AUTHENTICATED
U.S. GOVERNMENT
INFORMATION
GPO

Federal Register

10–29–08 Wednesday
Vol. 73 No. 210 Oct. 29, 2008

Pages 64179–64514

The **FEDERAL REGISTER** (ISSN 0097–6326) is published daily, Monday through Friday, except official holidays, by the Office of the Federal Register, National Archives and Records Administration, Washington, DC 20408, under the Federal Register Act (44 U.S.C. Ch. 15) and the regulations of the Administrative Committee of the Federal Register (1 CFR Ch. I). The Superintendent of Documents, U.S. Government Printing Office, Washington, DC 20402 is the exclusive distributor of the official edition. Periodicals postage is paid at Washington, DC.

The **FEDERAL REGISTER** provides a uniform system for making available to the public regulations and legal notices issued by Federal agencies. These include Presidential proclamations and Executive Orders, Federal agency documents having general applicability and legal effect, documents required to be published by act of Congress, and other Federal agency documents of public interest.

Documents are on file for public inspection in the Office of the Federal Register the day before they are published, unless the issuing agency requests earlier filing. For a list of documents currently on file for public inspection, see *www.federalregister.gov.*

The seal of the National Archives and Records Administration authenticates the Federal Register as the official serial publication established under the Federal Register Act. Under 44 U.S.C. 1507, the contents of the **Federal Register** shall be judicially noticed.

The **Federal Register** is published in paper and on 24x microfiche. It is also available online at no charge as one of the databases on GPO Access, a service of the U.S. Government Printing Office.

The online edition of the **Federal Register** *www.gpoaccess.gov/nara,* available through GPO Access, is issued under the authority of the Administrative Committee of the Federal Register as the official legal equivalent of the paper and microfiche editions (44 U.S.C. 4101 and 1 CFR 5.10). It is updated by 6 a.m. each day the **Federal Register** is published and includes both text and graphics from Volume 59, Number 1 (January 2, 1994) forward.

For more information about GPO Access, contact the GPO Access User Support Team, call toll free 1-888-293-6498; DC area 202-512-1530; fax at 202-512-1262; or via e-mail at *gpoaccess@gpo.gov.* The Support Team is available between 7:00 a.m. and 9:00 p.m. Eastern Time, Monday–Friday, except official holidays.

The annual subscription price for the **Federal Register** paper edition is $749 plus postage, or $808, plus postage, for a combined **Federal Register, Federal Register** Index and List of CFR Sections Affected (LSA) subscription; the microfiche edition of the **Federal Register** including the **Federal Register** Index and LSA is $165, plus postage. Six month subscriptions are available for one-half the annual rate. The prevailing postal rates will be applied to orders according to the delivery method requested. The price of a single copy of the daily **Federal Register,** including postage, is based on the number of pages: $11 for an issue containing less than 200 pages; $22 for an issue containing 200 to 400 pages; and $33 for an issue containing more than 400 pages. Single issues of the microfiche edition may be purchased for $3 per copy, including postage. Remit check or money order, made payable to the Superintendent of Documents, or charge to your GPO Deposit Account, VISA, MasterCard, American Express, or Discover. Mail to: U.S. Government Printing Office—New Orders, P.O. Box 979050, St. Louis, MO 63197-9000; or call toll free 1-866-512-1800, DC area 202-512-1800; or go to the U.S. Government Online Bookstore site, see *bookstore.gpo.gov.*

There are no restrictions on the republication of material appearing in the **Federal Register.**

How To Cite This Publication: Use the volume number and the page number. Example: 73 FR 12345.

Postmaster: Send address changes to the Superintendent of Documents, Federal Register, U.S. Government Printing Office, Washington, DC 20402, along with the entire mailing label from the last issue received.

SUBSCRIPTIONS AND COPIES

PUBLIC	
Subscriptions:	
Paper or fiche	**202–512–1800**
Assistance with public subscriptions	**202–512–1806**
General online information	**202–512–1530; 1–888–293–6498**
Single copies/back copies:	
Paper or fiche	**202–512–1800**
Assistance with public single copies	**1–866–512–1800 (Toll-Free)**
FEDERAL AGENCIES	
Subscriptions:	
Paper or fiche	**202–741–6005**
Assistance with Federal agency subscriptions	**202–741–6005**

Printed on recycled paper.

Contents

Federal Register

Vol. 73, No. 210

Wednesday, October 29, 2008

Agriculture Department
See Food and Nutrition Service
See Forest Service

Alcohol and Tobacco Tax and Trade Bureau
RULES
Establishment of the Leona Valley Viticultural Area (2007R-281P), 64199–64202
PROPOSED RULES
Distilled Spirits Plant Regulations (2001R-194P); Extension of Comment Period, 64287–64288
Proposed Expansions of the Russian River Valley and Northern Sonoma Viticultural Areas; Reopening of Comment Period, 64286–64287
NOTICES
Agency Information Collection Activities; Proposals, Submissions, and Approvals, 64397–64399

Appalachian States Low-Level Radioactive Waste Commission

NOTICES
Meetings:
Appalachian States Low-Level Radioactive Waste Commission; Annual Meeting, 64302

Centers for Disease Control and Prevention
NOTICES
Agency Information Collection Activities; Proposals, Submissions, and Approvals, 64336–64337

Children and Families Administration
NOTICES
Agency Information Collection Activities; Proposals, Submissions, and Approvals, 64337–64338

Coast Guard
RULES
Extension of Compliance Date:
Captain of the Port Zones Buffalo, Duluth, Detroit, Lake Michigan, and Sault Ste. Marie, 64208
NOTICES
Meetings:
National Boating Safety Advisory Council, 64355–64356

Commerce Department
See Industry and Security Bureau
See International Trade Administration
See National Oceanic and Atmospheric Administration
NOTICES
Agency Information Collection Activities; Proposals, Submissions, and Approvals, 64302

Defense Department
See Navy Department
NOTICES
Agency Information Collection Activities; Proposals, Submissions, and Approvals:
Small Business Size Rerepresentation, 64308

Education Department
RULES
Title I—Improving the Academic Achievement of the Disadvantaged, 64436–64513
NOTICES
Agency Information Collection Activities; Proposals, Submissions, and Approvals, 64308–64310
Teaching American History Grant Program:
Catalog of Federal Domestic Assistance (CFDA) Number 84.215X., 64310–64311

Employment and Training Administration
RULES
Apprenticeship Programs, Labor Standards for Registration, Amendment of Regulations, 64402–64434

Energy Department
See Federal Energy Regulatory Commission
NOTICES
Meetings:
Environmental Management Site-Specific Advisory Board, Paducah, 64311–64312

Environmental Protection Agency
RULES
Approval and Promulgation of Air Quality Implementation Plans:
Illinois, 64213–64215
Virginia; Movement of Richmond and Hampton Roads 8-Hour Ozone Areas from the Nonattainment Area List to the Maintenance Area List, 64210–64213
Carbaryl; Order Denying NRDC's Petition to Revoke Tolerances, 64229–64246
Pesticide Management and Disposal; Standards for Pesticide Containers and Containment, 64215–64228
Pesticide Tolerances:
Pyrimethanil, 64246–64252
Texas:
Final Authorization of Initiated Changes and Incorporation by Reference of Hazardous Waste Management Program, 64252–64260
PROPOSED RULES
Approval and Promulgation of Air Quality Implementation Plans:
Illinois, 64293
Virginia; Movement of Richmond and Hampton Roads 8-Hour Ozone Areas from the Nonattainment Area List to the Maintenance Area List, 64293–64294
Texas:
Final Authorization of State-initiated Changes and Incorporation by Reference of State Hazardous Waste Management Program, 64294–64295
NOTICES
Agency Information Collection Activities; Proposals, Submissions, and Approvals:
NESHAP for Coke Oven Batteries (Renewal), 64314–64316
NSPS for Metal Coil Surface Coating, 64316–64317
Carbaryl RED Amendment and Response to Petition to Cancel Registrations; Availability, 64317–64318
Draft Toxicological Review of Tetrachloroethylene (Perchloroethylene):
In Support of the Summary Information in the Integrated Risk Information System; Correction, 64318
Ethylene Oxide; Preliminary Determination to Terminate Special Review, 64318–64320

Nicotine; Notice of Receipt of Request to Voluntarily Cancel a Pesticide Registration, 64320–64322
Pesticide Product Registration:
Conditional Approval, 64323–64324
Pesticide Product Registration Approval, 64322–64323
Pesticide Products; Registration Applications, 64324–64327
Receipt of Requests for Amendments to Delete Uses in Certain Pesticide Registrations, 64327–64330
Sulfluramid Registration Review Final Decision; Availability, 64330–64331
Triclosan; Reregistration Eligibility Decision; Availability, 64331–64333

Equal Employment Opportunity Commission
NOTICES
SES Performance Review Board, 64333

Federal Aviation Administration
RULES
Airworthiness Directives:
Bombardier Model CL 600 2C10 (Regional Jet Series 700 & 701) Series Airplanes and Model CL 600 2D24 (Regional Jet Series 900) Series Airplanes, 64191–64194
Standard Instrument Approach Procedures, and Takeoff Minimums and Obstacle Departure Procedures; Miscellaneous Amendments, 64194–64195
PROPOSED RULES
Airworthiness Directives:
Aircraft Industries a.s. (Type Certificate G60EU, etc.) Model L 23 Super Blanik Sailplane, 64282–64284
Boeing Model 727 Airplanes, 64284–64286
NOTICES
Meetings:
Executive Committee of the Aviation Rulemaking Advisory Committee, 64394–64395

Federal Communications Commission
RULES
Carriage of Digital Television Broadcast Signals, 64260–64263
NOTICES
Meetings:
Consumer Advisory Committee, 64333–64334

Federal Deposit Insurance Corporation
RULES
Temporary Liquidity Guarantee Program, 64179–64191

Federal Energy Regulatory Commission
NOTICES
Combined Notice of Filings, 64312–64314

Federal Maritime Commission
NOTICES
Agreements Filed, 64334–64335
Ocean Transportation Intermediary License, 64335

Federal Railroad Administration
NOTICES
Application for Approval of Discontinuance or Modification of a Railroad Signal System, etc.:
Canadian National Railway, 64395
Petition for Special Approval of Alternate Standard:
Long Island Railroad and Metro-North Railroad, 64395–64396

Federal Reserve System
NOTICES
Change in Bank Control Notices; Acquisition of Shares of Bank or Bank Holding Companies, 64335–64336
Formations of, Acquisitions by, and Mergers of Bank Holding Companies, 64336
Proposals to Engage in Permissible Nonbanking Activities or to Acquire Companies that are Engaged in Permissible Nonbanking Activities, 64336

Fish and Wildlife Service
NOTICES
Endangered Species Recovery Permit Applications, 64360–64361
Final Comprehensive Conservation Plan and Finding of No Significant Impact; Availability:
Waccamaw National Wildlife Refuge, Georgetown, Horry, and Marion Counties, South Carolina, 64361–64363
Pee Dee National Wildlife Refuge, Anson and Richmond Counties, NC, 64363

Food and Drug Administration
RULES
Food Additives Permitted in Feed and Drinking Water of Animals:
Methyl Esters of Conjugated Linoleic Acid (Cis-9, Trans-11 and Trans-10, Cis-12-Octadecadienoic Acids), 64197–64199
NOTICES
Agency Information Collection Activities; Proposals, Submissions, and Approvals
Substantiation for Dietary Supplement Claims Made Under the Federal Food, Drug, and Cosmetic Act, 64338
Waiver of In Vivo Demonstration of Bioequivalence of Animal Drugs, etc., 64338–64340
Memorandum of Understanding:
National Heart, Lung, and Blood Institute, a Part of the National Institutes of Health, 64340–64348
U.S. Army Medical Research Institute of Infectious Diseases, 64348–64354

Food and Nutrition Service
NOTICES
Agency Information Collection Activities; Proposals, Submissions, and Approvals, 64301

Forest Service
PROPOSED RULES
Sale and Disposal of National Forest System Timber; Downpayment and Periodic Payments, 64288–64293

General Services Administration
NOTICES
Agency Information Collection Activities; Proposals, Submissions, and Approvals:
Small Business Size Rerepresentation, 64308

Health and Human Services Department
See Centers for Disease Control and Prevention
See Children and Families Administration
See Food and Drug Administration
See Health Resources and Services Administration
See National Institutes of Health

Health Resources and Services Administration
NOTICES
Meetings:
Council on Graduate Medical Education, 64354

Homeland Security Department
See Coast Guard
See U.S. Customs and Border Protection
PROPOSED RULES
Secure Handling of Ammonium Nitrate Program, 64280–64282

Housing and Urban Development Department
NOTICES
Agency Information Collection Activities; Proposals, Submissions, and Approvals:
Loan Guarantees for Indian Housing, 64360

Industry and Security Bureau
NOTICES
Agency Information Collection Activities; Proposals, Submissions, and Approvals, 64302–64303
Effectiveness of Licensing Procedures for Agricultural Commodities to Cuba, 64303

Interior Department
See Fish and Wildlife Service
See Land Management Bureau
See Minerals Management Service
See National Park Service

International Trade Administration
NOTICES
Antidumping:
Hot-Rolled Carbon Steel Flat Products from Thailand, 64303–64304
Stainless Steel Butt-Weld Pipe Fittings from Taiwan, 64304–64305
Initiation of Antidumping and Countervailing Duty Administrative Reviews and Deferral of Administrative Review, 64305–64307
NAFTA Panel Reviews:
Completion of Panel Review, 64307
Withdrawal of Application for Duty-Free Entry of Scientific Instruments, 64307

International Trade Commission
NOTICES
Investigations:
Catheters, Consoles and Other Apparatus for Cryosurgery, 64369

Labor Department
See Employment and Training Administration
See Occupational Safety and Health Administration

Land Management Bureau
NOTICES
Recreation & Public Purposes Act Classification:
Utah, 64363–64364
Recreation and Public Purposes Act Classification:
Utah, 64364–64366

Minerals Management Service
RULES
Royalty Relief for Deepwater Outer Continental Shelf Oil and Gas Leases—Conforming Regulations to Court Decision, 64205–64206

National Aeronautics and Space Administration
NOTICES
Agency Information Collection Activities; Proposals, Submissions, and Approvals:
Small Business Size Rerepresentation, 64308

National Institute for Literacy
NOTICES
Meetings:
National Institute for Literacy Advisory Board, 64369–64370

National Institutes of Health
NOTICES
Meetings:
National Heart, Lung, and Blood Institute, 64354–64355
National Institute of Allergy and Infectious Diseases, 64355

National Oceanic and Atmospheric Administration
RULES
Endangered and Threatened Species; Conservation of Threatened Elkhorn and Staghorn Corals, 64264–64279
PROPOSED RULES
Fisheries of the Caribbean, Gulf of Mexico, and South Atlantic:
Amendments to the Spiny Lobster Fishery Management Plans for the Caribbean and Gulf of Mexico and South Atlantic, 64295–64300
NOTICES
Atlantic Highly Migratory Species; Atlantic Shark Management Measures, 64307–64308

