the likely environmental impacts associated with this Project. Copies of these documents may be obtained by making a request, in writing, to the Regional Office (see **ADDRESSES**). This notice is provided pursuant to Section 10 of the Act (16 U.S.C. 1531 et seq.) and National Environmental Policy Act regulations at 40 CFR 1506.6.

We specifically request information, views, and opinions from the public via this notice on the Federal action, including the identification of any other aspects of the human environment not already identified in the EA. Further, we specifically solicit information regarding the adequacy of the HCP as measures against our ITP issuance criteria found in 50 CFR parts 13 and 17.

If you wish to comment, you may submit comments by any one of several methods. Please reference permit number TE189611, Seabreeze, in such comments. You may mail comments to the Service's Regional Office (see **ADDRESSES**). You may also comment via the internet to *david_dell@fws.gov*. Please also include your name and return address in your internet message. If you do not receive a confirmation from us that we have received your internet message, contact us directly at either telephone number listed above (see **FOR FURTHER INFORMATION CONTACT**).

Finally, you may hand-deliver comments to either Service office listed above (see **ADDRESSES**). Before including your address, phone number, e-mail, 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 view, we cannot guarantee that we will be able to do so. If you wish us to withhold your name and address, you must state this prominently at the beginning of your comments. We will not, however, consider anonymous comments. We will make all submissions from organizations or businesses, and from individuals identifying themselves as representatives or officials of organizations or businesses, available for public inspection in their entirety.

The area encompassed under the ITP totals 1.35 acres along the beachfront of the Gulf of Mexico. The Project is located on the western portion of Perdido Key, a 16.9 mile barrier island. Perdido Key constitutes the entire historic range of the Perdido Key beach mouse. The Perdido Key beach mouse was listed as an endangered species under the Act in 1985 (June 6, 1985, 50 FR 23872). The mouse is also listed as an endangered species by the State of Florida. Critical habitat was designated for the Perdido Key beach mouse at the time of listing (50 FR 23872) and revised on October 12, 2006 (71 FR 60238).

We will evaluate the HCP and comments submitted thereon to determine whether the application meets the requirements of section 10(a) of the Act. If it is determined that those requirements are met, the ITP will be issued for the incidental take of the Perdido Key beach mouse. We will also evaluate whether issuance of the section 10(a)(1)(B) ITP complies with section 7 of the Act by conducting an intra-Service section 7 consultation. The results of this consultation, in combination with the above findings, will be used in the final analysis to determine whether or not to issue the ITP.

Dated: *September 26, 2008.*

Sam D. Hamilton,

Regional Director, Southeast Region.

[FR Doc. E8–24820 Filed 10–16–08; 8:45 am]

BILLING CODE 4310–55–P

DEPARTMENT OF THE INTERIOR

Bureau of Land Management

[WY–930–09–1610–DO–015F]

Notice of Intent To Prepare Resource Management Plans and Associated Environmental Impact Statement, Initiate Public Scoping, and Call for Coal and Other Resource Information

AGENCY: Bureau of Land Management, Interior.

ACTION: Notice of Intent and Call for Coal and Other Resource Information

SUMMARY: Notice is hereby given that the Wyoming Bureau of Land Management (BLM) intends to prepare (1) a Resource Management Plan (RMP) for the Cody Field Office and (2) a RMP for the Worland Field Office. These two actions will require a single Environmental Impact Statement (EIS). These two RMPs and the associated EIS will be called the Bighorn Basin Resource Management Plan Revision Project. The resulting RMPs will replace the Washakie and Grass Creek RMPs, in Worland, and the Cody RMP. The BLM is also soliciting resource information for coal and other resources for the planning area.

DATES: The BLM will announce public scoping meetings to identify relevant issues through local news media, a project newsletter, and the project Web site *http://www.blm.gov/wy/st/en/programs/Planning/RMPs/bighorn* at least 15 days prior to the first meeting. The BLM will provide formal opportunities for public participation upon publication of the Draft RMP/EIS, currently scheduled for 2010.

ADDRESSES: You may submit written comments by any of the following methods:

Web Site: http://www.blm.gov/wy/st/en/programs/Planning/RMPs/bighorn.

E-mail: BBRMP_WYMail@blm.gov .

Mail: Worland Field Office, Attn: RMP Project Manager, 101 South 23rd, P.O. Box 119, Worland, WY 82401.

In order to reduce the use of paper and control costs, we strongly encourage the public to submit comments electronically at the project Web site. Comments submitted to BLM for use in this planning effort, including names and home addresses of individuals submitting comments, are subject to disclosure under the Freedom of Information Act (FOIA) (5 U.S.C. 522). Written comments received during the public scoping process may be published as part of the environmental analysis process. After the close of the public scoping period, public comments submitted, including names, e-mail addresses, and street addresses of respondents, will be available for public review at the BLM Worland Office during regular business hours (7:45 a.m. to 4:30 p.m.), Monday through Friday (except federal holidays).

FOR FURTHER INFORMATION: For further information and/or to have your name added to the project mailing list, contact Caleb Hiner, RMP Project Manager, at the Worland Field Office (307) 347–5171.

SUPPLEMENTARY INFORMATION: The purpose of the public scoping process is to identify issues and planning criteria that should be considered in the RMP/EIS and to initiate public participation in the planning process. BLM personnel will be present at scoping meetings to explain the planning process and other requirements for preparing a RMP/EIS.

The Planning Area for the project includes lands within the BLM Worland and Cody Field Offices' administrative boundaries, in all of Big Horn, Park, and Washakie Counties, and most of Hot Springs County in north-central Wyoming. The Planning Area includes all lands, regardless of jurisdiction, totaling 5.6 million acres; however, the BLM will only make decisions on lands that fall under the BLM's jurisdiction. Lands within the Planning Area under the BLM's jurisdiction make up the Decision Area. The Decision Area consists of BLM-administered surface, totaling 3.2 million acres, and mineral estate, totaling 4.2 million acres. The Planning Area includes 12 Wilderness Study Areas (WSAs), nine Areas of Critical Environmental Concern (ACECs), two areas of Special Designation, and seven Special Recreation Management Areas.

This planning process will fulfill the needs and obligations set forth by the National Environmental Policy Act (NEPA), the Federal Land Policy and Management Act (FLPMA), and BLM management policies. The BLM will work collaboratively with interested parties to identify the management decisions that are best suited to local, regional, and national needs and concerns.

The purpose of the public scoping process is to determine relevant issues that will influence the scope of the environmental analysis and EIS alternatives. These issues also guide the planning process. You may submit comments on issues and planning criteria in writing to the BLM at any public scoping meeting, or you may submit them to the BLM using one of the methods listed in the **ADDRESSES** section above. To be most helpful, you

should submit formal scoping comments during the comment period. 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. All submissions from organizations or businesses, and from individuals identifying themselves as representatives or officials of organizations or businesses, are available for public inspection in their entirety. The comments and list of attendees for each scoping meeting will be available to the public for 30 days after the scoping period to clarify the views expressed.

Preliminary issues and management concerns have been identified by BLM personnel, other agencies, and in meetings with individuals and user groups. They represent the BLM's knowledge to date regarding the existing issues and concerns with current land management. The major issues that will be addressed in this planning effort include: Energy and minerals management; climate change and greenhouse gas emissions; management of riparian areas and water quality concerns; livestock grazing management; recreation/visitor use and safety management; travel management, including Off Highway Vehicle use; management of wildlife habitat including protection of sensitive species habitat; land tenure adjustments, realty leases, and utility corridor rights-of-way; management of areas with special values, such as ACECs; and visual resource management.

Comments received during scoping will be placed in one of three categories: (1) Issues to be resolved in the plan; (2) Issues to be resolved through policy or administrative action; or (3) Issues beyond the scope of this plan.

The BLM will provide a rationale for the categorization of comments. In addition to these major issues, a number of management questions and concerns will be addressed in the RMPs. The public is encouraged to help identify these questions and concerns during the scoping phase. Planning criteria are the constraints or ground rules that are developed to guide and direct the revision of the RMPs. The planning criteria serve to: ensure the planning effort is consistent with and incorporates legal requirements; provide for management of all resource uses in the planning area; focus on the issues; identify the scope and parameters of the planning effort; inform the public of what to expect from the planning effort; and help ensure the RMP revision process is accomplished efficiently. Planning criteria are based on laws and regulations, guidance provided by the BLM Wyoming State Director, results of consultation and coordination with the public, input from other agencies and governmental entities, and Indian tribes, analysis of information pertinent to the planning area, public input, and professional judgment.

Preliminary planning criteria are: (1) This planning effort will recognize valid existing rights; (2) management actions must comply with laws, executive orders, policy, and regulations; (3) lands covered in the RMP/EIS for the planning effort include lands that may affect, or be affected by, the management occurring on the BLM-administered public lands in the planning area; (4) within the planning area, there will be no RMP decisions made on non-federal land surface or mineral estate, on Federal lands administered by other Federal agencies, or the Federal mineral estate underlying Federal lands administered by other Federal agencies; (5) a collaborative and multi-jurisdictional approach will be used, where possible, to jointly determine the desired future condition and management direction for the public lands; (6) to the extent possible and within legal and regulatory parameters, BLM management and planning decisions will complement the planning and management decisions of other agencies, State and local governments, and Native American tribes, with jurisdictions intermingled with and adjacent to the planning area; (7) planning and management direction will be focused on the relative values of resources and not the combination of uses that will give the greatest economic return or economic output; (8) where practicable and timely for the planning effort, current scientific information, research, and new technologies will be considered; (9) Reasonably Foreseeable Action or Activity (RFA) scenarios for all land and resource uses (including minerals) will be developed and portrayed based on historical, existing, and projected levels for all programs; (10) existing endangered species recovery plans, including plans for reintroduction of endangered and other species, will be considered. The BLM will use an interdisciplinary approach to develop the RMPs to ensure consideration of the variety of resource issues and concerns identified. Specialists with expertise in the following disciplines will be involved in the planning process: rangeland management, minerals and geology, renewable energy, forestry, outdoor recreation, archaeology, paleontology, caves and karsts, wildlife and fisheries, lands and realty, hydrology, soils, sociology, special management areas, hazardous materials, wild horses, and economics.

Parties interested in leasing and development of Federal coal in the planning area should provide coal resource data for their area(s) of interest. Specifically, information is requested on the location, quality, and quantity of Federal coal with development potential, and on surface resource values related to the 20 coal unsuitability criteria described in 43 CFR part 3461. This information will be used for any necessary updating of coal screening determination (43 CFR 3420.1–4) in the Decision Area and in the environmental analysis. In addition to coal resource data, the BLM seeks resource information and data for other public land values (e.g., air quality, cultural and historic resources, fire/fuels, fisheries, forestry, lands and realty, non-energy minerals and geology, oil and gas (including coal-bed natural gas), paleontology, rangeland management, recreation, soil, water, and wildlife) in the planning area. The purpose of this request is to assure that the planning effort has sufficient information and data to consider a reasonable range of resource uses, management options, and alternatives for the public lands.

Proprietary data marked as confidential may be submitted in response to this call for coal and other resource information. Please submit all proprietary information submissions to the address listed above. The BLM will treat submissions marked as ''Confidential'' in accordance with applicable laws and regulations governing the confidentiality of such information.

Authority: 43 CFR 1610.2(c) and 3420.1–2.

Dated: September 29, 2008.

Donald A. Simpson,

Acting State Director.

[FR Doc. E8–23536 Filed 10–16–08; 8:45 am]

BILLING CODE 4310–22–P

DEPARTMENT OF THE INTERIOR

Bureau of Land Management

[CACA 47740, LLCAD07000 L51030000]

Notice of Intent To Prepare an Environmental Impact Statement/Staff Assessment and Proposed Land Use Plan Amendment for the Proposed SES Solar Two Project, Imperial County, CA

AGENCY: Bureau of Land Management, Interior.

ACTION: Notice.

SUMMARY: In compliance with the National Environmental Policy Act of 1969, as amended (NEPA), and the California Environmental Quality Act (CEQA), the Department of the Interior, Bureau of Land Management (BLM), together with the California Energy Commission (Energy Commission), (hereinafter jointly referred to as the Agencies) intend to prepare an Environmental Impact Statement/Staff Assessment (EIS/SA), and a Proposed Land Use Plan Amendment, for the Stirling Energy Systems (SES) Solar Two Project (Project), a Stirling engine systems solar dish project in Imperial County, California. SES is seeking approval to construct and operate an electrical generating facility with a nominal capacity of 750 megawatts (MW), using concentrated solar thermal power. The approximately 6,500 acres of land needed to develop the Project consists of approximately 6,140 acres of BLM administered public land and approximately 360 acres of privately owned land.

SES has submitted an application to the BLM requesting a right-of-way (ROW) to construct the Project and related facilities. Pursuant to the California Desert Conservation Area (CDCA) Plan (1980, as amended), sites associated with power generation or transmission not identified in the CDCA Plan will be considered through the plan amendment process.

Under Federal law, BLM is responsible for processing requests for rights-of-way to authorize such proposed projects and associated transmission lines and other appurtenant facilities on land it manages. BLM must comply with the requirements of NEPA to ensure that environmental impacts associated with construction, operation, and decommissioning will be identified, analyzed and considered in the application process. In the case of solar thermal power plant projects, this will be accomplished through coordination of the state and federal application processes, public participation, environmental analysis, and the preparation of Draft and Final Environmental Impact Statement (EIS) in coordination with the Energy Commission and its Preliminary and Final Staff Assessments.

Under California law, the Energy Commission is responsible for reviewing the applications for certification filed for thermal power plants over 50 MW, and also has the role of lead agency for the environmental review of such projects under the CEQA (Public Resources Code, section 25500 *et seq.*; and Public Resources Code, section 21000 *et seq.*) The Energy Commission conducts this review in accordance with the administrative adjudication provisions of the Administrative Procedure Act (Gov. Code, section 11400 *et seq.*) and its own regulations governing site certification proceedings (Cal. Code Regs., tit. 20, section 1701 *et seq.*), which have been deemed CEQA equivalent by the Secretary of Resources. SES Solar Two, LLC has submitted an Application for Certification (AFC) to the Energy Commission. The AFC facilitates analysis and review by staff prior to an Energy Commission decision.

DATES: Publication of this notice initiates a public scoping period of at least 30 days. During the public scoping period, the Agencies will solicit public comments on issues, concerns, potential impacts, alternatives, and mitigation measures that should be considered in the analysis of the proposed action. In addition, the Agencies expect to hold at least one public meeting/workshop during the scoping period to encourage public input. The public meeting(s) will be announced through the local news media, newspapers, mailings, the BLM Web page (*http://www.ca.blm.gov/elcentro*) and the Energy Commission Web page (*http://www.energy.ca.gov/sitingcases/solartwo/*) at least 15 days prior to the event. While you may have the opportunity to make oral comments, comments must also be submitted in writing. In order to be included in the Draft EIS/Preliminary Staff Assessment (DEIS/PSA), all comments must be received prior to the close of the scoping period or 15 days after the last public meeting, whichever is later. Additional opportunities for public participation and formal comment occur when the DEIS/PSA is issued.

ADDRESSES: You may submit comments in a variety of ways: (1) By U.S. mail, (2) by electronic mail, (3) or by attending the public scoping meeting(s) and submitting written comments at the meeting(s).

By Mail: Please use first-class postage and be sure to include your name and a return address. Please send written comment to: Christopher Meyer, Project Manager, Systems Assessment & Facility Siting Division, California Energy Commission, 1516 Ninth Street, MS–15, Sacramento, CA 95814.

By Electronic Mail: E-mail comments are welcome; however, please remember to include your name and return address in the e-mail message. E-mail messages should be sent to *CMeyer@energy.state.ca.us.*

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.

FOR FURTHER INFORMATION CONTACT: Information regarding the BLM process may be obtained from the Bureau of Land Management, 1661 So. 4th Street, El Centro, 92243, attention Lynda Kastoll, (760) 337–4421, *lynda_kastoll@ca.blm.gov*; or Erin Dreyfuss, (760) 337–4436, *erin_dreyfuss@ca.blm.gov*. Information regarding the Energy Commission process may be obtained from Christopher Meyer, Project Manager, Systems Assessment & Facility Siting Division, California Energy Commission, 1516 Ninth Street, MS–15, Sacramento, CA 95814, (916) 653–1639, *CMeyer@energy.state.ca.us.* Information on participating in the Commission's review of the project may be obtained through the Commission's Public Adviser's Office, at (916) 654–4489 or toll free in California, (800) 822–6228, or by email at *PublicAdviser@energy.state.ca.us.* News media inquiries should be directed to the Commission's media office at (916) 654–4989, or via email at *mediaoffice@energy.state.ca.us.*

Status of the proposed project, copies of notices, an electronic version of the AFC, and other relevant documents are also available on the Commission's internet Web site at *http://www.energy.ca.gov/sitingcases/solartwo.* You can also subscribe to receive e-mail notification of all notices at *http://www.energy.ca.gov/listservers.*

SUPPLEMENTARY INFORMATION: SES Solar Two, LLC has applied to BLM for a right-of-way on public lands to

construct a concentrated solar thermal power plant facility approximately 14 miles west of El Centro, CA, in Imperial County. The project site is just south of Plaster City between the Union Pacific Railroad tracks and the Interstate 8 highway. The facility is expected to operate for approximately 30 years. The proposed project would utilize SunCatcher technology, consisting of approximately 30,000 25-kilowatt solar power dishes with a generating capacity of approximately 750 megawatts (MW) to be built in two phases. The first phase would consist up to 12,000 SunCathers configured in 200 1.5 MW solar groups of 60 SunCatchers per group and have a net nominal generating capacity of 300 MW. The second phase would consist of approximately 18,000 SunCatchers configured in 500 1.5 MW groups with a net generating capacity of 450 MW. Each SunCatcher system consists of an approximate 38-foot high by 40-foot wide solar concentrator dish that supports an array of curved glass mirror facets designed to automatically track the sun and focus solar energy onto a Power Conversion Unit which generates electricity. Related structures would include a main services complex, assembly buildings, a 230-kilovolts (kV) electrical substation, a 10-mile transmission line, access roads, supply water line, and a 10-mile double circuit 230kV transmission line from the project site to San Diego Gas and Electric's existing Imperial Valley electrical substation interconnecting the project to the existing 500 kV transmission system. The 450–MW Phase II is dependent on the approval of the proposed Sunrise Powerlink 500kV transmission line that would also interconnect with the Imperial Valley electrical substation. The EIS/SA will analyze the site-specific impacts on air quality, biological resources, cultural resources, water resources, geological resources and hazards, hazardous materials handling, land use, noise, paleontological resources, public health, socioeconomics, soils, traffic and transportation, visual resources, waste management and worker safety and fire protection, as well as facility design engineering, efficiency, reliability, transmission system engineering and transmission line safety and nuisance. The CDCA Plan, while recognizing the potential compatibility of solar generation facilities on public lands, requires that all sites associated with power generation or transmission not identified in the Plan will be considered through the Plan Amendment process.

The following Planning Criteria will be utilized during the plan amendment process:

- The plan amendment process will be completed in compliance with FLPMA, NEPA, and all other relevant Federal law, Executive orders, and management policies of the BLM;
- The plan amendment process will include an EIS that will comply with NEPA standards;
- Where existing planning decisions are still valid, those decisions may remain unchanged and be incorporated into the new plan amendment;
- The plan amendment will recognize valid existing rights;
- Native American Tribal consultations will be conducted in accordance with policy and Tribal concerns will be given due consideration. The plan amendment process will include the consideration of any impacts on Indian trust assets;
- Consultation with the SHPO will be conducted throughout the plan amendment process; and
- Consultation with USFWS will be conducted throughout the plan amendment process.

If the ROW and proposed land use plan amendment are approved by BLM, the concentrated solar thermal power plant facility on public lands would be authorized in accordance with Title V of the Federal Land Policy and Management Act of 1976 and the Federal Regulations at 43 CFR part 2800.

A certificate designating approval of the Energy Commission must be obtained by SES before it may construct a power plant and/or electric transmission line and related facilities.

Dated: October 10, 2008.

Thomas Pogacnik,

Deputy State Director, Natural Resources (CA–930), California State Office.

[FR Doc. E8–24685 Filed 10–16–08; 8:45 am]

BILLING CODE 4310–40–P

DEPARTMENT OF THE INTERIOR

Bureau of Land Management

[WY–060–1320–EL, WY–060–5110–GA–CK33, WY–060–5110–GA–CK36, WY–060–5110–GA–CK35, WYW161248, WYW172585, WYW172657, WYW173360]

Notice of Availability and Notice of Hearing for the South Gillette Area Coal Draft Environmental Impact Statement That Includes Four Federal Coal Lease by Applications, Wyoming

AGENCY: Bureau of Land Management, Interior.

ACTION: Notice of Availability.

SUMMARY: In accordance with the National Environmental Policy Act of 1969 (NEPA, 42 U.S.C. 4321 *et seq.*) and the Federal Land Policy and Management Act of 1976 (FLPMA, 43 U.S.C. 1701 *et seq.*), the Bureau of Land Management (BLM) has prepared a Draft Environmental Impact Statement (DEIS) for the South Gillette Area Coal project that contains four Federal Coal Lease By Applications (LBAs), and by this Notice is announcing a public hearing requesting comments on the DEIS, Maximum Economic Recovery (MER), and Fair Market Value (FMV) pursuant to 43 Code of Federal Regulations (CFR) 3425.4.

DATES: To ensure comments will be considered, the BLM must receive written comments on the South Gillette Area Coal DEIS, MER, and FMV within 60 days following the date the Environmental Protection Agency publishes the Notice of Availability in the **Federal Register**. The public hearing will be held at 7 p.m. MST, on November 19, 2008, at the Campbell County George Amos Memorial Building, 412 South Gillette Avenue, Gillette, Wyoming.

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

- *E-mail: casper_wymail@blm.gov.*
- *Fax:* 307–261–7587.
- *Mail:* Casper Field Office, Bureau of Land Management, Attn: Teresa Johnson, 2987 Prospector Drive, Casper, Wyoming 82604.

Copies of the DEIS are available at the following BLM office locations: BLM Wyoming State Office, 5353 Yellowstone Road, Cheyenne, Wyoming 82009; and BLM Casper Field Office, 2987 Prospector Lane, Casper, Wyoming 82604. The DEIS is available electronically on the following Web site: *http://www.blm.gov/wy/st/en/info/NEPA/cfodocs/south_gillette.html.*

FOR FURTHER INFORMATION CONTACT: Teresa Johnson or Mike Karbs at the above address, or telephone: 307–261–7600.

SUPPLEMENTARY INFORMATION: The DEIS analyzes the potential impacts for Federal Coal LBAs serialized as WYW161248, WYW172585, WYW172657, and WYW173360 and referred to as the Belle Ayr North, West Coal Creek, Caballo West, and Maysdorf II tracts, in the decertified Powder River Federal Coal Production Region, Wyoming. The BLM is considering issuing these four coal leases as a result of four applications filed between July of 2004 and September of 2006.

SUPPLEMENTARY INFORMATION by application is as follows.

Belle Ayr North Coal Tract

The BLM is considering issuing a coal lease as a result of a July 6, 2004, application made by RAG Wyoming Land Company (RAG) to lease the Federal coal in the Belle Ayr North coal tract (WYW161248). RAG subsequently sold the Belle Ayr Mine and its associated interests to Foundation Coal Holdings, Inc. (Foundation). From this point forward, the applicant for the Belle Ayr North Tract will be referred to as Foundation. The Belle Ayr North LBA is located in Campbell County Wyoming, east of Hwy 59 and south of the Bishop Road/Hwy 59 intersection.

Foundation originally applied for the tract to extend the life of the existing Belle Ayr Mine in accordance with 43 CFR part 3425. The applicant estimated that the tract includes approximately 200 million tons of in-place Federal coal underlying the following lands in Campbell County, Wyoming:

T. 48 N., R. 71 W., 6th PM, Wyoming
Section 18: Lots 17, 18, 19 (W½, SE¼);
Section 19: Lots 5 through 19;
Section 20: Lots 3 (SW¼), 4 (W½, SE¼), 5, 6, 7 (S½), 9 (S½), 10 through 16;
Section 21: Lots 13, 14;
Section 28: Lots 3 through 6;
Section 29: Lots 1, 6;
T. 48 N., R.72 W., 6th PM, Wyoming
Section 24: Lots 1, 8.

Containing 1,578.74 acres, more or less.

The Belle Ayr Mine is adjacent to the LBA and has an approved mining and reclamation plan from the Land Quality Division of the Wyoming Department of Environmental Quality (DEQ) and an approved air quality permit from the Air Quality Division of the Wyoming DEQ that allows them to mine up to 45 million tons of coal per year.

West Coal Creek Coal Tract

The BLM is considering issuing a coal lease as a result of a February 10, 2006, application made by Ark Land Company (Ark) to lease the Federal coal in the West Coal Creek coal tract (WYW172585). The West Coal Creek LBA is located in Campbell County east of Hoadley Road approximately 12 miles northeast of the city of Wright, Wyoming.

Ark originally applied for the tract to extend the life of the existing Coal Creek Mine in accordance with 43 CFR part 3425. The applicant estimated that the tract includes approximately 57 million tons of recoverable Federal coal underlying the following lands in Campbell County, Wyoming:

T. 46 N., R. 70 W., 6th PM, Wyoming
Section 18: Lots 14 through 17;
Section 19: Lots 7 through 10, 15 through 18;
Section 30: Lots 5 through 20.

Containing 1,151.26 acres, more or less.

The Coal Creek Mine is adjacent to the LBA and has an approved mining and reclamation plan from the Land Quality Division of the Wyoming DEQ and an approved air quality permit from the Air Quality Division of the Wyoming DEQ that allows them to mine up to 25 million tons of coal per year.

Caballo West Coal Tract

The BLM is considering issuing a coal lease as a result of a March 15, 2006, application made by Caballo Coal Company (Caballo) to lease the Federal coal in the Caballo West coal tract (WYW172657). The Caballo West LBA is located in Campbell County Wyoming east of the Hwy 59/Bishop Road intersection.

Caballo originally applied for the tract to extend the life of the existing Caballo Mine in accordance with 43 CFR part 3425. The applicant estimated that the tract includes approximately 87.5 million tons of mineable Federal coal underlying the following lands in Campbell County, Wyoming:

T. 48 N., R. 71 W., 6th PM, Wyoming
Section 7: Lots 12, 19;
Section 8: Lot 10;
Section 17: Lots 1 through 10, 11 (N½, SE¼), 12 (NE¼), 15 (N½, SE¼), 16;
Section 18: Lot 5, 12 (NE¼);
Section 20: Lots 1, 2 (NE¼), 8 (N½, SE¼).

Containing 777.485 acres, more or less.

The Caballo Mine is adjacent to the LBA and has an approved mining and reclamation plan from the Land Quality Division of the Wyoming DEQ and an approved air quality permit from the Air Quality Division of the Wyoming DEQ that allows them to mine up to 50 million tons of coal per year.

Maysdorf II Coal Tract

The BLM is considering issuing a coal lease as a result of a September 1, 2006, application made by Cordero Mining Company (Cordero) to lease the Federal coal in the Maysdorf II coal tract (WYW173360). The Maysdorf II LBA is located in Campbell County Wyoming on the east side of Hwy 59 starting approximately 5 miles south of the Bishop Road Hwy 59 intersection. The Maysdorf II LBA has 2 separate units. The larger of the 2 units is against the west edge of the Cordero-Rojo Mine. The other unit is to the south of the Cordero-Rojo mine and to the west of the Coal Creek Mine by roughly 1 mile.

Cordero originally applied for the tract to extend the life of the existing Cordero-Rojo Mine in accordance with 43 CFR part 3425. The applicant estimated that the tract includes approximately 483 million tons of in-place Federal coal underlying the following lands in Campbell County, Wyoming:

T. 46 N., R. 71 W., 6th PM, Wyoming
Section 4: Lots 8, 9, 16, 17;
Section 5: Lots 5, 12, 13, 20;
Section 9: Lots 6 through 8;
Section 10: Lots 7 through 10;
Section 11: Lots 13 through 16;
Section 14: Lots 1 through 4;
Section 15: Lots 1 through 4;
T. 47 N., R. 71 W., 6th PM, Wyoming
Section 7: Lots 6 through 11, 14 through 19;
Section 17: Lots 1 through 15, SW¼NW¼;
Section 18: Lots 5 through 14, 19, 20;
Section 20: Lots 1, 8, 9, 16;
Section 21: Lots 4, 5, 12, 13;
Section 28: Lots 4, 5, 12, 13;
Section 29: Lots 1, 8, 9, 16;
Section 32: Lots 1, 8, 9, 16;
Section 33: Lots 4, 5, 12, 13;
T. 47 N., R. 72 W., 6th PM, Wyoming
Section 12: Lots 1 through 16;
Section 13: Lots 1 through 8.

Containing 4,653.80 acres, more or less.

The Cordero-Rojo Mine is adjacent to the LBA and has an approved mining and reclamation plan from the Land Quality Division of the Wyoming DEQ and an approved air quality permit from the Air Quality Division of the Wyoming DEQ that allows them to mine up to 65 million tons of coal per year.

The DEIS analyzes and discloses to the public direct, indirect, and cumulative environmental impacts of issuing four Federal coal leases in the Wyoming portion of the Powder River Basin. A copy of the DEIS has been sent to affected Federal, State, and local government agencies; persons and entities identified as potentially being affected by a decision to lease the Federal coal in each of the tracts; and persons who indicated to the BLM that they wished to receive a copy of the DEIS. The purpose of the public hearing is to solicit comments on the DEIS, on the proposed competitive sales of the Belle Ayr North, West Coal Creek, Caballo West, and Maysdorf II coal tracts, and on the FMV and MER of the Federal coal.

The Wyoming DEQ; the Office of Surface Mining Reclamation and Enforcement; and the Wyoming Department of Transportation are cooperating agencies in the preparation of the DEIS.

The DEIS analyzes leasing all of the South Gillette Area coal tracts as the Proposed Action. Under the Proposed Action, a competitive sale would be held and a lease issued for Federal coal contained in the tracts as applied for by each of the applicants. As part of the coal leasing process, the BLM is evaluating adding Federal coal to the tracts to avoid bypassing coal or to

prompt competitive interest in unleased Federal coal in this area. The alternate tract configurations for each of the LBAs that BLM is evaluating are described and analyzed as separate alternatives in the DEIS. Under these alternatives, competitive sales would be held and leases issued for Federal coal lands included in tracts modified by the BLM. The DEIS also analyzes the alternative of rejecting the application(s) to lease Federal coal as the No Action Alternative. The Proposed Actions and alternatives for each of the LBAs being considered in the DEIS are in conformance with the Approved Resource Management Plan for Public Lands Administered by the Bureau of Land Management Buffalo Field Office (2001).

Requests to be included on the mailing list for this project and to request copies of the DEIS or notification of the comment period or hearing date, or both, may be sent in writing, by facsimile, or electronically to the addresses previously stated at the beginning of this notice. The BLM asks that those submitting comments on the DEIS make them as specific as possible with reference to page numbers and chapters of the document. Comments that contain only opinions or preferences will not receive a formal response; however, they will be considered as part of the BLM decision-making process.

Please note that comments and information submitted including names, street addresses, and e-mail addresses of respondents will be available for public review and disclosure at the above address during regular business hours (7:45 a.m. to 4:30 p.m.), Monday through Friday, except holidays.

Before including your address, phone number, e-mail address, or other personal identifying information in your comment, you should be aware that your entire comment—including your personal identifying information—may be made publicly available at any time. While you can ask us in your comment to withhold your personal identifying information from public review, we cannot guarantee that we will be able to do so.

Donald A. Simpson,

Acting State Director.

[FR Doc. E8–24632 Filed 10–16–08; 8:45 am]

BILLING CODE 4310–22–P

DEPARTMENT OF THE INTERIOR

Bureau of Land Management

[OR–930–6350–DQ–047H] HAG–08–0204

Notice of Availability of the Final Environmental Impact Statement for the Revision of the Resource Management Plans of the Western Oregon Bureau of Land Management Districts of Salem, Eugene, Roseburg, Coos Bay, and Medford, and the Klamath Falls Resource Area of the Lakeview District

AGENCY: Bureau of Land Management, Interior.

ACTION: Notice of Availability.

SUMMARY: In accordance with the National Environmental Policy Act of 1969 and the Federal Land Policy and Management Act of 1976, the Bureau of Land Management (BLM) has prepared six Resource Management Plans with a single associated Final Environmental Impact Statement (RMP/FEIS) for the Salem, Eugene, Roseburg, Coos Bay, and Medford Districts and the Klamath Falls Resource Area of the Lakeview District in western Oregon.

DATES: The Assistant Secretary of the Interior for Land and Minerals Management is the responsible official for the RMP. Accordingly, there will be no administrative review ''protest'' on the RMP/FEIS under 43 CFR 1610.5–2. The Record of Decision (ROD) will not be signed until at least 30 days after the Environmental Protection Agency (EPA) publishes this notice of availability of the Final EIS in the **Federal Register**.

ADDRESSES: Copies of the RMP/FEIS have been sent to affected federal, state, and local government agencies, and to tribal governments. Interested persons may review the RMP/FEIS on the Internet at *http://www.blm.gov/or/plans/wopr/index.php.* Copies of the RMP/FEIS are available for public inspection at Salem, Eugene, Roseburg, Coos Bay, and Medford District offices and the Grants Pass, Klamath Falls and Tillamook Resource Area offices.

FOR FURTHER INFORMATION, CONTACT: Jerry Hubbard, Western Oregon Plan Revisions Public Outreach Coordinator; at (503) 808–6115.

SUPPLEMENTARY INFORMATION: The BLM has analyzed revision of six Resource Management Plans with this single Environmental Impact Statement. These plans are the Salem, Eugene, Roseburg, Medford, and Coos Bay District RMPs and the Klamath Falls Resource Area RMP. The RMP/FEIS for the Western Oregon Bureau of Land Management Districts has identified and analyzed four action alternatives, including the RMP, for managing approximately 2,550,000 acres of federal land, most of which are revested Oregon and California Railroad Grant and Coos Bay Wagon Road Grant lands, within the western Oregon planning area.

The major resource management plan issues include:

- Providing a sustainable supply of wood and other forest products, as mandated by the Oregon & California Lands Act of 1937, while also meeting other applicable laws.
- Providing for conservation of species listed under the Endangered Species Act.
- Contributing to meeting the goals of the Clean Water Act and the Safe Drinking Water Act.
- Reducing the risk of wildfire and integrating fire back into the ecosystem.

Comments received on the Draft Environmental Impact Statement (DEIS) were important in shaping the Resource Management Plans. The RMP is based on Alternative 2 from the DEIS, but includes portions of the other alternatives in the DEIS.

Some of the key changes include:

- Wider riparian management areas, as described in Alternative 1 of the DEIS.
- Late successional management areas were reconfigured to match the Final Northern Spotted Owl Recovery Plan.
- Deferring harvest for 15 years in ''older and more structurally complex multi-layered conifer stands,'' as described in Final Northern Spotted Owl Recovery Plan in the timber management area.
- Using uneven-aged management, as described in Alternative 3 of the DEIS, in the southern portion of the Medford District and the Klamath Falls Resource Area to decrease fire hazard and increase fire resiliency.

Dated: September 8, 2008.

Edward W. Shepard,

State Director, Oregon/Washington, Bureau of Land Management.

[FR Doc. E8–24655 Filed 10–16–08; 8:45 am]

BILLING CODE 4310–33–P

INTERNATIONAL TRADE COMMISSION

[Investigation 332–325]

The Economic Effects of Significant U.S. Import Restraints: Sixth Update

AGENCY: United States International Trade Commission.

ACTION: Notice of sixth update report and scheduling of public hearing.

SUMMARY: This notice announces the schedule and scope of the Commission's sixth update report in investigation No. 332–325, *The Economic Effects of Significant U.S. Import Restraints*, including the expansion in scope to include a summary of the major steps and results of U.S. trade liberalizing efforts since 1934 and effects of liberalization as reported in the economic literature, as requested in the U.S. Trade Representative's (USTR) letter received on August 22, 2008. This series of reports was originally requested in a letter from the USTR dated May 15, 1992.

DATES: *December 2, 2008:* Deadline for filing requests to appear at the public hearing.

December 11, 2008: Deadline for filing pre-hearing briefs and statements.

January 8, 2009: Public hearing.

February 6, 2009: Deadline for filing post-hearing briefs and statements.

August 20, 2009: Transmittal of Commission report to USTR.

ADDRESSES: All Commission offices, including the Commission's hearing rooms, are located in the United States International Trade Commission Building, 500 E Street SW., Washington, DC. All written submissions should be addressed to the Secretary, United States International Trade Commission, 500 E Street SW., Washington, DC 20436. The public record for this investigation may be viewed on the Commission's electronic docket (EDIS) at *http://www.usitc.gov/secretary/edis.htm*.

FOR FURTHER INFORMATION CONTACT: William Deese, Project Leader (*william.deese@usitc.gov* or 202–205–2626) or Kyle Johnson, Deputy Project Leader (*kyle.johnson@usitc.gov* or 202–205–3229) for information specific to this sixth update report. For information on the legal aspects of this investigation, contact William Gearhart of the Commission's Office of the General Counsel (202–205–3091 or *william.gearhart@usitc.gov*). The media should contact Margaret O'Laughlin, Office of External Relations (202–205–1819 or *margaret.olaughlin@usitc.gov*). Hearing-impaired individuals may obtain information on this matter by contacting the Commission's TDD terminal at 202–205–1810. General information concerning the Commission may also be obtained by accessing its Internet server (*http://www.usitc.gov*). Persons with mobility impairments who will need special assistance in gaining access to the Commission should contact the Office of the Secretary at 202–205–2000.

Background: The Commission instituted this investigation under section 332(g) of the Tariff Act of 1930 (19 U.S.C. 1332(g)) following receipt on May 15, 1992 of a request from the USTR. The request asked that the Commission conduct an investigation assessing the quantitative economic effects of significant U.S. import restraints on the U.S. economy and prepare periodic update reports after the initial report. The Commission published a notice of institution of the investigation in the **Federal Register** of June 17, 1992 (57 FR 27063). The first report was delivered to the USTR in November 1993, the first update in December 1995, the second update in May 1999, the third update in June 2002, the fourth update in June 2004, and the fifth update in February 2007.

As requested by the USTR in a letter received on August 22, 2008, the Commission in this sixth update will include a summary of the major steps and results of U.S. trade liberalizing efforts since 1934 and the effects of liberalization as reported in the economic literature. The USTR asked that the summary be accessible to readers who may not be professional economists. As in previous reports in this series, the sixth update will continue to assess the economic effects of significant import restraints on U.S. consumers and firms, the income and employment of U.S. workers, and the net economic welfare of the United States. This assessment will use the Commission's computable general equilibrium model. However, as per earlier instructions from the USTR, the Commission will not assess import restraints resulting from antidumping or countervailing duty investigations, section 337 and 406 investigations, or section 301 actions.

Public Hearing: A public hearing in connection with this investigation will be held beginning at 9:30 a.m. on January 8, 2009, at the United States International Trade Commission, 500 E Street SW., Washington DC. Requests to appear at the hearing should be filed with the Secretary no later than 5:15 p.m., December 2, 2008, in accordance with the requirements in the ''Written Submissions'' section below. In the event that, as of the close of business on December 2, 2008, no witnesses are scheduled to appear at the hearing, the hearing will be canceled. Any person interested in attending the hearing as an observer or non-participant may call the Secretary to the Commission (202–205–2000) after December 2, 2008 to determine whether the hearing will be held.

Written Submissions: In lieu of or in addition to participating in the hearing, interested parties are invited to submit written statements or briefs concerning this investigation. All written submissions, including requests to appear at the hearing, statements, and briefs, should be addressed to the Secretary. Any pre-hearing statements or briefs should be filed not later than 5:15 p.m., December 11, 2008; and post-hearing statements and briefs and all other written submissions should be filed not later than 5:15 p.m., February 6, 2009. All written submissions must conform with the provisions of section 201.8 of the Commission's *Rules of Practice and Procedure* (19 CFR 201.8). Section 201.8 of the rules requires that a signed original (or a copy designated as an original) and fourteen (14) copies of each document be filed. In the event that confidential treatment of the document is requested, at least four (4) additional copies must be filed, in which the confidential information must be deleted (see the following paragraph for further information regarding confidential business information). The Commission's rules do not authorize filing submissions with the Secretary by facsimile or electronic means, except to the extent permitted by section 201.8 of the rules (see *Handbook for Electronic Filing Procedures, http://www.usitc.gov/secretary/fed_reg_notices/rules/documents/handbook_on_electronic_filing.pdf*; persons with questions regarding electronic filing should contact the Secretary at 202–205–2000. Any submissions that contain confidential business information must also conform with the requirements of section 201.6 of the Commission's *Rules of Practice and Procedure* (19 CFR 201.6). Section 201.6 of the rules requires that the cover of the document and the individual pages be clearly marked as to whether they are the ''confidential'' or ''non-confidential'' version, and that the confidential business information be clearly identified by means of brackets. All written submissions, except for confidential business information, will be made available in the Office of the Secretary to the Commission for inspection by interested parties.

The USTR stated that her office intends to make the Commission's report in this investigation available to the public in its entirety and asked that the Commission not include any confidential business or national security information in this report. Consequently, the report that the Commission sends to the USTR will not contain any such information. Any

confidential business information received by the Commission in this investigation and used in preparing its report will not be published in a manner that would reveal the operations of the firm supplying the information.

By order of the Commission.

Issued: October 10, 2008.

Marilyn R. Abbott,

Secretary to the Commission.

[FR Doc. E8–24607 Filed 10–16–08; 8:45 am]

BILLING CODE 7020–02–P

INTERNATIONAL TRADE COMMISSION

[Investigation No. 701–TA–431 (Review)]

Drams and Dram Modules From Korea

AGENCY: United States International Trade Commission.

ACTION: Termination of five-year review.

SUMMARY: The subject five-year review was initiated in July 2008 to determine whether revocation of the countervailing duty order on DRAMs and DRAM modules from Korea would be likely to lead to continuation or recurrence of material injury. On October 3, 2008, the Department of Commerce published notice that it was revoking the order effective August 11, 2008, ''{b}ecause the domestic interested party did not file a substantive response by the applicable deadline and has withdrawn its notice of intent to participate in this sunset review * * *'' (73 FR 57594). Accordingly, pursuant to section 751(c) of the Tariff Act of 1930 (19 U.S.C. 1675(c)), the subject review is terminated.

DATES: *Effective Date:* August 11, 2008.

FOR FURTHER INFORMATION CONTACT: Mary Messer (202–205–3193), Office of Investigations, U.S. International Trade Commission, 500 E Street, SW., Washington, DC 20436. Hearing-impaired individuals are advised that information on this matter can be obtained 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*).

Authority: This review is being terminated under authority of title VII of the Tariff Act of 1930; this notice is published pursuant to section 207.69 of the Commission's rules (19 CFR 207.69).

By order of the Commission.

Issued: October 10, 2008.

Marilyn R. Abbott,

Secretary to the Commission.

[FR Doc. E8–24601 Filed 10–16–08; 8:45 am]

BILLING CODE 7020–02–P

INTERNATIONAL TRADE COMMISSION

[USITC SE–08–028]

Government in the Sunshine Act Meeting Notice

AGENCY HOLDING THE MEETING: United States International Trade Commission.

TIME AND DATE: October 21, 2008 at 11 a.m.

PLACE: Room 101, 500 E Street SW., Washington, DC 20436, Telephone: (202) 205–2000.

STATUS: Open to the public.

MATTERS TO BE CONSIDERED:

1. *Agenda for future meetings:* none.
2. Minutes.
3. Ratification List.
4. Inv. Nos. 731–TA–1131–1134 (Final)(Polyethylene Terephthalate Film, Sheet, and Strip from Brazil, China, Thailand, and the United Arab Emirates)—briefing and vote. (The Commission is currently scheduled to transmit its determinations and Commissioners' opinions to the Secretary of Commerce on or before October 31, 2008.)
5. *Outstanding action jackets:* none.

In accordance with Commission policy, subject matter listed above, not disposed of at the scheduled meeting, may be carried over to the agenda of the following meeting.

By order of the Commission.

Issued: October 14, 2008.

William R. Bishop,

Hearings and Meetings Coordinator.

[FR Doc. E8–24769 Filed 10–16–08; 8:45 am]

BILLING CODE 7020–02–P

DEPARTMENT OF JUSTICE

Notice of Lodging of Amended Consent Decree; Under the Comprehensive Environmental Response, Compensation, and Liability Act of 1980 (''CERCLA'')

Consistent with Section 122(d) of the Comprehensive Environmental Response, Compensation, and Liability Act of 1980, as amended (''CERCLA''), 42 U.S.C. 9622(d), and 28 CFR 50.7, notice is hereby given that on October 7, 2008, the United States lodged an Amended Consent in *United States of America* v. *Lockheed Martin Corporation, et al.,* Civil No. 4:02–cv–146 (USDC W.D. Ky.) for the Green River Landfill Superfund Site, located in Maceo, Daviess County, Kentucky (the ''Site''). This Court originally approved a Consent Decree in this matter on September 27, 2002. Since the time the original Consent Decree was approved by the Court, the ''Settling Defendants'' as defined therein, and the United States Environmental Protection Agency (''EPA'') have been unable to implement the institutional controls required at the Site by Section IX of the Consent Decree. Under the proposed Amended Consent Decree, one ''Settling Defendant,'' Browning-Ferris Industries of Kentucky, Inc. (''BFIKY'') has or will acquire the property needed to institute the necessary institutional controls and, after entry of the Amended Consent Decree, will transfer such property to de maximus inc., defined in the proposed Amended Consent Decree as the ''Owner Settling Defendant.'' In addition, BFIKY will donate another parcel to Daviess County, which desires to keep it as open space. These property transfers will permit the remaining defendants to institute the required institutional controls and the open space will be an important buffer around the Site.

Under the proposed Amended Consent Decree, in exchange for the property transfers referenced above, BFIKY will have no further obligations under the Amended Consent Decree and will receive from the United States a covenant not to sue or to take administrative action pursuant to Sections 106 or 107 of Comprehensive Environmental Response, Compensation, and Liability Act of 1980 (''CERCLA''), 42 U.S.C. 9606 and 9607 as amended, and Section 7003 of the Resource Conservation and Recovery Act (''RCRA''), 42 U.S.C. 6973, for the United States' past and future costs at the Site. The remaining Settling Defendants will receive from the United States a covenant not to sue or to take administrative action pursuant to Sections 106 and 107 of CERCLA, 42 U.S.C. 9606 and 9607 as amended, and Section 7003 of RCRA, in exchange for implementing the remedy and required institutional controls at the Site and paying EPA's remaining costs under the terms of the proposed Amended Consent Decree.

The Department of Justice will receive for a period of thirty (30) days from the date of this publication comments relating to the Consent Decree Amendments. Comments should be addressed to the Assistant Attorney General, Environment and Natural

Resources Division, and either e-mailed to *pubcomment-ees.enrd@usdoj.gov* or mailed to P.O. Box 7611, U.S. Department of Justice, Washington, DC 20044–7611, and should refer to *United States of America* v. *Lockheed Martin Corporation, et al.,* Civil No. 4:02–cv–146 (USDC W.D. Ky.) (DOJ Ref. No. 90–11–2–1098).

The Amended Consent Decree may be examined at U.S. EPA Region 4, 61 Forsyth Street, Atlanta, GA 30303 (contact Kevin Beswick, Esq. (404) 562–9580). During the public comment period, the Amended Consent Decree may also be examined on the following Department of Justice Web site, *http://www.usdoj.gov/enrd/Consent_Decrees.html.* A copy of the Consent Decree may also be obtained by mail from the Consent Decree Library, U.S. Department of Justice, P.O. Box 7611, Washington, DC 20044–7611 or by faxing or e-mailing a request to Tonia Fleetwood *(tonia.fleetwood@usdoj.gov),* fax no. (202) 514–0097, phone confirmation number (202) 514–1547. In requesting a copy from the Consent Decree Library, please refer to *United States of America* v. *Lockheed Martin Corporation, et al.,* Civil No. 4:02–cv–146 (USDC W.D. Ky.) (DOJ Ref. No. 90–11–2–1098), and enclose a check in the amount of $29.00 (25 cents per page reproduction cost) payable to the U.S. Treasury or, if by e-mail or fax, forward a check in that amount to the Consent Decree Library at the stated address.

Henry S. Friedman,

Assistant Section Chief, Environmental Enforcement Section, Environment and Natural Resources Division.

[FR Doc. E8–24711 Filed 10–16–08; 8:45 am]

BILLING CODE 4410–15–P

DEPARTMENT OF JUSTICE

Drug Enforcement Administration

Importer of Controlled Substances; Notice of Application

Pursuant to 21 U.S.C. 958(i), the Attorney General shall, prior to issuing a registration under this section to a bulk manufacturer of a controlled substance in schedule I or II, and prior to issuing a regulation under 21 U.S.C. 952(a)(2) authorizing the importation of such a substance, provide manufacturers holding registrations for the bulk manufacture of the substance an opportunity for a hearing.

Therefore, in accordance with Title 21 Code of Federal Regulations (CFR), 1301.34(a), this is notice that on August 8, 2008, Fisher Clinical Services, Inc., 7554 Schantz Road, Allentown, Pennsylvania 18106, made application by renewal to the Drug Enforcement Administration (DEA) to be registered as an importer of Noroxymorphone (9668), a basic class of controlled substance listed in schedule II.

The company plans to import the listed substance for analytical research and clinical trials.

Any bulk manufacturer who is presently, or is applying to be, registered with DEA to manufacture such basic classes of controlled substances may file comments or objections to the issuance of the proposed registration and may, at the same time, file a written request for a hearing on such application pursuant to 21 CFR 1301.43 and in such form as prescribed by 21 CFR 1316.47.

Any such comments or objections should be addressed, in quintuplicate, to the Drug Enforcement Administration, Office of Diversion Control, Federal Register Representative (ODL), 8701 Morrissette Drive, Springfield, Virginia 22152; and must be filed no later than November 17, 2008.

This procedure is to be conducted simultaneously with, and independent of, the procedures described in 21 CFR 1301.34(b), (c), (d), (e), and (f). As noted in a previous notice published in the **Federal Register** on September 23, 1975, (40 FR 43745), all applicants for registration to import a basic class of any controlled substance in schedule I or II are, and will continue to be, required to demonstrate to the Deputy Assistant Administrator, Office of Diversion Control, Drug Enforcement Administration, that the requirements for such registration pursuant to 21 U.S.C. 958(a); 21 U.S.C. 823(a); and 21 CFR 1301.34(b), (c), (d), (e), and (f) are satisfied.

Dated: October 9, 2008.

Joseph T. Rannazzisi,

Deputy Assistant Administrator, Office of Diversion Control, Drug Enforcement Administration.

[FR Doc. E8–24774 Filed 10–16–08; 8:45 am]

BILLING CODE 4410–09–P

DEPARTMENT OF JUSTICE

Drug Enforcement Administration

Importer of Controlled Substances; Notice of Application

Pursuant to 21 U.S.C. 958(i), the Attorney General shall, prior to issuing a registration under this Section to a bulk manufacturer of a controlled substance in schedule I or II, and prior to issuing a regulation under 21 U.S.C. 952(a)(2) authorizing the importation of such a substance, provide manufacturers holding registrations for the bulk manufacture of the substance an opportunity for a hearing.

Therefore, in accordance with Title 21 Code of Federal Regulations (CFR), 1301.34(a), this is notice that on August 5, 2008, Noramco Inc., 500 Swedes Landing Road, Wilmington, Delaware 19801–4417, made application by renewal to the Drug Enforcement Administration (DEA) to be registered as an importer of Opium, Raw (9600) and Concentrate of Poppy Straw (9670), basic classes of controlled substances listed in schedule II.

The company plans to import the listed controlled substances to manufacture other controlled substances.

Any bulk manufacturer who is presently, or is applying to be, registered with DEA to manufacture such basic classes of controlled substances may file comments or objections to the issuance of the proposed registration and may, at the same time, file a written request for a hearing on such application pursuant to 21 CFR 1301.43 and in such form as prescribed by 21 CFR 1316.47.

Any such comments or objections should be addressed, in quintuplicate, to the Drug Enforcement Administration, Office of Diversion Control, Federal Register Representative (ODL), 8701 Morrissette Drive, Springfield, Virginia 22152; and must be filed no later than November 17, 2008.

This procedure is to be conducted simultaneously with, and independent of, the procedures described in 21 CFR 1301.34(b), (c), (d), (e), and (f). As noted in a previous notice published in the **Federal Register** on September 23, 1975, (40 FR 43745), all applicants for registration to import a basic class of any controlled substance in schedules I or II are, and will continue to be, required to demonstrate to the Deputy Assistant Administrator, Office of Diversion Control, Drug Enforcement Administration, that the requirements for such registration pursuant to 21 U.S.C. 958(a); 21 U.S.C. 823(a); and 21 CFR 1301.34(b), (c), (d), (e), and (f) are satisfied.

Dated: October 9, 2008.

Joseph T. Rannazzisi,

Deputy Assistant Administrator, Office of Diversion Control, Drug Enforcement Administration.

[FR Doc. E8–24780 Filed 10–16–08; 8:45 am]

BILLING CODE 4410–09–P

DEPARTMENT OF JUSTICE

Drug Enforcement Administration

Importer of Controlled Substances; Notice of Application

Pursuant to 21 U.S.C. 958(i), the Attorney General shall, prior to issuing a registration under this Section to a bulk manufacturer of a controlled substance in schedule I or II, and prior to issuing a registration under 21 U.S.C. 952(a)(2) authorizing the importation of such a substance, provide manufacturers holding registrations for the bulk manufacture of the substance an opportunity for a hearing.

Therefore, in accordance with Title 21 Code of Federal Regulations (CFR), 1301.34(a), this is notice that on September 4, 2008, Formulation Technologies LLC., 11400 Burnet Road, Suite 4010, Austin, Texas 78758, made application by renewal to the Drug Enforcement Administration (DEA) to be registered as an importer of Fentanyl (9801), a basic class of controlled substance listed in schedule II.

The company plans to import the listed controlled substance for analytical characterization, secondary packaging, and/or for distribution to clinical trial sites.

Any bulk manufacturer who is presently, or is applying to be, registered with DEA to manufacture such basic class of controlled substance may file comments or objections to the issuance of the proposed registration and may, at the same time, file a written request for a hearing on such application pursuant to 21 CFR 1301.43 and in such form as prescribed by 21 CFR 1316.47.

Any such comments or objections being sent via regular mail should be addressed, in quintuplicate, to the Drug Enforcement Administration, Office of Diversion Control, Federal Register Representative (ODL), 8701 Morrissette Drive, Springfield, Virginia 22152; and must be filed no later than November 17, 2008.

This procedure is to be conducted simultaneously with, and independent of, the procedures described in 21 CFR 1301.34(b), (c), (d), (e), and (f). As noted in a previous notice published in the **Federal Register** on September 23, 1975, (40 FR 43745), all applicants for registration to import a basic class of any controlled substances in schedule I or II are, and will continue to be, required to demonstrate to the Deputy Assistant Administrator, Office of Diversion Control, Drug Enforcement Administration, that the requirements for such registration pursuant to 21 U.S.C. 958(a); 21 U.S.C. 823(a); and 21 CFR 1301.34(b), (c), (d), (e), and (f) are satisfied.

Dated: October 9, 2008.

Joseph T. Rannazzisi,

Deputy Assistant Administrator, Office of Diversion Control, Drug Enforcement Administration.

[FR Doc. E8–24783 Filed 10–16–08; 8:45 am]

BILLING CODE 4410–09–P

DEPARTMENT OF JUSTICE

Drug Enforcement Administration

Manufacturer of Controlled Substances; Notice of Application

Pursuant to § 1301.33(a) of Title 21 of the Code of Federal Regulations (CFR), this is notice that on August 5, 2008, Noramco Inc., Division of Ortho McNeil, Inc., 500 Swedes Landing Road, Wilmington, Delaware 19801–4417, made application by renewal to the Drug Enforcement Administration (DEA) as a bulk manufacturer of the basic classes of controlled substances listed in schedules I and II:

Drug	Schedule
Codeine-N-oxide (9053)	I
Dihydromorphine (9145)	I
Morphine-N-oxide (9307)	I
Methylphenidate (1724)	II
Methylphenidate HCL (1726)	II
Codeine (9050)	II
Dihydrocodeine (9120)	II
Oxycodone (9143)	II
Hydromorphone (9150)	II
Hydrocodone (9193)	II
Morphine (9300)	II
Thebaine (9333)	II
Opium extracts (9610)	II
Opium fluid extract (9620)	II
Opium tincture (9630)	II
Opium, powdered (9639)	II
Opium, granulated (9640)	II
Oxymorphone (9652)	II

The company plans to bulk manufacture the above listed controlled substances for sale and distribution to manufacturers for product development and formulation.

Any other such applicant, and any person who is presently registered with DEA to manufacture such substances, may file comments or objections to the issuance of the proposed registration pursuant to 21 CFR 1301.33(a).

Any such written comments or objections should be addressed, in quintuplicate, to the Drug Enforcement Administration, Office of Diversion Control, Federal Register Representative (ODL), 8701 Morrissette Drive, Springfield, Virginia 22152; and must be filed no later than December 16, 2008.

Dated: October 9, 2008.

Joseph T. Rannazzisi,

Deputy Assistant Administrator, Office of Diversion Control, Drug Enforcement Administration.

[FR Doc. E8–24767 Filed 10–16–08; 8:45 am]

BILLING CODE 4410–09–P

DEPARTMENT OF JUSTICE

Drug Enforcement Administration

Manufacturer of Controlled Substances; Notice of Application

Pursuant to § 1301.33(a) of Title 21 of the Code of Federal Regulations (CFR), this is notice that on July 10, 2008, Penick Corporation, 33 Industrial Park Road, Pennsville, New Jersey 08070, made application by letter to the Drug Enforcement Administration (DEA) as a bulk manufacturer of Oripavine (9330), a basic class of controlled substance listed in schedule II.

The company will use the above listed controlled substance in the manufacture of other controlled substance intermediates for sale to its customers.

Any other such applicant, and any person who is presently registered with DEA to manufacture such substances, may file comments or objections to the issuance of the proposed registration pursuant to 21 CFR 1301.33(a).

Any such written comments or objections should be addressed, in quintuplicate, to the Drug Enforcement Administration, Office of Diversion Control, Federal Register Representative (ODL), 8701 Morrissette Drive, Springfield, Virginia 22152; and must be filed no later than December 16, 2008.

Dated: October 9, 2008.

Joseph T. Rannazzisi,

Deputy Assistant Administrator, Office of Diversion Control, Drug Enforcement Administration.

[FR Doc. E8–24768 Filed 10–16–08; 8:45 am]

BILLING CODE 4410–09–P

DEPARTMENT OF JUSTICE

Drug Enforcement Administration

Manufacturer of Controlled Substances; Notice of Application

Pursuant to § 1301.33(a) of Title 21 of the Code of Federal Regulations (CFR), this is notice that on July 15, 2008, Cerilliant Corporation, 811 Paloma Drive, Suite A, Round Rock, Texas 78665–2402, made application by renewal to the Drug Enforcement Administration (DEA) as a bulk manufacturer of the basic classes of

controlled substances listed in schedules I and II:

Drug	Schedule
Cathinone (1235)	I
Methcathinone (1237)	I
N-Ethylamphetamine (1475)	I
N,N-Dimethylamphetamine (1480)	I
Aminorex (1585)	I
4-Methylaminorex (cis isomer) (1590)	I
Gamma-Hydroxybutyric acid (2010)	I
Methaqualone (2565)	I
Alpha-ethyltryptamine (7249)	I
Lysergic acid diethylamide (7315)	I
Marihuana (7360)	I
Tetrahydrocannabinols (7370)	I
Mescaline (7381)	I
3,4,5-Trimethoxyamphetamine (7390)	I
4-Bromo-2,5-dimethoxyamphetamine (7391)	I
4-Bromo-2,5-dimethoxyphenethylamine (7392)	I
4-Methyl-2,5-dimethoxyamphetamine (7395)	I
2,5-Dimethoxyamphetamine (7396)	I
2,5-Dimethoxy-4-ethylamphetamine (7399)	I
3,4-Methylenedioxyamphetamine (7400)	I
5-Methoxy-3,4-methylenedioxyamphetamine (7401)	I
N-Hydroxy-3,4-methylendioxyamphetamine (7402)	I
3,4-Methylendioxy-N-ethylamphetamine (7404)	I
3,4-Methylenedioxymethamphetamine (7405)	I
4-Methoxyamphetamine (7411)	I
Alpha-methyltryptamine (7432)	I
Bufotenine (7433)	I
Diethyltryptamine (7434)	I
Dimethyltryptamine (7435)	I
Psilocybin (7437)	I
Psilocyn (7438)	I
N-Benzylpiperazine (7493)	I
Acetyldihydrocodeine (9051)	I
Benzylmorphine (9052)	I
Codeine-N-oxide (9053)	I
Dihydromorphine (9145)	I
Heroin (9200)	I
Hydromorphinol (9301)	I
Methyldihydromorphine (9304)	I
Morphine-N-oxide (9307)	I
Normorphine (9313)	I
Pholcodine (9314)	I
Acetylmethadol (9601)	I
Allylprodine (9602)	I
Alphacetylmethadol except levo-alphacetylmethadol (9603)	I
Alphameprodine (9604)	I
Alphamethadol (9605)	I
Betacetylmethadol (9607)	I
Betameprodine (9608)	I
Betamethadol (9609)	I
Betaprodine (9611)	I
Hydroxypethidine (9627)	I
Noracymethadol (9633)	I
Norlevorphanol (9634)	I
Normethadone (9635)	I
Trimeperidine (9646)	I
Phenomorphan (9647)	I
Para-Fluorofentanyl (9812)	I
3-Methylfentanyl (9813)	I
Alpha-Methylfentanyl (9814)	I
Acetyl-alpha-methylfentanyl (9815)	I
Beta-hydroxyfentanyl (9830)	I
Beta-hydroxy-3-methylfentanyl (9831)	I
Alpha-Methylthiofentanyl (9832)	I
3-Methylthiofentanyl (9833)	I
Thiofentanyl (9835)	I
Amphetamine (1100)	II
Methamphetamine (1105)	II
Phenmetrazine (1631)	II
Methylphenidate (1724)	II
Amobarbital (2125)	II

Drug	Schedule
Pentobarbital (2270)	II
Secobarbital (2315)	II
Glutethimide (2550)	II
Nabilone (7379)	II
1-Phenylcyclohexylamine (7460)	II
Phencyclidine (7471)	II
1-Piperidinocyclohexanecarbonitrile (8603)	II
Alphaprodine (9010)	II
Cocaine (9041)	II
Codeine (9050)	II
Dihydrocodeine (9120)	II
Oxycodone (9143)	II
Hydromorphone (9150)	II
Diphenoxylate (9170)	II
Benzoylecgonine (9180)	II
Ethylmorphine (9190)	II
Hydrocodone (9193)	II
Levomethorphan (9210)	II
Levorphanol (9220)	II
Isomethadone (9226)	II
Meperidine (9230)	II
Meperidine intermediate-A (9232)	II
Meperidine intermediate-B (9233)	II
Meperidine intermediate-C (9234)	II
Methadone (9250)	II
Methadone intermediate (9254)	II
Dextropropoxyphene, bulk (non-dosage forms) (9273)	II
Morphine (9300)	II
Thebaine (9333)	II
Levo-alphacetylmethadol (9648)	II
Oxymorphone (9652)	II
Noroxymorphone (9668)	II
Racemethorphan (9732)	II
Alfentanil (9737)	II
Sufentanil (9740)	II
Fentanyl (9801)	II

The company plans to manufacture small quantities of the listed controlled substances to make reference standards which will be distributed to their customers.

Any other such applicant, and any person who is presently registered with DEA to manufacture such substances, may file comments or objections to the issuance of the proposed registration pursuant to 21 CFR 1301.33(a).

Any such written comments or objections should be addressed, in quintuplicate, to the Drug Enforcement Administration, Office of Diversion Control, Federal Register Representative (ODL), 8701 Morrissette Drive, Springfield, Virginia 22152; and must be filed no later than December 16, 2008.

Dated: October 9, 2008.

Joseph T. Rannazzisi,

Deputy Assistant Administrator, Office of Diversion Control, Drug Enforcement Administration.

[FR Doc. E8–24771 Filed 10–16–08; 8:45 am]

BILLING CODE 4410–09–P

DEPARTMENT OF JUSTICE

Drug Enforcement Administration

Manufacturer of Controlled Substances; Notice of Application

Pursuant to § 1301.33(a) of Title 21 of the Code of Federal Regulations (CFR), this is notice that on July 15, 2008, Noramco Inc., 1440 Olympic Dr., Athens, Georgia 30601, made application by renewal to the Drug Enforcement Administration (DEA) as a bulk manufacturer of the basic classes of controlled substances listed in schedules I and II:

Drug	Schedule
Codeine-N-Oxide (9053)	I
Morphine-N-Oxide (9307)	I
Amphetamine (1100)	II
Methylphenidate (1724)	II
Codeine (9050)	II
Dihydrocodeine (9120)	II
Oxycodone (9143)	II
Hydromorphone (9150)	II
Hydrocodone (9193)	II
Morphine (9300)	II
Oripavine (9330)	II
Thebaine (9333)	II
Oxymorphone (9652)	II
Alfentanil (9737)	II
Sufentanil (9740)	II
Carfentanil (9743)	II
Fentanyl (9801)	II

The company plans to manufacture small quantities of the schedule I controlled substances for internal testing; the schedule II controlled substances will be manufactured in bulk for distribution to its customers.

Any other such applicant, and any person who is presently registered with DEA to manufacture such substances, may file comments or objections to the issuance of the proposed registration pursuant to 21 CFR 1301.33(a).

Any such written comments or objections should be addressed, in quintuplicate, to the Drug Enforcement Administration, Office of Diversion Control, Federal Register Representative (ODL), 8701 Morrissette Drive, Springfield, Virginia 22152; and must be filed no later than December 16, 2008.

Dated: October 9, 2008.

Joseph T. Rannazzisi,

Deputy Assistant Administrator, Office of Diversion Control, Drug Enforcement Administration.

[FR Doc. E8–24772 Filed 10–16–08; 8:45 am]

BILLING CODE 4410–09–P

DEPARTMENT OF JUSTICE

Drug Enforcement Administration

Manufacturer of Controlled Substances; Notice of Application

Pursuant to § 1301.33(a) of Title 21 of the Code of Federal Regulations (CFR), this is notice that on August 5, 2008, Cayman Chemical Company, 1180 East Ellsworth Road, Ann Arbor, Michigan 48108, made application by renewal to the Drug Enforcement Administration (DEA) as a bulk manufacturer of the basic classes of controlled substances listed in schedule I:

Drug	Schedule
Marihuana (7360)	I
Tetrahydrocannabinols (7370)	I

The company plans to manufacture small quantities of marihuana derivatives for research purposes. In reference to drug code 7360 (Marihuana), the company plans to bulk manufacture cannabidiol. In reference to drug code 7370 (Tetrahydrocannabinols), the company will manufacture a synthetic THC. No other activity for this drug code is authorized for registration.

Any other such applicant, and any person who is presently registered with DEA to manufacture such substances, may file comments or objections to the issuance of the proposed registration pursuant to 21 CFR 1301.33(a).

Any such written comments or objections should be addressed, in quintuplicate, to the Drug Enforcement Administration, Office of Diversion Control, Federal Register Representative (ODL), 8701 Morrissette Drive, Springfield, Virginia 22152; and must be filed no later than December 16, 2008.

Dated: October 9, 2008.

Joseph T. Rannazzisi,

Deputy Assistant Administrator, Office of Diversion Control, Drug Enforcement Administration.

[FR Doc. E8–24773 Filed 10–16–08; 8:45 am]

BILLING CODE 4410–09–P

DEPARTMENT OF JUSTICE

Drug Enforcement Administration

Manufacturer of Controlled Substances; Notice of Registration

By Notice dated June 20, 2008, and published in the **Federal Register** on June 27, 2008, (73 FR 36573), Archimica, Inc., 2460 W. Bennett Street, Springfield, Missouri 65807–1229, made application by renewal to the Drug Enforcement Administration (DEA) to be registered as a bulk manufacturer of the basic classes of controlled substances listed in schedule II:

Drug	Schedule
Methylphenidate (1724)	II
Phenylacetone (8501)	II
Methadone Intermediate (9254)	II

The company plans to manufacture the listed controlled substances in bulk for research purposes, and sale to its customers.

No comments or objections have been received. DEA has considered the factors in 21 U.S.C. 823(a) and determined that the registration of Archimica, Inc. to manufacture the listed basic classes of controlled substances is consistent with the public interest at this time. DEA has investigated Archimica, Inc. to ensure that the company's registration is consistent with the public interest. The investigation has included inspection and testing of the company's physical security systems, verification of the company's compliance with state and local laws, and a review of the company's background and history. Therefore, pursuant to 21 U.S.C. 823, and in accordance with 21 CFR 1301.33, the above named company is granted registration as a bulk manufacturer of the basic classes of controlled substances listed.

Dated: October 9, 2008.

Joseph T. Rannazzisi,

Deputy Assistant Administrator, Office of Diversion Control, Drug Enforcement Administration.

[FR Doc. E8–24775 Filed 10–16–08; 8:45 am]

BILLING CODE 4410–09–P

DEPARTMENT OF JUSTICE

Drug Enforcement Administration

Manufacturer of Controlled Substances; Notice of Registration

By Notice dated April 28, 2008, and published in the **Federal Register** on May 2, 2008, (73 FR 24313), Abbott Laboratories, DBA Knoll Pharmaceutical Company, 30 North Jefferson Road, Whippany, New Jersey 07981, made application by renewal to the Drug Enforcement Administration (DEA) to be registered as a bulk manufacturer of the basic classes of controlled substances listed in schedules I and II:

Drug	Schedule
Dihydromorphine (9145)	I
Hydromorphone (9150)	II

The company plans to manufacture bulk product and dosage units for distribution to its customers.

No comments or objections have been received. DEA has considered the factors in 21 U.S.C. 823(a) and determined that the registration of Abbott Laboratories to manufacture the listed basic classes of controlled substances is consistent with the public interest at this time. DEA has investigated Abbott Laboratories to ensure that the company's registration is consistent with the public interest. The investigation has included inspection and testing of the company's physical security systems, verification of the company's compliance with state and local laws, and a review of the company's background and history. Therefore, pursuant to 21 U.S.C. 823, and in accordance with 21 CFR 1301.33, the above named company is granted registration as a bulk manufacturer of the basic classes of controlled substances listed.

Dated: October 9, 2008.

Joseph T. Rannazzisi,

Deputy Assistant Administrator, Office of Diversion Control, Drug Enforcement Administration.

[FR Doc. E8–24777 Filed 10–16–08; 8:45 am]

BILLING CODE 4410–09–P

DEPARTMENT OF LABOR

Mine Safety and Health Administration

Petitions for Modification

AGENCY: Mine Safety and Health Administration, Labor.

ACTION: Notice of petitions for modification of existing mandatory safety standards.

SUMMARY: Section 101(c) of the Federal Mine Safety and Health Act of 1977 and 30 CFR Part 44 govern the application, processing, and disposition of petitions for modification. This notice is a summary of petitions for modification filed by the parties listed below to modify the application of existing

mandatory safety standards published in Title 30 of the Code of Federal Regulations.

DATES: All comments on the petitions must be received by the Office of Standards, Regulations, and Variances on or before November 17, 2008.

ADDRESSES: You may submit your comments, identified by ''docket number'' on the subject line, by any of the following methods:

1. *Electronic Mail: Standards-Petitions@dol.gov.*
2. *Facsimile:* 1–202–693–9441.
3. *Regular Mail:* MSHA, Office of Standards, Regulations, and Variances, 1100 Wilson Boulevard, Room 2350, Arlington, Virginia 22209, Attention: Patricia W. Silvey, Director, Office of Standards, Regulations, and Variances.
4. *Hand-Delivery or Courier:* MSHA, Office of Standards, Regulations, and Variances, 1100 Wilson Boulevard, Room 2350, Arlington, Virginia 22209, Attention: Patricia W. Silvey, Director, Office of Standards, Regulations, and Variances.

MSHA will consider only comments postmarked by the U.S. Postal Service or proof of delivery from another delivery service such as UPS or Federal Express on or before the deadline for comments. Individuals who submit comments by hand-delivery are required to check in at the receptionist desk on the 21st floor.

Individuals may inspect copies of the petitions and comments during normal business hours at the address listed above.

FOR FURTHER INFORMATION CONTACT: Barbara Barron, Office of Standards, Regulations, and Variances at 202–693–9447 (Voice), *barron.barbara@dol.gov* (E-mail), or 202–693–9441 (Telefax). [These are not toll-free numbers].

SUPPLEMENTARY INFORMATION:

I. Background

Section 101(c) of the Federal Mine Safety and Health Act of 1977 (Mine Act) allows the mine operator or representative of miners to file a petition to modify the application of any mandatory safety standard to a coal or other mine if the Secretary determines that: (1) An alternative method of achieving the result of such standard exists which will at all times guarantee no less than the same measure of protection afforded the miners of such mine by such standard; or (2) that the application of such standard to such mine will result in a diminution of safety to the miners in such mine. In addition, the regulations at 30 CFR 44.10 and 44.11 establish the requirements and procedures for filing petitions for modifications.

II. Petitions for Modification

Docket Number: M–2008–045–C.

Petitioner: Guest Mountain Mining Corporation, P.O. Box 2560, Wise, Virginia 24293.

Mine: Guest Mountain #3 Mine, MSHA I.D. No. 44–07069 and Guest Mountain #4 Mine, MSHA I.D. No. 44–05815, located in Wise County, Virginia.

Regulation Affected: 30 CFR 77.214(a) (Refuse piles; general).

Modification Request: The petitioner requests a modification of the existing standard which prohibits refuse piles to be located over abandoned openings to permit sealing of abandoned mine openings during mine closure. The petitioner proposes to use scalped rock to cover the portal openings of the Guest Mountain #3 Mine upon closure of the mine in late 2008 or in early 2009. The petitioner states that: (1) This disposal fill will utilize scalped rock, i.e. underground development waste, partings, and ''draw'' rock/laminated shale roof rock from the adjacent Guest Mountain #4 Mine, Maggard Branch Coal, LLC, Virginia Division of Mined Land Reclamation Permit 1402002; (2) both mines are in the Parsons seam; and (3) there is a highwall at the mine portal area that varies in height from a few feet up to approximately 50 feet. The petitioner states that the refuse fill will consist of a combination of scalped rock and non-combustible rock rip rap that will ensure the openings will drain freely and not impound water, in the event the openings have water, and will not affect the stability of the refuse fill. The petitioner states that there are no plans to place mine refuse, i.e., scalped rock over the portals in question until after the mine has ceased underground operations, and there will be no miners underground during the entire time the scalped rock is being placed. The petitioner further states that the placement of scalped rock above its portals can be done safely and in accordance with all regulations by following the plan as outlined in this petition. The petitioner asserts that its proposal to cover the mine openings provides the same measure of protection as the existing standard.

Docket Number: M–2008–046–C.

Petitioner: Black Beauty Coal Company, 13101 Zeigler 11 Road, P.O. Box 369, Coulterville, Illinois 62237.

Mine: Gateway Mine, MSHA I.D. No. 11–02408, located in Randolph County, Illinois.

Regulation Affected: 30 CFR 75.1101–1(b) (Deluge-type water spray systems).

Modification Request: The petitioner requests a modification of the existing standard to permit a weekly visual examination and functional test to be performed in lieu of using blow-off dust covers for deluge-type water spray fire-suppression systems used at each belt drive. The petitioner states that: (1) Corrections will be made immediately if a clogged nozzle or any other malfunction is detected as a result of the weekly examination and functional test; (2) the procedure used to perform the functional test will be posted at or near each belt drive that utilizes a deluge-type water spray fire-suppression system; and (3) revisions to the approved training plan will specify the procedure used to conduct weekly functional tests. The petitioner asserts that the safety of the miners will not be compromised with the proposed testing procedures.

Patricia W. Silvey,

Director, Office of Standards, Regulations, and Variances.

[FR Doc. E8–24703 Filed 10–16–08; 8:45 am]

BILLING CODE 4510–43–P

DEPARTMENT OF LABOR

Occupational Safety and Health Administration

[Docket No. OSHA–2008–0039]

Asbestos in Construction Standard; Extension of the Office of Management and Budget's (OMB) Approval of Information Collection (Paperwork) Requirements

AGENCY: Occupational Safety and Health Administration (OSHA), Labor.

ACTION: Request for public comment.

SUMMARY: OSHA solicits comments concerning its proposal to extend OMB approval of the information collection requirements contained in the Asbestos in Construction Standard (29 CFR 1926.1101).

DATES: Comments must be submitted (postmarked, sent, or received) by December 16, 2008.

ADDRESSES: *Electronically:* You may submit comments and attachments electronically at *http://www.regulations.gov,* which is the Federal eRulemaking Portal. Follow the instructions online for submitting comments.

Facsimile: If your comments, including attachments, are not longer than 10 pages, you may fax them to the OSHA Docket Office at (202) 693–1648.

Mail, hand delivery, express mail, messenger, or courier service: When

using this method, you must submit three copies of your comments and attachments to the OSHA Docket Office, Docket No. OSHA–2008–0039, U.S. Department of Labor, Occupational Safety and Health Administration, Room N–2625, 200 Constitution Avenue, NW., Washington, DC 20210. Deliveries (hand, express mail, messenger, and courier service) are accepted during the Department of Labor's and Docket Office's normal business hours, 8:15 a.m. to 4:45 p.m., e.t.

Instructions: All submissions must include the Agency name and OSHA docket number for the ICR (OSHA–2008–0039). All comments, including any personal information you provide, are placed in the public docket without change, and may be made available online at *http://www.regulations.gov*. For further information on submitting comments see the ''Public Participation'' heading in the section of this notice titled ''**SUPPLEMENTARY INFORMATION**.''

Docket: To read or download comments or other material in the docket, go to *http://www.regulations.gov* or the OSHA Docket Office at the address above. All documents in the docket (including this **Federal Register** notice) are listed in the *http://www.regulations.gov* index; however, some information (*e.g.,* copyrighted material) is not publicly available to read or download through the website. All submissions, including copyrighted material, are available for inspection and copying at the OSHA Docket Office. You may contact Jamaa Hill at the address below to obtain a copy of the ICR.

FOR FURTHER INFORMATION CONTACT: Jamaa N. Hill or Todd Owen, Directorate of Standards and Guidance, OSHA, U.S. Department of Labor, Room N–3609, 200 Constitution Avenue, NW., Washington, DC 20210; telephone (202) 693–2222.

SUPPLEMENTARY INFORMATION:

I. Background

The Department of Labor, as part of its continuing efforts to reduce paperwork and respondent (*i.e.,* employer) burden, conducts a preclearance consultation program to provide the public with an opportunity to comment on proposed and continuing information collection requirements in accordance with the Paperwork Reduction Act of 1995 (44 U.S.C. 3506(c)(2)(A)). This program ensures that information is in the desired format, reporting burden (time and costs) is minimal, collection instruments are clearly understood, and OSHA's estimate of the information collection burden is accurate. The Occupational Safety and Health Act of 1970 (the OSH Act) (29 U.S.C. 651 *et seq.*) authorizes information collection by employers as necessary or appropriate for enforcement of the OSH Act or for developing information regarding the causes and prevention of occupational injuries, illnesses, and accidents (29 U.S.C. 657). The OSH Act also requires that OSHA obtain such information with minimum burden upon employers, especially those operating small businesses, and to reduce to the maximum extent feasible unnecessary duplication of efforts in obtaining information (29 U.S.C. 657). The standard protects employees from adverse health effects from occupational exposure to asbestos, including lung cancer, mesothelioma, asbestosis (an emphysema-like condition) and gastrointestinal cancer.

II. Special Issues for Comment

OSHA has a particular interest in comments on the following issues:

- Whether the proposed information collection requirements are necessary for the proper performance of the Agency's functions, including whether the information is useful;
- The accuracy of OSHA's estimate of the burden (time and costs) of the information collection requirements, including the validity of the methodology and assumptions used;
- The quality, utility, and clarity of the information collected; and
- Ways to minimize the burden on employers who must comply; for example, by using automated or other technological information collection and transmission techniques.

III. Proposed Actions

OSHA is requesting that OMB extend its approval of the information collection requirements contained in the Asbestos in Construction Standard (29 CFR 1926.1101). OSHA is proposing to decrease its current burden hour estimate of 5,569,658 to 4,957,552, a total decrease of −612,106 hours. The decrease occurred because a review of data indicated the number of employers affected by the Standard decreased from 1.4 to 1.2 million.

The Agency will summarize the comments submitted in response to this notice and will include this summary in the request to OMB.

Type of Review: Extension of a currently approved collection.

Title: Asbestos in Construction Standard (29 CFR 1926.1101).

OMB Number: 1218–0134.

Affected Public: Business or other for-profits; Federal Government; State, Local, or Tribal Government.

Number of Respondents: 255,271.

Frequency of Response: On occasion, Annually.

Average Time per Response: Time per response ranges from 5 minutes (0.08 hour) to maintain records to 1.67 hours to complete a medical examination.

Estimated Total Burden Hours: 4,957,552 hours.

Estimated Cost (Operation and Maintenance): $28,278,936.

IV. Public Participation—Submission of Comments on This Notice and Internet Access to Comments and Submissions

You may submit comments in response to this document as follows: (1) Electronically at *http://www.regulations.gov,* which is the Federal eRulemaking Portal; (2) by facsimile (FAX); or (3) by hard copy. All comments, attachments, and other material must identify the Agency name and the OSHA docket number for the ICR (Docket No. OSHA–2008–0039). You may supplement electronic submissions by uploading document files electronically. If you wish to mail additional materials in reference to an electronic or facsimile submission, you must submit them to the OSHA Docket Office (see the section of this notice titled **ADDRESSES**). The additional materials must clearly identify your electronic comments by your name, date, and the docket number so the Agency can attach them to your comments.

Because of security procedures, the use of regular mail may cause a significant delay in the receipt of comments. For information about security procedures concerning the delivery of materials by hand, express delivery, messenger, or courier service, please contact the OSHA Docket Office at (202) 693–2350 (TTY (877) 889–5627).

Comments and submissions are posted without change at *http://www.regulations.gov.* Therefore, OSHA cautions commenters about submitting personal information such as social security numbers and date of birth. Although all submissions are listed in the *http://www.regulations.gov* index, some information (e.g., copyrighted material) is not publicly available to read or download through this Web site. All submissions, including copyrighted material, are available for inspection and copying at the OSHA Docket Office. Information on using the *http://www.regulations.gov* Web site to submit comments and access the docket is available at the Web site's ''User Tips''

link. Contact the OSHA Docket Office for information about materials not available through the Web site, and for assistance in using the Internet to locate docket submissions.

V. Authority and Signature

Edwin G. Foulke, Jr., Assistant Secretary of Labor for Occupational Safety and Health, directed the preparation of this notice. The authority for this notice is the Paperwork Reduction Act of 1995 (44 U.S.C. 3506 *et seq.*) and Secretary of Labor's Order No. 5–2007 (72 FR 31159).

Signed at Washington, DC, this 10th day of October 2008.

Edwin G. Foulke, Jr.,

Assistant Secretary of Labor for Occupational Safety and Health.

[FR Doc. E8–24683 Filed 10–16–08; 8:45 am]

BILLING CODE 4510–26–P

NATIONAL AERONAUTICS AND SPACE ADMINISTRATION

[Notice (08–078)]

NASA Advisory Council; Science Committee; Planetary Protection Subcommittee; Meeting

AGENCY: National Aeronautics and Space Administration.

ACTION: Notice of meeting.

SUMMARY: The National Aeronautics and Space Administration (NASA) announces a meeting of the Planetary Protection Subcommittee of the NASA Advisory Council (NAC). This Subcommittee reports to the Science Committee of the NAC. The Meeting will be held for the purpose of soliciting from the scientific community and other person's scientific and technical information relevant to program planning.

DATES: Thursday, November 6, 2008, 9 a.m. to 5 p.m. and Friday, November 7, 2008, 9 a.m. to 3 p.m. Eastern Standard Time.

ADDRESSES: NASA Headquarters, 300 E Street, SW., Room 6H45, Washington, DC 20546.

FOR FURTHER INFORMATION CONTACT: Ms. Marian Norris, Science Mission Directorate, NASA Headquarters, Washington, DC 20546, (202) 358–4452, fax (202) 358–4118, or *mnorris@nasa.gov.*

SUPPLEMENTARY INFORMATION: The meeting will be open to the public up to the capacity of the room. The agenda for the meeting includes the following topics:

—Planetary Science Division/Science Mission Directorate Activities.
—Exploration System Mission Directorate/Science Mission Directorate Coordination and Human Exploration of the Moon.
—Update of Committee on Space Research (COSPAR) Planetary Protection Panel Actions.
—Update of Mars Exploration Program Analysis Group (MEPAG).

It is imperative that the meeting be held on these dates to accommodate the scheduling priorities of the key participants. Attendees will be requested to sign a register and to comply with NASA security requirements, including the presentation of a valid picture ID, before receiving an access badge. Foreign nationals attending this meeting will be required to provide the following information no less than 5 working days prior to the meeting: full name; gender; date/place of birth; citizenship; visa/green card information (number, type, expiration date); passport information (number, country, expiration date); employer/affiliation information (name of institution, address, country, telephone); title/position of attendee. To expedite admittance, attendees with U.S. citizenship can provide identifying information 3 working days in advance by contacting Marian Norris via e-mail at *mnorris@nasa.gov* or by telephone at (202) 358–4452.

P. Diane Rausch,

Advisory Committee Management Officer, National Aeronautics and Space Administration.

[FR Doc. E8–24677 Filed 10–16–08; 8:45 am]

BILLING CODE 7510–13–P

NATIONAL SCIENCE FOUNDATION

Advisory Committee for Education and Human Resources; Notice of Meeting

In accordance with the Federal Advisory Committee Act (Pub. L. 92–463, as amended), the National Science Foundation announces the following meeting:

Name: Advisory Committee for Education and Human Resources (#1119).

Date/Time:

November 5, 2008; 8:30 a.m. to 5 p.m.
November 6, 2008; 8:30 a.m. to 12 p.m.

Place: National Science Foundation Headquarters, Stafford Place I—Room 1235, 4201 Wilson Boulevard, Arlington VA 22230.

Type of Meeting: Open.

Contact Person: James Colby, National Science Foundation, 4201 Wilson Boulevard, Arlington, VA 22230, (703) 292–5331, *jcolby@nsf.gov.*

If you are attending the meeting and need access to the NSF, please contact the individual listed above so your name may be added to the building access list.

Purpose of Meeting: To provide advice with respect to the Foundation's science, technology, engineering, and mathematics (STEM) education and human resources programming.

Agenda:

November 5, 2008

Assistant Director's Remarks

Discussion of Selected Programs that Support:
- Broadening Participation to Improve Workforce Development
- Promoting Learning Through Research and Evaluation

Review and Acceptance of Committee of Visitor Reports
- Scholarships in STEM
- ADVANCE (Increasing the Participation and Advancement of Women in Academic Science and Engineering Careers)
- Graduate Teaching Fellows in K–12 Education, and the Integrative Graduate Education and Research Traineeship (IGERT) programs

November 6, 2008

Review and Acceptance of Committee of Visitor Reports (continued from Wednesday)
- Informal Science Education (ISE) and the Innovative Technology Experiences for Students and Teachers (ITEST) programs
- Math and Science Partnership (MSP) program

Visit with the NSF Director.
Future Issues for Consideration.

Dated: October 14, 2008.

Susanne Bolton,

Committee Management Officer.

[FR Doc. E8–24656 Filed 10–16–08; 8:45 am]

BILLING CODE 7555–01–P

NATIONAL SCIENCE FOUNDATION

Advisory Committee for Geosciences; Notice of Meeting

In accordance with the Federal Advisory Committee Act (Pub. L. 92–463, as amended), the National Science Foundation announces the following meeting:

Name: Advisory Committee for Geosciences (1755).

Dates:

November 19, 2008, 8:30 a.m.–5 p.m.
November 20, 2008, 8:30 a.m.–2 p.m.

Place: Stafford II, Room 555, National Science Foundation, 4201 Wilson Blvd., Arlington, Virginia 22230.

Type of Meeting: Open.

Contact Person: Melissa Lane, National Science Foundation, Suite 705, 4201 Wilson Blvd., Arlington, Virginia 22230. Phone 703–292–8500.

Minutes: May be obtained from the contact person listed above.

Purpose of Meeting: To provide advice, recommendations, and oversight concerning support for research, education, and human resources development in the geosciences.

Agenda:

November 19

Directorate Activities and Plans.
Discussion of Draft Strategic Plan.
Division Subcommittee Meetings.
Education & Diversity Subcommittee Meeting.

November 20

Earth Scope Briefing.
Meeting with the Director.
Planning for Spring Meeting.

Dated: October 14, 2008.

Susanne Bolton,

Committee Management Officer.

[FR Doc. E8–24657 Filed 10–16–08; 8:45 am]

BILLING CODE 7555–01–P

NUCLEAR REGULATORY COMMISSION

Detroit Edison Company; Notice of Receipt and Availability of Application for a Combined License

On September 18, 2008, Detroit Edison Company filed with the U.S. Nuclear Regulatory Commission (NRC, the Commission) pursuant to Section 103 of the Atomic Energy Act and Title 10 of the *Code of Federal Regulations* (10 CFR) Part 52, ''Licenses, Certifications, and Approvals for Nuclear Power Plants,'' an application for a combined license (COL) for an economic simplified boiling water reactor (ESBWR) nuclear power plant, to be located in Monroe County, Michigan. The reactor is to be identified as Fermi 3.

An applicant may seek a COL in accordance with Subpart C of 10 CFR Part 52. The information submitted by the applicant includes certain administrative information such as financial qualifications submitted pursuant to 10 CFR 52.77, as well as technical information submitted pursuant to 10 CFR 52.79.

Subsequent **Federal Register** notices will address the acceptability of the tendered COL application for docketing and provisions for participation of the public in the COL review process.

A copy of the application is available for public inspection at the Commission's Public Document Room (PDR), located at One White Flint North, Public File Area O1 F21, 11555 Rockville Pike (first floor), Rockville, Maryland, and via the Agencywide Documents Access and Management System (ADAMS) Public Electronic Reading Room on the Internet at the NRC Web site, *http://www.nrc.gov/reading-rm/adams.html.* The cover letter ADAMS Accession number is ML082730763. Future publicly available documents related to the application will also be posted in ADAMS. Persons who do not have access to ADAMS, or who encounter problems in accessing the documents located in ADAMS, should contact the NRC Public Document Room staff by telephone at 1–800–397–4209 or 301–415–4737, or by e-mail to *pdr@nrc.gov.* The application is also available at *http://www.nrc.gov/reactors/new-reactors/Fermi.html.*

Dated at Rockville, Maryland, this 10th day of October 2008.

For the Nuclear Regulatory Commission.

Chandu Patel,

Senior Project Manager, ESBWR/ABWR Projects Branch 1, Division of New Reactor Licensing, Office of New Reactors.

[FR Doc. E8–24675 Filed 10–16–08; 8:45 am]

BILLING CODE 7590–01–P

SECURITIES AND EXCHANGE COMMISSION

Sunshine Act Meeting

Notice is hereby given, pursuant to the provisions of the Government in the Sunshine Act, Public Law 94–409, that the Securities and Exchange Commission will hold a Closed Meeting on Tuesday, October 21, 2008, at 10 a.m.

Commissioners, Counsel to the Commissioners, the Secretary to the Commission, and recording secretaries will attend the Closed Meeting. Certain staff members who have an interest in the matters also may be present.

The General Counsel of the Commission, or his designee, has certified that, in his opinion, one or more of the exemptions set forth in 5 U.S.C. 552b(c)(5), (6), (7), 9(B) and (10) and 17 CFR 200.402(a)(5), (6), (7), 9(ii) and (10), permit consideration of the scheduled matters at the Closed Meeting.

Commissioner Casey, as duty officer, voted to consider the items listed for the Closed Meeting in closed session.

The subject matter of the Closed Meeting scheduled for Tuesday, October 21, 2008, will be:

Formal orders of investigation;
Institution and settlement of injunctive actions;
Institution and settlement of administrative proceedings of an enforcement nature; and
Other matters relating to enforcement proceedings.

At times, changes in Commission priorities require alterations in the scheduling of meeting items.

For further information and to ascertain what, if any, matters have been added, deleted or postponed, please contact:

The Office of the Secretary at (202) 551–5400.

Dated: October 14, 2008.

Florence E. Harmon,

Acting Secretary.

[FR Doc. E8–24720 Filed 10–16–08; 8:45 am]

BILLING CODE 8011–01–P

DEPARTMENT OF STATE

[Public Notice: 6401]

Bureau of Educational and Cultural Affairs; ''Connecting Through Difference: Share Your Story'' Online Video Contest

ACTION: Notice.

SUMMARY: People all over the world ages 14 and older are invited to submit videos, not to exceed three minutes in length, containing any form of artistic expression including, but not limited to, dance, spoken word, poetry, and song, that highlight the theme ''Connecting through Difference: Share your Story.''

DATES: Contest submissions will be accepted from on or about December 1, 2008, 12 p.m. EST, until January 26, 2009, 11:59 p.m. EST. The Department will accept comments from the public up to December 16, 2008.

SUBMISSIONS: Only videos submitted online at *connect.state.gov* will be considered.

ADDRESSES: You may submit comments, identified by any of the following methods:

- *Mail (paper, disk, or CD–ROM submissions):* U.S. Department of State, Office of the Assistant Secretary for Educational and Cultural Affairs, SA–44, 301 4th Street, SW., Room 800, Washington, DC 20547, Attn: Michele Peters.
- *E-mail: ExchangesDirect@state.gov.* Please reference ''Online Video Contest'' in the subject line of your message.

FOR FURTHER INFORMATION CONTACT: Ms. Michele Peters, Office of the Assistant Secretary for Educational and Cultural Affairs, (202) 203–5102; SA–44, 301 4th Street, SW., Room 800, Washington, DC 20547.

SUPPLEMENTARY INFORMATION: The Bureau of Educational and Cultural Affairs (ECA), under the authority of the Mutual Educational and Cultural Exchange Act of 1961, as amended (Fulbright-Hays), fosters mutual understanding between the United States and other countries through international educational, professional and cultural programs. ECA does so by promoting personal, professional, and institutional ties between private

citizens and organizations in the United States and those abroad, as well as by presenting U.S. society and culture in all of its diversity to overseas audiences.

The strategic objective of ECA is to assist in the development of friendly, sympathetic, and peaceful relations between the United States and other countries of the world by establishing and furthering common interests and values between Americans and people of different countries, cultures and faiths. To this end, ECA designs and implements programs that build personal and institutional relationships and that engage educational institutions and the private sector as partners on key public diplomacy initiatives.

ECA is building on and amplifying its international exchange programs by creating online communities that enhance mutual understanding. On October 1, 2008 ECA launched an interactive Web site and online social networking space (*connect.state.gov*) to build a worldwide community of people dedicated to creating international understanding and dialogue. Through this Online Video Contest, members of ECA's social networking Web site are invited to submit one video each that addresses the theme ''My Culture + Your Culture = ? Connecting Through Difference: Share your Story''. The Contest goal is to open active channels of communication, with the ECA Web site serving as the focal point for fostering a discussion of common values and interests. This overview of the Contest initiative is provided in order fully to inform the public and interested members of the philanthropic, corporate and NGO communities of ECA's strategic objectives and priorities.

The Contest will be open to the general public worldwide and will be launched and open for submissions in December 2008. Employees and contractors of the U.S. Government, and their immediate family members (spouse, parent, child, sibling and spouse or ''step'' of each) and those living in the same household, are not eligible to enter the Contest. The general public will be invited to submit videos of three minutes or less. Videos will be submitted and judged in two age group categories: (1) 14–17 years, and (2) 18 years and over (ages at time of submission). Videos may contain any form of artistic expression (e.g., song, dance, skit). Initially, the general public worldwide will be invited to vote for their favorite video contest submissions on ECA's social networking Web site (*connect.state.gov*). The 40 videos receiving the most public support will be sent to a blue ribbon panel of alumni from ECA's international exchange programs to be ranked. Four grand prize winners will receive global recognition of their videos and be eligible to participate in an ECA-funded, approximately two-week international exchange program. Winners must have a valid passport by the time of travel; prizes are contingent on visa eligibility and issuance.

Contest Details and Rules will be available at *connect.state.gov* no later than the December 1, 2008 contest start date.

ECA welcomes the views of the philanthropic, corporate and NGO communities on this initiative and the potential for strategic partnership in achieving them.

Dated: October 10, 2008.

Goli Ameri,

Assistant Secretary for Educational and Cultural Affairs, Department of State.

[FR Doc. E8–24721 Filed 10–16–08; 8:45 am]

BILLING CODE 4710–05–P

DEPARTMENT OF STATE

[Public Notice 6403]

Culturally Significant Objects Imported for Exhibition Determinations: ''Fragment to Vase: Approaches to Ceramic Restoration''

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 five objects to be included in the exhibition ''Fragment to Vase: Approaches to Ceramic Restoration,'' imported from abroad for temporary exhibition within the United States, are of cultural significance. The objects are imported pursuant to a loan agreement with the foreign owner or custodian. I also determine that the exhibition or display of two of these objects at the Getty Villa, Malibu, CA, from on or about December 18, 2008, until on or about June 1, 2009, and at possible additional exhibitions or venues yet to be determined, is in the national interest. I also determine that the exhibition or display of the remaining three objects at the Getty Villa, Malibu, CA, from on or about January 1, 2013, until on or about September 1, 2013, 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 Julie Simpson, Attorney-Adviser, Office of the Legal Adviser, U.S. Department of State (*telephone:* (202) 453–8050). The address is U.S. Department of State, SA–44, 301 4th Street, SW., Room 700, Washington, DC 20547–0001.

Dated: October 10, 2008.

C. Miller Crouch,

Principal Deputy Assistant Secretary for Educational and Cultural Affairs, Department of State.

[FR Doc. E8–24724 Filed 10–16–08; 8:45 am]

BILLING CODE 4710–05–P

DEPARTMENT OF STATE

[Public Notice 6402]

Culturally Significant Objects Imported for Exhibition Determinations: ''Taking Shape: Finding Sculpture in the Decorative Arts''

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 ''Taking Shape: Finding Sculpture in the Decorative Arts'' imported from abroad for temporary exhibition within the United States, are of cultural significance. The objects are imported pursuant to a loan agreement with the foreign owner or custodian. I also determine that the exhibition or display of the exhibit objects at The J. Paul Getty Museum, Los Angeles, California, from on or about March 31, 2009, until on or about July 5, 2009; 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 Wolodymyr Sulzynsky, Attorney-Adviser, Office of the Legal Adviser, U.S. Department of

State (telephone: 202/453–8050). The address is U.S. Department of State, SA–44, 301 4th Street, SW., Room 700, Washington, DC 20547–0001.

Dated: October 9, 2008.

C. Miller Crouch,

Principal Deputy Assistant Secretary for Educational and Cultural Affairs, Department of State.

[FR Doc. E8–24722 Filed 10–16–08; 8:45 am]

BILLING CODE 4710–05–P

DEPARTMENT OF STATE

[Public Notice 6404]

International Narcotics and Law Enforcement Affairs Personnel Records System

SUMMARY: Notice is hereby given that the Department of State proposes to create a new system of records, the International Narcotics and Law Enforcement Affairs Personnel Records System, which is currently in operation, pursuant to the provision of the Privacy Act of 1974 as amended (5 U.S.C. 552a) and Office of Management and Budget Circular No. A–130, Appendix I. The Department's report was filed with the Office of Management and Budget on October 8, 2008.

It is proposed that the new system be named ''International Narcotics and Law Enforcement Affairs Personnel Records System.'' The new system description will specify that International Narcotics and Law Enforcement Affairs Personnel Records System maintains records primarily on contracted personnel serving in criminal justice roles for the purposes of documenting individuals' experience and skills relevant to International Narcotic Law Enforcement Affairs' funded programs; ensuring foreign policy sensitivity and maintenance of the public trust, personnel safety and accountability; providing aggregate statistical data for program management purposes; providing information related to employment suitability for service in high-risk environments, including authority to carry weapons; and capturing and validating flight mission data.

The proposed routine uses provide for disclosure to private employers when necessary for contract administration and to Federal agencies and international organizations, upon their request, for the purpose of verifying information relating to employment eligibility. These proposed routine uses are compatible with the purpose of collecting information for the International Narcotics Law Enforcement Affairs Personnel Records System, as they facilitate the selection of suitable individuals to serve as contract personnel in operations organized and funded by the Department of State, or as contract personnel for other federal agencies or international organizations operating in high-risk environments where the selection of suitable individuals is essential for maintaining public trust, personnel safety and accountability.

Any persons interested in commenting on the new International Narcotics and Law Enforcement Affairs Personnel Records system of records may do so by submitting comments in writing to Margaret P. Grafeld, Director, Office of Information Programs and Service, A/ISS/IPS, SA–2, 515 22nd Street NW., Department of State, Washington, DC 20522–8001. The new system of records for the International Narcotics and Law Enforcement Affairs Personnel Records System will remain effective, unless comments are received 40 days from the date of publication that result in a contrary determination.

This new system description will read as set forth below.

Dated: October 8, 2008.

Raj Chellaraj,

Assistant Secretary for the Bureau of Administration, Department of State.

State–74

SYSTEM NAME:

International Narcotics and Law Enforcement Affairs (INL) Personnel Records (INLPR).

SECURITY CLASSIFICATION:

Sensitive but Unclassified.

SYSTEM LOCATIONS:

2201 C Street, NW., Washington, DC 20520; 2765 Business Center Blvd., Melbourne, FL 32940; Navy Hill, SA–4, 2430 E Street, NW., Washington, DC 20037; 1800 G Street, NW., SA–22, Washington, DC 20006.

CATEGORIES OF INDIVIDUALS COVERED BY THE SYSTEM:

Current or previous contractors and Federal employees affiliated with Bureau of International Narcotics and Law Enforcement Affairs.

AUTHORITY FOR MAINTENANCE OF THE SYSTEM:

The Foreign Assistance Act of 1961 as amended, in particular Chapter 8, Part I, section 481 *et seq.,* codified at 22 U.S.C. 2291 and 2292; State Department Basic Authorities Act of 1980, as amended, section 36(b), codified at 22 U.S.C. 2708; Section 103(c) of the Omnibus Diplomatic Security and Antiterrorism Act of 1986 (Public Law 99–399), as amended, codified at 22 U.S.C. 4802; Section 207 of the Foreign Service Act of 1980, codified at 22 U.S.C. 3927; National Security Decision Directive-38; National Security Presidential Directive-44 (Management of Interagency Efforts Concerning Reconstruction and Stabilization); other authorities, as appropriate.

CATEGORIES OF RECORDS IN THE SYSTEM:

Records include biographical information (full name, date of birth, home zip code, and email address), employee or contractor identification number, job location, employment history, experience, reports of significant/serious incidents, skills, training, and related information.

PURPOSE:

The INLPR system maintains records primarily on contracted personnel serving in criminal justice roles for the purposes of: Documenting individuals' experience and skills relevant to INL-funded programs; ensuring maintenance of the public trust, personnel safety, and accountability; providing aggregate statistical data for program management purposes; providing information related to employment suitability for service in high-risk environments, including authority to carry weapons; and capturing and validating flight mission data.

ROUTINE USES OF RECORDS MAINTAINED IN THE SYSTEM, INCLUDING CATEGORIES OF USERS AND PURPOSES OF SUCH USES:

Records may be disclosed to private employers when necessary for contract administration in connection with the purposes above, and to Federal and State agencies and international organizations, upon their request, for the purpose of providing information relating to employment eligibility. See also the standard routine uses listed in the Department of State Prefatory Statement, published in the **Federal Register**.

POLICIES AND PRACTICES FOR STORING, RETRIEVING, ACCESSING, RETAINING AND DISPOSING OF RECORDS IN THE SYSTEM:

STORAGE:

Electronic and paper.

RETRIEVABILITY:

Records may be retrieved by individual name, employee identification number, contractor identification number, or date of birth.

SAFEGUARDS:

All users are given information system security awareness training, including the procedures for handling Sensitive but Unclassified and

personally identifiable information. Annual refresher training is mandatory. Before being granted access to INLPR, a user must first be granted access to Department of State computer systems.

Remote access to Department of State network from non-Department owned systems is only authorized through Department approved access program. Remote access to the network is configured with the Office of Management and Budget Memorandum M–07–16 security requirements of two factor authentication and time out function.

All Department of State employees and contractors with authorized access have undergone a thorough background security investigation. Access to the Department of State and its facilities is controlled by security guards, and admission is limited to those individuals possessing a valid identification card or under proper escort. All paper records containing personal information are maintained in secured filing cabinets or in restricted areas, access to which is limited to authorized personnel. Access to electronic files is password-protected and under the direct supervision of the information owner. The INLPR structures access privileges to reflect the separation of key duties that end-users perform within the functions the application supports. Access privileges are consistent with the need-to-know, separation of duties, and supervisory requirements established for manual processes.

When it is determined that a user no longer needs access, the user account is disabled.

RETENTION AND DISPOSAL:

These records are maintained until they become inactive, at which time they are destroyed or retired in accordance with published record disposition schedules of the Department of State and as approved by the National Archives and Records Administration. More specific information may be obtained by writing to the Director, Office of Information Programs and Services, A/ISS/IPS, SA–2, Department of State, 515 22nd Street, NW., Washington DC 20522–8001.

SYSTEM MANAGER AND ADDRESS:

Principal Deputy Assistant Secretary, Bureau of International Narcotics and Law Enforcement Affairs, 2201 C Street, NW., Washington, DC 20520.

NOTIFICATION PROCEDURES:

Individuals who have reason to believe that the INLPR system might have records pertaining to them should write to the Director, Office of Information Programs and Services, A/ISS/IPS, SA–2, Department of State, 515 22nd Street, NW., Washington, DC 20522–8001. The individual must specify that he or she wishes the records of the INLPR system to be checked. At a minimum, the individual must include: Name, date and place of birth, current mailing address and zip code, and signature.

RECORD ACCESS AND AMENDMENT PROCEDURES:

Individuals who wish to gain access to or amend records pertaining to themselves should write to the Director, Office of Information Programs and Services, A/ISS/IPS, SA–2, Department of State, 515 22nd Street, NW., Washington, DC 20522–8001.

RECORD SOURCE CATEGORIES:

These records contain information that is obtained directly from the individual, international organizations, prior employers, current employers, and/or law enforcement agencies.

SYSTEM EXEMPTED FROM CERTAIN PROVISIONS OF THE PRIVACY ACT:

None.

[FR Doc. E8–24723 Filed 10–16–08; 8:45 am]

BILLING CODE 4710–24–P

DEPARTMENT OF TRANSPORTATION

Federal Aviation Administration

Second Meeting, Special Committee 213/EUROCAE: Enhanced Flight Vision Systems/Synthetic Vision Systems (EFVS/SVS), EUROCAE Working Group 79 (WG–79).

AGENCY: Federal Aviation Administration (FAA), DOT.

ACTION: Notice of RTCA Special Committee 213/EUROCAE, Enhanced Flight Vision Systems/Synthetic Vision Systems (EFVS/SVS), EUROCAE Working Group 79 (WG–79).

SUMMARY: The FAA is issuing this notice to advise the public of a first meeting of RTCA Special Committee 213, Standards for Air Traffic Data Communication Services.

DATES: The meeting will be held November 6–7, 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 (Pub. L. 92–463, 5 U.S.C., Appendix 2), notice is hereby given for a Special Committee 213 meeting. The agenda will include:

November 6

- Opening Plenary Session (Welcome, Introductions, and Agenda Review)
- Approval 1st Common Meeting SC–213/WG–79 Summary
- Resolve final review and comment (FRAC) comments and approve SC–213/WG–79 draft MASPS for EVS, SVS, CVS and EFVS

November 7

- Continue resolution of FRAC comments on the draft MASPS, as required
- Approve document for consideration by the PMC on December 16, 2008
- Closing Plenary Session (Other Business, Date and Place of Next Meeting, Meeting Evaluation, 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 October 10, 2008.

James H. Williams,

Director, Systems in Engineering and Safety, RTCA Advisory Committee (Acting).

[FR Doc. E8–24764 Filed 10–16–08; 8:45 am]

BILLING CODE 4910–13–P

DEPARTMENT OF TRANSPORTATION

Federal Motor Carrier Safety Administration

Notice of Fiscal Year 2009 Safety Grants and Solicitation for Applications

AGENCY: Federal Motor Carrier Safety Administration (FMCSA), DOT.

ACTION: Notice.

SUMMARY: This notice is intended to announce the Fiscal Year (FY) 2009 FMCSA safety grant opportunities and to provide schedules and directions for those grant programs posted on grants.gov (*http://www.grants.gov*). FMCSA disseminates funds and oversees grants awarded in support of 11 safety programs. These programs

consist of the Motor Carrier Safety Assistance Program (MCSAP) Basic and Incentive grants, MCSAP New Entrant Safety Audit grants, MCSAP High Priority grants, Commercial Motor Vehicle (CMV) Operator Safety Training grants, Border Enforcement grants (BEG), Commercial Driver's License Program Improvement (CDLPI) grants, Commercial Driver's License Information System (CDLIS) Modernization grants, Performance and Registration Information Systems Management (PRISM) grants, Safety Data Improvement Program grants (SaDIP), and Commercial Vehicle Information Systems and Networks (CVISN) grants. Each of these grant programs was provided for in the Agency's most recent authorization, the Safe, Accountable, Flexible, Efficient Transportation Equity Act: A Legacy for Users (SAFETEA–LU). The purpose of this Notice is to provide a comprehensive source of information regarding the opportunities for funding under the FMCSA's grant programs.

SUPPLEMENTARY INFORMATION: Additional information is provided below for each individual grant program.

MCSAP Basic and Incentive Grants

Sections 4101 and 4107 of SAFETEA–LU authorize the Motor Carrier Safety Grants funding for FY 2006 through FY 2009. MCSAP Basic and Incentive grants are governed by 49 U.S.C. 31102–31104 and 49 CFR Part 350. Under the Basic and Incentive grant programs, a State lead MCSAP agency, as designated by its Governor, is eligible to apply for Basic and Incentive grant funding by submitting a commercial vehicle safety plan (CVSP). See 49 CFR 350.201 and 205. Pursuant to 49 CFR 350.303, FMCSA will reimburse each lead State MCSAP agency 80 percent of eligible costs incurred in a fiscal year. Each lead agency will provide a 20 percent match to qualify for the program. In accordance with 49 CFR 350.323, the Basic grant funds will be distributed proportionally to each State's lead MCSAP agency using the following four equally weighted (25 percent) factors:

(1) 1997 road miles (all highways) as defined by the FMCSA;

(2) All vehicle miles traveled (VMT) as defined by the FMCSA;

(3) Population—annual census estimates as issued by the U.S. Census Bureau; and

(4) Special fuel consumption (net after reciprocity adjustment) as defined by the FMCSA.

A State lead MCSAP agency may qualify for Incentive Funds if it can demonstrate that its CMV safety program has shown improvement in any or all of the following five categories:

(1) Reduction in the number of large truck-involved fatal accidents;

(2) Reduction in the rate of large-truck-involved fatal accidents or maintenance of a large-truck-involved fatal accident rate that is among the lowest 10 percent of such rates for MCSAP recipients and is not higher than the rate most recently achieved;

(3) Upload of CMV accident reports in accordance with current FMCSA policy guidelines;

(4) Verification of Commercial Driver's Licenses during all roadside inspections; and

(5) Upload of CMV inspection data in accordance with current FMCSA policy guidelines. Incentive funds will be distributed in accordance with 49 CFR 350.327(b).

Prior to the start of each fiscal year, FMCSA calculates the amount of Basic and Incentive Funding each State is expected to receive. This information is provided to the States and is made available on the Agency's Web site at *www.fmcsa.dot.gov/documents/safety-security/ATTCHMNT3-Est-09-Funding-Planning-Dist.pdf*.

For FY 2009, $152,387,000 for Basic grant funding and $10,000,000 for Incentive grant funding is expected to be available. It should be noted that Basic and Incentive grants are awarded based on the State's submission of the CVSP. The evaluation factors described in the section below titled ''Application Information for FY 2009 Grants'' will not be considered and submission of applications to grants.gov is not necessary.

New Entrant Safety Audit Grants

Sections 4101 and 4107 of SAFETEA–LU also authorize the Motor Carrier Safety Grants funding for FY 2006 through FY 2009 to enable grant recipients to conduct interstate New Entrant safety audits consistent with 49 CFR Parts 350.321 and 385.301. State and local governments are eligible to apply. The FMCSA's share of these grant funds will be 100 percent for State agencies. New Entrant grant applications must be submitted electronically through grants.gov.

For FY 2009, the level of funding is expected to be up to $29,000,000 for New Entrant Safety Audits.

MCSAP High Priority Grants

Section 4101 of SAFETEA–LU also authorizes the Motor Carrier Safety Grants funding for FY 2006 through FY 2009 to enable recipients to carry out activities and projects that improve CMV safety and compliance with CMV regulations. Funding is available for projects that are national in scope, increase public awareness and education, demonstrate new technologies and reduce the number and rate of CMV accidents. Eligible recipients are State agencies, local governments, and organizations representing government agencies that use and train qualified officers and employees in coordination with State motor vehicle safety agencies.

For grants awarded for public education activities, the Federal share will be 100 percent. For all High Priority grants other than those awarded in support of public education activities, the FMCSA will provide reimbursements for no more than 80 percent of all eligible costs, and recipients will be required to provide a 20 percent match. FMCSA may reserve up to $5 million in FY 2009 High Priority funding exclusively for innovative traffic enforcement projects, with particular emphasis on work zone enforcement and rural road safety. Also, FMCSA may reserve up to $10 million for an innovative traffic enforcement initiative known as ''Ticketing Aggressive Cars and Trucks'' or TACT. TACT provides a research-based safety model that can be replicated by States when conducting a high-visibility traffic enforcement program to promote safe driving behaviors among car and truck drivers. The objective of this program is to reduce the number of commercial truck and bus related crashes, fatalities and injuries resulting from improper operation of motor vehicles and aggressive driving behavior. More information regarding TACT can be found at *http://www.fmcsa.dot.gov/safety-security/tact/abouttact.htm.*

Consistent with Section 4107 of SAFETEA–LU, for FY 2009, up to $15,000,000 of High Priority grant funds are expected to be available. High Priority grant applications must be submitted electronically through grants.gov.

CMV Operator Safety Training Grants

Section 4134 of SAFETEA–LU establishes a grant program which enables recipients to train current and future drivers in the safe operation of CMVs, as defined in 49 U.S.C. 31301(4). Eligible awardees include State governments, local governments, and accredited post-secondary educational institutions (public or private) such as colleges, universities, vocational-technical schools and truck driver training schools. Funding priority for this discretionary grant funding will be given to regional or multi-state

educational or nonprofit associations serving economically distressed regions of the United States. The Federal share of these funds will be 80 percent, and the recipients will be required to provide a 20 percent match. CMV Operatory Safety Training grant applications must be submitted electronically through grants.gov.

For FY 2009, $1,000,000 of CMV Operator Safety Training grant funds are expected to be available.

Border Enforcement Grants (BEG)

Section 4110 of SAFETEA–LU established the BEG program. The purpose of this discretionary program is to provide funding for border CMV safety programs and related enforcement activities and projects. An entity or a State that shares a land border with another country is eligible to receive this grant funding. Eligible awardees include State governments, local governments, and entities (i.e. accredited post-secondary educational institutions (public or private) such as universities). Requests from entities must be coordinated with the State lead CMV inspection agency. Applications must include a Border Enforcement Plan and meet the required maintenance of expenditure requirement. BEG awards will take into consideration the State or entity's performance on previous BEG awards; its ability to expend the awarded funds with the BEG performance year; and activities meeting the BEG national criteria established by the FMCSA. As established by SAFETEA–LU, the Federal share of these funds will be 100 percent, and there is no matching requirement. BEG grant applications must be submitted electronically through grants.gov.

For FY 2009, $32,000,000 of BEG grant funds are expected to be available.

CDLPI Grant

Section 4124 of SAFETEA–LU includes a discretionary grant program that provides funding for improving States' implementation of the Commercial Driver's License (CDL) program, including expenses for computer hardware and software, publications, testing, personnel, training Funds may not be used to rent, lease, or buy land or buildings. The agency designated by each State as the primary driver licensing agency responsible for the development, implementation, and maintenance of the CDL program is eligible to apply for grant funding. State grant proposals must include the State's assessment of its CDL and a detailed budget explaining how the funds will be used. The Federal share of funds for projects awarded under this grant is established by SAFETEA–LU as 100 percent. Therefore, there is no State matching requirement. The funding opportunity announcement on grants.gov will provide more detailed information on the application process; national funding priorities for FY 2009; evaluation criteria; required documents and certifications; State maintenance of expenditure requirements; and additional information related to the availability of funds. Additional information is listed later in this document. CLDPI grant applications must be submitted electronically through grants.gov.

For FY 2009, $25,000,000 of grant funds are expected to be available.

CDLIS Modernization Grants

Section 4123 of SAFETEA–LU includes a discretionary grant program that provides funding for modernization of CDLIS. This section includes funds for States to upgrade their driver licensing information systems for the specific purpose of making them compatible with the new modernized CDLIS specifications. The agency in each State designated as the primary driver licensing agency responsible for the development, implementation, and maintenance of the CDL program is eligible to apply for grant funding. The Federal share of the funds for projects awarded under this grant is established by SAFETEA–LU as 80 percent; there is a 20 percent matching requirement. States may use in-kind contributions to meet this matching requirement (including annual CDLIS pointer fees). Funds are available to any State that is in substantial compliance with the requirements of 49 U.S.C. 31311 and submits a grant proposal that qualifies under the conditions in this notice, including assuming the responsibility of incorporating the new CDLIS specifications and improving its commercial driver licensing system. State grant proposals must include a detailed budget explaining how the funds will be used and how the State will meet the matching requirements. The funding opportunity announcement on grants.gov will provide more detailed information on the application process; eligible projects under the CDLIS Modernization plan; evaluation criteria; required documents and certifications; and additional information related to the availability of funds. Additional information is listed later in this document. CDLIS Modernization grant applications must be submitted electronically through grants.gov.

For FY 2009, $8,000,000 of grant funds are expected to be available.

SaDIP Grants

Section 4128 of SAFETEA–LU establishes the Safety Data Improvement Program (SaDIP). The legislation supports a discretionary grant program that provides funding for States to improve the quality of large truck and bus crash and inspection data reported by the States to FMCSA. Eligible awardees include a State agency located in one of the fifty States, the District of Columbia, Puerto Rico, Northern Mariana Islands, American Samoa, Guam, and the U.S. Virgin Islands. SaDIP grant applications must be submitted electronically through grants.gov.

For FY 2009, $3,000,000 of grant funds are expected to be available.

PRISM Grants

Section 4109 of SAFETEA–LU provides funding for States to implement the Performance and Registration Information Systems Management (PRISM) requirements that link Federal motor carrier safety information systems with State CMV registration and licensing systems to enable a State to determine the safety fitness of a motor carrier or registrant when licensing or registering or while the license or registration is in effect. PRISM grant applications must be submitted electronically through grants.gov.

In FY 2009, $5,000,000 of grant funds are expected to be available.

CVISN Grants

Section 4126 of SAFETEA–LU provides funding for States to deploy, operate, and maintain elements of their Commercial Vehicle Information Systems and Networks (CVISN) Program, including commercial vehicle, commercial driver, and carrier-specific information systems and networks. The agency in each State designated as the primary agency responsible for the development, implementation, and maintenance of a CVISN-related system is eligible to apply for grant funding.

Section 4126 of SAFETEA–LU distinguishes between two types of CVISN projects: Core and Expanded. To be eligible for funding of Core CVISN deployment project(s), a State must have its most current Core CVISN Program Plan and Top-Level Design approved by FMCSA and the proposed project(s) should be consistent with its approved Core CVISN Program Plan and Top-Level Design. If a State does not have a Core CVISN Program Plan and Top-Level Design, it may apply for up to $100,000 in funds to either compile or update a Core CVISN Program Plan and Top-Level Design.

A State may also apply for funds to prepare an Expanded CVISN Program Plan and Top-Level Design if FMCSA acknowledged the State as having completed Core CVISN deployment. In order to be eligible for funding of any Expanded CVISN deployment project(s), a State must have its most current Expanded CVISN Program Plan and Top-Level Design approved by FMCSA and any proposed Expanded CVISN project(s) should be consistent with its Expanded CVISN Program Plan and Top-Level Design. If a State does not have an Expanded CVISN Program Plan and Top-Level Design, it may apply for up to $100,000 in funds to either compile or update an Expanded CVISN Program Plan and Top-Level Design.

In FY 2009, $25,000,000 of CVISN grant funds are expected to be available. CVISN grant applications must be submitted electronically through grants.gov. Awards for approved CVISN grant applications are made on a first-come, first-served basis.

Application Information for FY 2009 Grants: (Note: This section is not applicable to MCSAP Basic and Incentive grant application processes.) Visit *www.grants.gov*. Information on the grant, application process, and additional contact information is available at that Web site. General information about the FMCSA grant programs is available in the Catalog of Federal Domestic Assistance (CFDA) which can be found on the Internet at *http://www.cfda.gov*. To apply for funding, applicants must register with grants.gov at *http://www.grants.gov/applicants/get-registered.jsp* and submit an application in accordance with instructions provided.

Evaluation Factors: The following evaluation factors will be used in reviewing the applications for all FMCSA discretionary grants.

(1) Prior performance—Completion of identified programs and goals per the project plan.

(2) Effective Use of Prior Grants—Demonstrated timely use of available funds.

(3) Cost Effectiveness—Applications will be evaluated and prioritized on the expected impact on safety relative to the investment of grant funds. Where appropriate, costs per unit will be calculated and compared with national averages to determine effectiveness. In other areas, proposed costs will be compared with historical information to confirm reasonableness.

(4) Applicability to announced priorities—If national priorities are included in the grants.gov notice, those grants that specifically address these issues will be given priority consideration.

(5) Ability of the applicant to support the strategies and activities in the proposal for the entire project period of performance.

(6) Use of innovative approaches in executing a project plan to address identified safety issues.

(7) Feasibility of overall program coordination and implementation based upon the project plan.

(8) Grant specific evaluation factors as described in the grants.gov application information. The FMCSA provides information on its Web site outlining past fiscal year (FY) MCSAP Basic, Incentive, and discretionary grants funding by State (*http://www.fmcsa.dot.gov/safety-security/safety-initiatives/mcsap/funding.htm*).

DATES: For the following discretionary grant programs, FMCSA will consider funding completed applications between the following dates:

New Entrant Safety Audits Grants—October 1, 2008–December 1, 2008
Border Enforcement Grants—October 1, 2008–November 15, 2008
MCSAP High Priority Grants—October 1, 2008
CMV Operator Safety Training Grants—October 1, 2008–December 1, 2008
CDLPI Grants—November 1, 2008–January 30, 2009
CDLIS Modernization Grants—November 15, 2008–February 15, 2009
SaDIP Grants—November 1, 2008–February 1, 2009
PRISM Grants—January 1, 2009–March 1, 2009
CVISN Grants—January 1, 2009–July 15, 2009

When each of those applications has been reviewed, and funding has been awarded as appropriate, applications submitted after these due dates may be considered on a case-by-case basis.

FOR FURTHER INFORMATION CONTACT: Please contact the following FMCSA staff with questions or needed information on the Agency's grant programs:

New Entrant Safety Audits Grants—Arthur Williams, *arthur.williams@dot.gov*, 202–366–3695
Border Enforcement Grants—Carla Vagnini, *carla.vagnini@dot.gov*, 202–366–3771
MCSAP High Priority Grants—Cim Weiss, *cim.weiss@dot.gov*, 202–366–0275
CMV Operator Safety Training Grants—Julie Otto, *julie.otto@dot.gov*, 202–366–0710
CDLPI Grants—Brandon Poarch, *brandon.poarch@dot.gov*, 202–366–3030
CDLIS Modernization Grants—Brandon Poarch, *brandon.poarch@dot.gov*, 202–366–3030
SaDIP Grants—Suzanne Cotty, *suzanne.cotty@dot.gov*, 202–493–0304
PRISM Grants—Tom Lawler, *tom.lawler@dot.gov*, 202–366–3866
CVISN Grants—Jeff Secrist, *jeff.secrist@dot.gov*, 202–385–2367

All staff may be reached at FMCSA, 1200 New Jersey Avenue, SE., Washington, DC 20590. Office hours are from 8 a.m. to 4:30 p.m., EST, Monday through Friday, except Federal holidays.

Issued on: October 7, 2008.

William A. Quade,

Associate Administrator for Enforcement and Program Delivery.

Terry Shelton,

Associate Administrator for Research and Information Technology.

[FR Doc. E8–24697 Filed 10–16–08; 8:45 am]

BILLING CODE 4910–EX–P

DEPARTMENT OF TRANSPORTATION

Federal Motor Carrier Safety Administration

[Docket ID FMCSA–2008–0292]

Qualification of Drivers; Exemption Applications; Vision

AGENCY: Federal Motor Carrier Safety Administration (FMCSA), DOT.

ACTION: Notice of applications for exemptions; request for comments.

SUMMARY: FMCSA announces receipt of applications from 22 individuals for exemptions from the vision requirement in the Federal Motor Carrier Safety Regulations. If granted, the exemptions would enable these individuals to qualify as drivers of commercial motor vehicles (CMVs) in interstate commerce without meeting the Federal vision standard.

DATES: Comments must be received on or before November 17, 2008.

ADDRESSES: You may submit comments bearing the Federal Docket Management System (FDMS) Docket ID FMCSA–2008–0292 using any of the following methods:

- *Federal eRulemaking Portal:* Go to *http://www.regulations.gov*. Follow the on-line instructions for submitting comments.
- *Mail:* Docket Management Facility; U.S. Department of Transportation, 1200 New Jersey Avenue, SE., West Building

Ground Floor, Room W12–140, Washington, DC 20590–0001.

• *Hand Delivery:* West Building Ground Floor, Room W12–140, 1200 New Jersey Avenue, SE., Washington, DC, between 9 a.m. and 5 p.m., Monday through Friday, except Federal holidays.

• *Fax:* 1–202–493–2251.

Each submission must include the Agency name and the docket ID for this Notice. Note that DOT posts all comments received without change to *http://www.regulations.gov*, including any personal information included in a comment. Please see the Privacy Act heading below.

Docket: For access to the docket to read background documents or comments, go to *http://www.regulations.gov* at any time or Room W12–140 on the ground level of the West Building, 1200 New Jersey Avenue, SE., Washington, DC, between 9 a.m. and 5 p.m., Monday through Friday, except Federal holidays. The FDMS is available 24 hours each day, 365 days each year. If you want acknowledgment that we received your comments, please include a self-addressed, stamped envelope or postcard or print the acknowledgment page that appears after submitting comments on-line.

Privacy Act: Anyone may search the electronic form of all comments received into any of our dockets by the name of the individual submitting the comment (or of the person signing the comment, if submitted on behalf of an association, business, labor union, etc.). You may review the DOT's complete Privacy Act Statement in the **Federal Register** published on April 11, 2000 (65 FR 19476). This information is also available at *http://Docketsinfo.dot.gov*.

FOR FURTHER INFORMATION CONTACT: Dr. Mary D. Gunnels, Director, Medical Programs, (202) 366–4001, *fmcsamedical@dot.gov*, FMCSA, Department of Transportation, 1200 New Jersey Avenue, SE., Room W64–224, Washington, DC 20590–0001. Office hours are from 8:30 a.m. to 5 p.m., Monday through Friday, except Federal holidays.

SUPPLEMENTARY INFORMATION:

Background

Under 49 U.S.C. 31136(e) and 31315, FMCSA may grant an exemption for a 2-year period if it finds ''such exemption would likely achieve a level of safety that is equivalent to, or greater than, the level that would be achieved absent such exemption.'' FMCSA can renew exemptions at the end of each 2-year period. The 22 individuals listed in this notice each have requested an exemption from the vision requirement in 49 CFR 391.41(b)(10), which applies to drivers of CMVs in interstate commerce. Accordingly, the Agency will evaluate the qualifications of each applicant to determine whether granting the exemption will achieve the required level of safety mandated by statute.

Qualifications of Applicants

Timothy S. Ballard

Mr. Ballard, age 49, has had amblyopia in his left eye since childhood. The visual acuity in his right eye is 20/20 and in the left, 20/150. Following an examination in 2008, his optometrist noted, ''In my opinion, there is no reason to restrict Mr. Ballard from driving a commercial vehicle.'' Mr. Ballard reported that he has driven straight trucks for 5 years, accumulating 250,000 miles. He holds a Class B Commercial Driver's License (CDL) from North Carolina. His driving record for the last 3 years shows no crashes and no convictions for moving violations in a CMV.

Paul W. Browning

Mr. Browning, 55, has had retinal detachment in his right eye since 1996. The best corrected visual acuity in his right eye is hand motion vision and in the left, 20/20. Following an examination in 2008, his optometrist noted, ''It is my medical opinion that Mr. Browning has sufficient vision to perform the driving tasks required to operate a commercial vehicle.'' Mr. Browning reported that he has driven straight trucks for 12 years, accumulating 300,000 miles, tractor-trailer combinations for 5 years, accumulating 150,000 miles, and buses for 5 years, accumulating 7,500 miles. He holds a Class A CDL from New Mexico. His driving record for the last 3 years shows no crashes and one conviction for a moving violation in a CMV. He changed lanes improperly.

Timothy D. Carle

Mr. Carle, 66, has loss of vision in his right eye due to a retinal detachment that occurred 20 years ago. The best corrected visual acuity in his right eye is light perception and in the left, 20/20. Following an examination in 2008, his optometrist noted, ''I certify that, in my medical opinion, he has sufficient vision to perform the driving tasks required to operate a commercial vehicle safely.'' Mr. Carle reported that he has driven straight trucks for 19 years, accumulating 446,348 miles. He holds a Class B CDL from Wisconsin. His driving record for the last 3 years shows no crashes and no convictions for moving violations in a CMV.

Ronald W. Garner

Mr. Garner, 61, has optic neuropathy due to traumatic injury since 1993. The best corrected visual acuity in his right eye is 20/20 and in the left, 20/80. Following an examination in 2008, his ophthalmologist noted, ''I feel Ron has sufficient vision to operate a commercial vehicle.'' Mr. Garner reported that he has driven tractor-trailer combinations for 43 years, accumulating 1.7 million miles. He holds a Class A CDL from Washington. His driving record for the last 3 years shows no crashes and no convictions for moving violations in a CMV.

Paul A. Gregerson

Mr. Gregerson, 71, has had age-related macular degeneration since 2004. The best corrected visual acuity in his right eye is 20/300 and in the left, 20/20. Following an examination in 2008, his optometrist noted, ''He retains excellent central vision of his left eye and with the complete visual field of both eyes, it is my opinion that he is visually competent to operate a commercial vehicle.'' Mr. Gregerson reported that he has driven tractor-trailer combinations for 45 years, accumulating 5.4 million miles. He holds a Class A CDL from Iowa. His driving record for the last 3 years shows no crashes and no convictions for moving violations in a CMV.

Benjamin P. Hall

Mr. Hall, 49, has had amblyopia in his right eye since childhood. The best corrected visual acuity in his right eye is 20/60 and in the left, 20/25. Following an examination in 2008, his ophthalmologist noted, ''I can medically certify that Mr. Hall has sufficient vision to perform the driving tasks required to operate a commercial vehicle.'' Mr. Hall reported that he has driven straight trucks for 20 years, accumulating 20,000 miles. He holds a Class A CDL from New York. His driving record for the last 3 years shows no crashes and no convictions for moving violations in a CMV.

Frank L. Langston

Mr. Langston, 70, has had amblyopia in his left eye since birth. The best corrected visual acuity in his right eye is 20/20 and in the left, 20/400. Following an examination in 2008, his ophthalmologist noted, ''In my opinion, his vision is sufficient to operate a commercial vehicle.'' Mr. Langston reported that he has driven straight trucks for 5 years, accumulating 250,000

miles, and tractor-trailer combinations for 40 years, accumulating 4 million miles. He holds a Class D operator's license from Alabama. His driving record for the last 3 years shows no crashes and no convictions for moving violations in a CMV.

Bruce J. Lewis

Mr. Lewis, 41, has had amblyopia in his left eye since birth. The best corrected visual acuity in his right eye is 20/15 and in the left, 20/400. Following an examination in 2008, his ophthalmologist noted, ''In my medical opinion, Mr. Lewis has sufficient vision to operate a commercial vehicle.'' Mr. Lewis reported that he has driven straight trucks for 19 years, accumulating 760,000 miles. He holds a Class 10 operator's license from Rhode Island, which allows him to operate any motor vehicle except a motorcycle and a vehicle that weighs more than 26,000 pounds, carries 16 or more passengers or transports placarded amounts of hazardous materials. His driving record for the last 3 years shows no crashes and no convictions for moving violations in a CMV.

John L. Lolley

Mr. Lolley, 40, has a prosthetic left eye due to a history of congenital cataract and glaucoma. The visual acuity in his right eye is 20/20. Following an examination in 2008, his ophthalmologist noted, ''Mr. Lolley has adequate vision to operate a commercial vehicle.'' Mr. Lolley reported that he has driven straight trucks for 9 years, accumulating 36,000 miles. He holds a Class D operator's license from Alabama. His driving record for the last 3 years shows no crashes and no convictions for moving violations in a CMV.

Kenny Y. Louie

Mr. Louie, 40, has had amblyopia in his left eye since childhood. The best corrected visual acuity in his right eye is 20/20 and in the left, 20/200. Following an examination in 2008, his ophthalmologist noted, ''From my evaluation, with both eyes, this patient has sufficient vision and a full visual field to perform the driving tasks required to operate a commercial vehicle.'' Mr. Louie reported that he has driven straight trucks for 17 years, accumulating 4,250 miles. He holds a Class C operator's license from California. His driving record for the last 3 years shows no crashes and no convictions for moving violations in a CMV.

Josue Maqueira

Mr. Maqueira, 66, has complete loss of vision in his left eye due to optic atrophy. The best corrected visual acuity in his right eye is 20/20 and in the left, 20/400. Following an examination in 2008, his ophthalmologist noted, ''I believe he is able to drive a commercial vehicle safely as a result of his excellent vision with glasses worn and his full visual field in the right eye, even though his left eye is legally blind.'' Mr. Maqueira reported that he has driven straight trucks for 40 years, accumulating 4.8 million miles, and tractor-trailer combinations for 40 years, accumulating 4.8 million miles. He holds a Class A CDL from Florida. His driving record for the last 3 years shows no crashes and no convictions for moving violations in a CMV.

Lido J. Martocchio

Mr. Martocchio, 51, has loss of vision in his left eye due to a traumatic injury since childhood. The best corrected visual acuity in his right eye is 20/20 and in the left, hand motion vision. Following an examination in 2008 his optometrist noted, ''Mr. Lido's visual deficiency is currently stable. Although he is monocular, he does not need any corrective lenses to drive and he does have sufficient vision to perform the driving tasks required to operate a commercial vehicle in my professional opinion.'' Mr. Martocchio reported that he has driven straight trucks for 21 years, accumulating 315,000 miles. He holds a Class B CDL from California. His driving record for the last 3 years shows no crashes and no convictions for moving violations in a CMV.

Michael W. McCann

Mr. McCann, 48, has had amblyopia in his right eye since childhood. The best corrected visual acuity in his right eye is 20/400 and in the left, 20/20. Following an examination in 2008, his optometrist noted, ''Mr. McCann's current ocular health and visual fields are excellent. His present visual status is sufficient to perform the driving tasks required to operate a commercial vehicle.'' Mr. McCann reported that he has driven straight trucks for 13 years, accumulating 390,000 miles, tractor-trailer combinations for 5 years, accumulating 650,000 miles, and buses for 18 years, accumulating 180,000 miles. He holds a Class A CDL from Virginia. His driving record for the last 3 years shows one crash, for which he was not cited, and one conviction for speeding in a CMV. He exceeded the speed limit by 19 mph.

Duffy P. Metrejean, Jr.

Mr. Metrejean, 54, has had amblyopia in his left eye since birth. The best corrected visual acuity in his right eye is 20/20 and in the left, 20/60. Following an examination in 2008, his optometrist noted, ''In my opinion, Mr. Metrejean has sufficient vision to perform the driving tasks required to operate a commercial vehicle.'' Mr. Metrejean reported that he has driven tractor-trailer combinations for 25 years, accumulating 2 million miles. He holds a Class D operator's license from Louisiana. His driving record for the last 3 years shows no crashes and no convictions for moving violations in a CMV.

Hudson M. Osborne

Mr. Osborne, 44, has complete loss of vision in his left eye due to ocular trauma sustained as a child. The best corrected visual acuity in his right eye is 20/20. Following an examination in 2008, his optometrist noted, ''It is my medical opinion that Hudson Osborne has sufficient vision to perform the driving tasks required to operate a commercial vehicle.'' Mr. Osborne reported that he has driven straight trucks for 5 years, accumulating 300,000 miles, and buses for 1 year, accumulating 15,000 miles. He holds a Class A CDL from Nevada. His driving record for the last 3 years shows one crash, for which he was cited, and no convictions for moving violations in a CMV.

Stephen P. Preslopsky

Mr. Preslopsky, 53, has loss of vision in his left eye due to a cataract. The best corrected visual acuity in his right eye is 20/20 and in the left, hand motion vision. Following an examination in 2008, his ophthalmologist noted, ''It is my opinion that Mr. Preslopsky's vision is sufficient to operate a commercial vehicle, however, this is only from a medical stand point.'' Mr. Preslopsky reported that he has driven straight trucks for 9 years, accumulating 256,500 miles, and tractor–trailer combinations for 21 years, accumulating 1 million miles. He holds a Class A CDL from Florida. His driving record for the last 3 years shows no crashes and no convictions for moving violations in a CMV.

Ross C. Rich

Mr. Rich, 54, has a prosthetic right eye due to a traumatic injury. The best corrected visual acuity in his left eye is 20/20. Following an examination in 2008, his ophthalmologist noted, ''In my medical opinion, Mr. Rich has sufficient vision in his left eye to perform the

driving tasks required to operate a commercial vehicle.'' Mr. Rich reported that he has driven straight trucks for 3 years, accumulating 156,000 miles. He holds a Class A CDL from Minnesota. His driving record for the last 3 years shows no crashes and no convictions for moving violations in a CMV.

Melinda V. Salas

Ms. Salas, 47, has a prosthetic right eye due to traumatic injury since childhood. The best corrected visual acuity in her left eye is 20/20. Following an examination in 2008, her optometrist noted, ''In my medical opinion, Melinda has sufficient vision to perform driving tasks required to operate a commercial vehicle.'' Ms. Salas reported that she has driven straight trucks for 5 years, accumulating 27,000 miles. She holds a Class C operator's license from California. Her driving record for the last 3 years shows no crashes and no convictions for moving violations in a CMV.

Jayland R. Siebers

Mr. Siebers, 52, has a prosthetic right eye due to meningioma of the optic nerve that occurred in 1993. The visual acuity in his left eye is 20/20. Following an examination in 2008, his optometrist noted, ''I certify that he meets the visual requirements outlined to perform the driving tasks required to operate a commercial motor vehicle.'' Mr. Siebers reported that he has driven tractor–trailer combinations for 32 years, accumulating 3.8 million miles. He holds a Class A CDL from Kansas. His driving record for the last 3 years shows no crashes and one conviction for speeding in a CMV. He exceeded the speed limit by 12 mph.

Christopher G. Strand

Mr. Strand, 37, has aphakia in his left eye due to a traumatic injury that occurred 20 years ago. The best corrected visual acuity in his right eye is 20/20 and in the left, 20/100. Following an examination in 2008, his optometrist noted, ''In my opinion, Chris's visual status and adaptation to it is sufficient for him to operate a commercial vehicle.'' Mr. Strand reported that he has driven tractor–trailer combinations for 12 years, accumulating 1.3 million miles. He holds a Class A CDL from Wisconsin. His driving record for the last 3 years shows no crashes and no convictions for moving violations in a CMV.

Michael J. Welle

Mr. Welle, 52, has aphakia in his right eye due to a traumatic injury that he sustained as a child. The visual acuity in his right eye is 20/400 and in the left, 20/20. Following an examination in 2008, his optometrist noted, ''Mr. Welle has had this condition for 40 years and it has been stable and he has adapted very well, his peripheral vision and color vision are normal and in my professional opinion has more than adequate vision to operate a commercial vehicle.'' Mr. Welle reported that he has driven tractor–trailer combinations for 24 years, accumulating 2.4 million miles. He holds a Class A CDL from Minnesota. His driving record for the last 3 years shows no crashes and no convictions for moving violations in a CMV.

Patricia A. White

Ms. White, 39, has had amblyopia in her right eye since birth. The best corrected visual acuity in her right eye is 20/400 and in the left, 20/20. Following an examination in 2008, her optometrist noted, ''I feel that Ms. White has sufficient vision to perform the driving tasks required to operate a commercial vehicle.'' Ms. White reported that she has driven buses for 14 years, accumulating 406,000 miles. She holds a Class D operator's license from Illinois. Her driving record for the last 3 years shows no crashes and no convictions for moving violations in a CMV.

Request for Comments

In accordance with 49 U.S.C. 31136(e) and 31315, FMCSA requests public comment from all interested persons on the exemption petitions described in this notice. The Agency will consider all comments received before the close of business November 17, 2008. Comments will be available for examination in the docket at the location listed under the **ADDRESSES** section of this notice. The Agency will file comments received after the comment closing date in the public docket, and will consider them to the extent practicable. In addition to late comments, FMCSA will also continue to file, in the public docket, relevant information that becomes available after the comment closing date. Interested persons should monitor the public docket for new material.

Issued on: October 9, 2008.

Larry W. Minor,

Associate Administrator for Policy and Program Development.

[FR Doc. E8–24691 Filed 10–16–08; 8:45 am]

BILLING CODE 4910–EX–P

DEPARTMENT OF TRANSPORTATION

Federal Motor Carrier Safety Administration

[Docket No. FMCSA–00–8398; FMCSA–00–7165; FMCSA–04–18885; FMCSA–04–17984; FMCSA–06–24783]

Qualification of Drivers; Exemption Applications; Vision

AGENCY: Federal Motor Carrier Safety Administration (FMCSA), DOT.

ACTION: Notice of renewal of exemptions; request for comments.

SUMMARY: FMCSA announces its decision to renew the exemptions from the vision requirement in the Federal Motor Carrier Safety Regulations for 26 individuals. FMCSA has statutory authority to exempt individuals from the vision requirement if the exemptions granted will not compromise safety. The Agency has concluded that granting these exemption renewals will provide a level of safety that is equivalent to, or greater than, the level of safety maintained without the exemptions for these commercial motor vehicle (CMV) drivers.

DATES: This decision is effective October 27, 2008. Comments must be received on or before November 17, 2008.

ADDRESSES: You may submit comments bearing the Federal Docket Management System (FDMS) Docket ID FMCSA–00–8398; FMCSA–00–7165; FMCSA–04–18885; FMCSA–04–17984; FMCSA–06–24783, using any of the following methods.

- *Federal eRulemaking Portal:* Go to *http://www.regulations.gov*. Follow the on-line instructions for submitting comments.
- *Mail:* Docket Management Facility; U.S. Department of Transportation, 1200 New Jersey Avenue, SE., West Building Ground Floor, Room W12–140, Washington, DC 20590–0001.
- *Hand Delivery or Courier:* West Building Ground Floor, Room W12–140, 1200 New Jersey Avenue, SE., Washington, DC, between 9 a.m. and 5 p.m., Monday through Friday, except Federal Holidays.
- *Fax:* 1–202–493–2251.

Each submission must include the Agency name and the docket number for this Notice. Note that DOT posts all comments received without change to *http://www.regulations.gov*, including any personal information included in a comment. Please see the Privacy Act heading below.

Docket: For access to the docket to read background documents or

comments, go to *http://www.regulations.gov* at any time or Room W12–140 on the ground level of the West Building, 1200 New Jersey Avenue, SE., Washington, DC, between 9 a.m. and 5 p.m., Monday through Friday, except Federal holidays. The FDMS is available 24 hours each day, 365 days each year. If you want acknowledgment that we received your comments, please include a self-addressed, stamped envelope or postcard or print the acknowledgement page that appears after submitting comments on-line.

Privacy Act: Anyone may search the electronic form of all comments received into any of our dockets by the name of the individual submitting the comment (or of the person signing the comment, if submitted on behalf of an association, business, labor union, etc.).

You may review the DOT's complete Privacy Act Statement in the **Federal Register** published on April 11, 2000 (65 FR 19476). This information is also available at *http://DocketInfo.dot.gov*.

FOR FURTHER INFORMATION CONTACT: Dr. Mary D. Gunnels, Director, Medical Programs, (202) 366–4001, *fmcsamedical@dot.gov*, FMCSA, Department of Transportation, 1200 New Jersey Avenue, SE., Room W64–224, Washington, DC 20590–0001. Office hours are from 8:30 a.m. to 5 p.m. Monday through Friday, except Federal holidays.

SUPPLEMENTARY INFORMATION:

Background

Under 49 U.S.C. 31136(e) and 31315, FMCSA may renew an exemption from the vision requirements in 49 CFR 391.41(b)(10), which applies to drivers of CMVs in interstate commerce, for a two-year period if it finds ''such exemption would likely achieve a level of safety that is equivalent to, or greater than, the level that would be achieved absent such exemption.'' The procedures for requesting an exemption (including renewals) are set out in 49 CFR part 381.

Exemption Decision

This notice addresses 26 individuals who have requested a renewal of their exemption in accordance with FMCSA procedures. FMCSA has evaluated these 26 applications for renewal on their merits and decided to extend each exemption for a renewable two-year period. They are:

Paul G. Albrecht
Elijah A. Allen, Jr.
David W. Brown
Monty G. Calderon
David J. Caldwell
Walden V. Clarke
Awilda S. Colon
David Hagadorn
Zane G. Harvey, Jr.
Jeffrey M. Keyser
Donnie A. Kildow
Carl M. McIntire
Daniel A. McNabb
David G. Meyers
Robert E. Moore
Thomas L. Oglesby
Michael J. Paul
Russell A. Payne
Rodney M. Pegg
Raymond E. Peterson
Zbigniew P. Pietranik
John C. Rodriguez
James A. Walker
Richard A. Westfall
Charles E. Wood
Joseph F. Wood

These exemptions are extended subject to the following conditions: (1) That each individual have a physical examination every year (a) by an ophthalmologist or optometrist who attests that the vision in the better eye continues to meet the standard in 49 CFR 391.41(b)(10), and (b) by a medical examiner who attests that the individual is otherwise physically qualified under 49 CFR 391.41; (2) that each individual provide a copy of the ophthalmologist's or optometrist's report to the medical examiner at the time of the annual medical examination; and (3) that each individual provide a copy of the annual medical certification to the employer for retention in the driver's qualification file and retain a copy of the certification on his/her person while driving for presentation to a duly authorized Federal, State, or local enforcement official. Each exemption will be valid for two years unless rescinded earlier by FMCSA. The exemption will be rescinded if: (1) The person fails to comply with the terms and conditions of the exemption; (2) the exemption has resulted in a lower level of safety than was maintained before it was granted; or (3) continuation of the exemption would not be consistent with the goals and objectives of 49 U.S.C. 31136(e) and 31315.

Basis for Renewing Exemptions

Under 49 U.S.C. 31315(b)(1), an exemption may be granted for no longer than two years from its approval date and may be renewed upon application for additional two year periods. In accordance with 49 U.S.C. 31136(e) and 31315, each of the 26 applicants has satisfied the entry conditions for obtaining an exemption from the vision requirements (65 FR 78256; 66 FR 16311; 65 FR 33406; 65 FR 57234; 67 FR 57266; 69 FR 52741; 71 FR 53489; 69 FR 53493; 69 FR 62742; 71 FR 62148; 69 FR 33997; 69 FR 61292; 71 FR 55820; 71 FR 32183; 71 FR 41310). Each of these 26 applicants has requested renewal of the exemption and has submitted evidence showing that the vision in the better eye continues to meet the standard specified at 49 CFR 391.41(b)(10) and that the vision impairment is stable. In addition, a review of each record of safety while driving with the respective vision deficiencies over the past two years indicates each applicant continues to meet the vision exemption standards. These factors provide an adequate basis for predicting each driver's ability to continue to drive safely in interstate commerce. Therefore, FMCSA concludes that extending the exemption for each renewal applicant for a period of two years is likely to achieve a level of safety equal to that existing without the exemption.

Request for Comments

FMCSA will review comments received at any time concerning a particular driver's safety record and determine if the continuation of the exemption is consistent with the requirements at 49 U.S.C. 31136(e) and 31315. However, FMCSA requests that interested parties with specific data concerning the safety records of these drivers submit comments by November 17, 2008.

FMCSA believes that the requirements for a renewal of an exemption under 49 U.S.C. 31136(e) and 31315 can be satisfied by initially granting the renewal and then requesting and evaluating, if needed, subsequent comments submitted by interested parties. As indicated above, the Agency previously published notices of final disposition announcing its decision to exempt these 26 individuals from the vision requirement in 49 CFR 391.41(b)(10). The final decision to grant an exemption to each of these individuals was based on the merits of each case and only after careful consideration of the comments received to its notices of applications. The notices of applications stated in detail the qualifications, experience, and medical condition of each applicant for an exemption from the vision requirements. That information is available by consulting the above cited **Federal Register** publications.

Interested parties or organizations possessing information that would otherwise show that any, or all of these drivers, are not currently achieving the statutory level of safety should immediately notify FMCSA.

The Agency will evaluate any adverse evidence submitted and, if safety is

being compromised or if continuation of the exemption would not be consistent with the goals and objectives of 49 U.S.C. 31136(e) and 31315, FMCSA will take immediate steps to revoke the exemption of a driver.

Issued on: October 10, 2008.

Larry W. Minor,

Associate Administrator for Policy and Program Development.

[FR Doc. E8–24700 Filed 10–16–08; 8:45 am]

BILLING CODE 4910–EX–P

DEPARTMENT OF TRANSPORTATION

Federal Motor Carrier Safety Administration

[Docket No. FMCSA–99–6156, FMCSA–00–7006, FMCSA–00–7165, FMCSA–02–12294]

Qualification of Drivers; Exemption Renewals; Vision

AGENCY: Federal Motor Carrier Safety Administration (FMCSA), DOT.

ACTION: Notice of final disposition.

SUMMARY: FMCSA previously announced its decision to renew the exemptions from the vision requirement in the Federal Motor Carrier Safety Regulations for 34 individuals. FMCSA has statutory authority to exempt individuals from the vision requirement if the exemptions granted will not compromise safety. The Agency has reviewed the comments submitted in response to the previous announcement and concluded that granting these exemptions will provide a level of safety that will be equivalent to, or greater than, the level of safety maintained without the exemptions for these commercial motor vehicle (CMV) drivers.

FOR FURTHER INFORMATION CONTACT: Dr. Mary D. Gunnels, Director, Medical Programs, (202) 366–4001, *fmcsamedical@dot.gov,* FMCSA, Department of Transportation, 1200 New Jersey Avenue, SE., Room W64–224, Washington, DC 20590–0001. Office hours are from 8:30 a.m. to 5 p.m. Monday through Friday, except Federal holidays.

SUPPLEMENTARY INFORMATION:

Electronic Access

You may see all the comments online through the Federal Document Management System (FDMS) at *http://www.regulations.gov.*

Background

Under 49 U.S.C. 31136(e) and 31315, FMCSA may grant an exemption for a 2-year period if it finds ''such exemption would likely achieve a level of safety that is equivalent to, or greater than, the level that would be achieved absent such exemption.'' The statute also allows the Agency to renew exemptions at the end of the 2-year period. The comment period ended on October 2, 2008.

Discussion of Comments

FMCSA received no comments in this proceeding.

Conclusion

The Agency has not received any adverse evidence on any of these drivers that indicates that safety is being compromised. Based upon its evaluation of the 34 renewal applications, FMCSA renews the Federal vision exemptions for John W. Arnold, Derric D. Burrell, Anthony J. Cesternino, Jack D. Clodfelter, Tommy J. Cross, Jr., Eric L. Dawson, III, Richard L. Derick, Craig E. Dorrance, Jos Reginald I. Hall eph A. Dunlap, Calvin J. Eldridge, Shawn B. Gaston, James F. Gereau, Ronald E. Goad, James O. Hancock, Sherman W. Hawk, Jr., Robert C. Jeffres, Alfred C. Jewell, Jr., Lewis V. McNeice, Kevin J. O'Donnell, Gregory M. Preves, James M. Rafferty, Paul C. Reagle, Sr., Daniel Salinas, Wayne R. Sears, Lee R. Sidwell, David L. Slack, James C. Smith, Roger R. Strehlow, John T. Thomas, Brian W. Whitmer, Jeffrey D. Wilson, Larry M. Wink, and William E. Woodhouse.

In accordance with 49 U.S.C. 31136(e) and 31315, each renewal exemption will be valid for 2 years unless revoked earlier by FMCSA. The exemption will be revoked if: (1) The person fails to comply with the terms and conditions of the exemption; (2) the exemption has resulted in a lower level of safety than was maintained before it was granted; or (3) continuation of the exemption would not be consistent with the goals and objectives of 49 U.S.C. 31136 and 31315.

Issued on: October 9, 2008.

Larry W. Minor,

Associate Administrator for Policy and Program Development.

[FR Doc. E8–24695 Filed 10–16–08; 8:45 am]

BILLING CODE 4910–EX–P

DEPARTMENT OF TRANSPORTATION

Federal Motor Carrier Safety Administration

[Docket No. FMCSA–99–6480; FMCSA–99–5578; FMCSA–99–5748; FMCSA–01–11426; FMCSA–02–12294; FMCSA–04–17195; FMCSA–05–22194; FMCSA–06–24783]

Qualification of Drivers; Exemption Renewals; Vision

AGENCY: Federal Motor Carrier Safety Administration (FMCSA), DOT.

ACTION: Notice of final disposition.

SUMMARY: FMCSA previously announced its decision to renew the exemptions from the vision requirement in the Federal Motor Carrier Safety Regulations for 16 individuals. FMCSA has statutory authority to exempt individuals from the vision requirement if the exemptions granted will not compromise safety. The Agency has reviewed the comments submitted in response to the previous announcement and concluded that granting these exemptions will provide a level of safety that will be equivalent to, or greater than, the level of safety maintained without the exemptions for these commercial motor vehicle (CMV) drivers.

FOR FURTHER INFORMATION CONTACT: Dr. Mary D. Gunnels, Director, Medical Programs, (202)–366–4001, *fmcsamedical@dot.gov,* FMCSA, Department of Transportation, 1200 New Jersey Avenue, SE., Room W64–224, Washington, DC 20590–0001. Office hours are from 8:30 a.m. to 5 p.m. Monday through Friday, except Federal holidays.

SUPPLEMENTARY INFORMATION:

Electronic Access

You may see all the comments online through the Federal Document Management System (FDMS) at *http://www.regulations.gov.*

Background

Under 49 U.S.C. 31136(e) and 31315, FMCSA may grant an exemption for a 2-year period if it finds ''such exemption would likely achieve a level of safety that is equivalent to, or greater than, the level that would be achieved absent such exemption.'' The statute also allows the Agency to renew exemptions at the end of the 2-year period. The comment period ended on September 17, 2008.

Discussion of Comments

FMCSA received no comments in this proceeding.

Conclusion

The Agency has not received any adverse evidence on any of these drivers that indicates that safety is being compromised. Based upon its evaluation of the 16 renewal applications, FMCSA renews the Federal vision exemptions for Frank R. Berritto, Roosevelt Bryant, Jr., Daniel K. Davis, III, Timothy J. Droeger, Oskia D. Johnson, David C. Leoffler, Richard W. O'Neill, Larry A. Priewe, David M. Smith, Kenneth C. Steele, Mark J. Stevwing, Patrick D. Talley, Paul D. Totty, Loren R. Walker, Kris Wells, and Timothy J. Wilson.

In accordance with 49 U.S.C. 31136(e) and 31315, each renewal exemption will be valid for 2 years unless revoked earlier by FMCSA. The exemption will be revoked if: (1) The person fails to comply with the terms and conditions of the exemption; (2) the exemption has resulted in a lower level of safety than was maintained before it was granted; or (3) continuation of the exemption would not be consistent with the goals and objectives of 49 U.S.C. 31136 and 31315.

Issued on: October 9, 2008.

Larry W. Minor,

Associate Administrator for Policy and Program Development.

[FR Doc. E8–24698 Filed 10–16–08; 8:45 am]

BILLING CODE 4910–EX–P

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 mode of transportation, etc.) are described in footnotes to the application number. Application numbers with the suffix ''M'' demote a modification request. There applications have been separated from the new application for special permits to facilitate processing.

DATES: Comments must be received on or before November 3, 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 October 9, 2008.

Delmer F. Billings,

Director, Office of Hazardous Materials, Special Permits and Approvals.

MODIFICATION SPECIAL PERMITS

Application No.	Docket No.	Applicant	Regulation(s) affected	Nature of special permit thereof
6614–M		Auto-Chlor System, Memphis, TN.	49 CFR 173.202; 173.203.	To modify the special permit to authorize the transportation in commerce of an additional Class 8 material in non-DOT specification polyethylene bottles placed in a polyethylene crate.
8006–M		JA–RU, Inc., Jacksonville, FL.	49 CFR 172.400(a); 172.504 Table 2; 172.101; 172.202(a)(3); 172.301(a).	To modify the special permit to authorize the transportation in commerce of certain toy caps by JaRu customers between their distribution centers and their retail stores without meeting the marking and packaging requirements.
8215–M		Olin Corporation, Winchester Division (Former Grantee: Olin Corporation, Brass and Winchester, Inc.) East Alton, IL.	49 CFR Part 172, Subpart E; 172.320; 173.62(c); 173.212; 172.504(e).	To modifly the special permit to add a specially designed truck to haul hazardous materials.
12102–M		Veolia ES Technical Solutions, L.L.C., Flanders, NJ.	49 CFR 173.56(i); 173.56(b).	To modify the special permit to authorize the transportation in commercie of an additional Class 3 and Division 4.1 hazardous material.
12690–M		Air Products & Chemicals, Inc., Allentown, PA.	49 CFR 173.304(a)(2), Note 2.	To modify the special permit to authorize ultrasonic testing of cylinders and to add a drawing.
14158–M		UTC Power Corporation, South Windsor, CT.	49 CFR 176.83	To modify the special permit to authorize more than one package of a Division 4.2 solid in the same assembly unit with more than one package of Class 8 liquids.

MODIFICATION SPECIAL PERMITS—Continued

Application No.	Docket No.	Applicant	Regulation(s) affected	Nature of special permit thereof
14287–M		Troxler Electronic Laboratories, Inc., Research Triangle Park, NC.	49 CFR 173.431	To modify the special permit to authorize an additional source capsule model number.
14715–M		The Linde Group, Murray Hill, NJ.	49 CFR 173.301(d)(2); 173.302(a)(3); 178.37–5.	To reissue the special permit originally issued on an emergency basis for the transportation in commerce of DOT Specification 3AAX cylinders made of 4130X steel for transportation of a compressed natural gas.
14732–M		Johnson Controls Rental Solutions, Indianapolis, IN.	49 CFR 173.306(e)(1).	To reissue the special permit originally issued on the emergency basis for transportation in commerce of reconditioned (used) refrigerating machines containing a group A1 refrigerant by motor vehicle.

[FR Doc. E8–24617 Filed 10–16–08; 8:45 am]

BILLING CODE 4909–60–M

DEPARTMENT OF TRANSPORTATION

Pipeline and Hazardous Materials Safety Administration

Office of Hazardous Materials Safety; Notice of 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 November 17, 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 Southeast, 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 October 7, 2008.

Delmer F. Billings,

Director, Office of Hazardous Materials, Special Permits and Approvals.

NEW SPECIAL PERMITS

Application No.	Docket No.	Applicant	Regulation(s) affected	Nature of special permits thereof
14774–N		Mercury Marine, Fond du Lac, WI.	49 CFR 176.905(i)	To authorize the transportation in commerce of internal combustion engines that contain small amounts of hazardous materials residue by cargo vessel. (mode 3).
14776–N		Dollar General, Scottsville, KY.	49 CFR 173.213, 172.301(a) and 172.400(a).	To authorize the one-way Corporation transportation in commerce of Class 9 hazardous waste in palletized non-DOT specification packaging with alternative marking and labeling. (mode 1).
14777–N		General Dynamics, Marion, IL.	49 CFR 173.213	To authorize the one-way transportation in commerce of Class 9 hazardous waste in alternative packaging for approximately 8 miles by motor vehicle. (mode 1).
14778–N		Metalcraft/Sea-Fire Marine Inc., Baltimore, MD.	49 CFR 173.301(f)	To authorize the transportation in commerce of non-DOT specification cylinders containing a Division 2.2 compressed gas for export only. (modes 1, 3, 4, 5).
14779–N		Corrosion Companies Inc., Washougal, WA.	49 CFR 107.503(b) and (c), 172.102(c)(3) Special Provisions B15 and B23, 173.241, 173.242, 173.243 and 173.345.	To authorize the manufacture, marking, sale and use of non-DOT Specification cargo tank motor vehicle conforming to DOT 407/412 with certain exceptions. (mode 1).
14780–N		Flexcon Industries, Randolph, MA.	49 CFR 173.115(b)(1)	To authorize the manufacture, marking, sale and use of pre pressurized diaphragm expansion vessels for the transportation of compressed gas. (modes 1, 2, 3).

[FR Doc. E8–24618 Filed 10–16–08; 8:45 am]
BILLING CODE 4909–60–M

DEPARTMENT OF TRANSPORTATION

Pipeline and Hazardous Materials Safety Administration

International Standards on the Transport of Dangerous Goods; Public Meeting

AGENCY: Pipeline and Hazardous Materials Safety Administration (PHMSA), Department of Transportation.

ACTION: Notice of public meetings.

SUMMARY: This notice is to advise interested persons that PHMSA will conduct a public meeting in preparation for the 34th session of the United Nations Sub-Committee of Experts on the Transport of Dangerous Goods (UNSCOE TDG) to be held November 30–December 9, 2008 in Geneva, Switzerland. During this meeting, PHMSA is also soliciting comments relative to potential new work items which may be considered for inclusion in its international agenda, and comments relative to a potential future rulemaking action regarding the use and applicability of international standards.

This notice also provides information relative to a separate public meeting in preparation for the 16th Session of the United Nations Sub-Committee of Experts on the Globally Harmonized System of Classification and Labelling of Chemicals (UNSCOE GHS) to be held December 10–12, 2008.

Information Regarding the UNSCOE TDG Meeting:

DATES: Wednesday, November 17, 2008; 8 a.m.–11 a.m.

ADDRESSES: The UNSCOE TDG meeting will be held at the DOT Headquarters, West Building, Oklahoma City Conference Room, 1200 New Jersey Avenue, SE., Washington, DC 20590.

Conference call capability/live meeting information: Conference call-in and ''live meeting'' capability will be provided for this meeting. To participate by telephone, dial 1 (888) 324–9365 and enter participant passcode 61017. During the call, please press *6 to mute/unmute your individual line. This will ensure participants are not subjected to any background noise from individual lines. In addition, ''live meeting'' provides a way to view information presented during the meeting via the Internet. To access ''live meeting'' please follow the instructions posted on our Web site at: *http://www.phmsa.dot.gov/hazmat/regs/international.*

FOR FURTHER INFORMATION CONTACT: Mr. Duane Pfund, Director, Office of International Standards or Mr. Shane Kelley, International Transportation Specialist, Office of Hazardous Materials Safety, Department of Transportation, Washington, DC 20590; (202) 366–0656.

SUPPLEMENTARY INFORMATION: The primary purpose of this meeting will be to prepare for the 34th session of the UNSCOE TDG and to discuss draft U.S. positions on UNSCOE proposals. The 34th session of the UNSCOE TDG is the final meeting in the current biennium cycle. The UNSCOE will consider proposals for the 16th Revised Edition of the United Nations Recommendations on the Transport of Dangerous Goods Model Regulations which will come into force in the international regulations from January 1, 2011. Topics to be covered during the public meetings include:

Transport of limited quantities and consumer commodities, use of electronic documentation, requirements for toxic by inhalation liquids, requirements for cryogenic receptacles, requirements for lithium batteries, fumigated units and dry ice, harmonization with the IAEA Regulations for the safe transport of radioactive materials, guiding principles for the development of the Model Regulations, and various proposals related to listing, classification, packaging, and hazard communication.

In addition, PHMSA is soliciting comments on how to further enhance harmonization for international transport of hazardous materials. PHMSA is finalizing an international strategic plan to address harmonization and welcomes input on items which stakeholders believe should be included in this plan.

Finally, PHMSA is soliciting comments regarding a potential future rulemaking action regarding the use of international regulations, in particular the International Civil Aviation Organization's Technical Instructions for the Safe Transport of Dangerous Goods by Air (ICAO TI) and the International Maritime Dangerous Goods Code (IMDG Code). PHMSA is considering proposing to mandate the use of these regulations for the international transportation (see 49 CFR 171.8) of hazardous materials by aircraft or vessel. PHMSA requests comments regarding this prospective proposal. PHMSA is interested in comments including, but not limited to, comments related to the safety and economic implications of mandating the use of these regulations for international shipments, as well as implications to training of personnel.

The public is invited to attend without prior notification. Due to the heightened security measures participants are encouraged to arrive early to allow time for security checks necessary to obtain access to the building. Following the 34th session of the UNSCOE TDG to present the results of the session, PHMSA will place a copy of the Sub-Committee's report and an updated copy of the pre-meeting summary document on PHMSA's Hazardous Materials Safety Homepage at *http: //hazmat.dot.gov/regs/intl/intstandards.htm.*

Documents

Copies of documents for the UNSCOE TDG meeting and the meeting agenda may be obtained by downloading them from the United Nations Transport Division's Web site at: *http://www.unece.org/trans/main/dgdb/dgsubc/c32008.html.* This site may also be accessed through PHMSA's Hazardous Materials Safety Web site at *http: //hazmat.dot.gov/regs/intl/intstandards.htm.* PHMSA's site provides additional information regarding the LTNSCOE TDG and related matters such as a summary of decisions taken at previous sessions of the UNSCOE TDG.

Information regarding the UNSCOE GHS meeting:

DATES: Thursday, November 18, 2008; 10 a.m.–12 p.m.

ADDRESSES: The UNSCOE GHS meeting will take place at the Environmental Protection Agency Potomac Yard One facility, Bellavista Conference Room (11100, 11th Floor), 2777 S. Crystal Drive, Arlington, VA 22202. To facilitate entry, please have a picture ID available and/or a U.S. Government building pass if applicable.

FOR FURTHER INFORMATION CONTACT: Kristen Hendricks, Field and External Affairs Division, Office of Pesticide Programs (703) 308–0308, *hendricks.kristen(epa.gov*) or Dorothy Semazzi, Field and External Affairs Division, Office of Pesticide Programs (703) 347–8540, *semazzi.dorothy@epa.gov).*

Conference Call Information: To participate in the meeting by conference call, dial 1 (866) 299–3188, and enter participant passcode 7033080308.

SUPPLEMENTARY INFORMATION: The Environmental Protection Agency is hosting this open informal meeting of the Interagency GHS Coordinating Group to provide interested groups and

individuals with an update on GHS-related issues and an opportunity to present their views orally and in writing for consideration in developing draft U.S. positions for the upcoming UNSCOE GHS meeting. The Agenda will include:

1. Introductions.
2. Key issues/documents to be considered in December UNSCOE GHS.
3. Proposals for next biennium program of work.
4. Public comments.

Documents

Copies of documents for the December UNSCOE GHS meeting, the meeting agenda, and reports and documents from previous sessions may be downloaded from the UN Web site at: *http://www.unece.org/trans/main/dgdb/dgsubc4/c4age.html.*

Theodore L. Willke,

Associate Administrator for Hazardous Materials Safety.

[FR Doc. E8–24718 Filed 10–16–08; 8:45 am]

BILLING CODE 4910–60–M

DEPARTMENT OF TRANSPORTATION

Surface Transportation Board

[STB Finance Docket No. 35132]

Pennsylvania Northeast Regional Railroad Authority—Acquisition Exemption—in Monroe and Northampton Counties, PA

Pennsylvania Northeast Regional Railroad Authority (PNRRA), a political subdivision and non-operating Class III rail carrier, has filed a verified notice of exemption under 49 CFR 1150.41 to acquire an ownership interest in 10.6 miles of rail line from Norfolk Southern Railway Company (NSR). The line extends between milepost 2.0 (approximately old milepost 74) at Slate and milepost 12.2 (approximately old milepost 84.6),[1] in Monroe and Northampton Counties, PA.[2] The transaction is subject to retention of overhead trackage rights by NSR.

PNRRA certifies that its projected annual revenues as a result of this transaction will not result in the creation of a Class II or Class I rail carrier and further certifies that its projected annual revenues will not exceed $5 million.

The transaction is expected to be consummated in phases on or after November 3, 2008.

If the notice contains false or misleading information, the exemption is void *ab initio.* Petitions to revoke the exemption under 49 U.S.C. 10502(d) may be filed at any time. The filing of a petition to revoke will not automatically stay the transaction. Petitions for stay must be filed no later than October 24, 2008 (at least 7 days before the exemption becomes effective).

Pursuant to the Consolidated Appropriations Act, 2008, Public Law 110–161, § 193, 121 Stat. 1844 (2007), nothing in this decision authorizes the following activities at any solid waste rail transfer facility: collecting, storing or transferring solid waste outside of its original shipping container; or separating or processing solid waste (including baling, crushing, compacting and shredding). The term ''solid waste'' is defined in section 1004 of the Solid Waste Disposal Act, 42 U.S.C. 6903.

An original and 10 copies of all pleadings, referring to STB Finance Docket No. 35132, must be filed with the Surface Transportation Board, 395 E Street, SW., Washington, DC 20423–0001. In addition, one copy of each pleading must be served on Keith G. O'Brien, 2401 Pennsylvania Ave., NW., Ste. 300, Washington, DC 20037.

Board decisions and notices are available on our Web site at *http://www.stb.dot.gov.*

Decided: October 8, 2008.

By the Board, David M. Konschnik, Director, Office of Proceedings.

Anne K. Quinlan,

Acting Secretary.

[FR Doc. E8–24629 Filed 10–16–08; 8:45 am]

BILLING CODE 4915–01–P

[1] Although the route miles to be acquired would appear to be 10.2 miles based on current mileposts, PNRRA states that investigation has confirmed that the actual mileage to be acquired is 10.6 miles, consistent with the old milepost designations.

[2] PNRRA owns approximately 82 miles of rail line in Lackawanna, Monroe, and Wayne Counties, PA. The lines are operated by Delaware-Lackawanna Railroad Co. pursuant to a contract with PNRRA.

DEPARTMENT OF THE TREASURY

Submission for OMB Review; Comment Request

October 9, 2008.

The Department of Treasury will submit the following public information collection requirement(s) to OMB for review and clearance under the Paperwork Reduction Act of 1995, Public Law 104–13 on or after the date of publication of this notice. Copies of the submission(s) may be obtained by calling the Treasury Bureau Clearance Officer listed. Comments regarding this information collection should be addressed to the OMB reviewer listed and to the Treasury Department Clearance Officer, Department of the Treasury, Room 11000, and 1750 Pennsylvania Avenue, NW., Washington, DC 20220.

DATES: Written comments should be received on or before November 17, 2008, to be assured of consideration.

Internal Revenue Service (IRS)

OMB Number: 1545–XXXX.

Type of Review: New Collection Request.

Title: Rev Proc 2008–XX Exempt Organizations Voluntary Compliance Program (EOVCP).

Description: This information collection is needed to offer a voluntary compliance program of limited time to non-filers of Form 990 Series. The objective is to enhance voluntary compliance with respect to reporting and filing obligations under sections 26 U.S.C. 6033 and 6011 for entities exempt under 26 U.S.C. 501(a). The data collected will be used by the Tax Exempt and Government Entities division of the Internal Revenue Service to help certain exempt organizations meet their reporting and filing obligations.

Respondents: Not-for-profit institutions.

Estimated Total Burden Hours: 30,000 hours.

Clearance Officer: Glenn P. Kirkland, (202) 622–3428, Internal Revenue Service, Room 6516, 1111 Constitution Avenue, NW., Washington, DC 20224.

OMB Reviewer: Kimberly Nelson, (202) 395–3787, Office of Management and Budget, Room 10235, New Executive Office Building, Washington, DC 20503.

Robert Dahl,

Treasury PRA Clearance Officer.

[FR Doc. E8–24667 Filed 10–16–08; 8:45 am]

BILLING CODE 4830–01–P

DEPARTMENT OF THE TREASURY

Submission for OMB Review; Comment Request

October 9, 2008.

The Department of the Treasury will submit the following public information collection requirement(s) to OMB for review and clearance under the Paperwork Reduction Act of 1995, Public Law 104–13 on or after the date of publication of this notice. Copies of the submission(s) may be obtained by calling the Treasury Bureau Clearance Officer listed. Comments regarding this information collection should be addressed to the OMB reviewer listed and to the Treasury Department Clearance Officer, Department of the

Treasury, Room 11000, and 1750 Pennsylvania Avenue, NW., Washington, DC 20220.

DATES: Written comments should be received on or before November 17, 2008 to be assured of consideration.

Internal Revenue Service (IRS)

OMB Number: 1545–1793.
Type of Review: Extension.
Title: Rev. Proc. 2002–43, Determination of Substitute Agent for a Consolidated Group.
Description: The information is needed in order for (i) A terminating common parent of a consolidated group to notify the IRS that it will terminate and to designate another corporation to be the group's substitute agent, pursuant to Treas. Reg. Sec. 1.1502–77(d)(1) or Sec. 1.1052–77A(d); (ii) the remaining members of a consolidated group to designate a substitute agent pursuant to Sec. 1.1502–77A (d); (iii) the default substitute agent to notify the IRS that it is the default substitute agent pursuant to Sec. 1.1502–77(d)(2); or (iv) requests by a member of the group for the IRS to designate a substitute agent or replace a previously designated substitute agent. The IRS will use the information to determine whether to approve the designation (if approval is required), to designate a substitute agent, or to replace a substitute agent, and to change the IRS's records to reflect the name and other information about the substitute agent.
Respondents: Businesses or other for-profit institutions.
Estimated Total Burden Hours: 400 hours.

OMB Number: 1545–1653.
Type of Review: Extension.
Title: Revenue Procedure 99–26 Secured Employee Benefits Settlement Initiative.
Description: This revenue procedure provides taxpayers options to settle cases in which they accelerated deductions for accrued employee benefits secured by a letter of credit, bond, or other similar financial instrument.
Respondents: Businesses or other for-profit institutions.
Estimated Total Burden Hours: 2,000 hours.

OMB Number: 1545–1027.
Type of Review: Extension.
Title: U.S. Property and Casualty Insurance Company Income Tax Return.
Forms: 1120–PC.
Description: Property and casualty insurance companies are required to file an annual return of income and pay the tax due. The data is used to insure that companies have correctly reported income and paid the correct tax.
Respondents: Businesses or other for-profit institutions.
Estimated Total Burden Hours: 649,218 hours.

OMB Number: 1545–0108.
Type of Review: Extension.
Title: Annual Summary and Transmittal of U.S. Information Returns.
Forms: 1096.
Description: Form 1096 is used to transmit information returns (Forms 1099, 1098, 5498, and W–2G) to the IRS Service Centers. Under IRC section 6041 and related sections, a separate Form 1096 is used for each type of return sent to the service center by the payer. It is used by IRS to summarize and categorize the transmitted forms.
Respondents: Businesses or other for-profit institutions.
Estimated Total Burden Hours: 1,016,812 hours.

OMB Number: 1545–0257.
Type of Review: Extension.
Title: Forms 8109 and 8109–B, Federal Tax Deposit Coupon; and Form 8109–C, FTD Address Change.
Forms: 8109–B, 8109, 8109–C.
Description: Federal Tax Deposit Coupons are used to deposit certain types of taxes at authorized depositaries. Coupons are sent to the IRS Centers for crediting to taxpayers' accounts. Data is used by the IRS to make the credit and to verify tax deposits claimed on the returns. The FTD Address change is used to change the address on the FTD coupons. All taxpayers required to make deposits are affected.
Respondents: Businesses or other for-profit institutions.
Estimated Total Burden Hours: 1,841,607 hours.

Clearance Officer: Glenn P. Kirkland, (202) 622–3428, Internal Revenue Service, Room 6516, 1111 Constitution Avenue, NW., Washington, DC 20224.
OMB Reviewer: Alexander T. Hunt, (202) 395–7316, Office of Management and Budget, Room 10235, New Executive Office Building, Washington, DC 20503.

Celina Elphage,
Treasury PRA Clearance Officer.

[FR Doc. E8–24668 Filed 10–16–08; 8:45 am]

BILLING CODE 4830–01–P

DEPARTMENT OF THE TREASURY

Fiscal Service

Notice of Rate for Use in Federal Debt Collection and Discount and Rebate Evaluation

AGENCY: Financial Management Service, Fiscal Service, Treasury.

ACTION: Notice of rate for use in Federal debt collection and discount and rebate evaluation.

SUMMARY: Pursuant to section 11 of the Debt Collection Act of 1982, as amended, (31 U.S.C. 3717), the Secretary of the Treasury is responsible for computing and publishing the percentage rate to be used in assessing interest charges for outstanding debts owed to the Government. Treasury's Cash Management Requirements (TFM Volume I, Part 6, Chapter 8000) prescribe use of this rate by agencies as a comparison point in evaluating the cost effectiveness of a cash discount. In addition, 5 CFR 13 15.8 of the Prompt Payment rule on ''Rebates'' requires that this rate be used in determining when agencies should pay purchase card invoices when the card issuer offers a rebate. Notice is hereby given that the applicable rate is 3.00 percent for calendar year 2009.

DATES: The rate will be in effect for the period beginning on January 1, 2009, and ending on December 31, 2009.

FOR FURTHER INFORMATION CONTACT: Inquiries should be directed to the Agency Enterprise Solutions Division, Financial Management Service, Department of the Treasury, 401 14th Street, SW., Washington, DC 20227 (Telephone: 202–874–6650).

SUPPLEMENTARY INFORMATION: The rate reflects the current value of funds to the Treasury for use in connection with Federal Cash Management systems and is based on investment rates set for purposes of Public Law 95–147, 91 Stat. 1227. Computed each year by averaging Treasury Tax and Loan (TT&L) investment rates for the 12-month period ending every September 30, rounded to the nearest whole percentage, for applicability effective each January 1, the rate is subject to quarterly revisions if the annual average, on a moving basis, changes by 2 percentage points. The rate in effect for the calendar year 2009 reflects the average investment rates for the 12-month period that ended September 30, 2008.

Dated: October 6, 2008.

Sheryl R. Morrow,
Assistant Commissioner, Federal Finance.

[FR Doc. E8–24451 Filed 10–16–08; 8:45 am]

BILLING CODE 4810–35–M

DEPARTMENT OF THE TREASURY

United States Mint

Notification of American Eagle Platinum Proof and Uncirculated Coin Price Decreases

SUMMARY: The United States Mint is adjusting prices for its American Eagle Platinum Proof and Uncirculated Coins.

Pursuant to the authority that 31 U.S.C. 5112(k) and 5111(a) grant the Secretary of the Treasury to mint and issue platinum coins, and to prepare and distribute numismatic items, the United States Mint mints and issues 2008 American Eagle Platinum Proof and Uncirculated Coins in four denominations with the following weights: One-ounce, one-half ounce, one-quarter ounce, one-tenth ounce. The United States Mint also produces American Eagle Platinum Proof and Uncirculated four-coin sets that contain one coin of each denomination. In accordance with 31 U.S.C. 9701(b)(2)(B), the United States Mint is changing the price of these coins to reflect decreases in the market price of platinum.

Effective on October 17, 2008, the United States Mint will commence selling the following 2008 American Eagle Platinum Proof and Uncirculated Coins according to the following price schedule:

Description	Price
American Eagle Platinum Proof Coins:	
One-ounce platinum coin	$1,324.95
One-half ounce platinum coin	674.95
One-quarter ounce platinum coin	349.95
One-tenth ounce platinum coin	149.95
Four-coin platinum set	2,419.95
American Eagle Platinum Uncirculated Coins:	
One-ounce platinum coin	1,214.95
One-half ounce platinum coin	619.95
One-quarter ounce platinum coin	319.95
One-tenth ounce platinum coin	134.95
Four-coin platinum set	2,219.95

FOR FURTHER INFORMATION CONTACT: Andrew Brunhart, Deputy Director; United States Mint; 801 Ninth Street, NW., Washington, DC 20220; or call 202–354–7500.