National Park Service
NOTICES
Intent to Repatriate Cultural Items:
U.S. Department of the Interior, National Park Service, Intermountain Region, Santa Fe, NM; Correction, 64366–64367
Inventory Completion:
U.S. Department of the Interior, Bureau of Indian Affairs, Washington, DC, and New York State Museum, Albany, NY, 64367
U.S. Department of the Interior, Bureau of Indian Affairs, Washington, DC, and Northwest Museum of Arts; Culture, Spokane, WA, 64368–64369
U.S. Department of the Interior, U.S. Fish and Wildlife Service, Region 7, Anchorage, AK, 64367–64368

Navy Department
RULES
Payments of Amounts due Mentally Incompetent Members of the Naval Service, 64206–64207

Nuclear Regulatory Commission
NOTICES
Facility Operating Licenses:
Florida Power Corp.; Withdrawal of Application, 64370

Occupational Safety and Health Administration
RULES
Electrical Standard; Clarifications; Corrections, 64202–64205

Personnel Management Office
RULES
Veterans' Preference, 64179

Pipeline and Hazardous Materials Safety Administration
NOTICES
Delays in Processing of Special Permits Applications, 64396–64397

Postal Regulatory Commission
NOTICES
Parcel Return Service (Contract 1), 64370–64371

Securities and Exchange Commission
NOTICES
Applications:
The Reserve Fund, 64372
Filings:
Consolidated Tape Association Plan and Consolidated Quotation Plan; Amendments, 64372–64373
Meetings; Sunshine Act, 64373–64374
Orders of Suspension of Trading:
Hat Trick Beverage, Inc., 64374
Self-Regulatory Organizations; Proposed Rule Changes:
Financial Industry Regulatory Authority, Inc., 64374–64376
NASDAQ Stock Market LLC, 64377–64379
New York Stock Exchange LLC, 64379–64392
The New York Stock Exchange LLC, 64392–64394

Social Security Administration
RULES
Technical Amendments to Definition of Persons Closely Approaching Retirement Age, 64195–64197

Transportation Department
See Federal Aviation Administration
See Federal Railroad Administration
See Pipeline and Hazardous Materials Safety Administration
NOTICES
Applications of Prescott Support Co., Inc. for Certificate Authority, 64394

Treasury Department
See Alcohol and Tobacco Tax and Trade Bureau
NOTICES
Survey of U.S. Ownership of Foreign Securities (as of December 31, 2008), 64397

U.S. Customs and Border Protection
NOTICES
Importer Self-Assessment Product Safety Pilot, 64356–64358
Quarterly IRS Interest Rates Used in Calculating Interest on Overdue Accounts and Refunds on Customs Duties, 64358–64360

Veterans Affairs Department
RULES
Posttraumatic Stress Disorder, 64208–64210

Separate Parts In This Issue

Part II
Labor Department, Employment and Training Administration, 64402–64434

Part III
Education Department, 64436–64513

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

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

CFR PARTS AFFECTED IN THIS ISSUE

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

5 CFR
211 64179

6 CFR
Proposed Rules:
Ch. 1 64280

12 CFR
370 64179

14 CFR
39 64191
97 64194
Proposed Rules:
39 (2 documents) 64282, 64284

20 CFR
404 64195
416 64195

21 CFR
573 64197

27 CFR
9 64199
Proposed Rules:
9 64286
19 64287

29 CFR
29 64402
1910 64202

30 CFR
203 64205
260 64205

32 CFR
726 64206

33 CFR
105 64208

34 CFR
200 64436

36 CFR
Proposed Rules:
223 64288

38 CFR
3 64208

40 CFR
52 (2 documents) 64210, 64213
152 64215
156 64215
165 64215
180 (2 documents) 64229, 64246
271 64252
272 64252
Proposed Rules:
52 (2 documents) 64293
271 64294
272 64294

47 CFR
76 64260

50 CFR
223 64264
Proposed Rules:
622 64295
640 64295

Rules and Regulations

Federal Register
Vol. 73, No. 210
Wednesday, October 29, 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.

OFFICE OF PERSONNEL MANAGEMENT

5 CFR Part 211

RIN 3206–AL33

Veterans' Preference

AGENCY: U.S. Office of Personnel Management.

ACTION: Final rule.

SUMMARY: The Office of Personnel Management (OPM) is adopting as a final rule an interim rule that implemented a change to the definition of ''active duty'' for veterans' preference entitlement contained in § 211.102(f) of title 5, Code of Federal Regulations.

DATES: Final rule effective October 29, 2008.

FOR FURTHER INFORMATION CONTACT: Scott A. Wilander, Ed.D., by telephone at (202) 606–0960; by fax at (202) 606–0390; TTY at (202) 606–3134; or by e-mail at *Scott.Wilander@opm.gov*.

SUPPLEMENTARY INFORMATION: On July 27, 2007, OPM issued an interim rule with request for comments at 72 FR 41215, to amend its regulations regarding veterans' preference. This rule expanded the definition of ''active duty'' contained in 211.102(f) of title 5, Code of Federal Regulations, for a ''disabled veteran'' as defined by 5 U.S.C. 2108(2), to include active duty for training.

OPM received two written comments pertinent to the interim changes. A discussion of these comments is provided below.

One individual asked OPM to consider changing the definition of ''active duty'' to include active duty for training for a ''veteran,'' defined by 5 U.S.C. 2108(1)(A), who ''served on active duty in the armed forces during a war, in a campaign or expedition for which a campaign badge has been authorized, or during the period beginning April 28, 1952, and ending July 1, 1955.'' The commenter noted that such a change was necessary because both 5 U.S.C. 2108(2) and 2108(1)(A) use the term ''active duty'' without modification. We agree and have revised the regulation accordingly.

Another commenter noted that some individuals who are eligible under these provisions may not have received the documentation (e.g., DD–214) required to claim veterans' preference due to the relatively short duration of their service. We understand it may be difficult for these individuals to claim veterans' preference without a DD–214 but we note that OPM provides guidance (e.g., the Delegated Examining Operations Handbook) to agencies for accepting alternatives to the DD–214. We will consider adding similar guidance in VetGuide and VetsInfo Guide to better help job-seeking veterans.

OPM received one written comment from an individual that went beyond the scope of the amendments contained in the interim rule. Because this comment was not pertinent to the interim amendments, OPM is not responding to it. The commenter asked OPM to require agencies, by regulation, to notify job-seeking veterans of the status of their job applications and whether their veterans' preference was considered in the selection process.

E.O. 12866, Regulatory Review

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

Regulatory Flexibility Act

I certify that this regulation would not have a significant economic impact on a substantial number of small entities (including small businesses, small organizational units, and small governmental jurisdictions) because it affects only Federal employees.

Paperwork Reduction Act

The information collection requirements contained in this final rule are currently approved by OMB under 3206–AL33. This final regulation does not modify this approved collection.

List of Subjects in 5 CFR Part 211

Government employees, Veterans.

U.S. Office of Personnel Management.

Michael W. Hager,

Acting Director.

■ Accordingly, the interim rule amending part 211 of title 5, Code of Federal Regulations, which was published at 72 FR 41215 on July 27, 2007, is adopted as a final rule with the following changes:

PART 211—VETERAN PREFERENCE

■ 1. The authority citation for part 211 continues to read as follows:

Authority: 5 U.S.C. 1302.

■ 2. In § 211.102, revise paragraph (f) to read as follows:

§ 211.102 Definitions.

* * * * *

(f) *Active duty or active military duty*—(1) *Active duty or active military duty* for veterans defined in paragraphs (a)(1) through (3) and disabled veterans defined in paragraph (b) of this section means active duty with military pay and allowances in the armed forces, including training or for determining physical fitness and including service in the Reserves or National Guard.

(2) Active duty or active military duty for a veteran defined in paragraph (a)(4) through (6) of this section means full-time duty with military pay and allowances in the armed forces, except for training or for determining physical fitness and except for service in the Reserves or National Guard.

* * * * *

[FR Doc. E8–25753 Filed 10–28–08; 8:45 am]

BILLING CODE 6325–39–P

FEDERAL DEPOSIT INSURANCE CORPORATION

12 CFR Part 370

RIN 3064–AD37

Temporary Liquidity Guarantee Program

AGENCY: Federal Deposit Insurance Corporation (FDIC).

ACTION: Interim rule with request for comments.

SUMMARY: The FDIC is issuing this Interim Rule following a determination of systemic risk pursuant to section 13(c)(4)(G) of the Federal Deposit Insurance Act. As a result of this

systemic risk determination, and in an effort to avoid or mitigate serious adverse effects on economic conditions or financial stability, the FDIC is establishing the Temporary Liquidity Guarantee Program. As further described in the Interim Rule, the Temporary Liquidity Guarantee Program has two primary components: the Debt Guarantee Program, by which the FDIC will guarantee the payment of certain newly-issued senior unsecured debt, and the Transaction Account Guarantee Program, by which the FDIC will guarantee certain noninterest-bearing transaction accounts.

DATES: The Interim Rule becomes effective on October 23, 2008, except for paragraphs (h)(2) and (h)(3) of § 370.5 which will become effective December 1, 2008. Coverage under the Temporary Liquidity Guarantee Program was established by the Board of Directors of the FDIC as of October 14, 2008. Comments on the rule must be received by November 13, 2008.

ADDRESSES: You may submit comments on the Interim Rule, by any of the following methods:

- *Agency Web Site: http://www.FDIC.gov/regulations/laws/federal/notices.html.* Follow instructions for submitting comments on the Agency Web Site.
- *E-mail: Comments@FDIC.gov.* Include RIN # 3064–AD37 on 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:* Comments may be hand delivered to the 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.

Instructions: All comments received will be posted generally without change to *http://www.fdic.gov/regulations/laws/federal/propose.html,* including any personal information provided.

FOR FURTHER INFORMATION CONTACT: Diane Ellis, Associate Director, Financial Risk Management, Division of Insurance and Research, (202) 898–8978 or *dellis@fdic.gov;* William V. Farrell, Manager, Assessment Operations Section, Division of Finance, (703) 562–6168 or *wfarrell@fdic.gov;* Donna Saulnier. Manager, Assessment Policy Section, Division of Finance, (703) 562–6167 or *dsaulnier@fdic.gov;* Richard Bogue, Counsel, Legal Division, (202) 898–3726 or *rbogue@fdic.gov;* Robert Fick, Counsel, Legal Division, (202) 898–8962 or *rfick@fdic.gov;* A. Ann Johnson, Counsel, Legal Division, (202) 898–3573 or *aajohnson@fdic.gov;* Gail Patelunas, Deputy Director, Division of Resolutions and Receiverships, (202) 898–6779 or *gpatelunas@fdic.gov;* John Corston, Associate Director (Large Bank Supervision), Division of Supervision and Consumer Protection, (202) 898–6548 or *jcorston@fdic.gov;* Serena L. Owens, Associate Director, Supervision and Applications Branch, Division of Supervision and Consumer Protection, (202) 898–8996 or *sowens@fdic.gov.*

SUPPLEMENTARY INFORMATION:

I. Background

In light of the unprecedented disruption in the nation's credit markets, the Congress, the Department of the Treasury, and the Federal Deposit Insurance Corporation (FDIC), along with other federal banking regulators, have taken steps to preserve the nation's confidence in its financial institutions and in the American and global economy. Congress recently passed the Emergency Economic Stabilization Act of 2008;[1] the Department of the Treasury provided for capital injections into banks; the Board of Governors of the Federal Reserve System made available commercial paper facilities; Congress temporarily raised deposit insurance limits and the FDIC issued interim regulations accordingly.[2] Nonetheless, many insured depository institutions have responded to the market turmoil by retaining cash and severely tightening their lending standards. Disruptions in money markets have significantly impaired the ability of creditworthy companies to issue commercial paper, particularly at longer maturities. Interest rates on commercial paper continue to be extremely high. Issuances of residential and commercial mortgage-backed securities in the first half of 2008 have fallen by more than 90 percent from levels one year ago, and issuances of asset-backed securities have fallen 68 percent over the same period. As a result of this market volatility, economic concern has intensified, and short-term funding markets have slowed significantly.

FDIC analysis suggests that a five percent reduction in uninsured deposits would reduce Gross Domestic Product growth by 1.2 percent per year in a normal economy and 2.0 percent per year in a stressed economy. With U.S. economic growth currently stressed, a run of this magnitude could result in, or deepen and prolong, recession. FDIC data indicate rapid and substantial outflows of uninsured deposits from institutions that are perceived to be stressed. The systemic nature of this threat is further evidenced by the increasing number of bank failures.

II. Systemic Risk Determination

The severity of today's financial conditions affects more than just a single insured depository institution: the financial stability of a significant number of financial institutions is being threatened, and the nation's entire financial system appears to be at risk.

Section 141 of the Federal Deposit Insurance Corporation Improvement Act of 1991 (FDICIA)[3] added section 13(c)(4)(G) to the Federal Deposit Insurance Act (FDI Act). 12 U.S.C. 1823(c)(4)(G). That section provides a blueprint that authorizes action by the Federal government in circumstances involving such systemic risk. This provision permits the FDIC to take action or provide assistance as necessary to avoid or mitigate the effects of the perceived risks, following a recommendation of the existence of systemic risk by the Board, with the written concurrence of the Board of Governors of the Federal Reserve System (FRB) and an eventual determination of systemic risk by the Secretary of the Treasury (after consultation with the President).

The Secretary of the Treasury (after consultation with the President) made a determination of systemic risk following receipt of the written recommendation of the Board on October 13, 2008, along with the written recommendation of the FRB, in accordance with section 13(c)(4)(G) to the FDI Act. 12 U.S.C. 1823(c)(4)(G). The determination of systemic risk allowed the FDIC to take certain actions to avoid or mitigate serious adverse effects on economic conditions and financial stability. The FDIC announced a number of initiatives aimed at reducing the systemic risks that exist in the market, specifically relating to noninterest-bearing transaction accounts at insured depository institutions and senior unsecured debt of insured depository institutions and most U.S. holding companies of such insured depository institutions. Collectively these initiatives are described more fully in the Interim Rule that follows, and are referred to as the FDIC's Temporary Liquidity Guarantee Program (TLG Program).

In making its written recommendation regarding systemic risk and providing for the TLG Program, the Board reviewed a number of factors concerning current economic conditions and the nation's troubled financial

[1] Public Law No. 110–343 (Oct. 3, 2008).

[2] 73 FR 61658 (Oct. 17, 2008).

[3] Public Law No. 102–242 (Dec. 19, 1991).

stability. Among the economic factors that the Board considered in making its determination were unduly tightened lending standards and terms, decreased borrowing, rapid outflows of deposits, reduced issuances of commercial paper and asset- and mortgage-backed securities, decreased and costly alternative funding mechanisms, and a lack of confidence in financial institutions based on embedded and uncertain balance sheet losses.

III. Authority To Implement the TLG Program

In addition to the authority granted to the FDIC by the systemic risk determination made under Section 13(c)(4) of the FDI Act, 12 U.S.C. 1823(c)(4), as described above, the FDIC is authorized under Section 9(a) Tenth of the FDI Act, 12 U.S.C. 1819(a)Tenth, to prescribe, by its Board of Directors, such rules and regulations as it may deem necessary to carry out the provisions of the FDI Act. The Board has determined that this Interim Rule is necessary to implement the TLG Program. Similarly the FDIC has authority to adopt regulations governing the operations of its receiverships pursuant to Section 11(d)(1) of the FDI Act, 12 U.S.C. 1821(d)(1) and the broad authority granted by 12 U.S.C. 1823(c)(1).

IV. The Interim Rule

The TLG Program described in the Interim Rule will address the systemic risk recognized by the FDIC and the other agencies. The TLG Program is designed to preserve confidence and encourage liquidity in the banking system in order to ease lending to creditworthy businesses and consumers. The TLG Program is a voluntary and time-limited program that will be funded through special fees without reliance on taxpayer funding. Subject to the conditions set forth in the regulation, the program consists of two basic components: A temporary guarantee of newly-issued senior unsecured debt (the Debt Guarantee Program) and a temporary unlimited guarantee of funds in noninterest-bearing transaction accounts at FDIC-insured institutions (the Transaction Account Guarantee Program). At the expiration of the TLG Program, if funds remain after the FDIC has satisfied all eligible claims, the surplus funds will remain in the Deposit Insurance Fund and will be included in the future calculation of the reserve ratio.

The following entities are eligible to participate in the program subject to any restrictions that might be imposed by the FDIC in consultation with the primary regulator: FDIC-insured depository institutions, any U.S. bank holding company or financial holding company, and any U.S. savings and loan holding company that either engages only in activities that are permissible for financial holding companies to conduct under section (4)(k) of the Bank Holding Company Act of 1956 (BHCA) or has at least one insured depository institution subsidiary that is the subject of an application that was pending on October 13, 2008, pursuant to section 4(c)(8) of the BHCA, or any affiliate of these entities approved by the FDIC after a written request made by, and the positive recommendation of, the appropriate Federal banking agency. (eligible entities). To be an eligible entity and issue guaranteed debt pursuant to the Debt Guarantee Program, a bank or savings and loan holding company must have at least one chartered, insured, and operating bank or savings association within its holding company structure.

The TLG Program became effective on October 14, 2008. For the first 30 days of the program, all eligible entities are covered under the TLG Program, and the guarantees provided by the TLG Program will be offered at no cost to eligible entities. On or before November 12, 2008, however, eligible entities must inform the FDIC whether they will opt-out of the TLG Program, and they may notify the FDIC on or before that date of their intent to participate in the program. If an eligible entity opts out of the TLG Program, the FDIC's guarantee of its newly-issued senior unsecured debt and noninterest-bearing transaction deposit accounts will expire at the earlier of 11:59 pm EST on November, 12, 2008, or at the time of the FDIC's receipt of the eligible entity's opt-out decision, regardless of the term of the instrument. An eligible entity that chooses not to opt out of either or both programs will become a participating entity in the program.

An eligible entity may elect to opt out of either the Debt Guarantee Program or the Transaction Account Guarantee Program or of both components of the TLG Program. All eligible entities within a U.S. Banking Holding Company or a U.S. Savings and Loan Holding Company structure must make the same decision regarding continued participation in each component of the TLG Program or none of the members of the holding company structure will be eligible for participation in that component of the TLG Program.

In order to notify depositors and lenders when they are dealing with an institution that is covered by the TLG Program, an eligible entity's decision to opt out of either component of the TLG Program will be made publicly available. The FDIC will maintain and will post on its Web site a list of those entities that have opted out of either or both components of the TLG Program. Each eligible entity must make clear to relevant parties whether or not it has chosen to participate in either or both components of the TLG Program. Eligible entities that do not opt out of the Debt Guarantee Program on or before November 12, 2008, will be unable to select which newly issued senior unsecured debt is guaranteed debt as they issue such debt. All senior unsecured debt issued during the initial 30-day period by the participating entity will become guaranteed debt as and when issued.

If an eligible entity remains in the Debt Guarantee Program of the TLG Program, it must clearly disclose to interested lenders and creditors, in writing and in a commercially reasonable manner, what debt it is offering and whether the debt is guaranteed under this program. Debt guaranteed by the FDIC under the Debt Guarantee Program, must be clearly identified as ''guaranteed by the FDIC'' and properly disclosed to creditors.

If an eligible entity remains in the Transaction Account Guarantee Program, the participating entity must prominently disclose in writing at its main office and at all branches at which deposits are taken its decision to participate in or opt-out of the Transaction Account Guarantee Program. These disclosures must be provided in simple, readily understandable text indicating the institution's participation or nonparticipation in the Transaction Account Guarantee Program. The disclosure must clearly state whether or not covered noninterest-bearing transaction accounts are fully insured by the FDIC. If the institution uses sweep arrangements or takes other actions that result in funds in a noninterest-bearing transaction account being transferred to or reclassified as an interest-bearing account or a non-transaction account, the institution also must disclose those actions to the affected customers and clearly advise them in writing that such actions will void the transaction account guarantee.

A. The Debt Guarantee Program

The Debt Guarantee Program temporarily will guarantee all newly-issued senior unsecured debt up to prescribed limits that is issued by participating entities on or after October 14, 2008, through and including June 30, 2009. As a result, the unpaid balance

of this newly-issued senior unsecured debt will be paid by the FDIC upon the failure of the issuing institution or the filing of a bankruptcy petition with respect to the issuing holding company. As more fully explained in the interim rule, senior unsecured debt includes, without limitation, federal funds purchased, promissory notes, commercial paper, unsubordinated unsecured notes, certificates of deposit standing to the credit of a bank, bank deposits in an international banking facility (IBF) of an insured depository institution, and Eurodollar deposits standing to the credit of a bank. Senior unsecured debt may be denominated in foreign currency. The term ''bank'' means an insured depository institution or a depository institution regulated by a foreign bank supervisory agency. To be eligible for the Debt Guarantee Program, senior unsecured debt must be noncontingent. It must be evidenced by a written agreement, contain a specified and fixed principal amount to be paid on a date certain, and not be subordinated to another liability.

The primary purpose of the Debt Guarantee Program is to provide liquidity to the inter-bank lending market and promote stability in the unsecured funding market for banks. The purpose is not to encourage innovative, exotic or complex funding structures or to protect lenders who make high-risk loans in hopes of high returns. Thus, for purposes of the Debt Guarantee Program, senior unsecured debt excludes, for example, obligations from guarantees or other contingent liabilities, derivatives, derivative-linked products, debt paired with any other security, convertible debt, capital notes, the unsecured portion of otherwise secured debt, negotiable certificates of deposit, and deposits in foreign currency and Eurodollar deposits that represent funds swept from individual, partnership or corporate accounts held at insured depository institutions. Also excluded are loans to affiliates, including parents and subsidiaries, or to institution affiliated parties, including controlling shareholders, directors, and officers.

Eligible debt must be issued on or before June 30, 2009. For eligible debt issued by that date, the FDIC will provide the guarantee coverage for such debt until the earlier of the maturity date of the debt or until June 30, 2012. This final effective date for coverage is absolute; coverage will expire at 11:59 p.m. EST on June 30, 2012, regardless of whether the liability has matured at that time. If an eligible entity chooses to opt out of the Debt Guarantee Program, the FDIC's debt guarantee will terminate on the earlier of 11:59 p.m. EST p.m. on November 12, 2008, or at the time of the eligible entity's opt-out decision. In order for the newly-issued senior unsecured debt to be guaranteed, the debt instrument must be clearly identified in writing in a commercially reasonable manner on the face of any documentation as ''guaranteed by the FDIC,'' and this fact must be properly disclosed to the creditors. The Debt Guarantee Program will not apply to debt that is contractually subordinated to other debt of the entity.

The FDIC will temporarily guarantee newly issued unsubordinated debt in a total amount up to 125 percent of the par or face value of senior unsecured debt outstanding, excluding debt extended to affiliates, as of September 30, 2008, that is scheduled to mature on or before June 30, 2009. This maximum guaranteed amount will be calculated for each individual participating entity within a holding company structure. Under procedures to be detailed shortly, the FDIC will require that each participating entity calculate its outstanding senior unsecured debt as of September 30, 2008, and provide that information—even if the amount of the senior unsecured debt is zero—to the FDIC.

The 125 percent limit may be adjusted for certain participating entities if the FDIC, in consultation with any appropriate Federal banking agency, determines it is necessary. Additionally, after written request and positive recommendation by the appropriate Federal banking agency, the FDIC, in its sole discretion and on a case-by-case basis, may allow an affiliate of a participating entity to take part in the Debt Guarantee Program. The FDIC may grant a participating entity authority to temporarily exceed the 125 percent limitation or limit a participating entity to less than 125 percent. These decisions will be made on a case-by-case basis.

A participating entity may not represent that its debt is guaranteed by the FDIC if it does not comply with the rules governing the Debt Guarantee Program. If the issuing entity has opted out of the Debt Guarantee Program, it may no longer represent that its newly-issued debt is guaranteed by the FDIC. Similarly, once an entity has reached its 125 percent limit, it may not represent that any additional debt is guaranteed by the FDIC, and must specifically disclose that such debt is not guaranteed.

After consultation with a participating entity's appropriate Federal banking agency, the FDIC may determine in its discretion that the entity shall not be permitted to participate in the TLG Program. Termination of participation will have only a prospective effect, and the entity must notify its customers and creditors that it is no longer issuing guaranteed debt.

Entities who choose to participate in the Debt Guarantee Program and who issue guaranteed debt agree to supply information requested by the FDIC, as well as to be subject to FDIC on-site reviews as needed after consultation with the appropriate Federal banking agency to determine compliance with the terms and requirements of the Debt Guarantee Program. Participating entities also agree that they will be bound by the FDIC's decisions, in consultation with the appropriate federal banking agency, regarding the management of the TLG Program.

The FDIC's agreement arising from the Debt Guarantee Program in no way exempts any participating entity from complying with federal and state securities laws and with any other applicable laws.

B. The Transaction Account Guarantee Program

Under the Transaction Account Guarantee Program, the FDIC has provided a temporary full guarantee for funds held at FDIC-insured depository institutions in noninterest-bearing transaction accounts above the existing deposit insurance limit. The FDIC anticipates that these accounts will include payment-processing accounts, such as payroll accounts, frequently used by an insured depository institution's business customers, and further anticipates that the Transaction Account Guarantee Program will stabilize these and other similar accounts. This coverage became effective on October 14, 2008, and will continue through December 31, 2009 (assuming that the insured depository institution does not opt out of this component of the TLG Program).

Under the Interim Rule, a ''noninterest-bearing transaction account'' is defined as a transaction account with respect to which interest is neither accrued nor paid and on which the insured depository institution does not reserve the right to require advance notice of an intended withdrawal. This definition encompasses traditional demand deposit checking accounts that allow for an unlimited number of deposits and withdrawals at any time. It also encompasses official checks issued by an insured depository institution. This definition, however, does not encompass negotiable order of

withdrawal (NOW) accounts or money market deposit accounts (MMDAs).

Depository institutions sometimes waive fees or provide fee-reducing credits for customers with checking accounts. Such account features do not prevent an account from qualifying under the Transaction Account Guarantee Program as a noninterest-bearing transaction account, as long as the account otherwise satisfies the definition.

The guarantee provided for noninterest-bearing transaction accounts is in addition to and separate from the coverage provided under the FDIC's general deposit insurance regulations at 12 CFR Part 330. Although the unlimited coverage for noninterest-bearing transaction accounts under the TLG Program is intended primarily to apply to transaction accounts held by businesses, it applies to all such accounts held by any depositor. Thus, for example, if a consumer has a $250,000 certificate of deposit and a noninterest-bearing checking account for $50,000, he or she would be fully insured for $300,000 (assuming the depositor has no other funds at the same institution). First, coverage of $250,000 would be provided for the certificate of deposit under the FDIC's general rules for deposit insurance coverage. *See* 12 CFR 330.1(n) (providing that the standard maximum deposit insurance amount is $250,000 through December 31, 2009). Separately, full coverage of the $50,000 checking account would be provided under the Transaction Account Guarantee Program.

The Interim Rule includes a provision relating to sweep accounts. Under this provision, the FDIC will treat funds in sweep accounts in accordance with the usual rules and procedures for determining sweep balances at a failed depository institution. Under these procedures, funds may be swept or transferred from a noninterest-bearing transaction account to another type of deposit or nondeposit account. The FDIC will treat the funds as being in the account to which the funds were transferred. An exception will exist, however, for funds swept from a noninterest-bearing transaction account to a noninterest-bearing savings account. Such swept funds will be treated as being in a noninterest-bearing transaction account. As a result of this treatment funds swept into a noninterest-bearing savings account will be guaranteed by the Transaction Account Guarantee Program.

C. Fees for the TLG Program

Beginning on November 13, 2008, any eligible entity that has not chosen to opt out of the debt guarantee program will be assessed fees for continued coverage. All eligible debt issued from October 14, 2008 (and still outstanding on November 13, 2008), through June 30, 2009, will be charged an annualized fee equal to 75 basis points multiplied by the amount of debt issued, and calculated for the maturity period of that debt or June 30, 2012, whichever is earlier. The fee charged will take into account that no fees will be charged during the first 30 days of the program. If any participating entity issues eligible debt guaranteed by the Debt Guarantee Program, the participating entity's assessment will be based on the total amount of debt issued and the maturity date at issuance. If the guaranteed debt is ultimately retired before its scheduled maturity, fees will not be refunded.

If an eligible entity does not opt out, all newly-issued senior unsecured debt up to the maximum amount will become guaranteed as and when issued. Participating entities are prohibited from issuing guaranteed debt in excess of the maximum amount for the institution. Participating entities are also prohibited from issuing non-guaranteed debt until the maximum allowable amount of guaranteed debt has been issued. A participating entity can then issue non-guaranteed debt in any amount and for any maturity. If a participating entity nonetheless issues debt identified as ''guaranteed by the FDIC'' in excess of the limit established by the FDIC, it will have its assessment rate for guaranteed debt increased to 150 basis points on all outstanding guaranteed debt, and the participating entity and its institution-affiliated parties will be subject to enforcement actions including the assessment of civil money penalties, as appropriate.

Participating entities can take part in the guaranteed debt program as outlined above without any further action on their part. If a participating entity wants to have the option of issuing certain non-guaranteed senior unsecured debt before issuing the maximum amount of guaranteed debt, it must elect to do so through FDIC*connect* on or before 11:59 p.m. EST on November 12, 2008. Election of this option would require a participating entity to pay a nonrefundable fee in exchange for which it will be able to issue, at any time and without regard to the cap, non-guaranteed senior unsecured debt with a maturity date after June 30, 2012. The fee would be applied to the par or face value of senior unsecured debt, excluding debt extended to affiliates, outstanding as of September 30, 2008, that is scheduled to mature on or before June 30, 2009. The fee will equal the 75 basis point annual rate charged for six months (or 37.5 basis points). The six-month period is based upon estimates of the weighted average remaining maturity of existing debt that matures on or before June 30, 2009. It recognizes that much of the outstanding debt as of September 30, 2008, which is not guaranteed, will be rolled over into guaranteed debt only when the outstanding debt matures. The nonrefundable fee will be collected in six equal monthly installments. An entity electing the nonrefundable fee option will also be billed as it issues guaranteed debt under the Debt Guarantee Program, and the amounts paid as a nonrefundable fee will be applied to offset these bills until the nonrefundable fee is exhausted. Thereafter, the institution will have to pay additional assessments on guaranteed debt as it issues the debt.