Authority: 31 U.S.C. 5111, 5112 & 9701.

Dated: October 10, 2008.

Edmund C. Moy,

Director, United States Mint.

[FR Doc. E8–24684 Filed 10–16–08; 8:45 am]

BILLING CODE 4810–02–P

Federal Register

Friday,
October 17, 2008

Part II

Department of the Interior

Fish and Wildlife Service

50 CFR Part 17

Endangered and Threatened Wildlife and Plants; Designation of Critical Habitat for the San Bernardino Kangaroo Rat (Dipodomys merriami parvus); Final Rule

DEPARTMENT OF THE INTERIOR

Fish and Wildlife Service

50 CFR Part 17

[FWS–R8–ES–2007–0008; 92210–1117–0000–FY08 B4]

RIN 1018–AV07

Endangered and Threatened Wildlife and Plants; Designation of Critical Habitat for the San Bernardino Kangaroo Rat (Dipodomys merriami parvus)

AGENCY: Fish and Wildlife Service, Interior.

ACTION: Final rule.

SUMMARY: We, the U.S. Fish and Wildlife Service (Service), are designating final revised critical habitat for the San Bernardino kangaroo rat (*Dipodomys merriami parvus*) under the Endangered Species Act of 1973, as amended (Act). Approximately 7,779 acres (ac) (3,148 hectares (ha)) of habitat in San Bernardino and Riverside Counties, California, are being designated as critical habitat for the San Bernardino kangaroo rat. This final revised designation constitutes a reduction of approximately 25,516 ac (10,326 ha) from the 2002 designation of critical habitat for the San Bernardino kangaroo rat.

DATES: This rule becomes effective on November 17, 2008.

ADDRESSES: The final rule, final economic analysis, and map of critical habitat will be available on the Internet at *http://www.regulations.gov* and *http://www.fws.gov/carlsbad/*. Supporting documentation we used in preparing this final rule will be available for public inspection, by appointment, during normal business hours, at the U.S. Fish and Wildlife Service, Carlsbad Fish and Wildlife Office, 6010 Hidden Valley Road, Carlsbad, CA 92011; telephone 760–431–9440; facsimile 760–431–5901.

FOR FURTHER INFORMATION CONTACT: Jim Bartel, Field Supervisor, U.S. Fish and Wildlife Service, Carlsbad Fish and Wildlife Office (see **ADDRESSES** section). If you use a telecommunications device for the deaf (TDD), call the Federal Information Relay Service (FIRS) at 800–877–8339.

SUPPLEMENTARY INFORMATION:

Background

It is our intent to discuss only those topics directly relevant to the designation of critical habitat for the San Bernardino kangaroo rat in this final rule. For more information on the taxonomy, biology, and ecology of the San Bernardino kangaroo rat, refer to the final listing rule published in the **Federal Register** on September 24, 1998 (63 FR 51005), the original final critical habitat rule published in the **Federal Register** on April 23, 2002 (67 FR 19812), the proposed rule to revise critical habitat published in the **Federal Register** on June 19, 2007 (72 FR 33808), and the April 16, 2008, notice of availability of the draft economic analysis (DEA) and changes to the proposed rule (73 FR 20581).

Subspecies Description, Life History, Distribution, Ecology, and Habitat

No new substantial information pertaining to the subspecies description, life history, distribution, ecology, or habitat of the San Bernardino kangaroo rat was received following the 2007 proposed rule to revise critical habitat for this subspecies. Therefore, please refer to the final listing rule published in the **Federal Register** on September 24, 1998 (63 FR 51005), and the proposed rule to revise critical habitat published in the **Federal Register** on June 19, 2007 (72 FR 33808), for a discussion of the subspecies' description, life history, distribution, ecology, and habitat.

Previous Federal Actions

As discussed in the proposed rule to revise critical habitat for this subspecies, the Service agreed, as part of a settlement agreement, to submit to the **Federal Register** a proposal to revise critical habitat, if prudent, on or before June 1, 2007, and a final rule by June 1, 2008, which was later extended to October 1, 2008. We published a proposed rule to revise critical habitat in the **Federal Register** on June 19, 2007 (72 FR 33808), and announced the first public comment period on the proposed rule. On December 11, 2007 (72 FR 70284), we opened a second public comment period on the proposed rule and announced our intention to hold two public hearings on the proposed rule that were held in San Bernardino, California, on January 10, 2008. On April 16, 2008, we published in the **Federal Register** a notice of availability (NOA) announcing the availability of the DEA (dated February 6, 2008), opening the third public comment period on the proposed rule to revise critical habitat, and announcing changes to the proposed rule (73 FR 20581). In addition, on July 29, 2008, we published in the **Federal Register** an NOA announcing the availability of an Addendum to the Economic Analysis, opening a fourth public comment period (73 FR 43910). This final rule completes our obligations under the March 23, 2006, settlement agreement regarding the subject subspecies. For a discussion of additional information on previous Federal actions concerning the San Bernardino kangaroo rat, refer to the final listing rule published in the **Federal Register** on September 24, 1998 (63 FR 51005), and the final designation of critical habitat published in the **Federal Register** on April 23, 2002 (67 FR 19812).

Summary of Comments and Recommendations

We requested written comments from the public on the proposed rule to revise critical habitat for the San Bernardino kangaroo rat during four comment periods. The first comment period opened June 19, 2007 (72 FR 33808), associated with the publication of the proposed rule, and closed August 20, 2007. We received one request for a public hearing during this comment period. The second comment period opened December 11, 2007 (72 FR 70284), associated with the publication of a notice of public hearings that were held January 10, 2008, and closed January 25, 2008. The third comment period opened April 16, 2008 (73 FR 20581), associated with the notice of availability of the DEA, and closed May 16, 2008. The fourth comment period opened July 29, 2008 (73 FR 43910), associated with the availability of an addendum to the economic analysis, and closed August 13, 2008. During these four public comment periods, we contacted appropriate Federal, State, and local agencies; scientific organizations; and other interested parties and invited them to comment on the proposed rule to revise critical habitat for this subspecies and the associated DEA.

During the first comment period, we received 12 public comments directly addressing the proposed revision of critical habitat: 1 from a Federal agency, 1 from a local government, 9 from organizations, and 1 from an individual. During the second comment period and the January 10, 2008, public hearings, we received 29 comments directly addressing the proposed revision of critical habitat for this subspecies: 4 from local governments, 6 from organizations, and 19 from individuals. During the third comment period, we received 3 comments directly addressing the proposed revision of critical habitat for this subspecies and/or the DEA: 1 from a Federal agency and 2 from organizations. During the fourth comment period, we received 5 comments directly addressing the proposed revision of critical habitat for

the San Bernardino kangaroo rat and/or the DEA: 3 from organizations, and 2 from individuals.

Peer Review

In accordance with our policy on peer review in Act (16 U.S.C. 1531 *et seq.*) activities, published on July 1, 1994 (59 FR 34270), we solicited expert opinions from five knowledgeable individuals with scientific expertise that included familiarity with the subspecies, the geographic region in which it occurs, and conservation biology principles. We received responses from two of the peer reviewers. The peer reviewers generally concurred with our methods and conclusions and indicated that the Service did a thorough job of delineating critical habitat using the best available scientific information.

We reviewed all comments received from the peer reviewers and the public for substantive issues and new information regarding the designation of critical habitat for the San Bernardino kangaroo rat. All public comments are addressed in the following summary and incorporated into the final rule as appropriate.

Peer Reviewer Comments

Comment 1: One peer reviewer commented that in the 2007 proposed rule to revise critical habitat, the Service's non-inclusion of areas designated as critical habitat in 2002 was not supported in the document with empirical data or some type of population viability modeling.

Our Response: Our revised critical habitat designation is substantially smaller than the 2002 critical habitat designation. Given the new information that became available to us in the five years since the previous designation, we find that we erroneously designated some areas. Areas previously designated in 2002 but not designated in this revised rule do not meet the definition of critical habitat. The changes in this rule are due to several factors. Better biological information allowed us to more specifically define primary constituent elements (PCEs) for this species, and site visits in December 2006 and January 2007 allowed us to more precisely define the areas that meet the definition of critical habitat on the ground. This allowed us to remove areas that do not meet our criteria for identifying the physical or biological features that are essential to the conservation of the species. The 2002 critical habitat designation included areas in which few occurrences were recorded. Such areas of low-density occupation or sporadic occupancy were removed from the proposed revised designation because they do not support core populations (i.e., areas where the subspecies has been repeatedly detected through live trapping). Finally, we employed refined mapping techniques in the current revision to more precisely map areas that contain PCEs. This more refined approach allowed us to remove areas that do not meet the definition of critical habitat. See the ''Summary of Changes From the 2002 Critical Habitat Designation'' and ''Criteria Used To Identify Critical Habitat'' sections of this final rule for more information.

We based the proposed revision of critical habitat for the San Bernardino kangaroo rat on the best available scientific and commercial data including peer-reviewed published literature, gray literature (non-published or non-peer-reviewed survey or research reports), survey information, Geographic Information System coverage data, and site visits with subspecies experts. We delineated proposed critical habitat using criteria based on the biological needs of the subspecies according to the best available science. Application of these criteria (see ''Criteria Used To Identify Critical Habitat'' section of this final rule) results in the determination of the physical and biological features that are essential to the conservation of this subspecies, as identified by the PCEs in the appropriate quantity and spatial arrangement essential to the conservation of the subspecies. The areas proposed as critical habitat: (1) Support core populations that are considered necessary for conservation of the subspecies including areas demographically disconnected from the largest populations, but which may be important for the long-term conservation of the subspecies; and (2) include non-degraded alluvial fans, washes, floodplains, and adjacent upland areas with appropriate soils and vegetation. At this time, a population viability analysis has not been completed for the San Bernardino kangaroo rat. When delineating critical habitat for the San Bernardino kangaroo rat, we used the best available scientific information to determine those areas containing the features essential to its conservation.

Comment 2: One peer reviewer commented on the reduction of critical habitat from what was designated in 2002. The peer reviewer stated that the 2007 proposed rule to revise critical habitat explains that this reduction is a result of additional knowledge about specific habitat requirements and occurrence data. The peer reviewer further questioned if the 2002 critical habitat designation was too superficial as a result of being rushed, or if the 2007 proposed revision to the critical habitat designation is overly conservative. The peer reviewer also suggested that we provide additional rationale for not designating areas with low population density or low habitat quality.

Our Response: The Act defines critical habitat as (1) the specific areas within the geographical area occupied by the species at the time it is listed on which are found those physical or biological features (a) essential to the conservation of the species, and (b) which may require special management considerations or protection, and (2) specific areas outside the geographical area occupied by the species at the time it is listed upon a determination by the Secretary that such areas are essential for the conservation of the species. The reduction in total area from what was designated in 2002 is primarily the result of: (1) Exclusions of habitat under section 4(b)(2) of the Act; (2) revision of the primary constituent elements: (3) revision of our criteria used to identify critical habitat; and (4) removal of lands within the geographical area occupied by the subspecies at the time it was listed that do not contain the physical or biological features as identified by the PCEs in the appropriate quantity and spatial arrangement essential to the conservation of the subspecies.

In 2002, we used the best available scientific information at that time to delineate critical habitat and do not consider the 2002 designation to be ''superficial.'' However, as acknowledged by the peer reviewer, we have significant additional occurrence data and knowledge about specific habitat requirements of this subspecies that was not known when we first designated critical habitat for the San Bernardino kangaroo rat in 2002. We utilized this data to appropriately revise the primary constituent elements and criteria used to identify critical habitat consistent with the statutory obligations of the Act. In addition, since 2002, case law has developed that has helped to further our understanding of the statutory obligations of the Act and the definition of critical habitat (*e.g., The Cape Hatteras Access Preservation Alliance* v. *U.S. Dep't of the Interior*, 344 F. Supp. 2d 108 (D.D.C. 2004); *Home Builders Ass'n of N. Cal.* v. *U.S. Fish and Wildlife Service*, U.S. Dist. LEXIS 80255 (E.D. Cal. 2006); and *Arizona Cattle Growers' Ass'n* v. *Kempthorne*, 534 F. Supp. 2d 1013 (D. Ariz. 2008)). Thus, we have refined our approach to this critical habitat designation to insure compliance with the Act, including the identification of the geographical areas occupied by the subspecies at the time of listing, the

identification of physical or biological features (and primary constituent elements) essential to the conservation of the subspecies, determination of any areas outside the geographical area occupied by the subspecies at the time of listing that are essential for the conservation of the subspecies, and appropriate exclusions under section 4(b)(2) of the Act. A complete discussion of how data collected since the 2002 designation was utilized to refine the proposed designation can be found in the ''Summary of Changes From the 2002 Critical Habitat Designation'' and ''Summary of Changes From the 2007 Proposed Rule To Revise Critical Habitat'' sections of this final rule.

As discussed in the ''Criteria Used To Identify Critical Habitat'' section of this final rule, we delineated critical habitat for the San Bernardino kangaroo rat using the following criteria: (1) Areas occupied by the subspecies at the time of listing, and currently occupied, within the historical range of the subspecies; (2) areas retaining fluvial dynamics containing one or more of the PCEs for the subspecies; (3) areas supporting a core population of the subspecies; and (4) areas demographically disconnected from the largest populations, but which may be important for the long-term recovery of the subspecies. Application of these criteria results in the determination of the physical and biological features that are essential to the conservation of this subspecies, identified as the subspecies' PCEs laid out in the appropriate quantity and spatial arrangement. Thus, not all areas supporting the identified PCEs will meet the definition of critical habitat. Specifically, as noted by the commenter, some areas occupied at low densities are not included in the final revised critical habitat designation. Areas occupied at low densities are not likely to contribute to recovery of the subspecies, and we do not have information suggesting that the areas in question support core populations or information suggesting these areas would be capable of supporting a core population in the near future.

Conservation (i.e., recovery) is defined in section 3 of the Act as the ''use of all methods and procedures which are necessary to bring any endangered species or threatened species to the point at which the measures provided pursuant to this Act are no longer necessary.'' In accordance with section 4(a)(1) of the Act, we determine if any species is an endangered or threatened species (or revise its listed status) because of any of the five threat factors identified in the Act (i.e., (A) present or threatened destruction, modification, or curtailment of its habitat or range; (B) overutilization for commercial, recreational, scientific, or educational purposes; (C) disease or predation; (D) the inadequacy of existing regulatory mechanisms; or (E) other natural or manmade factors affecting its continued existence). Therefore, conservation, or recovery, is achieved when a five factor analysis indicates that current and future threats have been minimized to an extent that the species is no longer in danger of extinction or likely to become endangered in the foreseeable future. Recovery is a dynamic process requiring adaptive management of threats and there are many paths to accomplishing recovery of a species. We believe that the lands identified in this rule as meeting the definition of critical habitat are adequate to ensure the conservation of the San Bernardino kangaroo rat throughout its extant range based on the best available scientific information at this time.

We recognize that some efforts that positively contribute to the conservation of this subspecies may occur outside the boundaries of this final designation; however, we do not believe that this designation is ''conservative.'' Rather, our proposed designation in combination with the NOA, which announced the addition of areas to the proposed designation, and this final designation accurately describe all specific areas meeting the statutory definition of critical habitat for the San Bernardino kangaroo rat. See the ''Summary of Changes From the 2002 Critical Habitat Designation'' and ''Summary of Changes From the 2007 Proposed Rule To Revise Critical Habitat'' sections of this final rule for more information.

Comment 3: One peer reviewer commented that the Service's focus on core populations as a primary criterion for designating critical habitat is logical and appropriate. The reviewer further commented that while the core populations may be necessary for conservation of the San Bernardino kangaroo rat, they may not be sufficient in area or connectivity to achieve a reasonable probability of persistence in the face of periodic flooding and drought. Another peer reviewer commented that the proposed revision to critical habitat includes dispersal corridors and habitat connectivity necessary for the subspecies.

Our Response: In this final revised designation we focused primarily on core populations in undisturbed habitat in the Santa Ana River, Lytle/Cajon Creeks, and the San Jacinto River washes. We believe that protecting these three largest core populations is necessary for the conservation of the San Bernardino kangaroo rat. In response to this and other comments, we revised our criteria to also capture occupied areas demographically disconnected from the three largest populations, but which may be important for the long-term conservation of the subspecies (for a detailed discussion see ''Criteria Used To Identify Critical Habitat'' section of this final rule). We then re-evaluated the proposed critical habitat boundaries and included in the designation additional areas in Mill Creek, Plunge Creek, Cable Creek wash, and Bautista Creek. We are not designating small, isolated areas of degraded habitat or areas devoid of fluvial processes because such areas likely only support unsustainable populations that would not contribute to the recovery of the subspecies. We believe that with these revisions, we included sufficient lowland and upland alluvial sage scrub habitat within a sufficient number of critical habitat units to ensure connectivity and persistence of the subspecies following periodic flooding and drought.

Comment 4: One peer reviewer had concerns about excluding areas from the critical habitat designation that are protected by a management or conservation agreement, particularly because the proposed exclusion of those areas increases the degree to which critical habitat in all three units is fragmented. This reviewer questioned whether proposed exclusions render the remaining critical habitat areas sufficient for the subspecies' recovery if management actions on the excluded areas fail to preserve their value to the subspecies. Another peer reviewer agreed with the logic of excluding from the final revised critical habitat designation areas that are covered by management plans that benefit the San Bernardino kangaroo rat, but the reviewer questioned whether monitoring would be conducted or reports would be required ensuring compliance with these plans, or whether the plans are having the desired effects.

Our Response: Section 4(b)(2) of the Act directs the Secretary to designate critical habitat on the basis of the best scientific data available and after taking into consideration the economic impacts, national security impacts, and any other relevant impacts of specifying any particular area as critical habitat. An area may be excluded from critical habitat if it is determined that the benefits of exclusion outweigh the benefits of specifying a particular area

as critical habitat, unless the failure to designate an area as critical habitat will result in the extinction of the species. The Service recognizes that 80 percent of federally listed species occur either partially or solely on private lands (Crouse et al. 2002) and we will only achieve recovery of federally listed species with the cooperation of private landowners. As discussed in the ''Conservation Partnerships on Non-Federal Lands'' section below, we believe that designation of critical habitat on private lands can negatively impact the working relationships and conservation partnerships we have formed with private landowners.

In making the Woolly-Star Preserve Area (WSPA) Management Plans, the Former Norton Air Force Base Conservation Management Plan (CMP), the Western Riverside County Multiple Species Habitat Conservation Plan (MSHCP), and the Cajon Creek Habitat Conservation Management Area Habitat Enhancement and Management Plan (Cajon Creek HCMA HEMP) exclusions, we evaluated the benefits of designating non-Federal lands that may not have a Federal nexus for consultation while considering if our existing partnerships have, or will, result in greater conservation benefits to the San Bernardino kangaroo rat and its habitat than would likely result from consultation on a designation. We balanced the benefits of inclusion against the benefits of exclusion (i.e., the benefits of preserving partnerships and encouraging development of additional HCPs and other conservation plans in the future). All areas excluded under 4(b)(2) that have completed habitat conservation plans (HCPs) or other Service-approved management plans receive long-term protection and conservation that provides equivalent or greater conservation benefit to the San Bernardino kangaroo rat than would likely result from including these areas in the designation, and the exclusion of lands covered by these plans will not jeopardize the continued existence of the subspecies. The conservation objectives in these plans for the San Bernardino kangaroo rat, and the implementation status of these plans to date, are discussed in the ''Exclusions Under Section 4(b)(2) of the Act'' section below. The conservation and management of San Bernardino kangaroo rat habitat as described in these management plans have reduced and will continue to remove or reduce known threats to the subspecies and its habitat, contributing to the survival and recovery of this subspecies. We believe the exclusions we made in this final revised rule are legally supported under section 4(b)(2) of the Act and scientifically justified.

The exclusion of critical habitat does not dismiss or lessen the value of these areas to the overall conservation of this subspecies. Rather, we believe that the judicious exclusion of specific areas of non-Federal lands from critical habitat designations, where we have developed close partnerships with non-Federal land owners that resulted in the development of HCPs or other voluntary conservation plans, can contribute to species recovery and provide a superior level of conservation than the designation of critical habitat alone. As described in detail in the ''Exclusions Under Section 4(b)(2) of the Act'' section below, we determined that the benefits of excluding areas covered by the WSPA Management Plans, the Former Norton Air Force Base CMP, the Western Riverside County MSHCP, and the Cajon Creek HCMA HEMP outweigh the benefits of designating these lands, and that these exclusions will not result in the extinction of the San Bernardino kangaroo rat. Surveys and monitoring will continue to be required for areas excluded based on completed management plans to ensure they are effective (see ''Areas Considered for Exclusion Under Section 4(b)(2) of the Act'' section below for more information).

Comment 5: One peer reviewer discussed our identification of PCEs for the San Bernardino kangaroo rat, and specifically agreed that the PCEs are based on the best available science, and that the identified PCEs appropriately provide for the conservation of the subspecies.

Our Response: The description of the PCEs for the San Bernardino kangaroo rat is based on the best available scientific and commercial data regarding the subspecies, including a compilation of data from peer-reviewed, published literature; unpublished or non-peer reviewed survey and research reports; and opinions of biologists knowledgeable about the San Bernardino kangaroo rat and its habitat. Consequently, the PCEs, as described in this final rule, represent our best assessment of what habitat components, in the appropriate quantity and spatial arrangement, are essential to the conservation of the subspecies.

Public Comments

Comments Related to Criteria Used To Identify Critical Habitat

Comment 6: Two commenters stated that the proposed rule is flawed because it fails to include several significant areas of occupied habitat previously designated as critical habitat in 2002 that support one or more of the PCEs: (1) Three areas in the Santa Ana River wash; (2) the Etiwanda Fan; (3) four areas in Cajon/Lytle Creeks; and (4) two areas in the San Jacinto River. The commenters stated that the Service provided no data to support the conclusion that these areas are not occupied by the subspecies (e.g., trapping data) or do not contain the PCEs. They further stated that several areas (i.e., Etiwanda Fan, areas in Cajon/Lytle Creeks) that were not included in the proposed designation are currently occupied to some extent and, therefore, must contain the PCEs required by the species. One commenter stated that all populations inclusive of peripheral populations are essential for recovery and that not including all occupied areas as critical habitat will continue to fragment and drive the species closer to the brink of extinction.

Another commenter stated that according to a review of occurrence information for the San Bernardino kangaroo rat and habitat assessments conducted in 2007, the following areas are currently occupied by the subspecies and contain the PCEs, and therefore, should have been included in the proposed designation: (1) Three areas along Plunge Creek in the Santa Ana River watershed; (2) one area in the Santa Ana River; (3) one area in Lytle Creek; (4) Cable Creek in the Lytle/Cajon Creeks watershed; (5) Bautista Creek in the San Jacinto River watershed; and (6) the Etiwanda Fan. Several commenters also called for the reevaluation of Plunge Creek, the Santa Ana River in Redlands, Lytle Creek near the 210 Freeway, Cable Creek, and the Etiwanda Fan.

Certain areas that were not included in the June 19, 2007, proposed revision to critical habitat (72 FR 33808) were commented on more frequently than others mentioned above: Specifically, Plunge Creek, Mill Creek, the Cable Creek wash, and Bautista Creek. Multiple comments received during the first two comment periods and the public hearings, including comments received from biologists familiar with the San Bernardino kangaroo rat, indicated the importance of these areas as confirmed occupied habitat containing the PCEs, and which retain fluvial input and that may be necessary for the long-term conservation of the subspecies.

Our Response: For a detailed discussion of the areas previously designated as critical habitat that are not included in this revised designation, see the ''Summary of Changes From the

2002 Critical Habitat Designation'' section of this final rule. Under section 3(5)(C) of the Act, critical habitat shall not include the entire geographical area which can be occupied by the species unless otherwise determined by the Secretary. Critical habitat is defined in section 3 of the Act as (1) the specific areas within the geographical area occupied by a species, at the time it is listed in accordance with the Act, on which are found those physical or biological features (a) essential to the conservation of the species and (b) that may require special management considerations or protection; and (2) specific areas outside the geographical area occupied by a species at the time it is listed, upon a determination that such areas are essential for the conservation of the species. In developing the proposed rule to revise critical habitat, we considered the geographical area occupied by the subspecies at the time of listing, and within that broad geographical area, identified those areas that, based on the best available scientific and commercial data, contain the physical and biological features essential to the subspecies' conservation. We believe that our proposed designation, including changes to the proposed designation outlined in the April 16, 2008, NOA (73 FR 20581), and this final designation accurately describe all areas meeting the definition of critical habitat for the San Bernardino kangaroo rat.

As discussed in the proposed rule to revise critical habitat and the April 16, 2008, NOA announcing changes to the proposed rule, we identified critical habitat for this subspecies based on several criteria. Application of these criteria (see ''Criteria Used To Identify Critical Habitat'' section of this final rule) results in the determination of the physical and biological features that are essential to the conservation of this subspecies, as identified by the PCEs in the appropriate quantity and spatial arrangement essential to the conservation of the subspecies. Thus, not all areas supporting the identified PCEs will meet the definition of critical habitat. The areas designated as critical habitat (1) support core populations that are considered necessary for conservation of the subspecies, including areas demographically disconnected from the largest populations that may be important for the long-term conservation of the subspecies; and (2) include non-degraded alluvial fans, washes, floodplains, and adjacent upland areas with appropriate soils and vegetation.

We recognize that our designation does not encompass all known occurrences of this subspecies as noted by the commenters. Small, isolated areas of degraded habitat or areas devoid of fluvial processes are likely to only support unsustainable populations that would not contribute to the recovery of the subspecies. Although we are not designating all known occurrences of the San Bernardino kangaroo rat, we believe the criteria we used to identify areas that contain the features essential to the conservation of the subspecies, and which are included in the final revised critical habitat designation, are adequate to ensure the conservation of the subspecies throughout its extant range. Species that are protected across their ranges are expected to have lower likelihoods of extinction (Soule and Simberloff 1986, pp. 32–35; Scott et al. 2001, pp. 1297–1300); we are designating multiple locations across the range of the subspecies to prevent range collapse.

In light of significant comments received during the comment periods for the proposed rule on areas that are essential to the subspecies and should be included in the designation, and new information received, we revised our criteria used to identify critical habitat to capture additional self-sustaining populations of San Bernardino kangaroo rats necessary for recovery (see ''Criteria Used To Identify Critical Habitat'' section below for more information). We then re-evaluated the proposed critical habitat boundaries and included in the designation additional areas in Mill Creek, Plunge Creek (including areas providing habitat connectivity of the Plunge Creek wash with the Santa Ana River wash), Cable Creek wash, and Bautista Creek. These areas are currently designated as critical habitat for the San Bernardino kangaroo rat (67 FR 19812, April 23, 2002); however, we did not propose these areas as critical habitat in the June 19, 2007 (73 FR 33808), proposed revision to critical habitat, but announced the addition of these areas as changes to the proposed rule in the April 16, 2008, NOA. See the ''Summary of Changes From the 2007 Proposed Rule to Revise Critical Habitat'' and the ''Unit Descriptions'' sections of this final rule for more information.

Comment 7: One commenter indicated concerns about the following statement made in the proposed rule: ''Portions of the habitat downstream of the Bautista Creek confluence have been or are in the process of being developed or are being used for water conservation activities and therefore this habitat does not contain the PCEs.'' The commenter indicated that these areas should be included in critical habitat and further stated that no data was presented in the proposed rule indicating that these areas are no longer occupied, no longer contain the PCEs; and if degraded, how these areas have become degraded over the last five years.

Our Response: In the 2007 proposed rule, we discussed an integrated water recharge and recovery program to be implemented by Eastern Municipal Water District at the confluence of the San Jacinto River and Bautista Creek within existing critical habitat Unit 3. The project was expected to impact approximately 37 ac (15 ha) of floodplain and upland habitat (Service 2006, p. 21). The Service issued a biological opinion for this project on November 16, 2006 (Service 2006, FWS–WRIV–4051.5), which found that the proposed action would not jeopardize the continued existence of the subspecies nor adversely modify the currently designated critical habitat. Although Map 4 of the proposed rule (72 FR 33808) depicts these lands within the boundary of proposed critical habitat Unit 3, the text of the proposed rule explained that we were not proposing to include these lands as revised critical habitat because they had been addressed by the section 7 consultation and biological opinion, and the proposed action would permanently impact this habitat. The water recharge and recovery program lands total approximately 39 ac (16 ha), not 37 ac (15 ha) as previously reported in the proposed rule (72 FR 33808), all of which are currently designated as critical habitat for the San Bernardino kangaroo rat. These approximately 39 ac (16 ha) of lands are divided into five individual outparcels ranging in size from less than an acre to 35 ac (14 ha) and each areas is surrounded by other lands that we did include in the proposed revision to designated critical habitat. The commenter is correct in pointing out that this area has not yet been developed and the area does currently contain the physical and biological features essential to the conservation of this subspecies, as identified by the PCEs in the appropriate quantity and spatial arrangement. Furthermore, as indicated in the biological opinion, we are aware that this area is occupied.

Following publication of the proposed rule to revise the critical habitat designation, several surveys were conducted within these 39 ac (16 ha) in association with the integrated water recharge and recovery project. These surveys have indicated that the population of San Bernardino kangaroo rats in these areas is larger than previously believed and exceeds what we estimated the population to be in

2006. Based on these survey results, the Army Corps of Engineers requested that we re-initiate consultation on this project. Because these lands are currently designated as critical habitat and the maps indicating areas proposed as critical habitat included these areas (72 FR 33808), and in light of the public comment, new survey data and re-initiation of consultation on the Eastern Municipal Water District project, we included these 39 ac (16 ha) in Unit 3 as lands that meet the definition of critical habitat. We believe that inclusion of these 39 ac (16 ha) is a logical outgrowth of the proposed rule and is scientifically sound and legally justified. We determined, however, that these 39 ac (16 ac) should be excluded from the final critical habitat designation under section 4(b)(2) of the Act. See the ''Summary of Changes From the 2007 Proposed Rule To Revise Critical Habitat'' and ''Exclusions Under Section 4(b)(2) of the Act'' sections of this final rule for more information.

Comment 8: Several commenters stated that the Service cannot focus primarily on its definition of core populations (i.e., areas where the subspecies was repeatedly detected through live trapping) when false negatives occur from live trapping surveys 20 percent of the time. They further stated that the Service's definition of core populations is inappropriate, would result in substantial San Bernardino kangaroo rat populations being excluded from critical habitat, and should be redefined. A number of commenters suggested peripheral or sporadically occupied locations are essential for conservation of the subspecies. One commenter stated that areas currently having low populations should not be removed from critical habitat. The commenter stated that the Service's assertion that some viable San Bernardino kangaroo rat populations do not fit the definition of a core population, and are therefore less important, has no biological basis for an animal that has already lost 90 percent of its historical range. The commenter stated that by not including potential or occupied habitat that has been degraded as critical habitat would allow private landowners and public agencies the ability to further degrade those areas that are important to the conservation of the San Bernardino kangaroo rat.

Our Response: As discussed in the ''Criteria Used To Identify Critical Habitat'' section of this final rule, we delineated critical habitat for the San Bernardino kangaroo rat using the following criteria: (1) Areas occupied by the subspecies at the time of listing, and currently occupied, within the historical range of the subspecies; (2) areas retaining fluvial dynamics containing one or more of the PCEs for the subspecies; (3) areas supporting a core population of the subspecies; and (4) areas demographically disconnected from the largest populations, but which may be important for the long-term recovery of the subspecies. Application of these criteria results in the determination of the physical and biological features that are essential to the conservation of this subspecies, identified as the species' PCEs laid out in the appropriate quantity and spatial arrangement. Thus, not all areas supporting the identified PCEs will meet the definition of critical habitat. Based on information provided in public comments, these criteria were revised after the June 19, 2007 (72 FR 33808), proposed revision to critical habitat to capture essential features supporting additional self-sustaining populations of San Bernardino kangaroo rats (see ''Criteria Used To Identify Critical Habitat'' section below for more information). As a result, we added four areas totaling approximately 1,579 ac (639 ha) to the proposed revision as announced in the April 16, 2008 NOA (73 FR 20581). We believe our final designation accurately describes all specific areas meeting the definition of critical habitat for the San Bernardino kangaroo rat. We acknowledge that false negatives can occur from live trapping surveys for San Bernardino kangaroo rats; however, as required under the Act, we used the best available scientific information in determining areas occupied by this subspecies.

We recognize that our designation of critical habitat for the San Bernardino kangaroo rat does not encompass all known occurrences of this subspecies as noted by the commenters. In this designation, we focused primarily on core populations (i.e., areas where the subspecies was repeatedly detected through live trapping) in undisturbed habitat in the Santa Ana River, Lytle/Cajon Creeks, and the San Jacinto River washes. We believe protecting the largest core populations is necessary for recovery of the subspecies. Small, isolated areas of degraded habitat or areas devoid of fluvial processes are likely to only support unsustainable populations that would not contribute to the recovery of this subspecies. Although we are not designating all known occurrences of the San Bernardino kangaroo rat, we believe our criteria are sufficient, and therefore the designation is adequate, to ensure the conservation of this subspecies throughout its extant range based on the best available information at this time. We recognize that the designation of critical habitat may not include all of the habitat that may eventually be determined to be necessary for the recovery of the subspecies, and critical habitat designations do not signal that habitat outside of the designation is unimportant or may not contribute to recovery. Areas outside the final critical habitat designations will continue to be subject to conservation actions implemented under section 7(a)(1) of the Act, and regulatory protections afforded by the section 7(a)(2) jeopardy standard and the prohibitions of section 9 of the Act.

Comment 9: One commenter cited statements in the proposed rule that several areas were not included in the proposed designation because they ''contain habitat that has been degraded'' and requested justification as to why no regulatory mechanisms were triggered in the past to prevent habitat destruction in these areas since they were included in the 2002 designation.

Our Response: As explained above in response to comment 2, the reduction in total area from what was designated in 2002 is primarily the result of: (1) Exclusions of habitat under section 4(b)(2) of the Act; (2) revision of the primary constituent elements; (3) revision of our criteria used to identify critical habitat; (4) and removal of lands within the geographical area occupied by the subspecies at the time it was listed that do not contain the physical or biological features as identified by the PCEs in the appropriate quantity and spatial arrangement essential to the conservation of the subspecies.

We have significant additional occurrence data and knowledge about specific habitat requirements of this species that was not known when we first designated critical habitat for the San Bernardino kangaroo rat in 2002. We utilized this data to revise the primary constituent elements and criteria used to identify critical habitat consistent with the statutory obligations of the Act and applicable case law (see the ''Summary of Changes From the 2002 Critical Habitat Designation'' section of this final rule for more information).

As pointed out by the commenter, there are areas of currently designated critical habitat that were removed in part due to habitat degradation and/or the determination that the areas do not contain the physical and biological features essential to the conservation of this subspecies. Some of these areas likely did not support the physical and biological features essential to the

conservation of the subspecies in 2002, when critical habitat was first designated (see ''Summary of Changes'' section). We have revised the PCEs since the 2002 designation based on new information and a better understanding of the statutory obligations of the Act. Furthermore, we diligently reviewed all areas considered for designation to demonstrate existence of the physical and biological features essential to the conservation of this subspecies within the geographical area occupied by this subspecies at listing.

Other areas have become degraded since critical habitat was designated. Critical habitat receives protection under section 7 of the Act through the prohibition against Federal agencies carrying out, funding, or authorizing the destruction or adverse modification of critical habitat. Section 7(a)(2) of the Act requires consultation on Federal actions that may affect critical habitat. However, there are a number of reasons why designated critical habitat can become degraded without triggering consultation.

The designation of critical habitat does not affect land ownership or establish a refuge, wilderness, reserve, preserve, or other conservation area. Generally, habitat may degrade through time due to lack of management. A critical habitat designation does not force a landowner to manage their land to the benefit of a species. Furthermore, proposed projects or actions occurring in critical habitat that do not involve a Federal nexus are not subject to the section 7 prohibition against destruction or adverse modification of critical habitat and, therefore, no consultation is required for those projects to occur. Where the consultation requirements of section 7(a)(2) do apply, an analysis would only result in a finding of destruction or adverse modification if the project was expected to impact the capability of the critical habitat unit as a whole to perform its conservation function for the subspecies. Projects may adversely impact the physical and biological features essential to the conservation of a species within a critical habitat unit without impairing the unit's conservation role and function for the species. For example, the Service completed formal section 7 consultation on the Lytle Creek North Master Planned Community in existing critical habitat Unit 2. In our Biological Opinion we determined that the proposed action was not likely to jeopardize the continued existence of the subspecies nor result in the destruction or adverse modification of critical habitat (Service 2003a, p. 45, FWS–SB–1640.11), even though the project resulted in the loss of some designated critical habitat. We have not consulted on any projects within designated critical habitat where we determined that project implementation would destroy or otherwise adversely modify critical habitat such that the designated unit could no longer properly function and support the essential features for which it was designated. Finally, in the event of a destruction or adverse modification finding, the landowner's obligation is not to restore or recover the species, but to implement reasonable and prudent alternatives to avoid destruction or adverse modification of critical habitat.

Comment 10: Two commenters stated that critical habitat should include linkage corridors and address connectivity issues relevant to the San Bernardino kangaroo rat. One commenter stated that arguments in the proposed rule to remove specific areas within the Santa Ana River watershed show a limited understanding of the habitat needs and the corridor connectivity issues that are relevant to this subspecies. One commenter further stated that the critical habitat delineated in the proposed revision to critical habitat shows a limited, single-species perspective. Several commenters stated that continuity between populations must be maintained.

One commenter stated that, through the proposed rule, fragments of critical habitat were created (i.e., Plunge Creek) and populations removed because they are believed to be isolated from perhaps larger populations (i.e., Etiwanda Fan, Cable Creek, and Bautista Creek) and that the goal for the designation should be to form linkages between occupied areas, which reduce genetic isolations, allow populations to re-colonize following local extinctions from stochastic events, and migrate in response to environmental change.

Our Response: We agree that linkages are important to reduce genetic isolation and to allow for re-colonization and migration. Included in the criteria for defining the physical and biological features within occupied habitat for inclusion in the critical habitat designation are areas adjacent to and between San Bernardino kangaroo rat occurrence points that maintain connectivity of occurrences in one continuous patch of suitable habitat. We maintained connectivity of core populations within each of the proposed critical habitat units. However, in some areas there are geographical barriers to connectivity, such as manmade structures or large expanses of unsuitable habitat. These areas are not likely to support actual movement of San Bernardino kangaroo rats and do not contain the physical and biological features essential to the conservation of this subspecies, and therefore do not meet the definition of critical habitat and are not included in this final designation. As announced in the NOA for the draft economic analysis (73 FR 20581), we are including in the final revised critical habitat designation areas in and around Plunge and Mill Creeks to increase connectivity in Unit 1. Furthermore, we are including portions of Cable Creek (Unit 4) and Bautista Creek (Unit 5) in the designation of critical habitat as these areas may be important for the long-term conservation of this subspecies. See the ''Summary of Changes From the 2007 Proposed Rule To Revise Critical Habitat'' and the ''Unit Descriptions'' sections of this final rule for more information.

Designation of these areas within the Santa Ana River, Lytle/Cajon Creeks, and San Jacinto River watersheds is based on data and information received during the comment periods from these and other commenters and creates additional connectivity within the designation. We responded to all data and scientific information received during the comment periods and did not receive any other data indicating that additional areas within the Santa Ana River watershed, or elsewhere within the range of the San Bernardino kangaroo rat, meet the definition of critical habitat. We agree with the commenter that this final designation is limited in perspective to a single subspecies, the San Bernardino kangaroo rat. It is outside the scope of this final rule to address conservation need of other species within a single species critical habitat designation.

Comment 11: One commenter asserted that the Service's statement in the 2007 proposed rule that channelized areas in the San Jacinto River prevent connectivity with core populations is unjustified, and that we provided no evidence indicating that the PCEs are not present or that these areas do not provide connectivity. Several commenters stated that channelized creeks (such as portions of Cable and Bautista creeks) should contain a natural bottom with islands of habitat that the subspecies could use as corridor habitat, utilizing patches of habitat as ''stepping stones'' and temporary refugia as they disperse.

Our Response: Channelized areas are not included in this designation because they do not provide suitable habitat to sustain San Bernardino kangaroo rat populations beyond the next storm event, which could flood the channels

with high-velocity flows from bank to bank, eliminating populations within the channelized areas. Furthermore, we have no evidence to suggest that this subspecies utilizes channelized areas (some of which are lined with concrete) to successfully migrate between populations. We agree that channels with natural bottoms and islands of habitat could provide better opportunities for dispersal between populations. However, these ''stepping stones'' are not in place at this time, and we are not including these channelized areas in the designation of critical habitat as they do not currently meet the definition of critical habitat.

Comment 12: One commenter stated that construction technologies should be explored that would create or sustain San Bernardino kangaroo rat habitat. The commenter also stated that a hydrologic analysis of the existing levees, detention basins, and other flood control structures should be completed to determine if these structures are still required. Another commenter stated that areas along the Santa Ana River are important, as re-engineering of flood control features can create appropriate conditions for the San Bernardino kangaroo rat.

Our Response: We agree that flood control and water conservation structures contributed to the loss of suitable habitat for the San Bernardino kangaroo rat by altering hydrological processes, and we agree that sustaining areas where natural hydrological processes remain is important to the conservation of this subspecies. Although studies of construction technologies and investigations of the necessity for existing hydrological structures could benefit the conservation of this subspecies in the future, we do not currently have this information and we were not able to include an analysis of such information in making our designation of critical habitat. When delineating critical habitat for the San Bernardino kangaroo rat, we used the best available scientific information to determine those areas that meet the definition of critical habitat.

Comment 13: One commenter stated that the proposed rule was flawed because the Service failed to include unoccupied areas for recovery. The commenter stated that the Service ignored the recovery goal of critical habitat by failing to include historical habitat that may not be currently occupied, but could provide an opportunity for the subspecies' recovery. The commenter further stated that the Service must consider and evaluate the recovery benefits of critical habitat designation in order to promulgate a legally valid critical habitat rule. One commenter stated that areas outside the geographical area occupied by the subspecies included in the 2002 designation are still essential to the conservation of the subspecies and should have been included in the 2007 proposed rule.

Our Response: The Service may designate as critical habitat areas outside of the geographical area occupied by a species at the time it was listed when we can demonstrate that those areas are essential for the conservation of the species (section 3(5)(A)(ii) of the Act). Likewise, we can designate as critical habitat areas ''outside the geographical area presently occupied by a species only when a designation limited to its present range would be inadequate to ensure the conservation of the species.'' (50 CFR 424.12(e)).

Conservation (i.e., recovery) is achieved when a five factor analysis performed pursuant to section 4(a)(1) if the Act indicates that current and future threats have been minimized to an extent that the species is no longer threatened with extinction in the foreseeable future. Recovery is a dynamic process requiring adaptive management of threats and there are many paths to accomplishing recovery of a species. We recognize that it is unlikely that threats to this subspecies will be removed from all areas identified in this rule and that recovery efforts will occur outside the boundaries of this final designation; however, we believe that that conservation of this subspecies would be achieved if threats to this subspecies, as described in the ''Special Management Considerations or Protection'' section of this rule, were reduced or removed due to management and protection of those areas. Therefore, consistent with the statutory obligations of the Act and our implementing regulations we are not designating any unoccupied areas or areas outside the geographical area occupied by this subspecies at the time it was listed.

Critical habitat designations do not signal that habitat outside the designation is unimportant or may not contribute to a species' recovery. Areas outside the final critical habitat designation will continue to be subject to conservation actions implemented under section 7(a)(1) of the Act, and regulatory protections afforded by the section 7(a)(2) jeopardy standard and the prohibitions of section 9 of the Act. Critical habitat designations based on the best available information at the time of designation will not control the direction and substance of future recovery plans, habitat conservation plans, or other species conservation planning efforts if information available at the time of those planning efforts calls for a different outcome. We recognize that the threats faced by this subspecies may change in the future; however, we base our critical habitat designations on the information available at the time of the designation and do not speculate as to what areas may be found essential if better information becomes available or what areas may become essential over time. The commenter did not include any specific data supporting their statement that unoccupied areas are essential for the recovery of the San Bernardino kangaroo rat and we are not aware of any studies or data that we did not consider. Should additional data become available, we may revise this critical habitat designation, subject to available funding and other conservation priorities.

Contrary to the commenter's assertion, we note that all areas designated as critical habitat in 2002 were within the geographical area occupied by the species at the time of listing. For a detailed discussion regarding areas referenced by the commenter that were designated in 2002 but not included in this final revised designation, please see the ''Summary of Changes From the 2002 Critical Habitat Designation'' section of this final rule.

Comment 14: One commenter stated that before the Service reduces critical habitat of a species that is already in peril, the Service should scientifically analyze if this reduction further jeopardizes the species' recovery and that a recovery plan, including a population viability analysis, should be completed for the San Bernardino kangaroo rat.

Our Response: We agree that a recovery plan and a population viability analysis could provide useful information when considering a critical habitat designation; however, at this time, neither a recovery plan nor a population viability analysis was completed for the San Bernardino kangaroo rat. Given the timeframe in which we had to prepare this critical habitat rule, we did not have time to prepare a recovery plan or a population viability analysis for this subspecies; and the Act does not require the preparation of such analyses before critical habitat is designated. When delineating critical habitat for the San Bernardino kangaroo rat, we used the best available scientific information to determine those areas that meet the definition of critical habitat.

Comments Related to the Primary Constituent Elements

Comment 15: One commenter stated that hydrological processes are an essential part of the alluvial fan sage scrub plant community and San Bernardino kangaroo rat habitat and, therefore, should be included as a PCE. The commenter further stated areas that provide necessary hydrology to downstream alluvial fans and the processes that the San Bernardino kangaroo rat relies upon for habitat renewal and maintenance should have been included in the proposed designation.

Our Response: We consider PCEs to be tangible, recognizable, or measurable features in the landscape, where possible, and not the processes that result in the feature. Biologists and non-biologists should be able to clearly determine the presence of PCEs in the field. A process such as hydrological regime should not be a PCE, but the resulting habitat condition (i.e., the end result of the process) is an appropriate PCE. In the case of the San Bernardino kangaroo rat, although hydrological processes maintain the alluvial sage scrub with proper soil and vegetative characteristics for this subspecies, habitat features described by the PCEs are the actual habitat parameters relied upon by the San Bernardino kangaroo rat, not the natural process that contributes to the long-term maintenance of the habitat (see the ''Primary Constituent Elements'' section for a detailed discussion).

Comment 16: One commenter stated that the proposed rule fails to describe the PCEs based on the best available science. This commenter stated that according to Braden and McKernan (2000), San Bernardino kangaroo rats were documented in a variety of plant communities, including coastal sage scrub, chaparral, in highly disturbed areas previously not thought to be suitable habitat for this subspecies (i.e., dirt parking lots, dirt roads), and questioned why these plant communities and disturbed areas were not included in the proposed designation.

Our Response: The PCEs for the San Bernardino kangaroo rat described in the proposed rule and this final rule are based on the best available science (see Comment 5 and response above). We are aware of the Braden and McKernan (2000) study, which showed San Bernardino kangaroo rats occupying areas that were previously thought to be unsuitable habitat, and we have used that information in revising the PCEs and delineating critical habitat for this subspecies in this final rule. Please refer to the ''Primary Constituent Elements'' section of this final rule for more information on this topic.

Comment 17: One commenter disagreed with PCEs 2 and 3, stating that areas with up to 50 percent chamise chaparral cover are unsuitable for the San Bernardino kangaroo rat and that marginal upland areas occupied at low densities that are in proximity to occupied habitat do not serve to perpetuate the subspecies.

Our Response: We disagree with the commenters' assertion that up to 50 percent chamise chaparral cover is unsuitable for the San Bernardino kangaroo rat. Research shows that alluvial fan habitat with mature, relatively dense vegetation, including chaparral, is at least periodically occupied by the San Bernardino kangaroo rat (Braden and McKernan 2000, p. 16) (see Comment 16 and response above and the ''Primary Constituent Elements'' section of this final rule). Also, we believe upland areas contain features essential to the conservation of the subspecies (see the ''Primary Constituent Elements'' section of this final rule for a detailed discussion of the importance of upland habitat).

Comments Related to Subspecies Biological Information

Comment 18: One commenter suggested our statement that inclusion of ''sufficient areas to provide the space needed to maintain the home range for this subspecies'' is naïve and misleading. This commenter stated they have studied home range dynamics and space utilization of the Merriam's kangaroo rat (*Dipodomys merriami*), of which the San Bernardino kangaroo rat is a subspecies, and the commenter noted that this species diverges from the normally accepted concept of home range as a single area where an individual remains for life. The commenter further stated that the size, shape, and location of a home range will change dramatically through time depending on a number of factors.

Our Response: We agree with the commenter about the dynamic and changing nature of the San Bernardino kangaroo rat's home range. We did not suggest in the proposed rule that this subspecies has a defined, static home range where it remains during its entire lifetime. Furthermore, we considered the dynamic home range of this subspecies when delineating critical habitat. In order to clarify concerns voiced by the commenter, we changed the quoted text which appears in the ''Primary Constituent Elements'' section of this final rule to read ''sufficient areas to provide the space needed to maintain the home range dynamics of this subspecies.''

Comments Related to Proposed Exclusions Under Section 4(b)(2) of the Act

Comment 19: One commenter stated that many of the proposed exclusions of critical habitat are not consistent with the stated goals of the Service in providing protection and recovery for the San Bernardino kangaroo rat, while another commenter stated that areas proposed for exclusion by the Service should remain in critical habitat. Another commenter stated that while they support conservation efforts for the San Bernardino kangaroo rat through management plans and acquisition of funding to implement these plans, these efforts are not a substitute for the designation of critical habitat. This commenter stated that the rationale for proposing the following areas for exclusion under section 4(b)(2) of the Act is unjustified for the following reasons:

(1) WSPA Management Plan—(a) this plan does not mention the San Bernardino kangaroo rat as a target species for conservation nor does it provide species-specific monitoring; (b) because the San Bernardino kangaroo rat is sympatric with the woolly star, declines in the number of woolly star plants documented in this area over the past seven seasons may indicate a potential decline in San Bernardino kangaroo rat habitat as well; (c) relying on the draft WSPA Multiple Species Habitat Management Plan (MSHMP) to exclude areas from final critical habitat is not justified since the specific goals of the draft MSHMP are currently non-binding;

(2) Former Norton Air Force Base CMP—while conservation easements are identified as the method to assure San Bernardino kangaroo rat conservation in perpetuity, to date no conservation easements are recorded for these areas;

(3) Western Riverside County MSHCP—the purpose of the MSHCP to streamline Federal and State regulatory mechanisms and allow for take of endangered species is very different from the purpose of critical habitat to recover species; and

(4) The designation of Norton Air Force Base, Cajon Creek Habitat Conservation Management Area, and Eastern Municipal Water District Conservation Lands as critical habitat causes no additional regulatory burdens to the agencies that now manage them and will actually aid in bringing much-needed resources to the management of these areas.

Our Response: We determined that the benefits of exclusion outweigh the benefits of inclusion for lands covered by the WSPA Management Plans, the Former Norton Air Force Base CMP, the Western Riverside County MSHCP, and the Cajon Creek HCMA HEMP, and therefore excluded these lands from critical habitat under 4(b)(2) of the Act. Please see the ''Exclusions Under Section 4(b)(2) of the Act'' section of this final rule for a detailed discussion of the management plans and the benefits each plan provides to the San Bernardino kangaroo rat.

Where a Federal nexus exists, lands designated as critical habitat are protected from destruction or adverse modification under section 7(a)(2) of the Act. However, the conservation and management plans mentioned above incorporate on-going management and protection for the San Bernardino kangaroo rat that will benefit the long-term conservation of the subspecies. This type of long-term management would not necessarily result from a section 7(a)(2) consultation on an area where critical habitat is designated. Additionally, the protection and management afforded to San Bernardino kangaroo rat habitat under these plans extend to private lands that may otherwise lack a Federal nexus triggering consultation under section 7(a)(2) of the Act. Moreover, these plans provide for proactive monitoring and management of conserved lands, which is important to the survival and recovery of the San Bernardino kangaroo rat.

Such conservation needs are typically not addressed through the application of the statutory prohibition on destruction or adverse modification of critical habitat. Section 4(b)(2) of the Act directs the Secretary to consider the economic impact, national security impact, and any other relevant impact of specifying any particular area as critical habitat. An area may be excluded from critical habitat if it is determined that the benefits of exclusion outweigh the benefits of specifying a particular area as critical habitat, unless the failure to designate an area as critical habitat will result in the extinction of the species. As discussed in detail in the ''Exclusions Under Section 4(b)(2) of the Act'' section, we believe the exclusions in this final rule are legally supported under section 4(b)(2) of the Act and scientifically justified. The benefits of designating critical habitat in areas covered by these plans are minimal, and implementation of these plans will result in an increased level of protection and long-term conservation for the San Bernardino kangaroo rat. Imposing an additional regulatory review as a result of designating critical habitat may undermine these conservation efforts and partnerships.

With regard to the comments above that are specific to the WSPA Plan; first, we acknowledge that the San Bernardino kangaroo rat is not directly addressed by the 1993 Management Plan for the Santa Ana River Woolly-Star implemented on the WSPA. However, the management tasks benefit the San Bernardino kangaroo rat as well (see ''Woolly-Star Preserve Area (WSPA) Management Plans'' discussion below). Second, we have no records to indicate that a recent decline in woolly star plants is directly related to a decline in San Bernardino kangaroo rat habitat. Third, we are not basing our exclusion of WSPA lands solely on the recent draft WSPA MSHCP. We are excluding those lands based on partnerships with the local sponsors in preparation and implementation of the 1993 WSPA management plan and the ongoing update to that plan (i.e., the WSPA MSHCP) which will address the San Bernardino kangaroo rat (see the ''Woolly-Star Preserve Area (WSPA) Management Plans'' exclusion discussion below).

With regard to the conservation easements on Former Norton Air Force Base (CMP) lands, the San Bernardino International Airport Authority (SBIA Authority) is currently pursuing conservation easements to assure San Bernardino kangaroo rat conservation in perpetuity on these lands.

Regarding the remaining points raised by the commenter above specific to the Western Riverside County MSHCP, the Former Norton Air Force Base CMP, and the Cajon Creek HCMA HEMP, please see the ''Benefits of Designating Critical Habitat,'' ''Conservation Partnerships on Non-Federal Lands,'' ''Benefits of Excluding Lands With HCPs or Other Approved Management Plans,'' and the plan-specific exclusions sections of this final rule for a full discussion of our rationale for excluding these lands under section 4(b)(2) of the Act. Finally, we are not excluding the Eastern Municipal Water District conservation lands from critical habitat for the San Bernardino kangaroo rat.

Comment 20: Two commenters stated that the proposed revision would violate the Implementing Agreement (IA) of the Western Riverside County MSHCP because it does not exclude 506 ac (205 ha) of water district land within the MSHCP boundaries. They further stated that the MSCHP has already taken the 506 ac (205 ha) of water district lands into account—and state that in the IA, the Service agreed that ''in the event that a critical habitat determination is made for any Covered Species Adequately Conserved * * * lands within the boundaries of the MSHCP will not be designated as critical habitat.'' They further stated that the MSHCP provides full protection for the San Bernardino kangaroo rat even without consideration of the 506 ac (205 ha) owned by the two water districts (Eastern Municipal Water District and Lake Hemet Municipal Water District). Additionally, the commenters stated that the water districts could qualify as a ''Participating Special Entity'' under the MSHCP and the significance of this is that if either water district wishes to implement a project for which take authorization is required, they must comply with the MSHCP and its IA. Thus, if take authorization were ever required for their properties, it would be covered under the MSHCP.

Our Response: In the proposed rule to revise critical habitat, we provided a description of the Western Riverside County MSHCP and an analysis of the proposed exclusion from critical habitat of lands covered by this plan to allow the public to comment and provide additional information that should be considered in our final exclusion analysis (see ''Exclusions under Section 4(b)(2) of the Act'' section below for a detailed discussion). We appreciate any conservation work that Eastern Municipal Water District and Lake Hemet Municipal Water District may be doing; however, the water districts are not signatories to or permittees under the MSHCP. Because the water districts are not signatories of the MSHCP, they may elect to not be a ''Participating Special Entity'', and instead choose an alternative approach outside of the MSHCP to conduct their activities. By taking an alternative approach, a water district would not be required to comply with the MSHCP and associated IA. Therefore, the benefits of including lands owned by the Eastern Municipal Water District and Lake Hemet Municipal Water District as critical habitat are higher than the benefits of including other lands within the overall MSHCP boundaries subject to the MSHCP, and we determined under section 4(b)(2) of the Act that the water districts' lands should not be excluded from this final designation.

Comment 21: One commenter stated that the area covered by the Cajon Creek HCMA HEMP should remain in the critical habitat designation to remind the conservation area managers of their responsibility to the San Bernardino kangaroo rat and other threatened and endangered species.

Our Response: The Cajon Creek HCMA HEMP, managed by Vulcan Materials Company (formerly CalMat Company), Western Division, was created to offset sand and gravel mining proposed within and adjacent to Cajon Creek. In making the Cajon Creek HCMA HEMP exclusion, we evaluated the benefits of designating non-Federal lands that may not have a Federal nexus for consultation while considering if our existing partnership has, or will, result in greater conservation benefits to the San Bernardino kangaroo rat and its habitat than would likely result from consultation on a designation. We balanced the benefits of inclusion against the benefits of exclusion (i.e., the benefits of preserving partnerships and encouraging development of additional HCPs and other conservation plans in the future). We determined that the Cajon Creek HCMA HEMP provides equivalent or greater conservation benefit to the San Bernardino kangaroo rat than would likely result from including this area in the designation, that designation could impact our current and future partnerships, and that exclusion of the lands covered by this plan will not result in the extinction of the subspecies (see ''Exclusions under Section 4(b)(2) of the Act'' section below for a detailed discussion). Vulcan Materials is responsible for managing these alluvial fan scrub habitat areas in perpetuity for 24 species, including the San Bernardino kangaroo rat, regardless of whether or not critical habitat for the San Bernardino kangaroo rat exists on these lands. Vulcan Materials Company is aware of the conservation value of their land and has maintained a strong partnership with the Service by submitting annual reports and ensuring that management and monitoring of their conservation lands adheres to the requirements of the Cajon Creek HCMA HEMP.

Comment 22: One commenter stated that they oppose the Service's policy of relying on section 4(b)(2) to exclude habitat that may be covered by management plans, conservation easements, and/or endowments under the logic that these areas do not need ''special management'' pursuant to section 3(5)(A). The commenter referred to this approach as ''belt and suspenders'' and reminded the Service that the district court of Arizona struck down this approach in *Center for Biological Diversity, et al.* v. *Norton* (D. Ariz. 2003). Furthermore, the commenter stated that our exclusion analyses are flawed because a determination that excluding an area will not result in the extinction of a species does not consider the recovery standards and benefits associated with designation. The commenter believes that all San Bernardino kangaroo rat habitat needs special management because of the variety of impacts to its habitat (e.g., changes in hydrologic regimes, direct impacts from development, off-road vehicle impacts). The commenter stated that current or future management actions provided for the San Bernardino kangaroo rat or its habitat by management plans and/or conservation plans are not a reasonable justification for excluding these areas from the protection that a designation of critical habitat provides. The commenter further stated that the Act defines critical habitat as an area that may need special management, and therefore areas that are receiving management under a management plan and/or conservation plan meet the definition of critical habitat and should not be excluded if the necessary management is being provided under a plan. The commenter concluded that the Service should include in the final critical habitat designation all historical and contemporary areas where the San Bernardino kangaroo rat was known (unless it has been developed), because these areas meet the definition of critical habitat by nature of their need for special management.

Our Response: The commenter appears to be confusing the purposes of sections 3(5)(A) and 4(b)(2) of the Act. Section 3(5)(A) provides the requirements for identifying critical habitat, while section 4(b)(2) directs the Secretary to consider the impacts of designating such areas as critical habitat and provides the Secretary with discretion to exclude particular areas if the benefits of exclusion outweigh the benefits of inclusion. In this rule, we have not stated that areas do not meet the definition of critical habitat under 3(5)(A) because they are being adequately managed. However, we have considered the management of particular areas that do meet the definition of critical habitat in our analyses under section 4(b)(2).

We explain our criteria for designating critical habitat in response to comments 6, 8, and 13 above as well as the ''Criteria Used To Designate Critical Habitat'' section below. The responses to comments 6 and 8 address why this designation does not contain all known occurrences of this subspecies (i.e., contemporary areas) and the response to comment 13 addresses why we are not including any unoccupied habitat (i.e., historical areas) in this final rule. We believe our criteria captures all areas that meet the definition of critical habitat under section 3(5)(A) of the Act. We will focus our response to this comment on our exclusion of lands under section 4(b)(2) of the Act that we determined met the definition of critical habitat under section 3(5)(A) of the Act.

Section 4(b)(2) of the Act states that any designations of and/or revisions to critical habitat will be made on the basis of the best scientific data available after taking into consideration the economic impact, the impact on national security, and any other relevant impact of specifying any particular area as critical habitat. The Secretary may exclude any area from critical habitat if he determines that the benefits of exclusion outweigh the benefits of specifying such area as part of the critical habitat, unless he determines that the failure to designate such area as critical habitat will result in the extinction of the species concerned. Therefore, consistent with the Act, we must consider the relevant impacts of designating areas that meet the definition of critical habitat using the best available scientific data available prior to finalizing a critical habitat designation.

After determining the areas that meet the definition of critical habitat under section 3(5)(A) of the Act as described above, we took into consideration the economic impact, the impact on national security, and other relevant impacts of specifying any particular area as critical habitat for the San Bernardino kangaroo rat. In this final designation, we recognize that designating critical habitat in areas where we have partnerships with land owners that have led to conservation and/or management of listed species on non-Federal lands has a relevant perceived impact to landowners and a relevant impact to future partnerships and conservation efforts on non-Federal lands. These impacts are described in detail in the ''Conservation Partnerships on Non-Federal Lands'' section below. Based on these relevant impacts, we evaluated the benefits of designating areas as critical habitat against the benefits of excluding these areas from the critical habitat designation. Please see the ''Application of Section 4(b)(2) of the Act'' and ''Exclusions under Section 4(b)(2) of the Act'' sections of this final rule for a detailed discussion of the benefits of excluding lands covered by management plans versus the benefits of including these areas in a critical habitat designation. Upon weighing the specific benefits of inclusion against specific benefits of exclusion, we determined that the benefits of excluding a portion of units 1, 2, 3, and 5 outweigh the

benefits of including these areas in the final critical habitat designation. When weighing the benefits of including an area in the critical habitat designation, we fully consider the regulatory benefits provided to the species under section 7(a)(2) of the Act based on the statutory difference between a jeopardy analysis and an adverse modification analysis, and our balancing analyses reflects our consideration of the recovery standards and benefits associated with designation. Further we determined that the exclusion of these areas will not result in extinction of the San Bernardino kangaroo rat. Contrary to the commenter's belief, this determination to exclude areas where the benefits of exclusion outweigh the benefits of inclusion and where we determined that the exclusion will not result in the extinction of the species is consistent with the statutory obligations of the Act. Therefore, we believe these exclusions are in full compliance with the Act.

Comment 23: One commenter stated that the proposed critical habitat rule did not unequivocally demonstrate that the benefits of excluding areas covered by management plans from critical habitat outweigh the benefits of including them.

Our Response: As stated above, the Secretary may exclude any area from critical habitat if he determines that the benefits of exclusion outweigh the benefits of specifying such area as part of the critical habitat, unless he determines that the failure to designate such area as critical habitat will result in the extinction of the species concerned. The benefits of excluding an area from a critical habitat designation (e.g., preserving partnerships and fostering new partnerships) are not directly comparable to the benefits of including that same area within a designation (e.g., regulatory consultation requirement), and therefore one cannot unequivocally compare the two in an analysis; rather the Secretary fully considers the impacts of designation and weighs all the factors to determine if the benefits of exclusion outweigh the benefits of inclusion. For the reasons detailed in the ''Exclusions under Section 4(b)(2) of the Act'' section of this final rule, we determined that the benefits of exclusion outweigh the benefits of inclusion for lands covered by the WSPA Management Plans, the Former Norton Air Force Base CMP, the Western Riverside County MSHCP, and the Cajon Creek HCMA HEMP, and determined that exclusion of these lands will not result in the extinction of the San Bernardino kangaroo rat. Therefore, we have excluded these lands from the critical habitat designation under section 4(b)(2) of the Act.

Comments on Lands Designated as Critical Habitat

Comment 24: Several commenters stated there are areas within the proposed critical habitat that should not be included in the final designation because they do not contain the PCEs, are not occupied by the subspecies, or otherwise do not meet the definition of critical habitat. One commenter objected to the inclusion of three parcels of land along City Creek in proposed Unit 1 that are used by San Bernardino County Flood Control for maintenance activities following storm events, and stated that these parcels are being evaluated by the City of Highland as part of its land use planning effort for the future development of the Golden Triangle area. Two commenters objected to the inclusion of large areas of property (owned by Lytle Development Company) in the Lytle Creek area in proposed critical habitat Unit 2. The objection is based on negative survey data over recent years and judgment of a biological consultant who believes the areas in question are not suitable habitat for this subspecies, are not occupied, or are not essential to the conservation of the subspecies.

Our Response: Where site-specific information was submitted to us with a rationale as to why an area should not be designated as critical habitat, we evaluated that information in accordance with the definition of critical habitat pursuant to section 3(5)(A) of the Act. Following our evaluation of the provided information, we made a determination that modifications to the critical habitat boundaries were not warranted. Data used in the preparation of our final revised designation indicate that the area of Lytle Creek in question is occupied by the San Bernardino kangaroo rat and contains some of the last remaining suitable upland habitat (PCEs 2 and 3) in Unit 2 that contains the features essential to the conservation of the subspecies, and the areas near City Creek provide suitable alluvial habitat in Unit 1 and connectivity with the core population in the Sana Ana River wash. The area in question meets our criteria used to identify critical habitat (see ''Criteria Used To Identify Critical Habitat'' section below). We believe that based on the behavior and ecology of the San Bernardino kangaroo rat as extrapolated from the best available scientific data, the animal may not be detectable at all times across all areas designated as critical habitat, and, based on our analysis, we believe we properly defined occupancy as it relates to the behavior and ecology of this subspecies.

Comment 25: One commenter stated the Service failed to make the requisite finding that land within two areas of Lytle Creek, which they claim should be excluded, may require special management considerations or protection. The commenter claims that these lands are not candidates for special management considerations or protection because no reasonable amount of management efforts could make these lands suitable for the San Bernardino kangaroo rat or connect them with the Lytle Creek wash population. The commenter further stated that one of these areas is outside the geographical area occupied by the San Bernardino kangaroo rat and the Service has not made, and cannot make, the requisite findings to include the area within critical habitat under 16 U.S.C. section 1532(5)(A)(ii).

Our Response: We determined through survey data, vegetation data, analysis of aerial imagery, and site visits with Service subspecies experts, that these two areas of Lytle Creek are within the geographical area occupied at the time of listing, are currently occupied, and contain the features essential to the conservation of the San Bernardino kangaroo rat. We acknowledge that these upland areas are likely occupied at a lower density than areas within the lowland wash and contain somewhat dense vegetation; however, these areas contain some of the last remaining upland habitat within Unit 2 (PCEs 2 and 3) and contain the features essential to the conservation of the subspecies as described in the ''Primary Constituent Elements'' section of this final rule. As discussed in the ''Unit Descriptions'' section of this final rule, the physical and biological features within the Lytle/Cajon Creek wash may require special management considerations or protection to minimize impacts associated with flood control operations, water conservation projects, sand and gravel mining, and urban development. Furthermore, Braden and McKernan (2000, p. 16) demonstrated that areas with late phases of floodplain vegetation, such as mature alluvial fan sage scrub and associated coastal sage scrub and chaparral, including some areas of moderate to dense vegetation, are at least periodically occupied by San Bernardino kangaroo rats. Additionally, we believe the earthen levees separating some of these areas from the active wash do not isolate individuals or prohibit movements in these areas from the core population within Lytle Creek wash. Therefore, we disagree with the

commenter's claim that no reasonable amount of management efforts could make this land suitable for the subspecies or connect San Bernardino kangaroo rats in these areas with the Lytle Creek wash population; this area is occupied, connected, and the essential features may require special management considerations or protection.

Comment 26: Two commenters stated that social, economic, and policy considerations in the context of the Act's section 4(b)(2) balancing test support excluding a larger area from the designation in two areas within the Lytle Creek wash. The commenters suggested that there are various benefits to excluding Lytle Development Company (LDC) lands from the critical habitat designation. The commenters stated that removing critical habitat from these areas would allow LDC to develop its proposed Lytle Creek Ranch project. The commenters further stated that LDC would then be able, through financing generated by that project, to dedicate permanent conservation habitat for the San Bernardino kangaroo rat.

Our Response: Lands owned by LDC contain both upland and lowland alluvial scrub habitat that contains features essential to the conservation of this subspecies and we appreciate LDC's willingness to contribute to the long-term conservation of the San Bernardino kangaroo rat. However, when performing the required analysis under section 4(b)(2) of the Act, the existence of a management plan (i.e., HCP or other type) that considers enhancement or recovery of listed species as its management standard is relevant to our weighing of the benefits of inclusion versus the benefits of excluding a particular area in a critical habitat designation. In considering the benefits of including lands in a designation that are covered by a current HCP or other management plan, we evaluate a number of factors to help us determine if the plan provides equivalent or greater conservation benefit than would likely result from consultation on a designation: (1) Whether the plan is complete and provides protection from destruction or adverse modification; (2) whether there is a reasonable expectation that the conservation management strategies and actions will be implemented for the foreseeable future, based on past practices, written guidance, or regulations; and (3) whether the plan provides conservation strategies and measures consistent with currently accepted principles of conservation biology. Because habitat was not set aside and a management plan not completed that is consistent with the above factors, we determined that the exclusion of these areas under section 4(b)(2) of the Act based in part on potential future conservation would be inappropriate. Further, we do not believe the relative economic impact outweighed the conservation benefits of including these lands in the critical habitat designation.

Comment 27: One commenter stated that the proposed rule somewhat mischaracterizes the existing LDC restoration and conservation program. The commenter stated that the program is managing all 217 ac (88 ha) to benefit the San Bernardino kangaroo rat (not just 40 ac (16 ha)) within the protected conservation area.

Our Response: We acknowledge the conservation efforts of LDC, and in response to this comment we revised and supplemented the discussion of the LDC conservation areas in this final rule. Please see the ''Unit Descriptions'' section below for more information.

Comment 28: One commenter stated that additional losses of habitat for the San Bernardino kangaroo rat are slated to occur and gave the example that the City of Highland is proceeding with a number of projects within currently designated and proposed critical habitat. The commenter stated that these further reductions in the animal's habitat underscore the need to identify all extant areas where the subspecies exists and to include all occupied habitat in the final revised critical habitat designation. A second commenter stated that areas proposed by Orange County Flood Control District and the City of Highland for development of 3,000 homes and a highway through Mill Creek Wash lie within the proposed critical habitat boundary. A third commenter stated that the same 3,000-home project would be placed in an area that is one of the only places in Unit 1 (Mill Creek Wash) that still retains fluvial input.

Our Response: We are not currently in consultation on the proposed projects mentioned in the comment above. Any project involving a Federal nexus which may affect a federally listed species or designated critical habitat would require consultation with the Service to ensure such actions would not jeopardize the continued existence of the species or destroy or adversely modify critical habitat (see the ''Critical Habitat'' section of this final rule for a detailed discussion). The designation of critical habitat does not affect projects that do not have a Federal nexus; however, if a project may result in take of a federally listed species, then the project proponent would need to obtain an incidental take permit from the Service to be in compliance with the Act. Mill Creek is important to the recovery of the subspecies as it is the only large stretch of contiguous, occupied habitat for the San Bernardino kangaroo rat within Unit 1 that is not fragmented by development (e.g., roads, aggregate mining pits). Furthermore, Mill Creek is the only remaining source of alluvial sediments within Unit 1 that has not been significantly altered by flood control structures, water diversions, or other activities. Although we did not include the majority of Mill Creek in our June 19, 2007, proposed revision to critical habitat, we have since re-evaluated Mill Creek as described in the April 16, 2008, NOA in light of several substantive public comments recommending the inclusion of Mill Creek as critical habitat. We are including approximately 388 ac (157 ha) of Mill Creek in the final revised designation (see the ''Summary of Changes From the 2007 Proposed Rule To Revise Critical Habitat'' section of this final rule for more information).

As discussed in our response to comment 6 above, under section 3(5)(C) of the Act, critical habitat shall not include the entire geographical area which can be occupied by the species unless otherwise determined by the Secretary. In developing the proposed rule to revise critical habitat, we considered the geographical area occupied by the subspecies at the time of listing, and within that broad geographical area, identified those areas that, based on the best available scientific and commercial data, contain the physical and biological features essential to the subspecies' conservation. We recognize that our designation of critical habitat for the San Bernardino kangaroo rat does not encompass all known occurrences of this subspecies as noted by the commenter. Although we are not designating all known occurrences of the San Bernardino kangaroo rat, we believe that our final designation is adequate to ensure the conservation of this subspecies throughout its extant range based on the best available information at this time.

Comment 29: One commenter stated that any revisions to designated critical habitat as proposed in the June 19, 2007, proposed rule (72 FR 33808) are premature because they fail to consider several ongoing Federal processes that directly affect the San Bernardino kangaroo rat. The commenter specifically identified the Wash Plan (or Plan B) as a multiple species HCP process occurring in the Santa Ana River wash area, to address conservation

of and provide incidental take coverage for the San Bernardino kangaroo rat. The commenter also mentioned that the U.S. Army Corps of Engineers (ACOE) is preparing a Multiple Species Habitat Management Plan, to avoid, minimize, or offset impacts associated with the Seven Oaks Dam, which would also include conservation strategies for the San Bernardino kangaroo rat. The commenter stated that because Federal, State, and local stakeholders have invested significant amounts of time in both of these processes, it is only proper to delay designation of the final critical habitat until the completion of these processes.

Our Response: The Service is aware of and has considered the Federal projects mentioned in the comment above in the process of revising designated critical habitat; however, we are under a court-ordered timeline to submit to the **Federal Register** a final rule revising critical habitat for the San Bernardino kangaroo rat by October 1, 2008.

Comment 30: Several commenters provided information about the proposed critical habitat Unit 2 (Lytle/Cajon Creek wash) along the State Route 210 freeway (SR–210). Most of these comments indicated that areas along the freeway should be removed from critical habitat because they are developed or will soon be developed. Commenters suggested removing areas along the length of the SR–210, and specifically identified 100 feet along the north side of SR–210 and the south side of SR–210 in the vicinity of the Pepper Avenue extension project.

Our Response: The revised critical habitat boundary in Unit 2 (Lytle/Cajon Creek wash) extends south to Highland Avenue, which is north of the new SR–210 crossing of Lytle Creek. Much of the areas around SR–210 that were commented on were not included in the proposed revision to critical habitat because they do not meet the definition of critical habitat. The delineated critical habitat boundary lies just north of SR–210. We are not designating critical habitat from Highland Avenue south in the Lytle/Cajon wash. Areas designated as critical habitat within Lytle Creek are occupied and contain the features essential to the conservation of the San Bernardino kangaroo rat.

Comment 31: One commenter suggested the Service reject any proposal to remove critical habitat within the City of Highland in the area of Greenspot Road and City Creek/Plunge Creek just east of SR–30. The commenter stated that this area is viable, occupied habitat. The commenter indicated that removing this area from the critical habitat designation allows for the development of a shopping center. The commenter indicated that removal of this area from the critical habitat designation is not based on good science.

Our Response: The area in the vicinity of Greenspot Road between SR–30 and Boulder Avenue/Orange Street does not support the PCEs required by the San Bernardino kangaroo rat in the appropriate quantity and spatial arrangement essential to the conservation of the subspecies as it consists of habitat degraded by mining activities and development or contains grassy fields. Furthermore, Plunge Creek at Orange Street is completely channelized and diverted from its historical connection with the Santa Ana River. We are aware that some areas in the vicinity of Greenspot Road not included in this designation may be sparsely occupied; however, we have determined that these areas do not meet the definition of critical habitat. There is a section of relatively undisturbed alluvial scrub habitat east of City Creek and SR–30 that we are including in this designation. Areas that support populations, but are outside the critical habitat designation, will continue to be subject to conservation actions we implement under section 7(a)(1) of the Act. Any proposed activity, including the proposed shopping center mentioned in the comment would also be subject to the regulatory protections afforded by the section 7(a)(2) jeopardy standard, if a Federal nexus is involved, and the prohibitions of section 9 of the Act.

Comment 32: One commenter stated it is reasonably foreseeable that the proposed critical habitat will, if approved, result in significant adverse impacts to the San Bernardino kangaroo rat. For this reason, the commenter encouraged the Service to reconsider its position regarding the National Environmental Policy Act (NEPA) and prepare environmental analyses as defined by NEPA before approving this reduction.

Our Response: It is our position that, outside the jurisdiction of the Circuit Court of Appeals for the Tenth Circuit, we do not need to prepare environmental analyses as defined by NEPA (42 U.S.C. 4321 et seq.) in connection with designating critical habitat under the Act. We published a notice outlining our reasons for this determination in the **Federal Register** on October 25, 1983 (48 FR 49244). This assertion was upheld in the courts of the Ninth Circuit Court of Appeals (*Douglas County* v. *Babbitt,* 48 F.3d 1495 (9th Cir. 1995), cert. denied 516 U.S. 1042 (1996)).

Comment 33: One commenter stated that due to climate change in the future, the San Bernardino kangaroo rat will move slowly up the Lytle and Cajon Creek wash area instead of going further south.

Our Response: We did not address potential impacts of global climate change on this subspecies in the proposed rule because we are not currently aware of any subspecies-specific or geographic-specific information on this potential threat. While we do not deny that global climate change is occurring, we cannot predict what areas might be important for this subspecies in light of future climate changes without on-the-ground evidence documenting range shift patterns in San Bernardino kangaroo rat populations. The commenter expressed a general concern for the effects of climate change on the San Bernardino kangaroo rat, but did not provide evidence supporting a possible range shift for this subspecies. Should additional data become available, we may revise this critical habitat designation subject to available funding and other conservation priorities.

Comment 34: One commenter suggested that the Etiwanda fan needs to be retained because it is currently occupied and provides recovery opportunities for the subspecies.

Our Response: The Etiwanda fan area is not included in this revision to critical habitat because we have determined that this area does not meet the definition of critical habitat. The area is significantly degraded, largely unoccupied, and does not contain the physical and biological features essential to the conservation of the San Bernardino kangaroo rat. We believe that our designation of critical habitat contains the areas necessary for the recovery and long-term conservation of this subspecies without the inclusion of the Etiwanda fan.

Comments From Other Federal Agencies

Comment 35: The U.S. Forest Service (USFS) commented that they oppose the designation of critical habitat for the San Bernardino kangaroo rat on National Forest lands. The USFS further stated that the San Bernardino National Forest (SBNF) recently revised its Land and Resource Management Plan (LRMP), and management direction was incorporated that the USFS believes provides sufficient protection and management for the San Bernardino kangaroo rat and its habitat. They also stated that the Service concurred that these conservation measures provide protection for this subspecies when the Service issued a non-jeopardy biological

opinion on the LRMP in 2005 (Service 2005, p. 175). The USFS believes that no additional benefit to, or protection for, this subspecies would occur as a result of critical habitat designation of National Forest lands, it is simply not needed in order to conserve this subspecies. The USFS also stated that it currently has in place ''special management considerations or protection'' for this subspecies, and that it does not need any additional considerations or protection that critical habitat designation of National Forest lands might provide.

The USFS also commented that designation of critical habitat identified in the proposed rule would unnecessarily add to the USFS workload by requiring them to conduct a separate analysis and make a determination of effect for designated critical habitat when consulting under section 7 of the Act.

Our Response: We determined that National Forest lands contain physical and biological features essential to the conservation of the San Bernardino kangaroo rat, and therefore, meet the definition of critical habitat (see ''Criteria Used To Identify Critical Habitat'' section below). We acknowledge that the revised LRMP will benefit the San Bernardino kangaroo rat and its habitat. The LRMP contains general provisions for species conservation and suggests specific management and conservation actions that will benefit this species and the physical and biological features essential to its conservation. Implementation of the LRMP should address known threats to this species on National Forest lands. We appreciate and commend the efforts of the USFS to conserve federally listed species on their lands.

The Secretary has the discretion to exclude an area from critical habitat under section 4(b)(2) of the Act after taking into consideration the economic impact, the impact on national security, and any other relevant impact if he determines that the benefits of such exclusion outweigh the benefits of designating such area as critical habitat, unless he determines that the exclusion would result in the extinction of the species concerned. We considered the request from the USFS that we exclude their lands because it would unnecessarily add work in the future to determine the effect regarding critical habitat for actions on their lands and the fact that they had already completed consultation under section 7(a)(2) of the Act on their revised LRMP.

As part of our section 7 consultation with the USFS on the SBNF LRMP, the USFS has already consulted on various activities carried out on National Forest lands including: Roads and trail management; recreation management; special use permit administration; administrative infrastructure; fire and fuels management; livestock grazing and range management; minerals management; and law enforcement. In our 2005 biological opinion on the LRMP, we determined that implementation of the plan was not likely to jeopardize the continued existence of the San Bernardino kangaroo rat or adversely modify critical habitat designated in 2002 for this subspecies. Since the USFS has already consulted with us on potential impacts to critical habitat related to the activities outlined in the LRMP, the designation of revised critical habitat should not require additional consultation for those activities.

Based on the record before us, we have elected not to exclude these lands and are designating National Forest lands that meet the definition of critical habitat for the San Bernardino kangaroo rat. We will continue to consider on a case-by-case basis in future critical habitat rules whether to exclude particular Federal lands from such designation when we determine that the benefits of such exclusion outweigh the benefits of their inclusion.

Comments Related to the Draft Economic Analysis

Comment 36: One commenter stated the Service needs to include all occupied and unoccupied, historical habitat in the economic analysis (and final critical habitat), and not rely on the flawed draft critical habitat as the basis for the economic analysis.

Our Response: We believe our final designation accurately describes all specific areas meeting the definition of critical habitat for the San Bernardino kangaroo rat. As discussed in the ''Criteria Used To Identify Critical Habitat'' section of this final rule and response to comments 3 and 6 above, we delineated critical habitat for the San Bernardino kangaroo rat using the following criteria: (1) Areas occupied by the subspecies at the time of listing, and currently occupied, within the historical range of the subspecies (2) areas retaining fluvial dynamics containing one or more of the PCEs for the subspecies; (3) areas supporting a core population of the subspecies; and (4) areas demographically disconnected from the largest populations, but which may be important for the long-term recovery of the subspecies. Application of these criteria results in the determination of the physical and biological features that are essential to the conservation of this subspecies, identified as the species' PCEs laid out in the appropriate quantity and spatial arrangement. Thus, not all areas supporting the identified PCEs will meet the definition of critical habitat.

We recognize that our designation does not encompass all known occurrences of this subspecies as noted by the commenter. Specifically, we did not include in the final designation small, isolated areas of degraded habitat or areas devoid of fluvial processes because such areas likely only support unsustainable populations that would not contribute to the recovery of the subspecies. Further, we designate critical habitat in areas outside the geographical area presently occupied by a species only when a designation limited to its present range would be inadequate to ensure the conservation of the species (50 CFR 424.12(e)). Accordingly, when the best scientific and commercial data do not demonstrate that the conservation needs of the species require designation of critical habitat outside of occupied areas, we will not designate critical habitat outside the geographical area occupied by the species. Although we are not designating all known occurrences of the San Bernardino kangaroo rat, we believe the areas we have identified as meeting the definition of critical habitat, and which are included in the final revised critical habitat designation, are adequate to ensure the conservation of the subspecies throughout its extant range. Species that are protected across their ranges are expected to have lower likelihoods of extinction (Soule and Simberloff 1986, pp. 32–35; Scott et al. 2001, pp. 1297–1300); we are designating multiple locations across the range of the subspecies to prevent range collapse.

We recognize that the designation of critical habitat may not include all of the habitat that may eventually be determined to be necessary for the recovery of the subspecies, and critical habitat designations do not signal that habitat outside the designation is unimportant or may not contribute to recovery. We do not agree that the proposed designation is flawed, and maintain it was appropriate to base the draft economic analysis on the areas included in the proposed rule.

Comment 37: One commenter asserts that the Service must look only at the incremental cost of the proposed designation and not at the costs attributable to listing alone when considering exclusion of habitat areas.

Our Response: The U.S. Office of Management and Budget's (OMB) guidelines for conducting economic analysis of regulations direct Federal agencies to measure the costs of a regulatory action against a baseline, which it defines as the ''best assessment of the way the world would look absent the proposed action.'' In other words, the baseline includes the existing regulatory and socio-economic burden imposed on landowners, managers, or other resource users potentially affected by the designation of critical habitat. Impacts that are incremental to that baseline (i.e., occurring over and above existing constraints) are attributable to the proposed regulation. Significant debate has occurred regarding whether assessing the impacts of the Service's proposed regulations using this baseline approach is appropriate in the context of critical habitat designations.

In order to address the divergent opinions of the courts and provide the most complete information to decision-makers, the economic analysis reports both: (a) The baseline impacts of SBKR conservation from protections afforded the species absent critical habitat designation; and (b) the estimated incremental impacts precipitated specifically by the designation of critical habitat for the species. Summed, these two types of impacts comprise the fully co-extensive impacts of San Bernardino kangaroo rat conservation in areas considered for critical habitat designation.

Incremental effects of critical habitat designation are determined using the Service's December 9, 2004, interim guidance on ''Application of the 'Destruction or Adverse Modification' Standard Under Section 7(a)(2) of the Endangered Species Act'' and information regarding what potential consultations and project modifications may potentially occur as a result of critical habitat designation over and above those associated with the listing. In *Gifford Pinchot Task Force* v. *United States Fish and Wildlife Service,* the Ninth Circuit invalidated the Service's regulation defining destruction or adverse modification of critical habitat, and the Service no longer relies on this regulatory definition when analyzing whether an action is likely to destroy or adversely modify critical habitat. Under the statutory provisions of the Act, the Service determines destruction or adverse modification on the basis of whether, with implementation of the proposed Federal action, the affected critical habitat would remain functional to serve its intended conservation role for the species. A detailed description of the methodology used to define baseline and incremental impacts is provided later in this section.

Comment 38: Two commenters request that the Service estimate the economic benefits of critical habitat designation, including positive health effects associated with foregone air pollution, water conservation, open space preservation, protection of other species, and savings from reduced flood plain development.

Our Response: Under Executive Order 12866, OMB directs Federal agencies to provide an assessment of both the social costs and benefits of proposed regulatory actions. 22 OMB's Circular A–4 distinguishes two types of economic benefits: direct benefits and ancillary benefits. Ancillary benefits are defined as favorable impacts of a rulemaking that are typically unrelated, or secondary, to the statutory purpose (i.e., direct benefits) of the rulemaking.

In the context of critical habitat, the primary purpose of the rulemaking (i.e., the direct benefit) is the potential to enhance conservation of the species. The published economics literature has documented that social welfare benefits can result from the conservation of endangered and threatened species. In its guidance for implementing Executive Order 12866, OMB acknowledges that it may not be feasible to monetize, or even quantify, the benefits of environmental regulations due to either an absence of defensible, relevant studies or a lack of resources on the implementing agency's part to conduct new research. Rather than rely on economic measures, the Service believes that direct benefits of the proposed rule are best expressed in biological terms that can be weighed against the expected cost impacts of the rulemaking.

Critical habitat designation may also generate ancillary benefits. Critical habitat aids in the conservation of species specifically by protecting the primary constituent elements on which the species depends. To this end, critical habitat designation can result in maintenance of particular environmental conditions that may generate other social benefits aside from the preservation of the species. That is, management actions undertaken to conserve a species or habitat may have coincidental, positive social welfare implications (e.g., increased recreational opportunities in a region). Although not the primary purpose of critical habitat, ancillary benefits may result in gains in employment, output, or income that may offset the direct, negative impacts to a region's economy resulting from actions to conserve a species or its habitat.

It is often difficult to evaluate the ancillary benefits of critical habitat designation. To the extent that ancillary benefits of the rulemaking may be captured by the market through an identifiable shift in resource allocation, they are factored into the overall economic impact assessment in this report. For example, if habitat preserves are created to protect a species, the value of existing residential property adjacent to those preserves may increase, resulting in a measurable positive impact. Where data are available, this analysis attempts to capture the net economic impact (i.e., the increased regulatory burden less any discernable offsetting market gains), of species conservation efforts imposed on regulated entities and the regional economy.

Comment 39: One commenter expressed concern that the economic analysis relies too heavily on economic modeling to predict the impacts of the proposed rule on development. The economic analysis does not account for local factors, such as the presence of floodplains in San Bernardino kangaroo rat habitat and a slow housing market, which will depress development regardless of the critical habitat designation. In particular, other Federal laws and flood insurance policies, state law, and local land use policies generally prohibit development in floodplains.

Our Response: As described in Appendix D, Section D.2 of the DEA, the analysis relies on growth projection data provided by the Southern California Association of Governments (SCAG), which is widely regarded as the most reliable and up-to-date source of this information.

Section 3.3.3.2 of the DEA describes the geographic scope of the analysis of impacts on development. The analysis considers the impacts on projected development in all privately owned, unprotected lands within the area proposed for final critical habitat designation. When projecting growth within the area of proposed critical habitat, flood plains were removed from the area of the analysis for the reasons expressed by the commenter. However, portions of the proposed critical habitat are located in areas outside of the floodplain boundaries. The area of proposed critical habitat includes uplands and low-lying areas that are not in the floodplain.

Comment 40: One commenter argues that there is no basis or evidence that the costs of protecting the San Bernardino kangaroo rat will increase to $10.6 million per year.

Our Response: As shown in Table ES–1 of the DEA, the baseline cost of protecting the San Bernardino kangaroo rat and its habitat is projected to be $15.2 million on an annualized basis. Additionally, incremental costs attributable to the designation of critical habitat are predicted to total $4.3 million on an annualized basis. It is unclear how the commenter's estimate of $10.6 million per year was obtained. As discussed on pages 2–3 and 2–7 of the DEA, the baseline costs are driven by foregone revenues to Eastern Municipal Water District of scaling back the Hemet/San Jacinto Recharge and Recovery Program by 30,000 acre feet per year. The costs associated with these activities are based on information provided by the Director of Engineering at Eastern Municipal Water District. The impacts of scaling back the groundwater recharge program will occur in the future; no comparable reduction in groundwater recharge occurred in the past. Therefore, future annual costs of protecting the San Bernardino kangaroo rat are expected to be higher than in the past.

Comment 41: One commenter states that the DEA grossly inflates administrative and project modification costs, and cites as an example an estimate on page 45 of the DEA that the Bureau of Land Management (BLM) will spend $200,000 per year to install signs and enforce existing closures prohibiting off-road vehicle use on BLM lands. Furthermore, the commenter states that if incurred, these costs should not be attributed to the San Bernardino kangaroo rat. Finally, the commenter asserts that purchasing signage will have a positive regional effect on the economy that should off-set the costs.

Our Response: The source of the commenter's example is unclear. The DEA does not have a page 45 or Section 4–5, nor does it estimate the costs of signage. To address the overall concern expressed in the comment, the DEA analyzes how entities will alter their behavior to conserve the San Bernardino kangaroo rat. If an agency will undertake a conservation measure for the benefit of the San Bernardino kangaroo rat, then the cost of that action is considered attributable to the San Bernardino kangaroo rat. Allocating economic resources to the conservation measure and away from other activities represents an opportunity cost. Conservation measures may have positive distributional effects; however, paying for the conservation measure essentially transfers resources away from other entities that would have incurred the distributional gains.

Comment 42: One commenter stated that the DEA does not address any of the economic benefits of the designation of critical habitat.

Our Response: See our response to comment 38 above.

Comment 43: One commenter was concerned that the DEA does not analyze the economic impacts of the lands the Service added to the critical habitat designation.

Our Response: The Addendum to the Economic Analysis of Critical Habitat Designation for San Bernardino Kangaroo Rat, which analyzes the additional lands proposed for critical habitat designation, was made available to the public for review and comment on July 29, 2008.

Comment 44: One commenter noted that the housing projections in the DEA do not account for LDC plans to develop 5,800 houses in Unit 2.

Our Response: We revised the development projections in the Final Economic Analysis (FEA) (see pages 2–11 to 2–15 and pages 3–4 to 3–11 of the FEA) to account for LDC's planned development in Unit 2.

Comment 45: Two commenters explained that the DEA significantly underestimates economic impacts in Unit 2 because it does not account for LDC's development plans.

Our Response: We recalculated impacts in the FEA to account for LDC's home development projections. See pages 2–14 to 2–15 and pages 3–10 to 3–11 of the FEA for the revised impacts in Unit 2.

Comment 46: Two commenters pointed out that LDC is intending to develop 647 acres of its property that is mostly within upland San Bernardino kangaroo rat habitat. According to the commenter, designation of critical habitat on these 647 acres would place uncertainty over LDC's economic use and development potential.

Our Response: The FEA includes all costs associated with the impact of critical habitat on LDC's 647 acres (see pages 2–14 and 3–10 of the FEA). The economic analysis accounts for lost land values, delay, and other costs related to regulatory uncertainty.

Comment 47: One commenter argued that the DEA incorrectly assumes that there is no limitation on the stock of land available for mitigation purposes. The commenter suggested that the DEA will need to either identify the location and amount of suitable San Bernardino kangaroo rat habitat that is available for use as future San Bernardino kangaroo rat habitat mitigation land or the analysis in the DEA will need to be revised to factor in the true effects of there being only a small and finite amount of suitable San Bernardino kangaroo rat habitat available for use as mitigation land.

Our Response: While we agree that only a finite amount of San Bernardino kangaroo rat habitat exists, there is sufficient evidence from conservation banks (see pages 2–11 to 2–12 of the FEA) that ample land exists within and outside of conservation banks to accommodate potential future compensation for impacts to the San Bernardino kangaroo rat and its habitat.

Comment 48: One commenter asserted the DEA incorrectly estimates the per acre cost of San Bernardino kangaroo rat mitigation habitat. The commenter cited evidence that the cost of mitigation land has gone up in the last ten years. The commenter reasoned that one can expect the cost of mitigation land to continue to rise in the future.

Our Response: We consulted with local conservation bank owners and consultants familiar with the area to determine the likely future cost of conservation bank credits (see footnote 56 in the DEA). We used the best available conservation bank prices to estimate the future costs of conservation. We confirmed these prices with conservation bank owners for the FEA (see page 2–12 of the FEA).

Comment 49: A commenter stated that the evaluation of the economic cost of this proposed designation in the DEA is limited by defining the time period of the economic analysis as the next 22 years.

Our Response: As explained on page 1–17 of the DEA, the economic analysis calculates impacts based on activities that are ''reasonably foreseeable.'' The standard framework for economic analyses calculates impacts in a twenty year timeframe. Future impacts were calculated in the DEA through the year 2030 to be consistent with Southern California Association of Governments projections.

Comment 50: A commenter criticized the DEA for overvaluing the impacts of critical habitat. The commenter asserts that all of the costs would be required even if critical habitat had not been designated because the San Bernardino kangaroo rat currently lives in those areas.

Our Response: We disagree with the commenter's assertion that all potential costs would be required even without critical habitat. The DEA quantifies the baseline impacts, defined as those future impacts that result from listing and other conservation efforts for the San Bernardino kangaroo rat. Baseline impacts include costs that would be required because the San Bernardino

kangaroo rat is found in the area. The DEA also quantifies incremental impacts, which are impacts that would not exist but for the designation of critical habitat. These costs occur above and beyond those associated with San Bernardino kangaroo rats living in the area.

Comment 51: One commenter pointed to page 11 of the Draft Addendum to the Economic Analysis, stating that a proponent agency does not have the legal authority to determine if a project will adversely affect a federally endangered species or its habitat. The commenter noted that these determinations are required to have the Service's concurrence.

Our Response: The commenter was concerned with the following passage on page 11 of the Draft Addendum: ''[San Bernardino County Flood Control District (SBCFCD)] maintains in-house biologists who review all proposed projects to determine whether the project may affect the San Bernardino kangaroo rat or its habitat. San Bernardino County Flood Control District self-regulates by avoiding projects in critical habitat that the biologists determine may adversely affect the San Bernardino kangaroo rat or its habitat. If SBCFCD determines that the project is warranted despite the potential adverse effects to the San Bernardino kangaroo rat (e.g., if there is a potential for substantial flood damage), then SBCFCD will undertake the project and consult with the Service.''

As explained in this passage, SBCFCD avoids projects that it thinks may warrant consultation with the Service for impacts to the San Bernardino kangaroo rat or its habitat. San Bernardino County Flood Control District consults with the Service when it undertakes a project in an area occupied by San Bernardino kangaroo rats or within the San Bernardino kangaroo rat critical habitat boundaries. San Bernardino County Flood Control District does not determine if a project will or will not adversely affect a federally endangered species or its habitat independently from the Service.

Summary of Changes From the 2002 Critical Habitat Designation

We stated in our April 23, 2002 rule that we designated ''33,295 ac (13,485 ha)'' of critical habitat for the San Bernardino kangaroo rat. When corrected for summing, rounding, and conversion errors, the 2002 designation of critical habitat totaled 33,291 ac (13,472 ha). The areas identified in this final rule constitute a revision to the 2002 designation. In this final rule we are designating 7,779 ac (3,148 ha) of land in Riverside and San Bernardino counties, California. Below we describe the changes in each unit between the 2002 final critical habitat rule, the 2007 revised proposed critical habitat rule, and this 2008 final revised critical habitat rule for the San Bernardino kangaroo rat (summarized in Table 1). Discrepancies in reported acreages between the 2002 designation and this final revision are due to refinements in our ability to more precisely calculate acreages. The entire final revised critical habitat designation (i.e., 7,779 ac (3,148 ha)) is contained within the area included in the 2002 final critical habitat designation.

Our revised critical habitat designation is substantially smaller than the existing designation. Updated information that became available to us in the five years since the previous designation indicates that we erroneously designated some areas. Improved and updated biological information submitted to our office and gained during site visits in December 2006 and January 2007 allowed us to: (1) Revise the criteria used to identify critical habitat and focus attention on core populations in undisturbed habitat with retained fluvial dynamics; (2) more specifically define and map areas supporting the physical or biological features for this subspecies; and (3) precisely ground-truth areas included in the 2002 critical habitat designation. As described in detail below, our review of updated information led us to revise our criteria used to identify critical habitat (see ''Criteria Used To Identify Critical Habitat'' section) and resulted in our removal of several areas that were previously designated as we determined that these areas do not meet the definition of critical habitat.

The 2000 proposed rule and the 2002 critical habitat designation describe the geographical area occupied by the San Bernardino kangaroo rat at the time it was listed in 1998, including the Santa Ana River, Lytle Creek, Cajon Creek, San Jacinto River, City Creek, Etiwanda fan and wash, Reche Canyon and South Bloomington. All units designated as critical habitat in 2002 (i.e., Santa Ana River, Lytle/Cajon/Cable creeks, San Jacinto River/Bautista Creek, and Etiwanda fan) were considered occupied at the time of listing and designation. The background section of the 2002 critical habitat designation provides justification explaining how the original listing rule significantly underestimated the amount of area occupied by the subspecies at the time of listing and concludes that a minimum of 32,507 ac (as mathematically converted), or 13,155 ha, were occupied at the time of listing. The criteria utilized for the 2002 designation identified areas that supported few occurrence records for inclusion in the designation. We have now determined, based on the best currently available information, that such areas of low density occupation (or sporadic occupancy) are not likely to contribute to the long-term conservation of this subspecies as they do not support core populations, are not capable of supporting a core population in the near future, and they provide little protection against stochastic events. Areas that contain the physical and biological features that are essential to the conservation of this subspecies, identified as the subspecies' PCEs laid out in the appropriate quantity and spatial arrangement, are those areas capable of supporting a core population of San Bernardino kangaroo rats and providing protection against stochastic events. Therefore, some areas supporting low density or sporadic occupancy designated in 2002 were removed from this revised designation. Finally, we employed refined mapping techniques using updated aerial imagery in the current revision, which allowed us to more precisely map areas that contain PCEs. This refined approach allowed us to remove areas that do not meet the definition of critical habitat.

The main differences in this revised designation compared to the 2002 critical habitat designation include the following:

(1) On the basis of our new analyses involving the factors described above, we determined that portions of the 2002 (i.e., existing) Unit 1 (Santa Ana River), Unit 2 (Lytle and Cajon Creeks), Unit 3 (San Jacinto River), and all of Unit 4 (Etiwanda Alluvial Fan and Wash) do not contain PCEs in the appropriate quantity and spatial arrangement essential to the conservation of the San Bernardino kangaroo rat. Therefore, we are not including these areas in our revision to critical habitat. The following paragraphs provide unit by unit explanations why areas previously designated as critical habitat do not meet the definition of critical habitat for the San Bernardino kangaroo rat.

We removed approximately 4,658 ac (1,885 ha) within Unit 1 (Santa Ana River) from our revision to critical habitat, largely because these areas do not contain the physical and biological features that are essential to the conservation of this subspecies, identified as the subspecies' PCEs laid out in the appropriate quantity and spatial arrangement. Below we describe the six general areas removed and the

habitat status in those areas. Occurrence data from these six areas indicate that none of these areas currently support or are capable of supporting core populations in the near future. The inability to support a core population further underscores the habitat data indicating that these areas do not contain the physical and biological features that are essential to the conservation of the San Bernardino kangaroo rat. First, areas along Mill Creek, especially to the north, do not provide suitable habitat for this subspecies. Second, a flood control levee south of Mill Creek cut off habitat from fluvial processes, which resulted in overgrown vegetation and water retention basins that are unsuitable habitat conditions for the subspecies. Third, the stretch of the Santa Ana River below Seven Oaks Dam and areas to the north and west of a large barrow pit are cut off from fluvial processes and water retention basins have been constructed in the area. Fourth, a large area within the 2002 critical habitat designation near Plunge Creek extending south and west to the confluence of City Creek with the Santa Ana River is degraded due to mining operations, flood control structures (and the subsequent loss of fluvial influence necessary to maintain habitat), and water retention basins. Fifth, the habitat downstream of Tippecanoe Avenue Bridge is heavily channelized with steep banks inhibiting the use of upland habitat; we do not have data indicating that this area is occupied. Sixth, there are also a number of smaller areas of degraded habitat around the periphery of the 2002 critical habitat designation that are not included in this revision to critical habitat because these areas do not contain the physical and biological features essential to the conservation of this subspecies.

We removed approximately 9,284 ac (3,757 ha) within Unit 2 (Lytle and Cajon Creeks) from our revision to critical habitat, largely because these areas do not contain the physical and biological features that are essential to the conservation of this subspecies. Below we describe the six general areas removed and the habitat status in those areas. Occurrence data from these six areas indicate that none of these areas currently support or are capable of supporting core populations in the near future. The inability to support a core population further underscores the habitat data indicating that these areas do not contain the physical and biological features that are essential to the conservation of the San Bernardino kangaroo rat. First, one separate parcel northeast of the main Lytle/Cajon Creek unit (labeled as Unit 2 B in the 2002 critical habitat rule) contains habitat that is degraded and this area is largely unoccupied. Second, the southernmost portion of Lytle Creek contains habitat that is degraded through surface mining and flood control structures, making this area unsuitable for the subspecies. Third, the upper reaches of both Lytle and Cajon Creeks contain large rocky substrates that do not provide habitat for this subspecies and we have no recent occurrence data for these upstream areas. Fourth, portions of habitat along the Lytle Creek arm are degraded from sand and gravel mining operations and associated infrastructure. Fifth, after formal consultation with the Service was completed, approximately 670 ac (271 ha) within the 2002 critical habitat designation that is north of Lytle Creek and east of I–15 is currently under development for the Lytle Creek North development project. Sixth, a large expanse of a remnant flood plain south of Lytle Creek and I–15 and west of Riverside Avenue is partially developed and does not contain the PCEs for the subspecies. It was suggested in the 2002 critical habitat designation that this area could provide connectivity with the Etiwanda fan; however, this area is void of fluvial influence, does not support a core population, and is cut off from Lytle Creek and the Etiwanda fan by extensive roadways. Therefore, we believe that demographic or genetic connectivity through the remnant flood plain south of Lytle Creek is unlikely. Because these areas do not contain the physical and biological features that are essential to the conservation of this subspecies, we are not including them in the revision to critical habitat.

A portion of a separate parcel designated in 2002 as part of Unit 2 is now designated as Unit 4 (Cable Creek Wash) in this revised critical habitat designation (see Table 1 and the Unit Descriptions section).

We removed approximately 4,757 ac (1,925 ha) within Unit 3 (San Jacinto River) from our revision to critical habitat, largely because these areas do not contain the physical and biological features that are essential to the conservation of this subspecies. Below we describe the five general areas removed and the habitat status in those areas. Occurrence data from these five areas also indicate that none of these areas currently support or are capable of supporting core populations in the near future. The inability to support a core population further underscores the habitat data indicating that these areas do not contain the physical and biological features that are essential to the conservation of the San Bernardino kangaroo rat. First, portions of Bautista Creek and the downstream reach of the San Jacinto River are largely channelized and do not contain the PCEs or provide suitable habitat for the San Bernardino kangaroo rat. Second, we included in the 2002 critical habitat designation the downstream portion of the San Jacinto River (downstream of State Route 79) because we believed the area contained essential physical and biological features that would reduce risks to the subspecies from stochastic events. Based on our evaluation of the best scientific information currently available, we no longer consider this area to meet the definition of critical habitat because site visits have revealed that this channelized section of the San Jacinto River is less alluvial and more riparian in nature, and thus is unlikely to reduce the risks from stochastic events and does not contain the physical and biological features essential to the conservation of this subspecies. Third, the channelized areas of the San Jacinto River and Bautista Creek prevent connectivity with the core population in the San Jacinto wash. Fourth, at the time of the 2002 critical habitat rule, we believed that Tribal lands in Unit 3 were occupied, despite a lack of occurrence data for these areas. We believed this because the Tribal lands were continuous with adjacent areas of habitat in the San Jacinto River known to be occupied; however, we still do not have occurrence data or habitat condition data for the two tributaries on Tribal land north of the San Jacinto wash and are not designating critical habitat on Tribal lands in this revised critical habitat designation (see ''Government-to-Government Relationship with Tribes'' section). Fifth, in the eastern most (upstream) portion of the San Jacinto River that was designated as critical habitat in 2002, we do not have occurrence data to indicate that the area is occupied or supports a core population of San Bernardino kangaroo rats. Based on the best scientific information currently available, we no longer believe these areas contain the physical and biological features that are essential to the conservation of this subspecies, and are not including them in the revision to critical habitat.

A portion of a separate parcel designated as part of Unit 3 in 2002 is now designated as Unit 5 (Bautista Creek) in this revised critical habitat designation (see Table 1 and the ''Unit Descriptions'' section).

We removed approximately 4,820 ac (1,951 ha) within Unit 4 (Etiwanda Alluvial Fan and Wash) from our

revision to critical habitat, largely because these areas do not contain the physical and biological features that are essential to the conservation of this subspecies. In the 2002 critical habitat rule, we stated that the Etiwanda fan was likely occupied by a small remnant population of the subspecies, but urban development and existing and proposed flood control structures will preclude the occurrence of future natural fluvial processes in portions of the unit. Additionally, we stated that despite these conditions, the San Bernardino kangaroo rat persists in some areas of the unit. Since the 2002 critical habitat designation, flood control structures and urban development have continued to alter the natural flood regime of this alluvial fan resulting in poor habitat conditions. Occurrence data from these areas also indicates that none of these areas currently support or are capable of supporting core populations in the near future. The inability to support a core population further underscores the habitat data indicating that these areas do not contain the physical and biological features that are essential to the conservation of the San Bernardino kangaroo rat. Furthermore, site visits confirmed that occupied areas within this unit do not contain the PCEs in the appropriate quantity and spatial arrangement necessary to sustain a core population of this subspecies into the future. Connectivity with the nearest core population in Unit 2 is precluded by development and roadways. Because these areas do not contain the physical and biological features that are essential to the conservation of this subspecies, we are not including them in the revision to critical habitat.

(2) We re-evaluated and revised the PCEs as needed in light of applicable case law and current Service guidelines and policies. We revised the PCEs to provide more specificity with regard to the location of and necessity for suitable soil types, vegetative habitat, and upland areas related to the biological needs of the subspecies. We also included a range of the preferred percentage of vegetative cover. We note that revisions to the PCEs alone did not result in the removal of existing critical habitat from this revised critical habitat designation, nor did it result in the identification of areas outside the 2002 designation that meet the definition of critical habitat.

(3) In the 2002 critical habitat mapping process, we used aerial photography at a scale of 1:24,000 and 2001 digital orthophotography. In the process of mapping and delineating boundaries for this revised critical habitat designation we used USDA NAIP 2005, 1 meter True Color Aerial Photography. This updated aerial imagery allowed us to more accurately and precisely delineate boundaries of critical habitat.

(4) In addition to the areas that we removed from the 2002 designation in this final revision to critical habitat, we also excluded approximately 2,917 ac (1,180 ha) under section 4(b)(2) of the Act (see ''Summary of Changes From the 2007 Proposed Rule To Revise Critical Habitat'' and ''Exclusions Under Section 4(b)(2) of the Act'' sections of this final rule for detailed discussion of the exclusions).

TABLE 1—CHANGES BETWEEN THE APRIL 23, 2002, CRITICAL HABITAT DESIGNATION, THE JUNE 19, 2007, PROPOSED DESIGNATION, AND THIS FINAL REVISED DESIGNATION

Critical habitat unit in this final rule	County	Area identification used in this rule	2002 designation of critical habitat (67 FR 19812) and ac (ha)	2007 proposed revision to the critical habitat designation (72 FR 33808) and ac (ha)	2008 final revised critical habitat designation and ac (ha)
1. Santa Ana River Wash.	San Bernardino	Plunge Creek	All 3 areas included in Unit 1; 8,935 ac (3,616 ha).	Small section proposed as part of Unit 1; 3,623 ac (1,466 ha) [3].	All 3 areas included as Unit 1; 3,258 ac (1,318 ha).
		Mill Creek	ditto	Considered not to be essential; not proposed [3].	ditto.
		Santa Ana River and City Creek.	ditto	Included as part of Unit 1; 3,623 ac (1,466 ha).	ditto.
2. Lytle/Cajon Creek Wash.	San Bernardino	Lytle Creek and Cajon Creek.	Both areas included in Unit 2; 13,970 ac (5,653 ha).	Included as part of Unit 2; 4,686 ac (1,896 ha).	Included as Unit 2; 3,421 ac (1,384 ha).
		Cable Creek	ditto	Considered not to be essential; not proposed [3].	Included as Unit 4; 483 ac (195 ha).
3. San Jacinto River Wash.	Riverside	San Jacinto River	Both areas included in Unit 3; 5,565 ac (2,252 ha).	Included as Unit 3; 769 ac (311 ha).	Included as Unit 3; 506 ac (205 ha).
		Bautista Creek	ditto	Considered not to be essential; not proposed [3].	Included as Unit 5; 111 ac (45 ha).
4. Cable Creek Wash	San Bernardino	Cable Creek	Included as part of Unit 2; 13,970 ac (5,653 ha).	Considered not to be essential; not proposed [3].	Included as Unit 4; 483 ac (195 ha).
5. Bautista Creek	Riverside	Bautista Creek	Included as part of Unit 3; 769 ac (311 ha).	Considered not to be essential; not proposed [3].	Included as Unit 5; 111 ac (45 ha).
Etiwanda Alluvial Fan [1]	San Bernardino	Etiwanda Alluvial Fan	Unit 4; 4,820 ac (1,950 ha).	Considered not to be essential; not proposed.	Determined not to be essential.

TABLE 1—CHANGES BETWEEN THE APRIL 23, 2002, CRITICAL HABITAT DESIGNATION, THE JUNE 19, 2007, PROPOSED DESIGNATION, AND THIS FINAL REVISED DESIGNATION—Continued

Critical habitat unit in this final rule	County	Area identification used in this rule	2002 designation of critical habitat (67 FR 19812) and ac (ha)	2007 proposed revision to the critical habitat designation (72 FR 33808) and ac (ha)	2008 final revised critical habitat designation and ac (ha)
Totals			33,291 ac[2] (13,472 ha).	9,078 ac (3,674 ha) ..	7,779 ac (3,148 ha).

[1] The Etiwanda Alluvial Fan was considered Unit 4 in the 2002 final critical habitat rule (67 FR 19812); however, the Cable Creek Wash is now considered Unit 4 in this final revised critical habitat rule.
[2] The 2002 rule incorrectly stated that "33,295 (13,474 ha)" were designated.
[3] These areas were added to proposed critical habitat in the April 16, 2008, NOA (73 FR 20581).

Summary of Changes From the 2007 Proposed Rule To Revise Critical Habitat

The areas identified in this final revised rule also constitute a revision of the areas we proposed to designate as critical habitat for the San Bernardino kangaroo rat on June 19, 2007 (72 FR 33808). In light of substantial public comments and a revision of our criteria used to identify critical habitat, we reevaluated and included in this final rule four areas that were not included in the 2007 proposed rule. These areas (described below) include Mill Creek and Plunge Creek in Unit 1, and Cable Creek and Bautista Creek in Units 4 and 5. These additions to proposed critical habitat were announced in the April 16, 2008, NOA (73 FR 20581). The reduction in total area from the 2007 proposed critical habitat designation is primarily the result of exclusions of habitat under section 4(b)(2) of the Act (described below). The main differences between the 2007 proposed critical habitat rule and this final rule include the following:

(1) During the first and second comment periods for the proposed rule, we received significant comments from the public, including biologists familiar with the San Bernardino kangaroo rat, which led us to reevaluate and revise our criteria used to identify critical habitat. Please see the ''Changes to Proposed Revised Critical Habitat'' section of the April 16, 2008, NOA (73 FR 20581), and the ''Criteria Used To Identify Critical Habitat'' section of this final rule for more information on our revised criteria.

(2) During the first and second comment periods for the proposed rule, we received significant comments from the public, including biologists familiar with the San Bernardino kangaroo rat, on areas essential to the subspecies that should be included in the designation. As a result of these comments, new information received, and revision of the criteria used to identify critical habitat, we reevaluated the following areas: Mill Creek, Plunge Creek (including areas providing habitat connection between the Plunge Creek wash and Santa Ana River wash), Cable Creek wash, and Bautista Creek. All of these areas are were designated as critical habitat for the San Bernardino kangaroo rat in 2002 (see 50 CFR 17.95(a); 67 FR 19812, April 23, 2002); however, we did not propose these areas as critical habitat in the June 19, 2007, proposed revision to critical habitat (72 FR 33808). Below we describe each area we reevaluated, explain why we did not include the area in the 2007 proposed rule, and explain why we are including these areas in the final revised designation of critical habitat.

Mill Creek

Mill Creek flows into and joins the Santa Ana River wash (Unit 1) in the eastern side of the unit. We did not include the Mill Creek area in the 2007 proposed rule (72 FR 33808), although we indicated that it was considered important to the subspecies by contributing fluvial dynamics to the Santa Ana River wash. At the time of the proposed revised rule, we had limited survey data to indicate Mill Creek was occupied by the San Bernardino kangaroo rat. Furthermore, we determined this area contained large expanses of unsuitable habitat. As such, we did not include the majority of lower Mill Creek in the June 19, 2007, proposed revision to critical habitat.

During the public comment period, we received a number of comments highlighting the importance of Mill Creek as an area not only occupied by the San Bernardino kangaroo rat connected to and contiguous with the core population in the Santa Ana wash, but also indicating that the area contains the physical and biological features essential to the conservation of this subspecies. Upon receiving comments from the public about Mill Creek, we reevaluated our data in this area. Evidence of extensive burrowing activity observed by Service biologists indicates this area is occupied by kangaroo rats, and live-trapping confirms that Mill Creek is occupied by the San Bernardino kangaroo rat subspecies. Based on this information, we determined that the reach of Mill Creek occupied by the San Bernardino kangaroo rat to its confluence with the Santa Ana River is important to the recovery of the subspecies because it is the only large stretch of contiguous, occupied habitat for the San Bernardino kangaroo rat within Unit 1 that is not fragmented by development (e.g., roads, aggregate mining pits). Further, we confirmed that habitat at Mill Creek is connected to and contiguous with habitat supporting the core population in Unit 1, and therefore, San Bernardino kangaroo rats inhabiting Mill Creek are part of the Santa Ana River wash core population.

We also received comments about the importance of Mill Creek as a source of sediment through natural fluvial dynamics to the majority of the Santa Ana River wash (Unit 1). Existing infrastructure (e.g., levees, culverts, concrete-lined channels, bridge abutments and other fill) affects the function of the Santa Ana River and its tributaries within the historical and current range of this subspecies. As a result, the historical floodplain dynamics within the upper Santa Ana River watershed are permanently altered (MEC 2000, pp. 175–176). Periodic flooding provides natural scour and sediment deposition, decreases vegetation density and cover, and naturally maintains the alluvial sage scrub that supports this subspecies. Mill Creek is the only remaining source of alluvial sediments remaining within Unit 1 that has not been significantly altered by flood control structures, water diversions, or other activities. Although the Santa Ana River is incised just downstream from its confluence with Mill Creek, floodplain elevations downstream (e.g., downstream of Opal Street in Mentone) allow overbank scour

and sediment deposition during even small- to moderate-intensity storms. The periodic deposition of sediments from Mill Creek helps to naturally maintain the soil and alluvial fan sage scrub (i.e., the PCEs upon which the survival and recovery of the San Bernardino kangaroo rat in Unit 1 depend) within critical habitat along the Santa Ana River as suitable habitat to support the core population of San Bernardino kangaroo rats within this unit. We determined that this area of Mill Creek meets the definition of critical habitat, and we are including 388 ac (157 ha) of Mill Creek in the final revision to critical habitat for Unit 1.

Plunge Creek

Plunge Creek is located north of the main stem of the Santa Ana River in Unit 1 and is largely isolated from the core population of San Bernardino kangaroo rats in the wash by sand and gravel mining operations. A portion of Plunge Creek was included in the June 19, 2007, proposed revision to critical habitat, but no critical habitat connection existed between this area of Plunge Creek and other portions of proposed Unit 1.

We did not propose revised critical habitat connecting Plunge Creek to other critical habitat areas in proposed Unit 1 because, although lands in this area are managed by the Bureau of Land Management (BLM), the BLM is considering the revision of their South Coast Resource Management Plan and an exchange of land within their existing Area of Critical Environmental Concern (ACEC) for lands that are privately owned within the Santa Ana River wash. Should this exchange occur, we anticipate that the Upper Santa Ana River Habitat Conservation Plan (USAR HCP, also known as ''Plan B'') would be proposed. The land exchange would occur to facilitate aggregate mining, water conservation, roadway improvements, and other activities in areas that are now within the ACEC, while other, less-disturbed habitat areas for the San Bernardino kangaroo rat would be conserved through the implementation of the USAR HCP.

Although we have been working with the BLM and associated stakeholders on the land exchange for many years, we have not yet been asked by the BLM to formally consult on this action. However, during collaboration with the BLM and stakeholders in the USAR HCP, we agreed upon a potential future mining boundary. Our June 19, 2007, proposed revision to critical habitat did not include any areas identified in this collaboration as areas where future mining may occur.

We received significant comment from the public highlighting the importance of Plunge Creek to the conservation of the San Bernardino kangaroo rat. Commenters were concerned that the proposed revision to critical habitat around Plunge Creek (which is north of existing and proposed mining pits) did not connect to critical habitat in the Santa Ana River mainstem south of these pits. Plunge Creek is extensively modified upstream of Greenspot Road by levees and the bridge crossing the creek on Greenspot Road, and the creek at Orange Street is completely channelized and diverted from its historical connection with the Santa Ana River. However, significant sediment deposition occurs immediately downstream of the Greenspot Road bridge and provides for habitat renewal in portions of the adjacent WSPA and the reach of Plunge Creek from Greenspot Road to its diversion at Orange Street. This area of relatively undisturbed alluvial scrub is occupied by the San Bernardino kangaroo rat. Commenters, including biologists familiar with the San Bernardino kangaroo rat, stated that it is important for the persistence of the subspecies in Unit 1 that the demographic and genetic connectivity of populations in Plunge Creek and the Santa Ana wash be conserved.

Based on information received and additional analysis of our own data, we determined that the population of San Bernardino kangaroo rats in Plunge Creek is at risk of local extirpation without a habitat connection in Unit 1 to provide for demographic and genetic exchange between San Bernardino kangaroo rats in Plunge Creek and the Santa Ana River main stem area. We are including approximately 265 ac (107 ha) of occupied habitat in the final revision to critical habitat for Unit 1. This additional area, which contains the physical and biological features essential to the conservation of the subspecies, provides connectivity between Plunge Creek and the core population in the Santa Ana River wash.

Cable Creek Wash

The Cable Creek wash is located northeast of the Lytle/Cajon Creek wash (within current Unit 2) on the opposite side of Interstate 215 (I–215). This wash, although occupied, is isolated from proposed Unit 2 by I–215, flood control structures, and other development. Cable Creek is channelized where it approaches the freeway. The concrete channel eventually crosses underneath I–215 to flow into the Lytle/Cajon wash, but the channel precludes the movement of individual San Bernardino kangaroo rats between these areas. Hence, any genetic or demographic connection between San Bernardino kangaroo rats in Cable Creek wash and the Lytle/Cajon wash is likely minimal to non-existent. We did not propose Cable Creek wash in the June 19, 2007, proposed revision to critical habitat because of the disconnect between this population at Cable Creek and the larger population of San Bernardino kangaroo rats at Lytle/Cajon Creek.

During the comment periods for the San Bernardino kangaroo rat proposed critical habitat revision, we received significant comment from the public about Cable Creek wash. Commenters stated that this wash contains essential physical and biological features, retains fluvial dynamics, and is one of the few areas of occupied San Bernardino kangaroo rat habitat within the remaining range of the subspecies. Further, this area appears large enough to support a population of San Bernardino kangaroo rats indefinitely, despite its disconnection from the core population in the Lytle/Cajon Creek wash. Based on information received and additional analysis of our own data, we determined that Cable Creek contains quality San Bernardino kangaroo rat habitat, and repeated positive survey results suggest this area supports a self-sustaining population of this subspecies. Additionally, we received comments suggesting this area could be important for the long-term conservation of this subspecies in the future if population levels in the core area of the Lytle/Cajon wash were to decrease due to catastrophic events. The demographic isolation of Cable Creek from Lytle/Cajon Creek occurred relatively recently on an evolutionary time scale, and therefore, we agree that the Cable Creek wash population could be utilized to augment recovery of the Lytle/Cajon wash population. Based on these comments, we revised our criteria identifying critical habitat to include areas disconnected from core population areas that may be important for the long-term conservation of the subspecies. We have determined that approximately 483 ac (195 ha) of land in the Cable Creek wash contain the physical and biological features essential to the conservation of the subspecies, and we are designating this area in a new critical habitat Unit 4.

Bautista Creek

Bautista Creek drains into the San Jacinto River wash from the south, flowing into an area supporting the core population of San Bernardino kangaroo rats within the San Jacinto River (proposed Unit 3). Bautista Creek is

channelized approximately 2 miles (3.2 kilometers) downstream of the San Bernardino National Forest boundary and now flows for several miles through a 4-sided concrete box channel to its confluence with the San Jacinto River. This steep-sided channel effectively isolates San Bernardino kangaroo rats in Bautista Creek from those in the San Jacinto River. Minimal genetic connectivity may exist between the Bautista Creek and San Jacinto River populations by way of highly disturbed, upland agricultural fields along the length of the concrete channel (if those agricultural areas are occupied at some low level by the subspecies). Demographic connectivity of the two populations through these highly disturbed agricultural areas is unlikely, although an occasional individual may survive being washed downstream through the channel during a high flow event. However, such an event is likely so rare it is considered relatively meaningless to the population in terms of demographic or genetic exchange between individual animals in Bautista Creek and the San Jacinto River. It is also unlikely that San Bernardino kangaroo rats could successfully migrate from the San Jacinto River upstream through the concrete channel to the Bautista Creek area. Based on this information, we did not include Bautista Creek in the June 19, 2007, proposed revision to critical habitat.

We received significant comment during the public comment periods about the unchannelized reaches of Bautista Creek that were designated in the April 23, 2002, final rule as critical habitat (67 FR 19812). These comments focused on the unimpeded fluvial dynamics that maintain existing physical and biological features and occupancy by the San Bernardino kangaroo rat in this area. It was noted that given the extent and quality of habitat in this area, the population of San Bernardino kangaroo rats in Bautista Creek is likely self-sustaining in the long-term despite the lack of habitat connectivity with the San Jacinto River wash. We determined that the unchannelized portion of Bautista Creek is occupied as documented through live-trapping results, and that this area retains fluvial dynamics maintaining the physical and biological features required by the San Bernardino kangaroo rat. Additionally, we received comments suggesting the Bautista Creek population is important for the long-term conservation of the San Bernardino kangaroo rat, as it provides a safeguard against population declines and local extinction in the San Jacinto River wash unit (proposed Unit 3). The demographic isolation of Bautista Creek from the San Jacinto River occurred relatively recently on an evolutionary time scale, and therefore, we agree that the Bautista Creek population could be utilized to augment recovery of the San Jacinto River wash population. The comments we received also highlighted the importance of conserving the Bautista Creek area as it represents the southernmost extent of the range for the San Bernardino kangaroo rat. Based in part on these comments, we revised our criteria identifying critical habitat to include disconnected areas that may be important for the long-term conservation of the subspecies. We have determined that approximately 443 ac (179 ha) of land in Bautista Creek contain the physical and biological features essential to the conservation of the subspecies, and we are designating this area in a new critical habitat Unit 5.

In total, we added approximately 1,579 ac (639 ha) of Federal and private land to the June 19, 2007, proposed revision to critical habitat for the San Bernardino kangaroo rat (Table 2) as described in the April 16, 2008, NOA. Of these 1,579 ac (639 ha), approximately 349 ac (141 ha) are excluded from this final critical habitat designation under section 4(b)(2) of the Act based on benefits provided to the subspecies as a result of partnerships that include development of management plans discussed below.

(3) In the 2007 proposed rule, we discussed an integrated water recharge and recovery program to be implemented by Eastern Municipal Water District at the confluence of the San Jacinto River and Bautista Creek within existing critical habitat Unit 3. The Service issued a biological opinion for this project on November 16, 2006 (Service 2006, FWS–WRIV–4051.5) which found that the action did not adversely modify the currently designated critical habitat. The project would permanently impact approximately 39 ac (16 ha) of habitat through the construction of well sites in upland habitat and groundwater recharge basins in the floodplain of the San Jacinto River. In the proposed rule we stated that we were not proposing these areas as revised critical habitat; it was anticipated that these areas would no longer contain the PCEs upon construction of the well sites and recharge basins. During the public comment periods, we received public comment indicating these areas contain the essential physical and biological features. Also, recent survey data has indicated the current population of San Bernardino kangaroo rats in these areas is larger than previously believed, and that project impacts would exceed the identified level of anticipated incidental take during preconstruction trapping within the project site. Formal consultation with the Service on the Eastern Municipal Water District project has been reinitiated, and construction within the project site has ceased. Because these areas still contain the essential physical and biological features, we determined that the 39 ac (16 ha) Eastern Municipal Water District project site within Unit 3 meets the definition of critical habitat. However, we are excluding these 39 ac (16 ha) under section 4(b)(2) of the Act (see ''Exclusions Under Section 4(b)(2) of the Act'' section of this final rule for a detailed discussion of this exclusion).

(4) We proposed lands covered by the WSPA Management Plans for exclusion under section 4(b)(2) of the Act. We determined that the benefits of exclusion outweigh the benefits of inclusion on these lands; therefore, we excluded approximately 751 ac (304 ha) of lands in Unit 1 covered by the WSPA Management Plans under section 4(b)(2) of the Act (see ''Exclusions Under Section 4(b)(2) of the Act'' section of this final rule for a detailed discussion of this exclusion).

(5) We proposed lands covered by the Former Norton Air Force Base CMP for exclusion under section 4(b)(2) of the Act. We determined that the benefits of exclusion outweigh the benefits of inclusion on these lands; therefore, we excluded approximately 267 ac (108 ha) of lands in Unit 1 covered by the Former Norton Air Force Base CMP under section 4(b)(2) of the Act (see ''Exclusions Under Section 4(b)(2) of the Act'' section of this final rule for a detailed discussion of this exclusion).

(6) We proposed lands covered by the Cajon Creek HCMA HEMP for exclusion under section 4(b)(2) of the Act. We reported in the proposed rule that there was an acreage discrepancy on the actual size of the Cajon Creek HCMA HEMP and we proposed to exclude approximately 1,271 ac (514 ha) from the final revision to critical habitat. Following publication of the proposed rule, Vulcan Materials Co. (who manages the area) re-evaluated the original survey data for the Cajon Creek HCMA HEMP, and conducted additional surveys that demonstrate the Cajon Creek HCMA HEMP is approximately 1,265 ac (512 ha) in size. We determined that the benefits of exclusion outweigh the benefits of inclusion on these lands; therefore, we have excluded approximately 1,265 ac (512 ha) of lands in Unit 2 covered by

the Cajon Creek HCMA HEMP under section 4(b)(2) of the Act (see ''Exclusions Under Section 4(b)(2) of the Act'' section of this final rule for a detailed discussion of this exclusion).

(7) We proposed lands covered by the Western Riverside County MSHCP for exclusion under section 4(b)(2) of the Act. We determined that the benefits of exclusion outweigh the benefits of inclusion on these lands; therefore, we excluded approximately 595 ac (241 ha) of private and permittee-owned Public/Quasi-Public lands in Unit 3 and Unit 5 covered by the Western Riverside County MSHCP under section 4(b)(2) of the Act (see ''Exclusions Under Section 4(b)(2) of the Act'' section of this final rule for a detailed discussion of this exclusion).

Taking into consideration the above additions to the 2007 proposed revision to the critical habitat designation, and exclusions under section 4(b)(2) of the Act, we are designating approximately 7,779 ac (3,148 ha) of land in San Bernardino and Riverside Counties as critical habitat in this final rule.

Critical Habitat

Critical habitat is defined in section 3 of the Act as:

(1) The specific areas within the geographical area occupied by a species, at the time it is listed in accordance with the Act, on which are found those physical or biological features

(a) Essential to the conservation of the species and

(b) Which may require special management considerations or protection; and

(2) specific areas outside the geographical area occupied by a species at the time it is listed, upon a determination that such areas are essential for the conservation of the species.

Conservation, as defined under section 3 of the Act, means the use of all methods and procedures that are necessary to bring any endangered or threatened species to the point at which the measures provided under the Act are no longer necessary. Such methods and procedures include, but are not limited to, all activities associated with scientific resources management such as research, census, law enforcement, habitat acquisition and maintenance, propagation, live trapping, transplantation, and in the extraordinary case where population pressures within a given ecosystem cannot otherwise be relieved, may include regulated taking.

Critical habitat receives protection under section 7(a)(2) of the Act through the prohibition against Federal agencies carrying out, funding, or authorizing the destruction or adverse modification of critical habitat. Section 7(a)(2) of the Act requires consultation on Federal actions that may affect critical habitat. The designation of critical habitat does not affect land ownership or establish a refuge, wilderness, reserve, preserve, or other conservation area. Such designation does not allow the government or public to access private lands. Such designation does not require implementation of restoration, recovery, or enhancement measures by private landowners. Where a landowner requests Federal agency funding or authorization for an action that may affect a listed species or critical habitat, the consultation requirements of section 7(a)(2) would apply, but even in the event of a destruction or adverse modification finding, the landowner's obligation is not to restore or recover the species, but to implement reasonable and prudent alternatives to avoid destruction or adverse modification of critical habitat.

For inclusion in a critical habitat designation, the habitat within the geographical area occupied by the species at the time of listing must contain the physical and biological features that are essential to the conservation of the species, and be included only if those features may require special management considerations or protection. Critical habitat designations identify, to the extent known using the best scientific data available, habitat areas that provide essential life cycle needs of the species (i.e., areas on which are found the PCEs laid out in the appropriate quantity and spatial arrangement essential to the conservation of the species). Under the Act, we can designate critical habitat in areas outside the geographical area occupied by the species at the time it is listed as critical habitat only when we determine that those areas are essential for the conservation of the species.

Section 4 of the Act requires that we designate critical habitat on the basis of the best scientific and commercial data available. Further, our Policy on Information Standards Under the Endangered Species Act (published in the **Federal Register** on July 1, 1994 (59 FR 34271)), the Information Quality Act (section 515 of the Treasury and General Government Appropriations Act for Fiscal Year 2001 (Pub. L. 106–554; H.R. 5658)), and our associated Information Quality Guidelines provide criteria, establish procedures, and provide guidance to ensure that our decisions are based on the best scientific data available. They require our biologists, to the extent consistent with the Act and with the use of the best scientific data available, to use primary and original sources of information as the basis for recommendations to designate critical habitat.

When we are determining which areas should be designated as critical habitat, our primary source of information is generally the information developed during the listing process for the species. Additional information sources may include the recovery plan for the species, articles in peer-reviewed journals, conservation plans developed by States and counties, scientific status surveys and studies, biological assessments, or other unpublished materials and expert opinion or personal knowledge.

Habitat is often dynamic, and species may move from one area to another over time. Furthermore, we recognize that designation of critical habitat may not include all of the habitat areas that we may eventually determine are necessary for the recovery of the species, based on scientific data not now available to the Service. For these reasons, a critical habitat designation does not signal that habitat outside the designated area is unimportant or may not promote the recovery of the species.

Areas that support populations, but are outside the critical habitat designation, will continue to be subject to conservation actions implemented under section 7(a)(1) of the Act. They are also subject to the regulatory protections afforded by section 9 of the Act and the section 7(a)(2) jeopardy standard, as determined on the basis of the best available scientific information at the time of the agency action. Federally funded or permitted projects affecting listed species outside their designated critical habitat areas may still result in jeopardy findings in some cases. Similarly, critical habitat designations made on the basis of the best available information at the time of designation will not control the direction and substance of future recovery plans, HCPs, or other species conservation planning efforts if information available at the time of these planning efforts calls for a different outcome.

Primary Constituent Elements (PCEs)

In accordance with section 3(5)(A)(i) of the Act and the regulations at 50 CFR 424.12, in determining which areas occupied by the species at the time of listing to designate as critical habitat, we consider those physical and biological features essential to the conservation of the species that may require special management considerations or protection. We

consider the physical and biological features to be the PCEs laid out in the appropriate quantity and spatial arrangement essential to the conservation of the species. The PCEs include, but are not limited to:

(1) Space for individual and population growth and for normal behavior;

(2) Food, water, air, light, minerals, or other nutritional or physiological requirements;

(3) Cover or shelter;

(4) Sites for breeding, reproduction, or rearing (or development) of offspring; and

(5) Habitats that are protected from disturbance or are representative of the historical, geographical, and ecological distributions of a species.

We derive the PCEs required for the San Bernardino kangaroo rat from its biological needs as described below, in the proposed rule to revise critical habitat published in the **Federal Register** on June 19, 2007 (72 FR 33808), and in the NOA published in the **Federal Register** on April 16, 2008 (73 FR 20581). Additional information can also be found in the final listing rule published in the **Federal Register** on September 24, 1998 (63 FR 51005), and in the original final critical habitat rule published in the **Federal Register** on April 23, 2002 (67 FR 19812).

Space for Individual and Population Growth and Normal Behavior

San Bernardino kangaroo rats are typically found on alluvial fans, which are relatively flat or gently sloping masses of loose rock, gravel, and sand deposited by a stream as it flows into a valley or upon a plain (McKernan 1993, p. 1). This subspecies is also found on floodplains, washes, areas with braided channels, and in adjacent upland areas containing appropriate physical and vegetative characteristics (McKernan 1993, p. 1). These areas consist of sand, loam, sandy loam, or gravelly soils (McKernan 1993, p. 1) that are associated with alluvial processes (i.e., the scour and deposition of clay, silt, sand, gravel, or similar material by running water such as rivers and streams; or debris flows). San Bernardino kangaroo rats have a strong preference for, and are more abundant on, soils deposited by alluvial processes (McKernan 1997, p. 36). These soils allow San Bernardino kangaroo rats to dig simple, shallow burrow systems for shelter and rearing offspring, and surface pits for food storage that provide for individual and population growth and for normal behavior.

Few studies have occurred on the burrowing behavior of the San Bernardino kangaroo rat; however, their burrowing habits are similar to the Merriam's kangaroo rat (of which the San Bernardino kangaroo rat is a subspecies), which has been extensively studied. Merriam's kangaroo rats have weak forelegs and are restricted to burrowing in soil that has not been compacted, such as alluvial deposits of sand or sandy loam (Price 2007, p. 2). As a result of limited digging ability, Merriam's kangaroo rats dig simple shallow burrow systems where they spend approximately 75 percent of their lives (Reynolds 1958, pp. 113 and 122). Burrows consist of one or two chambers averaging 6 inches in depth (Reynolds 1960, p. 51). Kenagy (1973, p. 1207) observed that Merriam's kangaroo rats occupied one to three simple burrows depending on the season. Merriam's kangaroo rats do not have the ability to burrow into hard soils, and because of this, the highest numbers of kangaroo rats can be found on loose, sandy soils (Reynolds 1958, p. 113; Huey 1951, p. 212). Light, textured soil that is favorable to burrowing is an important factor limiting the range of Merriam's kangaroo rats (Reynolds 1958, p. 114). Sandy loam soils are not too heavy to discourage digging, yet they are not light enough to facilitate tunnel cave-ins that can occur in other soil types (Reynolds 1958, p. 113). For these reasons, sandy loam soils found on alluvial fans and maintained by alluvial processes are essential to the survival and normal behavior of the San Bernardino kangaroo rat.

Alluvial sage scrub habitat is necessary for normal behavior of the San Bernardino kangaroo rat because this plant community provides cover and food resources within areas containing suitable soils for burrowing. Alluvial sage scrub is considered a distinct and rare plant community that dominates major outwash fans at the mouths of canyons along the coastal side of the San Gabriel, San Bernardino, and San Jacinto Mountains and some smaller floodplain and riverine areas of southern California (Hanes et al. 1989, p. 187). Described as a variant of coastal sage scrub (Smith 1980, p. 135), alluvial sage scrub is also referred to as alluvial scrub, Riversidean alluvial fan scrub, alluvial fan sage scrub, cismontane alluvial scrub, alluvial fan scrub, or Riversidean alluvial fan sage scrub. Alluvial sage scrub occurs on two types of floodplain soils: Riverwash Association soils and Soboba Association soils (Hanes et al. 1989, p. 188). Comprised of an assortment of low-growing drought-deciduous shrubs, larger evergreen woody shrubs, and other perennial species tolerant of a relatively sterile, rapidly draining substrate, this relatively open vegetation type is adapted to periodic severe flooding and erosion (Hanes et al. 1989, p. 187; Smith 1980, p. 126).

Alluvial sage scrub vegetation includes plant species that are often associated with coastal sage scrub, chaparral, or desert transition communities (Smith 1980, p. 126). Common plant species found within these plant communities may include: *Lepidospartum squamatum* (scalebroom); *Eriogonum fasciculatum* (California buckwheat); *Eriodictyon crassifolium* (woolly yerba santa); *Eriodictyon trichocalyx* (hairy yerba santa); *Yucca whipplei* (our Lord's candle); *Rhus ovata* (sugar bush); *Rhus integrifolia* (lemonadeberry); *Malosma laurina* (laurel sumac); *Juniperus californicus* (California juniper); *Baccharis salicifolia* (mulefat); *Penstemon spectabilis* (showy penstemon); *Heterotheca villosa* (golden aster); *Eriogonum elongatum* (tall buckwheat); *Encelia farinosa* (brittle bush); *Opuntia* spp. (prickly pear and cholla); *Adenostoma fasciculatum* (chamise); *Prunus ilicifolia* (holly-leaf cherry); *Quercus* spp. (oaks); *Salvia apiana* (white sage); annual forbs (e.g., *Phacelia* spp. (phacelia); *Lupinus* spp. (lupine); and *Plagiobothrys* spp. (popcorn flower)); and native and nonnative grasses.

Three phases of alluvial sage scrub have been described: pioneer, intermediate, and mature. The phases are thought to correspond to factors such as flood scour, distance from flood channel, time since last flood, and substrate features (Smith 1980, p. 136; Hanes et al. 1989, p. 187). Under natural conditions, flood waters periodically break out of the main river channel in a complex pattern, resulting in a braided appearance to the floodplain and a mosaic of vegetation stages. Pioneer sage scrub, the earliest phase, is subject to frequent hydrological disturbance and the sparse vegetation pattern is usually renewed by frequent floods (Smith 1980, p. 136; Hanes et al. 1989, p. 187). The intermediate phase, which is typically found on benches between the active channel and mature floodplain terraces, is subject to periodic flooding at longer intervals. The vegetation of early and intermediate stages is relatively open (less than 50 percent canopy cover) and supports the highest densities of the San Bernardino kangaroo rat (McKernan 1997, p. 50), likely due in part to few root systems to interfere with burrowing. Price (2007, p. 2) suggests that kangaroo rats associate with sparsely vegetated habitats because

dense vegetation produces litter that covers the soil surface and bare soil surface is needed for dust-bathing and efficient seed collection. Areas like these, with a significant amount of bare ground, can also facilitate movement for a bipedal species like the San Bernardino kangaroo rat. For Merriam's kangaroo rats, an abundance of perennial grass cover can create an unfavorable environment by interfering with ease of travel and escape from predators (Reynolds 1958, p. 114).

The oldest or mature phase of alluvial sage scrub, which is found on elevated floodplain terraces, is rarely affected by flooding and supports the highest plant density (Smith 1980, p. 137). Although mature areas are generally used less frequently or occupied at lower densities by San Bernardino kangaroo rats (likely due to extensive root systems and heavy vegetative cover that inhibit burrowing, predator escape, and foraging) than those supporting earlier phases, these areas contain features essential to the conservation of the subspecies. Lower portions of the floodplain, where higher densities of San Bernardino kangaroo rats are found, are likely to become inundated or lost due to scour and sediment deposition during flooding events and some animals may drown during such events.

In a study to determine the effects of flooding on Merriam's kangaroo rats and two other heteromyid (family of rodents that includes the kangaroo rats, kangaroo mice, and pocket mice) species, Kenagy (1973, p. 1205) noted heavy burrow damage, and a 23 percent reduction in the number of chisel-toothed kangaroo rats (*Dipodomys microps*) trapped post-flooding compared to pre-flood numbers. Elevated upland portions of the floodplain containing mature phase alluvial sage scrub with patches of suitable soils and vegetative cover can support some individuals, but the low density of animals suggests these areas likely remain occupied only because of their proximity to the more densely occupied lower elevation portions of the floodplain. More important to the preservation of the San Bernardino kangaroo rat in channelized systems where bank-to-bank flooding can occur are individuals occupying the upland areas as they may be the only individuals remaining for recolonization of the lower floodplain after flooding has subsided (Pavelka 2006).

Regional persistence of the San Bernardino kangaroo rat depends on recolonization of local populations that have been extirpated by drought or flood events (Price 2007, p. 2). Research conducted by Braden and McKernan (2000, p. 16) during 1998 and 1999 demonstrated that areas with late phases of floodplain vegetation, such as mature alluvial fan sage scrub and associated coastal sage scrub and chaparral, including some areas of moderate to dense vegetation such as nonnative grasslands, are at least periodically occupied by the subspecies. Due to the dynamic nature of the alluvial floodplain, all elevations within the floodplain and the associated phases of alluvial sage scrub habitat are essential to the conservation and long-term survival of the San Bernardino kangaroo rat.

A limited amount of data exists pertaining to population dynamics of the San Bernardino kangaroo rat. Information is not currently available on several aspects of the subspecies' life history such as fecundity (the capacity of an organism to produce offspring), survival, population age and sex structure, intra- and interspecific competition, and causes and rates of mortality. With respect to population density, Braden and McKernan (2000) documented substantial annual variation on a trapping grid in San Bernardino County, where densities ranged from 2 to 26 animals per 2.47 ac (1 ha). The reasons for these greatly disparate values during the 15-month study are unknown. These fluctuations bring to light several important aspects of the subspecies' distribution and life history that should be considered when identifying the physical and biological features essential to the conservation of the subspecies: (1) A low population density observed in an area at one point in time does not mean the area is occupied at the same low density during any other month, season, or year; (2) a low population density is not an indicator of low habitat quality or low overall value of the land for the conservation of the subspecies; (3) an abundance of San Bernardino kangaroo rats can decrease rapidly; and (4) one or more factors (e.g., food availability, fecundity, disease, predation, genetics, environment) are strongly influencing the subspecies' population dynamics in one or more areas. High-amplitude, high-frequency fluctuations in small, isolated populations make the San Bernardino kangaroo rat extremely susceptible to local extirpation.

Areas that contain low densities of San Bernardino kangaroo rats may be important for dispersal, genetic exchange, colonization of newly suitable habitat, and re-colonization of areas after severe storm events. The dynamic nature of the alluvial habitat leads to a situation where not all the habitat associated with alluvial processes is suitable for the subspecies at any point in time. However, areas generally considered unsuitable habitat, such as out-of-production vineyards and margins of orchards, can and do develop into suitable habitat for the subspecies through natural processes (67 FR 19812). The San Bernardino kangaroo rat is documented in the following areas: those containing suitable soils that have been altered due to human disturbance not typically associated with the subspecies, including nonnative grasslands; margins of orchards and out-of-use vineyards; mature stage alluvial sage scrub with greater than 50 percent canopy cover; and areas of wildland/urban interface within floodplains or terraces that are adjacent to occupied habitat (67 FR 19812, April 23, 2002). These upland areas can support individuals for repopulation of wash areas extirpated by flood events (Pavelka 2006). This can occur directly by dispersal of adult individuals, or indirectly through dispersal of offspring (Pavelka 2006).

Little is known about home range size, dispersal distances, or other spatial requirements of the San Bernardino kangaroo rat. However, home ranges for the Merriam's kangaroo rat in the Palm Springs, California, area averaged 0.82 ac (0.33 ha) for males and 0.77 ac (0.31 ha) for females (Behrends et al. 1986, p. 204). Blair (1943, p. 26) reported much larger home ranges for Merriam's kangaroo rats in New Mexico, where home ranges averaged 4.1 ac (1.7 ha) for males and 3.9 ac (1.6 ha) for females. Space requirements for the San Bernardino kangaroo rat likely vary according to season, age and sex of animal, food availability, and other factors. Although outlying areas of their home ranges may overlap, *Dipodomys* adults actively defend small core areas near their burrows (Jones 1993, p. 583). Home range overlap between males and between males and females is extensive, but female-female overlap is slight (Jones 1993, p. 584). The degree of competition between San Bernardino kangaroo rats and sympatric (i.e., living in the same geographical area) species of kangaroo rats for food and other resources is not presently known. While we do not have sufficient information to quantify the home range required by the San Bernardino kangaroo rat, we believe we included sufficient areas through the delineation of critical habitat in wash and upland areas to provide the space needed to maintain the home range dynamics of this subspecies.

Food

As stated in the previous sections, the alluvial sage scrub plant community

occupied by the San Bernardino kangaroo rat provides food resources for the subspecies. However, little is known about the specific diet of San Bernardino kangaroo rats. They emerge from their burrow systems at sunset and feed at night, when they are most active. San Bernardino kangaroo rats are generally granivorous (i.e., feed on seeds and grains) and like most Merriam's kangaroo rats, often store large quantities of seeds in surface pits for later consumption (Reichman and Price 1993, p. 540; Reynolds 1958, p. 126). This species feeds primarily on the seeds of alluvial sage scrub species, but green vegetation and insects can also be important seasonal food sources. Insects, when available, are documented to constitute as much as 50 percent of a kangaroo rat's diet (Reichman and Price 1993, p. 540).

Wilson et al. (1985, p. 731) reported that in comparison to other rodents, Merriam's kangaroo rats, and heteromyids in general, have relatively low reproductive output that can be linked to food resources. Rainfall and the availability of food are cited as factors affecting kangaroo rat populations. Droughts lasting more than a year can cause rapid declines in population numbers after seed caches are depleted (Goldingay et al. 1997, p. 56).

Cover or Shelter

San Bernardino kangaroo rats depend on suitable soils for burrowing and vegetative cover for shelter from predation. Potential predators include the common barn owl (*Tyto alba*), great horned owl (*Bubo virginianus*), long-eared owl (*Asio otus*), gray fox (*Urocyon cinereoargenteus*), coyote (*Canis latrans*), long-tailed weasel (*Mustela frenata*), bobcat (*Lynx rufus*), badger (*Taxidea taxus*), San Diego gopher snake (*Pituophis melanoleucus annectens*), California king snake (*Lampropeltis getulus californiae*), red diamond rattlesnake (*Crotalus ruber*), southern Pacific rattlesnake (*Crotalus oreganus*), and domestic cats (*Felis catus*) (Bolger et al. 1997, p. 560; 67 FR 19812, April 23, 2002).

Primary Constituent Elements for the San Bernardino Kangaroo Rat

Pursuant to the Act and its implementing regulations, we are required to identify the physical and biological features within the geographical area occupied by the San Bernardino kangaroo rat at the time of listing that are essential to the conservation of the species and which may require special management considerations or protection. The physical and biological features are the primary constituent elements (PCEs) laid out in the appropriate quantity and spatial arrangement essential to the conservation of the species. All areas designated as critical habitat for the San Bernardino kangaroo rat are within the geographical area occupied by the species at the time of listing, are currently occupied, and contain sufficient essential features to support at least one life history function.

Based on our current knowledge of the life history, biology, and ecology of the San Bernardino kangaroo rat and the requirements of the habitat to sustain the essential life history functions of the subspecies, we determined that the PCEs specific to the San Bernardino kangaroo rat are:

(1) Alluvial fans, washes, and associated floodplain areas containing soils consisting predominately of sand, loamy sand, sandy loam, and loam, which provide burrowing habitat necessary for sheltering and rearing offspring, storing food in surface caches, and movement between occupied patches;

(2) Upland areas adjacent to alluvial fans, washes, and associated floodplain areas containing alluvial sage scrub habitat and associated vegetation, such as coastal sage scrub and chamise chaparral, with up to approximately 50 percent canopy cover providing protection from predators, while leaving bare ground and open areas necessary for foraging and movement of this subspecies; and

(3) Upland areas adjacent to alluvial fans, washes, and associated floodplain areas, which may include marginal habitat such as alluvial sage scrub with greater than 50 percent canopy cover with patches of suitable soils (PCE 1) that support individuals for re-population of wash areas following flood events. These areas may include agricultural lands, areas of inactive aggregate mining activities, and urban/wildland interfaces.

With this final designation of critical habitat, we intend to conserve the physical and biological features essential to the conservation of the subspecies, through the identification of the appropriate quantity and spatial arrangement of the PCEs sufficient to support the life history functions of the subspecies. Some units contain all of these PCEs and support multiple life processes, while some units contain only a portion of these PCEs, those necessary to support the subspecies' particular use of that habitat. Because not all life history functions require all the PCEs, not all critical habitat units will contain all the PCEs.

Special Management Considerations or Protection

When designating critical habitat, we assess whether the areas within the geographical area occupied at the time of listing contain features essential to the conservation of the subspecies that may require special management considerations or protection. We also considered how revising the current designation of critical habitat highlights habitat with essential features in need of special management considerations or protection.

The majority of all remaining suitable habitat, and therefore, the long-term persistence of the San Bernardino kangaroo rat, is threatened by the direct and indirect effects of: sand and gravel mining; construction, operation, and maintenance of flood control structures; water conservation activities; urban and industrial development; agricultural activities; and off-road vehicle activity. With an expanding human population in the region, it is likely that these activities will continue to threaten the habitat and PCEs upon which the San Bernardino kangaroo rat depends.

Sand and gravel mining operations have degraded San Bernardino kangaroo rat habitat in all of the critical habitat units except Unit 4, with major operations occurring in the Santa Ana River and Lytle Creek washes. Mining activities directly affect the PCEs for the subspecies by altering soil composition and structure, and by stripping away vegetative cover (PCEs 1 and 2). Furthermore, flood control structures are often built to protect mining operations from flood damage. This alters the hydrology essential for maintaining proper soil and alluvial sage scrub habitat for the San Bernardino kangaroo rat (PCEs 1 and 2). Special management considerations or protection may be required to minimize effects of mining activities on alluvial sage scrub habitat and the natural hydrological processes that maintain proper alluvial sage scrub conditions for the San Bernardino kangaroo rat.

Flood control and water conservation activities related to increasing human population and development have had major impacts on San Bernardino kangaroo rat habitat and the alluvial processes that maintain habitat in each of the critical habitat units. Flood control berms, levees, and concrete-lined channels increase severity (i.e., velocity and scour) of flood events in lower elevations within the floodplain, and cut off upland portions of alluvial sage scrub habitat from hydrological processes that maintain suitable San Bernardino kangaroo rat conditions

(PCEs 1, 2, and 3). In the absence of periodic flooding and scouring, upland alluvial sage scrub habitat increases in cover and in density of nonnative vegetation to the point where the open canopy and ground conditions (PCE 2) preferred by the subspecies no longer exist (Service 2004, p. 293). Some flood control structures (e.g., concrete channels) can prevent movement and dispersal between occupied areas of the alluvial wash and floodplain. Decades of groundwater pumping have severely depleted groundwater reserves within San Bernardino kangaroo rat habitat and resulted in an ever-increasing need to recharge groundwater supplies by percolation of local or imported water sources into the local groundwater basin (Service 2004, p. 293). Further habitat degradation occurs where groundwater recharge ponds (i.e., percolation basins) have been constructed. Recharge structures are unsuitable for the San Bernardino kangaroo rat due to periodic standing water. These structures are especially evident in the Santa Ana River and San Jacinto River washes. Special management considerations or protection may be required to minimize effects of flood control and water conservation activities on alluvial sage scrub habitat and the natural hydrological processes that maintain proper alluvial sage scrub conditions for the San Bernardino kangaroo rat.

Development projects pose a serious threat to San Bernardino kangaroo rat habitat in all five critical habitat units. As the human population of the surrounding area continues to increase, the threat of development encroaching upon alluvial washes and associated upland areas will persist (PCEs 1, 2, and 3). Large-scale development projects may permanently eliminate and fragment habitat containing the PCEs for the subspecies. Furthermore, continued fragmentation of habitat is likely to promote higher levels of predation by native animals (Bolger et al. 1997, p. 560) and urban-associated animals (e.g., domestic cats, opossums (*Didelphis virginianus*), and striped skunks (*Mephitis mephitis*)) as the interface between natural habitat and urban areas is increased (Churcher and Lawton 1987, p. 452). Roadways and bridges built to accommodate the growing population in the area constrict channel width and contribute to the removal of alluvial fan habitat from normal hydrological processes (PCE 1). The downstream alluvial benches become isolated behind the fill used to construct the bridge within the channel area and do not experience natural flood-borne scour and deposition. Pier and footing placement within channels is a typical necessary bridge design feature. Instream piers create scour areas in front of the piers, increase water velocity through the embankments and piers (which can result in downstream erosion), and create a permanent shadow over habitat under the bridge. These factors typically result in permanently degraded habitat for the San Bernardino kangaroo rat even though high flows are seasonal in this area. Special management considerations or protection may be required to minimize the impacts of development within the alluvial wash and adjacent upland areas. Areas of the alluvial washes and floodplains adjacent to development may require exclusionary fencing and signage to minimize human and domestic animal disturbance of San Bernardino kangaroo rat habitat. Because this subspecies is active at night, lights from adjacent developed areas should be minimized and directed away from San Bernardino kangaroo rat habitat.

Agricultural activities adjacent to all five critical habitat units and within critical habitat Unit 5 occasionally result in the disking of patches of suitable or occupied habitat that may be distributed throughout upland agricultural areas. Disking destroys San Bernardino kangaroo rat burrows and degrades remaining vegetation associations (Service 2004, p. 293) (PCEs 1 and 2). This can contribute to the susceptibility of local populations to extirpation during large-scale flood events by restricting San Bernardino kangaroo rats to areas most vulnerable to flooding (i.e., lower elevations of the floodplain) (Service 2004, p. 293). Special management considerations or protection may be required to minimize effects of agricultural activities on alluvial sage scrub habitat.

Unauthorized off-road vehicle activity continues to be a threat to San Bernardino kangaroo rat habitat in the San Jacinto River wash area. Most of this activity occurs within the wash downstream of the East Main Street/Lake Park Drive Bridge. Off-road activity that goes unchecked directly damages plant communities, the soil crust, and the burrow systems of kangaroo rats, thereby degrading habitat (Bury et al. 1977, p. 16; Service 2004, p. 293) (PCEs 1 and 2). Special management considerations or protection, such as exclusionary fencing, additional enforcement, and signage placed around areas of the wash, may be needed to minimize impacts from unauthorized off-road vehicle use.

Criteria Used To Identify Critical Habitat

We are designating critical habitat for the San Bernardino kangaroo rat in areas that we have determined were within the geographical area occupied at the time of listing, and contain PCEs in the appropriate quantity and spatial arrangement essential to the conservation of this subspecies. Some lands contain all PCEs and support multiple life processes. Some lands contain only a portion of the PCEs necessary to support the particular biological value of that habitat to this subspecies. As explained in detail below, we are not designating critical habitat in areas outside the geographical area occupied by the species at the time of listing because we determined that such areas are not essential to the conservation of the subspecies.

We define occupied habitat as: (1) Those areas containing occurrence data from the time of listing (1980 to 1998); (2) those areas containing occurrence data since the time of listing (1998 to present); and (3) areas adjacent to and between occurrence points that maintain habitat connectivity between occurrences in one continuous patch of suitable habitat. As discussed in the ''Background'' section of the proposed rule published in the **Federal Register** on June 19, 2007 (72 FR 33808), occurrences discovered since the listing of the subspecies in 1998 are within the geographical area occupied at the time of listing (i.e., Santa Ana River, Lytle/Cajon Creek, and San Jacinto River washes).

In this designation, we have focused primarily on core populations (i.e., areas where the subspecies has been repeatedly detected through live trapping) in undisturbed habitat in the Santa Ana River, Lytle/Cajon Creeks, and the San Jacinto River washes that contain the physical and biological features essential to the conservation of the San Bernardino kangaroo rat. We believe that protecting the habitat supporting these three largest core populations is essential to the survival and recovery of the subspecies. Small, isolated areas of degraded habitat or areas devoid of fluvial processes are likely only to support unsustainable populations that would not contribute to the recovery of this subspecies. In defining core population boundaries, we included areas demographically disconnected from the three largest populations, but which may provide the subspecies with protection against stochastic events (e.g., flooding in excess of a 100-year storm event that removes flood-plain terrace habitat;

earthquakes; fires followed by erosion of adjacent slopes that bury occupied habitat) that could cause local extirpations in the larger units. These areas are occupied by the subspecies and contain likely self-sustaining populations, relatively undisturbed alluvial scrub habitat with largely unimpeded fluvial dynamics, and, thus, the PCEs in the appropriate quantity and spatial arrangement essential to the conservation of the subspecies.

We delineated critical habitat for the San Bernardino kangaroo rat using the following criteria: (1) Areas occupied by the subspecies at the time of listing, and currently occupied, within the historical range of the subspecies; (2) areas retaining fluvial dynamics containing one or more of the PCEs for the subspecies; (3) areas supporting a core population of the subspecies; and (4) areas demographically disconnected from the three largest populations, but which may be important for the long-term recovery of the subspecies. Utilizing 2005 aerial imagery and occurrence data to determine areas of occupancy, we delineated critical habitat on maps to include occupied non-degraded alluvial fans, washes, floodplains, and adjacent upland areas containing the PCEs required by the San Bernardino kangaroo rat. We then made site visits with biologists considered to be experts on this subspecies and its habitat to confirm the presence of PCEs in the areas delineated on the maps. Because of the importance of upland habitat as a source of animals to repopulate wash areas following flood events, we included upland habitat containing one or more PCEs, adjacent to occupied wash habitat in this designation.

The Service may designate as critical habitat areas outside of the geographical area occupied by a species at the time it was listed when we can demonstrate that those areas are essential for the conservation of the species. Likewise, we can designate as critical habitat areas outside the geographical area presently occupied by a species only when a designation limited to the species' present range would be inadequate to ensure the conservation of the species (50 CFR 424.12(e)). Conservation (i.e., recovery) is defined in section 3 of the Act as the ''use of all methods and procedures which are necessary to bring any endangered species or threatened species to the point at which the measures provided pursuant to this Act are no longer necessary.'' In accordance with section 4(a)(1) of the Act, we determine if any species is an endangered or threatened species (or revise its listed status) because of any of the five threat factors identified in the Act (i.e., (A) present or threatened destruction, modification, or curtailment of its habitat or range; (B) overutilization for commercial, recreational, scientific, or educational purposes; (C) disease or predation; (D) the inadequacy of existing regulatory mechanisms; or (E) other natural or manmade factors affecting its continued existence). Therefore, conservation, or recovery, is achieved when a five factor analysis indicates that current and future threats have been minimized to an extent that the species is no longer in danger of extinction or likely to become endangered in the foreseeable future. Recovery is a dynamic process requiring adaptive management of threats and there are many paths to accomplishing recovery of a species. We recognize that it is unlikely that threats to this subspecies will be removed from all areas identified in this rule and that recovery efforts will occur outside the boundaries of this final designation; however, we believe that that conservation of this subspecies would be achieved if threats to this subspecies, as described in the ''Special Management Considerations or Protection'' section of this rule, were reduced or removed in the areas we identified as meeting the definition of critical habitat. Therefore, consistent with the statutory obligations of the Act and our implementing regulations we are not designating any unoccupied areas or areas outside the geographical area occupied by this subspecies at the time it was listed.

When determining the critical habitat boundaries, we made every effort to avoid including developed areas such as lands covered by buildings, pavement, and other structures because such lands lack PCEs for the San Bernardino kangaroo rat. Areas currently being used for sand/gravel mining operations (e.g., pits, staging areas) do not contain the PCEs required by the San Bernardino kangaroo rat. The scale of the maps prepared under the parameters for publication within the Code of Federal Regulations may not reflect the exclusion of such developed lands. Any such lands inadvertently left inside critical habitat boundaries shown on the maps of this final critical habitat are excluded by text in this rule and are not designated as critical habitat. Therefore, Federal actions involving these textually excluded lands would not trigger section 7 consultation with respect to critical habitat and the requirement of no adverse modification unless the specific actions may affect the subspecies or PCEs in adjacent critical habitat.

Final Critical Habitat Designation

We are designating approximately 7,779 ac (3,148 ha) of land as critical habitat for the San Bernardino kangaroo rat in five units. Table 2 provides the approximate area determined to meet the definition of critical habitat for the San Bernardino kangaroo rat in the 2007 proposed rule, areas added to the proposed rule in the April 16, 2008 NOA, areas being excluded from final critical habitat designation under section 4(b)(2) of the Act (please see ''Exclusions Under Section 4(b)(2) of the Act'' section for a detailed discussion), and areas being designated as critical habitat.

TABLE 2—CRITICAL HABITAT UNITS FOR THE SAN BERNARDINO KANGAROO RAT IN CALIFORNIA; LAND OWNERSHIP AND EVOLUTION OF FINAL SIZE IN ACRES (HECTARES)

Critical habitat unit	Land ownership	2007 Proposed critical habitat (72 FR 33808)	2008 NOA additions to proposed critical habitat (73 FR 20581)	Areas excluded under section 4(b)(2) of the act	Final critical habitat
1. Santa Ana River Wash, San Bernardino County.	BLM [1]	559 (226)	184 (74)	00 (00)	743 (301)
	Local [2]	267 (108)	00 (00)	267 (108)	00 (00)
	Private	2,797 (1,132)	469 (190)	751 (304)	2,515 (1,018)
Subtotal		3,623 (1,466)	653 (264)	1,018 (412)	3,258 (1,318)
2. Lytle/Cajon Creek Wash, San Bernardino County.	USFS [3]	89 (36)	00 (00)	00 (00)	89 (36)

TABLE 2—CRITICAL HABITAT UNITS FOR THE SAN BERNARDINO KANGAROO RAT IN CALIFORNIA; LAND OWNERSHIP AND EVOLUTION OF FINAL SIZE IN ACRES (HECTARES)—Continued

Critical habitat unit	Land ownership	2007 Proposed critical habitat (72 FR 33808)	2008 NOA additions to proposed critical habitat (73 FR 20581)	Areas excluded under section 4(b)(2) of the act	Final critical habitat
	Private	4,597 (1,860)	00 (00)	1,265 (512)	3,332 (1,348)
Subtotal		4,686 (1,896)	00 (00)	1,265 (512)	3,421 (1,384)
3. San Jacinto River Wash, Riverside County.	Water District [4]	506 (205)	00 (00)	[6] 39 (16)	506 (205)
	Local Flood [5]	94 (38)	00 (00)	94 (38)	00 (00)
	Private	169 (68)	00 (00)	169 (68)	00 (00)
Subtotal		769 (311)	00 (00)	302 (122)	506 (205)
4. Cable Creek Wash, San Bernardino County.	Private	00 (00)	483 (195)	00 (00)	483 (195)
Subtotal		00 (00)	483 (195)	00 (00)	483 (195)
5. Bautista Creek, Riverside County.	USFS [3]	00 (00)	73 (30)	00 (00)	73 (30)
	USFS Inholding	00 (00)	38 (15)	00 (00)	38 (15)
	Local Flood [5]	00 (00)	4 (2)	4 (2)	00 (00)
	Private	00 (00)	328 (133)	328 (133)	00 (00)
Subtotal		00 (00)	443 (179)	332 (134)	111 (45)
Total		9,078 (3,674)	1,579 (639)	2,917 (1,180)	7,779 (3,148)

[1] BLM = Bureau of Land Management
[2] Local = Local Reuse Authority
[3] USFS = U.S. Forest Service
[4] Water District = Eastern Municipal Water District and Lake Hemet Municipal Water District
[5] Local Flood = Riverside County Flood Control
[6] Please see the ''Summary of Changes From the 2007 Proposed Rule To Revise Critical Habitat'' section for a discussion of Eastern Municipal Water District lands excluded from critical habitat.

Below, we present brief descriptions of the units designated as critical habitat for the San Bernardino kangaroo rat. For more information about the areas excluded from critical habitat, please see the ''Exclusions Under Section 4(b)(2) of the Act'' section of this final rule.

Unit 1: Santa Ana River Wash

Unit 1 consists of approximately 3,258 ac (1,318 ha) and is located in San Bernardino County. This unit includes the Santa Ana River and portions of City, Plunge, and Mill Creeks. The area includes lands within the cities of San Bernardino, Redlands, and Highland. Although Seven Oaks Dam (northeast of Unit 1) impedes sediment transport and reduces the magnitude, frequency, and extent of flood events from the Santa Ana River, the system still retains partial fluvial dynamics because Mill Creek is not impeded by a dam or debris basin. This critical habitat unit was occupied at the time of listing, is currently occupied, and contains all of the features essential to the conservation of the San Bernardino kangaroo rat. Additionally, this unit contains the highest densities of San Bernardino kangaroo rats in the Santa Ana wash. The physical and biological features contained within this unit may require special management considerations or protection to minimize impacts associated with flood control operations, water conservation projects, sand and gravel mining, and urban development.

Approximately 751 ac (304 ha) of revised proposed critical habitat Unit 1 occurred within the WSPA, a section of the floodplain downstream of Seven Oaks Dam that was preserved by the flood control districts of Orange, Riverside, and San Bernardino Counties. The WSPA was established in 1988 by the ACOE to minimize the effects of Seven Oaks Dam on the federally endangered plant, *Eriastrum densifolium* ssp. *sanctorum* (Santa Ana River woolly-star). This area of alluvial fan scrub in the wash near the low-flow channel of the river was identified for preservation because these sections of the wash were thought to have the highest potential to maintain the hydrology necessary for the periodic regeneration of early phases of alluvial fan sage scrub. A 1993 Management Plan for the Santa Ana River WSPA has been completed, and a draft MSHMP for WSPA lands, which includes protection for the San Bernardino kangaroo rat, is to be completed as an additional conservation measure pursuant to our December 19, 2002, biological opinion on operations for Seven Oaks Dam (Service 2002b, p. 8). As a result of our partnership and development of approved management plans, we excluded the approximately 751 ac (304 ha) of WSPA lands from the final revised critical habitat designation (see ''Exclusions Under Section 4(b)(2) of the Act'' section for a detailed discussion).

In 1994, the BLM designated three parcels in the Santa Ana River, a total of approximately 760 ac (308 ha), as an ACEC. One parcel is located south of the Seven Oaks borrow pit, another is farther west and south of Plunge Creek, and the third is located farther west between two large mining pits. The primary goal of this ACEC designation is to protect and enhance the habitat of federally listed plant species occurring in the area while providing for the administration of valid existing water conservation rights. Although the establishment of this ACEC is important in regard to conservation of sensitive

species and vegetation communities in this area, the administration of existing water conservation rights conflicts with the BLM's ability to manage their lands for the San Bernardino kangaroo rat. Existing rights include a withdrawal of Federal lands for water conservation through an act of Congress on February 20, 1909 (Public Law 248, 60th Cong., 2nd sess.). The entire ACEC is included in this withdrawn land and may be used for water conservation measures, such as the construction of percolation basins. Although the BLM is coordinating with the Service to conserve San Bernardino kangaroo rat habitat, at this time we do not consider these lands to be managed for the benefit of the San Bernardino kangaroo rat or its PCEs, and we are not excluding these lands from the final revised critical habitat designation.

We are currently coordinating with the BLM, ACOE, San Bernardino Valley Conservation District, Cemex Construction Materials, Robertson's Ready Mix, and other local interests on a proposed exchange of Federal and private lands and the development of the Upper Santa Ana River Habitat Conservation Plan (USAR HCP, also known as ''Plan B''). The goal of the USAR HCP is to consolidate a large block of alluvial fan scrub occupied by three federally endangered species (the San Bernardino kangaroo rat, *Eriastrum densifolium* ssp. *sanctorum*, and *Dodecahema leptoceras* (slender-horned spineflower)) and one federally threatened species (the coastal California gnatcatcher (*Polioptila californica californica*)). The area under consideration includes the majority of the Santa Ana wash from just downstream of the confluence of Mill Creek with the Santa Ana River to Alabama Street. While the goal of this effort is to benefit the San Bernardino kangaroo rat through the establishment of preserve lands that will be managed for this subspecies and other listed species, we are still in the development phase of this HCP, and we are not excluding lands within the proposed Santa Ana River Wash Conservation Area from the final revised critical habitat designation.

Approximately 267 ac (108 ha) of occupied habitat in the Santa Ana River wash is set aside for conservation in perpetuity by the U.S. Air Force as part of on-base site remediation efforts at the former Norton Air Force Base in San Bernardino, California. These areas are managed specifically for the San Bernardino kangaroo rat and *Eriastrum densifolium* spp. *sanctorum* pursuant to the Former Norton Air Force Base CMP completed in March 2002. We excluded these 267 ac (109 ha) from the final revised critical habitat designation based on benefits provided to San Bernardino kangaroo rat habitat through our partnership and the approved CMP (see ''Exclusions Under Section 4(b)(2) of the Act'' section for a detailed discussion).

Unit 2: Lytle/Cajon Creek Wash

Unit 2 encompasses approximately 3,421 ac (1,384 ha) in San Bernardino County and includes the northern extent of this subspecies' remaining distribution. This unit contains habitat along and between Lytle and Cajon Creeks from the Interstate 15 Bridge in Lytle Creek and the Kenwood Avenue/Cajon Boulevard junction in Cajon Creek, downstream to Highland Avenue. Unit 2 was occupied at the time of listing, is currently occupied, and contains all of the features essential to the conservation of the San Bernardino kangaroo rat. This unit includes some of the last remaining alluvial fans, floodplain terraces, historical braided river channels, and associated alluvial sage scrub and upland vegetation that provides habitat for the San Bernardino kangaroo rat in the Lytle/Cajon Creek wash. This unit also contains the highest densities of San Bernardino kangaroo rat in the Lytle/Cajon wash. The physical and biological features within this unit may require special management considerations or protection to minimize impacts associated with flood control operations, water conservation projects, sand and gravel mining, and urban development.

The hydro-geomorphological processes that apparently rejuvenate and maintain the dynamic mosaic of alluvial fan sage scrub are still largely intact in Lytle and Cajon Creeks (i.e., stream flows are not impeded by dams or debris basins), and the remaining habitat allows dispersal between these two drainages, which is important for genetic exchange between populations (67 FR 19812, April 23, 2002). This unit is adjacent to large tracts of undeveloped land and contains upland areas occupied by the subspecies (PCEs 1, 2, and 3).

Several areas that were proposed in Unit 2 will be or are protected and managed to some extent for the San Bernardino kangaroo rat. The Cajon Creek Habitat Conservation Management Area (HCMA) includes approximately 1,265 ac (512 ha) to offset approximately 2,270 ac (919 ha) of sand and gravel mining proposed within and adjacent to Cajon Creek. Of the 1,265 ac (512 ha) Cajon Creek HCMA, approximately 567 ac (229 ha) is the Cajon Creek Conservation Bank established to help conserve populations of 24 species associated with alluvial fan scrub, including the San Bernardino kangaroo rat. Furthermore, the remaining 698 ac (282 ha) are set aside as permanent conservation lands. These conservation lands will be managed in perpetuity for alluvial fan scrub habitat and associated listed species (including the San Bernardino kangaroo rat) pursuant to the HEMP (M. Blane and Associates 1996) and associated Memorandum of Understanding and Implementation Agreement for the Cajon Creek Habitat Management Area (MOU) (CalMat Company 1996). We excluded 1,265 ac (512 ha) of HCMA lands from the final revised critical habitat designation based on our partnership and benefits provided by the HEMP and MOU (see ''Exclusions Under Section 4(b)(2) of the Act'' for a detailed discussion).

In 2003, the Service issued a biological opinion for the Lytle Creek North Master Planned Community, which falls within the boundary of existing San Bernardino kangaroo rat habitat (Service 2003a, FWS–SB–1640.11). The project includes an approximately 677 ac (274 ha) master planned community with over 2,400 residential units. Construction activities are proposed to be phased over an estimated 5 to 10 years. As an off-site measure for this project, the Lytle Creek Development Company will dedicate approximately 213 ac (86 ha) of largely undeveloped habitat within Lytle Creek (Unit 2) as a conservation area for the San Bernardino kangaroo rat. Habitat that provides primary foraging, sheltering, and breeding habitat for the San Bernardino kangaroo rat within this area will be conserved and managed in perpetuity (Service 2003a, p. 45). Forty acres (16 ha) of this area is upland island habitat that lies within the floodplain and will receive additional management through restoration or enhancement for the benefit of the San Bernardino kangaroo rat (Service 2003a, p. 42). A long-term management plan will be completed at the end of an initial management period allowing for lessons learned during that time to be incorporated into the long-term management plan. However, to date, no conservation easements or endowments have been secured for the lands proposed as conservation areas, nor has the long-term management plan been completed, and we are not excluding the 213 ac (86 ha) of proposed future conservation lands that will be established as a result of this project

from the final revised critical habitat designation.

On June 15, 1999, we issued our biological opinion on the construction and extension of the north levee at Sunwest Materials' (now CEMEX) Lytle Creek Quarry (Service 1999, 1–6–99–F–42). The armored, engineered levee (over 10,000 feet (3,048 meters) in length) protects mining operations from flooding and replaces a shorter, earthen embankment (Service 1999, p. 3). As a conservation measure for this project, Sunwest Materials delivered to the California Department of Fish and Game a conservation easement deed to approximately 26 ac (11 ha) delineated as Conservation Area 1 to protect biological resources in perpetuity (Service 1999, p. 7). Additionally, Sunwest Materials is to record a biological resource deed restriction on approximately 12 ac (5 ha) of land to permanently preclude activities that would interfere with habitat value (Service 1999, p. 8). However, a management plan benefiting the San Bernardino kangaroo rat is not yet developed for these lands, and we are not excluding these 38 ac (16 ha) from the final revised critical habitat designation.

Unit 3: San Jacinto River Wash

Unit 3 encompasses approximately 506 ac (205 ha) in Riverside County and includes areas along the San Jacinto River in the vicinity of San Jacinto, Hemet, and Valle Vista. This unit encompasses the San Jacinto River wash from the Blackburn Road/Lake Hemet Main Canal area, downstream to the East Main Street Bridge. This unit includes all of the features essential to the conservation of the San Bernardino kangaroo rat, was occupied at the time of listing, and is currently occupied. Additionally, this unit contains one of only three large extant core populations of the San Bernardino kangaroo rat and is the only core population in Riverside County. Historically, the San Bernardino kangaroo rat occurred along the San Jacinto River from the upper reach of habitat in the river downstream past State Route 79. The physical and biological features within this unit may require special management considerations or protection to minimize impacts associated with flood control operations, channelization, water conservation projects (groundwater recharge ponds), off-road vehicle activity, and urban development.

Lands within Unit 3 are adjacent to lands of the Soboba Band of Luiseño Indians Reservation, which were included in the 2002 final critical habitat designation (see 50 CFR 17.95(a); 67 FR 19812, April 23, 2002). We are not designating these Tribal lands as critical habitat for the San Bernardino kangaroo rat in this final revised critical habitat designation (see ''Government-to-Government Relationship with Tribes'' section for a detailed discussion).

All private lands proposed as critical habitat in the San Jacinto River wash fall within the boundaries of the Western Riverside County MSHCP. We excluded private lands under the jurisdiction of permittees to the MSHCP and all lands owned and managed by permittees to the MSHCP within this area (263 ac (106 ha)) based on our partnership and the benefits provided to the San Bernardino kangaroo rat by the Western Riverside County MSHCP. We are also excluding 39 ac (16 ha) of land owned by the Eastern Municipal Water District related to The Soboba Band of Luiseño Indians Settlement Act and implementation of its associated settlement agreement. Please see ''Exclusions Under Section 4(b)(2) of the Act'' section for detailed discussions of these exclusions.

Unit 4: Cable Creek Wash

Unit 4 consists of approximately 483 ac (195 ha) and is located in San Bernardino County. This unit encompasses the Cable Creek alluvial floodplain from the mouth of Cable Canyon to I–215 where the creek becomes channelized. Because Cable Creek is not impeded by a dam or debris basin, the fluvial dynamics necessary to maintain the PCEs of San Bernardino kangaroo rat habitat remain in this unchannelized portion of Cable Creek. This critical habitat unit was occupied at the time of listing, is currently occupied, and contains all of the features essential to the conservation of the San Bernardino kangaroo rat. Additionally, this unit contains a likely self-sustaining population of San Bernardino kangaroo rats that may be important for the long-term conservation of the subspecies. This unit is demographically isolated from the core population of the subspecies in the Lytle/Cajon wash (Unit 2). A stochastic event causing dramatic population decline or local extirpation in Unit 2 may have little effect on Unit 4. In such a case, the population in Unit 4 could serve as a source of individuals for repopulating Unit 2. The physical and biological features contained within this unit may require special management considerations or protection to minimize impacts associated with flood control operations, water conservation projects, sand and gravel mining, and urban development.

Unit 5: Bautista Creek

Unit 5 consists of approximately 111 ac (45 ha) and is located in Riverside County. This unit includes occupied habitat from the unchannelized reach of Bautista Creek (i.e., from the existing instream mining operation to upstream areas where the grade of the creek precludes the formation of alluvial terraces or braids). This unit represents the southernmost extent of the San Bernardino kangaroo rat's current range. The wash system in upper Bautista Creek retains fluvial dynamics because it is not impeded by a dam, debris basin, or concrete channelization. This critical habitat unit was occupied at the time of listing, is currently occupied, and contains all of the features essential to the conservation of the San Bernardino kangaroo rat. Historically, the subspecies occurred upstream of the Bautista flood control basin until the topography of the canyon becomes too steep. This unit contains agricultural areas that could be occupied at low densities by this subspecies (PCE 3). Additionally, this unit contains a likely self-sustaining population of San Bernardino kangaroo rats that may be important for the long-term conservation of the subspecies. This unit is demographically isolated from the core population of the subspecies in the San Jacinto wash (Unit 3) by a concrete-lined channel. This channel directs flows from upper Bautista Creek downstream to the San Jacinto River. Given the current status of the San Bernardino kangaroo rat and ongoing threats to its habitat, it is important for the conservation of the San Bernardino kangaroo rat that natural fluvial processes in occupied habitat are maintained. A stochastic event could cause a dramatic population decline or local extirpation in either Units 3 or 5. In such a case, through relocation for the purposes of recovery, the population in Unit 5 could serve as a source of individuals for repopulating Unit 3, and vice versa. The physical and biological features contained within this unit may require special management considerations or protection to minimize impacts associated with agricultural activities, sand and gravel mining, and urban development.