Under the Transaction Account Guarantee Program, the FDIC provides a full guarantee for deposits held at FDIC-insured institutions in noninterest-bearing transaction accounts. This coverage became effective on October 14, 2008, and will expire at 11:59 p.m. EST on December 31, 2009 (assuming the insured depository institution does not opt out of the Transaction Account Guarantee Program). The Interim Rule provides that all insured depository institutions are automatically enrolled in the Transaction Account Guarantee Program for an initial thirty-day period (from October 14, 2008, through November 12, 2008). Insured depository institutions are not required to pay any assessments for participating in the Transaction Account Guarantee Program for this initial 30-day period.

Beginning on November 13, 2008, insured depository institutions that have not opted out of the Transaction Account Guarantee Program will be assessed on a quarterly basis an annualized 10 basis point assessment on balances in noninterest-bearing transaction accounts that exceed the existing deposit insurance limit of $250,000. Under the Interim Rule, the FDIC will collect such assessments at the same time and in the same manner as it collects an institution's quarterly deposit insurance assessments under Part 327 of the FDIC's rules and regulations. Assessments associated with the Transaction Account Guarantee Program will be in addition to an institution's risk-based assessment imposed under Part 327 of the FDIC's rules and regulations.

The Interim Rule requires the FDIC to impose an emergency systemic risk assessment on insured depository institutions if the fees and assessments

collected under the TLG Program are insufficient to cover any loss incurred as a result of the TLG Program. In addition, if at the conclusion of these programs there are any excess funds collected from the fees associated with the TLG Program, the funds will remain as part of the Deposit Insurance Fund.

D. Payment of Claims by the FDIC Pursuant to the Transaction Account Guarantee Program

The Interim Rule sets forth the process for payment and recovery of FDIC guarantees of ''noninterest-bearing transaction accounts,'' as that term is defined in the Interim Rule. Under the rule, the FDIC's obligation to make payment, in its capacity as guarantor of deposits held in noninterest-bearing transaction accounts, arises upon the failure of a participating federally insured depository institution. The payment and claims process for satisfying claims under the Transaction Account Guarantee Program generally will follow the procedures prescribed for deposit insurance claims pursuant to section 11(f) of the FDI Act (12 U.S.C. 1821(f)), and the FDIC will be subrogated to the rights of depositors against the institution pursuant to section 11(g) of the FDI Act (12 U.S.C. 1821(g)).

The FDIC will make payment to the depositor for the guaranteed amount under the Transaction Account Guarantee Program or will make such guaranteed amount available in an account at another insured depository institution at the same time it fulfills its deposit insurance obligation under Part 330. The payment made pursuant to the Transaction Account Guarantee Program will be made as soon as possible after the FDIC, in its sole discretion, determines whether the deposit is eligible and what amount is ultimately guaranteed. In most cases, the FDIC will make the entire amount of a qualifying transaction account available to the depositor on the next business day following the failure of an institution that participates in the Transaction Account Guarantee Program. If there is no acquiring institution for a transaction account guaranteed by the Transaction Account Guarantee Program, the FDIC will mail a check to the depositor for the full amount of the guaranteed account within days of the insured depository institution's failure.

As a result of assuming the receiver's responsibility for making payment on the transaction account, the FDIC will be subrogated to all rights of the depositor against the institution with respect to noninterest-bearing transaction accounts guaranteed by the Transaction Account Guarantee Program. This subrogation right includes the right of the FDIC to receive dividends from the proceeds of the receivership estate of the institution. As is currently the case, the FDIC as manager of the Deposit Insurance Fund, will be entitled to receive dividends in the deposit class for that portion of the account. (See 12 U.S.C. 1821(d)(11)(A)(ii)). Similarly, the FDIC would be entitled to receive dividends from the receiver for assuming its obligation with regard to the uninsured portion of the guaranteed transactional deposit accounts.

As it does in satisfying claims for insured deposits, the FDIC will rely on the books and records of the insured depository institution to establish ownership and coverage for payment of deposits subject to the Transaction Account Guarantee Program. In making its determination about what amounts are guaranteed, the FDIC will be entitled to the same discretion it has under section 11(f)(2) of the FDI Act (12 U.S.C. 1821(f)(2)), in requiring the depositor to file a proof of claim (POC). The FDIC does not anticipate that a POC will be required during the normal course of guarantee determination and payment pursuant to the Transaction Account Guarantee Program, but situations requiring a POC to be filed may arise. The FDIC's determination of the guaranteed amount will be final and will be considered a final administrative determination subject to judicial review in accordance with Chapter 7 of Title 5, similar to that provided for in sections 11(f)(4) and (5) of the FDI Act (12 U.S.C. 1821(f)(4) and (5)), regarding judicial review of insured deposit claims. A noninterest-bearing transaction account depositor may seek judicial review of the FDIC's determination on payment of the guaranteed amount in the United States district court for the federal judicial district where the principal place of business of the depository institution is located within 60 days of the date on which the FDIC's final determination is issued.

E. Payment of Claims by the FDIC Pursuant to the Debt Guarantee Program: Insured Depository Institution Debt

Pursuant to the Debt Guarantee Program the FDIC will guarantee senior unsecured debt, as that term is defined, for institutions that have chosen to participate in the Debt Guarantee Program. The FDIC's obligation to make payment, in its capacity as guarantor of senior unsecured debt issued by participating insured depository institutions, arises upon the failure of a participating insured depository institution. The FDIC will use the well-established receivership claims process to process guarantee requests. The FDIC will not consider any evidence provided by the debt holder that is not presented to the FDIC within 90 days of the publication of the claims notice by the receiver for the failed institution. The FDIC anticipates that many debt holders, particularly sellers of federal funds, will be paid on the next business day immediately following the failure of an insured depository institution. In all instances, the FDIC commits to pay claims related to its debt guarantee expeditiously and will strive to make payment on the next business day after the claim is determined to be valid. .

The FDIC will be subrogated to the rights of any creditor it pays under the program.

F. Payment of Claims by the FDIC Pursuant to the Debt Guarantee Program: Holding Company Debt

With respect to senior unsecured debt of holding companies eligible for payment based on the Debt Guarantee Program, when the holding company files for bankruptcy protection, the FDIC will make payment to the debt holder for the principal amount of the debt and interest to the date of the filing of a bankruptcy petition by the issuing institution. As with claims for debt issued by insured depository institutions, the FDIC will strive to expedite the claims payment process, but the FDIC generally will not make payment on the guaranteed amount for a debt asserted against a bankruptcy estate, unless and until the claim for the unsecured senior debt has been determined to be an allowed claim against the bankruptcy estate and such claim in not subject to reconsideration under 11 U.S.C. 502(j). If the FDIC does not pay eligible guaranteed debt within one business day of the filing of a bankruptcy petition with respect to a participating bank or savings and loan holding company, the FDIC will pay interest until payment is made on the eligible debt at the 90-day T-bill rate in effect when the bankruptcy petition was filed.

To properly establish ownership and coverage under this aspect of the TLG Program, the FDIC normally will require the holder to file a POC within 90 days of the published bar date of the bankruptcy proceeding. The FDIC may also consider the books and records of the holding company and its affiliates to determine the holder of the unsecured senior debt and the amount eligible for payment under the Debt Guarantee Program. The holder of the unsecured

senior debt of a holding company will also be required to timely file a bankruptcy POC against the holding company's bankruptcy estate and to present evidence of such timely filed bankruptcy POC in order to be eligible for a debt guarantee payment under the TLG Program.

To receive payment under the Debt Guarantee Program, the holder of the unsecured senior debt shall be required to assign its rights, title and interest in the unsecured senior debt to the FDIC and to transfer its validated claim in bankruptcy to the FDIC. This assignment shall include the right of the FDIC to receive principal and interest payments on the unsecured senior debt from the proceeds of the bankruptcy estate of the holding company. If the holder of the unsecured senior debt receives any distribution from the bankruptcy estate prior to the FDIC's payment under the guarantee, the guaranteed amount paid by the FDIC shall be reduced by the amount the holder has received in the distribution from the bankruptcy estate. In the case of a bankruptcy estate, the FDIC as assignee of the unsecured senior debt shall be entitled to receive distributions from the liquidation or other resolution of the bankruptcy estate in accordance with 11 U.S.C. 726 or a confirmed plan of reorganization or liquidation in accordance with 11 U.S.C. 1129. The POC must be filed with the FDIC within 90 days of the published bar date of the bankruptcy proceeding.

Request for Comments

The FDIC invites comments on all aspects of the Temporary Liquidity Guarantee Program as described in the Interim Rule and suggestions for its implementation.

In particular, the FDIC specifically requests suggestions on ways in which the claims process for the Debt Guarantee Program may be modified to speed payment to eligible claimants without putting at risk the funds administered by the FDIC.

Negotiable order of withdrawal (NOW) accounts are excepted from the definition of definition of ''noninterest-bearing transaction account'' in the Interim Rule. Should the definition be modified and the FDIC's transaction guarantee be extended to include coverage for NOW accounts held by sole proprietorships, non-profit religious, philanthropic, charitable organizations and the like, or governmental units for the deposit of public funds if the interest paid is de minimis?

The Interim Rule provides for a number of disclosures relative to the FDIC's Debt Guarantee Program. Does the certainty of payment provided by the required disclosures to lenders and creditors outweigh the burden on participating entities in providing the disclosures? Are there alternative, less burdensome ways to achieve the same result and foster creditor confidence in the Debt Guarantee Program?

Regulatory Analysis and Procedure

A. Administrative Procedure Act

Pursuant to section 553(b)(B) of the Administrative Procedure Act (APA), notice and comment are not required prior to the issuance of a final rule if an agency for good cause finds that notice and public procedure thereon are impracticable, unnecessary, or contrary to the public interest. In addition, section 553(d)(3) of the APA provides that an agency, for good cause found and published with the rule, does not have to comply with the requirements that a final rule be published not less than 30 days before its effective date. The FDIC finds good cause to adopt this Interim Rule without prior notice and comment and without the 30-day delayed effective date.

The FDIC's finding is based upon the severe financial conditions that threaten the stability of the nation's economy generally and the banking system in particular, the serious adverse effects on economic conditions and financial stability that would result from any delay of the effective date of the Interim Rule, and the fact that the Temporary Liquidity Guarantee Program became effective on October 14, 2008. 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 15-day comment period. The 15-day comment period will allow the FDIC to receive comments in a timely manner and provide the industry with a final rule as quickly as possible, given the Interim Rule's October 23, 2008, effective date. In adopting the final regulation, the FDIC will revise the Interim Rule, if appropriate, in light of the comments received on the Interim Rule.

B. Community Development and Regulatory Improvement Act

The Riegle Community Development and Regulatory Improvement Act requires that any new rule prescribed by a Federal banking agency that imposes additional reporting, disclosures, or other new requirements on insured depository institutions take effect on the first day of a calendar quarter unless the agency determines, for good cause published with the rule, that the rule should become effective before such time.[4] Based upon the severe financial conditions that threaten the stability of the nation's economy generally and the banking system in particular, the serious adverse effects on economic conditions and financial stability that would result from any delay of the effective date of the Interim Rule, and the fact that the Temporary Liquidity Guarantee Program has been in effect since October 14, 2008, the FDIC invokes the good cause exception to make the Interim Rule effective on October 23, 2008.

C. 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 1996 (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 rule may be reviewed.

D. Regulatory Flexibility Act

The Regulatory Flexibility Act (RFA) requires an agency that is issuing a proposed rule to prepare and make available for public comment an initial regulatory flexibility analysis that describes the impact of a proposed rule on small entities. Because this rulemaking does not involve the issuance of a notice of proposed rulemaking, the requirements of the RFA do not apply.

E. Paperwork Reduction Act

This interim rule contains information collection requirements subject to the Paperwork Reduction Act (PRA). The FDIC has submitted a request for review and approval of a collection of information under the emergency processing procedures in Office of Management and Budget (OMB) regulation, 5 CFR 1320.13. The FDIC is requesting approval by October 23, 2008, of reporting requirements on amounts of senior unsecured debt, decisions to opt in or opt out of the TLG Program or either of its components, issuance of guaranteed debt and debt holder guarantee claims against a receivership; disclosure requirements regarding participation in the debt guarantee component, participation in the transaction account guarantee component, and termination of participation in the TLG Program.

These reporting and disclosure requirements are needed immediately to facilitate the FDIC's administration of

[4] 12 U.S.C. 4802.

the Temporary Liquidity Guarantee Program and to ensure notice to the public about which entities are participating in the program. The use of emergency clearance procedures is necessary because of the sudden, unanticipated systemic risks posed to the nation's financial system by recent economic conditions and because public harm is reasonably likely to result if liquidity is not restored to financial markets. The burden for reporting requirements on the amount of uninsured deposits and reporting and recordkeeping requirements will be accounted for, as appropriate, by an amendment to Consolidated Reports of Condition and Income (OMB No. 3064–0052) and Thrift Financial Reports or by adjustments to the information collection for this interim rule.

The proposed burden estimate is as follows:

Title: Temporary Liquidity Guarantee Program.

OMB Number: New collection.

Frequency of Response:

Initial report of amount of senior unsecured debt—once.

Subsequent reports on amount of senior unsecured debt—4.

Opt-out/opt-in notice—once.

Notice of debt guarantee—once.

Notice of transaction account guarantee—once.

Notice of issuance of debt guarantee—26 to 250.

Notice of termination of participation—once.

Debt-holder guarantee claims—once.

Bankruptcy POC/evidence of POC—once.

Affected Public: FDIC-insured depository institutions, thrift holding companies, bank and financial holding companies.

Estimated Number of Respondents:

Initial report of amount of senior unsecured debt—14,400.

Subsequent reports on amount of senior unsecured debt—14,400.

Opt-out/opt-in notice—1,600.

Notice of debt guarantee—9,150.

Notice of transaction account guarantee—8,000.

Notice of issuance of debt guarantee—13,650.

Notice of termination of participation—300.

Debt-holder guarantee claims—2,300.

Bankruptcy POC/evidence of POC—300.

Average time per response:

Initial report of amount of senior unsecured debt—1 hour.

Subsequent reports on amount of senior unsecured debt hour—1.

Opt-out/opt-in notice—0.5 hour.

Notice of debt guarantee—1 to 2 hours.

Notice of transaction account guarantee—2 hours.

Notice of issuance of debt guarantee—0.5 to 3 hours.

Notice of termination of participation—3 hours.

Debt-holder guarantee claims—3 hours.

Bankruptcy POC/evidence of POC—1 hour.

Estimated Annual Burden:

Initial report of amount of senior unsecured debt—14,400 hours.

Subsequent reports on amount of senior unsecured debt—57,600 hours.

Opt-out/opt-in notice—800 hours.

Notice of debt guarantee—15,300 hours.

Notice of transaction account guarantee—16,000 hours.

Notice of issuance of debt guarantee—2,086,900 hours.

Notice of termination of participation—900 hours.

Debt-holder guarantee claims—6,900 hours.

Bankruptcy POC/evidence of POC—300 hours.

Total annual burden—2,199,100 hours.