All private lands proposed as critical habitat in Bautista Creek fall within the boundaries of the Western Riverside County MSHCP. We excluded private lands under the jurisdiction of permittees to the MSHCP and all lands owned and managed by permittees to the MSHCP within this area (332 ac (134

ha)) based on our partnership and the benefits provided to the San Bernardino kangaroo rat by the Western Riverside County MSHCP (see ''Exclusions Under Section 4(b)(2) of the Act'' section for a detailed discussion).

Effects of Critical Habitat Designation

Section 7 Consultation

Section 7(a)(2) of the Act requires Federal agencies, including the Service, to ensure that actions they fund, authorize, or carry out are not likely to jeopardize the continued existence of a listed species or destroy or adversely modify designated critical habitat. Decisions by the Fifth and Ninth Circuit Courts of Appeals have invalidated our definition of ''destruction or adverse modification'' (50 CFR 402.02) (see *Gifford Pinchot Task Force* v. *U.S. Fish and Wildlife Service,* 378 F. 3d 1059 (9th Cir 2004) and *Sierra Club* v. *U.S. Fish and Wildlife Service et al.*, 245 F.3d 434, 442F (5th Cir 2001)), and we do not rely on this regulatory definition when analyzing whether an action is likely to destroy or adversely modify critical habitat. Under the statutory provisions of the Act, destruction or adverse modification is determined on the basis of whether, with implementation of the proposed Federal action, the affected critical habitat would remain functional to serve its intended conservation role for the species.

Under section 7(a)(2) of the Act, if a Federal action may affect a listed species or its critical habitat, the responsible Federal agency (action agency) must enter into consultation with us. As a result of this consultation, we document compliance with the requirements of section 7(a)(2) through our issuance of:

(1) A concurrence letter for Federal actions that may affect, but are not likely to adversely affect, listed species or critical habitat; or

(2) A biological opinion for Federal actions that are likely to adversely affect listed species or critical habitat.

When we issue a biological opinion concluding that a project is likely to jeopardize the continued existence of a listed species or destroy or adversely modify critical habitat, we also provide reasonable and prudent alternatives to the project, if any are identifiable. We define ''reasonable and prudent alternatives'' at 50 CFR 402.02 as alternative actions identified during consultation that:

(1) Can be implemented in a manner consistent with the intended purpose of the action,

(2) Can be implemented consistent with the scope of the Federal agency's legal authority and jurisdiction,

(3) Are economically and technologically feasible, and

(4) Would, in the Director's opinion, avoid jeopardizing the continued existence of the listed species or destroying or adversely modifying critical habitat.

Reasonable and prudent alternatives can vary from slight project modifications to extensive redesign or relocation of the project. Costs associated with implementing a reasonable and prudent alternative are similarly variable.

Regulations at 50 CFR 402.16 require Federal agencies to reinitiate consultation on previously reviewed actions in instances where a new species is listed or critical habitat is subsequently designated that may be affected and the Federal agency has retained discretionary involvement or control over the action or such discretionary involvement or control is authorized by law. Consequently, Federal agencies may need to request reinitiation of consultation with us on actions for which formal consultation has been completed, if those actions may affect subsequently listed species or designated critical habitat.

Federal activities that may affect the San Bernardino kangaroo rat or its designated critical habitat will require consultation under section 7(a)(2) of the Act. Activities on State, Tribal, local or private lands requiring a Federal permit (such as a permit from the U.S. Army Corps of Engineers under section 404 of the Clean Water Act (33 U.S.C. 1251 et seq.) or a permit from the Service under section 10(a)(1)(B) of the Act) or involving some other Federal action (such as funding from the Federal Highway Administration, Federal Aviation Administration, or the Federal Emergency Management Agency) are examples of agency actions that may be subject to the section 7(a)(2) consultation process. Federal actions not affecting listed species or critical habitat, and actions on State, Tribal, local or private lands that are not federally funded, authorized, or permitted, do not require section 7(a)(2) consultations.

Application of the ''Adverse Modification'' Standard

The key factor related to the adverse modification determination is whether, with implementation of the proposed Federal action, the affected critical habitat would remain functional to serve its intended conservation role for the species. Activities that may destroy or adversely modify critical habitat are those that alter the physical and biological features to an extent that appreciably reduces the conservation value of critical habitat for the San Bernardino kangaroo rat. Generally, the conservation role of the San Bernardino kangaroo rat critical habitat units is to support occurrences of the subspecies in the Santa Ana River, Lytle/Cajon Creeks, the San Jacinto River, Cable Creek, and Bautista Creek, which in combination with core occurrences on private land excluded from critical habitat designation under section 4(b)(2) of the Act, comprise the core populations of this subspecies.

Section 4(b)(8) of the Act requires us to briefly evaluate and describe, in any proposed or final regulation that designates critical habitat, activities involving a Federal action that may destroy or adversely modify such habitat, or that may be affected by such designation.

Activities that, when carried out, funded, or authorized by a Federal agency, may affect critical habitat and therefore should result in consultation for the San Bernardino kangaroo rat include, but are not limited to (please see ''Special Management Considerations or Protection'' section for a more detailed discussion on the impacts of these actions to the listed subspecies):

(1) Actions that would result in loss or fragmentation of suitable habitat, such as urban and industrial development, sand and gravel mining, off-road vehicle activity, and groundwater recharge operations. These activities could eliminate or reduce habitat necessary for the growth and reproduction of the San Bernardino kangaroo rat. Resulting fragmentation could isolate populations, increasing risk of local extirpations from stochastic events and decreasing movement between remaining patches of suitable habitat.

(2) Actions that would alter natural hydrological and geomorphological processes necessary to maintain alluvial sage scrub habitat. Such activities could include, but are not limited to: channel alteration; flood control operations; and construction of flood control structures such as dams, levees, and detention basins. These activities could eliminate or reduce preferred habitat conditions for the growth and reproduction of the San Bernardino kangaroo rat. Periodic high flows and flood events provide sediment scour, sediment deposition, and thinning of vegetation which maintains alluvial sage scrub habitat.

(3) Actions that would appreciably decrease habitat value or quality

through indirect and edge effects. Such activities could include, but are not limited to: urban, industrial, and agricultural development; and construction of roads and railways. These activities could have indirect effects that could lead to increases in human activity, in light levels during nighttime foraging, in predation by domestic and feral animals associated with residential development, and the invasion of exotic plants, or otherwise eliminate or reduce preferred habitat conditions for the San Bernardino kangaroo rat. Measures to minimize the impacts of these activities to the species and its habitat could include the installation of fencing to decrease predation by domestic and feral animals, placement of lighting structures (e.g., street lights) such that the light is directed away from habitat, and the use of best management practices to reduce the amount of water entering habitat due to sheet flow.

We consider all of the units designated as critical habitat to be within the geographical area occupied by the subspecies at the time of listing, and to contain features essential to the conservation of the San Bernardino kangaroo rat. Federal agencies already consult with us on activities in areas occupied by the San Bernardino kangaroo rat that may affect the subspecies to ensure that their actions do not jeopardize the continued existence of the San Bernardino kangaroo rat.

Exclusions

Application of Section 4(b)(2) of the Act

Section 4(b)(2) of the Act states that the Secretary must designate and revise critical habitat on the basis of the best available scientific data after taking into consideration the economic impact, national security impact, and any other relevant impact of specifying any particular area as critical habitat. The Secretary may exclude an area from critical habitat if he determines that the benefits of such exclusion outweigh the benefits of specifying such area as part of the critical habitat, unless he determines, based on the best scientific data available, that the failure to designate such area as critical habitat will result in the extinction of the species. In making that determination, the legislative history is clear that the Secretary has broad discretion regarding which factor(s) to use and how much weight to give to any factor. In the following sections, we address a number of general issues that are relevant to our analysis under section 4(b)(2) of the Act.

Economic Analysis

Following the publication of the proposed revised critical habitat designation, we conducted an economic analysis to estimate the potential economic effect of the designation. The draft economic analysis (DEA; dated February 6, 2008) was made available for public review and comment from April 16, 2008, to May 16, 2008 (73 FR 20581), and from July 29, 2008, to August 13, 2008 (73 FR 43910). The Service also completed an Addendum to the Economic Analysis (dated May 21, 2008) that addressed the potential economic impacts associated with the additional 1,579 ac (639 ha) presented in the April 16, 2008 NOA. The Addendum was made available for public review and comment from July 29, 2008, to August 13, 2008 (73 FR 43910). Substantive comments and information received on the DEA and Addendum are summarized above in the ''Public Comment'' section and are incorporated into the final analysis, as appropriate. Taking any relevant new information into consideration, the Service completed a final economic analysis (FEA) (dated August 29, 2008) of the designation that updates the DEA by removing impacts that were not considered probable or likely to occur, and by adding an estimate of the costs associated solely with the designations of critical habitat for the San Bernardino kangaroo rat (incremental impacts).

The primary purpose of the economic analysis is to estimate the potential economic impacts associated with the designation of critical habitat for the San Bernardino kangaroo rat. This information is intended to assist the Secretary in making decisions about whether the benefits of excluding particular areas from the designation outweigh the benefits of including those areas in the designation. The economic analysis considers the economic efficiency effects that may result from the designation. In the case of habitat conservation, efficiency effects generally reflect the ''opportunity costs'' associated with the commitment of resources to comply with habitat protection measures (such as lost economic opportunities associated with restrictions on land use). It also addresses how potential economic impacts are likely to be distributed, including an assessment of any local or regional impacts of habitat conservation and the potential effects of conservation activities on government agencies, private businesses, and individuals. The economic analysis measures lost economic efficiency associated with residential and commercial development and public projects and activities, such as economic impacts on water management and transportation projects, Federal lands, small entities, and the energy industry. This information can be used by the Secretary to assess whether the effects of the designation might unduly burden a particular group or economic sector. Finally, the economic analysis looks retrospectively at costs that have been incurred since the date we listed the San Bernardino kangaroo rat as endangered (September 24, 1998; 63 FR 51005), and considers those costs that may occur in the years following the revised designation of critical habitat, with the timeframes for this analysis varying by activity.

The economic analysis focuses on the direct and indirect costs of the rule. However, economic impacts to land use activities can exist in the absence of critical habitat. These impacts may result from, for example, local zoning laws, State and natural resource laws, and enforceable management plans and best management practices applied by other State and Federal agencies. Economic impacts that result from these types of protections are not included in the analysis as they are considered to be part of the regulatory and policy baseline.

The economic analysis examines activities taking place both within and adjacent to the designation. It estimates impacts based on activities that are ''reasonably foreseeable'' including, but not limited to, activities that are currently authorized, permitted, or funded, or for which proposed plans are currently available to the public. Accordingly, the analysis bases estimates on activities that are likely to occur within a 20-year timeframe, from when the proposed rule became available to the public (June 19, 2007, 72 FR 33808). The 20-year timeframe was chosen for the analysis because, as the time horizon for an economic analysis is expanded, the assumptions on which the projected number of projects and cost impacts associated with those projects are based become increasingly speculative.

The economic analysis is intended to quantify the baseline and incremental economic impacts of all potential conservation efforts for the San Bernardino kangaroo rat associated with the following activities: (1) Water conservation; (2) flood control; (3) urban development; (4) sand and gravel mining; (5) agricultural activities; and (6) off-road vehicle activities. Baseline impacts include impacts associated with overlapping protections from other Federal, State, and local laws that aid

habitat conservation in the study area. In other words, those impacts associated with the listing of the species and not associated with critical habitat. Incremental impacts are those expected to occur solely because of the designation of critical habitat; these would not be expected to occur but for the designation of critical habitat. Potential incremental economic impacts are estimated over a 23-year period from 2008 through 2030 and include an overall cost of $164.4 million in present value terms using a 7 percent discount rate. No incremental economic impacts are expected in areas excluded from critical habitat under section 4(b)(2) of the Act. The impacts in areas excluded from critical habitat are all considered to be baseline impacts.

For the purposes of the economic analysis and assessing effects on development, the revised critical habitat was divided into upland and lowland areas. Lowland areas are occupied by the San Bernardino kangaroo rat year-round at high densities of individuals. Because this is such a narrow endemic subspecies found in very few locations, any loss of lowland habitat in which the functional ability of a lowland critical habitat unit was adversely modified or destroyed would also likely result in jeopardy to this narrow endemic subspecies. Therefore, any adverse modification decision for lowland habitat areas would likely be coincident to a jeopardy determination for the same action. Thus, potential economic impacts from conservation efforts that may be necessary to avoid adverse modification of critical habitat within lowland areas are considered co-extensive with the impacts of the listing of the San Bernardino kangaroo rat and, for the purposes of this analysis, are considered to be in the baseline.

The general conservation role of critical habitat within the upland habitat areas is to act as refuge for the San Bernardino kangaroo rat during flooding events that inundate the low-lying alluvial fans (i.e., the lowlands) that this subspecies usually occupies. Conservation efforts not otherwise necessary to avoid jeopardy to the San Bernardino kangaroo rat may be required in upland areas to ensure that the conservation role and function of the critical habitat unit are conserved. Therefore, incremental costs due to the designation of critical habitat may be incurred in upland areas as it is reasonable to expect that the Service may recommend avoidance and minimization efforts in upland areas designated as critical habitat (up to and including complete avoidance) specifically to avoid the destruction or adverse modification of critical habitat. Thus, impacts of conservation efforts that may result in reduced or no development in the upland areas are considered incremental impacts of critical habitat designation.

The vast majority of incremental impacts attributed to critical habitat designation are due to potential constraints on development within upland areas. The projected number of housing units in upland areas of critical habitat is 791 according to estimates using the Southern California Association of Governments forecasts. Assuming the potential constraints on development in the upland areas result in complete avoidance of these areas, total incremental impacts are projected to be approximately $44.4 million present value at a 7 percent discount rate over a 23-year period. In addition to the Southern California Association of Government forecasts, we received detailed projected housing information from the Lytle Creek Development Co. for certain upland areas in Unit 2. The Lytle Creek Development Co. projects an additional 3,962 housing units in those areas. Again assuming complete avoidance of upland areas, total additional incremental impacts are projected to be approximately $120 million present value at a 7 percent discount rate over a 23-year period. A very small portion of incremental effects are attributed to water conservation activities in upland areas, approximately $140 million annualized at a 7 percent discount rate.

In addition to projecting the incremental impacts expected to occur solely because of the designation of critical habitat, the economic analysis considers the potential economic effects of actions relating to the conservation of the San Bernardino kangaroo rat, including costs associated with sections 4, 7, 9, and 10 of the Act. It further considers the economic effects of protective measures taken as a result of other Federal, State, and local laws that aid habitat conservation for the San Bernardino kangaroo rat in areas containing features essential to the conservation of the subspecies. The FEA estimates that the potential economic effects of actions relating to the conservation of this subspecies, including costs associated with sections 4, 7, and 10 of the Act (baseline costs, not attributable to critical habitat), will be $202.7 million present value at a 7 percent discount rate over the next 23 years.

After consideration of the impacts under section 4(b)(2) of the Act, we have not excluded any areas from the final critical habitat designation based on the identified economic impacts. The final economic analysis is available at *http://www.regulations.gov* or upon request from the Carlsbad Fish and Wildlife Office (see **ADDRESSES** section).

Benefits of Designating Critical Habitat

The process of designating critical habitat as described in the Act requires that the Service identify those lands within the geographical area occupied by the species at the time of listing on which are found the physical or biological features essential to the conservation of the species that may require special management considerations or protection, and those areas outside the geographical area occupied by the species at the time of listing that are essential for the conservation of the species. In identifying those lands, the Service must consider the recovery needs of the species, such that, on the basis of the best scientific and commercial data available at the time of designation, the habitat that is identified, if managed or protected, could provide for the survival and recovery of the species.

The identification of areas that contain features essential to the conservation of the species that can, if managed or protected, provide for the recovery of a species, is beneficial. The process of proposing and finalizing a critical habitat rule provides the Service with the opportunity to determine the physical and biological features essential to the conservation of the species within the geographical area occupied by the species at the time of listing, as well as to determine other areas essential for the conservation of the species. The designation process includes peer review and public comment on the identified physical and biological features and areas. This process is valuable to land owners and managers in developing conservation management plans for identified areas, as well as any other occupied habitat or suitable habitat that may not be included in the areas the Service identifies as meeting the definition of critical habitat.

The consultation provisions under section 7(a)(2) of the Act constitute the regulatory benefits of critical habitat. As discussed above, Federal agencies must consult with the Service on actions that may affect critical habitat and must avoid destroying or adversely modifying critical habitat. Federal agencies must also consult with us on actions that may affect a listed species and refrain from undertaking actions that are likely to jeopardize the continued existence of such species. The analysis of effects to critical habitat is a separate and

different analysis from that of the effects to the species. Therefore, the difference in outcomes of these two analyses represents the regulatory benefit of critical habitat. For some species, and in some locations, the outcome of these analyses will be similar, because effects to habitat will often also result in effects to the species. However, the regulatory standard is different, as the jeopardy analysis investigates the action's impact to survival and recovery of the species, while the adverse modification analysis investigates the action's effects to the designated habitat's contribution to conservation. This will, in many instances, lead to different results and different regulatory requirements. Thus, critical habitat designations may provide greater benefits to the recovery of a species than would listing alone.

There are two limitations to the regulatory effect of critical habitat. First, a consultation is only required where there is a Federal nexus (an action authorized, funded, or carried out by any Federal agency)—if there is no Federal nexus, the critical habitat designation of private lands itself does not restrict actions that destroy or adversely modify critical habitat. Second, the designation only limits destruction or adverse modification. By its nature, the prohibition on adverse modification is designed to ensure that the conservation role and function of those areas that contain the physical and biological features essential to the conservation of the species or of unoccupied areas that are essential for the conservation of the species are not appreciably reduced. Critical habitat designation alone, however, does not require private property owners to undertake specific steps toward recovery of the species.

Once an agency determines that consultation under section 7(a)(2) of the Act is necessary, the process may conclude informally when the Service concurs in writing that the proposed Federal action is not likely to adversely affect critical habitat. However, if we determine through informal consultation that adverse impacts are likely to occur, then formal consultation is initiated. Formal consultation concludes with a biological opinion issued by the Service on whether the proposed Federal action is likely to result in destruction or adverse modification of critical habitat.

For critical habitat, a biological opinion that concludes in a determination of no destruction or adverse modification may contain discretionary conservation recommendations to minimize adverse effects to the primary constituent elements, but it would not suggest the implementation of any reasonable and prudent alternative. We suggest reasonable and prudent alternatives to the proposed Federal action only when our biological opinion results in an adverse modification conclusion.

As stated above, the designation of critical habitat does not require that any management or recovery actions take place on the lands included in the designation. Even in cases where consultation is initiated under section 7(a)(2) of the Act, the end result of consultation is to avoid jeopardy to the species and/or adverse modification of its critical habitat, but not necessarily to manage critical habitat or institute recovery actions on critical habitat. Conversely, voluntary conservation efforts implemented through management plans institute proactive actions over the lands they encompass and are put in place to remove or reduce known threats to a species or its habitat; therefore, implementing recovery actions. We believe that in many instances the regulatory benefit of critical habitat is minimal when compared to the conservation benefit that can be achieved through implementing Habitat Conservation Plans (HCPs) under section 10 of the Act or other habitat management plans. The conservation achieved through such plans is typically greater than what we achieve through multiple site-by-site, project-by-project, section 7(a)(2) consultations involving consideration of critical habitat. Management plans commit resources to implement long-term management and protection to particular habitat for at least one and possibly other listed or sensitive species. Section 7(a)(2) consultations only commit Federal agencies to preventing adverse modification of critical habitat caused by the particular project, and they are not committed to provide conservation or long-term benefits to areas not affected by the proposed action. Thus, implementation of an HCP or management plan that incorporates enhancement or recovery as the management standard may often provide as much or more benefit than a consultation for critical habitat designation.

Another benefit of including lands in critical habitat is that designation of critical habitat serves to educate landowners, State and local governments, and the public regarding the potential conservation value of an area. This helps focus and promote conservation efforts by other parties by clearly delineating areas of high conservation value for the San Bernardino kangaroo rat. In general, critical habitat designation always has educational benefits; however, in some cases, they may be redundant with other educational effects. For example, HCPs have significant public input and may largely duplicate the educational benefits of a critical habitat designation. Including lands in critical habitat also would inform State agencies and local governments about areas that could be conserved under State laws or local ordinances.

Conservation Partnerships on Non-Federal Lands

Most federally listed species in the United States will not recover without cooperation of non-Federal landowners. More than 60 percent of the United States is privately owned (National Wilderness Institute 1995, p.2), and at least 80 percent of endangered or threatened species occur either partially or solely on private lands (Crouse et al. 2002, p. 720; Stein et al. 1995, p. 400) found that only about 12 percent of listed species were found almost exclusively on Federal lands (90 to 100 percent of their known occurrences restricted to Federal lands) and that 50 percent of federally listed species are not known to occur on Federal lands at all.

Given the distribution of listed species with respect to land ownership, conservation of listed species in many parts of the United States is dependent upon working partnerships with a wide variety of entities and the voluntary cooperation of many non-Federal landowners. Building partnerships and promoting voluntary cooperation of landowners are essential to understanding the status of species on non-Federal lands, and are necessary to implement recovery actions such as reintroducing listed species, habitat restoration, and habitat protection.

Many non-Federal landowners derive satisfaction from contributing to endangered species recovery. We promote these private-sector efforts through the Department of the Interior's Cooperative Conservation philosophy. Conservation agreements with non-Federal landowners (HCPs, safe harbor agreements, other conservation agreements, easements, and State and local regulations) enhance species conservation by extending species protections beyond those available through section 7 consultations. In the past decade, we have encouraged non-Federal landowners to enter into conservation agreements, based on a view that we can achieve greater species conservation on non-Federal land through such partnerships than we can

through regulatory methods (61 FR 63854, December 2, 1996).

Many private landowners, however, are wary of the possible consequences of encouraging endangered species to their property, and there is mounting evidence that some regulatory actions by the Federal Government, while well-intentioned and required by law, can (under certain circumstances) have unintended negative consequences for the conservation of species on private lands (Wilcove et al. 1996, pp. 5–6; Bean 2002, pp. 2–3; Conner and Mathews 2002, pp. 1–2; James 2002, pp. 270–271; Koch 2002, pp. 2–3; Brook et al. 2003, pp. 1639–1643). Many landowners fear a decline in their property value due to real or perceived restrictions on land-use options where threatened or endangered species are found. Consequently, harboring endangered species is viewed by many landowners as a liability. This perception results in anti-conservation incentives because maintaining habitats that harbor endangered species represents a risk to future economic opportunities (Main et al. 1999, pp. 1264–1265; Brook et al. 2003, pp. 1644–1648).

According to some researchers, the designation of critical habitat on private lands significantly reduces the likelihood that landowners will support and carry out conservation actions (Main et al. 1999, p. 1263; Bean 2002, p. 2; Brook et al. 2003, pp. 1644–1648). The magnitude of this negative outcome is greatly amplified in situations where active management measures (such as reintroduction, fire management, and control of invasive species) are necessary for species conservation (Bean 2002, pp. 3–4). We believe that the judicious exclusion of specific areas of non-federally owned lands from critical habitat designations can contribute to species recovery and provide a superior level of conservation than critical habitat alone.

The purpose of designating critical habitat is to contribute to the conservation of threatened and endangered species and the ecosystems upon which they depend. The outcome of the designation, triggering regulatory requirements for actions funded, authorized, or carried out by Federal agencies under section 7(a)(2) of the Act, can sometimes be counterproductive to its intended purpose on non-Federal lands. Thus the benefits of excluding areas that are covered by partnerships or voluntary conservation efforts can often be high.

Benefits of Excluding Lands With HCPs or Other Approved Management Plans

The benefits of excluding lands with HCPs or other approved long-term management plans from critical habitat designation include relieving landowners, communities, and counties of any additional regulatory burden that might be imposed as a result of the critical habitat designation. Most HCPs and other conservation plans take many years to develop, and upon completion, are consistent with the recovery objectives for listed species that are covered within the plan area. Many also provide conservation benefits to unlisted sensitive species. Imposing an additional regulatory review as a result of the designation of critical habitat may undermine our efforts and partnerships as well. Our experience in implementing the Act has found that designation of critical habitat within the boundaries of management plans that provide conservation measures for a species is a disincentive to many entities that are either currently developing such plans, or contemplating doing so in the future, because one of the incentives for undertaking conservation is greater ease of permitting where listed species are affected. Addition of a new regulatory requirement would remove a significant incentive for undertaking the time and expense of management planning.

A related benefit of excluding lands covered by approved HCPs and management plans that cover listed species from critical habitat designation is the unhindered, continued ability it gives us to seek new partnerships with future plan participants, including States, counties, local jurisdictions, conservation organizations, and private landowners, which together can implement conservation actions that we would be unable to accomplish otherwise. Designating lands within approved management plan areas as critical habitat would likely have a negative effect on our ability to establish new partnerships to develop these plans, particularly plans that address landscape-level conservation of species and habitats. By excluding these lands, we preserve our current partnerships and encourage additional conservation actions in the future.

Both HCPs and Natural Communities Conservation Plan (NCCP)–HCP applications require consultation, which would review the effects of all HCP-covered activities that might adversely impact the species under a jeopardy standard, including possibly significant habitat modification, even without the critical habitat designation. Additionally, all other Federal actions that may affect the listed species still require consultation under section 7(a)(2) of the Act, and we review these actions for possibly significant habitat modification in accordance with the jeopardy standard under Section 7(a)(2).

The information provided in the previous sections applies to all the following discussions of benefits of inclusion or exclusion of critical habitat.

Application of Section 4(b)(2)—Other Relevant Impacts—Conservation Partnerships

Section 4(b)(2) of the Act allows the Secretary to exclude areas from critical habitat for other relevant impacts if he determines that the benefits of such exclusion outweigh the benefits of specifying such area as part of the critical habitat, unless he determines, based on the best scientific data available, that the failure to designate such area as critical habitat will result in the extinction of the species. As discussed above in the ''Conservation Partnerships on Non-Federal Lands'' section, we believe that designation can negatively impact the working relationships and conservation partnerships we have formed with private landowners. The Service recognizes that 80 percent of endangered or threatened species occur either partially or solely on private lands (Crouse et al. 2002) and we will only achieve recovery of federally listed species with the cooperation of private landowners.

In making the following exclusions, we evaluated the benefits of designating these non-Federal lands that may not have a Federal nexus for consultation while considering if our existing partnerships have, or will, result in greater conservation benefits to the San Bernardino kangaroo rat and the physical or biological features essential to its conservation than a critical habitat designation. As discussed in the ''Benefits of Designating Critical Habitat'' section above, conservation partnerships that result in implementation of an HCP or other management plan that considers enhancement or recovery as the management standard often provide as much or more benefit than consultation for critical habitat designation (the primary benefit of a designation).

In considering the benefits of including lands in a designation that are covered by a current HCP or other management plan, we evaluate a number of factors to help us determine if the plan provides equivalent or greater conservation benefit than would

likely result from consultation on a designation:

(1) Whether the plan is complete and provides protection from destruction or adverse modification;

(2) Whether there is a reasonable expectation that the conservation management strategies and actions will be implemented for the foreseeable future, based on past practices, written guidance, or regulations; and

(3) Whether the plan provides conservation strategies and measures consistent with currently accepted principles of conservation biology.

We balance the benefits of inclusion against the benefits of exclusion by considering the benefits of preserving partnerships and encouraging development of additional HCPs and other conservation plans in the future.

Woolly-Star Preserve Area (WSPA) Management Plans

Approximately 751 ac (304 ha) of the 765-ac (310 ha) WSPA is within proposed critical habitat Unit 1. The WSPA is within the 100- to 500-year floodplain of the upper Santa Ana River immediately downstream from the Seven Oaks Dam. The WSPA was established in 1988 by the ACOE as part of the conservation measures developed through a section 7 consultation to address impacts to the federally endangered *Eriastrum densifolium* ssp. *sanctorum* resulting from construction of the Seven Oaks Dam (Service File: 1–6–88–F–6, June 22, 1989). The San Bernardino County Flood Control District, Orange County Flood Control Division, and Riverside County Flood Control and Water Conservation District are responsible for the operation of the Seven Oaks Dam.

A management plan for *Eriastrum densifolium* ssp. *sanctorum* was prepared in coordination with the Service, California Department of Fish and Game, ACOE, and the flood control districts (Chambers Group, Inc. 1993). The 1993 Management Plan for the Santa Ana River Woolly-Star was created to be implemented on the 765-ac (310-ha) WSPA (Chambers Group, Inc. 1993, p. 2). This plant inhabits early and intermediate successional stages of alluvial fan scrub habitat, which are the preferred habitat areas for the San Bernardino kangaroo rat. The overall strategy for the management plan on WSPA lands is to avoid physical disturbances to alluvial habitat and to allow for disturbances by natural processes (Chambers Group, Inc. 1993, p. 3–1). The 1993 Management Plan for *E. d.* ssp. *sanctorum* includes a description of management tasks, which are currently being implemented, that benefit habitat for *E. d.* ssp. *sanctorum*. Implementation of the plan is carried out by the flood control districts identified above. Though not addressed directly by the plan, these management tasks benefit the San Bernardino kangaroo rat as well. These management tasks include: Identification and implementation of habitat renewal methods; control of exotic species; reduction of off-road vehicle activity, trash dumping, and other negative human impacts; and a public awareness program (Chambers Group, Inc. 1993, p. 3–2). Lands within the WSPA were placed under a conservation easement that is jointly held by the flood control districts of San Bernardino, Riverside, and Orange counties (Lovell 2007, p. 1). Since the inception of the 1993 Management Plan for the Santa Ana River Woolly-Star, ongoing biological studies and management tasks have been conducted on the WSPA to increase understanding of *E. d.* ssp. *sanctorum* habitat (alluvial scrub) and habitat renewal and to increase the quality of alluvial habitat. Studies and management tasks involve population and habitat monitoring, along with habitat renewal and population expansion of *E. d.* ssp. *sanctorum* (PSOMAS and CSUF 2004, p.1). These ongoing efforts help to ensure not only the conservation of *E. d.* ssp. *sanctorum*, but alluvial habitat in general and the native plants and animals that depend on this habitat, including the San Bernardino kangaroo rat.

The ACOE, San Bernardino County Flood Control District, Orange County Flood Control Division, and Riverside County Flood Control and Water Conservation District have committed to the development and implementation of a Multiple Species Habitat Management Plan (MSHMP) for the WSPA that will update the 1993 plan and include habitat management specifically for the San Bernardino kangaroo rat and the federally endangered *Dodecahema leptoceras* as part of the conservation measures proposed during consultation regarding the effects of operation and maintenance of the dam on *Eriastrum densifolium* ssp. *sanctorum, D. leptoceras* and the San Bernardino kangaroo rat. The goals of the draft MSHMP specific to the San Bernardino kangaroo rat include: (1) Maintenance and/or expansion of the current subspecies distribution within the WSPA; (2) optimization of habitat conditions; and (3) maintenance and/or enhancement of populations of the San Bernardino kangaroo rat within the WSPA.

General objectives of the MSHMP in support of the San Bernardino kangaroo rat management goals are to (1) monitor the San Bernardino kangaroo rat and relevant habitat elements according to standardized protocols; (2) conduct studies to fill gaps in knowledge related to subspecies biology and habitat; (3) measure San Bernardino kangaroo rat response to experimental habitat treatments and potential management measures; (4) establish priority of areas for implementation of habitat management to maintain or enhance suitability for the subspecies; and (5) refine management measures over time using an adaptive management framework. Information gathered through the implementation of the MSHMP will be used to support science-based management decisions and evaluation of management success. Various potential management alternatives may be implemented such as protective management, disturbance control, nonnative grass control, habitat enhancement and restoration, and habitat renewal. The management of this area is anticipated to help to maintain and protect alluvial wash and upland habitat (PCEs 1, 2, and 3) required by the San Bernardino kangaroo rat. The MSHMP is currently in draft form and will replace the 1993 management plan. The MSHMP will be reviewed by the resource agencies for their concurrence prior to implementation (Service 2002b, p. 8). The ACOE, San Bernardino County Flood Control District, Orange County Flood Control Division, and Riverside County Flood Control and Water Conservation District are responsible for the development and implementation of the MSHMP.

Protocol surveys (live-trapping) conducted during 2005 and 2006 confirm that portions of the WSPA are currently occupied by the San Bernardino kangaroo rat (Service, unpublished Geographic Information System data), and habitat surveys suggest that much of this area is likely to support the San Bernardino kangaroo rat (MEC Analytical Systems, Inc. 2000, fig. 24). Ongoing surveys and habitat management to benefit the San Bernardino kangaroo rat are anticipated as part of the MSHMP currently in development. The Service is working with the ACOE and their biological consultants on baseline subspecies surveys and trials of habitat manipulations, and management practices followed by trapping surveys to show both density and distribution of the San Bernardino kangaroo rat within the WSPA. These actions are being undertaken as part of the development of a final MSHMP.

The 1998 final listing rule for the San Bernardino kangaroo rat identified habitat loss, destruction, degradation, and fragmentation due to sand and gravel mining operations, flood control projects, and urban development as primary threats to the San Bernardino kangaroo rat. As described above, the WSPA Management Plans have provided and will continue to provide enhancement of the habitat by removing or reducing threats to this subspecies and the PCEs. The WSPA Management Plans preserve habitat that supports identified core populations of this subspecies and, therefore, provide for recovery.

In the 1998 final listing rule, we discussed that the area set aside by the ACOE as mitigation (i.e., the WSPA) for the then proposed Seven Oaks Dam project was not adequate to conserve this subspecies. We stated that the conserved area only represents approximately 4 percent of the alluvial scrub in the area. We also stated in the listing rule that the majority of the conserved habitat will no longer receive the hydrological scouring considered necessary to maintain alluvial scrub habitat. Although this may be true of the Santa Ana River, Mill Creek is not impeded by dams and is the primary source of sediment and alluvial processes to this area. The primary objective of the existing WSPA and the additional conservation measures outlined in the Biological Assessment for the Seven Oaks Dam, Santa Ana River Mainstem Project (August 2000) is to compensate for potential changes in floodplain characteristics and listed species' (including the San Bernardino kangaroo rat) habitat brought about by construction and operation of Seven Oaks Dam (Service 2002b, p. 7). These WSPA lands are currently designated as critical habitat. For these reasons, we determined that the WSPA is important to the subspecies and the associated management plans adequately conserve habitat for the San Bernardino kangaroo rat. Based on the reasoning provided below, we excluded from Unit 1 the approximately 751 ac (304 ha) of non-Federal lands within the WSPA Management Plans area from the final revised critical habitat designation under section 4(b)(2) of the Act.

Benefits of Inclusion—Woolly-Star Preserve Area (WSPA) Management Plans

The inclusion of approximately 751 ac (304 ha) of WSPA lands in the revised critical habitat designation could be beneficial because it identifies lands to be managed for the conservation of the San Bernardino kangaroo rat. The process of proposing and finalizing the revised critical habitat rule provided the Service with the opportunity to evaluate and refine the features or PCEs essential to the conservation of the subspecies within the geographical area occupied by the San Bernardino kangaroo rat at the time of listing, as well as to evaluate whether there are other areas essential for the conservation of the subspecies. The designation process included peer review and public comment on the identified features and areas. This process is valuable to land owners and managers in developing conservation management plans for identified areas, as well as any other occupied habitat or suitable habitat that may not have been included in the Service's determination of essential habitat. However, identification of important habitat and habitat features for the San Bernardino kangaroo rat within the area covered by the WSPA Management Plans and efforts to conserve the subspecies and its habitat were initiated prior to the proposed revised critical habitat rule and will continue into the future.

The educational benefits of designation are small and largely redundant to those derived through conservation efforts currently being planned and implemented in the WSPA. The process of developing the WSPA Management Plans has involved several partners including (but not limited to) flood control districts of San Bernardino, Riverside, and Orange counties, California Department of Fish and Game, ACOE, and the Service.

The educational benefits of critical habitat designation derived through informing WSPA partners and other members of the public of areas important for the long-term conservation of this subspecies have already been and continue to be achieved through: (1) Development of the WSPA Management Plans; (2) the original designation process in 2002; and (3) publication of the proposed revisions to critical habitat in 2008, notices of public comment periods, and the public hearings.

The consultation provisions under section 7(a) of the Act constitute the regulatory benefits of inclusion for critical habitat. As discussed above, Federal agencies must consult with us on actions that may affect critical habitat and must avoid destroying or adversely modifying critical habitat. All of the approximately 751 ac (304 ha) of WSPA lands in Unit 1 that are being excluded are on private property, with the potential Federal nexus for the San Bernardino kangaroo rat as a result of actions by the ACOE associated with the Santa Ana River in the area. Therefore, including this area would provide some regulatory benefits under section 7(a) of the Act.

However, the WSPA Management Plans address conservation issues from a coordinated, integrated perspective rather than a piecemeal project-by-project approach that could result in this area absent these plans, and the plans will achieve more San Bernardino kangaroo rat conservation than would be achieved through such multiple site-by-site, project-by-project, section 7 consultations involving consideration of critical habitat. Furthermore, the WSPA Management Plans include proactive monitoring and management of conserved lands (as previously described), thereby reducing known threats to the San Bernardino kangaroo rat and its habitat. These measures provide assurance that the features essential to the conservation of the San Bernardino kangaroo rat within the WSPA will be permanently protected and managed to conserve this subspecies. In light of the conserved status of the lands and the potential piecemeal project-by-project approach for future section 7 consultations on these lands, we conclude that the potential regulatory benefit of designating this area as critical habitat is minimal. The WSPA Management Plans provide as much or more benefit than a consultation for critical habitat designation conducted under the standards required by the Ninth Circuit in the *Gifford Pinchot* decision.

Benefits of Exclusion—Woolly-Star Preserve Area (WSPA) Management Plans

Multi-jurisdiction management plans (such as the 1993 WSPA Management Plan and the draft MSHMP that is being developed) foster an ecosystem-based approach for habitat conservation planning purposes. Once such an ecosystem-based management plan is developed (similar to the HCP conservation planning process), conservation issues can be addressed through a coordinated approach. Coordinating landscape-scale conservation with the flood control districts and the ACOE will assist in the preservation of interconnected linkage areas and populations that support recovery of the subspecies. We believe that the benefits of excluding lands under the scenario described above are: (1) Retaining and fostering the existing partnership and working relationship with all stakeholders; and (2) encouraging future regional habitat management plans or HCP development or development of other species/habitat

conservation plans. Additionally, exclusion of the existing WSPA (which is being incorporated into the draft MSHMP) demonstrates our good faith effort to work productively with non-Federal entities, which should encourage initiation and completion of other multi-jurisdiction management plans. Designation of lands covered by the WSPA Management Plan may discourage other landowners or flood control districts from seeking or completing similar conservation efforts.

We developed a working relationship with the San Bernardino County Flood Control District, Orange County Flood Control Division, and Riverside County Flood Control and Water Conservation District through the development of the 1993 WSPA Management Plan and the draft MSHMP that is being developed, which incorporates appropriate protections and management for the San Bernardino kangaroo rat, its habitat, and the features essential to the conservation of this subspecies. By excluding 751 ac (304 ha) of lands in Unit 1 from designation, we are eliminating an essentially redundant layer of regulatory review for projects covered by the WSPA Management Plans, enhancing our working relationship with the flood control districts, and encouraging new partnerships with other water districts, landowners, and jurisdictions. We believe these partnerships are critical for the conservation of the San Bernardino kangaroo rat.

The Benefits of Exclusion Outweigh the Benefits of Inclusion—Woolly-Star Preserve Area (WSPA) Management Plans

We reviewed and evaluated the proposed designation of essential habitat in the WSPA and determined that the benefits of excluding critical habitat on 751 ac (304 ha) of land in the WSPA outweigh the benefits of designating these lands as critical habitat. This area is protected by a conservation easement jointly held by the flood control districts of San Bernardino, Riverside, and Orange counties. Because these lands are part of an established conservation easement, they are protected and include permanent management that is funded by an endowment. These measures provide assurance that the features essential to the conservation of the San Bernardino kangaroo rat at the WSPA will be permanently protected and managed to conserve this subspecies.

As discussed in the ''Benefits of Exclusion'' section above, we developed a close working relationship with the participating flood control districts responsible for the WSPA Management Plans through the development of those plans, which incorporate appropriate protections and management of this subspecies' essential physical and biological features. Those protections are consistent with the mandates under section 7 of the Act to avoid destruction or adverse modification of critical habitat and go beyond that prohibition by including active management and protection of essential habitat areas. Designation of critical habitat alone does not achieve recovery or require management of those lands identified in the critical habitat rule. We believe that the recovery benefits of excluding the WSPA lands and implementing the WSPA Management Plans outweigh the recovery benefits of retaining these lands as critical habitat. Furthermore, the benefits to recovery of inclusion primarily have already been met through the identification of those areas most important to the subspecies. By excluding these lands from designation, we are eliminating a largely redundant layer of regulatory review for a limited set of projects on non-Federal lands that are addressed by the management plans, and we are helping to preserve our ongoing partnership with the WSPA Management Plan participants and encourage new partnerships with other landowners and jurisdictions. The minimal educational and potential regulatory benefits of including the WSPA lands in critical habitat are small when compared to the impact such a designation could have on our current and future partnerships. These partnerships are integral to achieving long-term conservation of the San Bernardino kangaroo rat. Designating critical habitat on non-Federal lands within areas covered by the WSPA Management Plans could have a detrimental effect to our partnership with the plan participants and could be a significant disincentive to the establishment of future partnerships and management plans with other partners.

We reviewed and evaluated the exclusion of the approximately 751 ac (304 ha) of non-Federal lands in Unit 1 covered by the WSPA Management Plans from the final revised critical habitat designation for the San Bernardino kangaroo rat and determined that the benefits of excluding these lands outweigh the benefits of including them. As discussed above, the WSPA Management Plans will provide for significant preservation and management of the physical and biological features essential to the conservation of the San Bernardino kangaroo rat and will help reach the recovery goals for this subspecies.

Exclusion Will Not Result in Extinction of the Subspecies—Woolly-Star Preserve Area (WSPA) Management Plans

We determined that the exclusion of the non-Federal lands within the area covered by the WSPA Management Plans from the final revised designation of critical habitat for the San Bernardino kangaroo rat will not result in the extinction of the subspecies. The WSPA Management Plans provide protection and management in perpetuity of lands within Unit 1, including the physical and biological features essential to the conservation of the San Bernardino kangaroo rat. Additionally, the jeopardy standard of section 7 of the Act and routine implementation of conservation measures through the section 7 process provide assurances that the subspecies will not go extinct as a result of this exclusion.

Former Norton Air Force Base Conservation Management Plan (CMP)

The Norton Air Force Base in Unit 1 was formally transferred to private ownership in 2003. Prior to closure, the U.S. Air Force completed installation remediation that included the closure of an area known as ''Landfill 2.'' In accordance with conservation measures outlined in our November 26, 1996, biological opinion (1–6–96–F–10) on the closure of Landfill 2, the U.S. Air Force developed a management plan (the Former Norton Air Force Base CMP, completed in 2002) for approximately 267 ac (108 ha) of habitat occupied by the San Bernardino kangaroo rat in the Santa Ana River wash area (Unit 1). Approximately 54 ac (22 ha) in two parcels were designated Core Management Areas (CMA–1 and CMA–2), and 214 ac (87 ha) comprise an Open Space Management Area (OSMA). Under the CMP completed in March 2002, these areas are managed specifically for the San Bernardino kangaroo rat and *Eriastrum densifolium* ssp. *sanctorum* (U.S. Air Force 2002, pp. 1–4).

CMA–1 (approximately 29 ac (12 ha)) and CMA–2 (approximately 25 ac (10 ha)) are located along the southern edge of the OSMA. CMA–1 includes both floodplain habitat on the 'wet' side of an existing flood control levee and fenced upland habitat behind the levee along the northern edge of the Santa Ana River. CMA–2 is located entirely within the Santa Ana River floodplain. Approximately 13 ac (5 ha) of CMA–2 are owned by the Inland Valley Development Agency and the remainder of the CMA lands and the OSMA are owned by the San Bernardino International Airport Authority (SBIA

Authority). These areas provide important upland habitat that supports individual San Bernardino kangaroo rats necessary to re-populate the active floodplain following large-scale floods that scour out lower-elevation terrace habitat adjacent to the active river channel (Service 2003b, p. 18) (PCE 3). Lands within these CMAs are to be permanently protected by conservation easements (U.S. Air Force 2002, p. 5–11). The CMAs are adjacent to the approximately 214-acre (87-hectare) OSMA that surrounds the existing runway of the SBIA.

The OSMA is an aircraft over-run area that is managed in accordance with Federal Aviation Administration (FAA) guidelines for such lands. However, the SBIA Authority manages the OSMA in such as a way as to minimize adverse impacts to the San Bernardino kangaroo rat as described in the CMP and our biological opinion issued for the base closure (FWS–SB–1723.10, August 5, 2003). The 214-acre (87-hectare) OSMA is in the immediate vicinity of the eastern runway, and safety regulations require that most of this land remain undeveloped (U.S. Air Force 2002, p. 5–5). The OSMA is protected from flooding by levees, but routine mowing required by the FAA keeps vegetation from becoming dense and senescent, which creates open habitat that may be suitable for San Bernardino kangaroo rats (Service 2003b, p. 17). No disking or other ground disturbance is allowed within the OSMA area and implementation of the prescribed mowing regime is unlikely to result in crushing of San Bernardino kangaroo rat burrows (Service 2003b, p. 18).

Upon closure of the Former Norton Air Force Base in 2003, the SBIA Authority and the Inland Valley Development Agency assumed responsibility for the management of the CMAs pursuant to the CMP (Service 2003b, p. 6). Management practices currently conducted on SBIA Authority and Inland Valley Development Agency property are described in the CMP and include (1) subspecies monitoring every 2 to 3 years following the Service-approved protocol, (2) vegetation surveys and adaptive control of invasive weedy plants, (3) trash removal, and (4) installation of protective signage and maintenance of barriers to reduce and prevent trespassing (U.S. Air Force 2002, pp. 5–11). In accordance with the CMP, the SBIA Authority provides us with annual reports regarding the status of the CMP and OSMA (documents on file at the Carlsbad Fish and Wildlife Office). The SBIA Authority routinely removes exotic or weedy plant species within the CMAs, controls coyote access to fenced portions of CMA–1 and the OSMA, which reduces predation on the San Bernardino kangaroo rat in these areas, removes all dumped trash as soon as possible in accordance with the CMP and FAA guidelines, and promptly addresses any trespass issues as needed (e.g., fence and sign repairs). Human activities incompatible with the purpose of the CMAs are restricted (U.S. Air Force 2002, pp. 5–12). These management actions and the eventual placement of a conservation easement on the CMA parcels are anticipated to ensure that habitat containing the PCEs for the San Bernardino kangaroo rat is conserved within the CMAs and the OSMA through the protection and management of alluvial washes and upland habitat (PCEs 1, 2, and 3) required by the subspecies.

The 1998 final listing rule for the San Bernardino kangaroo rat identified the following primary threats to the San Bernardino kangaroo rat: habitat loss, destruction, degradation, and fragmentation due to sand and gravel mining operations; flood control projects; and urban development. As described above, the Former Norton Air Force Base CMP provides enhancement of the habitat by removing or reducing threats to this subspecies and the PCEs. The CMP preserves habitat that supports identified core populations of this subspecies and therefore provides for recovery. Based on the reasoning provided below, we excluded from Unit 1 the approximately 267 ac (108 ha) of non-Federal lands within the Former Norton Air Force Base CMP area from the final revised critical habitat designation under section 4(b)(2) of the Act.

Benefits of Inclusion—Former Norton Air Force Base Conservation Management Plan (CMP)

The inclusion of approximately 267 ac (108 ha) of non-Federal lands within CMA–1 and CMA–2 (of the Former Norton Air Force Base) in the revised critical habitat designation could be beneficial because it identifies lands to be managed for the conservation of the San Bernardino kangaroo rat. The process of proposing and finalizing the revised critical habitat rule provided the Service with the opportunity to evaluate and refine the features or PCEs essential to the conservation of the subspecies within the geographical area occupied by the San Bernardino kangaroo rat at the time of listing, as well as to evaluate whether there are other areas essential for the conservation of the subspecies. The designation process included peer review and public comment on the identified features and areas. This process is valuable to land owners and managers in developing conservation management plans for identified areas, as well as any other occupied habitat or suitable habitat that may not have been included in the Service's determination of essential habitat.

The educational benefits of designation are small and largely redundant to those derived through conservation efforts currently being implemented in the approximately 267 ac (108 ha) of lands within CMA–1 and CMA–2. The process of developing the CMP has involved several partners including (but not limited to) the U.S. Air Force, SBIA Authority, Inland Valley Development Agency, and the Service.

The educational benefits of critical habitat designation derived through informing our partners and other members of the public of areas important for the long-term conservation of the San Bernardino kangaroo rat have already been and continue to be achieved through: (1) Development and implementation of the CMP; (2) the original designation process in 2002; and (3) publication of the proposed revisions to critical habitat in 2008, notices of public comment periods, and the public hearings.

The consultation provisions under section 7(a) of the Act constitute the regulatory benefits of inclusion for critical habitat. As discussed above, Federal agencies must consult with us on actions that may affect critical habitat and must avoid destroying or adversely modifying critical habitat. All of the approximately 267 ac (108 ha) of CMA–1 and CMA–2 lands in Unit 1 that are being excluded are on private property, with the potential Federal nexus for the San Bernardino kangaroo rat as a result of actions by the ACOE associated with Santa Ana River in the area or actions by the Federal Aviation Administration. Therefore, including this area would provide some regulatory benefits under section 7(a) of the Act.

However, the Former Norton Air Force Base CMP addresses conservation issues from a coordinated, integrated perspective rather than a piecemeal project-by-project approach that could result in this area absent this plan, and will achieve more San Bernardino kangaroo rat conservation than would be achieved through such multiple site-by-site, project-by-project, section 7 consultations involving consideration of critical habitat. The permanent conservation of these lands (i.e., conservation easement) is currently in progress. Furthermore, the CMP includes proactive monitoring and management of conserved lands (as

previously described), thereby reducing known threats to the San Bernardino kangaroo rat and its habitat. These measures provide assurance that the features essential to the conservation of the San Bernardino kangaroo rat within the CMAs will be protected and managed to conserve this subspecies. In light of the progress made to establish conservation easements on these lands and the potential piecemeal project-by-project approach for future section 7 consultations that may occur on these lands, we conclude that the potential regulatory benefit of designating this area as critical habitat is minimal. The CMP provides as much or more benefit than a consultation for critical habitat designation conducted under the standards required by the Ninth Circuit in the *Gifford Pinchot* decision.

Benefits of Exclusion—Former Norton Air Force Base Conservation Management Plan (CMP)

The exclusion of the Former Norton Air Force Base CMP lands from critical habitat will help preserve and foster the partnerships that we developed with the Inland Valley Development Agency and SBIA Authority, and aid in encouraging other landowners to participate in conservation planning. Excluding the existing CMP lands demonstrates our good faith effort to work productively with non-Federal entities, which should encourage initiation and completion of conservation plans. As discussed above, many landowners and local jurisdictions perceive critical habitat being designated on lands covered by existing conservation plans as an unfair and unnecessary regulatory burden given the expense and time involved in developing and implementing conservation plans such as the CMP. The exclusion of this area signals to other private landowners that if they take steps to put their lands into conservation, they may avoid an additional layer of regulation, which, as we described above in the ''Conservation Partnerships on Non-Federal Lands'' section, sometimes acts as a disincentive for private landowners. Therefore, designation of lands covered by the CMP participants may discourage other landowners from seeking or completing similar conservation efforts. We believe that fostering these types of partnerships with non-Federal landowners are critical for the conservation of the San Bernardino kangaroo rat.

The Benefits of Exclusion Outweigh the Benefits of Inclusion—Former Norton Air Force Base Conservation Management Plan (CMP)

As discussed in the ''Benefits of Inclusion'' section, we believe that the regulatory benefit of designating critical habitat on private lands covered by the Former Norton Air Force Base CMP would be low. The CMP addresses conservation issues from a coordinated, integrated perspective rather than a piecemeal project-by-project approach and will achieve more San Bernardino kangaroo rat conservation than would be achieved through multiple site-by-site, project-by-project, section 7 consultations involving consideration of critical habitat. Furthermore, the CMP provides for the proactive monitoring and management of conserved lands (as previously described), reducing known threats to the San Bernardino kangaroo rat and its habitat.

Conservation and management of San Bernardino kangaroo rat habitat is essential to the survival and recovery of this subspecies. Such conservation needs are typically not addressed through the application of the statutory prohibition on destruction or adverse modification of critical habitat. The CMP provides as much or more benefit than a consultation for critical habitat designation conducted under the standards required by the Ninth Circuit in the *Gifford Pinchot* decision. Furthermore, educational benefits that may be derived from a critical habitat designation are minimal and largely redundant to the educational benefits achieved through significant State and local government input during the development of this management plan.

We developed a close partnership with the CMP participants through the development of this management plan that incorporates appropriate protections and management of this subspecies' essential physical and biological features. Those protections are consistent with the mandates under section 7 of the Act to avoid destruction or adverse modification of critical habitat and go beyond that prohibition by including active management and protection of essential habitat areas. Designation of critical habitat alone does not achieve recovery or require management of those lands identified in the critical habitat rule. We believe the recovery benefits of excluding the former Norton Air Force Base conservation lands and implementing the CMP outweigh the recovery benefits of retaining these lands as critical habitat. Furthermore, the benefits to recovery of inclusion primarily have already been met through the identification of those areas most important to the subspecies. The minimal educational and potential regulatory benefits of including the Former Norton Air Force Base lands in critical habitat are small when compared to the impact such a designation could have on our current and future partnerships. By excluding these lands from designation, we are eliminating a largely redundant layer of regulatory review for a limited set of projects on non-Federal lands that are addressed by the management plan, and we are helping to preserve our ongoing partnership with the CMP participants and to encourage new partnerships with other landowners and jurisdictions. These partnerships are critical for the conservation of the San Bernardino kangaroo rat. Designating critical habitat on non-Federal lands within areas covered by the CMP area could have a detrimental effect to our partnership with the plan participants and could be a significant disincentive to the establishment of future partnerships and management plans with other partners.

We reviewed and evaluated the exclusion of approximately 267 ac (108 ha) of non-Federal lands in Unit 1 from the designation of final revised critical habitat for the San Bernardino kangaroo rat and determined that the benefits of excluding these lands outweigh the benefits of including them. As discussed above, the CMP will provide for significant preservation and management of the physical and biological features essential to the conservation of the San Bernardino kangaroo rat and will help reach the recovery goals for this subspecies.

Exclusion Will Not Result in Extinction of the Subspecies—Former Norton Air Force Base Conservation Management Plan (CMP)

We determined that the exclusion of the non-Federal lands within the area covered by the CMP from the final revised designation of critical habitat for the San Bernardino kangaroo rat will not result in the extinction of the subspecies. The CMP provides protection and management, in perpetuity of lands within Unit 1, including the physical and biological features essential to the conservation of the San Bernardino kangaroo rat. Additionally, the jeopardy standard of section 7 of the Act and routine implementation of conservation measures through the section 7 process provide assurances that the subspecies will not go extinct as a result of this exclusion.

Cajon Creek Habitat Conservation Management Area, Habitat Enhancement and Management Plan (Cajon Creek HCMA HEMP)

The Cajon Creek HCMA, managed by Vulcan Materials Co. (formerly CalMat Co.), Western Division, was created in 1996 to offset approximately 2,270 ac (919 ha) of sand and gravel mining proposed within and adjacent to Cajon Creek. According to the HEMP for the HCMA and the associated Memorandum of Understanding and Implementation Agreement for the Cajon Creek Habitat Management Area (MOU), the HCMA includes approximately 1,378 ac (558 ha) of lands in Unit 2, which are managed to protect or restore alluvial scrub habitat within the 100-year floodplain to help conserve populations of 24 species associated with alluvial fan scrub, including the San Bernardino kangaroo rat. Pioneer, intermediate, and mature phase alluvial scrub habitats can be found in the Cajon Creek HCMA, along with all three of the PCEs required by the San Bernardino kangaroo rat (M. Blane and Associates 1996, p. 11). Recent surveys of the HCMA conducted by Vulcan Materials Co. have established that the original survey data was inaccurate and the actual size of the HCMA is 1,265 ac (512 ha), not 1,378 ac (558 ha), made up of 698 ac (282 ha) of conservation lands and a 567 ac (229 ha) conservation bank.

Of the HCMA lands, 698 ac (282 ha) were set aside to offset impacts from the proposed mining to alluvial fan sage scrub habitat and associated listed species including the San Bernardino kangaroo rat (Service 1998b, p. 2), and the 567 ac (229 ha) Cajon Creek Conservation Bank was established. These lands will be conserved and managed in perpetuity for alluvial fan scrub habitat and associated listed species (including the San Bernardino kangaroo rat) pursuant to the HEMP completed in July 1996, and the associated MOU signed on October 21, 1996 (Service 1998b, p. 2). The lands set aside to offset mining impacts were placed under a permanent conservation easement. The approximately 567 ac (229 ha) Cajon Creek Conservation Bank was placed under a 10-year conservation easement on February 16, 1998. The original intent of the Service, ACOE, and Vulcan Materials Co. was to place those lands within the bank under permanent conservation easement once all credits had been sold. The MOU addressing the permanent conservation of the Cajon Creek Conservation Bank and the conservation easement were recently extended by Vulcan Materials Co. until 2025 (Vulcan Materials Company 2006, p. 1). More than half of the total credits available within the Cajon Creek Conservation Bank have been sold (M. Blane and Associates 2006, p. 5). Those credits not purchased by the end of the term will be available for purchase by the resource agencies (i.e., Service and California Department of Fish and Game).

Habitat protection and enhancement measures are explained in the HEMP (M. Blane and Associates 1996, p. 21). Habitat protection measures are used to minimize unauthorized human intrusion and impacts associated with such intrusion (M. Blane and Associates 1996, p. 21). More specifically, protection measures involve restricted access to the HCMA to minimize off-road vehicle use, target shooting, trash dumping, and other activities that result in degradation of natural areas (M. Blane and Associates 1996, p. 25). Restrictive barriers and signage are placed along borders and near access points. Removal of unnecessary roads and subsequent revegetation of those roads further discourage unauthorized access (M. Blane and Associates 1996, p. 28). Furthermore, trash existing on HCMA lands and adjacent lands within San Bernardino County Flood Control property is removed as stated in the HEMP (M. Blane and Associates 1996, p. 28). Habitat enhancement measures are intended to restore the biological integrity of degraded alluvial scrub habitat and associated plant and animal species (including the San Bernardino kangaroo rat) within the HCMA and to protect it from further degradation (M. Blane and Associates 1996, p. 21). Specifically, habitat enhancement includes weed control involving removal of exotic plants on HCMA lands and adjacent lands and alluvial scrub revegetation activities as described in the HEMP (M. Blane and Associates 1996, p. 22). The above protection and enhancement measures ensure that alluvial fans, washes, and associated upland habitat (PCEs 1, 2, and 3) required by this subspecies are conserved.

The Cajon Creek HCMA has been and continues to be managed in accordance with the HEMP and MOU by Vulcan Materials Company, which provides us with an annual report of management activities within the HCMA. Plan implementation has resulted in revegetation of previously mined areas, trash removal and overall decrease in trash dumping, placement of signage and barriers in areas vulnerable to unauthorized access, and successful invasive weed eradication (M. Blane and Associates 2006, p. 12). The continued implementation of the Cajon Creek HCMA HEMP will ensure the long-term conservation of habitat for the San Bernardino kangaroo rat.

The 1998 final listing rule for the San Bernardino kangaroo rat identified the following primary threats to the San Bernardino kangaroo rat: habitat loss, destruction, degradation, and fragmentation due to sand and gravel mining operations; flood control projects; and urban development. As described above, the Cajon Creek Habitat Conservation Management Area HEMP provides enhancement of the habitat by removing or reducing threats to this subspecies and the PCEs. The HEMP preserves habitat that supports identified core populations of this subspecies and therefore provides for recovery. Based on the reasoning provided below, we excluded from Unit 2 the approximately 1,265 ac (512 ha) of non-Federal lands within the Cajon Creek HCMA from the San Bernardino kangaroo rat final revised critical habitat designation under section 4(b)(2) of the Act.

Benefits of Inclusion—Cajon Creek HCMA HEMP

The inclusion of approximately 1,265 ac (512 ha) of non-Federal lands within the Cajon Creek HCMA in the revised critical habitat designation could be beneficial because it identifies lands to be managed for the conservation of the San Bernardino kangaroo rat. The process of proposing and finalizing the revised critical habitat rule provided the Service with the opportunity to evaluate and refine the features or PCEs essential to conservation of the subspecies within the geographical area occupied by the San Bernardino kangaroo rat at the time of listing, as well as to evaluate whether there are other areas essential for the conservation of the subspecies. The designation process included peer review and public comment on the identified features and areas. This process is valuable to land owners and managers in developing conservation management plans for identified areas, as well as any other occupied habitat or suitable habitat that may not have been included in the Service's determination of essential habitat.

The educational benefits of designation are small and largely redundant to those derived through conservation efforts currently being implemented in the approximately 1,378 ac (558 ha) of lands within the Cajon Creek HCMA and as a result of the development of the conservation easement and the involvement of the public and local government representatives in the day-to-day operation of the bank. The process of

developing the HEMP has involved several partners including (but not limited to) CalMat Co., California Department of Fish and Game, ACOE, and the Service.

The educational benefits of critical habitat designation derived through informing our partners and other members of the public of areas important for the long-term conservation of the San Bernardino kangaroo rat have already been and continue to be achieved through: (1) Development and implementation of the HEMP; (2) the original designation process in 2002; and (3) publication of the proposed revisions to critical habitat in 2008, notices of public comment periods, and the public hearings.

The consultation provisions under section 7(a) of the Act constitute the regulatory benefits of inclusion for critical habitat. As discussed above, Federal agencies must consult with us on actions that may affect critical habitat and must avoid destroying or adversely modifying critical habitat. All of the approximately 1,265 ac (512 ha) of HCMA lands in Unit 2 that are being excluded are on private property, with the potential Federal nexus for the San Bernardino kangaroo rat as a result of actions by ACOE. Therefore, including this area would provide some regulatory benefits under section 7(a) of the Act.

However, the Cajon Creek HCMA HEMP and associated MOU provides for the conservation and management of the identified lands. The permanent conservation of these lands (i.e., conservation easement) is currently in progress. The HEMP addresses conservation issues from a coordinated, integrated perspective rather than a piecemeal project-by-project approach that could result in this area absent this plan, and will achieve more San Bernardino kangaroo rat conservation than would be achieved through such multiple site-by-site, project-by-project, section 7 consultations involving consideration of critical habitat. Furthermore, the HEMP includes proactive monitoring and management of conserved lands (as previously described), thereby reducing known threats to the San Bernardino kangaroo rat and its habitat. These measures provide assurance that the features essential to the conservation of the San Bernardino kangaroo rat within the Cajon Creek HCMA will be protected and managed to conserve this subspecies. In light of the progress made to establish conservation easements on these lands and the potential piecemeal project-by-project approach for future section 7 consultations that may occur on these lands, we conclude that the potential regulatory benefit of designating this area as critical habitat is minimal. The HEMP provides as much or more benefit than a consultation for critical habitat designation conducted under the standards required by the Ninth Circuit in the *Gifford Pinchot* decision.

Benefits of Exclusion—Cajon Creek HCMA HEMP

The Cajon Creek HCMA HEMP provides for conservation bank lands in a coordinated, integrated manner. The protection and active management of San Bernardino kangaroo rat and its essential habitat features on HCMA lands conserved the subspecies at this site and directly contributes to the survival and recovery of this species.

The exclusion of the Cajon Creek HCMA lands from critical habitat will help preserve and foster the partnerships that we developed with Vulcan Materials Co., and the California Department of Fish and Game, and aid in encouraging other landowners to participate in conservation planning. Excluding the existing Cajon Creek HCMA lands demonstrates our good faith effort to work productively with non-Federal entities, which should encourage initiation and completion of conservation plans. As discussed above, many landowners and local jurisdictions perceive critical habitat being designated on lands covered by existing conservation plans as an unfair and unnecessary regulatory burden given the expense and time involved in developing and implementing conservation plans such as the Cajon Creek HCMA HEMP. The exclusion of this area signals to other private landowners that if they take steps to put their lands into conservation, they may avoid an additional layer of regulation, which, as we described above in the ''Conservation Partnerships on Non-Federal Lands'' section, sometimes acts as a disincentive for private landowners. Therefore, designation of lands covered by the HEMP may discourage other landowners from seeking or completing similar conservation efforts. We believe that fostering these types of partnerships with non-Federal landowners are critical for the conservation of the San Bernardino kangaroo rat.

Benefits of Exclusion Outweigh the Benefits of Inclusion—Cajon Creek HCMA HEMP

As discussed in the ''Benefits of Inclusion'' section, we believe the regulatory benefit of designating critical habitat on private lands covered by the Cajon Creek HCMA HEMP would be low. The Cajon Creek HCMA HEMP addresses conservation issues from a coordinated, integrated perspective rather than a piecemeal project-by-project approach and will achieve more San Bernardino kangaroo rat conservation than would be achieved through multiple site-by-site, project-by-project, section 7 consultations involving consideration of critical habitat. Furthermore, the Cajon Creek HCMA HEMP provides for the proactive monitoring and management of conserved lands (as previously described), reducing known threats to the San Bernardino kangaroo rat or its habitat.

Conservation and management of San Bernardino kangaroo rat habitat is essential to the survival and recovery of this subspecies. Such conservation needs are typically not addressed through the application of the statutory prohibition on destruction or adverse modification of critical habitat. The Cajon Creek HCMA HEMP provides as much or more benefit than a consultation for critical habitat designation conducted under the standards required by the Ninth Circuit in the *Gifford Pinchot* decision. Furthermore, educational benefits that may be derived from a critical habitat designation are minimal and largely redundant to the educational benefits achieved through significant State and local government input during the development of this management plan.

We developed a close partnership with the Cajon Creek HCMA HEMP participants through the development of this management plan that incorporates appropriate protections and management of this subspecies' essential physical and biological features. Those protections are consistent with the mandates under section 7 of the Act to avoid destruction or adverse modification of critical habitat and go beyond that prohibition by including active management and protection of essential habitat areas. Designation of critical habitat alone does not achieve recovery or require management of those lands identified in the critical habitat rule. We believe the recovery benefits of excluding the Cajon Creek HCMA lands and implementing the HEMP outweigh the recovery benefits of retaining these lands as critical habitat. Furthermore, the benefits to recovery of inclusion primarily have already been met through the identification of those areas most important to the subspecies. The minimal educational and potential regulatory benefits of including the Cajon Creek HCMA lands in critical habitat are small when compared to the impact such a designation could have

on our current and future partnerships. By excluding these lands from designation, we are eliminating a largely redundant layer of regulatory review for a limited set of projects on non-Federal lands that are addressed by the management plan and we are helping to preserve our ongoing partnership with the Cajon Creek HCMA HEMP participants and to encourage new partnerships with other landowners and jurisdictions. Those partnerships are critical for the conservation of the San Bernardino kangaroo rat. Designating critical habitat on non-Federal lands within areas covered by the Cajon Creek HCMA HEMP could have a detrimental effect to our partnership with the plan participants and could be a significant disincentive to the establishment of future partnerships and management plans with other partners.

We reviewed and evaluated the exclusion of approximately 1,265 ac (512 ha) of non-Federal lands in Unit 2 from the designation of final revised critical habitat for the San Bernardino kangaroo rat and determined that the benefits of excluding these lands outweigh the benefits of including them. As discussed above, the Cajon Creek HCMA HEMP will provide for significant preservation and management of the physical and biological features essential to the conservation of the San Bernardino kangaroo rat and will help reach the recovery goals for this subspecies.

Exclusion Will Not Result in Extinction of the Subspecies—Cajon Creek HCMA HEMP

We determined that the exclusion of non-Federal lands within the area covered by the Cajon Creek HCMA HEMP from the final revised designation of critical habitat for the San Bernardino kangaroo rat will not result in the extinction of the subspecies. The Cajon Creek HCMA HEMP provides protection and management, in perpetuity of lands within Unit 2, including the physical and biological features essential to the conservation of the San Bernardino kangaroo rat. Additionally, the jeopardy standard of section 7 of the Act and routine implementation of conservation measures through the section 7 process provide assurances that the subspecies will not go extinct as a result of this exclusion.

Western Riverside County Multiple Species Habitat Conservation Plan (MSHCP)

The Western Riverside County MSHCP is a large-scale, multi-jurisdictional HCP encompassing about 1.26 million ac (510,000 ha) in western Riverside County (Units 3 and 5). The MSHCP addresses 146 listed and unlisted ''covered species,'' including the San Bernardino kangaroo rat. Participants in the MSHCP include 14 cities: The County of Riverside, including the Riverside County Flood Control and Water Conservation Agency (County Flood Control), Riverside County Transportation Commission, Riverside County Parks and Open Space District, and Riverside County Waste Department; California Department of Parks and Recreation; and the California Department of Transportation. The Western Riverside County MSHCP was designed to establish a multi-species conservation program that minimizes and mitigates the expected loss of habitat and the incidental take of covered species. On June 22, 2004, the Service issued a single incidental take permit (TE–088609–0) under section 10(a)(1)(B) of the Act to 22 permittees under the MSHCP for a period of 75 years.

The Western Riverside County MSHCP will establish approximately 153,000 ac (61,917 ha) of new conservation lands (Additional Reserve Lands) to complement the approximate 347,000 ac (140,426 ha) of existing natural and open space areas designated by the MSHCP as Public/Quasi-Public (PQP) lands. These PQP lands include those under Federal ownership, primarily managed by the USFS and BLM, and also permittee-owned open-space areas (e.g., State parks, County Flood Control, and county park lands). Federally owned PQP lands are designated as critical habitat herein. Collectively, the Additional Reserve Lands and PQP lands form the overall Western Riverside County MSHCP Conservation Area. The precise configuration of the 153,000 ac (61,916 ha) of Additional Reserve Lands is not mapped or precisely identified in the MSHCP, but rather is based on textual descriptions of a Conceptual Reserve Design within the bounds of a 310,000 ac (125,453 ha) ''Criteria Area'' that is interpreted as implementation of the MSHCP proceeds.

Specific conservation objectives in the Western Riverside County MSHCP for the San Bernardino kangaroo rat include providing 4,400 ac (1,781 ha) of occupied or suitable habitat within the historical floodplains of the San Jacinto River and Bautista Creek and their tributaries in the MSHCP Conservation Area. This acreage goal can be attained through private lands within the Criteria Area that are targeted for inclusion within the MSHCP Conservation Area as potential Additional Reserve Lands and/or through coordinated management of PQP lands. Additionally, the MSHCP requires surveys for the San Bernardino kangaroo rat as part of the project review process for public and private projects where suitable habitat is present within a defined mammal species survey area (see Mammal Species Survey Area Map, Figure 6–5 of the MSHCP, Volume I). For locations with positive survey results, 90 percent of those portions of the property that provide long-term conservation value for the subspecies will be avoided until it is demonstrated that the conservation objectives for the subspecies are met (Additional Survey Needs and Procedures; MSHCP Volume 1, section 6.3.2).

The survey requirements, avoidance and minimization measures, and management for the San Bernardino kangaroo rat (and its PCEs) provided for in the Western Riverside County MSHCP exceed any conservation value provided as a result of regulatory protections that have been or may be afforded through critical habitat designation. Based on the reasoning provided below, we excluded from Unit 3 and Unit 5 the approximately 595 ac (241 ha) of private lands and permittee-owned PQP lands within the MSHCP Plan Area from the revised critical habitat designation under section 4(b)(2) of the Act. The areas excluded are in separate parcels in the San Jacinto River wash distributed between the Blackburn Road/Lake Hemet Main Canal area, downstream to the East Main Street Bridge, and in the Bautista Creek area upstream of the concrete-lined channel. Lands within these excluded areas are owned by or fall within the jurisdiction of MSHCP permittees. Projects in these areas conducted or approved by MSHCP permittees are subject to the conservation requirements of the MSHCP, including the Additional Survey Needs and Procedures policy.

Lands within the MSHCP plan area owned by Eastern Municipal Water District and Lake Hemet Municipal Water District are not subject to the conservation requirements of the MSHCP through any discretionary authority of the permittees. Therefore, 506 ac (205 ha) of lands within Unit 3 and Unit 5 owned by these two water districts are not excluded from the final revised designation under the Western Riverside County MSHCP.

The 1998 final listing rule for the San Bernardino kangaroo rat identified the following primary threats to the San Bernardino kangaroo rat: Habitat loss, destruction, degradation, and fragmentation due to sand and gravel mining operations; flood control

projects; and urban development. As described above, the Western Riverside County MSHCP provides enhancement of the habitat by removing or reducing threats to this subspecies and the PCEs. The MSHCP preserves habitat that supports identified core populations of this subspecies and therefore provides for recovery.

Benefits of Inclusion—Western Riverside County MSHCP

The inclusion of approximately 595 ac (241 ha) of permittee-owned or controlled lands within the Western Riverside County MSHCP could be beneficial because it identifies lands that require management for conservation of the San Bernardino kangaroo rat. The process of proposing and finalizing the revised critical habitat rule provided the Service with the opportunity to evaluate and refine the features or PCEs essential to the conservation of the subspecies within the geographical area occupied by the San Bernardino kangaroo rat at the time of listing, as well as to evaluate whether there are other areas essential for the conservation of the subspecies. The designation process included peer review and public comment on the identified features and areas. This process is valuable to land owners and managers in developing conservation management plans for identified areas, as well as any other occupied habitat or suitable habitat that may not have been included in the Service's determination of essential habitat.

The educational benefits of designation are small and largely redundant to those derived through conservation efforts currently being planned and implemented in the approximately 595 ac (241 ha) of permittee-owned or controlled lands within the Western Riverside MSHCP. As described above, the process of developing the Western Riverside County MSHCP has involved several partners including (but not limited to) the participating jurisdictions, California Department of Fish and Game, and Federal agencies. The educational benefits of critical habitat designation derived through informing Western Riverside County MSHCP partners and other members of the public of areas important for the long-term conservation of this subspecies have already been and continue to be achieved through: (1) Development of the HCP; (2) the original designation process in 2002; and (3) publication of the proposed revisions to critical habitat in 2008, notices of public comment periods, and the public hearings.

The consultation provisions under section 7(a) of the Act constitute the regulatory benefits of inclusion for critical habitat. As discussed above, Federal agencies must consult with us on actions that may affect critical habitat and must avoid destroying or adversely modifying critical habitat. There is the potential for future activities within the lands being excluded having a Federal nexus for the San Bernardino kangaroo rat as a result of actions by ACOE and the Federal Highways Administration. Therefore, including this area may provide some regulatory benefits under section 7(a) of the Act.

However, the Western Riverside County MSHCP addresses conservation issues from a coordinated, integrated perspective rather than a piecemeal, project-by-project approach (as would occur on these lands under sections 7 and 10 of the Act absent this regional plan) and will achieve more San Bernardino kangaroo rat conservation in the Western Riverside County MSHCP plan area than we would through section 7 consultations involving consideration of critical habitat. The PCEs required by the San Bernardino kangaroo rat will benefit by the conservation measures outlined in the Western Riverside County MSHCP. In summary, these conservation measures include: Preservation of high quality habitat; monitoring and management of preserve lands; restoration and enhancement of habitat; minimization of project impacts; education of the public and state and local governments; and conservation of partnerships. Such measures will remove or reduce known threats to the San Bernardino kangaroo rat and its PCEs in Unit 3 and Unit 5. The Western Riverside County MSHCP will ensure conservation and management actions take place that are not required by critical habitat designation (see ''Benefits of Designating Critical Habitat'' section above). For example, critical habitat designation does not ensure: Habitat enhancement and restoration; functional connections to adjoining habitat; or monitoring of the San Bernardino kangaroo rat (see discussion above).

In light of the preferable regional scale of conservation planning utilized in the development of the Western Riverside County MSHCP and the conservation that has and will occur under the Western Riverside County MSHCP, we conclude that the potential regulatory benefit of designating these areas in Unit 3 and Unit 5 as critical habitat is minimal.

Benefits of Exclusion—Western Riverside County MSHCP

Regional and subregional HCPs foster an ecosystem-based approach to habitat conservation planning, and once developed, conservation issues are addressed through a coordinated approach. However, these large and often costly regional plans are voluntary for the local jurisdiction that pursue this approach, in the sense that they could require landowners (e.g., homeowners, developers) to consult with the Service individually for a section 10 permit. As a result, the local jurisdiction would incur no costs associated with the landowner's need for a section 10 permit, requiring the landowner to obtain this permit prior to issuance of a building permit. However, this approach would result in uncoordinated, ''patchy'' conservation that would likely not further the recovery of federally listed species. Rather, by voluntarily developing these regional plans (versus individual landowner HCPs), the coordinated landscape-scale conservation results in preservation of interconnected linkage areas and populations that support recovery of listed species. We recognize that once an HCP is permitted, implementation of the conservation measures is not voluntary in order for permittees to receive incidental take coverage. However, the benefits of excluding lands under the scenario described above are: (1) Retaining and fostering the existing partnership and working relationship with all stakeholders; and (2) encouraging future regional HCP development or development of other species/habitat conservation plans. Additionally, exclusion of a HCP (such as the Western Riverside County MSHCP) demonstrates our good faith effort and working relationships, which should encourage initiation and completion of other HCPs.

We developed close partnerships with all participating entities through the development of the Western Riverside County MSHCP, which incorporates appropriate protections and management for the San Bernardino kangaroo rat, its habitat, and the features essential to the conservation of this subspecies. By excluding 595 ac (241 ha) of lands in Unit 3 and Unit 5 from designation, we are eliminating an essentially redundant layer of regulatory review for projects covered by the Western Riverside County MSHCP, helping to preserve our ongoing partnership with HCP participants, and encouraging new partnerships with other landowners and jurisdictions. These partnerships with HCP

participants are critical for the conservation of the San Bernardino kangaroo rat.

Benefits of Exclusion Outweigh the Benefits of Inclusion—Western Riverside County MSHCP

As discussed in the ''Benefits of Inclusion'' section above, we believe the regulatory benefit of designating critical habitat on private lands and permittee-owned PQP lands covered by the Western Riverside County MSHCP would be low. The Western Riverside County MSHCP addresses conservation issues from a coordinated, integrated perspective rather than a piecemeal project-by-project approach and will achieve more San Bernardino kangaroo rat conservation than we would achieve through multiple site-by-site, project-by-project, section 7 consultations involving consideration of critical habitat.

Conservation and management of San Bernardino kangaroo rat habitat is essential to the survival and recovery of this subspecies. Such conservation needs are typically not addressed through the application of the statutory prohibition on destruction or adverse modification of critical habitat. The specific conservation actions, avoidance and minimization measures, and management for the San Bernardino kangaroo rat and its PCEs provided by the Western Riverside County MSHCP exceed any conservation value provided as a result of regulatory protections that may be afforded through a critical habitat designation. The Western Riverside County MSHCP provides as much or more benefit than a consultation for critical habitat designation conducted under the standards required by the Ninth Circuit in the *Gifford Pinchot* decision. The benefits for the conservation of the San Bernardino kangaroo rat that would occur as a result of designating a small amount of as critical habitat (e.g., protection afforded through the section 7(a)(2) consultation process) are minimal compared to the overall conservation benefits for the subspecies that will be realized through the implementation of the Western Riverside County MSHCP. Furthermore, educational benefits that may be derived from a critical habitat designation are minimal and largely redundant to the educational benefits achieved through significant public, State, and local government input during the development of the Western Riverside County MSHCP.

We developed close partnerships with the 22 MSHCP permittees through the development of this regional HCP that incorporates appropriate protections and management of this subspecies' essential physical and biological features. Those protections are consistent with the mandates under section 7 of the Act to avoid destruction or adverse modification of critical habitat and go beyond that prohibition by including active management and protection of essential habitat areas. Designation of critical habitat alone does not achieve recovery or require management of those lands identified in the critical habitat rule. We believe the conservation benefits for the San Bernardino kangaroo rat that would occur as a result of designating those 595 ac (241 ha) in Unit 3 and Unit 5 as critical habitat (e.g., protection afforded through the section 7(a)(2) consultation process) is minimal compared to the overall conservation benefits for the subspecies that will be realized through the implementation of the Western Riverside County MSHCP. Furthermore, the benefits to recovery of inclusion primarily have already been met through the identification of those areas most important to the subspecies. By excluding these lands from designation, we are eliminating a largely redundant layer of regulatory review for a limited set of projects on non-Federal lands that are addressed by the MSHCP and we are helping to preserve our ongoing partnerships with the permittees and to encourage new partnerships with other landowners and jurisdictions. Those partnerships, and the landscape-level, multiple-species conservation planning efforts they promote, are critical for the conservation of the San Bernardino kangaroo rat. Designating critical habitat on non-Federal lands within the Western Riverside County MSHCP could have a detrimental effect to our partnerships with the 22 MSHCP permittees and could be a significant disincentive to the establishment of future partnerships and HCPs with other landowners.

We reviewed and evaluated the exclusion of 595 ac (241 ha) of private and permittee-owned PQP lands within the Western Riverside County MSHCP plan area from the final revised critical habitat designation for the San Bernardino kangaroo rat and determined that the benefits of excluding these lands in Unit 3 and Unit 5 outweigh the benefits of including them. As discussed above, the MSHCP will provide for significant preservation and management of habitat for and features essential to the conservation of the San Bernardino kangaroo rat and will help reach the recovery goals for this subspecies.

Exclusion Will Not Result in Extinction of the Subspecies—Western Riverside County MSHCP

In keeping with our analysis and conclusion detailed in our biological opinion for the Western Riverside County MSHCP (Service 2004, pp. 298–299), we have determined that the exclusion of 595 ac (241 ha) of private lands and permittee-owned PQP lands within the Western Riverside County MSHCP plan area from the final designation of critical habitat for the San Bernardino kangaroo rat will not result in the extinction of the subspecies. The MSHCP provides protection and management, in perpetuity, of lands that meet the definition of critical habitat, including PCEs, for the subspecies in Unit 3 and Unit 5. Additionally, the jeopardy standard of section 7 of the Act and routine implementation of conservation measures through the section 7 process provide assurances that the subspecies will not go extinct as a result of this exclusion.

Application of Section 4(b)(2)—Other Relevant Impacts—Soboba Band of Luiseño Indians Settlement Act

Hemet/San Jacinto Integrated Recharge Recovery Project

On July 31, 2008, the President signed the Soboba Band of Luiseño Indians Settlement Act (Pub. L. 110–297). As part of its obligations under the Settlement Agreement associated with this legislation, the Eastern Municipal Water District will implement an integrated water recharge and recovery program that includes the construction of recharge basins and well sites at the confluence of the San Jacinto River and Bautista Creek. This project is designed to provide water to the Soboba Band of Luiseño Indians in keeping with the Tribe's water rights. The Service issued a biological opinion to the ACOE for this project on November 16, 2006 (Service 2006, FWS–WRIV–4051.5). The ACOE reinitiated consultation for this project on January 29, 2008 (see Bautista Creek discussion under the ''Summary of Changes From the 2007 Proposed Rule To Revise Critical Habitat'' section of this rule for further information). The project will impact approximately 39 ac (16 ha) of land within the floodplain.

Benefits of Inclusion—Hemet/San Jacinto Integrated Recharge Recovery Project

The inclusion of 39 ac (16 ha) of Eastern Municipal Water District lands in this final revised critical habitat designation could be beneficial because it identifies lands that contain the

features essential to the conservation of the species. The process of proposing and finalizing the revised critical habitat rule provided the Service with the opportunity to evaluate and refine the features or PCEs essential to the conservation of the subspecies within the geographical area occupied by San Bernardino kangaroo rat at the time of listing, as well as to evaluate whether there are other areas essential for the conservation of the subspecies. The designation process included peer review and public comment on the identified features and areas. This process is valuable to land owners and managers in developing conservation management plans for identified areas, as well as any other occupied habitat or suitable habitat that may not have been included in the Service's determination of essential habitat.

The educational benefits of critical habitat designation derived through informing our partners and other members of the public of areas important for the long-term conservation of San Bernardino kangaroo rat have already been achieved through previously designating this area as critical habitat and through the section 7 consultation process on the proposed action (Service 2006, pp. 1–41).

The consultation provisions under section 7(a) of the Act constitute the regulatory benefits of inclusion for critical habitat. As discussed previously, Federal agencies must consult with us on actions that may affect critical habitat and must avoid destroying or adversely modifying critical habitat. On these approximately 39 ac (16 ha) of Eastern Municipal Water District lands in Unit 3 that are being excluded, a Federal nexus exists for the San Bernardino kangaroo rat as a result of actions by the ACOE. Therefore, including this area would provide some regulatory benefits under section 7(a) of the Act.

Benefits of Exclusion—Hemet/San Jacinto Integrated Recharge Recovery Project

The Soboba Band of Luiseño Indians Settlement Act and its associated Settlement Agreement represent a historic settlement of a decades-long water rights dispute under which the Tribe will receive an adequate and secure future water supply of 9,000 acre feet per year, $18 million from local water districts for economic development, $11 million from the Federal government for water development, and 128 ac (52 ha) of land near Diamond Valley for commercial development. In turn, the Tribe agreed to forebear some portion of their water rights for 50 years, which has a monetary value of more than $58 million. Additionally, the Settlement Act provides local water districts and Tribal neighbors: 7,500 acre feet of new imported water per year until at least 2035; $10 million in Federal funds to help recharge the aquifer with imported water; up to 100 acres (41 ha) of Soboba Band of Luiseño Indians reservation land for endangered species habitat; use of up to 4,900 acre feet of Soboba Band of Luiseño Indians water for 50 years for basin restoration; and the promise of new jobs and economic stimulus from Soboba Band of Luiseño Indians commercial development. The partnerships developed during the negotiation of this settlement are unique and are viewed as a framework for resolution of other water rights disputes. Implementation of the Settlement Agreement is expected to provide for restoration of the groundwater basin. Excluding the 39 ac (16 ha) of lands in Unit 3 from the designation will remove any perception that the regulatory impact of the critical designation may impede successful implementation of this important agreement, and will help to preserve our ongoing partnership with this project's participants and the signatories to the Settlement Agreement. Additionally, this exclusion will encourage new partnerships with other landowners, water districts, and other jurisdictions. We believe encouraging such partnerships are critical for the conservation of the San Bernardino kangaroo rat.

Benefits of Exclusion Outweigh Benefits of Inclusion—Hemet/San Jacinto Integrated Recharge Recovery Project

We reviewed and evaluated the benefits of inclusion and benefits of exclusion for the approximately 39 ac (16 ha) of non-Federal Eastern Municipal Water District lands in Unit 3, and determined that the benefits of excluding these lands outweigh the benefits of including them as critical habitat. We acknowledge that the designation of critical habitat on these lands would likely provide a conservation benefit to the San Bernardino kangaroo rat through the section 7(a)(2) consultation process. However, as discussed above, the benefits of excluding the area covered by the Hemet/San Jacinto Integrated Recharge Recovery Project are high and outweigh any regulatory or other benefit of including these lands in critical habitat, as such exclusion will help to preserve and foster the partnerships and inter-governmental relationships that have been developed over many years to achieve sustainable water management and habitat restoration in the San Jacinto River Basin. By excluding these lands, we will remove any additional regulatory impact resulting from a critical habitat designation that may potentially interfere with implementation of the Settlement Agreement. In addition to restoration of the groundwater basin, implementation of the historic Settlement Agreement will restore the Soboba Band of Luiseño Indians' water rights and allow the Tribe to manage their water resources for the betterment of the Tribe, which is expected to provide an economic stimulus to the Tribe and surrounding communities as well as providing for restoration of the groundwater basin.

Exclusion Will Not Result in Extinction of the Subspecies—Hemet/San Jacinto Integrated Recharge Recovery Project

We determined that the exclusion of the 39 ac (16 ha) of non-Federal lands within the area covered by the Hemet/San Jacinto Integrated Recharge Recovery Project from the final revised designation of critical habitat for the San Bernardino kangaroo rat will not result in the extinction of the subspecies. The area is occupied by the San Bernardino kangaroo rat, and the protections afforded through section 9 of the Act, the jeopardy standard of section 7 of the Act, and routine implementation of conservation measures through the section 7 process provide assurances that the subspecies will not go extinct as a result of this exclusion.

Required Determinations

Takings—Executive Order 12630

In accordance with E.O. 12630 (''Government Actions and Interference with Constitutionally Protected Private Property Rights''), we have analyzed the potential takings implications of designating critical habitat for the San Bernardino kangaroo rat in a takings implications assessment. Critical habitat designation does not affect landowner actions that do not require Federal funding or permits, nor does it preclude development of habitat conservation programs or issuance of incidental take permits to permit actions that do require Federal funding or permits to go forward. The takings implications assessment concludes that this final revised designation of critical habitat for the San Bernardino kangaroo rat does not pose significant takings implications.

Regulatory Planning and Review—Executive Order 12866

The Office of Management and Budget (OMB) has determined that this rule is not significant under E.O. 12866. OMB bases its determination upon the following four criteria:

(1) Whether the rule will have an annual effect of $100 million or more on the economy or adversely affect an economic sector, productivity, jobs, the environment, or other units of the government.

(2) Whether the rule will create inconsistencies with other Federal agencies' actions.

(3) Whether the rule will materially affect entitlements, grants, user fees, loan programs, or the rights and obligations of their recipients.

(4) Whether the rule raises novel legal or policy issues.

Civil Justice Reform—Executive Order 12988

In accordance with E.O. 12988 (Civil Justice Reform), the Office of the Solicitor has determined that the rule does not unduly burden the judicial system and that it meets the requirements of sections 3(a) and 3(b)(2) of the Order. We are designating critical habitat in accordance with the provisions of the Act. This final rule uses standard property descriptions and identifies the physical and biological features essential to the conservation of the species within the designated areas to assist the public in understanding the habitat needs of the San Bernardino kangaroo rat.

Federalism—Executive Order 13132

In accordance with E.O. 13132 (Federalism), this final rule does not have significant Federalism effects. A Federalism assessment is not required. In keeping with Department of the Interior and Department of Commerce policy, we requested information from, and coordinated development of, these final critical habitat designations with appropriate State resource agencies in California. During the public comment periods, we contacted appropriate State and local agencies and jurisdictions, and invited them to comment on the proposed revised critical habitat designation for the San Bernardino kangaroo rat. In total, we responded to five letters received during these comment periods from local governments (see ''Summary of Comments and Recommendations'' section). None of the critical habitat designation for the San Bernardino kangaroo rat occurs on State land, and, therefore, will have little impact on State and local governments and their activities. The designations may have some benefit to these governments in that the areas that contain the features essential to the conservation of the species are more clearly defined, and the primary constituent elements of the habitat are specifically identified. This information does not alter where and what federally sponsored activities may occur. However, it may assist local governments in long-range planning (rather than having them wait for case-by-case section 7 consultations to occur).

Energy Supply, Distribution, or Use—Executive Order 13211

On May 18, 2001, the President issued E.O. 13211 on regulations that significantly affect energy supply, distribution, and use. E.O. 13211 requires agencies to prepare Statements of Energy Effects when undertaking certain actions. This revision to critical habitat for the San Bernardino kangaroo rat is not considered a significant regulatory action under E.O. 12866. OMB has provided guidance for implementing this Order that outlines nine outcomes that may constitute ''a significant adverse effect'' when compared without the regulatory action under consideration. The economic analysis finds that none of these criteria are relevant to this analysis. Thus, based on information in the economic analysis (Appendix C), energy-related impacts associated with San Bernardino kangaroo rat conservation activities within the areas included in the final designation of critical habitat are not expected. As such, the final designation of critical habitat is not expected to significantly affect energy supplies, distribution, or use, and a Statement of Energy Effects is not required.

Unfunded Mandates Reform Act (2 U.S.C. 1501 et seq.)

In accordance with the Unfunded Mandates Reform Act, the Service makes the following findings:

(1) This rule would not produce a Federal mandate. In general, a Federal mandate is a provision in legislation, statute, or regulation that would impose an enforceable duty upon State, local, or Tribal governments, or the private sector, and includes both ''Federal intergovernmental mandates'' and ''Federal private sector mandates.'' These terms are defined in 2 U.S.C. 658(5)–(7). ''Federal intergovernmental mandate'' includes a regulation that ''would impose an enforceable duty upon State, local, or tribal governments,'' with two exceptions. It excludes ''a condition of federal assistance.'' It also excludes ''a duty arising from participation in a voluntary Federal program,'' unless the regulation ''relates to a then-existing Federal program under which $500,000,000 or more is provided annually to State, local, and Tribal governments under entitlement authority,'' if the provision would ''increase the stringency of conditions of assistance'' or ''place caps upon, or otherwise decrease, the Federal Government's responsibility to provide funding,'' and the State, local, or Tribal governments ''lack authority'' to adjust accordingly. (At the time of enactment, these entitlement programs were Medicaid; Aid to Families with Dependent Children work programs; Child Nutrition; Food Stamps; Social Services Block Grants; Vocational Rehabilitation State Grants; Foster Care, Adoption Assistance, and Independent Living; Family Support Welfare Services; and Child Support Enforcement.) ''Federal private sector mandate'' includes a regulation that ''would impose an enforceable duty upon the private sector, except (i) a condition of Federal assistance; or (ii) a duty arising from participation in a voluntary Federal program.''

The designation of critical habitat does not impose a legally binding duty on non-Federal government entities or private parties. Under section 7 of the Act, the only regulatory effect is that Federal agencies must ensure that their actions do not destroy or adversely modify critical habitat. Non-Federal entities that receive Federal funding, assistance, permits, or otherwise require approval or authorization from a Federal agency for an action, may be indirectly impacted by the designation of critical habitat. However, the legally binding duty to avoid destruction or adverse modification of critical habitat rests squarely on the Federal agency. Furthermore, to the extent that non-Federal entities are indirectly impacted because they receive Federal assistance or participate in a voluntary Federal aid program, the Unfunded Mandates Reform Act would not apply, nor would critical habitat shift the costs of the large entitlement programs listed above on to State governments.

(2) We do not believe that this rule would significantly or uniquely affect small governments because it would not produce a Federal mandate of $100 million or greater in any year; that is, it is not a ''significant regulatory action'' under the Unfunded Mandates Reform Act. As discussed in the economic analysis, anticipated future impacts in areas designated as critical habitat will be borne by the Federal Government and San Bernardino County Flood

Control District (SBCFCD); in areas excluded from the final designation, the total anticipated future impacts are not attributable to the designation of critical habitat. By definition, Federal agencies are not considered small entities, although the activities they fund or permit may be proposed or carried out by small entities. The SBCFCD is also not considered to be a small entity because it services a population exceeding the criteria for a ''small entity.'' As such, a Small Government Agency Plan is not required.

Regulatory Flexibility Act (5 U.S.C. 601 et seq.)

Under the Regulatory Flexibility Act, as amended by the Small Business Regulatory Enforcement Fairness Act (5 U.S.C. 802(2)), whenever an agency is required to publish a notice of rulemaking for any proposed or final rule, it must prepare and make available for public comment a regulatory flexibility analysis that describes the effect of the rule on small entities (i.e., small businesses, small organizations, and small government jurisdictions). However, no regulatory flexibility analysis is required if the head of an agency certifies the rule will not have a significant economic impact on a substantial number of small entities. The Small Business Regulatory Enforcement Fairness Act amended the Regulatory Flexibility Act to require Federal agencies to provide a certification statement of the factual basis for certifying that the rule will not have a significant economic impact on a substantial number of small entities. In this final rule, we are certifying that the critical habitat designation for the San Bernardino kangaroo rat will not have a significant economic impact on a substantial number of small entities. The following discussion explains our rationale.

According to the Small Business Administration, small entities include small organizations, such as independent nonprofit organizations; small governmental jurisdictions, including school boards and city and town governments that serve fewer than 50,000 residents; and small businesses (13 CFR 121.201). Small businesses include manufacturing and mining concerns with fewer than 500 employees, wholesale trade entities with fewer than 100 employees, retail and service businesses with less than $5 million in annual sales, general and heavy construction businesses with less than $27.5 million in annual business, special trade contractors doing less than $11.5 million in annual business, and agricultural businesses with annual sales less than $750,000. To determine if potential economic impacts to these small entities are significant, we considered the types of activities that might trigger regulatory impacts under this designation as well as types of project modifications that may result. In general, the term significant economic impact is meant to apply to a typical small business firm's business operations.

To determine if the revised designation of critical habitat for the San Bernardino kangaroo rat would affect a substantial number of small entities, we considered the number of small entities affected within particular types of economic activities, such as residential and commercial development. We considered each industry or category individually to determine if certification is appropriate. In estimating the numbers of small entities potentially affected, we also considered whether their activities have any Federal involvement; some kinds of activities are unlikely to have any Federal involvement and thus will not be affected by the designation of critical habitat. Designation of critical habitat only affects activities conducted, funded, permitted, or authorized by Federal agencies; non-Federal activities are not affected by the designation.

In areas where the subspecies is present, Federal agencies already are required to consult with us under section 7 of the Act on activities they fund, permit, or implement that may affect the San Bernardino kangaroo rat (see Section 7 Consultation section) or their critical habitat. Future consultations to avoid the destruction or adverse modification of critical habitat would be incorporated into the existing consultation process. In the case of completed consultations for ongoing Federal activities, however, the Federal agency would be required to reinitiate consultation (see Application of the ''Adverse Modification'' Standard section). Designation of critical habitat, in that case, could result in an additional economic impact on small entities.

In our final economic analysis of the proposed revision of critical habitat, we evaluated the potential economic effects on small business entities resulting from conservation actions related to the proposed revision of critical habitat for the San Bernardino kangaroo rat. The analysis is based on the estimated incremental impacts associated with the rulemaking as described in section 2 of the analysis. The analysis evaluates the potential for economic impacts related to activity categories including water conservation, flood control, and development. Impacts of conservation activities are not anticipated to affect small entities in the following categories: Fire management on Federal lands; invasive, nonnative plant species management on Federal lands; recreation management on Federal lands; and surveying, monitoring, and other activities on Federal lands. Land managers which may be impacted by the proposed rule include the BLM, USFS, SBCFCD, and private landowners. Of the entities that are likely to bear incremental impacts, there are no entities identified as small businesses, small organizations, or small government jurisdictions. The Federal agencies (BLM and USFS) and the special district (SBCFCD) do not meet the criteria for a small business. Individual private landowners in San Bernardino kangaroo rat critical habitat are not considered small businesses. Please refer to our economic analysis (Appendix C) of the proposed revision of critical habitat for a more detailed discussion of potential economic impacts.

In summary, we considered whether this final rule to revise critical habitat would result in a significant economic effect on a substantial number of small entities. For the above reasons and based on currently available information, we certify that the rule will not have a significant economic impact on a substantial number of small entities. Therefore, a regulatory flexibility analysis is not required.

Small Business Regulatory Enforcement Fairness Act (5 U.S.C. 801 et seq.)

Under the Small Business Regulatory Enforcement Fairness Act, this rule is not a major rule. Our detailed assessment of the economic effects of this designation is described in the economic analysis. Based on the effects identified in the economic analysis, we believe that this rule will not have an annual effect on the economy of $100 million or more, will not cause a major increase in costs or prices for consumers, and will not have significant adverse effects on competition, employment, investment, productivity, innovation, or the ability of U.S.-based enterprises to compete with foreign-based enterprises. Refer to the final economic analysis for a discussion of the effects of this determination (see **ADDRESSES** for information on obtaining a copy of the final economic analysis).

National Environmental Policy Act (NEPA) (42 U.S.C. 4321 et seq.)

It is our position that, outside the jurisdiction of the Circuit Court of the United States for the Tenth Circuit, we

do not need to prepare environmental analyses as defined by NEPA in connection with designating critical habitat under the Act. We published a notice outlining our reasons for this determination in the **Federal Register** on October 25, 1983 (48 FR 49244). This assertion was upheld in the courts of the Ninth Circuit Court of Appeals (*Douglas County* v. *Babbitt*, 48 F.3d 1495 (9th Cir. 1995), cert. denied 516 U.S. 1042 (1996)).

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

This rule does not contain any new collections of information that require approval by OMB under the Paperwork Reduction Act of 1995. This rule will not impose recordkeeping or reporting requirements on State or local governments, individuals, businesses, or organizations. 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.

Government-to-Government Relationship With Tribes

In accordance with the President's memorandum of April 29, 1994, ''Government-to-Government Relations with Native American Tribal Governments'' (59 FR 22951), Executive Order 13175, and the Department of the Interior's manual at 512 DM 2, we readily acknowledge our responsibility to communicate meaningfully with recognized Federal Tribes on a government-to-government basis. In accordance with Secretarial Order 3206 of June 5, 1997, ''American Indian Tribal Rights, Federal-Tribal Trust Responsibilities, and the Endangered Species Act,'' we readily acknowledge our responsibilities to work directly with tribes in developing programs for healthy ecosystems, to acknowledge that Tribal lands are not subject to the same controls as Federal public lands, to remain sensitive to Indian culture, and to make information available to tribes.

The 2002 designation of critical habitat (67 FR 19812) for the San Bernardino kangaroo rat included 710 ac (290 ha) of land within the Soboba Band of Luiseño Indians Reservation. At the time of the 2002 designation, we included these lands as critical habitat for the San Bernardino kangaroo rat because we believed that the area supported several populations and provided continuity between two adjacent areas of essential habitat. These lands are adjacent to occupied areas that we are designating as critical habitat within the San Jacinto wash (Unit 3). However, at the time of the drafting of this final rule, we lack information regarding the subspecies' location and habitat on Soboba Band of Luiseño Indians Reservation lands and are unable to thoroughly assess either the status of the subspecies on those lands or the management practices currently employed by the Tribe. Though we continue to believe, due to the continuity of these lands with known occupied habitat, that these Tribal lands are likely occupied, at least in part, by the San Bernardino kangaroo rat, we do not know whether these lands contain features that are essential to the conservation of the subspecies. As a result, and in light of Secretarial Order 3206, we are not including these Tribal lands in the area designated as revised critical habitat for the San Bernardino kangaroo rat. We are committed to maintaining a positive working relationship with the Tribes and will continue our attempts to work with them on conservation measures benefiting the San Bernardino kangaroo rat.

References Cited

A complete list of all references cited in this rulemaking is available on the Internet at *http://www.regulations.gov* and *http://www.fws.gov/carlsbad/*.

Author(s)

The primary authors of this rulemaking are staff at the Carlsbad Fish and Wildlife Office, Carlsbad, California.

List of Subjects in 50 CFR Part 17

Endangered and threatened species, Exports, Imports, Reporting and recordkeeping requirements, Transportation.

Regulation Promulgation

■ Accordingly, we amend part 17, subchapter B of chapter I, title 50 of the Code of Federal Regulations, as set forth below:

PART 17—[AMENDED]

■ 1. The authority citation for part 17 continues to read as follows:

Authority: 16 U.S.C. 1361–1407; 16 U.S.C. 1531–1544; 16 U.S.C. 4201–4245; Pub. L. 99–625, 100 Stat. 3500; unless otherwise noted.

■ 2. Amend § 17.95(a) by revising the entry for ''San Bernardino Kangaroo Rat (*Dipodomys merriami parvus*)'' to read as follows:

§ 17.95 Critical habitat—wildlife.

(a) *Mammals.*

* * * * *

San Bernardino Kangaroo Rat (*Dipodomys merriami parvus*)

(1) Critical habitat units are depicted for San Bernardino and Riverside Counties, California, on the maps below.

(2) The PCEs of critical habitat for the San Bernardino kangaroo rat are the habitat components that provide:

(i) Alluvial fans, washes, and associated floodplain areas containing soils consisting predominately of sand, loamy sand, sandy loam, and loam, which provide burrowing habitat necessary for sheltering and rearing offspring, storing food in surface caches, and movement between occupied patches;

(ii) Upland areas adjacent to alluvial fans, washes, and associated floodplain areas containing alluvial sage scrub habitat and associated vegetation, such as coastal sage scrub and chamise chaparral, with up to approximately 50 percent canopy cover providing protection from predators, while leaving bare ground and open areas necessary for foraging and movement of this subspecies; and

(iii) Upland areas adjacent to alluvial fans, washes, and associated floodplain areas, which may include marginal habitat such as alluvial sage scrub with greater than 50 percent canopy cover with patches of suitable soils that support individuals for re-population of wash areas following flood events. These areas may include agricultural lands, areas of inactive aggregate mining activities, and urban/wildland interfaces.

(3) Critical habitat does not include manmade structures (such as buildings, aqueducts, airports, roads, other paved areas, and the land on which such structures are located) existing on the effective date of this rule and not containing one or more of the PCEs.

(4) Data layers defining map units were created on a base of NAIP (USDA) 1:24,000 maps, and critical habitat units were then mapped using Universal Transverse Mercator (UTM) coordinates.

(5) Note: Index map of critical habitat units for the San Bernardino kangaroo rat follows:

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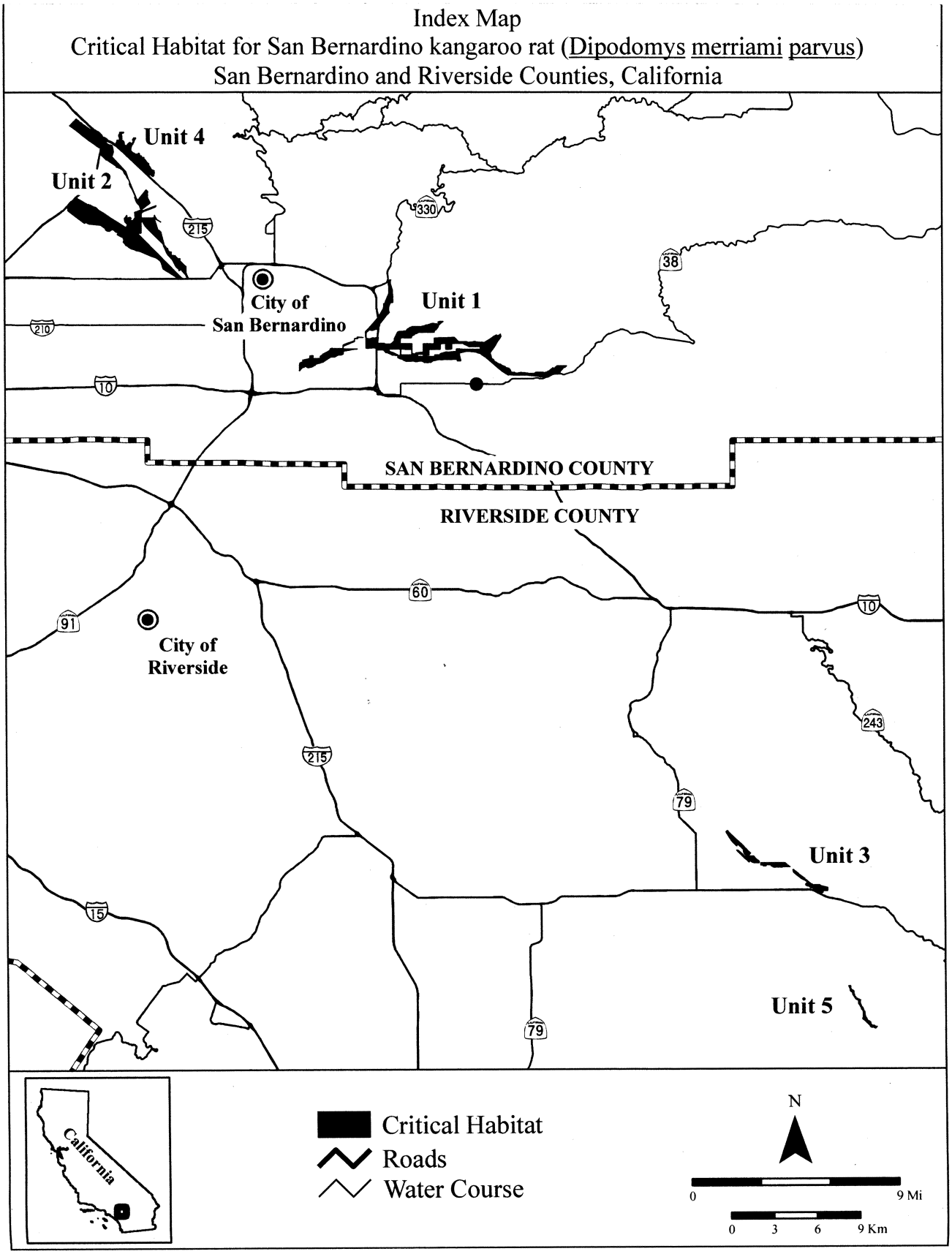

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(6) Unit 1: Santa Ana River Wash, San Bernardino County, California. From USGS 1:24,000 quadrangles San Bernardino North and Devore.

(i) Land bounded by the following Universal Transverse Mercator (UTM) North American Datum of 1983 (NAD83) coordinates (E, N): 482433, 3777208; 482510, 3777208; 482472, 3777140; 482478, 3776911; 482612, 3776482; 482627, 3776397; 482637, 3775622; 482488, 3775622; 482355, 3775366; 482348, 3775149; 482364, 3774946; 482386, 3774912; 482150, 3774673; 482081, 3774571; 481748, 3774155; 481621, 3773744; 481590, 3773748; 481552, 3773754; 481464, 3773760; 481227, 3773664; 481110, 3773680; 481067, 3773702; 481054, 3773704; 481017, 3773705; 480939, 3773677; 480770, 3773522; 480770, 3773486; 480755, 3773486; 480754, 3773175; 480754, 3773170; 480731, 3773170; 480731, 3773473; 480731, 3773532; 480731, 3773589; 480929, 3773768; 481548, 3774498; 481546, 3774500; 481646, 3774625; 481627, 3774739; 481723, 3774752; 481967, 3775193; 481996, 3775295; 481999, 3775520; 482088, 3775527; 482148, 3775727; 482358, 3776254; 482367, 3776695; 482342, 3776902; 482296, 3777059; thence returning to 482433, 3777208; land bounded by 486178, 3774253; 486118, 3774252; 486084, 3774218; 486083, 3774217; 486063, 3774197; 486030, 3774165; 485959, 3774096; 485933, 3774070; 485929, 3774066; 485908, 3774045; 485869, 3774005; 485866, 3774003; 485856, 3773996; 485830, 3773978; 485790, 3773949; 485779, 3773940; 485768, 3773931; 485752, 3773918; 485752, 3773918; 485752, 3773918; 485753, 3773918; 485785, 3773919; 485786, 3773919; 485851, 3773921; 485843, 3773910; 485801, 3773869; 485762, 3773819; 485724, 3773760; 485653, 3773680; 485553, 3773626; 485555, 3773539; 484779, 3773534; 484628, 3773535; 484460, 3773521; 484384, 3773499; 484335, 3773457; 484273, 3773434; 484214, 3773422; 484135, 3773370; 483968, 3773284; 483963, 3773284; 483962, 3773151; 483165, 3773148; 483155, 3772707; 483175, 3772709; 483184, 3772710; 483212, 3772710; 483968, 3772732; 483982, 3772732; 483978, 3772346; 483972, 3772037; 484020, 3772040; 484021, 3772023; 484198, 3772011; 484257, 3772092; 484782, 3772139; 484780, 3772338; 484777, 3772734; 485573, 3772725; 485573, 3772735; 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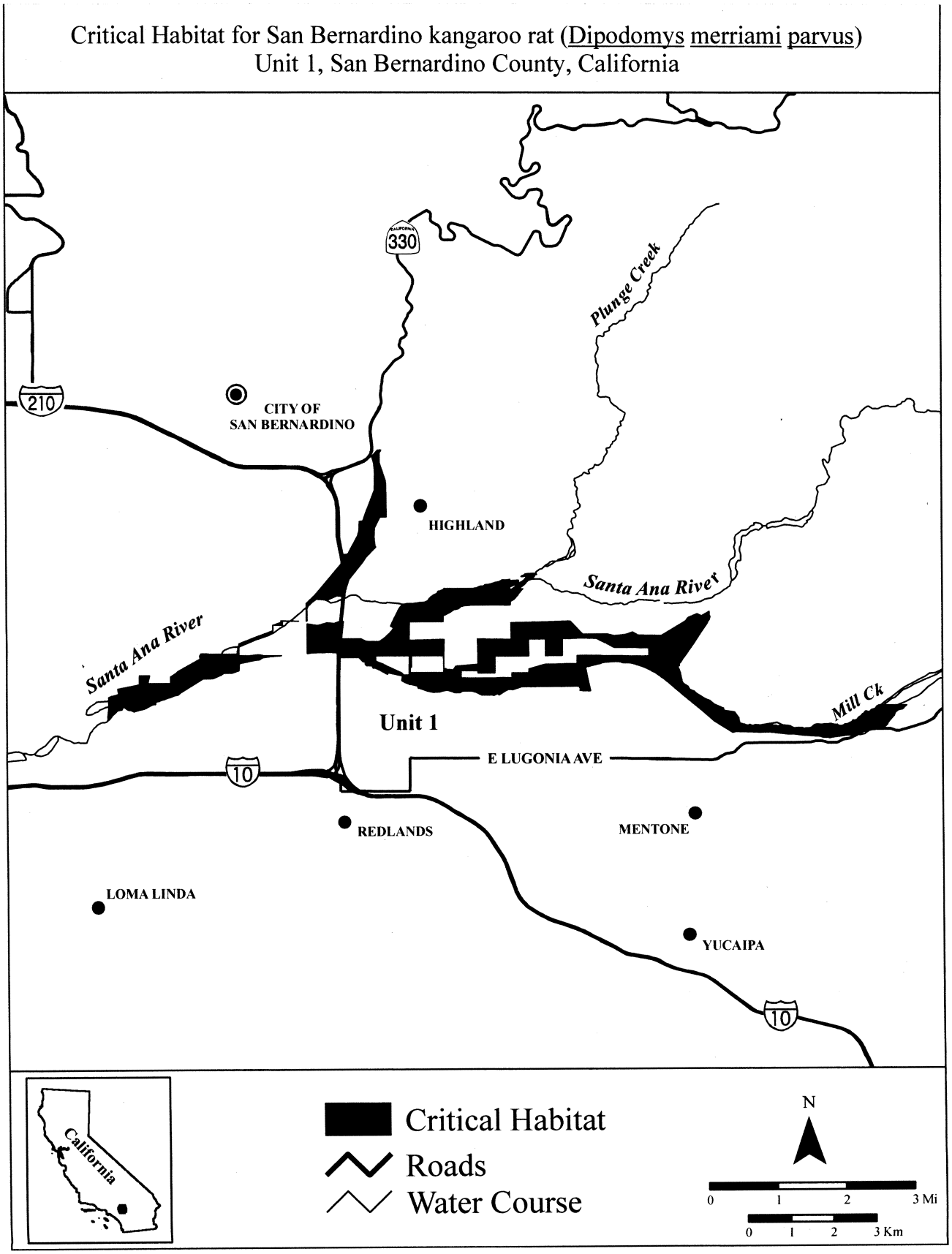
(ii) Note: Map of Unit 1—Santa Ana River Wash follows:

BILLING CODE 4310–55–P



BILLING CODE 4310–55–C

(7) Unit 2: Lytle/Cajon Creek Wash, San Bernardino County, California.

From USGS 1:24,000 quadrangles San

Bernardino South, Redlands, Yucaipa, and Harrison Mountain.

(i) Land bounded by the following Universal Transverse Mercator (UTM) North American Datum of 1983 (NAD83) coordinates (E, N): 459952, 3788034; 460404, 3788506; 460540, 3788401; 460651, 3788312; 460753, 3788234; 460844, 3788166; 461055, 3788012; 461159, 3787940; 461251, 3787876; 461287, 3787860; 461340, 3787819; 461597, 3787644; 461773, 3787530; 461793, 3787541; 461822, 3787541; 461919, 3787456; 462141, 3787271; 462332, 3787119; 462452, 3787052; 462562, 3786978; 462505, 3786840; 462634, 3786755; 462747, 3786722; 462898, 3786698; 462948, 3786656; 463021, 3786224; 462998, 3786186; 463006, 3786144; 462925, 3785866; 463882, 3784809; 464062, 3784361; 464695, 3782785; 465055, 3783227; 465304, 3783532; 465304, 3783532; 465302, 3783530; 465302, 3783530; 465433, 3783427; 465429, 3783386; 465403, 3783271; 465424, 3783199; 465392, 3783068; 465424, 3782988; 465432, 3782982; 465431, 3782981; 465596, 3782632; 465041, 3782194; 464977, 3782143; 464956, 3782135; 464966, 3782109; 464966, 3782015; 464970, 3782018; 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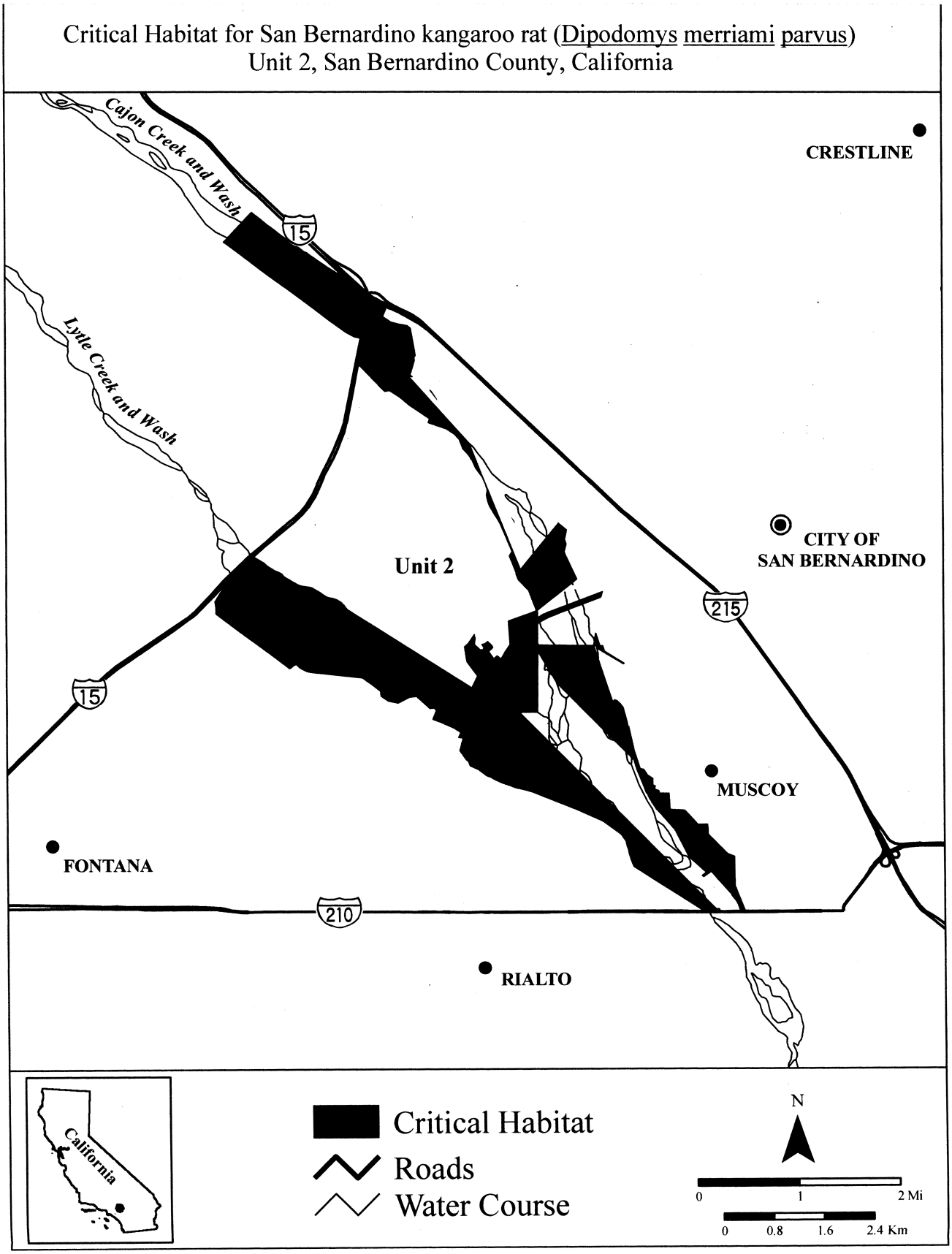
(ii) Note: Map of Unit 2—Lytle/Cajon Creek Wash follows:

BILLING CODE 4310–55–P



BILLING CODE 4310–55–C

(8) Unit 3: San Jacinto River Wash, Riverside County, California. From USGS 1:24,000 quadrangles San Jacinto, Lake Fulmor, and Blackburn Canyon.

(i) Land bounded by the following Universal Transverse Mercator (UTM) North American Datum of 1983 (NAD83) coordinates (E, N): 506626, 3737807; 506919, 3737520; 507441, 3737006; 507652, 3736797; 507652, 3736797; 507542, 3736682; 507439, 3736575; 507466, 3736575; 507466, 3736575; 507680, 3736576; 507877, 3736577; 507877, 3736577; 507915, 3736540; 507921, 3736534; 507968, 3736488; 507969, 3736487; 508139, 3736320; 508225, 3736236; 508250, 3736211; 508250, 3736211; 508250, 3736209; 508250, 3736111; 507865, 3736109; 507865, 3736126; 507865, 3736134; 507865, 3736136; 507865, 3736146; 507811, 3736147; 507730, 3736182; 507692, 3736202; 507730, 3736216; 507465, 3736422; 507445, 3736438; 507374, 3736495; 507358, 3736507; 507332, 3736481; 507328, 3736485; 507358, 3736514; 507352, 3736535; 507344, 3736558; 507321, 3736626; 507306, 3736656; 507275, 3736689; 507231, 3736733; 507185, 3736796; 507165, 3736822; 507165, 3736822; 507162, 3737005; 507161, 3737049; 506929, 3737280; 506688, 3737512; 506696, 3737306; 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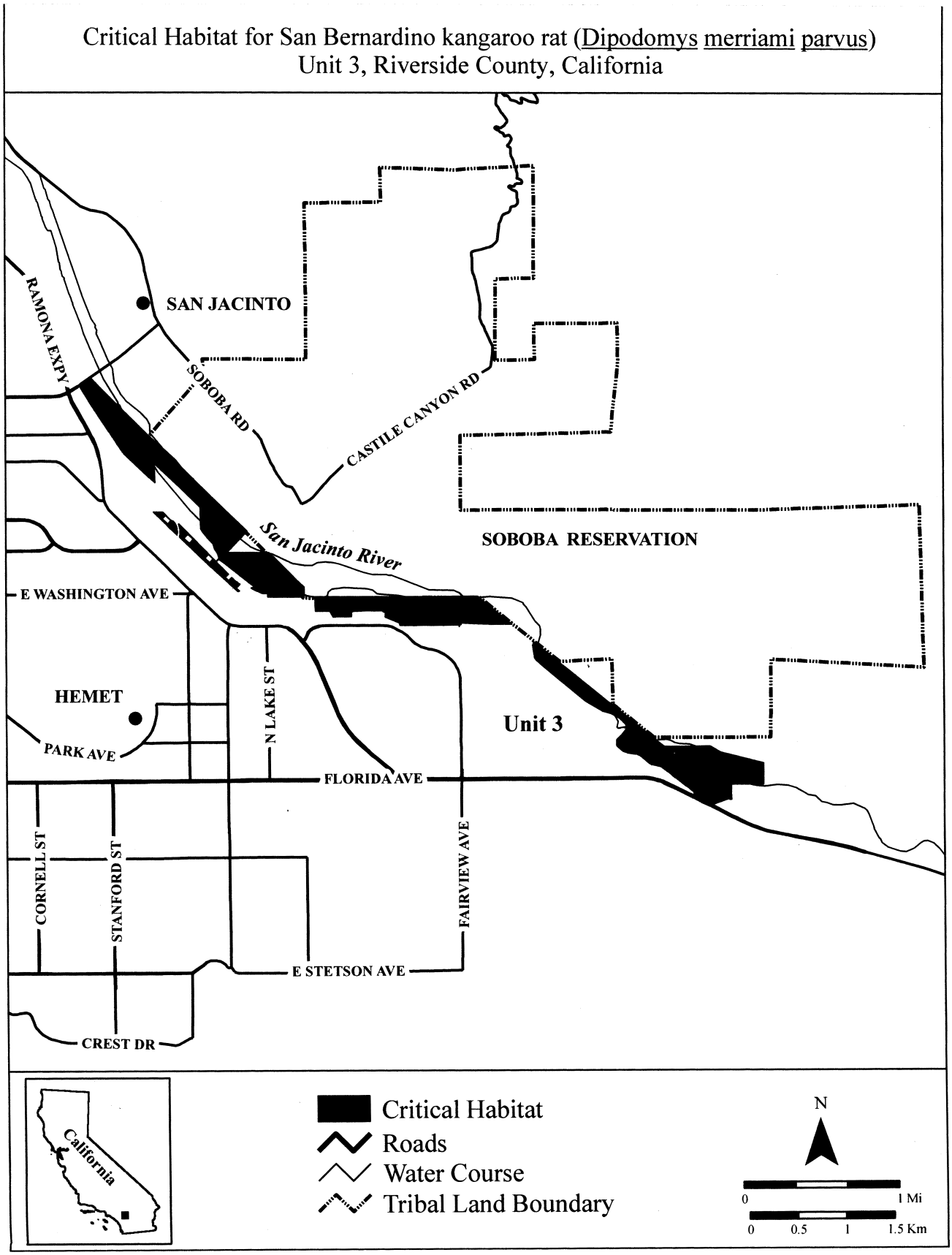
(ii) Note: Map of Unit 3—San Jacinto River Wash follows:

BILLING CODE 4310–55–P



BILLING CODE 4310–55–C

(9) Unit 4: Cable Creek Wash, San Bernardino County, California. From USGS 1:24,000 quadrangles San

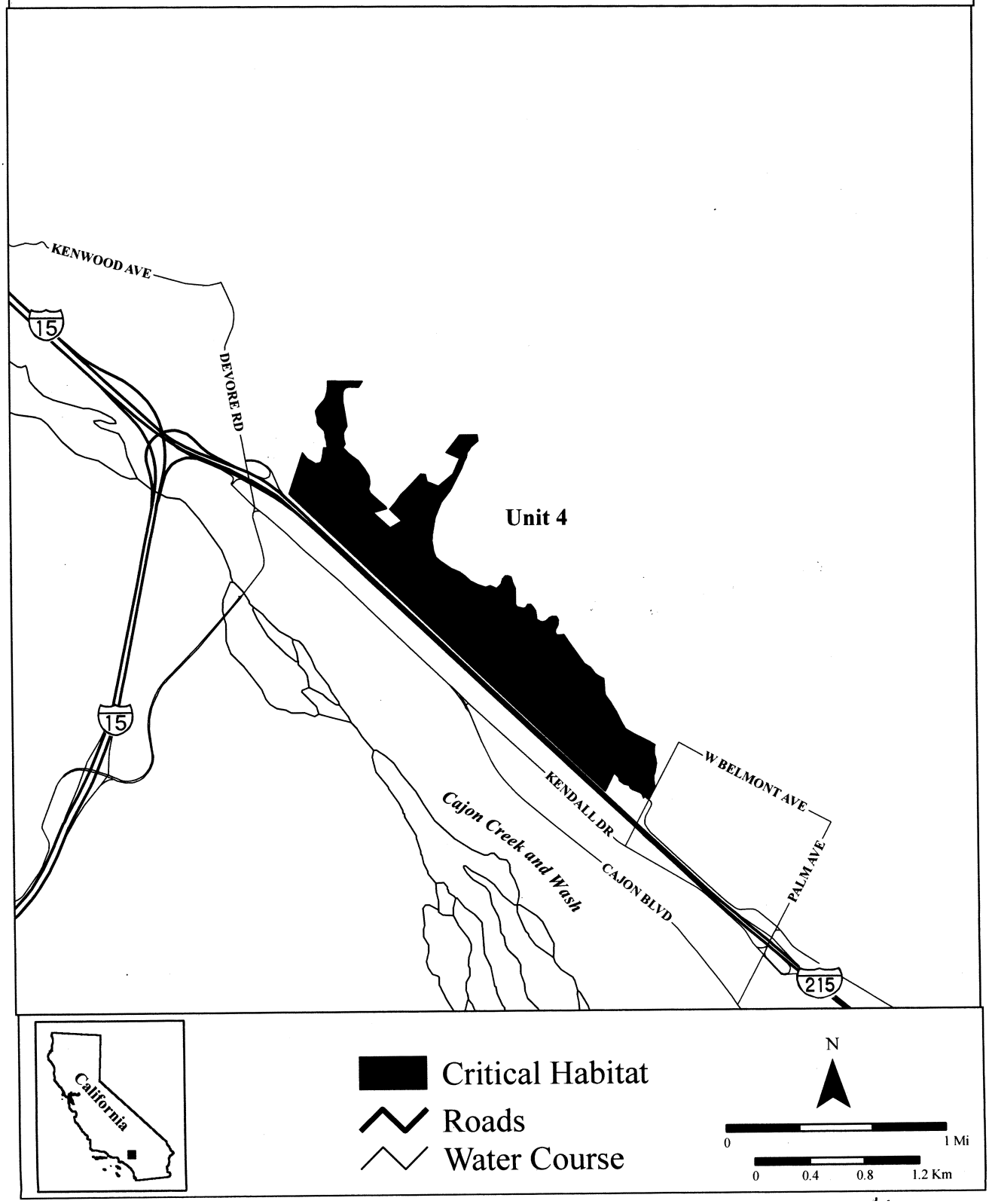
Bernardino South, Redlands, Yucaipa, and Harrison Mountain.

(i) Land bounded by the following Universal Transverse Mercator (UTM) North American Datum of 1983 (NAD83) coordinates (E, N): 463488, 3787583; 463744, 3787580; 463715, 3787533; 463646, 3787536; 463616, 3787529; 463602, 3787504; 463599, 3787437; 463618, 3787313; 463628, 3787249; 463609, 3787215; 463602, 3787194; 463603, 3787154; 463614, 3787118; 463603, 3787103; 463595, 3787091; 463627, 3787057; 463664, 3787028; 463708, 3786998; 463756, 3786932; 463786, 3786880; 463793, 3786839; 463794, 3786821; 463784, 3786780; 463795, 3786754; 463860, 3786697; 463911, 3786653; 463917, 3786638; 463815, 3786610; 463941, 3786497; 464028, 3786547; 463939, 3786634; 463978, 3786682; 464026, 3786745; 464072, 3786789; 464168, 3786891; 464206, 3786889; 464218, 3786834; 464300, 3786801; 464408, 3786892; 464461, 3787007; 464358, 3787052; 464461, 3787180; 464486, 3787180; 464593, 3787180; 464597, 3787136; 464564, 3787107; 464544, 3787091; 464532, 3787068; 464516, 3787050; 464511, 3787015; 464492, 3786982; 464476, 3786941; 464451, 3786888; 464388, 3786769; 464323, 3786685; 464274, 3786567; 464254, 3786446; 464249, 3786395; 464263, 3786319; 464278, 3786278; 464306, 3786248; 464392, 3786188; 464456, 3786161; 464489, 3786137; 464533, 3786098; 464591, 3786071; 464645, 3786052; 464679, 3786064; 464726, 3786044; 464761, 3786076; 464772, 3786114; 464791, 3786136; 464812, 3786136; 464835, 3786125; 464847, 3786083; 464865, 3786044; 464865, 3785996; 464865, 3785921; 464877, 3785905; 464905, 3785900; 464923, 3785893; 464941, 3785900; 464955, 3785924; 464979, 3785921; 465000, 3785896; 465015, 3785870; 465018, 3785842; 465022, 3785810; 465053, 3785793; 465073, 3785792; 465091, 3785801; 465114, 3785822; 465134, 3785833; 465164, 3785832; 465181, 3785804; 465177, 3785769; 465160, 3785735; 465155, 3785714; 465164, 3785694; 465194, 3785694; 465219, 3785697; 465252, 3785646; 465302, 3785573; 465367, 3785483; 465411, 3785453; 465445, 3785409; 465476, 3785388; 465510, 3785371; 465516, 3785275; 465519, 3785246; 465552, 3785201; 465604, 3785115; 465638, 3785047; 465664, 3784997; 465730, 3784959; 465843, 3784900; 465846, 3784898; 465883, 3784878; 465877, 3784853; 465876, 3784809; 465885, 3784777; 465891, 3784739; 465886, 3784704; 465879, 3784669; 465871, 3784651; 465871, 3784616; 465877, 3784572; 465826, 3784476; 465801, 3784496; 465792, 3784481; 465784, 3784509; 465769, 3784522; 465716, 3784545; 465697, 3784555; 465686, 3784577; 465653, 3784588; 465617, 3784614; 465614, 3784634; 465580, 3784669; 465512, 3784536; 464473, 3785523; 463196, 3786751; 463299, 3787054; 463331, 3787013; 463396, 3786974; 463433, 3786983; 463446, 3787022; 463455, 3787089; 463482, 3787091; 463479, 3787116; 463475, 3787141; 463467, 3787167; 463467, 3787190; 463459, 3787216; 463438, 3787238; 463417, 3787259; 463409, 3787278; 463409, 3787299; 463407, 3787321; 463399, 3787341; 463398, 3787362; 463412, 3787387; 463433, 3787415; 463454, 3787435; 463471, 3787466; 463486, 3787510; 463487, 3787543; thence returning to 463488, 3787583.

(ii) Note: Map of Unit 4—Cable Creek Wash follows:

BILLING CODE 4310–55–P

Critical Habitat for San Bernardino kangaroo rat (Dipodomys merriami parvus)
Unit 4, San Bernardino County, California

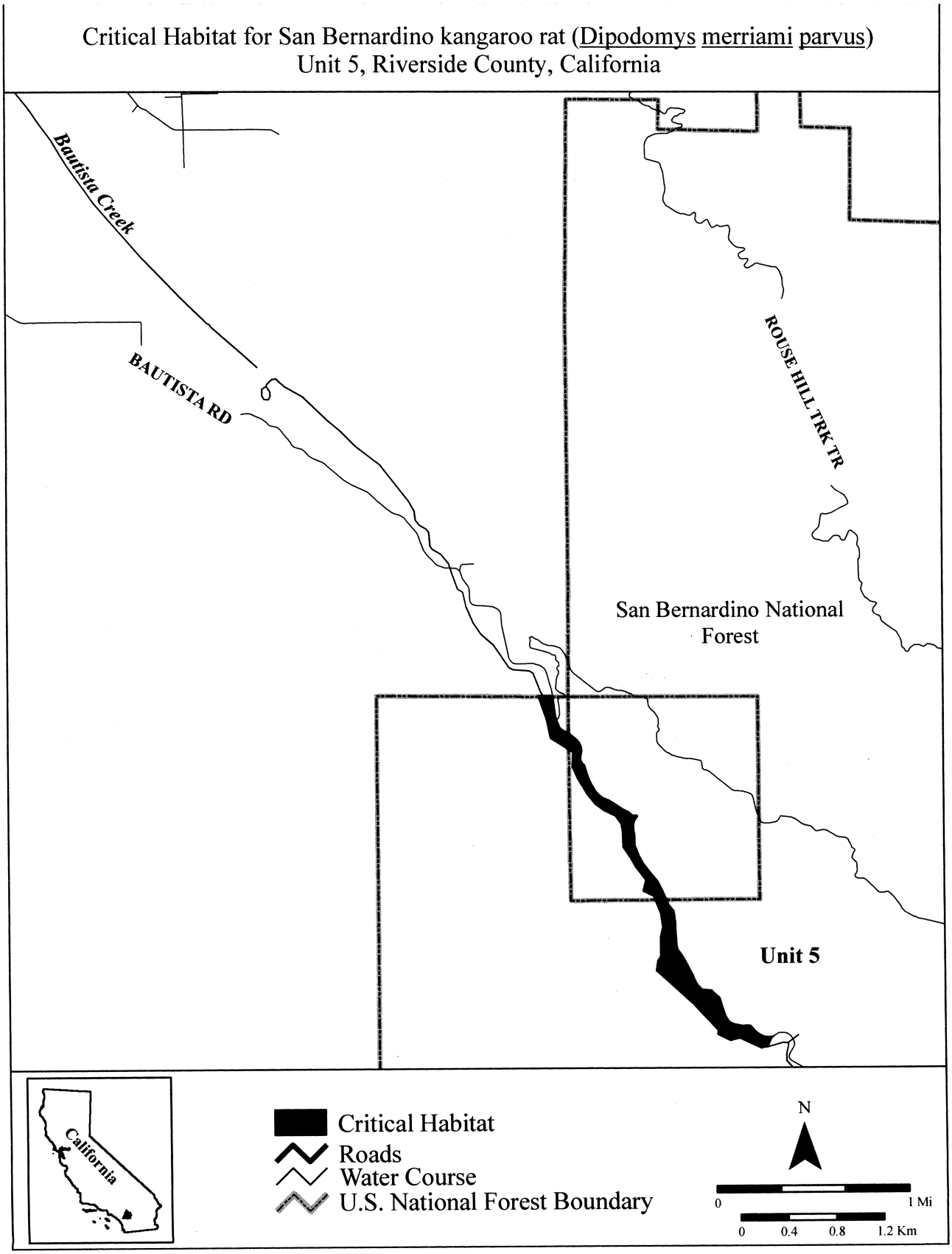


BILLING CODE 4310–55–C

(10) Unit 5: Bautista Creek, Riverside County, California. From USGS 1:24,000 quadrangle Blackburn Canyon.

(i) Land bounded by the following Universal Transverse Mercator (UTM) North American Datum of 1983 (NAD83) coordinates (E, N): 514568, 3727407; 514575, 3727407; 514581, 3727407; 514588, 3727407; 514593, 3727407; 514594, 3727400; 514604, 3727317; 514613, 3727237; 514630, 3727172; 514641, 3727149; 514659, 3727133; 514687, 3727111; 514735, 3727089; 514787, 3727047; 514817, 3727014; 514834, 3726971; 514834, 3726938; 514828, 3726894; 514828, 3726867; 514838, 3726842; 514860, 3726822; 514876, 3726765; 514896, 3726705; 514920, 3726656; 514955, 3726596; 514978, 3726573; 515017, 3726548; 515065, 3726527; 515087, 3726515; 515119, 3726495; 515161, 3726465; 515184, 3726451; 515225, 3726430; 515263, 3726401; 515298, 3726401; 515301, 3726391; 515279, 3726357; 515267, 3726325; 515267, 3726280; 515279, 3726226; 515279, 3726190; 515279, 3726148; 515291, 3726115; 515316, 3726054; 515344, 3726000; 515395, 3725932; 515471, 3725841; 515510, 3725760; 515536, 3725696; 515565, 3725637; 515601, 3725594; 515615, 3725497; 515617, 3725406; 515624, 3725301; 515632, 3725267; 515676, 3725203; 515724, 3725116; 515794, 3724968; 515822, 3724940; 515842, 3724928; 515883, 3724925; 515912, 3724923; 515922, 3724914; 515953, 3724887; 515979, 3724862; 515991, 3724838; 516002, 3724788; 516020, 3724736; 516033, 3724701; 516052, 3724666; 516079, 3724648; 516103, 3724637; 516140, 3724630; 516170, 3724625; 516207, 3724628; 516237, 3724623; 516270, 3724587; 516307, 3724553; 516352, 3724530; 516391, 3724529; 516427, 3724532; 516437, 3724536; 516410, 3724511; 516385, 3724448; 516328, 3724429; 516147, 3724514; 516067, 3724496; 515959, 3724546; 515962, 3724584; 515750, 3724813; 515546, 3725000; 515448, 3725089; 515461, 3725175; 515486, 3725210; 515483, 3725372; 515505, 3725454; 515489, 3725572; 515432, 3725718; 515343, 3725759; 515366, 3725854; 515280, 3725966; 515238, 3726038; 515175, 3726130; 515172, 3726264; 515162, 3726324; 515112, 3726394; 515023, 3726438; 514940, 3726499; 514877, 3726578; 514800, 3726705; 514752, 3726802; 514756, 3726934; 514572, 3727048; 514537, 3727207; 514480, 3727369; 514463, 3727407; 514529, 3727407; thence returning to 514568, 3727407.

(ii) Note: Map of Unit 5—Bautista Creek follows:


Critical Habitat for San Bernardino kangaroo rat (Dipodomys merriami parvus)
Unit 5, Riverside County, California
Bautista Creek
BAUTISTA RD
ROUSE HILL TRK TR
San Bernardino National Forest
Unit 5
California
Critical Habitat
Roads
Water Course
U.S. National Forest Boundary
N
0
1 Mi
0
0.4
0.8
1.2 Km

* * * * *

Dated: October 1, 2008.

Lyle Laverty,

Assistant Secretary for Fish and Wildlife and Parks.

[FR Doc. E8–23515 Filed 10–16–08; 8:45 am]

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Federal Register

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Part III

Department of Veterans Affairs

38 CFR Part 5
Special Ratings; Proposed Rule

DEPARTMENT OF VETERANS AFFAIRS

38 CFR Part 5

RIN 2900–AL88

Special Ratings

AGENCY: Department of Veterans Affairs.

ACTION: Proposed rule.

SUMMARY: The Department of Veterans Affairs (VA) proposes to reorganize and rewrite in plain language regulations relating to special ratings and ratings for health care eligibility only. These revisions are proposed as part of VA's rewrite and reorganization of all of its compensation and pension rules in a logical, claimant-focused, and user-friendly format. The intended effect of the proposed revisions is to assist claimants and VA personnel in locating and understanding these provisions.

DATES: Comments must be received by VA on or before December 16, 2008.

ADDRESSES: Written comments may be submitted through *http://www.Regulations.gov*; by mail or hand-delivery to Director, Regulations Management (02REG), Department of Veterans Affairs, 810 Vermont Ave., NW., Room 1068, Washington, DC 20420; or by fax to (202) 273–9026. (This is not a toll free number). Comments should indicate that they are submitted in response to ''RIN 2900–AL88—Special Ratings.'' Copies of comments received will be available for public inspection in the Office of Regulation Policy and Management, Room 1063B, between the hours of 8 a.m. and 4:30 p.m., Monday through Friday (except holidays). Please call (202) 461–4902 for an appointment. (This is not a toll free number). In addition, during the comment period, comments may be viewed online through the Federal Docket Management System (FDMS) at *http://www.Regulations.gov.*

FOR FURTHER INFORMATION CONTACT: William F. Russo, Director, Regulations Management (02REG), Department of Veterans Affairs, 810 Vermont Avenue, NW., Washington, DC 20420, (202) 273–9515. (This is not a toll free number).

SUPPLEMENTARY INFORMATION: The Secretary of Veterans Affairs has established an Office of Regulation Policy and Management (ORPM) to provide centralized management and coordination of VA's rulemaking process. One of the major functions of this office is to oversee a Regulation Rewrite Project (the Project) to improve the clarity and consistency of existing VA regulations. The Project responds to a recommendation made in the October 2001 ''VA Claims Processing Task Force: Report to the Secretary of Veterans Affairs.'' The Task Force recommended that the compensation and pension regulations be rewritten and reorganized in order to improve VA's claims adjudication process. Therefore, the Project began its efforts by reviewing, reorganizing, and redrafting the content of the regulations in 38 CFR part 3 governing the compensation and pension program of the Veterans Benefits Administration. These regulations are among the most difficult VA regulations for readers to understand and apply.

Once rewritten, the proposed regulations will be published in several portions for public review and comment. This is one such portion. It includes proposed rules regarding special ratings. After review and consideration of public comments, final versions of these proposed regulations will ultimately be published in a new part 5 in 38 CFR.

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Overview of New Part 5 Organization

We plan to organize the new part 5 regulations so that most provisions governing a specific benefit are located in the same subpart, with general provisions pertaining to all compensation and pension benefits also grouped together. This organization will allow claimants, beneficiaries, and their representatives, as well as VA adjudicators, to find information relating to a specific benefit more quickly than the organization provided in current part 3.

The first major subdivision would be ''Subpart A—General Provisions.'' It would include information regarding the scope of the regulations in new part 5, general definitions, and general policy provisions for this part. This subpart was published as proposed on March 31, 2006. *See* 71 FR 16464.

''Subpart B—Service Requirements for Veterans'' would include information regarding a veteran's military service, including the minimum service requirement, types of service, periods of war, and service evidence requirements. This subpart was published as proposed on January 30, 2004. *See* 69 FR 4820.

''Subpart C—Adjudicative Process, General'' would inform readers about types of claims and filing procedures, VA's duties, rights and responsibilities of claimants and beneficiaries, general evidence requirements, and effective dates for new awards, as well as revision of decisions and protection of VA ratings. This subpart will be published as three separate Notices of Proposed Rulemaking (NPRMs) due to its size. The first, concerning the duties of VA and the rights and responsibilities of claimants and beneficiaries, was published as proposed on May 10, 2005. *See* 70 FR 24680. The second, covering general evidence requirements, effective dates for awards, revision of decisions, and protection of VA ratings, was published as proposed on May 22, 2007. *See* 72 FR 28770. The third NPRM, concerning rules on filing VA benefits claims, was published as proposed on April 14, 2008. *See* 73 FR 20136.

''Subpart D—Dependents and Survivors'' would inform readers how VA determines whether an individual is a dependent or a survivor of a veteran. It would also provide the evidence requirements for these determinations. This subpart was published as proposed on September 20, 2006. *See* 71 FR 55052.

''Subpart E—Claims for Service Connection and Disability Compensation'' would define service-connected compensation, including direct and secondary service connection. This subpart would inform readers how VA determines entitlement to service connection. The subpart would also contain those provisions governing presumptions related to service connection, rating principles, and effective dates, as well as several special ratings. This subpart will be published as three separate NPRMs due to its size. The first, concerning presumptions related to service connection, was published as proposed on July 27, 2004. *See* 69 FR 44614. The second, concerning special ratings, is the subject of this document.

''Subpart F—Nonservice-Connected Disability Pensions and Death Pensions'' would include information regarding the three types of nonservice-connected pension: Old-Law Pension, Section 306 Pension, and Improved Pension. This subpart would also include those provisions that state how to establish entitlement to Improved Pension, and the effective dates governing each pension. This subpart would be published in two separate NPRMs due to its size. The portion concerning Old-Law Pension, Section 306 Pension, and elections of Improved Pension was published as proposed on December 27, 2004. *See* 69 FR 77578. The portion concerning Improved Pension was published as proposed on September 26, 2007. *See* 72 FR 54776.

''Subpart G—Dependency and Indemnity Compensation, Accrued Benefits, and Special Rules Applicable Upon Death of a Beneficiary'' would contain regulations governing claims for dependency and indemnity compensation (DIC); accrued benefits; benefits awarded, but unpaid at death; and various special rules that apply to the disposition of VA benefits, or proceeds of VA benefits, when a beneficiary dies. This subpart would also include related definitions, effective-date rules, and rate-of-payment rules. This subpart was published as two separate NPRMs due to its size. The portion concerning accrued benefits, special rules applicable upon the death of a beneficiary, and several effective-date rules was published as proposed on October 1, 2004. *See* 69 FR 59072. The portion concerning DIC benefits and general provisions relating to proof of death and service-connected cause of death was published as proposed on October 21, 2005. *See* 70 FR 61326.

''Subpart H—Special and Ancillary Benefits for Veterans, Dependents, and Survivors'' would pertain to special and ancillary benefits available, including benefits for children with various birth defects. This subpart was published as proposed on March 9, 2007. *See* 72 FR 10860.

''Subpart I—Benefits for Certain Filipino Veterans and Survivors'' would pertain to the various benefits available to Filipino veterans and their survivors. This subpart was published as proposed on June 30, 2006. *See* 71 FR 37790.

''Subpart J—Burial Benefits'' would pertain to burial allowances. This subpart was published as proposed on April 8, 2008. *See* 73 FR 19021.

''Subpart K—Matters Affecting the Receipt of Benefits'' would contain provisions regarding bars to benefits, forfeiture of benefits, and renouncement of benefits. This subpart was published as proposed on May 31, 2006. *See* 71 FR 31056.

''Subpart L—Payments and Adjustments to Payments'' would include general rate-setting rules, several adjustment and resumption regulations, and election-of-benefit rules. This subpart will be published as two separate NPRMs due to its size. The portion concerning payments to beneficiaries who are eligible for more than one benefit was published as proposed on October 2, 2007. *See* 72 FR 56136.

The final subpart, ''Subpart M—Apportionments to Dependents and Payments to Fiduciaries and Incarcerated Beneficiaries,'' would include regulations governing apportionments, benefits for incarcerated beneficiaries, and guardianship.

Some of the regulations in this NPRM cross-reference other compensation and pension regulations. If those regulations have been published in this or earlier NPRMs for the Project, we cite the proposed part 5 section. We also include, in the relevant portion of the Supplementary Information, the **Federal Register** document citation (including the Regulation Identifier Number and Subject Heading) where a proposed part 5 section published in an earlier NPRM may be found. However, where a regulation proposed in this NPRM would cross-reference a proposed part 5 regulation that has not yet been published, we cite the current part 3 regulation that deals with the same subject matter. The current part 3 section we cite may differ from its eventual part 5 counterpart in some respects, but this method will assist

readers in understanding these proposed regulations where no part 5 counterpart has yet been published. If there is no part 3 counterpart to a proposed part 5 regulation that has not yet been published, we have inserted ''[regulation that will be published in a future Notice of Proposed Rulemaking]'' where the part 5 regulation citation would be placed.

Because of its large size, proposed part 5 will be published in a number of NPRMs, such as this one. VA will not adopt any portion of part 5 as final until all of the NPRMs have been published for public comment.

In connection with this rulemaking, VA will accept comments relating to a prior rulemaking issued as a part of the Project, if the matter being commented on relates to both rulemakings.

Overview of This Notice of Proposed Rulemaking

This proposed rulemaking pertains to those regulations governing special ratings. These regulations would be contained in proposed Subpart E of new 38 CFR part 5. Although these regulations have been substantially restructured and rewritten for greater clarity and ease of use, most of the basic concepts contained in these proposed regulations are the same as in their existing counterparts in 38 CFR part 3. However, a few substantive changes are proposed, as are some regulations that do not have counterparts in 38 CFR part 3.

Table Comparing Current Part 3 Rules With Proposed Part 5 Rules

The following table shows the relationship between the proposed regulations contained in this NPRM and the current regulations in part 3:

Proposed part 5 section or paragraph	Based in whole or in part on 38 CFR part 3 section or paragraph
5.320(a)	3.351(b), 3.352(a) [first, fifth–seventh sentences].
5.320(b)	3.352(a) [second–fourth sentences].
5.321(a)	3.351(a)(2) and (b).
5.321(b)(1)–(3)	3.351(c)(1)–(2).
5.321(c)	3.351(c)(3).
5.322(a)	New.
5.322(b), (c)(1)–(3)	3.350(a)(2)(i).
5.322(c)(4)	3.350(a)(2)(i) (*b*) [sic].
5.322(d)	3.350(c)(2).
5.322(e)	3.350(d).
5.322(f)	3.350(b)(2) [second sentence].
5.322(g)	3.350(a)(4).
5.323(a)(1)–(8)	3.350(a).
5.323(b)(1)	3.350(a).
5.323(b)(2)	3.350(a).
5.323(c)(1)	New.
5.323(c)(2)	3.350(a)(1)(i) [first sentence].
5.323(c)(3)(i)–(iii)	3.350(a)(1)(i) [second sentence].
5.323(c)(3)(iv)	New.
5.323(c)(4)	New.
5.323(c)(5)	New.
5.323(c)(6)	3.350(a)(1)(iii).
5.323(c)(7)	3.350(a)(1)(iv).
5.323(d)(1)	3.350(a)(3)(i).
5.323(d)(2)	3.350(a)(3)(ii).
5.323(e)	3.350(a)(5).
5.323(f)	3.350(a)(6).
5.324 [introduction]	3.350(b).
5.324(a)	3.350(b), (b)(1).
5.324(b)	3.350(b), (b)(1).
5.324(c)	3.350(b), (b)(2).
5.324(d)	3.350(b), (b)(4).
5.324(e)	3.350(b)(3).
5.325 [introduction]	3.350(f).
5.325(a)	3.350(f)(1)(i).
5.325(b)	3.350(f)(1)(iii).
5.325(c)	3.350(f)(1)(vi).
5.325(d)	3.350(f)(2)(i).
5.326 [introduction]	3.350(c)(1).
5.326(a)	3.350(c)(1)(i).
5.326(b)	3.350(c)(1)(ii).
5.326(c)	3.350(f)(1)(ii).
5.326(d)	3.350(f)(1)(iv).
5.326(e)	3.350(c)(1)(iii).
5.326(f)	3.350(f)(1)(viii).
5.326(g)	3.350(c)(1)(iv).
5.326(h)	3.350(f)(2)(ii).
5.326(i)	3.350(c)(1)(v), (c)(3), and 4.79 [last sentence].
5.327 [introduction]	3.350(f).
5.327(a)	3.350(f)(1)(x).
5.327(b)	3.350(f)(1)(v).
5.327(c)	3.350(f)(1)(vii).
5.327(d)	3.350(f)(1)(ix).
5.327(e)	3.350(f)(2)(iii).
5.328	3.350(d) [introduction].
5.328(a)	3.350(d)(1).
5.328(b)	3.350(f)(1)(xi).
5.328(c)	3.350(d)(2).
5.328(d)	3.350(d) and (d)(3).
5.328(e)	3.350(d)(4).
5.329	3.350(f), (f)(1)(xii).
5.330 [introduction]	3.350(e)(1).
5.330(a)	3.350(e)(1)(i).
5.330(b)	3.350(e)(1)(iii).
5.330(c)	3.350(e)(1)(iv).
5.330(d)	3.350(e)(2).
5.330(e)	3.350(e)(1)(ii) and (e)(3).
5.331(a)	3.350(f).
5.331(b)(1)	3.350(f)(2)(iv).
5.331(b)(2)	3.350(f)(2)(v).
5.331(b)(3)	3.350(f)(2)(vi).
5.331(c)	3.350(f)(2)(vii).
5.331(c)(1)	3.350(f)(2)(vii) (A).
5.331(c)(2)	3.350(f)(2)(vii) (B).
5.331(c)(3)	3.350(f)(2)(vii) (C).
5.331(d)	3.350(f)(3) and (f)(4)(i).
5.331(e)(1),(2)	3.350(f)(4).
5.331(e)(3)	3.350(f)(4)(ii).
5.331(f)	3.350(f)(5).
5.332(a)	3.350(h)(1) and (2).
5.332(b)	3.350(h).
5.332(c)	3.350(h) and 3.352(b).
5.332(c)(1)(i)	3.350(h)(2) and 3.352(b)(1)(i).
5.332(c)(1)(ii)	3.352(b)(1)(ii).
5.332(c)(1)(iii)	3.352(b)(1)(iii).
5.332(c)(1)(iv)	3.352(b)(1)(iii).
5.332(c)(2)	3.352(b)(2) [first sentence].
5.332(c)(3)	3.352(b)(2) [second sentence].
5.332(c)(4)	3.352(b)(2) [third sentence].
5.332(c)(5)	3.352(b)(3).
5.332(c)(6)	3.352(b)(4).
5.333 [introduction]	3.350(i).
5.333(a)	3.350(i)(1).
5.333(b)	3.350(i)(2).
5.334	New.
5.335(a)	3.401(a)(1).
5.335(b)	3.401(a)(1).
5.336(a)(1)	3.401(a)(3).
5.336(a)(2)	3.401(a)(3).
5.336(b)	3.501(b)(3).
5.337	3.401(a)(2).
5.340	3.370.
5.341	3.371.
5.342	3.372.
5.343	3.374.
5.344	3.375.
5.345	3.378.
5.346(a)	3.959.
5.346(b)(1)(i)	3.350(g)(1).
5.346(b)(1)(ii)	3.401(g).
5.346(b)(2)	3.350(g)(2).
5.347	3.343(b).
5.350	3.361.
5.351	3.361(a)(2), 3.400(i).
5.352	3.362.
5.353	3.363.
5.360(a)	New.
5.360(b)	3.381(a).
5.360(c)(1)	3.381(e)(1).

Proposed part 5 section or paragraph	Based in whole or in part on 38 CFR part 3 section or paragraph
5.360(c)(2)	3.381(e)(2).
5.360(c)(3)	3.381(d)(5).
5.360(c)(4)	3.381(d)(6).
5.360(d)(1)–(3)	3.381(b).
5.360(d)(4)	3.381(c) [first sentence].
5.360(e) [introduction]	3.381(c) [second sentence].
5.360(e)(1)	3.381(d)(1).
5.360(e)(2)	3.381(d)(2).
5.360(e)(3)	3.381(d)(3).
5.360(e)(4)	3.381(d)(4).
5.360(e)(5)	3.381(e)(3).
5.360(e)(6)	3.381(e)(4).
5.360(e)(7)	3.381(f).
5.361(a)	3.360(a).
5.361(b)	3.360(c).
5.361(c)	3.360(b).
5.362	New.
5.363	3.359.
5.365	3.300.
5.366	3.385.
5.367	3.357.
5.368	3.315(b), (c).

Readers who use this table to compare the proposed provisions with the existing regulatory provisions, and who observe a difference between them, should consult the text that appears later in this document for an explanation of significant changes in each regulation. Not every paragraph of every current part 3 section regarding the subject matter of this rulemaking is accounted for in the table. In some instances, other portions of the part 3 sections that are contained in these proposed regulations appear in subparts of part 5 that are being published separately for public comment. For example, a reader might find a reference to paragraph (a) of a part 3 section in the table, but no reference to paragraph (b) of that section because paragraph (b) will be addressed in a separate NPRM. The table also does not include provisions from part 3 regulations that will not be carried forward to part 5. Such provisions are discussed specifically under the appropriate part 5 heading in this preamble. Readers are invited to comment on the proposed part 5 provisions and on our proposals to omit those part 3 provisions from part 5.

Content of Proposed Regulations

Special Monthly Compensation

5.320 Determining Need for Regular Aid and Attendance

Proposed § 5.320 is derived primarily from current § 3.352(a). Although § 3.352(a) by its terms applies only to determinations of the need for regular aid and attendance under § 3.351(c)(3) (increased DIC based on need for aid and attendance), in practice VA applies § 3.352(a) as the general criteria for determining the need for regular aid and attendance in every context for which benefits are premised on such a need and administered under part 3. This is reflected in part by the reference to the § 3.352(a) criteria in § 3.351(c)(3), which applies to a veteran, spouse, surviving spouse, or parent, and in § 3.350(b)(3), which refers to § 3.352(a) for the criteria to determine whether a veteran qualifies for special monthly compensation (SMC) based on the need for regular aid and attendance. In part 5, we would explicitly make these criteria generally applicable to all determinations of the need for regular aid and attendance, and, in so doing, will simplify and clarify the criteria.

Current § 3.351(b) uses the term ''helpless'' to mean requiring ''the regular aid and attendance of another person,'' but the Veterans' Housing Opportunity and Benefits Improvement Act of 2006 amended certain sections of title 38, United States Code, to replace the term ''helpless'' with the term ''significantly disabled'' (and similar terminology) when describing veterans, dependents, or survivors who need regular aid and attendance benefits. *See* Public Law 109–233, sec. 502, 120 Stat. 398, 415 (June 15, 2006). Despite the change in terminology, the Act did not make any substantive change to title 38. *See* Explanatory Statement on Amendment to Senate Bill, S. 1235, as amended, 152 Cong. Rec. H2976, H2978 (daily ed. May 22, 2006). The proposed part 5 criteria for needing regular aid and attendance, however, would not reference the statutory requirement that a person be ''helpless'' or ''so significantly disabled'' as to regularly need aid and attendance. The statutory term serves in § 3.352(a) as the basis for the application of the various criteria that can serve as the basis for a finding that an individual is in need of regular aid and attendance, which would be listed in proposed § 5.320(a)(1)–(6). But those criteria clearly apply only if a person is disabled and, as a result, the reference to being ''so significantly disabled'' is superfluous. We would, instead, simply state that a person needs regular aid and attendance if that person is unable to perform the functions listed in paragraphs (a)(1)–(6).

In addition, current § 3.351(b) uses the term ''require'' rather than ''need'' regular aid and attendance. We propose to use ''need'' in proposed part 5. The words ''need'' and ''require'' have identical meanings, but part 3 uses ''need'' more than 60 times when referring to regular aid and attendance, but uses ''require'' only five times. In the authorizing statutes, 38 U.S.C. 1114(*l*) uses the phrase ''in need of regular aid and attendance'', while 38 U.S.C. 1115(1)(E) and 1502(b) use ''need or require the regular aid and attendance.'' The word ''need'' is perfectly clear, and more easily understood than ''require'' or ''need or require,'' and using the word ''need'' will not result in any substantive difference between parts 3 and 5.

We would also omit the phrase ''of another person.'' In current part 3, the phrase inconsistently appears after ''aid and attendance.'' It is in current §§ 3.25(e) and 3.351(b), but not in §§ 3.350, 3.351(c), or 3.352. The statutes authorizing benefits based on needing ''regular aid and attendance'' do not consistently use the phrase ''of another person.'' Compare, e.g., 38 U.S.C. 1114(*l*), (m), (r) (not using ''of another person''), with 38 U.S.C. 1115(1)(E) (using ''of another person''). All of the criteria for determining need for aid and attendance listed in § 3.352, ''Criteria for determining aid and attendance and 'permanently bedridden,''' concern tasks that must be done by someone other than the person needing aid and attendance. Therefore, the phrase ''of another person'' is unnecessary.

In proposed § 5.320(a) we would specifically note that the need for regular aid and attendance need not be permanent. There is no express statutory requirement that a person's need for regular aid and attendance is permanent in nature, and the proposed rule is consistent with the current regulation. Indeed, to impose a ''permanent'' requirement might conflict with 38 U.S.C. 1114(*l*), which distinguishes a veteran's need for regular aid and attendance from a veteran being ''permanently bedridden,'' as further explained later in this NPRM.

As noted above, proposed § 5.320(a)(1)–(6) would set forth the basic criteria to establish the need for regular aid and attendance, which are derived from current § 3.352(a). The language describing the criteria in the proposed paragraph is plainer and more modern than that of the current regulation, but there are no substantive differences. In particular, current

§ 3.352(a), ''Basic criteria for regular aid and attendance and permanently bedridden,'' specifies that ''physical or mental'' incapacity necessitates assistance in protecting ''the claimant from hazards or dangers incident to his or her daily environment.'' In the proposed rule, we have omitted the phrase ''physical or mental.'' The term ''incapacity'' needs no such qualification because the only possible incapacitating causes of a person's inability to avoid hazards or dangers are physical or mental. Thus, the phrase ''physical or mental'' is superfluous.

Proposed § 5.320(b) reflects VA's policy to consider a person who is bedridden to also be a person who needs regular aid and attendance. Although the title of current § 3.352 and the caption to § 3.352(a) refer to the term ''permanently bedridden,'' the text of § 3.352(a) describes ''bedridden'' status without such qualification. Indeed, 38 U.S.C. 1114(*l*) contains the sole statutory requirement that a veteran be ''permanently bedridden,'' stating that a veteran is eligible for special monthly compensation at the rate set forth in section 1114(*l*) if the veteran ''is permanently bedridden or with such significant disabilities as to be in need of regular aid and attendance.'' That requirement would be covered by § 5.324(d).

Thus, proposed § 5.320(b) implements the general statutory criterion, appearing in several places in title 38, United States Code, that a person who is so significantly disabled as to need regular aid and attendance is entitled to certain VA benefits. It is reasonable to assume that a person who is bedridden due to disability has such need. Therefore, proposed part 5, like part 3, would consider a person who is bedridden to be one who needs regular aid and attendance.

Proposed § 5.320(b) is based on the rules governing ''bedridden'' determinations under current § 3.352(a). Current § 3.352(a) includes a statement that having ''voluntarily taken to bed'' would not support a finding of bedridden status. We propose to reword this requirement by stating that the person ''must remain in bed due to his or her disability or disabilities,'' thus eliminating the possibility that voluntary bed rest could qualify. We would add that the bed rest must be based on medical necessity, but clarify that such necessity cannot be for convalescence or cure. These statements are consistent with the current rule and will not lead to a different result in cases adjudicated under part 5.

The last two sentences of § 3.352(a) state, ''Determinations that the veteran is so helpless, [sic] as to be in need of regular aid and attendance will not be based solely upon an opinion that the claimant's condition is such as would require him or her to be in bed. They must be based on the actual requirement of personal assistance from others.'' Because the proposed regulation makes clear that a person who is bedridden also is in need of aid and attendance, we will not repeat these sentences in part 5.

5.321 Additional Compensation for Veteran Whose Spouse Needs Regular Aid and Attendance

Current § 3.351(a)(2) states that a veteran in receipt of disability compensation may be eligible for increased compensation if he or she has a spouse who is in need of regular aid and attendance. The authorizing statute, 38 U.S.C. 1115, requires a veteran to be entitled to disability compensation and to have a disability rating of not less than 30 percent to qualify for this additional benefit. We propose to include this language in § 5.321(a) because it reflects the current statutory criteria and will help readers locate the eligibility requirements.

Current § 3.351(c) contains the general criteria for determining whether a dependent spouse needs regular aid and attendance. We propose to reorganize these criteria in proposed § 5.321(b) and (c). Proposed paragraph (b) would be titled ''Automatic eligibility''; it would explain that a spouse would be found to be in need of regular aid and attendance if he or she is blind or has a serious visual impairment or is a patient in a nursing home due to mental or physical incapacity. Proposed paragraph (c) would be entitled ''Factual need''; it would state the principle found in current paragraph (c)(3) that a spouse will be considered in need of regular aid and attendance if a factual need is shown under proposed § 5.320.

Under current § 3.351(c), a ''spouse * * * will be considered in need of regular aid and attendance if he or she: (1) Is blind or so nearly blind as to have corrected visual acuity of 5/200 or less, in both eyes, or concentric contraction of the visual field to 5 degrees or less.'' Although not stated explicitly, it is long-standing VA practice to require that the concentric contraction be bilateral. The 1945 Schedule for Rating Disabilities states, ''With visual acuity 5/200 or less or the visual field reduced to 5 degrees contraction, *in either event in both eyes,* the question of entitlement on account of regular aid and attendance will be determined on the facts in the individual case.'' 1945 Rating Schedule, page 53–54, para.10 (4/1/1946) (emphasis added); *see also* 38 CFR 4.79 (substantially the same). Requiring bilateral concentric contraction of the visual field to 5 degrees bilaterally implements the ''so nearly blind'' criterion of need for regular aid and attendance in the authorizing statute. *See* 38 U.S.C. 1115(1)(E). The current VA rating schedule rates unilateral concentric contraction of the visual field to 5 degrees as 30 percent disabling; bilateral concentric contraction of the visual field to 5 degrees is rated 100 percent disabling. 38 CFR 4.84a, diagnostic code 6080 (2007). These rating criteria demonstrate that unilateral contraction of the visual field to 5 degrees cannot rationally be considered ''so nearly blind'' as to need regular aid and attendance within the meaning of 38 U.S.C. 1115(1)(E). Although § 4.79 and diagnostic code 6080 apply to rating the vision of veterans, there is no rational basis to construe the criterion ''so nearly blind'' differently for veterans and for their spouses. Hence, we propose to clarify that the concentric contraction criterion applies to both eyes. Stating the visual field criterion of the need as bilateral in proposed § 5.321(b) merely states current VA practice explicitly. It makes no substantive change.

We propose to cite 38 U.S.C. 1115 as the authority for proposed § 5.321, to show the actual authority for the criteria for need of a spouse for regular aid and attendance, especially regarding the nursing home and the blindness criteria. The authority citation for current § 3.351(c), is stated as 38 U.S.C. 1502(b), but this is incomplete. Section 1502(b) is the authority for those criteria in the context of pension. Section 1115(1)(E) authorizes special monthly compensation to a veteran with a spouse who needs regular aid and attendance. Hence, we have cited section 1115 as authority for proposed § 5.321.

The criteria to establish a dependent spouse's need for regular aid and attendance for purposes of a veteran's entitlement to additional compensation, set forth in 38 U.S.C. 1115(1)(E), include that the spouse be ''blind, or so nearly blind or significantly disabled as to need or require the regular aid and attendance of another person.'' However, the implementing regulation, 38 CFR § 3.351(c)(1), defines ''blind or so nearly blind'' as ''to have corrected visual acuity of 5/200 or less, in both eyes, or concentric contraction of the visual field to 5 degrees or less.'' These criteria are similar to the criteria in 38 U.S.C. 1114(*l*), which provides special monthly compensation to a veteran with such visual disability.

We note that it has been VA's longstanding practice to apply these criteria. The ''Veterans Disability Compensation and Survivor Benefits Act of 1976,'' Public Law 94–433, sec. 102, 90 Stat. 1375 (Sep. 30, 1976), authorized VA to provide additional compensation to veterans whose spouses needed regular aid and attendance, and that legislation was the source of what is now 38 U.S.C. 1115(1)(E). In 1976, VA amended § 3.351(a) to authorize such additional compensation. 41 FR 55872, 55874 (Dec. 23, 1976); VA Transmittal Sheet 617 (Oct. 1, 1967). However, the criteria for blindness, 5/200 visual acuity or 5 degrees concentric contraction of the visual field, remained unchanged. In light of VA's consistent, long-standing use of these criteria in this context, we propose to use the criteria in § 5.321.

In promulgating § 3.351(c)(1), VA adopted these more specific criteria, rather than the vague and difficult-to-apply criteria in 38 U.S.C. 1115(1)(E), because they are more objective and easier to apply. Moreover, this definition of ''blind or so nearly blind'' does not limit the veteran's entitlement to additional compensation under section 1115(1)(E), because § 5.321(c) allows the spouse to be considered in need of regular aid and attendance based on the facts in the individual case, regardless of his or her vision. This provision implements the language in 38 U.S.C. 1115(1)(E) that authorizes VA to pay such additional compensation when the veteran's spouse is ''so * * * significantly disabled as to need or require the regular aid and attendance of another person.''

5.322 Special Monthly Compensation—General Information and Definitions of Disabilities

Proposed § 5.322 would define disabilities that establish entitlement to SMC under the sections that follow that are not defined in those sections. Proposed paragraph (a) states that SMC is available for veterans who need regular aid and attendance, are bedridden, suffer certain service-connected disabilities or combinations of disabilities (considering also certain nonservice-connected disabilities in determining entitlement to certain SMC rates), or have a spouse who needs regular aid and attendance. The paragraph identifies by cross reference the regulations that address the potential contribution of a nonservice-connected disability to entitlement to SMC. This paragraph also informs the user where and how to find the monetary rates of SMC.

Proposed paragraphs (b) through (g) would consolidate principles that apply to establishing particular levels of compensation throughout current § 3.350. By consolidating these principles in proposed § 5.322 and, thereafter, referencing the particular paragraph where applicable, it will be easier for readers to find specific rules.

Title 38, United States Code, provides SMC for ''anatomical loss or loss of use of'' certain body parts. 38 U.S.C. 1114(k)–(p). Current § 3.350 variously uses the phrases ''anatomical loss or loss of use [of the named body part]'' and ''loss or loss of use [of the named body part].'' These phrases mean the same thing. Where § 3.350 uses ''loss of [a named body part]'', as contrasted with ''loss of use of [a named body part],'' ''loss of'' means anatomical loss, consistent with their statutory derivation. Compare, e.g., 38 U.S.C. 1114(k) (''anatomical loss or loss of use of one or more creative organs'') with § 3.350(a)(1)(i) (''Loss of a creative organ will be shown by acquired absence of one or both testicles * * * ovaries or other creative organ''). For consistency within part 5, we propose to use ''anatomical loss or loss of use [of the named body part]'' and ''anatomical loss [of the named body part]'' throughout part 5.

We propose to define the loss of use of a hand or a foot at proposed § 5.322 paragraphs (b) and (c), respectively. These definitions are derived from current § 3.350(a)(2). Current § 3.350(a)(2)(i)(a) [sic] refers to ''complete ankylosis of two major joints of an extremity,'' but does not define ''major joints.'' VA has defined the major joints in 38 CFR 4.45(f), and we propose to incorporate this definition into paragraphs (b) and (c) regarding the upper and lower extremity, respectively, as an aid to readers. Current § 3.350(a)(2)(i)(a) [sic] also refers to ''[e]xtremely unfavorable complete ankylosis of the knee'' without defining this term. VA has defined extremely unfavorable ankylosis of the knee in 38 4.71a, Diagnostic Code 5256, and we propose to incorporate this definition into paragraph (c)(1) as an aid to readers.

Current § 3.350(a)(2)(i) states the amount of function of a hand or foot of which there is loss of use as follows: ''Loss of use of a hand or a foot will be held to exist when no effective function remains other than that which would be equally well served by an amputation stump * * * with use of a suitable prosthetic appliance.'' This means the function of the hand or foot is less than or equal to the function of a prosthesis attached to the amputation stump. Proposed § 5.322(b) and (c) have restated the extent of function that qualifies as loss of use of a hand or foot, respectively, as ''functions no better than a prosthesis would function if attached to the [arm or leg] at a point of amputation below the [elbow or knee].'' ''[F]unctions no better than'' means the same thing as ''no effective function remains other than that which would be equally well served by.'' No substantive change is intended.

Proposed § 5.322(d) is based on current § 3.350(c)(2). The first sentence of current § 3.350(c)(2) states that in determining whether there is natural elbow or knee action for purposes of § 3.350(c)(1)(ii) and (iii), VA will consider whether use of the proper prosthetic appliance requires natural use of the joint or whether necessary motion is otherwise controlled, in that the muscles affecting joint motion, if not already atrophied, will become so. In proposed § 5.322(d), we would explain the effect of VA's consideration of whether the veteran is able to use a prosthesis that requires the natural use of the elbow or knee joint. The regulation explains that natural elbow or knee action is prevented when a prosthesis is in place if the veteran is unable to use a prosthesis that requires the natural use of the elbow or knee joint, or if the veteran is unable to move such a joint, as in complete ankylosis or complete paralysis. In order to simplify the rule, we propose not to repeat that VA will consider whether when using a proper prosthesis necessary motion is controlled by means other than natural use of the joint so that the muscles affecting joint motion, if not already atrophied, will become so. This language is not contained in 38 U.S.C. 1114 and does not aid in determining whether use of a prosthesis prevents natural elbow or knee action with a prosthesis in place.

Current § 3.350(c)(2) refers to ''no movement in the joint, as in ankylosis or complete paralysis.'' In proposed § 5.322(d), we have inserted the word ''complete'' before ''ankylosis'' to clarify the intent of the current rule that the ankylosis must be complete.

Proposed § 5.322(e) is derived from current § 3.350(d). VA will consider a veteran prevented from wearing a prosthesis due to amputation of an extremity (arm or leg) near the shoulder or hip if the anatomical loss prevents the use of a prosthesis, and reamputation at a higher level that permits the use of a prosthesis is not possible. If a prosthesis cannot be worn at the present level of amputation but could be worn if there were a reamputation at a higher level, VA will

consider the veteran not to have an anatomical loss of the extremity (arm or leg) so near the shoulder or hip as to qualify for SMC under 38 U.S.C. 1114(n). Instead, VA will consider the veteran eligible only for SMC based on anatomical loss or loss of use of the arm at a level, or with complications, preventing natural elbow action with a prosthesis in place.

We note that, like current § 3.350(d), § 3.350(f) requires anatomical loss of the leg or arm so near the hip or shoulder as to prevent the use of prosthetic appliance. We propose to make § 5.322 applicable to the part 5 counterparts to these provisions as well, instead of limiting its application to the counterparts of § 3.350(d), in an effort to ensure consistent use and application of terminology and promote consistency in VA decisionmaking.

Proposed § 5.322(f) is consistent with the second sentence of current § 3.350(b)(2). The rule bars payment of SMC to a veteran who has actual visual acuity better than 5/200 but is nevertheless assigned a disability rating based on visual acuity of 5/200. The rating schedule for impaired visual acuity, 38 CFR 4.84a, Table V, provides for rating based on impaired visual acuity of 5/200 to veterans with impaired visual acuity ranging between 5/200 and more than 10/200. *See* 38 CFR 4.83. However, SMC under 38 U.S.C. 1114 is available only to a veteran with visual acuity of 5/200 or less. Therefore, proposed § 5.322(f), like current § 3.350(b)(2), requires adjudicators to ascertain that a veteran in receipt of disability compensation based on visual acuity of 5/200 actually suffers from impaired visual acuity of 5/200 or less.

We propose to include the definition of loss of use or blindness of an eye, having only light perception, at proposed § 5.322(g). This definition is derived from current § 3.350(a)(4). We propose to restate ''considered of negligible utility'' contained in current § 3.350(a)(4) as ''considered insignificant usefulness of sight'' in § 5.322(g). Readers might misinterpret ''considered of negligible utility'' in the current regulation as meaning that a report showing visual acuity difficulties at distances less than 3 feet would make the result of the visual examination not useful in determining entitlement to SMC. The words ''negligible utility'' means insignificant usefulness of sight. The proposed restatement will make clear that the regulation refers to the disabling nature of a veteran's visual acuity and not to the evidentiary weight of a visual examination report.

5.323 Special Monthly Compensation Under 38 U.S.C. 1114(k)

Proposed § 5.323 is derived from current § 3.350(a). The proposed regulation would be titled ''Special monthly compensation under 38 U.S.C. 1114(k).''

In § 5.323(a)(8), we have clarified that treatment of breast tissue with radiation does not include diagnostic procedures that require the use of radiation. We do not believe that Congress intended to include diagnostic procedures such as a mammogram or other x-ray examination as a basis for compensation under 38 U.S.C. 1114(k), because such examinations are routinely performed.

Proposed § 5.323(b) is derived from the remaining three sentences in current § 3.350(a).

Proposed § 5.323(c) is derived from current § 3.350(a)(1). Proposed § 5.323(c)(1) defines a ''creative organ'' as an organ directly involved in reproduction. In VAOPGCPREC 2–2000, 65 FR 33422 (May 23, 2000), VA's General Counsel noted that the term ''creative organ'' is not defined in 38 U.S.C. 1114(k), nor in any other provision of title 38, United States Code. It is unique to section 1114(k) and is used in current § 3.350(a)(1) without definition. After examining the issue, the General Counsel determined that by using the term ''creative organ'' Congress meant procreative, or reproductive, organs. The proposed definition is consistent with VAOPGCPREC 2–2000.

Proposed § 5.323(c)(2) restates the first sentence of current § 3.350(a)(1)(i). The second sentence of current § 3.350(a)(1)(i) is restated in proposed § 5.323(c)(3)(i) through (iii).

Current 38 CFR 3.350(a)(1)(i)(c) states that loss of use of a creative organ may be shown ''when a biopsy, recommended by a board including a genitourologist and accepted by the veteran, establishes the absence of spermatozoa.'' We propose to use somewhat different language in § 5.323(c)(3)(iii) as follows: ''Absence of spermatozoa proven by biopsy performed with the informed consent of the veteran.'' We note that the reference to ''a board'' in the current rule relates to VA's former procedure of having a board of three VA employees (including a physician) adjudicate claims. Because this is no longer VA's procedure, and because any physician or VA adjudicator may order a biopsy, we propose not to include that reference in § 5.323(c)(3)(iii). The phrase ''accepted by the veteran'' might be misconstrued to mean that a veteran may accept or reject biopsy results. The intent of § 3.350(a)(1)(i)(c) was to clarify that undergoing a biopsy is voluntary and requires the veteran's informed consent.

Proposed § 5.323(c)(3)(iv) is a new provision that states that loss of use of a creative organ exists when medical evidence shows that, due to injury or disease, reproduction is not possible without medical intervention. Although essentially the definition of loss of use, this provision is based on VA's long-standing policy of awarding SMC if the medical evidence of record shows the loss of erectile power secondary to a disease process such as diabetes or multiple sclerosis in a male veteran or a condition of the reproductive tract, such as retrograde ejaculation or spermatozoa dumping into the bladder in a male veteran or the removal of a fallopian tube in a female veteran, that results in the loss of use of a creative organ.

We also propose to include in § 5.323(c)(3)(iv)(A) a statement reflecting long-standing VA policy that would allow for the award of SMC under 38 U.S.C. 1114(k) for the anatomical loss or loss of use of a creative organ even when one paired creative organ is capable of reproduction and the other is not. Both 38 U.S.C. 1114(k) and 38 CFR 3.350(a) are silent regarding this type of medical condition. Adding this rule to the proposed regulation is beneficial to veterans.

In § 5.323(c)(4), we propose to state that payment of SMC would be proper under 38 U.S.C. 1114(k) for loss of use of a creative organ even in instances when a veteran uses prescription medications or mechanical devices to treat erectile dysfunction. Veterans should not be prevented from receiving SMC when they are receiving treatment that corrects an otherwise compensable condition to some degree, particularly since the improvement in the condition may only be partial and because the loss of use may return when the treatment is suspended.

In § 5.323(c)(5), we propose to state clearly that SMC under 38 U.S.C. 1114(k) would be payable for a service-connected anatomical loss of a creative organ even if it is preceded by a nonservice-connected loss of use of that same organ. In addition, in proposed § 5.323(c)(5)(i) through (iv), we have included examples illustrating this principle. SMC should be granted even if the veteran was first unable to procreate for nonservice-connected reasons. Congress has provided two bases for SMC, anatomical loss or loss of use. Compensation for service-connected anatomical loss is authorized even though there was a preexisting,

nonservice-connected loss of use. *See* VAOPGCPREC 5–89, 54 FR 38033 (Sept. 14, 1989). According to the legislative history of 38 U.S.C. 1114(k), the purpose of SMC for anatomical loss or loss of use of a creative organ is to account for psychological factors as well as the loss of physical integrity. *See id.* Even where a veteran has previously suffered the anatomical loss of certain creative organs that results in the loss of use of the remaining creative organs, the psychological impact and the loss of physical integrity resulting from the later anatomical loss of one of the remaining organs cannot be ignored. An award of SMC under these circumstances is consistent with the terms of the statute and precedent opinions by VA's General Counsel. *See* VAOPGCPREC 93–90, 56 FR 1220 (Jan. 11, 1991).

Proposed § 5.323(c)(6) and (7) are derived from current § 3.350(a)(1)(iii) and (iv) respectively. We propose not to repeat the specific language from § 3.350(a)(1)(ii) in part 5. Current § 3.350(a)(1)(ii) addresses the issue of establishing service connection for ''loss or loss of use'' of a creative organ resulting from wounds or other trauma sustained in service or resulting from operations in service for the relief of other conditions for which the creative organ becomes incidentally involved. This provision is redundant of the basic principles for establishing service connection for a disability, which are contained in current § 3.303 and which the eventual part 5 counterpart to that regulation will address.

Current 38 CFR 3.350(a)(1)(iv) states:

> Atrophy resulting from mumps followed by orchitis in service is service connected. Since atrophy is usually perceptible within 1 to 6 months after infection subsides, an examination more than 6 months after the subsidence of orchitis demonstrating a normal genitourinary system will be considered in determining rebuttal of service incurrence of atrophy later demonstrated. Mumps not followed by orchitis in service will not suffice as the antecedent cause of subsequent atrophy for the purpose of authorizing the benefit.

In proposed § 5.323(c)(7), we explicitly state the presumption implicit in the current rule, § 3.350(a)(1)(iv), by using the word ''presumed.'' We also propose not to repeat the third sentence of § 3.350(a)(1)(iv) because it is redundant.

In proposed § 5.323(d), we would define loss of use of the buttocks. This definition is derived from current § 3.350(a)(3).

In proposed § 5.323(e) and (f), we would define deafness and aphonia. These definitions are derived from current § 3.350(a)(5) and (6), respectively.

5.324 Special Monthly Compensation under 38 U.S.C. 1114(l)

Proposed § 5.324 is derived from current § 3.350(b). (Note that the part 5 counterpart to the second sentence of current § 3.350(b)(2) is contained at proposed § 5.322(f), discussed above.)

In proposed § 5.324(a) and (b) we refer only to hands and feet, not to ''extremities.'' Although current § 3.350(b)(1), refers to loss of use of an extremity, the context clearly indicates that ''extremity'' refers only to a hand or foot. Section 3.350(a) only discusses the loss of use of hands or feet and current § 3.350(a)(2), which is referred to in § 3.350(b)(1), only pertains to loss of use of a hand or foot.

Section 1114(*l*) of title 38 of the United States Code provides for special monthly compensation (SMC) if a veteran is ''permanently bedridden.'' Current § 3.350(b)(4) implements this rule by referring the reader to the criteria in current § 3.352(a); however, but for its title, § 3.352(a) defines ''bedridden'' without requiring permanence. It makes sense to define ''permanently bedridden'' in proposed § 5.324, among the criteria for the benefit authorized by section 1114(*l*), because that is the only statute that contains such a criterion.

For proposed § 5.324, we would adapt the language of other current part 3 regulations that require permanence of a condition as a criterion of entitlement to a benefit. Part 3 contains three sections that characterize permanence of a condition. Section 3.350(i)(2) states that a veteran is permanently housebound because of service-connected disability or disabilities when he or she ''is substantially confined as a direct result of service-connected disabilities to his or her dwelling and the immediate premises or, if institutionalized, to the ward or clinical areas, and it is reasonably certain that the disability or disabilities and resultant confinement will continue throughout his or her lifetime.'' Section 3.351(d)(2), (e), and (f) state requirements for Improved Disability Pension, DIC, and Improved Death Pension, respectively, in substantially the same language.

Section 3.340(b) states, ''Permanence of total disability will be taken to exist when such impairment is reasonably certain to continue throughout the life of the disabled person. * * * [B]ecoming permanently * * * bedridden constitutes permanent total disability.'' In § 3.340(b), VA explicitly equates ''permanently bedridden'' with ''permanence of total disability.'' In each of these sections, permanence is characterized by the continuance of the condition described throughout the life of the person concerned.

Proposed § 5.324(d) would authorize special monthly compensation to a veteran whose service-connected disability or disabilities require him or her to remain in bed, ''and it is reasonably certain that the confinement to bed will continue throughout his or her lifetime.'' This definition is simple, easy to apply, and consistent with VA's definitions of permanence in other similar regulations.

Paragraphs (d) and (e) of proposed § 5.324 are derived from current § 3.350(b)(4) and (3), respectively. Though this reverses the order of the ''Need for aid and attendance'' and the ''Permanently bedridden'' paragraphs in § 3.350, we have chosen to follow the sequence of these criteria in section 1114(*l*). Unless the veteran would be entitled to an additional allowance under 38 U.S.C. 1114(r) (*see* § 5.332), it is more favorable to the veteran to base a grant of SMC under 38 U.S.C. 1114(*l*) on permanently bedridden status rather than the need for regular aid and attendance because SMC based on the need for regular aid and attendance might be reduced during hospitalization (*see* § 3.552). In the current regulation, this information is contained in § 3.350(b)(4), which pertains to permanently bedridden status. However, we provide the information to instruct VA personnel to consider whether a veteran is permanently bedridden if the veteran meets the requirements of the need for regular aid and attendance. We anticipate that it will be more helpful to VA personnel and other readers to place this information in proposed § 5.324(e), which pertains to the need for regular aid and attendance. Furthermore, we have made the rule mandatory by changing ''should'' to ''will,'' to avoid confusion about whether or when to apply it.

5.325 Special Monthly Compensation at the Intermediate Rate Between 38 U.S.C. 1114(l) and (m)

Proposed § 5.325 is derived from those provisions in current § 3.350(f)—specifically § 3.350(f)(1)(i), (iii), and (vi) and § 3.350(f)(2)(i)—that provide for entitlement to SMC at the intermediate rate between the rates established under 38 U.S.C. 1114(*l*) and (m). The statutory authority for § 5.325 would be 38 U.S.C. 1114(p). The introductory paragraph of proposed § 5.325 clarifies current § 3.350(f) as it pertains to rounding to the nearest dollar the intermediate rate between 38 U.S.C. 1114(*l*) and (m). The

current rule, § 3.350(f), requires VA to round ''to the nearest dollar.'' We propose to clarify the rule so that it requires VA to round ''down to the next lower dollar.'' This accords with the statutory requirement to round ''down to the nearest dollar.'' 38 U.S.C. 1114(p). We have clarified the same point in §§ 5.327, 5.329, and 5.331, which relate to other SMC awards.

Proposed § 5.325(d) is based on current § 3.350(f)(2)(i). We propose to add concentric contraction of the visual field reduced to 5 degrees or less as an equivalent alternative to 5/200 visual acuity contained in the current regulation. Current § 3.350(b)(2) provides the basis for treating visual acuity of 5/200 and a concentric contraction reduced to 5 degrees or less as equally disabling. Because the provisions of § 3.350 will be divided in part 5, we propose to apply this principle wherever it is applicable in the proposed regulations.

5.326 Special Monthly Compensation Under 38 U.S.C. 1114(m)

Proposed § 5.326 is derived in part from current § 3.350(c). It is also derived from those provisions in current § 3.350(f)—specifically § 3.350(f)(1)(ii), (iv), and (viii) and § 3.350(f)(2)(ii)—that provide for entitlement to SMC at the rate authorized by 38 U.S.C. 1114(m).

Proposed § 5.326(a) is based on current § 3.350(c)(1)(i). To determine the loss of use of a hand, we have added a cross reference to proposed § 5.322, which contains the part 5 counterpart to current § 3.350(a)(2). The criteria contained in § 3.350(a)(2) are used in the current regulations to determine loss of use of a hand as a basis for SMC under 38 U.S.C. 1114(k) and (*l*). It is VA's long-standing practice to determine loss of use of a hand as a basis for SMC under 38 U.S.C. 1114(m) using the same criteria. This practice ensures consistent use and application of terminology, which will promote consistency in VA decision-making.

Proposed § 5.326(c) is based on current § 3.350(f)(1)(ii). Where the current regulation states, ''Anatomical loss or loss of use of one foot with anatomical loss of one leg so near the hip as to prevent use of prosthetic appliance. * * *'', proposed paragraph (c) would state, ''* * * with anatomical loss of the other leg * * *.'' VA interprets section 1114(m) to mean the anatomical loss or loss of use of the foot and the anatomical loss of the leg described in this section must involve opposite limbs. Once a leg is lost, the foot on that leg is also lost. Statute and regulation already provide SMC for the anatomical loss or loss of use of a single foot, 38 U.S.C 1114(k); § 3.350(a)(2), and for the anatomical loss or loss of use of both feet. 38 U.S.C. 1114; 38 CFR 3.350(b). It would compensate the veteran twice for the same disability to permit SMC for anatomical loss of a leg so near the hip as to prevent use of a prosthetic appliance and anatomical loss or loss of use of the foot of the same leg. VA believes that Congress did not intend such a result.

Proposed § 5.326(i) is based on current § 3.350(c)(1)(v), (c)(3), and § 4.79 of this chapter. For the reasons stated in the preamble to proposed § 5.320(a), above, we have used the phrase ''need regular aid and attendance'' instead of ''helpless'' in § 5.326. We have combined sections 3.350(c)(1)(v) and 3.350(c)(3) in proposed § 5.326(i) because § 3.350(c)(3) states how VA applies § 3.350(c)(1)(v) when the veteran's visual acuity in both eyes is 5/200 or the visual field in both eyes is reduced to 5 degrees concentric contraction. Section 3.350(c)(3) mandates that if the veteran's visual acuity in both eyes is 5/200 or the visual field in both eyes is reduced to 5 degrees concentric contraction, VA will examine the facts in the individual case to determine whether the veteran's vision makes the veteran need regular aid and attendance. Proposed § 5.326(i) also clarifies by cross reference that VA will apply the criteria found at § 5.320 in determining whether a veteran needs regular aid and attendance. Whereas current § 3.350(c)(3) only states that the need for regular aid and attendance will be determined on the facts in the individual case, the language in § 5.326(i) notifies veterans and VA personnel of the specific criteria. The use of these criteria ensures consistent use and application of terminology, which will promote consistency in VA decision-making. The application of the criteria for the need for regular aid and attendance in § 5.320 to claims for SMC under 38 U.S.C. 1114(m) is consistent with current VA practice and, therefore, the explicit reference to these criteria does not constitute a change from the current regulation.

5.327 Special Monthly Compensation at the Intermediate Rate Between 38 U.S.C. 1114(m) and (n)

Proposed § 5.327 is derived from those provisions in current § 3.350(f)—specifically § 3.350(f)(1)(v), (vii), (ix), and (x) and § 3.350(f)(2)(iii)—that provide for entitlement to SMC at the intermediate rate between 38 U.S.C. 1114(m) and (n) for specified disabilities. The statutory authority for the provisions is 38 U.S.C. 1114(p). Paragraphs (a) and (b), the counterparts of § 3.350(f)(1)(x) and (f)(1)(v), respectively, would require the involvement of opposite limbs, as described in the discussion of § 5.326(c), above, for the same reasons discussed above. That is, proposed paragraph (a) provides the stated benefit for ''[a]natomical loss or loss of use of one hand with anatomical loss or loss of use of the other arm.'' Proposed paragraph (b) provides the stated benefit for ''[a]natomical loss or loss of use of one leg at a level, or with complications, preventing natural knee action with prosthesis in place with anatomical loss of the other leg.''

5.328 Special Monthly Compensation Under 38 U.S.C. 1114(n)

Proposed § 5.328 is derived in part from current § 3.350(d). It is also derived from current § 3.350(f)(1)(xi) which provides for entitlement to SMC at the rate authorized by 38 U.S.C. 1114(n). Proposed § 5.328(a) applies the concepts contained in current § 3.350(c)(2) pertaining to natural elbow action and SMC under 38 U.S.C. 1114(m) pertaining to SMC under 38 U.S.C. 1114(n). The use of this language in proposed § 5.328(a) ensures consistent use and application of terminology, which will promote consistency in VA decision-making.

Proposed § 5.328(b), the counterparts of § 3.350(f)(1)(xi), would require the involvement of opposite limbs, as described in the discussion of § 5.326(c), above, for the same reasons discussed above. That is, proposed paragraph (b) would state, ''Anatomical loss or loss of use of one hand with anatomical loss of the other arm.''

Current § 3.350(d) states that, ''The special monthly compensation provided by 38 U.S.C. 1114(n) is payable for any of the conditions which follow: Amputation is a prerequisite except for loss of use of both arms and blindness without light perception in both eyes.'' The statute uses the term ''anatomical loss.'' It does not use the term ''amputation,'' but the two terms have identical meaning. Therefore, we have used ''anatomical loss'' rather than ''amputation'' in § 5.328. We have not repeated the sentence of § 3.350(d) beginning ''Amputation is a prerequisite * * *'' because it is superfluous. It does not confer any rights or benefits. The paragraphs that contain the prerequisite of anatomical loss are explicit as to that requirement. It is not a prerequisite in those paragraphs that do not require it.

We propose to clarify the rule in current § 3.350(d)(4), which establishes entitlement under 38 U.S.C. 1114(n) for anatomical loss of both eyes or blindness without light perception in

both eyes, by stating in proposed § 5.328(e) that benefits under 38 U.S.C. 1114(n) are available based on ''anatomical loss of one eye and blindness without light perception in the other eye.'' The current regulation does not provide for a similar visual disability involving the anatomical loss of one eye and blindness without light perception in the other eye. If there is anatomical loss of an eye, there would be no light perception in that eye. Although current § 3.350(d)(4) does not explicitly state the basis for entitlement, where there is anatomical loss of one eye and blindness without light perception in the other eye, there is also, obviously, no light perception in either eye. Therefore, entitlement to 38 U.S.C. 1114(n) would be established under the current rule.

5.329 Special Monthly Compensation at the Intermediate Rate Between 38 U.S.C. 1114(n) and (o)

Proposed § 5.329 is derived from current § 3.350(f)(1)(xii), which provides for entitlement to SMC at the intermediate rate between 38 U.S.C. 1114(n) and (*o*) for anatomical loss or loss of use of one arm at a level, or with complications, preventing natural elbow action with prosthesis in place and anatomical loss of the other arm so near the shoulder as to prevent the use of prosthetic appliance. The statutory authority for this provision is 38 U.S.C. 1114(p).

5.330 Special Monthly Compensation Under 38 U.S.C. 1114(o)

Proposed § 5.330 is derived from current § 3.350(e).

Proposed § 5.330(b) is based on current § 3.350(e)(1)(iii). Proposed paragraph (b) implements a statutory amendment to 38 U.S.C. 1114(*o*), the authority for paragraph (b) of this section. Public Law 110–157, sec. 101, 121 Stat. 1831, (Dec. 26, 2007). Specifically, the statutory amendment changed the visual acuity criterion of section 1114(*o*) from 5/200 to 20/200. Section 5.330(b) would implement this statutory change.

Current § 3.350(e)(2) refers to paraplegia and states that paralysis of both lower extremities with loss of anal and bladder sphincter control will entitle a veteran to the maximum rate under 38 U.S.C. 1114(*o*). In § 5.330(d), we propose to substitute the phrase ''loss of use'' for the current term ''paralysis.'' The term ''paralysis'' is not defined for VA purposes. It is a term most commonly associated with inability to move or have sensation in a body part as a result of an injury or a disease involving the nervous system. This is a narrow definition that does not address disabilities as a result of muscle or bone damage. The phrase ''loss of use'' is used extensively by VA personnel in rating disabilities involving the extremities and therefore is an appropriate substitute term. The phrase ''loss of use'' will be clearer to the reader and will ensure that loss of use will entitle a veteran to this level of SMC.

The basis for an award of SMC at the maximum rate under 38 U.S.C. 1114(*o*) for a veteran who has loss of anal and bladder sphincter control together with loss of use of both lower extremities is that such a veteran is presumed to be in need of regular aid and attendance. As such, the veteran is entitled to SMC under 38 U.S.C. 1114(*l*) and 1114(m). A veteran with disabilities entitled to two or more of the rates provided in 38 U.S.C. 1114(*l*) through (n) is entitled to compensation under 38 U.S.C. 1114(*o*). This basis for entitlement is restated in proposed § 5.330(d).

We will not repeat § 3.350(e)(4) and the third and fourth sentences of § 3.350(e)(3). These sentences are redundant of § 3.350(e)(1)(ii), which states that the special monthly compensation provided by 38 U.S.C. 1114(*o*) is payable for ''* * * [c]onditions entitling to two or more of the rates (no condition being considered twice) provided in 38 U.S.C. 1114(*l*) through (n).'' This provision is incorporated in § 5.330(e).

Current § 3.350(e)(4) reads, ''The maximum rate, as a result of including helplessness as one of the entitling multiple disabilities, is intended to cover, in addition to obvious losses and blindness, conditions such as the loss of use of two extremities with absolute deafness and nearly total blindness or with severe multiple injuries producing total disability outside the useless extremities, these conditions being construed as loss of use of two extremities and helplessness.'' This paragraph essentially re-states § 3.350(e)(1)(ii), which is incorporated in § 5.330(e).

Similarly, the second, third and fourth sentences of § 3.350(e)(3) reads:

> This requires, for example, that where a veteran who had suffered the loss or loss of use of two extremities is being considered for the maximum rate on account of helplessness requiring regular aid and attendance, the latter must be based on need resulting from pathology other than that of the extremities. If the loss or loss of use of two extremities or being permanently bedridden leaves the person helpless, increase is not in order on account of this helplessness. Under no circumstances will the combination of 'being permanently bedridden' and 'being so helpless as to require regular aid and attendance' without separate and distinct anatomical loss, or loss of use, of two extremities, or blindness, be taken as entitling to the maximum benefit.

These sentences merely elaborate on or rephrase the limitation from current § 3.350(e)(1)(ii) that the same disability may not be considered as the basis for two rates of SMC. Although some explanation of the concepts of current § 3.350(e)(1)(ii) is helpful, the more concise discussion proposed in paragraphs (e)(1) and (2) of § 5.330 is still sufficient and easier to read and understand.

5.331 Special Monthly Compensation Under 38 U.S.C. 1114(p)

Proposed § 5.331 is derived from current § 3.350(f)(2) through (f)(5). The proposed regulation provides rules regarding payment of additional SMC under 38 U.S.C. 1114(p).

Proposed § 5.331(b)(1) is based on current § 3.350(f)(2)(iv). Instead of referring to blindness in both eyes with visual acuity of 5/200 or less, we propose to refer to proposed § 5.324(c), which provides for SMC for veterans with visual acuity of 5/200 or less. Note that, as discussed in the preamble to proposed § 5.325, we would thereby add concentric contraction of the visual field to 5 degrees or less as an equivalent alternative to 5/200 visual acuity contained in current § 3.350(f)(2)(iv).

Current § 3.350(f)(3) states that ''additional single permanent disability or combinations of permanent disabilities independently ratable at 50 percent or more'' are bases for additional SMC, as specified in the rule. In § 5.331(d)(1), we propose to change the plural, ''combinations,'' to the singular, ''combination,'' because the intent of § 3.350(f)(3) was to require only one combination of disabilities independently ratable at 50 percent or more for entitlement to the specified additional SMC.

In proposed § 5.331(d)(1) and (e)(2), we state VA's long-standing policy that the half-step increase for additional permanent independent disability or disabilities ratable at 50 percent or more, contained in current § 3.350(f)(3), may not be paid concurrently with the full-step increase for an additional single permanent independent 100 percent disability, contained in current § 3.350(f)(4). This policy is consistent with the language of 38 U.S.C. 1114(p), which states that if a veteran's service-connected disabilities exceed the requirements for a particular rate, VA may award an additional full-step or an additional half-step to the veteran. The full-step and the half-step are alternative awards, not cumulative awards.

In proposed § 5.331(d)(2) and (e)(3), we restate and clarify the rule now in § 3.350(f)(4)(i) affecting entitlement to the additional half or whole-step based on additional independent disability or disabilities ratable at 50 percent or more, or the single permanent independent 100 percent disability, respectively. Current § 3.350(f)(4)(i) states, ''Where the multiple loss or loss of use entitlement to a statutory or intermediate rate between 38 U.S.C. 1114(*l*) and (*o*) is caused by the same etiological disease or injury, that disease or injury may not serve as the basis for the independent 50 percent or 100 percent unless it is so rated without regard to the loss or loss of use.'' We would not use the word ''etiological,'' because it is superfluous and possibly confusing.

''Etiology'' is a medical term that means ''the causes or origin of a disease or disorder.'' *Dorland's Illustrated Medical Dictionary 660* (31st ed. 2007). So, although diabetic neuropathy, *Dorland's* 1287, and diabetic retinopathy, *Dorland's* 1659, might have the same etiology, it is not VA's intent that the phrase ''same etiological disease'' preclude the independent 50-percent-or-more or the independent 100 percent benefit if separate and distinct disabilities with the same etiology otherwise meet the criteria for entitlement. Likewise, VA does not intend to preclude the benefit if separate and distinct injuries have the same etiology, for example, a motor vehicle accident, or a bomb blast. Simply, in the context of § 5.331(d)(2) and (e)(3), the phrases ''same etiological disease or injury'' and ''same disease or injury'' mean the same thing. No substantive change from the meaning of current § 3.350(f)(4)(i) is intended.

We would state the rule in § 5.331(d)(2) as it pertains to the additional independent disability or disabilities ratable at 50 percent or more as the basis of entitlement to benefits under 38 U.S.C. 1114(p), and in § 5.331(e)(3) as it pertains to the single additional independent 100 percent disability as the basis of entitlement to benefits under 38 U.S.C. 1114(p). By doing so, we would reinforce that the basis for special monthly compensation (under other than section 1114(p)) must be independent of the disability or disabilities that are independently ratable at 50 percent or more, or of the single disability that is ratable at 100 percent.

Current § 3.350(f)(3), upon which proposed § 5.331(d)(3) is based, states that graduated ratings for arrested tuberculosis ''will not be utilized in this connection, but the permanent residuals of tuberculosis may be utilized.'' The wording used in the current regulation can be improved with respect to its use of the language ''will not be utilized in this connection'' and ''may be utilized'', and we will make these improvements in part 5. The current part 3 regulation is derived from VA Regulation 1236(C) (as amended on Oct. 28, 1954) which stated in pertinent part, ''Since this subdivision contemplates that [the additional 50 percent disability] be permanent in character, the graduated ratings for arrested tuberculosis * * * will not be utilized in determining entitlement to * * * special monthly compensation.'' We have, therefore, reworded the language in proposed § 5.331(d)(3) to reflect that permanent residuals of tuberculosis, and not the graduated ratings for arrested tuberculosis, may serve as the basis for SMC under § 5.331(d) because the graduated ratings for arrested tuberculosis are not intended to be permanent.

Proposed § 5.331(e)(3) is derived from current § 3.350(f)(4)(ii), which states the same rule, verbatim, as does § 3.350(f)(3) quoted above. Proposed § 5.331(e)(3) would state the same rule as does § 5.331(d)(3) for the same reasons.

In proposed § 5.331(f), we have restated the triple extremity rule contained in current § 3.350(f)(5), which provides for compensation for anatomical loss or loss of use of three extremities. We have clarified that the triple extremity rule entitles the veteran to the next higher intermediate rate or, if the veteran is already entitled to an intermediate rate, to the next higher rate under 38 U.S.C. 1114. We note that current paragraphs § 3.350(f)(2), (f)(3), and (f)(5) use different language to describe the same result. Compare 38 CFR 3.350(f)(2)(iv) (''* * * will afford entitlement to the next higher intermediate rate of if the veteran is already entitled to an intermediate rate, to the next higher statutory rate * * *.'') with 38 CFR 3.350(f)(5) (''* * * shall entitle a veteran to the next higher rate without regard to whether that rate is a statutory rate or an intermediate rate.'').

We have phrased the part 5 counterparts so that the language is consistent throughout proposed § 5.331. Likewise, for consistency throughout proposed § 5.331, we have changed the reference to the maximum rate payable for anatomical loss or loss of use of three extremities from ''38 U.S.C. 1114(p)'' to ''38 U.S.C. 1114(*o*)''. In each other instance of a statement of the maximum rate payable, current § 3.350(f) characterizes the maximum payment as ''in no event higher than'' or ''not above'' the rate for 38 U.S.C. 1114(*o*). Whereas the rate section 1114(*o*) provides and the maximum rate section 1114(p) provides are the same dollar amount, this change is not substantive.

We also propose to state clearly in proposed § 5.331(f) that VA will combine the loss of use of whichever two extremities will provide the veteran with the highest level of SMC payable before awarding the next higher rate based on the anatomical loss or loss of use of a third extremity. Calculating SMC in this manner provides the highest possible level of SMC. This will ensure that VA personnel comply with current § 3.103(a) which requires ''a decision which grants every benefit that can be supported in law.'' We also propose to state VA's long-standing policy that when VA applies the triple extremity rule, a veteran is entitled to keep any rates payable under 38 U.S.C. 1114(k) and any rate payable under 38 U.S.C. 1114(p) for additional independent 50 or 100 percent disabilities.

5.332 Additional Allowance for Regular Aid and Attendance Under 38 U.S.C. 1114(r)(1) or for a Higher Level of Care Under 38 U.S.C. 1114(r)(2)

Proposed § 5.332 is derived from current §§ 3.350(h) and 3.352(b). Under current § 3.350(h)(1), a veteran receiving the maximum rate of SMC provided by 38 U.S.C. 1114(*o*) or (p), who requires regular aid and attendance or a higher level of care, is entitled to an additional allowance under 38 U.S.C. 1114(r) for any period(s) during which he or she is not hospitalized at the expense of the United States. Current § 3.350(h)(2) is an essentially parallel provision that states that a veteran, receiving SMC at the intermediate rate between 38 U.S.C. 1114(n) and (*o*) and at the rate under 38 U.S.C. 1114(k), who requires regular aid and attendance or a higher level of care is entitled to an additional allowance under 38 U.S.C. 1114(r) for any period(s) during which he or she is not hospitalized at the expense of the United States. Because veterans are entitled to the same allowance under 38 U.S.C. 1114(r), regardless of whether they are receiving the maximum rate of SMC provided by 38 U.S.C. 1114(*o*) or are receiving SMC at the intermediate rate between 38 U.S.C. 1114(n) and (*o*) plus SMC under 38 U.S.C. 1114(k), proposed § 5.332(a) combines the essentially parallel provisions contained in current § 3.350(h)(1) and (2) into a single paragraph.

Current § 3.350(h)(2) differs from proposed § 5.332(a) in that § 3.350(h)(2) does not state that an allowance under 38 U.S.C. 1114(r) is payable regardless

of whether the need for regular aid and attendance or a higher level of care is a partial basis for entitlement to SMC at the specified rate (the intermediate rate between 38 U.S.C. 1114(n) and (*o*), plus the rate under 38 U.S.C. 1114(k)) or is based on an independent factual determination. However, VA's long-standing practice is to allow the service-connected disabilities that are used to establish entitlement at the specified rate to also be used to establish a factual need for regular aid and attendance or a higher level of care for purposes of benefits under section 1114(r).

Proposed § 5.332(b) is derived from those portions of current § 3.350(h) that refer to veterans who are in need of regular aid and attendance and entitled to an allowance under 38 U.S.C. 1114(r)(1).

Proposed § 5.332(c) is based on those portions of current § 3.350(h) that refer to veterans who, in addition to being in need of regular aid and attendance, require a higher level of care and are entitled to an allowance under 38 U.S.C. 1114(r)(2). Proposed § 5.332(c) also contains the criteria for the allowance under 38 U.S.C. 1114(r)(2) that are described in current § 3.352(b).

There is no part 5 counterpart to current § 3.352(b)(5), which states that the allowance under 38 U.S.C. 1114(r)(2) is to be granted only when the veteran's need for a higher level of care is clearly established and the amount of services required by the veteran on a daily basis is substantial. There is no statutory requirement under 38 U.S.C. 1114(r) that the veteran's need for a higher level of care be ''clearly established,'' and there is no reason to believe that an evidentiary standard different from that set forth in 38 U.S.C. 5107(b) should apply to proof of the need for a higher level of care. Although the current regulation does not impose a new standard of proof, eliminating the ''clearly established'' requirement should eliminate the possibility that that requirement could be misconstrued as an evidentiary rule. Moreover, the detailed and specific requirements for establishing the need for a higher level of care, set forth in paragraphs (c)(3), (4), (5), and (6), require evidence of a factual nature and sufficiently ensure that the need will be based on evidence of record.

Regarding the current requirement that the amount of needed services be ''substantial,'' the definition of ''personal healthcare services'' in paragraph (c)(3) describes services that clearly establish a greater need than would be required simply by § 5.320. Hence, there is no need to repeat the term, ''substantial,'' and the application of this part 5 rule will not produce a different outcome than the application of the current rule.

5.333 Special Monthly Compensation Under 38 U.S.C. 1114(s)

Proposed § 5.333 is a restatement of current § 3.350(i). The definition of housebound is slightly reworded for uniformity throughout part 5. No substantive changes are intended.

5.334 Special Monthly Compensation Tables

We propose to include tables in paragraphs (d) through (g) of this section as aids in determining the statutory or intermediate rate of SMC payable for certain combinations of disabilities. These tables will make it easier for readers of the regulations to determine the proper rate of SMC payable for a combination of severe disabilities. The tables summarize selected regulatory text in proposed §§ 5.323 through 5.333, which contain more detailed information about each benefit. These tables are intended to provide a useful summary of the regulatory text found in current § 3.350. We do not intend these tables to confer any rights or benefits in addition to those conferred by the regulations.

5.335 Effective Dates—Special Monthly Compensation Under §§ 5.332 and 5.333

Proposed § 5.335 is derived from a reorganization of current § 3.401, which establishes the effective date for SMC based on the need for regular aid and attendance or due to being housebound. Current § 3.401(a)(1) states that the effective date for an award of regular aid and attendance and housebound benefits is either the date of receipt of claim or the date entitlement arose, whichever is later, except as provided in current § 3.400(o)(2). The same paragraph also states that when an award ''based on an original or reopened claim is effective for a period prior to the date of receipt of the claim, the additional * * * compensation payable by reason of need for regular aid and attendance or housebound status shall also be awarded for any part of the award's retroactive period for which entitlement to the additional benefit is established.'' To clarify current § 3.401(a)(1), we propose to rewrite this regulation in two separate paragraphs (a) and (b) in proposed § 5.335 so that these two rules can be more easily identified and understood.

Proposed § 5.335(a) would refer to § 3.400(o)(2) of this chapter, and to paragraph (b) of § 5.335 as exceptions to the general effective date rule stated in paragraph (a) of that section.

In addressing retroactive awards, current 3.401(a)(1) addresses pension as well as compensation awards. We have moved the pension provision to proposed § 5.392. *See* 72 FR 54776 (Sep. 26, 2007) (effective dates for special monthly pension).

Proposed § 5.335(b) expands the scope of current § 3.401(a)(1), which provides for retroactive awards of SMC for regular aid and attendance or housebound status, as noted above. Proposed § 5.335(b) would provide for retroactive awards of any SMC payment when entitlement to the SMC is established for any part of a retroactive period of compensation based on an original or reopened compensation claim. It is logical to treat the effective date of all SMC awards consistently with the effective date of awards of SMC for regular aid and attendance or housebound status. This is consistent with VA policy to grant every benefit to which veterans are entitled. *See* proposed § 5.4(b), published in 71 FR 16457 (Mar. 31, 2006).

5.336 Effective Dates—Additional Compensation for Regular Aid and Attendance Payable for a Veteran's Spouse Under § 5.321

Proposed § 5.336 is derived from a reorganization of those parts of current §§ 3.401 and 3.501 relating to the effective date for SMC for regular aid and attendance payable for a veteran's spouse. Current § 3.401(a)(3) states that the effective date for an award of additional compensation payable to a veteran based on the need for regular aid and attendance of a spouse is the date of receipt of the claim or the date entitlement arose, whichever is later. The paragraph also states that additional compensation for regular aid and attendance for a spouse will be awarded retroactively if the award is in conjunction with a retroactive award of compensation based on an original or reopened claim, for any part of the retroactive period for which entitlement to SMC is established. Proposed § 5.336(a)(1) and (2) separate these two rules.

Current § 3.401(a)(3) refers to the benefit payable for regular aid and attendance of the veteran's spouse as ''additional disability compensation.'' Proposed § 5.336(a)(2) specifically identifies the benefit as regular aid and attendance.

Current § 3.501(b)(3) states that the effective date for the discontinuance of additional compensation to a veteran based on the need for regular aid and attendance of a spouse will be the end

of the month in which the award action is taken if the need for regular aid and attendance has ceased. Proposed § 5.336(b) includes this effective date provision.

5.337 Award of Special Monthly Compensation Based on the Need for Regular Aid and Attendance During Period of Hospitalization

Current § 3.401(a)(2) states that, when the need for regular aid and attendance is initially established while a veteran is receiving hospital, institutional, or domiciliary care, the effective date for the award will be the date of discharge. We restate this information in proposed § 5.337. No substantive changes are intended.

Tuberculosis

5.340 Pulmonary Tuberculosis Shown by X-ray in Active Service

We propose to repeat the language of current § 3.370 in proposed § 5.340 without change.

5.341 Presumptive Service Connection for Tuberculous Disease; Wartime and Service After December 31, 1946

We propose to repeat the language of current § 3.371 in proposed § 5.341, with only the following technical changes. First, the proposed rule references the proposed part 5 counterpart to current § 3.307, § 5.261, which was published as proposed on July 27, 2004. *See* 69 FR 44614, 44624–25. Second, where current § 3.371(c) refers to the time period ''within 36 months after the veteran's separation from service as determined under § 3.307(a)(2),'' in proposed § 5.341(c) we refer to the time period as ''within the 3-year presumptive period provided by § 5.261(d).'' The proposed language matches the language in proposed § 5.341(a)(1) and will make the proposed regulation internally consistent in the reference to the 3-year presumptive period for tuberculosis.

5.342 Initial Grant Following Inactivity of Tuberculosis

We propose to repeat the language of current § 3.372 in proposed § 5.342 without change.

5.343 Effect of Diagnosis of Active Tuberculosis

Proposed § 5.343 repeats the language of current § 3.374, except for one technical change and one clarification. The proposed rule replaces the title ''Chief Medical Director'' with ''Under Secretary for Health,'' VA's current title for the identical position. Section 3.374(b) states, ''Reference to the Clinic Director or Chief, Outpatient Service, will be in order in questionable cases and, if necessary, to the [Under Secretary for Health] in Central Office.'' Proposed § 5.343(b) would state, ''In a case where there is no such diagnosis, but there is evidence that the veteran has tuberculosis, the case will be referred to [the VA officers specified in the regulation].'' This makes clear that the referral is mandatory in the circumstance described, and it eliminates potential uncertainty about what could make a case ''questionable.'' No substantive changes are intended.

5.344 Determination of Inactivity (Complete Arrest) of Tuberculosis

We propose to repeat the language of current § 3.375 in proposed § 5.344 without change.

5.345 Changes From Activity in Pulmonary Tuberculosis Pension Cases

We propose to repeat the language of current § 3.378 in proposed § 5.345, with only minor, technical revisions.

5.346 Tuberculosis and Compensation Under 38 U.S.C. 1114(q) and 1156

Proposed § 5.346(a) repeats the language of current § 3.959. The proposed section's title makes clear that it only applies to compensation under 38 U.S.C. 1114(q) and 1156. This is not done in the current regulation. No substantive changes are intended.

Proposed § 5.346(b)(1)(i) is based on current § 3.350(g)(1), which provides for SMC for arrested tuberculosis. The statutory authority for this compensation was 38 U.S.C. 1114(q), which was repealed by section 4(a) of Public Law 90–493, 82 Stat. 409 (Aug. 19, 1968). However, under section 4(b) of Public Law 90–493, a veteran who was receiving or entitled to receive compensation for tuberculosis on August 19, 1968, is entitled to a minimum monthly rate of compensation of $67. Id. This provision will be placed in part 5 because there are some current veterans who continue to receive this benefit. Although the part 3 equivalent of this paragraph is contained in current § 3.350 with the other SMC provisions authorized by 38 U.S.C. 1114, we propose to place this provision with other regulations pertaining to tuberculosis so that it will be easier to locate.

We propose to repeat the language of current § 3.401(g) in proposed § 5.346(b)(1)(ii) without change. Current § 3.401(g) provides the effective date for the minimum monthly rate of compensation of $67. Placing this effective date provision in the same regulation as basis for the specific benefit to which it applies is consistent with our proposal to organize by benefit and topic the part 5 rewrites of the current part 3 regulations.

Proposed § 5.346(b)(2) is based on current § 3.350(g)(2). No substantive changes are intended.

5.347 Continuance of a Total Disability Rating for Service-Connected Tuberculosis

We propose, in § 5.347, to repeat the language of current § 3.343(b) without substantive change. We have updated the term, ''rating board'' to ''agency of original jurisdiction,'' VA's current term for the VA activity that is responsible for making the initial determination on an issue affecting a claimant's or beneficiary's right to benefits.

The citation to current § 3.321(b) will be updated to the part 5 equivalent when we publish the final version of this rule.

Injury or Death Due to Hospitalization or Treatment

5.350 Benefits Under 38 U.S.C. 1151(a) for Additional Disability or Death Due to Hospital Care, Medical or Surgical Treatment, Examination, Training and Rehabilitation Services, or Compensated Work Therapy Program

We propose to repeat the language of current § 3.361 in proposed § 5.350 with one substantive change. We have not repeated current § 3.361(g)(1), ''Death before January 1, 1957.'' The paragraph provides that death compensation is the benefit payable under 38 U.S.C. 1151 for such deaths.

There are fewer than 300 beneficiaries currently receiving death compensation. Except for one small group of beneficiaries, death compensation is payable only if the veteran died prior to January 1, 1957. VA has not received a claim for death compensation in over 10 years and we do not expect to receive any more claims. We conclude that because of the small number of beneficiaries of death compensation, the provisions concerning death compensation do not need to be carried forward to part 5.

We have updated the citation to § 3.114(a), contained in current § 3.361(a)(2), to the proposed part 5 counterpart, § 5.152(a), which was published as proposed on May 22, 2007. *See* 72 FR 28770, 28789.

Current § 3.361 applies to claims under 38 U.S.C. 1151(a) received by VA after September 30, 1997. Current § 3.358 is a similar regulation that applies to claims under 38 U.S.C. 1151(a) received by VA before October 1, 1997. Because Part 5 will apply only to future claims, we will not repeat the provisions of current § 3.358 in Part 5.

5.351 Effective Dates for Awards of Benefits Under 38 U.S.C. 1151(a)

Proposed § 5.351 is derived from current § 3.400(i)(1). The effective-date rule is restated without substantive change.

5.352 Effect on Benefits Awarded Under 38 U.S.C. 1151(a) of Federal Tort Claims Act Compromises, Settlements, and Judgments Entered After November 30, 1962

Proposed § 5.352 restates current § 3.362 with only minor technical revisions. Current § 3.362 applies to claims under 38 U.S.C. 1151(a) received by VA after September 30, 1997. Current § 3.800 is a similar regulation that applies to claims under 38 U.S.C. 1151(a) received by VA before October 1, 1997. Because part 5 will apply only to future claims, we will not repeat the provisions of current § 3.800 in part 5.

5.353 Effect on Benefits Awarded Under 38 U.S.C. 1151(a) of Federal Tort Claims Act Administrative Awards, Compromises, Settlements, and Judgments Finalized Before December 1, 1962

Proposed § 5.353 restates current § 3.363 with only minor technical revisions. Current § 3.363 applies to claims under 38 U.S.C. 1151(a) received by VA after September 30, 1997. Current § 3.800 is a similar regulation that applies to claims under 38 U.S.C. 1151(a) received by VA before October 1, 1997. Because Part 5 will apply only to future claims, we will not repeat the provisions of current § 3.800 in Part 5.

Ratings for Healthcare Eligibility Only

5.360 Service Connection of Dental Conditions for Treatment Purposes

Proposed § 5.360 is derived from current § 3.381. Proposed paragraph (a) is a cross reference which states that, ''Eligibility requirements for dental treatment are set forth in § 17.161 of this chapter.''

Proposed paragraph (b) is derived from current § 3.381(a). It lists the dental conditions that may be considered service connected solely for establishing eligibility for outpatient dental treatment. We have added a statement of VA's long-standing policy that monetary compensation cannot be paid for these dental conditions in order to clarify for the public the nature of the VA benefits that veterans are entitled to receive.

In addition, the current regulation under § 3.381(a) lists periodontal disease as one of the four dental conditions that can be considered for service connection, but it does not indicate whether the periodontal disease must be acute or chronic in nature. We propose to clarify the requirement that periodontal disease must be chronic in nature before service connection can be considered because the current VA regulation, in § 3.381(e)(2), prohibits the establishment of service connection for acute periodontal disease. This clarification is thus consistent with current practice, and including it in this rule will help the readers of this provision.

Current § 3.381(e) says that the conditions listed therein will not be service connected for dental treatment purposes. Section 5.360(c) would insert the word ''outpatient'', thus: ''* * * for outpatient dental treatment purposes:''. We note the title of § 3.381 does not include ''outpatient,'' but § 3.381(a) is about conditions that qualify for ''outpatient dental treatment as provided in § 17.161 of this chapter.'' Section 3.381 as a whole distinguishes conditions that do from conditions that do not qualify for treatment as § 17.161 provides. The addition of ''outpatient'' to proposed paragraph (c) is to harmonize the section internally and to harmonize the section with § 17.161. It makes no substantive change.

5.361 Healthcare Eligibility of Persons Administratively Discharged Under Other-Than-Honorable Conditions

Proposed § 5.361 restates, with minor technical and organizational revisions, current § 3.360. No substantive changes are intended.

5.362 Presumption of Service Incurrence of Active Psychosis for Purposes of Entitlement to Hospital, Nursing Home, Domiciliary, and Medical Care

Chapter 17 of title 38 U.S.C. pertains to hospital, nursing home, and domiciliary and medical care for veterans. Section 1702 of this title states:

> For the purposes of [chapter 17], any veteran of World War II, the Korean conflict, the Vietnam era, or the Persian Gulf War who developed an active psychosis (1) within two years after discharge or release from the active military, naval, or air service, and (2) before July 26, 1949, in the case of a veteran of World War II, before February 1, 1957, in the case of a veteran of the Korean conflict, before May 8, 1977, in the case of a Vietnam era veteran, or before the end of the two year period beginning on the last day of the Persian Gulf War, in the case of a veteran of the Persian Gulf War, shall be deemed to have incurred such disability in active military, naval, or air service.

We propose a new regulation that implements this statutory provision. Although the statutory provision was enacted originally in 1958, it has never been codified by regulation. Codifying this provision will help ensure that veterans, their representatives, and VA employees are aware of this potentially important benefit.

Proposed § 5.362(a) sets forth the basic rule that VA will presume service connected an active psychosis that develops in a veteran identified in § 5.362(b). Proposed § 5.362(b) sets forth the statutorily required wartime service and provides the exact periods during which the active psychosis must have developed or, in the case of the ongoing Persian Gulf War, provides that such psychosis must have developed within two years after the end of that war.

To aid the reader, we propose to cross reference § 5.20, published as proposed on January 30, 2004, which specifies the periods of war. *See* 69 FR 4820, 4832.

5.363 Determination of Service Connection for Former Members of the Armed Forces of Czechoslovakia or Poland

We propose no substantive change to the language of current § 3.359. We have updated the term, ''rating board'' to ''agency of original jurisdiction,'' VA's current term for the VA activity that is responsible for making the initial determination on an issue affecting a claimant's or beneficiary's right to benefits.

Miscellaneous Service-Connection Regulations

5.365 Claims Based on the Effects of Tobacco Products

We propose to repeat the language of current § 3.300 in § 5.365 without substantive change. We are not repeating the first clause of § 3.300, ''For claims received by VA after June 9, 1998,'' because all claims under part 5 will be received after 1998. For references to other part 3 provisions contained within current § 3.300, we have updated the references to the part 5 counterparts that have already been addressed in a prior NPRM. Sections 5.260, 5.261, 5.262, 5.263, 5.264, 2.265, 5.267, and 5.268 were published as proposed on July 27, 2004. *See* 69 FR 44614. We have retained the cite to the current part 3 regulation where the proposed part 5 regulation that deals with the same subject matter has not yet been published.

5.366 Disability Due to Impaired Hearing

Proposed § 5.366 is a restatement of current § 3.385. No substantive changes are intended.

5.367 Civil Service Preference Ratings

We propose to repeat the content of current § 3.357 in proposed § 5.367 without change.

5.368 Basic Eligibility Determinations: Home Loan and Education Benefits

We propose to repeat the language of current § 3.315(b) and (c) in proposed § 5.368 without substantive change. Note that this proposed regulation does not contain an equivalent provision to current § 3.315(a); however, current § 3.57(a)(1)(ii) states the same rule regarding the definition of child—that a person 18 years of age or older may be recognized as a ''child'' for the purpose of compensation and pension benefits, if the person, before reaching 18 years of age, became permanently incapable of self-support by reason of physical or mental disability. Proposed § 5.220(b)(2)(i), the proposed part 5 equivalent of these part 3 provisions, was published on September 20, 2006. *See* 71 FR 55052, 55069.

In proposed § 5.368, we have changed the citation to § 3.12a to its counterpart in part 5, § 5.39, published as proposed on January 30, 2004. *See* 69 FR 4820, 4841–42.

Endnote Regarding Amendatory Language

We intend to ultimately remove part 3 entirely, but we are not including amendatory language to accomplish that at this time. VA will provide public notice before removing part 3.

Paperwork Reduction Act of 1995

This document contains no provisions constituting a collection of information under the Paperwork Reduction Act (44 U.S.C. 3501–3521).

Regulatory Flexibility Act

The Secretary hereby certifies that this proposed regulatory amendment will 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. This proposed amendment would not affect any small entities. Therefore, pursuant to 5 U.S.C. 605(b), this proposed 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.

The economic, interagency, budgetary, legal, and policy implications of this proposed rule have been examined, and it has been determined to be a significant regulatory action under the Executive Order because it is likely to result in a rule that may raise novel legal or policy issues arising out of legal mandates, the President's priorities, or the principles set forth in the Executive Order.

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 an 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 1 year. This proposed rule would have no such effect on State, local, and tribal governments, or the private sector.

Catalog of Federal Domestic Assistance Numbers and Titles

The Catalog of Federal Domestic Assistance program numbers and titles for this proposal are 64.100, Automobiles and Adaptive Equipment for Certain Disabled Veterans and Members of the Armed Forces; 64.101, Burial Expenses Allowance for Veterans; 64.102, Compensation for Service-Connected Deaths for Veterans' Dependents; 64.104, Pension for Non-Service Connected Disability for Veterans; 64.105, Pension to Veterans Surviving Spouses, and Children; 64.106, Specially Adapted Housing for Disabled Veterans; 64.109, Veterans Compensation for Service-Connected Disability; 64.110, Veterans Dependency and Indemnity Compensation for Service-Connected Death; 64.115, Veterans Information and Assistance; and 64.127, Monthly Allowance for Children of Vietnam Veterans Born with Spina Bifida.

List of Subjects in 38 CFR Part 5

Administrative practice and procedure, Claims, Disability benefits, Health care, Pensions, Radioactive materials, Veterans, Vietnam.

Approved: July 10, 2008.

Gordon H. Mansfield,

Deputy Secretary of Veterans Affairs.

For the reasons set out in the preamble, VA proposes to further amend 38 CFR part 5 as proposed to be added at 69 FR 4832, January 30, 2004, and as further proposed to be amended at 69 FR 44614, July 27, 2004, as follows:

PART 5—COMPENSATION, PENSION, BURIAL, AND RELATED BENEFITS

Subpart E—Claims for Service Connection and Disability Compensation

1. The authority citation for subpart E continues to read as follows:

Authority: 38 U.S.C. 501(a) and as noted in specific sections.

2. Sections 5.320 through 5.369 and their undesignated center headings are added to subpart E to read as follows:

Special Monthly Compensation

Sec.

5.320 Determining need for regular aid and attendance.

5.321 Additional compensation for veteran whose spouse needs regular aid and attendance.

5.322 Special monthly compensation—general information and definitions of disabilities.

5.323 Special monthly compensation under 38 U.S.C. 1114(k).

5.324 Special monthly compensation under 38 U.S.C. 1114(*l*).

5.325 Special monthly compensation at the intermediate rate between 38 U.S.C. 1114(*l*) and (m).

5.326 Special monthly compensation under 38 U.S.C. 1114(m).

5.327 Special monthly compensation at the intermediate rate between 38 U.S.C. 1114(m) and (n).

5.328 Special monthly compensation under 38 U.S.C. 1114(n).

5.329 Special monthly compensation at the intermediate rate between 38 U.S.C. 1114(n) and (*o*).

5.330 Special monthly compensation under 38 U.S.C. 1114(*o*).

5.331 Special monthly compensation under 38 U.S.C. 1114(p).

5.332 Additional allowance for regular aid and attendance under 38 U.S.C. 1114(r)(1) or for a higher level of care under 38 U.S.C. 1114(r)(2).
5.333 Special monthly compensation under 38 U.S.C. 1114(s).
5.334 Special monthly compensation tables.
5.335 Effective dates—Special monthly compensation under §§ 5.332 and 5.333.
5.336 Effective dates—additional compensation for regular aid and attendance payable for a veteran's spouse under § 5.321.
5.337 Award of special monthly compensation based on the need for regular aid and attendance during period of hospitalization.
5.338–5.339 [Reserved]

Tuberculosis

5.340 Pulmonary tuberculosis shown by X-ray in active service.
5.341 Presumptive service connection for tuberculous disease; wartime and service after December 31, 1946.
5.342 Initial grant following inactivity of tuberculosis.
5.343 Effect of diagnosis of active tuberculosis.
5.344 Determination of inactivity (complete arrest) of tuberculosis.
5.345 Changes from activity in pulmonary tuberculosis pension cases.
5.346 Tuberculosis and compensation under 38 U.S.C. 1114(q) and 1156.
5.347 Continuance of a total disability rating for service-connected tuberculosis.
5.348–5.349 [Reserved]

Injury or Death Due to Hospitalization or Treatment

5.350 Benefits under 38 U.S.C. 1151(a) for additional disability or death due to hospital care, medical or surgical treatment, examination, training and rehabilitation services, or compensated work therapy program.
5.351 Effective dates for awards of benefits under 38 U.S.C. 1151(a).
5.352 Effect on benefits awarded under 38 U.S.C. 1151(a) of Federal Tort Claims Act compromises, settlements, and judgments entered after November 30, 1962.
5.353 Effect on benefits awarded under 38 U.S.C. 1151(a) of Federal Tort Claims Act administrative awards, compromises, settlements, and judgments finalized before December 1, 1962.
5.354–5.359 [Reserved]

Ratings for Healthcare Eligibility Only

5.360 Service connection of dental conditions for treatment purposes.
5.361 Healthcare eligibility of persons administratively discharged under other-than-honorable conditions.
5.362 Presumption of service incurrence of active psychosis for purposes of hospital, nursing home, domiciliary, and medical care.
5.363 Determination of service connection for former members of the Armed Forces of Czechoslovakia or Poland.
5.364 [Reserved]

Miscellaneous Service-Connection Regulations

5.365 Claims based on the effects of tobacco products.
5.366 Disability due to impaired hearing.
5.367 Civil service preference ratings.
5.368 Basic eligibility determinations: home loan and education benefits.
5.369 [Reserved]

Subpart E—Claims for Service Connection and Disability Compensation

Special Monthly Compensation

§ 5.320 Determining need for regular aid and attendance.

For the purposes of this part, an individual needs regular aid and attendance if either of the following is true:

(a) The individual, based on his or her condition as a whole, has a temporary or permanent need for assistance, as shown by the extent of his or her impaired ability to perform any or all of the following functions:

(1) Getting dressed or undressed.

(2) Keeping clean and presentable.

(3) Making frequent and necessary adjustments to a prosthetic or orthopedic appliance. (This does not include the adjustment of appliances that able persons also cannot adjust without assistance, such as lacing at the back, supports, and belts.)

(4) Eating or drinking, as a result of the loss of coordination of the upper extremities or extreme weakness.

(5) Attending to bowel and bladder needs.

(6) Protecting himself or herself from the hazards or dangers of his or her daily environment.

(Authority: 38 U.S.C. 1114(*l*), (m), (r)).

(b) The individual is temporarily or permanently bedridden (i.e., must remain in bed due to his or her disability or disabilities based on medical necessity and not based on a prescription of bed rest for purposes of convalescence or cure).

(Authority: 38 U.S.C. 1114(*l*))

§ 5.321 Additional compensation for veteran whose spouse needs regular aid and attendance.

(a) *General entitlement.* A veteran who has a service-connected disability rating of at least 30 percent is entitled to special monthly compensation (SMC) if his or her spouse needs regular aid and attendance.

(b) *Automatic eligibility.* The spouse will be considered to be in need of regular aid and attendance if any of the following apply:

(1) The spouse has corrected visual acuity of 5/200 or less in both eyes;

(2) The spouse has concentric contraction of the visual field to 5 degrees or less in both eyes; or

(3) The spouse is a patient in a nursing home because of mental or physical incapacity.

(c) *Factual need.* If the spouse does not meet the criteria under paragraph (b), the spouse will be considered in need of regular aid and attendance if need is demonstrated under § 5.320.

(Authority: 38 U.S.C. 1115)

§ 5.322 Special monthly compensation—general information and definitions of disabilities.

(a) *General.* (1) Multiple regulations (§§ 5.321, 5.323–5.333) allow special monthly compensation (SMC) to veterans who have certain service-connected disabilities. The monetary rates of payment of SMC are found in 38 U.S.C. 1114 and 1115(1)(E). They are also on the Internet at *http://www.va.gov* and are available from any VA Regional Office. Under 38 U.S.C. 1114 and 1115(1)(E), a veteran is entitled to SMC if he or she is in receipt of service-connected disability compensation and:

(i) Is in need of regular aid and attendance (see § 5.320);

(ii) Is permanently bedridden;

(iii) Has certain disabilities or combinations of disabilities; or

(iv) Has a spouse who is in need of regular aid and attendance.

(2) Certain nonservice-connected disabilities will be considered in determining entitlement to SMC. (See §§ 5.323(c)(5)) (contribution of nonservice-connected loss of use of creative organ to service-connected loss of use of creative organ); 5.330(b), (c) (bilateral deafness of specified severity); 5.331(b) (bilateral blindness as specified with bilateral deafness as specified).

(3) This section defines disabilities that establish entitlement to SMC and that are not defined in other regulations.

(b) *Loss of use of a hand* means the hand functions no better than a prosthesis would function if attached to the arm at a point of amputation below the elbow. In making this determination, VA will consider the actual remaining function of the hand, including, but not limited to, whether the hand can perform acts such as grasping or manipulation with the same proficiency as an amputation stump with prosthesis. Complete ankylosis of two major joints of an upper extremity is an example of a situation that will constitute loss of use of the hand. The major joints of the upper extremity are the shoulder, elbow, and wrist.

(c) *Loss of use of a foot* means the foot functions no better than a prosthesis

would function if attached to the leg at a point of amputation below the knee. In making this determination, VA will consider the actual remaining function of the foot, including, but not limited to, whether the foot can perform acts such as balance or propulsion with the same proficiency as an amputation stump with prosthesis. Examples of situations that will constitute loss of use of a foot include:

(1) Extremely unfavorable complete ankylosis of the knee, that is, the knee fixed in flexion at an angle of 45 degrees or more;

(2) Complete ankylosis of two major joints of the lower extremity, that is, of the hip, knee, or ankle;

(3) Shortening of the lower extremity of 3.5 inches or more; and

(4) Complete paralysis of the external popliteal nerve (common peroneal) and resulting foot drop, accompanied by characteristic organic changes including trophic and circulatory disturbances and other concomitants that confirm complete paralysis of the nerve.

(d) *Natural elbow or knee action prevented when a prosthesis is in place* means that the veteran is unable to use a prosthesis that requires the natural use of the elbow or knee joint. If there is no movement of the joint (as in complete ankylosis or complete paralysis) and a prosthesis is not used, VA will determine entitlement to SMC based on prevented natural elbow or knee action as if a prosthesis were in place.

(e) *Use of prosthesis prevented* means that the veteran's disability prevents the use of prosthesis. This can establish the veteran's entitlement to SMC in two circumstances:

(1) *Anatomical loss near the shoulder.* A veteran meets the requirements for SMC based on anatomical loss of the upper extremity (arm) near the shoulder if the anatomical loss prevents the use of a prosthesis, and reamputation at a higher level that permits the use of a prosthesis is not possible. However, if the veteran cannot wear a prosthesis at the present level of amputation of the arm but could wear a prosthesis if there were a reamputation at a higher level, VA will consider the veteran eligible only for SMC based on anatomical loss or loss of use of the arm at a level, or with complications, preventing natural elbow action with a prosthesis in place (see paragraph (d) of this section).

(2) *Anatomical loss near the hip.* A veteran meets the requirements for SMC based on anatomical loss of the lower extremity (leg) near the hip if the anatomical loss prevents the use of a prosthesis, and reamputation at a higher level that permits the use of a prosthesis is not possible. However, if the veteran cannot wear a prosthesis at the present level of amputation of the leg but could wear a prosthesis if there were a reamputation at a higher level, VA will consider the veteran eligible only for SMC based on anatomical loss or loss of use of the leg at a level, or with complications, preventing natural knee action with a prosthesis in place (see paragraph (d) of this section).

(f) *Visual acuity of 5/200 or less.* If the veteran has actual visual acuity better than 5/200 but is nevertheless assigned a disability rating under part 4 of this chapter based on visual acuity of 5/200, the veteran is not considered to have visual acuity of 5/200 or less for purposes of eligibility for SMC. See § 4.83 of this chapter.

(g) *Loss of use or blindness of one eye, having only light perception.* Loss of use or blindness of one eye, having only light perception, means that the veteran is unable to recognize test letters at 1 foot and cannot perceive objects or hand movements, or count fingers, at a distance of 3 feet. A veteran is eligible for SMC under this paragraph if he or she meets the criteria in the preceding sentence, even if the veteran can perceive objects or hand movements, or can count fingers, at distances of less than 3 feet. See § 4.79 of this chapter.

(Authority: 38 U.S.C. 501(a), 1114)

§ 5.323 Special monthly compensation under 38 U.S.C. 1114(k).

(a) *Basic entitlement.* Special monthly compensation (SMC) under 38 U.S.C. 1114(k) is payable to a veteran who has the following service-connected disabilities:

(1) Anatomical loss or loss of use of one hand.

(2) Anatomical loss or loss of use of one foot.

(3) Anatomical loss or loss of use of both buttocks.

(4) Anatomical loss or loss of use of one or more creative organs.

(5) Blindness of one eye having only light perception.

(6) Deafness of both ears having absence of air and bone conduction.

(7) Complete organic aphonia with constant inability to communicate by speech.

(8) In the case of a female veteran, either of the following:

(i) Anatomical loss of 25 percent or more of tissue from a single breast or both breasts in combination (including, but not limited to, loss by mastectomy or partial mastectomy); or

(ii) Treatment of breast tissue with radiation (''treatment'' includes therapeutic procedures but not diagnostic procedures).

Note to paragraph (a): For the criteria for determining anatomical loss or loss of use of a hand or of a foot, see § 5.322(b) and (c) respectively. For the criteria for determining loss of use or blindness of one eye, having only light perception, see § 5.322(g).

(b) *Limitations.*

(1) *Combining with 38 U.S.C. 1114(a) through (j), or (s).* SMC under 38 U.S.C. 1114(k) is payable in addition to the compensation authorized by 38 U.S.C. 1114(a) through (j), or (s), subject to the following limitations:

(i) The combined rate of compensation must not exceed the monthly rate provided by 38 U.S.C. 1114(*l*) when authorized in conjunction with any of the rates provided by 38 U.S.C. 1114(a) through (j), or (s).

(ii) If the veteran has entitlement under 38 U.S.C. 1114(*l*) through (n), or (p), SMC under 38 U.S.C. 1114(k) is payable for each anatomical loss or loss of use in addition to the losses used to establish entitlement under 38 U.S.C. 1114(*l*) through (n), or (p), as long as the combined monthly compensation does not exceed the monthly rate provided by 38 U.S.C. 1114(*o*).

(iii) The additional compensation for dependents under 38 U.S.C. 1115 and the additional allowance for regular aid and attendance or a higher level of care provided by 38 U.S.C. 1114(r) are not subject to the above limitations regarding maximum monthly compensation payable under this paragraph.

(2) *Combining with 38 U.S.C. 1114(l) through (n).* A disability for which SMC is paid under 38 U.S.C. 1114(k) may not be a basis for a higher level of SMC under 38 U.S.C. 1114(*l*) through (n); however, a disability for which SMC is paid under 38 U.S.C. 1114(k) may be paid concurrently with SMC under 38 U.S.C. 1114(*l*) through (n), as long as the same disability is not the basis for SMC under both 38 U.S.C. 1114(k) and either 38 U.S.C. 1114(*l*), (m), or (n). The total combined rate of SMC cannot exceed the amount set forth in 38 U.S.C. 1114(*o*).

(c) *Creative organ.* (1) A creative organ means an organ directly involved in reproduction.

(2) Anatomical loss of a creative organ exists in any of the following circumstances:

(i) Acquired absence of one or both testicles (other than undescended testicles);

(ii) Acquired absence of one or both ovaries; or

(iii) Acquired absence of other creative organs.

(3) Loss of use of a creative organ exists in any of the following circumstances:

(i) The diameters of the affected testicle are reduced to one-third of the corresponding diameters of the normal testicle;

(ii) The diameters of the affected testicle are reduced to one-half or less of the corresponding normal testicle with changes in consistency of the affected testicle (harder or softer) when compared to the normal testicle;

(iii) Absence of spermatozoa proven by biopsy performed with the informed consent of the veteran; or

(iv) Medical evidence shows that, due to injury or disease, reproduction is not possible without medical intervention. This could occur if the veteran has:

(A) In the case of paired creative organs, the loss of function of at least one such organ; or

(B) In the case of an unpaired creative organ, loss of function.

(4) SMC under 38 U.S.C. 1114(k) is payable for service-connected erectile dysfunction as the loss of use of a creative organ even if the veteran uses prescription medications or mechanical devices to treat the erectile dysfunction. This rule applies regardless of whether such treatment is effective.

(5) SMC under 38 U.S.C. 1114(k) is payable for a service-connected anatomical loss of a creative organ even if it is preceded by a nonservice-connected loss of use. Examples of this include, but are not limited to, the following:

(i) The veteran had a vasectomy before military service with the anatomical loss or loss of use of one testicle during military service;

(ii) The veteran had a vasectomy following military service with a subsequent prostatectomy as a result of service-connected prostate cancer;

(iii) The veteran had impotence as a result of a nonservice-connected psychiatric condition with subsequent prostatectomy due to service-connected prostate cancer; or

(iv) The veteran had a tubal ligation before service with a subsequent oophorectomy due to service-connected injury or disease.

(6) SMC under 38 U.S.C. 1114(k) is not payable when anatomical loss or loss of use of a creative organ resulted from elective surgery performed after military service. However, if the elective surgery after service was necessary to correct an injury caused by surgery during military service, SMC under 38 U.S.C. 1114(k) is payable. Surgery advised on sound medical judgment for relief of a pathological condition or to prevent possible future pathological consequences is not considered to be elective surgery.

(7) Atrophy resulting from mumps followed by orchitis in service is presumed service connected. Because atrophy is usually perceptible within 1 to 6 months after infection subsides, an examination more than 6 months after the remission of orchitis demonstrating a normal genitourinary system will be considered in determining if the presumption is rebutted.

(d) *Determining loss of use of both buttocks.* (1) Loss of use of both buttocks exists if there is severe damage by disease or injury to muscle group XVII, bilaterally (See §§ 4.56, 4.73, Diagnostic Code 5317, of this chapter), and additional disability making it impossible for the individual, without assistance, to rise from a seated position and from a stooped position (fingers to toes position) and to maintain postural stability (pelvis upon head of femur). The cited assistance may be provided by the individual's own hands or arms, and, in the matter of postural stability, by a special appliance.

(2) The receipt of SMC for anatomical loss or loss of use of both lower extremities under 38 U.S.C. 1114(*l*) through (n) does not prevent the receipt of SMC under 38 U.S.C. 1114(k) for loss of use of both buttocks if appropriate tests clearly substantiate there is such additional loss of use.

(e) *Deafness.* Deafness of both ears, having absence of air and bone conduction, exists if an authorized VA audiology examination shows bilateral hearing loss equal to or greater than the bilateral hearing loss required for a maximum rating under the Schedule for Rating Disabilities in part 4 of this chapter.

(f) *Aphonia.* Complete organic aphonia exists if an individual has a disability of the speech organs that constantly precludes communication by speech.

(Authority: 38 U.S.C. 1114(k))

§ 5.324 Special monthly compensation under 38 U.S.C. 1114(l).

Special monthly compensation (SMC) under 38 U.S.C. 1114(*l*) is payable to a veteran who has any of the following service-connected disabilities:

(a) Anatomical loss or loss of use of both feet. See § 5.322(c).

(b) Anatomical loss or loss of use of one hand and one foot. See § 5.322(b), (c).

(c) Each eye having either:

(1) Blindness with visual acuity of 5/200 or less under § 5.322(f); or

(2) Concentric contraction of the visual field to 5 degrees or less.

(d) Service-connected disability (or disabilities) causing the veteran to be permanently bedridden, which means that the veteran must remain in bed, and it is reasonably certain that the confinement to bed will continue throughout his or her lifetime. The criteria for determining whether a veteran is bedridden are found at § 5.320(b).

(e) Service-connected disability or disabilities establishing the veteran's need for regular aid and attendance under § 5.320. Note: Unless the veteran is entitled to additional SMC under 38 U.S.C. 1114(r) (see § 5.332), VA will award SMC under 38 U.S.C. 1114(*l*) based on permanently bedridden status if the veteran is permanently bedridden (see paragraph (d) of this section) rather than on the need for regular aid and attendance.

(Authority: 38 U.S.C. 1114(*l*))

Cross Reference: § 5.330, ''Special monthly compensation under 38 U.S.C. 1114(*o*)'' (discussing combinations of awards made under §§ 5.324, 5.326, or 5.328).

§ 5.325 Special monthly compensation at the intermediate rate between 38 U.S.C. 1114(l) and (m).

VA will pay special monthly compensation (SMC) at the intermediate rate between 38 U.S.C. 1114(*l*) and (m) for any of the combinations of disabilities listed in paragraphs (a) through (d) of this section. (The intermediate rate is the arithmetic mean between the rates for (*l*) and (m), rounded down to the next lower dollar.)

(a) Anatomical loss or loss of use of one foot with anatomical loss or loss of use of the opposite leg at a level, or with complications, preventing natural knee action with prosthesis in place.

(b) Anatomical loss or loss of use of one arm at a level, or with complications, preventing natural elbow action with prosthesis in place with anatomical loss or loss of use of one foot.

(c) Anatomical loss or loss of use of one hand with anatomical loss or loss of use of one leg at a level, or with complications, preventing natural knee action with prosthesis in place.

(d) Blindness of one eye with visual acuity of 5/200 or less, or concentric contraction of the visual field to 5 degrees or less of one eye; and blindness of the other eye, having only light perception.

(Authority: 38 U.S.C. 1114(p))

Cross Reference: § 5.322, ''Special monthly compensation—general information and definitions of disabilities'' (containing the criteria for the disabilities listed in § 5.325).

§ 5.326 Special monthly compensation under 38 U.S.C. 1114(m).

Special monthly compensation (SMC) under 38 U.S.C. 1114(m) is payable for any of the following combinations of disabilities:

(a) Anatomical loss or loss of use of both hands.

(b) Anatomical loss or loss of use of both legs at a level, or with complications, preventing natural knee action with prosthesis in place.

(c) Anatomical loss or loss of use of one foot with anatomical loss of the other leg so near the hip as to prevent the use of prosthetic appliance.

(d) Anatomical loss or loss of use of one arm so near the shoulder as to prevent the use of prosthetic appliance with anatomical loss or loss of use of one foot.

(e) Anatomical loss or loss of use of one arm at a level, or with complications, preventing natural elbow action with prosthesis in place and anatomical loss or loss of use of one leg at a level, or with complications, preventing natural knee action with prosthesis in place.

(f) Anatomical loss or loss of use of one hand with anatomical loss of one leg so near the hip as to prevent the use of a prosthetic appliance.

(g) Blindness in both eyes having only light perception.

(h) Blindness of one eye with visual acuity of 5/200 or less or with concentric contraction of the visual field to 5 degrees or less; and

(1) Anatomical loss of the other eye; or

(2) Blindness without light perception of the other eye.

(i) Blindness in both eyes leaving the veteran so significantly disabled as to need regular aid and attendance. If the veteran has visual acuity of 5/200 or less in both eyes or concentric contraction of the visual field to 5 degrees or less in both eyes, then entitlement to compensation at the section 1114(m) rate will be determined on the facts in the individual case.

(Authority: 38 U.S.C. 1114(m), (p))

Cross References: § 5.320, ''Determining need for regular aid and attendance.'' § 5.322, ''Special monthly compensation—general information and definitions of disabilities'' (containing the criteria for the disabilities listed in § 5.326). § 4.76, ''Examination of field [of] vision'' (containing the criteria for blindness based on concentric contraction of the visual field). § 5.330, ''Special monthly compensation under 38 U.S.C. 1114(*o*)'' (discussing combinations of awards made under §§ 5.324, 5.326, or 5.328).

§ 5.327 Special monthly compensation at the intermediate rate between 38 U.S.C. 1114(m) and (n).

VA will pay special monthly compensation (SMC) at the intermediate rate between 38 U.S.C. 1114(m) and (n) for any of the combinations of disabilities listed in paragraphs (a) through (d) of this section. (The intermediate rate is the arithmetic mean between the rates for 38 U.S.C. 1114(m) and (n), rounded down to the nearest dollar.)

(a) Anatomical loss or loss of use of one hand with anatomical loss or loss of use of the other arm at a level, or with complications, preventing natural elbow action with prosthesis in place.

(b) Anatomical loss or loss of use of one leg at a level, or with complications, preventing natural knee action with prosthesis in place with anatomical loss of the other leg so near the hip as to prevent the use of prosthetic appliance.

(c) Anatomical loss of one arm so near the shoulder as to prevent the use of prosthetic appliance with anatomical loss or loss of use of one leg at a level, or with complications, preventing natural knee action with prosthesis in place.

(d) Anatomical loss or loss of use of one arm at a level, or with complications, preventing natural elbow action with prosthesis in place with anatomical loss of one leg so near the hip as to prevent the use of prosthetic appliance.

(e) Blindness of one eye, having only light perception; and

(1) Anatomical loss of the other eye; or

(2) Blindness without light perception of the other eye.

(Authority: 38 U.S.C. 1114(p))

Cross References: § 5.322, ''Special monthly compensation—general information and definitions of disabilities.'' § 5.326, ''Special monthly compensation under 38 U.S.C. 1114(m).''

§ 5.328 Special monthly compensation under 38 U.S.C. 1114(n).

VA will pay special monthly compensation (SMC) under 38 U.S.C. 1114(n) for any of the combinations of disabilities listed in paragraphs (a) through (e) of this section.

(a) Anatomical loss or loss of use of both arms at a level, or with complications, preventing natural elbow action with prosthesis in place.

(b) Anatomical loss or loss of use of one hand with anatomical loss of the other arm so near the shoulder as to prevent the use of a prosthetic appliance.

(c) Anatomical loss of both legs so near the hip as to prevent the use of prosthetic appliances.

(d) Anatomical loss of one arm so near the shoulder as to prevent the use of a prosthetic appliance and anatomical loss of one leg so near the hip as to prevent the use of a prosthetic appliance.

(e) Anatomical loss of both eyes, blindness without light perception in both eyes, or anatomical loss of one eye and blindness without light perception in the other eye.

(Authority: 38 U.S.C. 1114(n), (p))

Cross References: § 5.322, ''Special monthly compensation—general information and definitions of disabilities.'' § 5.326, ''Special monthly compensation under 38 U.S.C. 1114(m).'' § 5.327, ''Special monthly compensation at the intermediate rate between 38 U.S.C. 1114(m) and (n)'' (containing the criteria for the disabilities listed in § 5.328). § 5.330, ''Special monthly compensation under 38 U.S.C. 1114(*o*)'' (discussing combinations of awards made under §§ 5.324, 5.326, or 5.328).

§ 5.329 Special monthly compensation at the intermediate rate between 38 U.S.C. 1114(n) and (o).

VA will pay special monthly compensation (SMC) at the intermediate rate between 38 U.S.C. 1114(n) and (*o*) for anatomical loss or loss of use of one arm at a level, or with complications, preventing natural elbow action with prosthesis in place and anatomical loss of the other arm so near the shoulder as to prevent the use of prosthetic appliance. (The intermediate rate is the arithmetic mean between the rates for (n) and (*o*), rounded down to the next lower dollar.)

(Authority: 38 U.S.C. 1114(p))

Cross References: § 5.322, ''Special monthly compensation—general information and definitions of disabilities.'' § 5.328, ''Special monthly compensation under 38 U.S.C. 1114(n)'' (containing the criteria for the disabilities listed in § 5.329).

§ 5.330 Special monthly compensation under 38 U.S.C. 1114(o).

VA will pay special monthly compensation (SMC) under 38 U.S.C. 1114(*o*) for any of the following combinations of disabilities:

(a) Anatomical loss of both arms so near the shoulder as to prevent the use of prosthetic appliances.

(b) Bilateral deafness rated at 60 percent or more disabling (and the hearing impairment in either one or both ears is service connected) in combination with service-connected blindness with bilateral visual acuity of 20/200 or less.

(c) Service-connected total deafness in one ear or bilateral deafness rated at 40 percent or more disabling (and the

hearing impairment in either one or both ears is service connected) in combination with service-connected blindness of both eyes having only light perception or less.

(d) Loss of use of both lower extremities together with loss of anal and bladder sphincter control. (VA will consider that the requirement of loss of anal and bladder sphincter control is met even though incontinence has been overcome under a strict regimen of rehabilitation training and/or other auxiliary measures.)

(e) Disabilities entitling the veteran to two or more of the monetary rates provided in 38 U.S.C. 1114(*l*) through (n), without considering any disabilities twice.

(1) *Separate and distinct disabilities.* Entitlement under this paragraph (e) must be based on separate, distinct disabilities.

(2) *Common cause.* A common cause of disabilities that are otherwise separate and distinct will not preclude entitlement to SMC under this paragraph (e). For example, a veteran with service-connected anatomical loss or loss of use of both hands and both feet resulting from a common cause would nevertheless be entitled to SMC.

(Authority: 38 U.S.C. 1114(*o*))

Cross References: § 5.320, ''Determining need for regular aid and attendance.'' § 5.322, ''Special monthly compensation—general information and definitions of disabilities.'' § 5.328, ''Special monthly compensation under 38 U.S.C. 1114(n).'' § 5.329; ''Special monthly compensation at the intermediate rate between 38 U.S.C. 1114(n) and (*o*).'' § 5.332, ''Additional allowance for regular aid and attendance under 38 U.S.C. 1114(r)(1) or for a higher level of care under 38 U.S.C. 1114(r)(2)'' (containing criteria based in part on the disabilities listed in § 5.330).

§ 5.331 Special monthly compensation under 38 U.S.C. 1114(p).

(a) *Intermediate or next higher level of special monthly compensation.* In the event the veteran's service-connected disabilities exceed the requirements for any of the rates prescribed under §§ 5.324 through 5.329, VA will pay special monthly compensation (SMC) under 38 U.S.C. 1114(p) as follows. (An intermediate rate authorized by this section is the arithmetic mean between the two rates of SMC, rounded down to the next lower dollar.)

(b) *Bilateral blindness in combination with deafness.* (1) Blindness in both eyes rated under §§ 5.324(c), 5.325(d), or 5.326(h) or (i), with service-connected total deafness in one ear, entitles the veteran to the next higher intermediate rate. If the veteran is already entitled to an intermediate rate, the veteran will be entitled to the next higher rate under 38 U.S.C. 1114. However, the rate cannot exceed the rate under 38 U.S.C. 1114(*o*).

(2) Blindness in both eyes rated under §§ 5.326(g), 5.327(e), or 5.328(e) with bilateral deafness (and the hearing impairment in either one or both ears is service connected) rated at 10 percent or 20 percent disabling entitles the veteran to the next higher intermediate rate. If the veteran is already entitled to an intermediate rate, the veteran will be entitled to the next higher rate under 38 U.S.C. 1114. However, the rate cannot exceed the rate under 38 U.S.C. 1114(*o*).

(3) Blindness in both eyes, rated under §§ 5.324(c), 5.325(d), 5.326(g), (h), or (i), 5.327(e), or 5.328(e), with bilateral deafness rated at not less than 30 percent disabling (and the hearing impairment in one or both ears is service connected) entitles the veteran to the next higher rate under 38 U.S.C. 1114. If the veteran is already entitled to an intermediate rate, the veteran will be entitled to the next higher intermediate rate. However, the rate cannot exceed the rate under 38 U.S.C. 1114(*o*).

(c) *Bilateral blindness in combination with anatomical loss or loss of use of a hand or foot.* Blindness in both eyes, rated under §§ 5.324(c), 5.325(d), 5.326(g), (h), or (i), 5.327(e), or 5.328(e), combined with any of the disabilities described below (in paragraphs (c)(1), (2), or (3) of this section).

(1) Service-connected anatomical loss or loss of use of one hand entitles the veteran to the next higher statutory rate under 38 U.S.C. 1114. If the veteran is already entitled to an intermediate rate, the veteran will be entitled to the next higher intermediate rate. However, the rate cannot exceed the rate under 38 U.S.C. 1114(*o*).

(2) Service-connected anatomical loss or loss of use of one foot which by itself or in combination with another compensable disability would be ratable at 50 percent or more disabling, entitles the veteran to the next higher rate under 38 U.S.C. 1114. If the veteran is already entitled to an intermediate rate, the veteran will be entitled to the next higher intermediate rate. However, the rate cannot exceed the rate under 38 U.S.C. 1114(*o*).

(3) Service-connected anatomical loss or loss of use of one foot which is ratable at less than 50 percent disabling and which is the only compensable disability other than bilateral blindness, entitles the veteran to the next higher intermediate rate. If the veteran is already entitled to an intermediate rate, the veteran will be entitled to the next higher rate under 38 U.S.C. 1114. However, the rate cannot exceed the rate under 38 U.S.C. 1114(*o*).

(d) *Additional independent disability or disabilities ratable at 50 percent or more disabling.* (1) If a veteran is entitled to SMC under one of the rates payable under §§ 5.324 through 5.329 and also has a permanent disability, or combination of permanent disabilities, which are independently ratable at 50 percent or more disabling, VA will award the veteran SMC at the next higher intermediate rate. If the veteran is already entitled to an intermediate rate, VA will award the next higher rate under 38 U.S.C. 1114. However, the rate payable pursuant to this paragraph cannot exceed the rate under 38 U.S.C. 1114(*o*). This benefit may not be paid concurrently with the 100 percent rate pursuant to 38 U.S.C. 1114(p) under § 5.331(e).

(2) ''Independently ratable'' means that the additional disability or disabilities ratable at 50 percent or more disabling are separate and distinct, and involve different anatomical segments or bodily systems, from the disability or disabilities establishing entitlement under §§ 5.324 through 5.329. If the bases for the additional disability or disabilities and the basis for entitlement to SMC under §§ 5.324 through 5.329 are caused by the same disease or injury, VA cannot pay the next higher intermediate rate unless the additional disability or disabilities would be rated 50 percent or more disabling without regard to the basis for entitlement to SMC under §§ 5.324 through 5.329.

(3) Permanent residuals of tuberculosis, and not the graduated ratings for arrested tuberculosis, may serve as the basis for the independent 50 percent disability rating.

(e) *Additional independent disability ratable at 100 percent.* (1) If a veteran is entitled to SMC at one of the rates payable under §§ 5.324 through 5.329 and has a single permanent disability that is independently ratable at 100 percent disabling, VA will award the veteran the next higher rate under 38 U.S.C. 1114. If the veteran is receiving SMC at an intermediate rate, VA will award to the next higher intermediate rate. The single permanent disability must be independently ratable at 100 percent disabling without regard to individual unemployability. The rate assigned under this paragraph cannot exceed the rate under 38 U.S.C. 1114(*o*). It cannot be paid concurrently with the 50 percent-or-more rate payable under paragraph (d) of this section.

(2) For the definition of ''independently ratable,'' see paragraph (d)(2) of this section.

(3) Permanent residuals of tuberculosis, and not the graduated ratings for arrested tuberculosis, may serve as the basis for the independent 100 percent disability rating.

(f) *Three extremities.* Anatomical loss, loss of use, or a combination of anatomical loss and loss of use of three extremities entitles the veteran to the next higher intermediate rate. If the veteran is already entitled to an intermediate rate, the veteran will be entitled to the next higher rate under 38 U.S.C. 1114. VA will combine the anatomical loss or loss of use of whichever two extremities will provide the veteran with the highest level of SMC before combining the third anatomical loss or loss of use of an extremity to award the next higher rate. However, this combined rate cannot exceed the rate under 38 U.S.C. 1114(*o*). When there is entitlement for triple extremity or blindness with extremity, it will be in addition to any entitlement under 38 U.S.C. 1114(k) or (p) for the 50 or 100 percent elevations for the same extremity.

(Authority: 38 U.S.C. 1114(p))

§ 5.332 Additional allowance for regular aid and attendance under 38 U.S.C. 1114(r)(1) or for a higher level of care under 38 U.S.C. 1114(r)(2).

(a) *General.* The additional allowance that 38 U.S.C. 1114(r) authorizes is payable whether the need for regular aid and attendance or for a higher level of care is a partial basis for entitlement to the maximum rate under 38 U.S.C. 1114(*o*) or (p), or to the intermediate rate between 38 U.S.C. 1114(n) and (*o*) plus the rate under 38 U.S.C. 1114(k), or is based on an independent factual determination.

(b) *Criteria for additional allowance under 38 U.S.C. 1114(r)(1).* A veteran is entitled to an additional allowance under 38 U.S.C. 1114(r)(1) when all of the following conditions are met:

(1) The veteran is entitled to the maximum rate under 38 U.S.C. 1114(*o*) or (p), or to the intermediate rate between 38 U.S.C. 1114(n) and (o) plus the rate under 38 U.S.C. 1114(k);

(2) The veteran meets the requirements for regular aid and attendance under § 5.320; and

(3) The veteran is not hospitalized at United States Government expense.

(c) *Criteria for additional allowance under 38 U.S.C. 1114(r)(2).* (1) *General criteria.* A veteran is entitled to an additional allowance under 38 U.S.C. 1114(r)(2), instead of the allowance under 38 U.S.C. 1114(r)(1), when all of the following conditions are met:

(i) The veteran is entitled to the maximum rate under 38 U.S.C. 1114(*o*) or (p), or to the intermediate rate between 38 U.S.C. 1114(n) and (*o*) plus the rate under 38 U.S.C. 1114(k);

(ii) The veteran meets the requirements for regular aid and attendance under § 5.320;

(iii) The veteran needs a ''higher level of care'' (as defined in paragraph (c)(2) of this section);

(iv) Without the higher level of care, the veteran would require hospitalization, nursing home care, or other residential institutional care; and

(v) The veteran is not hospitalized at United States Government expense.

(2) *Higher level of care.* For the purposes of this section, a veteran needs a ''higher level of care'' whenever the veteran requires personal healthcare services provided on a daily basis in the veteran's residence by a person who is licensed to provide these services or who provides these services under the regular supervision of a licensed healthcare professional.

(3) *Personal healthcare services.* For the purposes of this section, ''personal healthcare services'' include, but are not limited to, physical therapy, administration of injections, placement of indwelling catheters, the changing of sterile dressings, or similar functions, the performance of which requires professional healthcare training or the regular supervision of a trained healthcare professional.

(4) *Licensed healthcare professional.* For the purposes of this section, a ''licensed healthcare professional'' includes, but is not limited to, a doctor of medicine or osteopathy, a registered nurse, a licensed practical nurse, or a physical therapist licensed to practice by a State or a political subdivision of a State.

(5) *Under the regular supervision of a licensed healthcare professional.* For the purposes of this section, the term ''under the regular supervision of a licensed healthcare professional'' means that an unlicensed person performing personal healthcare services is following a regimen of personal healthcare services prescribed by a healthcare professional, and that the healthcare professional consults with the unlicensed person providing the healthcare services at least once each month to monitor the prescribed regimen. The consultation need not be in person; a telephone call is sufficient.

(6) *Care may be provided by a relative of the veteran or a member of the veteran's household.* A relative of the veteran or a member of the veteran's household may perform the necessary personal healthcare services. However, such a person must be a licensed healthcare professional or provide the necessary personal healthcare services under the regular supervision of a licensed healthcare professional.

(Authority: 38 U.S.C. 1114(r))

§ 5.333 Special monthly compensation under 38 U.S.C. 1114(s).

Special monthly compensation (SMC) under 38 U.S.C. 1114(s) is payable to a veteran who has a single service-connected disability rated as 100 percent disabling and either:

(a) An additional service-connected disability, or combination of disabilities, ratable as 60 percent disabling independent of the single service-connected disability rated as 100 percent; or

(b) Is permanently housebound as a result of service-connected disability or disabilities. For the purposes of this section, a veteran is permanently housebound if he or she is substantially confined to his or her residence (ward or clinical areas, if institutionalized) and immediate premises because of a service-connected disability or disabilities, and it is reasonably certain that such disability or disabilities will remain throughout the veteran's lifetime.

(Authority: 38 U.S.C. 1114(s))

§ 5.334 Special monthly compensation tables.

(a) *General.* The tables in this section are meant as aids to summarize the statutory or intermediate rate of special monthly compensation (SMC) payable to veterans under 38 U.S.C. 1114 for certain combinations of disabilities. The regulatory text in §§ 5.323 through 5.333 describes these benefits in more detail. No additional rights or benefits are conferred by this section. The tables are informative only and will not be used as a basis to grant or deny benefits in a particular case.

(b) *Symbols.* The following defines the symbols used in the tables in this section:

L = the rate under 38 U.S.C. 1114(*l*).
L½ = the intermediate rate between 38 U.S.C. 1114(*l*) and (m).
M = the rate under 38 U.S.C. 1114(m).
M½ = the intermediate rate between 38 U.S.C. 1114(m) and (n).
N = the rate under 38 U.S.C. 1114(n).
N½ = the intermediate rate between 38 U.S.C. 1114(n) and (*o*).
O = the rate under 38 U.S.C 1114(*o*).

(c) *Usage.* In Tables 1 through 4, the columns and rows are labeled with specific disabilities or combinations of disabilities. The point where a column and row intersect represents the rate or intermediate rate of SMC payable for the specified combination of disabilities. For example, in Table 1, a veteran who

has the anatomical loss or loss of use of one leg at a level, or with complications, preventing natural knee action with prosthesis in place and anatomical loss of one arm so near the shoulder as to prevent the use of prosthetic appliances is entitled to the intermediate rate of SMC between 38 U.S.C. 1114(m) and (n) (symbol M½).

(d) *Table 1.* To determine the level of SMC payable when there are varying degrees of anatomical loss or loss of use of two extremities, identify the proper degree of loss for one extremity along the top row of Table 1 and the proper degree of loss for the other extremity down the left column. The square where the column and row intersect contains the symbol for the level of SMC payable and the regulatory citation that supports it.

TABLE 1—SMC—EXTREMITIES ONLY

Extremities	Anatomical loss or loss of use: one foot	Anatomical loss or loss of use: one hand	Anatomical loss or loss of use: one leg & no knee action	Anatomical loss or loss of use: one arm & no elbow action	Anatomical loss of one leg: near hip	Anatomical loss of one arm: near shoulder
Anatomical loss or loss of use: one foot	L § 5.324(a)	L § 5.324(b)	L½ § 5.325(a)	L½ § 5.325(b)	M § 5.326(c)	M § 5.326(d)
Anatomical loss or loss of use: one hand	L § 5.324(b)	M § 5.326(a)	L½ § 5.325(c)	M½ § 5.327(a)	M § 5.326(f)	N § 5.328(b)
Anatomical loss or loss of use: one leg & no knee action	L½ § 5.325(a)	L½ § 5.325(c)	M § 5.326(b)	M § 5.326(e)	M½ § 5.327(b)	M½ § 5.327(c)
Anatomical loss or loss of use: one arm & no elbow action	L½ § 5.325(b)	M½ § 5.327(a)	M § 5.326(e)	N § 5.328(a)	M½ § 5.327(d)	N½ § 5.329
Anatomical loss of one leg: near hip	M § 5.326(c)	M § 5.326(f)	M½ § 5.327(b)	M½ § 5.327(d)	N § 5.328(c)	N § 5.328(d)
Anatomical loss of one arm: near shoulder	M § 5.326(d)	N § 5.328(b)	M½ § 5.327(c)	N½ § 5.329	N § 5.328(d)	O § 5.330(a)

(e) *Table 2.* To determine the level of SMC payable when there are varying degrees of blindness in both eyes, identify the proper degree of blindness for one eye down the left column of Table 2 and the proper degree of blindness for the other eye along the top row. The square where the column and row intersect contains the symbol for the level of SMC payable and the regulatory citation that supports it.

TABLE 2—SMC BASED ON BILATERAL BLINDNESS

Vision in one eye	Vision in other eye				
	Visual acuity of 5/200 or less	Visual field contraction to 5° or less	Light perception only	No light perception	Anatomical loss of eye
Visual acuity of 5/200 or less	L § 5.324(c)	L § 5.324(c)	L½ § 5.325(d)	M § 5.326(h)	M § 5.326(h)
Visual field contraction to 5° or less	L § 5.324(c)	L § 5.324(c)	L½ § 5.325(d)	M § 5.326(h)	M § 5.326(h)
Light perception only	L½ § 5.325(d)	L½ § 5.325(d)	M § 5.326(g)	M1/2 § 5.327(e)	M½ § 5.327(e)
No light perception	M § 5.326(h)	M § 5.326(h)	M½ § 5.327(e)	N § 5.328(e)	N § 5.328(e)
Anatomical loss of eye	M § 5.326(h)	M § 5.326(h)	M½ § 5.327(e)	N § 5.328(e)	N § 5.328(e)

(f) *Table 3.* To determine the level of SMC when there is bilateral blindness together with anatomical loss or loss of use of an extremity, identify the level of SMC for bilateral blindness from Table 3 and locate it along the top row. Then identify the proper extremity loss down the left column. The square where the column and row intersect contains the symbol for the level of SMC payable and the regulatory citation that supports it.

TABLE 3—SMC—BILATERAL BLINDNESS WITH ANATOMICAL LOSS OR LOSS OF USE OF EXTREMITY

Additional disability	SMC for bilateral blindness alone				
	"L"	"L½"	"M"	"M½"	"N"
Service-connected anatomical loss or loss of use of one foot rated less than 50%, and it is the only compensable disability other than blindness	L½ + K L § 5.331(c)(3); § 5.323(b)(2)	M + K L § 5.331(c)(3); § 5.323(b)(2)	M½ + K L § 5.331(c)(3); § 5.323(b)(2)	N + K L § 5.331(c)(3); § 5.323(b)(2)	N½ + K L § 5.331(c)(3); § 5.323(b)(2)
Service-connected anatomical loss or loss of use of one foot rated 50% or more, either alone or in combination with another disability	M + K L § 5.331(c)(2); § 5.323(b)(2)	M½ + K L § 5.331(c)(2); § 5.323(b)(2)	N + K L § 5.331(c)(2); § 5.323(b)(2)	N½ + K L § 5.331(c)(2); § 5.323(b)(2)	O L § 5.331(c)(2);
Service-connected anatomical loss or loss of use of one hand	M + K L § 5.331(c)(1); § 5.323(b)(2)	M½ + K L § 5.331(c)(1); § 5.323(b)(2)	N + K L § 5.331(c)(1); § 5.323(b)(2)	N½ + K L § 5.331(c)(1); § 5.323(b)(2)	O L § 5.331(c)(1)

(g) *Table 4.* To determine the level of SMC when there is bilateral blindness together with deafness, identify the level of SMC for bilateral blindness from Table 4 and locate it along the top row. Then identify the proper degree of deafness down the left column. The square where the column and row intersect contains the symbol for the level of SMC payable and the regulatory citation that supports it.

TABLE 4—SPECIAL MONTHLY COMPENSATION—BILATERAL BLINDNESS WITH DEAFNESS

Additional disability	SMC for bilateral blindness alone					
	"L"	"L½"	"M" under § 5.326(h) or (i)	"M" under § 5.326(g)	"M½"	"N"
Service-connected (SC) total deafness in one ear	L½ § 5.331(b)(1)	M § 5.331(b)(1)	M½ § 5.331(b)(1)	O § 5.330(c)	O § 5.330(c)	O § 5.330(c)
Bilateral deafness rated 10% or 20% (one or both ears SC)	L No additional SMC	L No additional SMC	L No additional SMC	M½ § 5.331(b)(2)	N § 5.331(b)(2)	N½ § 5.331(b)(2)
Bilateral deafness rated 30% (one or both ears SC)	M § 5.331(b)(3)	M½ § 5.331(b)(3)	N § 5.331(b)(3)	N § 5.331(b)(3)	N½ § 5.331(b)(3)	O § 5.331(b)(3)
Bilateral deafness rated 40% or 50% (one or both ears SC)	M § 5.331(b)(3)	M½ § 5.331(b)(3)	N § 5.331(b)(3)	O § 5.330(c)	O § 5.330(c)	O § 5.330(c)
Bilateral deafness rated 60% or more (one or both ears SC)	O § 5.330(b)	O § 5.330(b)	O § 5.330(b)	O § 5.330(b)	O § 5.330(b)	O § 5.330(b)

(Authority: 38 U.S.C. 1114)

§ 5.335 Effective dates—Special monthly compensation under §§ 5.332 and 5.333.

(a) *General Rule.* Except as provided in § 3.400(o)(2) of this chapter (regarding effective dates for increased disability), and in paragraph (b) of this section, the effective date for an award of special monthly compensation (SMC) under §§ 5.332, ''Additional allowance for regular aid and attendance under 38 U.S.C. 1114(r)(1) or for a higher level of care under 38 U.S.C. 1114(r)(2),'' or 5.333, ''Special monthly compensation under 38 U.S.C. 1114(s),'' will be the date of receipt of the claim or the date entitlement arose, whichever is later.

(b) *Retroactive award of SMC.* When VA awards disability compensation, based on an original or reopened claim, for a retroactive period, VA will also award SMC for all or any part(s) of that retroactive period during which the veteran met the eligibility requirements for SMC.

(Authority: 38 U.S.C. 5110(a), (b))

§ 5.336 Effective dates—additional compensation for regular aid and attendance payable for a veteran's spouse under § 5.321.

(a) *Award of regular aid and attendance.* (1) The effective date for an award of additional compensation payable to a veteran because of the veteran's spouse's need for regular aid and attendance will be the date of receipt of the claim or the date entitlement arose, whichever is later.

(2) When disability compensation, based on an original or reopened claim, is awarded retroactive to an effective date prior to the date of receipt of the

claim, regular aid and attendance for the spouse will also be awarded for any part of the prior period for which entitlement to regular aid and attendance for the spouse is established.

(b) *Discontinuance of award of regular aid and attendance.* The effective date for the discontinuance of regular aid and attendance will be the end of the month in which VA stops paying the aid and attendance.

Cross References: § 3.501(b)(3) of this chapter, ''Veterans [effective dates for reduction or discontinuance of benefits].''

(Authority: 38 U.S.C. 501, 5110(b)(1), (2))

§ 5.337 Award of special monthly compensation based on the need for regular aid and attendance during period of hospitalization.

An award of special monthly compensation (SMC) based on a need for regular aid and attendance under § 5.324, ''Special monthly compensation under 38 U.S.C. 1114(*l*),'' that is made for a period during which the veteran is or was receiving hospital, institutional, or domiciliary care at VA expense will be effective on the date of discharge or release from hospitalization. If the award is retroactive, VA will not provide compensation based on the need for regular aid and attendance for the period during which the veteran was receiving hospital, institutional, or domiciliary care at VA expense.

§§ 5.338–5.339 [Reserved]

Tuberculosis

§ 5.340 Pulmonary tuberculosis shown by X-ray in active service.

(a) *Active disease.* X-ray evidence alone may be adequate for grant of direct service connection for pulmonary tuberculosis. When under consideration, all available service department films and subsequent films will be secured and read by specialists at designated stations who should have a current examination report and X-ray. Resulting interpretations of service films will be accorded the same consideration for service connection purposes as if clinically established, however, a compensable rating will not be assigned prior to establishment of an active condition by approved methods.

(b) *Inactive disease.* Where the veteran was examined at the time of entrance into active service but no X-ray was made, or if made, is not available and there was no notation or other evidence of active or inactive re-infection type pulmonary tuberculosis existing prior to such entrance, it will be assumed that the condition occurred during service and direct service connection will be in order for inactive pulmonary tuberculosis shown by X-ray evidence during service in the manner prescribed in paragraph (a) of this section, unless lesions are first shown so soon after entry on active service as to compel the conclusion, on the basis of sound medical principles, that they existed prior to entry on active service.

(c) *Primary lesions.* Healed primary type tuberculosis shown at the time of entrance into active service will not be taken as evidence to rebut direct or presumptive service connection for active re-infection type pulmonary tuberculosis.

(Authority: 38 U.S.C. 501(a))

§ 5.341 Presumptive service connection for tuberculous disease; wartime and service after December 31, 1946.

(a) *Pulmonary tuberculosis.* (1) Evidence of activity on comparative study of X-ray films showing pulmonary tuberculosis within the 3-year presumptive period provided by § 5.261(d) will be taken as establishing service connection for active pulmonary tuberculosis subsequently diagnosed by approved methods but service connection and rating may be assigned only from the date of such diagnosis or other evidence of clinical activity.

(2) A notation of inactive tuberculosis of the re-infection type at induction or enlistment definitely prevents the grant of service connection under § 5.261 for active tuberculosis, regardless of the fact that it was shown within the appropriate presumptive period.

(b) *Pleurisy with effusion without obvious cause.* Pleurisy with effusion with evidence of diagnostic studies ruling out obvious nontuberculous causes will qualify as active tuberculosis. The requirements for presumptive service connection will be the same as those for tuberculous pleurisy.

(c) *Tuberculous pleurisy and endobronchial tuberculosis.* Tuberculous pleurisy and endobronchial tuberculosis fall within the category of pulmonary tuberculosis for the purpose of service connection on a presumptive basis. Either will be held incurred in service when initially manifested within the 3-year presumptive period provided by § 5.261(d).

(d) *Miliary tuberculosis.* Service connection for miliary tuberculosis involving the lungs is to be determined in the same manner as for other active pulmonary tuberculosis.

(Authority: 38 U.S.C. 501(a))

§ 5.342 Initial grant following inactivity of tuberculosis.

When service connection is granted initially on an original or reopened claim for pulmonary or nonpulmonary tuberculosis and there is satisfactory evidence that the condition was active previously but is now inactive (arrested), it will be presumed that the disease continued to be active for 1 year after the last date of established activity, provided there is no evidence to establish activity or inactivity in the intervening period. For a veteran entitled to receive compensation on August 19, 1968, the beginning date of graduated ratings will commence at the end of the 1-year period. For a veteran who was not receiving or entitled to receive compensation on August 19, 1968, ratings will be assigned in accordance with the Schedule for Rating Disabilities in part 4 of this chapter. This section is not applicable to running award cases.

(Authority: 38 U.S.C. 501(a))

§ 5.343 Effect of diagnosis of active tuberculosis.

(a) *Service diagnosis.* Service department diagnosis of active pulmonary tuberculosis will be accepted unless a board of medical examiners, a Clinic Director, or Chief, Outpatient Service certifies, after considering all the evidence, including the favoring or opposing tuberculosis and activity, that such diagnosis was incorrect. Doubtful cases may be referred to the Under Secretary for Health in Central Office.

(b) *Department of Veterans Affairs diagnosis.* Diagnosis of active pulmonary tuberculosis by the medical authorities of VA as the result of examination, observation, or treatment will be accepted for rating purposes. In a case where there is no such diagnosis, but there is evidence that the veteran has tuberculosis, the case will be referred to the Clinic Director or Chief, Outpatient Service, and, if necessary, to the Under Secretary for Health in Central Office.

(c) *Private physician's diagnosis.* Diagnosis of active pulmonary tuberculosis by private physicians based on their examination, observation or treatment will not be accepted to show the disease was initially manifested within the presumptive period after discharge from active service unless confirmed by acceptable clinical, X-ray or laboratory studies, or by findings of active tuberculosis based upon acceptable hospital observation or treatment.

(Authority: 38 U.S.C. 501(a))

§ 5.344 Determination of inactivity (complete arrest) of tuberculosis.

(a) *Pulmonary tuberculosis.* A veteran shown to have had pulmonary tuberculosis will be held to have reached a condition of ''complete arrest'' when a diagnosis of inactive is made.

(b) *Nonpulmonary disease.* Determination of complete arrest of nonpulmonary tuberculosis requires absence of evidence of activity for 6 months. If there are two or more foci of such tuberculosis, one of which is active, the condition will not be considered to be inactive until the tuberculous process has reached arrest in its entirety.

(c) *Arrest following surgery.* Where there has been surgical excision of the lesion or organ, the date of complete arrest will be the date of discharge from the hospital, or 6 months from the date of excision, whichever is later.

(Authority: 38 U.S.C. 501(a))

§ 5.345 Changes from activity in pulmonary tuberculosis pension cases.

A permanent and total disability rating in effect during hospitalization will not be discontinued before hospital discharge based on a change in classification from active. At hospital discharge, the permanent and total rating will be discontinued unless the medical evidence does not support a finding of complete arrest (see § 5.344) or where complete arrest is shown but the medical authorities recommend that employment not be resumed or be resumed only for short hours (not more than 4 hours a day for a 5-day week). If either of the two aforementioned conditions is met, discontinuance will be deferred pending examination in 6 months. Although complete arrest may be established upon that examination, the permanent and total rating may be extended for a further period of 6 months provided the veteran's employment is limited to short hours as recommended by the medical authorities (not more than 4 hours a day for a 5-day week). Similar extensions may be granted under the same conditions at the end of 12 and 18-month periods. At the expiration of 24 months after hospitalization, the case will be considered under § 3.321(b) of this chapter if continued short hours of employment are recommended or if other evidence warrants submission.

(Authority: 38 U.S.C. 501(a))

§ 5.346 Tuberculosis and compensation under 38 U.S.C. 1114(q) and 1156.

(a) *General.* Any veteran who, on August 19, 1968, was receiving or entitled to receive compensation for active or inactive (arrested) tuberculosis may receive compensation under 38 U.S.C. 1114(q) and 1156 as in effect before August 20, 1968.

(b) *Special monthly compensation (SMC) under 38 U.S.C. 1114(q) for inactive tuberculosis (complete arrest).* (1)(i) For a veteran who was receiving or entitled to receive compensation for tuberculosis on August 19, 1968, the minimum monthly rate is $67. This minimum SMC is not to be combined with or added to any other disability compensation. The rating criteria for determining inactivity of tuberculosis are set out in § 5.344.

(ii) The effective date for special monthly compensation (SMC) under paragraph (b)(1)(i) of this section will be the date the graduated rating of the disability or compensation for that degree of disablement combined with other service-connected disabilities provides compensation payable at a rate less than $67.

(2) For a veteran who was not receiving or entitled to receive compensation for tuberculosis on August 19, 1968, the SMC authorized by paragraph (b)(1) of this section is not payable.

(Authority: 38 U.S.C. 501(a); Pub. L. 90–493, 82 Stat. 809)

§ 5.347 Continuance of a total disability rating for service-connected tuberculosis.

In service-connected cases, ratings for active or inactive tuberculosis will be governed by the Schedule for Rating Disabilities in part 4 of this chapter. Where in the opinion of the agency of original jurisdiction the veteran at the expiration of the period during which a total rating is provided will not be able to maintain inactivity of the disease process under the ordinary conditions of life, the case will be submitted under § 3.321(b) of this chapter.

(Authority: 38 U.S.C. 501(a))

§§ 5.348–5.349 [Reserved]

Injury or Death Due to Hospitalization or Treatment

§ 5.350 Benefits under 38 U.S.C. 1151(a) for additional disability or death due to hospital care, medical or surgical treatment, examination, training and rehabilitation services, or compensated work therapy program.

(a) *Claims subject to this section.* (1) *General.* Except as provided in paragraph (a)(2) of this section, this section applies to claims received by VA after September 30, 1997. This includes original claims and claims to reopen or otherwise readjudicate a previous claim for benefits under 38 U.S.C. 1151 or its predecessors. The effective date of benefits is subject to § 5.351. For claims received by VA before October 1, 1997, see § 3.358 of this chapter.

(2) *Compensated Work Therapy.* With respect to claims alleging disability or death due to compensated work therapy, this section applies to claims that were pending before VA on November 1, 2000, or that were received by VA after that date. The effective date of benefits is subject to §§ 5.152(a) and 5.351, and shall not be earlier than November 1, 2000.

(b) *Determining whether a veteran has an additional disability.* To determine whether a veteran has an additional disability, VA will compare the veteran's condition immediately before the beginning of the hospital care, medical or surgical treatment, examination, training and rehabilitation services, or compensated work therapy (CWT) program upon which the claim is based to the veteran's condition after such care, treatment, examination, services, or program has stopped. VA considers each involved body part or system separately.

(c) *Establishing the cause of additional disability or death.* Claims based on additional disability or death due to hospital care, medical or surgical treatment, or examination must meet the causation requirements of this paragraph and paragraph (d)(1) or (d)(2) of this section. Claims based on additional disability or death due to training and rehabilitation services or CWT program must meet the causation requirements of paragraph (d)(3) of this section.

(1) *Actual causation required.* To establish causation, the evidence must show that the hospital care, medical or surgical treatment, or examination resulted in the veteran's additional disability or death. Merely showing that a veteran received care, treatment, or examination and that the veteran has an additional disability or died does not establish cause.

(2) *Continuance or natural progress of injury or disease.* Hospital care, medical or surgical treatment, or examination cannot cause the continuance or natural progress of injury or disease for which the care, treatment, or examination was furnished unless VA's failure to timely diagnose and properly treat the disease or injury proximately caused the continuance or natural progress. The provision of training and rehabilitation services or CWT program cannot cause the continuance or natural progress of injury or disease for which the services were provided.

(3) *Veteran's failure to follow medical instructions.* Additional disability or death caused by a veteran's failure to

follow properly given medical instructions is not caused by hospital care, medical or surgical treatment, or examination.

(d) *Establishing the proximate cause of additional disability or death.* The proximate cause of disability or death is the action or event that directly caused the disability or death, as distinguished from a remote contributing cause.

(1) *Care, treatment, or examination.* To establish that carelessness, negligence, lack of proper skill, error in judgment, or similar instance of fault on VA's part in furnishing hospital care, medical or surgical treatment, or examination proximately caused a veteran's additional disability or death, it must be shown that the hospital care, medical or surgical treatment, or examination caused the veteran's additional disability or death (as explained in paragraph (c) of this section); and

(i) VA failed to exercise the degree of care that would be expected of a reasonable healthcare provider; or

(ii) VA furnished the hospital care, medical or surgical treatment, or examination without the veteran's or, in appropriate cases, the veteran's representative's informed consent. To determine whether there was informed consent, VA will consider whether the healthcare providers substantially complied with the requirements of § 17.32 of this chapter. Minor deviations from the requirements of § 17.32 of this chapter that are immaterial under the circumstances of a case will not defeat a finding of informed consent. Consent may be express (*i.e.*, given orally or in writing) or implied under the circumstances specified in § 17.32(b) of this chapter, as in emergency situations.

(2) *Events not reasonably foreseeable.* Whether the proximate cause of a veteran's additional disability or death was an event not reasonably foreseeable is in each claim to be determined based on what a reasonable health care provider would have foreseen. The event need not be completely unforeseeable or unimaginable but must be one that a reasonable healthcare provider would not have considered an ordinary risk of the treatment provided. In determining whether an event was reasonably foreseeable, VA will consider whether the risk of that event was the type of risk that a reasonable health care provider would have disclosed in connection with the informed consent procedures of § 17.32 of this chapter.

(3) *Training and rehabilitation services or compensated work therapy program.* To establish that the provision of training and rehabilitation services or a CWT program proximately caused a veteran's additional disability or death, it must be shown that the veteran's participation in an essential activity or function of the training, services, or CWT program provided or authorized by VA proximately caused the disability or death. The veteran must have been participating in such training, services, or CWT program provided or authorized by VA as part of an approved rehabilitation program under 38 U.S.C. chapter 31 or as part of a CWT program under 38 U.S.C. 1718. It need not be shown that VA approved that specific activity or function, as long as the activity or function is generally accepted as being a necessary component of the training, services, or CWT program that VA provided or authorized.

(e) *Department employees and facilities.* (1) A Department employee is an individual:

(i) Who is appointed by the Department in the civil service under title 38, United States Code, or title 5, United States Code, as an employee as defined in 5 U.S.C. 2105;

(ii) Who is engaged in furnishing hospital care, medical or surgical treatment, or examinations under authority of law; and

(iii) Whose day-to-day activities are subject to supervision by the Secretary of Veterans Affairs.

(2) A Department facility is a facility over which the Secretary of Veterans Affairs has direct jurisdiction.

(f) *Activities that are not hospital care, medical or surgical treatment, or examination furnished by a Department employee or in a Department facility.* The following are not hospital care, medical or surgical treatment, or examination furnished by a Department employee or in a Department facility within the meaning of 38 U.S.C. 1151(a):

(1) Hospital care or medical services furnished under a contract made under 38 U.S.C. 1703.

(2) Nursing home care furnished under 38 U.S.C. 1720.

(3) Hospital care or medical services, including, but not limited to, examination, provided under 38 U.S.C. 8153, in a facility over which the Secretary does not have direct jurisdiction.

(g) *Benefits payable under 38 U.S.C. 1151 for a veteran's death after December 31, 1956.* The benefit payable under 38 U.S.C. 1151(a) to an eligible survivor for a veteran's death occurring after December 31, 1956, is dependency and indemnity compensation.

(Authority: 38 U.S.C. 1151)

§ 5.351 Effective dates for awards of benefits under 38 U.S.C. 1151(a).

The effective date for the award of compensation under § 5.350 based on additional disability or death due to hospitalization, medical or surgical treatment, examinations, vocational rehabilitation training, or compensated work therapy will be one of the following:

(a) *Disability.* Date injury or aggravation was suffered if a claim is received within one year after that date; otherwise, date of receipt of the claim.

(b) *Death.* First day of the month in which the veteran's death occurred, if a claim is received within one year after the date of death; otherwise, date of receipt of the claim.

(c) *Compensated work therapy.* For an award of compensation under § 5.350 based on additional disability or death due to compensated work therapy, see also § 5.350(a)(2).

(Authority: 38 U.S.C. 5110(c))

§ 5.352 Effect on benefits awarded under 38 U.S.C. 1151(a) of Federal Tort Claims Act compromises, settlements, and judgments entered after November 30, 1962.

(a) *Claims subject to this section.* This section applies to claims received by VA after September 30, 1997. This includes original claims and claims to reopen or otherwise readjudicate a previous claim for benefits under 38 U.S.C. 1151(a) or its predecessors.

(b) *Offset of veterans' awards of compensation.* If a veteran's disability is the basis of a judgment under 28 U.S.C. 1346(b) awarded, or a settlement or compromise under 28 U.S.C. 2672 or 2677 entered, after November 30, 1962, the amount to be offset under 38 U.S.C. 1151(b) from any compensation awarded under 38 U.S.C. 1151(a) is the entire amount of the veteran's share of the judgment, settlement, or compromise, including the veteran's proportional share of attorney fees.

(c) *Offset of survivors' awards of dependency and indemnity compensation.* If a veteran's death is the basis of a judgment under 28 U.S.C. 1346(b) awarded, or a settlement or compromise under 28 U.S.C. 2672 or 2677 entered, after November 30, 1962, the amount to be offset under 38 U.S.C. 1151(b) from any dependency and indemnity compensation awarded under 38 U.S.C. 1151(a) to a survivor is only the amount of the judgment, settlement, or compromise representing damages for the veteran's death the survivor receives in an individual capacity or as distribution from the decedent veteran's estate of sums included in the judgment, settlement, or compromise to compensate for harm

suffered by the survivor, plus the survivor's proportional share of attorney fees.

(d) *Offset of structured settlements.* This paragraph applies if a veteran's disability or death is the basis of a structured settlement or structured compromise under 28 U.S.C. 2672 or 2677 entered after November 30, 1962.

(1) *The amount to be offset.* The amount to be offset under 38 U.S.C. 1151(b) from benefits awarded under 38 U.S.C. 1151(a) is the veteran's or survivor's proportional share of the cost to the United States of the settlement or compromise, including the veteran's or survivor's proportional share of attorney fees.

(2) *When the offset begins.* The offset of benefits awarded under 38 U.S.C. 1151(a) begins the first month after the structured settlement or structured compromise has become final that such benefits would otherwise be paid.

(Authority: 38 U.S.C. 1151)

§ 5.353 Effect on benefits awarded under 38 U.S.C. 1151(a) of Federal Tort Claims Act administrative awards, compromises, settlements, and judgments finalized before December 1, 1962.

(a) *Claims subject to this section.* This section applies to claims received by VA after September 30, 1997. This includes original claims and claims to reopen or otherwise readjudicate a previous claim for benefits under 38 U.S.C. 1151(a) or its predecessors.

(b) *Effect of administrative awards, compromises, settlements, or judgments.* If a veteran's disability or death was the basis of an administrative award under 28 U.S.C. 1346(b) made, or a settlement or compromise under 28 U.S.C. 2672 or 2677 finalized, before December 1, 1962, VA may not award benefits under 38 U.S.C. 1151(a) for any period after such award, settlement, or compromise was made or became final. If a veteran's disability or death was the basis of a judgment under 28 U.S.C. 1346(b) that became final before December 1, 1962, VA may award benefits under 38 U.S.C. 1151(a) for the disability or death unless the terms of the judgment provide otherwise.

(Authority: 38 U.S.C. 1151)

§§ 5.354–5.359 [Reserved]

Ratings for Healthcare Eligibility Only

§ 5.360 Service connection of dental conditions for treatment purposes.

(a) *General Principles.* Eligibility requirements for dental treatment are set forth in § 17.161 of this chapter.

(b) *Conditions service connected for treatment purposes.* VA will not pay compensation for any of the following dental conditions; however, these conditions may be service connected solely for providing outpatient dental treatment:

(1) Treatable carious teeth.

(2) Replaceable missing teeth.

(3) Dental or alveolar abscesses.

(4) Chronic periodontal disease.

(c) *Conditions not service connected for treatment purposes.* The following conditions will not be service connected for outpatient dental treatment purposes:

(1) Calculus.

(2) Acute periodontal disease.

(3) Teeth noted at entry as nonrestorable, regardless of treatment during service.

(4) Teeth noted as missing at entry, regardless of treatment during service.

(d) *Rating principles.* VA will determine service connection for establishing eligibility for outpatient dental treatment using the following principles:

(1) VA will consider each defective or missing tooth and each disease of the teeth and periodontal tissues separately to determine whether the condition was incurred or aggravated in line of duty during active service.

(2) VA will determine whether the condition is due to combat or other in-service trauma.

(3) VA will consider whether the veteran was interned as a prisoner of war.

(4) VA will consider the condition of teeth and periodontal tissues at the time of entry into active duty.

(e) *Aggravation.* Notations of conditions made at entry to service and treatment of such conditions during service (including, but not limited to, fillings, extractions, and placement of a prosthesis) will not be considered as evidence of aggravation, unless additional pathology developed after 180 days or more of active military service.

(1) Teeth noted as normal at entry will be service connected for treatment purposes if they were filled or extracted after 180 days or more of active military service.

(2) Teeth noted as filled at entry will be service connected for treatment purposes if they were extracted, or if the existing filling was replaced, after 180 days or more of active military service.

(3) Teeth noted as carious but restorable at entry will not be service connected for treatment purposes on the basis that they were filled during service. Service connection may be established for treatment purposes if new caries developed 180 days or more after such teeth were filled.

(4) Teeth noted as carious but restorable at entry will be service connected for treatment purposes if extraction was required after 180 days or more of active military service.

(5) Third molars will not be service connected for treatment purposes unless disease or pathology of the tooth developed after 180 days or more of active military service, or was due to combat or in-service trauma.

(6) Impacted or malposed teeth and other developmental defects will not be service connected for treatment purposes unless disease or pathology of the teeth developed after 180 days or more of active military service.

(7) Teeth extracted because of chronic periodontal disease will be service connected for treatment purposes only if they were extracted after 180 days or more of active military service.

(Authority: 38 U.S.C. 1712)

§ 5.361 Healthcare eligibility of persons administratively discharged under other-than-honorable conditions.

(a) *General.* VA will provide healthcare and related benefits authorized by chapter 17 of title 38 U.S.C. to certain former service persons with administrative discharges under other-than-honorable conditions for any disability incurred or aggravated during active military service in line of duty.

(b) *Eligibility criteria.* VA will use the same eligibility criteria that are applicable to determinations of incurrence in service and of incurrence in the line of duty when there is no character of discharge bar to determine a claimant's health-care eligibility.

(c) *Characterization of discharge.* VA will not furnish healthcare and related benefits for any disability incurred in or aggravated during a period of service terminated by a bad conduct discharge or when one of the character of discharge bars listed in § 3.12(c) of this chapter applies.

(Authority: Pub. L. 95–126, 91 Stat. 1106)

§ 5.362 Presumption of service incurrence of active psychosis for purposes of hospital, nursing home, domiciliary, and medical care.

(a) *Presumption of service incurrence for active psychosis.* For purposes of determining eligibility for hospital, nursing home, domiciliary, and medical care under chapter 17 of title 38, United States Code, VA will presume incurred in active military service any active psychosis developed by a veteran under the circumstances described in paragraph (b) of this section.

(b) *Requirements.* In order to be entitled to a presumption of service incurrence for active psychosis for purposes of this section, a veteran must have served during one of the periods of

war specified in the following table and developed the psychosis within two years after discharge from active military service and before the date specified in the following table that corresponds to the period of war during which the veteran served.

Veterans who served during:	Must have developed active psychosis within two years after discharge from active military service and before:
World War II	July 26, 1949.
Korean conflict	February 1, 1957.
Vietnam era	May 8, 1977.
Persian Gulf War	The end of two-year period beginning on the last day of the Persian Gulf War.

Cross Reference: § 5.20, ''Dates of periods of war.''

(Authority: 38 U.S.C. 101(16), 105, 501(a), 1702)

§ 5.363 Determination of service connection for former members of the Armed Forces of Czechoslovakia or Poland.

The agency of original jurisdiction will determine whether the condition for which treatment is claimed by former members of the Armed Forces of Czechoslovakia or Poland under 38 U.S.C. 109(c) is service connected. This determination will be made using the same criteria that apply to determinations of service connection based on service in the Armed Forces of the United States.

(Authority: 38 U.S.C. 501(a))

§ 5.364 [Reserved]

Miscellaneous Service-Connection Regulations

§ 5.365 Claims based on the effects of tobacco products.

(a) Except as provided in paragraph (b) of this section, a disability or death will not be service connected on any basis, including secondary service connection under § 3.310 of this chapter, if it resulted from injury or disease attributable to the veteran's use during service of tobacco products, such as cigars, cigarettes, smokeless tobacco, pipe tobacco, and roll-your-own tobacco.

(b) Paragraph (a) of this section does not prohibit service connection if any of the following are true:

(1) The disability or death resulted from injury or disease that is otherwise shown to have been incurred or aggravated during service, which means that the disability or death can be service connected on some basis other than the veteran's use of tobacco products during service or that the disability became manifest or death occurred during service;

(2) The disability or death resulted from injury or disease that appeared to the required degree of disability within any applicable presumptive period under §§ 5.260, 5.261, 5.262, 5.263, 5.264, 5.265, 5.267, or 5.268; or

(3) Service connection is established for ischemic heart disease or other cardiovascular disease under § 3.310(c) of this chapter as secondary to a disability not caused by the use of tobacco products during service.

(Authority: 38 U.S.C. 501(a), 1103, 1103 note)

§ 5.366 Disability due to impaired hearing.

VA will consider impaired hearing to be a disability when any of the following three criteria is satisfied:

(a) The auditory threshold in any of the frequencies of 500, 1000, 2000, 3,000, or 4000 Hertz is 40 decibels or greater;

(b) The auditory thresholds for at least three of the frequencies of 500, 1000, 2000, 3000, or 4000 Hertz are 26 decibels or greater; or

(c) Speech recognition scores using the Maryland CNC Test are less than 94 percent.

(Authority: 38 U.S.C. 1110)

§ 5.367 Civil service preference ratings.

For certifying civil service disability preference only, a service-connected disability may be assigned a rating of less than 10 percent. Any directly or presumptively service-connected injury or disease that exhibits some extent of actual impairment may be held to exist at the level of less than 10 percent. For disabilities incurred in combat, however, no actual impairment is required.

(Authority: 38 U.S.C. 501(a))

§ 5.368 Basic eligibility determinations: home loan and education benefits.

(a) *Loans.* (1) *General.* Eligibility of certain veterans (listed in paragraph (a)(2) of this section) for a loan under 38 U.S.C. chapter 37 requires a determination that the veteran was discharged or released because of a service-connected disability, or that the official service department records show that he or she had, at the time of separation from service, a service-connected disability that in medical judgment would have warranted a discharge for disability. These determinations are subject to the presumption of soundness under § 3.304(b) of this chapter. Determinations based on World War II, Korean conflict, and Vietnam era service are also subject to the presumption of aggravation under § 3.306(b) of this chapter, and determinations based on service after January 31, 1955, and before August 5, 1964; or after May 7, 1975, are subject to the presumption of aggravation under § 3.306 (a) and (c) of this chapter. This paragraph is also applicable, regardless of length of service, in determining eligibility to the maximum period of entitlement based on discharge or release for a service-connected disability. (See § 5.39, ''Minimum active duty service requirement for VA benefits.'')

(2) *Veterans affected.* The veterans affected by this paragraph are:

(i) Veteran of World War II, the Korean conflict, or the Vietnam era who served for less than 90 days; or

(ii) Veterans who served less than 181 days on active duty as defined in §§ 36.4301 and 36.4501, and whose dates of service were:

(A) After July 25, 1947, and before June 27, 1950;

(B) After January 31, 1955, and before to August 5, 1964; or

(C) After May 7, 1975.

(Authority: 38 U.S.C. 3702, 3707)

(b) *Veterans' educational assistance.* (1) A determination is required as to whether a veteran was discharged or released from active duty service because of a service-connected disability, or whether the official service department records show that the veteran had at time of separation from service a service-connected disability which in medical judgment would have warranted discharge for disability, whenever any of the following circumstances exist:

(i) The veteran applies for benefits under 38 U.S.C. chapter 32, the minimum active duty service requirements of 38 U.S.C. 5303A apply to him or her, and the veteran would be eligible for such benefits only if:

(A) He or she was discharged or released from active duty for a disability incurred or aggravated in the line of duty; or

(B) He or she has a disability that VA has determined to be compensable under 38 U.S.C. chapter 11; or

(ii) The veteran applies for benefits under 38 U.S.C. chapter 30 and:

(A) The evidence of record does not clearly show either that the veteran was discharged or released from active duty for disability or that the veteran's discharge or release from active duty was unrelated to disability, and

(B) The veteran is eligible for basic educational assistance except for the minimum length of active duty service requirements of § 21.7042(a) or § 21.7044(a) of this chapter.

(2) A determination is required as to whether a veteran was discharged or released from service in the Selected Reserve for a service-connected disability or for a medical condition which preexisted the veteran's having become a member of the Selected Reserve and which VA determines is not service connected when the veteran applies for benefits under 38 U.S.C. chapter 30 and:

(i) The veteran would be eligible for basic educational assistance under that chapter only if he or she was discharged from the Selected Reserve for a service-connected disability or for a medical condition which preexisted the veteran's having become a member of the Selected Reserve and which VA finds is not service connected, or

(ii) The veteran is entitled to basic educational assistance and would be entitled to receive it at the rates stated in § 21.7136(a) or § 21.7137(a) of this chapter only if he or she was discharged from the Selected Reserve for a service-connected disability or for a medical condition which preexisted the veteran's having become a member of the Selected Reserve and which VA finds is not service connected.

(3) A determination is required as to whether a reservist has been unable to pursue a program of education due to a disability which has been incurred in or aggravated by service in the Selected Reserve when:

(i) The reservist is otherwise entitled to educational assistance under 10 U.S.C. chapter 1606, and

(ii) He or she applies for an extension of his or her eligibility period.

(4) The determinations required by paragraphs (b)(1) through (b)(3) of this section are subject to the presumptions of soundness under § 3.304(b) of this chapter and aggravation under § 3.306(a) and (c) of this chapter, based on service rendered after May 7, 1975.

(Authority: 38 U.S.C. 3011(a)(1)(A)(ii), 3012(b)(1), 3202(1)(A), 10 U.S.C. 16133(b))

§ 5.369 [Reserved]

[FR Doc. E8–23825 Filed 10–16–08; 8:45 am]

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Federal Register

Friday,
October 17, 2008

Part IV

Department of Energy

10 CFR Parts 430 and 431

Energy Conservation Program: Energy Conservation Standards for Certain Consumer Products (Dishwashers, Dehumidifiers, Electric and Gas Kitchen Ranges and Ovens, and Microwave Ovens) and for Certain Commercial and Industrial Equipment (Commercial Clothes Washers); Test Procedure for Microwave Ovens; Proposed Rules

DEPARTMENT OF ENERGY

10 CFR Parts 430 and 431

[Docket Number EE–2006–STD–0127]

RIN: 1904–AB49

Energy Conservation Program: Energy Conservation Standards for Certain Consumer Products (Dishwashers, Dehumidifiers, Electric and Gas Kitchen Ranges and Ovens, and Microwave Ovens) and for Certain Commercial and Industrial Equipment (Commercial Clothes Washers)

AGENCY: Office of Energy Efficiency and Renewable Energy, Department of Energy.

ACTION: Notice of proposed rulemaking and notice of public meeting.

SUMMARY: The Energy Policy and Conservation Act (EPCA), as amended, prescribes energy conservation standards for various consumer products and commercial and industrial equipment, and requires the U.S. Department of Energy (DOE) to determine whether amended, more stringent, standards would be technologically feasible and economically justified, and would save a significant amount of energy. In this notice, DOE is proposing to amend the energy conservation standards for residential gas kitchen ranges and ovens and microwave ovens, as well as commercial clothes washers. DOE has tentatively determined that energy conservation standards for residential electric kitchen ranges and ovens are not technologically feasible or economically justified, and, therefore, is proposing a ''no-standard'' standard for these products. DOE had also initially considered amended energy conservation standards for residential dishwashers and dehumidifiers in this rulemaking; however, the Energy Independence and Security Act of 2007 (EISA 2007) subsequently prescribed standards for these products. Therefore, DOE is not proposing standards for dishwashers and dehumidifiers in this notice, but will instead codify the statutory standards in a final rule. Finally, today's notice is announcing a public meeting on the proposed standards.

DATES: DOE will accept comments, data, and information regarding this notice of proposed rulemaking (NOPR) before and after the public meeting, but no later than December 16, 2008. See section VII, ''Public Participation,'' of this notice for details.

DOE will hold a public meeting on Thursday, November 13, 2008, from 9 a.m. to 4 p.m., in Washington, DC. DOE must receive requests to speak at the public meeting before 4 p.m., Thursday, October 30, 2008. DOE must receive a signed original and an electronic copy of statements to be given at the public meeting before 4 p.m., Thursday, November 6, 2008.

ADDRESSES: The public meeting will be held at the U.S. Department of Energy, Forrestal Building, Room 8E–089, 1000 Independence Avenue, SW., Washington, DC 20585. (Please note that foreign nationals visiting DOE Headquarters are subject to advance security screening procedures. If you are a foreign national and wish to participate in the workshop, please inform DOE of this fact as soon as possible by contacting Ms. Brenda Edwards at (202) 586–2945 so that the necessary procedures can be completed.)

Any comments submitted must identify the NOPR for Energy Conservation Standards for Home Appliance Products, and provide the docket number EE–2006–STD–0127 and/or regulatory information number (RIN) 1904–AB49. Comments may be submitted using any of the following methods:

1. *Federal eRulemaking Portal: http://www.regulations.gov.* Follow the instructions for submitting comments.

2. *E-mail: home_appliance.rulemaking@ee.doe.gov.* Include docket number EE–2006–STD–0127 and/or RIN number 1904–AB49 in the subject line of the message.

3. *Postal Mail:* Ms. Brenda Edwards, U.S. Department of Energy, Building Technologies Program, Mailstop EE–2J, 1000 Independence Avenue, SW., Washington, DC, 20585–0121. Please submit one signed paper original.

4. *Hand Delivery/Courier:* Ms. Brenda Edwards, U.S. Department of Energy, Building Technologies Program, 950 L'Enfant Plaza, SW., Suite 600, Washington, DC 20024. Telephone: (202) 586–2945. Please submit one signed paper original.

For detailed instructions on submitting comments and additional information on the rulemaking process, see section VII of this document (Public Participation).

Docket: For access to the docket to read background documents or comments received, visit the U.S. Department of Energy, Resource Room of the Building Technologies Program, 950 L'Enfant Plaza, SW., Suite 600, Washington, DC 20024, (202) 586–2945, between 9 a.m. and 4 p.m., Monday through Friday, except Federal holidays. Please call Ms. Brenda Edwards at the above telephone number for additional information regarding visiting the Resource Room.

FOR FURTHER INFORMATION CONTACT: Mr. Stephen Witkowski, Project Manager, Energy Conservation Standards for Home Appliance Products, U.S. Department of Energy, Office of Energy Efficiency and Renewable Energy, Building Technologies Program, EE–2J, 1000 Independence Avenue, SW., Washington, DC 20585–0121. Telephone: (202) 586–7463. E-mail: *Stephen.Witkowski@ee.doe.gov.*

Ms. Francine Pinto, Mr. Eric Stas, or Mr. Michael Kido, U.S. Department of Energy, Office of the General Counsel, GC–72, 1000 Independence Avenue, SW., Washington, DC 20585–0121. Telephone: (202) 586–9507. E-mail: *Francine.Pinto@hq.doe.gov*, *Eric.Stas@hq.doe.gov*, or *Michael.Kido@hq.doe.gov.*

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I. Summary of the Proposed Rule

The Energy Policy and Conservation Act [1] (EPCA or the Act), as amended, provides that any amended energy conservation standard DOE prescribes, including ones for cooking products [2] and commercial clothes washers (collectively referred to in this notice of proposed rulemaking (NOPR) as ''the two appliance products''), shall be designed to ''achieve the maximum improvement in energy efficiency * * * which the Secretary determines is technologically feasible and economically justified.'' (42 U.S.C. 6295(o)(2)(A) and 6316(a).) Furthermore, any new or amended standard must ''result in significant conservation of energy.'' (42 U.S.C. 6295(o)(3)(B) and 6316(a).) In accordance with these and other statutory criteria discussed in this notice, DOE proposes to amend the energy conservation standards for the two appliance products and raise efficiency levels as shown in Table I.1. The standards would apply to all products listed in Table I.1 that are manufactured in, or imported into, the United States three years after the publication of the final rule in the **Federal Register**.

[1] 42 U.S.C. 6291 *et seq.*

[2] The term ''cooking products,'' as used in this notice, refers to residential electric and gas kitchen ranges and ovens, including microwave ovens.

TABLE I.1—PROPOSED ENERGY CONSERVATION STANDARDS FOR COOKING PRODUCTS AND COMMERCIAL CLOTHES WASHERS

Product class	Proposed energy conservation standards
Conventional Cooking Products:	
Gas cooktops/conventional burners	No constant burning pilot lights.
Electric cooktops/low or high wattage open (coil) elements	No standard.
Electric cooktops/smooth elements	No standard.
Gas ovens/standard oven	No constant burning pilot lights.
Gas ovens/self-clean oven	No change to existing standard.
Electric ovens	No standard.
Microwave ovens	Maximum standby power = 1.0 watt.
Commercial clothes washers:	
Top-loading commercial clothes washers	1.76 Modified Energy Factor/8.3 Water Factor.
Front-loading commercial clothes washers	2.00 Modified Energy Factor/5.5 Water Factor.

In addition, DOE is proposing prescriptive standards that require elimination of constant-burning pilots for gas cooktops and gas standard ovens and standby power limits for microwave ovens. Furthermore, DOE has tentatively concluded that standards for conventional electric cooking products (*i.e.*, non-microwave oven products) and amended standards for gas self-cleaning ovens are not technologically feasible and economically justified. Therefore, DOE is proposing a ''no-standard'' standard for conventional electric cooking products. In addition, since standards already exist for gas self-cleaning ovens (*i.e.*, a ban on standing pilot lights), DOE is not proposing amendments to the existing standards.

DOE notes that in the November 15, 2007, advance notice of proposed rulemaking (ANOPR; referred to as the ''November 2007 ANOPR''), DOE announced it was considering amended standards for residential dishwashers and dehumidifiers. 72 FR 64432. However, section 311 of the Energy Independence and Security Act of 2007 (EISA 2007; Pub. L. 110–140) amended EPCA to establish revised energy conservation standards for residential dishwashers and dehumidifiers. (42 U.S.C. 6295(g)(9) and 6295(cc)) These EISA 2007 amendments set energy efficiency standards for these products; therefore, DOE will codify these statutory standards for residential dishwashers and dehumidifiers in a separate final rule.

EISA 2007, through section 310, also amended EPCA to require that any final rule establishing or revising a standard for a covered product, which includes residential dishwashers, dehumidifiers, ranges and ovens, and microwave ovens, adopted after July 1, 2010, shall incorporate standby mode and off mode energy use into a single amended or new standard, if feasible. If not feasible, the Secretary shall prescribe within the final rule a separate standard for standby mode and off mode energy consumption, if justified. (42 U.S.C. 6295(gg)(3)(A)–(B)) Although EISA 2007 will ultimately require test procedures for all covered residential products to measure standby mode and off mode energy consumption, it set specific deadlines for amendments to the test procedures for certain products, including the following products relevant to this rulemaking: residential dishwashers, ranges and ovens, microwave ovens, and dehumidifiers (all due by March 31, 2011). (42 U.S.C. 6295(gg)(2))

DOE's preliminary analyses suggested that there could be a significant energy savings potential associated with microwave oven standby power, so DOE decided to accelerate its test procedure rulemaking for microwaves. DOE is publishing a test procedure NOPR for microwave ovens in the **Federal Register**. Having such a test procedure in place is a prerequisite for implementing an energy conservation standard that takes into account standby mode and off mode energy consumption. For the reasons stated in this notice, DOE does not currently have sufficient data at this time to allow it to consider a single standard incorporating standby mode and off mode for cooking products other than microwave ovens, so DOE is therefore proposing a separate standby power limit for microwave ovens only. Standby and off mode power for conventional cooking products, dishwashers, and dehumidifiers will be considered in separate rulemakings which will meet the March 31, 2011, EISA 2007 deadline.

DOE is not proposing energy conservation standards at this time for standby and off mode power in dishwashers, dehumidifiers, and commercial clothes washers (CCWs) for the following reasons: (1) Standby mode power in dishwashers is already accounted for in the energy conservation standards, specified in terms of annual energy consumption, established by EISA 2007 (42 U.S.C. 6295(g)(10)(A)); (2) DOE has insufficient information on dehumidifier usage patterns to conduct an analysis of standby and off mode performance; and (3) EISA 2007 does not include CCWs as a covered product for the purposes of prescribing standards for standby and off mode energy consumption. DOE notes that EPCA directs DOE to use the residential clothes washer (RCW) test procedure for CCWs. (42 U.S.C. 6314(a)(8)) In this test procedure, measurements for modified energy factor (MEF) and water factor (WF) are provided. This test procedure is also the subject of a rulemaking proposing amendments to incorporate standby and off mode power into energy consumption metrics, as required by EISA 2007 by June 30, 2009. However, since the proposed amendments would create a new metric (*i.e.*, integrated modified energy factor (IMEF), incorporating standby mode and off mode power into MEF) but would retain MEF and not change its calculation under the test procedure, there will be no impact of these proposed amendments on CCWs.

DOE estimates that the energy conservation standards proposed today would save a significant amount of energy-an estimated 0.75 quadrillion British thermal units (Btu), or quads, of cumulative energy over 30 years (2012–2042). This amount is equivalent to 15.8 days of U.S. gasoline use. Breaking these figures down by product type, the national energy savings of the proposed standards for conventional gas cooking products is estimated to be 0.14 quads. For microwave ovens, it is estimated that the proposed standby power standard would result in national energy savings of 0.45 quads. For CCWs, the national energy savings resulting from the proposed standards is

estimated to be 0.15 quads.[3] In addition, the proposed standards for CCWs save over 190 billion gallons of cumulative water consumption over 30 years (2012–2042).

The cumulative national net present value (NPV) of total consumer costs and savings of the proposed standards from 2012 to 2042, in 2006 dollars (2006$), ranges from $2.2 billion (seven-percent discount rate) to $5.3 billion (three-percent discount rate). Again, breaking these figures down by product type, the NPV of the proposed standards for conventional gas cooking products ranges from $0.2 billion (seven-percent discount rate) to $0.6 billion (three-percent discount rate). DOE estimates the industry net present value (INPV) of gas cooktops to be approximately $287 million and $466 million for gas ovens in 2006$. If DOE adopts the proposed standards, it estimates U.S. gas cooktop manufacturers will lose between 1.74 percent and 4.12 percent of the INPV, which is approximately $5 to $12 million. For gas ovens, DOE estimates U.S. manufacturers will lose between 1.57 percent and 2.10 percent of the INPV, which is approximately $7 to $10 million.

For microwave ovens, the NPV of the proposed standards ranges from $1.6 billion (seven-percent discount rate) to $3.5 billion (three-percent discount rate). DOE estimates the INPV to be approximately $1.45 billion in 2006$. If DOE adopts the proposed standards, it estimates U.S. manufacturers will lose between 2.52 percent and 4.92 percent of the INPV, which is approximately $37 to $71 million.

For CCWs, the NPV of the proposed standards ranges from $0.5 billion (seven-percent discount rate) to $1.2 billion (three-percent discount rate). This is the estimated total value of future operating-cost savings minus the estimated increased equipment costs, discounted to 2007 in 2006 dollars (2006$). DOE estimates the INPV to be approximately $56 million in 2006$. If DOE adopts the proposed standards, it expects manufacturers will lose between 26.50 percent and 31.09 percent of the INPV, which is approximately $15 million to $17 million. However, the NPV for consumers (at the seven-percent discount rate) would exceed industry losses due to energy efficiency standards by at least 29.4 times.

DOE believes the impacts of standards on consumers would be positive for each type of covered product addressed in this rulemaking, even though that standard may increase some initial costs. For example, DOE estimates that the proposed standards for conventional gas cooking products would increase the consumer retail price by $18 for gas cooktops and $22 for gas standard ovens. In addition, DOE believes that over 50 percent of consumers purchasing gas cooking products with constant burning or standing pilot lights would need to install an electrical outlet at a cost of $235 to accommodate a product that requires electricity to operate. But even with these additional costs, DOE estimates that the savings in reduced energy costs outweigh these costs; in other words, the average life-cycle cost (LCC) savings are positive. For microwave ovens, DOE estimates that limiting standby power consumption to 1.0 watt (W) would decrease energy costs but increase the consumer retail price by only $2, resulting in positive economic impacts to consumers. Although DOE estimates that the proposed MEF and WF standards for CCWs would increase the retail price by over $229 per unit for top-loading washers and $21 for front-loading washers, the operating cost savings outweigh these price increases, resulting in positive economic impacts to CCW consumers.

DOE's analyses indicate that the energy savings resulting from the proposed standards would have benefits to utilities and to the environment. The energy saved is in the form of electricity and natural gas, and DOE expects the energy savings from the proposed standards to eliminate the need for approximately 404 megawatts (MW) of generating capacity by 2042. Breaking this figure down by product type: the proposed standards for conventional gas cooking products eliminate the need for approximately 56 MW of generating capacity; the proposed standards for microwave ovens eliminate the need for 320 MW of generating capacity, and the proposed standards for CCWs eliminate the need for 28 MW of generating capacity. These results reflect DOE's use of energy price projections from the U.S. Energy Information Administration (EIA)'s *Annual Energy Outlook 2008* (*AEO 2008*).[4]

In addition, the proposed standards would have environmental benefits, which would be estimated to result in cumulative (undiscounted) greenhouse gas emission reductions of 76 million tons (Mt) of carbon dioxide (CO_2) from 2012 to 2042. Specifically, the proposed standards for conventional gas cooking products would reduce CO_2 emissions by 14.6 Mt; the proposed standards for microwave ovens would reduce CO_2 emissions by 50.5 Mt; and the proposed standards for CCWs reduce CO_2 emissions by 11.5 Mt.

The standards for gas cooking products and CCWs would also result in 10.1 kilotons (kt) of nitrogen oxides (NO_X) emissions reductions, at the sites where appliances are used, from 2012 to 2042. In addition, gas cooking product and CCW standards would result in power plant NO_X emissions reductions of 0.5 kt to 11.9 kt from 2012 to 2042. Moreover, the standards for microwave ovens would result in power plant emission reductions of 2.7 kt to 66.0 kt of NO_X from 2012 to 2042, attributable to these appliances.

The standards for gas cooking products, microwave ovens, and CCWs would also possibly result in power plant mercury (Hg) emissions reductions. For cooking products, Hg emissions could be reduced by up to 0.2 tons (t) from 2012 to 2042. For CCWs, up to 0.2 t of Hg emissions reductions could be realized over 2012 to 2042. For microwave ovens, Hg emissions could be reduced by up to 1.1 t from 2012 to 2042.

In sum, the proposed standards represent the maximum improvement in energy and water efficiency that is technologically feasible and economically justified. DOE found that the benefits to the Nation of the proposed standards (energy and water savings, consumer average LCC savings, national NPV increase, and emission reductions) outweigh the costs (loss of INPV, and LCC increases for some consumers). DOE has concluded that the proposed standards are economically justified and technologically feasible, particularly since units achieving these standard levels already are commercially available. DOE notes that it considered higher efficiency levels as trial standard levels (TSLs), and is still considering them in this rulemaking; however, DOE tentatively believes that the burdens of the higher efficiency levels (loss of INPV and LCC increases for some consumers) outweigh the benefits (energy savings, LCC savings for some consumers, national NPV increase, and emission reductions). After reviewing public comments on this NOPR, DOE may ultimately decide to adopt one of its other TSLs or another value in between.

Finally, although DOE has proposed a ''no-standard'' standard for several of the conventional cooking product classes, Federal energy conservation requirements, including a ''no-

[3] The energy savings by product type may not sum to the total quads due to rounding of individual values.

[4] DOE intends to use the most recently available version of EIA's *Annual Energy Outlook* to generate the results for the final rule. Available online at *http://www.eia.doe.gov/oiaf/aeo/*.

standard'' standard, generally supersede State laws or regulations concerning energy conservation testing, labeling, and standards. (42 U.S.C. 6297(a)–(c)) DOE can, however, grant waivers of such preemption for particular State laws or regulations, in accordance with the procedures and other provisions of section 327(d) of EPCA, as amended. (42 U.S.C. 6297(d))

II. Introduction

A. Consumer Overview

DOE is proposing energy conservation standard levels for residential cooking products and CCWs as shown in Table I.1. The proposed standards would apply to products manufactured or imported three years after the date the final rule is published in the **Federal Register**.[5]

Residential and commercial consumers will see benefits from the proposed standards. Although DOE expects the purchase price of the high efficiency cooking products and CCWs to be higher (ranging from 1 to 26 percent for cooking products and 2 to 31 percent for CCWs) than the average price of this equipment today, the energy efficiency gains will result in lower energy costs, saving consumers $1 to $63 per year on their energy bills, again depending on the product. When these savings are summed over the lifetime of the product, consumers are expected to save an average of $6 to $252, depending on the product. DOE estimates that the payback period for the more-efficient, higher-priced product will range from 0.3 to 9 years, depending on the product. In contrast, residential consumers will see no impact in terms of the standard for electric kitchen ranges and ovens, because it was determined that amended standards were not justified under the existing statutory criteria.

B. Authority

Title III of EPCA sets forth a variety of provisions designed to improve energy efficiency. Part A of Title III (42 U.S.C. 6291–6309) provides for the ''Energy Conservation Program for Consumer Products Other Than Automobiles.'' The program covers consumer products (all of which are referred to hereafter as ''covered products''), including residential dishwashers, dehumidifiers, and cooking products. (42 U.S.C. 6292, 6295) Part A–1 of Title III (42 U.S.C. 6311–6317) establishes a similar program for ''Certain Industrial Equipment,'' which deals with a variety of commercial and industrial equipment (referred to hereafter as ''covered equipment'') including CCWs. (42 U.S.C. 6312; 6313(e)) EPCA sets both energy and water efficiency standards for CCWs, and authorizes DOE to amend both. (42 U.S.C. 6313(e))

Specifically, for dishwashers, the National Appliance Energy Conservation Act of 1987 (NAECA), Public Law 100–12, amended EPCA to establish prescriptive standards, requiring that dishwashers be equipped with an option to dry without heat, and further requiring that DOE conduct two cycles of rulemakings to determine if more stringent standards are justified. (42 U.S.C. 6295(g)(1) and (4)) Section 311(a)(2) of EISA 2007 subsequently established maximum energy and water use levels for residential dishwashers manufactured on or after January 1, 2010.[6] (42 U.S.C. 6295(g)(10))

Section 135(c)(4) of the Energy Policy Act of 2005 (EPACT 2005; Pub. L. 109–58) added dehumidifiers as products covered under EPCA and established standards for them that became effective on October 1, 2007. (42 U.S.C. 6295(cc)) These amendments to EPCA also require that DOE issue a final rule by October 1, 2009, to determine whether these standards should be amended. (42 U.S.C. 6295(cc)) If amended standards are justified, they must become effective by October 1, 2012. (*Id.*) In the event that DOE fails to publish such a final rule, EPACT 2005 specifies a new set of amended standards with an effective date of October 1, 2012. (*Id.*) EISA 2007 subsequently amended section 325(cc) of EPCA by replacing the requirement for a rulemaking to amend the dehumidifier standards with prescriptive minimum efficiency levels for dehumidifiers manufactured on or after October 1, 2012.[7] (EISA 2007, section 311(a)(1); 42 U.S.C. 6295(cc))

Product capacity (pints/day)	Minimum EF (liters/kWh)
Up to 35.00	1.35
35.01–45.00	1.50
45.01–54.00	1.60
54.01–75.00	1.70
75.00 or more	2.5

As with dishwashers, NAECA amended EPCA to establish prescriptive standards for cooking products, requiring gas ranges and ovens with an electrical supply cord that are manufactured on or after January 1, 1990 not to be equipped with a constant burning pilot, and requiring DOE to conduct two cycles of rulemakings for ranges and ovens to determine if the standards established should be amended. (42 U.S.C. 6295 (h)(1)–(2))

Similar to dehumidifiers, EPACT 2005 included amendments to EPCA that added CCWs as covered equipment, and it also established standards for such equipment that is manufactured on or after January 1, 2007.[8] (EPACT 2005, section 136(a) and (e); 42 U.S.C. 6311(1) and 6313(e)) EPACT 2005 also requires that DOE issue a final rule by January 1, 2010, to determine whether these standards should be amended. (EPACT 2005, section 136(e); 42 U.S.C. 6313(e))

It is pursuant to the authority set forth above that DOE is conducting the present rulemaking for cooking products and CCWs and will codify the statutory standards for dishwashers and dehumidifiers. The following discusses some of the key provisions of EPCA relevant to this standards-setting rulemaking.

Under EPCA, the overall program consists of the following core elements: (1) Testing; (2) labeling; and (3) Federal energy conservation standards. The Federal Trade Commission (FTC) is responsible for labeling products covered by part A, and DOE implements the remainder of the program. Under 42 U.S.C. 6293 and 6314, EPCA authorizes DOE, subject to certain criteria and conditions, to develop test procedures to measure the energy efficiency, energy use, or estimated annual operating cost of covered products and equipment. The test procedures for the appliance products subject to today's notice appear at Title 10 of the Code of Federal Regulations (CFR) part 430, subpart B—dishwashers in appendix C, dehumidifiers in appendix X, cooking products in appendix I, and CCWs in appendix J1 (the latter pursuant to 10 CFR 431.154.)

EPCA provides criteria for prescribing new or amended standards for covered products and equipment.[9] As indicated

[5] At this time, DOE anticipates that publishing a final rule in March 2009, pursuant to the requirements of a Federal court consent decree, which would make the amended standards effective in March 2012.

[6] Under the statute, a standard size dishwasher shall not exceed 355 kWh/year and 6.5 gallons per cycle, and a compact size dishwasher shall not exceed 260 kWh/year and 4.5 gallons per cycle.

[7] Under the statute, such dehumidifiers shall have an Energy Factor (EF) that meets or exceeds the following values: (See above table.)

[8] Under the statute, a CCW must have a modified energy factor (MEF) of at least 1.26 and a water factor (WF) of not more than 9.5.

[9] The EPCA provisions discussed in the remainder of this subsection directly apply to covered products, and also apply to certain covered equipment, such as commercial clothes washers, by virtue of 42 U.S.C. 6316(a). Note that the term ''product'' is used generally to refer to consumer appliances, while ''equipment'' is used generally to refer to commercial units.

above, any new or amended standard for either of the two appliance products must be designed to achieve the maximum improvement in energy efficiency that is technologically feasible and economically justified. (42 U.S.C. 6295(o)(2)(A)) Additionally, DOE may not prescribe a standard for some types of products if: (1) No test procedure has been established for that product; or (2) DOE determines by rule that the standard is not technologically feasible or economically justified. (42 U.S.C. 6295(o)(3)(A)–(B)) The statute also provides that, in deciding whether a standard is economically justified, DOE must, after receiving comments on the proposed standard, determine whether the benefits of the standard exceed its burdens by considering, to the greatest extent practicable, the following seven factors:

(1) The economic impact of the standard on manufacturers and consumers of the products or equipment subject to the standard;

(2) The savings in operating costs throughout the estimated average life of the covered products or equipment in the type (or class) compared to any increase in the price, initial charges, or maintenance expenses for the covered products that are likely to result from the imposition of the standard;

(3) The total projected amount of energy (or, as applicable, water) savings likely to result directly from the imposition of the standard;

(4) Any lessening of the utility or the performance of the covered products or equipment likely to result from the imposition of the standard;

(5) The impact of any lessening of competition, as determined in writing by the Attorney General, that is likely to result from the imposition of the standard;

(6) The need for national energy and water conservation; and

(7) Other factors the Secretary considers relevant.

(42 U.S.C. 6295(o)(2)(B)(i))

Furthermore, EPCA contains what is commonly known as an ''anti-backsliding'' provision. (42 U.S.C. 6295(o)(1)) This provision prohibits the Secretary from prescribing any amended standard that either increases the maximum allowable energy use or decreases the minimum required energy efficiency of a covered product or equipment. Also, the Secretary may not prescribe an amended or a new standard if the Secretary finds that interested persons have established by a preponderance of the evidence that the standard is likely to result in the unavailability in the United States of any product type (or class) with performance characteristics, features, sizes, capacities, and volume that are substantially the same as those generally available in the United States at the time of the Secretary's finding. (42 U.S.C. 6295(o)(4))

In addition, EPCA, as amended (42 U.S.C. 6295(o)(2)(B)(iii)), establishes a rebuttable presumption that a standard is economically justified if the Secretary finds that ''the additional cost to the consumer of purchasing a product complying with an energy conservation standard level will be less than three times the value of the energy (and as applicable, water) savings during the first year that the consumer will receive as a result of the standard,'' as calculated under the test procedure in place for that standard. This approach provides an alternative path in establishing economic justification under the EPCA factors. (42 U.S.C. 6295(o)(2)(B)(iii)) DOE considered this test, but believes that the criterion it applies (*i.e.*, a limited payback period) is not sufficient for determining economic justification. Instead, DOE has considered a full range of impacts, including those to the consumer, manufacturer, Nation, and environment.

In promulgating a standard for a type or class of covered product that has two or more subcategories, DOE must specify a different standard level than that which applies generally to such type or class of products ''for any group of covered products which have the same function or intended use, if * * * products within such group—(A) consume a different kind of energy from that consumed by other covered products within such type (or class); or (B) have a capacity or other performance-related feature which other products within such type (or class) do not have and such feature justifies a higher or lower standard'' than applies or will apply to the other products. (42 U.S.C. 6295(q)(1)) In determining whether a performance-related feature justifies such a different standard for a group of products, DOE must consider ''such factors as the utility to the consumer of such a feature'' and other factors DOE deems appropriate. *Id.* Any rule prescribing such a standard must include an explanation of the basis on which such higher or lower level was established. (42 U.S.C. 6295(q)(2))

Federal energy conservation requirements generally supersede State laws or regulations concerning energy conservation testing, labeling, and standards. (42 U.S.C. 6297(a)–(c)) DOE can, however, grant waivers of Federal preemption for particular State laws or regulations, in accordance with the procedures and other provisions of EPCA found in 42 U.S.C. 6297(d). Specifically, States that regulate an energy conservation standard for a type of covered product for which there is a Federal energy conservation standard may petition the Secretary for a DOE rule that allows the State regulation to become effective with respect to such covered product. (42 U.S.C. 6297(d)(1)(A)) DOE must prescribe a rule granting the petition if the Secretary finds that the State has established by a preponderance of the evidence that its regulation is needed to meet ''unusual and compelling State or local energy * * * interests.'' (42 U.S.C. 6297(d)(1)(B))

C. Background

1. Current Standards

a. Dishwashers

DOE established the current energy conservation standards for dishwashers manufactured on or after May 14, 1994 in a final rule on May 14, 1991 (56 FR 22250), which consist of a requirement that the energy factor (EF) of a standard size dishwasher must not be less than 0.46 cycles per kilowatt-hour (kWh) and that the EF of a compact size dishwasher must not be less than 0.62 cycles per kWh. (10 CFR 430.32(f))

b. Dehumidifiers

EPCA, as amended by EPACT 2005, prescribes the current energy conservation standard for dehumidifiers, as shown in Table II.1. (42 U.S.C. 6295(cc)(1); 10 CFR 430.32(v))

TABLE II.1—EPACT 2005 STANDARDS FOR RESIDENTIAL DEHUMIDIFIERS

Dehumidifier capacity	Standards effective October 1, 2007 EF (liters/kWh)
25.00 pints/day or less	1.00
25.01–35.00 pints/day	1.20
35.01–54.00 pints/day	1.30
54.01–74.99 pints/day	1.50
75.00 pints/day or more	2.25

c. Cooking Products

EPCA prescribes the current energy conservation standard for cooking products, which consists of a requirement that gas ranges and ovens with an electrical supply cord that are manufactured on or after January 1, 1990, not be equipped with a constant burning pilot. (42 U.S.C. 6295(h)(1); 10 CFR 430.32(j))

d. Commercial Clothes Washers

EPCA, as amended by EPACT 2005, also prescribes standards for CCWs

manufactured on or after January 1, 2007. (42 U.S.C. 6313(e)) These standards require that CCWs have an MEF of at least 1.26 and a WF of not more than 9.5. (*Id.*; 10 CFR 431.156)

2. History of Standards Rulemaking for Residential Dishwashers, Dehumidifiers, and Cooking Products; and Commercial Clothes Washers

For dishwashers, NAECA amended EPCA to establish prescriptive standards, requiring that dishwashers be equipped with an option to dry without heat, and further requiring that DOE conduct two cycles of rulemakings to determine if more stringent standards are justified. (42 U.S.C. 6295(g)(1) and (4)) On May 14, 1991, DOE published a final rule establishing the first set of performance standards for dishwashers (56 FR 22250); these new standards discussed became effective on May 14, 1994 (10 CFR 430.32(f)). DOE initiated a second standards rulemaking for dishwashers by publishing an ANOPR on November 14, 1994 (59 FR 56423). However, as a result of the priority-setting process outlined in its *Procedures, Interpretations and Policies for Consideration of New or Revised Energy Conservation Standards for Consumer Products* (the ''Process Rule'') (61 FR 36974 (July 15, 1996); 10 CFR part 430, subpart C, appendix A), DOE suspended the standards rulemaking for dishwashers.

Section 135(c)(4) of EPACT 2005 added dehumidifiers as products covered under EPCA and established standards for them that became effective on October 1, 2007. (42 U.S.C. 6295(cc)) DOE has incorporated these standards into its regulations (70 FR 60407, 60414 (Oct. 18, 2005); 10 CFR 430.32(v)).

The November 2007 ANOPR addressed standards for residential dishwashers and dehumidifiers, in addition to cooking products and CCWs. On December 19, 2007, however, Congress enacted EISA 2007, which, among other things, established minimum efficiency levels for dehumidifiers manufactured on or after October 1, 2012. (EISA 2007, section 311(a)(1); 42 U.S.C. 6295(cc)) In addition, section 311(a)(2) of EISA 2007 established maximum energy and water use levels for residential dishwashers manufactured on or after January 1, 2010. (42 U.S.C. 6295(g)(10)) Because EISA 2007 established standards for residential dishwashers and dehumidifiers, DOE will codify the statutory standards for these products in a separate final rule.[10] DOE will not entertain comment on these standard levels set under EISA 2007, because the Department does not have discretion to modify such statutory levels. As a result, DOE will limit its analysis in the balance of this NOPR to cooking products and commercial clothes washers.

The existing prescriptive standard for cooking products, described above, was added to EPCA by amendments contained in the NAECA. As set forth in greater detail in the November 2007 ANOPR, these amendments required DOE to conduct two cycles of rulemakings to determine whether to revise the standard. DOE undertook the first cycle of these rulemakings and issued a final rule on September 8, 1998 (63 FR 48038), which found that no standards were justified for electric cooking products. Partially due to the difficulty of conclusively demonstrating that elimination of standing pilots was economically justified, DOE did not adopt a standard for gas cooking products. 72 FR 64432, 64438 (Nov. 15, 2007). DOE is currently in the second cycle of rulemakings required by the NAECA amendments to EPCA. (42 U.S.C. 6295(h)(2))

EPACT 2005 included amendments to EPCA that added CCWs as covered equipment and established the current standards for such equipment. (EPACT 2005, section 136(a) and (e); 42 U.S.C. 6311(1)(G) and 6313(e)) DOE has incorporated these standards into its regulations (70 FR 60407, 60416 (Oct. 18, 2005); 10 CFR 431.156). The EPACT 2005 amendments also require that DOE conduct two cycles of rulemakings to determine whether these standards should be amended. (EPACT 2005, section 136(e); 42 U.S.C. 6313(e)(2)) The first of these rules must be published by January 1, 2010, and any amended standard in the rule would apply to products manufactured three years after the rule is published. *Id.*

To initiate the current rulemaking to consider energy conservation standards, on March 15, 2006, DOE published on its Web site a document titled, *Rulemaking Framework for Commercial Clothes Washers and Residential Dishwashers, Dehumidifiers, and Cooking Products* (Framework Document).[11] 71 FR 15059 (March 27, 2006). The Framework Document described the procedural and analytical approaches that DOE anticipated using to evaluate energy conservation standards for these products, and identified various issues to be resolved in conducting the rulemaking. DOE held a public meeting on April 27, 2006, to present the Framework Document, to describe the analyses it planned to conduct during the rulemaking, to receive comments from stakeholders, and to inform and facilitate stakeholders' involvement in the rulemaking. DOE received 11 written comments in response to the Framework Document after the public meeting.

On December 4, 2006, DOE posted two spreadsheet tools for this rulemaking on its Web site.[12] The first tool calculates LCC and payback periods (PBPs) and included spreadsheets for: (1) Dishwashers; (2) dehumidifiers; (3) cooktops; (4) ovens; (5) microwave ovens; and (6) CCWs. The second tool—the national impact analysis (NIA) spreadsheet—calculates the impacts on shipments and the national energy savings (NES) and NPV at various candidate standard levels. The NIA spreadsheets include one each for: (1) Dishwashers; (2) dehumidifiers; (3) cooktops and ovens; (4) microwave ovens; and (5) CCWs.

DOE published the ANOPR for this rulemaking on November 15, 2007, and held a public meeting on December 13, 2007, to present and seek comment on the November 2007 ANOPR analytical methodology and results. 72 FR 64432. In the November 2007 ANOPR, DOE described and sought further comment on the analytical framework, models, and tools (*e.g.*, LCC and NIA spreadsheets) it was using to analyze the impacts of energy conservation standards for these products. In conjunction with the November 2007 ANOPR, DOE also posted on its Web site the complete November 2007 ANOPR technical support document (TSD). The TSD included the results of a number of DOE's preliminary analyses, including: (1) The market and technology assessment; (2) screening analysis; (3) engineering analysis; (4) energy and water use determination; (5) markups analysis to determine equipment price; (6) LCC and PBP analyses; (7) shipments analysis; (8) NES and national impact analyses; and (9) manufacturer impact analysis (MIA). In the November 2007 ANOPR and at the public meeting, DOE invited comment in particular on the following issues concerning cooking products and CCWs: (1) Microwave oven standby power; (2) product classes; (3) CCW horizontal-axis designs; (4) microwave

[10] DOE intends to codify all prescriptive energy conservation standards established under EISA 2007 for various products and equipment into its regulations in a separate **Federal Register** notice.

[11] This document is available on the DOE Web site at: *http://www.eere.energy.gov/buildings/appliance_standards/residential/dehumidifiers.html.*

[12] These spreadsheets are available on the DOE Web site at: *http://www.eere.energy.gov/buildings/appliance_standards/residential_products.html.*

oven design options; (5) technologies unable to be analyzed and exempted product classes, including potential limitations of existing test procedures; (6) CCW per-cycle energy consumption; (7) CCW consumer prices; (8) repair and maintenance costs; (9) efficiency distributions in the base case; (10) CCW shipments forecasts; (11) base-case and standards-case forecasted efficiencies; and (12) TSLs. 72 FR 64432, 64512–14 (Nov. 15, 2007).

The November 2007 ANOPR also included background information, in addition to that set forth above, on the history and conduct of this rulemaking and on DOE's use in this rulemaking of its Process Rule. 72 FR 64432, 64438–39 (Nov. 15, 2007). DOE held a public meeting in Washington, DC, on December 13, 2007, to present the methodologies and results for the November 2007 ANOPR analyses, along with a summary of supplemental analysis DOE conducted for microwave ovens (referred to as the ''December 2007 public meeting''). At the December 2007 public meeting, stakeholders commented that they had come to an agreement regarding what they believed to be appropriate levels for energy conservation standards for dehumidifiers and dishwashers and would offer draft legislation that would reflect such agreement. (Association of Home Appliance Manufacturers (AHAM), Public Meeting Transcript, No. 23.7 at pp. 20 and 24; [13] Appliance Standards Awareness Project (ASAP), Public Meeting Transcript, No. 23.7 at p. 24) These stakeholders' suggested energy conservation standard levels were subsequently incorporated into the EISA 2007 amendments to EPCA, as discussed previously in this section.

DOE expects to issue a final rule in this rulemaking in March 2009. Based on this schedule, the effective date of any new energy efficiency standards for these products would be March 2012, three years after the final rule is published in the **Federal Register**.

III. General Discussion

A. Standby Power for Cooking Products

Section 310 of the EISA 2007 amends section 325 of the EPCA to require DOE to regulate standby mode and off mode energy consumption for all covered products, including residential ranges and ovens and microwave ovens, as part of energy conservation standards for which a final rule is adopted after July 10, 2010. In addition, EISA 2007 amended section 325 of EPCA to specifically require that test procedures for ranges and ovens and microwave ovens be amended by March 31, 2011 to include measurement of standby mode and off mode energy consumption, taking into consideration the most current versions of International Electrotechnical Commission's (IEC) Standard 62301 *Household electrical appliances—Measurement of standby power* [14] (IEC 62301) and IEC Standard 62087 *Methods of measurement for the power consumption of audio, video and related equipment* (IEC 62087).[15] (42 U.S.C. 6295(gg)) Because the final rule for this rulemaking is scheduled to be published in the **Federal Register** by March 31, 2009, an energy conservation standard for cooking products set forth by this rulemaking is not required to incorporate standby mode and off mode energy consumption.

Although DOE is also not required to incorporate standby mode and off mode energy consumption for any cooking products at this time, in the November 2007 ANOPR, DOE stated that it is considering including standby power in the energy conservation standards and intends to initiate amendment of its test procedure to measure microwave oven standby power because: (1) Energy consumption in standby mode represents a significant proportion of microwave oven annual energy consumption, and (2) the range of standby power among microwave ovens currently on the market suggests that the likely impact of a standard would be significant in terms of energy consumption. 72 FR 64432, 64440–42 (Nov. 15, 2007). Such a test procedure change is a prerequisite to incorporate a standby power requirement as part of the energy conservation standard for microwave ovens.[16] DOE invited comments on this issue, and commenters generally supported the early initiation of test procedure amendments to measure standby power consumption in microwave ovens. The comments on this issue are discussed in section III.B.2 of this notice.

DOE also invited comment on the incorporation of standby power in an energy conservation standard for residential cooking products. Several organizations—ASAP, Natural Resources Defense Council (NRDC), Northwest Power and Conservation Council (NPCC), Northeast Energy Efficiency Partnerships (NEEP), and the American Council for an Energy-Efficient Economy (ACEEE)—filed a single joint comment (hereafter Joint Comment) that supported a standby power standard for residential ovens, including microwave ovens, or, in the alternative, a prescriptive requirement if test methods cannot be amended in time to support this rulemaking. For the reasons just discussed, DOE is considering incorporating standby power into the energy conservation standard for microwave ovens. For conventional cooking products, as will be discussed in more detail in section III.B.2, DOE does not have data or information to analyze standby mode and off mode power consumption. DOE will instead consider test procedure amendments for conventional cooking products in a later rulemaking that meets the March 31, 2011, deadline set by EISA 2007. (42 U.S.C. 6295(gg)(2)(B))

For microwave ovens, the Joint Comment stated that, while per-unit standby power savings amount to only several W per unit, they represent not only a large proportion of total microwave oven annual energy use but a large national impact as well when considering the stock and sales rate of microwave ovens. (Joint Comment, No. 29 at p. 7) DOE recognizes the Joint Comment's support for a standby power standard, but notes that even if the proposed standard were to be a prescriptive standby power level, a test procedure amendment prior to the final rule of this standards rulemaking would be required to incorporate such a measurement.

In assessing the opportunity to reduce standby power, the Joint Comment compared maximum microwave oven standby power in measurements reported by DOE, AHAM, and the Australian National Appliance and Equipment Energy Efficiency Committee (ANAEEEC). These measurements ranged from almost 6 W to 8.4 W, with

[13] A notation in the form ''AHAM, Public Meeting Transcript, No. 23.7 at p. 20'' identifies an oral comment that DOE received during the December 13, 2007, ANOPR public meeting and which was recorded in the public meeting transcript in the docket for this rulemaking (Docket No. EE–2006–STD–0127), maintained in the Resource Room of the Building Technologies Program. This particular notation refers to a comment (1) made by the Association of Home Appliance Manufacturers (AHAM) during the public meeting, (2) recorded in document number 23.7, which is the public meeting transcript that is filed in the docket of this rulemaking, and (3) which appears on page 20 of document number 23.7. A notation in the form ''EEI, No. 25 at pp. 2–3'' identifies a written comment (1) made by the Edison Electric Institute (EEI), (2) recorded in document number 25 that is filed in the docket of this rulemaking, and (3) which appears on pages 2–3 of document number 25.

[14] IEC standards are available at: *http://www.iec.ch.*

[15] IEC 62087 does not cover any products for this rulemaking, and, therefore, was not considered.

[16] As discussed in the November 2007 ANOPR, addressing standby mode and off mode energy consumption is not required for this standards rulemaking under EPCA, but DOE seeks to publish a final rule for the test procedure amendments prior to March 31, 2009, in order to allow the microwave oven energy conservation standards to account for standby mode and off mode power consumption.

a presumed standby demand of 3 W at most for minimal functionality, as inferred from microwaves listed in the Federal Energy Management Program (FEMP) procurement database which have both a clock display and a cooking sensor. The Joint Comment further stated that since there are no State or Federal standby performance or active mode performance standards, manufacturers have had little incentive to optimize the standby demand of microwave ovens. As an example of a product for which standby power was raised to the highest levels of design consideration by manufacturers, the Joint Comment stated that significant standby power reductions were achieved at minimal or no cost for external power supplies in response to market demands (*e.g.*, portable electronics) and policy demands (*e.g.*, standards or ENERGY STAR levels). (Joint Comment, No. 29 at pp. 5–8) AHAM, on the other hand, commented that DOE should not promulgate a standby power standard for cooking products in general, and in the case of microwave ovens, the contribution of standby power to total microwave oven energy use is relatively small and is associated with significant functionality for the consumer. (AHAM, No. 32 at p. 2)

As part of its engineering analysis, DOE sampled 32 microwave ovens, and AHAM provided test data for an additional 21 units submitted by manufacturers. Each microwave oven was tested according to the existing DOE test procedure, which measures the amount of energy required to raise the temperature of one kilogram of water by 10 degrees Celsius under controlled conditions. The ratio of usable output power over input power describes the EF, which is also a measure of the cooking efficiency. The data from the DOE and AHAM cooking tests show a cooking efficiency range from 55 percent to 62 percent. Reverse engineering conducted by DOE attempted to identify design options associated with this variation in cooking efficiency. Although design options among various microwave ovens were found to be highly standardized, DOE was unable to correlate specific design options or other features such as cavity size or output power with cooking efficiency. (See chapter 5 of the TSD accompanying this notice.)

DOE also observed significant variability in the cooking efficiency measurements obtained using the DOE microwave oven test procedure for the 53 units tested by DOE and AHAM. The data show test-to-test variability of several EF percentage points for a given microwave oven (*i.e.*, where a given combination of design options could be assigned to a number of TSLs, depending upon the test results). DOE was also unable to ascertain why similarly designed, equipped, and constructed microwave ovens showed varying EFs and, hence, annual energy consumption. DOE further notes that manufacturers stated during MIA interviews that the water used in the test procedure is not representative of an actual food load. One manufacturer stated, for example, that this could result in different microwave ovens being rated at the same energy efficiency even though true cooking performance is different.

In a review of the DOE microwave oven test procedure (which does not currently incorporate a measure of standby mode and off mode energy use), DOE explored whether it would be technically feasible to combine the existing measure of energy efficiency during the cooking cycle (per-use) with standby mode and off mode energy use (over time) to form a single metric, as required by EISA 2007. (42 U.S.C. 6295(gg)(2)(A)) Specifically, the test procedure's existing metric for microwave oven overall energy efficiency measures the efficiency of heating a sample of water over a period of seconds. In contrast, standby mode and off mode energy consumption is a measure of the amount of energy used over a period of multiple hours while not performing the function of heating a load. DOE found that an overall energy efficiency that combines the two values is representative of neither the energy efficiency of the microwave oven for a very short period of use (as is the case with the EF) nor the efficiency of the microwave oven over an extended period of time.

DOE notes that certain DOE test procedures for other products combine a measure of cycle efficiency and standby energy use to derive an overall ''energy efficiency measure,'' (*e.g.*, gas kitchen ranges and ovens incorporate pilot gas consumption in EF, electric ovens include clock power in EF, and gas dryers include pilot gas consumption). However, DOE believes that in those cases where the difference in energy use between the primary function of those products and the standby power is so large that the standby power has little impact on the overall measure of energy efficiency or the combined efficiency is based on energy use of the primary energy function and standby power over the same period, (*e.g.*, annual or seasonal), the combined measure of energy efficiency is a meaningful measure. In the case of microwave ovens, the energy consumption associated with standby mode is a significant fraction of the overall energy use. DOE notes, for example, that, depending on the cooking efficiency and standby power, the rank ordering of two microwave ovens based on EF alone could reverse if standby power were factored in, depending on the values of cooking energy use and standby power.[17] Therefore, given the similar magnitudes of microwave oven annual energy consumption associated with these two disparate and largely incompatible metrics that are measured over very different time periods, DOE questioned whether it would be technically feasible to incorporate EF and standby power into a combined energy efficiency metric that produces a meaningful result.

To explore standby mode and off mode power for the purpose of potential microwave oven energy conservation standards, DOE tested 32 sample units using the current IEC Standard 62301 standby test procedure and recorded a standby power range of about 1.2 W to 5.8 W (with less than 0.5 percent test-to-test deviation). DOE observed no off mode power consumption for the microwave ovens in its test sample, and DOE's research suggests that no other microwave ovens available in the United States consume energy in an off mode.[18] Thus, DOE focused its investigations on standby mode. Data suggested correlations between specific features and standby power, thereby

[17] For example, two units among the microwave ovens tested by AHAM, each with 1000 W of input power, will be designated Unit A and Unit B for the purposes of this illustration. The EF of Unit A was measured by AHAM according to the current DOE test procedure as 55.7 percent, while the EF of Unit B was measured as 57.3 percent. The standby power of Unit A, however, was measured as 1.7 W, compared to the 4.4 W of standby power for Unit B. If a combined EF (''CEF'') were to be calculated by adding the annual standby energy use to the annual cooking energy consumption, this CEF for Unit A would be 50.5 percent, while the CEF for Unit B would be 45.0 percent, thereby reversing the rankings of the two microwave ovens according to their energy descriptor. The unit that was formerly considered the higher efficiency unit would thus be rated as lower in efficiency.

[18] A microwave oven is considered to be in ''off mode'' if it is plugged in to a main power source, is not being used for an active function such as cooking or defrosting, and is consuming power for features other than a display, cooking sensor, controls (including a remote control), or sensors required to reactivate it from a low power state. For example, a microwave oven with mechanical controls and no display or cooking sensor that consumed power for components such as a power supply when the unit was not activated would be considered to be in off mode. Note that DOE believes there are no longer any such microwave ovens with mechanical controls on the market, and, in fact, is not aware of any microwave ovens currently available that can operate in off mode.

providing the basis for a cost-efficiency curve. However, for the reasons stated above about combining a per-cycle efficiency with standby power over a long period of time, as well as due to the observed test variability in the cooking efficiency results, DOE is concerned that an overall measure of cooking efficiency that combines cooking and standby energy cannot produce test results that measure energy efficiency or energy use of microwave ovens in a reasonable and repeatable manner. An ''average'' microwave runs 8,689 hours in standby mode per year. Based on the standby power range measured by DOE and AHAM, standby power consumption represents a relatively large component of total annual energy consumption. At the efficiency baseline from the analysis conducted for the previous cooking products rulemaking, as discussed in the 1996 *Technical Support Document for Residential Cooking Products* (1996 TSD), (which was also observed in the test sample), the observed range of annual energy consumption due to cooking (14.2 kWh) is equivalent to approximately 2 W of standby power. (See chapter 3 of the TSD accompanying this notice.)

DOE also explored whether the existing test procedure's measure of annual energy consumption could be modified to be a combined energy efficiency descriptor for microwave ovens, despite the fact that EF is currently listed as the energy efficiency descriptor. For the reasons articulated here, DOE has tentatively concluded that neither approach meets the statutory standard for a combined metric.

In light of the above, DOE believes that, although it may be mathematically possible to combine energy consumption into a single metric encompassing active (cooking), standby, and off modes, it is not technically feasible to do so at this time, because of the high variability in the current cooking efficiency measurement from which the active mode EF and annual energy consumption are derived (as discussed previously) and because of the significant contribution of standby power to overall microwave oven energy use. Given DOE's recent research, there is concern that cooking efficiency results for microwave ovens would not be meaningful, so incorporation of such results in a combined metric similarly would not be expected to be meaningful. Inherent in a determination of technical feasibility under EISA 2007 for a combined metric for active, standby, and off mode energy consumption is an expectation that the results would be meaningful. Accordingly, for the purposes of this notice, DOE is not proposing to incorporate standby and off modes with active mode into a combined metric, but is instead proposing a separate metric to measure standby power, as provided for by EISA 2007 in cases where it is technically infeasible to incorporate standby and off modes into a combined energy conservation metric.[19] (42 U.S.C. 6295(gg)(3)(B))

Although it may not be technically feasible to develop a combined metric for microwave ovens today, it may be possible to do so in the future, provided that each is measured on a consistent basis (*i.e.*, kWh per year apportioned to each mode) so that the results are meaningful and comparable. In this vein, DOE notes the need to develop a test procedure that addresses the high-variability concerns with its current cooking efficiency measure. DOE understands that IEC, AHAM, manufacturers, and others are exploring whether a test procedure can be developed that responds to the concerns DOE has raised. DOE expects to evaluate potential future test procedures to determine whether any address the concerns discussed above and meet the requirements of section 325(gg) of the Act, thereby making them suitable candidates for use in amending the DOE test procedure. If such test procedures are developed, DOE will consider a combined measure of microwave oven energy efficiency in a future rulemaking.

B. Test Procedures

1. Dishwashers and Dehumidifiers

Because EISA 2007 provides prescriptive energy conservation standards for dishwashers and dehumidifiers based on existing DOE test procedures (42 U.S.C. 6295(g)(10) and (cc)(2), respectively), DOE is not proposing to make changes to the test procedures for these products at this time. DOE will consider test procedure amendments to address potential incorporation of standby mode and off mode power into the energy efficiency metrics in a later rulemaking or rulemakings that meet the March 31, 2011, deadline set by the EISA 2007 amendments to EPCA. (42 U.S.C. 6295(gg)(2)(B)(vi))

[19] DOE notes that if a microwave oven standard is established based on standby power alone, measurable energy savings would certainly be achieved. If, however, standby power were to be combined with cooking efficiency, it is conceivable that many microwave ovens could already comply with the standard without reducing standby power, since the annual energy consumption due to standby power is on the same order as that associated with the variability in EF.

2. Cooking Products

As noted in the November 2007 ANOPR, DOE indicated that it does not intend to modify test procedures for cooking products as part of this rulemaking, other than an amendment to consider the standby power consumption of microwave ovens. *72 FR 64432, 64442* (Nov. 15, 2007).

The DOE test procedure for microwave ovens references IEC 705–1988 *Household Microwave Ovens—Methods for Measuring Performance,* and Amendment 2–1993 (IEC 705) for methodology of measuring cooking performance. The Joint Comment on the ANOPR urged DOE to continue to use the existing DOE test method and the referenced IEC 705 for active power measurement for the EF calculation because it appears to provide greater precision of measurement than the current version of the IEC standard, redesignated as IEC 60705–1993 Edition 3.2–2006 (IEC 60705). (Joint Comment No. 29 at p. 9) DOE observed during its efficiency testing of a representative sample of microwave ovens that IEC 705–1988 provides a more stable and repeatable cooking efficiency measurement than IEC 60705. Thus, DOE will not amend the microwave oven test procedure to reference IEC 60705 instead of IEC 705–1988. As discussed above, DOE is not aware of any other alternative test procedures that could be considered for incorporation by reference at this time.

As part of the DOE microwave oven standby power tests, DOE reviewed IEC 62301 to determine whether the specified test conditions were suitable for microwave oven tests. At the December 2007 ANOPR public meeting, DOE contemplated incorporation by reference of IEC 62301 into the DOE test procedure, but suggested several clarifications that would be required to deal with instances where the IEC test conditions were non-specific: (1) the microwave oven clock display should be set to 12 a.m. at the start of the test period; and (2) the standby power test should be run for a period of 12 hours to obtain a true average standby power, since clock power can vary as a function of displayed time, depending on the specific display technology. DOE sought comment on these potential modifications to the microwave oven test procedure, as well as any changes to the conventional cooking product test procedures to include standby power.