The FDIC plans to follow this emergency request with a request for standard 3-year approval. Although this program, including most of the burden on participating entities, will be largely ended by the end of 2009, a few elements will be ongoing until 2012. The request will be processed under OMB's normal clearance procedures in accordance with the provisions of OMB regulation 5 CFR 1320.10. To facilitate processing of the emergency and normal clearance submissions to OMB, the FDIC invites the general public to comment on: (1) Whether this collection of information is necessary for the proper performance of the FDIC's functions, including whether the information has practical utility; (2) the accuracy of the estimates of the burden of the information collection, including the validity of the methodologies and assumptions used; (3) ways to enhance the quality, utility, and clarity of the information to be collected; and (4) ways to minimize the burden of the information collection on respondents, including through the use of automated collection techniques or other forms of information technology; and (5) estimates of capital or start up costs, and costs of operation, maintenance and purchase of services to provide the information.

List of Subjects in 12 CFR Part 370

Banks, Banking, Bank deposit insurance, Holding companies, National banks, Reporting and recordkeeping requirements, Savings associations.

■ For the reasons stated above, the Board of Directors of the Federal Deposit Insurance Corporation amends title 12 of the Code of Federal Regulations by adding new Part 370 as follows:

PART 370—TEMPORARY LIQUIDITY GUARANTEE PROGRAM

Sec.
370.1 Scope.
370.2 Definitions.
370.3 Debt Guarantee Program.
370.4 Transaction Account Guarantee Program.
370.5 Participation.
370.6 Assessments under the Debt Guarantee Program.
370.7 Assessments for the Transaction Account Guarantee Program.
370.8 Systemic Risk Emergency Special Assessment to recover loss.
370.9 Recordkeeping requirements.
370.10 Oversight.
370.11 Enforcement mechanisms.
370.12 Payment of claims.

Authority: 12 U.S.C. 1813(l), 1813(m), 1817(i), 1818, 1819(a)(Tenth); 1820(f), 1821(a); 1821(c); 1821(d); 1823(c)(4).

§ 370.1 Scope.

■ This part sets forth the eligibility, limitations, procedures, requirements, and other provisions related to participation in the FDIC's temporary liquidity guarantee program.

§ 370.2 Definitions.

As used in this part, the terms listed in this section are defined as indicated below. Other terms used in this part that are defined in the Federal Deposit Insurance Act (FDI Act) have the meanings given them in the FDI Act except as otherwise provided herein.

(a) *Eligible entity.* The term ''eligible entity'' means any of the following:

(1) An insured depository institution;

(2) A U.S. bank holding company, provided that it has at least one chartered and operating insured depository institution within its holding company structure;

(3) A U.S. savings and loan holding company, provided that it has at least one chartered and operating insured depository institution within its holding company structure or

(4) Other affiliates of insured depository institutions that the FDIC after consultation with the appropriate Federal banking agency, designates as eligible entities which affiliates, by seeking and obtaining such designation, will have opted in to the debt guarantee program.

(b) *Insured Depository Institution.* The term ''insured depository institution'' means an insured depository institution as defined in section 3(c)(2) of the FDI

Act, 12 U.S.C. 1813(c)(2), except that it does not include an ''insured branch'' of a foreign bank as defined in section 3(s)(3) of the FDI Act, 12 U.S.C. 1813(s)(3), for purposes of the debt guarantee program.

(c) *U.S. Bank Holding Company.* The term ''U.S. Bank Holding Company'' means a ''bank holding company'' as defined in section 2(a) of the Bank Holding Company Act of 1956 (''BHCA''), 12 U.S.C. 1841(a), that is organized under the laws of any State or the District of Columbia.

(d) *U.S. Savings and Loan Holding Company.* The term ''U.S. Savings and Loan Holding Company'' means a ''savings and loan holding company'' as defined in section 10(a)(1)(D) of the Home Owners' Loan Act of 1933 (''HOLA''), 12 U.S.C. 1467a(a)(1)(D), that is organized under the laws of any State or the District of Columbia and either:

(1) Engages only in activities that are permissible for financial holding companies under section 4(k) of the BHCA, 12 U.S.C.1843(k), or

(2) Has at least one insured depository institution subsidiary that is the subject of an application under section 4(c)(8) of the BHCA, 12 U.S.C. 1843(c)(8), that was pending on October 13, 2008.

(e) *Senior unsecured debt.* The term ''senior unsecured debt'' means unsecured borrowing that: Is evidenced by a written agreement; has a specified and fixed principal amount to be paid in full on demand or on a date certain; is noncontingent; and is not, by its terms, subordinated to any other liability.

(1) Senior unsecured debt includes, for example, federal funds purchased, promissory notes, commercial paper, unsubordinated unsecured notes, certificates of deposit standing to the credit of a bank, bank deposits in an international banking facility (IBF) of an insured depository institution, and Eurodollar deposits standing to the credit of a bank. For purposes of this paragraph, the term ''bank'' means an insured depository institution or a depository institution regulated by a foreign bank supervisory agency.

(2) Senior unsecured debt may be denominated in foreign currency.

(3) Senior unsecured debt excludes, for example, obligations from guarantees or other contingent liabilities, derivatives, derivative-linked products, debt paired with any other security, convertible debt, capital notes, the unsecured portion of otherwise secured debt, negotiable certificates of deposit, and deposits in foreign currency and Eurodollar deposits that represent funds swept from individual, partnership or corporate accounts held at insured depository institutions. Also excluded are loans to affiliates, including parents and subsidiaries, and institution affiliated parties.

(f) *Newly issued senior unsecured debt.* The term ''newly issued senior unsecured debt'' means senior unsecured debt issued by a participating entity on or after October 14, 2008, and on or before:

(1) The earlier of November 12, 2008 or the date an eligible entity opts out, for an eligible entity that opts out of the debt guarantee program; or

(2) June 30, 2009, for an eligible entity that does not opt out of the debt guarantee program.

(g) *Participating entity.* The term ''participating entity'' means:

(1) For the period from October 14, 2008, through November 12, 2008, any eligible entity that has not opted out; or

(2) For the period from November 13, 2008 through June 30, 2012, an eligible entity that has not opted out of the debt guarantee program; or

(3) For the period from November 13, 2008 through December 31, 2009, an eligible entity that has not opted out of the transaction account guarantee program.

(h) *Noninterest-bearing transaction account.* (1) The term ''noninterest-bearing transaction account'' means a transaction account as defined in 12 CFR 204.2 that is

(i) Maintained at an insured depository institution;

(ii) With respect to which interest is neither accrued nor paid; and

(iii) On which the insured depository institution does not reserve the right to require advance notice of an intended withdrawal.

(2) A noninterest-bearing transaction account does not include, for example, a negotiable order of withdrawal (NOW) account or money market deposit account (MMDA) as those accounts are defined in 12 CFR 204.2.

(i) *FDIC-Guaranteed debt.* The term ''FDIC-guaranteed debt'' means senior unsecured debt issued by a participating entity that meets the requirements of this part for debt that is guaranteed under the debt guarantee program, and is clearly identified as ''guaranteed by the FDIC.''

(j) *Debt guarantee program.* The term ''debt guarantee program'' refers to the protections afforded newly issued senior unsecured debt as described in this part.

(k) *Transaction account guarantee program.* The term ''transaction account guarantee program'' refers to the protections afforded funds in noninterest-bearing transaction accounts as described in this part.

(l) *Temporary liquidity guarantee program.* The term ''temporary liquidity guarantee program'' includes both the debt guarantee program and the transaction account guarantee program.

§ 370.3 Debt Guarantee Program.

(a) Upon the failure of a participating entity that is an insured depository institution or the filing of a petition in bankruptcy with respect to any other participating entity, and subject to the other provisions of this part, the FDIC guarantees payment of the unpaid principal and contract interest accrued to the date of failure or bankruptcy, as appropriate, of all FDIC-guaranteed debt issued by the participating entity during the period from October 14, 2008, through June 30, 2009, provided that the FDIC will pay interest at the 90-day T-Bill bill rate if there is a delay in payment beyond the next business day after the failure of the institution or the date of filing of the bankruptcy petition, respectively.

(b) Absent action by the FDIC, the maximum amount of debt to be issued under the guarantee is 125 percent of the par value of the participating entity's senior unsecured debt, excluding debt extended to affiliates or institution affiliated parties, outstanding as of September 30, 2008 that was scheduled to mature on or before June 30, 2009. Under certain circumstances and subject to certain conditions, including disclosure requirements, a participating entity may issue senior unsecured debt that is not subject to the guarantee. If the participating entity issues debt identified as ''guaranteed by the FDIC'' in excess of its maximum amount, it will become subject to assessment increases as provided in § 370.6(e). The FDIC may make exceptions to this guarantee limit, for example, allow a participating entity to exceed the 125 percent guarantee limit, restrict a participating entity to less than 125 percent, and/or impose other limits or requirements. If a participating entity had no senior unsecured debt on September 30, 2008, the entity may seek to have some amount of debt covered by the debt guarantee program. The FDIC, after consultation with the appropriate Federal banking agency, will decide whether, and to what extent, such requests will be granted on a case-by-case basis.

(1) Each participating entity shall calculate the amount of its senior unsecured debt outstanding as of September 30, 2008 excluding debt extended to affiliates, that was scheduled to mature on or before June 30, 2009, using the definitions described in this regulation.

(2) Each participating entity will report the calculated amount to the FDIC, even if such amount is zero, in an approved format via FDIC*connect* no later than November 12, 2008.

(3) Each subsequent report to the FDIC concerning debt issuances or balances outstanding will state whether the eligible institution has issued guaranteed debt that exceeded its limits at any time since the previous reporting period.

(4) All reports subject to this section will contain a certification from the eligible institution's Chief Financial Officer (CFO) or equivalent certifying the accuracy of the information reported.

(c) For FDIC-guaranteed debt issued on or before June 30, 2009, the FDIC's guarantee will terminate on the earlier of the maturity of the debt or June 30, 2012.

(d) Debt cannot be issued and identified as guaranteed by the FDIC if:

(1) The proceeds are used to prepay debt that is not FDIC-guaranteed;

(2) The issuing entity has previously opted out of the debt guarantee program;

(3) The issuing entity has had its participation in the debt guarantee program terminated by the FDIC;

(4) The issuing entity has exceeded its authorized limit for issuing guaranteed debt as specified in paragraph (b) of this section,

(5) The debt does not otherwise meet the requirements of this part; or

(6) The debt is extended to an affiliate, an insider of the participating entity, or an insider of an affiliate without FDIC approval of the guarantee.

(e) The FDIC's agreement to include a participating entity's senior unsecured debt in the debt guarantee program does not exempt the entity from complying with any applicable law including, without limitation, Securities and Exchange Commission registration or disclosure requirements that would be applicable if the entity or liability were not included in the program.

(f) *Long term non-guaranteed debt option.* On or before 11:59 p.m., Eastern Standard Time, November 12, 2008 a participating entity may also notify the FDIC that it has elected to issue non-guaranteed debt with maturities beyond June 30, 2012, at any time, in any amount, and without regard to the guarantee limit. By making this election the participating entity agrees to pay to the FDIC the nonrefundable fee as provided in § 370.6(f).

§ 370.4 Transaction Account Guarantee Program.

(a) In addition to the coverage afforded to depositors under 12 CFR Part 330, a depositor's funds in a noninterest-bearing transaction account maintained at a participating entity that is an insured depository institution are insured in full (irrespective of the standard maximum deposit insurance amount defined in 12 CFR 330.1(n)) from October 14, 2008, through the earlier of:

(1) The date of opt-out, if the entity opted out, or

(2) December 31, 2009.

(b) In determining whether funds are in a noninterest-bearing transaction account for purposes of this section, the FDIC will apply its normal rules and procedures under § 360.8 (12 CFR 360.8) for determining account balances at a failed insured depository institution. Under these procedures, funds may be swept or transferred from a noninterest-bearing transaction account to another type of deposit or nondeposit account. Unless the funds are in a noninterest-bearing transaction account after the completion of a sweep under § 360.8, the funds will not be guaranteed under the transaction account guarantee program.

(c) Notwithstanding paragraph (b) of this section, in the case of funds swept from a noninterest-bearing transaction account to a noninterest-bearing savings deposit account, the FDIC will treat the swept funds as being in a noninterest-bearing transaction account. As a result of this treatment, the funds swept from a noninterest-bearing transaction account to a noninterest-bearing savings account will be guaranteed under the transaction account guarantee program.

§ 370.5 Participation.

(a) *Initial period.* All eligible entities are covered under the temporary liquidity guarantee program for the period from October 14, 2008 through November 12, 2008, unless they opt out on or before November 12, 2008 in which case the coverage ends on the date of the opt-out.

(b) The issuance of FDIC-guaranteed debt subject to the protections of the debt guarantee program is an affirmative action by a participating entity that constitutes its agreement to be:

(1) Bound by the terms and conditions of the program, including without limitation, being subject to the assessments provided herein;

(2) Subject to and to comply with any FDIC request to provide information relevant to participation in the debt guarantee program and to be subject to FDIC on-site reviews as needed after consultation with the appropriate Federal banking agency to determine compliance with the terms and requirements of the debt guarantee program; and

(3) Bound by the FDIC's decisions, in consultation with the appropriate Federal banking agency, regarding the management of the temporary liquidity guarantee program.

(c) *Opt-out and Opt-In Options.* From October 14, 2008 through November 12, 2008 each eligible entity is a participating entity in both the debt guarantee program and the transaction account guarantee program, unless the entity opts out. No later than 11:59 p.m., Eastern Standard Time, November 12, 2008, each eligible entity must inform the FDIC if it desires to opt out of the debt guarantee program or the transaction account guarantee program, or both. Failure to opt out by 11:59 p.m., Eastern Standard Time, November 12, 2008 constitutes a decision to continue in the program after that date. Prior to November 12, 2008 an eligible entity may inform the FDIC that it will not opt out of either or both programs (opt in).

(d) An eligible entity may elect to opt out of either the guaranteed debt program or the transaction account guarantee program or both. The choice to opt out, once made, is irrevocable. Similarly, the choice to affirmatively opt in, as provided in § 370.5(c), once made, is irrevocable.

(e) All eligible entities within a U.S. bank holding company group or U.S. savings and loan holding company group must make the same decision regarding continued participation in each guarantee program; failure to do so constitutes an opt out by all members of the group.

(f) Eligible entities that do not opt out on or before November 12, 2008 will not be able to select which newly issued senior unsecured debt is guaranteed debt; all senior unsecured debt issued by a participating entity up to the guarantee limit will become guaranteed debt as and when issued, subject to § 370.3(f).

(g) *Procedures for Opting Out.* The FDIC will provide procedures for opting out and for making an affirmative decision to opt in using FDIC's secure e-business Web site, FDIC*connect*. Entities that are not insured depository institutions will select and solely use an affiliated insured depository institution to submit their opt-out election and to make any assessment payments required under the temporary liquidity guarantee program.

(h) *Disclosures regarding participation in the temporary liquidity guarantee program.*

(1) The FDIC will publish on its Web site:

(i) A list of the eligible entities that have opted out of the debt guarantee program and

(ii) A list of the eligible entities that have opted out of the transaction account guarantee program.