The Joint Comment stated that DOE should modify the oven, cooktop, and microwave oven test procedures as necessary to measure the clock face standby energy use and any other

standby energy use, such as control electronics and power supply losses. In addition, the Joint Comment stated that DOE should use IEC 62301 to test standby power, with the instruction to start the test with a clock setting of 12 a.m. and run the test for 12 hours or a lesser period of time demonstrated mathematically to be representative of a 12-hour period. (Joint Comment, No. 29 at pp. 6 and 9) ASAP commented that it supports a test procedure change to address microwave oven standby power, and that this test procedure change should not be a hurdle to implementing a standard that addresses standby power. (ASAP, Public Meeting Transcript, No. 23.7 at p. 72) GE Consumer and Industrial (GE), on the other hand, commented that it does not believe that there is justification for the development of ''necessarily complex'' new test procedures for cooking products. (GE, No. 30 at p. 2)

DOE believes separate test procedure rulemakings for standby mode and off mode power for microwave ovens and conventional cooking products are warranted. To support this rulemaking, the test procedure change to incorporate microwave oven standby mode and off mode power has been initiated in parallel with the current rulemaking, and a final rule for the test procedure will be published before the publication of a final rule on energy conservation standards. For conventional cooking products, DOE sought data and stakeholder feedback on the decision to retain the existing test procedures in the November 2007 ANOPR (72 FR 66432, 64513 (Nov. 15, 2007)), and did not receive any inputs. DOE does not have any data on standby power consumption in conventional cooking products that indicate the potential for significant energy savings. Thus, DOE will consider test procedure amendments in a later rulemaking that meets the March 31, 2011, deadline set by the EISA 2007 amendments to EPCA. (42 U.S.C. 6295(gg)(2)(B))

3. Commercial Clothes Washers

EPCA directs DOE to use the same test procedures for CCWs as those established by DOE for RCWs. (42 U.S.C. 6314(a)(8)) While DOE believes commercial laundry practices likely differ from residential practices,[20] DOE believes that the existing clothes washer test procedure (at 10 CFR part 430, subpart B, appendix J) adequately accounts for the efficiency rating of CCWs, and that DOE's methods for characterizing energy and water use in the NOPR analyses adequately account for the consumer usage patterns specific to CCWs. 72 FR 64432, 64442 (Nov. 15, 2007).

Alliance Laundry Systems (Alliance) commented that, as a first-order estimate, CCW usage patterns would be similar to those of the RCW market. Hence, Alliance supports the continued use of the existing test procedure as being generally representative of the multi-family and laundromat applications of the CCW segment of the market. (Alliance, No. 26 at p. 3)

GE commented that the RCW test procedure gives credit for features, such as multiple water levels, which have no energy efficiency benefit in actual CCW use and which may confuse the end customer. Therefore, GE suggests that DOE develop a representative test procedure specifically for CCWs. (GE, No. 30 at p. 3) Similarly, during the MIA interviews, multiple manufacturers mentioned that the use of the RCW test procedure provides an incentive for CCW manufacturers to incorporate design options for which the RCW test procedure gives credit, but which are unlikely to save energy in actual CCW use or provide additional utility to consumers. For example, commenters stated that adaptive fill and load selector switches are unlikely to be used by consumers who generally pay a fixed fee per load and who are thus likely to run full-sized loads and/or select the maximum fill setting. However, commenters did not provide data that demonstrate differences between CCW and RCW usage patterns or the energy implications thereof, nor did they address the statutory requirement to utilize the RCW test procedure for CCWs.

DOE recognizes that in certain situations, the controls and/or operation of a CCW (*e.g.*, fill level) can be set so that the CCW will not necessarily have the energy and water savings that might be expected to occur for RCWs. However, DOE does not have sufficient usage data to alter its preliminary conclusion that the existing RCW test procedure is adequate to measure the energy consumption of CCWs.

C. Technological Feasibility

1. General

DOE considers a design option to be technologically feasible if it is in use by the respective industry or if research has progressed to the development of a working prototype. Therefore, in each standards rulemaking, DOE conducts a screening analysis, based on information it has gathered regarding existing technology options and prototype designs. In consultation with manufacturers, design engineers, and others, DOE develops a list of design options for consideration in the rulemaking. Once DOE has determined that a particular design option is technologically feasible, it further evaluates each design option in light of the following three additional criteria: (a) Practicability to manufacture, install, and service; (b) adverse impacts on product utility or availability; or (c) adverse impacts on health or safety. 10 CFR part 430, subpart C, appendix A, section 4(a)(3) and (4). All design options that pass these screening criteria are candidates for further assessment in the engineering and subsequent analyses in the ANOPR stage. DOE may amend the list of retained design options in the NOPR analyses based on comments received on the ANOPR and on further research.

All of the design options for cooking products and CCWs that DOE identified in the November 2007 ANOPR remain and were considered in today's proposed rule. (See the TSD accompanying this notice, chapter 4.)

a. Cooking Products

During MIA interviews, manufacturers commented that improved contact conductance for electric open (coil) element cooktops was more dependent on the flatness of the cookware used by the consumer rather than the design of the heating element itself. DOE is unaware of data substantiating these statements, and therefore chose to retain the design option for the purposes of this NOPR.

In addition to the design options for microwave oven cooking efficiency presented in the November 2007 ANOPR, DOE also investigated technology options that reduce standby power. DOE identified lower-power display technologies, improved power supplies and controllers, and alternative cooking sensor technologies as options to reduce standby power. DOE conducted this research when it became aware of the likelihood of EISA 2007 being signed, which DOE understood was to contain provisions pertaining to standby mode and off mode power consumption. Therefore, DOE presented details of each design option to stakeholders at the December 2007 public meeting even though the results were not available in time for publication in the November 2007 ANOPR. DOE believes all of these options are technologically feasible, and in the ANOPR invited comment on technology options that reduce standby power in microwave ovens. 72 FR

[20] Commercial clothes washers are typically used more frequently and filled with a larger load than residential clothes washers.

64432, 64513 (Nov. 15, 2007). For more details of these technology options and stakeholder comments, see section IV.B of this notice.

b. Commercial Clothes Washers

Alliance concurred with the CCW design options that DOE screened out and requested that DOE also screen out ''added insulation'' and ''tighter tub tolerances'' from the CCW list of design options. Alliance stated that neither of these has been shown to impact energy consumption. (Alliance, No. 26 at p. 3) Since DOE received no data regarding the effectiveness of these two design options, today's NOPR retains them.

2. Maximum Technologically Feasible Levels

EPCA requires as part of an energy conservation standards rulemaking that DOE must ''determine the maximum improvement in energy efficiency or maximum reduction in energy use that is technologically feasible'' for such product. (42 U.S.C. 6295(p)(1) and 6316(a)) Table III.1 lists the ''max-tech'' levels that DOE determined for this rulemaking.

TABLE III.1—MAX-TECH LEVELS FOR COOKING PRODUCTS AND COMMERCIAL CLOTHES WASHERS

Product		Max-Tech EF
Gas Cooktops		0.42
Electric Open (Coil) Cooktops		0.769
Electric Smooth Cooktops		0.753
Gas Standard Ovens		0.0583
Gas Self-Clean Ovens		0.0632
Electric Standard Ovens		0.1209
Electric Self-Clean Ovens		0.1123
Microwave Ovens		0.602
		Max-Tech Standby Power (W)
Microwave Ovens		0.02 W
	Max-Tech MEF (ft^3/kWh)	Max-Tech WF (gal/ft^3)
Top-Loading Commercial Clothes Washers	1.76	8.3
Front-Loading Commercial Clothes Washers	2.35	4.4

a. Cooking Products

For cooking products, DOE has retained the max-tech efficiency levels that the previous analysis outlined in the 1996 TSD defined, for the reasons that follow. DOE does not have efficiency data for conventional cooking products currently on the market, since manufacturers are not required to report EF. However, as reported in the November 2007 ANOPR, manufacturers have stated there have been no substantive changes in technology since the 1996 analysis that would affect max-tech efficiency levels. 72 FR 64432, 64436 and 64452 (Nov. 15, 2007).

For microwave ovens, both AHAM data and DOE supplemental testing, as presented at the December 2007 public meeting, confirmed that the max-tech EF level from the 1996 TSD remains the max-tech level in the context of the current rulemaking. The max-tech microwave oven standby power level corresponds to a unit equipped with a default automatic power-down function that shuts off certain power-consuming components after a specified period of user inactivity. The standby power at max-tech was obtained from a microwave oven currently on the market in Korea which incorporates such a feature. (See the TSD accompanying this notice, chapter 5.)

b. Commercial Clothes Washers

For CCWs, DOE recognizes that MEF and WF pairings may not simultaneously achieve max-tech levels. That is, a CCW with the highest possible MEF may not achieve the lowest possible WF. Similarly, a CCW with the lowest WF may not achieve the highest MEF. DOE considered several models currently available to determine max-tech values that best represent optimal performance for CCWs on the market today. DOE did not specify max-tech levels that represent a ''hybrid'' of the highest possible MEF and the lowest possible WF for each product class. For more details on this selection, see section IV.C.1 of this notice.

D. Energy Savings

1. Determination of Savings

DOE used its NIA spreadsheet to estimate energy savings from amended standards for the appliance products that are the subject of this rulemaking. (Section IV.E of this notice and in chapter 11 of the TSD accompanying this notice describe the NIA spreadsheet model.) DOE forecasted energy savings over the period of analysis (beginning in 2012, the year that amended standards would go into effect, and ending in 2042) for each TSL, relative to the base case, which represents the forecast of energy consumption in the absence of amended energy conservation standards. DOE quantified the energy savings attributable to amended energy conservation standards as the difference in energy consumption between the standards case and the base case.

The base case considers market demand for more efficient products. For example, the market share of gas cooking appliances with standing pilot ignition systems has been declining for several years. (See section IV.E.3 of this notice and chapter 11 of the TSD accompanying this notice for more details.) As kitchens are remodeled or updated, consumers frequently take the opportunity to replace existing appliances with new ones, often replacing older ranges, ovens, and cooktops that incorporated standing pilots with models that are ignited electronically. The National Electrical Code (NEC) allows gas-fired appliances

to be attached to existing small appliance branch circuits, making such retrofits during kitchen remodels relatively easy. (2008 NEC section 210.52(B)(2)) While outlets for gas-fired ovens, ranges, and cooktops are not required by the NEC, many local and State building codes require them in new construction and kitchen renovations, gradually reducing the number of kitchens in which there are no such outlets. Section IV.D.2.a describes in detail the additional installation costs that would be incurred by consumers in the event that standards are issued for gas cooking products that eliminate the use of standing pilot ignition systems. The added installation costs are accounted for in the evaluation of consumer economic impacts in the LCC and PBP analysis and the NIA.

The NIA spreadsheet model calculates the electricity savings in ''site energy'' expressed in kWh. Site energy is the energy directly consumed on location by an individual product. DOE reports national energy savings on an annual basis in terms of the aggregated source energy savings, which is the savings of energy that is used to generate and transmit the energy consumed at the site. To convert site energy to source energy, DOE derived conversion factors, which change with time, from *AEO 2008*. (See TSD chapter 11 accompanying this notice for further details.)

2. Significance of Savings

EPCA, as amended, prohibits DOE from adopting a standard for a product if that standard would not result in ''significant'' energy savings. (42 U.S.C. 6295(o)(3)(B)) While the Act does not define the term ''significant,'' the U.S. Court of Appeals for the District of Columbia, in *Natural Resources Defense Council* v. *Herrington*, 768 F.2d 1355, 1373 (D.C. Cir. 1985), indicated that Congress intended ''significant'' energy savings in this context to be savings that were not ''genuinely trivial.'' The energy savings for energy conservation standards at each of the TSLs considered in this rulemaking are nontrivial, and, therefore, DOE considers them ''significant'' within the meaning of 42 U.S.C. 6295(o)(3)(B).

E. Economic Justification

1. Specific Criteria

As noted earlier, EPCA provides seven factors to be evaluated in determining whether an energy conservation standard is economically justified. (42 U.S.C. 6295(o)(2)(B)) The following sections discuss how DOE has addressed each of those seven factors in this rulemaking.

a. Economic Impact on Manufacturers and Consumers

To determine the quantitative impacts of a new or amended standard on manufacturers, the economic impact analysis is based on an annual-cash-flow approach. This includes both a short-term assessment, based on the cost and capital requirements during the period between the announcement of a regulation and the time when the regulation becomes effective, and a long-term assessment. The impacts analyzed include INPV (which values the industry on the basis of expected future cash flows), cash flows by year, changes in revenue and income, and other measures of impact, as appropriate. Second, DOE analyzes and reports the impacts on different types of manufacturers, with particular attention to impacts on small manufacturers. Third, DOE considers the impact of standards on domestic manufacturer employment, manufacturing capacity, plant closures, and loss of capital investment. Finally, DOE takes into account cumulative impacts of different regulations (not limited to DOE) on manufacturers.

For consumers, measures of economic impact include the changes in LCC and payback period for the product at each TSL. Under EPCA, the LCC is one of the seven factors to be considered in determining economic justification. (42 U.S.C. 6295(o)(2)(B)(i)(II)) It is discussed in detail in the section below.

b. Life-Cycle Costs

The LCC is the sum of the purchase price of equipment (including the installation) and the operating expense (including energy and maintenance expenditures), discounted over the lifetime of the appliance or equipment.

In this rulemaking, DOE calculated both LCC and LCC savings for various efficiency levels. For cooking products, the LCC analysis estimated the LCC for representative equipment in housing units that represent the segment of the U.S. housing stock that uses these appliances. Through the use of a housing stock sample, DOE determined for each household in the sample the energy consumption and energy price of the cooking product. Thus, by using a representative sample of households, the analysis captured the wide variability in energy consumption and energy prices associated with cooking product use.

For CCWs, although DOE was unable to develop a representative sample of the building stock that uses the appliance, it still established the variability and uncertainty in energy and water use by defining the uncertainty and variability in the use (cycles per day) of the equipment. The variability in energy and water pricing were characterized by regional differences in energy and water prices. To account for uncertainty and variability in other inputs, such as equipment lifetime and discount rate, DOE used a distribution of values with probabilities attached to each value.

Therefore, for each housing unit with a cooking appliance and each consumer with a CCW, DOE sampled the values of these inputs from the probability distributions. As a result, the analysis produced a range of LCCs. This approach permits DOE to identify the percentage of consumers achieving LCC savings or attaining certain payback values due to an increased energy conservation standard, in addition to the average LCC savings or average payback for that standard. DOE presents the LCC savings as a distribution, with a mean value and a range, and for purposes of the analysis, DOE assumed that the consumer purchases the product in 2012.

c. Energy Savings

While significant energy conservation is a separate statutory requirement for imposing an energy conservation standard, EPCA requires DOE, in determining the economic justification of a standard, to consider the total projected energy savings that are expected to result directly from the standard. (42 U.S.C. 6295(o)(2)(B)(i)(III)) DOE used the NIA spreadsheet results in its consideration of total projected savings.

d. Lessening of Utility or Performance of Products

In establishing classes of products, DOE considered whether the evaluated design options would likely lessen the utility or performance of the products under consideration in this rulemaking. (42 U.S.C. 6295(o)(2)(B)(i)(IV)) DOE determined that none of the considered TSLs would reduce the utility or performance of the products under consideration in the rulemaking.

- For gas cooking products, the potential elimination of standing pilot ignition systems and replacement with electronic ignition systems retains the basic consumer utility of igniting the gas to initiate a cooking process, while following safety requirements specified in American National Standards Institute (ANSI) Z21.1–2005 and

Addenda 1–2007, *Household Cooking Gas Appliances* (ANSI Z21.1).[21]

• For microwave ovens, all consumer utility features that affect standby power, such as a clock display and a cooking sensor, would be retained.

• For CCWs, the proposed standards maintain the consumer utility of washing clothes in a washer with either top or front access.

Alliance, Whirlpool, and AHAM commented in support of multiple product classes for CCWs due in part to consumer utility issues, including capacity, reliability, and access of axis. (Alliance, No. 26 at p. 1; Whirlpool, No. 28 at pp. 3–4; AHAM No. 32, at pp. 3–4) DOE believes that all of these consumer utilities will be maintained by the standards under consideration, as is discussed in the context of the CCW product class definition in section IV.A.2 of this notice.

e. Impact of Any Lessening of Competition

EPCA directs DOE to consider any lessening of competition that is likely to result from standards. It directs the Attorney General to determine the impact, if any, of any lessening of competition likely to result from a proposed standard and to transmit such determination to the Secretary, not later than 60 days after the publication of a proposed rule, together with an analysis of the nature and extent of such impact. (42 U.S.C. 6295(o)(2)(B)(i)(V) and (B)(ii)) DOE has transmitted a copy of today's proposed rule to the Attorney General and has requested that the Department of Justice (DOJ) provide its determination on this issue.

f. Need of the Nation To Conserve Energy

The non-monetary benefits of the proposed standard are likely to be reflected in improvements to the security and reliability of the Nation's energy system-namely, reductions in the overall demand for energy will result in reduced costs for maintaining reliability of the Nation's electricity system. DOE conducts a utility impact analysis to estimate how standards may impact the Nation's needed power generation capacity. This analysis captures the effects of efficiency improvements on electricity consumption by the appliance products which are the subject of this rulemaking.

The proposed standard also is likely to result in improvements to the environment. In quantifying these improvements, DOE has defined a range of primary energy conversion factors and associated emission reductions based on the estimated level of power generation displaced by energy conservation standards. DOE reports the environmental effects from each TSL for this equipment in the environmental assessment in the TSD. (42. U.S.C. 6295(o)(2)(B)(i)(VI) and 6316(a))

2. Rebuttable Presumption

As set forth under 42 U.S.C. 6295(o)(2)(B)(iii), there is a rebuttable presumption that an energy conservation standard is economically justified if the increased installed cost for a product that meets the standard is less than three times the value of the first-year energy savings resulting from the standard (and water savings in the case of a water efficiency standard). However, although DOE examined the rebuttable-presumption criteria, it determined economic justification for the proposed standard levels through a detailed analysis of the economic impacts of increased efficiency as described above, pursuant to 42 U.S.C. 6295(o)(2)(B)(i). Section IV.D.12 of this notice addresses the rebuttable-presumption payback calculation.

IV. Methodology and Discussion of Public Comments

DOE used spreadsheet models to estimate the impacts of the TSLs used in weighing the benefits and burdens of amended standards for the products that are the subject of this rulemaking. Specifically, it used the engineering spreadsheet to develop the relationship between cost and efficiency for these products and to calculate the simple payback period for the purposes of addressing the rebuttable presumption that a standard with a payback period of less than three years is economically justified. The LCC spreadsheet calculates the consumer benefits and payback periods for amended energy conservation standards. The NIA spreadsheet provides shipments forecasts and then calculates NES and NPV impacts of potential amended energy conservation standards. DOE also assessed manufacturer impacts, largely through use of the Government Regulatory Impact Model (GRIM).

Additionally, DOE estimated the impacts of energy conservation standards for the appliance products on utilities and the environment. DOE used a version of EIA's National Energy Modeling System (NEMS) for the utility and environmental analyses. The NEMS model simulates the energy economy of the United States and has been developed over several years by the EIA primarily for the purpose of preparing the *Annual Energy Outlook*. The NEMS produces forecasts for the United States that are available in the public domain. The version of NEMS used for appliance standards analysis is called NEMS–BT and is primarily based on the *AEO 2008* with minor modifications.[22] The NEMS–BT offers a sophisticated picture of the effect of standards, since it accounts for the interactions between the various energy supply and demand sectors and the economy as a whole.

A. Product Classes

In general, when evaluating and establishing energy conservation standards, DOE divides covered products into classes by the type of energy used, capacity, or other performance-related features that affect consumer utility and efficiency. (42 U.S.C. 6295(q); 6316(a)) Different energy conservation standards may apply to different product classes. *Id.*

1. Cooking Products

For cooking products, DOE based its product classes on energy source (*e.g.*, gas or electric) and cooking method (*e.g.*, cooktops, ovens, and microwave ovens). DOE identified five categories of cooking products: gas cooktops, electric cooktops, gas ovens, electric ovens, and microwave ovens. In its regulations implementing EPCA, DOE defines a ''conventional range'' as ''a class of kitchen ranges and ovens which is a household cooking appliance consisting of a conventional cooking top and one or more conventional ovens.'' 10 CFR 430.2. The November 2007 ANOPR presents DOE's reasons for not treating gas and electric ranges as a distinct product category and for not basing its product classes on that category. 72 FR 64432, 64443 (Nov. 15, 2007). For example, DOE defined a single product class for gas cooktops as gas cooktops with conventional burners.

For electric cooktops, DOE determined in the 1996 TSD that the ease of cleaning smooth elements provides greater utility to the consumer than coil elements, and that smooth elements typically consume more energy than coil elements. Therefore, DOE has defined two separate product

[21] ANSI standards are available at *http://www.ansi.org.*

[22] The EIA approves the use of the name NEMS to describe only an *AEO* version of the model without any modification to code or data. Because the present analysis entails some minor code modifications and runs the model under various policy scenarios that deviate from *AEO* assumptions, the name NEMS–BT refers to the model as used here. (''BT'' stands for DOE's Building Technologies Program.) For more information on NEMS, refer to *The National Energy Modeling System: An Overview,* DOE/EIA–0581 (98) (Feb. 1998) (available at: *http://tonto.eia.doe.gov/FTPROOT/forecasting/058198.pdf*).

classes for open (coil) element and smooth element electric cooktops.

For electric ovens, DOE determined that the type of oven-cleaning system is a utility feature that affects performance. DOE found that standard ovens and ovens using a catalytic continuous-cleaning process use roughly the same amount of energy. On the other hand, self-cleaning ovens use a pyrolytic process that provides enhanced consumer utility with different overall energy consumption, as compared to either standard or catalytically lined ovens, due to the amount of energy used during the cleaning cycle and better insulation. Thus, DOE has defined two product classes for electric ovens: standard ovens with or without a catalytic line and self-cleaning ovens.

DOE applied the same reasoning for gas ovens as it used for electric ovens, defining two product classes, one for standard ovens with or without a catalytic line and one for self-cleaning ovens.

DOE determined that microwave ovens constitute a single product class for the purposes of this rulemaking. This product class can encompass microwave ovens with and without browning (thermal) elements, but does not include microwave ovens that incorporate convection systems. For a discussion of why DOE is not considering microwave ovens with convection capability in this rulemaking, see section IV.A.1.c of this notice.

In sum, in this rulemaking DOE is using the following eight product classes in analyzing and setting standards for cooking products:

- Gas cooktop/conventional burners;
- Electric cooktop/open (coil) elements;
- Electric cooktop/smooth elements;
- Gas oven/standard oven;
- Gas oven/self-clean oven;
- Electric oven/standard oven;
- Electric oven/self-clean oven; and
- Microwave oven.

For more information on the specification of product classes for cooking products, see chapter 3 of the TSD accompanying this notice.

a. Standing Pilot Ignition Systems

DOE proposed in the November 2007 ANOPR that standing pilot ignition systems do not provide unique utility that would warrant a separate product class for gas cooking products incorporating them, and requested comment on such a determination for product classes. 72 FR 66432, 64463 and 64513 (Nov. 15, 2007). The American Gas Association (AGA) and GE commented that standing pilot ignition systems do provide unique utility for several reasons, including: (1) The ability to operate the range during electrical power outages, (2) providing safe ignition where electrical supply is unavailable (such as lodges and hunting cabins) or not located reasonably close to the range, and (3) providing safe ignition where religious and cultural practices prohibit the use of electronic ignition. (AGA, Public Meeting Transcript, No. 23.7 at p. 21; AGA, No. 27 at p. 2; GE, No. 30 at p. 2) AGA commented that religious and cultural prohibitions on the use of electricity in the United States were the reason for the original EPCA language requiring electronic ignition only on gas cooking products with other electrical features. (AGA, No. 27 at pp. 2, 14) AGA further stated that this consideration was the reason for DOE's exception allowing standing pilot lights on gravity gas-fired boilers in the EISA 2007. (AGA, No. 27 at p. 2) On the other hand, the Joint Comment stated that non-standing pilot ignition (*i.e.*, electronic ignition) should be a design option and that an exemption for standing pilot ignition ranges is inappropriate. (Joint Comment, No. 29 at p. 6)

In considering standing pilot ignition systems as either a separate product class or a design option, DOE notes that the purpose of such systems is to ignite the gas when burner operation is called for during a cooking process, and either standing pilot or electronic ignition provides this function. In addition, DOE has concluded from previous analysis that the average consumer does not experience frequent enough or long enough power outages to consider the ability to operate in the event of an electric power outage a significant utility.

DOE also addressed a similar issue in the residential furnace and boiler rulemaking, where DOE made an exception to allow standing pilot ignition for gravity gas-fed boilers. Gravity gas-fed boilers, however, are a type of heating equipment that represent a unique utility in that they do not require an electric circulation motor to operate, a utility which happens to accommodate religious and cultural practices which prohibit electronic ignition as well. Thus, the exception is based on continuing to allow products with certain performance characteristics to be available to all consumers. But DOE is unable to create a similar exception for gas cooking products because there is no unique utility associated with standing pilot ignition.

Through market research, DOE determined that battery-powered electronic ignition systems have been implemented in other products, such as instantaneous gas water heaters, barbeques, furnaces, and other appliances, and the use of such ignition systems appears acceptable under ANSI Z21.1. Therefore, subgroups with religious and cultural practices which prohibit the use of line electricity (*i.e.*, electricity from the utility grid) can still use gas cooking products without standing pilots, assuming gas cooking products are made available with battery-powered ignition. Furthermore, there is not expected to be any appreciable difference in cooking performance between gas cooking products with or without a standing pilot. Thus, DOE concludes that standing pilot ignition systems do not provide a distinct utility and that a separate class for standing pilot ignition systems is not warranted under section 325(q)(1) of EPCA. (42 U.S.C. 6295(q)(1))

b. Commercial-Style Cooking Products and Induction Technology

DOE stated in the November 2007 ANOPR that it lacks efficiency data to determine whether certain designs (*e.g.*, commercial-style cooking products) and certain technologies (*e.g.*, induction cooktops) should be excluded from the rulemaking. 72 FR 64432, 64444 and 64460 (Nov. 15, 2007). AHAM, Whirlpool, and Sub-Zero Wolf Incorporated (Wolf) supported DOE's approach to exclude commercial-style cooking products, given the relatively small gains in energy savings for cooking products as a whole, the small relative size of the commercial-style products market, and required changes to the test procedure. (AHAM, No. 32 at p. 3, 9; Whirlpool, No. 28 at p. 6; Wolf, No. 24 at p. 2) AHAM and Wolf also stated that induction technology should not be considered for a variety of reasons, including (1) the lack of an applicable test procedure, (2) the relatively small gains in energy savings for cooking products as a whole, (3) the small relative size of the induction cooking market, and (4) the special cookware requirements. (Wolf, No. 24 at p. 2; AHAM, No. 32 at p. 3) DOE did not receive any comments opposing this proposal.

Therefore, absent any comment opposing the proposal and in light of the comments in support of the proposal, DOE is not considering commercial-style cooking products and induction technology in this rulemaking as proposed in the November 2007 ANOPR.

c. Microwave Ovens

In the November 2007 ANOPR, DOE considered a single product class for

microwave ovens. The Joint Comment agreed that microwave ovens should be represented in a single product class without consideration of cavity size or output power rating, due to the lack of correlation between microwave oven size and efficiency demonstrated by both the AHAM and DOE studies. (Joint Comment, No. 29 at p. 9) AHAM opposed a single microwave oven product class, stating that the product class should be broken up into subcategories according to features that may be different than when the standard was first put into effect many years ago. (AHAM, Public Meeting Transcript, No. 23.7 at pp. 32–33)

Based on the data already supplied to DOE by AHAM, and by DOE's own testing, no features or utilities were observed to be uniquely correlated with efficiency such that they would warrant defining multiple product classes for microwave ovens, according to the criteria put forth by EPCA. (42 U.S.C. 6295(q)) Thus, for the purposes of this rulemaking, DOE has retained a single product class for microwave ovens.

2. Commercial Clothes Washers

In the November 2007 ANOPR, DOE stated that it planned to consider a single product class for CCWs in accordance with the prescriptive standards for such equipment set in EPACT 2005. 72 FR 64432, 64465 (Nov. 15, 2007). Through EPACT 2005, Congress imposed a minimum energy efficiency threshold for all CCWs to meet.[23] EPACT 2005 placed all CCWs into a single product class with a single energy efficiency and water efficiency standard for all covered equipment. *Id.* Accordingly, these standards encompass CCWs with wash baskets that rotate around either a vertical or horizontal axis.[24]

At the same time, DOE noted in the ANOPR that it has the authority to establish additional product classes within the CCW product category if warranted, and requested data and information on the product class definitions in the November 2007 ANOPR. 72 FR 64432, 64513 (Nov. 15, 2007). AHAM, Alliance, and Whirlpool supported two CCW product classes, suggesting that DOE should set a separate standard for top-loaders and front-loaders. (AHAM, Public Meeting Transcript, No. 23.7 at pp. 35–36 and pp. 81–82; Alliance, Public Meeting Transcript, No. 23.7 at pp. 36–37; and Whirlpool, No. 28 at pp. 3–4)

In considering whether separate classes are warranted, DOE must consider the utility and performance characteristics to determine whether the relevant requirements have been met. (42 U.S.C. 6295(q); 6313(a)) Among the criteria DOE considered when examining potential separate product classes for clothes washers was the wash basket axis of rotation, which DOE also used for RCWs. (See 10 CFR 430.32(g))

Alliance stated that front-loading and top-loading CCWs show no overlap in operating efficiency, in terms of MEF and WF, and that they have unique characteristics. For example, such characteristics include the ability of top-loaders to allow a consumer to lift the lid mid-cycle to add an item, whereas front-loaders must drain the water in the drum before the door can be opened. (Alliance, Public Meeting Transcript, No. 23.7 at pp. 36–37)

DOE notes that a review of the current California Energy Commission (CEC), Consortium for Energy Efficiency (CEE), and ENERGY STAR clothes washer product databases shows some overlap in energy efficiency for top-loading and front-loading CCWs. However, this overlap is not nearly as broad as in the RCW market. DOE agrees that the efficiency levels that can be achieved by front-loading CCWs are generally higher than the levels that can be achieved by top-loading CCWs.

Regarding product utility, Whirlpool cited the November 2007 ANOPR's statement that ''[T]he residential clothes washer rulemaking history clearly demonstrated that size, axis of access, and certain technologies had consumer utility that affect performance and, therefore, warranted separate product classes for residential products.'' Whirlpool's point was that RCWs and CCWs are analogous products that should be treated in a consistent fashion. (Whirlpool, No. 28 at p. 4) ASAP, on the other hand, agreed with DOE's tentative approach of maintaining a single product class, noting that Congress and DOE have set standards over the last 20 years that have changed the mix of unit characteristics available on the market. ASAP argued that in an earlier RCW efficiency standards rulemaking, DOE had eliminated the warm rinse cycle, a feature many consumers liked. ASAP concluded that maintaining every characteristic on the market would restrict DOE's ability to set any efficiency standards. (ASAP, Public Meeting Transcript, No. 23.7 at pp. 38–40) ASAP also commented that the consumer utility of CCWs to wash clothes is independent of whether they are accessed from the top or the front. (ASAP, Public Meeting Transcript, No. 23.7 at pp. 83–84)

Although DOE considered issuing a single CCW product class in the ANOPR that would encompass both top-loading and front-loading CCWs, further consideration of the relevant statutory provisions and the public comments on the November 2007 ANOPR have led DOE to conclude that EPCA does not permit adoption of a standard that would eliminate top-loading CCWs. Accordingly, for the reasons explained below, DOE has decided to establish two classes of CCWs based upon axis of access (*i.e.*, top-loading or front-loading).

When directing the Secretary to consider amendments to the energy efficiency standards for CCWs, Congress did not mandate use of a single class or alter other relevant provisions of the statute related to setting classes. First, under 42 U.S.C. 6311(21), the definition of ''commercial clothes washer'' specifically includes both horizontal-axis clothes washers (front-loading machines) and vertical-axis clothes washers (top-loading machines). Further, the prescriptive standards for CCWs (1.26 MEF/9.5 WF), as set forth in 42 U.S.C. 6313(e), are achievable by both top-loading and front-loading machines. Neither provision indicates an intention to eliminate either type of CCW currently available.

Next, 42 U.S.C. 6295(o)(4)[25] provides, ''The Secretary may not prescribe an amended or new standard * * * that is likely to result in the unavailability in the United States in any covered product type (or class) of performance characteristics (including reliability), features, sizes, capacities, and volumes that are substantially the same as those generally available in the United States at the time of the Secretary's finding.'' This statutory provision demonstrates congressional intent to forego potential energy savings under certain enumerated circumstances. DOE has determined that this provision applies to the present CCW rulemaking.

In previous rulemakings, DOE has concluded that the method of ''loading'' clothes in washers (axis of access) is a

[23] 42 U.S.C. 6313(e); codified at 10 CFR 431.156.

[24] Typically, vertical-axis clothes washers are accessed from the top (also known as ''top-loaders''), while horizontal-axis clothes washers are accessed from the front (also known as ''front-loaders''). However, a limited number of residential horizontal-axis clothes washers which are accessible from the top (using a hatch in the wash basket) are currently available, although DOE is unaware of any such CCWs on the market. For the purposes of this analysis, the terms ''vertical-axis'' and ''top-loading'' will be used interchangeably, as will the terms ''horizontal-axis'' and ''front-loading.'' Additionally, clothes washers that have a wash basket whose axis of rotation is tilted from horizontal are considered to be horizontal-axis machines.

[25] This provision is also applicable to CCWs, pursuant to 42 U.S.C. 6316(a).

''feature'' within the meaning of 42 U.S.C. 6295(o)(4) and, consequently, established separate product classes for top-loading and front-loading RCWs. (56 FR 22263 (May 14, 1991)) DOE reiterated this position in denying the California Energy Commission's (CEC) petition for waiver from Federal preemption of its RCW regulation.[26] (71 FR 78157 (Dec. 28, 2006)) DOE denied the CEC petition for three separate and independent reasons, one of which was that ''interested parties demonstrated by a preponderance of evidence that the State of California regulation would likely result in the unavailability of a class of residential clothes washers in California. * * * [T]he rule would violate EPCA in another way, *i.e.*, it would mandate the 6.0 WF standard in 2010, which would likely result in the unavailability of top-loader residential clothes washers.'' *Id.* at 78157–58. Given the similarities in technologies and design and operating characteristics between RCWs and CCWs, in DOE's judgment, the axis of access must be accorded similar treatment in the context of the current CCW rulemaking.

If DOE were to propose an amended standard for CCWs under the statutory criteria set forth in EPCA based upon a single product class, the result would be a standard that would effectively eliminate top-loading CCWs from the market, because it would set an MEF for all CCWs at a level significantly higher than the max-tech for top-loading machines. Because such a standard would violate the statute (42 U.S.C. 6295(o)(4); 6313(a)), DOE has decided to propose separate product classes and accompanying standards for top-loading and front-loading CCWs in today's NOPR.

B. Technology Assessment

In the market and technology assessment DOE conducted for the November 2007 ANOPR, DOE identified technology options available to improve the energy efficiency of each type of covered product. (See the TSD accompanying this notice, chapter 3.) A discussion of these options as they relate to the product categories at issue in this rulemaking follows.

1. Cooking Products

At the December 2007 public meeting, DOE summarized its initial observations of technologies associated with standby power in microwave ovens and invited comment. DOE investigated technology options that appeared to be feasible means of decreasing standby power. Based on observations from tests, DOE suggested that microwave oven standby power largely depends on the display technology used, the associated power supplies and controllers, and the presence or lack of a cooking sensor that requires standby power.[27] AHAM stated that functions such as sensors, clocks, and perhaps others consume standby power but also provide consumer utility. If a standby power standard is developed, AHAM believes it is critical to look at these functions and identify them properly in order to change the test procedure appropriately. AHAM stated it would work with DOE to identify the changes and some of the consumer utilities. (AHAM, Public Meeting Transcript, No. 23.7 at pp. 70–71)

According to Whirlpool, microwave ovens use standby power primarily for a clock and the instant-on capability. Whirlpool noted that consumers who purchase over-the-range microwave ovens with features such as sensing and auto-cook cycles expect a display that allows execution of these capabilities, matches their other premium appliances such as their ranges, and differentiates itself from the simple display on a basic-functionality countertop microwave oven. (Whirlpool, No. 28 at pp. 1–2; Whirlpool, Public Meeting Transcript, No. 23.7 at p. 73)

The Edison Electric Institute (EEI) commented that it does not consider cooking sensors in microwave ovens to be a part of ''standby,'' since the sensors perform useful and helpful functions to consumers. EEI stated that DOE should test microwave ovens to see if cooking sensors reduce overall cooking times because reduced cooking times will likely create greater energy savings than the standby energy consumption of the sensor. (EEI, No. 25 at pp. 2–3)

DOE will analyze any data and information provided by stakeholders to evaluate the utility provided by specific features that contribute to microwave oven standby power. In addition, DOE has conducted additional research on several microwave oven technologies that significantly affect standby power, including cooking sensors, display technologies, and control strategies and associated control boards.

a. Cooking Sensors

Product teardowns performed by DOE during the November 2007 ANOPR analyses revealed that the most common identifiable cooking sensors are absolute humidity sensors. This sensor technology currently requires standby power in the range of 1 to 2 W to keep the sensing element heated, and also requires warm-up times in excess of two minutes if the sensor power is switched off. Japanese microwave oven manufacturers stated that they are unaware of any absolute humidity sensors that did not require standby power to stay warm. Standby testing by DOE and AHAM revealed no microwave ovens with cooking sensors that consume less than 2 W in standby mode.

EEI questioned whether cooking sensors that lack multi-minute warm-up times exist, since microwave oven cooking times typically do not exceed two minutes. (EEI, Public Meeting Transcript, No. 23.7 at p. 234) The Joint Comment stated that, in the unlikely event that there is not a straightforward technical solution (*e.g.*, a faster-stabilizing gas-sensing medium) to existing sensor technology, DOE should look into alternative sensing approaches to cooking status. The Joint Comment stated that if DOE fails to find standard-type cook sensors with shorter stabilization times or alternative sensing and control strategies, at a minimum, DOE should evaluate other options including (1) an auto power-down mode for cooking sensing devices that is consumer programmable, and (2) requirements that microwave ovens be shipped with the cooking sensor disabled. (Joint Comment, No. 29 at p. 8)

Whirlpool commented that a potential standby power standard could eliminate cooking sensors in microwave ovens as current cooking sensors typically require two minutes to warm up before use. According to Whirlpool, imposing a two-minute waiting period before each microwave oven use would negate much of its consumer utility. (Whirlpool, No. 28 at pp. 1–3)

During teardown analyses, DOE observed that microwave ovens from one manufacturer use a piezoelectric steam sensor, which requires zero power in standby mode. In addition, DOE has identified infrared and weight sensors with little to no warm-up time that do not consume standby power and that have been applied successfully in microwave ovens currently available in the Japanese market. DOE has also identified relative humidity sensors as a type of zero-standby sensor that can be used in a microwave oven, but is unaware of any microwave ovens on the market that use this type of sensor. Lastly, DOE was made aware of an

[26] DOE's denial of the CEC petition is currently in litigation *(California Energy Comm'n* v. *DOE,* No. 07–71576 (9th Cir. filed April 23, 2007)).

[27] Cooking sensors, which infer the cooking state of the food load, can reduce cook times and potentially produce real-world energy savings, although this benefit is not currently captured by the DOE test procedure and DOE is unaware of any data quantifying such an effect.

absolute humidity sensor that requires no standby power, has zero incremental cost above that of a conventional absolute humidity sensor, and is in the process of being phased into production for a major microwave oven supplier to the U.S. market. Based on its research and manufacturer interviews, DOE believes that the number of different sensor technologies available on the market that do not require standby power suggests that the utility of a cooking sensor can be maintained with zero standby power. Further, DOE believes all manufacturers could transition to no-standby-power cooking sensors at a zero incremental cost for the sensor change by the effective date of a proposed standby power standard.

b. Display Technologies

During reverse-engineering activities conducted as part of the November 2007 ANOPR analysis, DOE observed three different display types used in microwave ovens: Light-emitting diode (LED) displays, liquid crystal displays (LCD) with and without backlighting, and vacuum fluorescent displays (VFD). (See chapter 3 of the TSD accompanying this notice for further discussion of these technologies.) Within the 32-unit sample that DOE examined, microwave ovens equipped with VFDs consumed the most power, on average, followed by units featuring backlit LCDs, LEDs, and non-backlit LCDs. DOE sought comment regarding the consumer utility of different display technologies.

The Joint Comment stated that, unless a unique consumer utility can be shown for VFDs, the standard level analyzed should be based on LCD backlit or LED displays. According to the Joint Comment, LED and organic LED (OLED) products have dramatically increasing efficiency performance, and more color palettes are becoming available. In their opinion, a 1.0 to 1.5 W combined allowance for clock face display and illumination with power supply losses appears more than ample in view of rapidly improving power supply and lighting technologies. (Joint Comment, No. 29 at pp. 8–9)

Interviews DOE conducted with display manufacturers revealed that VFDs can achieve higher brightness levels, wider viewing angles, and higher contrast than backlit LCDs. Display manufacturers also stated that LEDs have largely comparable performance to VFDs in terms of brightness and viewing angle. A VFD manufacturer mentioned that, while VFD technologies with efficiencies comparable to backlit LCDs do exist, such displays are substantially more expensive than the VFDs commonly found in microwave ovens today.

Multiple manufacturers of cooking products interviewed as part of the MIA process mentioned the need to differentiate their cooking appliance lines from those of their competitors with (among other things) coordinated displays and user interfaces. Manufacturers noted that LCD displays (backlit or not) do not work well in appliances that get very hot, such as ovens, due to thermal limitations. Manufacturers also opposed switching entirely to LED-based displays since it could make it harder for them to differentiate their products, particularly in a market as commoditized as microwave ovens. Lastly, manufacturers noted that larger, more complex, and more colorful displays are usually associated with premium appliances, which will have a harder time achieving the same standby power consumption as units with smaller, dimmer, and simpler displays.

The current rulemaking does not seek to regulate the standby power consumption of conventional cooking appliances, and microwave ovens do not feature high surface temperatures and can incorporate one of many display options, as noted in the DOE sample. In addition, not all high-end appliance manufacturers use the same display technology across all cooking appliances that they manufacture. For example, at least one manufacturer uses a backlit LCD in its microwave oven, with the backlighting LEDs color-coordinated with the VFDs found in its ovens. DOE believes that the consumer utility of a microwave oven display is its brightness, viewing angle, and ability to display complex characters, and that this utility can be achieved by several display technologies. Therefore, in determining standby power levels, DOE will consider each of these display technologies and their respective power requirements.

c. Power Supply and Control Board Options

Another potential area for standby power improvements is the power supplies on the control board. Multiple improvement paths with varying risk to manufacturers are available, including the selective upgrading of power supply components to boost efficiency, the reduction of peak power demand through the use of lower-power components, and the transition to switching power supplies.

Power supply topology experts that DOE consulted noted that the quality of the transformer core material, types of diodes, capacitor quality, and voltage regulator selection could reduce no-load standby power for the power supply by half and boost conversion efficiency from 55 to 70 percent. Switching power supplies offer the highest conversion efficiencies (up to 75 percent) and lowest no-load standby losses (0.2 W or less) though at a higher cost, higher part count, and greater complexity. However, switching power supplies are as yet unproven in long-term microwave oven applications, and the greater complexity of these power supplies may also lower overall reliability. For more detail, see chapter 3 of the TSD accompanying this notice.

There already are some premium microwave ovens on the U.S. market that incorporate switching power supplies. However, due to the incremental cost of such a power supply over a conventional power supply and the price competition in the microwave oven market, it is unlikely that switching power supplies will find wider application unless low standby power budgets force manufacturers to consider them.

d. Power-Down Options

Manufacturers could also meet very low (less than 1 W) standby power levels according to the EISA 2007 and IEC 62301 definitions of ''standby mode'' by incorporating an automatic function that turns off most power-consuming components once a period of inactivity has elapsed. Such a low-consumption state could be user-selectable on demand, or could be the default condition in which the microwave oven is shipped such that the consumer would be required to opt into maintaining the display, cooking sensor, or other utility feature during standby. DOE has determined that some microwave oven suppliers to the U.S. market have already taken such approaches to meet prescriptive standby power standards in other markets such as Japan. Therefore, DOE analyzed how the consumer utility of a microwave oven is influenced by this design option. A large number of microwave ovens in the Japanese market implement this feature, according to DOE discussions with the Japanese Electrical Manufacturers' Association.

As outlined in the cooking sensor discussion (see section IV.B.1 of this notice), the Joint Comment stated that if DOE fails to find suitable cooking or other sensors, at a minimum, DOE should evaluate (1) an auto power-down mode for cooking sensing devices that is consumer programmable and (2) requirements that microwave ovens be shipped with the cooking sensor

disabled. (Joint Comment, No. 29 at p. 8)

DOE determined that control strategies are available that allow manufacturers to make design tradeoffs between incorporating standby-power-consuming features such as displays or cooking sensors and including a function to turn power off to these components during standby.

2. Commercial Clothes Washers

DOE did not receive any comments on the technology assessment for CCWs other than those discussed previously in section III.C.1. Therefore, DOE retained all of the CCW design options listed in the November 2007 ANOPR for the engineering analysis. (For further information, see chapter 3 of the TSD accompanying this notice.)

C. Engineering Analysis

The purpose of the engineering analysis is to characterize the relationship between the efficiency (or annual energy use) and cost of the products that are the subject of this rulemaking. DOE used this efficiency/cost relationship as input to the payback period, LCC, and national impact analyses. To generate manufacturing costs, DOE has identified three basic methodologies: (1) The design-option approach, which provides the incremental costs of adding to a baseline model's design options that will improve its efficiency; (2) the efficiency-level approach, which provides the incremental costs of moving to higher energy efficiency levels, without regard to the particular design option(s) used to achieve such increases; and (3) the cost-assessment (or reverse-engineering) approach, which provides ''bottom-up'' manufacturing cost assessments for achieving various levels of increased efficiency, based on detailed data on costs for parts and material, labor, shipping/packaging, and investment for models that operate at particular efficiency levels.

DOE conducted the engineering analysis for this rulemaking using different methods for each of the covered products. For cooking products, DOE selected the design-option approach, because efficiency ratings of products on the market are not reported; therefore, the engineering analysis for cooking products was based upon an update to the analysis contained in the 1996 TSD. For CCWs, published efficiency data allowed the use of an efficiency-level approach. DOE supplemented both approaches with data gained through reverse-engineering analysis and primary and secondary research, as appropriate. Details of the engineering analysis are in the TSD accompanying this notice (see chapter 5).

1. Efficiency Levels

a. Cooking Products

For cooking products, DOE reviewed and updated the design options and efficiency levels published in the 1996 TSD analysis, as generally supported by stakeholders. DOE did not receive any comments regarding omitted cooking technologies and will retain all the cooking technologies and design options identified in the November 2007 ANOPR. (See chapter 3 of the TSD accompanying this notice.)

Microwave Oven Cooking Efficiency. To identify microwave oven design options, DOE performed a reverse-engineering analysis on a representative sample of microwave ovens. DOE did not find any additional design options beyond those identified in the November 2007 ANOPR. DOE also performed efficiency testing on the sample of microwave ovens, which validated data submitted by AHAM (reproduced in appendix 5–A of the TSD accompanying this notice). Results from both AHAM and DOE efficiency testing showed no identifiable correlation between cooking efficiency and either cavity volume or rated output power. DOE's reverse-engineering analysis included an evaluation of microwave oven magnetrons, magnetron power supplies, and fan motors (identified as design options in the TSD). This evaluation determined that efficiencies for these design options have changed little since the 1996 analysis. Therefore, DOE believes that this supplementary analysis validates the efficiency levels that were presented in the November 2007 ANOPR. For more detail, see chapter 5 of the TSD accompanying this notice.

Microwave Oven Standby Power. DOE is considering a maximum average standby power, in W, for microwave ovens. DOE's analysis estimates the incremental manufacturing cost for microwave ovens with standby power levels below the baseline standby power level of 4 W. For the purposes of this standby power analysis, a baseline microwave oven is considered to incorporate an absolute humidity cooking sensor.

To analyze the cost-efficiency relationship for microwave oven standby, DOE defined standby power levels expressed as a maximum average standby power, in W. To analyze the impacts of standards, DOE defined the following four standby levels for analysis: The FEMP procurement efficiency recommendation; the IEA One-Watt level; a standby power level as a gap-fill between the FEMP Procurement Efficiency Recommendation and IEA One-Watt Program levels; and the current maximum microwave oven standby technology (*i.e.*, lowest standby power) that DOE believes is or could be commercially available when the energy conservation standards become effective, based on a review of microwave ovens currently on the market worldwide. Table IV.1 provides the microwave oven standby levels and the reference source for each level that DOE has analyzed. For more details on the determination of standby power levels, see chapter 5 of the TSD accompanying this notice.

TABLE IV.1—STANDBY POWER LEVELS FOR MICROWAVE OVENS

Standby level	Standby level source	Standby power (W)
Baseline	Baseline	4.0
1	FEMP Procurement Efficiency Recommendation	2.0
2	Gap Fill	1.5
3	IEA 1-Watt Program	1.0
4	Max-Tech	0.02

The Joint Comment stated that opportunities exist for reducing standby power without affecting consumer utility. The Joint Comment noted that, for the microwave ovens listed in the FEMP procurement database, 50 percent of the models with both a clock display and a cooking sensor have a standby demand of between 2.1 and 3.0 W,

implying that a baseline standby demand could be reduced to 3.0 W and probably less without threat of reduction of consumer utility. (Joint Comment, No. 29 at pp. 6–8)

b. Commercial Clothes Washers

The efficiency levels for CCWs are defined by two factors normalized by wash basket volume—MEF and WF. These two variables are only directly related to each other via the average hot water usage by a clothes washer as measured by the DOE test procedure. Other measured parameters affect only one variable or the other. For example, cold water consumption only affects the WF, while remaining moisture content (RMC) only affects the MEF. (See chapter 5 of the TSD accompanying this notice for further explanation.) Based on comments and the determination at that time to consider a single product class for CCWs, DOE selected potential efficiency levels for the November 2007 ANOPR that were based on current Federal energy conservation standards, ENERGY STAR and CEE Commercial Clothes Washer Initiative criteria, and specifications for CCWs currently on the market. DOE sought comment on whether efficiency level 5 (2.0 MEF/5.5 WF, which corresponds to efficiency level 2 for front-loading CCWs in the current analysis) should be changed to allow for manufacturer cost differentiation above and below this level.

Alliance stated that the only reason to adjust CCW energy and water consumption at the 2.0 MEF/5.5 WF level would be to allow inclusion of other manufacturers (since Alliance already produces units at this level) and to allow manufacturers to add water through additional rinses. The latter would address rinsing issues prevalent in front-loading machines but would consume more energy in the motor. Alliance stated that it could support adjusting the 2.0 MEF/5.5 WF level to be less stringent and more flexible in meeting consumer demands for cleaning and rinsing performance, as well as to allow the inclusion of existing manufacturer designs that would obviate the need for incurring additional investment. (Alliance, No. 26 at p. 2) DOE notes that, based on the entries in the CEC, CEE, and ENERGY STAR databases, CCWs from several manufacturers can attain 2.0 MEF/5.5 WF for both institutional and non-institutional use. For example, two other manufacturers produce non-institutional front-loading CCWs that achieve energy and water efficiency levels of 2.13 MEF/5.03 WF and 1.99 MEF/6.8 WF, respectively. Alliance and one of its competitors could thus add water to their CCW cycle, whereas the third competitor would have to reduce water consumption to meet the 5.5 WF standard with its current model that nearly meets the 2.0 MEF efficiency level.

Based upon the determination of two product classes for CCWs (see section IV.A.2), DOE subsequently revised the efficiency levels presented in the November 2007 ANOPR to characterize top-loading and front-loading CCWs separately. Accordingly, DOE considered the efficiency levels subsequently presented in Table IV.3, which were derived from current Federal energy conservation standards, ENERGY STAR and CEE Commercial Clothes Washer Initiative criteria and databases of currently available models, and entries in the CEC database. DOE seeks comment on these revised efficiency levels.

DOE also sought comment on the max-tech efficiency level defined for the single product class in the November 2007 ANOPR. DOE noted that some CCWs on the market have MEFs or WFs that exceed the CCW max-tech efficiency level for one measure, but not both. For example, one CCW on the market at the time of the November 2007 ANOPR (2.45 MEF/9.5 WF) had a max-tech MEF performance but a baseline WF performance.[28] DOE did not receive comment on which front-loading CCWs best represent max-tech, and why. Stakeholder comments discussed in the November 2007 ANOPR indicated that a high MEF and low WF are not necessarily correlated, and, thus, a max-tech level based on the highest MEF and lowest WF is not realistic. 72 FR 64432, 64465 (Nov. 15, 2008). As discussed in section III.C.2.b, DOE agreed with these comments, and selected top-loading and front-loading CCWs currently available on the market that exhibit a balance of high MEF and low WF to represent max-tech for each product class.

For top-loading CCWs, no max-tech level was defined in the November 2007 ANOPR because the analysis was structured as a single product class, and, generally, top-loading machines cannot achieve as high an efficiency level as front-loading machines. Based on market surveys of currently available models, DOE proposes in this notice a max-tech level of (1.76 MEF/8.3 WF) for top-loading CCWs. For front-loading CCWs, DOE considered the max-tech level proposed in the November 2007 ANOPR for the single product class, since all CCWs at such high efficiencies are front-loading. However, because new model introductions and discontinuations have occurred since the November 2007 ANOPR, DOE has determined a new max-tech level for front-loading CCWs as well, which is higher in efficiency than the max-tech level proposed in the November 2007 ANOPR (2.2 MEF/5.1 WF). The new max-tech level for front-loading machines is (2.35 MEF/4.4 WF), based on a currently available CCW. These units were selected after an extensive market survey, and DOE's research suggests that their combination of high MEF and low WF represent the best-in-class balance between MEF and WF for the two product classes of CCWs. These max-tech levels were also the basis for all MIA incremental cost data developed in DOE's analysis. DOE seeks comment on the determination of the max-tech efficiency levels for top-loading and front-loading CCWs.

2. Manufacturing Costs

DOE estimates a manufacturing cost for products at each efficiency level in this rulemaking. These manufacturing costs are the basis of inputs for a number of other analyses, including the LCC, national impact, and the GRIM analyses.

The Joint Comment made the following three cross-cutting comments about manufacturing costs spanning the product families that this rulemaking could affect:

- Rather than rely primarily on manufacturer average cost data, DOE should give greatest weight in its analysis to cost data determined through its reverse-engineering analyses, which have a better track record of estimating actual costs.
- When using manufacturer data, DOE should use the minimum cost data submitted, rather than the average cost data. Minimum data are appropriate because the low-cost manufacturer will determine prices in a market at equilibrium. If one manufacturer has found a cheaper way to make a product, others will follow if they wish to compete in the price-sensitive portion of the marketplace.
- Once a new standard is promulgated, producers have a strong incentive to invest in new engineering solutions and production capacity that will enable them to comply at the lowest possible cost. (Joint Comment, No. 29 at p. 13)

DOE agrees with the first point of the Joint Comment that reverse-engineering provides valuable information in

[28] This information, available at *http://www.energy.ca.gov/appliances/appliance/excel_based_files/Clothes_Washers/*, was accessed on April 29, 2008.

determining manufacturing cost, and DOE notes that, in addition to considering the manufacturer-submitted cost data, it conducts reverse-engineering analysis and teardowns to the extent practicable. DOE also considers sales census data combined with a markup data to reflect all the steps in the distribution chain, as well as previous TSD cost data, updated to reflect current manufacturing costs. DOE has used all the listed approaches as part of this rulemaking, although the precise approach varied by product.

In response to the Joint Comment's second point, DOE does not believe that it has been demonstrated that the low-cost manufacturer will determine the prices in a market at equilibrium, nor that a low-cost manufacturer will correspond to low-cost products on the market. There may be relatively complex, low-cost machines that are not necessarily produced by the low-cost manufacturer. There may also be features, including quality, that are indicative of higher-cost units that the marketplace demands. Therefore, DOE continues to use shipment-weighted average cost data in its analyses because it believes that such costs are the most reflective of the manufacturing costs that industry incurs. DOE notes that many appliances with nominally similar functions sell at a range of price points. Such differentiation may be the result of features that may not be efficiency-related but may provide consumer utility. Through its shipments-weighted average costing process, DOE believes that the rulemaking will factor in continuing product differentiation, since it best reflects the actual state of the industry and the preferences by consumers. This shipment-weighted approach is also consistent with the data submitted by stakeholders, allowing direct comparisons between DOE analyses such as the reverse engineering and the data submittals.

In considering the Joint Comment's third point, DOE recognizes that it may well be true that a change in energy conservation standards is an opportunity for manufacturers to make investments beyond what would be required to meet the new standards in order to minimize the costs or to respond to other factors. For example, a product could be re-engineered to take out cost (*e.g.*, reduce the number of parts); capital investments could be made to remove labor costs (*e.g.*, automate production); or production could be moved to lower-cost areas. However, these are individual company decisions, and it is impossible for DOE to forecast and analyze such investments. DOE does not know of any data that provide it with the capability of determining what precise course a manufacturer will take. Furthermore, while manufacturers have been able to take costs out of products to meet previous energy conservation standards, there are no data to suggest that there are any further costs to take out. Regarding capital investments, DOE assumes that the existing manufacturing processes remain the same. If capital investments are expected to be made, DOE requires data demonstrating this in order to include in the MIA and the employment impact analysis. Similarly, because the potential for moving production is unknown to DOE, data must be provided for analysis.

Cooking Products. The Joint Comment suggested that DOE should collect energy and cost data for ovens for individual features such as low-power electronic controls, clock faces, and other standby load features. If industry cannot provide compelling cost data, the Joint Comment suggested that DOE should model it as a zero-cost design option. (Joint Comment, No. 29 at p. 6; ASAP, Public Meeting Transcript, No. 23.7 at p. 62) Regarding microwave oven costs, Whirlpool supported the approach of using the Producer Price Index (PPI) to update design options identified in the prior rulemaking, and stated that it is unaware of meaningful new design options to recommend to DOE. (Whirlpool, No. 28 at p. 5)

DOE contacted original equipment manufacturer (OEM) suppliers and manufacturers to better understand the costs associated with various microwave oven components such as displays, power supplies, and magnetrons. Suppliers and manufacturers agreed that many lower-power, higher-efficiency components cost more to implement. For example, a switching power supply has more, and higher cost, components than a standard unregulated power supply. Similarly, increases in raw material prices have affected the cooking efficiency design options that DOE had identified in this and past analyses. Because no industry cost data were provided, DOE scaled the costs associated with each cooking efficiency design option from the 1996 TSD by the PPI. Because DOE proposes a microwave oven standby power standard, DOE developed manufacturing costs related to improved standby performance by estimating costs of published power supply designs and components, referencing subject-matter experts, and interviewing manufacturers that use such components.

Commercial Clothes Washers. For CCWs, AHAM supplied industry-aggregated manufacturing cost data for the November 2007 ANOPR analyses at two efficiency levels, which correspond to efficiency level 1 for top-loading CCWs and efficiency level 2 for front-loading CCWs. DOE updated these costs following the November 2007 ANOPR to include additional efficiency levels for each product class, based on manufacturer-supplied data and DOE analysis. DOE undertook a limited reverse-engineering approach to costing out the different efficiency points.[29] In addition, DOE relied on interviews with manufacturers, knowledge of the clothes washer market through previous rulemakings, ENERGY STAR, and other activities. DOE believes that the updated cost-efficiency curves reflect costs that clothes washer manufacturers are likely to experience.

The following discussion addresses specific issues raised in response to the November 2007 ANOPR.

a. Cooking Products

Electronic Ignition Systems. In the November 2007 ANOPR, DOE identified electronic ignition systems as a design option that can be used instead of standing pilot lights to light gas-fired cooking appliances. DOE estimated incremental manufacturing costs of electronic ignition systems by scaling the manufacturing costs that were provided in the 1996 TSD by the PPI.

DOE did not receive any comments that electronic ignition systems were an inappropriate design option to consider for this rulemaking. However, AGA commented that DOE underestimated the incremental manufacturing cost of electronic ignition for gas cooking products. According to AGA, the Harper-Wyman Co. provided an incremental retail price of $150 for a gas range with electronic ignition relative to a range with standing pilot ignition system in 1998 comments to DOE. This retail price increment stands in sharp contrast to the $37 incremental manufacturing cost estimated by DOE. (AGA, No. 27 at p. 13)

In response to AGA's comments, DOE contacted component suppliers of gas cooking product ignition systems to validate DOE's manufacturing cost estimates in the November 2007 ANOPR. DOE believes that the information collected verifies that the costs in the November 2007 ANOPR represent current costs and, therefore, will continue to characterize the incremental manufacturing costs for the non-standing pilot ignition systems with

[29] Late introductions of high-efficiency models did not allow for extensive reverse engineering due to the rulemaking schedule.

the estimates developed for the November 2007 ANOPR.

Microwave Oven Standby Power. For microwave ovens, DOE estimates a cost-efficiency relationship (or ''curve'') for microwave oven standby power in the form of the incremental manufacturing costs associated with incremental reductions in baseline standby power. As part of the November 2007 ANOPR analysis, DOE tested and tore down 32 microwave ovens and determined that microwave oven standby power depends on, among other factors, the display technology used, the associated power supplies and controllers, and the presence or lack of a cooking sensor. The results and discussion of standby testing along with standby power data submitted by AHAM can be found in chapter 5 of the TSD accompanying this notice. From this testing and reverse-engineering, DOE observed correlations between specific components and technologies, or combinations thereof, and measured standby power.

DOE estimated costs for each of component and technology by using quotes obtained from suppliers, interviews with manufacturers, interviews with subject matter experts, research and literature review, and numerical modeling. DOE obtained preliminary incremental manufacturing costs associated with the standby levels by considering combinations of these components as well as other technology options identified to reduce standby power. DOE also conducted manufacturer interviews to obtain greater insight into the design strategies to improve efficiency and the associated costs.

Table IV.2 shows microwave oven standby power preliminary cost-efficiency results. Based upon DOE's research, interviews with subject matter experts, and discussions with manufacturers, DOE believes that all consumer utility (*i.e.*, display, cooking sensor, etc.) can be maintained by standby levels down to standby level 3 (1.0 W). At the max-tech level, DOE would expect the implementation of an auto power-down feature that would, among other things, shut off the display after a period of inactivity, potentially impacting consumer utility. For the detailed cost-efficiency analysis, including descriptions of design options and design changes to meet standby levels, see chapter 5 of the TSD accompanying this notice.

TABLE IV.2—INCREMENTAL MANUFACTURING COSTS FOR MICROWAVE OVEN STANDBY POWER

Standby level	Incremental cost
Baseline	NA
1	$ 0.30
2	$ 0.67
3	$ 1.47
4	$ 5.13

DOE observed several different cooking sensor technologies in its sample of 32 microwave ovens. Follow-on testing after the December 2007 public meeting showed that some of these sensors are zero-standby (relative humidity) cooking sensors. One manufacturer also indicated during its MIA interview that its supplier of cooking sensors had developed zero-standby absolute humidity cooking sensors and that these sensors would have the same manufacturing cost as the higher-standby power devices they would replace. Based on the number of zero-standby cooking sensor approaches from which manufacturers can choose, DOE believes that all manufacturers can and likely will implement zero-standby cooking sensors by the effective date of a standby power standard, and maintain the consumer utility of a cooking sensor without affecting unit cost.

DOE believes that a standard at standby levels 1 or 2 would not affect consumer utility, because all display types could continue to be used. For these two levels, better power supplies should allow the continued use of any display that DOE found in its sample of 32 units. At standby level 3 for VFDs and standby level 4 for all display technologies, DOE analysis suggests the need for a separate controller (auto power-down) that automatically turns off all other power-consuming components during standby mode. Such a feature would impact the consumer utility of having a clock display only if the consumer could not opt out of auto power-down. For the detailed cost-efficiency analysis, including descriptions of design options and design changes to meet standby levels, see chapter 5 of the TSD accompanying this notice.

b. Commercial Clothes Washers

The CCW industry currently has only three major manufacturers (*i.e.*, with more than one percent market share), and a limited number of CCWs models are available for purchase. As a result, only a few models are available for purchase at a given efficiency point, thereby restricting the amount of data that AHAM could submit.[30] Accordingly, AHAM submitted two manufacturing cost estimates: (1) $74.63 at (1.42 MEF/9.5 WF), and (2) $316.35 at (2.00 MEF/5.5 WF.) These are incremental costs over a baseline top-loading CCW. Without additional data, and based on preliminary manufacturer inputs, DOE, in the November 2007 ANOPR, adopted a cost-efficiency curve where all efficiency levels at or above (1.60 MEF/8.5 WF) incorporated the same manufacturing cost published for (2.00 MEF/5.5 WF.) DOE sought stakeholders' comment on how to refine the cost curve to better reflect shipment-weighted manufacturing costs by efficiency level. 72 FR 64432, 64513 (Nov. 15, 2007).

In comments on the ANOPR, Whirlpool, Alliance, and AHAM stated that it was not reasonable to assume that all CCWs achieving (1.60MEF/8.5 WF) through (2.20 MEF/5.1 WF) would have the same costs. (Whirlpool, No. 28 at pp. 4–5, Alliance, No. 26 at p. 2 and AHAM, No. 32 at p. 10) For example, Whirlpool stated that step functions generally exist in product cost as efficiency increases, and that the cost differences between these steps are significant, whereas the cost differences within the steps are less significant. (Whirlpool, No. 28 at pp. 4–5) In other words, certain efficiency levels can only be reached using certain technology options. In the case of CCWs, there is a point beyond which standard top-loading CCWs with agitators can no longer be used and a switch has to be made to higher-efficiency platforms. Whereas the run up to the switch may be gradual in terms of design changes, a switch to a higher-efficiency platform such as a front-loading CCW usually entails a significant jump in product cost, which appears as a step function. Whirlpool noted that DOE has identified the steps for CCWs as traditional top-load and front-load units. According to Whirlpool, DOE's analysis does not include the possibility of a high-efficiency top-load CCW. Further, Whirlpool stated that, although such a machine is not in the market today, the company's experience in building residential high-efficiency top-load clothes washers could be translated into the development of a high-efficiency top-load CCW. Such a machine could likely perform at CCW efficiency levels (1.72 MEF/8.0 WF), (1.80 MEF/7.5 WF),

[30] In order to avoid anti-competitive effects, AHAM is limited to publishing aggregated data by efficiency levels for which at least three AHAM members have submitted cost-efficiency data. AHAM weights the submission by unit shipments for each manufacturer to reflect current market conditions and to maintain confidentiality.

and (2.00 MEF/5.5 WF). (Whirlpool, No. 28 at pp. 4–5)

Although AHAM is unable to provide cost information at levels other than (1.42 MEF/9.5 WF) and (2.0 MEF/5.5 WF) while maintaining the confidentiality of its members, it recommended that DOE either approach CCW manufacturers directly or evaluate the cost differentials between residential front-loading units and verify with manufacturers that application of these costs and design options are realistic for CCWs. (AHAM, No. 32 at p. 10) In response, DOE contacted all CCW manufacturers and constructed its own estimate of the manufacturer cost curve by efficiency level.

Alliance produces both top-loading and front-loading CCWs. Alliance stated that a low-cost alternative to front-loading CCWs for efficiency levels above 1.42 MEF would use existing, non-traditional technologies that are proprietary and have been shown not to be accepted in the residential market, and thus would never be accepted in the commercial market. According to Alliance, the reason for a constant incremental CCW manufacturing cost at MEF = 1.6 and above is that Alliance cannot afford to invest in any new technology in that range, because they already have a washer at the higher (2.00 MEF/5.5 WF) efficiency level. (Alliance, No. 26 at p. 2) DOE noted the new listing of a traditional top-loading CCW in December 2007 that achieves (1.76 MEF/8.3 WF), well beyond the limits that Alliance stated could be achieved. However, market acceptance of the new unit is unknown and similar washers incorporating spray rinse technology have been previously withdrawn from the CCW market due to consumer acceptance issues.

DOE is sensitive to the unique position of the low volume manufacturer (LVM) in the marketplace, as its low manufacturing scale makes product development and capital expenditure investments that much harder to justify. Unlike its diversified competitors, the LVM services the comparatively small (*i.e.* 45× smaller) CCW market almost exclusively. Whereas its competitors can develop new technologies for use in the CCW market as well as the much larger RCW market, the LVM has to depreciate its investments over a much smaller production range. As a result of its concentration on commercial laundry and its low manufacturing scale, the LVM will be disproportionately affected by any CCW rulemaking compared to its competitors who derive less than two percent of their clothes washer revenues from CCW sales. DOE research to date suggests that a wholesale conversion of the LVM production facility to a lower-cost front-loading washer is not cost-justified. Thus, a consumer boycott of higher-efficiency but traditional top-loading clothes washers due to wash performance issues could be just as effective at ending top-loading CCW production as a single product class designation requiring the use of front-loading washers. The LVM has stated that if it were required to convert its production facility to front-loading production that it would likely suffer material harm and exit the clothes washer business altogether.

The Joint Comment argued that Alliance has a dominant CCW market share and can thus make the kinds of investments that are required to meet applicable efficiency standards. The Joint Comment also stated that Alliance's competitors would be forced to recover their efficiency-related investments over a smaller shipment base, and that their investments in CCWs could not be distributed over the cost-competitive RCW market as well. (Joint Comment, No. 29 at p. 3)

In response to these comments, DOE notes that most CCWs on the market in the United States are based largely on RCW platforms that are upgraded selectively. Some investments (such as the controllers) are CCW-specific but only make up part of the total unit cost. The majority of capital expenditures related to tooling, equipment, and other machinery in a plant can usually be applied to the residential as well as the commercial market. Thus, overall (RCW + CCW) manufacturing scale has a significant impact on the cost-effectiveness of potential upgrades. A manufacturer with a high-volume residential line can cost-justify much more capital-intensive solutions if they are applicable in both markets, in contrast to a low-volume manufacturer that lacks the scale to make the investments worthwhile. Thus, a low-volume manufacturer may be required to purchase upgrade options from third-party vendors to upgrade their units instead of developing less expensive, but capital-intensive, in-house solutions. In the clothes washer market, the most direct CCW competitor has over 60 times the overall shipment volumes of the LVM. This scale difference also relates to purchasing power. A large, diversified appliance manufacturer can use its production scale to achieve better prices for raw materials and commonly purchased components like controllers, motors, belts, switches, sensors, and wiring harnesses. Even if a large company purchases fewer items of a certain component, its overall revenue relationship with a supplier may still enable it to achieve better pricing than a smaller competitor can, even if that competitor buys certain components in higher quantities. Lastly, high-volume manufacturers benefit from being able to source their components through sophisticated supply chains on a worldwide basis. A low-volume manufacturer is unlikely to be able to compete solely on manufacturing cost.

Based on the comments, DOE reviewed the November 2007 ANOPR CCW manufacturing cost information and interviewed CCW manufacturers representing nearly 100 percent of U.S. sales to discuss, among other things, the cost-efficiency curve. (See section IV.H.6.b of this notice and appendix 5–B of the TSD for further detail.) Based on this review and the information gathered, DOE modified the cost-efficiency curve based on detailed CCW manufacturer feedback, aggregating the responses by unit shipments to ensure confidentiality. Table IV.3 shows the updated cost-efficiency data.

TABLE IV.3 INCREMENTAL MANUFACTURING COSTS FOR COMMERCIAL CLOTHES WASHERS

Efficiency level	Modified energy factor/water factor		Incremental cost	
	Top-loading	Front-loading	Top-loading	Front-loading
Baseline	1.26/9.5	1.72/8.0	$0.00	$0.00
1	1.42/9.5	1.8/7.5	$74.63	$0.00
2	1.6/8.5	2.0/5.5	$129.83	$13.67
3	1.76/8.3	2.2/5.1	$144.43	$37.84
4	N/A	2.35/4.4	N/A	$63.63

D. Life-Cycle Cost and Payback Period Analyses

DOE conducted LCC and PBP analyses to evaluate the economic impacts of possible amended energy conservation standards for the two appliance products, on individual consumers for the cooking products and commercial consumers for CCWs. (See the TSD accompanying this notice, chapter 8.) The LCC is the total consumer expense over the life of the appliance, including purchase and installation expense and operating costs (energy expenditures and maintenance costs). To compute LCCs, DOE discounted future operating costs to the time of purchase and summed them over the lifetime of the appliance. The PBP is the change in purchase expense as a result of an increased efficiency standard, divided by the change in annual operating cost that results from the standard. Otherwise stated, the PBP is the number of years it would take for the consumer to recover the increased costs of a higher efficiency product through energy savings.

DOE measures the change in LCC and the change in PBP associated with a given efficiency level relative to an estimate of base-case appliance efficiency. The base-case estimate reflects the market in the absence of amended mandatory energy conservation standards, including the demand for products that exceed the current energy conservation standards. Section IV.E.9 discusses the estimate of base-case efficiency in detail.

For cooking products, DOE calculated the LCC and payback periods for a nationally representative set of housing units, which were selected from EIA's *Residential Energy Consumption Survey* (RECS). Similar to the November 2007 ANOPR, today's proposed rule for residential cooking products continues to use the 2001 RECS.[31] EIA had not yet released the 2005 RECS when the analysis was performed. For each sampled household, DOE determined the energy consumption and energy price for the cooking product. Thus, by using a representative sample of households, the analysis captured the wide variability in energy consumption and energy prices associated with cooking product use. The Department determined the LCCs and payback periods for each sampled household using the cooking product's unique energy use and energy price, as well as other input variables. The Department calculated the LCC associated with the baseline cooking product in each household. To calculate the LCC savings and payback period associated with more efficient equipment (*i.e.*, equipment meeting higher efficiency standards), DOE substituted the baseline unit with a more-efficient design.

For CCWs, DOE was unable to develop a consumer sample because neither RECS nor EIA's *Commercial Building Energy Consumption Survey*[32] (CBECS) provide the necessary data to develop one. As a result, DOE was not able to use a consumer sample to establish the variability in energy and water use and energy and water pricing. Instead, DOE established the variability and uncertainty in energy and water use by defining the uncertainty and variability in the use (cycles per day) of the equipment. The variability in energy and water pricing were characterized by regional differences in energy and water prices.

Inputs for determining the total installed cost include equipment prices—which account for manufacturer costs, manufacturer markups, retailer or distributor markups, and sales taxes—and installation costs. Inputs for determining operating expenses include annual energy and water consumption, natural gas, electricity, and water prices, natural gas, electricity, and water price projections, repair and maintenance costs, equipment lifetime, discount rates, and the year that standards take effect. To account for uncertainty and variability in certain inputs, DOE created distributions of values with probabilities attached to each value. As described above, DOE characterized the variability in energy consumption and energy prices for residential cooking products by using household samples. For CCWs, DOE characterized the uncertainty and variability in equipment usage to capture the variability and uncertainly in energy and water consumption, whereas regional differences were used to capture the variability in energy and water pricing. For the installed cost inputs identified above, DOE characterized the sales taxes with probability distributions. For the other operating cost inputs, it characterized the discount rate and the equipment lifetime with distributions.

The LCC and PBP model uses a Monte Carlo simulation to incorporate uncertainty and variability into the analysis when combined with Crystal Ball (a commercially available software program). The Monte Carlo simulations sampled input values randomly from the probability distributions (and the household samples for residential cooking products). The model calculated the LCC and PBP for each efficiency level for 10,000 housing units per simulation run.

For both cooking products and CCWs, Table IV.4 summarizes the approach and data that DOE used to derive the inputs to the LCC and PBP calculations for the November 2007 ANOPR and the changes made for today's proposed rule. The following sections discuss the inputs and the changes.

[31] U.S. Department of Energy-Energy Information Administration, *Residential Energy Consumption Survey, 2001 Public Use Data Files* (2001). Available at: *http://www.eia.doe.gov/emeu/recs/recs2001/publicuse2001.html.*

[32] U.S. Department of Energy-Energy Information Administration, *Commercial Buiilding Energy Consumption Survey, 2003 Public Use Data Files* (2003). Available at *http://www.eia.doe.gov/emeu/cbecs/cbecs2003/public_use_2003/cbecs_pudata2003.html.*

TABLE IV.4—SUMMARY OF INPUTS AND KEY ASSUMPTIONS IN THE LCC AND PBP ANALYSES

Inputs	2007 ANOPR description	Changes for the proposed rule
Affecting Installed Costs		
Product Price	Derived by multiplying manufacturer cost by manufacturer, retailer (for residential cooking products) and distributor (for CCWs) markups and sales tax, as appropriate.	No change.
Installation Cost	Cooking Products: Baseline cost based on RS Means *Plumbing Cost Data*, 2005.[33] Estimated that 20 percent of households with gas cooktops and standard ovens that do not require electricity to operate would incur added costs for the installation of an electrical outlet to accommodate designs that require electricity (*e.g.*, glo-bar or electronic spark ignition). Electrical outlet installation cost based on the type of cable, tubing and wire used, resulting in an average cost of $76. All other standard levels for all other product classes incur no additional installation costs.	Cooking Products: Baseline cost updated with RS Means *Mechanical Cost Data*, 2008.[34] Revised the percent of households with gas cooking products that would need to install an electrical outlet. Based on requirements in the NEC, estimated that 10 percent of households with gas standard ovens and 4 percent of households with gas cooktops would need to install an electrical outlet to accommodate designs that require electricity. Updated electrical outlet installation costs based on requirements in the NEC. Revised cost of $235 based on the installation of ground-fault circuit-interrupter (GFCI).
	CCWs: Baseline cost based on RS Means *Plumbing Cost Data*, 2005. No additional installation cost for all standard levels.	CCWs: Baseline cost updated with RS Means *Mechanical Cost Data*, 2008.
Affecting Operating Costs		
Annual Energy and Water Use.	Cooking Products: Based on recent estimates from the 2004 *California Residential Appliance Saturation Survey*[35] (RASS) and the Florida Solar Energy Center[36] (FSEC). Used 2001 RECS data to establish the variability of annual cooking energy consumption.	Cooking Products: No change with one exception—microwave oven standby power included.
	CCWs: Per-cycle energy and water use based on MEF and WF levels. Disaggregated into per-cycle machine, dryer, and water heating energy using data from DOE's 2000 TSD for residential clothes washers. Annual energy and water use determined from the annual usage (number of use cycles). Usage based on several studies including research sponsored by the Multi-housing Laundry Association[37] (MLA) and the Coin Laundry Association[38] (CLA). Different use cycles determined for multi-family and laundromat product applications.	CCWs: No change.
Energy and Water/Wastewater Prices.	Electricity: Based on EIA's 2005 Form 861 data. Natural Gas: Based on EIA's 2005 *Natural Gas Monthly*.[39] Water/Wastewater: Based on Raftelis Financial Consultants (RFC) and the American Water Works Association's (AWWA) 2004 *Water and Wastewater Survey*.[40] Variability: Regional energy prices determined for 13 regions; regional water/wastewater price determined for four regions.	Electricity: Updated using EIA's 2006 Form 861 data. Natural Gas: Updated using EIA's 2006 *Natural Gas Monthly*. Water/Wastewater: Updated using RFC/AWWA's 2006 *Water and Wastewater Survey*. Variability: No change.
Energy and Water/Wastewater Price Trends.	Energy: Forecasted with EIA's *AEO 2007*. Water/Wastewater: Forecasted with extrapolation from Bureau of Labor Statistics' (BLS) national water price index from 1970 through 2005.[41]	Energy: Forecasts updated with EIA's *AEO 2008*. Water/Wastewater: Forecasts updated with BLS index through 2007.
Repair and Maintenance Costs.	Cooking Products: Estimated no change in costs for products more efficient than baseline products.	Cooking Products: For gas cooktops and standard ovens, accounted for increased costs associated with glo-bar or electronic spark ignition systems relative to standing pilot ignition systems. For all standard levels for all other product classes, maintained no change in costs between products more efficient than baseline products.

[33] RS Means, *Plumbing Cost Data* (28th Annual Edition (2005). Available for purchase at: *http://www.rsmeans.com/bookstore/*.

[34] RS Means, *Mechanical Cost Data* (30th Annual Edition) (2008). Available for purchase at: *http://www.rsmeans.com/bookstore/*.

[35] Please see the following Web site for further information: *http://www.energy.ca.gov/appliances/rass/*.

[36] Please see the following Web site for further information: *http://www.fsec.ucf.edu/en/*.

[37] Please see the following Web site for further information: *http://www.mla-online.com/*.

[38] Please see the following Web site for further information: *http://www.coinlaundry.org/*.

[39] Please see the following Web site for further information: *http://www.eia.doe.gov/*.

[40] Please see the following Web site for further information: *http://www.awwa.org/Bookstore/*.

[41] Please see the following Web site for further information: *http://www.bls.gov/*.

TABLE IV.4—SUMMARY OF INPUTS AND KEY ASSUMPTIONS IN THE LCC AND PBP ANALYSES—Continued

Inputs	2007 ANOPR description	Changes for the proposed rule
	CCWs: Estimated no change in costs for products more efficient than baseline products.	CCWs: Estimated annualized repair costs for each efficiency level based on half the equipment lifetime divided by the equipment lifetime.
Affecting Present Value of Annual Operating Cost Savings		
Product Lifetime	Cooking Products: Based on data from *Appliance Magazine*,[42] past DOE TSDs, and the California Measurement Advisory Committee (CALMAC).[43] Variability and uncertainty characterized with uniform probability distributions.	Cooking Products: No change with the exception that variability and uncertainty characterized with Weibull probability distributions.
	CCWs: Based on data from various sources including the CLA. Different lifetimes established for multi-family and laundromat product applications. Variability and uncertainty characterized with uniform probability distributions.	CCWs: No change with the exception that variability and uncertainty characterized with Weibull probability distributions.
Discount Rates	Cooking Products: Approach based on the finance cost of raising funds to purchase appliances either through the financial cost of any debt incurred to purchase equipment, or the opportunity cost of any equity used to purchase equipment. Primary data source is the Federal Reserve Board's *Survey of Consumer Finances* (SCF) for 1989, 1992, 1995, 1998, 2001, and 2004.[44]	Cooking Products: No change.
	CCWs: Approach based on cost of capital of publicly traded firms in the sectors that purchase CCWs. Primary data source is Damodaran Online.[45]	CCWs: No change.
Affecting Installed and Operating Costs		
Effective Data of New Standard.	2012	No change.
Base-Case Efficiency Distributions.	Gas cooktops: 7% at baseline; 93% with electronic spark ignition.	Gas cooktops: No change.
	Gas standard ovens: 18% at baseline; 82% with glo-bar ignition.	Gas standard ovens: 18% at baseline; 74% with glo-bar ignition; 8% with electronic spark ignition.
	Microwave ovens: 100% at baseline EF of 0.557. Standby power was not considered in the analysis.	Microwave ovens: 100% at baseline EF but accounted for product market shares at different standby power levels; 46% with standby power consumption of greater than 2.0 W; 35% with standby power consumption of greater than 1.5 W and less than or equal to 2.0 W; 19% with standby power consumption of greater than 1.0 W and less than or equal to 1.5 W.
	All other cooking products: 100% at baseline	All other cooking products: No change.
	CCWs: Analyzed as single product class with 80% at baseline (1.26 MEF/9.5 WF); 20% at 2.00 MEF/5.50 WF.	CCWs: Analyzed as two product classes: top-loading and front-loading. Distributions for both classes based on the number of available models at the efficiency levels. Top-Loading: 63.6% at 1.26 MEF/9.5 WF; 33.3% at 1.42 MEF/9.5 WF; 0% at 1.60 MEF/8.5 WF; 3.0% at 1.76 MEF/8.3 WF. Front-Loading: 7.4% at 1.72 MEF/8.0 WF; 4.4% at 1.80 MEF/7.5 WF; 85.3% at 2.00 MEF/5.5 WF; 1.5% at 2.20 MEF/5.1 WF; 1.5% at 2.35 MEF/4.4 WF.

1. Product Price

To calculate the consumer product prices, DOE multiplied the manufacturing costs developed from the engineering analysis by the supply-chain markups it developed (along with sales taxes). To calculate the final, installed prices for baseline products, as well as higher efficiency products, DOE added the consumer product prices to the installation costs.

a. Cooking Products

For cooking products, DOE relied on data from AHAM's *2003 Fact Book*[46] showing that over 93 percent of residential appliances (including cooking products) are distributed from the manufacturer directly to a retailer. Therefore, DOE determined cooking product retail prices using markups based solely on the premise that these appliances are sold through a manufacturer-to-retailer distribution channel. Whirlpool commented that DOE should not focus solely on the retail distribution channel for its determination of retail prices. Whirlpool

[42] Please see the following Web site for further information: *http://www.appliancemagazine.com/*.

[43] Please see the following Web site for further information: *http://www.calmac.org/*.

[44] Please see the following Web site for further information: *http://www.federalreserve.gov*.

[45] Please see the following Web site for further information: *http://pages.stern.nyu.edu/~adamodar/*.

[46] Available online at: *http://www.aham.org*.

stated that the analysis and assumptions made for the retail distribution channel are reasonably accurate but completely ignore the contractor distribution channel. Whirlpool claimed that the contractor distribution channel comprises approximately 20 percent of total industry volume (not the seven percent cited in the November 2007 ANOPR TSD), with a greater portion of cooking products flowing through this channel. Whirlpool said that larger new home builders and apartment management firms use the contractor channel, and that the margins and behavior of the parties in this channel differ from those in the retail channel. Whirlpool recommended that future rulemakings consider the contractor channel. (Whirlpool, No. 28 at p. 12) DOE understands that the contractor distribution channel may distribute a significant portion of cooking product sales. However, since DOE's analysis for rulemakings on other residential appliances indicates that overall markups in the contractor channel are on average similar to those in the retailer channel, DOE believes that it can reasonably assume that the retail prices determined from the manufacturer-to-retailer distribution channel for this standards rulemaking provide a good estimate for cooking product prices.

b. Commercial Clothes Washers

For CCWs, DOE developed the distribution channels based on data developed by the CEE.[47] The CEE data indicate that the relevant portions of the commercial, family-sized clothes washer market can be divided into three areas: (1) Laundromats; (2) private multi-family housing; and (3) large institutions (*e.g.*, military barracks, universities, housing authorities, lodging establishments, and health care facilities). For purposes of developing the markups for CCWs, DOE based its calculations on the distribution channel that involves only distributors, because it believed that this channel would provide good estimates of consumer prices for the entire market. In the November 2007 ANOPR, DOE specifically sought comment on whether determining CCW consumer prices based solely on the distribution channel that includes distributors will result in representative equipment prices for all CCW consumers. AHAM, Alliance, and Whirlpool generally agreed with DOE's approach of representing CCW equipment prices with data from the distributor channel only. (AHAM, No. 32 at p. 11; Alliance, Public Meeting Transcript, No. 2 at p. 132; Whirlpool, No. 28 at p. 8) DOE did not receive any negative comments on this approach. As a result, DOE did not change its approach for determining CCW markups for today's proposed rule.

According to the Joint Comment, for relatively small changes in a standard level, as associated with many product rulemakings to date, the available literature shows that products just meeting an amended standard have often had no price change or even price declines after the adoption of the more stringent standards. The Joint Comment cited reports from the European Union suggesting that actual price impacts are lower than predicted in their most recent round of standards for several products. Possible explanations include manufacturing economies found as a result of re-engineering of products after a standards amendment and retailer pricing strategies that prevent pass-through of small manufacturer cost increases to the retail customer. The Joint Comment claimed that this issue is especially relevant to microwave ovens, because the manufacturing cost to reduce standby power is likely to be very low, but the principle also will be relevant for any standard that entails a small impact on manufacturing costs. The Joint Comment stated that DOE should review actual pricing for standards effective in recent years to calibrate the accuracy of DOE's price predictions. In developing such a calibration, the Joint Comment stated that DOE must separate commodity price impacts (*e.g.*, the cost of steel has increased sharply since 2001) from impacts associated with a new efficiency standard. (Joint Comment, No. 29 at pp. 9–10, 13–14) As described in section IV.C.2, Manufacturing Costs, DOE does not find merit to the Joint Comment's claims that the price change of meeting an amended standard declines after the standards' adoption. DOE recognizes that every change in minimum energy conservation standards is an opportunity for manufacturers to make investments beyond what would be required to meet the new standards in order to minimize the costs or to respond to other factors. DOE's manufacturing cost estimates, MIA interviews, and the GRIM analysis seek to gauge the most likely industry response to proposed energy conservation standards. DOE's analysis of responses must be based on currently available technology that will be non-proprietary when a rulemaking becomes effective, and thus cannot speculate on future product and market innovation. For more details on DOE's response, see section IV.C.2.

2. Installation Cost

The installation cost is the consumer's total cost to install the equipment, excluding the marked-up consumer equipment price. More specifically, installation costs include labor, overhead, and any miscellaneous materials and parts. DOE determined baseline product installation costs for cooktops, ovens, and CCWs based on data from RS Means. For the November 2007 ANOPR, DOE used data from the RS Means *Plumbing Cost Data,* 2005 to estimate installation costs for cooking products and CCWs.[48] RS Means provides estimates on the labor required to install each of above three products. For today's proposed rule, DOE updated its baseline installation costs using RS Means *Mechanical Cost Data,* 2008.[49]

a. Cooking Products

For cooking products (except gas cooktops and standard ovens), DOE estimated that installation costs would not increase with product efficiency. For gas cooktops and standard ovens, DOE estimated the impact that eliminating standing pilot ignition systems would have on the installation cost. Specifically, DOE considered the percentage of households with gas ranges, cooktops, and ovens that would require the installation of an electrical outlet in the kitchen to accommodate a gas cooking product that would need electricity to operate, as well as the cost of installing an electrical outlet.

DOE estimated for its November 2007 ANOPR that an upper bound of 20 percent of households using gas cooktops and standard ovens with standing pilot ignition systems would require the installation of an electrical outlet in the kitchen for a product that requires electricity. AGA commented that the percentage of consumers that would need to install an electrical outlet is much greater than 20 percent, and suggested that the vast majority of pilot ignition products shipped are for installations where rewiring would be required for a range without pilot ignition. AGA questioned DOE's assumption that kitchens with existing electrical outlets would not require modification or installation of additional outlets, stating that State and

[47] Consortium for Energy Efficiency, *Commercial Family-Sized Washers: An Initiative Description of the Consortium for Energy Efficiency* (1998). This document is available at: *http://www.cee1.org/com/cwsh/cwsh-main.php3.*

[48] RS Means, *Plumbing Cost Data* (28th Edition)(2005) p. 97. Available for purchase at: *http://www.rsmeans.com.*

[49] RS Means, *Mechanical Cost Data* (31st Annual Edition) (2008). Available for purchase at: *http://www.rsmeans.com.*

local building codes, most of which mandate adherence to National Fire Protection Agency (NFPA) 70, NEC, may not be ignored by consumers who would install a range with an electrical connection when replacing their pilot ignition ranges. AGA stated that many homes with standing pilot gas ranges are older and will not have outlets in close enough proximity to the range. AGA believes that current shipments of pilot ignition gas products are used in a segment of the replacement market where an electrical outlet is not within six feet of the appliance, and that these consumers will have to install an electrical outlet in the vicinity of their range. (AGA, Public Meeting Transcript, No. 23.7 at pp. 149–52; and AGA, No. 27 at pp. 2–3, 6–7, and 11–12)

ASAP inquired as to whether DOE's estimate that 20 percent of households would require the installation of an electrical outlet would be updated using more recent data. (ASAP, Public Meeting Transcript, No. 23.7 at pp. 150–151) According to the Joint Comment, homes with no electricity in the kitchen may exist, but they would be such a small proportion of homes that the installation cost would be negligible in a national LCC analysis. (Joint Comment, No. 29 at p. 5)

In response to these comments, DOE conducted an assessment of NEC requirements over time.[50] DOE reviewed the gas oven and gas cooktop household samples to establish which houses may require an outlet installation. Because RECS specifies the home's vintage (year built), DOE was able to determine the composition of the household sample by particular vintage groupings. DOE also determined that every household in each sample had an electric refrigerator, so DOE concluded that every home had at least one electrical outlet in the kitchen. However, the NEC did not require spacing of electrical outlets every six feet prior to 1959. As a result, DOE could not conclusively determine that pre-1960 houses would have an outlet near the gas-fired appliance. Thus, it assumed that pre-1960 homes, representing 57 percent of the standard gas oven sample and 54 percent of the gas cooktop sample, may need an additional outlet installed in the kitchen to accommodate a gas cooking product without standing pilot ignition. Because DOE is not aware of any data on how the use of gas cooking products equipped with standing pilot lights is distributed across housing stock vintages, it assumed that all of the households in each vintage could purchase a product with standing pilot lights in the base case, but that homes built after 1960 would not need an outlet.

For its November 2007 ANOPR, DOE estimated the installation cost of an electrical outlet based on data from RS Means. The resulting installation cost ranged from $42 to $125 and an average installation cost of $76 was used in the analysis. AGA commented that the installation costs used in the November 2007 ANOPR are much too low, adding that the NEC requires a lot of work to install an outlet near a range. AGA said that RS Means is an excellent source but has severe limitations, especially with respect to the variety of likely retrofit installations. Also, the RS Means data cover repair/remodeling projects in the $10,000 to $1 million range, which do not capture the true, consumer cost of rewiring for a gas range that requires electricity (*i.e.*, costs for retrofit wiring in a finished kitchen would be significantly higher). AGA also stated that if the outlet is exposed and available for countertop services, a ground-fault circuit-interrupter (GFCI) is required. If the consumer wants to avoid the installation of a GFCI, the outlet must be located behind the range and may require the installation of an additional circuit to service the additional load. In 1997, AGA's Building Energy and Code Committee indicated installation costs ranging from $110 to $350 in 1997 dollars for retrofits, depending on the region, with an average cost of $204. In AGA's opinion, such installation estimates are more representative than the cost used by DOE. AGA requested that DOE conduct a survey in major metropolitan areas and include varied housing types to obtain current installation costs. (AGA, Public Meeting Transcript, No. 23.7 at p. 22, 150; AGA, No. 27 at p. 3, pp. 12–13, and pp. 6–7) Supporting this position, GE commented that adding a new outlet to an existing kitchen would easily cost hundreds of dollars, whereas providing electricity to a rural household could cost thousands. (GE, No. 30 at p. 2)

DOE notes that the current NEC allows outlets for gas-fired appliances to be attached to existing small appliance circuits in kitchens. DOE revisited its installation cost estimates to address the requirements in the NEC for installing electrical outlets. As noted above, the NEC did not require that electrical outlets be spaced every six feet prior to 1959. In addition, the NEC had no requirement prior to 1962 that branch electrical circuits include a grounding conductor or ground path to which the grounding contacts of the receptacle could be connected. Therefore, because a GFCI outlet may need to be installed for older housing units built prior to the modern NEC, DOE revised its installation costs based solely on the installation of a GFCI outlet in a finished space. DOE derived its estimates based on the grounding of the outlet to a water pipe in the kitchen rather than back to a fuse box or circuit breaker panel. As in the November 2007 ANOPR, DOE relied on cost data from RS Means to estimate the installation cost. DOE recognizes that RS Means covers large projects totaling at least $10,000, so it added an electrician's trip charge to the installation cost. The resulting average installation cost determined by DOE is $235, much higher than the $76 cost it estimated for the November 2007 ANOPR.

Providing information on an alternative approach to installing an electrical outlet near the range, the Joint Comment urged DOE to consider the cost of adding an external, low-voltage power supply to the range to enable spark ignition. This power supply could then be plugged into more distant, existing outlets. The cost of such a power supply, even considering the need to include several transformer stages, would likely be a fraction of the cost of installing an outlet in the house. (Joint Comment, No. 29 at p. 6) DOE did not consider options to install a power supply in the appliance that would enable the use of low-voltage wiring to power the gas cooking product. This does not affect DOE's estimate that an outlet would need to be installed, because homes built before 1960 would still require an outlet installation to avoid the use of long extension cords to connect the appliance to an available outlet that could be up to 20 feet away from the cooking product.

b. Commercial Clothes Washers

DOE did not receive comments about installation costs for CCWs. Therefore, today's proposed rule used roughly the same installation costs as in the November 2007 ANOPR. As noted previously, the only change implemented by DOE was to update its costs from the November 2007 ANOPR, which were based on the RS Means *Plumbing Cost Data,* 2005, to those based on the RS Means *Mechanical Cost Data,* 2008. The resulting installation cost that DOE estimated equaled $186. DOE estimates that installation costs do not increase with product efficiency.

[50] D.A. Dini, *Some History of Residential Wiring Practices,* Underwriters Laboratories, Inc. (2006). This document is available at: *http://www.nfpa.org/assets/files//PDF/Proceedings/Dini_paper_-_History_Residential_Wiring.pdf.*

3. Annual Energy Consumption

a. Cooking Products

For cooking products (except microwave ovens), DOE determined in its November 2007 ANOPR that cooking energy consumption has declined since the mid-1990s. DOE based its determination on results from the 2004 California *Residential Appliance Saturation Survey* (RASS) [51] and the Florida Solar Energy Center (FSEC).[52] GE stated that its own internal information confirms DOE's conclusions—namely, that household cooking energy use is declining. (GE, No. 30 at p. 2) For today's proposed rule, DOE continues to base its annual energy consumption estimates for cooking products, other than microwave ovens, on the data from the 2004 RASS and FSEC. As for the November 2007 ANOPR, DOE continues to use the 2001 RECS data to establish the variability of annual cooking energy consumption for cooktops and ovens.

For microwave ovens, DOE used the 2004 RASS for its November 2007 ANOPR to estimate the product's annual energy consumption. DOE used the 2001 RECS data to establish the variability of annual cooking energy consumption for microwave ovens. For today's proposed rule, DOE continues to use the above approaches. Whirlpool stated that DOE should consider that microwave ovens use only one-quarter to one-third the energy of conventional ovens because conventional ovens are preheated and need to heat larger oven cavities. (Whirlpool, No. 28 at p. 5) DOE's findings indicate that both standard and self-cleaning electric ovens use approximately 170 kWh per year, whereas microwave ovens use on average 131 kWh per year, or 77 percent of the annual energy consumed by conventional ovens.

One change from the November 2007 ANOPR is inclusion of annual energy consumption associated with standby power. To estimate the annual energy use associated with standby power, DOE multiplied the baseline standby power by the number of hours in a year that the oven is in standby mode. The annual standby hours equals total hours in a year minus the number of hours that the microwave oven is in active operation. DOE determined the hours of active operation by dividing the average annual energy consumption by a representative input power for microwave ovens. Based on DOE's testing of microwave ovens reported at the December 2007 public meeting, the average microwave output power is 1,026 W. Based on the baseline microwave EF of 0.557, the average input power is 1,842 W. Therefore, based on an annual cooking energy consumption of 131 kWh per year, there are 71 hours of active operation, resulting in 8,689 hours that the appliance is in standby mode. See chapter 6 of the TSD accompanying this notice for further details.

b. Commercial Clothes Washers

For CCWs, DOE determined the annual energy and water consumption for its November 2007 ANOPR by multiplying the per-cycle energy and water use by the estimated number of cycles per year. CCW per-cycle energy consumption has three components: (1) Water-heating energy; (2) machine energy (the motor energy for turning an agitator or rotating a drum); and (3) drying energy. DOE determined the per-cycle clothes-drying energy use by first establishing the RMC based on the relationship between RMC and the MEF, and then using the DOE test procedure equation that determines the per-cycle energy consumption for the removal of moisture. DOE took the per-cycle machine energy use from its 2000 TSD for RCWs.[53] As noted in the discussion of the CCW test procedure (section III.B.3 of this notice,) DOE believes that the existing RCW test procedure adequately accounts for the characteristic energy and water use for CCWs in the NOPR analyses. As a result, DOE also believes that the per-cycle machine energy use for RCWs would be representative of CCW machine energy consumption. In the 2000 TSD, machine energy was calculated to be 0.133 kWh per cycle for MEFs up to 1.40, and 0.114 kWh per cycle for MEFs greater than 1.40. With the per-cycle clothes-drying and machine energy known, DOE determined the per-cycle water-heating energy use by first determining the total per-cycle energy use (the clothes container volume divided by the MEF) and then subtracting from it the per-cycle clothes-drying and machine energy.

In the November 2007 ANOPR, DOE specifically requested comment on whether the RCW per-cycle energy consumption values for clothes-drying and machine use are representative of CCWs. 72 FR 64432, 64513 (Nov. 15, 2007). AHAM and Whirlpool commented generally that residential clothes washer energy consumption is representative of the energy consumption of CCWs. (AHAM, No. 32 at p. 10 and Whirlpool, No. 28 at pp. 7–8) More specifically, AHAM stated that residential clothes washer per-cycle energy consumption is representative of CCW per-cycle energy consumption. (AHAM, No. 32 at p. 10) Whirlpool commented that the RMC values that DOE used appear to be reasonable. (Whirlpool, No. 28 at pp. 7–8) Whirlpool added that because machine energy use is a relatively small component of overall energy consumption,[54] mischaracterization of it probably would not distort the overall analysis. (Whirlpool, No. 28 at p. 7) NPCC, on the other hand, referred to studies (specifically one commissioned by the City of Toronto) [55] that have found that drying times in commercial laundry do not decrease with RMC. Because dryers do not have moisture sensors to terminate the cycle, NPCC claims they will continue to run based on the amount of money fed into the machine. (NPCC, Public Meeting Transcript, No. 23.7 at p. 126)

DOE recognizes that in some commercial settings, the drying cycle time may be fixed at a longer period than what the DOE dryer test procedure requires to achieve a ''bone dry'' state. As a result, the actual drying energy may not decrease as the RMC in clothing loads are lowered, which would imply that a CCW that produces a lower RMC in the wash load could be improperly receiving credit in the calculation of MEF. However, DOE notes that the cycle length for some

[51] California Energy Commission, *California Statewide Residential Appliance Saturation Survey* (Prepared for the CEC by KEMA–XNERGY, Itron, and RoperASW. Contract No. 400–04–009)(June 2004). This document is available at: *http://www.energy.ca.gov/appliances/rass/index.html.*

[52] Parker, D. S., ''Research Highlights from a Large Scale Residential Monitoring Study in a Hot Climate,'' *Proceedings of International Symposium on Highly Efficient Use of Energy and Reduction of its Environmental Impact* (Japan Society for the Promotion of Science Research for the Future Program, JPS–RFTF97P01002) (Jan. 2002) pp. 108–116. (Also published as FSEC–PF369–02, Florida Solar Energy Center.) This document is available at: *http://www.fsec.ucf.edu/en/publications/html/FSEC-PF-369-02/index.htm.*

[53] U.S. Department of Energy, *Final Rule Technical Support Document (TSD): Energy Efficiency Standards for Consumer Products: Clothes Washers* (Dec. 2000) Chapter 4, Table 4.1. This document is available at: *http://www.eere.energy.gov/buildings/appliance_standards/residential/clothes_washers.html.*

[54] The DOE clothes washer test procedure calculates total per-cycle energy consumption as the sum of: (1) The energy required to heat the water; and (2) the electrical energy required for the basket motor and drive system, controls, display, etc. (*i.e.*, machine energy use.) In addition, the MEF includes the energy required by a dryer to remove the RMC. Water heating energy and the energy required to remove the RMC are significantly higher than machine energy.

[55] City of Toronto Works and Emergency Services and Toronto Community Housing Corporation, *Multi-Unit Residential Clothes Washer Replacement Pilot Project 1999* (May 2003).

commercial dryers can be adjusted by the laundromat owner or route operator to match the average RMC of the CCWs at the same location, allowing for shorter drying cycles if the RMC is lowered. In addition, electronic payment systems, if equipped, provide the end-user the opportunity to select only the amount of time required to achieve the desired dryness of the load. Even if such adjustments are not made, customers of laundromats with fixed-cycle dryers can still benefit from lower RMCs by either putting more clothes into the dryer than they would have previously, or by interrupting the drying cycle when the clothes have dried to add a new set of clothes. Lastly, some laundromats operate ''free'' dryers (*i.e.*, consumers just pay for the wash cycle), which incentivize the owners to use CCWs equipped with moisture sensors to minimize drying time and energy consumption. For these reasons, as well as the supporting comments received from AHAM and Whirlpool, DOE believes that the use of the existing residential clothes washer test procedure provides a representative basis for rating and estimating the per-cycle energy use of CCWs.

4. Energy and Water Prices

a. Energy Prices

DOE derived average electricity and natural gas prices for 13 geographic areas consisting of the nine U.S. Census divisions, with four large States (New York, Florida, Texas, and California) treated separately. For Census divisions containing one of these large States, DOE calculated the regional average values minus the data for the large State.

DOE estimated residential and commercial electricity prices for each of the 13 geographic areas based on data from EIA Form 861, *Annual Electric Power Industry Report.*[56] DOE calculated an average residential electricity price by first estimating an average residential price for each utility—by dividing the residential revenues by residential sales—and then calculating a regional average price by weighting each utility with customers in a region by the number of residential consumers served in that region. For the November 2007 ANOPR, DOE used EIA data from 2004. The calculation methodology for today's proposed rule uses the most recent available data from 2006. The calculation methodology of average commercial electricity prices is identical to that for residential prices, except that DOE used commercial sector data.

DOE estimated residential and commercial natural gas prices in each of the 13 geographic areas based on data from the EIA publication *Natural Gas Monthly.*[57] For the November 2007 ANOPR, DOE used the complete annual data for 2005 to calculate an average summer and winter price for each area. For today's proposed rule, DOE used more recent 2006 data from the same source. It calculated seasonal prices because, for some end uses, seasonal variation in energy consumption is significant. DOE defined summer as the months May through September, with all other months defined as winter. DOE calculated an average natural gas price by first calculating the summer and winter prices for each State, using a simple average over the appropriate months, and then calculating a regional price by weighting each State in a region by its population. This method differs from the method used to calculate electricity prices, because EIA does not provide consumer-level or utility-level data on gas consumption and prices. The methods for calculating average commercial and residential natural gas prices are identical to each other except that the former relies on commercial sector data. Upon review of natural gas prices, AGA stated that, because DOE's analysis relied upon 2005 natural gas prices, the analysis overstates the cost of natural gas. AGA requested that DOE conduct a new natural gas cost survey to reflect current prices. (AGA, No. 27 at p. 4) As described above, DOE updated the prices to use the most recent data available from 2006. As described below, DOE uses price projections from EIA's *AEO* to forecast prices for future years. As is discussed in detail in section IV.E.3.g of this notice, for today's proposed rule, DOE did assess the impact of new energy conservation standards for cooking products and CCWs on forecasted energy prices.

To estimate the trends in electricity and natural gas prices for the November 2007 ANOPR, DOE used the price forecasts in EIA's *AEO 2007.* For today's proposed rule, DOE updated its energy price forecasts to those in the *AEO 2008.*[58] For today's proposed rule, DOE based its results on the *AEO 2008* reference case price forecasts. The spreadsheet tools which DOE used to conduct the LCC and PBP analysis allow users to select either the *AEO*'s high-growth case or low-growth case price forecasts to estimate the sensitivity of the LCC and PBP to different energy price forecasts. To arrive at prices in future years, DOE multiplied the average prices described above by the forecast of annual average price changes in *AEO 2008.* Because *AEO 2008* forecasts prices to 2030, DOE followed past guidelines provided to the FEMP by EIA and used the average rate of change during 2020–2030 to estimate the price trends after 2030. For the analyses to be conducted for the final rule, DOE intends to update its energy price forecasts based on the latest available *AEO.*

b. Water and Wastewater Prices

DOE obtained residential and commercial water and wastewater price data from the *Water and Wastewater Rate Survey* conducted by Raftelis Financial Consultants (RFC) and the American Water Works Association (AWWA). For the November 2007 ANOPR, DOE used the version of the survey from 2004, but for today's proposed rule, DOE used the most recent version (*i.e.*, the *2006 Water and Wastewater Rate Survey.*)[59] The survey covers approximately 300 water utilities and 200 wastewater utilities, with each industry analyzed separately. Because a sample of 200–300 utilities is not large enough to calculate regional prices for all U.S. Census divisions and large States, DOE calculated regional values at the Census region level (Northeast, South, Midwest, and West).

To estimate the future trend for water and wastewater prices, DOE used data on the historic trend in the national water price index (U.S. city average) provided by the Bureau of Labor Statistics (BLS).[60] For the November 2007 ANOPR, DOE used data covering the time period from 1970 through 2005. For today's proposed rule, DOE used updated data to extend that time period through 2007. DOE extrapolated a future trend based on the linear growth from 1970 to 2007.

5. Repair and Maintenance Costs

Repair costs are associated with repairing or replacing components that have failed in the appliance, whereas maintenance costs are associated with maintaining the operation of the equipment. For the November 2007 ANOPR, DOE assumed that small,

[56] Available at *http://www.eia.doe.gov/cneaf/electricity/epa/epa_sum.html.*

[57] DOE-Energy Information Administration, *Natural Gas Monthly.* Available at: *http://www.eia.doe.gov/oil_gas/natural_gas/data_publications/natural_gas_monthly/ngm.htm.*

[58] U.S. Department of Energy-Energy Information Administration, *Annual Energy Outlook 2008 with Projections to 2030* (DOE/EIA–0383) (March 2008).

[59] Raftelis Financial Consultants, Inc., ''2006 RFC/AWWA Water and Wastewater Rate Survey, 2006,'' (2006). This document is available at: *http://www.raftelis.com/ratessurvey.html.*

[60] Available at: *http://www.bls.gov.*

incremental changes in products related to efficiency result in either no or only small changes in repair and maintenance costs, compared with baseline products. However, DOE sought comment on its assumption that increases in product energy efficiency would not have a significant impact on the repair and maintenance costs.

a. Cooking Products

AGA noted that DOE had not included higher maintenance costs in its LCC analysis for gas cooking products with a more complex ignition system (*i.e.*, non-standing pilot ignition systems). According to AGA, this is a significant omission that DOE needs to address, especially since AGA stated that standing pilot ignition systems are likely to be relatively maintenance-free over the assumed product life of 19 years, whereas electronic ignition systems are not. AGA noted that in an analysis provided to DOE in 1998, Battelle estimated independent failure rates for each electronic ignition system as 0.9 failures over the life of the product. Battelle assumed that two such ignition system failures would occur on a free-standing range and that these failures would be non-concurrent. AGA commented that DOE needs to account for the increased repair costs for pilot ranges equipped with electronic controls and recommended that DOE's analysis include two electronic ignition service calls for these products, which AGA estimated currently costs between $125 and $300, including parts and labor, per service call. (AGA, Public Meeting Transcript, No. 23.7 at pp. 154–155; AGA, No. 27 at pp. 3–4 and p. 15)

DOE contacted six contractors in different States to estimate whether repair and maintenance costs still differ between standing pilot and non-standing pilot ignition systems. Based on the contractors' input, DOE determined that standing pilots are less costly to repair and maintain than either electric glo-bar/hot surface ignition systems (used in most gas ovens) or electronic spark ignition systems (used in gas cooktops and a small percentage of gas ovens). Standing pilot ignition systems require repair and maintenance every 10 years to clean valves. Electric glo-bar/hot surface ignition systems require glo-bar replacement approximately every 5 years. In the case of electronic ignition systems, control modules tend to last 10 years. The electrodes/igniters can fail because of hard contact from pots or pans, although failures are rare. Based on the above findings, DOE revised its analysis of repair and maintenance costs for gas cooking products. For standing pilot ignition systems, DOE estimated an average cost of $126 occurring in the tenth year of the product's life. For electric glo-bar/hot surface ignition systems, DOE estimated an average cost of $147 occurring every fifth year during the product's lifetime. For electronic spark ignition systems, DOE estimated an average cost of $178 occurring in the tenth year of the product's life. See chapter 8 of the TSD accompanying this notice for further information regarding these estimates.

b. Commercial Clothes Washers

AHAM, Alliance, and Whirlpool commented that front-loading units generally require more maintenance and repair than top-loading units. (AHAM, No. 32 at pp. 4, 9, 11, Alliance, No. 26 at p. 4 and Whirlpool, No. 28 at p. 8) Alliance stated that repair costs for front-loading washers are significantly higher than those for top-loading units because of their incorporation of electronic controls, variable speed motors, door locks, and multiple shock absorbers. Alliance claimed that more electronic circuitry and additional door lock circuitry increases diagnostic time and, thus, increases repair costs. (Alliance, No. 26 at p. 4) Whirlpool said that although the unit shipments of front-loading CCWs are less than half that of top-loading machines, the in-warranty repair costs are double that of top-loading machines, suggesting that the repair of front-loading machines is four times as costly as that of top-loading machines. (Whirlpool, No. 28 at p. 8) The Joint Comment, on the other hand, stated that their organizations are not aware of any data showing or suggesting that more-efficient products break down more often or require more maintenance than less efficient products. (Joint Comment, No. 29 at p. 10)

Although AHAM, Alliance, and Whirlpool claim that repair and maintenance costs are greater for front-loading washers than top-loading machines, no specific data were provided to identify the magnitude of such costs. Although in-warranty repair costs may be greater for front-loading washers as Whirlpool claims, the repair costs are not incurred by the consumer and thus do not contribute to the LCC of owning and operating the washer. However, DOE does recognize that a higher incidence of in-warranty repairs is likely to be an indication of the frequency of out-of-warranty repairs. Therefore, rather than continue to assume that higher-efficiency CCW designs do not incur higher repair costs, DOE included increased repair costs in today's proposed rule based on an algorithm developed by DOE for central air conditioners and heat pumps and which was also used for residential furnaces boilers.[61] This algorithm calculates annualized repair costs by dividing half of the equipment retail price by the equipment lifetime.

6. Product Lifetime

For the November 2007 ANOPR, DOE used a variety of sources to establish low, average, and high estimates for product lifetime. For residential cooking products, DOE established average product lifetimes of 19 years for conventional electric and gas cooking products and 9 years for microwave ovens. For CCWs, the average lifetime was 11.3 years for multi-family applications, and 7.1 years for laundromats. For the November 2007 ANOPR, DOE primarily used the full range of lifetime estimates to characterize the product lifetimes with uniform probability distributions ranging from a minimum to a maximum value. For microwave ovens, DOE used a triangular probability distribution to characterize product lifetime.

Whirlpool commented on DOE's use of uniform probability distributions by stating that the vast majority of statistical texts apply a ''long-tailed'' distribution to product failure/lifetimes. According to Whirlpool, generally, the Weibull,[62] or at least the Poisson distribution, is used for such purposes. Whirlpool strongly urged DOE to correct this oversimplification. (Whirlpool, No. 28 at p. 12) Because Weibull distributions are commonly used in reliability analyses, DOE agrees with Whirlpool and revised its characterization of residential cooking product and CCW product lifetimes for today's proposed rule with Weibull probability distributions. See chapter 8 of the TSD accompanying this notice for further details on the sources used to develop product lifetimes, as well as the use of Weibull distributions to characterize product lifetime distributions.

[61] U.S. Department of Energy, *Technical Support Document: Energy Efficiency Standards for Consumer Products: Residential Central Air Conditioners and Heat Pumps* (May 2002) Chapter 5. This document is available at: *http://www.eere.energy.gov/buildings/appliance_standards/residential/ac_central_1000_r.html.*

[62] The Weibull distribution is one of the most widely used lifetime distributions in reliability engineering. It is a versatile distribution that can take on the characteristics of other types of distributions, based on the value of its shape parameter.

7. Discount Rates

a. Cooking Products

To establish discount rates for the cooking products in the November 2007 ANOPR, DOE derived estimates of the finance cost of purchasing these appliances. Because the purchase of equipment for new homes entails different finance costs for consumers than the purchase of replacement equipment, DOE used different discount rates for new construction and replacement installations.

DOE estimated discount rates for new-housing purchases using the effective real (after-inflation) mortgage rate for homebuyers. This rate corresponds to the interest rate after deduction of mortgage interest for income tax purposes and after adjusting for inflation. DOE used the Federal Reserve Board's *Survey of Consumer Finances* (SCF) for 1989, 1992, 1995, 1998, and 2001 for mortgage interest rates.[63] After adjusting for inflation and interest tax deduction, effective real interest rates on mortgages across the six surveys averaged 3.2 percent. For replacement purchases, DOE's approach for deriving discount rates involved identifying all possible debt or asset classes that might be used to purchase replacement equipment, including household assets that might be affected indirectly. DOE estimated the average shares of the various debt and equity classes in the average U.S. household equity and debt portfolios using data from the SCFs from 1989 to 2004. DOE used the mean share of each class across the six sample years as a basis for estimating the effective financing rate for replacement equipment. DOE estimated interest or return rates associated with each type of equity and debt using SCF data and other sources. The mean real effective rate across the classes of household debt and equity, weighted by the shares of each class, is 5.6 percent. See chapter 8 of the TSD accompanying this notice for further details on the development of discount rates for cooking products.

The Joint Comment stated that if DOE continues to use a weighted-average cost of capital approach, the agency should make sure its calculations are up to date and consider consumers who use credit cards as month-to-month free loans by paying their bills on time. (Joint Comment, No. 29 at p. 13) As noted above, in developing its discount rates for residential consumers, DOE used data from the SCF. Data from the 2007 SCF survey were not available for this rulemaking. However, because the rates for various forms of credit carried by households in these years were established over a range of time, DOE believes they are representative of rates that may be in effect in 2013. The SCF data do not allow consideration of the special situations cited by the stakeholders, and DOE is not aware of any other nationally representative data source that provides interest rates from a statistically valid sample. Therefore, DOE continued to use the above approach and results for today's proposed rule.

b. Commercial Clothes Washers

For CCWs, DOE derived the discount rate for its November 2007 ANOPR from the cost of capital of publicly traded firms in the sectors that purchase CCWs. DOE estimated the cost of capital of these firms as the weighted average of the cost of equity financing and the cost of debt financing. DOE identified the following sectors purchasing CCWs: (1) Educational services; (2) hotels; (3) real estate investment trusts; and (4) personal services. DOE estimated the cost of equity using the capital asset pricing model (CAPM). The cost of debt financing is the interest rate paid on money borrowed by a company. DOE estimated the weighted-average cost of capital (WACC) using the respective shares of equity and debt financing for each sector that purchases CCWs. It calculated the real WACC by adjusting the cost of capital by the expected rate of inflation. To obtain an average discount rate value, DOE used additional data on the number of CCWs in use in various sectors. DOE estimated the average discount rate for companies that purchase CCWs at 5.7 percent. DOE received no comments on its development of discount rates for CCWs and continued to use the same approach for today's proposed rule.

8. Effective Date of the Amended Standards

The effective date is the future date when parties subject to the requirements of a new standard must begin compliance. Consistent with DOE's semi-annual implementation report for energy conservation standards activities submitted to Congress pursuant to section 141 of EPACT 2005, a final rule for all of the appliance products considered for this rulemaking is scheduled to be completed by March 2009. Any new energy efficiency standards for these products become effective three years after the final rule is published in the **Federal Register** (*i.e.*, March 2012). DOE calculated the LCC for the appliance consumers as if they would purchase a new piece of equipment in the year the standard takes effect.

9. Equipment Assignment for the Base Case

For the LCC analysis for its November 2007 ANOPR, DOE analyzed candidate standard levels relative to a baseline efficiency level. However, some consumers already purchase products with efficiencies greater than the baseline product levels. Thus, to accurately estimate the percentage of consumers that would be affected by a particular standard level, DOE's analysis considered the full breadth of product efficiencies that consumers already purchase under the base case (*i.e.*, the case without new energy efficiency standards). DOE refers to this distribution of product efficiencies as base-case efficiency distributions.

a. Cooking Products

DOE's approach for conducting the LCC analysis for cooking products relied on developing samples of households that use each of the products. Using the current distribution of product efficiencies, DOE assigned a specific product efficiency to each sample household. Because DOE performed the LCC calculations on a household-by-household basis, it based the LCC for a particular standard level on the efficiency of the product in the given household. For example, if a household was assigned a product efficiency that is greater than or equal to the efficiency of the standard level under consideration, the LCC calculation would show that this household is not impacted by an increase in product efficiency that is equal to the standard level.

DOE currently does not regulate cooking product efficiency with an energy efficiency descriptor, so little is known about the distribution of product efficiencies that consumers currently purchase. Thus, for all electric cooking products (other than microwave ovens) and gas self-cleaning ovens, DOE estimated that 100 percent of the market is at the baseline efficiency levels. For gas cooktops and gas standard ovens, data are available that allowed DOE to estimate the percentage of gas cooktops and gas standard ovens still sold with standing pilot lights.

DOE sought stakeholder feedback on its methodology and data sources for estimating base-case efficiency distributions. Whirlpool commented that DOE's distributions for the November 2007 ANOPR for all cooking products (except for gas standard ovens)

[63] The Federal Reserve Board, *1989, 1992, 1995, 1998, 2001, 2004 Survey of Consumer Finances* (1989, 1992, 1995, 1998, 2001, 2004). These documents are available at: *http://www.federalreserve.gov/pubs/oss/oss2/scfindex.html.*

were reasonably accurate. (Whirlpool, No. 28 at pp. 8–9) DOE continued to use these base-case efficiency distributions for today's proposed rule. For gas standard ovens, Whirlpool stated that the percentage of the market at the baseline level should be half of what DOE estimated. (*Id.*) DOE developed the market share of gas standard ovens with standing pilots on actual shipments data, the most recent being data from the *Appliance Recycling Information Center* (ARIC) for 1997, 2000, and 2004. Without actual shipments data from Whirlpool, DOE believes it has no basis to change its estimated market share of gas standard ovens with standing pilots.

For the November 2007 ANOPR, DOE allocated the entire market share of products without standard pilots to standard level 1 (products with glo-bar ignition). Based on information collected during the course of DOE's contacts with contractors to establish the repair and maintenance costs of gas cooking product ignition systems, DOE now estimates that 10 percent of products without standing pilots use spark ignition systems.

Table IV.5 shows the market shares of the efficiency levels in the base case (*i.e.*, in the absence of new energy conservation standards) for gas cooktops and gas standard ovens. In the table, candidate standard level 1 represents products without standing pilot light ignition systems.

TABLE IV.5—GAS COOKTOPS AND GAS STANDARD OVENS: BASE CASE MARKET SHARES

Gas cooktops			Gas standard ovens		
Standard level	EF	Market share (percent)	Standard level	EF	Market share (percent)
Baseline	0.156	6.8	Baseline	0.0298	17.6
1	0.399	93.2	1*	0.0536	74.2
2	0.420	0	2	0.0566	0
			3	0.0572	0
			4	0.0593	0
			5	0.0596	0
			6	0.0600	0
			1a*	0.0583	8.2

* For gas standard ovens, candidate standard levels 1 and 1a correspond to designs that are used for the same purpose—to eliminate the need for a standing pilot—but the technologies for each design are different. Candidate standard level 1 is a hot surface ignition device, whereas candidate standard level 1a is a spark ignition device. Candidate standard level 1a is presented at the end of the table because candidate standard levels 2 through 6 are derived from candidate standard level 1.

DOE's regulations do not currently contain standards for microwave ovens, so very little is known about the distribution of product efficiencies that consumers currently purchase. For its November 2007 ANOPR, DOE estimated that 100 percent of the microwave oven market was at the baseline efficiency level. This baseline efficiency level was described only in terms of the EF, because DOE did not consider standby power consumption for microwave ovens in its November 2007 ANOPR. As discussed previously in section IV.D, DOE established four standby power levels for consideration in today's proposed rule. Because DOE tentatively determined that it is technically infeasible to combine EF and standby power into a single efficiency metric, it continues to address the four cooking efficiency levels considered in the November 2007 ANOPR, independent of standby power consumption. (See section III.A. for a complete discussion on the technical infeasibility of combining EF and standby power into a single metric.) Table IV.6 shows the EF levels and their market shares in the base case. 72 FR 64432, 64488 (Nov. 15, 2007).

TABLE IV.6—MICROWAVE OVENS: BASE CASE MARKET SHARES FOR EF

Standard level	EF	Market share (percent)
Baseline	0.557	100
1a	0.586	0.0
2a	0.588	0.0
3a	0.597	0.0
4a	0.602	0.0

With regard to standby power, during the course of DOE's investigation of microwave oven standby power consumption, DOE and AHAM tested a combined total of 52 units (see section III.A.). Based on these tests, DOE determined the percentage at each of the standby power levels identified in section IV.C.1. Because no other data were available, DOE used the test data from the combined sample to develop the market shares of standby power consumption in the base case. DOE seeks comment on whether the market share data in Table IV.7 are representative of the microwave oven market as a whole.

TABLE IV.7—MICROWAVE OVENS: BASE CASE MARKET SHARES FOR STANDBY POWER

Standard level	Standby power (watts)	Market share (percent)
Baseline	4.0	46.2

TABLE IV.7—MICROWAVE OVENS: BASE CASE MARKET SHARES FOR STANDBY POWER—Continued

Standard level	Standby power (watts)	Market share (percent)
1b	2.0	34.6
2b	1.5	19.2
3b	1.0	0.0
4b	0.02	0.0

b. Commercial Clothes Washers

For the November 2007 ANOPR, DOE derived its base-case market share data for CCWs based on shipment-weighted efficiency data provided by AHAM and assuming that CCWs were to be analyzed as a single product class. DOE sought stakeholder feedback on its methodology and data sources. Whirlpool commented that the distributions used by DOE for CCWs are reasonably accurate. (Whirlpool, No. 28 at p. 9)

As discussed previously in section IV.A.2., DOE has now decided to analyze CCWs with two product classes for today's proposed rule—top-loading washers and front-loading washers. DOE used the number of available models within each product class to establish the base-case effciency distributions. Table IV.8 presents the market shares of the efficiency levels in the base case for CCWs. See chapter 8 of the TSD accompanying this notice for further details on the development of CCW base-case market shares.

TABLE IV.8—COMMERCIAL CLOTHES WASHERS: BASE CASE MARKET SHARES

Top-loading				Front-loading			
Standard level	MEF	WF	Market share (percent)	Standard level	MEF	WF	Market share (percent)
Baseline	1.26	9.50	63.6	Baseline	1.72	8.00	7.4
1	1.42	9.50	33.3	1	1.80	7.50	4.4
2	1.60	8.50	0.0	2	2.00	5.50	85.3
3	1.76	8.30	3.0	3	2.20	5.10	1.5
				4	2.34	4.40	1.5

10. Commercial Clothes Washer Split Incentive

Under a split incentive situation, the party purchasing more efficient and presumably more expensive equipment may not realize the operating cost savings from that equipment, because another party (*e.g.*, a landlord) may pay the utility bill. In the November 2007 ANOPR, DOE did not explicitly consider the potential of split incentives in the CCW market, because it believed that the probability of such incentives was very low.

Whirlpool disagreed with DOE's dismissal of the potential for split incentives in the CCW market. Whirlpool stated that those who own CCWs (usually route operators) do not incur the operating costs (as do, generally, laundromats and owners of multi-family dwellings). Route operators generally have contracts that run from 5 to 10 years, which limits their ability to pass on the higher costs of higher-efficiency units. (Whirlpool, No. 28 at pp. 12–13) Alliance noted that multi-housing property owners typically lease CCWs, and the route operator owns the machine. (Alliance, Public Meeting Transcript, No. 23.7 at p. 85)

To evaluate the ability of CCW owners to pass on the costs of more expensive CCWs in the form of higher lease costs, DOE examined the SEC filings of two of the largest route operators, Coinmach Service Corporation (Coinmach) and Mac-Gray Corporation (Mac-Gray). DOE found that the lease agreements for those two operators allow for flexibility in their contracting. Coinmach stated the following in a June 2000 10–K Securities and Exchange Commission (SEC) filing: ''The Company's [Coinmach] leases typically include provisions that allow for unrestricted price increases, a right of first refusal (an opportunity to match competitive bids at the expiration of the lease term) and termination rights if the Company does not receive minimum net revenues from a lease. The Company has some flexibility in negotiating its leases and, subject to local and regional competitive factors, may vary the terms and conditions of a lease, including commission rates and advance location payments.'' [64] The 2006 Mac-Gray 10–K SEC filing suggests that lease agreements are relatively short term, *i.e.*, under five years rather than the 5 to 10 years identified by Whirlpool: ''As of December 31, 2006, approximately 90% of our [Mac-Gray] installed machine base was located in laundry facilities subject to long-term leases, which have a weighted average remaining term of approximately five years . . . Approximately 10% to 15% of such laundry room leases are up for renewal each year.'' [65] This lease turnover rate suggests that route operators should be able to time equipment replacement and/or upgrades with lease renewals. This in turn allows route operators to renegotiate lease terms to compensate them for the higher capital expenditures associated with more-efficient laundry equipment while splitting the economic benefits of such CCWs with the building owner(s) as part of the lease.

Based on this information, DOE believes that few route operators would allow themselves to be held to a lease agreement that would prevent them from recovering the cost of more efficient CCW equipment. Therefore, DOE concludes that new CCW efficiency standards are unlikely to lead to split incentives in the CCW market.

11. Inputs to Payback Period Analysis

The payback period is the amount of time it takes the consumer to recover the additional installed cost of more

[64] This document is available at: *http://sec.edgar-online.com/2000/06/29/16/0000902561-00-000328/Section2.asp.*

[65] This document is available at: *http://www.secinfo.com/d11MXs.ujBa.htm#1j71.*

efficient equipment through energy (and water) cost savings, compared to baseline equipment. The simple payback period does not account for changes in operating expense over time or the time value of money. Payback periods are expressed in years. Payback periods greater than the life of the product mean that the increased total installed cost is not recovered in reduced operating expenses.

The inputs to the PBP calculation are the total installed cost of the equipment to the customer for each efficiency level and the annual (first-year) operating expenditures for each efficiency level. The PBP calculation uses the same inputs as the LCC analysis, except that energy (and water) price trends and discount rates are not needed.

12. Rebuttable-Presumption Payback Period

DOE performs a PBP analysis to determine whether the three-year rebuttable presumption of economic justification applies (in essence, whether the purchaser will recover the higher installed cost of more-efficient equipment through lowered operating costs within three years). For each TSL, DOE determined the value of the first year's energy savings by calculating the quantity of those savings in accordance with DOE's test procedure, and multiplying that amount by the average energy price forecast for the year in which a new standard is expected to take effect—in this case, 2012. Section V.B.1.c. of this notice and chapter 8 of the TSD accompanying this notice present the rebuttable-presumption PBP results. DOE did not receive any comments on its analysis of the three-year rebuttable presumption of economic justification.

E. National Impact Analysis—National Energy Savings and Net Present Value Analysis

1. General

DOE's NIA assesses the national energy savings, as well as the NPV of total customer costs and savings expected to result from new standards at specific efficiency levels.

DOE used the NIA spreadsheet to perform calculations of energy savings and NPV, using the annual energy consumption and total installed cost data used in the LCC analysis. DOE forecasted the energy savings, energy cost savings, equipment costs, and NPV for each product class from 2012 through 2042. The forecasts provided annual and cumulative values for all four output parameters. In addition, DOE incorporated into its NIA spreadsheet the capability to analyze sensitivities to forecasted energy prices and product efficiency trends.

Table IV.9 summarizes the approach and data DOE used to derive the inputs to the NES and NPV analyses for the November 2007 ANOPR and the changes made in the analyses of the proposed rule. A discussion of the inputs and the changes follows below. (See chapter 11 of the TSD accompanying this notice for further details.)

TABLE IV.9—APPROACH AND DATA USED TO DERIVE THE INPUTS TO THE NATIONAL ENERGY SAVINGS AND NET PRESENT VALUE ANALYSES

Inputs	2007 ANOPR description	Changes for the proposed rule
Shipments	Annual shipments from Shipments Model	See Table IV.10.
Effective Date of Standard	2012	No change.
Base-Case Forecasted Efficiencies.	Shipment-weighted efficiency (SWEF) determined in the year 2005. SWEF held constant over forecast period of 2005–2042.	No change.
Standards-Case Forecasted Efficiencies.	Cooking Products: ''Roll-up'' scenario used for determining SWEF in the year 2012 for each standards case. SWEF held constant over forecast period of 2012–2042.	Cooking Products: No change.
	CCWs: Analyzed as a single product class. Roll-up scenario used for determining SWEF in the year 2012 for each standards case. SWEF held constant over forecast period of 2012–2042.	CCWs: Analyzed as two product classes. For each product class, roll-up scenario used for determining SWEF in the year 2012 for each standards case. SWEF held constant over forecast period of 2012–2042.
Annual Energy Consumption per Unit.	Annual weighted-average values as a function of SWEF.	No change.
Total Installed Cost per Unit	Annual weighted-average values as a function of SWEF.	No change.
Energy and Water Cost per Unit.	Annual weighted-average values a function of the annual energy consumption per unit and energy (and water) prices.	No change.
Repair Cost and Maintenance Cost per Unit.	Cooking Products: No changes in repair and maintenance costs due to standards.	Cooking Products: Incorporated changes in repair costs for non-standing pilot ignition systems.
	CCWs: No changes in repair and maintenance costs due to standards.	CCWs: Incorporated changes in repair costs as a function of efficiency.
Escalation of Energy and Water Prices.	Energy Prices: AEO 2007 forecasts (to 2030) and extrapolation to 2042.	Energy Prices: Updated to AEO 2008 forecasts.
	Water Prices: Linear extrapolation of 1970–2005 historical trends in national water price index.	Water Prices: Updated to include historical trend through 2007.
Energy Site-to-Source Conversion.	Conversion varies yearly and is generated by DOE/EIA's NEMS* program (a time-series conversion factor; includes electric generation, transmission, and distribution losses).	No change.
Effect of Standards on Energy Prices.	Not considered	Determined but found not to be significant.
Discount Rate	Three and seven percent real	No change.

TABLE IV.9—APPROACH AND DATA USED TO DERIVE THE INPUTS TO THE NATIONAL ENERGY SAVINGS AND NET PRESENT VALUE ANALYSES—Continued

Inputs	2007 ANOPR description	Changes for the proposed rule
Present Year	Future expenses are discounted to year 2007	No change.

2. Shipments

An important element in the estimate of the future impact of a standard is product shipments. The shipments portion of the NIA Spreadsheet is a Shipments Model that uses historical data as a basis for projecting future shipments of the appliance products that are the subject of this rulemaking. In projecting shipments, DOE accounted for three market segments: (1) New construction; (2) existing buildings (*i.e.*, replacing failed equipment); and (3) early replacements (for cooking products) and retired units not replaced (*i.e.*, non-replacements for CCWs). DOE used the early replacement and non-replacement market segments to calibrate the Shipments Model to historical shipments data. For purposes of estimating the impacts of prospective standards on product shipments (*i.e.*, forecasting standards-case shipments) DOE accounted for the combined effects of changes in purchase price, annual operating cost, and household income on the consumer purchase decision.

Table IV.10 summarizes the approach and data DOE used to derive the inputs to the shipments analysis for the November 2007 ANOPR, and the changes it made for today's proposed rule. The most significant change pertains to CCWs. For the November 2007 ANOPR, DOE analyzed CCWs as a single product class. For reasons described in section IV.A.2, DOE has decided to analyze CCWs as two product classes—top-loading and front-loading washers. The general approach for forecasting CCW shipments for today's proposed rule remains unchanged from the 2007 ANOPR. That is, all CCW shipments (*i.e.*, shipments for both product classes) were estimated for the new construction, replacement and non-replacement markets. The difference for today's proposed rule is that after establishing forecasted product shipments for all CCWs, DOE allocated shipments to each of the two product classes based on the market share of each class. Based on data provided by AHAM for the 2007 ANOPR, DOE estimated that top-loading washers comprise 80 percent of the market while front-loading washers comprise 20 percent. DOE estimated that the product class market shares would remain unchanged over the time period 2005–2042. A discussion of the inputs and the changes follows below.

TABLE IV.10—APPROACH AND DATA USED TO DERIVE THE INPUTS TO THE SHIPMENTS ANALYSIS

Inputs	2007 ANOPR description	Changes for the proposed rule
Number of Product Classes	Cooking Products: Seven classes for conventional (*i.e.*, non-microwave oven cooking products; one class for microwave ovens.	Cooking Products: No change.
	CCWs: Single product class	CCWs: Two product classes: top-loading washers and front-loading washers. Shipments forecasts established for all CCWs and then disaggregated into the two product classes based on the market share of top- and front-loading washers. Market share data provided by AHAM; 80% top-loading and 20% front-loading. Product class market shares held constant over time period of 2005–2042.
New Construction Shipments	Cooking Products: Determined by multiplying housing forecasts by forecasted saturation of cooking products for new housing. Housing forecasts based on *AEO 2007* projections. New housing product saturations based on EIA's RECS. Forecasted saturations maintained at 2001 levels.	Cooking Products: No change in approach. Housing forecasts updated with EIA *AEO 2008* projections.
	CCWs: Determined by multiplying multi-housing forecasts by forecasted saturation of CCWs for new multi-housing. Multi-housing forecasts based on *AEO 2007* projections. New multi-housing product saturations calibrated against data from the Consortium for Energy Efficiency (CEE). Forecasted saturations maintained (frozen) at 1999 levels.	CCWs: Multi-housing forecasts updated with *AEO 2008* projections. Verified frozen saturations with data from the U.S. Census Bureau's *American Housing Survey* (AHS) for 1997–2005.
Replacements	Cooking Products: Determined by tracking total product stock by vintage and establishing the failure of the stock using retirement functions from the LCC and PBP analysis. Retirement functions were based on uniform lifetime distributions.	Cooking Products: No change in approach. Retirement functions revised to be based on Weibull lifetime distributions.
	CCWs: Determined by tracking total product stock by vintage and establishing the failure of the stock using retirement functions from the LCC and PBP analysis. Retirement functions were based on uniform lifetime distributions.	CCWs: No change in approach. Retirement functions revised to be based on Weibull lifetime distributions.

TABLE IV.10—APPROACH AND DATA USED TO DERIVE THE INPUTS TO THE SHIPMENTS ANALYSIS—Continued

Inputs	2007 ANOPR description	Changes for the proposed rule
Early Replacements (cooking products only).	Used to calibrate Shipments Model to historical shipments data. Two percent of the surviving stock per year is retired early.	No change.
Retired Units not Replaced (*i.e.*, non-replacements) (CCWs only).	Used to calibrate Shipments Model to historical shipments data. Starting in 1999 and extending to 2005, estimated that 3 to 35% of retired units were not replaced. Gradually reduced the percentage of non-replacements to zero between 2006 and 2013.	Froze the percentage of non-replacements at 15 percent for the period 2006–2042. Revision was made to account for the increased saturation rate of in-unit washers in the multi-family stock between 1997 and 2005 timeframe shown by the AHS.
Historical Shipments	Cooking Products: Data sources include AHAM data submittal, AHAM *Fact Book,* and *Appliance Magazine*.	Cooking Products: No change.
	CCWs: Data sources include AHAM data submittal, *Appliance Magazine,* and U.S. Bureau of Economic Analysis' quantity index data for commercial laundry.	CCWs: No change.
Purchase Price, Operating Cost, and Household Income impacts due to efficiency standards.	Developed the "relative price" elasticity which accounts for the purchase price and the present value of operating cost savings divided by household income. Used purchase price and efficiency data specific to residential refrigerators, clothes washers, and dishwashers between 1980 and 2002 to determine a "relative price" elasticity of demand, of −0.34.	No change.
Fuel Switching	Cooking Products: Not considered	Cooking Products: No change.
	CCWs: Not applicable	CCWs: Not applicable.

a. New Construction Shipments

To determine new construction shipments, DOE used forecasts of housing starts coupled with the product market saturation data for new housing. For new housing completions and mobile home placements, DOE used actual data through 2005, and adopted the projections from EIA's *AEO 2007* for 2006–2030 for the November 2007 ANOPR.[66] DOE updated its housing projections for today's proposed rule using *AEO 2008*. DOE used the 2001 RECS to establish cooking product market saturations for new housing. For CCWs, DOE relied on new construction market saturation data from CEE.[67]

b. Replacements

DOE estimated replacements using product retirement functions that it developed from product lifetimes. For the November 2007 ANOPR, DOE based the retirement function on a uniform probability distribution for the product lifetime. As discussed in section IV.E.6 of this notice, DOE updated its product lifetime distributions for the LCC analysis using Weibull distributions. As a result, DOE also updated its retirement functions for the Shipments Model based on Weibull distributions.

Cooking Products. To calibrate each Shipments Model against historical shipments, DOE established the early replacement market segment for cooking products. DOE determined for its November 2007 ANOPR that two percent of the surviving stock was replaced early. This finding was retained for today's proposed rule.

Commercial Clothes Washers. For the November 2007 ANOPR, DOE determined that from 1988 to 1998, annual shipments of clothes washers stayed roughly in the range of 200,000 to 230,000 units per year. But data provided by AHAM show a drop in shipments to approximately 180,000 units in 2005. To calibrate its Shipments Model for the November 2007 ANOPR, DOE attributed this drop to non-replacements (*i.e.*, a portion of CCWs that were retired from service from 1999 to 2005 were not replaced). Since DOE found no evidence that such non-replacement would continue over time, it projected that overall shipments would recover and gradually increase after the drop witnessed between 1999 and 2005 as stocks of existing machines are retired. DOE specifically sought feedback in the November 2007 ANOPR on its assumptions regarding the shipments forecasts for CCWs.

AHAM, Alliance, Whirlpool, Southern Company (SC) and Miele argued that CCW shipments are likely to decrease further in the future. (AHAM, No. 32 at pp. 4, 11–12; Alliance, No. 26 at p. 5; Whirlpool, No. 28 at pp. 9–10; SCG, Public Meeting Transcript, No. 23.7 at pp. 179–180; and Miele, Public Meeting Transcript, No. 23.7 at pp. 110–111) AHAM disagreed with DOE's forecast of CCW shipments, arguing that future shipments will remain unchanged from historical values, if not somewhat reduced. AHAM stated that both the number of replacement units and the number of new common-area laundry units are decreasing. AHAM cited a study[68] by the National Multi-Housing Council indicating that growth in multi-family housing is being driven in large part by high-end apartment complexes, which often include in-apartment amenities such as clothes washers and dryers, and cited data from the U.S. Census Bureau's *American Housing Survey* (AHS) showing growth in in-unit clothes washers (for rental units). The switch to in-unit laundry appliances in rental units results in a reduction of shared laundry areas, implying a corresponding reduction in CCW shipments. (AHAM, No. 32 at pp. 4, 11–12)

Alliance agreed that CCWs are increasingly competing with in-unit laundry products in multi-family housing. It cited information from the Multi-housing Laundry Association (MLA) stating that most recent multi-family new construction in California and Nevada accommodates in-unit washers and many existing properties of 100 or more units are converting to in-

[66] U.S. Department of Energy-Energy Information Administration, *Annual Energy Outlook 2007 with Projections to 2030* (Feb. 2007) (DOE/EIA–0383 (2007)). This document is available at: *http://www.eia.doe.gov/oiaf/aeo/index.html.*

[67] Consortium for Energy Efficiency, *Commercial Family-Sized Washers: An Initiative Description of the Consortium for Energy Efficiency* (1998). This document is available at: *http://www.ceel.org/com/cwsh/cwsh-main.php3.*

[68] J. Goodman, *The Upscale Apartment Market: Trends and Prospects* (National Multi-Housing Council) (2001).

unit washers. Alliance supported AHAM's conclusions about CCW shipments and urged DOE to revise its shipments forecast to approximate the recent downward trend in CCW shipments, or, at the very least, keep CCW shipments constant. (ALS, No. 26 at p. 5) Whirlpool stated that CCW shipments are not increasing, and argued that an assumption of flat demand would be more realistic, adding that an alternative of declining demand should be explored to estimate the sensitivity of this assumption for overall energy savings. (Whirlpool, No. 28 at pp. 9–10) SC and Miele also stated that there is a trend toward multi-family residences using in-unit washers as opposed to common area laundry facilities. (SC, Public Meeting Transcript, No. 23.7 at pp. 179–180; Miele, Public Meeting Transcript, No. 23.7 at pp. 110–111)

The Joint Comment disagreed with the claims by AHAM, Whirlpool, and Alliance. The Joint Comment argued that Alliance cited no decline in CCW shipments when reporting to the SEC on ''trends and characteristics'' in the North American market for its commercial laundry products. Rather, the Joint Comment stated that Alliance cited population growth as a ''steady driver'' for CCW shipments (*i.e.*, suggesting that the DOE projection appears reasonable). (Joint Comment, No. 29 at p. 5)

DOE appreciates the evidence that AHAM and Alliance have provided to illustrate the movement in multi-family buildings away from common-area laundry facilities to in-unit washers and dryers. To reevaluate its November 2007 ANOPR shipments forecast, DOE verified AHAM's conclusion regarding the AHS data, namely, that the stock of in-unit washers in the multi-family stock has increased 16 percent between 1997 and 2005. DOE also found that from 1997 to 2005, the AHS shows that the saturation of in-unit washers in new multi-family construction has stayed relatively constant, varying only slightly between 76 and 80 percent. The implication is that CCW saturations in new multi-family construction also remained constant between 1997 and 2005. This suggests that the growth in in-unit washer saturations in the multi-family stock over the last 10 years was likely caused by conversions of rental property to condominiums, resulting in the gradual phase-out or non-replacement of failed CCWs in common-area laundry facilities. Based on this apparent trend, DOE revised its November 2007 ANOPR estimate that CCW non-replacements would gradually phase-out by 2013. For today's proposed rule, DOE used the average percent of non-replacements over the period between 1999 and 2005 (18 percent) and maintained it over the entire forecast period of 2006 to 2042. The effect of maintaining non-replacements at 18 percent results in CCW shipments forecasts staying relatively flat between 2006 and 2042. This is in contrast to the annual growth rate of two percent determined for the November 2007 ANOPR.

c. Purchase Price, Operating Cost, and Household Income Impacts

To estimate the combined effects on product shipments from increases in equipment purchase price and decreases in equipment operating costs due to new efficiency standards for the November 2007 ANOPR, DOE conducted a literature review and a statistical analysis on a limited set of appliance price, efficiency, and shipments data. As the November 2007 ANOPR describes, DOE used purchase price and efficiency data specific to residential refrigerators, clothes washers, and dishwashers between 1980 and 2002 to conduct simple regression analyses. DOE's analysis suggests that the relative price elasticity of demand, averaged over the three appliances, is −0.34. Because DOE's forecast of shipments and national impacts due to standards spans over 30 years, DOE considered how the relative price elasticity is affected once a new standard takes effect. After the purchase price change, price elasticity becomes more inelastic over the years until it reaches a terminal value—usually around the tenth year after the price change. DOE incorporated a relative price elasticity change that resulted in a terminal value of approximately one-third of the short-run elasticity (−0.34). In other words, DOE determined that consumer purchase decisions, in time, become less sensitive to the initial change in the product's relative price. DOE received no comments on its analysis to estimate the combined effects of increases in product purchase price and decreases in operating costs and, therefore, retained the analysis and the results for today's proposed rule.

Because the combined market of electric and gas cooking products is completely saturated, DOE assumed in the November 2007 ANOPR that electric and gas cooking product standard levels would neither affect base-case shipments nor cause shifts in electric and gas cooking product market shares for cooking products other than microwave ovens. Thus, DOE's Shipments Model for electric and gas cooking products (*i.e.*, conventional cooking products) does not incorporate use of a relative price elasticity.

d. Fuel Switching

AGA commented that it is likely that consumers will switch from gas to electric cooking products in the event that standing pilot ignition systems are eliminated. According to AGA, consumers who face rewiring costs when replacing a gas cooking product are likely to consider purchasing and rewiring for an all-electric cooking product. Therefore, AGA commented that DOE needs to analyze the likelihood of such fuel switching, including assessing the full fuel-cycle energy consumption and emission implications, and evaluating the tradeoffs between the costs of the wiring jobs and the first costs of competing gas and electric products. (AGA, No. 27 at p. 3)

As section IV.E.2 of this notice describes, DOE estimated a cost of $235 for installing an electrical outlet to accommodate a gas cooking product that needs electricity to operate. If a consumer were to switch from a gas cooking product to an electrical appliance due to the prospect of this installation cost, an outlet would still be needed to accommodate the electrical appliance. Based on the RS Means *Mechanical Cost Data*, 2008, the cost of installing only an outlet suitable for an electrical cooking appliance, which requires a 50-amp, 240-volt receptacle, is $305.[69] Due to the amperage and voltage requirements of the receptacle as well as the age of the household in which the outlet would be installed (pre-1960), a separate branch circuit coming off the fuse box or circuit breaker panel would be necessary to accommodate the electrical cooking appliance. Also, because of the additional amperage required by the electrical cooking appliance, it is highly likely that the fuse box or circuit breaker panel would need to be upgraded. Based on material costs from the Craftsman *2008 Repair & Remodeling Estimator*[70] and labor costs for the RS Means, *Mechanical Cost Data*, 2008, DOE estimated an installation cost of $1247 for installing a branch circuit and upgrading a breaker panel from 50 amps to 100 amps. Combined with the $305 installation cost of the receptacle, the total installation cost to accommodate an electrical cooking appliance is

[69] RS Means, *Mechanical Cost Data* (30th Annual Edition) (2008) *Op. cit.*

[70] Craftsman Book Company, *2008 National Repair & Remodeling Estimator* (2008). Available for purchase at: *http://craftsman-book.com/products/index.php?main_page=cbc_product_book_info&products_id=400.*

estimated to be $1562 or over six times the cost of installing a standard 120-volt outlet for a gas cooking product. Therefore, there is no financial incentive for a consumer to switch from gas cooking to electric cooking. Thus, DOE believes the probability of fuel switching is so low that DOE is not considering it in today's proposed rule. See chapter 11 of the TSD accompanying this notice for further details.

3. Other Inputs

The following is a discussion of the other inputs to the NIA and any revisions DOE made to those inputs for today's proposed rule.

a. Base-Case Forecasted Efficiencies

A key input to DOE's estimates of NES and NPV are the energy efficiencies that DOE forecasts over time for the base case (without new standards) and each of the standards cases. The forecasted efficiencies represent the annual shipment-weighted energy efficiency (SWEF) of the products under consideration over the forecast period (*i.e.*, from the estimated effective date of a new standard to 30 years after the standard becomes effective). Because key inputs to the calculation of the NES and NPV depend on the estimated efficiencies, they are of great importance to the analysis. In the case of the NES, the per-unit annual energy (and water) consumption is a direct function of product efficiency. Regarding the NPV, two inputs (the per-unit total installed cost and the per-unit annual operating cost), depend on efficiency. The per-unit total installed cost is a direct function of efficiency. Because it is a direct function of the per-unit energy (and water) consumption, the per-unit annual operating cost depends indirectly on product efficiency.

As section IV.D.9 of this notice discusses, DOE based its development of the product efficiencies in the base case on the assignment of equipment efficiencies in 2005. In other words, DOE determined the distribution of product efficiencies currently in the marketplace to develop a SWEF for 2005. Using the SWEF as a starting point, DOE developed base-case forecasted efficiencies based on estimates of future efficiency growth. From 2005 to 2012 (2012 being the estimated effective date of a new standard), DOE estimated for the November 2007 ANOPR that there would be no growth in SWEF (*i.e.*, no change in the distribution of product efficiencies). Because there are no historical data to indicate how product efficiencies have changed over time, DOE estimated that forecasted efficiencies would remain frozen at the 2012 efficiency level until the end of the forecast period (*i.e.*, 2042, or 30 years after the effective date). DOE did forecast the market share of gas standard ranges equipped with standing pilot lights to estimate the impact of eliminating standing pilot lights for gas cooktops and gas standard ovens. Although DOE recognizes the possibility that product efficiencies may change over time (*e.g.*, due to voluntary efficiency programs such as ENERGY STAR), without historical information, DOE had no basis for speculating how these product efficiencies may change.

AHAM commented that DOE's approach to estimating forecasted base-case efficiencies was realistic. (AHAM, No. 32 at p. 12) For cooking products, Whirlpool also agreed with DOE's approach because these products are not incentivized by transformation programs such as ENERGY STAR. Whirlpool stated that because a new standard was established for CCWs in 2007, a change from that level is unlikely before 2012 due to product development cycles. Whirlpool would not speculate on changes in efficiency between 2012 and 2042; however, Whirlpool disagreed with DOE's assumption of no change. Whirlpool added that voluntary market transformation programs, such as ENERGY STAR, have a proven track record of saving energy without standards, and one could reasonably assume that such programs will have at least the same impact going forward as they have had historically. (Whirlpool, No. 28 at p. 10)

For today's proposed rule, DOE maintained its approach of freezing forecasted efficiencies at the efficiency level estimated for 2012 for both residential cooking products and CCWs. For cooking products, the two stakeholders that did comment (AHAM and Whirlpool, as discussed above) agreed with DOE's approach. Due to Whirlpool's concerns regarding CCWs, DOE's Building Technologies Program contacted the ENERGY STAR program within DOE to determine what actions are being undertaken to promote the adoption of more-efficient CCWs. CCWs have been a product covered under the ENERGY STAR program since 2000. But the program has not been able to monitor sales on ENERGY STAR-qualified products because manufacturers are not required to submit relevant data to ENERGY STAR. Also, because CCWs are not sold through a distribution channel involving appliance retailers, DOE believes that any market share estimates developed would be dubious. Without reliable data from which to estimate the impact of ENERGY STAR on CCW market efficiency, DOE has decided to retain its frozen efficiency forecasts for today's proposed rule. This is a conservative estimate that will be taken into consideration when DOE weighs the benefits and burdens of TSLs.

b. Standards-Case Forecasted Efficiencies

For its determination of standards-case forecasted efficiencies, DOE used a ''roll-up'' scenario in the November 2007 ANOPR to establish the SWEF for 2012, the year that standards would become effective. DOE stated its expectation that product efficiencies in the base case, which did not meet the standard level under consideration, would roll-up to meet the new standard level. Also, DOE assumed that all product efficiencies in the base case that were above the standard level under consideration would not be affected (*i.e.*, would not require or experience efficiency improvements as a result of a new energy efficiency standard). DOE made the same estimates regarding forecasted standards-case efficiencies as for the base case, namely, that forecasted efficiencies remained frozen at the 2012 efficiency level until the end of the forecast period, because DOE had no data to reasonably estimate how such efficiency levels might change over the next 30 years. By maintaining the same growth rate for forecasted efficiencies in the standards case as in the base case (*i.e.*, zero or frozen growth), DOE retained a constant efficiency difference or gap between the two cases over the length of the forecast period. Although frozen trends may not reflect what happens to base-case and standards-case product efficiencies in the future, DOE nevertheless believes that maintaining a frozen efficiency difference between the base case and standards case provides a reasonable estimate of the impact that standards have on product efficiency. In other words, because the determination of national energy savings and national economic impacts are more reliant on the impact that standards have on product efficiency, it is more important to accurately estimate the product efficiency gap between the standards case and base case, rather than to accurately estimate the actual product efficiencies in the standards-case and base-case efficiency trends. To further explore this point, in the November 2007 ANOPR, DOE specifically sought feedback on its estimates of forecasted standards-case efficiencies and its view of how standards affect product

efficiency distributions in the year that standards take effect.

The Joint Comment on the ANOPR stated that DOE's roll-up assumption is inadequate for estimating impacts, especially for lower and mid-range candidate standard levels. According to the Joint Comment, new distributions of efficiency performance occur largely because ENERGY STAR has offered market distinction for higher efficiency products, while utilities and other efficiency program administrators have offered incentives for beyond-standards levels of performance. The Joint Comment argued that this process will become more important in the future, not less; this means consumers are buying an increasing number of products at levels significantly more efficient than Federal standards. For prior rulemakings, the Joint Comment argued that DOE has also evaluated a ''shift'' scenario, which models savings if the distribution of efficiencies were to remain the same as the current distribution, but simply shift above a given new standard level. The Joint Comment stated that modeling both roll-up and shift scenarios would enable DOE and stakeholders to better evaluate the impacts of a given standard level. (Joint Comment, No. 29 at pp. 4–5) Counter to the Joint Comment, both AHAM and Whirlpool concurred with DOE's use of a roll-up assumption for estimating the impact of standards on product efficiencies. (AHAM, No. 32 at p. 12; Whirlpool, No. 28 at p. 10)

As noted in Whirlpool's comments, there are no market transformation programs such as ENERGY STAR for cooking products. Therefore, without the lure of a market transformation program like ENERGY STAR to promote the use of more-efficient cooking products beyond a particular standard level, DOE believes it is reasonable to estimate the impact of standards on the SWEF with only a roll-up scenario.

As described above, CCWs are under the ENERGY STAR program, but there are no data on the impact that the program has had on market efficiency. In the case of top-loading washers, the base-case efficiency distribution specifies all but three percent of the top-loading CCW market at either the baseline or 1.42 MEF/9.5 WF efficiency levels. Because the technological changes required to achieve higher efficiency levels are not currently being utilized in top-loading CCW designs, DOE estimates that standards would be unlikely to shift the top-loading CCW market to levels beyond minimum required efficiencies. In the case of front-loading washers, over 80 percent of the front-loading CCW market is already at an efficiency level of 2.00 MEF/5.5 WF, which is nearly at the max-tech level of 2.35 MEF/4.4 WF. Therefore, the effects from a shift scenario for front-loading washers would not be significantly different than the effects from a roll-up scenario. That is, the increased energy and water savings resulting from moving the market to the max-tech level would be offset by the increased equipment and repair costs from that level. Because of the reasons stated above, for today's proposed rule, DOE has analyzed only a roll-up scenario to establish the SWEF for top-loading and front-loading washers after new CCW standards would become effective.

c. Annual Energy Consumption

The inputs for determining NES are annual energy (and water) consumption per unit, shipments, equipment stock, national annual energy consumption, and site-to-source conversion factors. Because the annual energy (and water) consumption per unit depend directly on efficiency, DOE used the SWEFs associated with the base case and each standards case, in combination with the annual energy (and water use) data, to estimate the shipment-weighted average annual per-unit energy (and water) consumption under the base case and standards cases. The national energy consumption is the product of the annual energy consumption per unit and the number of units of each vintage. This calculation accounts for differences in unit energy consumption from year to year.

The NIA uses forecasted shipments for the base case and all standards cases. As noted above in section IV.E.2.c, DOE used a relative price elasticity to estimate standards-case shipments for microwave ovens and CCWs, but not conventional cooking products. The increased total installed cost of more-efficient equipment causes some customers to forego equipment purchases. Consequently, shipments forecasted under the standards cases are lower than under the base case. To avoid the inclusion of savings from displaced shipments of microwave ovens, DOE used the standards-case shipments projection and the standards-case stock to calculate the annual energy consumption in the base case. However, for CCWs, DOE assumed any drop in shipments caused by standards would result in the purchase of used machines. As a result, the standards-case forecast explicitly accounted for the energy and water consumption of not only new standard-compliant CCWs but used equipment coming into the market due to the drop in new product shipments as well. Therefore, DOE maintained the use of the base-case shipments to determine the annual energy consumption in the base case.

DOE's November 2007 ANOPR analysis estimated that 0.23 quads of national energy savings would be associated with the elimination of standing pilot ignition systems in gas cooking products and the anticipated substitution of electric spark ignition for gas standard ovens. AGA asserted that the maximum energy savings would be less (0.06 quads over 30 years) and contended that the amount of energy saved from eliminating standing pilot ignition systems is not significant enough to warrant setting a standard that eliminates them. (AGA, No. 27 at pp. 2 and pp. 13–14)

EEI compared the energy savings of eliminating standing gas pilots to the potential energy savings from a microwave oven standby power standard. According to EEI, DOE's analysis shows that gas standby energy use in gas cooking products is a much more significant energy and cost issue than microwave oven standby energy use, and DOE should prioritize its methods and analysis to reduce standby gas energy usage. (EEI, No. 25 at pp. 2–3)

DOE recognizes both AGA's and EEI's comments, but their input focused on how the agency should interpret the results of its energy savings analyses, rather than altering DOE's methodology for estimating the national energy savings due to the elimination of standing pilots. As the November 2007 ANOPR noted, DOE's method accounted for the market share of gas cooking products with standing pilots. Based on historical trends in the shipments data, DOE forecasted a continual decline in the market share of gas cooking products with standing pilots. As described in section IV.D.9.a, DOE estimated that 17.6 percent of standard gas oven shipments and 6.8 percent of gas cooktop shipments would be equipped with standing pilots in 2012. The above percentages are based on all gas standard oven and cooktop shipments (*i.e.*, shipments from both stand-alone or built-in products as well as kitchen ranges). Because DOE estimated that kitchen ranges are the only gas products that still come equipped with standing pilots, only standard ovens and cooktops in kitchen ranges comprise the percent of all standard ovens and cooktops that are still equipped with standing pilots. DOE estimated that approximately 14 percent of gas ranges in 2012 were equipped with standing pilots. Overall, a smaller percentage of gas cooktops are equipped

with standing pilots (6.8 percent) than standard gas ovens (17.6 percent) because there are far more stand-alone cooktop shipments than built-in standard oven shipments. DOE estimated a total market share of less than five percent by 2042 for gas cooking products with standing pilots. See chapter 11 of the TSD accompanying this notice for further details. By forecasting a declining market share of gas cooking products with standing pilots, DOE believes it accurately estimated the national energy savings due to energy efficiency standards that eliminate standing pilots. National energy savings results are presented below in section V.B.3.a.

d. Site-to-Source Conversion

Since it is necessary to estimate the national energy savings expected from appliance standards, DOE uses a multiplicative factor to convert site energy consumption (at the home or commercial building) into primary or source energy consumption (the energy required to deliver the site energy). In the November 2007 ANOPR, DOE used annual site-to-source conversion factors based on the version of NEMS that corresponds to *AEO 2006*. For today's NOPR, DOE updated its conversion factors based on *AEO 2008*.[71] These conversion factors account for natural gas losses from pipeline leakage and natural gas used for pumping energy and transportation fuel. For electricity, the conversion factors vary over time due to projected changes in generation sources (*i.e.*, the power plant types projected to provide electricity to the country). Since the EIA's *AEO* does not provide energy forecasts that go beyond 2030, DOE used conversion factors that remain constant at the 2030 values throughout the remainder of the forecast.

e. Embedded Energy in Water and Wastewater Treatment and Delivery

In the November 2007 ANOPR, DOE did not include the energy required for water treatment and delivery for the reasons that follow. EPCA defines ''energy use'' to be ''the quantity of energy *directly* consumed by a consumer product at point of use, determined in accordance with test procedures under section 6293 of [42 U.S.C.].'' (42 U.S.C. 6291(4)) (emphasis added) Based on the definition of ''energy use,'' DOE does not believe it has the authority to consider embedded energy (*i.e.*, the energy required for water treatment and delivery) in the analysis. Furthermore, even if DOE had the authority, it does not believe adequate analytical tools exist to conduct such an evaluation.[72]

f. Total Installed Costs and Operating Costs

The total annual installed cost increase is equal to the annual change in the per-unit total installed cost (*i.e.*, the difference between base case and standards case) multiplied by the shipments forecasted in the standards case. DOE did not change its approach for calculating total annual installed cost increases for today's proposed rule.

The annual operating cost savings per unit includes changes in energy, water, repair, and maintenance costs. DOE forecasted energy prices for the November 2007 ANOPR based on *AEO 2007* and updated the energy prices for today's proposed rule using forecasts from *AEO 2008*.

In the November 2007 ANOPR analysis, DOE believed there would be no increase in maintenance and repair costs due to standards. But as section IV.D.5 of this notice discusses, based upon public comments, DOE has accounted for the added repair and maintenance costs associated with non-standing pilot ignition systems for today's proposed rule. DOE has also included increases in repair and maintenance costs for more-efficient CCWs.

g. Effects of Standards on Energy Prices

In the November 2007 ANOPR, DOE did not consider the potential impact of energy efficiency standards on energy prices. However, DOE did publish a final rule for residential furnaces and boilers rule in November 2007 that assessed the consumer benefits, in the form of reduced natural gas prices, from a 90-percent annual fuel utilization efficiency (AFUE) or higher standard for non-weatherized gas furnaces. 72 FR 65136, 65152 (Nov. 19, 2007). The Joint Comment stated that because DOE conducted such an analysis for the furnace and boiler standards rulemaking, it must also evaluate gas and electricity price impacts in the context of the residential cooking product and CCW rulemaking. The Joint Comment further stated that DOE should consider the impact of standards on gas and electricity prices as a factor for economic justification, arguing that ''NAECA authorizes the Secretary to account for other, non-enumerated factors that he determines are relevant (42 U.S.C. 6297(o)).''[73] (Joint Comment, No. 29 at p. 12)

In response, DOE did conduct an analysis using a version of the 2008 NEMS–BT, modified to account for energy savings associated with possible standards. The analysis estimated that gas and electric demand reductions resulting from max-tech standards for residential cooking products and CCWs had no detectable change on the U.S. average wellhead natural gas price or the average user price of electricity. Therefore, DOE concludes that residential cooking product and CCW standards will not provide additional consumer benefits over those determined in the NIA. See chapter 11 of the TSD accompanying this notice for more details.

h. Discount Rates

DOE multiplies monetary values in future years by the discount factor to determine the present value. The Joint Comment stated that societal discount rates are the subject of extensive academic research and that the weight of academic opinion is that the appropriate societal discount rate is three percent or less. (Joint Comment, No. 29 at p. 12) DOE estimated national impacts using both a three-percent and a seven-percent real discount rate as the average real rate of return on private investment in the U.S. economy. DOE uses these discount rates in accordance with guidance provided by the Office of Management and Budget (OMB) to Federal agencies on the development of regulatory analysis (OMB Circular A–4 (Sept. 17, 2003), section E, ''Identifying and Measuring Benefits and Costs'').

Chapters 10 and 11 of the TSD accompanying this notice provide additional detail on the shipments and national impacts analyses for the two

[71] For the standards rulemakings, DOE will generally use the same economic growth and development assumptions that underlie the most current *AEO* published by EIA. For its determination of site-to-source conversion factors, DOE used the version of NEMS corresponding to *AEO 2006* for the ANOPR due to the unavailability of the *AEO 2007* version at the time DOE conducted the NIA. For its analyses for the NOPR and final rule, DOE is committed to using the latest available version of NEMS.

[72] An analytical tool equivalent to EIA's NEMS would be needed to properly account for embedded energy impacts on a national scale, including the embedded energy due to water and wastewater savings. This new version of NEMS would need to analyze spending and energy use in dozens, if not hundreds, of economic sectors. This version of NEMS also would need to account for shifts in spending in these various sectors to account for the marginal embedded energy differences among these sectors. 72 FR 64432, 64498–99 (Nov. 15, 2007). DOE does not have access to such a tool or other means to accurately estimate the source energy savings impacts of decreased water or wastewater consumption and expenditures.

[73] DOE notes that the Joint Comment cites to a statutory section that does not exist (*i.e.*, 42 U.S.C. 6297(o). Instead, the Joint Comment presumably intended to cite 42 U.S.C. 6295(o)(2)(B)(i)(VII), which stands for the proposition presented.

appliance products subject to further analyses as part of this rulemaking.

F. Consumer Subgroup Analysis

In analyzing the potential impact of new or amended standards on individual and commercial consumers, DOE evaluates the impact on identifiable subgroups of consumers that may be disproportionately affected by a national standard level.

DOE used RECS data to analyze the potential effect of standards for residential cooking products on two consumer subgroups of interest: (1) Households with low income levels, and (2) households occupied by seniors. In addition, DOE received public comments that identified other specific consumer subgroups that could potentially be affected by the elimination of standing pilot ignition systems. According to AGA, Amish communities, which do not allow the use of electricity, have gas products that use either propane or natural gas. AGA stated that religious and cultural prohibitions regarding electricity use by certain groups in the U.S. are well understood and that this was the reason for the original EPCA language requiring electronic ignition only on gas cooking products with other electrical features. In addition, AGA claimed that this consideration was the reason for the exception to not ban standing pilot lights on gravity gas-fired boilers (which have no electrical supply) in EISA 2007. (AGA, No. 27 at p. 2) However, EEI argued that the Amish communities as a subgroup are extremely small, so it would be very difficult for DOE to analyze this subset. (EEI, Public Meeting Transcript, No. 23.7 at pp. 198–99) EEI estimated that 50,000 families (0.04 percent of U.S. households) do not use electricity in their homes and may use natural gas, propane, kerosene, or wood for cooking purposes. (EEI, No. 5 at pp. 3–4)

DOE reviewed the U.S. Census Bureau's 2005 AHS and found that approximately 13,000 households, representing 0.01 percent of the total U.S. household population, use gas cooking products and are without electricity. Although it is unknown whether this subset of the U.S. household population includes Amish households, DOE does not doubt that Amish households would be affected by the elimination of standing pilots. DOE has contacted the Mennonite Information Center, the Young Center at Elizabethtown College, and businesses that sell gas appliances to the Amish community in Lancaster County, Pennsylvania and verified that Amish households do use gas-only cooking products. But, as section IV.A.1 discusses, DOE market research shows that battery-powered electronic ignition systems have been implemented in other products, such as instantaneous gas water heaters, barbeques, furnaces, and other appliances, and the use of such products is not expressly prohibited by applicable safety standards such as ANSI Z21.1. Therefore, DOE believes that households that use gas for cooking and are without electricity will have technological options that would enable them to continue to use gas cooking if standing pilot ignition systems are eliminated. Because the subgroup consisting of households without electricity will still have technological options for continuing to use gas cooking products even if standing pilots are eliminated, DOE believes that this subgroup will not be adversely impacted by an efficiency standard requiring the elimination of standing pilots.

Another consumer subgroup stakeholders identified is low-income households. GE stated that eliminating gas pilot ranges would cause hardship for most households using these products, since the majority of these products are used in Federally sponsored and municipally sponsored low-income and low-cost housing. GE argued that requiring these households to wire themselves to accommodate a gas range with electronic ignition would be cost prohibitive. (GE, No. 30 at pp. 2–4) EEI commented that DOE may want to identify the percentage of low-income consumers that use equipment with standing pilots. (EEI, No. 5 at p. 4) DOE was not able to verify GE's claim (submitted without data) that the majority of gas pilot ranges are used in Federally sponsored and municipally sponsored low-income housing, because, for example, the RECS data that DOE uses for its consumer subgroup analysis lack sufficient detail.

DOE analyzed the potential effects of CCW standards on two subgroups: (1) Consumers not served by municipal water and sewer providers, and (2) small businesses. For consumers not served by water and sewer, DOE analyzed the potential impacts of standards by conducting the analysis with well and septic system prices, rather than water and wastewater prices based on RFC/AWWA data. For small CCW businesses, DOE analyzed the potential impacts of standards by conducting the analysis with different discount rates, because small businesses do not have the same access to capital as larger businesses. DOE estimated that for businesses purchasing CCWs, the average discount rate for small companies is 3.5 percent higher than the industry average. Due to the higher costs of conducting business, as evidenced by their higher discount rates, the benefits of CCW standards for small businesses will be less than the general population of CCW owners.

More details on the subgroup analysis and the results can be found in chapter 12 of the TSD accompanying this notice.

G. Manufacturer Impact Analysis

1. General Description

In determining whether a standard for either of the two appliance products subject to further analyses as part of this rulemaking is economically justified, the Secretary of Energy is required to consider ''the economic impact of the standard on the manufacturers and on the consumers of the products subject to such standard.'' (42 U.S.C. 6295(o)(2)(B)(i)(I) and 6316(a)) The statute also calls for an assessment of the impact of any lessening of competition as determined by the Attorney General. (42 U.S.C. 6295 (o)(2)(B)(i)(V) and 6316(a)) DOE conducted the MIA to estimate the financial impact of higher efficiency standards on manufacturers of the two appliance products, and to assess the impact of such standards on employment and manufacturing capacity.

The MIA has both quantitative and qualitative aspects. The quantitative part of the MIA relies on the GRIM, an industry cash-flow model customized for this rulemaking. The GRIM inputs characterize the industry cost structure, shipments, and revenues. This includes information from many of the analyses described above, such as manufacturing costs and prices from the engineering analysis and shipments forecasts. The key GRIM output is the INPV, which estimates the value of the industry on the basis of cash flows, expenditures, and investment requirements as a function of TSLs. Different sets of assumptions (scenarios) will produce different results. The qualitative part of the MIA addresses factors such as product characteristics, characteristics of particular firms, and market and product trends, and includes an assessment of the impacts of standards on subgroups of manufacturers. The complete MIA is outlined in chapter 13 of the TSD accompanying this notice.

In the Framework Document for this proceeding, notice of which was published in the **Federal Register** on March 27, 2006, DOE outlined the procedural and analytical approaches to be used in the MIA. (71 FR 15059) In the

November 2007 ANOPR for this rulemaking, DOE reported some preliminary MIA information and data in section II.K. 72 FR 64432, 64505–07 (Nov. 15, 2007). In response to these preliminary data, the November 2007 ANOPR, and DOE statements at the December public meeting, DOE received specific comments on the MIA, which are addressed in this section. In previous energy conservation standards rulemakings, DOE did not report any MIA results during the ANOPR phase of the rulemaking. However, under a new MIA format announced through a report issued to Congress on January 31, 2006, ''Energy Conservation Standards Activities'' [74] (as required by section 141 of EPACT 2005), DOE now reports preliminary MIA information at the ANOPR stage, as was done in the November 2007 ANOPR.

DOE conducted the MIA for cooking products and CCWs in three phases. Phase 1 (Industry Profile) characterized the industry using data on market share, sales volumes and trends, pricing, employment, and financial structure. Phase 2 (Industry Cash Flow) focused on each industry as a whole. In this phase, DOE used the GRIM to prepare an industry cash-flow analysis. Using publicly available information developed in Phase 1, DOE adapted the GRIM's generic structure to perform an analysis of cooking product and CCW energy conservation standards. In Phase 3 (Subgroup Impact Analysis), DOE conducted interviews with manufacturers representing the majority of domestic cooking product and CCW sales. This group included large and small manufacturers, thereby providing a representative cross-section of the two industries.

During these interviews, DOE discussed engineering, manufacturing, procurement, and financial topics specific to each company and obtained each manufacturer's view of the industry as a whole. The interviews provided valuable information that DOE used to evaluate the impacts of an amended energy conservation standard on manufacturers' cash flows, manufacturing capacities, and employment levels. DOE identified subgroups of manufacturers during interviews with manufacturers of cooking products and CCWs. The manufacturer subgroups are described in section IV.G.1.c. of this notice.

a. Phase 1 (Industry Profile)

In Phase 1 of the MIA, DOE prepared a profile of the cooking products and CCW industries based on the market and technology assessment prepared for this rulemaking. Before initiating the detailed impact studies, DOE collected information on the present and past structure and market characteristics of the cooking products and CCW industries. The information DOE collected included market share, equipment shipments, markups, and cost structure for various manufacturers. The industry profile includes: (1) Further detail on product characteristics; (2) estimated manufacturer market shares; (3) the financial situation of manufacturers; and (4) trends in the number of firms, the market, and product characteristics of the cooking products and CCW industries.

The industry profile included a top-down cost analysis of cooking products and CCW manufacturers that DOE used to derive cost and preliminary financial inputs for the GRIM (*e.g.*, revenues; material, labor, overhead, and depreciation expenses; selling, general, and administrative expenses (SG&A); and research and development (R&D) expenses). DOE also used public sources of information to further calibrate its initial characterization of each industry, including SEC 10–K reports, Standard & Poor's (S&P) stock reports,[75] and corporate annual reports. DOE supplemented this public information with data released by privately held companies.

b. Phase 2 (Industry Cash-Flow Analysis)

Phase 2 of the MIA focused on the financial impacts of new energy conservation standards on the industry as a whole. Higher energy conservation standards can affect a manufacturer's cash flow in three distinct ways, resulting in: (1) A need for increased investment; (2) higher production costs per unit; and (3) altered revenue by virtue of higher per-unit prices and changes in sales volumes. To quantify these impacts in Phase 2 of the MIA, DOE performed three separate cash-flow analyses, using the GRIM: One for the conventional cooking products industry, one for microwave ovens, and one for CCWs. In performing these analyses, DOE used the financial values derived during Phase 1 and the shipment scenarios used in the NIA.

c. Phase 3 (Subgroup Impact Analysis)

Using average cost assumptions to develop an industry cash-flow estimate is not adequate for assessing differential impacts among subgroups of manufacturers. For example, small or niche manufacturers, or manufacturers whose cost structure differs significantly from the industry average, could be more negatively affected. DOE used the results of the industry characterization analysis from Phase 1 to group manufacturers that exhibit similar characteristics. In the Framework Document and November 2007 ANOPR, DOE invited stakeholders to comment on the manufacturing subgroups that it should analyze for the MIA.

Cooking Products Subgroup: Small manufacturers of cooking products with standing pilot lights. DOE identified three manufacturers of gas-fired ovens, ranges, and cooktops with standing pilot lights. Two of the three manufacturers are classified as small businesses by the Small Business Administration (SBA). DOE categorized the two small businesses into their own subgroup as a result of their size and their concentration in the residential cooking industry. Both manufacturers produce gas-fired appliances with standing pilot ignition systems and derive over 25 percent of their total revenue from gas-fired appliances with standing pilot ignition systems. Both small manufacturers produce only residential cooking appliances and have annual sales in the $50–60 million range, whereas the third is a large, diversified appliance manufacturer. The two small cooking businesses are privately held, and each employs less than 300 employees.[76] DOE contacted both small cooking product businesses it identified to discuss differential impacts due to the elimination of standing pilot lights. DOE also interviewed the large manufacturer of gas-fired ovens, ranges, and cooktops with standing pilot lights.

Commercial Clothes Washers Subgroup. DOE identified three manufacturers that represent nearly 100 percent of CCW shipments. For CCWs, DOE categorized one manufacturer as its own subgroup because of its focus on the commercial laundry business. Due to the low shipment volumes in the CCW market and the much lower revenues of this manufacturer compared to its competitors, DOE identified this manufacturer as a ''Low-Volume Manufacturer'' (LVM) for its MIA

[74] Available at: *http://www1.eere.energy.gov/buildings/appliance_standards/schedule_setting.html.*

[75] Available at: *http://www2.standardandpoors.com/.*

[76] The SBA classifies a residential cooking appliance manufacturer as a small business if it has less than 750 employees. Refer to: *http://www.sba.gov/idc/groups/public/documents/sba_homepage/serv_sstd_tablepdf.pdf.*

subgroup analysis. In 2006, the LVM derived 87 percent of its clothes washer revenues from CCW sales, while CCW sales for each of its two main competitors represent less than one percent of their individual total clothes washer sales. Thus, the LVM fits the description of a niche manufacturer, even though in 2006 it had over $330 million in revenue and 1,500 employees. As discussed above, its two main competitors in the CCW market are diversified appliance manufacturers that each earns at least 50 times more revenue than the LVM on an annual basis. The LVM has successfully maintained its significant CCW market share despite its much smaller overall revenue base. DOE estimates that the LVM currently accounts for approximately 45 percent of CCW shipments. DOE described the differential cost impacts of new energy conservation standards on the LVM in the engineering analysis contained in the November 2007 ANOPR. (See Chapter 5 and Appendix 5–A of the TSD accompanying the November 2007 ANOPR.) The LVM does not qualify as a small business since it has over 1,000 employees.[77]

Compared to their larger competitors, both small cooking products businesses are highly concentrated in residential cooking appliance manufacturing, and the CCW LVM is highly concentrated in commercial laundry. Unlike their larger competitors, they operate at a much smaller scale and do not manufacture products across a broad range of industries. Thus, the potential impacts of this rulemaking on the small cooking products businesses and the CCW LVM could be disproportionate compared to the impacts on their large, diversified competitors. As a result, DOE performed an in-depth analysis of the issues facing the small cooking products businesses and the CCW LVM. (See chapter 13 and appendix 13–A of the TSD accompanying this notice.) The following paragraphs describe in detail the steps DOE took in developing the information for the MIA.

2. Government Regulatory Impact Model Analysis

As mentioned above, DOE uses the GRIM to quantify anticipated changes in cash flow that may result in a higher or lower industry value, which arise from potential energy conservation standards. The GRIM analysis uses a standard, annual cash-flow analysis that incorporates manufacturer prices, manufacturing costs, shipments, and industry financial information as inputs and models changes in costs, distribution of shipments, investments, and associated margins that would result from new regulatory conditions (in this case, standard levels). The GRIM spreadsheet uses a number of inputs to arrive at a series of annual cash flows, beginning with the base year of the analysis (2007) and continuing to 2042. DOE calculated INPVs by summing the stream of annual discounted cash flows during this period.

DOE used the GRIM to calculate cash flows using standard accounting principles and to compare changes in INPV between a base case and different TSLs (the standards cases). Essentially, the difference in INPV between the base case and a standards case represents the financial impact of the new energy conservation standards on manufacturers. DOE collected this information from several sources, including publicly available data and interviews with a number of manufacturers. See chapter 13 of the TSD accompanying this notice for details.

a. Government Regulatory Impact Model Scenarios and Key Inputs

Base-Case Shipments Forecast. The GRIM estimates manufacturer revenues based on total unit shipment forecasts and the distribution of these values by efficiency level. Changes in the efficiency mix at each standard level affect manufacturer finances. For this analysis, the GRIM used the NIA shipments forecasts from 2007 to 2042. In the shipments analysis, DOE also estimated the distribution of efficiencies in the base case for all product classes. In interviews, manufacturers of all product classes generally agreed with the NIA total shipment results.