(2) If an eligible entity does not opt out of the debt guarantee program, it must clearly identify, in writing and in a commercially reasonable manner, to any interested lender or creditor whether the newly issued debt it is offering is guaranteed or not.

(3) Each eligible entity that is an insured depository institution must post a prominent notice in the lobby of its main office and each branch clearly indicating whether the entity is participating in the transaction account guarantee program, *i.e.*, whether it has opted out. If the entity is participating in the transaction account guarantee program, the notice must also state that funds held in noninterest-bearing transactions accounts at the entity are insured in full by the FDIC.

(i) These disclosures must be provided in simple, readily understandable text.

(ii) If the institution uses sweep arrangements or takes other actions that result in funds being transferred or reclassified to an interest-bearing account or nontransaction account, the institution must disclose those actions to the affected customers and clearly advise them, in writing, that such actions will void the FDIC's guarantee.

(4) *Effective date for paragraph (2) and (3) of paragraph (h).* Paragraphs (h)(2) and (h)(3) of this section are effective December 1, 2008. Prior to that date, eligible entities should provide adequate disclosures of the substance of paragraphs (h)(2) and (h)(3) in a commercially reasonable manner.

(i) *Continued Eligibility.* The FDIC will determine eligibility in consultation with the eligible entity's appropriate Federal banking agency.

(1) Participation by an entity organized after the expiration of the opt-out period will be considered by the FDIC on a case-by-case basis in consultation with the entity's appropriate Federal banking agency.

(2) An eligible entity that is not an insured depository institution will no longer be eligible to participate in the debt guarantee program once it is no longer affiliated with a chartered and operating insured depository institution.

(j) *Duration*—(1) *Coverage for guaranteed debt.* The ability of participating entities to issue guaranteed debt under the debt guarantee program expires on June 30, 2009. For guaranteed debt issued on or before June 30, 2009, coverage would only be provided until the earlier of the maturity of the liability or June 30, 2012.

(2) *Coverage for noninterest-bearing transaction accounts.* Funds held in noninterest-bearing transaction accounts at eligible entities will be guaranteed from October 14, 2008 through November 12, 2008. If the eligible entity does not opt-out of the transaction account guarantee program, the coverage will exist through December 31, 2009.

§ 370.6 Assessments under the Debt Guarantee Program.

(a) *Waiver of assessment for initial period.* No eligible entity shall pay any assessment associated with the debt guarantee program for the period from October 14, 2008, through November 12, 2008.

(b) *Notice to the FDIC.* No debt shall be considered guaranteed under the FDIC's debt guarantee program unless notice of the issuance of such debt and payment of associated assessments is provided to the FDIC as required in paragraph (d) of this section.

(1) Any eligible entity that does not opt out of the Debt Guarantee Program by November 12, 2008, as provided in § 370.5, and issued any guaranteed debt during the period from October 14, 2008 through November 12, 2008 that was still outstanding on November 12, 2008, shall notify the FDIC of that issuance via the FDIC's e-business Web site FDIC*connect* by December 1, 2008, and the eligible entity's Chief Financial Officer or equivalent shall certify that the issuances outstanding at each point of time did not exceed the guaranteed amount limit as set forth in § 370.3.

(2) Any eligible entity that does not opt out of the program and that issues guaranteed debt after November 12, 2008, shall notify the FDIC of that issuance via the FDIC's e-business Web site FDIC*connect* within the time period specified by the FDIC. The eligible entity's Chief Financial Officer or equivalent shall certify that the issuance of guaranteed debt does not exceed the guarantee limit as set forth in § 370.3.

(3) The eligible entity shall be required to provide certification that the issuance does not exceed the guaranteed amount limit as set forth in § 370.3.

(4) The FDIC will provide procedures governing notice to the FDIC and certification of guaranteed amount limits for purposes of this section.

(c) *Initiation of assessments.* Beginning on November 13, 2008, any eligible entity that has chosen not to opt out of the debt guarantee program as provided in this part, will be charged assessments as set forth in this section.

(d) *Amount of assessments for debt within the guarantee limit*—(1) *Calculation of assessment.* The amount of assessment will be determined by multiplying the amount of eligible guaranteed debt times the term of the debt times an annualized 75 basis points. If the debt matures after June 30, 2012, June 30, 2012 will be used as the maturity date.

(2) *Assessment invoicing.* Once the participating entity provides notice as required in paragraphs (b)(1) and (b)(2) of this section, the invoice for the appropriate fee will be automatically generated and posted on *FDICconnect* for the account associated with the participating entity, and the time limits for providing payment in paragraph (e)(1) of this section will apply.

(3) *No assessment reduction for early retirement of guaranteed debt.* A participating entity's assessment shall not be reduced if guaranteed debt is retired prior to its scheduled maturity date.

(e) *Increased assessments for debt exceeding the Guarantee Limit.* Any participating entity that issues guaranteed debt represented as being ''guaranteed by the FDIC'' exceeding its guaranteed amount limit as set forth in § 370.3(b) shall have its assessment rate for all outstanding guaranteed debt increased to 150 basis points for purposes of the calculations in paragraphs (d)(1) of this section. In addition, any entity making such a misrepresentation may also be subject to enforcement action including civil money penalties under 12 U.S.C. 1818.

(f) *Long term non-guaranteed debt fee.* Each participating entity that elects to issue long term non-guaranteed debt pursuant to § 370.3(f) must pay the FDIC a nonrefundable fee equal to 37.5 basis points times the amount of the entity's senior unsecured debt (other than debt owed to affiliates) with a maturity date on or before June 30, 2009, outstanding as of September 30, 2008.

(1) The nonrefundable fee will be collected in six equal monthly installments.

(2) An entity electing the nonrefundable fee option will also be billed as it issues guaranteed debt under the debt guarantee program, and the amounts paid as a nonrefundable fee will be applied to offset these bills until the nonrefundable fee is exhausted.

(3) Thereafter, the institution will have to pay additional assessments on guaranteed debt as it issues the debt

(g) *Collection of assessments—ACH Debit.* Each participating entity shall take all actions necessary to allow the Corporation to debit assessments from the participating entity's designated

deposit account as provided for in § 327.3(a)(2). Each participating entity shall ensure that funds in an amount at least equal to the amount of the assessment are available in the designated account for direct debit by the Corporation on the first business day after posting of the invoice on *FDICconnect*. Failure to take any such action or to provide such funding of the account shall be deemed to constitute nonpayment of the assessment, and such failure by any participating entity will be subject to the penalties for failure to timely pay assessments as provided for at § 308.132(c)(3)(v).

§ 370.7 Assessment for the Transaction Account Guarantee Program.

(a) *Waiver of assessment for initial period.* No eligible entity shall pay any assessment associated with the transaction account guarantee program for the period from October 14, 2008, through November 12, 2008.

(b) *Initiation of assessment.* For the period beginning on November 13, 2008, and continuing through December 31, 2009, any eligible entity that has not notified the FDIC that it has opted out of the transaction account guarantee program as provided in § 370.5, will be subject to an assessment that will be reflected on its quarterly certified statement invoices.

(c) *Amount of assessment.* Any eligible entity that does not opt out of the transaction account guarantee program shall pay quarterly an annualized 10 basis point assessment on any deposit amounts exceeding the existing deposit insurance limit of $250,000, as reported on its quarterly Reports of Condition and Income or Thrift Financial Report in any noninterest-bearing transaction accounts (as defined in § 370.2(h), including any such amounts swept from a noninterest bearing transaction account into an noninterest bearing savings deposit account as provided in § 370.4(c). This assessment shall be in addition to an institution's risk-based assessment imposed under Part 327.

(d) *Collection of assessment.* Assessments for the transaction account guarantee program shall be collected along with a participating entity's quarterly deposit insurance payment as provided in § 327.3, and subject to penalties for failure to timely pay assessments as referenced in § 308.132(c)(3)(v).

§ 370.8 Systemic Risk Emergency Special Assessment to recover loss.

To the extent that the assessments provided under § 370.6 or § 370.7 are insufficient to cover any loss or expenses arising from the temporary liquidity guarantee program, the Corporation shall impose an emergency special assessment on insured depository institutions as provided under 12 U.S.C. 1823(c)(4)(G)(ii) of the FDI Act.

§ 370.9 Recordkeeping requirements.

The FDIC will establish procedures, require reports, and require participating entities to provide and preserve any information needed for the operation of this program.

§ 370.10 Oversight.

(a) *Oversight.* Participating entities availing themselves of the temporary liquidity guarantee program are subject to the FDIC's oversight regarding compliance with the terms of the temporary liquidity guarantee program.

(b) By issuing guaranteed debt, and not opting out of the temporary liquidity guarantee program, all participating entities agree, for the duration of the temporary liquidity guarantee program, to be subject to the FDIC's authority to determine compliance with the provisions and requirements of the program.

§ 370.11 Enforcement Mechanisms.

(a) *Termination of Participation.* If the FDIC, in its discretion, after consultation with the participating entity's appropriate Federal banking agency, determines that the participating entity should no longer be permitted to continue to participate in the temporary liquidity guarantee program, the FDIC will inform the entity that it will no longer be provided the protections of the temporary liquidity guarantee program.

(1) Termination of participation in the temporary liquidity guarantee program will solely have prospective effects. All previously issued guaranteed debt will continue to be guaranteed as set forth in this part.

(2) The FDIC will work with the participating entity and its appropriate Federal banking agency to assure that the entity notifies its customers and lenders or creditors that its participation in the temporary liquidity guarantee program has ended.

(b) *Enforcement Actions.* Violating the terms or requirements of the temporary liquidity guarantee program set forth in this part constitutes a violation of a regulation and subjects the participating entity to enforcement actions under Section 8 of the FDI Act (12 U.S.C. 1818), including the assessment of civil money penalties under section 8(i) of the FDI Act (12 U.S.C. 1818(i)). The appropriate Federal banking agency for the participating entity will consult with the FDIC in enforcing the provisions of this part. The appropriate Federal banking agency and the FDIC also have enforcement authority under 12 U.S.C. 1828(a)(4)(C) to pursue an enforcement action if a person knowingly misrepresents that any deposit liability, obligation, certificate, or share is insured when it is not in fact insured.

§ 370.12 Payment of Claims.

(a) *Claims for Deposits in Guaranteed Transaction Accounts.*

(1) *In general.* The FDIC will pay guaranteed claims of depositors who hold noninterest-bearing transaction deposit accounts in an insured depository institution that is a participating entity as soon as possible upon the failure of the entity. Unless otherwise provided for in this subsection, the guaranteed claims of depositors who hold noninterest-bearing transaction deposit accounts in such entities will be paid in accordance with 12 U.S.C. 1821(f) and 12 CFR 330.

(2) *Subrogation rights of FDIC.* Upon payment of such claims, the FDIC will be subrogated to the claims of depositors in accordance with 12 U.S.C. 1821(g).

(3) *Review of final determination.* The final determination of the amount guaranteed shall be considered a final agency action of the FDIC reviewable in accordance with Chapter 7 of Title 5, by the United States district court for the federal judicial district where the principal place of business of the depository institution is located. Any request for review of the final determination shall be filed with the appropriate district court not later than sixty (60) days of the date on which the final determination is issued.

(b) *Claims for Guaranteed Debt*—(1) *Guaranteed debt in receivership.*

(i) *Procedure for claims determination.* Holders of debt shall file a claim with the receiver of a failed insured depository institution that is a participating entity within ninety days after the FDIC publishes a notice to creditors of the failed financial institution to present claims pursuant to 12 U.S.C. 1821(d)(3)(B). The FDIC will consider the proof of claim, if timely filed, and will make a determination of the amount guaranteed within 180 days of the filing of the proof of claim, unless extended by written agreement between the claimant and the FDIC. The determination of the FDIC will be final. The FDIC will pay interest at the 90-day T-Bill bill rate if there is a delay in payment beyond the next business day after receivership.

(ii) *Subrogation rights of FDIC.* To receive payment under the debt guarantee program, the holder of the unsecured senior debt shall assign its rights, title and interest in the unsecured senior debt to the FDIC and to transfer its validated claim to the FDIC which will be subrogated to such rights.

(iii) *Review of final determination.* The debt holder shall have the right to seek judicial review of the FDIC's final determination of the amount guaranteed in the district or territorial court of the United States for the district within which the depository institution's principal place of business is located or the United States District Court for the District of Columbia. The debt holder must file suit on such claim before the end of the 60-day period beginning on the date of the FDIC's final determination or before the end of the 60-day period beginning on the 180th day after the debt holder filed the claim with the FDIC, unless extended by mutual agreement, if the FDIC has not made a final determination.

(2) *Guaranteed debt of a participating U.S. Bank Holding Company, or U.S. Savings and Loan Holding Company or Authorized Affiliates.*

(i) *Procedure for claims determination.* The holder of the unsecured senior debt of a holding company or authorized affiliate must timely file a bankruptcy proof of claim (POC) against the company's bankruptcy estate and present evidence of such timely filed bankruptcy POC in order to be eligible to participate in the TLG Program. The POC must be filed with the FDIC within 90 days of the published bar date of the bankruptcy proceeding. The claimant shall identify and describe the debt it believes is subject to the FDIC guarantee.

(ii) *Payment of claims.* The FDIC will make payment to the debt holder for the principal amount of the debt and contract interest to the date of the filing of a bankruptcy petition with respect to the company, provided that the FDIC will pay interest at the 90-day T-Bill bill rate if there is a delay in payment beyond the next business day after the date of filing of the bankruptcy petition. The FDIC is not required to make payment on the guaranteed amount for a debt asserted against a bankruptcy estate, unless and until the claim for the unsecured senior debt has been determined to be an allowed claim against the bankruptcy estate and such claim is not subject to reconsideration under 11 U.S.C. 502 (j).

(iii) *Assignment of rights to FDIC.* To receive payment under the debt guarantee program, the holder of the unsecured senior debt shall assign its rights, title and interest in the unsecured senior debt to the FDIC and to transfer its allowed claim in bankruptcy to the FDIC. This assignment shall include the right of the FDIC to receive principal and interest payments on the unsecured senior debt from the proceeds of the bankruptcy estate of the holding company. If the holder of the unsecured senior debt receives any distribution from the bankruptcy estate prior to the FDIC's payment under the guarantee, the guaranteed amount paid by the FDIC shall be reduced by the amount the holder has received in the distribution from the bankruptcy estate.

(iv) *Final determination.* The FDIC's determination of the guaranteed amount shall be a final administrative determination subject to judicial review.

(v) *Review of final determination.* The holder of an unsecured senior debt shall have the right to seek judicial review of the FDIC's final determination in the United States District Court for the District of Columbia or the United State District Court for the federal district where the holding company's principal place of business was located. Failure of the holder of the unsecured senior debt to seek such judicial review within sixty (60) days of the date of the rendering of the final determination will deprive the holder of the unsecured senior debt of all further rights and remedies with respect to the guarantee claim.

By order of the Board of Directors.

Dated at Washington, DC, this 23rd day of October, 2008.

Federal Deposit Insurance Corporation.

Robert E. Feldman,

Executive Secretary.