Standards-Case Shipments Forecast. For each standards case, DOE considers that shipments at efficiencies below the projected minimum standard levels would roll up to those efficiency levels in response to an increase in energy conservation standards. This scenario assumes that demand for high-efficiency equipment is a function of price, independent of the standard level. See chapter 13 of the TSD accompanying this notice for additional details.

For CCWs, DOE uses a shipment scenario that considers the impacts of changes in relative prices on consumer demand for each product to bound the impacts of standards on manufacturers. As described in the discussion of purchase price, operating cost, and household income impacts found in the shipments model in chapter 10 of the TSD accompanying this notice, this shipment scenario estimates how the combined effects of increases in purchase price and decreases in operating costs due to new energy conservation standards affect shipments. In the ''price elasticity of demand'' shipment scenario, the effects from the increase in product purchase prices offset the effects from decreased operating costs, resulting in a net decrease in shipments.

Base-Case and New Energy Conservation Standards Markup Scenarios. In the GRIM, markups are applied to the manufacturer production costs (MPCs) to calculate manufacturing selling price. After discussions with manufacturers, DOE analyzed two distinct markup scenarios: (1) A preservation of gross margin[78] (percentage) scenario; and (2) a preservation of gross margin (in absolute dollars) scenario.

DOE modeled the preservation of gross margin percentage scenario in all three GRIMs. Under this scenario, DOE applied a single uniform ''gross margin percentage'' markup across all efficiency levels. As production cost increases with efficiency, this scenario implies that the absolute dollar markup will increase. DOE calculated that the non-production cost markup (which consists of SG&A expenses, R&D expenses, interest, and profit) is 1.26. This markup is consistent with the one DOE used in the engineering analysis and GRIM analysis for the base case. In their interviews, all manufacturers believe it is optimistic to assume that, as their production costs increase in response to an energy conservation standard, they would be able to maintain the same gross margin percentage markup. Therefore, DOE believes that this scenario represents a high bound to industry profitability under an energy conservation standard.

During interviews, multiple manufacturers of microwave ovens and conventional cooking products stated that they have not been able to fully recover the increased costs from increased raw material prices. Instead, manufacturers were only able to recover part of the total increase in production cost. Several manufacturers suggested that a similar situation would happen as a result of new energy conservation standards. In the ''preservation of gross

[77] The SBA classifies a commercial laundry equipment manufacturer as a small business if it has less than 500 employees. Refer to: *http://www.sba.gov/idc/groups/public/documents/sba_homepage/serv_sstd_tablepdf.pdf.*

[78] ''Gross margin'' is defined as revenues minus cost of goods sold. On a unit basis, gross margin is selling price minus manufacturer production cost. In the GRIMs, markups determine the gross margin because various markups are applied to the manufacturer production costs to reach manufacturer selling price.

margin (absolute dollars)'' scenario, gross margin is defined as ''revenues less cost of goods sold.'' The implicit assumption behind this markup scenario is that the industry will lower its markups in response to the standards to maintain only its gross margin (in absolute dollars). This means the percentage difference between MPC and selling price will decrease in the standards case compared to the base case and the gross margin percentage will be lower. The industry would do so by passing through its increased production costs to customers, while increased R&D and selling, general, and administrative expenses directly lower profit. DOE implemented this scenario in the microwave oven and conventional cooking products GRIMs by lowering the production cost markups for each TSL to yield approximately the same gross margin in dollars in the standards cases in the year standard are effective (2012) as is yielded in the base case. This scenario is less optimistic than the preservation of gross margin percentage scenario.

Product and Capital Conversion Costs. Energy conservation standards typically cause manufacturers to incur one-time conversion costs to bring their production facilities and product designs into compliance with the new standards. For the purpose of the MIA, DOE classified these one-time conversion costs into two major groups: (1) Product conversion and (2) capital conversion costs. Product conversion expenses are one-time investments in research, development, testing, and marketing, focused on making product designs comply with the new energy conservation standard. Capital conversion expenditures are one-time investments in property, plant, and equipment to adapt or change existing production facilities so that new product designs can be fabricated and assembled.

DOE assessed the R&D expenditures manufacturers would be required to make at each TSL. For microwave ovens (EF standards) and conventional cooking products, DOE obtained financial information through manufacturer interviews and aggregated the data to prevent disclosure of proprietary or confidential information. For all product classes at each TSL, DOE considered these manufacturer responses. DOE estimated average industry product conversion expenditures by weighting these data by market share and, finally, extrapolated each manufacturer's R&D expenditures for each product. Where manufacturers did not comment, DOE used the conversion expenditures estimated in the 1996 TSD, updated by current production volumes and the PPI.[79] For CCW and standby power standards for microwave ovens, DOE used manufacturer interviews to determine the cost of upgrading a product platform. DOE used interviews and product catalogs to estimate the number of product platforms that needed to be upgraded at each TSL to obtain its estimates for the conversion costs of the entire industry.

DOE also evaluated the level of capital conversion costs manufacturers would incur in order to comply with amended energy conservation standards. For conventional cooking products, DOE initially revised the conversion capital expenditure figures in the 1996 TSD with current manufacturing volume projections and 2007 PPI figures.[80] During interviews, DOE asked manufacturers to comment on the figures, which DOE subsequently revised based on these responses. For microwave ovens and CCWs, DOE prepared preliminary estimates of the capital investments required at each TSL, which is affected in part by the ability to use existing plants, warehouses, tooling, and equipment. From the interviews and information in product catalogs, DOE was able to estimate what portion of existing manufacturing assets would need to be replaced and/or reconfigured, and what additional manufacturing assets would be required to manufacture the higher-efficiency products. In most cases, DOE projects that if standard levels were increased, the proportion of existing assets that manufacturers would have to replace would also increase. Additional information on the estimated product conversion and capital conversion costs is set forth in chapter 13 of the TSD accompanying this notice.

3. Manufacturer Interviews

As noted above, as part of the MIA, DOE discussed potential impacts of standards with multiple manufacturers. As section IV.G.1 of this notice describes, DOE conducted MIA interviews on multiple occasions with the three manufacturers representing nearly 100 percent of domestic CCW sales. These interviews were in addition to those DOE conducted as part of the engineering analysis. After the December 2007 public meeting, DOE also interviewed multiple cooking product manufacturers about microwave ovens, as well as conventional gas and electric cooking products. Data from the analysis indicated that the combined market share of these manufacturers represents 25 to 82 percent of unit shipments, depending on the specific cooking product category. For certain issues relating to standby power, DOE also interviewed subject-matter experts. All interviews provided information that DOE used to evaluate the impacts of potential new energy conservation standards on manufacturers' cash flows, manufacturing capacities, and employment levels.

Most of the information received from these meetings is protected by non-disclosure agreements and resides with DOE's contractors. Before each telephone interview or site visit, DOE provided company representatives with an interview guide that included the topics for which DOE sought input. As the November 2007 ANOPR describes, the MIA interview topics included key issues relevant to the rulemaking, including: (1) Product mix; (2) profitability; (3) conversion costs; (4) manufacturing capacity and employment levels; (5) market share and industry consolidation; (6) product utility and innovation; and (7) cumulative burden issues. Appendix 13-B of the TSD accompanying this notice provides copies of the discussion guides.

a. Conventional Cooking Products

During the manufacturer interviews in the November 2007 ANOPR phase, conventional cooking product manufacturers raised three key issues: (1) Continuing intense price competition and an inability to pass on cost increases, (2) financial and consumer utility impacts of standby power standards, and (3) consumer utility and economic/industry impacts of eliminating standing pilot ignition systems for gas-fired appliances. DOE requested additional information on these key issues during manufacturer interviews during the NOPR phase. Additional topics raised by manufacturers of conventional cooking products during the NOPR-phase interviews included: (1) The validity, cost-effectiveness, and potential efficiency improvements of design options; (2) the disproportionate effect of energy efficiency standards on manufacturer and consumer subgroups; (3) factors that affect the INPV; and (4) the expected financial and consumer utility impacts of potential standby power standards.

Multiple manufacturers cited price competition and the inability to pass on increased costs to consumers as their primary concern. DOE sought comment from appliance manufacturers on the potential consumer utility impacts as a

[79] Available at: *http://www.bls.gov/PPI/.*

[80] Available at: *http://www.bls.gov.*

result of standby power standards for conventional cooking products. In addition, a low standby power standard could result in a lack of product differentiation, harming manufacturers' profitability.

DOE sought comment regarding the potential elimination of standing pilot ignition systems from gas-fired cooking products, with replacement by electronic ignition systems using a spark or glo-bar igniter. (See chapter 5 of the TSD accompanying this notice for a further description.) Manufacturers of gas cooking products with standing pilot lights stated that there are several issues regarding the potential elimination of standing pilot lights, including: (1) The consumer utility of standing pilot ignition systems for customers without line power (for religious, economic, or other reasons); (2) likely retrofitting of standing pilot-equipped equipment with non-certified ignition devices, which may be unsafe; (3) the retrofit costs are higher than DOE projects for consumers without an electrical outlet nearby; and (4) competitive impacts on the industry. Furthermore, interviews highlighted that two small businesses will be impacted disproportionately from elimination of pilot lights and could be harmed materially. Both small cooking appliance manufacturers stated that the elimination of the standing pilot option for their gas ranges would likely cause substantial harm, since standing pilot-equipped products represent more than 25 percent of their total revenues. DOE agrees that because the small businesses focus solely on the manufacture of residential cooking products, these two manufacturers could be affected to a greater extent than their larger competitors by a potential energy conservation standard that eliminates standing pilots.

For conventional cooking products, DOE interviewed manufacturers about the design options that were presented in the November 2007 ANOPR, which were based on those identified in the 1996 TSD. All manufacturers stated that their current cooking product designs are optimized for cost and performance, and thus any design options not already incorporated were deemed unlikely to save any significant energy. According to manufacturers, new design options would also result in significant upfront price increases and/or consumer utility issues because even purchased part substitutions result in substantial costs due to reliability, safety, and other necessary testing. During the MIA, DOE also sought to verify consumer subgroup(s) that could be disproportionately affected by this rulemaking. One manufacturer noted that some religious groups generally prohibit the use of line-powered appliances and that previous rulemakings (such as furnaces and boilers [81]) have included special provisions for such consumer sub-categories. See section IV.F of this notice for further discussion of the consumer subgroup analysis conducted for the NOPR.

DOE solicited comments from manufacturers about the likely impact on profitability, unit shipments, markups, and other factors that determine the INPV. Multiple manufacturers stated that energy conservation standards have the potential to significantly harm profitability because high-end cooking products typically have higher profit margins than entry-level appliances. Also, features that differentiate high-end appliances from lower-end appliances may be eliminated or become commonplace as a result of energy efficiency standards. Several manufacturers stated it is impossible to pass along cost increases to customers because of the competitive nature of the industry. Any cost increase due to standards set by DOE would thus automatically lower profit margins. One manufacturer expects greater foreign competition if standards force design options currently found only on high-end cooking products downward in the market, because the required redesign would eliminate the competitive advantage of domestic firms. DOE research suggests that the markups for low- and high-end cooking products differ (*i.e.*, margins on high-end products tend to be higher than the margins on low-end products).

b. Microwave Ovens

During interviews in the November 2007 ANOPR phase with microwave oven manufacturers, DOE identified two key issues: (1) Continuing intense price competition and an inability to pass on cost increases, and (2) financial and consumer utility impacts of standby power standards. Additional topics raised by microwave oven manufacturers during the NOPR-phase interviews included: (1) The validity and cost-effectiveness of design options, (2) factors that determine the INPV; and (3) microwave oven test procedure issues.

All manufacturers noted that most microwave oven manufacturing has moved overseas due to intense price competition and commoditization of this product category. Two manufacturers stated that they still wholly manufacture or assemble microwave ovens from components domestically, though the market share of these shipments is low compared to total industry shipments. All manufacturers stated the difficulty of passing any price increases (due to raw material costs, for example) on to consumers and they expect any energy conservation standard to further cut into manufacturer profits.

DOE sought comment on the various pathways that manufacturers could elect to pursue to meet proposed standby power consumption limits. Multiple pathways exist, based on the selection of the (1) display technology, (2) power supply/control boards, (3) cooking sensors, and (4) the possible incorporation of algorithms to automatically reduce standby power after a period of inactivity (the max-tech option).

All microwave oven manufacturers that DOE interviewed noted that the choice of display technology is an important differentiator in the marketplace. DOE research suggests that, if constantly active, VFD displays of the type commonly found in microwave ovens are unlikely to meet a standby power standard of 1.5 W or lower. Thus, in their opinion such a standby standard could lead to the loss of consumer utility.

Noting manufacturer concerns about reduced utility resulting from standby power requirements, DOE researched this issue in detail. Microwave ovens with all other display types found in the DOE sample are projected to be able to meet a 1.0 W standby level as long as other standby power-consuming components are carefully specified. DOE consulted power supply design subject matter experts before conducting interviews with manufacturers. The subject matter experts noted that the no-load standby loads imposed by the power supplies in the DOE microwave oven test sample could be reduced with improved materials or by a topology change to a switching power supply (which has more parts, a higher cost, and potentially lower reliability). One manufacturer stated that it already makes microwave ovens that use switching power supplies for the U.S. market. The manufacturer noted that such a power supply change reduced the standby power of that manufacturer's product from approximately 3 W to 1–2 W. All manufacturers agreed that substantial investments in product development

[81] Refer to: *http://www.eere.energy.gov/buildings/appliance_standards/residential/furnaces_boilers.html.*

would likely result from standby power standards.

All microwave oven manufacturers believe that a cooking sensor provides significant product differentiation. One manufacturer noted that it will transition this year to an absolute humidity sensor with zero standby power and zero incremental cost above that of a conventional absolute humidity sensor. For further information regarding microwave ovens, sensors, and standby power requirements, see section IV.B.1.a of this notice and chapter 5 of the TSD accompanying this notice.

In some countries, such as Japan, many microwave ovens power down automatically after a period of inactivity. Based on DOE criteria, such microwave ovens achieve max-tech standby power, since they consume minimally more power than microwave ovens with electromechanical timers while allowing the use of a cooking sensor. All manufacturers that DOE interviewed oppose the max-tech standby level (0.02 W), claiming that such a standard would effectively force manufacturers to switch off the displays on their microwave ovens after a period of inactivity. Not only would this require a completely revised control circuit (with additional cost, uncertain reliability, additional testing, and other implications), but it would also reduce the ability of manufacturers to differentiate their products in the marketplace. All manufacturers stated that consumers expect that a microwave oven equipped with a display should show clock time while in standby mode.

DOE identified two domestic microwave oven manufacturing facilities. DOE solicited comments from all microwave oven manufacturers regarding current industry conditions and likely responses to potential energy conservation standards. One manufacturer stated that any incremental cost could lead to plant closures and a shift to production facilities where the labor costs are lower.

All manufacturers oppose a standby level that would effectively limit their ability to differentiate high- versus low-end products in the market. During interviews, manufacturers were asked to comment on the minimum standby limit that would allow such differentiation. The minimum standby limit varied by manufacturer and ranged from 1.5 W to 4 W.

c. Commercial Clothes Washers

The key issues for CCW manufacturers remain unchanged from the November 2007 ANOPR analysis. During the NOPR MIA interviews, all CCW manufacturers stated they continue to support multiple CCW product classes and worry that high efficiency standards will significantly depress CCW unit shipments by encouraging the re-manufacture of old equipment and shifting the market further to in-unit laundry. Since its clothes washer revenue is so dependent on CCW sales, the LVM predicts that it will be impacted disproportionately by any CCW standard. The NOPR MIA interviews also focused on validating the November 2007 ANOPR CCW cost-efficiency curve. Based on conversations with all major CCW manufacturers and the determination of two CCW product classes, DOE is proposing two revised curves. For more details on the updated cost-efficiency curve, see section IV.C.2.b of this notice.

CCW manufacturers identified five key issues in the ANOPR interviews: (1) The risk of eliminating top-loading washers from the market; (2) reduced product shipments due to a shift from central laundry facilities to in-unit residential laundry and prolonging the life of existing equipment; (3) reduced cleaning performance of certain energy-saving design options; (4) the possible relocation of production facilities outside the country; and (5) the potential for industry consolidation and/or the elimination of the LVM. (See chapter 13 of the TSD accompanying this notice for more details.) DOE addressed each of these key issues again during manufacturer interviews in the NOPR phase. Additional topics DOE discussed with CCW manufacturers during the NOPR-phase interviews included: (1) Higher efficiency top-loading CCWs; (2) CCW performance metrics; (3) equipment reliability; and (4) test procedure issues.

All manufacturers stated both publicly and privately that they support two CCW product classes, with separate efficiency standards for front-loading and top-loading CCWs. All CCW manufacturers stated that they expect a single efficiency standard to result in the elimination of top-loading CCWs with a traditional agitator. According to multiple manufacturers, the higher TSLs are technically feasible with non-agitator top-loading platforms that are based on existing RCW designs. Whirlpool stated that it could develop such a washer, though the company did not disclose the cost. (Whirlpool, No. 28 at p. 5) However, multiple manufacturers consider these non-agitator top-loading CCWs unacceptable for the CCW market due to consumer utility issues. They believe that such CCWs cannot properly accommodate overloading and that consumer dissatisfaction could arise from poor wash quality.

Manufacturers believe elimination of agitator top-loading washers could also harm laundromats and route operators who own and operate CCWs. Existing inventories of replacement parts for top-loading washers could become obsolete as top-loading machines are replaced by front-loading models, potentially representing significant stranded capital.

DOE sought comment from manufacturers regarding the possible impacts on CCW shipments due to proposed efficiency standards. All manufacturers agreed that the CCW market is at best flat, and possibly in decline. Manufacturers stated that: (1) Higher CCW costs could hasten the trend in multi-home housing from centralized CCW facilities to in-unit laundry; and (2) route operators and other CCW owners are expected to aggressively repair and remanufacture existing top-loading units rather than replace them with incompatible models. Manufacturers also expressed concern about the potential of energy efficiency standards to decrease shipments due to the higher initial costs of front-loading CCWs. Manufacturers stated that top-loading CCWs are currently significantly lower in price, are more reliable, and have lower spare parts costs than front-loading CCWs. Because multi-housing units typically face fixed capital budgets, those units could purchase fewer CCWs if standards increase purchase prices. Since total industry CCW annual shipments are approximately 200,000, all manufacturers contacted were skeptical that engineering resources and capital would be used to design new, lower-cost front-loading machines or expand existing production lines. During the ANOPR interviews, manufacturers stated that all top-loading CCW manufacturing facilities are domestic, whereas a significant number of front-loading shipments are sourced from abroad. Thus, any forced investments or decrease in top-loading shipments will disproportionately affect U.S. manufacturing sites.

As noted above, three domestic manufacturers comprise nearly 100 percent of the CCW market. Two of them are large, diversified appliance manufacturers, whereas the LVM focuses exclusively on laundry products (and has an approximately 45 percent market share.) Because the LVM derives 87 percent of its clothes washer revenue from CCW sales, the impact of any CCW efficiency standards will affect the LVM more than its competitors, which derive

about one percent of their clothes washer revenue from CCW sales. The LVM has also stated that any standard that eliminates its current top-loading CCW platform, though not necessarily forcing the company out of business entirely, would materially harm the company and likely force it out of the clothes washer market altogether. For a detailed discussion of the LVM MIA issues, see the TSD accompanying this notice, chapter 13 and appendix 13–A.

H. Employment Impact Analysis

DOE considers employment impacts in the domestic economy as one factor in selecting a proposed standard. Employment impacts include direct and indirect impacts. Direct employment impacts are any changes in the number of employees for manufacturers of the appliance products that are the subject of this rulemaking, their suppliers, and related service firms. Indirect employment impacts are employment changes in the larger economy that occur due to the shift in expenditures and capital investment caused by the purchase and operation of more-efficient appliances. The MIA addresses the portion of direct employment impacts that concern manufacturers of the two appliance products that are subject to further analysis in this rulemaking, as well as the direct impacts on the suppliers of these manufacturers and related service firms.

Indirect employment impacts from standards consist of the net jobs created or eliminated in the national economy, other than in the manufacturing sector being regulated, due to: (1) Reduced spending by end users on energy (electricity, gas (including liquefied petroleum gas), and oil); (2) reduced spending on new energy supply by the utility industry; (3) increased spending on the purchase price of new products; and (4) the effects of those three factors throughout the economy. DOE expects the net monetary savings from standards to be redirected to other forms of economic activity. DOE also expects these shifts in spending and economic activity to affect the demand for labor in the short term, as explained below.

One method for assessing the possible effects on the demand for labor of such shifts in economic activity is to compare sectoral employment statistics developed by the BLS. The BLS regularly publishes its estimates of the number of jobs per million dollars of economic activity in different sectors of the economy, as well as the jobs created elsewhere in the economy by this same economic activity. Data from BLS indicate that expenditures in the utility sector generally create fewer jobs (both directly and indirectly) than expenditures in other sectors of the economy. There are many reasons for these differences, including wage differences and the fact that the utility sector is more capital intensive and less labor intensive than other sectors. (See Bureau of Economic Analysis, *Regional Multipliers: A User Handbook for the Regional Input-Output Modeling System (RIMS II)*, Washington, DC, U.S. Department of Commerce (1992).) Efficiency standards have the effect of reducing consumer utility bills. Because reduced consumer expenditures for energy likely lead to increased expenditures in other sectors of the economy, the general effect of efficiency standards is to shift economic activity from a less labor-intensive sector (*i.e.*, the utility sector) to more labor-intensive sectors (*e.g.*, the retail and manufacturing sectors). Thus, based on the BLS data alone, DOE believes net national employment will increase due to shifts in economic activity resulting from standards for cooking products and CCWs.

In developing this proposed rule, DOE estimated indirect national employment impacts using an input/output model of the U.S. economy called Impact of Sector Energy Technologies (ImSET). ImSET is a spreadsheet model of the U.S. economy that focuses on 188 sectors most relevant to industrial, commercial, and residential building energy use.[82] ImSET is a special-purpose version of the ''U.S. Benchmark National Input-Output'' (I–O) model, which has been designed to estimate the national employment and income effects of energy-saving technologies that are deployed by DOE's Office of Energy Efficiency and Renewable Energy. Compared with the previous versions of the model used in earlier rulemakings, this version allows for more complete and automated analysis of the essential features of energy efficiency investments in buildings, industry, transportation, and the electric power sectors. The ImSET software includes a computer-based I–O model with structural coefficients to characterize economic flows among the 188 sectors. ImSET's national economic I–O structure is based on the 1997 U.S. benchmark table (Lawson, *et al.* 2002),[83] specially aggregated to 188 sectors. DOE estimated changes in expenditures using the NIA spreadsheet. Using ImSET, DOE then estimated the net national, indirect-employment impacts on employment by sector of potential new efficiency standards for cooking products and CCWs.

While both ImSET and the direct use of BLS employment data suggest the proposed standards could increase the net demand for labor in the economy, the gains would most likely be very small relative to total national employment. Therefore, DOE concludes only that the proposed standards are likely to produce employment benefits that are sufficient to fully offset any adverse impacts on employment in the manufacturing or energy industries related to cooking products and CCWs. (See the TSD accompanying this notice, chapter 15.)

I. Utility Impact Analysis

The utility impact analysis estimates the change in the forecasted power generation capacity for the Nation, which would be expected to result from adoption of new standards. This analysis separately determines the changes to supply and demand as a result of natural gas, fuel oil, liquefied petroleum gas, or electricity residential consumption savings due to the standard. DOE calculated this change using the NEMS–BT computer model. NEMS–BT models certain policy scenarios such as the effect of reduced energy consumption per TSL by fuel type. The analysis output provides a forecast for the needed generation capacities at each TSL. The estimated net benefit of the standard is the difference between the forecasted generation capacities by NEMS–BT and the *AEO 2008* Reference Case.

DOE obtained the energy savings inputs associated with electricity and natural gas consumption savings from the NIA. These inputs reflect the effects of efficiency improvement on residential cooking product and CCW energy consumption, both fuel (natural gas) and electricity. Chapter 14 of the TSD accompanying this notice presents results of the utility impact analysis.

EEI stated that DOE should show the change in natural gas production (*i.e.*, infrastructure) as well as electric generation capacity as a result of standards. (EEI, No. 25 at p. 4) Historically, DOE's approach for the utility impact analysis has only evaluated the impact on natural gas consumption and utility sales. The evaluation of impacts on the natural gas infrastructure that may result from declines in the sales of natural gas is not

[82] Roop, J. M., M. J. Scott, and R. W. Schultz, *ImSET: Impact of Sector Energy Technologies*, (PNNL–15273 Pacific Northwest National Laboratory) (2005). Available at: *http://www.pnl.gov/main/publications/external/technical_reports/PNNL–15273.pdf.*

[83] Lawson, Ann M., Kurt S. Bersani, Mahnaz Fahim-Nader, and Jiemin Guo, ''Benchmark Input-Output Accounts of the U.S. Economy, 1997,'' *Survey of Current Business* (Dec. 2002) pp. 19–117.

possible with the NEMS–BT analysis methodology. Therefore, DOE did not perform this type of evaluation in the utility impact analysis for the residential cooking product and CCW rulemaking. It is unlikely such impacts would be significant for the gas utility industry, however, given that the annual change in natural gas supply resulting from the standards is in the range of 1–18 trillion Btu (compared to an annual national gas supply of 19.04 quadrillion Btu.[84])

In its November 2007 ANOPR, DOE stated that it did not plan to estimate impacts on water and wastewater utilities for its proposed rule, because the water and wastewater utility sector is more complicated than either the electric utility or gas utility sectors, with a high degree of geographic variability produced by a large diversity of water resource availability, institutional history, and regulatory context. 72 FR 64432, 64508 (Nov. 15, 2007). Further, DOE was not aware of any national data or nationally based tool that would allow it to calculate the impacts on water and wastewater utilities or water and wastewater infrastructure requirements. The Joint Comment and numerous water organizations stated that DOE should analyze the impacts on water and wastewater utilities. The Joint Comment added that because there are widespread problems in water and wastewater infrastructure financing, DOE should commit to conducting such an analysis. The commenters cite the Environmental Protection Agency's (EPA's) 2002 report, *The Clean Water and Drinking Water Infrastructure Gap Analysis* (EPA–816–R–02–020), as evidence of the infrastructure problem. (Joint Comment, No. 29 at p. 4; AWE, AR, AMWA, CUWCC, and TBW, No. 34 at p. 1)

In response to public comments, DOE nevertheless conducted a review of governmental and non-governmental analytical tools that might prove suitable for calculating the impacts of CCW standards on water and wastewater utilities or water and wastewater infrastructure requirements. Specifically, the EPA, the U.S. Geological Survey (USGS), and DOE are conducting or initiating national activities to study water and wastewater issues, including those pertaining to water and wastewater utilities. These tools are discussed below.

The EPA's WaterSense program[85] provides information to enhance the market for water-efficient products, programs, and practices. EPA developed the National Water Saving (NWS) spreadsheet tool to estimate water savings attributable to WaterSense activities. The model examines the effects of WaterSense by tracking the shipments of products that WaterSense designates as water-efficient. It estimates savings based on an accounting analysis of water-using equipment and building stock.[86] Since this tool only permits calculation of water savings, however, it would not add any capabilities that DOE does not already have

With respect to non-governmental efforts, the California Urban Water Conservation Council (CUWCC) and the Pacific Institute have developed two tools for California water utilities. *Avoided Cost Due to Water Efficiency and Conservation*[87] assists California water utilities in calculating avoided costs and developing methods to quantify the environmental benefits and costs associated with implementing water efficiency programs. *The Water to Air Model*[88] helps California water managers quantify the energy and air quality dimensions of water management decisions. Neither of these models would allow estimation of impacts of water savings on water utility infrastructure requirements, however.

In sum, none of these activities has yet produced the necessary data or tools to permit DOE to conduct a water utility impact analysis of the type requested by commenters.

Although DOE cannot yet determine water and wastewater utility impacts at the national level, both the LCC analysis and the NIA do include the economic savings from decreased water and wastewater charges. Such economic savings should include the economic value of any energy savings that may be included in the provision of consumer water and wastewater services.

J. Environmental Assessment

DOE has prepared a draft Environmental Assessment (EA) pursuant to the National Environmental Policy Act and the requirements of 42 U.S.C. 6295(o)(2)(B)(i)(VI) and 6316(a), to determine the environmental impacts of the proposed standards. Specifically, DOE estimated the reduction in power sector emissions of CO_2 using the NEMS–BT computer model. DOE calculated a range of estimates for reduction in oxides of nitrogen (NO_X) emissions and mercury (Hg) emissions using power sector emission rates. However, the Environmental Assessment (see chapter 16 of the TSD accompanying this notice) does not include the estimated reduction in power sector emissions of SO_2, because DOE has determined that due to the presence of national caps on SO_2 emissions as addressed below, any such reduction resulting from an energy conservation standard would not affect the overall level of SO_2 emissions in the United States. Because the operation of gas cooking products and CCWs requires use of fossil fuels and results in emissions of CO_2 and NO_X, DOE also accounted for the reduction in CO_2 and NO_X emissions from standards at the sites where these appliances are used.

The NEMS–BT is run similarly to the *AEO 2008* NEMS, except that cooking product and CCW energy use is reduced by the amount of energy saved (by fuel type) due to the TSLs. DOE obtained the inputs of national energy savings from the NIA spreadsheet model. For the environmental assessment, the output is the forecasted physical emissions. The net benefit of the standard is the difference between emissions estimated by NEMS–BT and the *AEO 2008* Reference Case. The NEMS–BT tracks CO_2 emissions using a detailed module that provides results with broad coverage of all sectors and inclusion of interactive effects. For the final rule, DOE intends to revise the emissions analysis using the *AEO 2009* NEMS model using the process outlined above.

The Clean Air Act Amendments of 1990 set an emissions cap on SO_2 for all power generation. The attainment of this target, however, is flexible among generators and is enforced through the use of emissions allowances and tradable permits. Because SO_2 emissions allowances have value, they will almost certainly be used by generators, although not necessarily immediately or in the same year with and without a standard in place. In other words, with or without a standard, total cumulative SO_2 emissions will always be at or near

[84] Department of Energy—Energy Information Administration, *Annual Energy Outlook 2008 with Projections to 2030* (DOE/EIA–0383) (June 2008) Table A1. Available at: *http://www.eia.doe.gov/oiaf/aeo/pdf/0383(2008).pdf.*

[85] The WaterSense program provides the public with information regarding water efficient products, including available consumer products and general information related to water efficiency. Refer to: *http://www.epa.gov/watersense/.*

[86] McNeil, Michael, Camilla Dunham Whitehead, Virginie Letschert, and Mirka della Cava, *WaterSense® Program: Methodology for National Water Savings Analysis Model Indoor Residential Water Use* (LBNL) (Feb. 2008).

[87] This model is available at: *http://www.cuwcc.com/technical/action.lasso?-database=cuwcc_catalog&-layout=CDML&-response=detailed_results.html&-recordID=34196&-search.*

[88] This model is available at: *http://www.pacinst.org/resources/water_to_air_models/index.htm.*

the ceiling, while there may be some timing differences between year-by-year forecast. Thus, it is unlikely that there will be an SO_2 environmental benefit from electricity savings as long as there is enforcement of the emissions ceilings.

Although there may not be an actual reduction in SO_2 emissions from electricity savings, there still may be an economic benefit from reduced demand for SO_2 emission allowances. Electricity savings decrease the generation of SO_2 emissions from power production, which can decrease the need to purchase or generate SO_2 emissions allowance credits, and decrease the costs of complying with regulatory caps on emissions.

Like SO_2, future emissions of NO_X and Hg would have been subject to emissions caps under the Clean Air Interstate Act (CAIR) and Clean Air Mercury Rule (CAMR). As discussed later in section V.B.6, these rules have been vacated by a Federal court. But the NEMS–BT model used for today's proposed rule assumed that both NO_X and Hg emissions would be subject to CAIR and CAMR emission caps. In the case of NO_X emissions, CAIR would have permanently capped emissions in 28 eastern States and the District of Columbia. Because the NEMS–BT modeling assumed NO_X emissions would be subject to CAIR, DOE established a range of NO_X reductions based on the use of a NO_X low and high emission rates (in metric kilotons (kt) of NO_X emitted per terawatt-hours (TWh) of electricity generated) derived from the *AEO 2008*. To estimate the reduction in NO_X emissions, DOE multiplied these emission rates by the reduction in electricity generation due to the standards considered. For mercury, because the emissions caps specified by CAMR would have applied to the entire country, DOE was unable to use the NEMS–BT model to estimate the physical quantity changes in mercury emissions due to energy conservation standards. To estimate mercury emission reductions due to standards, DOE used an Hg emission rate (in metric tons of Hg per energy produced) based on the *AEO 2008*. Because virtually all mercury emitted from electricity generation is from coal-fired power plants, DOE based the emission rate on the metric tons of mercury emitted per TWh of coal-generated electricity. To estimate the reduction in mercury emissions, DOE multiplied the emission rate by the reduction in coal-generated electricity associated with standards considered.

In comments on the ANOPR, Earth Justice (EJ) stated that DOE must evaluate the economic benefits of the standards' effects on allowance prices, that the exclusion of these benefits from DOE's analysis is arbitrary, and that this exclusion serves only to artificially depress the economic value of stronger efficiency standards. (EJ, No. 31 at pp. 1–2) DOE believes that the impact of any one standard on the allowance credit price is likely small and highly uncertain. However, DOE has attempted to monetize the potential benefit from SO_2 emission reductions resulting from cooking product and CCW standards. The potential impact on SO_2 allowance prices are discussed in section V.B.6. Because the CAIR and CAMR rules have been vacated by the courts, NO_X and Hg allowances are no longer relevant, and therefore, DOE did not estimate the potential impact of standards on NO_X and Hg allowance prices in today's proposed rule.

DOE also received comments from stakeholders on the valuation of CO_2 emissions savings that result from standards. The Joint Comment stated that by not placing an economic value on the benefits from reduced CO_2 emissions, DOE makes it difficult to weigh these benefits in comparison to other benefits and costs resulting from a given standard level. Implicitly, the Joint Comment argued that DOE is arbitrarily valuing pollution reductions at $0, so the best way to avoid this mistake would be to estimate an economic value for pollutant reductions. According to the Joint Comment, voluminous work, both from academia and the business world, exists on the range of potential carbon prices under various regulatory scenarios. (Joint Comment, No. 29 at pp. 10–11) EJ stated that failure to assign an economic value to CO_2 emissions is tantamount to valuing those emissions at zero, an approach that the United States Court of Appeals for the Ninth Circuit recently held in *Center for Biological Diversity* v. *NHTSA,* 508 F.3d 508, 535 (9th Cir. 2007), is arbitrary and capricious. Therefore, EJ reasoned that exclusion of CO_2 emissions reduction benefits from DOE's analysis on the basis of uncertainty about their precise measure would be arbitrary and capricious, arguing that there is considerable agreement that the monetized value of avoided CO_2 is significantly higher than zero. (EJ, No. 31 at p. 2) DOE has made several additions to its monetization of environmental emissions reductions in today's proposed rule, which are discussed in Section V.B.6, but has chosen to continue to report these benefits separately from the net benefits of energy savings. Nothing in EPCA, nor in the National Environmental Policy Act, requires that the economic value of emissions reduction be incorporated in the net present value analysis of the value of energy savings. Unlike energy savings, the economic value of emissions reduction is not priced in the marketplace.

EEI stated that in its analysis of CO_2, SO_2, mercury, and NO_X emissions from electric power generation, DOE should account for the rise in renewable portfolio standards and the possibility of an upcoming CO_2 cap and trade program, both of which would reduce the amount of CO_2 produced per kWh electricity generated. (EEI, No. 25 at p. 4) DOE's estimates of these emissions are based on output from the *AEO 2008* version of NEMS. The emissions projections reflect EIA's best judgment about market factors and policies that affect utility choice of power plants for electricity generation. EIA generally includes only those policies that are already enacted. As the enactment of a CO_2 cap and trade program is uncertain at this point, DOE believes it would be inappropriate to speculate on the nature and timing of such a policy for the purposes of this rulemaking.

DOE also estimated the impacts on emissions at the sites where the appliance products are installed. In addition to electricity, the operation of gas cooking products and CCWs requires use of fossil fuels and results in emissions of CO_2 and NO_X at the sites where the appliances are used. NEMS–BT provides no means for estimating such emissions. Therefore, DOE calculated separate estimates of the effect of the proposed standards on site emissions of CO_2 and NO_X, based on emissions factors derived from the literature. Natural gas was the only fossil fuel accounted for by DOE in its analysis of standards for cooking products and CCWs. Because natural gas combustion does not yield SO_2 emissions, DOE did not report the effect of the proposed standards on site emissions of SO_2. DOE reports the estimates of CO_2 and NO_X site emission savings in its environmental assessment.

EJ stated that DOE has presented no reasoned explanation—nor does one exist—of why environmental benefits that accrue in the future should be devalued. EJ stated that DOE's intention to discount emissions reductions only underscores that emissions reductions are susceptible to evaluation in economic as well as purely environmental terms. If DOE intends to apply strictly monetary concepts like discount rates to its valuation of emissions reductions, then it must incorporate those reductions into its cost/benefit analysis by calculating their

monetary value. (EJ, No. 31 at pp. 2–3) DOE believes that discounted environmental benefits represent a policy perspective wherein benefits farther in the future are less significant than energy savings closer to the present. DOE continues to provide discounted environmental benefits for today's proposed rule.

In its November 2007 ANOPR, DOE stated it would conduct a separate analysis of wastewater discharge impacts as part of the environmental assessment for water-consuming appliances. For today's proposed rule, DOE conducted this analysis for CCWs based on estimates of CCW water use and the typical amount of water retention in a clothes load after a wash cycle. Based on the RMC of the clothes after a wash cycle, DOE estimated that approximately two percent of CCW water use is retained in the clothes load at the baseline efficiency level. The RMC decreases as a function of increasing CCW efficiency, thereby decreasing the amount of water retention in the clothes. But the amount of water use decreases with CCW efficiency as well. Because the rate of water use savings grows at approximately double the rate of water retention, the increased amount of water retained in the clothes as a percentage of the water use savings drops from approximately two percent to one percent over the range of CCW efficiencies considered. Therefore, assuming that water not retained in the clothes load is discharged into the wastewater stream, wastewater discharge savings range from 98 to 99 percent of the water use savings at the baseline and max-tech levels, respectively. Section V.B.6 reports the estimated wastewater discharge savings.

V. Analytical Results

A. Trial Standard Levels

DOE analyzed the benefits and burdens of a number of TSLs for the appliance products that are the subject of today's proposed rule. Trial standard levels are based on efficiency levels explored in the ANOPR and were selected upon consideration of economic factors and current market conditions. The basis for the TSL selection is described for each of the appliance products below. Tables V.1, V.2, V.3, and V.4 present the TSLs and the corresponding product class efficiencies for conventional cooking products, microwave ovens (two tables), and CCWs, respectively.

1. Cooking Products

Table V.1 shows the TSLs for conventional cooking products. As discussed in section III.C.1, DOE conducts a screening analysis to determine the design options that are technologically feasible and can be considered as measures to improve product efficiency. However, as discussed in the November 2007 ANOPR as well as chapters 3 and 4 of the TSD accompanying this notice, there are few design options available for improving the efficiency of these cooking products due to physical limitations on energy transfer to the food load. This is particularly the case for all cooktop and self-cleaning oven product classes. For electric cooktops, DOE was able to identify only a single design change for analysis. For gas cooktops and electric self-cleaning ovens, DOE was able to identify two design options for analysis. And for gas self-cleaning ovens, DOE was able to identify three design options for analysis. Although DOE considered several design options for standard ovens, with the exception of eliminating standing pilots for gas standard ovens, none significantly increased product efficiency. Specifically, eliminating standing pilots reduces overall gas consumption by over 50 percent while all other design options reduce gas consumption by approximately two percent. Therefore, DOE gave further consideration to only four TSLs for conventional cooking products.

TSL 1 represents the elimination of standing pilot ignition systems from gas cooking products. All other product classes are unaffected by TSL 1, including gas self-cleaning ovens, which are not allowed to use standing pilot ignition systems because they already use electricity and come equipped with power cords to enable the self-cleaning cycle. Under TSL 1, DOE's current prescriptive standard of disallowing the use of standing pilot ignition systems in gas cooking pilots equipped with power cords would be extended to all gas cooking products, regardless of whether the appliance is equipped with a power cord. Also, under TSL 1, there would be no need for DOE to regulate the EF of any of the conventional cooking product classes because only standing pilot ignition systems are being affected.

TSL 2 for conventional cooking products consists of the candidate standard levels from each of the product classes that provide a majority of consumers (who are impacted by the standard) with an economic benefit. Based on this criterion, only electric coil cooktops and electric standard ovens have candidate standard levels that differ from those in TSL 1. In other words, for the remaining five product classes (electric smooth cooktops, electric self-cleaning ovens, and all gas cooking product classes), analytical results indicate there is no candidate standard level that provides an economic benefit to a majority of consumers.

TSL 3 for conventional cooking products consists of the same candidate standard levels as TSL 2, with the exception of the gas self-cleaning oven product class. For gas self-cleaning ovens, the design option that provides, on average, a small level of economic benefit to consumers is included.

TSL 4 is the maximum technologically feasible level.

TABLE V.1—TRIAL STANDARD LEVELS FOR CONVENTIONAL COOKING PRODUCTS

Product Classes	TSLs (EF)			
	TSL 1	TSL 2	TSL 3	TSL 4
Electric Coil Cooktops	No Standard (Baseline)	0.769	0.769	0.769
Electric Smooth Cooktops	No Standard (Baseline)	No Standard (Baseline)	No Standard (Baseline)	0.753
Gas Cooktops	No Pilot	No Pilot	No Pilot	0.420
Electric Standard Ovens	No Standard (Baseline)	0.1163	0.1163	0.1209
Electric Self-Cleaning Ovens	No Standard (Baseline)	No Standard (Baseline)	No Standard (Baseline)	0.1123
Gas Standard Ovens	No Pilot	No Pilot	No Pilot	0.0600
Gas Self-Cleaning Ovens	No Change to Existing Standard (Baseline).	No Change to Existing Standard (Baseline).	0.0625	0.0632

As discussed previously in section III.A, DOE has concluded that it is currently technically infeasible to combine cooking efficiency (or EF) into a new efficiency metric with standby power consumption in microwave ovens. As a result, DOE considered two sets of TSLs-one set comprised solely of EF levels (TSLs 1a–4a) and a second set comprised solely of standby power levels (TSLs 1b–4b).

Table V.2 shows the TSLs for the regulation of cooking efficiency or EF. TSLs 1a though 4a correspond to candidate standard levels 1a through 4a, respectively, and affect only the EF. For TSLs 1a through 4a, no standard to limit standby power is specified. TSL 4a corresponds to the maximum feasible EF level. None of these first four TSLs have an LCC lower than the baseline level or an NPV that provides a net economic benefit to the Nation.

TABLE V.2—TRIAL STANDARD LEVELS FOR MICROWAVE OVEN ENERGY FACTOR

	TSLs			
	TSL 1a	TSL 2a	TSL 3a	TSL 4a
EF	0.586	0.588	0.597	0.602

Table V.3 shows the TSLs for the regulation of standby power. TSLs 1b through 4b correspond to candidate standard levels 1b through 4b, respectively, and affect only standby power. For TSLs 1b through 4b, no standard on EF is specified. All four of these TSLs yield LCC savings relative to the baseline level and provide a net economic benefit to the Nation. TSL 3b corresponds to the maximum feasible level for the regulation of standby power, which does not affect the appliance's capability to continually display the time. TSL 4b corresponds to the maximum technologically feasible level for the regulation of standby power, and it also represents the level with the minimum LCC as well as the maximum NPV. However, TSL 4b results in the inability of the appliance to continually display the time.

TABLE V.3— TRIAL STANDARD LEVELS FOR MICROWAVE OVEN STANDBY POWER

	TSLs			
	TSL 1b	TSL 2b	TSL 3b	TSL 4b
Standby Power (W)	2.0	1.5	1.0	0.02

2. Commercial Clothes Washers

Table V.4 shows the TSLs for CCWs. TSLs consist of a combination of MEF and WF for each product class. In all, DOE has considered five TSLs. TSL 1 corresponds to the first candidate standard level from each product class and represents the efficiency level for each class with the least significant design change. For TSL 2, the candidate standard levels for each class are simply incremented to the second candidate standard level and represent the next technological design change for each class. TSL 3 represents the third candidate standard level for top-loading washers (the maximum efficiency level for this class) while keeping front-loading washers at its second candidate standard level. For TSL 3, front-loading washers were held to the second candidate standard level in order to minimize the equipment price difference between the two product classes. For TSL 4, top-loading washers are retained at their maximum efficiency level while front-loading washers are incremented to their third candidate standard level. Finally, TSL 5 corresponds to the maximum technologically feasible level for each product class. In progressing from TSL 1 to TSL 5, the LCC savings, NES, and NPV all increase. TSL 5 represents the level with the minimum LCC and maximum NES and NPV.

TABLE V.4—TRIAL STANDARD LEVELS FOR COMMERCIAL CLOTHES WASHERS

	TSL 1	TSL 2	TSL 3	TSL 4	TSL 5
Top-Loading:					
MEF	1.42	1.60	1.76	1.76	1.76
WF	9.5	8.5	8.3	8.3	8.3
Front-Loading:					
MEF	1.80	2.00	2.00	2.20	2.35
WF	7.5	5.5	5.5	5.1	4.4

B. Economic Justification and Energy Savings

1. Economic Impacts on Consumers

a. Life-Cycle Cost and Payback Period

To evaluate the net economic impact of standards on consumers, DOE conducted LCC and PBP analyses for each TSL. In general, higher-efficiency products would affect consumers in two ways: (1) annual operating expense would decrease; and (2) purchase price would increase. Section IV.D of this notice discusses the inputs DOE used for calculating the LCC and PBP.

The key outputs of the LCC analysis are a mean LCC savings relative to the baseline product design, as well as a probability distribution or likelihood of LCC reduction or increase, for each TSL and product class. The LCC analysis also estimates the fraction of product consumers for which the LCC will decrease (net benefit), increase (net cost), or exhibit no change (no impact) relative to the base-case equipment forecast. No impacts occur when the

equipment efficiencies of the base-case forecast already equal or exceed the considered TSL efficiency.

Tables V.5 through V.17 show the mean LCC savings and the percent of households with a net cost, no impact, and a net benefit (*i.e.*, positive savings) at each TSL for each product class. The average LCC and its components (the average installed price and the average operating cost) are also presented for each TSL. The tables also show the median and average payback period at each TSL.

Cooking Products. Tables V.5, V.6, and V.7 show the LCC and PBP results for cooktops. For example, in the case of gas cooktops, TSL 1 (pilotless ignition with an efficiency of 0.399 EF) shows an average LCC savings of $13 for the average household. Note that for TSL 1, 93.5 percent of the housing units in 2012 already purchased a gas cooktop with pilotless ignition in the base case and, thus, have zero savings due to the standard. If one compares the LCC of the average household at the baseline level at 0.106 EF ($822) to TSL 1 at 0.399 EF ($559), then the difference in the LCCs of the average household is $263. However, since the base case includes a significant number of households that are not impacted by the standard, the average savings over all of the households is actually $13, not $263. DOE determined the median and average values of the PBPs shown below by excluding the percentage of households not impacted by the standard. For example, in the case of TSL 1 for gas cooktops, 93.5 percent of the households did not factor into the calculation of the median and average PBP.

TABLE V.5—ELECTRIC COIL COOKTOPS: LIFE-CYCLE COST AND PAYBACK PERIOD RESULTS

TSL	EF	Life-cycle cost			Life-cycle cost savings				Payback period (years)	
		Average installed price	Average operating cost	Average LCC	Average savings	Households with			Median	Average
						Net cost (percent)	No impact (percent)	Net benefit (percent)		
Baseline	0.737	$272	$173	$445	.....	.....	.....	.....	.....	.....
1	0.737	272	173	445	No change from baseline					
2, 3, 4 ...	0.769	276	166	441	$4	29.5	0.0	70.6	7.3	18.1

TABLE V.6—ELECTRIC SMOOTH COOKTOPS: LIFE-CYCLE COST AND PAYBACK PERIOD RESULTS

TSL	EF	Life-cycle cost			Life-cycle cost savings				Payback period (years)	
		Average installed price	Average operating cost	Average LCC	Average savings	Households with			Median	Average
						Net cost (percent)	No impact (percent)	Net benefit (percent)		
Baseline	0.742	$309	$173	$482	.....	.....	.....	.....	.....	.....
1, 2, 3 ...	0.742	309	173	482	No change from baseline					
4	0.753	550	170	720	−$238	100.0	0.0	0.0	1,512	3,745

TABLE V.7—GAS COOKTOPS: LIFE-CYCLE COST AND PAYBACK PERIOD RESULTS

TSL	EF	Life-cycle cost			Life-cycle cost savings				Payback period (years)	
		Average installed price	Average operating cost	Average LCC	Average savings	Households with			Median	Average
						Net cost (percent)	No impact (percent)	Net benefit (percent)		
Baseline	0.106	$310	$512	$822	.....	.....	.....	.....	.....	.....
1, 2, 3 ...	0.399	332	227	559	$13	0.2	93.5	6.3	4.5	3.5
4	0.420	361	222	583	−$11	93.9	0.0	6.1	77	271

Similarly, Tables V.8 through V.11 show the LCC and PBP results for ovens (other than microwave ovens.) For example, in the case of gas standard ovens, TSL 1 (pilotless spark ignition with an efficiency of 0.0583 EF) shows an average LCC savings of $6. If one compares the LCC of the base case at 0.0298 EF ($803) to the standards case at 0.0583 EF ($714), then the difference in the LCCs is $89. However, the base case includes a significant number of households that are either at the baseline level or have ovens equipped with pilotless glo-bar ignition (82.3 percent of households). Because the base case includes a significant number of households that are not impacted by the standard, the average savings over all of the households is actually $6, not $289. DOE determined the median and average values of the PBPs shown below by excluding the percentage of households not impacted by the standard. For example, in the case of TSL 1 for gas standard ovens, 82.3 percent of the households did not factor into the calculation of the median and average PBP. Also, the large difference in the average and median values for TSL 4 for all ovens is due to households with excessively long PBPs in the distribution of results. The Monte Carlo simulation for TSL 4 yielded a few results with PBPs in excess of thousands of years. A limited number of

excessively long PBPs produce an average PBP that is very long. Therefore, in these cases, the median PBP is a more representative value to gauge the length of the PBP.

TABLE V.8—ELECTRIC STANDARD OVENS: LIFE-CYCLE COST AND PAYBACK PERIOD RESULTS

TSL	EF	Life-cycle cost			Life-cycle cost savings				Payback period (years)	
		Average installed price	Average operating cost	Average LCC	Average savings	Households with			Median	Average
						Net cost (percent)	No impact (percent)	Net benefit (percent)		
Baseline	0.1066	$414	$218	$631	.....	.....	.....	.....	.....	.....
1	0.1066	414	218	631	No change from baseline					
2, 3	0.1163	421	201	622	$9	43.9	0.0	56.1	8.0	310
4	0.1209	489	194	683	−$52	95.2	0.0	4.8	61	2,337

TABLE V.9—ELECTRIC SELF-CLEANING OVENS: LIFE-CYCLE COST AND PAYBACK PERIOD RESULTS

TSL	EF	Life-cycle cost			Life-cycle cost savings				Payback period (years)	
		Average installed price	Average operating cost	Average LCC	Average savings	Households with			Median	Average
						Net cost (percent)	No impact (percent)	Net benefit (percent)		
Baseline	0.1099	$485	$230	$715	.....	.....	.....	.....	.....	.....
1, 2, 3 ...	0.1099	485	230	715	No change from baseline					
4	0.1123	548	226	774	−$143	78.9	0.0	21.1	240	1263

TABLE V.10—GAS STANDARD OVENS: LIFE-CYCLE COST AND PAYBACK PERIOD RESULTS

TSL	EF	Life-cycle cost			Life-cycle cost savings				Payback period (years)	
		Average installed price	Average operating cost	Average LCC	Average savings	Households with			Median	Average
						Net cost (percent)	No impact (percent)	Net benefit (percent)		
Baseline	0.0298	$430	$373	$803	.....	.....	.....	.....	.....	.....
1, 2, 3 ...	0.0583	464	250	714	$6	6.5	82.3	11.2	9.4	7.3
4	0.0600	507	469	975	−$86	95.0	0.0	5.0	27	473

TABLE V.11—GAS SELF-CLEANING OVENS: LIFE-CYCLE COST AND PAYBACK PERIOD RESULTS

TSL	EF	Life-cycle cost			Life-cycle cost savings				Payback period (years)	
		Average installed price	Average operating cost	Average LCC	Average savings	Households with			Median	Average
						Net cost (percent)	No impact (percent)	Net benefit (percent)		
Baseline	0.0540	$550	$594	$1,144	.....	.....	.....	.....	.....	.....
1, 2	0.0540	550	594	1,144	No change from baseline					
3	0.0625	566	577	1,143	$1	58.9	0.0	41.1	11	164
4	0.0632	574	576	1,150	−$6	68.8	0.0	31.2	16	279

Tables V.12 and V.13 show the LCC and PBP results for microwave ovens. Two sets of results are presented—one for the TSLs that pertain to EF and another for the TSLs that pertain to standby power. For the TSLs pertaining to standby power, TSL 2b (1.5 W standby power) shows an average LCC savings of $13. Note that for TSL 2b, 19.1 percent of the housing units in 2012 have already purchased a microwave oven at this level and, thus, have zero savings due to the standard. If one compares the LCC of the baseline at 0.557 EF and 4 W standby power ($348) to TSL 2b ($333), then the difference in the LCCs is $15. However, since the base case includes a significant number of households that are not impacted by the standard, the average savings over all the households is actually $13, not $15. DOE determined the median and average values of the PBPs shown below by

excluding the percentage of households not impacted by the standard. For example, in the case of TSL 2b, 19.1 percent of the households did not factor into the calculation of the median and average PBP.

TABLE V.12—MICROWAVE OVENS: LIFE-CYCLE COST AND PAYBACK PERIOD RESULTS FOR EF

TSL	EF	Life-cycle cost			Life-cycle cost savings				Payback period (years)	
		Average installed price	Average operating cost	Average LCC	Average savings	Households with			Median	Average
						Net cost (percent)	No impact (percent)	Net benefit (percent)		
Baseline	0.557	$220	$128	$348	.....	.....	.....	.....	.....	.....
1a	0.586	232	123	356	−$3	42.0	53.7	4.3	29	69
2a	0.588	246	123	369	−10	45.2	53.7	1.1	57	133
3a	0.597	267	122	389	−19	45.9	53.7	0.4	81	190
4a	0.602	294	121	415	−31	46.2	53.7	0.1	115	268

TABLE V.13—MICROWAVE OVENS: LIFE-CYCLE COST AND PAYBACK PERIOD RESULTS FOR STANDBY POWER

TSL	EF	Life-cycle cost			Life-cycle cost savings				Payback period (years)	
		Average installed price	Average operating cost	Average LCC	Average savings	Households with			Median	Average
						Net cost (percent)	No impact (percent)	Net benefit (percent)		
Baseline	4.0	$220	$128	$348	.....	.....	.....	.....	.....	.....
1b	2.0	220	115	335	6	0.0	53.7	46.3	0.3	0.3
2b	1.5	221	112	333	13	0.0	19.1	80.9	0.6	0.8
3b	1.0	222	102	331	18	0.0	0.0	100.0	1.5	1.6
4b	0.02	228	102	330	19	0.0	0.0	100.0	3.1	3.5

Commercial Clothes Washers. Tables V.14 and V.15 show the LCC and PBP results for both CCW product applications for the top-loading product class while Tables V.16 and V.17 show the LCC and PPB results for the front-loading product class. For example, in the case of the multi-family application for front-loading washers (Table V.16), TSL 2 (2.00 MEF/5.50 WF) shows an average LCC savings of $52. Note that for TSL 2, 88.3 percent of consumers in 2012 are assumed to already be using a CCW in the base case at TSL 2 and, thus, have zero savings due to the standard. If one compares the LCC of the baseline at 1.72 MEF/8.00 WF ($3980) to TSL 2 ($3489), then the difference in the LCCs is $491. However, since the base case includes a significant number of consumers that are not impacted by the standard, the average savings over all of the consumers is actually $52, not $491. DOE determined the median and average values of the PBPs shown below by excluding the percentage of households not impacted by the standard. For example, in the case of TSL 2 for front-loading washers in a multi-family application, 88.3 percent of the consumers did not factor into the calculation of the median and average PBP.

TABLE V.14—COMMERCIAL CLOTHES WASHERS, TOP-LOADING, MULTI-FAMILY APPLICATION: LIFE-CYCLE COST AND PAYBACK PERIOD RESULTS

TSL	MEF/WF	Life-cycle cost			Life-cycle cost savings				Payback period (years)	
		Average installed price	Average operating cost	Average LCC	Average savings	Households with			Median	Average
						Net cost (percent)	No impact (percent)	Net benefit (percent)		
Baseline	1.26/9.50	$734	$3,034	$3,768	.....	.....	.....	.....	.....	.....
1	1.42/9.50	852	2,934	3,786	−$11.6	45.0	35.7	19.3	10.7	15.6
2	1.60/8.50	940	2,675	3,615	154.5	15.4	2.8	81.7	4.5	5.5
3, 4, 5 ...	1.76/8.30	963	2,560	3,524	243.7	10.0	2.8	87.2	3.8	4.6

TABLE V.15—COMMERCIAL CLOTHES WASHERS, TOP-LOADING, LAUNDROMAT APPLICATION: LIFE-CYCLE COST AND PAYBACK PERIOD RESULTS

TSL	MEF/WF	Life-cycle cost			Life-cycle cost savings				Payback period (years)	
		Average installed price	Average operating cost	Average LCC	Average savings	Households with			Median	Average
						Net cost (percent)	No impact (percent)	Net benefit (percent)		
Baseline	1.26/9.50	$734	$3,191	$3,925	.....	.....	.....	.....	.....	.....
1	1.42/9.50	852	3,103	3,955	−$19.6	53.4	35.7	10.9	7.4	8.5

TABLE V.15—COMMERCIAL CLOTHES WASHERS, TOP-LOADING, LAUNDROMAT APPLICATION: LIFE-CYCLE COST AND PAYBACK PERIOD RESULTS—Continued

TSL	MEF/WF	Life-cycle cost			Life-cycle cost savings				Payback period (years)	
		Average installed price	Average operating cost	Average LCC	Average savings	Households with			Median	Average
						Net cost (percent)	No impact (percent)	Net benefit (percent)		
2	1.60/8.50	940	2,823	3,763	166.4	3.6	2.8	93.6	2.8	3.0
3, 4, 5 ...	1.76/8.30	963	2,712	3,675	252.3	1.1	2.8	96.1	2.4	2.5

TABLE V.16—COMMERCIAL CLOTHES WASHERS, FRONT-LOADING, MULTI-FAMILY APPLICATION: LIFE-CYCLE COST AND PAYBACK PERIOD RESULTS

TSL	MEF/WF	Life-cycle cost			Life-cycle cost savings				Payback period (years)	
		Average installed price	Average operating cost	Average LCC	Average savings	Households with			Median	Average
						Net cost (percent)	No impact (percent)	Net benefit (percent)		
Baseline	1.72/8.00	$1,316	$2,664	$3,980	.....	.....	.....	.....	.....	.....
1	1.80/7.50	1,316	2,664	3,860	$8.7	0.0	92.7	7.3	0.0	0.0
2, 3	2.00/5.50	1,338	2,544	3,489	51.8	0.0	88.3	11.7	0.4	0.5
4	2.20/5.10	1,376	2,151	3,404	134.4	2.3	2.8	94.9	2.8	3.1
5	2.35/4.40	1,417	2,027	3,302	234.1	1.5	1.5	97.0	2.8	3.0

TABLE V.17—COMMERCIAL CLOTHES WASHERS, FRONT-LOADING, LAUNDROMAT APPLICATION: LIFE-CYCLE COST AND PAYBACK PERIOD RESULTS

TSL	MEF/WF	Life-cycle cost			Life-cycle cost savings				Payback period (years)	
		Average installed price	Average operating cost	Average LCC	Average savings	Households with			Median	Average
						Net cost (percent)	No impact (percent)	Net benefit (percent)		
Baseline	1.72/8.00	$1,316	$1,885	$4,135	.....	.....	.....	.....	.....	.....
1	1.80/7.50	1,316	2,818	4,005	$9.5	0.0	92.7	7.3	0.0	0.0
2, 3	2.00/5.50	1,338	2,688	3,587	58.0	0.0	88.3	11.7	0.3	0.3
4	2.20/5.10	1,376	2,249	3,502	140.1	0.0	2.8	97.2	1.7	1.8
5	2.35/4.40	1,417	2,126	3,390	250.4	0.0	1.5	98.5	1.6	1.7

b. Consumer Subgroup Analysis

Using the LCC spreadsheet model, DOE determined the impact of the standards on the following consumer subgroups: (1) low-income households and senior-only households for conventional cooking products and microwave ovens, and (2) small business owners and consumers without municipal water and sewer for CCWs.

Cooking Products. For conventional cooking products and microwave ovens, the results for low-income and senior-only households indicate that the LCC impacts on these subgroups and the payback periods are similar to the LCC impacts and payback periods on the full sample of residential consumers. Thus, the proposed standards would have an impact on low-income households and senior-only households that would be similar to their impact on the general population of residential consumers. (See the TSD accompanying this notice, chapter 12.)

Commercial Clothes Washers. For CCWs, the results for consumers without municipal water and sewer indicate that the LCC impacts and payback periods for this subgroup are similar to the LCC impacts and payback periods on the full sample of CCW consumers. But for small business owners, the LCC impacts and payback periods are different than for the general population. For the top-loading product class, Tables V.18 and V.19 show the LCC impacts and payback periods for small multi-family property owners and small laundromats, respectively, while Tables V.20 and V.21 show the same but for the front-loading product class. For all TSLs for both product classes (with exception of TSL 1 for top-loading washers), both sets of small business owners, on average, realize LCC savings similar to the general population. The difference between the small business population and the general population occurs in the percentage of each population that realizes LCC savings from standards. With the exception of TSL 1 for top-loading washers, an overwhelming majority of the small business and general populations benefit from standards at each TSL. But for both product classes, a larger percentage of the general population benefits from standards than small business owners. This occurs because small businesses do not have the same access to capital as larger businesses. As a result, smaller businesses have a higher average discount rate than the industry average. Because of the higher discount rates, smaller businesses do not value future operating costs savings from more efficient CCWs as much as the general population. But to emphasize, in spite of the higher discount rates, a majority of small businesses still benefit from higher CCW standards at all TSLs, with the exception of TSL 1 for the top-loading product class.

TABLE V.18—COMMERCIAL CLOTHES WASHERS, TOP-LOADING, MULTI-FAMILY APPLICATION: LIFE-CYCLE COST AND PAYBACK PERIOD RESULTS FOR SMALL BUSINESS OWNERS

TSL	MEF/WF	Life-cycle cost			Life-cycle cost savings				Payback period (years)	
		Average installed price	Average operating cost	Average LCC	Average savings	Households with			Median	Average
						Net cost (percent)	No impact (percent)	Net benefit (percent)		
Baseline	1.26/9.50	$734	$2,463	$3,197	.....	.....	.....	.....	.....	.....
1	1.42/9.50	852	2,382	3,234	−$23.2	51.3	35.8	12.9	10.7	15.7
2	1.60/8.50	940	2,172	3,112	95.0	23.1	3.1	73.8	4.5	5.5
3, 4, 5 ...	1.72/8.00	963	2,079	3,042	163.1	15.7	3.1	81.2	3.8	4.6

TABLE V.19—COMMERCIAL CLOTHES WASHERS, TOP-LOADING, LAUNDROMAT APPLICATION: LIFE-CYCLE COST AND PAYBACK PERIOD RESULTS FOR SMALL BUSINESS OWNERS

TSL	MEF/WF	Life-cycle cost			Life-cycle cost savings				Payback period (years)	
		Average installed price	Average operating cost	Average LCC	Average savings	Households with			Median	Average
						Net cost (percent)	No impact (percent)	Net benefit (percent)		
Baseline	1.26/9.50	$734	$2,765	$3,499	.....	.....	.....	.....	.....	.....
1	1.42/9.50	852	2,689	3,541	−$26.9	59.4	35.8	4.8	7.4	8.5
2	1.60/8.50	940	2,447	3,387	122.5	7.0	3.1	89.9	2.8	3.0
3, 4, 5 ...	1.72/8.00	963	2,350	3,313	194.0	2.9	3.1	94.0	2.4	2.5

TABLE V.20—COMMERCIAL CLOTHES WASHERS, FRONT-LOADING, MULTI-FAMILY APPLICATION: LIFE-CYCLE COST AND PAYBACK PERIOD RESULTS FOR SMALL BUSINESS OWNERS

TSL	MEF/WF	Life-cycle cost			Life-cycle cost savings				Payback period (years)	
		Average installed price	Average operating cost	Average LCC	Average savings	Households with			Median	Average
						Net cost (percent)	No impact (percent)	Net benefit (percent)		
Baseline	1.72/8.00	$1,316	$2,164	$3,480	.....	.....	.....	.....	.....	.....
1	1.80/7.50	1,316	2,164	3,383	$6.9	0.0	92.9	7.1	0.0	0.0
2, 3	2.00/5.50	1,338	2,067	3,086	41.5	0.0	88.3	11.7	0.4	0.5
4	2.20/5.10	1,376	1,748	3,024	101.5	6.7	2.9	90.4	2.8	3.1
5	2.35/4.40	1,417	1,648	2,950	174.7	5.6	1.4	93.1	2.8	3.0

TABLE V.21—COMMERCIAL CLOTHES WASHERS, FRONT-LOADING, LAUNDROMAT APPLICATION: LIFE-CYCLE COST AND PAYBACK PERIOD RESULTS FOR SMALL BUSINESS OWNERS

TSL	MEF/WF	Life-cycle cost			Life-cycle cost savings				Payback period (years)	
		Average installed price	Average operating cost	Average LCC	Average savings	Households with			Median	Average
						Net cost (percent)	No impact (percent)	Net benefit (percent)		
Baseline	1.72/0	$1,316	$1,533	$3,759	.....	.....	.....	.....	.....	.....
1	1.80/7.50	1,316	2,443	3,646	$8.0	0.0	92.9	7.1	0.0	0.0
2, 3	2.00/5.50	1,338	2,330	3,287	50.0	0.0	88.3	11.7	0.3	0.3
4	2.20/5.10	1,376	1,949	3,219	116.2	0.0	2.9	97.1	1.7	1.8
5	2.35/4.40	1,417	1,843	3,128	206.2	0.0	1.4	98.6	1.6	1.7

c. Rebuttable-Presumption Payback

As discussed above, EPCA establishes a rebuttable presumption that, in essence, an energy conservation standard is economically justified if the increased purchase cost for a product that meets the standard is less than three times the value of the first-year energy savings resulting from the standard. (42 U.S.C. 6295(o)(2)(B)(iii)) DOE calculated a rebuttable-presumption payback period for each TSL to determine whether DOE could presume that a standard at that level is economically justified. Tables V.22 through V.25 show the rebuttable-presumption payback periods for conventional cooking products, microwave ovens, and CCWs, respectively. Because only a single, average value is necessary for establishing the rebuttable-presumption payback period, rather than using distributions for input values, DOE used discrete values. As required by EPCA, DOE based the calculation on the assumptions in the DOE test procedures

for the appliance products. (42 U.S.C. 6295(o)(2)(B)(iii)) As a result, DOE calculated a single rebuttable-presumption payback value, and not a distribution of payback periods, for each TSL.

TABLE V.22—REBUTTABLE-PRESUMPTION PAYBACK PERIODS FOR CONVENTIONAL COOKING PRODUCTS

TSL	Payback period (years)						
	Electric coil cooktops	Electric smooth cooktops	Gas cooktops	Electric standard ovens	Electric self-clean ovens	Gas standard ovens	Gas self-clean ovens
1	NA	NA	3.2	NA	NA	7.3	NA
2	3.2	NA	3.2	2.6	NA	7.3	NA
3	3.2	NA	3.2	2.6	NA	7.3	6.5
4	3.2	664	14	20	95	23	9.1

TABLE V.23—REBUTTABLE-PRESUMPTION PAYBACK PERIODS FOR MICROWAVE OVEN ENERGY FACTOR

TSL	Payback period (years)
1a	16
2a	32
3a	45
4a	64

TABLE V.24—REBUTTABLE-PRESUMPTION PAYBACK PERIODS FOR MICROWAVE OVEN STANDBY POWER

TSL	Payback period (years)
1b	0.2
2b	0.4
3b	0.8
4b	2.1

TABLE V.25—REBUTTABLE-PRESUMPTION PAYBACK PERIODS FOR COMMERCIAL CLOTHES WASHERS

TSL	Payback period (years)			
	Top-Loading		Front-loading	
	Multi-family application	Laundromat application	Multi-family application	Laundromat application
1	303	[a]∞	0	0
2	23.4	201	1.3	1.5
3	17.4	62	1.3	1.5
4	17.4	62	7.6	12.6
5	17.4	62	8.9	15.0

[a] Infinity.

With the exception of TSLs 2 and 3 for electric standard ovens and TSLs 1b to 4b for microwave ovens, and TSLs 1 to 3 for front-loading CCWs, the TSLs in the above tables do not have rebuttable-presumption payback periods of less than three years. DOE can use the rebuttable-presumption payback period as an alternative path for establishing economic justification under the EPCA factors. But DOE believes that the rebuttable-presumption payback period criterion (*i.e.*, a limited payback period) is not sufficient for determining economic justification. Instead, DOE has considered a full range of impacts, including those to consumers, manufacturers, the Nation, and the environment. Section V.C provides a complete discussion of how DOE considered the range of impacts to select its proposed standards.

2. Economic Impacts on Manufacturers

DOE performed an MIA to estimate the impact of new energy conservation standards on cooking product and CCW manufacturers. (See the TSD accompanying this notice, chapter 13.)

a. Industry Cash-Flow Analysis Results

DOE used the INPV in the MIA to compare the financial impacts of different TSLs on cooking product and CCW manufacturers. The INPV is the sum of all net cash flows discounted at the industry's cost of capital (discount rate.) Because the INPV applies only to the industries, the INPV is different from the NPV that DOE used to assess the cumulative benefit or cost of standards to consumers on a national basis. The GRIM estimated cash flows between 2007 and 2042 and found them to be consistent with the cash flows predicted in the national impact analysis.

DOE used the GRIM to compare the INPV of the base case (no new energy conservation standards) to that of each TSL. To evaluate the range of cash-flow impacts on the industries, DOE constructed different scenarios for each industry using different assumptions for

markups and shipments that correspond to the range of product-specific anticipated market responses. Each scenario results in a unique set of cash flows and corresponding industry value at each TSL. These steps allowed DOE to compare the potential impacts on industries as a function of TSLs in the GRIMs. The difference in INPV between the base case and the standards case is an estimate of the economic impacts that implementing that standard level would have on the entire industry.

i. Conventional Cooking Products

Based on conversations with manufacturers, the primary sources of uncertainty relating to the post-standards industry value for conventional cooking products are the post-standards markups and their associated profit margins.

To assess the lower end of the range of potential impacts for the conventional cooking products industry, DOE considered a scenario in which the industry gross margin percentage in the base case is preserved in the standards case (*i.e.*, the markup is held constant for all products at all TSLs). Thus, a manufacturer is able to fully pass on any additional costs due to standards and maintain the percentage margin between COGS and manufacturing selling price. Thus, if unit sales remain constant, the gross margin in absolute dollars will increase after a standard comes into effect.

To assess the higher end of the range of potential impacts for the conventional cooking products industry, DOE considered the scenario reflecting the preservation of industry gross margin in absolute dollars. Under this scenario, DOE assumed that the industry cannot pass on all additional costs due to efficiency-related changes (*i.e.*, the markup decreases for all TSLs in the standards case.) Thus, the absolute gross margin is held constant. This means that the percentage difference between manufacturer production cost and selling price will decrease in the standards case compared to the base case and that the gross margin percentage will be lower. As a result, the industry will make the same gross margin in absolute dollars post-standard in a scenario with constant shipments but the industry will also have a lower INPV since the gross margin percentage is eroding. Table V.26 through Table V.33 show the MIA results for each TSL using both markup scenarios described above for conventional cooking products, including electrical and gas cooktops and ovens.

TABLE V.26—MANUFACTURER IMPACT ANALYSIS FOR ELECTRIC COOKTOPS UNDER THE PRESERVATION OF GROSS MARGIN PERCENTAGE MARKUP SCENARIO

Preservation of gross margin percentage markup scenario						
	Units	Base case	TSL			
			1	2	3	4
INPV	(2006 $ millions)	357	357	355	355	434
Change in INPV	(2006 $ millions)		0	(2)	(2)	77
	(%)		0.00%	−0.56%	−0.56%	21.62%
Amended Energy Conservation Standards Product Conversion Expenses.	(2006 $ millions)		0.0	9.6	9.6	21.8
Amended Energy Conservation Standards Capital Investments	(2006 $ millions)		0.0	0.0	0.0	73.1
Total Investment Required	(2006 $ millions)		0.0	9.6	9.6	94.9

TABLE V.27—MANUFACTURER IMPACT ANALYSIS FOR ELECTRIC COOKTOPS UNDER THE PRESERVATION OF GROSS MARGIN ABSOLUTE DOLLARS MARKUP SCENARIO

Preservation of gross margin absolute dollars markup scenario						
	Units	Base case	TSL			
			1	2	3	4
INPV	(2006 $ millions)	357	357	346	346	(26)
Change in INPV	(2006 $ millions)		0	(11)	(11)	(383)
	(%)		0.00%	−3.18%	−3.18%	−107.19%
Amended Energy Conservation Standards Product Conversion Expenses.	(2006 $ millions)		0.0	9.6	9.6	21.8
Amended Energy Conservation Standards Capital Investments	(2006 $ millions)		0.0	0.0	0.0	73.1
Total Investment Required	(2006 $ millions)		0.0	9.6	9.6	94.9

TABLE V.28—MANUFACTURER IMPACT ANALYSIS FOR GAS COOKTOPS UNDER THE PRESERVATION OF GROSS MARGIN PERCENTAGE MARKUP SCENARIO

Preservation of gross margin percentage markup scenario						
	Units	Base case	TSL			
			1	2	3	4
INPV	(2006 $ millions)	287	282	282	282	315
Change in INPV	(2006 $ millions)		(5)	(5)	(5)	28
	(%)		−1.74%	−1.74%	−1.74%	9.83%
Amended Energy Conservation Standards Product Conversion Expenses.	(2006 $ millions)		9.4	9.4	9.4	20.8
Amended Energy Conservation Standards Capital Investments	(2006 $ millions)		2.2	2.2	2.2	3.3
Total Investment Required	(2006 $ millions)		11.5	11.5	11.5	24.1

TABLE V.29—MANUFACTURER IMPACT ANALYSIS FOR GAS COOKTOPS UNDER THE PRESERVATION OF GROSS MARGIN ABSOLUTE DOLLARS MARKUP SCENARIO

Preservation of gross margin absolute dollars markup scenario						
	Units	Base case	TSL			
			1	2	3	4
INPV	(2006 $ millions)	287	275	275	275	146
Change in INPV	(2006 $ millions)		(12)	(12)	(12)	(141)
	(%)		−4.12%	−4.12%	−4.12%	−49.12%
Amended Energy Conservation Standards Product Conversion Expenses.	(2006 $ millions)		9.4	9.4	9.4	20.8
Amended Energy Conservation Standards Capital Investments	(2006 $ millions)		2.2	2.2	2.2	3.3
Total Investment Required	(2006 $ millions)		11.5	11.5	11.5	24.1

TABLE V.30—MANUFACTURER IMPACT ANALYSIS FOR ELECTRIC OVENS UNDER THE PRESERVATION OF GROSS MARGIN PERCENTAGE MARKUP SCENARIO

Preservation of gross margin percentage markup scenario						
	Units	Base case	TSL			
			1	2	3	4
INPV	(2006 $ millions)	793	793	785	785	782
Change in INPV	(2006 $ millions)		0	(8)	(8)	(10)
	(%)		0.00%	−0.99%	−0.99%	−1.27%
Amended Energy Conservation Standards Product Conversion Expenses.	(2006 $ millions)		0.0	20.8	20.8	67.6
Amended Energy Conservation Standards Capital Investments	(2006 $ millions)		0.0	0.8	0.8	179.8
Total Investment Required	(2006 $ millions)		0.0	21.6	21.6	247.5

TABLE V.31—MANUFACTURER IMPACT ANALYSIS FOR ELECTRIC OVENS UNDER THE PRESERVATION OF GROSS MARGIN ABSOLUTE DOLLARS MARKUP SCENARIO

Preservation of gross margin absolute dollars markup scenario						
	Units	Base case	TSL			
			1	2	3	4
INPV	(2006 $ millions)	793	793	773	773	324
Change in INPV	(2006 $ millions)		0	(19)	(19)	(469)
	(%)		0.00%	−2.43%	−2.43%	−59.16%
Amended Energy Conservation Standards Product Conversion Expenses.	(2006 $ millions)		0.0	20.8	20.8	67.6
Amended Energy Conservation Standards Capital Investments	(2006 $ millions)		0.0	0.8	0.8	179.8
Total Investment Required	(2006 $ millions)		0.0	21.6	21.6	247.5

TABLE V.32 MANUFACTURER IMPACT ANALYSIS FOR GAS OVENS UNDER THE PRESERVATION OF GROSS MARGIN PERCENTAGE MARKUP SCENARIO

Preservation of gross margin percentage markup scenario						
	Units	Base case	TSL			
			1	2	3	4
INPV	(2006 $ millions)	466	459	459	460	420
Change in INPV	(2006 $ millions)		(7)	(7)	(6)	(47)
	(%)		−1.57%	−1.57%	−1.38%	−10.04%
Amended Energy Conservation Standards Product Conversion Expenses.	(2006 $ millions)		9.4	9.4	18.7	100.3
Amended Energy Conservation Standards Capital Investments	(2006 $ millions)		1.8	1.8	7.6	72.0
Total Investment Required	(2006 $ millions)		11.1	11.1	26.4	172.3

TABLE V.33—MANUFACTURER IMPACT ANALYSIS FOR GAS OVENS UNDER THE PRESERVATION OF GROSS MARGIN ABSOLUTE DOLLARS MARKUP SCENARIO

Preservation of gross margin (absolute dollars) markup scenario						
	Units	Base case	TSL			
			1	2	3	4
INPV	(2006 $ millions)	466	457	457	426	285
Change in INPV	(2006 $ millions)		(10)	(10)	(41)	(181)
	(%)		−2.10%	−2.10%	−8.68%	−38.80%
Amended Energy Conservation Standards Product Conversion Expenses.	(2006 $ millions)		9.4	9.4	18.7	100.3
Amended Energy Conservation Standards Capital Investments	(2006 $ millions)		1.8	1.8	7.6	72.0
Total Investment Required	(2006 $ millions)		11.1	11.1	26.4	172.3

Electric Cooktops. At TSL 1, the impact on INPV and cash flow for electric cooktops is zero. At this level, DOE assumed both electric coil and smooth cooktops would have the same efficiency level as the baseline. Therefore, no impacts are reported at TSL 1.

At TSL 2 and TSL 3, the impact on INPV and cash flow varies depending on manufacturers' ability to maintain gross margins as a percentage of revenues constant as the manufacturing product cost (MPC) increases as a result of standards. DOE estimated the impacts in INPV at TSL 2 and TSL 3 to range from −$2 million to −$11 million, or a change in INPV of −0.56 percent to −3.18 percent. At this level, the industry cash flow would decrease by

approximately 12 percent, to $18.3 million, compared to the base-case value of $20.8 million in the year leading up to the standards. DOE does not expect significant impacts at TSL 2 and TSL 3 because the investments needed to conform to the standards are relatively small compared to overall SG&A and R&D annual costs. In addition, product price increases would benefit manufacturers if they can fully pass along MPC increases to customers. However, overall INPV would decline in all scenarios at these standard levels because, according to manufacturers, the research and engineering costs needed to achieve these levels would exceed the relatively small capital expenditures and incremental costs at this standard level.

At TSL 4, the impact on INPV and cash flow will vary significantly depending on the manufacturers' ability to maintain a constant gross margin percentage as MPCs increase due to standards. DOE estimated the impacts in INPV to range from approximately positive $77 million to −$383 million, or a change in INPV of 21.62 percent to −107.19 percent. At this level, the industry cash flow decreases by approximately 168 percent, to −$14.1 million, compared to the base-case value of $20.8 million in the year leading up to the standards. At this TSL, if manufacturers are able to maintain their gross margin as a percentage of revenues, the impacts of higher manufacturing costs would be negated by the increases in total revenues. However, if manufacturers can only maintain their absolute dollar gross margin, then the impacts at TSL 4 would completely erode manufacturers' profits. According to manufacturers, the energy savings at this level are not economically justified because both consumers and manufacturers will experience negative impacts. Consumers would experience significantly higher prices, while manufacturers will experience decreased profits, lower revenues, and much higher R&D costs.

Gas Cooktops. At TSL 1, TSL 2, and TSL 3, the impact on INPV and cash flow varies depending on manufacturers' ability to fully maintain their gross margins as the MPCs increase as a result of the standards. These TSLs are equivalent to the elimination of standing pilot lights. DOE estimated the impacts in INPV at TSL 1, TSL 2, and TSL 3 to range from −$5 million up to −$12 million, or a change in INPV of −1.74 percent up to −4.12 percent. At this level, the industry cash flow decreases by approximately 19 percent, to $14.3 million, compared to the base case value of $17.6 million in the year leading up to the standards. Since more than 90 percent of the equipment being sold is already at or above this level (*i.e.*, most products do not have standing pilot lights), those manufacturers that do not fall below the efficiency levels specified by TSL 1, TSL 2, and TSL 3 will not have to make additional modifications to their product lines to conform to the amended energy conservation standards. DOE expects the lower end of the impacts to be reached, which indicates that industry revenues and costs will not be significantly negatively impacted as long as manufacturers can maintain their gross margin as a percentage of revenues. Analysis shows that although the elimination of standing pilot lights may not significantly impact large manufacturers, small manufacturers that rely on revenues from these products will be significantly impacted. In MIA interviews, all manufacturers of standing pilot-equipped gas appliances expressed concern about the potential elimination of standing pilots. Two small businesses, which both focus solely on cooking appliances, produce standing pilot-equipped products which comprise nearly half of their total annual gas product shipments and which they consider to be a differentiator from their larger, more-diversified competitors. While all manufacturers of gas cooking appliances affected by today's rule also make comparable cooking appliances with electronic ignition systems, these two small businesses are likely to be disproportionally impacted by a ban on standing pilot ignition systems. DOE contacted both manufacturers multiple times to better understand the potential business impact of a standing pilot ban and believes that, while standing pilot ignition systems are a differentiator, gas cooking products made by these manufacturers are primarily differentiated by non-standard unit widths and other features. Thus, while the potential elimination of standing pilot lights would lead to some decrease in differentiation, the main differentiators, notably non-standard unit sizes, will remain. DOE's discussion of the impacts on the small manufacturers is treated in the regulatory flexibility section of today's notice (see section VI. B.)

At TSL 4, the analysis shows that the impact on INPV and cash flow continues to vary significantly depending on the manufacturers' ability to pass on increases in MPCs to the customer. DOE estimated the impacts in INPV at TSL 4 to range from approximately positive $28 million to −$141 million, or a change in INPV of positive 9.83 percent to −49.12 percent. At this level, the industry cash flow decreases by approximately 38 percent, to $10.9 million, compared to the base case value of $17.6 million in the year leading up to the standards. At this level, the component switch also carries substantial redesign costs. Sealed burners affect the design of the entire cooktop, thereby making product conversion and capital conversion costs much greater than a simpler component switch. At this TSL, if manufacturers can maintain their gross margin as a percentage of revenues, the impacts of higher manufacturing costs would be negated by the increases in total revenues. However, if manufacturers can only maintain their absolute dollar gross margin, then the impacts of TSL 4 would significantly erode manufacturers' profits.

Electric Ovens. At TSL 1, the projected impact on INPV and cash flow for electric ovens is zero. At this level, DOE assumed both electric standard and self-cleaning ovens would have the same efficiency level as the baseline. Therefore, DOE reported no impacts at TSL 1.

At TSL 2 and TSL 3, the impact on INPV and cash flow varies depending on manufacturers' ability to maintain gross margin as a percentage of revenues as the MPCs increase as a result of standards. DOE estimated the impacts in INPV at TSL 2 and TSL 3 to range from −$8 million to −$19 million, or a change in INPV of approximately −.99 percent to −2.43 percent. At these levels, the industry cash flow would decrease by approximately 12 percent, to $40.4 million, compared to the base-case value of $46.1 million in the year leading up to the standards. DOE does not expect significant impacts at TSL 2 and TSL 3 because the investments needed to conform to the standards are relatively small in comparison to overall SG&A and R&D annual costs. In addition, product cost increases would benefit manufacturers if they can fully pass along MPC increases to customers.

At TSL 4, the analysis shows that impacts on INPV and cash flow would vary significantly depending on the manufacturers' ability to maintain gross margin as MPCs increase due to standards. DOE estimated the impacts in INPV to range from approximately −$10 million to −$469 million, or a change in INPV of −1.27 percent to −59.16 percent. At this level, the industry cash flow would decrease by approximately 194 percent, to −$43.3 million, compared to the base-case value of $46.1 million in the year leading up to the standards. At this

level, the increase in efficiency also carries substantial redesign costs. Forced convection and reducing conduction losses affect the design of the entire cavity, thereby making product conversion and capital conversion costs much greater than a simpler component switch. In addition, if manufacturers can maintain their gross margin as a percentage of revenues, the impacts of higher manufacturing costs would be relatively small. However, if manufacturers can only maintain their absolute dollar gross margin, then the impacts of TSL 4 would decrease the INPV of the industry by close to half.

Gas Ovens. At TSL 1 and TSL 2, the impact on INPV and cash flow varies depending on manufacturers' ability to fully maintain their gross margins as the MPC increases as a result of standards. These TSLs are equivalent to the elimination of standing pilot lights from gas cooking products. DOE estimated the impacts in INPV at TSL 1 and TSL 2 to range from a −$7 million up to −$10 million, or a change in INPV of −1.57 percent up to −2.10 percent. At this level, the industry cash flow decreases by approximately 11 percent, to $25.6 million, compared to the base case value of $28.8 million in the year leading up to the standards. Since more than 80 percent of the equipment being sold is already at or above this level (*i.e.*, most products do not have standing pilot lights), those manufacturers that do not fall below the efficiency levels specified by TSL 1 and TSL 2 would not have to make additional modifications to their product lines to conform to the amended energy conservation standards. DOE expects the lower end of the impacts to be reached, which indicates that industry revenues and costs are not significantly negatively impacted as long as manufacturers can maintain their gross margin as a percentage of revenues. The analysis shows that although the elimination of standing pilot lights may not significantly impact large manufacturers, small manufacturers that rely on revenues from these products would be impacted significantly. DOE's discussion of the impacts on the small manufacturers is explained in further detail in the regulatory flexibility section of today's notice (see section VI. B.)

At TSL 3, the impact on INPV and cash flow continues to vary depending on the manufacturers' ability to pass on increases in MPCs to the customer. DOE estimated the impacts in INPV at TSL 3 to range from approximately −$6 million to −$41 million, or a change in INPV of −1.38 percent to −8.68 percent. At this level, the analysis shows that the industry cash flow decreases by approximately 27 percent, to $20.9 million, compared to the base case value of $28.8 million in the year leading up to the standards.

At TSL 4, the impact on INPV and cash flow varies significantly depending on the manufacturers' ability to pass on increases in MPCs to the customer. DOE estimated the impacts in INPV at TSL 4 to range from approximately −$47 million to −$181 million, or a change in INPV of −10.04 percent to −38.80 percent. At this level, the analysis shows that the industry cash flow decreases by approximately 190 percent, to −$26.0 million, compared to the base case value of $28.8 million in the year leading up to the standards. At this TSL, if manufacturers can maintain their gross margin as a percentage of revenues, the projected increase in total revenues negates the impacts of higher manufacturing costs. However, if manufacturers can only maintain their absolute dollar gross margin, then the impacts of TSL 4 would significantly erode manufacturers' profits.

ii. Microwave Ovens

To assess the lower end of the range of potential impacts for the microwave oven industry, DOE considered the scenario reflecting the preservation of gross margin percentage. As production cost increases with efficiency, this scenario implies manufacturers will be able to maintain gross margins as a percentage of revenues. To assess the higher end of the range of potential impacts for the microwave oven industry, DOE considered the scenario reflecting preservation of gross margin in absolute dollars. Under this scenario, DOE assumed that the industry can maintain its gross margins in absolute dollars after the standard effective date. The industry would do so by passing through its increased costs to customers without increasing its gross margin in absolute dollars. Table V.34 and Table V.35 show MIA results related to the energy factor for each TSL using both markup scenarios described above for microwave oven manufacturers.

TABLE V.34—MANUFACTURER IMPACT ANALYSIS FOR MICROWAVE OVENS UNDER THE PRESERVATION OF GROSS MARGIN PERCENTAGE MARKUP SCENARIO (ENERGY FACTOR)

Preservation of gross margin percentage markup scenario						
	Units	Base case	TSL			
			1a	2a	3a	4a
INPV	(2006 $ millions)	1,450	1,494	1,567	1,687	1,717
Change in INPV	(2006 $ millions)		44	117	237	267
	(%)		3.04%	8.09%	16.34%	18.44%
Amended Energy Conservation Standards Product Conversion Expenses.	(2006 $ millions)		60.0	75.0	90.0	225.0
Amended Energy Conservation Standards Capital Investments	(2006 $ millions)		0.0	0.0	0.0	75.0
Total Investment Required	(2006 $ millions)		60.0	75.0	90.0	300.0

TABLE V.35—MANUFACTURER IMPACT ANALYSIS FOR MICROWAVE OVENS UNDER THE PRESERVATION OF GROSS MARGIN ABSOLUTE DOLLARS MARKUP SCENARIO (ENERGY FACTOR)

Preservation of gross margin percentage markup scenario						
	Units	Base case	TSL			
			1a	2a	3a	4a
INPV	(2006 $ millions)	1,450	1,250	1,064	775	284
Change in INPV	(2006 $ millions)		(199)	(386)	(675)	(1,165)
	(%)		−13.74%	−26.62%	−46.56%	−80.39%
Amended Energy Conservation Standards Product Conversion Expenses.	(2006 $ millions)		60.0	75.0	90.0	225.0
Amended Energy Conservation Standards Capital Investments	(2006 $ millions)		0.0	0.0	0.0	75.0
Total Investment Required	(2006 $ millions)		60.0	75.0	90.0	300.0

TSL 1a represents an improvement in cooking efficiency from the baseline level of 0.557 EF to 0.586 EF. At TSL 1a, the impact on INPV and cash flow varies greatly depending on the manufacturers and their ability to pass on increases in MPCs to the customer. DOE estimated the impacts in INPV at TSL 1a to range from less than $44 million to −$199 million, or a change in INPV of 3.04 percent to −13.74 percent. At this level, the industry cash flow decreases by approximately 18 percent, to $71.7 million, compared to the base-case value of $87.3 million in the year leading up to the standards.

TSL 2a represents an improvement in cooking efficiency from the baseline level of 0.557 EF to 0.588 EF. At TSL 2a, the impact on INPV and cash flow would be similar to TSL 1a and depend on whether manufacturers can fully recover the increases in MPCs from the customer. DOE estimated the impacts in INPV at TSL 2a to range from $117 million to −$386 million, or a change in INPV of 8.09 percent to −26.62 percent. At this level, the industry cash flow decreases by approximately 22 percent, to $67.9 million, compared to the base-case value of $87.3 million in the year leading up to the standards.

TSL 3a represents an improvement in cooking efficiency from the baseline level of 0.557 EF to 0.597 EF. At TSL 3a, the impact on INPV and cash flow continues to vary depending on the manufacturers and their ability to pass on increases in MPCs to the customer. DOE estimated the impacts in INPV at TSL 3a to range from approximately $237 million to −$675 million, or a change in INPV of 16.34 percent to −46.56 percent. At this level, the industry cash flow decreases by approximately 27 percent, to $64.0 million, compared to the base-case value of $87.3 million in the year leading up to the standards.

TSL 4a represents an improvement in cooking efficiency from the baseline level of 0.557 EF to 0.602 EF. At TSL 4a, DOE estimated the impacts in INPV to range from approximately $267 million to −$1,165 million, or a change in INPV of 18.44 percent to −80.39 percent. At this level, the industry cash flow decreases by approximately 101 percent, to −$1.0 million, compared to the base-case value of $87.3 million in the year leading up to the standards. At higher TSLs, manufacturers have a harder time fully passing on larger increases in MPCs to the customer.

Due to the similarities in design requirements to meet each TSL, the results for each TSL are dependent on the ability of manufacturers to pass along increases in manufacturer production costs and the additional conversion costs. The engineering analysis assumes that each TSL adds an additional component switch-out. For example, to reach TSL 2, manufacturers must switch the fan in addition to switching the power supply required to meet TSL 1. The high conversion costs associated with these switches drive INPV negative if incremental costs are only partially passed along to consumers. If the incremental costs are fully passed along to consumers, which manufacturers stated was unlikely due to fierce competition in the industry, the higher purchase prices are enough to overcome the high conversion and capital conversion costs, thereby making INPV positive. The magnitude of the positive cash flow impact under the preservation of gross margin percentage scenario and the negative cash flow impact under the preservation of gross margin (absolute dollars) scenario depends on the incremental cost of standards-compliant products. The higher the relative cost, the larger the impact on operating revenue and cash flow in the years following the effective date of the standard. Since higher TSLs correspond to higher relative costs, the impacts of the markup scenarios are greater at higher TSLs.

Table V.36 and Table V.37—show the standby power MIA results for each TSL using both markup scenarios described above for microwave ovens manufacturers.

TABLE V.36—MANUFACTURER IMPACT ANALYSIS FOR MICROWAVE OVENS UNDER THE PRESERVATION OF GROSS MARGIN PERCENTAGE MARKUP SCENARIO (STANDBY POWER)

Preservation of gross margin percentage markup scenario						
	Units	Base case	TSL			
			1b	2b	3b	4b
INPV	(2006 $ millions)	1,450	1,428	1,414	1,413	1,415

TABLE V.36—MANUFACTURER IMPACT ANALYSIS FOR MICROWAVE OVENS UNDER THE PRESERVATION OF GROSS MARGIN PERCENTAGE MARKUP SCENARIO (STANDBY POWER)—Continued

Preservation of gross margin percentage markup scenario						
	Units	Base case	TSL			
			1b	2b	3b	4b
Change in INPV	(2006 $ millions)		(22)	(35)	(37)	(35)
	(%)		−1.50%	−2.44%	−2.52%	−2.40%
Amended Energy Conservation Standards Product Conversion Expenses.	(2006 $ millions)		−37.5	67.5	82.5	135.0
Amended Energy Conservation Standards Capital Investments	(2006 $ millions)		−3.8	4.1	4.5	7.5
Total Investment Required	(2006 $ millions)		−41.3	71.6	87.0	142.5

TABLE V.37—MANUFACTURER IMPACT ANALYSIS FOR MICROWAVE OVENS UNDER THE PRESERVATION OF GROSS MARGIN ABSOLUTE DOLLARS MARKUP SCENARIO (STANDBY POWER)

Preservation of gross margin percentage markup scenario						
	Units	Base case	TSL			
			1b	2b	3b	4b
INPV	(2006 $ millions)	1,450	1,424	1,402	1,378	1,278
Change in INPV	(2006 $ millions)		(26)	(48)	(71)	(172)
	(%)		−1.77%	−3.28%	−4.92%	−11.87%
Amended Energy Conservation Standards Product Conversion Expenses.	(2006 $ millions)		37.5	67.5	82.5	135.0
Amended Energy Conservation Standards Capital Investments	(2006 $ millions)		3.8	4.1	4.5	7.5
Total Investment Required	(2006 $ millions)		41.3	71.6	87.0	142.5

TSL 1b represents an improvement in standby power from the baseline level of 4.0 W to 2.0 W. At TSL 1b, the impact on INPV and cash flow varies depending on the manufacturers' ability to pass on increases in MPCs to the customer. DOE estimated the impacts in INPV at TSL 1b to range from less than −$22 million to −$26 million, or a change in INPV of −1.50 percent to −1.77 percent. At this level, the industry cash flow decreases by approximately 13 percent, to $76.1 million, compared to the base-case value of $87.3 million in the year leading up to the standards.

TSL 2b represents an improvement in standby power from the baseline level of 4.0 W to 1.5 W. At TSL 2b, the impact on INPV and cash flow would be similar to TSL 1b and depend on whether manufacturers can fully recover the increases in MPCs from the customer. DOE estimated the impacts in INPV at TSL 2b to range from −$35 million to −$48 million, or a change in INPV of −2.44 percent to −3.28 percent. At this level, the industry cash flow decreases by approximately 22 percent, to $68.2 million, compared to the base-case value of $87.3 million in the year leading up to the standards.

TSL 3b represents an improvement in standby power from the baseline level of 4.0 W to 1.0 W. At TSL 3b, the impact on INPV and cash flow continues to vary depending on the manufacturers and their ability to pass on increases in MPCs to the customer. DOE estimated the impacts in INPV at TSL 3b to range from approximately −$37 million to −$71 million, or a change in INPV of −2.52 percent to −4.92 percent. At this level, the industry cash flow decreases by approximately 27 percent, to $64.1 million, compared to the base-case value of $87.3 million in the year leading up to the standards.

TSL 4b represents an improvement in standby power from the baseline level of 4.0 W to 0.02 W. At TSL 4b, DOE estimated the impacts in INPV to range from approximately −$35 million to −$172 million, or a change in INPV of −2.40 percent to −11.87 percent. At this level, the industry cash flow decreases by approximately 43 percent, to $49.3 million, compared to the base-case value of $87.3 million in the year leading up to the standards. At higher TSLs, manufacturers have a harder time fully passing on larger increases in MPCs to the customer. At TSL 4b, the conversion costs are higher than for TSL 1b, TSL 2b, and TSL 3b because the design of all microwave platforms must be more significantly altered.

For standby power standards, conversion costs increase at higher TSLs as the complexity of further lowering standby power increases, substantially driving up engineering time and also increasing the testing and product development time. If the increased production costs are fully passed on to consumers (the preservation of gross margin percentage scenario), the operating revenue from higher prices is

not enough to overcome the negative impacts from the substantial conversion costs. The incremental costs are small for each TSL, meaning the positive impact on cash flows is small compared to the conversion costs. As a result of the small incremental costs and large conversion expenses, INPV is negative for all TSLs under the preservation of gross margin percentage scenario. If the incremental costs are not fully passed along to customers (the preservation of gross margin (absolute dollars) scenario), the negative impacts on INPV are amplified at each TSL.

iii. Commercial Clothes Washers

For CCWs, the major source of uncertainty voiced by manufacturers during the interviews is the impact of higher standards on the number of CCWs sold. Pricing and profit margin issues were not emphasized as they were for cooking products. Future product sales are particularly important considering the high capital costs (particularly design costs) in comparison to the small number of products sold. In light of the concern over future shipments, DOE modeled two MIA scenarios, based on two shipment projections from the NIA.

To assess the lower end of the range of potential impacts for the CCW industry, DOE considered a scenario wherein unit shipments will not be impacted regardless of new energy conservation standards—this scenario is called the base-case shipments scenario. To assess the higher end of the range of potential impacts for the CCW industry, DOE considered a scenario in which total industry shipments would decrease due to the combined effects of increases in purchase price and decreases in operating costs due to new energy conservation standards—this scenario is called the price elastic of demand scenario. In both scenarios, it is assumed that manufacturers will be able to maintain the same gross margins (as a percentage of revenues) that is currently obtained in the base case.

Table V.38 and Table V.39 show the MIA results for each TSL using both shipment scenarios described above for CCW manufacturers.

TABLE V.38—MANUFACTURER IMPACT ANALYSIS FOR COMMERCIAL CLOTHES WASHERS WITH BASE CASE SHIPMENTS

Preservation of gross margin percentage markup with base case shipments							
	Units	Base case	Trial standard level				
			1	2	3	4	5
INPV	(2006 $ millions)	56	59	52	41	38	26
Change in INPV	(2006 $ millions)		4	(4)	(15)	(18)	(30)
	(%)		6.51%	−6.37%	−26.50%	−32.02%	−53.13%
Amended Energy Conservation Standards Product Conversion Expenses.	(2006 $ millions)		0.00	18.00	33.00	36.70	49.50
Amended Energy Conservation Standards Capital Investments.	(2006 $ millions)		0.00	1.60	2.60	3.35	5.90
Total Investment Required.	(2006 $ millions)		0.0	19.6	35.6	40.1	55.4

TABLE V.39—MANUFACTURER IMPACT ANALYSIS FOR COMMERCIAL CLOTHES WASHERS WITH PRICE ELASTICITY OF DEMAND SHIPMENTS

Preservation of gross margin percentage markup with price elasticity of demand shipments							
	Units	Base case	Trial standard level				
			1	2	3	4	5
INPV	(2006 $ millions)	56	58	50	38	35	23
Change in INPV	(2006 $ millions)		3	(6)	(17)	(20)	(32)
	(%)		4.91%	−10.27%	−31.09%	−36.83%	−58.19%
Amended Energy Conservation Standards Product Conversion Expenses.	(2006 $ millions)		0.00	18.00	33.00	36.70	49.50
Amended Energy Conservation Standards Capital Investments.	(2006 $ millions)		0.00	1.60	2.60	3.35	5.90

TABLE V.39—MANUFACTURER IMPACT ANALYSIS FOR COMMERCIAL CLOTHES WASHERS WITH PRICE ELASTICITY OF DEMAND SHIPMENTS—Continued

Preservation of gross margin percentage markup with price elasticity of demand shipments							
	Units	Base case	Trial standard level				
			1	2	3	4	5
Total Investment Required.	(2006 $ millions) ...	.....	0.0	19.6	35.6	40.1	55.4

At TSL 1, the impact on INPV and cash flow varies depending on the manufacturers' ability to maintain revenues as shipments decrease due to the price elasticity. DOE estimated the impacts in INPV at TSL 1 to range from positive $3.6 million to positive $2.7 million, or a change in INPV of 6.51 percent to 4.91 percent. At this level, the industry cash flow does not decrease from the base-case value of $3.8 million in the year leading up to the standards. Since all manufacturers have top-loading and front-loading washers already above this level, DOE assumed that there would be no product conversion or conversion capital costs.

At TSL 2, DOE estimated the impacts in INPV to range from −$3.5 million to −$5.7 million, or a change in INPV of −6.37 percent to −10.27 percent. At this level, the industry cash flow decreases by approximately 153 percent, to −$2.0 million, compared to the base-case value of $3.8 million in the year leading up to the standards. To conform to the standards at TSL 2, DOE estimated that at least one manufacturer will need to redesign and retool a line of top-loading washers that falls below this standard level. Since over 88 percent of front-loading washers exceed this level, DOE assumed that there would be relatively small product conversion and conversion capital costs for these washers.

At TSL 3, DOE estimated the impacts in INPV to range from −$14.7 million to −$17.3 million, or a change in INPV of −26.5 percent to −31.09 percent. At this level, the industry cash flow decreases by approximately 320 percent, to −$8.3 million, compared to the base case value of $3.8 million in the year leading up to the standards. Since over 88 percent of front-loading washers exceed this level, DOE assumed that there would be relatively small product conversion and conversion capital costs for these washers. However, at TSL 3 manufacturers stated that significant product redesigns and line retooling would be required to conform to the top-loading standard. Beyond the concerns captured in the GRIM model, other issues were raised by manufacturers at TSL 3. For top-loading CCWs, multiple manufacturers stated that customers could see a reduction in wash quality or reject new designs based on a perceived reduction in wash quality. As a consequence they believe that a significant portion of the industry could potentially shift from top-loading designs to front-loading designs. For manufacturers that do not produce large volumes of front-loading washers this would require significant capital to expand front-loading production lines and may force them to redesign their current models to reduce cost. The uncertainty in product class shifting adds to the perceived financial risks of adopting a TSL 3 for front-loading washers. The Department seeks comment on the possible magnitude of this shift.

At TSL 4, DOE estimated the impacts in INPV at TSL 4 to range from −$17.8 million to −$20.5 million, or a change in INPV of −32.02 percent to −36.83 percent. At this level, the industry cash flow decreases by approximately 367 percent, to −$10.0 million, compared to the base-case value of $3.8 million in the year leading up to the standards. As with TSL 3, the top-loading standard remains at max-tech at TSL 4, and the impacts as previously stated for this product class. Currently, 97 percent of front-loading washers shipped do not meet TSL 4, resulting in multiple manufacturers having to also redesign existing front-loading products to conform to the standard. The $8.1 million in product conversion and capital conversion costs to redesign and retool for the front-loading standard, while not appearing that substantial on a nominal basis, are significant for manufacturers due to low volumes of front-loading washers. Adjusting for shipment volumes, investing $8.1 million in front-loading washers is equivalent to investing over $26 million in top-loading washers. These investment costs are also high compared to the industry value of $19 million for front-loading washers. Consequently, it could be difficult for manufactures to justify the investments necessary to reach TSL 4 for front-loading washers.

At TSL 5, DOE estimated the impacts in INPV to range from −$29.5 million to −$32.3 million, or a change in INPV of −53.13 percent to −58.19 percent. At this level, the industry cash flow decreases by approximately 527 percent, to −$16.1 million, compared to the base-case value of $3.8 million in the year leading up to the standards. The top-loading standard remains at max tech at TSL 5. Almost all front-loading washers currently sold do not meet TSL 5. Since most manufacturers do not have existing washers that are close to meeting TSL 5, the redesign and tooling costs drive INPV extremely negative. At TSL 5, manufactures would have to invest $23.4 million in front-loading washer in an industry valued at $19 million. It could be difficult for manufactures to justify the investments necessary to reach max tech for both top-loading and front-loading washers.

b. Impacts on Employment

To quantitatively assess the impacts of energy conservation standards on cooking products and CCW manufacturing employment, DOE used the GRIM to estimate the domestic labor expenditures and number of employees in the base case and at each TSL from 2007 through 2042 for the conventional cooking products, microwave oven, and CCW industries. DOE used statistical data from the U.S. Census Bureau's 2006 Annual Survey of Manufactures [89] (2006 ASM) and 2006 Current Industry Report [90] (2006 CIR), the results of the engineering analysis, and interviews with manufacturers to estimate the inputs necessary to calculate industry-wide labor expenditures and domestic employment levels. Labor expenditures are a function of the labor intensity of the equipment, the sales volume, and an implicit assumption that wages remain fixed in real terms over time. (DOE

[89] The 2006 Annual Survey of Manufacturers is available at: *http://www.census.gov/mcd/asmhome.html.*

[90] The 2006 Current Industry Report is available at *http://www.census.gov/cir/www/alpha.html.*

notes that the MIA's analysis detailing impacts on employment focuses specifically on the production workers manufacturing the covered products in question, rather than a manufacturer's broader operations. Thus, the estimated number of impacted employees in the MIA is separate and distinct from the total number of employees used to determine whether a manufacturer is a small business for purposes of analysis under the Regulatory Flexibility Act.)

The estimates of production workers in this section only cover workers up to and including the line-supervisor level that are directly involved in fabricating and assembling a product within the original equipment manufacturer (OEM) facility. In addition, workers that perform services that are closely associated with production operations are included. Employees above the working-supervisor level are excluded from the count of production workers. Thus, the labor associated with non-production functions (*e.g.*, factory supervision, advertisement, sales) is explicitly not covered.[91] In addition, DOE's estimates only account for production workers that manufacture the specific products covered by this rulemaking. For example, a worker on a clothes dryer production line would not be included in the estimate of the number of CCW production workers. Finally, this analysis also does not factor in the dependence by some manufacturers on production volume to make their operations viable. For example, should a major line of business cease or move, a production facility may no longer have the manufacturing scale to obtain volume discounts on its purchases nor be able to justify maintaining major capital equipment. Thus, the impact on a manufacturing facility due to a line closure may affect more employees than just the production workers, but again this analysis focuses on the production workers directly impacted.

i. Conventional Cooking Products

Using the GRIM, DOE estimates that there are 2,146 U.S. production workers in the conventional cooking products industry. Using the CIR data, DOE estimates that approximately 27 percent of conventional cooking products sold in the U.S. are manufactured domestically. Today's notice estimates the impacts on U.S. production workers in the conventional cooking products industry as a result of the trial energy conservation standards as show in Table V.40.

TABLE V.40—CHANGE IN TOTAL NUMBER OF DOMESTIC PRODUCTION EMPLOYEES IN 2012 IN THE CONVENTIONAL COOKING PRODUCTS INDUSTRY

	Baseline	TSL 1	TSL 2	TSL 3	TSL 4
Total Number of Domestic Production Workers in 2012	2,146	2,153	2,163	2,181	2,731
Change in Total Number of Domestic Production Workers in 2012		7	17	35	585

DOE expects no significant direct employment impacts among conventional cooking products manufacturers for TSL 1 through TSL 3. Generally, DOE expects that there would be positive employment impacts among domestic conventional cooking products manufacturers for TSL 1 through TSL 3. Because production employment expenditures are assumed to be a fixed percentage of COGS and the MPCs increase with more efficient products, labor tracks the increased prices in the GRIM. The GRIM predicts a gradual increase in domestic employment after standards. Because there are large price increases for TSL 4, the GRIM predicts an increase in employment. However, it is likely that the positive impacts in employment due to the incremental cost increase overstate the impacts that would result from increased shipments over time. This overstatement is caused by the assumption of constant labor content as a percentage of revenue. For TSL 4 in particular, the design options involve component substitution which substantially increase the cost of purchase parts but should not result in a proportionate increase in labor costs.

DOE reached this conclusion independent of the employment impacts from the broader U.S. economy, which are documented in chapter 15 of the TSD accompanying this notice. The employment conclusions do not account for the possible relocation of domestic jobs to lower-labor-cost countries because the potential relocation of U.S. jobs is uncertain and highly speculative. Because the labor impacts in the GRIM do not take relocation into account, the labor impacts would be different if manufacturers chose to relocate to lower-cost countries. The relatively small capital costs at TSL 1 through TSL 3 make relocation less likely. However, at all TSLs, manufacturers face significant product conversion costs that correspond to redesigning products and testing components on all platforms. These significant conversion costs put pressure on manufacturers at all TSLs to cut costs. At TSL 4, manufacturers face both significant capital and product conversion costs, which put even greater pressure on cost reduction that could ultimately lead to relocation.

ii. Microwave Ovens

Using the GRIM, DOE estimates that there are 229 U.S. production workers in the microwave oven industry. Using the CIR data, DOE estimates that approximately four percent of microwave ovens sold in the U.S. are manufactured domestically. Today's notice estimates the impacts on U.S. production workers in the microwave oven industry as a result of the trial energy conservation and standby power standards as show in Table V.41 and Table V.42.

[91] The 2006 ASM provides the following definition: 'The 'production workers' number includes workers (up through the line-supervisor level) engaged in fabricating, processing, assembling, inspecting, receiving, storing, handling, packing, warehousing, shipping (but not delivering), maintenance, repair, janitorial and guard services, product development, auxiliary production for plant's own use (*e.g.*, power plant), recordkeeping, and other services closely associated with these production operations at the establishment covered by the report. Employees above the working-supervisor level are excluded from this item.''

TABLE V.41—CHANGE IN TOTAL NUMBER OF DOMESTIC PRODUCTION EMPLOYEES IN 2012 IN THE MICROWAVE OVEN INDUSTRY FOR ENERGY FACTOR STANDARDS

	Baseline	TSL 1	TSL 2	TSL 3	TSL 4
Total Number of Domestic Production Workers in 2012	229	246	264	292	327
Change in Total Number of Domestic Production Workers in 2012		17	34	62	98

TABLE V.42—CHANGE IN TOTAL NUMBER OF DOMESTIC PRODUCTION EMPLOYEES IN 2012 IN THE MICROWAVE OVEN INDUSTRY FOR STANDBY POWER STANDARDS

	Baseline	TSL 1	TSL 2	TSL 3	TSL 4
Total Number of Domestic Production Workers in 2012	229	230	230	232	239
Change in Total Number of Domestic Production Workers in 2012		0	1	2	9

For all energy factor and standby power TSLs, the GRIM calculates an increase in domestic employment due to energy conservation standards because production labor expenditures are assumed to be a fixed percentage of COGS and MPCs increase with more-efficient products. For all TSLs, the GRIM employment results agree with the bottom-up analysis in the engineering analysis. The incremental costs for more efficient components at all TSLs are relatively small. In response to standards, domestic manufacturers would most likely not alter employment levels much because inserting a more efficient component does not necessarily require more labor.

DOE reached this conclusion independent of the employment impacts from the broader U.S. economy, which are documented in chapter 15 of the TSD accompanying this notice. The employment conclusions do not account for the possible relocation of domestic jobs to lower-labor-cost countries because the potential relocation of U.S. jobs is uncertain and highly speculative. Since more than 95 percent of microwave ovens are already imported and the employment impacts in the GRIM are small, the actual impacts on domestic employment would depend on whether any U.S. manufacturer decided to shift remaining U.S. production to lower-cost countries.

iii. Commercial Clothes Washers

Using the GRIM, DOE calculates that there are 178 U.S. production workers in the commercial clothes washer industry. Using the CIR data, DOE estimates that approximately 81 percent of CCW sold in the U.S. are manufactured domestically. Today's notice estimates the impacts on U.S. production workers in the CCW industry impacted by energy conservation standards as show in Table V.43.

TABLE V.43—CHANGE IN TOTAL NUMBER OF DOMESTIC PRODUCTION EMPLOYEES IN 2012 IN THE CCW INDUSTRY

	Baseline	TSL 1	TSL 2	TSL 3	TSL 4	TSL 5
Total Number of Domestic Production Workers in 2012	178	196	216	222	224	227
Change in Total Number of Domestic Production Workers in 2012		18	38	44	46	48

DOE expects that there would be positive employment impacts among domestic commercial clothes washer manufacturers for TSL 1 through TSL 5. Because production employment expenditures are assumed to be a fixed percentage of COGS and the MPCs increase with more efficient products, labor tracks the increased prices in the GRIM. The GRIM predicts a steady level of domestic employment after standards at a level based on the increase in relative price.

DOE reached this conclusion independent of the employment impacts from the broader U.S. economy, which are documented in chapter 15 of the TSD accompanying this notice. The employment conclusions do not account for the possible relocation of domestic jobs to lower-labor-cost countries because the potential relocation of U.S. jobs is uncertain and highly speculative. The GRIM shows the employment levels rising at higher TSLs. If all standards-compliant CCWs are produced in the United States, the employment levels would be expected to be reasonably accurate. More-efficient washers are more complex and require more labor. However, approximately 80 percent of CCWs are currently produced domestically. The actual impacts on domestic employment after standards would be different if any U.S. manufacturer decided to shift remaining U.S. production to lower-cost countries. Due to the uncertainty in the business decisions of where to manufacture washers after standards, DOE presents a range of potential employment impacts if the potential for relocation is considered. The proposed standard could result in adding 44 production workers (if all manufacturers continue to produce washers in their existing U.S. facilities) to losing 178 production workers (if all U.S. manufacturers source standards-compliant washers or shift U.S. production abroad).

Based on the commercial washer revenues reported in Appendix 13–A and using the employment assumptions in section IV.G, DOE estimates there are approximately 150 production workers at the LVM manufacturing products directly covered by this rulemaking. In addition, DOE estimates that there are 20 non-production employees attributable to CCWs at the facility. The domestic facility also manufactures residential top-loading washers, standard dryers, front-loading residential washers, washer-extractors, and tumbler dryers. If the LVM decided

to no longer produce any soft-mount washers or standard dryers at the facility because it could not sell dryers without selling washers, approximately 292 production and 40 non-production jobs would be lost. Including all production workers involved in covered and non-covered products, the closure of the LVM domestic manufacturing plant would equate to a loss of approximately 600 factory employees.

A further discussion of the LVM and the potential impacts of relocation on employment for the CCW industry at other TSLs is presented in Chapter 13 of the TSD.

c. Impacts on Manufacturing Capacity

i. Conventional Cooking Products

According to the manufacturers of gas cooking products, amended energy conservation standards should not significantly affect production capacity, except at the max-tech levels. For example, in interviews, all manufacturers of cooking products with standing pilot lights stated they also manufacture products that do not use this type of ignition. Since manufacturers of gas cooking appliances with standing pilot ignitions typically also sell otherwise-identical appliances with electronic ignition systems, manufacturers stated that they expected impacts on manufacturing capacity due to changes in the ignition systems to be minimal. Thus, DOE believes manufacturers will be able to maintain manufacturing capacity levels and continue to meet market demand under amended energy conservation standards. For most other products and efficiencies, manufacturers can modify existing equipment to accommodate redesigned products with more efficient components without significantly impacting production volumes.

However, max-tech levels for standard electric ovens and standard gas ovens strand some existing manufacturing equipment and tooling, and would require substantial product development and retooling. DOE believes setting a standard at this level could lead to short term capacity problems for these products if manufacturers cannot make the tooling changes in time to meet the standard. For the other efficiencies, manufacturers will be able to retool without causing capacity constraints.

ii. Microwave Ovens

According to the majority of microwave oven manufacturers, new energy conservation standards will not significantly affect production capacity. As with conventional cooking products, any necessary microwave oven redesigns involve component switches that will not change the fundamental assembly of the equipment. However, manufacturers anticipate significant changes to tooling for TSL 4 for energy factor standards and minor changes to tooling at all TSLs for standby power standards. For all efficiency levels for energy factor and standby power standards, the most significant conversion costs are the research and development (R&D), testing, and certification of products with more-efficient components, which does not affect production line capacity. Thus, DOE believes manufacturers will be able to maintain manufacturing capacity levels and continue to meet market demand under new energy conservation standards.

iii. Commercial Clothes Washers

According to the majority of CCW manufacturers, new energy conservation standards could potentially impact manufacturers' production capacity depending on the efficiency level required. Necessary redesigns of front-loading and top-loading CCWs will not change the fundamental assembly of the product or cause a drastic increase in the volume requirements of one type of washer. Thus, DOE believes manufacturers will be able to maintain manufacturing capacity levels and continue to meet market demand under new energy conservation standards as long as manufacturers continue to offer top-loading and front-loading washers.

However, a very high efficiency standard for top-loading clothes washers could cause a manufacturer to abandon further manufacture of top-loading clothes washers after the effective date (due to concerns about wash quality, for example). Instead of manufacturing top-loading clothes washers, the manufacturers could elect to switch its entire production over to front-loading clothes washers. Since top-loading and front-loading clothes washers share few, if any parts, are built on completely separate assembly lines, and are built at very different production volumes, a manufacturer may not be able to make a platform switch from top-loading to front-loading washers without significant impacts on product development and capital expenses, along with capacity constraints.

For example, multiple manufacturers stated during interviews that front-loading CCWs represent a relatively small segment of their total production volumes. Thus, their front-loading production capacity may need to be substantially expanded to meet the demand that their top-loading production lines used to meet. This expansion could possibly affect capacity until new production lines come on line to service demand. In addition, manufacturers stated that the higher prices of front-loading washers could lead to a decrease in shipments. This could lead to a permanently lower production capacity as machines are repaired and the product lifetime of existing washers is extended.

d. Impacts on Subgroups of Manufacturers

As discussed above, using average cost assumptions to develop an industry cash flow estimate is not adequate for assessing differential impacts among subgroups of manufacturers. Small manufacturers, niche players, or manufacturers exhibiting a cost structure that differs significantly from the industry average could be affected differently. DOE used the results of the industry characterization to group manufacturers exhibiting similar characteristics.

As outlined earlier, two small cooking appliance businesses and a low-volume manufacturer of CCWs will be affected disproportionately by any energy efficiency regulation in their respective industries. These businesses are focused on one specific market segment and are orders of magnitude smaller than their diversified competitors. Due to this combination of market concentration and size, all of them are at risk of material harm to their business, depending on the TSL chosen.

For the small cooking appliance businesses, the primary issue is whether an amended standard would continue to allow gas-fired appliances with standing pilots to be sold. Two small businesses indicated that 25 percent or more of their entire production consists of such niche products, now that most manufacturers have switched to electronic ignition in their gas-fired cooking appliances. See section VI.B of this notice for detail discussion of possible impacts on small cooking appliance businesses.

The CCW LVM indicated that it could not manufacture top-loading washers above an MEF of 1.42 (TSL 1). If DOE sets a standard above TSL 1, the LVM would be forced to design a new top-loading washer, offer only front-loading washers, or choose to exit the CCW market altogether. Due to its small size, the investment required for the LVM to design a more efficient top-loading washer would put the company at a competitive disadvantage. If the LVM no longer offers top-loading washers and has to expand its front-loading production lines, it would likely cause

it to cease CCW production altogether, resulting in significant impacts to the industry. Currently, the LVM's top-loading washers account for more than half of the company's CCW revenues and three-quarters of its CCW shipments. To shift all top-loading CCWs to front-loading washers at current production volumes would require substantial investments that the company may not be able to justify. In addition, the LVM derives 87 percent of its clothes washer revenue from CCWs, so its sales in the RCW market would be too low to justify continuing any top-loading clothes washer manufacturing. While the LVM currently manufactures a front-loading clothes washer, it does so at a cost disadvantage compared to its competitors. The potential investment and risk required to develop a cost-competitive clothes washer that deviates significantly from its traditional top-loader agitator design could be too great for the LVM's current owners. The LVM could decide to exit the market rather than take this risk which could cause employment impacts in the CCW industry. Further detail and separate analysis of impacts on the LVM are found in Chapter 13 of the TSD accompanying this notice.

e. Cumulative Regulatory Burden

One aspect of assessing manufacturer burden is the cumulative impact of multiple DOE standards and the regulatory actions of other Federal agencies and States that affect the manufacturers of a covered product or equipment. DOE believes that a standard level is not economically justified if it contributes to an unacceptable cumulative regulatory burden. While any one regulation may not impose a significant burden on manufacturers, the combined effects of several existing or impending regulations may have serious consequences for some manufacturers, groups of manufacturers, or an entire industry. Assessing the impact of a single regulation may overlook this cumulative regulatory burden.

Companies that produce a wider range of regulated products may be faced with more capital and product development expenditures than their competitors. This can prompt those companies to exit the market or reduce their product offerings, potentially reducing competition. Smaller companies can be especially affected, since they have lower sales volumes over which to amortize the costs of compliance with new regulations.

In addition to DOE's energy conservation regulations for cooking products and CCWs, several other existing Federal regulations and pending regulations apply to these products and other equipment produced by the same manufacturers. DOE recognizes that each regulation can significantly impact manufacturers' financial operations. Multiple regulations affecting the same manufacturer can quickly strain its profits and possibly cause it to exit from the market. The most significant of these additional regulations include the standby power requirements, several additional Federal and State energy conservation standards, the Restriction of Hazardous Substance Directive (RoHS), and international energy conservation standards and test procedures.

Additional investments necessary to meet regulations in addition to the standards prescribed by this rulemaking could have significant impacts on manufacturers of cooking products and CCWs. For this NOPR, DOE also identified other regulations these manufacturers are facing for these and other products and equipment they manufacture within three years prior to and three years after the anticipated effective date of the amended energy conservation standards for cooking products and CCWs.

Most manufacturers interviewed for this rulemaking are already compliant with the RoHS directive. The most significant cumulative regulatory burden for gas cooking appliance manufacturers is a State-by-State restriction on mercury,[92] which affects the gas valves used in their appliances. Most gas cooking appliance manufacturers have already eliminated mercury switches or already have plans in place to do so. However, all appliance manufacturers are concerned about potential restrictions of other hazardous substances in the future, such as fire protection materials, which could be costly to remove from existing products.

Most manufacturers interviewed also sell products to other countries with energy conservation and standby standards. Manufacturers may incur a substantial cost to the extent that there are overlapping testing and certification requirements in other markets besides the United States. However, since DOE only has the authority to set standards on products sold in the United States, DOE only accounts for domestic compliance costs in its calculation of product conversion expenses for products covered in this rulemaking. For more details, see chapter 13 of the TSD accompanying this notice.

3. National Impact Analysis

a. Significance of Energy Savings

To estimate the energy savings through 2042 that would be expected to result from amended energy conservation standards, DOE compared the energy consumption of the appliance products under the base case to energy consumption of these products under the TSLs. Tables V.44 through V.47 show the forecasted national energy savings at each TSL for conventional cooking products, microwave ovens (two tables), and CCWs, respectively. For conventional cooking products, summing the energy savings for all products classes across each TSL considered in this rulemaking would result in significant energy savings, with the amount of savings increasing with higher efficiency standards. The same is true for microwave ovens and CCWs. For CCWs, summing the energy and water savings for both product classes across each TSL considered would result in significant energy and water savings. Chapter 11 of the TSD accompanying this notice provides additional details on the NES values reported below, as well as discounted NES results (and discounted national water savings results for CCWs) based on discount rates of three and seven percent. DOE reports both undiscounted and discounted values of energy savings. Discounted energy savings represent a policy perspective wherein energy savings farther in the future are less significant than energy savings closer to the present.[93]

[92] For example, the Interstate Mercury Education & Reduction Clearinghouse (IMERC) is a coalition of northeast states coordinating the banning of products containing mercury (see *http://www.newmoa.org/prevention/mercury/imerc.cfm*).

[93] Consistent with Executive Order 12866, ''Regulatory Planning and Review,'' 58 FR 51735 (Oct. 4, 1993), DOE follows the guidance of OMB regarding methodologies and procedures for regulatory impact analysis that affect more than one agency. In reporting energy and environmental benefits from energy conservation standards, DOE will report both discounted and undiscounted (*i.e.*, zero discount-rate) values.

TABLE V.44—SUMMARY OF CUMULATIVE NATIONAL ENERGY SAVINGS FOR CONVENTIONAL COOKING PRODUCTS

TSL	National energy savings (quads)							
	Electric coil cooktops	Electric smooth cooktops	Gas cooktops	Electric standard ovens	Electric self-clean ovens	Gas standard ovens	Gas self-clean ovens	Total
1	0.00	0.00	0.10	0.00	0.00	0.05	0.00	0.14
2	0.04	0.00	0.10	0.05	0.00	0.05	0.00	0.23
3	0.04	0.00	0.10	0.05	0.00	0.05	0.09	0.32
4	0.04	0.02	0.15	0.07	0.04	0.09	0.10	0.50

TABLE V.45—SUMMARY OF CUMULATIVE NATIONAL ENERGY SAVINGS FOR MICROWAVE OVENS (ENERGY FACTOR)

TSL	National energy savings (quads)
1a	0.08
2a	0.09
3a	0.11
4a	0.12

TABLE V.46—SUMMARY OF CUMULATIVE NATIONAL ENERGY SAVINGS FOR MICROWAVE OVENS (STANDBY POWER)

TSL	National energy savings (quads)
1b	0.23
2b	0.33
3b	0.45
4b	0.69

TABLE V.47—SUMMARY OF CUMULATIVE NATIONAL ENERGY AND WATER SAVINGS FOR COMMERCIAL CLOTHES WASHERS

TSL	Top-Loading		Front-Loading		Total	
	National energy savings (quads)	National water savings (trillion gallons)	National energy savings (quads)	National water savings (trillion gallons)	National energy savings (quads)	National water savings (trillion gallons)
1	0.05	0.00	0.00	0.00	0.05	0.00
2	0.11	0.15	0.00	0.01	0.11	0.16
3	0.15	0.18	0.00	0.01	0.15	0.19
4	0.15	0.18	0.01	0.03	0.16	0.21
5	0.15	0.18	0.02	0.06	0.17	0.24

b. Net Present Value

The NPV analysis is a measure of the cumulative benefit or cost of energy conservation standards to the Nation. In accordance with the OMB's guidelines on regulatory analysis (OMB Circular A–4, section E, September 17, 2003), DOE calculated NPV using both a seven-percent and a three-percent real discount rate. The seven-percent rate is an estimate of the average before-tax rate of return on private capital in the U.S. economy, and reflects the returns on real estate and small business capital as well as corporate capital. DOE used this discount rate to approximate the opportunity cost of capital in the private sector, since recent OMB analysis has found the average rate of return to capital to be near this rate. DOE also used the three-percent rate to capture the potential effects of standards on private consumption (*e.g.*, through higher prices for equipment and the purchase of reduced amounts of energy). This rate represents the rate at which society discounts future consumption flows to their present value. This rate can be approximated by the real rate of return on long-term government debt (*i.e.*, yield on Treasury notes minus annual rate of change in the Consumer Price Index), which has averaged about three percent on a pre-tax basis for the last 30 years.

Tables V.48 through V.51 show the forecasted NPV at each TSL for conventional cooking products, microwave ovens, and CCWs.

TABLE V.48—SUMMARY OF CUMULATIVE NET PRESENT VALUE FOR CONVENTIONAL COOKING PRODUCTS (IMPACTS FOR UNITS SOLD FROM 2012 TO 2042)

TSL	NPV (billion 2006$)															
	Electric coil cooktops		Electric smooth cooktops		Gas cooktops		Electric standard ovens		Electric self-clean ovens		Gas standard ovens		Gas self-clean ovens		Total	
	Discount rate		Discount rate		Discount rate		Discount rate		Discount rate		Discount rate		Discount rate		Discount rate	
	7%	3%	7%	3%	7%	3%	7%	3%	7%	3%	7%	3%	7%	3%	7%	3%
1	0.00	0.00	0.00	0.00	0.19	0.50	0.00	0.00	0.00	0.00	0.02	0.11	0.00	0.00	0.21	0.61
2	0.07	0.23	0.00	0.00	0.19	0.50	0.11	0.34	0.00	0.00	0.02	0.11	0.00	0.00	0.39	1.19
3	0.07	0.23	0.00	0.00	0.19	0.50	0.11	0.34	0.00	0.00	0.02	0.11	−0.01	0.19	0.38	1.37
4	0.07	0.23	−7.26	−13.89	−0.73	−1.11	−0.81	−1.37	−2.77	−5.21	−0.91	−1.76	−0.14	−0.04	−12.55	−23.14

TABLE V.49—SUMMARY OF CUMULATIVE NET PRESENT VALUE FOR MICROWAVE OVEN ENERGY FACTOR (IMPACTS FOR UNITS SOLD FROM 2012 TO 2042)

TSL	NPV (billion 2006$)	
	7% Discount rate	3% Discount rate
1a	−0.61	−1.07
2a	−1.60	−2.96
3a	−3.06	−5.72
4a	−4.94	−9.28

TABLE V.50—SUMMARY OF CUMULATIVE NET PRESENT VALUE FOR MICROWAVE OVEN STANDBY POWER (IMPACTS FOR UNITS SOLD FROM 2012 TO 2042)

TSL	NPV (billion 2006$)	
	7% Discount rate	3% Discount rate
1b	0.91	2.03
2b	1.25	2.79
3b	1.56	3.52
4b	1.61	3.90

TABLE V.51—SUMMARY OF CUMULATIVE NET PRESENT VALUE FOR COMMERCIAL CLOTHES WASHERS (IMPACTS FOR UNITS SOLD FROM 2012 TO 2042)

TSL	NPV (billion 2006$)					
	Top-Loading		Front-Loading		Total	
	7% Discount rate	3% Discount rate	7% Discount rate	3% Discount rate	7% Discount rate	3% Discount rate
1	−0.006	0.03	0.004	0.01	−0.001	0.04
2	0.29	0.77	0.03	0.06	0.32	0.83
3	0.43	1.10	0.03	0.06	0.46	1.16
4	0.43	1.10	0.07	0.16	0.50	1.27
5	0.43	1.10	0.12	0.29	0.55	1.39

c. Impacts on Employment

In addition to considering the direct employment impacts for the manufacturers of products covered by this rulemaking (discussed above), DOE also develops estimates of the indirect employment impacts of proposed standards in the economy in general. As noted previously, DOE expects energy conservation standards for the appliance products that are the subject of this rulemaking to reduce energy bills for consumers, with the resulting net savings being redirected to other forms of economic activity. DOE also realizes that these shifts in spending and economic activity could affect the demand for labor. To estimate these effects, DOE used an input/output model of the U.S. economy using BLS data (described in section IV.H). (See the TSD accompanying this notice, chapter 15.)

This input/output model suggests the proposed standards are likely to slightly increase the net demand for labor in the economy. Neither the BLS data nor the input/output model DOE uses includes the quality or wage level of the jobs. As Table V.52 shows, DOE estimates that net indirect employment impacts from the proposed standards are likely to be

small. The net increase in jobs is so small that it would be imperceptible in national labor statistics and might be offset by other, unanticipated effects on employment.

TABLE V.52—NET NATIONAL CHANGE IN INDIRECT EMPLOYMENT, JOBS IN 2042

[Net National Change in Jobs (thousands)]

Trial standard level	Conventional cooking products	Trial standard level	Microwave oven EF	Trial standard level	Microwave oven standby	Trial standard level	Commercial clothes washers
1	0.25	1a	0.77	1b	2.19	1	0.07
2	0.81	2a	0.78	2b	3.14	2	0.51
3	0.90	3a	0.93	3b	4.30	3	0.63
4	0.99	4a	0.96	4b	6.51	4	0.68
NA	NA	NA	NA	NA	NA	5	0.76

4. Impact on Utility or Performance of Products

For the reasons stated above in Section III.E.1.d., DOE believes that for purposes of 42 U.S.C. 6295(o)(2)(B)(i)(IV), none of the efficiency levels considered in this notice reduces the utility or performance of the appliance products under consideration in this rulemaking.

5. Impact of Any Lessening of Competition

In weighing the promulgation of any proposed standards, DOE is required to consider any lessening of competition that is likely to result from the adoption of those standards. The determination of the likely competitive impacts stemming from a proposed standard is made by the Attorney General, who transmits this determination, along with an analysis of the nature and extent of the impact, to the Secretary of Energy. (See 42 U.S.C. 6295(o)(2)(B)(i)(V) and (B)(ii).)

To assist the Attorney General in making such a determination, DOE has provided DOJ with copies of this notice and the TSD for review. DOE will consider DOJ's comments on the proposed rule in preparing the final rule.

6. Need of the Nation To Conserve Energy

An improvement in the energy efficiency of cooking products and CCWs addressed in this notice is likely to improve the security of the Nation's energy system by reducing overall demand for energy, and, thus, reducing the Nation's reliance on foreign sources of energy. Reduced demand also is likely to improve the reliability of the electricity system, particularly during peak-load periods. As a measure of this reduced demand, DOE expects the proposed standards covered under this rulemaking to eliminate the need for the construction of new power plants with approximately 404 MW electricity generation capacity in 2042.

Enhanced energy efficiency also produces environmental benefits. The expected energy savings from higher standards for the products covered by this rulemaking will reduce the emissions of air pollutants and greenhouse gases associated with energy production and household and building use of fossil fuels. Table V.53 shows cumulative CO_2, NO_X, and Hg (mercury) emissions reductions for the products under consideration in this rulemaking over the analysis period. The expected energy savings from cooking product and CCW standards will reduce the emissions of greenhouse gases associated with energy production, and may reduce the cost of maintaining nationwide emissions standards and constraints.

TABLE V.53—SUMMARY OF EMISSIONS REDUCTIONS (CUMULATIVE REDUCTIONS FOR PRODUCTS SOLD FROM 2012 TO 2042)

	TSL				
	1	2	3	4	NA
Emissions Reductions for Conventional Cooking Products:					
CO_2 (Mt)	14.62	16.62	25.08	37.54	NA
NO_X (kt)	6.32–12.06	6.39–13.71	10.11–20.55	14.99–30.65	NA
Hg (t)	0–0.20	0–0.26	0–0.37	0–0.56	NA
	1a	2a	3a	4a	NA
Emissions Reductions for Microwave Ovens Energy Factor:					
CO_2 (Mt)	11.49	16.95	27.54	38.51	NA
NO_X (kt)	0.58–14.25	0.85–20.85	1.37–33.74	1.91–47.04	NA
Hg (t)	0–0.25	0–0.37	0–0.60	0–0.84	NA
	1b	2b	3b	4b	NA
Emissions Reductions for Microwave Ovens Standby Power:					
CO_2 (Mt)	23.15	35.19	50.48	82.12	NA
NO_X (kt)	1.23–30.30	1.87–46.02	2.67–65.96	4.35–107.23	NA
Hg (t)	0–0.50	0–0.76	0–1.09	0–1.77	NA

TABLE V.53—SUMMARY OF EMISSIONS REDUCTIONS (CUMULATIVE REDUCTIONS FOR PRODUCTS SOLD FROM 2012 TO 2042)—Continued

	TSL				
	1	2	3	4	NA
	1	2	3	4	5
Emissions Reductions for Commercial Clothes Washers:					
CO_2 (Mt)	3.79	8.30	11.55	12.28	12.73
NO_X (kt)	1.43–3.25	3.04–7.13	4.25–9.93	4.51–10.56	4.67–10.95
Hg (t)	0–0.05	0–0.12	0–0.17	0–0.18	0–0.19

Mt = million metric tons.
kt = thousand metric tons.
t = metric tons.

The estimated cumulative CO_2, NO_X, and Hg emissions reductions for the proposed standards range up to a maximum of 38 Mt for CO_2, 15 kt to 31 kt for NO_X, and 0 t to 0.6 t for Hg for conventional cooking products over the period from 2012 to 2042. For microwave oven EF, cumulative emission reductions range up to a maximum of 39 Mt for CO_2, 2 kt to 47 kt for NO_X, and 0 t to 0.8 t for Hg, while for microwave oven standby, cumulative emission reductions range up to a maximum of 82 Mt for CO_2, 4 kt to 107 kt for NO_X, and 0 t to 1.8 t for Hg. For CCWs, cumulative emission reductions range up to a maximum of 13 Mt for CO_2, 5 kt to 11 kt for NO_X, and 0 t to 0.2 t for Hg. However, DOE's analyses show that TSL 4 for conventional cooking products, TSL 4a and TSL 4b for microwave ovens, and TSL 5 for CCWs provides the greatest reduction of emissions of all the TSLs considered. In the environmental assessment (chapter 16 of the TSD), DOE reports estimated annual changes in CO_2, NO_X, and Hg emissions attributable to each TSL. As discussed in section IV.J, DOE does not report SO_2 emissions reduction from power plants because reductions from an energy conservation standard would not affect the overall level of SO_2 emissions in the United States due to the emissions caps for SO_2.

The NEMS–BT modeling assumed that NO_X would be subject to the Clean Air Interstate Rule (CAIR) issued by the U.S. Environmental Protection Agency on March 10, 2005.[94] 70 FR 25162 (May 12, 2005). On July 11, 2008, the U.S. Court of Appeals for the District of Columbia Circuit (D.C. Circuit) issued its decision in *North Carolina* v. *Environmental Protection Agency,*[95] in which the court vacated the CAIR. If left in place, the CAIR would have permanently capped emissions of NO_X in 28 eastern States and the District of Columbia. As with the SO_2 emissions cap, a cap on NO_X emissions would have meant that energy conservation standards are not likely to have a physical effect on NO_X emissions in States covered by the CAIR caps. While the caps would have meant that physical emissions reductions in those States would not have resulted from the energy conservation standards that DOE is proposing today, the standards might have produced an environmental-related economic impact in the form of lower prices for emissions allowance credits, if large enough. DOE notes that the estimated total reduction in NO_X emissions, including projected emissions or corresponding allowance credits in States covered by the CAIR cap was insignificant and too small to affect allowance prices for NO_X under the CAIR.

Even though the D.C. Circuit vacated the CAIR, DOE notes that the D.C. Circuit left intact EPA's 1998 NO_X SIP Call rule, which capped seasonal (summer) NO_X emissions from electric generating units and other sources in 23 jurisdictions and gave those jurisdictions the option to participate in a cap and trade program for those emissions. 63 FR 57356, 57359 (Oct. 27, 1998).[96] DOE notes that the SIP Call rule may provide a similar, although smaller in extent, regional cap and may limit actual reduction in NO_X emissions from revised standards occurring in States participating in the SIP Call rule. However, the possibility that the SIP Call rule may have the same effect as CAIR is highly uncertain. Therefore, DOE established a range of NO_X reductions due to the standards being considered in today's proposed rule. DOE's low estimate was based on the emission rate of the cleanest new natural gas combined-cycle power plant available for electricity generation based on the assumption that efficiency standards would result in only the cleanest available fossil-fueled generation being displaced. DOE used the emission rate, specified in kt of NO_X emitted per TWh of electricity generated, associated with an advanced natural gas combined-cycle power plant, as specified by NEMS–BT. The emission rate specified by NEMS–BT is 0.0341 thousand short tons per TWh. To estimate the reduction in NO_X emissions, DOE multiplied this emission rate by the reduction in electricity generation due to the standards considered. DOE's high estimate was based on the use of a nationwide NO_X emission rate for all electrical generation. Use of such an emission rate assumes that future efficiency standards would result in displaced electrical generation mix that is equivalent to today's mix of power plants (*i.e.*, future power plants displaced are no cleaner than what are being used currently to generate electricity). In addition, under the high estimate assumption, standards would have little to no effect on the generation

[94] See *http://www.epa.gov/cleanairinterstaterule/*.

[95] Case No. 05–1244, 2008 WL 2698180 at *1 (D.C. Cir. July 11, 2008).

[96] In the NO_X SIP Call rule, EPA found that sources in the District of Columbia and 22 ''upwind'' States (States) were emitting NO_X (an ozone precursor) at levels that significantly contributed to ''downwind'' States not attaining the ozone NAAQS or at levels that interfered with states in attainment maintaining the ozone NAAQS. In an effort to ensure that ''downwind'' states attain or continue to attain the ozone NAAQS, EPA established a region-wide cap for NO_X emissions from certain large combustion sources and set a NO_X emissions budget for each State. Unlike the cap that CAIR would have established, the NO_X SIP Call Rule's cap only constrains seasonal (summer time) emissions. In order to comply with the NO_X SIP Call Rule, States could elect to participate in the NO_X Budget Trading Program. Under the NO_X Budget Trading Program, each emission source is required to have one allowance for each ton of NO_X emitted during the ozone season. States have flexibility in how they allocate allowances through their State Implementation Plans but States must remain within the EPA-established budget. Emission sources are allowed to buy, sell and bank NO_X allowances as appropriate. It should be noted that, on April 16, 2008, EPA determined that Georgia is no longer subject to the NO_X SIP Call rule. 73 FR 21528 (April 22, 2008).

mix. Based on the AEO 2008 for a recent year (2006) in which no regulatory or non-regulatory measures were in effect to limit NO_X emissions, DOE derived a high-end NO_X emission rate of 0.842 thousand short tons per TWh. To estimate the reduction in NO_X emissions, DOE multiplied this emission rate by the reduction in electricity generation due to the standards considered. DOE is considering whether changes are needed to its plan for addressing the issue of NO_X reduction. DOE invites public comment on how the agency should address this issue, including how it might value NO_X emissions for States now that the CAIR has been vacated.[97]

As noted above in section IV.J, with regard to mercury emissions, DOE is able to report an estimate of the physical quantity changes in mercury emissions associated with an energy conservation standard. As opposed to using the NEMS-BT model, DOE used a range of emission rates to estimate the mercury emissions that could be reduced from standards. DOE's low estimate was based on the assumption that future standards would displace electrical generation from natural gas-fired power plants resulting in an effective emission rate of zero. The low-end emission rate is zero because virtually all mercury emitted from electricity generation is from coal-fired power plants. Based on an emission rate of zero, no emissions would be reduced from standards. DOE's high estimate was based on the use of a nationwide mercury emission rate from the *AEO 2008*. Because power plant emission rates are a function of local regulation, scrubbers, and the mercury content of coal, it is extremely difficult to come up with a precise high-end emission rate. Therefore, DOE believes the most reasonable estimate is based on the assumption that all displaced coal generation would have been emitting at the average emission rate for coal generation as specified by the *AEO 2008*. As noted previously, because virtually all mercury emitted from electricity generation is from coal-fired power plants, DOE based the emission rate on the tons of mercury emitted per TWh of coal-generated electricity. Based on the emission rate for a recent year (2006), DOE derived a high-end emission rate of 0.0253 short tons per TWh. To estimate the reduction in mercury emissions, DOE multiplied the emission rate by the reduction in coal-generated electricity due to the standards considered. These changes in Hg emissions, as shown in Table V.53, are extremely small with a range of between 0.04 and 0.11 percent for conventional cooking products, 0.05 and 0.34 percent for microwave ovens, and 0.01 and 0.04 percent for CCWs of national base case emissions (as determined by the *AEO 2008*) depending on TSL.

The NEMS–BT model used for today's proposed rule could not be used to estimate Hg emission reductions due to standards as it assumed that Hg emissions would be subject to EPA's Clean Air Mercury Rule[98] (CAMR), which would have permanently capped emissions of mercury for new and existing coal-fired plants in all States by 2010. Similar to SO_2 and NO_X, DOE assumed that under such a system, energy conservation standards would result in no physical effect on these emissions, but might result in an environmental-related economic benefit in the form of a lower price for emissions allowance credits, if large enough. DOE estimated that the change in the Hg emissions from standards would not be large enough to influence allowance prices under CAMR.

On February 8, 2008, the D.C. Circuit issued its decision in *New Jersey* v. *Environmental Protection Agency,*[99] in which the Court, among other actions, vacated the CAMR referenced above. Accordingly, DOE is considering whether changes are needed to its plan for addressing the issue of mercury emissions in light of the D.C. Circuit's decision. DOE invites public comment on addressing mercury emissions in this rulemaking.

In today's proposed rule, DOE is taking into account a monetary benefit of CO_2 emission reductions associated with this rulemaking. To put the potential monetary benefits from reduced CO_2 emissions into a form that is likely to be most useful to decisionmakers and stakeholders, DOE used the same methods used to calculate the net present value of consumer cost savings: the estimated year-by-year reductions in CO_2 emissions were converted into monetary values and these resulting annual values were then discounted over the life of the affected appliances to the present using both 3 percent and 7 percent discount rates.

The estimates discussed below are based on an assumption of no benefit to an average benefit value reported by the IPCC.[100] It is important to note that the IPCC estimate used as the upper bound value was derived from an estimate of the mean value of worldwide impacts from potential climate impacts caused by CO_2 emissions, and not just the effects likely to occur within the United States. As DOE considers a monetary value for CO_2 emission reductions, the value should be restricted to a representation of those costs/benefits likely to be experienced in the United States. As DOE expects that such values would be lower than comparable global values, however, there currently are no consensus estimates for the U.S. benefits likely to result from CO_2 emission reductions. However, DOE believes it is appropriate to use U.S. benefit values, where available, and not world benefit values, in its analysis.[101] Because U.S. specific estimates are not available, and DOE did not receive any additional information that would help serve to narrow the proposed range as a representative range for domestic U.S. benefits, DOE believes it is appropriate to propose the global mean value as an appropriate upper bound U.S. value for purposes of sensitivity analysis.

As already discussed in section IV.J, DOE received comments on the ANOPR in the present rulemaking for estimating the value of CO_2 emissions reductions. Both the Joint Comment and EJ argued for assigning an economic value to CO_2 emissions. DOE's approach for assigning a range to the dollars per ton of CO_2 emissions recognizes and addresses the concerns of the Joint Comment and EJ.

[97] In anticipation of CAIR replacing the NO_X SIP Call Rule, many States adopted sunset provisions for their plans implementing the NO_X SIP Call Rule. The impact of the NO_X SIP Call Rule on NO_X emissions will depend, in part, on whether these implementation plans are reinstated.

[98] 70 FR 28606 (May 18, 2005).

[99] No. 05–1097, 2008 WL 341338, at *1 (D.C. Cir. Feb. 8, 2008).

[100] During the preparation of its most recent review of the state of climate science, the Intergovernmental Panel on Climate Change (IPCC) identified various estimates of the present value of reducing carbon-dioxide emissions by one ton over the life that these emissions would remain in the atmosphere. The estimates reviewed by the IPCC spanned a range of values. In the absence of a consensus on any single estimate of the monetary value of CO_2 emissions, DOE used the estimates identified by the study cited in Summary for Policymakers prepared by Working Group II of the IPCC's Fourth Assessment Report to estimate the potential monetary value of CO_2 reductions likely to result from standards finalized in this rulemaking. According to IPCC, the mean social cost of carbon (SCC) reported in studies published in peer-reviewed journals was $43 per ton of carbon. This translates into about $12 per ton of carbon dioxide. The literature review (Tol 2005) from which this mean was derived did not report the year in which these dollars were denominated. However, we understand this estimate was denominated in 1995 dollars. Updating that estimate to 2007 dollars yields a SCC of $15 per ton of carbon dioxide.

[101] In contrast, most of the estimates of costs and benefits of increasing the efficiency of residential cooking products and commercial clothes washers include only economic values of impacts that would be experienced in the U.S. For example, in determining impacts on manufacturers, DOE generally does not consider impacts that occur solely outside of the United States.

Given the uncertainty surrounding estimates of the societal cost of carbon (SCC), relying on any single study may be inadvisable since its estimate of the SCC will depend on many assumptions made by its authors. The Working Group II's contribution to the Fourth Assessment Report of the IPCC notes that:

> The large ranges of SCC are due in the large part to differences in assumptions regarding climate sensitivity, response lags, the treatment of risk and equity, economic and non-economic impacts, the inclusion of potentially catastrophic losses, and discount rates.[102]

Because of this uncertainty, DOE is relying on Tol (2005), which was presented in the IPCC's Fourth Assessment Report, and was a comprehensive meta-analysis of estimates for the value of SCC. As a result, DOE is relying on the Tol study reported by the IPCC as the basis for its analysis.

DOE continues to believe that the most appropriate monetary values for consideration in the development of efficiency standards are those drawn from studies that attempt to estimate the present value of the marginal economic benefits likely to result from reducing greenhouse gas emissions, rather than estimates that are based on the market value of emission allowances under existing cap and trade programs or estimates that are based on the cost of reducing emissions—both of which are largely determined by policy decisions that set the timing and extent of emission reductions and do not necessarily reflect the benefit of reductions. DOE also believes that the studies it relies upon generally should be studies that were the subject of a peer review process and were published in reputable journals.

In today's NOPR, DOE is essentially proposing to rely on a range of values based on the values presented in Tol (2005). Additionally, DOE has applied an annual growth rate of 2.4% to the value of SCC, as suggested by the IPCC Working Group II (2007, p. 822), based on estimated increases in damages from future emissions reported in published studies. Because the values in Tol (2005) were presented in 1995 dollars, DOE is assigning a range for the SCC of $0 to $20 ($2007) per ton of CO_2 emissions.

DOE is proposing to use the median estimated social cost of CO_2 as an upper bound of the range. This value is based on Tol (2005), which reviewed 103 estimates of the SCC from 28 published studies, and concluded that when only peer-reviewed studies published in recognized journals are considered, ''that climate change impacts may be very uncertain but [it] is unlikely that the marginal damage costs of carbon dioxide emissions exceed $50 per ton carbon [comparable to a 2007 value of $20 per ton carbon dioxide when expressed in 2007 U.S. dollars with a 2.4% growth rate].''

In proposing a lower bound of $0 for the estimated range, DOE agrees with the IPCC Working Group II (2007) report that ''significant warming across the globe and the locations of significant observed changes in many systems consistent with warming is very unlikely to be due solely to natural variability of temperatures or natural variability of the systems'' (pp. 9), and, thus, tentatively concludes that a global value of zero for reducing emissions cannot be justified. However, DOE also believes that it is reasonable to allow for the possibility that the U.S. portion of the global cost of carbon dioxide emissions may be quite low. In fact, some of the studies looked at in Tol (2005) reported negative values for the SCC. DOE is using U.S. benefit values, and not world benefit values, in its analysis, and, further, DOE believes that U.S. domestic values will be lower than the global values. Additionally, the statutory criteria in EPCA do not require consideration of global effects. Therefore, DOE is proposing to use a lower bound of $0 per ton of CO_2 emissions in estimating the potential benefits of today's proposed rule.

The resulting estimates of the potential range of net present value benefits associated with the reduction of CO_2 emissions are reflected in Table V.54.

TABLE V.54—ESTIMATES OF SAVINGS FROM CO_2 EMISSIONS REDUCTIONS UNDER TRIAL STANDARD LEVELS AT 7% DISCOUNT RATE AND 3% DISCOUNT RATE

Conventional cooking product TSL	Estimated cumulative CO_2 (Mt) emission reductions	Value of estimated CO_2 emission reductions (million 2007$) at 7% discount rate	Value of estimated CO_2 emission reductions (million 2007$) at 3% discount rate
1	14.62	$0 to $114	$0 to $256.
2	16.62	$0 to $129	$0 to $290.
3	25.08	$0 to $192	$0 to $438.
4	37.54	$0 to $286	$0 to $654.
Microwave oven energy factor TSL	**Estimated cumulative CO_2 (Mt) emission reductions**	**Value of estimated CO_2 emission reductions (million 2007$) at 7% discount rate**	**Value of Estimated CO_2 emission reductions (million 2007$) at 3% discount rate**
1a	11.49	$0 to $90	$0 to $201.
2a	16.95	$0 to $131	$0 to $296.
3a	27.54	$0 to $212	$0 to $481.
4a	38.51	$0 to $295	$0 to $672.
Microwave oven energy factor TSL	**Estimated cumulative CO_2 (Mt) emission reductions**	**Value of estimated CO_2 emission reductions (million 2007$) at 7% discount rate**	**Value of estimated CO_2 emission reductions (million 2007$) at 3% discount rate**
1b	23.51	$0 to $186	$0 to $406.
2b	35.19	$0 to $281	$0 to $617.
3b	50.48	$0 to $403	$0 to $885.

[102] *Climate Change 2007—Impacts, Adaptation and Vulnerability* Contribution of Working Group II to the Fourth Assessment Report of the IPCC, 17. *Available at http://www.ipcc-wg2.org* (last accessed Aug. 7, 2008).

Microwave oven energy factor TSL	Estimated cumulative CO_2 (Mt) emission reductions	Value of estimated CO_2 emission reductions (million 2007$) at 7% discount rate	Value of estimated CO_2 emission reductions (million 2007$) at 3% discount rate
4b	82.12	$0 to $654	$0 to $1,440.
Commercial clothes washer TSL	**Estimated cumulative CO_2 (Mt) emission reductions**	**Value of estimated CO_2 emission reductions (million 2007$) at 7% discount rate**	**Value of estimated CO_2 emission reductions (million 2007$) at 3% discount rate**
1	3.79	$0 to $29	$0 to $64.
2	8.30	$0 to $64	$0 to $141.
3	11.55	$0 to $89	$0 to $196.
4	12.28	$0 to $94	$0 to $209.
5	12.73	$0 to $98	$0 to $217.

DOE also investigated the potential monetary impact resulting from the impact of today's efficiency standards on SO_2, NO_X, and Hg emissions. As previously stated, DOE's initial analysis assumed the presence of nationwide emission caps on SO_2 and Hg, and caps on NO_X emissions in the 28 States covered by the CAIR caps. In the presence of emission caps, DOE concluded that no physical reductions in power sector emissions would likely occur; however, the lower generation requirements associated with standards could potentially put downward pressure on the prices of emissions allowances in cap-and-trade markets. Estimating this effect is very difficult because of factors such as credit banking, which can change the trajectory of prices. DOE has further concluded that the effect from standards on SO_2 allowance prices is likely to be negligible, based upon runs of the NEMS–BT model. See chapter 16 (Environmental Assessment) of the TSD accompanying this notice for further details regarding SO_2 allowance price impacts.

As discussed earlier, with respect to NO_X the CAIR rule has been vacated by the courts, so projected annual NO_X allowances from NEMS–BT are no longer relevant. In DOE's subsequent analysis, NO_X emissions are not controlled by a nationwide regulatory system. For the range of NO_X reduction estimates and Hg reduction estimates, DOE estimated the national monetized benefits of emissions reductions from today's proposed rule based on environmental damage estimates from the literature. Available estimates suggest a very wide range of monetary values for NO_X emissions, ranging from $370 per ton to $3,800 per ton of NO_X from stationary sources, measured in 2001$ [103] or a range of $421 per ton to $4,326 per ton in 2006$. As discussed above, with the D.C. Circuit vacating the CAIR, DOE is considering how it should address the issue of NO_X reduction and corresponding monetary valuation. DOE invites public comment on how the agency should address this issue, including how to value NO_X emissions for States in the absence of the CAIR.

DOE has already conducted research for today's proposed rule and determined that the basic science linking mercury emissions from power plants to impacts on humans is considered highly uncertain. However, DOE identified two estimates of the environmental damages of mercury based on two estimates of the adverse impact of childhood exposure to methyl mercury on IQ for American children, and subsequent loss of lifetime economic productivity resulting from these IQ losses. The high-end estimate is based on an estimate of the current aggregate cost of the loss of IQ in American children that results from exposure to mercury of U.S. power plant origin ($1.3 billion per year in 2000$), which translates to $31.7 million per ton emitted per year (2006$).[104] The low-end estimate was $664,000 per ton emitted in 2004$ or $709,000 per ton in 2006$, which DOE derived from a published evaluation of mercury control using different methods and assumptions from the first study, but also based on the present value of the lifetime earnings of children exposed.[105] DOE invites public comment on how the agency should address this issue, including how to value mercury emissions in the absence of the CAMR. The resulting estimates of the potential range of the present value benefits associated with the national reduction of NO_X and national reductions in Hg emissions are reflected in Table V.55 and Table V.56.

TABLE V.55—PRELIMINARY ESTIMATES OF MONETARY SAVINGS FROM REDUCTIONS OF Hg AND NO_X BY TRIAL STANDARD LEVEL AT A 7% DISCOUNT RATE

Conventional cooking product TSL	Estimated cumulative NO_X (kt) emission reductions	Value of estimated NO_X emission reductions (million 2006$)	Estimated cumulative Hg (t) emission reductions	Value of estimated Hg emission reductions (million 2006$)
1	6.32 to 12.06	0.7 to 13.9	0 to 0.20	0 to 1.8.
2	6.39 to 13.71	0.7 to 15.7	0 to 0.26	0 to 2.2.
3	10.11 to 20.55	1.0 to 23.0	0 to 0.37	0 to 3.1.
4	14.99 to 30.65	1.5 to 33.7	0 to 0.56	0 to 4.6.

[103] Office of Management and Budget Office of Information and Regulatory Affairs, ''2006 Report to Congress on the Costs and Benefits of Federal Regulations and Unfunded Mandates on State, Local, and Tribal Entities,'' (2006).

[104] Trasande, L., *et al., Applying Cost Analyses to Drive Policy that Protects Children,* 1076 ANN. N.Y. ACAD. SCI. 911 (2006).

[105] Ted Gayer and Robert Hahn, *Designing Environmental Policy: Lessons from the Regulation of Mercury Emissions,* Regulatory Analysis 05–01 (AEI-Brookings Joint Center For Regulatory Studies) p. 31 (2004). A version of this paper was published in the *Journal of Regulatory Economics* in 2006. The estimate was derived by back-calculating the annual benefits per ton from the net present value of benefits reported in the study.

Microwave oven energy factor TSL	Estimated cumulative NO_X (kt) emission reductions	Value of estimated NO_X emission reductions (million 2006$)	Estimated cumulative Hg (t) emission reductions	Value of estimated Hg emission reductions (million 2006$)
1a	0.58 to 14.25	0.1 to 17.6	0 to 0.25	0 to 2.0.
2a	0.85 to 20.85	0.1 to 25.3	0 to 0.37	0 to 2.9.
3a	1.37 to 33.74	0.2 to 40.4	0 to 0.60	0 to 4.6.
4a	1.91 to 47.04	0.2 to 55.9	0 to 0.84	0 to 6.4.
Microwave oven standby power TSL	Estimated cumulative NO_X (kt) emission reductions	Value of estimated NO_X emission reductions (million 2006$)	Estimated cumulative Hg (t) emission reductions	Value of estimated Hg emission reductions (million 2006$)
1b	1.23 to 30.30	0.2 to 38.9	0 to 0.50	0 to 4.0.
2b	1.87 to 46.02	0.2 to 58.9	0 to 0.76	0 to 6.1.
3b	2.67 to 65.96	0.3 to 84.2	0 to 1.09	0 to 8.7.
4b	4.35 to 107.23	0.5 to 136.4	0 to 1.77	0 to 14.2.
Commercial clothes washer TSL	Estimated cumulative NO_X (kt) emission reductions	Value of estimated NO_X emission reductions (million 2006$)	Estimated cumulative Hg (t) emission reductions	Value of estimated Hg emission reductions (million 2006$)
1	1.43 to 3.25	0.2 to 3.7	0 to 0.06	0 to 0.4.
2	3.04 to 7.13	0.3 to 8.0	0 to 0.13	0 to 0.9.
3	4.25 to 9.93	0.5 to 11.2	0 to 0.19	0 to 1.3.
4	4.51 to 10.56	0.5 to 11.9	0 to 0.20	0 to 1.4.
5	4.67 to 10.95	0.5 to 12.3	0 to 0.21	0 to 1.4.

TABLE V.56—PRELIMINARY ESTIMATES OF MONETARY SAVINGS FROM REDUCTIONS OF Hg AND NO_X BY TRIAL STANDARD LEVEL AT A 3% DISCOUNT RATE

Conventional cooking product TSL	Estimated cumulative NO_X (kt) emission reductions	Value of estimated NO_X emission reductions (million 2006$)	Estimated cumulative Hg (t) emission reductions	Value of estimated Hg emission reductions (million 2006$)
1	6.32 to 12.06	1.4 to 28.2	0 to 0.20	0 to 3.5.
2	6.39 to 13.71	1.4 to 32.0	0 to 0.26	0 to 4.5.
3	10.11 to 20.55	2.2 to 47.4	0 to 0.37	0 to 6.4.
4	14.99 to 30.65	3.3 to 70.3	0 to 0.56	0 to 9.5.
Microwave oven energy factor TSL	Estimated cumulative NO_X (kt) emission reductions	Value of estimated NO_X emission reductions (million 2006$)	Estimated cumulative Hg (t) emission reductions	Value of estimated Hg emission reductions (million 2006$)
1a	0.58 to 14.25	0.1 to 34.3	0 to 0.25	0 to 4.2.
2a	0.85 to 20.85	0.2 to 49.7	0 to 0.37	0 to 6.1.
3a	1.37 to 33.74	0.3 to 80.1	0 to 0.60	0 to 9.9.
4a	1.91 to 47.04	0.4 to 111.2	0 to 0.84	0 to 13.8.
Microwave oven standby power TSL	Estimated cumulative NO_X (kt) emission reductions	Value of estimated NO_X emission reductions (million 2006$)	Estimated cumulative Hg (t) emission reductions	Value of estimated Hg emission reductions (million 2006$)
1b	1.23 to 30.30	0.3 to 74.1	0 to 0.50	0 to 8.4.
2b	1.87 to 46.02	0.4 to 112.4	0 to 0.76	0 to 12.8.
3b	2.67 to 65.96	0.6 to 160.9	0 to 1.09	0 to 18.3.
4b	4.35 to 107.23	1.0 to 261.2	0 to 1.77	0 to 29.8.
Commercial clothes washer TSL	Estimated cumulative NO_X (kt) emission reductions	Value of estimated NO_X emission reductions (million 2006$)	Estimated cumulative Hg (t) emission reductions	Value of estimated Hg emission reductions (million 2006$)
1	1.43 to 3.25	0.3 to 7.5	0 to 0.06	0 to 0.9.
2	3.04 to 7.13	0.7 to 16.6	0 to 0.13	0 to 2.0.
3	4.25 to 9.93	1.0 to 23.0	0 to 0.19	0 to 2.8.
4	4.51 to 10.56	1.0 to 24.5	0 to 0.20	0 to 3.0.
5	4.67 to 10.95	1.0 to 25.4	0 to 0.21	0 to 3.1.

Table V.57 presents the estimated wastewater discharge reductions due to the TSLs for CCWs. In chapter 16 of the TSD accompanying this notice, DOE reports annual changes in wastewater discharge attributable to each TSL.

TABLE V.57—SUMMARY OF WASTEWATER DISCHARGE REDUCTIONS (CUMULATIVE REDUCTIONS FOR PRODUCTS SOLD FROM 2012 TO 2042)

	TSL				
	1	2	3	4	5
Wastewater Discharge Reductions for Commercial Clothes Washers: Wastewater (trillion gallons)	0.00	0.16	0.19	0.20	0.23

C. Proposed Standards

1. Overview

Under 42 U.S.C. 6295(o)(2)(A) and 6316(a), EPCA requires that any new or amended energy conservation standard for any type (or class) of covered product shall be designed to achieve the maximum improvement in energy efficiency that the Secretary determines is technologically feasible and economically justified. In determining whether a standard is economically justified, the Secretary must determine whether the benefits of the standard exceed its burdens to the greatest extent practicable, in light of the following seven factors:

(1) The economic impact of the standard on manufacturers and consumers of the products or equipment subject to the standard;

(2) The savings in operating costs throughout the estimated average life of the covered products or equipment in the type (or class) compared to any increase in the price, initial charges, or maintenance expenses for the covered products that are likely to result from the imposition of the standard;

(3) The total projected amount of energy (or, as applicable, water) savings likely to result directly from the imposition of the standard;

(4) Any lessening of the utility or the performance of the covered products or equipment likely to result from the imposition of the standard;

(5) The impact of any lessening of competition, as determined in writing by the Attorney General, that is likely to result from the imposition of the standard;

(6) The need for national energy and water conservation; and

(7) Other factors the Secretary considers relevant.

(42 U.S.C. 6295(o)(2)(B)(i) and 6316(a))

The new or amended standard also must ''result in significant conservation of energy.'' (42 U.S.C. 6295(o)(3)(B) and 6316(a))

In selecting the proposed energy conservation standards for cooking products and CCWs for consideration in today's NOPR, DOE started by examining the maximum technologically feasible levels, and determined whether those levels were economically justified. If DOE determined that the maximum technologically feasible level was not justified, DOE then analyzed the next lower TSL to determine whether that level was economically justified. DOE repeated this procedure until it identified an economically justified TSL.

To aid the reader in understanding the benefits and/or burdens of each TSL, the following tables summarize the quantitative analytical results for each TSL, based on the assumptions and methodology discussed above. These tables present the results—or, in some cases, a range of results—for each TSL. The range of values reported in these tables for industry impacts represents the results for the different markup scenarios that DOE used to estimate manufacturer impacts.

In addition to the quantitative results, DOE also considers other burdens and benefits that affect economic justification. In the case of conventional cooking products, DOE considered the burden that would be imposed on the industry to comply with performance standards. Currently, conventional cooking products are not rated for efficiency because DOE has promulgated only prescriptive standards for gas cooking products. Therefore, any proposed performance standards would require the industry to test, rate, and label these cooking products, a significant burden that the industry currently does not bear. DOE has also considered harmonization of standby power standards for microwave ovens with international standby power programs such as Korea's e-standby program,[106] Australia's standby program,[107] and Japan's Top Runner Program.[108] These programs seek to establish standby power efficiency ratings through the International Energy Agency (IEA)'s One-Watt program, which seeks to lower standby power below 1 W for microwave ovens.[109] Both Korea and Australia will be publishing mandatory standby power standards of 1 W by 2010 and 2012, respectively. In accordance with Japan's Top Runner Program, Japanese appliance manufacturers made a voluntary declaration to reduce standby power of microwave ovens without a timer as close to zero as possible and that of microwave ovens with a timer to 1 W or lower.

In sum, the proposed standard levels for the products/equipment that are the subject of this rulemaking reflect DOE's careful balancing of the relevant statutory factors under EPCA. After considering public comments on this NOPR, DOE will publish a final rule that either adopt the proposed TSL, one of the higher or lower TSLs, or some value in between.

2. Conclusion

a. Conventional Cooking Products

Table V.58 presents a summary of the quantitative results for each conventional cooking product TSL. These results indicate the energy savings and economic impacts due to increasing the efficiency of conventional cooking products.

TABLE V.58—SUMMARY OF RESULTS FOR CONVENTIONAL COOKING PRODUCTS

Category	TSL 1	TSL 2	TSL 3	TSL 4
Primary Energy Saved (quads)	0.14	0.23	0.32	0.50

[106] Refer to: *http://www.kemco.or.kr/eng/*.

[107] Refer to: *http://www.energyrating.gov.au/standby.html*.

[108] Refer to: *http://www.eccj.or.jp/top_runner/index.html*.

[109] IEA Energy Information Centre, *Standby Power Use and the IEA ''1-Watt Plan''*. Available at: *http://www.iea.org/textbase/subjectqueries/standby.asp*.

TABLE V.58—SUMMARY OF RESULTS FOR CONVENTIONAL COOKING PRODUCTS—Continued

Category	TSL 1	TSL 2	TSL 3	TSL 4
7% Discount Rate	0.04	0.06	0.08	0.12
3% Discount Rate	0.08	0.12	0.17	0.26
Generation Capacity Reduction (GW)**	0.056	0.074	0.109	0.167
NPV (2006$ billion):				
7% Discount Rate	0.215	0.393	0.381	(12.548)
3% Discount Rate	0.609	1.186	1.374	(23.141)
Industry Impacts:				
Gas Cooktops				
Industry NPV (2006$ million)	(5)–(12)	(5)–(12)	(5)–(12)	28–(141)
Industry NPV (% Change)	(2)–(4)	(2)–(4)	(2)–(4)	10–(49)
Electric Cooktops				
Industry NPV (2006$ million)	0	(2)–(11)	(2)–(11)	77–(383)
Industry NPV (% Change)	0	(1)–(3)	(1)–(3)	22–(107)
Gas Ovens				
Industry NPV (2006$ million)	(7)–(10)	(7)–(10)	(6)–(41)	(47)–(181)
Industry NPV (% Change)	(2)	(2)	(1)–(9)	(10)–(39)
Electric Ovens				
Industry NPV (2006$ million)	0	(8)–(19)	(8)–(19)	(10)–(469)
Industry NPV (% Change)	0	(1)–(2)	(1)–(2)	(1)–(59)
Cumulative Emissions Impacts †:				
CO_2 (Mt)	14.62	16.62	25.08	37.54
NO_X (kt)	6.32–12.06	6.39–13.71	10.11–20.55	14.99–30.65
Hg (t)	0–0.20	0–0.26	0–0.37	0–0.56
Mean LCC Savings* (2006$):				
Gas Cooktop/Conventional Burners	13	13	13	(11)
Electric Cooktop/Low or High Wattage Open (Coil) Elements	.....	4	4	4
Electric Cooktop/Smooth Elements	.....	.....	.....	(283)
Gas Oven/Standard Oven with or without a Catalytic Line	6	6	6	(86)
Gas Oven/Self-Clean Oven	.....	.....	1	(6)
Electric Oven/Standard Oven with or without a Catalytic Line	.....	9	9	(52)
Electric Oven/Self-Clean Oven	.....	.....	.....	(143)
Median PBP (years):				
Gas Cooktop/Conventional Burners	4.5	4.5	4.5	77.1
Electric Cooktop/Low or High Wattage Open (Coil) Elements	.....	7.3	7.3	7.3
Electric Cooktop/Smooth Elements	.....	.....	.....	1512
Gas Oven/Standard Oven with or without a Catalytic Line	9.4	9.4	9.4	26.9
Gas Oven/Self-Clean Oven	.....	.....	11.4	16.4
Electric Oven/Standard Oven with or without a Catalytic Line	.....	8.0	8.0	60.6
Electric Oven/Self-Clean Oven	.....	.....	.....	240
LCC Results:				
Gas Cooktop/Conventional Burners				
Net Cost (%)	0.2	0.2	0.2	93.9
No Impact (%)	93.5	93.5	93.5	0.0
Net Benefit (%)	6.3	6.3	6.3	6.1
Electric Cooktop/Low or High Wattage Open (Coil) Elements				
Net Cost (%)	.....	29.4	29.4	29.4
No Impact (%)	.....	0.0	0.0	0.0
Net Benefit (%)	.....	70.6	70.6	70.6
Electric Cooktop/Smooth Elements				
Net Cost (%)	.....	.....	.....	100.0
No Impact (%)	.....	.....	.....	0.0
Net Benefit (%)	.....	.....	.....	0.0
Gas Oven/Standard Oven with or without a Catalytic Line				
Net Cost (%)	6.5	6.5	6.5	95.0
No Impact (%)	82.3	82.3	82.3	0.0
Net Benefit (%)	11.2	11.2	11.2	5.0
Gas Oven/Self-Clean Oven				
Net Cost (%)	.....	.....	58.9	68.8
No Impact (%)	.....	.....	0.0	0.0
Net Benefit (%)	.....	.....	41.1	31.2
Electric Oven/Standard Oven with or without a Catalytic Line				
Net Cost (%)	.....	43.9	43.9	95.2
No Impact (%)	.....	0.0	0.0	0.0
Net Benefit (%)	.....	56.1	56.1	4.8
Electric Oven/Self-Clean Oven				
Net Cost (%)	.....	.....	.....	78.9
No Impact (%)	.....	.....	.....	0.0
Net Benefit (%)	.....	.....	.....	21.1

* Parentheses indicate negative (−) values. For LCCs, a negative value means an increase in LCC by the amount indicated.
** Changes in installed generation capacity by 2042 based on *AEO 2008* Reference Case.
† CO_2 emissions impacts include physical reductions at power plants and at households. NO_X emissions impacts include physical reductions at power plants as well as production of emissions allowance credits where NO_X emissions are subject to emissions caps.

First, DOE considered TSL 4, the max-tech level. TSL 4 would likely save 0.50 quads of energy through 2042, an amount DOE considers significant. Discounted at seven percent, the projected energy savings through 2042 would be 0.12 quads. For the Nation as a whole, DOE projects that TSL 4 would result in a net decrease of $12.5 billion in NPV, using a discount rate of seven percent. The emissions reductions at TSL 4 are 37.54 Mt of CO_2, 14.99 kt to 30.65 kt of NO_X, and 0 t to 0.56 t of Hg. Total generating capacity in 2042 is estimated to decrease compared to the reference case by 0.167 gigawatts (GW) under TSL 4.

At TSL 4, DOE projects that the average conventional cooking product consumer will experience an increase in LCC, with the exception of consumers of electric coil cooktops. In the case of electric coil cooktops, the average consumer will save only $4 in LCC due to TSL 4. With the exception of electric coil cooktop consumers, DOE estimated LCC increases for at least 68 percent of consumers in the Nation that purchase conventional cooking products. The median payback period of each product class at TSL 4, with the exception of electric coil cooktops and gas self-cleaning ovens, is projected to be substantially longer than the mean lifetime of the equipment.

Although TSL 4 for electric coil cooktops yields LCC savings and provides relatively short paybacks for average consumers, DOE estimates that the technology needed to attain the efficiency level (improved contact conductance) may not provide energy savings under field conditions, for the reasons below. (See section IV.B for more details.) Measured efficiency gains from improved contact conductance have been obtained under test procedure conditions using the aluminum test block. To ensure consistent and repeatable testing, an aluminum test block is used to establish cooktop efficiency by measuring the increased heat content of the block during a test measurement. Because the test block is much flatter than actual cooking vessels, thereby allowing for a higher degree of thermal contact between the block and coil element, DOE believes that the efficiency gains with an actual cooking vessel likely will not be as large or may not even be achievable. Therefore, DOE has significant doubt that electric cooktop consumers may actually realize economic savings with products at TSL 4.

DOE estimated the projected change in INPV at TSL 4 for each of the following four general categories of conventional cooking products: gas cooktops, electric cooktops, gas ovens, and electric ovens. The projected change in INPV ranges from an increase of $28 million to a decrease of $141 million for gas cooktops, an increase of $77 million to a decrease of $383 million for electric cooktops, a decrease of $47 million to a decrease of $181 million for gas ovens, and a decrease of $10 million to a decrease of $469 million for electric ovens. At TSL 4, DOE recognizes the risk of very large negative impacts if manufacturers' expectations about reduced profit margins are realized. In particular, if the high end of the range of impacts is reached as DOE expects, TSL 4 could result in a net loss of 49 percent in INPV to gas cooktop manufacturers, a net loss of 107 percent in INPV to electric cooktop manufacturers, a net loss of 39 percent to gas oven manufacturers, and a net loss of 59 percent to electric oven manufacturers.

After carefully considering the analysis and weighing the benefits and burdens of TSL 4, the Secretary has reached the following initial conclusion: At TSL 4, the benefits of energy savings and emissions reductions would be outweighed by the potential multi-million dollar negative net economic cost to the Nation, the economic burden on consumers, and the large capital conversion costs that could result in a reduction in INPV for manufacturers.

Next, DOE considered TSL 3, which yielded primary energy savings estimated at 0.32 quads of energy through 2042, an amount which DOE considers to be significant. Discounted at seven percent, the energy savings through 2042 would be 0.08 quads. For the Nation as a whole, DOE projects that TSL 3 would result in a net increase of $381 million in NPV, using a discount rate of seven percent. The emissions reductions are projected to be 25.08 Mt of CO_2, 10.11 kt to 20.55 kt of NO_X, and 0 t to 0.37 t of Hg. Total generating capacity in 2042 under TSL 3 is estimated to decrease by 0.109 GW.

At TSL 3, DOE projects that the impacts of amended energy conservation standards on average consumers of conventional cooking products will decrease their LCC. For electric smooth cooktops and electric self-cleaning ovens, TSL 3 does not increase the efficiency beyond baseline levels because none of the candidate standard levels for these products provide economic savings to consumers. At TSL 3, average gas and electric coil cooktop consumers will save $13 and $4 in LCC, respectively. Average consumers of gas standard ovens, gas self-cleaning ovens, and electric standard ovens will realize LCC savings of $6, $1, and $9, respectively. The median payback period of each product class impacted by TSL 3 is projected to be at least 40 percent shorter than the mean lifetime of the products, 19 years. For example, at TSL 3 the projected payback period is 4.5 years for average consumers of gas cooktops, whereas the projected payback period is 11.4 years for average consumers of gas self-cleaning ovens.

Although TSL 3 provides LCC savings to the average consumer, DOE estimates a significant percentage of consumers of gas self-cleaning ovens and electric standard ovens will be burdened by the standard (*i.e.*, experience increases in their LCC). DOE estimates that 59 percent of consumers of gas self-cleaning ovens and 44 percent of consumers of electric standard ovens will be burdened by TSL 3. In the case of electric standard ovens, although a majority of consumers still benefit from the standard, almost 50 percent of consumers would be burdened. By comparison, a majority of non-impacted gas cooktop and non-impacted gas standard oven consumers would realize LCC savings due to TSL 3. Specifically, in the case of gas cooktops, 93.5 percent of consumers are not impacted by TSL 3 (*i.e.*, 93.5 percent of consumers already purchase cooktops at TSL 3). Of the remaining 6.5 percent of gas cooktop consumers who are impacted by TSL 3, over 96 percent realize LCC savings. For gas standard ovens, 82.3 percent consumers are not impacted by TSL 3. Of the remaining 17.7 percent of gas standard oven consumers who are impacted by TSL 3, over 63 percent realize LCC savings. In the case of electric coil cooktops, although DOE estimates that over 70 percent of consumers would decrease their LCC, the efficiency gain achieved at TSL 3 would be achieved through the same technological change as TSL 4 (improved contact conductance). As noted for TSL 4, DOE has significant doubt that electric cooktop consumers will actually realize economic savings at TSL 3.

At TSL 3, the projected change in INPV for each of the four general categories of conventional cooking products range from a decrease of $5 million to a decrease of $12 million for gas cooktops, a decrease of $2 million to a decrease of $11 million for electric cooktops, a decrease of $6 million to a decrease of $41 million for gas ovens, and a decrease of $8 million to a decrease of $19 million for electric ovens. At TSL 3, DOE recognizes the risk of negative impacts if manufacturers' expectations about

reduced profit margins are realized. In particular, if the high end of the range of impacts is reached as DOE expects, TSL 3 could result in maximum net losses of up to 4 percent in INPV for gas cooktop manufacturers, three percent for electric cooktop manufacturers, nine percent for gas oven manufacturers, and two percent for electric oven manufacturers.

Although DOE recognizes the increased economic benefits to the Nation that could result from TSL 3, DOE has tentatively concluded that the benefits of a Federal standard at TSL 3 would still be outweighed by the economic burden on conventional cooking product consumers. For example, DOE believes the economic savings realized by average consumers are outweighed by the significant percentage of gas self-cleaning oven and electric standard oven consumers who are burdened by the standard. Considering that TSL 3 also adversely impacts manufacturers' INPV, DOE believes the benefits of energy savings and emissions impacts are not significant enough to outweigh the burdens of the standard.