[FR Doc. E8–25739 Filed 10–24–08; 4:15 pm]

BILLING CODE 6714–01–P

DEPARTMENT OF TRANSPORTATION

Federal Aviation Administration

14 CFR Part 39

[Docket No. FAA–2008–0555; Directorate Identifier 2008–NM–074–AD; Amendment 39–15705; AD 2005–13–02 R1]

RIN 2120–AA64

Airworthiness Directives; Bombardier Model CL–600–2C10 (Regional Jet Series 700 & 701) Series Airplanes and Model CL–600–2D24 (Regional Jet Series 900) Series Airplanes

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

ACTION: Final rule.

SUMMARY: The FAA is revising an existing airworthiness directive (AD) that applies to certain Bombardier Model CL–600–2C10 (Regional Jet series 700 & 701) series airplanes and Model CL–600–2D24 (Regional Jet series 900) series airplanes. That AD currently requires revising the Airworthiness Limitations section of the Instructions of Continued Airworthiness by incorporating new repetitive inspections and an optional terminating action for the repetitive inspections, and repairing any crack. This new AD clarifies the applicability of the existing AD. This AD results from reports of hydraulic pressure loss in either the number 1 or number 2 hydraulic system due to breakage or leakage of hydraulic lines in the aft equipment bay and reports of cracks on the aft pressure bulkhead web around the feed-through holes. We are issuing this AD to prevent loss of hydraulic pressure, which could result in reduced controllability of the airplane, and to detect and correct cracks on the aft pressure bulkhead web, which could result in reduced structural integrity of the aft pressure bulkhead.

DATES: This AD is effective December 3, 2008.

On July 27, 2005 (70 FR 35987, June 22, 2005), the Director of the Federal Register approved the incorporation by reference of Bombardier CRJ 700/900 Series Temporary Revision MRM2–129, dated June 1, 2004.

ADDRESSES: For service information identified in this AD, contact Bombardier, Inc., Canadair, Aerospace Group, P.O. Box 6087, Station Centre-ville, Montreal, Quebec H3C 3G9, Canada.

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 AD, the regulatory evaluation, any comments received, and other information. The address for the Docket Office (telephone 800–647–5527) is the Document Management Facility, U.S. Department of Transportation, Docket Operations, M–30, West Building Ground Floor, Room W12–140, 1200 New Jersey Avenue, SE., Washington, DC 20590.

FOR FURTHER INFORMATION CONTACT: Pong Lee, Aerospace Engineer, Airframe and Propulsion Branch, ANE–171, FAA, New York Aircraft Certification Office, 1600 Stewart Avenue, Suite 410,

Westbury, New York 11590; telephone (516) 228–7324; fax (516) 794–5531.

SUPPLEMENTARY INFORMATION:

Discussion

The FAA proposed to amend part 39 of the Federal Aviation Regulations (14 CFR part 39) with an airworthiness directive (AD) to revise AD 2005–13–02, amendment 39–14138 (70 FR 35987, June 22, 2005). The existing AD applies to certain Bombardier Model CL–600–2C10 (Regional Jet series 700 & 701) series airplanes and Model CL–600–2D24 (Regional Jet series 900) series airplanes. The proposed AD was published in the **Federal Register** on May 19, 2008 (73 FR 28754) to continue to revise the Airworthiness Limitations section of the Instructions of Continued Airworthiness by incorporating new repetitive inspections and an optional terminating action for the repetitive inspections, and repairing any crack. The proposed AD also clarifies the applicability of the existing AD.

Comments

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

Request To Withdraw NPRM

Comair requests that the NPRM be withdrawn. Comair states that the minor editorial correction to the Applicability section of the NPRM should not warrant a revised or new directive, and that the revised AD will not increase the airworthiness of any airplane. Comair also states that a review of the airplane log will indicate which service bulletins have been incorporated by Bombardier, on a limited basis, before delivery to a customer.

We do not agree with Comair to withdraw the NPRM. When a previously issued AD is changed, we issue a correction, revision, or supersedure AD, depending on the nature of the material being changed. In the case of this AD, a revision AD is the appropriate means to clarify the Applicability section of AD 2005–13–02. We have determined that issuance of this AD is necessary because Bombardier does not incorporate service bulletins in production and operators may misinterpret which affected airplanes are subject to the requirements of this AD.

Requests To Revise the Applicability Section

Comair notes that Bombardier Service Bulletin 670BA–29–008 is currently at Revision B, dated August 28, 2007. Paragraph (c) of the NPRM (i.e., Applicability section) refers to the initial issue, dated March 12, 2004; and Revision A, dated May 5, 2004; of that service bulletin.

From this comment, we infer that Comair is requesting that paragraph (c) of the NPRM be revised to also exclude those airplanes on which Revision B of Bombardier Service Bulletin 670BA–29–008 has been incorporated. We agree and revised paragraph (c) of this AD accordingly.

Comair requests that the serial numbers for Model CL–600–2C10 series airplanes identified in Table 1 of the NPRM be limited to serial numbers 10003 through 10156 inclusive. Comair states that comments were submitted to the NPRM for AD 2005–13–02 to limit the serial number range for which that AD should apply. In the preamble of the final rule for AD 2005–13–02, Comair notes that the FAA agreed with that comment but believes that we made a mistake by not revising the serial numbers in Table 1 of that AD (which is retained in the NPRM). Although not addressed in its NPRM comment for AD 2005–13–02, Comair also requests that, for the reason discussed previously, Table 1 of the NPRM be limited to serial numbers 15001 through 15026 inclusive for Model CL–600–2D24 series airplanes. Comair states that it does not make sense to issue an AD against airplane serial numbers for which there is no action required.

We do not agree with Comair's request to revise Table 1 of this AD. As stated in the preamble of AD 2005–13–02, we revised the applicability of that AD to exclude those airplanes on which certain modification summaries and service information had been incorporated. This approach rather than changing the reference to certain serial numbers, accomplishes the same intent. The referenced modification summaries and service information in this AD (i.e., Modification Summaries 670T00494 or 670T11944; Modification Summary 670T11508; and Bombardier Service Bulletin 670BA–29–008, dated March 12, 2004, Revision A, dated May 5, 2004, or Revision B, dated August 28, 2007) identify the serial numbers of those airplanes. Therefore, we find no change to this AD is necessary in this regard.

Request To Revise Costs of Compliance Section

Comair requests that the number of U.S.-registered airplanes specified in the Costs of Compliance section of the NPRM be changed from 116 to 255. Comair states that the Costs of Compliance section takes into account that either only airplanes with serial numbers below 10157 and 15027 are affected by this AD or the number needs to be adjusted to today's U.S. registry level. Comair states that a conversation with a Bombardier Field Service Representative indicates that all affected serial numbers have had the modification summaries and/or service bulletin specified in paragraph (c) of the NPRM incorporated and thus the NPRM does not apply to any U.S registered airplanes.

We agree with Comair to revise the Costs of Compliance section of this AD to reflect the current number of affected airplanes on the U.S. registry (i.e., 324 airplanes). We consulted with Bombardier and confirmed that all affected Bombardier Model CL–600–2C10 (Regional Jet series 700 & 701) series airplanes and Model CL–600–2D24 (Regional Jet series 900) series airplanes have been modified according to the optional terminating action specified in this AD. Therefore, currently, this AD imposes no additional financial burden on any U.S. operator. We have also revised the Costs of Compliance section of this AD in this regard.

Conclusion

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

Costs of Compliance

This AD affects about 324 airplanes of U.S. registry. We have been advised that all affected Bombardier Model CL–600–2C10 (Regional Jet series 700 & 701) series airplanes and Model CL–600–2D24 (Regional Jet series 900) series airplanes on the U.S. Register have been modified according to the optional terminating action specified in this AD. Therefore, currently, this AD imposes no additional financial burden on any U.S. operator.

However, if an unmodified airplane is imported and placed on the U.S. Register in the future, the actions required by this AD would take about 1 work hour per airplane, at an average labor rate of $80 per work hour. Based on these figures, we estimate the cost of this AD to be $80 per airplane.

Authority for This Rulemaking

Title 49 of the United States Code specifies the FAA's authority to issue rules on aviation safety. Subtitle I, section 106, describes the authority of

the FAA Administrator. Subtitle VII, Aviation Programs, describes in more detail the scope of the Agency's authority.

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

Regulatory Findings

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

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

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

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

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

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

List of Subjects in 14 CFR Part 39

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

Adoption of the Amendment

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

PART 39—AIRWORTHINESS DIRECTIVES

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

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

§ 39.13 [Amended]

■ 2. The Federal Aviation Administration (FAA) amends § 39.13 by removing amendment 39–14138 (70 FR 35987, June 22, 2005) and adding the following new airworthiness directive (AD):

2005–13–02 Bombardier, Inc. (Formerly Canadair): Amendment 39–15705. Docket No. FAA–2008–0555; Directorate Identifier 2008–NM–074–AD.

Effective Date

(a) This airworthiness directive (AD) is effective December 3, 2008.

Affected ADs

(b) This AD revises AD 2005–13–02.

Applicability

(c) This AD applies to the airplanes listed in Table 1 of this AD, certificated in any category, excluding those airplanes on which Modification Summary 670T00494 or 670T11944; and Modification Summary 670T11508 or Bombardier Service Bulletin 670BA–29–008, dated March 12, 2004, Revision A, dated May 5, 2004, or Revision B, dated August 28, 2007; has been incorporated.

TABLE 1—APPLICABILITY

Bombardier model	Serial No.
(1) CL–600–2C10 (Regional Jet Series 700 & 701) series airplanes	10003 through 10999 inclusive.
(2) CL–600–2D24 (Regional Jet Series 900) series airplanes	15001 through 15990 inclusive.

Unsafe Condition

(d) This AD resulted from reports of hydraulic pressure loss in either the number 1 or number 2 hydraulic system due to breakage or leakage of hydraulic lines in the aft equipment bay and reports of cracks on the aft pressure bulkhead web around the feed-through holes. We are issuing this AD to prevent loss of hydraulic pressure, which could result in reduced controllability of the airplane, and to detect and correct cracks on the aft pressure bulkhead web, which could result in reduced structural integrity of the aft pressure bulkhead.

Compliance

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

Restatement of Requirements of AD 2005–13–02

Revision of Airworthiness Limitations Section

(f) Within 30 days after July 27, 2005 (the effective date of AD 2005–13–02), revise the Airworthiness Limitations section of the Instructions of Continued Airworthiness by inserting a copy of the new repetitive inspections and an optional terminating action of Bombardier CRJ 700/900 Series Temporary Revision (TR) MRM2–129, dated June 1, 2004, into section 1.4, Part 2 (Airworthiness Limitations), of Bombardier Regional Jet Model CL–600–2C10 and CL–600–2D24 Maintenance Requirements Manual, CSP B–053. Thereafter, except as provided in paragraph (h)(2) or (i) of this AD, no alternative structural inspection intervals may be approved for this aft pressure bulkhead and pylon pressure pan in the vicinity of the hydraulic fittings and the hydraulic tube adapters.

(g) When the information in TR MRM2–129, dated June 1, 2004, is included in the general revisions of the Maintenance Requirement Manual, the general revisions may be inserted into the Airworthiness Limitations section of the Instructions of Continued Airworthiness and this TR may be removed.

Corrective Action

(h) If any crack is found during any inspection done in accordance with Bombardier CRJ 700/900 Series TR MRM2–129, dated June 1, 2004, or the same inspection specified in the general revisions of the Maintenance Requirement Manual, do the actions specified in paragraphs (h)(1) and (h)(2) of this AD.

(1) Before further flight, repair the crack in accordance with a method approved by either the Manager, New York Aircraft Certification Office (ACO), FAA; or Transport Canada Civil Aviation (TCCA) (or its delegated agent).

(2) At the applicable time specified in paragraph (h)(2)(i) or (h)(2)(ii) of this AD, revise the Airworthiness Limitations section of the Instructions of Continued Airworthiness by inserting a copy of the inspection requirements for the repair required by paragraph (h)(1) of this AD into Section 1.4, Part 2 (Airworthiness Limitations), of Bombardier Regional Jet Model CL–600–2C10 and CL–600–2D24 Maintenance Requirements Manual, CSP B–053. Thereafter, except as provided in paragraph (i) of this AD, no alternative structural inspection intervals may be approved for this aft pressure bulkhead and pylon pressure pan in the vicinity of the hydraulic fittings, and the hydraulic tube adapters.

(i) If the repair required by paragraph (h)(1) of this AD is done after the effective date of this AD: Revise the Airworthiness Limitations section within 12 months after the repair.

(ii) If the repair required by paragraph (h)(1) of this AD was accomplished before July 27, 2005: Revise the Airworthiness

Limitations section within 12 months after the repair or 30 days after July 27, 2005, whichever occurs later.

Alternative Methods of Compliance (AMOCs)

(i)(1) The Manager, New York ACO, FAA, ATTN: Pong Lee, Aerospace Engineer, Airframe and Propulsion Branch, ANE–171, FAA, New York ACO, 1600 Stewart Avenue, Suite 410, Westbury, New York 11590; telephone (516) 228–7324; fax (516) 794–5531; 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.

Related Information

(j) Canadian airworthiness directive CF–2004–14, dated July 20, 2004, also addresses the subject of this AD.

Material Incorporated by Reference

(k) You must use Bombardier CRJ 700/900 Series Temporary Revision MRM2–129, dated June 1, 2004, to perform the actions that are required by this AD, unless the AD specifies otherwise.

(1) On July 27, 2005 (70 FR 35987, June 22, 2005), the Director of the Federal Register approved the incorporation by reference of Bombardier CRJ 700/900 Series Temporary Revision MRM2–129, dated June 1, 2004.

(2) Contact Bombardier, Inc., Canadair, Aerospace Group, P.O. Box 6087, Station Centre-ville, Montreal, Quebec H3C 3G9, Canada, for a copy of this service information. You may review copies at the FAA, Transport Airplane Directorate, 1601 Lind Avenue, SW., Renton, Washington; or at the National Archives and Records Administration (NARA). For information on the availability of this material at NARA, call 202–741–6030, or go to: *http://www.archives.gov/federal-register/cfr/ibr-locations.html.*

Issued in Renton, Washington, on October 9, 2008.

Ali Bahrami,

Manager, Transport Airplane Directorate, Aircraft Certification Service.

[FR Doc. E8–25637 Filed 10–28–08; 8:45 am]

BILLING CODE 4910–13–P

DEPARTMENT OF TRANSPORTATION

14 CFR Part 97

[Docket No. 30634; Amdt. No. 3293]

Standard Instrument Approach Procedures, and Takeoff Minimums and Obstacle Departure Procedures; Miscellaneous Amendments

AGENCY: Federal Aviation Administration (FAA), DOT.

ACTION: Final rule.

SUMMARY: This rule establishes, amends, suspends, or revokes Standard Instrument Approach Procedures (SIAPs) and associated Takeoff Minimums and Obstacle Departure Procedures for operations at certain airports. These regulatory actions are needed because of the adoption of new or revised criteria, or because of changes occurring in the National Airspace System, such as the commissioning of new navigational facilities, adding new obstacles, or changing air traffic requirements. These changes are designed to provide safe and efficient use of the navigable airspace and to promote safe flight operations under instrument flight rules at the affected airports.