DOE considered TSL 2 next. DOE projects that TSL 2 would save 0.23 quads of energy through 2042, an amount DOE considers significant. Discounted at seven percent, the projected energy savings through 2042 would be 0.06 quads. For the Nation as a whole, DOE projects TSL 2 to result in net savings in NPV of $393 million. The estimated emissions reductions are 16.62 Mt of CO_2, 6.39 kt to 13.71 kt of NO_X, and 0 t to 0.26 t of Hg. Total generating capacity in 2042 under TSL 2 would likely decrease by 0.074 GW.

The candidate standard levels for each of the product classes that comprise TSL 2 are the same as TSL 3 except for gas self-cleaning ovens. DOE did not increase the efficiency for gas self-cleaning ovens beyond the baseline level for TSL 2 because, as described for TSL 3, efficiency levels greater than the baseline level do not yield LCC savings to a majority of gas self-cleaning consumers. For all other product classes, the impacts to consumers at TSL 3 are identical to TSL 2.

At TSL 2, the projected change in INPV for each of the four general categories of conventional cooking products range from a decrease of $5 million to a decrease of $12 million for gas cooktops, a decrease of $2 million to a decrease of $11 million for electric cooktops, a decrease of $7 million to a decrease of $10 million for gas ovens, and a decrease of $8 million to a decrease of $19 million for electric ovens. At TSL 2, DOE recognizes the risk of negative impacts if manufacturers' expectations about reduced profit margins are realized. In particular, if the high end of the range of impacts is reached as DOE expects, TSL 2 could result in a net loss of 4 percent in INPV to gas cooktop manufacturers, a net loss of three percent in INPV to electric cooktop manufacturers, a net loss of two percent to gas oven manufacturers, and a net loss of two percent to electric oven manufacturers.

Although DOE recognizes the increased economic benefits to the Nation that could result from TSL 2, DOE concludes that the benefits of a Federal standard at TSL 2 would still be outweighed by the economic burden that would be placed upon conventional cooking product consumers. Under TSL 2, DOE would no longer impose a standard for gas self-cleaning ovens, thereby reducing the economic burden to the Nation. The decreased economic burden under TSL 2 is evident from the change in NPV as net savings to the Nation increases to $393 million from the $381 million realized under TSL 3. Even so, DOE believes the economic savings realized by average consumers are outweighed by the significant percentage of electric standard oven consumers who are still burdened by the standard. A TSL 2 standard would also adversely impact manufacturer INPV. Consequently, DOE believes the benefits of energy savings and emissions impacts of TSL 2 are not significant enough to outweigh the burdens that would be created by the standard.

DOE considered TSL 1 next. DOE projects that TSL 1 would save 0.14 quads of energy through 2042, an amount DOE considers significant. Discounted at seven percent, the projected energy savings through 2042 would be 0.04 quads. For the Nation as a whole, DOE projects TSL 1 to result in net savings in NPV of $215 million. The estimated emissions reductions are 14.62 Mt of CO_2, 6.32 kt to 12.06 kt of NO_X, and 0 t to 0.20 t of Hg. Total generating capacity in 2042 under TSL 1 would likely decrease by 0.056 GW.

At TSL 1, only amended energy conservation standards consisting of prescriptive requirements to eliminate standing pilots for gas cooktops and gas standard ovens would be promulgated by DOE. DOE projects the impacts of amended energy conservation standards on average consumers of gas cooktops and gas standard ovens will decrease their LCC. At TSL 1, average gas cooktop and gas standard oven consumers will save $13 and $6 in LCC, respectively. DOE estimates that 93.5 percent of gas cooktops consumers and 82.3 percent of gas standard oven consumers already purchase products at TSL 1. Of the non-impacted consumers (*i.e.*, consumers already purchasing products at TSL 1), DOE estimates that over 96 percent of gas cooktop consumers and over 63 percent of gas standard oven consumers realize LCC savings due to the elimination of standing pilots. The median payback period is projected to be 4.5 years for the average gas cooktop consumer and 9.4 years for the average gas standard oven consumer.

DOE recognizes that there are subgroups in the Nation that use gas cooking products but are without household electricity. Under TSL 1, these subgroups (approximately 0.01 percent of the total U.S. household population) are likely to be impacted because they would be required to use an electrical source for cooking products to operate the ignition system. However, DOE market research shows that battery-powered electronic ignition systems have been implemented in other products, such as instantaneous gas water heaters, barbeques, furnaces, and other appliances, and the use of such products is not expressly prohibited by applicable safety standards. Therefore, DOE believes that households that use gas for cooking and are without electricity will likely have technological options that would enable them to continue to use gas cooking if standing pilot ignition systems are eliminated.

At TSL 1, the projected change in INPV ranges from a decrease of $5 million to a decrease of $12 million for gas cooktops and a decrease of $7 million to a decrease of $10 million for gas ovens. At TSL 1, DOE recognizes the risk of negative impacts if manufacturers' expectations about reduced profit margins are realized. In particular, if the high end of the range of impacts is reached as DOE expects, TSL 1 could result in a net loss of 4 percent in INPV to gas cooktop manufacturers and a net loss of two percent to gas oven manufacturers. Although DOE estimates that TSL 1 will lead to some net loss in INPV to gas cooktop and gas oven manufacturers, because TSL 1 is comprised of prescriptive requirements, the industry would not be burdened with the additional costs associated with complying with performance requirements. Currently, only prescriptive standards for conventional cooking products are in effect requiring that gas cooking products with an electrical supply cord not be equipped with a constant burning pilot. As a result, conventional cooking product manufacturers are not burdened with

the costs of testing the rated performance of their products to label and comply with performance-based energy conservation standards. Because TSL 1 effectively extends the existing prescriptive requirement to all gas cooking products, regardless of whether the products have an electrical supply cord, DOE avoids burdening manufacturers with testing, labeling, and compliance costs that they currently do not bear.

After considering the analysis and weighing the benefits and the burdens, DOE has tentatively concluded that the benefits of a TSL 1 standard outweigh the burdens. In particular, the Secretary has tentatively concluded that TSL 1 saves a significant amount of energy and is technologically feasible and economically justified. Therefore, DOE today proposes to adopt the energy conservation standards for conventional cooking products at TSL 1. Table V.59 demonstrates the proposed energy conservation standards for all product classes of conventional cooking products.

TABLE V.59—PROPOSED ENERGY CONSERVATION STANDARDS FOR CONVENTIONAL COOKING PRODUCTS

Product class	Proposed energy conservation standards
Gas Cooktop/Conventional Burners	No Constant Burning Pilot Lights.
Electric Cooktop/Low or High Wattage Open (Coil) Elements	No Standard.
Electric Cooktop/Smooth Elements	No Standard.
Gas Oven/Standard Oven with or without a Catalytic Line	No Constant Burning Pilot Lights.
Gas Oven/Self-Clean Oven	No Change to Existing Standard.
Electric Oven/Standard Oven with or without a Catalytic Line	No Standard.
Electric Oven/Self-Clean Oven	No Standard.

b. Microwave Ovens

Table V.60 presents a summary of the quantitative results for the four microwave oven TSLs pertaining to the EF.

TABLE V.60—SUMMARY OF RESULTS FOR MICROWAVE OVEN ENERGY FACTOR

Category	TSL 1a	TSL 2a	TSL 3a	TSL 4a
Primary Energy Saved (quads)	0.08	0.09	0.11	0.12
7% Discount Rate	0.02	0.02	0.03	0.03
3% Discount Rate	0.05	0.05	0.06	0.07
Generation Capacity Reduction (GW)**	0.063	0.097	0.160	0.227
NPV (2006$ billion):				
7% Discount Rate	(0.61)	(1.60)	(3.06)	(4.94)
3% Discount Rate	(1.07)	(2.96)	(5.72)	(9.28)
Industry Impacts:				
Industry NPV (2006$ million)	44–(199)	117–(386)	237–(675)	267–(1165)
Industry NPV (% Change)	3–(14)	8–(27)	16–(47)	18–(80)
Cumulative Emissions Impacts †:				
CO_2 (Mt)	11.49	16.95	27.54	38.51
NO_X (kt)	0.58–14.25	0.85–20.85	1.37–33.74	1.91–47.04
Hg (t)	0–0.25	0–0.37	0–0.60	0–0.84
Mean LCC Savings* (2006$)	(3)	(10)	(19)	(31)
Median PBP (years)	29.4	57.1	81.4	114.6
LCC Results:				
Net Cost (%)	42.0	45.2	45.9	46.2
No Impact (%)	53.7	53.7	53.7	53.7
Net Benefit (%)	4.3	1.1	0.4	0.1

* Parentheses indicate negative (−) values. For LCCs, a negative value means an increase in LCC by the amount indicated.
** Changes in installed generation capacity by 2042 based on *AEO 2008* Reference Case.
† CO_2 emissions impacts include physical reductions at power plants. NO_X emissions impacts include physical reductions at power plants as well as production of emissions allowance credits where NO_X emissions are subject to emissions caps.

First, DOE considered TSL 4a, the max-tech level for microwave oven cooking efficiency. TSL 4a would likely save 0.12 quads of energy through 2042, an amount DOE considers significant. Discounted at seven percent, the projected energy savings through 2042 would be 0.03 quads. For the Nation as a whole, DOE projects that TSL 4a would result in a net decrease of $4.94 billion in NPV, using a discount rate of seven percent. The emissions reductions at TSL 4a are 38.51 Mt of CO_2, 1.91 kt to 47.04 kt of NO_X, and 0 t to 0.84 t of Hg. Total generating capacity in 2042 is estimated to decrease compared to the reference case by 0.227 gigawatts (GW) under TSL 4a.

At TSL 4a, DOE projects that the average microwave oven consumer will experience an increase in LCC. Although DOE estimates that all microwave oven consumers purchase products with an EF at the baseline level, 54 percent of consumers are estimated to purchase microwave ovens with standby power consumption lower than the baseline standby consumption. As a result, the associated annual energy use for the 54 percent of consumers with low microwave oven standby power is lower than the annual energy consumption of products meeting TSL 4a. Therefore, the 54 percent of consumers purchasing low standby power consuming microwave ovens are not impacted by TSL 4a. For the

microwave oven consumers in the Nation impacted by TSL 4a, DOE estimates that nearly all will be burdened with LCC increases. The median payback period of the average consumer is projected to be substantially longer than the mean lifetime of the equipment.

DOE estimated the projected change in INPV ranges at TSL 4a from an increase of $267 million to a decrease of $1,165 million. At TSL 4a, DOE recognizes the risk of very large negative impacts if manufacturers' expectations about reduced profit margins are realized. In particular, if the high end of the range of impacts is reached as DOE expects, TSL 4a could result in a net loss of 80 percent in INPV to microwave oven manufacturers.

After carefully considering the analysis and weighing the benefits and burdens of TSL 4a, the Secretary has reached the following initial conclusion: At TSL 4a, the benefits of energy savings and emissions reductions would be outweighed by the potential multi-billion dollar negative net economic cost to the Nation, the economic burden on consumers, and the large capital conversion costs that could result in a reduction in INPV for manufacturers.

DOE considered TSL 3a next. Primary energy savings are estimated at 0.11 quads of energy through 2042, which DOE considers significant. Discounted at seven percent, the energy savings through 2042 would be 0.03 quads. For the Nation as a whole, DOE projects that TSL 3a would result in a net decrease of $3.06 billion in NPV, using a discount rate of seven percent. The emissions reductions are projected to be 27.54 Mt of CO_2, 1.37 kt to 33.74 kt of NO_X, and 0 t to 0.60 t of Hg. Total generating capacity in 2042 under TSL 3a is estimated to decrease by 0.160 GW.

At TSL 3a, DOE projects that the average microwave oven consumer will experience an increase in LCC. Although DOE estimates that all microwave oven consumers purchase products with an EF at the baseline level, 54 percent of consumers are estimated to purchase microwave ovens with standby power consumption lower than the baseline standby consumption. As a result, the associated annual energy use for the 54 percent of consumers with low microwave oven standby power is lower than the annual energy consumption of products meeting TSL 3a. Therefore, the 54 percent of consumers purchasing low standby power consuming microwave ovens are not impacted by TSL 3a. For the microwave oven consumers in the Nation impacted by TSL 3a, DOE estimates that nearly all will be burdened with LCC increases. The median payback period of the average consumer is projected to be substantially longer than the mean lifetime of the equipment.

DOE estimated the projected change in INPV ranges from an increase of $237 million to a decrease of $675 million. At TSL 3a, DOE recognizes the risk of very large negative impacts if manufacturers' expectations about reduced profit margins are realized. In particular, if the high end of the range of impacts is reached as DOE expects, TSL 3a could result in a net loss of 47 percent in INPV to microwave oven manufacturers.

After carefully considering the analysis and weighing the benefits and burdens of TSL 3a, the Secretary has reached the following initial conclusion: At TSL 3a, the benefits of energy savings and emissions reductions would be outweighed by the potential multi-billion dollar negative net economic cost to the Nation, the economic burden on consumers, and the large capital conversion costs that could result in a reduction in INPV for manufacturers.

DOE considered TSL 2a next. DOE projects that TSL 2a would save 0.09 quads of energy through 2042, an amount DOE considers significant. Discounted at seven percent, the projected energy savings through 2042 would be 0.02 quads. For the Nation as a whole, DOE projects TSL 2 to result in net cost in NPV of $1.60 billion. The estimated emissions reductions are 16.95 Mt of CO_2, 0.85 kt to 20.85 kt of NO_X, and 0 t to 0.37 t of Hg. Total generating capacity in 2042 under TSL 2 would likely decrease by 0.097 GW.

At TSL 2a, DOE projects that the average microwave oven consumer will experience an increase in LCC. Although DOE estimates that all microwave oven consumers purchase products with an EF at the baseline level, 54 percent of consumers are estimated to purchase microwave ovens with standby power consumption lower than the baseline standby consumption. As a result, the associated annual energy use for the 54 percent of consumers with low microwave oven standby power is lower than the annual energy consumption of products meeting TSL 2a. Therefore, the 54 percent of consumers purchasing low standby power consuming microwave ovens are not impacted by TSL 2a. For the microwave oven consumers in the Nation impacted by TSL 2a, DOE estimates that almost 98 percent will be burdened with LCC increases. The median payback period of the average consumer is projected to be substantially longer than the mean lifetime of the equipment.

At TSL 2a, the projected change in INPV range from an increase of $117 million to a decrease of $386 million. At TSL 2a, DOE recognizes the risk of negative impacts if manufacturers' expectations about reduced profit margins are realized. In particular, if the high end of the range of impacts is reached as DOE expects, TSL 2a could result in a net loss of 27 percent in INPV to microwave oven manufacturers.

After carefully considering the analysis and weighing the benefits and burdens of TSL 2a, the Secretary has reached the following initial conclusion: At TSL 2a, the benefits of energy savings and emissions reductions would be outweighed by the potential negative net economic cost (over a billion dollars) to the Nation, the economic burden on consumers, and the large capital conversion costs that could result in a reduction in INPV for manufacturers.

DOE considered TSL 1a next. DOE projects that TSL 1a would save 0.08 quads of energy through 2042, an amount DOE considers significant. Discounted at seven percent, the projected energy savings through 2042 would be 0.02 quads. For the Nation as a whole, DOE projects TSL 1a to result in net cost in NPV of $610 million. The estimated emissions reductions are 11.49 Mt of CO_2, 0.58 kt to 14.25 kt of NO_X, and 0 t to 0.25 t of Hg. Total generating capacity in 2042 under TSL 1a would likely decrease by 0.063 GW.

At TSL 1a, DOE projects that the average microwave oven consumer will experience an increase in LCC. Although DOE estimates that all microwave oven consumers purchase products with an EF at the baseline level, 54 percent of consumers are estimated to purchase microwave ovens with standby power consumption lower than the baseline standby consumption. As a result, the associated annual energy use for the 54 percent of consumers with low microwave oven standby power is lower than the annual energy consumption of products meeting TSL 1a. Therefore, the 54 percent of consumers purchasing low standby power consuming microwave ovens are not impacted by TSL 2a. For the microwave oven consumers in the Nation impacted by TSL 1a, DOE estimates that almost 91 percent will be burdened with LCC increases. The median payback period of the average consumer is projected to be substantially longer than the mean lifetime of the equipment.

At TSL 1a, the projected change in INPV range from a decrease of $44 million to a decrease of $199 million. At TSL 1a, DOE recognizes the risk of

negative impacts if manufacturers' expectations about reduced profit margins are realized. In particular, if the high end of the range of impacts is reached as DOE expects, TSL 1a could result in a net loss of 14 percent in INPV to microwave oven manufacturers.

After carefully considering the analysis and weighing the benefits and burdens of TSL 1a, the Secretary has reached the following initial conclusion: At TSL 1a, the benefits of energy savings and emissions reductions would be outweighed by the potential multi-million dollar negative net economic cost to the Nation, the economic burden on consumers, and the large capital conversion costs that could result in a reduction in INPV for manufacturers.

Based upon the available information, DOE has tentatively concluded that none of the TSLs for microwave oven cooking efficiency are economically justified. Therefore, DOE proposes no standards for microwave cooking efficiency or EF.

Table V.61 presents a summary of the quantitative results for the four microwave oven TSLs pertaining to standby power.

TABLE V.61—SUMMARY OF RESULTS FOR MICROWAVE OVEN STANDBY POWER

Category	TSL 1b	TSL 2b	TSL 3b	TSL 4b
Primary Energy Saved (quads)	0.23	0.33	0.45	0.69
7% Discount Rate	0.06	0.09	0.12	0.19
3% Discount Rate	0.13	0.18	0.25	0.38
Generation Capacity Reduction (GW) **	0.145	0.222	0.320	0.525
NPV (2006$ billion):				
7% Discount Rate	0.91	1.25	1.56	1.61
3% Discount Rate	2.03	2.79	3.52	3.90
Industry Impacts:				
Industry NPV (2006$ million)	(22)–(26)	(35)–(48)	(37)–(71)	(35)–(172)
Industry NPV (% Change)	(1.50)–(1.77)	(2.44)–(3.28)	(2.52)–(4.92)	(2.40)–(11.87)
Cumulative Emissions Impacts †				
CO_2 (Mt)	23.15	35.19	50.48	82.12
NO_X (kt)	1.23–30.30	1.87–46.02	2.67–65.96	4.35–107.23
Hg (t)	0–0.50	0–0.76	0–1.09	0–1.77
Mean LCC Savings * (2006$):	6	13	18	19
Median PBP (years):	0.3	0.6	1.5	3.1
LCC Results:				
Net Cost (%)	0.0	0.0	0.0	0.0
No Impact (%)	53.7	19.1	0.0	0.0
Net Benefit (%)	43.3	80.9	100.0	100.0

* Parentheses indicate negative (−) values. For LCCs, a negative value means an increase in LCC by the amount indicated.
** Changes in installed generation capacity by 2042 based on *AEO 2008* Reference Case.
† CO_2 emissions impacts include physical reductions at power plants. NO_X emissions impacts include physical reductions at power plants as well as production of emissions allowance credits where NO_X emissions are subject to emissions caps.

First, DOE considered TSL 4b, the max-tech level which affects only the standby power consumption of microwave ovens. TSL 4b would likely save 0.69 quads of energy through 2042, an amount DOE considers significant. Discounted at seven percent, the projected energy savings through 2042 would be 0.19 quads. For the Nation as a whole, DOE projects that TSL 4b would result in a net increase of $1.61 billion in NPV, using a discount rate of seven percent. The emissions reductions at TSL 4b are 82.12 Mt of CO_2, 4.35 kt to 107.23 kt of NO_X, and 0 t to 1.77 t of Hg. Total generating capacity in 2042 is estimated to decrease compared to the reference case by 0.525 gigawatts (GW) under TSL 4b.

At TSL 4b, DOE projects that the average microwave oven consumer will experience a decrease in LCC of $19. DOE also estimates all consumers in the Nation that purchase microwave ovens will realize some level of LCC savings. The median payback period of the average consumer at TSL 4b is projected to be 3.1 years, substantially shorter than the lifetime of the product.

Although DOE estimates that all microwave ovens consumers would benefit economically from TSL 4b, the reduction in standby power consumption at that level would result in the loss of certain functions which provide utility to consumers, specifically the continual display of the time of day. Because it is uncertain as to how greatly this function is valued by consumers, DOE is concerned that TSL 4b may result in significant loss of consumer utility.

DOE estimated the projected change in INPV ranges from a decrease of $35 million to a decrease of $172 million. At TSL 4b, DOE recognizes the risk of very large negative impacts if manufacturers' expectations about reduced profit margins are realized. In particular, if the high end of the range of impacts is reached as DOE expects, TSL 4b could result in a net loss of 11.87 percent in INPV to microwave oven manufacturers.

After carefully considering the analysis and weighing the benefits and burdens of TSL 4b, the Secretary has reached the following initial conclusion: At TSL 4b, the benefits of energy savings, economic benefit, and emissions reductions would be outweighed by the potential economic burden on consumers from loss of product utility and the large capital conversion costs that could result in a reduction in INPV for manufacturers.

DOE considered TSL 3b next. Primary energy savings are estimated at 0.45 quads of energy through 2042, which DOE considers significant. Discounted at seven percent, the energy savings through 2042 would be 0.12 quads. For the Nation as a whole, DOE projects that TSL 3b would result in a net increase of $1.56 billion in NPV, using a discount rate of seven percent. The emissions reductions are projected to be 50.48 Mt of CO_2, 2.67 kt to 65.96 kt of NO_X, and 0 t to 1.09 t of Hg. Total generating capacity in 2042 under TSL 3b is estimated to decrease by 0.320 GW.

At TSL 3b, DOE projects that the average microwave oven consumer will experience a decrease in LCC of $18. DOE also estimates all consumers in the Nation that purchase microwave ovens would realize some level of LCC savings. The median payback period of

the average consumer at TSL 3b is projected to be 1.5 years, substantially shorter than the lifetime of the product.

TSL 3b not only economically benefits all consumers, but DOE estimates that the reduction in standby power consumption (down to a level of no great than 1.0 watt) would not impact consumer utility. For example, the continual display of time which would be lost under TSL 4b is retained at TSL 3b.

DOE estimated the projected change in INPV ranges from a decrease of $37 million to a decrease of $71 million. At TSL 3b, DOE recognizes the risk of very large negative impacts if manufacturers' expectations about reduced profit margins are realized. In particular, if the high end of the range of impacts is reached as DOE expects, TSL 3b could result in a net loss of 4.92 percent in INPV to microwave oven manufacturers.

After considering the analysis and weighing the benefits and the burdens, DOE has tentatively concluded that the benefits of a TSL 3b standard outweigh the burdens. In particular, the Secretary has tentatively concluded that TSL 3b saves a significant amount of energy and is technologically feasible and economically justified. Therefore, DOE today proposes to adopt the energy conservation standards for microwave ovens at TSL 3b. Table V.62 demonstrates the proposed energy conservation standards for microwave ovens.

TABLE V.62—PROPOSED ENERGY CONSERVATION STANDARDS FOR MICROWAVE OVEN STANDBY POWER CONSUMPTION

Product class	Proposed energy conservation standards
Microwave Oven with or without Thermal Elements.	Maximum Standby Power = 1.0 Watt.

c. Commercial Clothes Washers

Table V.63 presents a summary of the quantitative results for each CCW TSL.

TABLE V.63—SUMMARY OF RESULTS FOR COMMERCIAL CLOTHES WASHERS

Category	TSL 1	TSL 2	TSL 3	TSL 4	TSL 5
Primary Energy Saved (quads)	0.05	0.11	0.15	0.16	0.17
7% Discount Rate	0.01	0.03	0.04	0.04	0.04
3% Discount Rate	0.03	0.06	0.08	0.09	0.09
Primary Water Saved (trillion gallons)	0.00	0.16	0.19	0.21	0.24
7% Discount Rate	0.00	0.04	0.05	0.05	0.06
3% Discount Rate	0.00	0.09	0.10	0.11	0.13
Generation Capacity Reduction (GW) **	0.009	0.020	0.028	0.030	0.031
NPV (2006$ billion):					
7% Discount Rate	(0.001)	0.32	0.46	0.50	0.55
3% Discount Rate	0.04	0.83	1.16	1.27	1.39
Industry Impacts:					
Industry NPV (2006$ million)	4–3	(4)–(6)	(15)–(17)	(18)–(20)	(30)–(32)
Industry NPV (% Change)	6.5–4.9	(6.4)–(10.3)	(26.5)–(31.1)	(32.0)–(36.8)	(53.1)–(58.2)
Cumulative Emissions Impacts †					
CO_2 (Mt)	3.79	8.30	11.55	12.28	12.73
NO_X (kt)	1.43–3.25	3.04–7.13	4.25–9.93	4.51–10.56	4.67–10.95
Hg (t)	0–0.05	0–0.12	0–0.17	0–0.18	0–0.19
Wastewater Discharge Impacts (trillion gallons)	0.00	0.16	0.19	0.20	0.23
Mean LCC Savings * (2006$):					
Top-Loading, Multi-Family	(11.6)	154	244	244	244
Top-Loading, Laundromat	(19.6)	166	252	252	252
Front-Loading, Multi-Family	8.7	52	52	134	234
Front-Loading, Laundromat	9.5	58	58	140	250
Median PBP (years):					
Top-Loading, Multi-Family	10.7	4.5	3.8	3.8	3.8
Top-Loading, Laundromat	7.4	2.8	2.4	2.4	2.4
Front-Loading, Multi-Family	0.0	0.4	0.4	2.8	2.8
Front-Loading, Laundromat	0.0	0.3	0.3	1.7	1.6
LCC Results:					
Top-Loading					
Multi-Family					
Net Cost (%)	45.0	15.4	10.0	10.0	10.0
No Impact (%)	35.7	2.8	2.8	2.8	2.8
Net Benefit (%)	19.3	81.7	87.2	87.2	87.2
Laundromat					
Net Cost (%)	53.4	3.6	1.1	1.1	1.1
No Impact (%)	35.7	2.8	2.8	2.8	2.8
Net Benefit (%)	10.9	93.6	96.1	96.1	96.1
Front-Loading					
Multi-Family					
Net Cost (%)	0.0	0.0	0.0	2.3	1.5
No Impact (%)	92.7	88.3	88.3	2.8	1.5
Net Benefit (%)	7.3	11.7	11.7	94.9	97.0
Laundromat					
Net Cost (%)	0.0	0.0	0.0	0.0	0.0
No Impact (%)	92.7	88.3	88.3	2.8	1.5
Net Benefit (%)	7.3	11.7	11.7	97.2	98.5

* Parentheses indicate negative (−) values. For LCCs, a negative value means an increase in LCC by the amount indicated.
** Changes in installed generation capacity by 2042 based on *AEO 2008* Reference Case.

† CO_2 emissions impacts include physical reductions at power plants and at commercial buildings. NO_X emissions impacts include physical reductions at power plants as well as production of emissions allowance credits where NO_X emissions are subject to emissions caps.

First, DOE considered TSL 5, the max-tech level. TSL 5 would likely save 0.17 quads of energy and 0.24 trillion gallons of water through 2042, an amount DOE considers significant. Discounted at seven percent, the projected energy and water savings through 2042 would be 0.04 quads and 0.06 trillion gallons, respectively. For the Nation as a whole, DOE projects that TSL 5 would result in a net increase of $0.55 billion in NPV, using a discount rate of seven percent. The emissions reductions at TSL 5 are 12.73 Mt of CO_2, 4.67 kt to 10.95 kt of NO_X, and 0 t to 0.19 t of Hg. Total generating capacity in 2042 is estimated to decrease compared to the reference case by 0.031 gigawatts (GW) under TSL 5.

At TSL, 5, DOE projects that the average top-loading CCW consumer would experience a decrease in LCC of $244 in multi-family applications and $252 in laundromats. DOE also estimates an LCC decrease for an overwhelming majority of consumers in the Nation that purchase top-loading CCWs—87 percent of consumers in multi-family applications and 96 percent of consumers in laundromats. The median payback period of the average consumer at TSL 5 in multi-family applications and in laundromats is projected to be 3.8 years and 2.4 years, respectively.

At TSL 5, DOE projects that the average front-loading CCW consumer would experience a decrease in LCC of $234 in multi-family applications and $250 in laundromats. DOE also estimates an LCC decrease for an overwhelming majority of consumers in the Nation that purchase front-loading CCWs—97 percent of consumers in multi-family applications and 99 percent of consumers in laundromats. The median payback period of the average consumer at TSL 5 in multi-family applications and in laundromats is projected to be 2.8 years and 1.6 years, respectively.

At TSL 5, DOE estimated the projected change in INPV ranges from a total decrease of $29.5 million for both product classes to a total decrease of $32.3 million. At TSL 5, DOE recognizes the risk of very large negative impacts if manufacturers' expectations about reduced profit margins are realized. In particular, if the high end of the range of impacts is reached as DOE expects, TSL 5 could result in a net loss of 58 percent in INPV to CCW manufacturers. Also, DOE is especially sensitive to the potentially severe impacts to the LVM of CCWs. Since the LVM's clothes washer revenue is so dependent on CCW sales, DOE is concerned that TSL 5 will disproportionately impact it.

Although DOE recognizes the increased economic benefits to the Nation that could result from TSL 5, DOE has tentatively concluded that the benefits of a Federal standard at TSL 5 would be outweighed by the potential for disincentivizing consumers from purchasing more efficient front-loading washers. At TSL 5, front-loading washers are highly efficient but have a purchase price estimated to be $455 more expensive than top-loading washers. With such a large price differential between the two types of CCWs, and with less than two percent of the front-loading market at TSL 5, DOE is concerned that significant numbers of potential consumers of front-loading washers would choose to purchase a less efficient top-loading washer.

If potential front-loading washer consumers did decide to switch to less expensive top-loading washers, the NES and NPV realized from TSL 5 would be diminished. DOE notes that in developing the energy savings and water savings estimates in Table V.63, the agency held constant the ratio of front-loading to top-loading CCW shipments across the various TSLs. Particularly at TSL 3 to TSL 5, the differences in these estimates are small, especially at a seven percent discount rate. DOE requests comment as to whether it should account for the price elasticity of demand when calculating the anticipated energy and water savings at the different TSLs. DOE also seeks relevant data or other information on this topic. The Department believes that the values currently in Table V.63 represent the high end of the potential energy and water savings for these TSLs. Taking into account price elasticity of demand could affect the anticipated energy and water savings of the various TSLs, and it could potentially result in a change in the TSL with the highest projected energy/water savings level.

In addition, TSL 5 would adversely impact manufacturers' INPV to a significant extent. Not only does the industry face a potential loss in industry INPV, but manufacturers would also need to make significant capital investments for both types of CCWs in order to produce both top-loading and front-loading washers at the maximum technologically feasible levels. After carefully considering the analysis and weighing the benefits and burdens of TSL 5, the Secretary has reached the following initial conclusion: At TSL 5, the benefits of energy savings, economic benefit, and emissions reductions would be outweighed by the potential for disincentivizing consumers to purchase high-efficiency front-loading CCWs and the large capital conversion costs that could result in a substantial reduction in INPV for manufacturers.

Next, DOE considered TSL 4. TSL 4 would likely save 0.16 quads of energy and 0.21 trillion gallons of water through 2042, an amount DOE considers significant. Discounted at seven percent, the projected energy and water savings through 2042 would be 0.04 quads and 0.05 trillion gallons, respectively. For the Nation as a whole, DOE projects that TSL 4 would result in a net increase of $0.50 billion in NPV, using a discount rate of seven percent. The emissions reductions at TSL 4 are 12.28 Mt of CO_2, 4.51 kt to 10.56 kt of NO_X, and 0 t to 0.18 t of Hg. Total generating capacity in 2042 is estimated to decrease compared to the reference case by 0.030 gigawatts (GW) under TSL 4.

At TSL 4, top-loading CCWs have the same efficiency as TSL 5. Therefore, top-loading CCW consumers will experience the same LCC impacts and payback periods as TSL 5. At TSL 4 for front-loading CCWs, DOE projects that the average front-loading CCW consumer would experience a decrease in LCC of $134 in multi-family applications and $140 in laundromats. DOE also estimates an LCC decrease for an overwhelming majority of consumers in the Nation that purchase front-loading CCWs—95 percent of consumers in multi-family applications and 97 percent of consumers in laundromats. The median payback period of the average consumer at TSL 5 in multi-family applications and in laundromats is projected to be 2.8 years and 1.7 years, respectively.

DOE estimated the projected change in INPV ranges from a decrease of $18 million to a decrease of $20 million. At TSL 4, DOE recognizes the risk of very large negative impacts if manufacturers' expectations about reduced profit margins are realized. In particular, if the high end of the range of impacts is reached as DOE expects, TSL 4 could result in a net loss of 37 percent in INPV to CCW manufacturers. Also, DOE is especially sensitive to the potentially severe impacts to the LVM of CCWs. Since the LVM's clothes washer revenue is so dependent on CCW sales, DOE is

concerned that TSL 4 will disproportionately impact it.

Although DOE recognizes the increased economic benefits to the Nation that could result from TSL 4, DOE has the same concerns regarding TSL 4 as for TSL 5. Namely, DOE has concerns as to the potential of TSL 4 to disincentivize consumers from purchasing more-efficient front-loading washers. As a result, DOE has tentatively concluded that the benefits of a Federal standard at TSL 4 would be outweighed by this potential adverse impact. At TSL 4, front-loading CCWs are highly efficient but have a purchase price estimated to be $414 more expensive than top-loading washers. With such a price differential between the two types of CCWs, and with less than four percent of the front-loading market meeting TSL 4, DOE is concerned that significant numbers of potential consumers of front-loading CCWs would be more likely choose to purchase a less-efficient top-loading CCW. If potential front-loading washer consumers did decide to switch to less expensive top-loading washers, the NES and NPV realized from TSL 4 would be diminished. In addition, TSL 4 would adversely impact manufacturers' INPV to a significant extent. Not only does the industry face a potential loss in industry INPV, but manufacturers would also need to make significant capital investments for both types of CCWs in order to produce both top-loading washers at the maximum technologically feasible level and front-loading washers at a level which only three percent of the market currently meets. After carefully considering the analysis and weighing the benefits and burdens of TSL 4, the Secretary has reached the following initial conclusion: At TSL 4, the benefits of energy savings, economic benefit, and emissions reductions would be outweighed by the potential for disincentivizing consumers to purchase high-efficiency front-loading CCWs and the large capital conversion costs that could result in a substantial reduction in INPV for manufacturers.

Next, DOE considered TSL 3. TSL 3 would likely save 0.15 quads of energy and 0.19 trillion gallons of water through 2042, an amount DOE considers significant. Discounted at seven percent, the projected energy and water savings through 2042 would be 0.04 quads and 0.05 trillion gallons, respectively. For the Nation as a whole, DOE projects that TSL 3 would result in a net increase of $0.46 billion in NPV, using a discount rate of seven percent. The emissions reductions at TSL 3 are 11.55 Mt of CO_2, 4.25 kt to 9.93 kt of NO_X, and 0 t to 0.17 t of Hg. Total generating capacity in 2042 is estimated to decrease compared to the reference case by 0.028 gigawatts (GW) under TSL 3.

At TSL 3, top-loading CCWs have the same efficiency as TSL 5. Therefore, top-loading CCW consumers would experience the same LCC impacts and payback periods as TSL 5. At TSL 3 for front-loading CCWs, DOE projects that the average front-loading CCW consumer would experience a decrease in LCC of $52 in multi-family applications and $58 in laundromats. DOE also estimates an LCC decrease for all consumers that do not already purchase front-loading CCWs with an efficiency meeting TSL 3. The median payback period of the average consumer at TSL 3 in multi-family applications and in laundromats is projected to be 0.4 years and 0.3 years, respectively.

DOE estimated the projected change in INPV ranges from a decrease of $15 million to a decrease of $17 million. At TSL 3, DOE recognizes the risk of very large negative impacts if manufacturers' expectations about reduced profit margins are realized. In particular, if the high end of the range of impacts is reached as DOE expects, TSL 3 could result in a net loss of 31 percent in INPV to CCW manufacturers. Also, DOE is especially sensitive to the potential adverse impacts to the LVM of CCWs. Since the LVM's clothes washer revenue is so dependent on CCW sales, DOE is concerned that TSL 3 will disproportionately impact it.

DOE recognizes the increased economic benefits to the Nation that could result from TSL 3 but still has concerns of the potential for disincentivizing consumers from purchasing more-efficient front-loading washers. But at TSL 3, the price difference between front-loading and top-loading CCWs drops to $375. More importantly, over 88 percent of the front-loading market already meets TSL 3. With such a large front-loading market share at TSL 3, it indicates the current cost-effectiveness to consumers of this TSL. Therefore, DOE believes that the remaining 12 percent of front-loading CCW consumers not already purchasing washers at TSL 3 would likely to do so if standards are set at TSL 3. DOE notes that TSL 3 adversely impacts manufacturers' INPV. But because such a large percent of the front-loading market is at TSL 3, manufacturers would likely not need to make significant capital investments for front-loading CCWs. Therefore, significant capital investments would only be required in order to produce top-loading washers at TSL 3.

After considering the analysis and weighing the benefits and the burdens, DOE has tentatively concluded that the benefits of a TSL 3 standard outweigh the burdens. In particular, the Secretary has tentatively concluded that TSL 3 saves a significant amount of energy and is technologically feasible and economically justified. Therefore, DOE today proposes to adopt the energy conservation standards for CCWs at TSL 3. Table V.64 demonstrates the proposed energy conservation standards for CCWs. Even though DOE is proposing amended energy conservation standards for CCWs at TSL 3, DOE recognizes the potential adverse impacts to the LVM and the likelihood that adverse impacts may be significant for CCW market competition. Therefore, DOE will carefully consider the Department of Justice's review of the proposed standards for CCWs before issuing its final rule for this product.

TABLE V.64—PROPOSED ENERGY CONSERVATION STANDARDS FOR COMMERCIAL CLOTHES WASHERS

Product class	Proposed energy conservation standards
Top-Loading ..	1.76 Modified Energy Factor/ 8.3 Water Factor.
Front-Loading	2.00 Modified Energy Factor/ 5.5 Water Factor.

VI. Procedural Issues and Regulatory Review

A. Review Under Executive Order 12866

DOE has determined today's regulatory action is a ''significant regulatory action'' under section 3(f)(1) of Executive Order 12866, ''Regulatory Planning and Review.'' 58 FR 51735 (Oct. 4, 1993). Accordingly, this action was subject to review under the Executive Order by the Office of Information and Regulatory Affairs (OIRA) in the Office of Management and Budget.

The Executive Order requires that each agency identify in writing the specific market failure or other specific problem and that it intends to address that warrants new agency action, as well as to assess the significance of the problem to determine whether any new regulation is warranted. Executive Order 12866, section 1(b)(1).

With the exception of electric and some gas cooking products, DOE's preliminary analysis for some residential gas cooking products, microwave ovens, and CCWs explicitly quantifies and accounts for the percentage of consumers that already purchase more-efficient equipment and

takes these consumers into account when determining the national energy savings associated with various TSLs. The preliminary analysis suggests that accounting for the market value of energy savings alone (*i.e.*, excluding any possible additional ''externality'' benefits such as those noted below) would produce enough benefits to yield net benefits across a wide array of products and circumstances. In its ANOPR, DOE requested additional data (including the percentage of consumers purchasing more-efficient cooking products and the extent to which consumers of all product types will continue to purchase more-efficient equipment), in order to test the existence and extent of these consumer actions. DOE received no such data from interested parties in response to the ANOPR but continues to request these data in today's proposed rule.

DOE believes that there is a lack of consumer information and/or information processing capability about energy efficiency opportunities in the home appliance market. If this is the case, DOE would expect the energy efficiency for home appliances to be randomly distributed across key variables such as energy prices and usage levels. With the exception of some cooking products, DOE has already identified the percentage of consumers that already purchase more-efficient products. However, DOE does not correlate the consumer's usage pattern and energy price with the efficiency of the purchased product. In its ANOPR, DOE sought data on the efficiency levels of existing home appliances by how often they are used (*e.g.*, how many times or hours the product is used) and their associated energy prices (and/or geographic regions of the country). DOE received no such data from interested parties in response to the ANOPR but continues to request these data in today's proposed rule. If DOE does receive data, it plans to use these data to test the extent to which purchasers of this equipment behave as if they are unaware of the costs associated with their energy consumption. Also, DOE seeks comment on consumer knowledge of the Federal ENERGY STAR program, and on the program's potential as a resource for increasing knowledge of the availability and benefits of energy-efficient appliances in the home appliance consumer market.

A related issue is asymmetric information (one party to a transaction has more and better information than the other) and/or high transactions costs (costs of gathering information and effecting exchanges of goods and services). In many instances, the party responsible for an appliance purchase may not be the one who pays the cost to operate it. For example, home builders in large-scale developments often make decisions about appliances without input from home buyers and do not offer options to upgrade those appliances. Also, apartment owners normally make decisions about appliances, but renters often pay the utility bills. If there were no transactions costs, it would be in the home builders' and apartment owners' interest to install appliances that buyers and renters would choose. For example, one would expect that a renter who knowingly faces higher utility bills from low-efficiency appliances would be willing to pay less in rent, and the apartment owner would indirectly bear the higher utility cost. However, this information is not readily available, and it may not be in the renter's interest to take the time to develop it, or, in the case of the landlord who installs a high-efficiency appliance, to convey that information to the renter.

To the extent that asymmetric information and/or high transactions costs are problems, one would expect to find certain outcomes for appliance energy efficiency. For example, all things being equal, one would not expect to see higher rents for apartments with high-efficiency appliances. Conversely, if there were symmetric information, one would expect appliances with higher energy efficiency in rental units where the rent includes utilities compared to those where the renter pays the utility bills separately. Similarly, for single-family homes, one would expect higher energy efficiency levels for replacement units than appliances installed in new construction. Within the new construction market, one would expect to see appliances with higher energy efficiency levels in custom-built homes (where the buyer has more say in appliance choices) than in comparable homes built in large-scale developments.

In addition, this rulemaking is likely to yield certain external benefits resulting from improved energy efficiency of cooking products and CCWs that are not captured by the users of such equipment. These benefits include externalities related to environmental protection and energy security that are not reflected in energy prices, such as reduced emissions of greenhouse gases. The emissions reductions in today's proposed rule are projected to be 76.6 Mt of CO_2 and 16.1 kt of NO_X. DOE invites comments on the weight that DOE should place on these factors in its determination of the maximum energy efficiency level at which the total benefits are likely to exceed the total burdens resulting from an amended standard.

As previously stated, DOE continues to seek data that might enable it to test for market failures or other specific problems for the products under consideration in this rulemaking. Given adequate data, there are ways to test for the extent of market failure for CCWs, for example. One would expect the owners of CCWs who also pay for their energy and water consumption to purchase machines that use less energy and water compared to machines whose owners do not pay for energy and water, other things being equal. To test for this form of market failure, DOE needs data on energy efficiency and water consumption of such units and whether the owner of the equipment is also the operator. DOE is also interested in other potential tests of market failure and data that would enable such tests.

As noted above, DOE conducted a regulatory impact analysis and, under the Executive Order, was subject to review by the Office of Information and Regulatory Affairs (OIRA) in the OMB. DOE presented to OIRA the draft proposed rule and other documents prepared for this rulemaking, including the RIA, and has included these documents in the rulemaking record. They are available for public review in the Resource Room of the Building Technologies Program, 950 L'Enfant Plaza, SW., 6th Floor, Washington, DC 20024, (202) 586–9127, between 9 a.m. and 4 p.m., Monday through Friday, except Federal holidays.

The RIA is contained as chapter 17 in the TSD prepared for the rulemaking. The RIA consists of: (1) A statement of the problem addressed by this regulation, and the mandate for government action; (2) a description and analysis of the feasible policy alternatives to this regulation; (3) a quantitative comparison of the impacts of the alternatives; and (4) the national economic impacts of the proposed standard.

The RIA calculates the effects of feasible policy alternatives to energy conservation standards for residential cooking products and CCWs, and provides a quantitative comparison of the impacts of the alternatives. DOE evaluated each alternative in terms of its ability to achieve significant energy savings at reasonable costs, and compared it to the effectiveness of the proposed rule. DOE analyzed these alternatives using a series of regulatory scenarios as input to the NIA Spreadsheets for the two appliance products, which it modified to allow

inputs for voluntary measures. For more details on how DOE modified the NIA spreadsheets to determine the impacts due to the various non-regulatory alternatives to standards, refer to chapter 17 of the TSD accompanying this notice.

As shown in Table VI.1 below, DOE identified the following major policy alternatives for achieving increased energy efficiency in residential cooking products and CCWs:

- No new regulatory action;
- Financial incentives;
- Consumer rebates;
- Consumer tax credits;
- Manufacturer tax credits;
- Voluntary energy efficiency targets;
- Bulk government purchases;
- Early replacement; and
- The proposed approach (national performance and prescriptive standards).

TABLE VI.1—NON-REGULATORY ALTERNATIVES TO STANDARDS

Policy alternatives	Energy Savings * (quads)	Water savings (trillion gallons)	Net present value ** (billion $)	
			7% discount rate	3% discount rate
Conventional Cooking Products ***				
No New Regulatory Action	0	NA	0	0
Consumer Rebates	0.12	NA	0.17	0.52
Consumer Tax Credits	0.05	NA	0.07	0.23
Manufacturer Tax Credits	0.01	NA	0.02	0.06
Early Replacement	0.01	NA	0.07	0.12
Today's Standards at TSL 1	0.14	NA	0.21	0.61
Microwave Ovens:				
No New Regulatory Action	0	NA	0	0
Consumer Rebates	0.07	NA	0.27	0.60
Consumer Tax Credits	0.02	NA	0.07	0.16
Manufacturer Tax Credits	0.01	NA	0.04	0.09
Voluntary Energy Efficiency Targets	0.35	NA	1.22	2.82
Early Replacement	0.02	NA	0.10	0.15
Bulk Government Purchases	0.01	NA	0.02	0.05
Today's Standards at TSL 3b	0.45	NA	1.56	3.52
Commercial Clothes Washers:				
No New Regulatory Action	0	0	0	0
Consumer Rebates	0.08	0.08	0.20	0.53
Consumer Tax Credits	0.01	0.02	0.04	0.09
Manufacturer Tax Credits	0.01	0.01	0.03	0.07
Voluntary Energy Efficiency Targets †	0.03	0.03	0.08	0.21
Early Replacement	0.01	0.01	0.14	0.22
Bulk Government Purchases †	0.01	0.01	0.03	0.08
Today's Standards at TSL 3	0.15	0.19	0.46	1.16

* Energy savings are in source quads.

** Net present value is the value in the present of a time series of costs and savings. DOE determined the net present value from 2012 to 2042 in billions of 2006 dollars.

*** Voluntary energy efficiency target and bulk government purchase alternatives are not considered because the percentage of the market at TSL 1 (today's proposed standard) is well over the market adoption target level that each alternative strives to attain.

† Voluntary energy efficiency target and bulk government purchase alternatives are not considered for front-loading washers because the percentage of the market at TSL 3 (today's proposed standard) is well over the market adoption target level that each alternative strives to attain.

The net present value amounts shown in Table VI.1 refer to the NPV for consumers. The costs to the government of each policy (such as rebates or tax credits) are not included in the costs for the NPV since, on balance, consumers would be both paying for (through taxes) and receiving the benefits of the payments. The following paragraphs discuss each of the policy alternatives listed in Table VI.1. (See the TSD accompanying this notice, chapter 17.)

No New Regulatory Action. The case in which no regulatory action is taken with regard to cooking products and CCWs constitutes the ''base case'' (or ''No Action'') scenario. In this case, between 2012 and 2042, conventional cooking products are expected to use 10.3 quads of primary energy, microwave ovens 5.2 quads, and CCWs 0.97 quads along with 2.2 trillion gallons of water. Since this is the base case, energy savings and NPV are zero by definition.

Consumer Rebates. Consumer rebates cover a portion of the incremental installed cost difference between products meeting baseline efficiency levels and those meeting higher efficiency levels, which generally result in a higher percentage of consumers purchasing more-efficient models. DOE utilized market penetration curves from a study that analyzed the potential of energy efficiency in California.[110] The penetration curves are a function of benefit-cost ratio (*i.e.*, lifetime operating costs savings divided by increased total installed costs) to estimate the increased market share of more-efficient products given incentives by a rebate program. Using specific rebate amounts, DOE calculated, for each of the considered products, the benefit-cost ratio of the more-efficient appliance with and without the rebate to project the increased market penetration of the product due to a rebate program.

For conventional cooking products meeting the efficiency levels in TSL 1 (*i.e.*, gas cooking products without constant burning pilot lights), DOE estimated that the annual increase in consumer purchases of these products due to consumer rebates would be 7.8 percent. DOE selected the portion of the incremental costs covered by the rebate (*i.e.*, 100 percent) using data from rebate programs conducted by 88 gas utilities, electric utilities, and other State

[110] Rufo, M. and F. Coito, *California's Secret Energy Surplus: The Potential for Energy Efficiency* (prepared for The Energy Foundation and The Hewlett Foundation by Xenergy, Inc.) (2002).

government agencies.[111] DOE estimated that the impact of this policy would be to permanently transform the market so that the increased market share seen in the first year of the program would be maintained throughout the forecast period. At the estimated participation rates, consumer rebates would be expected to provide 0.12 quads of national energy savings and an NPV of $0.17 billion (at a seven-percent discount rate).

For microwave ovens meeting the efficiency levels at TSL 3b (*i.e.*, maximum standby power consumption of 1.0 watt), DOE estimated that the percentage of consumers purchasing more-efficient products due to consumer rebates would increase annually by 9.9 percent. DOE assumed that the rebate would cover the entire incremental cost for this product since that cost is so small. DOE estimated that the impact of this policy would be to permanently transform the market so that the increased market share seen in the first year of the program would be maintained throughout the forecast period. At the estimated participation rates, consumer rebates would be expected to provide 0.07 quads of national energy savings and an NPV of $0.27 billion (at a seven-percent discount rate).

For CCWs meeting TSL 3, DOE estimated that the percentage of consumers purchasing the more-efficient products due to consumer rebates would increase annually by 40.2 percent for top-loading washers and 4.0 percent for front-loading washers. DOE selected the rebate amount using data from rebate programs for CCWs conducted by 24 gas, electric, and water utilities and other agencies. DOE estimated that the impact of this policy would be to permanently transform the market so that the increased market share seen in the first year of the program would be maintained throughout the forecast period. At the estimated participation rates, consumer rebates would be expected to provide 0.08 quads of national energy savings, 85 billion gallons of national water savings, and an NPV of $0.20 billion (at a seven-percent discount rate).

Although DOE estimated that consumer rebates would provide national benefits for conventional cooking products, microwave ovens, and CCWs, these benefits would be smaller than the benefits resulting from national performance standards at the proposed levels. Thus, DOE rejected consumer rebates as a policy alternative to national performance standards.

Consumer Tax Credits. Consumer tax credits cover a percentage of the incremental installed cost difference between products meeting baseline efficiency levels and those with higher efficiencies. Consumer tax credits are considered a viable non-regulatory market transformation program as evidenced by the inclusion of Federal consumer tax credits in EPACT 2005 for various residential appliances. (section 1333 of EPACT 2005; codified at 26 U.S.C. 25C) DOE reviewed the market impact of tax credits offered by the Oregon Department of Energy (ODOE) (ODOE, No. 35 at p. 1) and Montana Department of Revenue (MDR) (MDR, No. 36 at p. 1) to estimate the effect of a national tax credit program. To help estimate the impacts from such a program, DOE also reviewed analyses prepared for the California Public Utilities Commission,[112] the Northwest Energy Efficiency Alliance,[113] and the Energy Foundation/Hewlett Foundation.[114] For each of the appliance products considered for this rulemaking, DOE estimated that the market effect of a tax credit program would gradually increase over a time period until it reached its maximum impact. Once the tax credit program attained its maximum effect, DOE assumed the impact of the policy would be to permanently transform the market at this level.

For conventional cooking products, DOE estimated that the market share of efficient products meeting TSL 1 would increase by 0.7 percent in 2012 and increase over a six-year period to an annual maximum of 2.8 percent in 2020. At these estimated participation rates, consumer tax credits would be expected to provide 0.05 quads of national energy savings and an NPV of $0.07 billion (at a seven-percent discount rate). For microwave ovens, DOE estimated that the market share of efficient products meeting TSL 3b would increase by 0.7 percent in 2012, and increase over a nine-year period to an annual maximum of 2.8 percent in 2020.[115] At these estimated participation rates, consumer tax credits would be expected to provide 0.02 quads of national energy savings and an NPV of $0.07 billion (at a seven-percent discount rate).

For CCWs, DOE estimated that consumer tax credits would induce an increase of 1.3 percent in 2012 in the purchase of products meeting TSL 3 and eventually increase to a maximum of 5.8 percent in 2020 for both top-loading and front-loading washers.[116] At the estimated participation rates, consumer tax credits would be expected to provide 0.01 quads of national energy savings, 16 billion gallons of national water savings, and an NPV of $0.04 billion (at a seven-percent discount rate).

DOE estimated that while consumer tax credits would yield national benefits for conventional cooking products, microwave ovens, and CCWs, these benefits would be much smaller than the benefits from the proposed national performance standards. Thus, DOE rejected consumer tax credits as a policy alternative to national performance standards.

Manufacturer Tax Credits. Manufacturer tax credits are considered a viable non-regulatory market transformation program as evidenced by the inclusion of Federal tax credits in EPACT 2005 for manufacturers of residential appliances. (Section 1334 of EPACT 2005; codified at 26 U.S.C. 45M) Similar to consumer tax credits, manufacturer tax credits would effectively result in lower product prices to consumers by an amount that covered part of the incremental price difference between products meeting baseline efficiency levels and those meeting higher efficiency levels. Because these tax credits would go to manufacturers instead of consumers, research indicates that fewer consumers would be affected by a manufacturer tax credit program than by consumer tax credits.[117] [118] Although consumers

[111] Because DOE was not able to identify consumer rebate programs specific to conventional cooking products, rebate amounts for another kitchen appliance, dishwashers, were used to estimate the impact from a rebate program providing incentives for more-efficient cooking products.

[112] Itron and KEMA, *2004/2005 Statewide Residential Retrofit Single-Family Energy Efficiency Rebate Evaluation* (prepared for the California Public Utilities Commission, Pacific Gas And Electric Company, San Diego Gas And Electric Company, Southern California Edison, Southern California Gas Company, CPUC–ID#: 1115–04) (2007).

[113] KEMA, *Consumer Product Market Progress Evaluation Report 3* (prepared for Northwest Energy Efficiency Alliance, Report #07–174) (2007).

[114] Rufo, M. and F. Coito, *op. cit.*

[115] Because DOE was not able to identify consumer tax credit programs specific to conventional cooking products and microwave ovens, increased market penetrations for another kitchen appliance, dishwashers, were used to estimate the impact from a tax credit program providing incentives for more-efficient conventional cooking products and microwave ovens.

[116] Because DOE was not able to identify consumer tax credit programs specific to commercial clothes washers, increased market penetrations for residential clothes washers were used to estimate the impact from a tax credit program providing incentives for more-efficient commercial clothes washers.

[117] K. Train, *Customer Decision Study: Analysis of Residential Customer Equipment Purchase*

Continued

would benefit from price reductions passed through to them by the manufacturers, research demonstrates that approximately half the consumers who would benefit from a consumer tax credit program would be aware of the economic benefits of more efficient technologies included in an appliance manufacturer tax credit program. In other words, research estimates that half of the effect from a consumer tax credit program is due to publicly available information or promotions announcing the benefits of the program. This effect, referred to as the ''announcement effect,'' is not part of a manufacturer tax credit program. Therefore, DOE estimated that the effect of a manufacturer tax credit program would be only half of the maximum impact of a consumer tax credit program.

For conventional cooking products, the percentage of consumers purchasing products meeting TSL 1 would be expected to increase by 0.6 percent due to a manufacturer tax credit program.[119] For microwave ovens, DOE estimated the percentage of consumers purchasing products at TSL 3b would be expected to increase by 1.4 percent. For CCWs, DOE estimated the percentage of consumers purchasing products at TSL 3 would be expected to increase by 2.9 percent for both top-loading and front-loading washers. For all of the considered products, DOE assumed that the impact of the manufacturer tax credit policy would be to permanently transform the market so that the increased market share seen in the first year of the program would be maintained throughout the forecast period.

At the above estimated participation rates, manufacturer tax credits would provide 0.01 quads of national energy savings and an NPV of $0.02 billion (at a seven-percent discount rate) for conventional cooking products, 0.01 quads of national energy savings and an NPV of $0.04 billion (at a seven-percent discount rate) for microwave ovens, and 0.01 quads of national energy savings, 12 billion gallons of national water savings, and an NPV of $0.03 billion (at a seven-percent discount rate) for CCWs.

DOE estimated that while manufacturer tax credits would yield national benefits for conventional cooking products, microwave ovens, and CCWs, these benefits would be much smaller than the benefits from national performance standards. Thus, DOE rejected manufacturer tax credits as a policy alternative to the proposed national performance standards.

Voluntary Energy Efficiency Targets. DOE estimated the impact of voluntary energy efficiency targets by reviewing the historical and projected market transformation performance of past and current ENERGY STAR programs.

To estimate the impacts from a voluntary energy efficiency program targeting the adoption of microwave ovens meeting TSL 3b, DOE evaluated the ENERGY STAR program's experience with cathode ray tube (CRT) televisions,[120] as well as other consumer electronics products.[121] Over a 10-year period spanning 1998–2007, the ENERGY STAR program estimated the annual market share increases of CRT televisions and other consumer electronics meeting qualifying efficiency levels due to the ENERGY STAR program which increased to a maximum of 58 percent. DOE applied this same pattern of market share increase to microwave ovens beginning in 2012. Because CRT televisions and microwave ovens have similar characteristics (*i.e.*, electronic or electric appliance with an overwhelming majority of households owning the product), DOE believes it is reasonable to estimate the impacts of the ENERGY STAR program for microwave ovens with the impacts that have been realized for CRT televisions. After attaining this maximum market share after 10 years, DOE's analysis maintained that market share throughout the remainder of the forecast period. DOE estimated that voluntary energy efficiency targets would be expected to provide 0.35 quads of national energy savings and an NPV of $1.22 billion (at a seven-percent discount rate). Although this program would provide national benefits, DOE's analysis indicates that they would be smaller than the benefits resulting from the proposed national performance standards. Thus, DOE rejected the use of voluntary energy efficiency targets as a policy alternative to national performance standards.

To estimate the impacts from a voluntary energy efficiency program targeting the adoption of top-loading CCWs meeting TSL 3, DOE evaluated the potential impacts of expanding the Federal government's existing ENERGY STAR program for CCWs. DOE modeled the voluntary efficiency program based on the ENERGY STAR program's experience with RCWs.[122] [123] Over the period spanning 2007–2025, ENERGY STAR projected that the market share of RCWs meeting target efficiency levels due to ENERGY STAR will increase to a maximum of 28 percent. DOE estimated that an expanded voluntary program would increase their market share by half of these projected annual amounts for the existing ENERGY STAR program, reaching a maximum of 14 percent increased market share. For CCWs, DOE assumed that the impacts of the existing ENERGY STAR program were already incorporated in the base case, and applied the same pattern of market share increase from an expanded voluntary program to CCWs beginning in 2012. After attaining its maximum market share of 14 percent in the year 2030, DOE's analysis maintained that market share throughout the remainder of the forecast period. DOE estimated that an expanded program of voluntary energy efficiency targets would be expected to provide 0.03 quads of national energy savings, 33 billion gallons of national water savings, and an NPV of $0.08 billion (at a seven-percent discount rate). Although this program would provide national benefits, they were estimated to be smaller than the benefits resulting from the proposed national performance standards. Thus, DOE rejected the use of voluntary energy efficiency targets as a policy alternative to national performance standards.

DOE did not analyze the potential impacts of voluntary energy efficiency targets for front-loading CCWs or conventional cooking products because a vast majority of products already meet the proposed standards. In the case of front-loading CCWs, over 88 percent of the market meets TSL 3, while in the case of conventional cooking products, over 85 percent of the gas range market already meets TSL 1. The ENERGY STAR program typically targets products where a maximum of approximately 25 percent of the existing market meets the target efficiency

Decisions (prepared for Southern California Edison by Cambridge Systematics, Pacific Consulting Services, The Technology Applications Group, and California Survey Research Services) (1994).

[118] Lawrence Berkeley National Laboratory, End-Use Forecasting Group. *Analysis of Tax Credits for Efficient Equipment (1997).* Available at: *http://enduse.lbl.gov/Projects/TaxCredits.html.* (Last accessed April 24, 2008.)

[119] DOE assumed that the manufacturer tax credit program would affect only consumers of gas cooking products, who did not need electric outlets installed; therefore the increased percentage impact includes only those consumers.

[120] The efficiency gains of CRT televisions, like those of microwaves, come from reducing standby losses.

[121] Sanchez, M.C., C.A. Webber, R. Brown, and G.K. Homan, *2007 Status Report—Savings Estimates for the ENERGY STAR® Voluntary Labeling Program* (Lawrence Berkeley National Laboratory, LBNL–56380) (2007).

[122] Data were not available on the market impacts of the CCW program.

[123] Sanchez *et al., op. cit.*

level.[124] Since the markets for front-loading CCWs and gas ranges are well above the 25 percent threshold, DOE did not consider this approach for conventional cooking products.

Early Replacement. The early replacement policy alternative envisions a program to replace old, inefficient units with models meeting efficiency levels higher than baseline equipment. Under an early replacement program, State governments or electric and gas utilities would provide financial incentives to consumers to retire the appliance early in order to hasten the adoption of more-efficient products. For all of the considered products, DOE modeled this policy by applying a four percent increase in the replacement rate above the natural rate of replacement for failed equipment. DOE based this percentage increase on program experience with the early replacement of appliances in the State of Connecticut.[125] DOE assumed the program would continue for as long as it would take to ensure that the eligible existing stock in the year that the program began (2012) was completely replaced.

For conventional cooking products, this policy alternative would replace old, inefficient units with models meeting the efficiency levels in TSL 1. DOE estimated that such an early replacement program would be expected to provide 0.04 quads of national energy savings and an NPV of $0.07 billion (at a seven-percent discount rate). For microwave ovens, this policy alternative would replace old, inefficient units with models meeting the efficiency levels in TSL 3b. DOE estimated that such an early replacement program would be expected to provide 0.02 quads of national energy savings and an NPV of $0.10 billion (at a seven-percent discount rate). For CCWs, this policy alternative would replace old, inefficient top-loading and front-loading units with models meeting the efficiency levels in TSL 3. DOE estimated that such an early replacement program would be expected to provide 0.01 quads of national energy savings, 14 billion gallons of national water savings, and an NPV of $0.14 billion (at a seven-percent discount rate).

Although DOE estimated that the above early replacement programs for each of the considered products would provide national benefits, they would be much smaller than the benefits resulting from national performance standards. Thus, DOE rejected early replacement incentives as a policy alternative to national performance standards.

Bulk Government Purchases. Under this policy alternative, the government sector would be encouraged to shift their purchases to products that meet the target efficiency levels above baseline levels. Aggregating public sector demand could provide a market signal to manufacturers and vendors that some of their largest customers sought suppliers with products that met an efficiency target at favorable prices. This program also could induce ''market pull'' impacts through manufacturers and vendors achieving economies of scale for high-efficiency products. DOE assumed that Federal, State, and local government agencies could administer such a program. At the Federal level, such a program would add microwave ovens to the products for which FEMP has energy efficient procurement specifications and would modify the existing FEMP specifications for CCWs. DOE modeled this program by assuming an increase in the installation of equipment meeting higher efficiency levels for those households where government agencies purchase or influence the purchase of appliances.

For microwave ovens, this program would encourage the government sector to shift their purchases to units that meet the efficiency levels in TSL 3b. Based on data from the 2005 AHS, there are approximately two million housing units that are publicly owned, representing about 1.6 percent of all U.S. households.[126] Per RECS 2001, 76 percent of Federally owned housing units have microwave ovens.[127] Therefore, DOE estimated that 1.2 million publicly owned housing units have microwave ovens. Based on research of the effectiveness of bulk government purchasing programs, DOE estimated that the market share of more-efficient microwave ovens in publicly owned housing would increase at a rate of eight percent per year over a 10-year period (2012–2021) and remain at the 2021 level for the remainder of the forecast period.[128] DOE estimated that bulk government purchases of microwave ovens would be expected to provide 0.01 quads of national energy savings and an NPV of $0.02 billion (at a seven-percent discount rate), benefits which would be much smaller than those estimated for the proposed national performance standards. Thus, DOE rejected bulk government purchases as a policy alternative to national performance standards.

For CCWs, this program would encourage the government sector to shift its purchases to top-loading units that meet the efficiency levels in TSL 3. DOE estimated that this policy would apply to multifamily buildings that are government-owned. Based on a technology review prepared for FEMP by Pacific Northwest National Laboratory (PNNL), approximately 7000 CCWs (representing a 3.2 percent market share) were purchased in the year 2000 for Federal buildings.[129] Based on research of the effectiveness of bulk government purchasing programs, DOE estimated that the market share of more-efficient CCWs in Federally owned multifamily buildings would increase at a rate of eight percent per year over a 10-year period (2012–2021) and remain at the 2021 level for the remainder of the forecast period. DOE estimated that bulk government purchases would be expected to provide 0.01 quads of national energy savings, 13 billion gallons of national water savings, and an NPV of $0.03 billion (at a seven-percent discount rate), benefits which would be much smaller than those estimated for the proposed national performance standards. Thus, DOE rejected bulk government purchases as a policy alternative to national performance standards.

DOE did not analyze the potential impacts of bulk government purchases for front-loading CCWs or conventional cooking products because a vast majority of products already meet the proposed standards. In the case of front-loading CCWs, over 88 percent of the market meets TSL 3, while in the case of conventional cooking products, over 85 percent of the gas range market already meets TSL 1. FEMP

[124] Sanchez, M. and A. Fanara, ''New Product Development: The Pipeline for Future ENERGY STAR Growth,'' *Proceedings of the 2000 ACEEE Summer Study on Energy Efficiency in Buildings* (2000) Vol 6, pp. 343–354.

[125] Nexus and RLW Analytics, *Impact, Process, and Market Study of the Connecticut Appliance Retirement Program: Overall Report, Final.* (submitted to Northeast Utilities—Connecticut Light and Power and the United Illuminating Company by Nexus Market Research, Inc. and RLW Analytics, Inc.) (2005).

[126] U.S. Department of Housing and Urban Development—Office of Policy Development and Research, *A Picture of Subsidized Households—2000* (2000). Available at: *http://www.huduser.org/picture2000/.* (Last accessed April 24, 2008.)

[127] U.S. Department of Energy—Energy Information Administration, *Residential Energy Consumption Survey: Household Energy Consumption and Expenditures 2001* (2001). Available at: *http://www.eia.doe.gov/emeu/recs/public.html.*

[128] Harris, J. and F. Johnson, ''Potential Energy, Cost, and CO_2 Savings from Energy-Efficient Government Purchase,'' *Proceedings of the ACEEE 2000 Summer Study on Energy Efficiency in Buildings* (2000) Vol 4, pp. 147–166.

[129] Pacific Northwest National Laboratory, *Assessment of High-Performance, Family-Sized Commercial Clothes Washers* (DOE/EE–0218) (2000).

procurement specifications typically promote products in the top 25 percent of the existing product offerings in terms of efficiency. Since most of the front-loading CCWs and gas ranges sold in the base case already comply with such specifications, DOE was not able to consider this program as a source of data for top-loading CCWs and conventional cooking products.

National Performance Standards (TSL 1 for conventional cooking products, TSL 3b for microwave ovens, and TSL 3 for CCWs). As indicated in the paragraphs above, none of the alternatives DOE examined would save as much energy as the proposed standards. Therefore, DOE proposes to adopt the efficiency levels listed in section V.C.

B. Review Under the Regulatory Flexibility Act

The Regulatory Flexibility Act (5 U.S.C. 601 *et seq.*) requires preparation of an initial regulatory flexibility analysis for any rule that by law must be proposed for public comment, unless the agency certifies that the rule, if promulgated, will not have a significant economic impact on a substantial number of small entities. As required by Executive Order 13272, *Proper Consideration of Small Entities in Agency Rulemaking,* 67 FR 53461 (August 16, 2002), DOE published procedures and policies on February 19, 2003, to ensure that the potential impacts of its rules on small entities are properly considered during the rulemaking process. 68 FR 7990. DOE has made its procedures and policies available on the Office of General Counsel's Web site: *http://www.gc.doe.gov.*

DOE reviewed today's proposed rule under the provisions of the Regulatory Flexibility Act and the procedures and policies published on February 19, 2003. 68 FR 7990. A regulatory flexibility analysis examines the impact of the rule on small entities and considers alternative ways of reducing negative impacts. DOE identified producers of all products covered by this rulemaking which have manufacturing facilities located within the United States. DOE then looked at publicly available data and contacted manufacturers, where needed, to determine if they meet the SBA's definition of a small manufacturing facility.

For the manufacturers of products covered by this rulemaking, the SBA has set three size thresholds, which define which entities are ''small businesses'' for the purposes of the statute. Since all CCW manufacturers also produce RCWs, limits for both categories are presented in Table VI.2, along with the size limits of household cooking appliance manufacturers. DOE used the small business size standards published on March 11, 2008, as amended, by the SBA to determine whether any small entities would be required to comply with the rule. 61 FR 3286 (codified at 13 CFR part 121.) The size standards are listed by North American Industry Classification System (NAICS) code and industry description.

VI.2—SBA AND NAICS CLASSIFICATION OF SMALL BUSINESSES POTENTIALLY AFFECTED BY THIS RULE

Industry description	Revenue limit	Employee limit	NAICS
Residential Laundry Equipment Manufacturing	N/A	1,000	335224
Commercial Laundry Equipment Manufacturing	N/A	500	333312
Household Cooking Appliance Manufacturing	N/A	750	335221

1. Cooking Products

The conventional cooking appliance industry is characterized by both domestic and international manufacturers. Most conventional cooking appliances are currently manufactured in the United States. Consolidation within the cooking products industry has reduced the number of parent companies that manufacture similar equipment under different affiliates and labels.

DOE conducted a market survey and created a list of every manufacturer that makes conventional cooking appliances for sale in the United States. DOE also asked stakeholders and industry representatives if they were aware of any other small manufacturers. DOE then reviewed publicly available data and contacted manufacturers, as necessary, to determine whether they meet the SBA's definition of a ''small business'' in the cooking appliance industry. Based on this analysis, DOE estimates that there are two small domestic manufacturers of conventional cooking appliances. One of these appliance manufacturers has production limited to ranges, while the other produces cooktops, ranges, hoods, wall ovens, and cooking ventilation equipment. Before issuing this notice of proposed rulemaking, DOE contacted both small businesses, and one of them agreed to be interviewed. Dun and Bradstreet reports that both companies are privately owned, have less than 300 employees, and have annual revenues of less than $60 million.[130] DOE also obtained information about small business impacts while interviewing manufacturers that exceed the small business size threshold of 750 employees in this industry.

DOE found that, as it pertains to the elimination of standing pilots, small manufacturers have the same concerns as the remaining high-volume manufacturer of gas cooking appliances with standing pilot ignition systems. DOE summarized the key issues in section IV.G.3.a of today's notice. One small business manufacturer objected to the potential elimination of standing pilot ignition systems, because 25 percent of its unit shipments feature such ignition systems. This manufacturer noted that appliances with standing pilot lights have become a niche market, with progressively fewer competitors offering these types of products. DOE found some differences in the R&D emphasis and marketing strategies between small business manufacturers and large manufacturers, as smaller businesses tend to focus on appliance sizes not offered by larger manufacturers. However, DOE believes the GRIM analysis, which models each product class separately, still represents the small businesses affected by standards. The qualitative and quantitative GRIM results are summarized in section V.B.2 of today's notice.

DOE reviewed the standard levels considered in today's notice of proposed rulemaking under the provisions of the Regulatory Flexibility Act and the procedures and policies published on February 19, 2003. Based on the foregoing, DOE determined that it cannot certify that these proposed energy conservation standard levels, if promulgated, would have no significant economic impact on a substantial number of small entities. DOE made this

[130] Refer to: *http://www.dnb.com/us/.*

determination because of the potential impacts that the proposed energy conservation standard levels under consideration for cooking appliances that eliminate standing pilots would have on the manufacturers, including the small businesses, which produce them. Consequently, DOE has prepared an initial regulatory flexibility analysis (IRFA) for this rulemaking. The IRFA describes potential impacts on small businesses associated with the elimination of standing pilots from conventional cooking appliance design and manufacturing.

The potential impacts on cooking appliance manufacturers are discussed in the following sections. DOE has transmitted a copy of this IRFA to the Chief Counsel for Advocacy of the Small Business Administration for review.

a. Reasons for the Proposed Rule

Title III of EPCA sets forth a variety of provisions designed to improve energy efficiency. Part A of Title III (42 U.S.C. 6291–6309) provides for the ''Energy Conservation Program for Consumer Products Other Than Automobiles.'' The program covers consumer products and certain commercial products (all of which are referred to hereafter as ''covered products''), including residential cooking products. (42 U.S.C. 6292(10)) DOE is proposing in today's notice to amend energy conservation standards for conventional cooking appliances by eliminating standing pilot ignition systems.

b. Objectives of, and Legal Basis for, the Proposed Rule

EPCA provides criteria for prescribing new or amended standards for covered products and equipment.[131] As indicated above, any new or amended standard for either of the two appliance products must be designed to achieve the maximum improvement in energy efficiency that is technologically feasible and economically justified (42 U.S.C. 6295(o)(2)(A)), although EPCA precludes DOE from adopting any standard that would not result in significant conservation of energy. (42 U.S.C. 6295(o)(3)(B)) Moreover, DOE may not prescribe a standard: (1) for certain products, if no test procedure has been established for the product; or (2) if DOE determines by rule that the standard is not technologically feasible or economically justified. (42 U.S.C. 6295(o)(3)) The Act (42 U.S.C. 6295(o)(2)(B)(i)) also provides that, in deciding whether a standard is economically justified, DOE must, after receiving comments on the proposed standard, determine whether the benefits of the standard exceed its burdens by considering, to the greatest extent practicable, weighing seven factors as described in section II.B of the preamble. EPCA directs DOE to undertake energy conversation standards rulemakings for cooking products and CCWs according to the schedules established in 42 U.S.C. 6295(h)(2) and 42 U.S.C. 6313(e)(2)(A)(i), respectively.

c. Description and Estimated Number of Small Entities Regulated

Through market research, interviews with manufacturers of all sizes, and discussions with trade groups, DOE was able to identify two small businesses that manufacture conventional cooking appliances which would be affected by today's rule.

d. Description and Estimate of Compliance Requirements

Potential impacts on all manufacturers of conventional cooking appliances vary by TSL. Margins for all businesses could be impacted negatively by the adoption of any TSL, since all manufacturers have expressed an inability to pass on cost increases to retailers and consumers. The two small domestic businesses under discussion differ from their competitors in that they are focused cooking appliance manufacturers, not diversified appliance manufacturers. Therefore, any rule affecting products manufactured by these small businesses will impact them disproportionately because of their size and their focus on cooking appliances. However, due to the low number of competitors that agreed to be interviewed, DOE was not able to characterize this industry segment with a separate cash-flow analysis due to concerns about maintaining confidentiality and uncertainty regarding the quantitative impact on revenues of a standing pilot ban.

At TSL 1 for gas ovens and gas cooktops, the elimination of standing pilot lights would eliminate one of the niches that these two small businesses serve in the cooking appliance industry. Both businesses also manufacture ovens and cooktops with electronic ignition systems, but the ignition source would no longer be a differentiator within the industry as it is today. The result would be a potential loss of market share since consumers would be able to choose from a wider variety of competitors, all of which operate at much higher production scales.

For all other TSLs concerning conventional cooking appliances (which are not being considered in today's rule), the impact on small, focused business entities would be proportionately greater than for their competitors since these businesses lack the scale to afford significant R&D expenses, capital expansion budgets, and other resources when compared to larger entities. The exact extent to which smaller entities would be affected, however, is hard to gauge since manufacturers did not respond to questions regarding all investment requirements by TSL during interviews. Notwithstanding this limitation, research associated with the LVM and other small entities in prior rulemakings suggests that many costs associated with complying with rulemakings are fixed, regardless of production volume.

Since all domestic manufacturers already manufacture all of their conventional cooking appliances with electronic ignition modules as a standard feature or as an option for consumers, the cost of converting the remaining three domestic manufacturers exclusively to electronic ignition modules would be modest. However, given their focus and scale, any conventional cooking appliance rule would affect these two domestic small businesses disproportionately compared to their larger and more diversified competitor.

e. Duplication, Overlap, and Conflict with Other Rules and Regulations

DOE is not aware of any rules or regulations that duplicate, overlap, or conflict with the rule being considered today.

f. Significant Alternatives to the Proposed Rule

In today's rule, the only TSL under consideration for conventional cooking appliances is the elimination of standing pilot ignition systems for gas ovens and gas cooktops. All manufacturers of such appliances with standing pilot systems stated during interviews that there are no known alternatives on the market today that would allow their appliances to meet safety standards (such as ANSI Z21.1), while not using a line-powered ignition system or standing pilots. While battery-powered ignition systems have found application in a few cooking products such as the outdoor gas barbeque market, none of such systems have yet to find application in or approval for indoor cooking appliances. During an MIA interview, one manufacturer

[131] The EPCA provisions discussed in the remainder of this subsection directly apply to covered products, and also apply to certain covered equipment, such as commercial clothes washers, by virtue of 42 U.S.C. 6316(a).

expressed doubt that any third-party supplier would develop such a solution, given the small, and shrinking market that standing pilot-equipped ranges represent. Another manufacturer stated, however, that while the market share of gas cooking products with standing pilot ignition systems has been declining, a substantial market is still served by such appliances. DOE research suggests that battery-powered ignition systems could be incorporated by manufacturers at a modest cost if manufacturer's market research suggested that a substantial number of consumers found such a product attribute important. DOE notes that such systems have been incorporated successfully in a range of related appliances, such as instantaneous water heaters. Further, DOE believes that there is nothing in the applicable safety standards that would prohibit such ignition systems from being implemented on gas cooking products. Therefore, DOE believes that households that use gas for cooking and are without electricity will likely have technological options that would enable them to continue to use gas cooking if standing pilot ignition systems are eliminated.

In addition to the TSL being considered, the TSD associated with this proposed rule includes a report referred to in section VI.A in the preamble as the regulatory impact analysis (RIA) (discussed earlier in this report and in detail in chapter 17 of the TSD). For conventional cooking appliances, this report discusses the following policy alternatives: (1) No standard, (2) consumer rebates, (3) consumer tax credits, (4) manufacturer tax credits, and (5) early replacement. With the exception of consumer rebates, the energy savings of these regulatory alternatives are at least three times smaller than those expected from the standard levels under consideration. The economic impacts mirror these regulatory alternatives.

The conventional cooking appliance industry is very competitive. The two small businesses differentiate their products from most larger competitors by offering their products in non-traditional sizes and with standing pilot ignition systems. Three primary consumer groups purchasing standing pilot-equipped products were identified by manufacturers in their MIA interviews: (1) Consumers without line power near the range (or in the house); (2) consumers who prefer appliances without line power for religious reasons; and (3) consumers seeking the lowest initial appliance cost. Manufacturers could not identify the size of the respective market segments, but demographics suggest that initial price is the primary reason that consumers are opting for standing pilot-equipped ranges. Religious subgroups that eschew line power and homes without line power cannot alone explain why up to 18 percent of gas cooking appliances are bought with standing pilot ignition systems. Furthermore, all manufacturers already make gas ranges with electronic ignition, including the high-volume domestic manufacturer of conventional cooking appliances with standing pilots. Thus, the primary benefit of standing pilot ignition systems appears to be that some differentiation from most higher-volume competitors. While the actual revenue benefit is hard to quantify, one small business manufacturer stated during interviews that the company would expect to experience material economic harm if standing pilot ignition systems were eliminated.

Due to the low number of small business respondents to DOE inquiries and the uncertainty regarding the potential impact of TSL 1 on small conventional cooking appliance manufacturers, DOE was not able to conduct a separate small business impact analysis. DOE continues to seek input from businesses that would be affected by the elimination of standing pilot ignition systems and will still consider this trial level for the purpose of the NOPR.

As mentioned above, the other policy alternatives (no standard, consumer rebates, consumer tax credits, manufacturer tax credits, and early replacement) are described in section VI.A of the preamble and in the regulatory impact analysis (chapter 17 of the TSD accompanying this notice). Since the impacts of these policy alternatives are lower than the impacts described above for the proposed standard levels, DOE expects that the impacts to small manufacturers would also be less than the impacts described above for the proposed standard level. DOE requests comment on the impacts to small business manufacturers for these and any other possible alternatives to the proposed rule for these manufacturers. DOE will consider any comments received regarding impacts to small business manufacturers for all the alternatives identified (including those in the RIA,) when preparing the final rule.

2. Microwave Ovens

The microwave oven industry consists of eight manufacturers with a market share larger than two percent. Most are large, foreign companies that import microwave ovens into the United States. There are two U.S. facilities that partially assemble microwave ovens. Both of these facilities are owned by large appliance manufacturers. None of the microwave oven manufacturers falls into any small business category. Thus, DOE did not address the microwave oven industry further in the small business analysis.

3. Commercial Clothes Washers

The CCW industry consists of three principal competitors that make up almost 100 percent of the market share. Two of them are diversified appliance manufacturers, while the third is a focused laundry equipment manufacturer. Before issuing this notice of proposed rulemaking, DOE interviewed all CCW manufacturers. Since all CCW manufacturers also make RCWs, DOE also considered whether a CCW manufacturer could be considered a small business entity in that industry. None of the CCW manufacturers fall into any small business category. Thus, DOE did not address the CCW industry further in the small business analysis.

C. Review Under the Paperwork Reduction Act

Under the Paperwork Reduction Act of 1995 (PRA) (44 U.S.C. 3501 *et seq.*), a person is not required to respond to a collection of information by a Federal agency, including a requirement to maintain records, unless the collection displays a valid OMB control number. (44 U.S.C. 3506(c)(1)(B)(iii)(V)) This rulemaking imposes no new information or recordkeeping requirements. Accordingly, Office of Management and Budget clearance is not required under the PRA.

D. Review Under the National Environmental Policy Act

DOE has prepared a draft environmental assessment (EA) of the impacts of the proposed rule pursuant to the National Environmental Policy Act of 1969 (42 U.S.C. 4321 *et seq.*), the regulations of the Council on Environmental Quality (40 CFR parts 1500–1508), and DOE's regulations for compliance with the National Environmental Policy Act (10 CFR part 1021). This assessment includes an examination of the potential effects of emission reductions likely to result from the rule in the context of global climate change, as well as other types of environmental impacts. The draft EA has been incorporated into the TSD; the environmental impact analyses are contained primarily in Chapter 16 of that document. Before issuing a final rule for residential cooking products and CCWs, DOE will consider public

comments and, as appropriate, determine whether to issue a finding of no significant impact as part of a final EA or to prepare an environmental impact statement (EIS) for this rulemaking.

E. Review Under Executive Order 13132

Executive Order 13132, ''Federalism,'' 64 FR 43255 (August 4, 1999) imposes certain requirements on agencies formulating and implementing policies or regulations that preempt State law or that have Federalism implications. The Executive Order requires agencies to examine the constitutional and statutory authority supporting any action that would limit the policymaking discretion of the States and to carefully assess the necessity for such actions. The Executive Order also requires agencies to have an accountable process to ensure meaningful and timely input by State and local officials in the development of regulatory policies that have Federalism implications. On March 14, 2000, DOE published a statement of policy describing the intergovernmental consultation process it will follow in the development of such regulations. 65 FR 13735. DOE has examined today's proposed rule and has determined that it 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. EPCA governs and prescribes Federal preemption of State regulations as to energy conservation for the products that are the subject of today's proposed rule. States can petition DOE for exemption from such preemption to the extent, and based on criteria, set forth in EPCA. (42 U.S.C. 6297(d) and 6316(b)(2)(D)) No further action is required by Executive Order 13132.

F. Review Under Executive Order 12988

With respect to the review of existing regulations and the promulgation of new regulations, section 3(a) of Executive Order 12988, ''Civil Justice Reform'' (61 FR 4729 (Feb. 7, 1996)) imposes on Federal agencies the general duty to adhere to the following requirements: (1) Eliminate drafting errors and ambiguity; (2) write regulations to minimize litigation; and (3) provide a clear legal standard for affected conduct rather than a general standard and promote simplification and burden reduction. Section 3(b) of Executive Order 12988 specifically requires that Executive agencies make every reasonable effort to ensure that the regulation: (1) Clearly specifies the preemptive effect, if any; (2) clearly specifies any effect on existing Federal law or regulation; (3) provides a clear legal standard for affected conduct while promoting simplification and burden reduction; (4) specifies the retroactive effect, if any; (5) adequately defines key terms; and (6) addresses other important issues affecting clarity and general draftsmanship under any guidelines issued by the Attorney General. Section 3(c) of Executive Order 12988 requires Executive agencies to review regulations in light of applicable standards in section 3(a) and section 3(b) to determine whether they are met or it is unreasonable to meet one or more of them. DOE has completed the required review and determined that, to the extent permitted by law, this proposed rule meets the relevant standards of Executive Order 12988.

G. Review Under the Unfunded Mandates Reform Act of 1995

DOE reviewed this regulatory action under Title II of the Unfunded Mandates Reform Act of 1995 (Pub. L. 104–4) (UMRA), which requires each Federal agency to assess the effects of Federal regulatory actions on State, local and Tribal governments and the private sector. For a proposed regulatory action likely to result in a rule that may cause the expenditure by State, local, and Tribal governments, in the aggregate, or by the private sector of $100 million or more in any one year (adjusted for inflation), section 202 of UMRA requires an agency to publish a written statement assessing the costs, benefits, and other effects of the rule on the national economy. (2 U.S.C. 1532(a), (b)) The UMRA also requires a Federal agency to develop an effective process to permit timely input by elected officers of State, local, and Tribal governments on a proposed ''significant intergovernmental mandate,'' and requires an agency plan for giving notice and opportunity for timely input to potentially affected small governments before establishing any requirements that might significantly or uniquely affect small governments. On March 18, 1997, DOE published a statement of policy on its process for intergovernmental consultation under UMRA (62 FR 12820) (also available at *http://www.gc.doe.gov*). Although today's proposed rule does not contain a Federal intergovernmental mandate, it may impose expenditures of $100 million or more on the private sector.

Section 202 of UMRA authorizes an agency to respond to the content requirements of UMRA in any other statement or analysis that accompanies the proposed rule. 2 U.S.C. 1532(c). The content requirements of section 202(b) of UMRA relevant to a private sector mandate substantially overlap the economic analysis requirements that apply under section 325(o) of EPCA and Executive Order 12866. The **SUPPLEMENTARY INFORMATION** section of the notice of proposed rulemaking and the ''Regulatory Impact Analysis'' section of the TSD for this proposed rule respond to those requirements.

Under section 205 of UMRA, the Department is obligated to identify and consider a reasonable number of regulatory alternatives before promulgating a rule for which a written statement under section 202 is required. DOE is required to select from those alternatives the most cost-effective and least burdensome alternative that achieves the objectives of the rule unless DOE publishes an explanation for doing otherwise or the selection of such an alternative is inconsistent with law. As required by 42 U.S.C. 6295(h) and (o), 6313(e), and 6316(a), today's proposed rule would establish energy conservation standards for residential cooking products and CCWs that are designed to achieve the maximum improvement in energy efficiency that DOE has determined to be both technologically feasible and economically justified. A full discussion of the alternatives considered by DOE is presented in the ''Regulatory Impact Analysis'' section of the TSD for today's proposed rule.

H. Review Under the Treasury and General Government Appropriations Act, 1999

Section 654 of the Treasury and General Government Appropriations Act, 1999 (Pub. L. 105–277) requires Federal agencies to issue a Family Policymaking Assessment for any rule that may affect family well-being. This rule would not have any impact on the autonomy or integrity of the family as an institution. Accordingly, DOE has concluded that it is not necessary to prepare a Family Policymaking Assessment.

I. Review Under Executive Order 12630

DOE has determined, under Executive Order 12630, ''Governmental Actions and Interference with Constitutionally Protected Property Rights,'' 53 FR 8859 (March 18, 1988), that this regulation would not result in any takings that would require compensation under the Fifth Amendment to the United States Constitution.

J. Review Under the Treasury and General Government Appropriations Act, 2001

Section 515 of the Treasury and General Government Appropriations Act, 2001 (44 U.S.C. 3516 note) provides for agencies to review most disseminations of information to the public under guidelines established by each agency pursuant to general guidelines issued by OMB. The OMB guidelines were published at 67 FR 8452 (Feb. 22, 2002), and DOE's guidelines were published at 67 FR 62446 (Oct. 7, 2002). DOE has reviewed this notice under the OMB and DOE guidelines and has concluded that it is consistent with applicable policies in those guidelines.

K. Review Under Executive Order 13211

Executive Order 13211, ''Actions Concerning Regulations That Significantly Affect Energy Supply, Distribution, or Use,'' 66 FR 28355 (May 22, 2001), requires Federal agencies to prepare and submit to the Office of Information and Regulatory Affairs (OIRA), Office of Management and Budget, a Statement of Energy Effects for any proposed significant energy action. A ''significant energy action'' is defined as any action by an agency that promulgated or is expected to lead to promulgation of a final rule, and that: (1) Is a significant regulatory action under Executive Order 12866, or any successor order; and (2) is likely to have a significant adverse effect on the supply, distribution, or use of energy, or (3) is designated by the Administrator of OIRA as a significant energy action. For any proposed significant energy action, the agency must give a detailed statement of any adverse effects on energy supply, distribution, or use should the proposal be implemented, and of reasonable alternatives to the action and their expected benefits on energy supply, distribution, and use.

Today's regulatory action would not have a significant adverse effect on the supply, distribution, or use of energy and, therefore, is not a significant energy action. Accordingly, DOE has not prepared a Statement of Energy Effects.

L. Review Under the Information Quality Bulletin for Peer Review

On December 16, 2004, OMB, in consultation with the Office of Science and Technology (OSTP), issued its ''Final Information Quality Bulletin for Peer Review'' (the Bulletin), which was published in the **Federal Register** on January 14, 2005. 70 FR 2664. The Bulletin establishes that certain scientific information shall be peer reviewed by qualified specialists before it is disseminated by the Federal government, including influential scientific information related to agency regulatory actions. The purpose of the Bulletin is to enhance the quality and credibility of the Government's scientific information. Under the Bulletin, the energy conservation standards rulemakings analyses are ''influential scientific information.'' The Bulletin defines ''influential scientific information'' as ''scientific information the agency reasonably can determine will have, or does have, a clear and substantial impact on important public policies or private sector decisions.'' 70 FR 2664, 2667 (Jan. 14, 2005).

In response to OMB's Bulletin, DOE conducted formal in-progress peer reviews of the energy conservation standards development process and analyses and has prepared a Peer Review Report pertaining to the energy conservation standards rulemaking analyses. Generation of this report involved a rigorous, formal, and documented evaluation process using objective criteria and qualified and independent reviewers to make a judgment as to the technical/scientific/business merit, the actual or anticipated results, and the productivity and management effectiveness of programs and/or projects. The ''Energy Conservation Standards Rulemaking Peer Review Report'' dated February 2007 has been disseminated and is available at the following Web site: *http://www.eere.energy.gov/buildings/appliance_standards/peer_review.html.*

VII. Public Participation

A. Attendance at Public Meeting

DOE will hold a public meeting on Thursday, November 13, 2008, from 9 a.m. to 4 p.m., in Washington, DC. The public meeting will be held at the U.S. Department of Energy, Forrestal Building, Room 8E–089, 1000 Independence Avenue, SW, Washington, DC 20585. To attend the public meeting, please notify Ms. Brenda Edwards at (202) 586–2945 or *Brenda.Edwards@ee.doe.gov.* As explained in the **ADDRESSES** section, foreign nationals visiting DOE Headquarters are subject to advance security screening procedures. Any foreign national wishing to participate in the meeting should advise DOE of this fact as soon as possible by contacting Ms. Brenda Edwards to initiate the necessary procedures.

B. Procedure for Submitting Requests to Speak

Any person who has an interest in this notice, or who is a representative of a group or class of persons that has an interest in these issues, may request an opportunity to make an oral presentation. Such persons may hand-deliver requests to speak, along with a compact disc (CD) in WordPerfect, Microsoft Word, PDF, or text (ASCII) file format to the address shown in the **ADDRESSES** section at the beginning of this notice of proposed rulemaking between the hours of 9 a.m. and 4 p.m., Monday through Friday, except Federal holidays. Requests may also be sent by mail or e-mail to: *Brenda.Edwards@ee.doe.gov.*

Persons requesting to speak should briefly describe the nature of their interest in this rulemaking and provide a telephone number for contact. DOE requests persons scheduled to be heard to submit an advance copy of their statements at least two weeks before the public meeting. At its discretion, DOE may permit any person who cannot supply an advance copy of their statement to participate, if that person has made advance alternative arrangements with the Building Technologies Program. The request to give an oral presentation should ask for such alternative arrangements.

C. Conduct of Public Meeting

DOE will designate a DOE official to preside at the public meeting and may also use a professional facilitator to aid discussion. The meeting will not be a judicial or evidentiary-type public hearing, but DOE will conduct it in accordance with 5 U.S.C. 553 and section 336 of EPCA, 42 U.S.C. 6306. A court reporter will be present to record the proceedings and prepare a transcript. DOE reserves the right to schedule the order of presentations and to establish the procedures governing the conduct of the public meeting. After the public meeting, interested parties may submit further comments on the proceedings as well as on any aspect of the rulemaking until the end of the comment period.

The public meeting will be conducted in an informal, conference style. DOE will present summaries of comments received before the public meeting, allow time for presentations by participants, and encourage all interested parties to share their views on issues affecting this rulemaking. Each participant will be allowed to make a prepared general statement (within time limits determined by DOE), before the discussion of specific topics. DOE will

permit other participants to comment briefly on any general statements.

At the end of all prepared statements on a topic, DOE will permit participants to clarify their statements briefly and comment on statements made by others. Participants should be prepared to answer questions by DOE and by other participants concerning these issues. DOE representatives may also ask questions of participants concerning other matters relevant to this rulemaking. The official conducting the public meeting will accept additional comments or questions from those attending, as time permits. The presiding official will announce any further procedural rules or modification of the above procedures that may be needed for the proper conduct of the public meeting.

DOE will make the entire record of this proposed rulemaking, including the transcript from the public meeting, available for inspection at the U.S. Department of Energy, Resource Room of the Building Technologies Program, 950 L'Enfant Plaza, SW, Suite 600, Washington, DC, 20024, (202) 586–2945, between 9 a.m. and 4 p.m., Monday through Friday, except Federal holidays. Any person may buy a copy of the transcript from the transcribing reporter.

D. Submission of Comments

DOE will accept comments, data, and information regarding the proposed rule before or after the public meeting, but no later than the date provided at the beginning of this notice of proposed rulemaking. Information submitted should be identified by docket number EE–2006–STD–0127 and/or RIN 1904–AB49. Comments, data, and information submitted to DOE's e-mail address for this rulemaking should be provided in WordPerfect, Microsoft Word, PDF, or text (ASCII) file format. Stakeholders should avoid the use of special characters or any form of encryption and, wherever possible, comments should carry the electronic signature of the author. Comments, data, and information submitted to DOE via mail or hand delivery/courier should include one signed original paper copy. No telefacsimiles (faxes) will be accepted.

Pursuant to 10 CFR 1004.11, any person submitting information that he or she believes to be confidential and exempt by law from public disclosure should submit two copies: One copy of the document including all the information believed to be confidential, and one copy of the document with the information believed to be confidential deleted. DOE will make its own determination about the confidential status of the information and treat it according to its determination.

Factors of interest to DOE when evaluating requests to treat submitted information as confidential include: (1) A description of the items; (2) whether and why such items are customarily treated as confidential within the industry; (3) whether the information is generally known by or available from other sources; (4) whether the information has previously been made available to others without obligation concerning its confidentiality; (5) an explanation of the competitive injury to the submitting person which would result from public disclosure; (6) when such information might lose its confidential character due to the passage of time; and (7) why disclosure of the information would be contrary to the public interest.

E. Issues on Which DOE Seeks Comment

DOE is particularly interested in receiving comments and views of interested parties concerning:

(1) The proposed standards for residential gas kitchen ranges and ovens, microwave ovens, and CCWs, as well as the proposed ''no-standard'' standard for residential electric kitchen ranges and ovens other than microwave ovens;

(2) Whether battery-powered spark ignition modules are a viable alternative to standing pilots for manufacturers of gas ranges, ovens, and cooktops;

(3) The preliminary determination of the technical infeasibility of incorporating microwave oven cooking efficiency with standby mode and off mode power into a single metric for the purpose of developing energy conservation standards;

(4) Input and data regarding off mode power for microwave ovens;

(5) Input and data on the utility provided by specific features that contribute to microwave oven standby power. In particular, DOE seeks information on the utility of display technologies, as well as on cooking sensors that do not require standby power;

(6) Input and data on control strategies available to allow manufacturers to make design tradeoffs between incorporating standby-power-consuming features such as displays or cooking sensors and including a function to turn power off to these components during standby mode. DOE also seeks comment on the viability and cost of microwave oven control board circuitry that could accommodate transistors to switch off cooking sensors and displays;

(7) Whether switching or similar modern power supplies can operate successfully inside a microwave oven and the associated efficiency impacts on standby power;

(8) The selection of microwave oven standby standard levels for the engineering analysis;

(9) Input and data on the estimated incremental manufacturing costs, as well as the assumed approaches to achieve each standby level for microwave ovens. DOE also seeks comment on whether any intellectual property or patent infringement issues are associated with the design options presented in the TSD to achieve each standby level;

(10) Input and data on the estimated market share of microwave ovens at different standby power consumption levels;

(11) The appropriateness of using other discount rates in addition to seven percent and three percent real to discount future emissions reductions; and

(12) The determination of the anticipated environmental impacts of the proposed rule, particularly with respect to the methods for valuing the expected CO_2 and NO_X emissions savings due to the proposed standards.

VIII. Approval of the Office of the Secretary

The Secretary of Energy has approved publication of this proposed rule.

List of Subjects

10 CFR Part 430

Administrative practice and procedure, Confidential business information, Energy conservation, Household appliances, Imports, Intergovernmental relations, Small businesses.

10 CFR Part 431

Administrative practice and procedure, Confidential business information, Energy conservation, Reporting and recordkeeping requirements.

Issued in Washington, DC, on September 29, 2008.

John F. Mizroch,

Acting Assistant Secretary, Energy Efficiency and Renewable Energy.

For the reasons stated in the preamble, chapter II, subchapter D, of Title 10 of the Code of Federal Regulations, Parts 430 and 431 are proposed to be amended to read as set forth below:

PART 430—ENERGY CONSERVATION PROGRAM FOR CONSUMER PRODUCTS

1. The authority citation for part 430 continues to read as follows:

Authority: 42 U.S.C. 6291–6309; 28 U.S.C. 2461 note.

2. Section 430.23 of subpart B is amended by revising paragraph (i)(3) to read as follows:

§ 430.23 Test procedures for the measurement of energy and water consumption.

* * * * *

(i) * * *

(3) The standby power for microwave ovens shall be determined according to 3.2.4 of appendix I to this subpart. The standby power shall be rounded off to the nearest 0.1 watt.

* * * * *

3. Section 430.32 of subpart C is amended by revising paragraph (j) to read as follows:

§ 430.32 Energy and water conservation standards and effective dates.

* * * * *

(j) *Cooking Products.* (1) Gas cooking products with an electrical supply cord shall not be equipped with a constant burning pilot light. This standard is effective on January 1, 1990.

(2) Gas cooking products without an electrical supply cord shall not be equipped with a constant burning pilot light. This standard is effective on [DATE 3 YEARS AFTER FINAL RULE **Federal Register** PUBLICATION].

(3) Microwave ovens shall have an average standby power not more than 1.0 watt. This standard is effective on [DATE 3 YEARS AFTER FINAL RULE **Federal Register** PUBLICATION].

* * * * *

4. Section 430.62(a)(4) of subpart F is amended by redesignating paragraphs (a)(4)(xi) through (xvii) as (a)(4)(xii) through (xviii) respectively, and by adding new paragraph (a)(4)(xi) to read as follows:

§ 430.62 Submission of data.

(a) * * *

(4) * * *

(xi) Microwave ovens, the average standby power in watts.

* * * * *

PART 431—ENERGY EFFICIENCY PROGRAM FOR CERTAIN COMMERCIAL AND INDUSTRIAL EQUIPMENT

5. The authority citation for part 431 continues to read as follows:

Authority: 42 U.S.C. 6291–6317.

6. Section 431.156 of subpart I is revised to read as follows:

§ 431.156 Energy and water conservation standards and effective dates.

Each commercial clothes washer manufactured on or after [DATE 3 YEARS AFTER FINAL RULE **Federal Register** PUBLICATION], shall have a modified energy factor no less than and a water factor no greater than:

Product class	Modified energy factor (cu. ft./kWh/cycle)	Water factor (gal./cu. ft./cycle)
i. Top-Loading	1.76	8.3
ii. Front-Loading	2.00	5.5

[FR Doc. E8–23405 Filed 10–16–08; 8:45 am]
BILLING CODE 6450–01–P

DEPARTMENT OF ENERGY

10 CFR Part 430

[Docket No. EERE–2008–BT–TP–0011]

RIN: 1904—AB78

Energy Conservation Program for Consumer Products: Test Procedure for Microwave Ovens

AGENCY: Office of Energy Efficiency and Renewable Energy, Department of Energy.

ACTION: Notice of proposed rulemaking and public meeting.

SUMMARY: The U.S. Department of Energy (DOE) proposes to amend its test procedures for microwave ovens under the Energy Policy and Conservation Act to provide for the measurement of standby mode and off mode power use by microwave ovens. The proposed amendments would incorporate into the DOE test procedure provisions from the International Electrotechnical Commission's Standard 62301, *Household electrical appliances—Measurement of standby power*, First Edition 2005–06, as well as language to clarify application of these provisions for measuring standby mode and off mode power in microwave ovens. The proposed amendments would also correct a technical error in the calculation of microwave test cooking energy output. DOE will hold a public meeting to discuss and receive comments on the issues presented in this notice.

DATES: DOE will accept comments, data, and information regarding the notice of proposed rulemaking (NOPR) before and after the public meeting, but no later than December 31, 2008. For details, see section V, ''Public Participation'', of this NOPR.

DOE will hold a public meeting on Friday, November 14, 2008, from 9 a.m. to 4 p.m., in Washington, DC. DOE must receive requests to speak at the public meeting before 4 p.m., Friday, October 31, 2008. DOE must receive a signed original and an electronic copy of statements to be given at the public meeting before 4 p.m., Friday, November 7, 2008.

ADDRESSES: The public meeting will be held at the U.S. Department of Energy, Forrestal Building, Room 8E–089, 1000 Independence Avenue, SW., Washington, DC 20585–0121. To attend the public meeting, please notify Ms. Brenda Edwards at (202) 586–2945. Please note that foreign nationals visiting DOE Headquarters are subject to advance security screening procedures. Any foreign national wishing to participate in the meeting should advise DOE as soon as possible by contacting Ms. Edwards to initiate the necessary procedures.

Any comments submitted must identify the NOPR on Test Procedures for Microwave Ovens, and provide the docket number EERE–2008–BT–TP–0011 and/or regulatory information number (RIN) 1904–AB78. Comments may be submitted using any of the following methods:

1. *Federal eRulemaking Portal: http://www.regulations.gov.* Follow the instructions for submitting comments.

2. *E-mail: MicroOven–2008–TP–0011@ee.doe.gov.* Include docket number EERE–2008–BT–TP–0011 and/or RIN 1904–AB78 in the subject line of the message.

3. *Mail:* Ms. Brenda Edwards, U.S. Department of Energy, Building Technologies Program, Mailstop EE–2J, 1000 Independence Avenue, SW.,

Washington, DC 20585–0121. Please submit one signed original paper copy.

4. *Hand Delivery/Courier:* Ms. Brenda Edwards, U.S. Department of Energy, Building Technologies Program, 6th Floor, 950 L'Enfant Plaza, SW., Washington, DC 20024. Telephone: (202) 586–2945. Please submit one signed original paper copy.

For detailed instructions on submitting comments and additional information on the rulemaking process, see section V (Public Participation) of this document.

Docket: For access to the docket to read background documents or comments received, visit the U.S. Department of Energy, 6th Floor, 950 L'Enfant Plaza, SW., Washington, DC, 20024, (202) 586–2945, between 9 a.m. and 4 p.m., Monday through Friday, except Federal holidays. Please call Ms. Brenda Edwards at the above telephone number for additional information about visiting the Resource Room. Please note: DOE's Freedom of Information Reading Room no longer houses rulemaking materials.

FOR FURTHER INFORMATION CONTACT: Mr. Stephen Witkowski, U.S. Department of Energy, Energy Efficiency and Renewable Energy, Building Technologies Program, EE–2J, 1000 Independence Avenue, SW., Washington, DC 20585–0121. Tel.: (202) 586–7463. E-mail: *Stephen.Witkowski@ee.doe.gov.*

Ms. Francine Pinto or Mr. Eric Stas, U.S. Department of Energy, Office of the General Counsel, GC–72, 1000 Independence Avenue, SW., Washington, DC 20585–0121. Tel.: (202) 586–9507. E-mail: *Francine.Pinto@hq.doe.gov* or *Eric.Stas@hq.doe.gov*.

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I. Background and Legal Authority

Title III of the Energy Policy and Conservation Act (42 U.S.C. 6291 *et seq.*; EPCA or the Act) sets forth a variety of provisions designed to improve energy efficiency. Part A of Title III (42 U.S.C. 6291–6309) establishes the ''Energy Conservation Program for Consumer Products Other Than Automobiles'' for consumer products, including microwave ovens, the subject of today's notice. (42 U.S.C. 6291(1)–(2) and 6292(a)(10))

Under the Act, this program consists essentially of three parts: testing, labeling, and establishing Federal energy conservation standards. The testing requirements consist of test procedures that manufacturers of covered products must use to certify to DOE that their products comply with energy conservation standards adopted under EPCA and for representing the efficiency of their products, and that DOE must use to determine whether the products comply with EPCA standards. Section 323 of EPCA (42 U.S.C. 6293) sets forth criteria and procedures for DOE's adoption and amendment of such test procedures. It states, for example, that ''[a]ny test procedures prescribed or amended under this section shall be reasonably designed to produce test results which measure energy efficiency, energy use, * * * or estimated annual operating cost of a covered product during a representative average use cycle or period of use, as determined by the Secretary [of Energy], and shall not be unduly burdensome to conduct.'' (42 U.S.C. 6293(b)(3)) In addition, if DOE determines that a test procedure amendment is warranted, it must publish proposed test procedures and offer the public an opportunity to present oral and written comments on them, with a comment period no less than 60 or more than 270 days. (42 U.S.C. 6293(b)(2)) Finally, in any rulemaking to amend a test procedure, DOE must determine ''to what extent, if any, the proposed test procedure would alter the measured energy efficiency * * * of any covered product as determined under the existing test procedure.'' (42 U.S.C. 6293(e)(1)) If DOE determines that the amended test procedure would alter the measured efficiency of a covered product, DOE must amend the applicable energy conservation standard accordingly. (42 U.S.C. 6293(e)(2))

DOE's test procedure for microwave ovens appears at appendix I to subpart B of Title 10 of the Code of Federal Regulations (CFR). That test procedure, the only one DOE has promulgated for microwave ovens, was part of an October 3, 1997, final rule that also revised the test procedures for other cooking products to measure their efficiency and energy use more accurately. 62 FR 51976. The microwave oven test procedure incorporates portions of the International Electrotechnical Commission (IEC) Standard 705–1998 and Amendment 2–1993, *Methods for Measuring the Performance of Microwave Ovens for Households and Similar Purposes*, and measures microwave oven cooking efficiency, but does not address energy use in the standby or off modes. *Id.*

As part of DOE's current rulemaking concerning energy conservation standards for commercial clothes washers and residential cooking products, including microwave ovens (hereafter referred to as the appliance standards rulemaking), DOE held a public meeting on April 27, 2006, to present its Framework Document for that rulemaking [1] and to receive comments from stakeholders. 71 FR 15059 (March 27, 2006). Participants at the April 2006 public meeting included energy and environmental groups, as well as appliance manufacturers and trade groups. In the Framework Document, DOE stated that it did not

[1] A copy of the Framework Document, ''Rulemaking Framework for Commercial Clothes Washers and Residential Dishwashers, Dehumidifiers, and Cooking Products,'' can be found on DOE's website at *http://www.eere.energy.gov/buildings/appliance_standards/pdfs/home_appl_framework_31506.pdf* . This rulemaking originally included residential dishwashers and dehumidifiers, but they are no longer part of the rulemaking, because Congress subsequently set prescriptive standards for those products.

intend to amend the cooking products test procedure, which includes testing procedures for microwave ovens. (Framework Document, No. 4.3 at p. 4) [2]

The American Council for an Energy-Efficient Economy (ACEEE) commented that the use of standby power needs to be considered for all cooking products. (ACEEE, Public Meeting Transcript, No. 5 at p. 91) [3] The Association of Home Appliance Manufacturers (AHAM) recognized that standby power consumption is essentially already included in the test procedure for ovens and cooktops; however, for microwave ovens, a test procedure revision to include standby power would be required. (AHAM, Public Meeting Transcript, No. 5 at p. 92)

AHAM provided test data on microwave standby power for a sample of 21 microwave ovens available on the U.S. market. For the AHAM submission, standby power was tested in accordance with IEC Standard 62301, *Household electrical appliances—Measurement of standby power,* First Edition 2005–06 (IEC Standard 62301). DOE supplemented the data provided by AHAM by purchasing a representative sample of 32 microwave ovens and measuring the standby power consumption, also according to IEC Standard 62301. Both sets of data showed a wide range of standby power use. Based on an average annual useful cooking energy output of 79.8 kilowatt-hours (kWh) (according to the DOE test procedure) and a baseline microwave oven cooking efficiency of 55.7 percent, each watt of standby power represents an additional 8.76 kWh per year, or 6 percent of the annual cooking energy consumption. 72 FR 64432, 64441 (Nov. 15, 2007).

In the November 15, 2007, advance notice of proposed rulemaking (ANOPR) (hereafter referred to as the November 2007 ANOPR) regarding energy conservation standards for kitchen ranges and ovens and commercial clothes washers, DOE concluded that energy consumption by microwave ovens in the standby mode represents a significant portion of microwave ovens' energy use, and that a standard regulating such energy consumption would likely have significant energy savings. 72 FR 64432, 64441–42. DOE further stated that to include standby power in an efficiency standard for microwave ovens', it needed to modify its test procedure for this product. *Id.*

On December 13, 2007, DOE held a public meeting to receive and discuss comments on the November 2007 ANOPR (hereafter referred to as the December 2007 public meeting). At the December 2007 public meeting, DOE presented for discussion the possibility that test standard IEC Standard 62301 could be incorporated by reference into DOE's microwave oven test procedure to measure standby power. DOE also discussed clarifications to the IEC Standard 62301 test conditions at the December 2007 public meeting, including a requirement that if the measured power is not stable, the standby mode power test would be run for a period of 12 hours, with an initial clock setting of 12 a.m. DOE stated that this would permit more accurate measurement of average standby power consumption. DOE sought comment on these points from stakeholders. As discussed below, several stakeholders provided comments.

On December 19, 2007, the Energy Independence and Security Act of 2007 (EISA 2007; Pub. L. 110–140) was enacted. The EISA 2007 amendments to EPCA (section 310) require DOE to amend the test procedures for covered products to address standby mode and off mode energy consumption. The EISA 2007 amendments direct DOE to amend the test procedures to integrate such energy consumption into the energy descriptor for that product. If that is technically infeasible, DOE must instead prescribe a separate standby mode and off mode energy use test procedure if technically feasible. (42 U.S.C. 6295(gg)(2)(A)) Any such amendment must consider the most current versions of IEC Standards 62301 and 62087. *Id.* For microwave ovens, DOE must prescribe any such amendment by March 31, 2011. (42 U.S.C. 6295(gg)(2)(B)(vi))

The amended test procedure proposed in today's notice is expected to be used in future microwave oven energy conservation standards that are the subject of a concurrent rulemaking. The National Appliance Energy Conservation Act of 1987 (NAECA; Pub. L. 100–12), which amended EPCA, established prescriptive standards for cooking products, although no standards were established for microwave ovens. The NAECA amendments also required DOE to conduct two cycles of rulemakings to determine whether to revise the standard. DOE undertook the first cycle of these rulemakings and issued a final rule on September 8, 1998 (63 FR 48038), which found that no standards were justified for electric cooking products, including microwave ovens. DOE is currently in the second cycle of rulemakings required by the NAECA amendments to EPCA. (42 U.S.C. 6295(h)(2))

The EISA 2007 amendments to EPCA also direct DOE to incorporate standby and off mode energy use into any final rule establishing or revising a standard for a covered product adopted after July 1, 2010. (42 U.S.C. 6295(gg)(3)) Although DOE anticipates publishing the final rule revising energy conservation standards for microwave ovens by March 31, 2009, and is, thus, not required under EPCA to include standby and off mode power in amended standards, DOE intends to propose microwave oven standards addressing standby and off mode power for the reasons discussed above.

II. Summary of the Proposed Rule

In today's notice of proposed rulemaking (NOPR), DOE proposes amending its test procedures for microwave ovens to: (1) provide a foundation for DOE to develop and implement energy conservation standards that address use of standby mode and off mode power by this product; and (2) address the statutory requirement to expand test procedures to incorporate a measure of standby mode and off mode power consumption. The following section summarizes these proposed changes.

In this NOPR, DOE proposes to incorporate by reference into the microwave oven test procedure specific clauses from IEC Standard 62301 regarding test conditions and testing procedures for measuring the average standby mode and average off mode power consumption. DOE also proposes to incorporate into the microwave oven test procedure the definitions of ''active mode,'' ''standby mode,'' and ''off mode'' that are set forth in the EISA 2007 amendments to EPCA. (42 U.S.C. 6295(gg)(1)(A)) DOE is further proposing language that would clarify the application of clauses from IEC Standard 62301 for measuring standby mode and off mode power. Specifically, DOE is proposing to define the test duration for cases in which the measured power is not stable (*i.e.*, varies over a cycle), recognizing that the power consumption of microwave oven

[2] A notation in this form provides a reference for information that is in the docket of DOE's rulemaking to develop standards for appliance products (Docket No. EE–2006–STD–0127), maintained in the Resource Room of the Building Technologies Program. This notation indicates that the statement preceding the reference was made in DOE's Framework Document, which is document number 4.3 in the docket, and appears at page 4 of that document.

[3] This notation identifies an oral comment (1) made by American Council for an Energy-Efficient Economy (ACEEE) during the April 27, 2006, Framework public meeting in the standards rulemaking, (2) recorded in document number 5, which is the public meeting transcript that is filed in the docket of that rulemaking, and (3) which appears on page 91 of document number 5.

displays can vary based on the clock time being displayed. Finally, DOE is proposing a technical correction to the equation for calculating the microwave oven test cooking energy output which, as currently stated in the test procedure, produces a value with incorrect units.

The EISA 2007 amendments to EPCA direct DOE to amend the microwave oven test procedure to integrate energy consumption in standby mode and off mode into the overall energy descriptor. (42 U.S.C. 6295(gg)(2)(A)) If that is technically infeasible, DOE must instead prescribe a separate standby mode and off mode energy use test procedure, if technically feasible. *Id.* DOE believes that it is not technically feasible to integrate standby mode and off mode power consumption into the existing microwave oven efficiency metric for the reasons outlined in section III.C. Therefore, DOE is proposing in today's notice to provide separate descriptors for standby mode and off mode power for microwave ovens.

As noted above, EPCA requires that DOE determine whether a proposed test procedure amendment would alter the measured efficiency of a product, and thereby require adjustment of existing standards. (42 U.S.C. 6293(e)) Since there are no Federal energy conservation standards for microwave ovens (including energy use in the standby and off modes), such requirement does not apply to this rulemaking.

Finally, DOE recognizes that the EISA 2007 amendments to EPCA also require the test procedure for ''kitchen ranges and ovens'' (*i.e.*, conventional cooking products) be amended by March 31, 2011, to include standby mode and off mode energy consumption. (42 U.S.C. 6295(gg)(2)(B)(vi)) However, DOE is not proposing to amend the test procedures at this time for any other class of kitchen ranges and ovens (*i.e.*, conventional cooking products) as part of this rulemaking. DOE does not have standby mode or off mode power data for conventional cooking products to enable it to determine what changes would be required in the test procedures for those products. DOE intends to conduct a subsequent, separate rulemaking to amend the test procedures for these other classes of kitchen ranges and ovens, for which a final rule would be published by March 2011.

III. Discussion

A. Products Covered by This Test Procedure Rulemaking

The purpose of this proposal is to amend the test procedures for kitchen ranges and ovens to include test procedures for the measurement of standby mode and off mode power use for microwave ovens. DOE defines ''microwave oven'' as ''a class of kitchen ranges and ovens which is a household cooking appliance consisting of a compartment designed to cook or heat food by means of microwave energy.'' 10 CFR 430.2 The proposed amendments cover all microwave ovens for which the primary source of heating energy is electromagnetic (microwave) energy, including microwave ovens with or without thermal elements designed for surface browning of food. The proposal does not address combination ovens (*i.e.*, ovens consisting of a single compartment in which microwave energy and one or more other technologies, such as thermal or halogen cooking elements or convection systems, contribute to cooking the food). The proposal also does not cover the type of cooking appliance classified by DOE regulations as a microwave/conventional range, which has separate compartments or components consisting of a microwave oven, a conventional oven, and a conventional cooking top. *Id.* DOE requested data on the efficiency characteristics of combination ovens in the November 2007 ANOPR, but did not receive any information. If this information is made available at a later date, DOE may include these products in future proceedings.

DOE plans to address only the microwave oven test procedure at this time, for two reasons. First, DOE does not have standby mode or off mode power data for conventional cooking products to enable it to determine what changes would be required in the test procedures for those products. Second, DOE intends to determine whether a standby power standard level for microwave ovens is technologically feasible and economically justified in the appliance standards rulemaking. If so, the test procedure must be amended to include standby power well in advance of the March 31, 2011, deadline specified by EISA 2007. DOE will conduct a subsequent separate rulemaking to amend the conventional cooking products test procedure in order to meet the March 31, 2011, deadline specified by EISA 2007.

B. Effective Date for the Test Procedure

As indicated above, EPCA requires that the microwave oven test procedure be amended to incorporate measurement of standby mode and off mode power by March 31, 2011. To the extent possible, when conducting a rulemaking to amend its test procedures, DOE strives to finalize an amended test procedure before issuing a NOPR for energy conservation standards for that product. In this instance, DOE is accelerating the schedule for amending its microwave oven test procedure to allow the amended test procedure to be used in the concurrent appliance standards rulemaking, which would address standby mode and off mode power standards for microwave ovens. DOE expects to publish the microwave oven test procedure final rule before publishing a final rule in the appliance standards rulemaking. The effective date of the modified microwave oven test procedure would be three years after the test procedure final rule is published, which is expected to be before the effective date of the appliance standards rulemaking.

C. Measures of Energy Consumption

Although there are no current energy conservation standards for microwave ovens, the DOE microwave oven test procedure provides for the calculation of several measures of energy consumption, including cooking efficiency, energy factor (EF), and annual energy consumption. Historically, DOE's rulemaking analyses have used EF as the energy conservation metric for microwave ovens.[4] (10 CFR 430.23(i)(4))

Section 325(gg)(2)(A) of EPCA directs that the ''[t]est procedures for all covered products shall be amended pursuant to section 323 to include standby mode and off mode energy consumption, taking into consideration the most current versions of Standards 62301 and 62087 of the International Electrotechnical Commission, with such energy consumption integrated into the overall energy efficiency, energy consumption, or other energy descriptor for each covered product, unless the Secretary determines that—(i) the current test procedures for a covered product already fully account for and incorporate the standby mode and off mode energy consumption of the covered product; or (ii) such an integrated test procedure is technically infeasible for a particular covered product, in which case the Secretary shall prescribe a separate standby mode and off mode energy use test procedure for the covered product, if technically feasible.'' (42 U.S.C. 6295(gg)(2)(A)) DOE's microwave oven test procedure does not currently account for standby

[4] According to the DOE test procedure, microwave oven EF is defined as the ratio of (Annual Useful Cooking Energy Output / Annual Total Energy Consumption) (10 CFR 430, subpart B, appendix I), which is equivalent to microwave cooking efficiency (Test Energy Output / Test Energy Consumption) (10 CFR 430.23 (i)(2)).

mode and off mode energy consumption. Therefore, DOE evaluated the overall energy efficiency descriptor—EF—to determine whether it could be modified to include standby mode and off mode energy consumption.

The current test procedure measures the amount of energy required to raise the temperature of 1 kilogram of water by 10 degrees Celsius under controlled conditions. The ratio of usable output power over input power describes the EF, which is also a measure of the cooking efficiency. As discussed above, DOE sampled 32 microwave ovens, and AHAM independently tested 21 additional units, for a total of 53 microwave ovens. The data from cooking tests on these units show a cooking efficiency range from 55 percent to 62 percent. Reverse engineering conducted by DOE as part of the appliance standards rulemaking attempted to identify design options associated with this variation in cooking efficiency. Although design options among various microwave ovens were found to be highly standardized, DOE was unable to correlate specific design options or other features such as cavity size or output power with cooking efficiency.

DOE also observed significant variability in the cooking efficiency measurements obtained using the DOE microwave oven test procedure for the 53 units tested by DOE and AHAM. The data show test-to-test variability of several EF percentage points for a given microwave oven (*i.e.*, where a given combination of design options could be assigned to a number of trial standard levels (TSLs), depending upon the test results). DOE was also unable to ascertain why similarly designed, equipped, and constructed microwave ovens showed varying EFs and, hence, annual energy consumption. DOE further notes that manufacturers stated during interviews that the water used in the test procedure is not representative of an actual food load. One manufacturer stated, for example, that this could result in different microwave ovens being rated at the same energy efficiency even though true cooking performance is different. DOE believes that it is infeasible to specify a food load in the test procedure at this time, because it will require significant revisions and comments from stakeholders to understand what a representative food load is and how to ensure consistency in food properties from test to test.

DOE explored whether it would be technically feasible to combine the energy efficiency during the cooking cycle (per-use) with standby mode and off mode energy use (over time) to form a single metric, as required by EISA 2007. (42 U.S.C. 6295(gg)(2)(A)) The existing measure of microwave overall energy efficiency measures the efficiency of heating a sample of water over a period of seconds. In contrast, standby mode and off mode energy consumption is a measure of the amount of energy used over a period of multiple hours while not performing the function of heating a load. DOE finds that an overall energy efficiency that combines the two values is representative of neither the energy efficiency of the microwave oven for a very short period of use (as is the case with the EF) nor the efficiency of the microwave oven over an extended period of time.

DOE notes that certain test procedures do combine a measure of cycle efficiency and standby energy use to derive an overall energy efficiency measure (*e.g.*, gas kitchen ranges and ovens incorporate pilot gas consumption in EF, electric ovens include clock power in EF, and gas dryers include pilot gas consumption in EF). However, DOE believes that the combined measure of energy efficiency is a meaningful measure when the difference in energy use between the primary function of those products and the standby power is so large that the standby power has little impact on the overall measure of energy efficiency, or the combined efficiency is based on energy use of the primary energy function and standby power over the same period (*e.g.*, annual or seasonal). In the case of microwave ovens, the energy consumption associated with standby mode is a significant fraction of the overall energy use. DOE notes, for example, that depending on the cooking efficiency and standby power, the rank ordering of two microwave ovens based on EF alone could reverse if standby power were factored in, depending on the values of cooking energy use and standby power.[5] Therefore, given the similar magnitudes of microwave oven annual energy consumption associated with these two disparate and largely incompatible metrics that are measured over very different time periods, DOE questioned whether it would be technically feasible to incorporate EF and standby power into a combined energy efficiency metric that produces a meaningful result.

To explore standby mode and off mode power, DOE tested 32 sample units using the current IEC Standard 62301 standby test procedure and recorded a standby power range of about 1.2 W to 5.8 W (with less than 0.5 percent test-to-test deviation). DOE observed no off mode power consumption for the microwave ovens in its test sample, and DOE's research suggests that no other microwave ovens available in the United States consume energy in an off mode.[6] Thus, DOE focused its investigations on standby mode. Data suggested correlations between specific features and standby power, thereby providing the basis for a cost-efficiency curve. However, for the reasons stated above about combining a per-cycle efficiency with standby power over a long period of time, as well as due to the observed test variability in the cooking efficiency results, DOE is concerned that an overall measure of cooking efficiency that combines cooking and standby energy cannot produce test results that measure energy efficiency or energy use of microwave ovens in a reasonable and repeatable manner. An ''average'' microwave runs 8,689 hours in standby mode per year. Based on the standby power range measured by DOE and AHAM, standby power consumption represents a relatively large component of total annual energy consumption. At the efficiency baseline from the analysis conducted for the previous cooking products rulemaking, as discussed in the 1996 *Technical Support Document for Residential Cooking Products,* (which was also observed in the test sample), the observed range of annual energy consumption due to cooking (14.2 kWh) is equivalent to approximately 2 W of standby power.

DOE also explored whether the existing test procedure's measure of

[5] For example, two units among the microwave ovens tested by AHAM, each with 1000 W of input power, will be designated Unit A and Unit B for the purposes of this illustration. The EF of Unit A was measured by AHAM according to the current DOE test procedure as 55.7 percent, while the EF of Unit B was measured as 57.3 percent. The standby power of Unit A, however, was measured as 1.7 W, compared to the 4.4 W of standby power for Unit B. If a combined EF (''CEF'') were to be calculated by adding the annual standby energy use to the annual cooking energy consumption, this CEF for Unit A would be 50.5 percent, while the CEF for Unit B would be 45.0 percent, thereby reversing the rankings of the two microwave ovens according to their energy descriptor.

[6] A microwave oven is considered to be in ''off mode'' if it is plugged in to a main power source, is not being used for an active function such as cooking or defrosting, and is consuming power for features other than a display, cooking sensor, controls (including a remote control), or sensors required to reactivate it from a low power state. For example, a microwave oven with mechanical controls and no display or cooking sensor that consumed power for components such as a power supply when the unit was not activated would be considered to be in off mode. Note that DOE believes there are no longer any such microwave ovens with mechanical controls on the market, and, in fact, is not aware of any microwave ovens currently available that can operate in off mode.

annual energy consumption could be modified to be a combined energy efficiency descriptor for microwave ovens, despite the fact that EF has historically been used in energy conservation rulemakings as the energy efficiency descriptor. For the reasons articulated here, DOE has tentatively concluded that neither approach meets the statutory standard for a combined metric.

In light of the above, DOE believes that, although it may be mathematically possible to combine energy consumption into a single metric encompassing active (cooking), standby, and off modes, it is not technically feasible to do so at this time, because of the high variability in the current cooking efficiency measurement from which the active mode EF and annual energy consumption are derived and because of the significant contribution of standby power to overall microwave oven energy use. Given DOE's recent research, there is concern that cooking efficiency results for microwave ovens would not be meaningful, so incorporation of such results in a combined metric similarly would not be expected to be meaningful. Inherent in a determination of technical feasibility under EISA 2007 for a combined metric for active, standby, and off mode energy consumption is an expectation that the results would be meaningful. Accordingly, for the purposes of this notice, DOE is not proposing to incorporate standby and off modes with active mode into a combined metric, but is instead proposing a separate metric to measure standby power, as provided for by EISA 2007 in cases where it is technically infeasible to incorporate standby and off modes into a combined energy conservation metric.[7] (42 U.S.C. 6295(gg)(3)(B))

Although it may not be technically feasible to develop a combined metric for microwave ovens today, it may be possible to do so in the future, provided that each is measured on a consistent basis (*i.e.*, kWh per year apportioned to each mode) so that the results are meaningful and comparable. In this vein, DOE notes the need to develop a test procedure that addresses the high-variability concerns with its current cooking efficiency measure. DOE understands that IEC, AHAM, manufacturers, and others are exploring whether a test procedure can be developed that responds to the concerns DOE has raised. DOE expects to evaluate potential future test procedures to determine whether any address the concerns discussed above and meet the requirements of section 325(gg) of the Act, thereby making them suitable candidates for use in amending the DOE test procedure. If such test procedures are developed, DOE will consider a combined measure of microwave oven energy efficiency in a future rulemaking.

D. Incorporating by Reference IEC Standard 62301 First Edition 2005–06 for Measuring Standby Mode and Off Mode Power in Microwave Ovens

As discussed in section I of this notice, DOE received comments in response to the Framework Document that it should revise the microwave oven test procedure to address standby power. In response to these comments, DOE investigated existing test methods that could be incorporated by reference for measuring standby power in microwave ovens. DOE also investigated test methods for measuring off mode power in microwave ovens.

As noted previously, EPCA, as amended by EISA 2007, requires that test procedures ''shall be amended pursuant to section 323 to include standby mode and off mode energy consumption, taking into consideration the most current versions of Standards 62301 and 62087 of the International Electrotechnical Commission.* * *'' (42 U.S.C. 6295(gg)(2)(A)) DOE noted that IEC Standard 62301 provides for the measurement of standby power in electrical appliances, including microwave ovens, and, thus, is applicable to the proposed amendments to the test procedure. DOE also reviewed IEC Standard 62087, which specifies methods of measurement for the power consumption of TV receivers, VCRs, set top boxes, audio equipment, and multi-function equipment for consumer use. IEC Standard 62087 does not, however, include measurement for the power consumption of electrical appliances such as microwave ovens. Therefore, DOE determined that IEC Standard 62087 was not suitable for the proposed amendments to the microwave oven test procedure for this rulemaking.

The microwave oven standby power data that AHAM provided to DOE were based on measurements of standby power in accordance with IEC Standard 62301, as were the data DOE gathered in response to stakeholder comments on the Framework Document. DOE conducted a test program to analyze the suitability of IEC Standard 62301 for incorporation into the DOE microwave oven test procedure. Specifically, DOE sought to determine whether the IEC Standard 62301 test conditions and procedures would be suitable for incorporation into the DOE test procedure for microwave ovens to measure standby mode power use. Test data suggest that, with additional specifications added for test cycle duration and starting clock time, IEC Standard 62301 is indeed suitable for inclusion in the DOE test procedure for that purpose.

In reviewing alternative standby power test procedures for potential amendments to the DOE test procedure, DOE investigated both testing conditions and testing methods specified in the test procedures used by countries considered to be international leaders in reducing standby power consumption. The Japanese Electrical Manufacturers' Association (JEMA), which has been involved with Japan's Top Runner program,[8] indicated that the test procedure it uses resembles IEC Standard 62301 for standby testing of microwave ovens. In a March 2008 conversation with DOE, JEMA stated that the test procedure involves connecting the microwave oven to the power supply (without cooking), confirming that there is no change in the power supply (stable state), then measuring power consumption for one hour. Korea's e-Standby Program[9] uses a microwave oven test procedure in which a water load is heated for two minutes, and then the water load is removed, and the door is closed. After 30 minutes, the average standby power is measured over a 1-hour period. Thirty minutes later, the test is repeated, and the two standby power measurements are averaged.[10]

Although DOE recognizes the merits of these alternative standby power test procedures, DOE believes that IEC Standard 62301 still provides a more representative average standby power measurement than the versions Japan

[7] DOE notes that if a microwave oven standard is established based on standby power alone, measurable energy savings would certainly be achieved. If, however, standby power were to be combined with cooking efficiency, it is conceivable that many microwave ovens could already comply with the standard without reducing standby power, since the annual energy consumption due to standby power is on the same order as that associated with the variability in EF.

[8] Japan's Energy Conservation Act uses a ''top runner'' method to set energy efficiency targets for residential, commercial, and transportation sector equipment. Target values for future products are set based on the level of the most energy efficient products on the market at the time of the value setting process (*i.e.*, the ''top runners''). For more information, visit *http://www.eccj.or.jp/index_e.html*.

[9] Korea's e-Standby Program is a voluntary labeling program designed to promote the reduction of standby power consumption in home and office products. For more information, visit *http://www.kemco.or.kr/*. (English translation not available yet at the time the notice was written.)

[10] KEMCO publication, ''e-Standby Program Application Regulation,'' February 2007, pp. 48–49. Available online at *http://www.apec-esis.org/library/Korea_eStandby_Program_20070209.pdf*.

and Korea use because of the variations in power consumption associated with clock time display. DOE is unaware of any other test procedures applicable to the measurement of standby power in electrical appliances such as microwave ovens. Australia has indicated that it has supported the development of and currently uses IEC Standard 62301 for standby power testing.[11]

DOE also considered harmonization of test procedures with international standby programs, recognizing that microwave oven manufacturers typically supply a global market and, thus, will be subject to standby power standards in multiple countries. The International Energy Agency (IEA) has raised awareness of standby power through publications, international conferences, and policy advice to governments. In 1999, the IEA developed the ''1-Watt Plan,'' which proposed reducing standby power internationally in electronic devices and which advocates that all countries harmonize energy policies and adopt the same definition and test procedure.[12] In addressing harmonization, IEA stated that IEC Standard 62301 provides an internationally-sanctioned definition and test procedure for standby power, and this is now widely specified and used.[13] DOE believes that incorporating IEC Standard 62301 into the DOE test procedure will provide harmonization with most international standards for standby power in microwave ovens.

Considering these factors, DOE suggested at the December 2007 public meeting that clauses from IEC Standard 62301 could be incorporated by reference into the DOE test procedure to measure microwave oven standby power. DOE sought input from stakeholders on this suggestion. At that time, DOE did not suggest amendments to measure off mode power because the December 2007 public meeting predated the requirements promulgated by EISA 2007.

In response to DOE's presentation, the Appliance Standards Awareness Project (ASAP), Natural Resources Defense Council (NRDC), Northwest Power and Conservation Council, Northeast Energy Efficiency Partnerships, and ACEEE (hereafter ''Joint Comment'') stated in jointly filed comments that DOE should modify the oven, cooktop, and microwave oven test procedures as necessary to measure not only the clock face standby energy use, but any other standby energy use, such as control electronics and power supply losses. (Joint Comment, No. 29 at p. 6)[14] In addition, the Joint Comment recommended that DOE should use IEC Standard 62301 to test standby power, with the instruction to start the test with a clock setting of 12 a.m. and to run the test for 12 hours or a shorter period of time demonstrated mathematically to be representative of a 12-hour period. (Joint Comment, No. 29 at p. 9) ASAP commented that it supports a test procedure change to address microwave oven standby power, and that this change should not be a hurdle to implementing a standard that addresses standby power consumption. (ASAP, Public Meeting Transcript, No. 23.7 at p. 72) General Electric (GE) commented that it does not believe there is justification for the development of ''necessarily complex'' new test procedures for cooking products. (GE, No. 30 at p. 2)

DOE believes that the amendments to the microwave oven test procedure proposed in today's notice are not ''necessarily complex,'' and that the test procedure would provide a uniform and widely accepted test method for measuring standby mode and off mode power consumption. DOE also believes that the proposed amendments to the microwave oven test procedure would provide a method to measure the standby energy use of not just the clock display, but all microwave oven components, such as control electronics and power supply losses. The Joint Comment's concerns regarding modifying the oven and cooking top test procedures and about the starting clock time and test duration are addressed in sections III.A and III.F, respectively.

For the reasons presented above, DOE proposes in today's notice to incorporate by reference into the DOE test procedure for microwave ovens specific clauses from IEC Standard 62301 for the measurement of standby mode power. DOE believes that these clauses also can be applied to the measurement of off mode power for microwave ovens. Thus, DOE proposes to incorporate the same clauses from IEC Standard 62301 for measuring both standby mode and off mode power consumption. Specifically, these clauses provide test conditions and testing procedures for measuring the average standby mode and average off mode power consumption. With respect to testing conditions, section 4 of IEC Standard 62301 provides conditions for the supply voltage waveform, ambient room air temperature, and power measurement meter tolerances to provide for repeatable and precise measurements of standby mode and off mode power consumption. Section 5 of IEC Standard 62301 regarding testing procedures clarifies the measurement of standby mode for units with a short-duration higher power state before a lower power state, and it also provides methods for measuring standby mode and off mode power when the power measurement is stable and unstable (*i.e.*, varies over a representative cycle).

However, after careful review, DOE has determined that not all provisions of IEC Standard 62301 are appropriate for incorporation into DOE's microwave oven test procedure. IEC Standard 62301 also contains provisions in addition to those applicable to standby mode and off mode power testing of microwave ovens. For example, IEC Standard 62301 provides general conditions for the power supply, which the current DOE test procedure already addresses. IEC Standard 62301 also provides requirements for information to be recorded in a test report, which are beyond the scope of DOE's test procedure. Hence, only the applicable sections and clauses (as stated above) that are relevant to measurement of microwave oven standby mode and off mode power are incorporated by reference in today's proposed rule.

Finally, DOE recognizes that the IEC is developing an updated test procedure (IEC Standard 62301 Ed. 2.0). DOE understands that IEC projects publication of the new test procedure in July 2009, although the projected publication date could be subject to changes that would push the date back further. While DOE plans to follow development of the revised IEC Standard, the Department intends to determine whether a standby power standard level for microwave ovens is technologically feasible and economically justified in the appliance standards rulemaking, and to publish a final rule by March 2009. Thus, DOE plans to use the current version of IEC Standard 62301 in today's proposed test procedure, because the new version will be published after the final rule in the appliance standards rulemaking is

[11] For information on Australia's Standby Program, visit *http://www.energyrating.gov.au/standby-background.html.*

[12] For more information on IEA's ''1-Watt Plan,'' visit *http://www.iea.org/textbase/subjectqueries/standby.asp.*

[13] IEA, ''Fact Sheet: Standby Power Use and the IEA '1-Watt Plan','' April 2007, p. 1. Available online at *http://www.iea.org/textbase/papers/2007/standby_fact.pdf.*

[14] A notation in the form ''Joint Comment, No. 29 at p. 6'' identifies a written comment that DOE has received and has included in the docket of the standards rulemaking. This particular notation refers to a comment (1) Submitted jointly by the ASAP, NRDC, Northwest Power and Conservation Council, Northeast Energy Efficiency Partnerships, and ACEEE, (Joint Comment) (2) in document number 29 in the docket of that rulemaking, and (3) appearing on page 6 of document number 29.

scheduled to be published. After the final rule is published, subsequent amendments to the referenced IEC Standard by standard-setting organizations would become part of the DOE test procedure only if DOE amends its test procedure to incorporate them.

E. Definitions of ''Active Mode,'' ''Standby Mode,'' and ''Off Mode''

Whirlpool commented on the November 2007 ANOPR that it is imperative to give separate consideration to a standby mode where the product is providing a consumer benefit (*e.g.*, clock display, delay start, instant-on capability) as compared to a true off mode. Whirlpool further commented that the provisions in the proposed IEC Standard 62301 Ed. 2.0 do just that. (Whirlpool, No. 28, pp. 1–2)

DOE recognizes that there are consumer utility features, including those listed by Whirlpool, associated with standby mode but not off mode. EPCA defines ''standby mode'' as ''the condition in which an energy-using product—

(I) Is connected to a main power source; and

(II) Offers 1 or more of the following user-oriented or protective functions:

(aa) To facilitate the activation or deactivation of other functions (including active mode) by remote switch (including remote control), internal sensor, or timer.

(bb) Continuous functions, including information or status displays (including clocks) or sensor-based functions.''

(42 U.S.C. 6295(gg)(1)(A)(iii))

EPCA defines ''off mode'' as ''the condition in which an energy-using product—

(I) Is connected to a main power source; and

(II) Is not providing any standby mode or active mode function.''

(42 U.S.C. 6295(gg)(1)(A)(ii))

EPCA defines ''active mode,'' which is referenced in the definition of ''off mode,'' as ''the condition in which an energy-using product—

(I) Is connected to a main power source;

(II) Has been activated; and

(III) Provides 1 or more main functions.''

(42 U.S.C. 6295(gg)(1)(A)(i))

DOE considers ''main functions'' for a microwave oven to be those operations in which the magnetron and/or thermal element is energized for at least a portion of the time for purposes of heating, cooking, and/or defrosting the load.

For the reasons discussed in section III.D, DOE plans to use the EPCA definitions of ''active mode,'' ''standby mode,'' and ''off mode.'' Under these definitions, the modes described by Whirlpool would be classified as standby modes. A microwave oven with a continously energized display or cooking sensor, or a microwave oven that automatically powers down certain energy-consuming components after a cooking cycle and waits to detect an event triggering re-energization of these components, would be considered capable of operation in standby mode but not off mode. DOE additionally notes that if the microwave oven is equipped with a manual power on-off switch, which completely cuts off power to the appliance (*i.e.*, removes or interrupts all connections to the main power source, in the same manner as unplugging the appliance), the microwave oven would not be in the ''off mode'' when the switch is in the ''off'' position.

F. Specifications for the Test Methods and Measurements for Microwave Oven Standby Mode and Off Mode Testing

Because IEC Standard 62301 is written to provide a certain degree of flexibility so that the test standard can be used to measure standby mode and off mode power for most household electrical appliances (including microwave ovens), it does not specify closely the test method for measuring the power consumption in cases in which the measured power is not stable. Section 5.3.2 of IEC Standard 62301 states that ''[i]f the power varies over a cycle (*i.e.*, a regular sequence of power states that occur over several minutes or hours), the period selected to average power or accumulate energy shall be one or more complete cycles in order to get a representative average value.''

DOE investigated the possible regular sequences of power states for microwave ovens in order to propose clarifying language to IEC Standard 62301 that would provide accurate and repeatable test measurements. DOE's testing of standby power indicates that a given unit or model of a microwave oven with a clock display may use varying amounts of standby power depending on the clock time being displayed. According to DOE testing of a microwave oven equipped with a 12-hour clock display, standby power use at different times during a 12-hour cycle could vary by as much as 25 percent. DOE believes that the lack of specificity in IEC Standard 62301 about the test period could produce test results that are not comparable to those obtained using other time periods, and that would not represent the true standby power consumption of its microwave ovens. In addition, different testing laboratories could take different approaches in selecting cycles for testing. To assess possible alternatives to the test cycle specified in IEC Standard 62301, DOE investigated alternative time periods and averaging methods for calculating representative standby power use. Based on this testing, and to assure comparable and valid results, DOE proposes, as presented at the December 2007 public meeting, to include in the microwave oven test procedure a specification of the test period in cases in which the power is not stable as ''a 12-hour ± 30-second period.''

DOE also observed during tests that the standby power measurement for certain displays can be affected by the starting clock time, because for these displays, standby power is a function of the time being displayed. At the December 2007 public meeting, DOE discussed adding a requirement to the microwave oven test procedure that the initial clock time of any display be set at 12 a.m. at the start of the operating cycle. However, subsequent DOE analysis of approaches that are used to achieve very low microwave oven standby levels (*i.e.*, less than 1 W) led DOE to believe that this initial clock time requirement would fail to account for the strategy of an automatic transition to a low standby power state after a certain period of user inactivity. Because such a strategy could effect significant real-world energy savings, DOE no longer proposes to specify a clock time at the start of the test cycle. DOE determined that specifying a 12-hour test period alone would provide for a representative average use cycle for microwave ovens for which the measured power is not stable (*i.e.*, a microwave oven equipped with a 12-hour clock display).

In summary, DOE proposes measuring standby mode and off mode power consumption according to IEC Standard 62301, with a test duration of 12 hours, ± 30 seconds for cases in which power is not stable.

G. Technical Correction for the Microwave Oven Test Cooking Energy Output

The equation provided under section 4.4.1 (''Microwave Oven Test Cooking Energy Output'') of the DOE microwave oven test procedure contains a technical error in the equation for calculation of the microwave oven test cooking energy output, E_T, in watt-hours (Wh). The equation, using the variables and factors provided in the test procedure, currently calculates E_T in kWh instead of Wh. The test cooking energy output

is used to calculate annual energy consumption in section 4.4.3, in which the units for E_T are required to be Wh. Therefore, DOE proposes in today's notice to change the value of the conversion factor, K_e, in section 4.4.1 of 3,412 British thermal units (Btu) per kWh to a value of 3.412 Btu per Wh, so that E_T is calculated in the specified units of Wh. The proposed amended value for K_e in section 4.4.1 is the same as the value defined in section 1.11 (''Symbol Usage'').

H. Compliance With Other EPCA Requirements

Section 323(b)(3) of EPCA requires that ''[a]ny test procedures prescribed or amended under this section shall be reasonably designed to produce test results which measure energy efficiency, energy use * * * or estimated annual operating cost of a covered product during a representative average use cycle or period of use * * * and shall not be unduly burdensome to conduct.'' (42 U.S.C. 6293(b)(3)) DOE believes that the incorporation of clauses regarding test conditions and methods in IEC Standard 62301, along with the modifications described above, would satisfy this requirement. The proposed amendments to the DOE test procedure incorporate a test standard that is widely used and accepted internationally to measure standby power in standby mode and off mode. Based on DOE testing and analysis of IEC Standard 62301, DOE has determined that the proposed amendments to the microwave oven test procedure produce standby mode and off mode average power consumption measurements that represent an average use cycle both for cases in which the measured power is stable and when the measured power is unstable (*i.e.*, varies over a cycle). Also, the test methods and equipment that the amendment would require for measuring standby power in microwave ovens do not differ substantially from the test methods and equipment in the current DOE test procedure for measuring microwave oven cooking efficiency. Therefore, manufacturers would not be required to make a major investment in test facilities and new equipment. For these reasons, DOE has concluded that the amended test procedure would produce test results that measure the power consumption of a covered product during a representative average use cycle as well as annual energy consumption, and that the test procedure would not be unduly burdensome to conduct.

IV. Procedural Requirements

A. Review Under Executive Order 12866

Today's regulatory action is not a ''significant regulatory action'' under section 3(f) of Executive Order 12866, Regulatory Planning and Review, 58 FR 51735 (Oct. 4, 1993). Accordingly, this action was not subject to review under the Executive Order by the Office of Information and Regulatory Affairs (OIRA) in the Office of Management and Budget (OMB).

B. Review Under the Regulatory Flexibility Act

The Regulatory Flexibility Act (5 U.S.C. 601 *et seq.*) requires preparation of an initial regulatory flexibility analysis for any rule that by law must be proposed for public comment, unless the agency certifies that the rule, if promulgated, will not have a significant economic impact on a substantial number of small entities. As required by Executive Order 13272, ''Proper Consideration of Small Entities in Agency Rulemaking,'' 67 FR 53461 (August 16, 2002), DOE published procedures and policies on February 19, 2003, to ensure that the potential impacts of its rules on small entities are properly considered during the rulemaking process. 68 FR 7990. DOE's procedures and policies may be viewed on the Office of the General Counsel's Web site (*http://www.gc.doe.gov*).

DOE reviewed today's proposed rule under the provisions of the Regulatory Flexibility Act and the procedures and policies published on February 19, 2003. This rule proposes to prescribe test procedures that would be used to test compliance with energy conservation standards. The proposed rule affects microwave oven test procedures and would not have a significant economic impact, but would provide common testing methods. In addition, the Small Business Administration (SBA) considers an entity to be a small business if, together with its affiliates, it employs fewer than a threshold number of workers specified in 13 CFR part 121 according to the North American Industry Classification System (NAICS) codes. The threshold number for NAICS classification 335221, *Household cooking appliance manufacturers*, which includes microwave oven manufacturers, is 750 employees. DOE understands that only multinational companies with more than 750 employees, and their wholly owned subsidiaries, exist in this industry.

For these reasons, DOE tentatively concludes and certifies that the proposed rule would not have a significant economic impact on a substantial number of small entities. Accordingly, DOE has not prepared a regulatory flexibility analysis for this rulemaking. DOE will transmit the certification and supporting statement of factual basis to the Chief Counsel for Advocacy of the SBA for review under 5 U.S.C. 605(b).

C. Review Under the Paperwork Reduction Act of 1995

This rulemaking would not impose any new information collection or recordkeeping requirements. Accordingly, OMB clearance is not required under the Paperwork Reduction Act. (44 U.S.C. 3501 *et seq.*)

D. Review Under the National Environmental Policy Act of 1969

In this proposed rule, DOE proposes test procedure amendments that it expects will be used to develop and implement future energy conservation standards for microwave ovens. DOE has determined that this rule falls into a class of actions that are categorically excluded from review under the National Environmental Policy Act of 1969 (42 U.S.C. 4321 *et seq.*) and DOE's implementing regulations at 10 CFR part 1021. Specifically, this rule amends an existing rule without changing its environmental effect, and, therefore, is covered by the Categorical Exclusion in paragraph A6 to Appendix A to subpart D, 10 CFR part 1021, which applies because this rule would establish revisions to existing test procedures that will not affect the amount, quality, or distribution of energy usage, and, therefore, will not result in any environmental impacts.[15] Accordingly, neither an environmental assessment nor an environmental impact statement is required.

E. Review Under Executive Order 13132

Executive Order 13132, ''Federalism,'' imposes certain requirements on agencies formulating and implementing policies or regulations that preempt State law or that have Federalism implications. 64 FR 43255 (August 4, 1999). The Executive Order requires agencies to examine the constitutional and statutory authority supporting any action that would limit the policymaking discretion of the States,

[15] Categorical Exclusion A6 provides, ''Rulemakings that are strictly procedural, such as rulemaking (under 48 CFR part 9) establishing procedures for technical and pricing proposals and establishing contract clauses and contracting practices for the purchase of goods and services, and rulemaking (under 10 CFR part 600) establishing application and review procedures for, and administration, audit, and closeout of, grants and cooperative agreements.''

and to carefully assess the necessity for such actions. The Executive Order also requires agencies to have an accountable process to ensure meaningful and timely input by State and local officials in the development of regulatory policies that have Federalism implications. On March 14, 2000, DOE published a statement of policy describing the intergovernmental consultation process that it will follow in developing such regulations. 65 FR 13735. DOE examined this proposed rule and determined that it would not preempt State law and 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. Executive Order 13132 requires no further action.

F. Review Under Executive Order 12988

Regarding the review of existing regulations and the promulgation of new regulations, section 3(a) of Executive Order 12988, ''Civil Justice Reform,'' 61 FR 4729 (Feb. 7, 1996), imposes on Federal agencies the general duty to adhere to the following requirements: (1) Eliminate drafting errors and ambiguity; (2) write regulations to minimize litigation; (3) provide a clear legal standard for affected conduct rather than a general standard; and (4) promote simplification and burden reduction. Section 3(b) of Executive Order 12988 specifically requires that Executive agencies make every reasonable effort to ensure that the regulation specifies the following: (1) The preemptive effect, if any; (2) any effect on existing Federal law or regulation; (3) a clear legal standard for affected conduct while promoting simplification and burden reduction; (4) the retroactive effect, if any; (5) definitions of key terms; and (6) other important issues affecting clarity and general draftsmanship under any guidelines issued by the Attorney General. Section 3(c) of Executive Order 12988 requires Executive agencies to review regulations in light of applicable standards in sections 3(a) and 3(b) to determine whether they are met or it is unreasonable to meet one or more of them. DOE has completed the required review and determined that, to the extent permitted by law, this rule meets the relevant standards of Executive Order 12988.

G. Review Under the Unfunded Mandates Reform Act of 1995

Title II of the Unfunded Mandates Reform Act of 1995 (UMRA) (Pub. L. 104–4) requires each Federal agency to assess the effects of Federal regulatory actions on State, local, and Tribal governments and the private sector. For a proposed regulatory action likely to result in a rule that may cause the expenditure by State, local, and Tribal governments, in the aggregate, or by the private sector of $100 million or more in any one year (adjusted annually for inflation), section 202 of UMRA requires a Federal agency to publish estimates of the resulting costs, benefits, and other effects on the national economy. (2 U.S.C. 1532(a), (b)) UMRA also requires a Federal agency to develop an effective process to permit timely input by elected officers of State, local, and Tribal governments on a proposed ''significant intergovernmental mandate.'' UMRA requires an agency plan for giving notice and opportunity for timely input to potentially affected small governments before establishing any requirements that might significantly or uniquely affect such governments. On March 18, 1997, DOE published a statement of policy on its process for intergovernmental consultation under UMRA. 62 FR 12820. (The policy is also available at *http://www.gc.doe.gov*.) Today's proposed rule contains neither an intergovernmental mandate nor a mandate that may result in an expenditure of $100 million or more in any year, so these requirements do not apply.

H. Review Under the Treasury and General Government Appropriations Act, 1999

Section 654 of the Treasury and General Government Appropriations Act, 1999 (Pub. L. 105–277) requires Federal agencies to issue a Family Policymaking Assessment for any rule that may affect family well-being. Today's proposed rule would have no impact on the autonomy or integrity of the family as an institution. Accordingly, DOE has concluded that it is not necessary to prepare a Family Policymaking Assessment.

I. Review Under Executive Order 12630

DOE has determined, under Executive Order 12630, ''Governmental Actions and Interference with Constitutionally Protected Property Rights,'' 53 FR 8859 (March 18, 1988), that this regulation would not result in any takings that might require compensation under the Fifth Amendment to the U.S. Constitution.

J. Review Under the Treasury and General Government Appropriations Act, 2001

Section 515 of the Treasury and General Government Appropriations Act, 2001 (44 U.S.C. 3516 note) provides for agencies to review most disseminations of information to the public under guidelines established by each agency pursuant to general guidelines issued by OMB. OMB's guidelines were published at 67 FR 8452 (Feb. 22, 2002), and DOE's guidelines were published at 67 FR 62446 (Oct. 7, 2002). DOE has reviewed today's notice and concluded that it is consistent with applicable policies in the OMB and DOE guidelines.

K. Review Under Executive Order 13211

Executive Order 13211, ''Actions Concerning Regulations That Significantly Affect Energy Supply, Distribution, or Use,'' 66 FR 28355 (May 22, 2001), requires Federal agencies to prepare and submit to OIRA a Statement of Energy Effects for any proposed significant energy action. The definition of a ''significant energy action'' is any action by an agency that promulgated or is expected to lead to promulgation of a final rule, and that: (1) Is a significant regulatory action under Executive Order 12866, or any successor order; and (2) is likely to have a significant adverse effect on the supply, distribution, or use of energy; or (3) is designated by the Administrator of OIRA as a significant energy action. For any proposed significant energy action, the agency must give a detailed statement of any adverse effects on energy supply, distribution, or use if the proposal were to be implemented, and of reasonable alternatives to the action and their expected benefits on energy supply, distribution, and use. Today's regulatory action is not a significant regulatory action under Executive Order 12866. Moreover, it would not have a significant adverse effect on the supply, distribution, or use of energy. Therefore, it is not a significant energy action. Accordingly, DOE has not prepared a Statement of Energy Effects.

L. Review Under Section 32 of the Federal Energy Administration Act of 1974

Under section 301 of the DOE Organization Act (Pub. L. 95–91), DOE must comply with section 32 of the Federal Energy Administration Act of 1974 (Pub. L. 93–275), as amended by the Federal Energy Administration Authorization Act of 1977 (FEAA; Pub. L. 95–70) (15 U.S.C. 788). Section 32 essentially provides that, where a

proposed rule authorizes or requires use of commercial standards, the rulemaking must inform the public of the use and background of such standards. In addition, section 32(c) requires DOE to consult with the Attorney General and the Chairman of the Federal Trade Commission (FTC) concerning the impact of the commercial or industry standards on competition.

The proposed rule incorporates testing methods contained in sections 4 and 5 of the commercial standard, IEC Standard 62301. DOE has evaluated this standard and is unable to conclude whether it fully complies with the requirements of section 32(b) of the FEAA, *i.e.*, whether it was developed in a manner that fully provides for public participation, comment, and review. DOE will consult with the Attorney General and the Chairman of the FTC about the impact on competition of using the methods contained in this standard before prescribing a final rule.

V. Public Participation

A. Attendance at Public Meeting

The time, date, and location of the public meeting are listed in the **DATES** and **ADDRESSES** sections at the beginning of this NOPR. To attend the public meeting, please notify Ms. Brenda Edwards at (202) 586–2945. As explained in the **ADDRESSES** section, foreign nationals visiting DOE Headquarters are subject to advance security screening procedures.

B. Procedure for Submitting Requests to Speak

Anyone who has an interest in today's notice, or who represents a group or class of persons with an interest in these issues, may request an opportunity to make an oral presentation at the public meeting. Such persons may hand-deliver requests to speak to the address shown in the **ADDRESSES** section at the beginning of this notice between 9 a.m. and 4 p.m., Monday through Friday, except Federal holidays. Requests may also be sent by mail or e-mail to: Ms. Brenda Edwards, U.S. Department of Energy, Building Technologies Program, Mailstop EE–2J, 1000 Independence Avenue, SW., Washington, DC 20585–0121, or *Brenda.Edwards@ee.doe.gov*. Persons who wish to speak should include in their request a computer diskette or CD in WordPerfect, Microsoft Word, PDF, or text (ASCII) file format that briefly describes the nature of their interest in this rulemaking and the topics they wish to discuss. Such persons should also provide a daytime telephone number where they can be reached.

DOE requests persons selected to be heard to submit an advance copy of their statements at least one week before the public meeting. DOE may permit persons who cannot supply an advance copy of their statement to participate, if those persons have made advance alternative arrangements with the Building Technologies Program. Requests to give an oral presentation should ask for such alternative arrangements.

C. Conduct of Public Meeting

DOE will designate a DOE official to preside at the public meeting and may also use a professional facilitator to aid discussion. The meeting will not be a judicial or evidentiary-type public hearing, but DOE will conduct it in accordance with 5 U.S.C. 553 and section 336 of EPCA (42 U.S.C. 6306). A court reporter will be present to record the proceedings and prepare a transcript. DOE reserves the right to schedule the order of presentations and to establish the procedures governing the conduct of the public meeting. After the public meeting, interested parties may submit further comments on the proceedings as well as on any aspect of the rulemaking until the end of the comment period.

DOE will conduct the public meeting in an informal conference style. DOE will present summaries of comments received before the public meeting, allow time for presentations by participants, and encourage all interested parties to share their views on issues affecting this rulemaking. Each participant will be allowed to make a prepared general statement (within time limits determined by DOE), before the discussion of specific topics. DOE will permit other participants to comment briefly on any general statements. At the end of all prepared statements on each specific topic, DOE will permit participants to clarify their statements briefly and comment on statements made by others.

Participants should be prepared to answer DOE's and other participants' questions. DOE representatives may also ask participants about other matters relevant to this rulemaking. The official conducting the public meeting will accept additional comments or questions from those attending if time permits. The presiding official will announce any further procedural rules or modification of the above procedures that may be needed for the proper conduct of the public meeting.

DOE will make the entire record of this proposed rulemaking, including the transcript from the public meeting, available for inspection at the U.S. Department of Energy, 950 L'Enfant Plaza, SW., Suite 600, Washington, DC 20024, (202) 586–9127, between 9 a.m. and 4 p.m., Monday through Friday, except Federal holidays. Copies of the transcript are available for purchase from the transcribing reporter.

D. Submission of Comments

DOE will accept comments, data, and information regarding the proposed rule before or after the public meeting, but no later than the date provided at the beginning of this notice. Comments, data, and information submitted to DOE's e-mail address for this rulemaking should be provided in WordPerfect, Microsoft Word, PDF, or text (ASCII) file format. Stakeholders should avoid the use of special characters or any form of encryption, and wherever possible comments should include the electronic signature of the author. Comments, data, and information submitted to DOE via mail or hand delivery should include one signed original paper copy. No telefacsimiles (faxes) will be accepted.

According to 10 CFR 1004.11, any person submitting information that he or she believes to be confidential and exempt by law from public disclosure should submit two copies: One copy of the document that includes all of the information believed to be confidential, and one copy of the document with that information deleted. DOE will make its own determination as to the confidential status of the information and treat it accordingly.

Factors of interest to DOE when evaluating requests to treat submitted information as confidential include the following: (1) A description of the items; (2) whether and why such items are customarily treated as confidential within the industry; (3) whether the information is generally known by or available from other sources; (4) whether the information was previously made available to others without obligation concerning its confidentiality; (5) an explanation of the competitive injury to the submitting person that would result from public disclosure; (6) when such information might lose its confidential character due to the passage of time; and (7) why disclosure of the information would be contrary to the public interest.

E. Issues on Which DOE Seeks Comment

Although comments are welcome on all aspects of this rulemaking, DOE is particularly interested in receiving comments and views of interested parties on the following issues:

1. Energy Descriptor

DOE seeks comment on the determination of the technical infeasibility of incorporating energy factor and standby mode and off mode power into a single energy descriptor. (See section III.C.)

2. Incorporation of IEC Standard 62301

DOE invites comment on the adequacy of IEC Standard 62301 to measure standby mode and off mode power for microwave ovens in general, and on the suitability of incorporating into DOE regulations the specific provisions described in section III. D.

3. Test Cycle

DOE seeks comment on its proposed clarification to IEC Standard 62301, in which DOE would specify a test period of 12 hours ± 30 seconds for power measurements for microwave ovens for which the measured power is not stable. (See section III.F.)

4. Technical Correction

DOE seeks comment on its proposed change to the conversion factor used in the calculation of microwave oven test cooking energy output in order to produce a value in units of Wh rather than kWh. (See section III.G.)

VI. Approval of the Office of the Secretary

The Secretary of Energy has approved publication of today's Notice of Proposed Rulemaking.

List of Subjects in 10 CFR Part 430

Administrative practice and procedure, Confidential business information, Energy conservation, Household appliances, Imports, Intergovernmental Relations, Small businesses.

Issued in Washington, DC, on October 1, 2008.

John F. Mizroch,

Acting Assistant Secretary, Energy Efficiency and Renewable Energy.

For the reasons stated in the preamble, DOE proposes to amend 10 CFR part 430 to read as set forth below:

PART 430—ENERGY CONSERVATION PROGRAM FOR CONSUMER PRODUCTS

1. The authority citation for part 430 continues to read as follows:

Authority: 42 U.S.C. 6291–6309; 28 U.S.C. 2461 note.

2. Section 430.22 is amended by adding paragraph (b)(4)3., to read as follows:

§ 430.22 Reference Sources.

* * * * *

(b) * * *

(4) * * *

3. IEC 62301, ''Household electrical appliances—Measurement of standby power,'' Section 4, General conditions for measurements, Paragraph 4.2, ''Test room,'' Paragraph 4.4, ''Supply voltage waveform,'' and Paragraph 4.5, ''Power measurement accuracy;'' and Section 5 Measurements, Paragraph 5.1, ''General,'' Note 1, and Paragraph 5.3, ''Procedure'' (2005–06).

* * * * *

3. Appendix I to Subpart B of Part 430 is amended as follows:

a. In section 1. *Definitions*, by:

A. Redesignating section 1.11 as 1.15; and adding a new section 1.14;

B. Redesignating sections 1.7 through 1.10 as sections 1.10 through 1.13 respectively; and adding a new section 1.9;

C. Redesignating sections 1.5 through 1.6 as sections 1.7 through 1.8 respectively; and adding a new section 1.6;

D. Redesignating sections 1.1 through 1.4 as sections 1.2 through 1.5, respectively; and adding a new section 1.1;

b. In section 2. *Test Conditions*, by:

1. Revising sections 2.1.3; 2.2.1 and 2.5; and

2. Adding new sections 2.2.1.1, 2.2.1.2 and 2.9.1.3;

c. In section 3. *Test Methods and Measurements*, by adding new sections 3.1.3.2; 3.2.4 and 3.3.14.

d. In section 4. *Calculation of Derived Results From Test Measurements*, by:

1. Revising sections 4.4.1;

The additions and revisions read as follows:

Appendix I to Subpart B of Part 430–Uniform Test Method for Measuring the Energy Consumption of Conventional Ranges, Conventional Cooking Tops, Conventional Ovens, and Microwave Ovens

* * * * *

1. Definitions

* * * * *

1.1 *Active mode* means the condition in which a microwave oven is connected to a main power source, has been activated, and provides one or more main functions.

* * * * *

1.6. *IEC 62301* refers to the test standard published by the International Electrotechnical Commission, titled ''Household electrical appliances—Measurement of standby power,'' Publication 62301 First Edition 2005–06. (See 10 CFR 430.22)

* * * * *

1.9 *Off mode* means the condition in which a microwave oven is connected to a main power source and is not providing any standby mode or active mode function.

* * * * *

1.14 *Standby mode* the condition in which a microwave oven is connected to the main power source and offers one or more of the following user-oriented or protective functions: (1) to facilitate the activation or deactivation of other functions (including active mode) by remote switch (including remote control), internal sensor, or timer; (2) continuous functions, including information or status displays (including clocks) or sensor-based functions.

* * * * *

2. Test Conditions

* * * * *

2.1.3 *Microwave ovens.* Install the microwave oven in accordance with the manufacturer's instructions and connect to an electrical supply circuit with voltage as specified in Section 2.2.1. A watt–hour meter and watt meters shall be installed in the circuit and shall be as described in Section 2.9.1. If trial runs are needed to set the ''on'' time for the test, the test measurements are to be separated according to Section 4, Paragraph 12.6 of IEC 705 Amendment 2. (See 10 CFR 430.22)

* * * * *

2.2.1 *Electrical supply.*

2.2.1.1 *Voltage.* Maintain the electrical supply to the conventional range, conventional cooking top, and conventional oven being tested at 240/120 volts except that basic models rated only at 208/120 volts shall be tested at that rating. Maintain the voltage within 2 percent of the above specified voltages. For microwave oven testing, however, maintain the electrical supply to a microwave oven at 120 volts ±1 volt and at 60 hertz.

2.2.1.2 *Supply voltage waveform.* For the microwave oven testing, maintain the electrical supply voltage waveform as indicated in Section 4, Paragraph 4.4 of IEC 62301.

* * * * *

2.5 *Ambient room air temperature.* During the test, maintain an ambient room air temperature, T_R, of 77°±9 °F (25°±5 °C) for conventional ovens and cooking tops, or as indicated in Section 4, Paragraph 12.4 of IEC 705 Amendment 2 for microwave ovens for power output measurement or as indicated in Section 4, Paragraph 4.2 of IEC 62301 for standby mode and off mode power consumption measurement, as measured at least 5 feet (1.5 m) and not more than 8 feet (2.4 m) from the nearest surface of the unit under test and approximately 3 feet (0.9 m) above the floor. The temperature shall be measured with a thermometer or temperature indicating system with an accuracy as specified in Section 2.9.3.1.

* * * * *

2.9.1.3 *Standby mode and off mode watt meter.* The watt meter used to measure standby mode and off mode shall have a resolution as specified in Section 4, Paragraph 4.5 of IEC 62301. The watt meter shall also be able to record a ''true'' average

power as specified in Section 5, Paragraph 5.3.2(a) of IEC 62301.

* * * * *

3. Test Methods and Measurements

* * * * *

3.1.3.2 *Microwave oven test standby mode and off mode power.* Establish the testing conditions set forth in Section 2, ''TEST CONDITIONS,'' of this Appendix, omitting the microwave oven test load specified in Section 2.8. For microwave ovens that drop from a higher power state to a lower power state as discussed in Section 5, Paragraph 5.1, Note 1 of IEC 62301, allow sufficient time for the microwave oven to reach the lower power state before proceeding with the test measurement. Follow the test procedure as specified in Section 5, Paragraph 5.3 of IEC 62301. For units in which power varies over a cycle, as described in Section 5, Paragraph 5.3.2 of IEC Standard 62301, use the average power approach in Paragraph 5.3.2(a), but with a single test period of 12 hours ± 30 sec. If a microwave oven is capable of operation in either standby mode or off mode, or both, as defined in Sections 1.9 and 1.14, respectively, test the microwave oven in each mode in which it can operate.

* * * * *

3.2.4 *Microwave oven test standby mode and off mode power.* Make measurements as specified in Section 5, Paragraph 5.3 of IEC 62301. If the microwave oven is capable of operating in standby mode, measure the average standby mode power of the microwave oven, P_{SB}, in watts as specified in Section 3.1.3.2. If the microwave oven is capable of operating in off mode, measure the average off mode power of the microwave oven, P_{OFF}, as specified in Section 3.1.3.2.

* * * * *

3.3.14 Record the average standby mode power, P_{SB}, for the microwave oven standby mode, as determined in Section 3.2.4 for a microwave oven capable of operating in standby mode. Record the average off mode power, P_{OFF}, for the microwave oven off mode power test, as determined in Section 3.2.4 for a microwave oven capable of operating in off mode.

* * * * *

4. Calculation of Derived Results From Test Measurements

* * *

4.4 *Microwave oven.*

4.4.1 *Microwave oven test energy output.* Calculate the microwave oven test energy output, E_T, in watt–hour's (kJ). The calculation is repeated two or three times as required in Section 3.2.3. The average of the E_T's is used for a calculation in Section 4.4.3. For calculations specified in units of energy [watt–hours (kJ)], use the equation below:

$$E_T = \frac{C_p M_w \left(T_2 - T_1\right) + C_c M_c \left(T_2 - T_0\right)}{K_e}$$

Where:

M_w=the measured mass of the test water load, in pounds (g).

M_c=the measured mass of the test container before filling with test water load, in pounds (g).

T_1=the initial test water load temperature, in °F (°C).

T_2=the final test water load temperature, in °F (°C).

T_0=the measured ambient room temperature, in °F (°C).

C_c=0.210 Btu/1b-°F (0.88 kJ/kg · °C), specific heat of test container.

C_p=1.0 Btu/lb-°F (4.187 kJ/kg · °C), specific heat of water.

K_e=3.412 Btu/Wh (3,600 kJ/kWh) conversion factor of watt–hours to Btus.

* * * * *

[FR Doc. E8–23857 Filed 10–16–08; 8:45 am]

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Federal Register

Friday,
October 17, 2008

Part V

Department of Transportation

Pipeline and Hazardous Materials Safety Administration

49 CFR Part 192

Pipeline Safety: Standards for Increasing the Maximum Allowable Operating Pressure for Gas Transmission Pipelines; Final Rule

DEPARTMENT OF TRANSPORTATION

Pipeline and Hazardous Materials Safety Administration

49 CFR Part 192

[Docket No. PHMSA–2005–23447]

RIN 2137–AE25

Pipeline Safety: Standards for Increasing the Maximum Allowable Operating Pressure for Gas Transmission Pipelines

AGENCY: Pipeline and Hazardous Materials Safety Administration (PHMSA), Department of Transportation (DOT).

ACTION: Final rule.

SUMMARY: PHMSA is amending the pipeline safety regulations to prescribe safety requirements for the operation of certain gas transmission pipelines at pressures based on higher operating stress levels. The result is an increase of maximum allowable operating pressure (MAOP) over that currently allowed in the regulations. Improvements in pipeline technology assessment methodology, maintenance practices, and management processes over the past twenty-five years have significantly reduced the risk of failure in pipelines and necessitate updating the standards that govern the MAOP. This rule will generate significant public benefits by reducing the number and consequences of potential incidents and boosting the potential capacity and efficiency of pipeline infrastructure, while promoting rigorous life-cycle maintenance and investment in improved pipe technology.

DATES: *Effective Date:* This final rule takes effect November 17, 2008.

Incorporation by Reference Date: The incorporation by reference of a certain publication listed in this rule is approved by the Director of the Federal Register as of November 17, 2008.

FOR FURTHER INFORMATION CONTACT: Alan Mayberry by phone at (202) 366–5124, or by e-mail at *alan.mayberry@dot.gov*.

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A. Purpose of the Rulemaking

PHMSA published a Notice of Proposed Rulemaking (NPRM) on March 12, 2008 (73 FR 13167), to establish standards under which certain natural or other gas (gas) transmission pipelines would be allowed to operate at higher maximum allowable operating pressure (MAOP). The proposed changes were made possible by dramatic improvements in pipeline technology and risk controls over the past 25 years. The current standards for calculating MAOP on gas transmission pipelines were adopted in 1970, in the original pipeline safety regulations promulgated under Federal law. Almost all risk controls on gas transmission pipelines have been strengthened in the intervening years, beginning with the introduction of improved manufacturing, metallurgy, testing, and assessment tools and standards. Pipe manufactured and tested to modern standards is far less likely to contain defects that can grow to failure over time than pipe manufactured and installed a generation ago. Likewise, modern maintenance practices, if consistently followed, significantly reduce the risk that corrosion, or other defects affecting pipeline integrity, will develop in installed pipelines. Most recently, operators' development and implementation of integrity management programs have increased understanding about the condition of pipelines and how to reduce pipeline risks. In view of these developments, PHMSA concludes that certain gas transmission pipelines can be safely and reliably operated at pressures above current Federal pipeline safety design limits. With appropriate conditions and controls, permitting operation at higher pressures will increase energy capacity and efficiency without diminishing system safety.

Currently, PHMSA has granted special permits on a case-by-case basis to allow operation of particular pipeline segments at a higher MAOP than currently allowed under the existing design requirements. These special permits, that have been granted, have been limited to operation in Class 1, 2, and 3 locations and conditioned on demonstrated rigor in the pipeline's design and construction and the operator's performance of additional safety measures. Building on the record of success developed in the special permit proceedings, PHMSA is codifying the conditions and limitations of the special permits into standards of general applicability.

B. Background

B.1. Current Regulations

The design factor specified in § 192.105 restricts the MAOP of a steel

gas transmission pipeline based on stress levels and class location. For most steel pipelines, the MAOP is defined in § 192.619 based on design pressure calculated using a formula, found at § 192.111, which includes the design factor. The regulations establish four classifications based on population density, ranging from Class 1 (undeveloped, rural land) through Class 4 (densely populated urban areas). In sparsely populated Class 1 locations, the design factor specified in § 192.105 restricts the stress level at which a pipeline can be operated to 72 percent of the specified minimum yield strength (SMYS) of the steel. The operating pressures in more populated Class 2 and Class 3 locations are limited to 60 and 50 percent of SMYS, respectively. Paragraph (c) of § 192.619 provides an exception to this calculation of MAOP for pipelines built before the issuance of the Federal pipeline safety standards. A pipeline that is ''grandfathered'' under this section may be operated at a stress level exceeding 72 percent of SMYS if it was operated at that pressure for five years prior to July 1, 1970.

Part 192 also prescribes safety standards for designing, constructing, operating, and maintaining steel pipelines used to transport gas. Although these standards have always included several requirements for initial and periodic testing and inspection, prior to 2003, part 192 contained no Federal requirements for internal inspection of existing pipelines. Internal inspection is performed using a tool known as an ''instrumented pig'' (or ''smart pig''). Many pipelines constructed before the advent of this technology cannot accommodate an instrumented pig and, accordingly, cannot be inspected internally. Beginning in 1994, PHMSA required operators to design new pipelines so that they could accommodate instrumented pigs, paving the way for internal inspection (59 FR 17281; Apr. 12, 1994).

In December 2003, PHMSA adopted its gas transmission integrity management rule, requiring operators to develop and implement plans to extend additional protections, including internal inspection, to pipelines located in ''high consequence areas'' (HCAs) (68 FR 69816). Integrity management programs, as required by subpart O of part 192, include threat assessments, both baseline and periodic internal inspection, pressure testing, or direct assessment (DA), and additional measures designed to prevent and mitigate pipeline failures and their consequences. AN HCA, as defined in § 192.903, is a geographic territory in which, by virtue of its population density and proximity to a pipeline, a pipeline failure would pose a higher risk to people. In addition to class location, one of the criteria for identifying an HCA is a potential impact circle surrounding a pipeline. The calculation of the circle includes a factor for the MAOP, with the result that a higher MAOP results in a larger impact circle.

B.2. Evolution in Views on Pressure

Absent any defects, and with proper maintenance and management practices, steel pipe can last for many decades in gas service. However, the manufacture of the steel or rolling of the pipe can introduce flaws. In addition, during construction, improper backfilling can damage the pipe and pipe coating. Over time, damaged coating unchecked can allow corrosion to continue and cause leaks. Excavation-related damage can produce an immediate pipeline failure or leave a dent or coating damage that could grow to failure over time.

The regulations on MAOP in part 192 have their origin in engineering standards developed in the 1950s, when industry had relatively limited information about the material properties of pipe and limited ability to evaluate a pipeline's integrity during its operating lifetime. Early pipeline codes allowed maximum operating pressures to be set at a fixed amount under the pressure of the initial strength test without regard to SMYS. Pipeline engineers developing consensus standards looked for ways to lengthen the time before defects initiated during manufacture, construction, or operation could grow to failure. Their solutions focused on tests done at the mill to evaluate the ability of the pipe to contain pressure during operation. They added an additional factor to the hydrostatic test pressure of the mill test. At the time during the 1950's, the consensus standard, known as the B31.8 Code, used this conservative margin of safety for gas pipe design. A 25 percent margin of safety translated into a design factor limiting stress level to 72 percent of SMYS in rural areas. Specifically, the MAOP of 72 percent of SMYS comes from dividing the typical maximum mill test pressure of 90 percent of SMYS by 1.25. When issuing the first Federal pipeline safety regulations in 1970, regulators incorporated this design factor, as found in the 1968 edition of the B31.8 Code, into the requirements for determining the MAOP.

Even as the Federal regulations were being developed, some technical support existed for operation at a higher stress level, provided initial strength testing resulted in operators removing defects. In 1968, the American Gas Association published Report No. L30050 entitled *Study of Feasibility of Basing Natural Gas Pipeline Operating Pressure on Hydrostatic Test Pressure* prepared by the Battelle Memorial Institute. The research study concluded that:

- It is inherently safer to base the MAOP on the test pressure, which demonstrates the actual in-place yield strength of the pipeline, than to base it on SMYS alone.
- High pressure hydrostatic testing is able to remove defects that may fail in service.
- Hydrostatic testing to actual yield, as determined with a pressure-volume plot, does not damage a pipeline.

The report specifically recommended setting the MAOP as a percentage of the field test pressure. In particular, it recommended setting the MAOP at 80 percent of the test pressure when the minimum test pressure was 90 percent of SMYS or higher. Although the committee responsible for the B31.8 Code received the report, the committee deferred consideration of its findings at that time because the Federal regulators had already begun the process to incorporate the 1968 edition of the B31.8 Code into the Federal pipeline safety standards.

More than a decade later, the committee responsible for development of the B31.8 Code, now under the auspices of the American Society of Mechanical Engineers (ASME), revisited the question of the design factor it had deferred in the late 1960s. The committee determined pipelines could operate safely at stress levels up to 80 percent of SMYS. ASME updated the design factors in a 1990 addendum to the 1989 edition of the B31.8 Code, and they remain in the current edition. Although part 192 incorporates parts of the B31.8 Code by reference, it does not incorporate the updated design factors. With the benefit of operating experience with pipelines, it seems clear that operating pressure plays a less critical role in pipeline integrity and failure consequence than other factors within the operator's control.

By any measure, new technologies and risk controls have had a far greater impact on pipeline safety and integrity. A great deal of progress has occurred in the manufacture of steel pipe and in its initial inspection and testing. Technological advances in metallurgy and pipe manufacture decrease the risk of incipient flaws occurring and going undetected during manufacture. The detailed standards now followed in steel and pipe manufacturing provide

engineers considerable information about their material properties. Toughness standards make new steel pipe more likely to resist fracture and to survive mechanical damage. Knowledge about the material properties allows engineers to predict how quickly flaws, whether inherent or introduced during construction or operation, will grow to failure under known operating conditions.

Initial inspection and hydrostatic testing of pipelines allow operators to discover flaws that have occurred prior to operation, such as during transportation or construction. They also serve to validate the integrity of the pipeline before operation. Initial pressure testing causes longitudinal and some other flaws introduced during manufacture, transportation, or construction to grow to the point of failure. Initial pressure testing detects all but one type of manufacturing or construction defect that could cause failure in the near-term. The sole type of defect that pressure testing may not identify, a flaw in a girth weld, is detectable through pre-operational non-destructive testing, which is required in this rule.

The most common defects initiated during operation are caused by mechanical damage or corrosion. Improvements in technology have resulted in internal inspection techniques that provide operators a significant amount of information about defects. Although there is significant variance in the capability of the tools used for internal inspections, each provides the operator information about flaws in the pipeline that an operator would not otherwise have. An operator can then examine these flaws to determine whether they are defects requiring repair. In addition, internal inspections with in-line inspection (ILI) devices, unlike pressure testing, are not destructive and can be done while the pipeline is in operation. Initial internal inspection establishes a baseline. Operators can use subsequent internal inspections at appropriate intervals to monitor for changes in flaws already discovered or to find new flaws requiring repair or monitoring. Internal inspections, and other improved life-cycle management practices, increase the likelihood operators will detect any flaws that remain in the pipe after initial inspection and testing, or that develop after construction, well before the flaws grow to failure.

B.3. History of PHMSA Consideration

Although the agency had never formally revisited its part 192 MAOP standards, prior to this rulemaking, developments in related arenas have increasingly set the stage for changes to those standards. Grandfathered pipelines have operated successfully at higher stress levels in the United States during more than 35 years of Federal safety regulation. Many of these grandfathered pipelines have operated at higher stress levels for more than 50 years without a higher rate of failure. We have also been aware of pipelines outside the United States operating successfully at the higher stress levels permitted under the ASME standard. A technical study published in December 2000 by R.J. Eiber, M. McLamb, and W.B. McGehee, *Quantifying Pipeline Design at 72% SMYS as a Precursor to Increasing the Design Stress Level*, GRI–00/0233, further raised interest in the issue.

In connection with our issuance of the 2003 gas transmission integrity management regulations, PHMSA announced a policy to grant ''class location'' waivers (now called special permits) to operators demonstrating an alternative integrity management program for the affected pipeline. A ''class location'' waiver allows an operator to maintain current operating pressure on a pipeline following an increase in population that changes the class location. Absent a waiver, the operator would have to reduce pressure or replace the pipe with thicker walled pipe. PHMSA held a meeting on April 14–15, 2004, to discuss the criteria for the waivers. In a notice seeking public involvement in the process (69 FR 22116; Apr. 23, 2004), PHMSA announced:

> Waivers will only be granted when pipe condition and active integrity management provides a level of safety greater than or equal to a pipe replacement or pressure reduction.

A second notice (69 FR 38948; June 29, 2004) announced the criteria. The criteria included the use of high quality manufacturing and construction processes, effective coating, and a lack of systemic problems identified in internal inspections Although the class location special permits/waivers do not address increases in stress levels *per se,* the risk management approach developed in those cases takes account of operating pressure and addresses many of the same concerns. The same risk management approach, and many of the specific criteria applied in the class location waivers, guided PHMSA's handling of the special permits discussed below and, ultimately, this rule.

Beginning in 2005, operators began addressing the issue of stress level directly with requests that PHMSA allow operation at the MAOP levels that the ASME B31.8 Code would allow. With the increasing interest, PHMSA held a public meeting on March 21, 2006, to discuss whether to allow increased MAOP consistent with the updated ASME standards. PHMSA also solicited technical papers on the issue. Papers filed in response, as well as the transcript of the public meeting, are in the docket for this rulemaking. Later in 2006, PHMSA again sought public comment at a meeting of its advisory committee, the Technical Pipeline Safety Standards Committee (TPSSC). The transcript and briefing materials for the June 28, 2006, meeting are in the docket for the advisory committee, Docket ID PHMSA–RSPA–1998–4470–204, 220. This docket can be found at *http://www.regulations.gov*. Comments and papers written during the period these efforts were undertaken overwhelmingly supported examining increased MAOP as a way to increase energy efficiency and capacity while maintaining safety.

B.4. Safety Conditions in Special Permits

In 2005, operators began requesting waivers, now called special permits, to allow operation at the MAOP levels that the ASME B31.8 Code would allow. In some cases, operators filed these requests at the same time they were seeking approval from the Federal Energy Regulatory Commission (FERC) to build new gas transmission pipelines. In other cases, operators sought relief from current MAOP limits for existing pipelines that had been built to more rigorous design and construction standards.

In developing an approach to the requests, PHMSA examined the operating history of lines already operated at higher stress levels. Canadian and British standards have allowed operation at the higher stress levels for some time. The Canadian pipeline authority, which has allowed higher stress levels since 1973, reports the following regarding pipelines operating at stress levels higher than 72 percent of SMYS:

- About 6,000 miles of pipelines on the Alberta system, ranging from six to 42 inches in diameter, were installed or upgraded between the early 1970s and 2005;
- About 4,500 miles of pipelines on the Mainline system east of the Alberta-Saskatchewan border, ranging from 20 to 42 inches in diameter, were installed or upgraded between the early 1970s and 2005; and,

• More than 600 miles in the Foothills Pipe Line system, ranging from 36 to 40 inches in diameter, were installed between 1979 and 1998.

In the United Kingdom, about 1,140 miles of the Northern pipeline system have been uprated to operate at higher stress level in the past ten years. Accident rates for pipelines in these countries have not indicated a measurable increased risk from operation at these higher operating stress levels.

In the United States, some 5,000 miles of gas transmission lines have MAOPs that were grandfathered under § 192.619(c), when the Federal pipeline safety regulations were adopted in the early 1970s, continue to operate at stress levels higher than 72 percent of SMYS. After some accidents caused by corrosion on grandfathered pipelines, PHMSA considered whether to remove the exception in § 192.619(c). In 1992, PHMSA decided to continue to allow operation at the grandfathered pressures (57 FR 41119; Sept. 9, 1992). PHMSA based its decision on the operating history of two of the operators whose pipelines contained most of the mileage operated at the grandfathered pressures. PHMSA noted the incident rate on these pipelines, operated at stress levels above 72 percent of SMYS, was between 10 percent and 50 percent of the incident rate of pipelines operated at the lower pressure. Texas Eastern Gas Pipeline Company (now Spectra Energy), the operator of many of the grandfathered pipelines, attributed the lower incident rate to aggressive inspection and maintenance. This included initial hydrostatic testing to 100 percent of SMYS, internal inspection, visual examination of anomalies found during internal inspection, repair of defects, and selective pressure testing to validate the results of the internal inspection. Internal inspection was not in common use in the industry prior to the 1980s. PHMSA's statistics show these pipelines continue to have an equivalent safety record when compared with pipelines operating according to the design factors in the pipeline safety regulations.

PHMSA also considered technical studies and required companies seeking special permits to provide information about the pipelines' design and construction and to specify the additional inspection and testing to be used. PHMSA also considered how to handle findings that could compromise the long-term serviceability of the pipe. PHMSA concluded that pipelines can operate safely and reliably at stress levels up to 80 percent of SMYS if the pipeline has well-established metallurgical properties and can be managed to protect it against known threats, such as corrosion and mechanical damage.

Early and vigilant corrosion protection reduces the possibility of corrosion occurring. At the earliest stage, this includes care in applying a protective coating before transporting the pipe to the right-of-way. With the newer coating materials and careful application, coating provides considerable protection against external corrosion and facilitates the application of induced current, commonly called cathodic protection, to prevent corrosion from developing at any breaks that may occur in the coating. Regularly monitoring the level of protection and addressing any low readings will detect and correct conditions that can cause corrosion at an early stage. Vigilant corrosion protection includes close attention to operating conditions that lead to internal corrosion, such as poor gas quality. In addition, for new pipelines, operators' compliance with a rule issued last year requiring greater attention to internal corrosion protection during design and construction (72 FR 20059; Apr. 23, 2007) will prevent internal corrosion. Finally, corrosion protection includes internal inspection and other assessment techniques for early detection of both internal and external corrosion.

One of the major causes of serious pipeline failure is mechanical damage caused by outside forces, such as an equipment strike during excavation activities. Burying the pipeline deeper, increased patrolling, and additional line marking help prevent the risk that excavation will cause mechanical damage. Further, enhanced pipe properties increase the pipe's resistance to immediate puncture from a single equipment strike. Improved toughness increases the ability of the pipe to withstand mechanical damage from an outside force and may also limit any failure consequences to leaks rather than ruptures. This toughness usually allows time for the operator to detect the damage during internal inspection well before the pipe fails.

To evaluate each request for a special permit, PHMSA established a docket and sought public comment on the request. We received several public comments, most in response to the first special permits considered. Many of the comments supported granting the special permits. Those who were not supportive may have underestimated the significance of the safety upgrades required for the special permits. A few commenters raised technical concerns. Among these were questions about the impact of rail crossings and blasting activities in the vicinity of the pipeline. The special permits did not change the current requirements where road crossings exist and added a requirement to monitor activities, such as blasting, that could impact earth movement. Some commenters expressed concern about the impact radius of the pipeline operating at a higher stress level. PHMSA included supplemental safety criteria to address the increased radius. The remainder of the comments addressed concerns, such as compensation or aesthetics, which were outside the scope of the special permits. PHMSA special permits do not address issues on siting, which are governed by the FERC.

PHMSA expects to issue seven special permits, and possibly more, in response to these requests. In each case, PHMSA has provided oversight to confirm the line pipe is, or will be (for pipe yet to be constructed), as free of inherent flaws as possible, that construction and operation do not introduce flaws, and that any flaws are detected before they can fail. PHMSA accomplishes this by imposing a series of conditions on the grant of special permits. The conditions imposed as part of the special permits are designed to address the potential additional risk involved in operating the pipeline at a higher stress level. A proposed pipeline must be built to rigorous design and construction standards, and the operator requesting a special permit for an existing pipeline must demonstrate that the pipeline was built to rigorous design and construction standards. These additional design and construction standards focused on producing a high quality pipeline that is free from inherent defects that could grow more rapidly under operation at a higher stress level and is more resistant to expected operational risks. In addition, PHMSA requires the operator of a pipeline receiving a special permit to comply with operation and maintenance (O&M) requirements that exceed current pipeline safety regulations. These additional O&M and integrity management requirements focused on the potential for corrosion and mechanical damage and on detecting defects before the defects can grow to failure.

B.5. Codifying the Special Permit Standards

This rule puts in place a process for managing the life-cycle of a pipeline operating at a higher stress level based on our experience with the special permits. Integrity management focuses on managing and extending the service

life of the pipeline. Life-cycle management goes beyond the operations and maintenance practices, including integrity management, to address steel production, pipeline manufacture, pipeline design, and installation.

Industry experience with integrity management demonstrates the value of life-cycle management. Through baseline assessments in integrity management programs, gas transmission operators identified and repaired 2,883 defects in the first three years of the program (2004, 2005, and 2006). More than 2,000 of these were discovered in the first two years as operators assessed their highest risk, generally older, pipelines. In a September 2006 report, GAO–09–946, the Government Accountability Office noted this data as an early indication of improvement in pipeline safety. In order to qualify for operation at higher stress levels under this rule, pipelines will be designed and constructed under more rigorous standards. Baseline assessment of these lines will likely uncover few defects, but removing those few defects will result in safer pipelines. In addition, the results of the baseline assessment will aid in evaluating anomalies discovered during future assessments.

This rule, based on the terms and conditions of the special permits allowing operation at higher stress levels, imposes similar terms and conditions and limitations on operators seeking to apply the new rule. The terms and conditions, which include meeting design standards that go beyond current regulation, address the safety concerns related to operating the pipeline at a higher stress level. PHMSA will step up inspection and oversight of pipeline design and construction, in addition to review and inspection of enhanced life-cycle management requirements for these pipelines.

With special permits, PHMSA individually examined the design, construction, and O&M plans for a particular pipeline before allowing operation at a higher pressure than currently authorized. In each case, PHMSA conditioned approval on compliance with a series of rigorous design, construction, O&M, and management standards, including enhanced damage prevention practices. PHMSA's experience with these requests for special permits led to the conclusion that a rule of general applicability is appropriate. With a rule of general applicability, the conditions for approval are established for all without need to craft the conditions based on individual evaluation. Thus, this rule sets rigorous safety standards. In place of individual examination, the rule requires senior executive certification of an operator's adherence to the more rigorous safety standards. An operator seeking to operate at a higher pressure than allowed by current regulation must certify that a pipeline is built according to rigorous design and construction standards and must agree to operate under stringent O&M standards. After PHMSA or state pipeline safety authority (when the pipeline is located in a state where PHMSA has an interstate agent agreement, or an intrastate pipeline is regulated by that state) receives an operator's certification indicating its intention to operate at a higher operating stress level, PHMSA or the state would then follow up with the operator to verify compliance. As with the special permits, this rule would allow an operator to qualify both new and existing segments of pipeline for operation at the higher MAOP, provided the operator meets the conditions for the pipeline segment.

Several types of pipeline segments will not qualify under this rule. These include the following:

- Pipeline segments in densely populated Class 4 locations. In addition to the increased consequences of failure in a Class 4 location, the level of activity in such a location increases the risk of excavation damage.
- Pipeline segments of grandfathered pipeline already operating at a higher stress level but not constructed in accordance with modern standards. Although grandfathered pipeline has been operated successfully at the higher stress level, PHMSA or the state would examine any further increases individually through the special permit process.
- Bare or ineffectively coated pipe. This pipe lacks the coating needed to prevent corrosion and to make cathodic protection effective.
- Pipelines with wrinkle bends. Section 192.315(a) currently prohibits wrinkle bends in pipeline operating at hoop stress exceeding 30 percent of SMYS.
- Pipelines experiencing failures indicative of a systemic problem, such as seam flaws, during initial hydrostatic testing. Such pipe is more likely to have inherent defects that can grow to failure more rapidly at higher stress levels.
- Pipe manufactured by certain processes, such as low frequency electric welding process.
- Pipeline segments which cannot accommodate internal inspection devices.

We are establishing slightly different requirements for segments that have already been operating and those which are to be newly built. Some variation is necessary or appropriate for an existing pipeline. For example, the requirement for cathodically protecting pipeline within 12 months of construction is an existing requirement for all pipelines. A requirement for the operator of an existing pipeline segment to prove that the segment was in fact cathodically protected within 12 months of construction provides greater confidence in the condition of the existing segment. Allowing proof of five percent fewer nondestructive tests done on an existing segment at the time of construction recognizes the possibility that some welds may not be tested when 100 percent nondestructive testing is not required. The overriding principle in the variation is to allow qualification of a quality pipeline with minimal distinction. Based on our review of requests for special permits on existing pipelines, PHMSA does not believe the more rigorous standards we are requiring are too high for existing segments of modern design and construction. Setting the qualification standards lower for existing pipeline segments could encourage operators to construct a pipeline at the lower standards and seek to raise the operating pressure at some future date.

PHMSA acknowledges this rule may not cover all conditions encountered by a pipeline operator. Further, operators may have innovative alternative methods to the guidelines contained in this rule. To that end, operators may apply to PHMSA or state pipeline safety authority (when the pipeline is located in a state where PHMSA has an interstate agent agreement, or an intrastate pipeline is regulated by that state) for a special permit requesting to implement the alternative methods.

B.6. How To Handle Special Permits and Requests for Special Permits

A number of pipeline operators have submitted requests for special permits seeking relief from the current design requirements to allow operation at higher stress levels. For the most part, this rule addresses the relief requested. PHMSA has already granted many of these under terms and conditions that may vary slightly from those in this final rule. In some cases, the relief granted is specific to the relief requested by the operator and extends beyond the scope of this rulemaking. PHMSA has continued review of pending special permit applications while working on this rulemaking, in recognition that a final rule may not be issued by the time an operator intended to operate its pipeline at a higher operating stress level. With the publication of this final

rule, this case-by-case approach to approving operation under a special permit at higher operating stress levels is no longer needed.

PHMSA will terminate its review of any pending applications for special permits associated with operation at higher operating stress levels once this final rule is issued. Operators of those pipelines must comply with this final rule in order to operate their pipelines at a higher alternative MAOP. PHMSA will examine special permits that have already been granted, as appropriate, to determine if any modifications are needed in light of safety decisions made in preparing this rule.

B.7. Statutory Considerations

Under 49 U.S.C. 60102(a), PHMSA has broad authority to issue safety standards for the design, construction, O&M of gas transmission pipelines. Under 49 U.S.C. 60104(b), PHMSA may not require an operator to modify or replace existing pipelines to meet a new design or construction standard. Although this rule includes design and construction standards, these standards simply add more rigorous, non-mandatory requirements. This rule does not require an operator to modify or replace existing pipelines or to design and construct new pipeline in accordance with these non-mandatory standards. If, however, a new or existing pipeline meets these more rigorous standards, the rule allows an operator to elect to calculate the MAOP for the pipeline based on a higher stress level. This would allow operation at an increased pressure over that otherwise allowed for pipeline built since the Federal regulations were issued in the 1970s. To operate at the higher pressure, the operator would have to comply with more rigorous O&M, and management requirements.

Under 49 U.S.C. 60102(b), a gas pipeline safety standard must be practicable and designed to meet the need for gas pipeline safety and for protection of the environment. PHMSA must consider several factors in issuing a safety standard. These factors include the relevant available pipeline safety and environmental information, the appropriateness of the standard for the type of pipeline, the reasonableness of the standard, and reasonably identifiable or estimated costs and benefits. PHMSA has considered these factors in developing this rule and provides its analysis in the preamble.

PHMSA must also consider any comments received from the public and any comments and recommendations of the TPSSC. These are discussed below.

C. Comments on the NPRM

PHMSA received comments from 19 organizations in response to the NPRM. These included eleven pipeline operators, four trade associations and related organizations, three steel/pipe manufacturers, and one state pipeline safety regulatory agency.

C.1. General Comments

API 5L, 44th Edition

Many commenters noted that pipe material/design requirements in American Pipeline Institute (API) Standard 5L (API 5L) have been significantly revised in the 44th edition, which they stated would be in effect by the time a final rule is issued. These commenters generally suggested that PHMSA should defer to, or incorporate, requirements from the 44th edition where applicable rather than establishing different technical requirements in regulation.

Response

API 5L, 43rd edition, is currently incorporated by reference into the Code of Federal Regulations (CFR). PHMSA has begun a technical review of the 44th edition to determine whether and to what extent it is appropriate to update this reference or if exceptions need be taken when so incorporating the standard. PHMSA cannot reference requirements in the 44th edition until this review is completed and the regulations have been revised to incorporate the new edition. Where differences in the 44th edition would affect requirements in this rule, appropriate changes will be made when that edition is incorporated.

Effect on Special Permits

All commenters who addressed the question suggested that requirements in a final rule should not apply retroactively to pipelines operating at alternative MAOP based on special permits issued after detailed review by PHMSA. One pipeline operator provided a legal analysis maintaining that such retroactive application would be contrary to PHMSA's statutory authority. These organizations also commented that PHMSA should continue review of special permit applications until the final rule is issued, noting that in many cases operation at the proposed higher MAOP is necessary to meet contractual commitments operators have made in anticipation of a special permit being granted and to meet national energy needs.

Response

As noted above, PHMSA continued reviewing special permit applications throughout this rulemaking proceeding, generally applying the same criteria adopted in this rule. Having now published the final rule, we consider it unnecessary to complete review of pending special permit applications on the subject. Accordingly, PHMSA intends to terminate these proceedings, with appropriate notice to the individual applicants.

In contrast, this regulatory action has no effect on the status of special permits or waivers currently in effect. As we explained recently in Docket No. PHMSA–2007–0033, *Pipeline Safety: Administrative Procedures, Address Updates, and Technical Amendments,* (FR Volume 73, No. 61, 16562, published March 28, 2008), PHMSA reserves the right to revoke or modify a special permit or waiver based on an operator's failure to comply with the conditions of the special permit/waiver or on a showing of material error, misrepresentation, or changed circumstances. Although an operator may elect to surrender its special permit at any time, nothing in this rule requires the operator to do so or otherwise triggers reopening of a special permit/waiver currently in effect. The existing MAOP special permits were issued based upon a PHMSA review of the operator's engineering, construction, O&M procedures and operating history. While some of the pipeline segments may not meet all of the requirements specified in this final rule, the operational history and O&M practices provide an equivalent level of safety as provided in this final rule. Furthermore, whether a pipeline is operating at higher MAOP under this rule or a special permit/waiver, PHMSA will monitor and enforce compliance with the applicable conditions and safety controls.

Structure

One state pipeline safety regulatory agency expressed concern about the complexity and inconsistency being added to the regulations as a result of the structure of the proposed rule. The state agency noted that the proposal would add many pages to part 192 that would apply to only a limited number of gas transmission operators. The agency suggested that it would be more effective, and cause less confusion, if requirements for pipelines operating at an alternative MAOP were presented in a separate subpart, applicable only to those pipelines.

Response

PHMSA has not previously used a separate subpart to include varied requirements applicable to specific types of pipelines. Instead, subparts have been used for individual topics, such as Corrosion Control or Integrity Management. PHMSA considers it more appropriate to incorporate requirements applicable to each subpart as the requirements in this rule implicate several subparts. PHMSA also notes that no other commenters indicated that the structure of the proposed rule was confusing. PHMSA has retained the structure of the proposal in this final rule. PHMSA intends to post this notice of final rulemaking on its web site, which will provide a reference for pipeline operators that includes all of the requirements associated with alternative MAOP in one document.

C.2. Comments on Specific Provisions in the Proposed Rule

C.2.1. Section 192.7, Incorporation by Reference

Interstate Natural Gas Association of America (INGAA) and three pipeline operators supported incorporation of American Society of Testing and Materials (ASTM) standard ASTM A–578/A578M–96 into the regulations. These commenters generally noted that this action is consistent with reliance on consensus standards, which they support. American Gas Association (AGA) and the Gas Piping Technology Committee (GPTC) took the contrary position and opposed incorporation of the ASTM standard. GPTC commented that the standard is used by one mill and that other mills use other standards (including International Standards Organization (ISO) standards). GPTC also noted that there are a number of equivalent standards and that PHMSA should not select one for incorporation. AGA added that incorporating the standard could have unintended consequences of making the rule too prescriptive and precluding the use of equivalent standards.

Response

The final rule incorporates ASTM A578/A578M–96 into the regulations. Incorporation by reference makes the provisions of the standard apply, when it is referenced in a regulation, in the same manner as if they were written in the CFR. Referencing consensus standards wherever possible is the policy of the Federal government.

This standard is referenced in the regulation for assuring plate/coil quality control (QC). That reference requires that ultrasonic (UT) testing be conducted in accordance with the standard, API 5L paragraph 7.8.10, or equivalent. The pipe must also be manufactured in accordance with API 5L which is already referenced in § 192.7. PHMSA considers that the allowance for use of an equivalent standard renders moot the concerns expressed by AGA and GPTC.

C.2.2. Design Requirements

Section 192.112(a), General Standards for the Steel Pipe

Carbon equivalent: INGAA, five pipeline operators and two pipe manufacturers all noted that the proposed limit in paragraph (a)(1) on carbon equivalent (CE) (0.23 percent Pcm) is inconsistent with the 44th edition of API 5L. INGAA and one operator suggested deleting the limit from the proposed rule. Two operators noted that the NPRM described no analysis or data showing the need for a different limit. Several commenters indicated that high-strength pipe (grades X–80 and above) is difficult to achieve with the stated limit. One operator suggested that weldability is the key issue and that allowance for a higher CE is particularly important for high-strength and strain-based pipe. A steel manufacturer objected to sole reliance on the Pcm formula for determining the CE value.

Response

PHMSA agrees that the limit in API 5L is acceptable. PHMSA has changed the limit for CE to 0.25 Pcm (Ito-Bessyo formula for CE), which is consistent with API 5L. PHMSA does not agree that no limit should be included in the CFR. PHMSA considers that a limit is necessary to assure the quality of steel used for pipelines to operate at an alternative MAOP. Weldability tests are not timely for determining the acceptability of steel, as they cannot be performed until pipe is manufactured. Recent experience with several new pipelines using X–80 steel has indicated that such high strength steel can meet the CE limit. PHMSA does not currently have experience with steels of grades higher than X–80 and will need to understand what is important for such pipe grades as they are used.

PHMSA acknowledges that there are other methods for calculating the CE value of steel. The Pcm formula included in the proposed rule is a method used by several mills. PHMSA has revised the final rule to include use of an alternate International Institute of Welding (IIW) CE formula, used by other mills for determining CE.

Diameter to thickness ratio: INGAA and three pipeline operators suggested deleting the limit in proposed paragraph (a)(3) on the ratio of pipe diameter to thickness (D/t). They maintained that this limit may be inappropriate for high-grade pipe and that the concerns that might underlie such a limit are adequately addressed by the proposed rule and common construction practices and quality assurance (QA). One operator noted that ovality and denting issues are addressed by the proposed construction requirements of § 192.328, that QA is required by proposed § 192.620(d)(9), and that the baseline geometry ILI and the provisions of the ASME Code would also address the underlying concerns.

Response

PHMSA has retained the proposed limit. PHMSA adopted this limit (*i.e.*, $D/t \leq 100$) based upon presentations made by industry experts at the public meeting on ''Reconsideration of Maximum Allowable Operating Pressure in Natural Gas Pipelines'' held on March 21, 2006 in Reston, VA. Higher D/t ratios can lead to excessive denting during transportation, construction bending, pipe stringing on the right-of-way, backfilling, and hydrostatic testing.

Section 192.112(b), Fracture Control

Several commenters noted that some requirements included in the proposed rule are being eliminated or significantly revised in the 44th edition of API 5L. The steel/pipe manufacturers suggested referencing the new standard to, among other things, avoid unnecessarily limiting approaches to deriving arrest toughness and treating all sizes and types of pipe (*e.g.*, seamless) the same for purposes of the drop weight test.

INGAA and three pipeline operators suggested a change to allow a crack arrest design other than mechanical arrestors if crack propagation cannot be made self-limiting. (One operator noted that Clock Spring [1] is marketed as a crack arrestor). They suggested that a rule should allow an option for engineering analysis, including an analysis of consequences. One operator noted that this option could be particularly important for high-pressure, large-diameter pipelines. Two operators generally supported the proposed approach for fracture control if self-arrest is attainable. They noted that it is critical that operators have a plan and consider the potential under-

[1] Clock Spring is a commercially available composite sleeve used for pipeline repairs.

conservativeness of Charpy toughness equations for high grade pipe (X–70 and above).

Response

PHMSA has not yet incorporated the 44th edition of API 5L into the regulations. PHMSA is conducting a technical review of this edition to determine if it is acceptable for incorporation. If, after that review, PHMSA determines that the standard is acceptable, PHMSA will propose to incorporate the 44th edition and change other affected rules as appropriate.

The final rule requires an overall fracture control plan to resist crack initiation and propagation and to arrest a fracture within eight pipe joints with a 99 percent occurrence probability and within five pipe joints with a 90 percent occurrence probability. Research has shown that an effective fracture plan should include acceptable Charpy impact and drop weight tear tests, which are required in this final rule.

PHMSA considers composite sleeves to be suitable mechanical crack arrestors. Operators could use composite sleeves for this purpose, install periodic joints of thicker-walled pipe, or use other design features to provide crack arrest if it is not possible to achieve the toughness properties specified in the rule and also assure self-limiting arrest. PHMSA has revised the language in this final rule to allow additional design features and to make mechanical crack arrestors an example of such features rather than the only method allowed.

Section 192.112(c), Plate/Coil Quality Control

One pipeline operator and two pipe manufacturers suggested expanding the mill control inspection program to a full internal quality management program and including caster and plate/coil/pipe mills.

INGAA, three pipeline operators and two pipe manufacturers commented that the specificity of requirements applicable to mill inspection should be reduced. These commenters agreed that a macro etch test is appropriate but suggested that the details of how this test is applied should be left to decisions of the mill and the pipe purchaser. They suggested that API 5L provides a foundation for those decisions and the specific requirements in the proposed rule add unnecessary cost impact. One pipe manufacturer noted that the Mannesmann scale is very subjective, while a second separately commented that reference to the Mannesmann scale should be deleted because it is proprietary and thus inappropriate for inclusion in a regulation. One operator requested that the mill inspection requirements, including those for macro etch and UT examination, be explicitly limited to new pipelines, noting that it is unlikely these tests were performed for any existing pipelines and that they have minimal relevance for existing pipelines that would be subject to the proposed rule.

INGAA and four pipeline operators suggested that an alternative to the UT testing specified should be allowed for identifying laminations. They suggested that a full-body UT inspection, for example, should be acceptable.

One operator and two manufacturers commented that it is inappropriate to use the proposed macro etch test and acceptance criteria as a heat/slab rejection criteria. These commenters noted that no consensus standard references this test. The operator maintained that the test does not accomplish what PHMSA suggested in the preamble of the NPRM, that it is a lagging rather than a leading test and its use as an acceptance test without a retest allowance could result in rejection of up to 2,000 tons of steel or more. The operator suggested that this should be a mill control test rather than an acceptance test with specifics, including retest allowance, to be negotiated between the mill and pipe purchaser.

One operator and one manufacturer noted that ASTM A578 is a plate UT inspection standard. They commented that specifying this standard for coil/pipe is beyond its scope. They also commented that we gave no basis for proposing that 50 percent of surface and 90 percent of joints be examined. They noted that pipe seam welds and pipe ends are inspected radiographically or by UT and that additional UT is more appropriately a purchaser-specified requirement. Another operator also suggested that the 50 percent surface coverage requirement be deleted in favor of reference to ASTM A578/A578M.

Two manufacturers suggested that the rule allow UT on plate/coil or pipe body, noting that most United States mills lack equipment to perform ASTM A578 testing. Another manufacturer suggested that a combination of electromagnetic inspection (EMI) and UT inspection is superior and would produce the most dramatic impact. This combination, according to this manufacturer, is also applicable to seamless and electric resistance welded (ERW) pipe.

One manufacturer recommended that the inspection program of proposed section 192.112(c)(2)(ii) be limited to submerged arc welded (SAW) pipe, and that the acceptance criteria for UT testing be referenced to ASTM A578 or equivalent. This commenter noted that laminations are not a significant issue for modern pipe.

Response

PHMSA agrees that an ''internal quality management program'' is more descriptive than a ''mill control inspection program'' and that such a program should be required at all mills associated with the manufacture of steel and pipe. The final rule has been revised accordingly.

PHMSA considers that a macro etch test or other equivalent method is needed to identify inclusions that may cause centerline segregation during the continuous casting process. The acceptance criteria must be agreed to between the purchaser and the mill. PHMSA has added an alternative to the requirement for a macro etch test consisting of an operator QA monitoring plan that includes audits conducted by the operator (or an agent operating under its authority) of: (a) Steelmaking and casting facilities; (b) QC plans and manufacturing procedure specifications (MPS); (c) equipment maintenance and records of conformance; (d) applicable casting superheat and speeds; and (e) centerline segregation monitoring records to ensure mitigation of centerline segregation during the continuous casting process.

PHMSA agrees that alternate methods to test the pipe body for laminations, cracks, and inclusions should be acceptable and has revised the rule to allow methods per API 5L Section 7.8.10 or ASTM A578-Level B, or other equivalent methods. PHMSA understands that it is unlikely that many existing pipelines were manufactured using processes that included the specified examinations but does not consider that sufficient reason for excluding existing pipelines from the requirements.

The requirement for 50 percent of surface and 95 percent of lengths of pipe to be UT tested was set to ensure adequate QC standards. PHMSA agrees that the specified QC requirements also must be practical. In the final rule, we have reduced the requirement for 50 percent of surface coverage to 35 percent because we recognize that it may be difficult to achieve 50 percent coverage for pipe manufactured with helical seams.

PHMSA has not deleted reference to the Mannesmann scale, which is widely used by steel manufacturers. In

addition, the regulation allows for use of equivalent measures.

PHMSA does not agree that the inspection program of proposed 192.112(c)(2)(ii) should be limited to SAW pipe. PHMSA considers this requirement to be an overall quality management tool and not just for laminations. Additionally, PHMSA notes that at least one recently constructed pipeline has had problems with laminations.

Section 192.112(d), Seam Quality Control

INGAA, four pipeline operators, and two pipe manufacturers all recommended additional reliance on the procedures of API 5L 44th edition. The manufacturers would have referenced API 5L for toughness requirements and made them applicable to weld and heat affected zone in SAW pipe only. They noted that the proposed requirement is inappropriate for ERW pipe, that the specified toughness is higher than that called for in API 5L and is not necessary. The manufacturers believe that fracture arrest capabilities are not needed in weld metal, since staggered seams in pipeline construction result in arrest occurring in the pipe body.

INGAA and three pipeline operators would have eliminated reference to specific hardness testing or a maximum hardness level, arguing that API 5L contains sufficient guidance. They further noted that the specified hardness of 280 Vickers (Hv10) is only for sour gas. One manufacturer would have relaxed the hardness requirement to 300 Hv10 and allowed for equivalent test methods (per ASTM E140). Another would have specified a maximum hardness ''appropriate for the pipeline design'' vs. specifying a limit. The first manufacturer noted that API 5L does not specify hardness limits except for sour gas service or offshore pipelines and that the technical justification for these limits on other pipe is not obvious. The manufacturers maintained that limiting hardness may not allow attaining the best weld properties and that 280 Hv10 is likely not attainable for pipe grades X–80 and above.

Two pipe manufacturers requested that the rule be clarified to indicate that the seam QC requirements apply only to longitudinal or helical seams. They noted that pipe mill jointer welds require radiography per API 1104 and that significant capital expense would be required for pipe mills to UT test jointer and skelp end welds after cold expansion and hydrostatic testing.

Response

PHMSA has not yet incorporated the 44th edition of API 5L into the regulations. PHMSA is conducting a technical review of this edition to determine if it is acceptable for incorporation. If, after review, PHMSA determines that the standard is acceptable, PHMSA will propose to incorporate the 44th edition and propose changes to other affected regulations as appropriate.

PHMSA has deleted the proposed limit on toughness. This limit was not included in the conditions applied to special permits issued for alternative MAOP operation. Pipe procured to modern standards generally meets the proposed limit, and other requirements in this rule, provide for crack arrest. Thus, PHMSA concluded that a toughness limit was not needed.

PHMSA does not agree that it is not necessary to specify a hardness limit. All recent pipelines for which special permits have been issued to operate at alternative MAOP have met the proposed hardness limit without apparent difficulty. This includes X–80 pipe. The requirement helps assure that only high-quality steel is used for pipelines to be operated at alternative MAOP. Hardness must be limited to assure welds are not susceptible to cracking. The proposed limit has been retained in the final rule.

PHMSA intends the proposed seam inspection requirements to apply to pipe seam welds and not to jointer or skelp welds. The title of this subparagraph is ''Seam quality control,'' and its requirements all refer to ''seam welds'' or ''seams.'' PHMSA does not consider that additional changes are needed to clarify the applicability of these requirements.

Section 192.112(e), Mill Hydrostatic Test

Most commenters objected to the proposed requirement that mill hydrostatic tests be held for 20 seconds. They noted that mills typically follow API 5L, which specifies a hydrostatic test of 10 seconds and that changing this standard could reduce mill productivity. One operator also noted that a more rigorous qualification test is already specified elsewhere in the proposed regulation.

One manufacturer would have limited the required maximum test pressure to 3,000 psi if there are physical limitations in mill test equipment that preclude obtaining higher pressures. The manufacturer stated that most mills cannot achieve test pressures above 3,000 psi, which is the maximum specified in API 5L and that upgrades to equipment would cost from $0.5 to $4 million per tester.

Response

PHMSA agrees that a 20-second mill hydrostatic test is not needed and has revised the final rule to reduce the required hold time to 10 seconds. While a longer mill hydrostatic test may allow the discovery of more pipe defects, the benefit is marginal. The pipeline will later be subject to a much longer hydrostatic test prior to being placed in service according to 192.505(c). Moreover, in the case of Class 1 and 2 locations, the pipe will be tested at a higher stress level than the mill hydrostatic test according to 192.620(a)(2).

PHMSA does not consider it appropriate to limit the maximum test pressure to reflect the reported mill limitations. In practice, the need for tests above 3,000 psi should be rare. Test pressures that high would only be required for pipeline in a Class 3 location operating at a very high MAOP.

Section 192.112(f), Coating

INGAA, GPTC, and eight pipeline operators all objected to the proposed requirements that would have limited operation at an alternative MAOP to pipe coated with fusion bonded epoxy (FBE). The commenters noted that specifying any single coating type would stifle innovation. They suggested that a performance-based requirement would be more appropriate. The important performance characteristics they identified include non-disbonding and non-cracking. Two operators would add non-shielding, and GPTC suggested specifying that coating must meet or exceed the protection of FBE.

GPTC and one operator requested clarification that girth welds can be coated with other than FBE. GPTC also requested clarification that the proposed requirement in subparagraph 2 that coatings used for trenchless installation must resist abrasion and other damage applies to the coatings described under subparagraph 1.

Response

PHMSA agrees that specifying a particular coating could stifle innovation and we have revised the final rule to require non-shielding coatings. Eliminating reference to FBE coating in this section obviates the need for additional changes to note that girth welds can be coated with other than FBE.

PHMSA has made a minor change in response to GPTC's request for clarification. Subparagraph 192.112(f)(2)

now requires that coatings used for trenchless installation must resist abrasions and other installation damage ''in addition to being non-shielding.''

Section 192.112(g), Flanges and Fittings

INGAA and three pipeline operators generally supported the proposed requirements for certification records and a pre-heat procedure for welding of components with CE greater than 0.42 percent, but maintained that existing standards and operator supplemental requirements are adequate to assure the integrity of flanges and fittings. The operators cited specific standards to which fittings and flanges should be purchased. Another operator noted that the proposed requirements go beyond API and ASTM standards, and suggested that the new requirements should be part of an industry standard. This operator also suggested that PHMSA establish a minimum size below which certifications would not be required.

GPTC requested clarification as to what certification is required and what requirements/specifications are to be certified.

Response

PHMSA has concluded that no changes are needed to the standards proposed for flanges and fittings. It is likely that flanges and fittings procured to current standards will meet the rule's requirements. PHMSA will review the degree of compliance during inspections of pipelines being constructed or upgraded for operation at an alternative MAOP. PHMSA does not agree that the proposed requirements go beyond API and ASTM standards. Fittings, flanges and valves manufactured to API, ASTM, and/or ASME/ANSI standards should not be operated above the maximum operating pressure limits of those industry standards for the product rating. This rule change is not intended to increase maximum operating pressure limits or designated pressure or temperature rating of referenced code standards.

In the final rule, PHMSA has clarified that certification must address chemistry, strength and wall thickness.

Section 192.112(h), Compressor Stations

Commenters expressed concern about the proposed requirement to limit compressor station discharge temperatures to 120 degrees Fahrenheit (49 degrees Celsius) unless testing shows the coating can withstand higher temperatures in long-term operations. INGAA and four pipeline operators would allow ''research'' in addition to testing to permit operation above 120 degrees Fahrenheit. INGAA submitted a white paper titled ''A Review of the Performance of Fusion-Bonded Epoxy Coatings on Pipelines at Operating Temperatures Above 120 °F'', dated May 16, 2008, describing research it believes is relevant. The commenters stated that more testing is not needed, because FBE coating has been shown effective by research and experience in service. They maintained that disbonding may occur but is irrelevant because FBE coating is conductive and cathodic protection is still effective.

One pipeline operator would have allowed operation at a higher compressor station discharge temperature if justified by test or data held by the manufacturer, coating applicator, or operator. The operator maintained that modern coating can withstand higher temperatures, and that maintaining 120 degrees Fahrenheit may be impractical on hot days (during which peak loads often occur) in southern locations. Another operator suggested allowing operators to rely on FBE manufacturers' specifications as the ''testing'' adequate to allow operation above 120 degrees Fahrenheit, limiting operation to 90 percent of the manufacturer's continuous operating temperature. Another operator suggested allowing a long-term coating integrity monitoring program as an alternative to designing compressor stations to limit discharge temperature to 120 degrees Fahrenheit.

A state pipeline safety regulatory agency suggested that alternative approaches be allowed. The agency suggested that operators could install heavier walled pipe and operate at conventional MAOP for the distance required to assure that pipe wall temperatures would be below 120 degrees Fahrenheit. This commenter stated its belief that this would be a simpler and cheaper solution to the concern over compressor station outlet temperature and that its use should not be precluded.

Response

PHMSA is not persuaded by the arguments put forth by commenters, and in the INGAA white paper titled ''A Review of the Performance of Fusion-Bonded Epoxy Coatings on Pipelines at Operating Temperatures Above 120 °F'', dated May 16, 2008, that operation above 120 degrees Fahrenheit is simply acceptable. In fact, the INGAA white paper confirms that disbonding and possibly cracking of FBE coating is more likely to occur at operating temperatures above 120 degrees Fahrenheit. PHMSA disagrees that disbonding is irrelevant because disbonded FBE remains conductive and an operating cathodic protection system will protect the pipeline from corrosion.

External corrosion is one of the most significant threats affecting steel pipelines. PHMSA regulations require two levels of protection against this threat: Coating and cathodic protection. These requirements are intended to provide redundant protection. If coating fails, cathodic protection continues to protect the pipe. If cathodic protection fails, the coating is still present. PHMSA agrees that it is important that disbonded coating remain conductive to assure continued protection by cathodic protection. This is why the rule has been revised to require ''non-shielding'' coating. At the same time, PHMSA does not consider it acceptable to ignore known circumstances in which one of the protections against corrosion is likely to fail simply because the other exists. If PHMSA believed only one level of protection were needed, the regulations would require either coating or cathodic protection. INGAA's white paper confirms that there is a significant likelihood that one of the levels of protection against corrosion (*i.e.*, coating) will fail if operated above 120 degrees Fahrenheit. For pipelines to be operated at an alternative MAOP, where the margin for corrosion is smaller than for pipelines conforming to the existing regulations, PHMSA will not accept this higher likelihood of failure of the coating system.

Nevertheless, PHMSA recognizes that improvements in coating systems may allow operation above 120 degrees Fahrenheit without significantly higher likelihood of disbonding. Thus, the rule allows operation above this temperature if research, testing, and field monitoring tests demonstrate that the coating type being used will withstand long-term operation at the higher temperature. The operator must assemble and maintain the data supporting higher-temperature operation. Research, testing and field monitoring must be for coating by the same manufacturer and must be specific to the brand of coating (if the manufacturer makes more than one brand), application temperature, or operating temperature rated coating.

PHMSA agrees that a long-term coating integrity monitoring program can also assure that coating remains effective at higher operating temperatures, but the effectiveness of such a program depends on how it is structured and implemented. PHMSA would expect, for example, that a monitoring program being used as a basis for operating at temperatures above 120 degrees Fahrenheit would include periodic examinations to assure

coating integrity (*e.g.*, direct current voltage gradient). PHMSA has modified the final rule to allow a long-term coating integrity monitoring program to be used as a basis for allowing pipe temperatures in excess of 120 degrees Fahrenheit, but operators must submit their programs to the PHMSA pipeline safety regional office in which the pipeline is located for review before pipeline segments may be operated at alternative MAOP at these higher temperatures. PHMSA's review will help assure that the monitoring programs are comprehensive enough to assure long-term coating integrity, to identify instances in which coating integrity becomes degraded, and to address those problems. An operator must also notify a state pipeline safety authority when the pipeline is located in a state where PHMSA has an interstate agent agreement, or an intrastate pipeline is regulated by that state.

Where compressor station compression ratios raise the temperature of the flowing gas to above 120 degrees Fahrenheit, operators should consider installing gas coolers at compressor stations. This practice has been successfully used in the industry to cool the gas stream to not damage the pipe external coating.

PHMSA agrees that the alternative of heavier walled pipe operated at conventional MAOP for the distance required to assure that pipe wall temperatures do not exceed 120 degrees Fahrenheit suggested by the state regulator is also an acceptable method of addressing the concern of high-temperature operation. PHMSA has made minor changes to the rule to make it clear that this option is not precluded.

C.2.3. Construction Requirements

Section 192.328(a), Quality Assurance (QA)

Four pipeline operators supported the QA requirements of proposed § 192.328(a). A state pipeline safety regulator noted that subparagraph 2(ii) duplicated requirements in proposed § 192.620(c)(5) and questioned why both sub-rules were needed.

Response

PHMSA's experience in regulating pipelines operating at higher MAOPs under special permits has indicated that control of quality is subject to frequent problems. As a result, PHMSA considers that an explicit requirement for a QA plan during construction is needed. The requirements of proposed § 192.620(c)(5) also addressed quality concerns, but they relate principally to personnel qualification. As described below, this proposed paragraph has been revised in the final rule to more explicitly address the qualification of personnel performing construction tasks.

Section 192.328(b), Girth Welds

INGAA and four pipeline operators suggested moving the requirement for testing of girth welds on existing pipelines from § 192.328 to § 192.620. They believe that the requirement is inappropriately located in a construction section that is not otherwise applicable to existing pipe.

Response

PHMSA agrees and has moved this requirement in the final rule to § 192.620(b) as one of the criteria for determining when an existing pipeline can be operated at alternative MAOP.

Section 192.328(c), Depth of Cover

Three pipeline operators supported the proposed depth of cover requirements, although one would clarify that they apply to new construction. Another operator suggested that allowance be made for less depth of cover if alternative means of protection are used (*e.g.*, concrete slabs) that offer equivalent protection.

Response

PHMSA agrees that alternative protection is acceptable and has revised its proposed rule accordingly in this final rule. To satisfy the rule, alternative protection must provide equivalent protection and the operator must demonstrate this equivalence. Simply providing barriers without demonstrating that they provide equivalent protection is not sufficient.

PHMSA did not intend this requirement to apply to new construction only and thus, has not changed the requirement in the final rule. PHMSA considers that a pipeline to be operated at alternative MAOP, including existing pipelines, must have superior protection from outside force damage. PHMSA recognizes that existing pipelines constructed in compliance with § 192.327 may have less cover than required in this rule. Operators of those pipelines desiring to implement alternative MAOP must provide equivalent protection for those segments not meeting the depth of cover requirements.

Section 192.328(d), Initial Strength Testing

A number of commenters objected to the proposed requirement that any failure indicative of a fault in material disqualifies a pipeline segment from operation at an alternative MAOP. The commenters suggested that a root cause analysis be permitted, consistent with previously-issued special permits, to determine if the fault indicates a systemic issue. Disqualification is only appropriate, according to the commenters, if a systemic issue exists, and failures can result from isolated causes. One operator would also clarify that these requirements apply to base pipe material rather than flanges, gaskets, etc. Another suggested that multiple test failures can actually be beneficial, because they prompt additional failure analyses that better assure the integrity of the non-failed pipe.

Response

PHMSA agrees that a single failure can reflect an isolated cause and should not disqualify an entire segment from operation at an alternative MAOP if it can be demonstrated that the failure is not indicative of a problem that could affect the rest of the pipeline segment. PHMSA has revised the final rule to allow a root cause analysis of any failures as a way of justifying qualification of a pipeline segment. Root cause analysis must demonstrate that failures in alternative MAOP pipeline segments are not systemic. Operators are required to notify PHMSA of the results of their evaluations, which will allow us to validate their conclusions.

Section 192.328(e), Cathodic Protection

INGAA and seven pipeline operators suggested that this paragraph be deleted, since it duplicates requirements in § 192.455. One of the operators further commented that whether cathodic protection was operational within 12 months becomes irrelevant once the line is assessed and its condition is known.

Response

PHMSA recognizes that § 192.455 requires that cathodic protection be operational within 12 months of placing a pipeline in service but does not consider the requirement in this rule duplicative. Operators who complied with § 192.455 will, of course, meet this criterion for operation at alternative MAOP. Those who did not install cathodic protection within 12 months of initial operation will not, whether or not § 192.455 was effective at the time. PHMSA considers it critical that cathodic protection be provided as quickly as possible after construction, because there are some forms of corrosion that can result in high corrosion rates (*e.g.*, microbiological corrosion and corrosion from current

faults) producing significant loss of pipe wall in a short period of time. Operation at alternative MAOP is thus not allowed for those pipelines for which cathodic protection was not provided within 12 months of initial operation.

PHMSA has moved this requirement from § 192.328, a section addressing construction requirements, to § 192.620(d)(8), a section addressing operations and maintenance requirements. PHMSA believes that this change will help emphasize that this is not simply a re-statement of the requirement in § 192.455.

Section 192.328(f), Interference Currents

Three pipeline operators supported the proposed requirements in this subparagraph (one with the understanding that § 192.473 will govern for an existing Class 1 pipeline). Taking a contrary position, another operator urges PHMSA to delete this paragraph because the requirement is already addressed in the regulations and it is difficult to address all interference issues during construction without active cathodic protection (cathodic protection is not required to be in service until 12 months after construction).

Response

It is important to address the potential for interference currents as early as possible. Some pipelines have experienced significant wall loss in the first months of operation due to the effect of interference currents. While it may be true that all interference currents cannot be identified before cathodic protection is in operation, many can be anticipated and remediated during construction. These include the effects of electric transmission lines or electrified trains sharing or paralleling a right of way, or other ground beds in proximity to the pipeline's route. Operators need to address, during construction, interference currents that can be anticipated. Review of cathodic protection effectiveness once it is in operation may identify additional issues, and operators need to deal effectively with these. It is not necessary, however, and potentially deleterious to pipeline integrity to delay all actions addressing interference currents until this time. The provisions proposed in the NPRM remain unchanged in the final rule.

C.2.4. Eligibility for and Implementing Alternative MAOP

Section 192.620(a), Calculating an Alternative MAOP

Most commenters from the pipeline industry objected that the proposed requirements for calculating an alternative MAOP did not recognize that class locations may change once a pipeline is in service. They noted that § 192.611 recognizes this for conventional MAOP pipelines, and allows operation following a class change at a higher MAOP than would be required for new pipe in that class provided that testing was performed at a sufficiently high pressure. The commenters sought similar treatment for alternative MAOPs in this paragraph and conforming changes to the language in § 192.611 concerning class location changes. These commenters also noted that the proposed rule does not explicitly address compressor stations, meter stations, etc.

Two pipeline operators would reduce the test factor for Class 2 locations from 1.5 to 1.25. They contended that this would allow testing of Class 1 and 2 pipelines to be done together, thereby minimizing environmental disruption that would be associated with separately testing Class 2 to a higher factor. They noted that testing of both classes together would not be possible with a specified test factor of 1.5 for Class 2, since this would overstress the Class 1 pipe (*i.e.*, exceed 100 percent SMYS).

One operator suggested allowing a test factor of 1.25 for existing pipelines and requiring 1.5 only for lines installed after the effective date of this rule. They contended that specifying 1.5 as a design factor for Class 2 results in the alternative MAOP for Class 2 pipe segments being less than currently allowed for existing pipelines.

Two operators suggested that PHMSA amend the proposed rule to explicitly state that the design factors will increase for facilities (stations, crossings, fabricated assemblies, etc.) upgraded in accordance with the rule. One suggested stating that an increase of approximately 11 percent is allowed. The other suggested specific design factors of 0.56 for station pipe, 0.67 for fabricated assemblies and uncased road/railroad crossings in Class 1 areas, and 0.56 for such assemblies/crossings in Class 2 locations.

The state pipeline safety regulatory agency commented that the rule should contain only one provision regarding the test pressure used in determining the MAOP. This commenter noted proposed § 192.620(a)(2)(ii) limits MAOP to 1.5 times the test pressure in Class 2 and 3 locations and that proposed § 192.620(c)(3) allows 1.25 times test pressure in all classes. The commenter contends that a reference in the latter requirement to the former creates a confusing circularity.

Response

PHMSA agrees that the proposed regulation could be more restrictive than existing requirements in § 192.611 in the event of a class change. As noted in the comments, the existing regulation allows operation at a higher MAOP following a class change (*i.e.*, higher than would be required for a new pipeline installed in that class location) provided that testing has been conducted at a sufficiently high pressure to demonstrate adequate safety. PHMSA has revised the final rule to be more consistent with § 192.611 in allowing operation at a higher pressure following a class change.

PHMSA has reduced the required test pressure for existing pipelines (*i.e.*, pipelines installed prior to the effective date of the rule) in Class 2 locations to 1.25 times MAOP. This is consistent with § 192.611(a)(1). However, if Class 2 pipeline is tested at 1.25 times MAOP, then operation at an increased alternative MAOP following a class change is not allowed. Such testing does not provide sufficient assurance of safety margin for the higher population Class 3 areas. Operators who desire to operate at higher pressures following a change from Class 2 to Class 3 must test their pipe at 1.5 times alternative MAOP.

PHMSA has included alternate design factors for existing facilities and fabricated assemblies to be operated at alternative MAOP. PHMSA does not agree that design factors for facilities and fabricated assemblies are needed for new installations (*i.e.*, those constructed after the effective date of this final rule). PHMSA expects design factors for new facilities (stations, crossings, fabricated assemblies, etc.) to be in accordance with § 192.111(b), (c), and (d).

Section 192.620(b), When may an alternative MAOP be used?

Proposed paragraph b(6) limited eligibility for an alternative MAOP for pipeline segments that have previously been operated to those that have not experienced any failure during normal operations indicative of a fault in material. A number of commenters objected to this limitation, which is similar to the limitation in proposed § 192.328(d) described above. Here, again, the commenters indicated that root cause analysis should be allowed and operation at an alternative MAOP

should be proscribed only if the evaluation reveals a systemic issue.

GPTC requested that paragraph b(3) be clarified. That paragraph requires that segments to be operated at alternative MAOP must have remote monitoring and control provided by a supervisory control and data acquisition system. GPTC requested that PHMSA clarify the degree of ''control'' that is required and questioned whether remote control of flow and pressure are required or if remote control of valves is all that was intended.

One pipeline operator requested that either this paragraph or existing § 192.611 be revised to clarify the applicability of the current 72/60/50 percent SMYS limitation on hoop stress. The operator believes it is unclear when and if the § 192.611 limitations on hoop stress apply if an alternative MAOP is used.

Response

PHMSA agrees that exclusion from operation at an alternative MAOP is appropriate only if a failure during mill hydrostatic testing, construction hydrostatic testing, or operation is indicative of a systematic issue. PHMSA has revised the final rule here (in this paragraph and in § 192.328(d) above) to allow root cause analysis with operators required to notify PHMSA of the results.

Control requires that operators monitor pressures and flows as well as compressor start-up and shut-down. Valves must also be able to be remotely closed. The final rule has been modified to make these requirements clear.

PHMSA has revised § 192.611 to include hoop stress limits applicable to pipeline operating at alternative MAOP.

Section 192.620(c), What must an operator do to use an alternative MAOP?

INGAA and four pipeline operators suggested that an engineering analysis should be allowed for existing pipe that was not tested to 125 percent of the alternative MAOP. They noted that some existing pipe may have been tested to higher pressures but not quite to 125 percent, and that this pipe should not be automatically excluded. They noted that experience shows that the vast majority of existing pipe is tested successfully without systemic problems, and that the allowance for 95 percent vs. 100 percent of girth weld examinations in proposed § 192.328(b)(2) establishes a precedent for allowing existing pipe that can not fully meet new pipe criteria to operate at an alternative MAOP.

One pipeline operator suggested that the rule either state that pressure test must be at 125 percent of alternative MAOP for Classes 1, 2, and 3 or be revised to refer to the factors in § 192.620(a)(2)(ii). They contended the proposed language was unclear as to whether 125 percent is sufficient in all class locations.

A state pipeline safety regulatory agency again suggested that the rule should contain only one provision regarding test pressure (see discussion under § 192.620(a) above).

Several commenters addressed training and qualification requirements in proposed § 192.620(c)(5). The state agency noted that they duplicated proposed § 192.328(a)(2)(ii) and essentially applied operator qualification (OQ) requirements (subpart N) to construction personnel. The state agency suggested it would be simpler and less confusing if it were done in subpart N. One pipeline operator also suggested deleting paragraph c(5) and referring to subpart N. This operator noted that the proposed rule used undefined and vague language—terms such as QC and integrity verification (which could be confused with assessments under subpart O). The operator further noted that subpart N requires OQ and that the meaning of its requirements is well known.

GPTC requested clarification that the requirements are only applicable to segments that operate at an alternative MAOP and as to the meaning of the term ''integrity verification method.''

Response

PHMSA does not agree that an engineering analysis provides an adequate basis to justify operation at alternative MAOP. Operators who desire to use an alternative MAOP for existing pipelines that were not tested to sufficient pressures should re-test their pipelines.

PHMSA has revised the final rule to refer to paragraph (a) for test pressures rather than duplicating them. PHMSA agrees that this change could help avoid confusion.

PHMSA agrees that applying the known requirements of subpart N, related to the qualification of personnel performing work on the pipeline, would likely cause less confusion than specifying the alternative, but similar, requirements included in the proposed rule. Pipeline operators are familiar with subpart N, and their training programs under that subpart have been subjected to audits by PHMSA or states, as appropriate. By its terms, though, subpart N does not apply to construction tasks, since they are not ''an operations or maintenance task''—one part of the four-part test in § 192.801(b). PHMSA has revised this final rule to provide that ''construction'' tasks associated with implementing alternative MAOP be treated as covered tasks notwithstanding the definition in § 192.801(b). For those tasks, then, the requirements of subpart N will apply. This change obviates the concerns expressed by GPTC and the state agency. (PHMSA disagrees with the state comment, however, that the requirement as proposed duplicated § 192.328(a)(2)(ii), as the latter requirement applied only to girth weld coating and not to all construction-related tasks.)

C.2.5. Operation and Maintenance Requirements

Section 192.620(d), Additional O & M Requirements

Two pipeline operators and one state pipeline regulatory agency suggested that covered pipelines should be held to the same requirements as pipelines in HCA under subpart O. They believe that this would make most of § 192.620(d) unnecessary and would increase flexibility for operators.

The state regulator noted that it would avoid confusion that might be created for covered pipelines that would be subject to both sets of requirements. One operator commented that no technical basis is provided for the proposed requirements, while subpart O is based on science and research.

Response

PHMSA disagrees with these comments and has not changed the final rule because some provisions are more restrictive than subpart O.

Section 192.620(d)(1), Identifying Threats

INGAA and three pipeline operators suggested eliminating the requirement for a threat matrix and the implied need for additional preventive and mitigative measures. They noted that operation at incrementally higher pressures does not inherently increase risk or introduce new threats and that the proposed rule already includes requirements sufficient to address the incremental change.

Response

PHMSA does not agree that the rule necessarily addresses all threats to a pipeline. The rule addresses many known threats; however, other threats may exist or develop that may affect the pipeline's integrity. It is up to the operator to identify and evaluate possible pipeline threats and therefore PHMSA retained the requirement to identify and evaluate threats consistent with § 192.917. The term ''assess'' was changed to ''evaluate'' to avoid

confusion with a similar term used in integrity management.

Section 192.620(d)(2), Notifying the Public

INGAA and five pipeline operators would eliminate the requirements in this proposed section. They contended they are unnecessary as they duplicate requirements in existing § 192.616 for public education. They further contended that a dedicated notification, specific to operation at a higher pressure, is not needed. One operator would delete subparagraph (d)(2)(ii) and replace it with a one-time notification before operation under an alternative MAOP begins. This operator believes that the proposed requirement for a continuing information program is excessive, but that a one-time notification could be appropriate.

Response

Because of the higher consequences of operating a pipeline at a higher alternative MAOP (and thus a greater impact radius), PHMSA believes that additional public information is necessary to inform any stakeholders living along the right-of-way of this increase. Where the alternative MAOP pipeline is in an HCA already identified per Subpart O, then no additional notification is necessary beyond what is already required.

Section 192.620(d)(3), Responding to an Emergency in High Consequence Areas

Most industry commenters suggested deleting the requirement that operators be able to remotely open mainline valves. They maintained this requirement is unnecessary as an emergency response measure and is contrary to the operating practice of many gas transmission pipeline operators. Some also opposed a requirement for remote pressure monitoring, indicating that it would be costly to provide and would add no value. AGA commented that the language relating to remote control of valves was too prescriptive and could have the unintended consequence of requiring operators to make their safety procedures less stringent (presumably by allowing remote opening of valves).

GPTC and two pipeline operators questioned the requirement for remote valve operation if personnel response time to the valves exceeds one hour. They argued that the one-hour criterion is arbitrary and not justified by research. One operator suggested that it is also counter to experience. These commenters also noted that it is unclear how the response time is to be applied, from the time of notification of an event, from the time a responder is requested to go to the valve location, or from some other triggering event. GPTC suggested that PHMSA consider a requirement based on mileage, similar to § 192.179. One operator indicated that the need for remote control should be based on risk analysis rather than an arbitrary specified response time.

Response

PHMSA agrees that the proposed requirement that operators be able to remotely open mainline valves is not needed for emergency response. PHMSA agrees that it is more conservative to require local action to open valves that may have been closed in response to an emergency. PHMSA has modified the final rule to eliminate the requirement that operators be able to remotely open valves. PHMSA considers it important to be able to monitor pressure in order to know that valve closure has been effective. PHMSA has retained this requirement.

PHMSA considers a one-hour response time appropriate and reasonable. It provides time to respond to events while limiting the consequences of an extended conflagration. In the final rule, PHMSA has clarified that the one-hour period begins from the time an event requiring valve closure is identified in the control room and is to be determined using normal driving conditions and speed limits.

Section 192.620(d)(4), Protecting the Right-of-way

All commenters except the state pipeline safety regulatory agency and the steel/pipe manufacturers addressed this section. All contended that the requirement to patrol the right-of-way 26 times per year was excessive and that experience indicates that more frequent patrolling does not prevent pipeline events. They maintained that the proposed frequency has no apparent basis other than that it is the patrolling frequency required for hazardous liquid pipelines and that application of a hazardous liquid pipeline frequency to gas transmission lines is inappropriate.

One operator noted that its experience with monthly patrols has demonstrated that there is very little excavation activity during winter and the summer growing season, making patrols then of little value. The commenters' proposals for alternate patrolling intervals varied, with some suggesting intervals that would vary based on the class location. INGAA suggested patrolling every 4½ months and after known events.

INGAA and one pipeline operator suggested deleting the requirement for a soil monitoring plan, because it would be costly and only duplicates other existing requirements.

INGAA and six pipeline operators suggested deleting the requirement to maintain depth of cover. In its place, they would require restoring depth of cover or providing appropriate preventive and mitigation measures only where damage may occur due to loss of cover. They noted that maintaining the original depth of cover is impractical and unnecessary. Normal erosion and other events can reduce depth of cover, but that reduction does not necessarily lead to an increased risk of damage. Action may be needed in limited circumstances and providing other protection in those circumstances may be more effective and less costly than restoring the original depth of cover. One operator suggested that a monitoring/maintaining depth of cover requirement should be driven by events or risk analysis and that discussion in the preamble of the NPRM implied such an approach. This operator suggested allowing engineered solutions in addition to restoring depth of cover.

INGAA and four pipeline operators would delete or relax the requirement for line-of-sight pipeline markers. INGAA noted that discussion at the March 2007 public meeting indicated that such markers add no value. One operator suggested that it would be more effective to emphasize one-call damage prevention in the preamble of the final rule. Another operator noted that installation of such markers is ''non-trivial,'' and that there is no data or analysis supporting the need for them. Yet another operator commented that the intent of the requirement is unclear and suggested that circumstances other than agricultural areas and large bodies of water (exclusions included in the proposed rule) would also make it difficult to install line-of-sight markers (*e.g.*, steep terrain, swamps).

INGAA and five pipeline operators objected to what they characterized as an ''open ended'' requirement to implement national consensus standards for damage prevention. These commenters suggested that the requirements focus on the damage prevention best practices identified by the Common Ground Alliance (CGA) and require that operators implement the CGA best practices that apply to their situation. One operator suggested that operators be allowed to evaluate and choose among CGA practices. Another operator also supported a right to choose, indicating that the CGA guide includes no expectation that operators will adopt all best practices.

INGAA and five pipeline operators objected to the proposed requirement for a right-of-way management plan, because it duplicates existing requirements for damage prevention.

Response

PHMSA has revised the required patrol frequency to once per month, at intervals not to exceed 45 days. The decision to reduce the patrolling frequency from 26 patrols per year was based on further analysis of the value added by the cost of additional patrolling, PHMSA's greater experience with administering special permits, and comments from industry and public advocates supporting risk-based requirements rather than a one-size-fits-all approach. PHMSA believes that the right of way management plan required by § 192.620(d)(4)(vi), coupled with the patrolling requirement, will provide appropriate safety coverage through requiring an operator to develop and implement an array of actions based on the risk of third-party damage to the pipeline. These preventative actions may well include additional patrolling above what is required by this rule in areas that are more heavily-populated or that possess greater chances for third-party activities in the vicinity of a pipeline.

PHMSA has retained the requirement for a soil monitoring program. Gas transmission pipelines are often located in areas that can exhibit unstable soils, such as clay, hills, and mountainous areas. It is important to assure that stresses caused by soil movement do not damage pipelines in these areas with reduced design safety factors. PHMSA recognizes that operators may already address these issues in their damage prevention plans or other operating and maintenance procedures. If so, an additional plan is not required. Operators must be able to demonstrate, during regulatory audits, that soil monitoring is addressed within their procedures.

PHMSA has retained the requirement for line-of-sight pipeline markers. Outside damage is the most significant threat to gas transmission pipelines, resulting in the greatest number of accidents. These accidents occur despite current requirements for pipeline markers. Those requirements in § 192.707 already require that markers be maintained ''as close as practical'' in the areas required to be covered. PHMSA continues to believe that it is important to provide line-of-sight markers for pipelines operating at alternative MAOP in order to reduce the frequency of outside damage. PHMSA supports one-call programs, and regularly takes actions to encourage and foster their use. Still, damage incidents occur. It is important to reinforce the need for using a one-call program by providing visual evidence that a pipeline is located in an area subject to potential excavation.

At the same time, PHMSA recognizes that installation of line-of-sight markers is not feasible in all locations. The rule does not require installation of line-of-sight markings in agricultural areas or large water crossings such as lakes and swamps where line-of-sight markers are not practicable. The marking of pipelines is also subject to FERC orders or environmental permits and local laws/regulations. The rule does not require installation where these other authorities prohibit markers.

PHMSA also retained the requirement for a right-of-way management plan since PHMSA data indicates recurring similarities in pipeline accidents on construction sites where better management of the right-of-way could have prevented the accidents. This provision is not redundant with existing damage prevention program requirements, but requires operators to take further steps to integrate activities under those programs to provide for better protection of the right-of-way.

Section 192.620(d)(5), Controlling Internal Corrosion

INGAA, GPTC, four pipeline operators and the state pipeline safety regulatory agency would require a program to monitor gas quality and to remediate internal corrosion as needed but would delete all the specific requirements in this section. One operator suggested that a program complying with Subpart I is all that is needed. The state regulatory agency noted that the NPRM provided no rationale for more stringent or prescriptive requirements than those recently published as § 192.476.

Two pipeline operators objected to the requirement for filter separators, contending that these devices are not effective for dealing with upsets involving free water and can provide a false sense of security. One suggested that other actions could be required to assure gas quality. Two other operators suggested that properly designed gas separators would be as effective as filter separators.

One operator objected to requirements for cleaning pigs, inhibitors, and sampling of accumulated liquids. Another opposed the requirement for inhibitors. These operators noted that these actions are not needed if gas monitoring confirms no deleterious constituents. They maintained that the requirements are unnecessary and can potentially result in unintended consequences and risks.

AGA contended that operators should be allowed to determine appropriate methods for monitoring gas quality and that these methods need not always require testing by individual operators. AGA believes this is especially true if tariffs and operating experience demonstrate the absence of contaminants. One pipeline operator asked that PHMSA clarify that the required chromatographs are for analysis of corrosive constituents and need not provide complete analysis for heating value or other purposes.

Two pipeline operators suggested that PHMSA define deleterious gas stream constituents of concern. Two pipeline operators suggested that the limits on gas constituents should be deleted or revised based on research and testing. They believe that the proposed limits are not technically justified. One further noted that deleterious effects may result from contaminants acting ''in concert.''

One pipeline operator would revise the requirement for review of an operator's internal corrosion monitoring and mitigation program to annual review because there is no technical justification for quarterly reviews. Another operator suggested that the gas quality requirements be deleted, as they may conflict with tariffs and result in duplicate enforcement. This operator also suggested that sampling intervals be established by reference to section § 192.477 and agreed that a requirement for quarterly review of internal corrosion monitoring programs is excessive.

Response

PHMSA concludes that the proposed requirements do not duplicate or conflict with those in the recently published § 192.476. The latter requirements deal principally with design considerations related to internal corrosion, while those included here address monitoring to determine whether conditions conducive to such corrosion occur. Similarly, § 192.477 only requires monitoring if corrosive gas is present. The requirements included here specify contaminants to be monitored and limits to be achieved. Since § § 192.476 and 192.477 represent the requirements in subpart I related to internal corrosion, PHMSA does not agree that a program complying with subpart I alone is sufficient.

PHMSA has revised the requirement for use of cleaning pigs, inhibitors, and collection of accumulated liquids to apply only in those situations in which corrosive gas is determined to be

present. For the particular case of hydrogen sulfide, PHMSA has specified a limit (0.5 grain per hundred cubic feet, 8 parts per million (ppm)) above which this requirement applies.

PHMSA has retained the requirements for gas monitoring. It is important to monitor the gas stream to assure that internal corrosion will not occur or will be identified if corrosion does occur. Continuous monitoring is the most effective way of doing this. PHMSA agrees that monitoring equipment required by this rule is for the purpose of analyzing corrosive gas constituents and need not provide estimates of heating value or other characteristics. Operators can rely on others (*e.g.*, those supplying gas to them) to perform monitoring, but they must assure that such monitoring covers all gas streams and meets the requirements of this rule, including the need for continuous monitoring. PHMSA has also retained the requirement to review the internal corrosion monitoring program quarterly. Such reviews are needed to help assure that upset conditions that could potentially cause internal corrosion are identified and addressed promptly. Annual reviews are insufficient to do this.

PHMSA has revised the limit for hydrogen sulfide to 1.0 grain per hundred cubic feet, or 16 ppm. (PHMSA has also presented this limit in both forms of measurement, as suggested by one commenter). This limit is more consistent with typical tariff limits. At the same time, the final rule requires that additional mitigative actions, including use of cleaning pigs and inhibitors be required when the hydrogen sulfide content exceeds 0.5 grain per hundred cubic feet, as this concentration increases the likelihood of internal corrosion.

The final rule clarifies that deleterious gas stream constituents also include entrained or suspended solids (regardless of size) that are detrimental to the pipeline or pipeline facilities.

Section 192.620(d)(6), Controlling Interferences That Can Impact External Corrosion

Two pipeline operators requested that we clarify that interference surveys are only required where interference is likely, are to be developed using operator judgment, and can be performed using voltage measurements versus ''current.''

Response

PHMSA has clarified the final rule to require that surveys be performed in areas where interference is suspected. Operators should consider the proximity of potential sources of interference, including electrical transmission lines, other cathodic protection systems, foreign pipelines, and electrified railways in deciding where surveys are needed. Operators must conduct surveys capable of detecting the effect of interfering currents, but these surveys need not measure ''current'' directly.

Section 192.620(d)(7), Confirming External Corrosion Control Through Indirect Assessment

INGAA and four pipeline operators requested that this section be revised to require close interval survey (CIS) alone versus one of CIS, direct current voltage gradient (DCVG), or alternating current voltage gradient (ACVG). One of these operators requested clarification that indirect examination is not necessary if additional measures are taken to assure the integrity of the pipeline. Yet another operator suggested that this section be revised to allow other methods of indirect assessment, noting that C–SCAN (which is a current measurement technique) is one possibility that appears to be precluded by the proposed language. All of these commenters plus three additional pipeline operators requested that the timeframe for conducting these examinations be relaxed from six months to one year. They noted that six months may often be impractical because of limitations associated with seasonal weather.

One pipeline operator would delete the proposed requirement for a coating survey of existing pipelines, maintaining that this examination is not needed, since the results of ILI and CIS show that the combination of coating and cathodic protection is working to protect against corrosion. This operator would move the requirement for indirect survey and coating damage remediation to § 192.328 to make it clear that this is a construction requirement applicable to new pipelines only. Another operator also commented that requirements to remediate construction damaged coating should be limited to new pipe only. This operator further requested deleting the proposed requirement to repair all voltage drops classified as moderate or severe by National Association of Corrosion Engineers (NACE), since it is unnecessary and impractical to repair every voltage drop. Another operator commented that operators should be allowed to develop specific repair criteria based on their experience.

INGAA and four pipeline operators would relax the proposed requirement to remediate construction coating damage to require either remediation or appropriate cathodic protection. They suggested that the proposed requirement conflicts with the NACE standard referenced in this section (NACE RP–0502–2002) and that coating remediation is not needed as cathodic protection provides adequate protection for areas affected by coating holidays. Another operator noted that the NACE defect classification guidelines are qualitative and that interpretation differences could result in differing repair expectations.

INGAA and two pipeline operators recommended relaxing the requirement to integrate indirect assessment results with ILI from six months to one year. They believe that more rapid integration is not needed and that the value of quicker integration is not explained in the NPRM. Another operator suggested there is an inconsistency in that paragraph (ii) requires action based on the results of one assessment while paragraph (iii) requires that the results of two assessments be integrated.

INGAA and three pipeline operators would delete the periodic assessment requirements of proposed paragraph (iv). They would move the requirements for location of CIS test points in proposed subparagraph (B) to § 192.328, as they contended these are more appropriate as construction requirements. These commenters would further revise the CIS location requirements to state that a CIS test station must be within one mile of each HCA, versus within each HCA. They contended that it is not practical to require a test station within each HCA, noting that the length of the pipeline in some HCAs may be very short. Another operator would combine subparagraphs (A) and (B).

Response

CIS is a technique to locate areas of poor cathodic protection and is considered a macro tool. Micro tools, such as DCVG or ACVG, must be used to locate small but critical coating holidays. C–SCAN, which is a current measurement technique, is considered a macro tool and will only find large coating holidays. Small coating holidays can be just as critical as large ones, especially in areas where cathodic protection potentials can be depressed. PHMSA considers it important to monitor coating condition. The comments suggesting that macro tools be allowed appear to be based on the premise that small coating holidays are not important as long as cathodic protection continues to protect the pipeline. As discussed above, PHMSA does not agree with this presumption, and here, again, does not agree that

either coating or cathodic protection is required; both are needed. PHMSA recognizes that if one accepts the presumption that assuring coating integrity is not important on pipelines subject to cathodic protection, then prompt resolution of coating issues is not important either. Since PHMSA does not accept the premise, PHMSA has not relaxed the proposed timeframes for conducting surveys or integrating results.

In particular, PHMSA does not agree that a one year interval should be allowed to assess coating adequacy. Experience has demonstrated that significant corrosion can occur during very short intervals. PHMSA notes that the proposed requirement potentially extends the period between the beginning of pipeline operation and coating assessment to 18 months—12 months after operation in which cathodic protection must be made operational (§ 192.455(a)(2)) plus the six months allowed here. PHMSA considers this to be the maximum period that should be allowed before determining coating adequacy. Proper planning and scheduling should allow operators to accommodate weather and other scheduling concerns. Operators can delay the start of operation at an alternative MAOP if they cannot schedule coating surveys within six months.

PHMSA's conclusion that coating integrity is important, regardless of the presence of cathodic protection, means that determining coating adequacy is important for existing pipelines as well as new construction. As such, it is not appropriate to move this requirement to a section applicable to new construction only. Further, it is not acceptable to rely on ILI or other assessment methods to identify corrosion after it has occurred. The purpose here is to prevent corrosion. ILI or other assessments are a second level of defense, detecting corrosion after it occurs, but PHMSA does not consider them to obviate the need for actions to prevent the problem from occurring in the first place. CIS is a verified method of determining if all of a segment is protected by appropriate cathodic protection potentials. The use of CIS will allow an operator to find any ''hot spots'' along the pipeline that could cause active corrosion. The CIS will find any depressed locations whereas a test station survey may miss such locations unless they are in close proximity to the test station.

With respect to proximity to a test station, PHMSA agrees that there could be situations in which it may not be practical to locate a test station within an HCA. This could occur, for example, when the HCA is determined by an identified site near the outer radius of the potential impact circle, in which case the length of pipeline in the HCA could be very short (on the order of several feet). Still, PHMSA does not agree that this limitation should be addressed by requiring that a test station be within one mile of an HCA. PHMSA has revised the final rule to require that a test station be located within an HCA if practicable and has retained the proposed requirement that test stations be located at half-mile intervals on pipelines to be operated at alternative MAOP.

Section 192.620(d)(8), Controlling External Corrosion Through Cathodic Protection

INGAA, GPTC and eight pipeline operators considered the requirement to address inadequate cathodic protection readings in six months to be excessive. They also noted that seasonal and land use issues make responding within one year much more reasonable, and suggested the proposed rule be changed accordingly. GPTC and one operator noted that the proposed change is inconsistent with an existing PHMSA interpretation, which states that remediation of inadequate cathodic protection readings is required before the next scheduled monitoring. The operator noted that this is typically one year (not to exceed 15 months), supporting the proposed change to a one-year response in this rule.

INGAA and three pipeline operators objected to the proposed requirement to conduct CISs after remediating cathodic protection problems to evaluate effectiveness. They noted that a CIS is not needed to confirm resolution of many problems (*e.g.*, loss of power, cut cable, short). They agreed that operators should confirm that remedial action was appropriate and effective, but contended that a requirement to perform a CIS after any remedial action is unjustified and excessive.

Response

As discussed above, experience has shown that significant corrosion damage can occur over brief periods. Pipelines operating at an alternative MAOP have less margin for corrosion than do pipelines operating at MAOP determined in accordance with § 192.111. Cathodic protection is an important protection against corrosion damage, as recognized by those commenting on this rule. PHMSA does not agree that it is acceptable to wait one year to resolve known cathodic protection problems. At the same time, PHMSA recognizes that there may be situations in which remediation in six months is not practical. PHMSA has revised the final rule to require operators to notify the PHMSA Regional Office where a pipeline is located (and states where appropriate) if inadequate cathodic protection readings are not addressed within six months, providing the reason for the delay and a justification that the delay is not detrimental to pipeline safety. This will allow regulators to review the circumstances of each situation in which resolution takes longer than six months and to make a judgment of adequacy based on the particular circumstances.

PHMSA agrees that it is not necessary to perform a complete CIS again to verify that any remedial action has addressed an identified problem. Commenters are correct in noting that problems such as a cut cable or short can result in inadequate cathodic protection readings and that correction of these problems can be verified without a new CIS. PHMSA has revised the final rule to require that operators verify that corrective action is adequate, leaving the means to do so up to the operator's discretion and judgment.

Section 192.620(d)(9), Conducting a Baseline Assessment of Integrity

Proposed § 192.620(d)(9)(iii) would require that headers, mainline valve by-passes, compressor station piping, meter station piping, or other short portions that cannot accommodate ILI tools be assessed using DA. INGAA and four pipeline operators objected to this requirement as unjustified and inconsistent with previous special permits. They suggested a change that would also allow pressure testing or development and implementation of a corrosion control plan. They further noted that these segments may be designed to § 192.111, may not operate at an alternative MAOP, and thus may not be subject to this section.

One operator also noted that there may be portions of a pipeline facility that will not be operated at an alternative MAOP. The operator requested clarification that the proposed requirements apply only to segments that are intended to operate at an alternative MAOP. This commenter also suggested an exclusion for small pipe and equipment to be consistent with a frequently asked question (FAQ) #84 on the gas transmission integrity management Web site (*http://primis.phmsa.dot.gov/gasimp/*). (The FAQ addresses whether small-diameter piping, *e.g.*, within a compressor station, must be considered to be part of an HCA. It states that potential impact

radii should be calculated, and a determination made as to whether an HCA exists, based on the diameter of individual pipeline segments.)

The same operator would also allow the baseline assessment for an existing pipeline segment to be conducted before operation at an alternative MAOP begins but within the assessment interval specified in subpart O rather than the proposed two years. The operator contended that there is no scientific basis to require assessments every two years, particularly if a pipeline segment is being managed under subpart O.

Response

PHMSA agrees that assessment of small-diameter station piping can be performed using pressure testing and has revised the final rule accordingly. PHMSA does not agree that it is acceptable for such a non-piggable pipeline to be under an unspecified corrosion control plan rather than to be subject to assessment.

PHMSA agrees that FAQ #84 addresses the same pipe, but does not agree that it is a precedent for determining whether a small-diameter pipeline requires assessment. An FAQ is advisory in nature and this FAQ provides guidance in the context of integrity management, on whether this pipeline should itself be determined to be an HCA. For this rule, additional assessment requirements are being applied to a pipeline operating at an alternative MAOP, regardless of whether it is in an HCA. PHMSA has revised this paragraph to clarify that it applies only to a pipeline operating at an alternative MAOP. Small-diameter pipe within a station that does not operate at alternative MAOP would not be affected by these requirements. PHMSA agrees that small-diameter pipe, headers, meter stations, compressor stations, river crossings, road crossings and any other pipeline facility can be designed and constructed in accordance with § 192.111 criteria and then would not be subject to alternative MAOP integrity assessment criteria such as ILI and DA.

PHMSA does not agree that it is acceptable to rely on assessments that may have been performed within the time intervals allowed by subpart O. Under subpart O, it may have been nearly ten years (in some limited cases 15 years) since a complete assessment was performed. PHMSA considers that more current information is needed before deciding that it is acceptable to operate a pipeline at an alternative MAOP. PHMSA considers the two-year period reasonable for operators to schedule and perform assessments that will result in more current information when the operating stresses on the pipeline are increased.

Section 192.620(d)(11), Making Repairs

INGAA and three pipeline operators noted that the repair requirements in the proposed rule are inconsistent with subpart O and, they believe, overly conservative and burdensome. INGAA contended that the proposed requirements will be unachievable in many cases. Another operator commented that the repair criteria proposed for Class 2 and 3 areas are extremely conservative and unnecessary.

Two pipeline operators suggested that this section be replaced with a reference to subpart O, since they believe the repair requirements of that subpart and ASME/ANSI B31.8S (referenced in subpart O) are appropriate for pipelines operating at 80 percent SMYS.

Two pipeline operators noted that the dent repair criteria in subparagraph (i)(A) are those for new pipelines following construction and before commissioning and suggested that these are inappropriate for existing pipelines. One of these operators contended that the repair criteria for existing pipelines should be as in subpart O, § 192.933(d). The other noted that there is experience demonstrating that plain dents of much greater than two percent of pipe diameter in depth are not a threat to pipeline integrity.

Three pipeline operators proposed alternative repair criteria. They would require immediate repair of defects for which the failure pressure is 1.1 times the revised alternative MAOP. They would require repairs within one year for defects for which the failure pressure is 1.25 times the MAOP. They contended that these criteria are consistent with those in subpart O and ASME/ANSI B31.8S and are appropriate. They believe that the criteria in the proposed rule represent an inappropriate shortening of the time allowed to address identified defects.

Proposed subparagraph (i)(A) would require that an operator ''use the most conservative calculation for determining remaining strength'' of a pipeline segment containing an identified anomaly. INGAA and four pipeline operators contended that this requirement could be interpreted to require that multiple calculations be performed, using all available tools/models, to determine which is most conservative. They believe this is inappropriate and that operators should use the most appropriate calculational tool.

Response

PHMSA recognizes that the repair criteria in this rule are more stringent than those in subpart O. PHMSA considers this appropriate. A pipeline that will operate under alternative MAOP is subject to more stress and has less wall thickness margin to failure than most pipelines operating under subpart O (with the exception of some grandfathered lines). Most pipelines that will be subject to this rule will be new pipelines. PHMSA's repair criteria use safety factors similar to those for the design of a new pipeline based upon class location design factors, and are intended to maintain overall safety margins at corrosion anomalies based upon all operating and environmental factors. The net effect of the QA and O&M requirements in this rule for construction and operation of those pipelines covered by the rule will likely result in the need for few repairs, even with these stricter criteria. PHMSA considers these factors of safety a key element in assuring public safety on higher MAOP pipelines.

Similarly, PHMSA disagrees that failure pressures of 1.1 and 1.25 times MAOP are appropriate for immediate and one-year (respectively) repairs for all class locations. Class 2 and Class 3 locations require more stringent safety factors for anomaly evaluation and remediation due to the higher consequences to public safety that may be caused by a leak or rupture of the pipeline. As discussed extensively throughout this response to comments, pipelines to be operated at alternative MAOP will operate at higher pressures with less margin to failure than most pipelines. Use of repair criteria different from and requiring repairs quicker than in subpart O is appropriate.

With respect to dents, the repair criteria of § 192.309(b) apply only for dents found during construction baseline assessments (*i.e.*, for new pipelines). PHMSA notes that this section already requires repair of two percent dents for pipelines over 12¾ inches in diameter. The criteria for repairing dents on existing pipelines and subsequent assessments on new pipelines and existing pipelines are in § 192.933(d).

PHMSA acknowledges that an operator cannot know which method for calculating remaining strength is most conservative without applying each method. Questions have been raised concerning the applicability of some current methods for calculating the remaining strength of high-strength pipelines and greater depth corrosion anomalies in all field operating

conditions. PHMSA is planning to sponsor a public meeting to review these questions and help determine the adequacy of existing calculational methods for the kind of high-strength pipe that will operate at alternative MAOP. PHMSA will propose changes to this rule at a later date, if appropriate.

C.3. Comments on Regulatory Analysis

One pipeline operator submitted two comments relating directly to the regulatory analysis supporting the proposed rule.

First, the operator contends that the expected reduction in expenditure for compressors for new pipelines should not be claimed as a benefit. The operator contended that reductions may be realized for existing pipelines that operate at an alternative MAOP but not for new pipelines.

Second, the operator contended that PHMSA should not state that new design factors will result in increased capacity for new pipelines and noted that new pipelines will be designed for the required capacity. The effect of the proposed rule will be to reduce costs by allowing the use of thinner-walled pipe.

Response

PHMSA understands that the operator's statement that new pipelines will be designed for the required capacity is at the heart of both of these comments. The operator essentially contended that new pipelines that will be so designed will see no increased capacity or change in costs as a result of this rule. PHMSA does not agree. New pipelines designed with alternative MAOPs should mean less cost to the customer/public, and thus a benefit to society, due to less capital costs for the same natural gas through-put/flow volumes. Existing pipelines will be able to carry up to an additional 11 percent natural gas flow volumes based upon the overall design of the pipeline and compressor stations with this alternative MAOP.

In the absence of this rule (or of obtaining a special permit to operate at alternative MAOP) new pipelines would need to be designed for less capacity or at increased cost (due to the need to use thicker-walled pipe). Thus, there is a societal benefit to this rule in that it will allow more gas to be transported at a higher standard of safety for a given dollar investment. The companies designing and constructing new pipelines under this rule will also realize a benefit, since in the absence of this rule (or a special permit addressing the same issues) they would either have to carry less gas or incur additional costs. PHMSA has revised the discussion in the regulatory analysis to help make this point more clearly.

D. Consideration by the Technical Pipeline Safety Standards Committee (TPSSC)

The TPSSC met on June 10, 2008, and considered the proposed rule. During this discussion, PHMSA provided its preliminary views of changes that might be made in response to comments submitted in response to the proposed rule.

PHMSA informed the TPSSC that some changes would be made in rule structure, moving some requirements to other sections for better applicability (*e.g.*, requirements applicable to existing pipelines would be moved from the section of the rule in which construction requirements are located).

PHMSA informed the TPSSC it has not adopted the suggestion by the state pipeline safety regulatory agency that submitted comments supported by its director (a member of the committee) to place the rule in a separate subpart, as that is counter to the general structure of part 192.

TPSSC members expressed concern, as did many commenters, about reliance on individual standards or tests. In the final rule, PHMSA has allowed use of equivalent methods (*e.g.*, for the macro etch test, hardness limits, type of crack arrestors).

PHMSA informed the TPSSC that the vast majority of commenters objected to the proposed requirement for mill hydrostatic inspection tests of longer duration and that, as a result, that change would not be included in the final rule. PHMSA also noted that most industry commenters noted that the proposed rule did not make allowances for changes in class location after a pipeline is in service, as do the existing regulations.

The anomaly repair requirements were of concern to industry, who asserted the requirements were overly conservative. PHMSA informed the TPSSC that this issue is complicated by questions recently raised concerning the applicability of remaining strength calculational methods to high-stress pipelines and that resolving those questions before completing this rule would delay issuance of the rule. PHMSA stated that it would conduct a public meeting later this year to address the global issue of appropriate calculational methods and repair criteria. Changes to this or other regulations requiring pipeline repair may be appropriate following that workshop.

Treatment of existing and pending applications for special permits was a significant concern for several members of the TPSSC. PHMSA noted that the standards in the final rule are very similar to those applied in recent special permits. PHMSA reported its intention to continue to review pending special permit applications while this rulemaking proceeded. Upon issuance of the final rule, PHMSA expects operators desiring to use alternative MAOP to comply with the rule. PHMSA will examine special permits that have already been granted, as appropriate, to determine if any modifications are needed in light of the outcome of this rulemaking.

Subsequent to discussion, the TPSSC voted unanimously to find the proposed rule and supporting regulatory evaluations technically feasible, reasonable, practicable, and cost effective, subject to incorporation of the changes discussed by PHMSA during this meeting. A transcript of the meeting is available in the docket.

E. The Final Rule

Revisions described in this section are changes to the corresponding section in the proposed rule.

E.1. In General

The rule adds a new section (§ 192.620) to Subpart L—Operations. This new section explains what an operator would have to do to operate at a higher MAOP than currently allowed by the design requirements. Among the conditions set forth in new § 192.620 is the requirement that the pipeline be designed and constructed to more rigorous standards. These additional design and construction standards are set forth in two additional new sections (§§ 192.112 and 192.328) located in Subpart C—Pipe Design and Subpart G—General Construction Requirements for Transmission Lines and Mains, respectively. In addition, the rule makes necessary conforming changes to existing sections on incorporation by reference (§ 192.7), change in class location (§ 192.611), and maximum allowable operating pressure (§ 192.619).

E.2. Amendment to § 192.7—Incorporation by Reference

The rule adds ASTM Designation: A 578/A578M—96 (Re-approved 2001) ''Standard Specification for Straight-Beam Ultrasonic Examination of Plain and Clad Steel Plates for Special Applications'' to the documents incorporated by reference under § 192.7. This specification prescribes standards for ultrasonic testing of steel plates. It is referenced in new § 192.112.

The rule also revises the description of item (B)(1) in the table of § 192.7(c)(2), API 5L ''Specification for Line Pipe,'' (43rd edition and errata), 2004, to indicate that it is referenced in new § 192.112 in addition to the locations at which it was referenced previously.

E.3. New § 192.112—Additional Design Requirements

The rule adds a new section to Subpart C—Pipe Design in 49 CFR Part 192. The new section, § 192.112, prescribes additional design standards required for the steel pipeline to be qualified for operation at an alternative MAOP based on higher stress levels. These include requirements for rigorous steel chemistry and manufacturing practices and standards. Pipelines designed under these standards contain pipe with toughness properties to resist damage from outside forces and to control fracture initiation and growth. The considerable attention paid to the quality of seams, coatings, and fittings will prevent flaws leading to pipeline failure. Unlike other design standards, § 192.112 applies to a new or existing pipeline only to the extent that an operator elects to operate at a higher alternative MAOP than allowed in current regulations.

Paragraph (a) sets high manufacturing standards for the steel plate or coil used for the pipe. The pipe would be manufactured in accordance with Level 2 of API 5L, with the ratio between diameter and wall thickness limited to prevent the occurrence of denting and ovality during construction or operation. Improved construction and inspection practices addressed elsewhere in this rule also help prevent denting and ovality.

Paragraph (a) has been revised in response to comments to add an alternative method (and applicable limit) for determining equivalent carbon content. In addition, the proposed limit on equivalent carbon content of 0.23 (Pcm formula) has been raised to 0.25. Several comments suggested deleting the limit on the ratio of pipe D/t, but this limit has been retained, as discussed above.

Paragraph (b) addresses fracture control of the metal. First PHMSA expects the metal would be tough; that is, deform plastically before fracturing. Second, the pipe would have to pass several tests designed to reduce the risk that fractures would initiate. Third, to the extent it would be physically impossible for particular pipe to meet toughness standards under certain conditions, crack arrestors would have to be added to stop a fracture within a specified length.

Paragraph (b) has been revised to allow alternate means of crack arrest. This can include the ''mechanical'' means included in the proposed rule but can also include other design features such as use of composite sleeves, spacing, increases in wall thickness at appropriate distances, etc. This paragraph has also been revised to clarify the factors that must be considered by an operator in evaluating resistance to fracture initiation and to make clear that this evaluation is intended to address the full range of relevant parameters to which the pipe will be exposed over its operating lifetime. If unexpected situations or a change in operating conditions result in a change in these parameters during operation, such that they are outside the bounds of those analyzed, operators will be required to review and update their evaluation and implement remedial measures to assure continued resistance to fracture initiation.

Paragraph (c) provides tests to verify that there are no deleterious imperfections in the plate or coil. The macro etch test will identify flaws such as segregation that impact the plate or coil quality. Surface and interior flaws such as laminations and cracking will show up in UT testing.

This paragraph has been revised, in response to comments, to change ''mill inspection program'' to an internal quality management program designed to eliminate or detect defects or inclusions that can affect pipe quality and to require that such a program be implemented at all mills involved in the process of casting the steel, rolling it into plate, coil or skelp, and the process of manufacturing the steel into line pipe. The revised paragraph also includes an alternative to the macro etch test and reference to an additional standard for UT testing the plate, coil, skelp or manufactured line pipe. (Equivalent standards are also still allowed.)

In addition to the quality of the steel, the integrity of a pipe depends on the integrity of the seams. Paragraph (d) provides for a QA program to assure tensile strength and toughness of the seams so that they resist breaking under regular operations. Hardness and UT tests after mill hydrostatic tests would ensure that the seams did not have defects or imperfections that were exposed by the stresses of the hydrostatic test pressure.

Paragraph (e) requires a mill pressure test for new pipe at a higher hoop stress than required by current regulations. The mill test is used to discover flaws introduced in manufacturing. Because the pipeline will be operated at a higher stress level, the more rigorous mill test is needed to match (or exceed) the level of safety provided for pipelines operated at less than 72 percent of SMYS. Paragraph (e) has been revised to eliminate the proposed extension of the duration of mill pressure tests.

Paragraph (f) sets rigorous standards for factory coating designed to protect the pipeline from external corrosion. A QA program must address all aspects of the application of coating that will protect the pipeline. This would include applying a coating resistant to damage during transportation and installation of the pipe and examining the coated pipeline to determine whether the applied coating is uniform and without defects. Thin spots or voids/holidays in the coating make it more likely for corrosion to occur and more difficult to protect the pipeline cathodically.

Paragraph (g) requires that factory-made fittings, induction bends, and flanges be certified as to their serviceability and quality. In addition the CE of these fittings and flanges would need to be documented, so that welding procedures could require pre-heat temperature to eliminate welding defects.

Paragraph (g) has been revised to clarify that the serviceability certification must address properties such as chemistry, minimum yield strength, and minimum wall thickness to meet design conditions. PHMSA expects that valves, flanges and fittings should be rated based upon the required specification rating class for the alternative MAOP and the operator to have documented mill reports with chemistry, minimum yield strength, and minimum wall thickness. Where specialty bends such as hot bends are used for pipeline segments operating per the alternative MAOP, PHMSA expects the operator to address properties such as chemistry, minimum yield strength, minimum wall thickness and other properties that the hot bending process could alter.

Paragraph (h) requires compressor design to limit the temperature of downstream pipe operating at an alternative MAOP to a specified maximum. Higher temperature can damage pipe coating. An exception to the specified maximum is allowed if testing of the coating shows it can withstand a higher temperature. The testing duration, qualification procedures and results must be of sufficient length and rigor to detect coating integrity issues for the type coating, operating and environmental conditions on the pipeline. Operators

may also rely on a long-term coating integrity monitoring program to justify operation at higher temperatures, provided the program is submitted to and reviewed by PHMSA.

Paragraph (h) has been revised to clarify the allowed exception. Testing must address coating adhesion and condition as well as cathodic disbondment. Operators are required to submit their test results, including the acceptance criteria they applied to assure themselves that these characteristics are adequate, to the appropriate PHMSA regional office(s) and applicable state regulatory authorities at least 60 days prior to operating at elevated temperature. (State notification applies when the pipeline is located in a state where PHMSA has an interstate agent agreement, or an intrastate pipeline is regulated by that state.)

A subtle, but important, change has also been made in the language in this paragraph. As proposed, the discharge temperature of compressor stations would have been limited to the specified temperature. As revised, the temperature of the nearest downstream pipeline segment to operate at alternative MAOP must be limited. For situations in which the pipeline segment at the discharge of a compressor station operates at alternative MAOP, there is no practical difference. The revised language, however, allows pipeline operators to implement an alternative approach in which they would use pipe operating at conventional MAOP from the discharge of a compressor station downstream to the point at which pipe temperature will drop to the specified limit. This may provide an alternative for situations in which it may be difficult to limit the compressor station discharge to the specified limit (*e.g.*, southern locations on hot summer days). Gas coolers may be installed at compressor stations on pipelines operating per the alternative MAOP that need to operate above 120 degrees Fahrenheit. Gas cooling at compressor stations is a long standing method for most operators to reduce gas pipeline temperatures.

E.4. New § 192.328—Additional Construction Requirements

The rule also adds a new section to Subpart G—General Construction Requirements for Transmission Lines and Mains. The new section, § 192.328, prescribes additional construction requirements, including rigorous QC and inspections, as conditions for operation of the steel pipeline at higher stress levels. Unlike other construction standards, § 192.328 would apply to a new or existing pipeline only to the extent that an operator elects to operate at a higher alternative MAOP than allowed in current regulations.

Paragraph (a) requires a QA plan for construction. QA, also called QC, is common in modern pipeline construction. Activities such as lowering the pipe into the ditch and backfilling, if done poorly, can damage the pipe and coating. Other construction activities such as nondestructive examination of girth welds, if done poorly, will result in flaws remaining in the pipeline or failures during hydrostatic testing or while in gas service. Using a QA plan helps to verify that the basic tasks done during construction of a pipeline are done correctly.

Field application of coating is one of these basic tasks to be covered in a QA plan. During the course of analyzing requests for special permits, PHMSA discovered field coatings at one construction site which were applied at lower temperature than needed for good adhesion to the pipe. Because coating is so critical to corrosion protection, paragraph (a) requires quality assurance plans to contain specific performance measures for field coating. Field coating must meet substantially the same standards as coating applied at the mill and the individuals applying the coating must be appropriately trained and qualified.

Installation of the pipe into the ditch and backfilling of the pipe are critical operations. PHMSA has found that construction and inspection lapses during the backfilling of the pipe have resulted in pipe denting and coating damage. Sometimes during backfilling of the pipe there are design requirements for the installation of other engineered items such as concrete weights at creek and water saturated soil areas. The proper installation of these types of engineered items is critical to ensure that the pipe and coating are not damaged and the item is installed as required in the specifications. PHMSA has found operator lapses in this critical QC aspect of pipeline construction.

Paragraph (b) requires non-destructive testing of all girth welds. Although past industry practice sometimes has been to non-destructively test only a sample of girth welds, no alternative exists for verifying the integrity of the remaining welds. The initial pressure testing once construction is complete does not normally detect flaws in girth welds unless the girth weld is cracked, has severe lack of penetration or is under undue tension stresses, which would be indicative of systemic problems on the pipeline. PHMSA believes that most modern pipeline construction projects include non-destructive testing of all girth welds. However, because the regulations do not require testing of all girth welds, an operator's records for pipelines already in operation may not be complete on 100 percent of girth welds. To account for this, proposed paragraph (b) would have required testing records for only 95 percent of girth welds on existing segments. This requirement has been retained, but proposed paragraph (b) has been moved to new § 192.620, as it applies to existing pipelines. This section addresses pipeline construction.

Paragraph (c) requires deeper burial of segments operated at higher stress level. A greater depth of cover decreases the risk of damage to the pipeline from excavation, including farming operations.

Paragraph (d) addresses the results of the initial strength test and the assurance these results provide that the material in the pipeline is free of pre-operational flaws which can grow to failure over time. Since the initial strength test is a destructive test, it only detects flaws that would fail at the test pressure. This could leave in place smaller flaws. To prevent this from occurring, the proposed paragraph would have disqualified any segment which experienced a failure during the initial strength test indicative of flaws in the material. Most commenters objected to this provision as too restrictive. They noted that failures can be isolated and that it was unreasonable to preclude an entire pipeline segment from operation at alternative MAOP because of a single failure. This paragraph has been revised to allow conduct of a root cause examination of a failure, including metallurgic examination of the failed pipe, as a way of justifying qualification of the pipeline segment. If that examination determines that the cause of the failure is not systemic, then the pipeline segment would not be disqualified from alternative MAOP operation. Operators must report the results of their root cause evaluation to regulators (PHMSA Regional Office or applicable state regulatory authorities). Review of these analyses by pipeline safety regulators will provide oversight for operator conclusions regarding the non-systemic nature of a failure.

Proposed paragraph (e) addressed cathodic protection on an existing segment. This paragraph has been moved to new § 192.620.

Paragraph (e) (proposed as paragraph (f)) addresses electrical interference for new segments. During construction, sources of electrical interference which can impair future cathodic protection or

damage the pipe prior to placing cathodic protection in service need to be identified. Addressing interference at this time supports better corrosion control. Operators will need to coordinate with electric transmission line operators prior to pipeline construction to identify locations of grounding structures and power line currents and voltages and their effect on the pipe. The additional O&M requirements of new § 192.620(d)(6) require operators electing to operate existing pipelines at higher stress levels to address electrical interference prior to raising the MAOP.

E.5. Amendment to § 192.611—Change in Class Location: Confirmation or Revision of Maximum Allowable Operating Pressure

The proposed rule did not include a provision to amend this section. Commenters pointed out that this section addresses changes in class location (*e.g.*, increase in population density near the pipeline) during operation. The existing requirements allow continued operation at pressures higher than would be required for new pipe installed in the new class location, provided pressure testing has been performed at appropriate pressures. The commenters noted that without addressing operation at alternative MAOP in this section, the regulations would effectively rescind the authorization provided by this rule to operate at higher pressure whenever there was a change in class location.

PHMSA agrees that this result was not intended. This section has been revised to include provisions for pipelines operating at alternative MAOP substantially the same as those already provided for existing pipelines. Operation at higher alternative pressures can continue after a class location change, again provided that the pipeline has been tested at appropriate pressures and is not an alternative MAOP operating in a Class 3 location that is upgraded to a Class 4 location. The limits on hoop stress included in this section have been revised to reflect the higher hoop stress that will be experienced by a pipeline at alternative MAOP.

E.6. Amendment to § 192.619—Maximum Allowable Operating Pressure

The final rule amends existing § 192.619 by adding a new paragraph (d) providing an additional means to determine the alternative MAOP for certain steel pipelines. In addition, the rule makes conforming changes to existing paragraph (a) of the section.

E.7. New § 192.620—Operation at an Alternative MAOP

The final rule adds a new section, § 192.620, to subpart L of part 192, to specify what actions an operator must take in order to elect an alternative MAOP based on higher operating stress levels. The rule applies to both new and existing pipelines.

E.7.1. § 192.620(a)—Calculating the Alternative MAOP

Paragraph (a) describes how to calculate the alternative MAOP based on the higher operating stress levels. Qualifying segments of pipeline would use higher design factors to calculate the alternative MAOP. For a segment currently in operation this would result in an increase in MAOP. No changes were proposed in the design factors used for segments within compressor or meter stations or segments underlying certain crossings. PHMSA expects new pipelines operating per the alternative MAOP to have road/railroad crossings, fabrications, headers, mainline valve assemblies, separators, meter stations and compressor stations designed and operated per existing design factors in § 192.111.

Paragraph (a) has been revised to include new design factors for compressor/meter stations or segments underlying certain crossings. These factors apply to facilities in existence prior to the effective date of this rule. Commenters pointed out that compressor stations for existing pipelines have been designed and that failure to allow alternative design factors for them could effectively preclude operation at alternative MAOP for the existing pipelines of which they are a part. PHMSA agrees this was not our intent. The additional risk associated with use of slightly higher design factors for these facilities is marginal. At the same time, there is little additional cost associated with designing stations/crossings/fabrications/headers for future pipelines to serve at the desired MAOP using existing design factors in § 192.111(b), (c), and (d). The rule includes no alternative design factors for these facilities in future pipelines, and operators must use the existing requirements.

E.7.2. § 192.620(b)—Which Pipeline Qualifies

Paragraph (b) describes which segments of new or existing pipeline are qualified for operation at the alternative MAOP. The alternative MAOP is allowed only in Class 1, 2, and 3 locations. Only steel pipelines meeting the rigorous design and construction requirements of §§ 192.112 and 192.328 and monitored by supervisory data control and acquisition systems qualify. Mechanical couplings in lieu of welding are not allowed. Although the special permits did not expressly mention mechanical couplings, PHMSA would not have granted a special permit if the pipeline involved had mechanical couplings.

As proposed, paragraph (b) would have excluded from consideration any existing pipeline that had experienced a failure indicative of materials concerns. This provision has been revised to allow root cause analysis to determine if the failure is indicative of a systemic problem and to preclude use of an alternative MAOP only if a failure is determined to be systematic in nature. Results of the analysis must be reported to regulators (PHMSA Regional Office or applicable state regulatory authorities). This is essentially the same change made for new pipelines in new § 192.328(d), as described above. Paragraph (b) has also been revised to include the requirement that 95 percent of girth welds must have been examined for existing pipelines to operate at alternative MAOP. This requirement was moved from proposed § 192.328(e), as discussed above.

E.7.3. §§ 192.620(c)(1), (2), and (3)—How an Operator Selects Operation Under This Section

Paragraph (c)(1) requires an operator to notify PHMSA, and applicable state pipeline safety regulators, when it elects to establish an alternative MAOP under this section. This notification must be provided at least 180 days prior to commencing operations at the alternative MAOP established under this section. This will provide PHMSA and states sufficient time for appropriate inspection which may include checks of the manufacturing process, visits to the pipeline construction sites, analysis of operating history of existing pipelines, and review of test records, plans, and procedures.

Paragraph (c)(3) requires an operator to further notify PHMSA when it has completed the actions necessary to support operation at an alternative MAOP, by submitting a certification by a senior executive that the pipeline meets the requirements for operation at alternative MAOP. The certification is required by paragraph (c)(2). A senior executive must certify that the pipeline meets the additional design and construction regulations of this rule. A senior executive must also certify that the operator has changed its O&M procedures to include the more rigorous

additional O&M requirements. In addition, a senior executive must certify that the operator has reviewed its damage prevention program in light of best practices, such as CGA best practices or some equivalent best practices, and made any needed changes to it to ensure that the program meets or exceeds those standards or practices. The certification must be submitted at least 30 days prior to operation at an alternative MAOP.

E.7.4. § 192.620(c)(4)—Initial Strength Testing

Paragraph (c)(4) addresses initial strength testing requirements. In order to establish the MAOP under this section, an operator must perform the initial strength testing of a new segment at a pressure at least as great as 125 percent of the MAOP in Class 1 locations and 150 percent in Class 2 and 3 locations. Since an existing pipeline was previously operated at a lower MAOP, it may have been initially tested at a pressure less than these levels. If so, paragraph (c) allows the operator to elect to conduct a new strength test in order to raise the MAOP.

E.7.5. § 192.620(c)(5)—Operation and Maintenance

Paragraph (c)(5) requires an operator to comply with the additional operating and maintenance requirements of § 192.620(d). An operator must comply with these additional requirements if the operator elects to calculate the alternative MAOP for a segment under § 192.620(a) and notifies PHMSA of that election.

E.7.6. § 192.620(c)(6)—New Construction and Maintenance Tasks

Paragraph (c)(6) addresses the need for competent performance of both new construction, and future maintenance activities, to ensure the integrity of the segment. PHMSA now requires operators to ensure that individuals who perform pipeline O&M activities are qualified. Paragraph (c)(6) requires operators seeking to operate at the allowable higher operating stress levels to treat construction tasks as if they were covered by subpart N, ''Qualification of Pipeline Personnel.'' Subpart N (commonly known as OQ) specifies training and qualification requirements applicable to tasks that meet a four-part test in § 192.801(b). Operations and maintenance tasks on the pipeline meet this test, and it is the requirements in subpart N that will govern training and qualification of personnel performing these tasks on a pipeline to be operated at an alternative MAOP. Construction tasks typically do not meet the four-part test and are not covered under subpart N. As proposed, paragraph (c)(6) (then designated (c)(5)) would have required operators to take other actions to assure qualification of personnel performing construction tasks on a pipeline intended to operate at alternative MAOP. Commenters noted that the proposed requirements were vague and subject to interpretation and suggested that PHMSA, instead, rely on the known requirements of subpart N. This paragraph has been modified, in response to these comments, to require that the requirements of subpart N be applied to construction tasks for a pipeline intended to operate at alternative MAOP regardless of the four-part test in § 192.801(b).

E.7.7. § 192.620(c)(7)—Recordkeeping

Paragraph (c)(7) specifies recordkeeping requirements for operators electing to establish the MAOP under this section. Existing regulations, such as §§ 192.13, 192.517(a), and 192.709, already require operators to maintain records applicable to this section. New § 192.620 is in subpart L. Because the additional requirements in this section address requirements found in other subparts of part 192, the recordkeeping requirements could cause confusion. For example, § 192.620(d)(9) requires a baseline assessment for integrity for a segment operated at the higher stress level regardless of its potential impact on an HCA. Section 192.947, in subpart O, requires operators to maintain records of baseline assessments for the useful life of the pipeline. Section 192.709 requires an operator to retain records for an inspection done under subpart L for a more limited time. Accordingly, this paragraph clarifies the need to maintain all records demonstrating compliance with all alternative MAOP requirements for the useful life of the pipeline.

E.7.8 § 192.620(c)(8)—Class Upgrades

Paragraph (c)(8) allows pipelines in Class 1 and 2 to be upgraded one class when class changes occur per § 192.611. This paragraph precludes operation of pipeline in Class 4 at alternative MAOP.

E.8. § 192.620(d)—Additional Operation and Maintenance Requirements

Paragraph (d) sets forth ten operating and maintenance requirements that supplement the existing requirements in part 192. Currently § 192.605 requires an operator to develop O&M procedures to implement the requirements of subparts L and M. Since § 192.620(d) is in subpart L, an operator must develop and follow the O&M procedures developed under this section. These include requirements for an operator to evaluate and address the issues associated with operating at higher pressures. Through its public education program, an operator would inform the public of any risks attributable to higher pressure operations. The additional operating and maintenance requirements address the two main risks the pipelines face, excavation damage and corrosion, through a combination of traditional practices and integrity management. Traditional practices include cathodic protection, control of gas quality, and maintenance of burial depth. Integrity management includes internal inspection on a periodic basis to identify and repair flaws before they can fail. The additional O&M and management requirements are discussed in more detail below.

E.8.1. § 192.620(d)(1)—Threat Assessments

Paragraph (d)(1) requires an operator to identify and evaluate threats to the pipeline consistent with the similar procedures done under integrity management to address the risks of operating at an increased stress level.

E.8.2. § 192.620(d)(2)—Public Awareness

Paragraph (d)(2) requires an operator to include any people potentially impacted by operation at a higher stress level within the outreach effort in its public education program required under existing § 192.616. In order to identify this population, an operator would use a broad area measured from the centerline of the pipe plus, in HCAs, the potential impact circle recalculated to reflect operation at a higher operating stress level. This is intended to get necessary information for safety to the people potentially impacted by a failure.

E.8.3. § 192.620(d)(3)—Emergency Response

Paragraph (d)(3) addresses the additional needs for responding to emergencies for operation at higher operating stress levels. Consistent with the conditions imposed in the special permits, and past experience with response issues, the paragraph requires methods such as remote control valves to provide more rapid shut-down in the event of an emergency.

E.8.4. § 192.620(d)(4)—Damage Prevention

Paragraph (d)(4) addresses one of the major risks of failure faced by a pipeline, damage from outside force such as damage occurring during excavation in the right-of-way. Although

the improved toughness of pipe reduces the risk of damage, it does not prevent it and additional measures are appropriate for pipelines operating at higher operating stress levels. This paragraph adds several new or more specific measures to existing requirements designed to prevent damage to pipelines from outside force.

The first more specific measure, in paragraph (d)(4)(i), addresses patrolling, required for all transmission pipelines by § 192.705. More frequent patrols of the right-of-way prevent damage by giving the operator more accurate and timely information about potential sources of ground disturbance and other outside force damage. These include both naturally occurring conditions, such as wash outs, and human activity, such as construction in the vicinity of the pipeline. The requirement is for patrols to be made monthly, at intervals not to exceed 45 days. The patrolling requirement along with other right-of-way requirements including line-of-sight markers, use of national consensus standards, and the right-of-way management plan comprise a multi-faceted approach to protecting the pipeline.

Other more specific or new measures to address damage prevention include developing and implementing a plan to monitor and address ground movement, a requirement of paragraph (d)(4)(ii). Ground movement such as earthquakes, landslides, soil erosion, and nearby demolition or tunneling can damage pipelines. Since pipelines near the surface are more likely to be damaged by surface activities, paragraph (d)(4)(iii) requires an operator to maintain the depth of cover over a pipeline or provide alternative protection. Line-of-sight markers alert excavators, emergency responders, and the general public of the presence and general location of pipelines. Paragraph (d)(4)(iv) requires these markers both to improve damage prevention and to enhance public awareness.

Damage prevention programs are improving because of the work being done by the CGA, a national, non-profit educational organization dedicated to preventing damage to pipelines and other underground utilities. The CGA has compiled best practices applicable to all parties relevant to preventing damage to underground utilities and actively promotes their use. Paragraph (d)(5)(v) requires operators electing to operate at higher stress levels to evaluate their damage prevention programs in light of industry best practices, such as those developed by CGA. An operator must identify the practices applicable to its circumstances and make appropriate changes to its damage prevention program. This approach is consistent with annual reviews of O&M programs under § 192.605. An operator must include in the certification required under § 192.620(c)(1) that the review and upgrade have occurred.

Paragraph (d)(4) also requires the preparation of a right-of-way management plan. In the past several years, PHMSA has seen recurring similarities in pipeline accidents on construction sites. In each case, better management of the pipeline right-of-way could have prevented the accidents. Better management includes closer attention to the qualifications of individuals critical to damage prevention, better marking practices, and closer oversight of the excavation. In 2006, PHMSA issued two advisory bulletins to alert operators of the need to pay closer attention to these important damage prevention issues. The first advisory bulletin described three accidents in which either operator personnel or contractors damaged gas transmission pipelines during excavation in the rights-of-way (ADB–06–01; 71 FR 2613; Jan.17, 2006). This bulletin advised operators to pay closer attention to integrating OQ regulations into excavation activities and providing that excavation is included as a covered task under OQ programs required by subpart N. The second advisory bulletin pointed to an additional excavation accident where the excavator struck an inadequately marked gas transmission pipeline (ADB–06–003; 71 FR 67703; Nov. 22, 2006). This advisory bulletin advised pipeline operators to pay closer attention to locating and marking pipelines before excavation activities begin and pointed to several good practices as well as the best practices described by the CGA. This paragraph requires an operator electing to operate at a higher stress level to develop a plan to manage the protection of their right-of-way from excavation activities. Each operator already has a damage prevention program, under § 192.614, and a program to ensure qualification of pipeline personnel, under subpart N. This management program requires the operator to integrate activities under those programs to provide better protection for the right-of-way of the pipeline operated at the higher stress level.

E.8.5. § 192.620(d)(5)—Internal Corrosion Control

Paragraph (d)(5) adds specificity to the requirements for internal corrosion control now in pipeline safety standards for pipelines operated at higher stress levels. These internal corrosion control programs must include use of gas separators or filter separators and gas quality monitoring equipment. Operators are required to use cleaning pigs and inhibitors when corrosive gas is present. (Use of cleaning pigs and inhibitors is required when the level of one corrosive contaminant, hydrogen sulfide (H_2S), is between 0.5 and 1.0 grain per hundred cubic feet). Most operators who have applied for special permits to operate their pipeline at alternative MAOP limit H_2S to 0.5 grain. The higher levels allowed in this rule are within typical FERC tariffs, but may present an increased likelihood of internal corrosion. Maximum levels of contaminants that could promote corrosion must be reviewed quarterly, and operators must adjust their programs as needed to monitor and mitigate any deleterious gas stream constituents. PHMSA believes the levels are fully consistent with the requirements in FERC tariffs designed to prevent internal corrosion.

E.8.6. §§ 192.620(d)(6), (7), and (8)—External Corrosion Control

Since external corrosion is one of the greatest risks to the integrity of pipelines operating at higher stress levels, the special permits and this rule contain several measures to prevent it from occurring. These include use of effective external coating, addressing interference, early installation of cathodic protection, confirming the adequacy of coating and cathodic protection and diligent monitoring of cathodic protection levels. The requirements concerning quality of the coating and installation of cathodic protection for new pipelines are addressed in sections on design and construction, as discussed above. The remaining external corrosion provisions are addressed here.

Interference from overhead power lines, railroad signaling, stray currents, or other sources can interfere with the cathodic protection system and, if not properly mitigated, even accelerate the rate of external corrosion. Paragraph (d)(6) requires an operator to identify and address interference early before damage to the pipeline can occur.

Paragraph (d)(7) requires an operator to confirm both the effectiveness of the coating and the adequacy of the cathodic protection system soon after deciding on operation at higher operating stress levels/alternative MAOP. This is accomplished through indirect assessments, such as a CIS for cathodic protection and DCVG or ACVG for coating condition. After completion of the baseline internal inspection

required by § 192.620(d)(9), an operator is required to integrate the results of that inspection with the indirect assessments. An operator must take remedial action to correct any inadequacies. In HCAs, an operator must periodically repeat indirect assessment to confirm that the cathodic protection system remains as functional as when first installed.

Paragraph (d)(8) requires more rigorous attention to ensure adequate levels of cathodic protection. Regulations now require an operator discovering a low reading, meaning a reduced level of protection, to act promptly to correct the deficiency. This section puts an outer limit of six months on the time for completion of the remedial action and restoration of an adequate level of cathodic protection. In addition, the operator must confirm that its actions have been effective in restoring cathodic protection.

E.8.7. §§ 192.620(d)(9) and (10)—Integrity Assessments

Among the most important ways of ensuring integrity during pipeline operations are the assessments done under the integrity management program requirements in subpart O. Paragraphs (d)(9) and (d)(10) require operators electing to operate at higher stress levels to perform both baseline and periodic assessments of the entire pipeline segment operating at the higher stress level, regardless of whether the pipeline segment is located in an HCA. The operator must use both a geometry tool and a high resolution magnetic flux tool for the entire pipeline segment. In very limited circumstances in which internal inspection is not possible because internal inspection tools cannot be accommodated, such as a short crossover segment connecting two pipelines in a right-of-way, an operator would substitute pressure testing or DA. The operator must then integrate the information provided by these assessments with testing done under previously described paragraphs. This analysis would form the basis for mitigating measures, and for prompt repairs under paragraph (d)(11).

E.8.8. § 192.620(d)(11)—Repair Criteria

The repair criteria under paragraph (d)(11) for anomalies in a pipeline segment operating at a higher stress level are slightly more conservative than for other pipelines, including pipelines covered by an integrity management program. With the tougher pipe, better coating, construction quality inspection program, coating surveys after installation and backfill, and careful attention to damage prevention and corrosion protection, a pipeline operated at higher operating stress levels should experience few anomalies needing evaluation.

E.9. § 192.620(e)—Overpressure Protection

The alternative MAOP is higher than the upper limit of the required overpressure protection under existing regulations. Paragraph (e) increases the overpressure protection limit to 104 percent of the MAOP, which is 83.2 percent of SMYS for a pipeline segment operating at the alternative MAOP in a Class 1 location.

F. Regulatory Analyses and Notices

F.1. Privacy Act Statement

Anyone may search the electronic form of all comments received for any of our dockets. You may review DOT's complete Privacy Act Statement in the **Federal Register** published on April 11, 2000 (65 FR 19477).

F.2. Executive Order 12866 and DOT Policies and Procedures

Due to magnitude of expected benefits, the DOT considers this rulemaking to be a significant regulatory action under section 3(f)(1) of Executive Order 12866 (58 FR 51735; Oct. 4, 1993). Therefore, DOT submitted it to the Office of Management and Budget for review. This rulemaking is also significant under DOT regulatory policies and procedures (44 FR 11034; Feb. 26, 1979).

PHMSA prepared a Regulatory Evaluation of the final rule. A copy is in Docket ID PHMSA–2005–23447.

PHMSA estimates that the rule will result in gas transmission pipeline operators uprating 3,500 miles of existing pipelines to an alternative MAOP. Additionally PHMSA estimates that, in the future, the rule will result in an annual additional 700 miles of new pipelines each year whose operators elect to use an alternative MAOP.

PHMSA expects the benefits of the rule to be substantial and in excess of $100 million per year. This expectation is based on quantified benefits in excess of $100 million per year (see below), coupled with un-quantified benefits associated with the rule that industry and PHMSA technical staff have identified. The expected benefits of the rule that cannot be readily quantified include:

- Reductions in incident consequences.
- Increases in pipeline capacity.
- Increases in the amount of natural gas filling the line, commonly called line pack.
- Reductions in adverse environmental impacts.

The rule's requirements, such as monthly right-of-way patrolling, additional internal inspections, and anomaly repair, are expected to prevent incidents that would have occurred in the absence of the rule, and to help mitigate the consequences of the incidents that do occur. In the case of new pipelines, the ability to use an alternative MAOP will make it possible to transport more product per dollar of pipeline cost than would be possible without this new rule. Quantifying the value of this increased capacity is difficult, and no estimate has been developed for this analysis. For existing pipelines, operation at a higher MAOP increases the amount of gas that can be transported. PHMSA expects the value of increased capacity due to use of alternative MAOP by gas pipelines to be significant. In areas where production is already well-established, there is an even greater potential for increased pipeline capacity. For example, one recipient of a special permit estimated a daily increase of at least 62 million standard cubic feet of gas.

Similarly, increases in line pack will produce increased benefits which are difficult to quantify. Line pack is increased due to gas compressibility at higher operating pressures which results in increased gas volumes in the pipeline. The reduced amount of exterior storage capacity needed resulting from increased line pack may result in capital or O&M savings for the pipelines or their customers. Greater line pack in a pipeline increases the ability of the operator to continue gas delivery during short outages such as maintenance and during peak flow periods. These benefits are not readily quantifiable.

The quantified benefits consist of:

- Fuel cost savings.
- Capital expenditure savings on pipe for new pipelines.

Of these, pipeline fuel cost savings is the most important contributor to the estimated benefits. Although these quantified benefits do not capture the full benefits of the rule, they exceed $100 million per year.

As a consequence of the rule, PHMSA estimates that pipeline operators will realize annually recurring benefits due to fuel cost savings of $49 million that will begin in the initial year after the rule goes into effect. Additionally, PHMSA estimates that each year pipeline operators will realize one-time benefits for savings in capital expenditures of $54.6 million (since 700 miles of new pipeline operating at an alternative MAOP are added each year,

the one-time benefits resulting from this added mileage will be the same each year.) The benefits of the rule over 20 years are expected to be as presented in the following table:

TABLE D.2.–1—SUMMARY AND TOTAL FOR THE ESTIMATED BENEFITS OF THE RULE

[Millons of dollars per year]

Benefit	Estimate for year 1	Estimate of new benefits occurring in each subsequent year
Reduced incident consequences	Not quantified	Not quantified.
Fuel cost savings	$49.0	$49.0
Reduced capital expenditures	$54.6	$54.6
Increased pipeline capacity	Not quantified	Not quantified.
Increased line pack	Not quantified	Not quantified.
Reduced adverse environmental impacts	Not quantified	Not quantified.
Other expected benefits	Not quantified	Not quantified.
Total	$103.6	$103.6

The present value of the benefits evaluated over 20 years at a three percent discount rate is $1,541 million, while the present value of the benefits over 20 years at a seven percent discount rate is $1,098 million. For both discount rates, the annualized benefits would be $103.6 million.

PHMSA expects the costs attributable to the rule are most likely to be incurred by operators for:

- Performing baseline internal inspections.
- Performing additional internal inspections.
- Performing anomaly repairs.
- Installing remotely controlled valves on either side of HCAs.
- Preparing threat assessments.
- Patrolling pipeline rights-of-way.
- Preparing the paperwork notifying PHMSA of the decision to use an alternative MAOP.

Overall, the costs of the rule over 20 years are expected to be as presented in the following table:

TABLE D.2.–2— SUMMARY AND TOTALS FOR THE ESTIMATED COSTS OF THE RULE

Cost item	Cost by year after implementation [thousands of dollars]			
	1st	2nd—10th	11th	12th—20th
Baseline internal inspections.	$29,119	None	None	None
Additional internal inspections.	None	None	$17,471	$2,912 each year.
Anomaly repairs	$1,015	None	$1,218	$203 each year.
Remotely controlled valves	$3,528	$588 each year	$588	$588 each year.
Threat Assessments	$180	$30 each year	$30	$30 each year.
Patrolling	$4,620	$5,390 to $11,550	$12,320	$15,090 to $19,250.
Notifying PHMSA	Nominal	Nominal	Nominal	Nominal.
Total	$38,462	$618 each year plus patrolling costs.	$31,627	$3,733 each year plus patrolling costs.

The present value of the costs evaluated over 20 years at a three percent discount rate are approximately $239 million, while the present value of the costs over 20 years at a seven percent discount rate are approximately $165 million. The annualized costs at the three percent discount rate are approximately $16 million, while the annualized costs at the seven percent discount rate are approximately $15 million.

Since the present value of the quantified benefits ($1,541 million at three percent and $1,098 million at seven percent) exceeds the present value of the costs ($328 million at three percent and $164 million at seven percent), the rule is expected to have net benefits.

F.3. Regulatory Flexibility Act

Under the Regulatory Flexibility Act (5 U.S.C. 601 *et seq.*), PHMSA must consider whether rulemaking actions would have a significant economic impact on a substantial number of small entities.

The final rule affects operators of gas pipelines. Based on annual reports submitted by operators, there are approximately 1,450 gas transmission and gathering systems and an equivalent number of distribution systems potentially affected by this rule. The size distribution of these operators is unknown and must be estimated.

The affected gas transmission systems all belong to NAICS 486210, Pipeline Transportation of Natural Gas. In accordance with the size standards published by the Small Business Administration, a business with $6.5 million or less in annual revenue is considered a small business in this NAICS.

Based on August 2006 information from Dunn & Bradstreet on firms in NAICS 486210, PHMSA estimates that 33 percent of the gas transmission and gathering systems have $6.5 million or less in revenue. Thus, PHMSA estimates that 479 of the gas transmission and gathering systems affected by the rule will have $6.5 million or less in annual revenue. PHMSA does not expect that

any local gas distribution companies or gathering systems will be taking advantage of the potential to use an alternative MAOP.

The rule mandates no action by gas transmission pipeline operators. Rather, it provides those operators with the option of using an alternative MAOP in certain circumstances, when certain conditions can be met. Consequently, it imposes no economic burden on the affected gas pipeline operators, large or small. Based on these facts, I certify that this rule will not have a substantial economic impact on a substantial number of small entities.

F.4. Executive Order 13175

PHMSA has analyzed this rulemaking according to Executive Order 13175, ''Consultation and Coordination with Indian Tribal Governments.'' Because the rule does not significantly or uniquely affect the communities of the Indian tribal governments, nor impose substantial direct compliance costs, the funding and consultation requirements of Executive Order 13175 do not apply.

F.5. Paperwork Reduction Act

This rule adds notification paperwork requirements and record retention on pipeline operators voluntarily choosing an alternative MAOP for their pipelines. Based on analysis of the regulation, there will be an estimated nine total annual burden hours attributable to the notification and recordkeeping requirements in the first year. In following years, the annual burden is expected to decrease to one and one-half hours. The associated cost of these annual burden hours is $720 in year one, and $120 thereafter. No other burden hours and associated costs are expected. The Paperwork Reduction Act analysis in the docket has a more detailed explanation.

F.6. Unfunded Mandates Reform Act of 1995

This rule does not impose unfunded mandates under the Unfunded Mandates Reform Act of 1995. It does not result in costs of $132 million or more in any one year to either State, local, or tribal governments, in the aggregate, or to the private sector, and is the least burdensome alternative that achieves the objective of the rulemaking.

F.7. National Environmental Policy Act

PHMSA has analyzed the rulemaking for purposes of the National Environmental Policy Act (42 U.S.C. 4321 *et seq.*). The rulemaking will require limited physical change or other work that would disturb pipeline rights-of-way. In addition, the rule codifies the terms of special permits PHMSA has granted. Although PHMSA sought public comment on environmental impacts with respect to most requests for special permits to allow operation at pressures based on higher stress levels, no commenters addressed environmental impacts. Further, PHMSA did not receive any comment on the environmental assessment it had prepared in conjunction with the proposed rule. PHMSA has determined the rulemaking is unlikely to significantly affect the quality of the human environment. An environmental assessment document is available for review in the docket.

F.8. Executive Order 13132

PHMSA has analyzed the rulemaking according to Executive Order 13132 (64 FR 43255, Aug. 10, 1999) and concluded that no additional consultation with States, local governments or their representatives is mandated beyond the rulemaking process. The rule does not have a substantial direct effect on the States, the relationship between the national government and the States, or the distribution of power and responsibilities among the various levels of government. The rule does not impose substantial direct compliance costs on State or local governments.

Further, no consultation is needed to discuss the preemptive effect of the proposed rule. The pipeline safety law, specifically 49 U.S.C. 60104(c), prohibits State safety regulation of interstate pipelines. Under the pipeline safety law, States have the ability to augment pipeline safety requirements for intrastate pipelines PHMSA regulates, but may not approve safety requirements less stringent than those required by Federal law. And a State may regulate an intrastate pipeline facility PHMSA does not regulate. In addition, 49 U.S.C. 60120(c) provides that the Federal pipeline safety law ''does not affect the tort liability of any person.'' It is these statutory provisions, not the rule, that govern preemption of State law. Therefore, the consultation and funding requirements of Executive Order 13132 do not apply.

F.9. Executive Order 13211

This rulemaking is likely to increase the efficiency of gas transmission pipelines. A gas transmission pipeline operating at an increased MAOP will result in increased capacity, fuel savings, and flexibility in addressing supply demands. This is a positive rather than an adverse effect on the supply, distribution, and use of energy. Thus this rulemaking is not a ''significant energy action'' under Executive Order 13211. Further, the Administrator of the Office of Information and Regulatory Affairs has not identified this rule as a significant energy action.

List of Subjects in 49 CFR Part 192

Design pressure, Incorporation by reference, Maximum allowable operating pressure, and Pipeline safety.

■ For the reasons provided in the preamble, PHMSA amends 49 CFR part 192 as follows:

PART 192—TRANSPORTATION OF NATURAL AND OTHER GAS BY PIPELINE: MINIMUM FEDERAL SAFETY STANDARDS

■ 1. The authority citation for part 192 continues to read as follows:

Authority: 49 U.S.C. 5103, 60102, 60104, 60108, 60109, 60110, 60113, and 60118; and 49 CFR 1.53.

■ 2. In § 192.7, in paragraph (c)(2) amend the table of referenced material by revising item (B)(1), redesignating items (C)(6) through (C)(13) as (C)(7) through (C)(14), and adding a new item (C)(6) to read as follows:

§ 192.7 What documents are incorporated by reference partly or wholly in this part?

* * * * *

(c) * * *

(2) * * *

Source and name of referenced material	49 CFR reference
B. * * *	* * *
(1) API Specification 5L "Specification for Line Pipe," (43rd edition and errata), 2004	§§ 192.55(e); 192.112; 192.113; Item I of Appendix B.
* * * * *	* *
C. * * *	
(6) ASTM Designation: A 578/A578M–96 (Re-approved 2001) "Standard Specification for Straight-Beam Ultrasonic Examination of Plain and Clad Steel Plates for Special Applications".	§§ 192.112(c)(2)(iii).
* * * * *	* *

■ 3. Add § 192.112 to subpart C to read as follows:

§ 192.112 Additional design requirements for steel pipe using alternative maximum allowable operating pressure.

For a new or existing pipeline segment to be eligible for operation at the alternative maximum allowable operating pressure (MAOP) calculated under § 192.620, a segment must meet the following additional design requirements. Records for alternative MAOP must be maintained, for the useful life of the pipeline, demonstrating compliance with these requirements:

To address this design issue:	The pipeline segment must meet these additional requirements:
(a) General standards for the steel pipe.	(1) The plate, skelp, or coil used for the pipe must be micro-alloyed, fine grain, fully killed, continuously cast steel with calcium treatment. (2) The carbon equivalents of the steel used for pipe must not exceed 0.25 percent by weight, as calculated by the Ito-Bessyo formula (Pcm formula) or 0.43 percent by weight, as calculated by the International Institute of Welding (IIW) formula. (3) The ratio of the specified outside diameter of the pipe to the specified wall thickness must be less than 100. The wall thickness or other mitigative measures must prevent denting and ovality anomalies during construction, strength testing and anticipated operational stresses. (4) The pipe must be manufactured using API Specification 5L, product specification level 2 (incorporated by reference, see § 192.7) for maximum operating pressures and minimum and maximum operating temperatures and other requirements under this section.
(b) Fracture control	(1) The toughness properties for pipe must address the potential for initiation, propagation and arrest of fractures in accordance with: (i) API Specification 5L (incorporated by reference, see § 192.7); or (ii) American Society of Mechanical Engineers (ASME) B31.8 (incorporated by reference, see § 192.7); and (iii) Any correction factors needed to address pipe grades, pressures, temperatures, or gas compositions not expressly addressed in API Specification 5L, product specification level 2 or ASME B31.8 (incorporated by reference, see § 192.7). (2) Fracture control must: (i) Ensure resistance to fracture initiation while addressing the full range of operating temperatures, pressures, gas compositions, pipe grade and operating stress levels, including maximum pressures and minimum temperatures for shut-in conditions, that the pipeline is expected to experience. If these parameters change during operation of the pipeline such that they are outside the bounds of what was considered in the design evaluation, the evaluation must be reviewed and updated to assure continued resistance to fracture initiation over the operating life of the pipeline; (ii) Address adjustments to toughness of pipe for each grade used and the decompression behavior of the gas at operating parameters; (iii) Ensure at least 99 percent probability of fracture arrest within eight pipe lengths with a probability of not less than 90 percent within five pipe lengths; and (iv) Include fracture toughness testing that is equivalent to that described in supplementary requirements SR5A, SR5B, and SR6 of API Specification 5L (incorporated by reference, see § 192.7) and ensures ductile fracture and arrest with the following exceptions: (A) The results of the Charpy impact test prescribed in SR5A must indicate at least 80 percent minimum shear area for any single test on each heat of steel; and (B) The results of the drop weight test prescribed in SR6 must indicate 80 percent average shear area with a minimum single test result of 60 percent shear area for any steel test samples. The test results must ensure a ductile fracture and arrest. (3) If it is not physically possible to achieve the pipeline toughness properties of paragraphs (b)(1) and (2) of this section, additional design features, such as mechanical or composite crack arrestors and/or heavier walled pipe of proper design and spacing, must be used to ensure fracture arrest as described in paragraph (b)(2)(iii) of this section.
(c) Plate/coil quality control	(1) There must be an internal quality management program at all mills involved in producing steel, plate, coil, skelp, and/or rolling pipe to be operated at alternative MAOP. These programs must be structured to eliminate or detect defects and inclusions affecting pipe quality. (2) A mill inspection program or internal quality management program must include (i) and either (ii) or (iii): (i) An ultrasonic test of the ends and at least 35 percent of the surface of the plate/coil or pipe to identify imperfections that impair serviceability such as laminations, cracks, and inclusions. At least 95 percent of the lengths of pipe manufactured must be tested. For all pipelines designed after [the effective date of the final rule], the test must be done in accordance with ASTM A578/A578M Level B, or API 5L Paragraph 7.8.10 (incorporated by reference, see § 192.7) or equivalent method, and either

To address this design issue:	The pipeline segment must meet these additional requirements:
	(ii) A macro etch test or other equivalent method to identify inclusions that may form centerline segregation during the continuous casting process. Use of sulfur prints is not an equivalent method. The test must be carried out on the first or second slab of each sequence graded with an acceptance criteria of one or two on the Mannesmann scale or equivalent; or (iii) A quality assurance monitoring program implemented by the operator that includes audits of: (a) all steelmaking and casting facilities, (b) quality control plans and manufacturing procedure specifications, (c) equipment maintenance and records of conformance, (d) applicable casting superheat and speeds, and (e) centerline segregation monitoring records to ensure mitigation of centerline segregation during the continuous casting process.
(d) Seam quality control	(1) There must be a quality assurance program for pipe seam welds to assure tensile strength provided in API Specification 5L (incorporated by reference, see § 192.7) for appropriate grades. (2) There must be a hardness test, using Vickers (Hv10) hardness test method or equivalent test method, to assure a maximum hardness of 280 Vickers of the following: (i) A cross section of the weld seam of one pipe from each heat plus one pipe from each welding line per day; and (ii) For each sample cross section, a minimum of 13 readings (three for each heat affected zone, three in the weld metal, and two in each section of pipe base metal). (3) All of the seams must be ultrasonically tested after cold expansion and mill hydrostatic testing.
(e) Mill hydrostatic test	(1) All pipe to be used in a new pipeline segment must be hydrostatically tested at the mill at a test pressure corresponding to a hoop stress of 95 percent SMYS for 10 seconds. The test pressure may include a combination of internal test pressure and the allowance for end loading stresses imposed by the pipe mill hydrostatic testing equipment as allowed by API Specification 5L, Appendix K (incorporated by reference, see § 192.7). (2) Pipe in operation prior to November 17, 2008, must have been hydrostatically tested at the mill at a test pressure corresponding to a hoop stress of 90 percent SMYS for 10 seconds.
(f) Coating	(1) The pipe must be protected against external corrosion by a non-shielding coating. (2) Coating on pipe used for trenchless installation must be non-shielding and resist abrasions and other damage possible during installation. (3) A quality assurance inspection and testing program for the coating must cover the surface quality of the bare pipe, surface cleanliness and chlorides, blast cleaning, application temperature control, adhesion, cathodic disbondment, moisture permeation, bending, coating thickness, holiday detection, and repair.
(g) Fittings and flanges	(1) There must be certification records of flanges, factory induction bends and factory weld ells. Certification must address material properties such as chemistry, minimum yield strength and minimum wall thickness to meet design conditions. (2) If the carbon equivalents of flanges, bends and ells are greater than 0.42 percent by weight, the qualified welding procedures must include a pre-heat procedure. (3) Valves, flanges and fittings must be rated based upon the required specification rating class for the alternative MAOP.
(h) Compressor stations	(1) A compressor station must be designed to limit the temperature of the nearest downstream segment operating at alternative MAOP to a maximum of 120 degrees Fahrenheit (49 degrees Celsius) or the higher temperature allowed in paragraph (h)(2) of this section unless a long-term coating integrity monitoring program is implemented in accordance with paragraph (h)(3) of this section. (2) If research, testing and field monitoring tests demonstrate that the coating type being used will withstand a higher temperature in long-term operations, the compressor station may be designed to limit downstream piping to that higher temperature. Test results and acceptance criteria addressing coating adhesion, cathodic disbondment, and coating condition must be provided to each PHMSA pipeline safety regional office where the pipeline is in service at least 60 days prior to operating above 120 degrees Fahrenheit (49 degrees Celsius). An operator must also notify a State pipeline safety authority when the pipeline is located in a State where PHMSA has an interstate agent agreement, or an intrastate pipeline is regulated by that State. (3) Pipeline segments operating at alternative MAOP may operate at temperatures above 120 degrees Fahrenheit (49 degrees Celsius) if the operator implements a long-term coating integrity monitoring program. The monitoring program must include examinations using direct current voltage gradient (DCVG), alternating current voltage gradient (ACVG), or an equivalent method of monitoring coating integrity. An operator must specify the periodicity at which these examinations occur and criteria for repairing identified indications. An operator must submit its long-term coating integrity monitoring program to each PHMSA pipeline safety regional office in which the pipeline is located for review before the pipeline segments may be operated at temperatures in excess of 120 degrees Fahrenheit (49 degrees Celsius). An operator must also notify a State pipeline safety authority when the pipeline is located in a State where PHMSA has an interstate agent agreement, or an intrastate pipeline is regulated by that State.

■ 4. Add § 192.328 to subpart G to read as follows:

§ 192.328 Additional construction requirements for steel pipe using alternative maximum allowable operating pressure.

For a new or existing pipeline segment to be eligible for operation at the alternative maximum allowable operating pressure calculated under § 192.620, a segment must meet the following additional construction requirements. Records must be maintained, for the useful life of the pipeline, demonstrating compliance with these requirements:

To address this construction issue:	The pipeline segment must meet this additional construction requirement:
(a) Quality assurance	(1) The construction of the pipeline segment must be done under a quality assurance plan addressing pipe inspection, hauling and stringing, field bending, welding, non-destructive examination of girth welds, applying and testing field applied coating, lowering of the pipeline into the ditch, padding and backfilling, and hydrostatic testing. (2) The quality assurance plan for applying and testing field applied coating to girth welds must be: (i) Equivalent to that required under § 192.112(f)(3) for pipe; and (ii) Performed by an individual with the knowledge, skills, and ability to assure effective coating application.
(b) Girth welds	(1) All girth welds on a new pipeline segment must be non-destructively examined in accordance with § 192.243(b) and (c).
(c) Depth of cover	(1) Notwithstanding any lesser depth of cover otherwise allowed in § 192.327, there must be at least 36 inches (914 millimeters) of cover or equivalent means to protect the pipeline from outside force damage. (2) In areas where deep tilling or other activities could threaten the pipeline, the top of the pipeline must be installed at least one foot below the deepest expected penetration of the soil.
(d) Initial strength testing	(1) The pipeline segment must not have experienced failures indicative of systemic material defects during strength testing, including initial hydrostatic testing. A root cause analysis, including metallurgical examination of the failed pipe, must be performed for any failure experienced to verify that it is not indicative of a systemic concern. The results of this root cause analysis must be reported to each PHMSA pipeline safety regional office where the pipe is in service at least 60 days prior to operating at the alternative MAOP. An operator must also notify a State pipeline safety authority when the pipeline is located in a State where PHMSA has an interstate agent agreement, or an intrastate pipeline is regulated by that State.
(e) Interference currents	(1) For a new pipeline segment, the construction must address the impacts of induced alternating current from parallel electric transmission lines and other known sources of potential interference with corrosion control.

■ 5. Amend § 192.611 by revising paragraph (a)(1) and (a)(3)(i) and (ii) and adding new paragraph (a)(3)(iii) to read as follows:

§ 192.611 Change in class location: Confirmation or revision of maximum allowable operating pressure.

(a) * * *

(1) If the segment involved has been previously tested in place for a period of not less than 8 hours:

(i) The maximum allowable operating pressure is 0.8 times the test pressure in Class 2 locations, 0.667 times the test pressure in Class 3 locations, or 0.555 times the test pressure in Class 4 locations. The corresponding hoop stress may not exceed 72 percent of the SMYS of the pipe in Class 2 locations, 60 percent of SMYS in Class 3 locations, or 50 percent of SMYS in Class 4 locations.

(ii) The alternative maximum allowable operating pressure is 0.8 times the test pressure in Class 2 locations and 0.667 times the test pressure in Class 3 locations. For pipelines operating at alternative maximum allowable pressure per § 192.620, the corresponding hoop stress may not exceed 80 percent of the SMYS of the pipe in Class 2 locations and 67 percent of SMYS in Class 3 locations.

* * * * *

(3) * * *

(i) The maximum allowable operating pressure after the requalification test is 0.8 times the test pressure for Class 2 locations, 0.667 times the test pressure for Class 3 locations, and 0.555 times the test pressure for Class 4 locations.

(ii) The corresponding hoop stress may not exceed 72 percent of the SMYS of the pipe in Class 2 locations, 60 percent of SMYS in Class 3 locations, or 50 percent of SMYS in Class 4 locations.

(iii) For pipeline operating at an alternative maximum allowable operating pressure per § 192.620, the alternative maximum allowable operating pressure after the requalification test is 0.8 times the test pressure for Class 2 locations and 0.667 times the test pressure for Class 3 locations. The corresponding hoop stress may not exceed 80 percent of the SMYS of the pipe in Class 2 locations and 67 percent of SMYS in Class 3 locations.

* * * * *

■ 6. Amend § 192.619 by revising paragraph (a) introductory text and by adding paragraph (d) to read as follows:

§ 192.619 Maximum allowable operating pressure: Steel or plastic pipelines.

(a) No person may operate a segment of steel or plastic pipeline at a pressure that exceeds a maximum allowable operating pressure determined under paragraph (c) or (d) of this section, or the lowest of the following:

* * * * *

(d) The operator of a pipeline segment of steel pipeline meeting the conditions prescribed in § 192.620(b) may elect to operate the segment at a maximum allowable operating pressure determined under § 192.620(a).

■ 7. Add § 192.620 to subpart L to read as follows:

§ 192.620 Alternative maximum allowable operating pressure for certain steel pipelines.

(a) *How does an operator calculate the alternative maximum allowable operating pressure?* An operator calculates the alternative maximum allowable operating pressure by using different factors in the same formulas used for calculating maximum allowable operating pressure under § 192.619(a) as follows:

(1) In determining the alternative design pressure under § 192.105, use a design factor determined in accordance with § 192.111(b), (c), or (d) or, if none of these paragraphs apply, in accordance with the following table:

Class location	Alternative design factor (F)
1	0.80
2	0.67
3	0.56

(i) For facilities installed prior to November 17, 2008, for which § 192.111(b), (c), or (d) apply, use the following design factors as alternatives for the factors specified in those paragraphs: § 192.111(b)—0.67 or less; 192.111(c) and (d)—0.56 or less.

(ii) [Reserved]

(2) The alternative maximum allowable operating pressure is the lower of the following:

(i) The design pressure of the weakest element in the pipeline segment, determined under subparts C and D of this part.

(ii) The pressure obtained by dividing the pressure to which the pipeline segment was tested after construction by

a factor determined in the following table:

Class location	Alternative test factor
1	1.25
2	[1] 1.50
3	1.50

[1] For Class 2 alternative maximum allowable operating pressure segments installed prior to November 17, 2008, the alternative test factor is 1.25.

(b) *When may an operator use the alternative maximum allowable operating pressure calculated under paragraph (a) of this section?* An operator may use an alternative maximum allowable operating pressure calculated under paragraph (a) of this section if the following conditions are met:

(1) The pipeline segment is in a Class 1, 2, or 3 location;

(2) The pipeline segment is constructed of steel pipe meeting the additional design requirements in § 192.112;

(3) A supervisory control and data acquisition system provides remote monitoring and control of the pipeline segment. The control provided must include monitoring of pressures and flows, monitoring compressor start-ups and shut-downs, and remote closure of valves;

(4) The pipeline segment meets the additional construction requirements described in § 192.328;

(5) The pipeline segment does not contain any mechanical couplings used in place of girth welds;

(6) If a pipeline segment has been previously operated, the segment has not experienced any failure during normal operations indicative of a systemic fault in material as determined by a root cause analysis, including metallurgical examination of the failed pipe. The results of this root cause analysis must be reported to each PHMSA pipeline safety regional office where the pipeline is in service at least 60 days prior to operation at the alternative MAOP. An operator must also notify a State pipeline safety authority when the pipeline is located in a State where PHMSA has an interstate agent agreement, or an intrastate pipeline is regulated by that State; and

(7) At least 95 percent of girth welds on a segment that was constructed prior to November 17, 2008, must have been non-destructively examined in accordance with § 192.243(b) and (c).

(c) *What is an operator electing to use the alternative maximum allowable operating pressure required to do?* If an operator elects to use the alternative maximum allowable operating pressure calculated under paragraph (a) of this section for a pipeline segment, the operator must do each of the following:

(1) Notify each PHMSA pipeline safety regional office where the pipeline is in service of its election with respect to a segment at least 180 days before operating at the alternative maximum allowable operating pressure. An operator must also notify a State pipeline safety authority when the pipeline is located in a State where PHMSA has an interstate agent agreement, or an intrastate pipeline is regulated by that State.

(2) Certify, by signature of a senior executive officer of the company, as follows:

(i) The pipeline segment meets the conditions described in paragraph (b) of this section; and

(ii) The operating and maintenance procedures include the additional operating and maintenance requirements of paragraph (d) of this section; and

(iii) The review and any needed program upgrade of the damage prevention program required by paragraph (d)(4)(v) of this section has been completed.

(3) Send a copy of the certification required by paragraph (c)(2) of this section to each PHMSA pipeline safety regional office where the pipeline is in service 30 days prior to operating at the alternative MAOP. An operator must also send a copy to a State pipeline safety authority when the pipeline is located in a State where PHMSA has an interstate agent agreement, or an intrastate pipeline is regulated by that State.

(4) For each pipeline segment, do one of the following:

(i) Perform a strength test as described in § 192.505 at a test pressure calculated under paragraph (a) of this section or

(ii) For a pipeline segment in existence prior to November 17, 2008, certify, under paragraph (c)(2) of this section, that the strength test performed under § 192.505 was conducted at a test pressure calculated under paragraph (a) of this section, or conduct a new strength test in accordance with paragraph (c)(4)(i) of this section.

(5) Comply with the additional operation and maintenance requirements described in paragraph (d) of this section.

(6) If the performance of a construction task associated with implementing alternative MAOP can affect the integrity of the pipeline segment, treat that task as a ''covered task'', notwithstanding the definition in § 192.801(b) and implement the requirements of subpart N as appropriate.

(7) Maintain, for the useful life of the pipeline, records demonstrating compliance with paragraphs (b), (c)(6), and (d) of this section.

(8) A Class 1 and Class 2 pipeline location can be upgraded one class due to class changes per § 192.611(a)(3)(i). All class location changes from Class 1 to Class 2 and from Class 2 to Class 3 must have all anomalies evaluated and remediated per: The ''original pipeline class grade'' § 192.620(d)(11) anomaly repair requirements; and all anomalies with a wall loss equal to or greater than 40 percent must be excavated and remediated. Pipelines in Class 4 may not operate at an alternative MAOP.

(d) *What additional operation and maintenance requirements apply to operation at the alternative maximum allowable operating pressure?* In addition to compliance with other applicable safety standards in this part, if an operator establishes a maximum allowable operating pressure for a pipeline segment under paragraph (a) of this section, an operator must comply with the additional operation and maintenance requirements as follows:

To address increased risk of a maximum allowable operating pressure based on higher stress levels in the following areas:	Take the following additional step:
(1) Identifying and evaluating threats.	Develop a threat matrix consistent with § 192.917 to do the following: (i) Identify and compare the increased risk of operating the pipeline at the increased stress level under this section with conventional operation; and (ii) Describe and implement procedures used to mitigate the risk.
(2) Notifying the public	(i) Recalculate the potential impact circle as defined in § 192.903 to reflect use of the alternative maximum operating pressure calculated under paragraph (a) of this section and pipeline operating conditions; and (ii) In implementing the public education program required under § 192.616, perform the following:

To address increased risk of a maximum allowable operating pressure based on higher stress levels in the following areas:	Take the following additional step:
	(A) Include persons occupying property within 220 yards of the centerline and within the potential impact circle within the targeted audience; and (B) Include information about the integrity management activities performed under this section within the message provided to the audience.
(3) Responding to an emergency in an area defined as a high consequence area in § 192.903.	(i) Ensure that the identification of high consequence areas reflects the larger potential impact circle recalculated under paragraph (d)(1)(i) of this section.
	(ii) If personnel response time to mainline valves on either side of the high consequence area exceeds one hour (under normal driving conditions and speed limits) from the time the event is identified in the control room, provide remote valve control through a supervisory control and data acquisition (SCADA) system, other leak detection system, or an alternative method of control. (iii) Remote valve control must include the ability to close and monitor the valve position (open or closed), and monitor pressure upstream and downstream. (iv) A line break valve control system using differential pressure, rate of pressure drop or other widely-accepted method is an acceptable alternative to remote valve control.
(4) Protecting the right-of-way	(i) Patrol the right-of-way at intervals not exceeding 45 days, but at least 12 times each calendar year, to inspect for excavation activities, ground movement, wash outs, leakage, or other activities or conditions affecting the safety operation of the pipeline. (ii) Develop and implement a plan to monitor for and mitigate occurrences of unstable soil and ground movement. (iii) If observed conditions indicate the possible loss of cover, perform a depth of cover study and replace cover as necessary to restore the depth of cover or apply alternative means to provide protection equivalent to the originally-required depth of cover. (iv) Use line-of-sight line markers satisfying the requirements of § 192.707(d) except in agricultural areas, large water crossings or swamp, steep terrain, or where prohibited by Federal Energy Regulatory Commission orders, permits, or local law. (v) Review the damage prevention program under § 192.614(a) in light of national consensus practices, to ensure the program provides adequate protection of the right-of-way. Identify the standards or practices considered in the review, and meet or exceed those standards or practices by incorporating appropriate changes into the program. (vi) Develop and implement a right-of-way management plan to protect the pipeline segment from damage due to excavation activities.
(5) Controlling internal corrosion	(i) Develop and implement a program to monitor for and mitigate the presence of, deleterious gas stream constituents. (ii) At points where gas with potentially deleterious contaminants enters the pipeline, use filter separators or separators and gas quality monitoring equipment. (iii) Use gas quality monitoring equipment that includes a moisture analyzer, chromatograph, and periodic hydrogen sulfide sampling. (iv) Use cleaning pigs and inhibitors, and sample accumulated liquids when corrosive gas is present. (v) Address deleterious gas stream constituents as follows: (A) Limit carbon dioxide to 3 percent by volume; (B) Allow no free water and otherwise limit water to seven pounds per million cubic feet of gas; and (C) Limit hydrogen sulfide to 1.0 grain per hundred cubic feet (16 ppm) of gas, where the hydrogen sulfide is greater than 0.5 grain per hundred cubic feet (8 ppm) of gas, implement a pigging and inhibitor injection program to address deleterious gas stream constituents, including follow-up sampling and quality testing of liquids at receipt points. (vi) Review the program at least quarterly based on the gas stream experience and implement adjustments to monitor for, and mitigate the presence of, deleterious gas stream constituents.
(6) Controlling interference that can impact external corrosion.	(i) Prior to operating an existing pipeline segment at an alternate maximum allowable operating pressure calculated under this section, or within six months after placing a new pipeline segment in service at an alternate maximum allowable operating pressure calculated under this section, address any interference currents on the pipeline segment. (ii) To address interference currents, perform the following: (A) Conduct an interference survey to detect the presence and level of any electrical current that could impact external corrosion where interference is suspected; (B) Analyze the results of the survey; and (C) Take any remedial action needed within 6 months after completing the survey to protect the pipeline segment from deleterious current.
(7) Confirming external corrosion control through indirect assessment.	(i) Within six months after placing the cathodic protection of a new pipeline segment in operation, or within six months after certifying a segment under § 192.620(c)(1) of an existing pipeline segment under this section, assess the adequacy of the cathodic protection through an indirect method such as close-interval survey, and the integrity of the coating using direct current voltage gradient (DCVG) or alternating current voltage gradient (ACVG). (ii) Remediate any construction damaged coating with a voltage drop classified as moderate or severe (IR drop greater than 35% for DCVG or 50 dBμv for ACVG) under section 4 of NACE RP–0502–2002 (incorporated by reference, see § 192.7). (iii) Within six months after completing the baseline internal inspection required under paragraph (8) of this section, integrate the results of the indirect assessment required under paragraph (6)(i) of this section with the results of the baseline internal inspection and take any needed remedial actions. (iv) For all pipeline segments in high consequence areas, perform periodic assessments as follows:

To address increased risk of a maximum allowable operating pressure based on higher stress levels in the following areas:	Take the following additional step:
	(A) Conduct periodic close interval surveys with current interrupted to confirm voltage drops in association with periodic assessments under subpart O of this part. (B) Locate pipe-to-soil test stations at half-mile intervals within each high consequence area ensuring at least one station is within each high consequence area, if practicable. (C) Integrate the results with those of the baseline and periodic assessments for integrity done under paragraphs (d)(8) and (d)(9) of this section.
(8) Controlling external corrosion through cathodic protection.	(i) If an annual test station reading indicates cathodic protection below the level of protection required in subpart I of this part, complete remedial action within six months of the failed reading or notify each PHMSA pipeline safety regional office where the pipeline is in service demonstrating that the integrity of the pipeline is not compromised if the repair takes longer than 6 months. An operator must also notify a State pipeline safety authority when the pipeline is located in a State where PHMSA has an interstate agent agreement, or an intrastate pipeline is regulated by that State; and (ii) After remedial action to address a failed reading, confirm restoration of adequate corrosion control by a close interval survey on either side of the affected test station to the next test station. (iii) If the pipeline segment has been in operation, the cathodic protection system on the pipeline segment must have been operational within 12 months of the completion of construction.
(9) Conducting a baseline assessment of integrity.	(i) Except as provided in paragraph (d)(8)(iii) of this section, for a new pipeline segment operating at the new alternative maximum allowable operating pressure, perform a baseline internal inspection of the entire pipeline segment as follows: (A) Assess using a geometry tool after the initial hydrostatic test and backfill and within six months after placing the new pipeline segment in service; and (B) Assess using a high resolution magnetic flux tool within three years after placing the new pipeline segment in service at the alternative maximum allowable operating pressure. (ii) Except as provided in paragraph (d)(8)(iii) of this section, for an existing pipeline segment, perform a baseline internal assessment using a geometry tool and a high resolution magnetic flux tool before, but within two years prior to, raising pressure to the alternative maximum allowable operating pressure as allowed under this section. (iii) If headers, mainline valve by-passes, compressor station piping, meter station piping, or other short portion of a pipeline segment operating at alternative maximum allowable operating pressure cannot accommodate a geometry tool and a high resolution magnetic flux tool, use direct assessment (per § 192.925, § 192.927 and/or § 192.929) or pressure testing (per subpart J of this part) to assess that portion.
(10) Conducting periodic assessments of integrity.	(i) Determine a frequency for subsequent periodic integrity assessments as if all the alternative maximum allowable operating pressure pipeline segments were covered by subpart O of this part and (ii) Conduct periodic internal inspections using a high resolution magnetic flux tool on the frequency determined under paragraph (d)(9)(i) of this section, or (iii) Use direct assessment (per § 192.925, § 192.927 and/or § 192.929) or pressure testing (per subpart J of this part) for periodic assessment of a portion of a segment to the extent permitted for a baseline assessment under paragraph (d)(8)(iii) of this section.
(11) Making repairs	(i) Perform the following when evaluating an anomaly: (A) Use the most conservative calculation for determining remaining strength or an alternative validated calculation based on pipe diameter, wall thickness, grade, operating pressure, operating stress level, and operating temperature: and (B) Take into account the tolerances of the tools used for the inspection. (ii) Repair a defect immediately if any of the following apply: (A) The defect is a dent discovered during the baseline assessment for integrity under paragraph (d)(8) of this section and the defect meets the criteria for immediate repair in § 192.309(b). (B) The defect meets the criteria for immediate repair in § 192.933(d). (C) The alternative maximum allowable operating pressure was based on a design factor of 0.67 under paragraph (a) of this section and the failure pressure is less than 1.25 times the alternative maximum allowable operating pressure. (D) The alternative maximum allowable operating pressure was based on a design factor of 0.56 under paragraph (a) of this section and the failure pressure is less than or equal to 1.4 times the alternative maximum allowable operating pressure. (iii) If paragraph (d)(10)(ii) of this section does not require immediate repair, repair a defect within one year if any of the following apply: (A) The defect meets the criteria for repair within one year in § 192.933(d). (B) The alternative maximum allowable operating pressure was based on a design factor of 0.80 under paragraph (a) of this section and the failure pressure is less than 1.25 times the alternative maximum allowable operating pressure. (C) The alternative maximum allowable operating pressure was based on a design factor of 0.67 under paragraph (a) of this section and the failure pressure is less than 1.50 times the alternative maximum allowable operating pressure. (D) The alternative maximum allowable operating pressure was based on a design factor of 0.56 under paragraph (a) of this section and the failure pressure is less than or equal to 1.80 times the alternative maximum allowable operating pressure. (iv) Evaluate any defect not required to be repaired under paragraph (d)(10)(ii) or (iii) of this section to determine its growth rate, set the maximum interval for repair or re-inspection, and repair or re-inspect within that interval.

(e) *Is there any change in overpressure protection associated with operating at the alternative maximum allowable operating pressure?* Notwithstanding the required capacity of pressure relieving and limiting stations otherwise required by § 192.201, if an operator establishes a maximum allowable operating pressure for a pipeline segment in accordance with paragraph (a) of this section, an operator must:

(1) Provide overpressure protection that limits mainline pressure to a maximum of 104 percent of the maximum allowable operating pressure; and

(2) Develop and follow a procedure for establishing and maintaining accurate set points for the supervisory control and data acquisition system.

Issued in Washington, DC, on October 2, 2008.

Carl T. Johnson,

Administrator.

[FR Doc. E8–23915 Filed 10–16–08; 8:45 am]

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Federal Register

Friday,
October 17, 2008

Part VI

Postal Regulatory Commission

39 CFR Part 3020

Administrative Practice and Procedure, Postal Service; Final Rule

POSTAL REGULATORY COMMISSION

39 CFR Part 3020

[Docket Nos. CP2008–18, CP2008–19, CP2008–20, CP2008–21, CP2008–22, CP2008–23 and CP2008–24; Order No. 107]

Administrative Practice and Procedure, Postal Service

AGENCY: Postal Regulatory Commission.

ACTION: Final rule.

SUMMARY: The Commission is adding several recently-negotiated Global Expedited Package Service contracts to the competitive product list. This action is consistent with changes in a recent law governing postal operations. Re-publication of the lists of market dominant and competitive products is also consistent with new requirements in the law.

DATES: Effective October 17, 2008.

ADDRESSES: Submit comments electronically via the Commission's Filing Online system at *http://www.prc.gov*.

FOR FURTHER INFORMATION CONTACT: Stephen L. Sharfman, General Counsel, 202–789–6820 and *stephen.sharfman@prc.gov*.

SUPPLEMENTARY INFORMATION: *Regulatory History,* 73 FR 50374 (August 26, 2008).

In these dockets, the Postal Service proposes to add seven individual negotiated service agreements, namely, specific Global Expedited Package Service (GEPS) contracts, to the Global Expedited Package Services 1 (GEPS 1) product established in Docket No. CP2008–5. For the reasons discussed below, the Commission grants the Postal Service's proposals.

I. Background

On August 14, 2008, the Postal Service filed seven identical notices, which have been assigned to Docket Nos. CP2008–18, CP2008–19, CP2008–20, CP2008–21, CP2008–22, CP2008–23 and CP2008–24, announcing price and classification changes for competitive products not of general applicability.[1] These notices announce individual negotiated service agreements and specific GEPS contracts which the Postal Service has executed with individual mailers. The Postal Service believes each is functionally equivalent to the GEPS 1 product established in Docket No. CP2008–5.

These dockets have been filed pursuant to 39 U.S.C. 3633 and 39 CFR 3015.5. In addition, the Postal Service contends that the contracts are in accord with Order No. 86.[2] In Order No. 86, the Commission found that additional contracts may be included as part of the GEPS 1 product if they meet the requirements of 39 U.S.C. 3633 and if they are substantially equivalent to the initial GEPS 1 contract.[3]

In support of each of these dockets, the Postal Service also filed the contract and supporting materials under seal. The Governors' Decision supporting the GEPS 1 product was filed in consolidated Docket No. CP2008–5.[4] The Notices also contain the Postal Service's arguments that these agreements are substantially equivalent and that they exhibit similar cost and market characteristics to the GEPS 1 product. Notices at 3–5.

In Order No. 100, the Commission gave notice of the seven dockets, appointed a Public Representative, and provided the public with an opportunity to comment.[5]

II. Comments

Comments were filed by the Public Representative.[6] The Public Representative's comments focus on five areas: (1) Cost coverage; (2) appropriate classification; (3) increased access to U.S. goods by consumers; (4) volume projections; and (5) selection of economic adjustment factors. The Public Representative concludes that the seven contracts at issue satisfy the requirements of 39 U.S.C. 3633 regarding cost coverage, the lack of cross-subsidization, and contribution to institutional costs. Public Representative Comments at 3–4. The Public Representative also believes that the contracts are substantially similar and any differences between them and the original GEPS 1 contract are immaterial. *Id.* at 5. Accordingly, the Public Representative contends that these contracts should be included as part of the GEPS 1 product category. *Id.*

The remainder of the Public Representative's comments focuses on the benefits of the contracts to U.S. consumers, the sufficiency of volume projections, and the need to exercise special care in selecting economic adjustment factors. *Id.* at 5–8.

III. Commission Analysis

The Postal Service proposes to add additional contracts under the GEPS 1 product that was created by Docket No. CP2008–5. In Order No. 86, the Commission noted that:

> If the Postal Service determines that it has entered into an agreement substantially equivalent to GEPS 1 with another mailer, it may file such a contract under rule 3015.5. In each case, the individual contract must be filed with the Commission, and each contract must meet the requirements of 39 U.S.C. 3633. The Postal Service shall identify all significant differences between the new contract and the pre-existing product group, GEPS 1. Such differences would include terms and conditions that impose new obligations or new requirements on any party to the contract. The Commission will verify whether or not any subsequent contract is in fact substantially equivalent. Contracts not having substantially the same terms and conditions as the GEPS 1 contract must be filed under 39 CFR part 3020, subpart B.

Order No. 86 at 7. First, the Commission reviews the contracts to ensure that they are substantially equivalent to the pre-existing contract classified as part of the GEPS 1 product and thus belong as part of that product. Second, the Commission must ensure that the contracts at issue in this proceeding independently satisfy the requirements of rule 3015.5 and 39 U.S.C. 3633.

Here, the Postal Service has filed seven additional contracts (Docket Nos. CP2008–18, CP2008–19, CP2008–20, CP2008–21, CP2008–22, CP2008–23 and CP2008–24) that it contends are substantially similar to the one submitted in Docket No. CP2008–5 and accordingly should be grouped under the GEPS 1 product. Notices at 3–5. It argues these contracts share the same cost and market characteristics as the previously classified GEPS 1 contract, in particular, those of small or medium-sized businesses that mail their products directly to foreign destinations using either Express Mail International, Priority Mail International, or both. *Id.* at 4.

The Postal Service also identifies what it terms ''incidental'' and ''minor'' differences between the proposed new contracts and the pre-existing product group, GEPS 1. *Id.* at 4–5. In particular, it notes that the contracts may differ in minor respects, for example, prices may

[1] Notice of United States Postal Service of Filing of Functionally Equivalent Global Expedited Package Services 1 Negotiated Service Agreement, August 14, 2008, filed in Docket Nos. CP2008–18, CP2008–19, CP2008–20, CP2008–21, CP2008–22, CP2008–23, and CP2008–24 (Notices).

[2] Docket No. CP2008–5, Order Concerning Global Expedited Package Services Contracts, June 27, 2008 (Order No. 86).

[3] Order No. 86 at 7.

[4] Docket No. CP2008–5, United States Postal Service Notice of Filing Redacted Copy of Governors' Decision No. 08–7, July 23, 2008.

[5] PRC Order No. 100, Notice and Order Concerning Filing of Additional Global Expedited Package Services 1 Negotiated Service Agreements, August 19, 2008 (Order No. 100).

[6] Public Representative Comments in Response to United States Postal Service Notice of Global Expedited Package Services Contract, September 3, 2008 (Public Representative Comments). On September 3, 2008, the Public Representative also filed a Motion for Late Acceptance of Comments by the Public Representative. The motion is granted.

vary due to volume commitments, signing dates of the agreements, existence of previous agreements, and other case specific and negotiation related factors. *Id.* at 4–5.

The Commission has reviewed the contracts in Docket Nos. CP2008–18, CP2008–19, CP2008–20, CP2008–21, CP2008–22, CP2008–23 and CP2008–24 and finds those agreements to be substantially equivalent in all pertinent respects to the GEPS 1 product.[7]

Additionally, the Commission reviews the filings to ensure that they meet the requirements of rules 3015.5 and 3015.7 and of 39 U.S.C. 3633. The Commission has reviewed the financial analysis provided under seal that accompanies the agreements in all seven dockets as well as the comments filed in this proceeding.

The Public Representative ''sees no specific cause for concern about the accuracy of the volume projections associated with these contracts,'' but recommends that ''the Postal Service * * * in its sealed filings identify the nature and source of these volume projections, in general terms, so that the Commission might properly evaluate the significance of possible vulnerabilities or weaknesses underlying those projections.'' Public Representative Comments at 7. The recommendation is not unreasonable. However, for purposes of the Commission's preliminary analysis with regard to the contracts at issue herein, it does not appear that a detailed analysis of the nature and sources of these volume projections would be warranted at this time. If, as a result of the Commission's Annual Compliance Determination, the volume projections are shown to be unreliable, appropriate remedial action may be taken.

The Public Representative also recommends that the Postal Service should take particular care to ensure that it selects proper economic adjustment factors. *Id.* at 7–8. The contracts at issue have a relatively short duration, one year. *See* Notices at 2. Thus, the risk associated with such factors, *e.g.*, that the Postal Service may fail to meet its statutory cost coverage requirements, appears to be minimal.

Based on the information provided, the Commission finds that all seven proposed contracts submitted should cover their attributable costs (39 U.S.C. 3633(a)(2)), should not lead to the subsidization of competitive products by market dominant products (39 U.S.C. 3633(a)(1)), and should have a positive effect on competitive products' contribution to institutional costs (39 U.S.C. 3633(a)(3)). Thus, a preliminary review of the proposed contracts indicates that they comport with the provisions applicable to rates for competitive products.

The revisions to the competitive product list are shown below the signature of this Order, and shall become effective upon publication in the **Federal Register**.

IV. Ordering Paragraphs

It is Ordered:

1. The contracts filed in Docket Nos. CP2008–18, CP2008–19, CP2008–20, CP2008–21, CP2008–22, CP2008–23 and CP2008–24 are added to the product category Global Expedited Package Services 1 (CP2008–5).

2. The Secretary shall arrange for publication of this order in the **Federal Register**.

By the Commission.

Steven W. Williams,

Secretary.

List of Subjects in 39 CFR Part 3020

Administrative practice and procedure, Postal Service.

■ For the reasons stated in the preamble, under the authority at 39 U.S.C. 503, the Postal Regulatory Commission amends 39 CFR part 3020 as follows:

■ 1. The authority citation for part 3020 continues to read as follows:

Authority: 39 U.S.C. 503; 3622; 3631; 3642; 3682.

■ 2. Revise Appendix A to Subpart A of Part 3020—Mail Classification Schedule to read as follows:

PART 3020—PRODUCT LISTS

Appendix A to Subpart A of Part 3020—Mail Classification Schedule

Part A—Market Dominant Products
Market Dominant Product List
First-Class Mail
- Single-Piece Letters/Postcards
- Bulk Letters/Postcards
- Flats
- Parcels
- Outbound Single-Piece First-Class Mail International
- Inbound Single-Piece First-Class Mail International

Standard Mail (Regular and Nonprofit)
- High Density and Saturation Letters
- High Density and Saturation Flats/Parcels
- Carrier Route
- Letters
- Flats
- Not Flat-Machinables (NFMs)/Parcels

Periodicals
- Within County Periodicals
- Outside County Periodicals

Package Services
- Single-Piece Parcel Post
- Inbound Surface Parcel Post (at UPU rates)
- Bound Printed Matter Flats
- Bound Printed Matter Parcels
- Media Mail/Library Mail

Special Services
- Ancillary Services
- International Ancillary Services
- Address List Services
- Caller Service
- Change-of-Address Credit Card Authentication
- Confirm
- International Reply Coupon Service
- International Business Reply Mail Service
- Money Orders
- Post Office Box Service

Negotiated Service Agreements
- HSBC North America Holdings Inc. Negotiated Service Agreement
- Bookspan Negotiated Service Agreement
- Bank of America corporation Negotiated Service Agreement
- The Bradford Group Negotiated Service Agreement

Market Dominant Product Descriptions
First-Class Mail [Reserved for Class Description]
- Single-Piece Letters/Postcards [Reserved for Product Description]
- Bulk Letters/Postcards [Reserved for Product Description]
- Flats [Reserved for Product Description]
- Parcels [Reserved for Product Description]
- Outbound Single-Piece First-Class Mail International [Reserved for Product Description]
- Inbound Single-Piece First-Class Mail International [Reserved for Product Description]

Standard Mail (Regular and Nonprofit) [Reserved for Class Description]
- High Density and Saturation Letters [Reserved for Product Description]
- High Density and Saturation Flats/Parcels [Reserved for Product Description]
- Carrier Route [Reserved for Product Description]
- Letters [Reserved for Product Description]
- Flats [Reserved for Product Description]
- Not Flat-Machinables (NFMs)/Parcels [Reserved for Product Description]

Periodicals [Reserved for Class Description]
- Within County Periodicals [Reserved for Product Description]
- Outside County Periodicals [Reserved for Product Description]

Package Services [Reserved for Class Description]
- Single-Piece Parcel Post [Reserved for Product Description]
- Inbound Surface Parcel Post (at UPU rates) [Reserved for Product Description]
- Bound Printed Matter Flats [Reserved for Product Description]

[7] The differences between the contracts and the originally classified GEPS 1 contract do not appear to be substantial. However, this finding does not preclude the Commission from revisiting this issue at a future date if circumstances warrant.

- Bound Printed Matter Parcels [Reserved for Product Description]
- Media Mail/Library Mail [Reserved for Product Description]

Special Services [Reserved for Class Description]
- Ancillary Services [Reserved for Product Description]
- Address Correction Service [Reserved for Product Description]
- Applications and Mailing Permits [Reserved for Product Description]
- Business Reply Mail [Reserved for Product Description]
- Bulk Parcel Return Service [Reserved for Product Description]
- Certified Mail [Reserved for Product Description]
- Certificate of Mailing [Reserved for Product Description]
- Collect on Delivery [Reserved for Product Description]
- Delivery Confirmation [Reserved for Product Description]
- Insurance [Reserved for Product Description]
- Merchandise Return Service [Reserved for Product Description]
- Parcel Airlift (PAL) [Reserved for Product Description]
- Registered Mail [Reserved for Product Description]
- Return Receipt [Reserved for Product Description]
- Return Receipt for Merchandise [Reserved for Product Description]
- Restricted Delivery [Reserved for Product Description]
- Shipper-Paid Forwarding [Reserved for Product Description]
- Signature Confirmation [Reserved for Product Description]
- Special Handling [Reserved for Product Description]
- Stamped Envelopes [Reserved for Product Description]
- Stamped Cards [Reserved for Product Description]
- Premium Stamped Stationery [Reserved for Product Description]
- Premium Stamped Cards [Reserved for Product Description]
- International Ancillary Services [Reserved for Product Description]
- International Certificate of Mailing [Reserved for Product Description]
- International Registered Mail [Reserved for Product Description]
- International Return Receipt [Reserved for Product Description]
- International Restricted Delivery [Reserved for Product Description]
- Address List Services [Reserved for Product Description]
- Caller Service [Reserved for Product Description]
- Change-of-Address Credit Card Authentication [Reserved for Product Description]
- Confirm [Reserved for Product Description]
- International Reply Coupon Service [Reserved for Product Description]
- International Business Reply Mail Service [Reserved for Product Description]
- Money Orders [Reserved for Product Description]
- Post Office Box Service [Reserved for Product Description]

Negotiated Service Agreements [Reserved for Class Description]
- HSBC North America Holdings Inc. Negotiated Service Agreement [Reserved for Product Description]
- Bookspan Negotiated Service Agreement [Reserved for Product Description]
- Bank of America Corporation Negotiated Service Agreement
- The Bradford Group Negotiated Service Agreement

Part B—Competitive Products

Competitive Product List

Express Mail
- Express Mail
- Outbound International Expedited Services
- Inbound International Expedited Services
  - Inbound International Expedited Services 1 (CP2008–7)

Priority Mail
- Priority Mail
- Outbound Priority Mail International
- Inbound Air Parcel Post

Parcel Select

Parcel Return Service

International
- International Priority Airlift (IPA)
- International Surface Airlift (ISAL)
- International Direct Sacks—M-Bags
- Global Customized Shipping Services
- Inbound Surface Parcel Post (at non-UPU rates)
- International Money Transfer Service
- International Ancillary Services

Special Services
- Premium Forwarding Service

Negotiated Service Agreements
- Domestic
  - Express Mail Contract 1 (MC2008–5)
- Outbound International
  - Global Expedited Package Services (GEPS) Contracts
    - GEPS 1 (CP2008–5, CP2008–11, CP2008–12, and CP2008–13, CP2008–18, CP2008–19, CP2008–20, CP2008–21, CP2008–22, CP2008–23 and CP2008–24)
  - Global Plus Contracts
    - Global Plus 1 (CP2008–9 and CP2008–10)
    - Global Plus 2 (MC2008–7, CP2008–16 and CP2008–17)
- Inbound Direct Entry Contracts with Foreign Postal Administrations (MC2008–6)

Competitive Product Descriptions
- Express Mail [Reserved for Group Description]
- Express Mail [Reserved for Product Description]
- Outbound International Expedited Services [Reserved for Product Description]
- Inbound International Expedited Services [Reserved for Product Description]
- Priority [Reserved for Product Description]
- Priority Mail [Reserved for Product Description]
- Outbound Priority Mail International [Reserved for Product Description]
- Inbound Air Parcel Post [Reserved for Product Description]
- Parcel Select [Reserved for Group Description]
- Parcel Return Service [Reserved for Group Description]
- International [Reserved for Group Description]
- International Priority Airlift (IPA) [Reserved for Product Description]
- International Surface Airlift (ISAL) [Reserved for Product Description]
- International Direct Sacks—M-Bags [Reserved for Product Description]
- Global Customized Shipping Services [Reserved for Product Description]
- International Money Transfer Service [Reserved for Product Description]
- Inbound Surface Parcel Post (at non-UPU rates) [Reserved for Product Description]
- International Ancillary Services [Reserved for Product Description]
- International Certificate of Mailing [Reserved for Product Description]
- International Registered Mail [Reserved for Product Description]
- International Return Receipt [Reserved for Product Description]
- International Restricted Delivery [Reserved for Product Description]
- International Insurance [Reserved for Product Description]
- Negotiated Service Agreements [Reserved for Group Description]
- Domestic [Reserved for Product Description]
- Outbound International [Reserved for Group Description]

[FR Doc. E8–24581 Filed 10–16–08; 8:45 am]

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FAR Case 2005-018, Contract Debts; published 9-17-08

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FEDERAL HOUSING FINANCING AGENCY

Affordable Housing Program Amendments

Federal Home Loan Bank Mortgage Refinancing Authority; published 10-17-08

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Boeing Model 767 200, 300, and 400ER Series Airplanes; comments due by 10-20-08; published 9-23-08 [FR E8-22220]

Bombardier Model CL 600 2C10 (Regional Jet Series 700, 701 & 702) Airplanes et al.; comments due by

10-23-08; published 9-23-08 [FR E8-22218]

EADS SOCATA Model TBM 700 Airplanes; comments due by 10-20-08; published 9-18-08 [FR E8-21429]

Maule Aerospace Technology, Inc. Models M-4, M-5, M-6, M-7, and M-8 Series Airplanes; comments due by 10-20-08; published 8-19-08 [FR E8-19168]

Turbomeca S.A. Arrius 2B1, 2B1A, 2B2, and 2K1 Turboshaft Engines; comments due by 10-23-08; published 9-23-08 [FR E8-21834]

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First Sale Declaration Requirement; comments due by 10-24-08; published 8-25-08 [FR E8-19640]

Uniform Rules Of Origin for Imported Merchandise; comments due by 10-23-08; published 9-8-08 [FR E8-20662]

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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. 928/P.L. 110–409

Inspector General Reform Act of 2008 (Oct. 14, 2008; 122 Stat. 4302)

H.R. 1594/P.L. 110–410

To designate the Department of Veterans Affairs Outpatient Clinic in Hermitage, Pennsylvania, as the Michael A. Marzano Department of Veterans Affairs Outpatient Clinic. (Oct. 14, 2008; 122 Stat. 4318)

H.R. 2786/P.L. 110–411

Native American Housing Assistance and Self-Determination Reauthorization Act of 2008 (Oct. 14, 2008; 122 Stat. 4319)

H.R. 6098/P.L. 110–412

Personnel Reimbursement for Intelligence Cooperation and Enhancement of Homeland Security Act of 2008 (Oct. 14, 2008; 122 Stat. 4336)

H.R. 7198/P.L. 110–413

Stephanie Tubbs Jones Gift of Life Medal Act of 2008 (Oct. 14, 2008; 122 Stat. 4338)

S. 906/P.L. 110–414

Mercury Export Ban Act of 2008 (Oct. 14, 2008; 122 Stat. 4341)

S. 1276/P.L. 110–415

Methamphetamine Production Prevention Act of 2008 (Oct. 14, 2008; 122 Stat. 4349)

S. 2304/P.L. 110–416

Mentally Ill Offender Treatment and Crime Reduction Reauthorization and Improvement Act of 2008 (Oct. 14, 2008; 122 Stat. 4352)

S. 3001/P.L. 110–417

Duncan Hunter National Defense Authorization Act for Fiscal Year 2009 (Oct. 14, 2008; 122 Stat. 4356)

S. 3550/P.L. 110–418

To designate a portion of the Rappahannock River in the Commonwealth of Virginia as the "John W. Warner Rapids". (Oct. 14, 2008; 122 Stat. 4772)

Last List October 16, 2008

CORRECTION

In the **List of Public Laws** that appeared in the issue of Thursday, October 16, 2008, the entry for S. 3296 (Public Law 110–402) is listed incorrectly. It should read as follows:

S. 3296/P.L. 110–402

To extend the authority of the United States Supreme Court Police to protect court officials off the Supreme Court Grounds and change the title of the Administrative Assistant to the Chief Justice. (Oct. 13, 2008; 122 Stat. 4254)

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