DATES: This rule is effective October 29, 2008. The compliance date for each SIAP, associated Takeoff Minimums, and ODP is specified in the amendatory provisions.

The incorporation by reference of certain publications listed in the regulations is approved by the Director of the **Federal Register** as of October 29, 2008.

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

For Examination—

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

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

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

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

Availability—All SIAPs are available online free of charge. Visit *nfdc.faa.gov* to register. Additionally, individual SIAP and Takeoff Minimums and ODP copies may be obtained from:

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

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

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

SUPPLEMENTARY INFORMATION: This rule amends Title 14, Code of Federal Regulations, Part 97 (14 CFR part 97) by amending the referenced SIAPs. The complete regulatory description of each SIAP is listed on the appropriate FAA Form 8260, as modified by the National Flight Data Center (FDC)/Permanent Notice to Airmen (P–NOTAM), and is incorporated by reference in the amendment under 5 U.S.C. 552(a), 1 CFR part 51, and § 97.20 of Title 14 of the Code of Federal Regulations.

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

The Rule

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

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

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

Conclusion

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

List of Subjects in 14 CFR Part 97

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

Issued in Washington, DC on October 17, 2008.

James J. Ballough,

Director, Flight Standards Service.

Adoption of the Amendment

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

PART 97—STANDARD INSTRUMENT APPROACH PROCEDURES

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

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

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

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

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

** * * Effective Upon Publication*

FDC date	State	City	Airport	FDC No.	Subject
10/02/08	MN	ST PAUL	LAKE ELMO	8/2097	NDB RWY 4, AMDT 4
10/02/08	MN	ST PAUL	LAKE ELMO	8/2098	RNAV (GPS) RWY 32, ORIG
10/07/08	AK	SELAWIK	SELAWIK	8/2872	RNAV (GPS) Z RWY 22, ORIG
10/07/08	AK	SELAWIK	SELAWIK	8/2873	RNAV (GPS) Y RWY 22, ORIG
10/07/08	AK	SELAWIK	SELAWIK	8/2874	RNAV (GPS) RWY 4, ORIG
10/08/08	CA	CHINO	CHINO	8/3055	RNAV (GPS) RWY 26R, ORIG–B
10/10/08	MT	POLSON	POLSON	8/3509	RNAV (GPS) RWY 36, ORIG
10/10/08	MT	POLSON	POLSON	8/3511	RNAV (GPS) RWY 18, ORIG–B
10/10/08	SC	GREENWOOD	GREENWOOD COUNTY	8/3529	VOR OR GPS RWY 9, AMDT 13
10/14/08	NM	FARMINGTON	FOUR CORNERS RGNL	8/3805	ILS OR LOC RWY 25, AMDT 7B
10/14/08	CA	CHICO	CHICO MUNI	8/3925	GPS RWY 13L, ORIG–A
10/14/08	CA	CHICO	CHICO MUNI	8/3926	GPS RWY 31R, ORIG–B
10/15/08	KY	FRANKFORT	CAPITAL CITY	8/4014	RNAV (GPS) RWY 24, AMDT 1
10/15/08	KY	FRANKFORT	CAPITAL CITY	8/4015	LOC RWY 24, AMDT 2
08/20/08	MD	SALISBURY	SALISBURY-OCEAN CITY WICOMICO REGIONAL.	8/4188	ILS RWY 32, AMDT 6A
10/15/08	CO	GUNNISON	GUNNISON-CRESTED BUTTE REGIONAL.	8/4212	GPS B, ORIG
10/15/08	CO	GUNNISON	GUNNISON-CRESTED BUTTE REGIONAL.	8/4213	VOR OR GPS A, AMDT 3B
08/23/08	MN	INTERNATIONAL FALLS	FALLS INTL	8/4805	ILS OR LOC RWY 31, AMDT 9
08/23/08	MN	INTERNATIONAL FALLS	FALLS INTL	8/4806	COPTER ILS OR LOC RWY 31, AMDT 1
08/25/08	NV	LOVELOCK	DERBY FIELD	8/4808	TAKEOFF MINS AND (OBSTACLE) DP, ORIG
09/12/08	CQ	PAGO PAGO	PAGO PAGO INTL	8/6779	ILS/DME RWY 5, AMDT 13B
09/12/08	AQ	PAGO PAGO/AMERICAN SOMOA.	PAGO PAGO INTL	8/6801	VOR/DME OR TACAN–B, AMDT 5A
09/12/08	CQ	PAGO PAGO	PAGO PAGO INTL	8/6803	NDB–C, AMDT 6

[FR Doc. E8–25512 Filed 10–28–08; 8:45 am]

BILLING CODE 4910–13–P

SOCIAL SECURITY ADMINISTRATION

20 CFR Parts 404 and 416

[Docket No. SSA–2008–0031]

RIN 0960–AG68

Technical Amendments to Definition of Persons Closely Approaching Retirement Age

AGENCY: Social Security Administration.

ACTION: Final rules.

SUMMARY: We are modifying the rules we use to determine disability under titles II and XVI of the Social Security Act (''Act'') to revise the definition of persons ''closely approaching retirement age'' from ''60–64'' to ''60 or older.'' These changes acknowledge that we make disability determinations for persons over age 64. We are also making minor technical changes that will not

have any effect on how we determine your eligibility for benefits.

DATES: These rules are effective October 29, 2008.

FOR FURTHER INFORMATION CONTACT: Helen Droddy, Social Insurance Specialist, 922 Altmeyer Building, Social Security Administration, 6401 Security Boulevard, Baltimore, MD 21235–6401, (410) 965–1483, for information about this notice. For information on eligibility or filing for benefits, call our national toll-free number, 1–800–772–1213 or TTY 1–800–325–0778, or visit our Internet site, Social Security Online, at *http://www.socialsecurity.gov*.

SUPPLEMENTARY INFORMATION:

Electronic Version

The electronic file of this document is available on the date of publication in the **Federal Register** at *http://www.gpoaccess.gov/fr/index.html*.

Background

We are finalizing, without change, the rules we proposed in the Notice of Proposed Rulemaking (NPRM) published in the **Federal Register** on June 20, 2008 (73 FR 35100). Additionally, we are amending paragraphs (c) and (d) of part 404, subpart P, appendix 2, § 203.00 to replace the words ''individual'' or ''individuals'' with ''person'' or ''persons,'' and to remove the term ''he or she.'' The sole purpose of these changes is to provide linguistic consistency between § 203.00 and other relevant sections. These changes are technical and will not have any substantive effect on how we determine your eligibility for benefits.

Change to Definition of Persons ''Closely Approaching Retirement Age''

We regularly review our regulations to eliminate or modify any rules affected by legislative or policy changes. Legislative changes to the age at which persons reach full retirement age require that we process disability claims for persons who are over age 64. Therefore, we are modifying our rules at §§ 404.1563(e), 404.1568(d)(4), part 404, subpart P, appendix 2, §§ 202.00(f), and 203.00(c), 416.963(e), and 416.968(d)(4) to include persons over age 64 in the subcategory of those ''closely approaching retirement age'' for benefits based on disability under titles II and XVI of the Act. This modification will make the definition consistent with our definition of ''full retirement age'' and acknowledge that we make disability determinations for persons over age 64 under title XVI as well. The changes will not have any substantive effect on how we determine your eligibility for benefits.

When will we start to use these final rules?

We will implement these final rules upon publication. We will apply these rules to new applications filed on or after the effective date of these rules and to claims pending before us. We will also apply these final rules in those claims remanded to us from a Federal court. With respect to claims currently pending in Federal court, we expect that the court will review the Commissioner's final decision in accordance with the rules in effect at the time of that decision. If a court reverses the Commissioner's final decision and remands the case for further administrative proceedings after the publication of these final rules, we will apply the provisions of these final rules to the entire period at issue in the claim in our new decision.

Public Comments

In the NPRM we published in the **Federal Register** on June 20, 2008, we provided the public with a 60-day comment period that ended on August 19, 2008. 73 FR 35100. We received one comment on the NPRM via the Federal eRulemaking portal at *http://www.regulations.gov*. We carefully considered the written comment and determined that it was outside the scope of the NPRM. Therefore, we did not adopt the comment nor publish a response.

Regulatory Procedures

We find good cause for dispensing with the 30-day delay in the effective date of a substantive rule provided by 5 U.S.C. 553(d)(3). As explained above, these final rules only make technical corrections that help explain how we determine disability for persons who are over the age of 64. They have no substantive effect on how we determine your eligibility for benefits. However, without these changes, our rules will not reflect current law or our operating policy and procedures and, thus, may mislead the public. Accordingly, we believe that it is in the public interest to make these final rules effective on the date of publication.

Executive Order 12866, as Amended

We have consulted with the Office of Management and Budget (''OMB'') and determined that these rules do not meet the criteria for a significant regulatory action under Executive Order 12866, as amended. Thus, they are not subject to OMB review.

Regulatory Flexibility Act

We certify that these final rules will not have a significant economic impact on a substantial number of small entities as they affect persons only. Therefore, a regulatory flexibility analysis as provided in the Regulatory Flexibility Act, as amended, is not required.

Paperwork Reduction Act

These rules do not impose any public reporting requirements subject to the Paperwork Reduction Act.

(Catalog of Federal Domestic Assistance Program Nos. 96.001, Social Security—Disability Insurance; 96.006, Supplemental Security Income.)

List of Subjects

20 CFR Part 404

Administrative practice and procedure; Blind; Disability benefits; Old-Age, Survivors, and Disability Insurance; Reporting and recordkeeping requirements; Social security.

20 CFR Part 416

Administrative practice and procedure; Aged: Blind; Disability benefits; Public assistance programs; Reporting and recordkeeping requirements; Supplemental Security Income (SSI).

Dated: October 20, 2008.

Michael J. Astrue,

Commissioner of Social Security.

■ For the reasons set out in the preamble, 20 CFR parts 404 and 416 are amended as follows:

PART 404—FEDERAL OLD-AGE, SURVIVORS AND DISABILITY INSURANCE (1950–)

Subpart P—[Amended]

■ 1. The authority citation for subpart P of part 404 continues to read as follows:

Authority: Secs. 202, 205(a), (b), and (d)–(h), 216(i), 221(a) and (i), 222(c), 223, 225, and 702(a)(5) of the Social Security Act (42 U.S.C. 402, 405(a), (b), and (d)–(h), 416(i), 421(a) and (i), 422(c), 423, 425, and 902(a)(5)); sec. 211(b), Pub. L. 104–193, 110 Stat. 2105, 2189; sec. 202, Pub. L. 108–203, 118 Stat. 509 (42 U.S.C. 902 note).

■ 2. Amend § 404.1563 to revise paragraph (e) to read as follows:

§ 404.1563 Your age as a vocational factor.

* * * * *

(e) *Person of advanced age.* We consider that at advanced age (age 55 or older), age significantly affects a person's ability to adjust to other work. We have special rules for persons of advanced age and for persons in this category who are closely approaching

retirement age (age 60 or older). See § 404.1568(d)(4).

* * * * *

■ 3. Amend § 404.1568 to revise the heading and the fifth sentence of paragraph (d)(4) to read as follows:

§ 404.1568 Skill requirements.

* * * * *

(d) *Skills that can be used in other work (transferability).* * * *

(4) *Transferability of skills for persons of advanced age.* * * * If you are *closely approaching retirement age* (age 60 or older) and you have a severe impairment(s) that limits you to no more than *light* work, we will find that you have skills that are transferable to skilled or semiskilled light work only if the light work is so similar to your previous work that you would need to make very little, if any, vocational adjustment in terms of tools, work processes, work settings, or the industry. * * *

■ 4. Amend part 404, subpart P, appendix 2, as follows:

■ a. In section 202.00, revise paragraph (f) to read as follows:

■ b. In section 203.00, revise paragraphs (b) and (c) to read as follows:

Appendix 2 to Subpart P of Part 404—Medical-Vocational Guidelines

* * * * *

202.00 *Maximum sustained work capability limited to light work as a result of severe medically determinable impairment(s).*

* * * * *

(f) For a finding of transferability of skills to light work for persons of advanced age who are closely approaching retirement age (age 60 or older), there must be very little, if any, vocational adjustment required in terms of tools, work processes, work settings, or the industry.

* * * * *

* * * * *

203.00 *Maximum sustained work capability limited to medium work as a result of severe medically determinable impairment(s).*

* * * * *

(b) The functional capacity to perform medium work represents such substantial work capability at even the unskilled level that a finding of disabled is ordinarily not warranted in cases where a severely impaired person retains the functional capacity to perform medium work. Even the adversity of advanced age (55 or over) and a work history of unskilled work may be offset by the substantial work capability represented by the functional capacity to perform medium work. However, we will find that a person who (1) has a marginal education, (2) has work experience of 35 years or more doing only arduous unskilled physical labor, (3) is not working, and (4) is no longer able to do this kind of work because of a severe impairment(s) is disabled, even though the person is able to do medium work. (*See* § 404.1562(a) in this subpart and § 416.962(a) in subpart I of part 416.)

(c) However, the absence of any relevant work experience becomes a more significant adversity for persons of advanced age (55 and over). Accordingly, this factor, in combination with a limited education or less, militates against making a vocational adjustment to even this substantial range of work and a finding of disabled is appropriate. Further, for persons closely approaching retirement age (60 or older) with a work history of unskilled work and with marginal education or less, a finding of disabled is appropriate.

PART 416—SUPPLEMENTAL SECURITY INCOME FOR THE AGED, BLIND, AND DISABLED

Subpart I—[Amended]

■ 5. The authority citation for subpart I of part 416 continues to read as follows:

Authority: Secs. 221(m), 702 (a)(5), 1611, 1614, 1619, 1631(a), (c), (d)(1), and (p), and 1633 of the Social Security Act (42 U.S.C. 421(m), 902(a)(5), 1382, 1382c, 1382h, 1383(a), (c), (d)(1), and (p), and 1383(b); secs. 4(c) and 5, 6(c)-(e), 14(a), and 15, Pub. L. 98–460, 98 Stat. 1794, 1801, 1802, and 1808 (42 U.S.C. 421 note, 423 note, and 1382h note).

■ 6. Amend § 416.963 to revise paragraph (e) to read as follows:

§ 416.963 Your age as a vocational factor.

* * * * *

(e) *Person of advanced age.* We consider that at advanced age (age 55 or older), age significantly affects a person's ability to adjust to other work. We have special rules for persons of advanced age and for persons in this category who are closely approaching retirement age (age 60 or older). See § 416.968(d)(4).

* * * * *

■ 7. Amend § 416.968 to revise the heading and the fifth sentence of paragraph (d)(4) to read as follows:

§ 416.968 Skill requirements.

* * * * *

(d) Skills that can be used in other work (transferability). * * *

(4) Transferability of skills for persons of advanced age. * * * If you are *closely approaching retirement age* (age 60 or older) and you have a severe impairment(s) that limits you to no more than *light* work, we will find that you have skills that are transferable to skilled or semiskilled light work only if the light work is so similar to your previous work that you would need to make very little, if any, vocational adjustment in terms of tools, work processes, work settings, or the industry. * * *

[FR Doc. E8–25532 Filed 10–28–08; 8:45 am]

BILLING CODE 4191–02–P

DEPARTMENT OF HEALTH AND HUMAN SERVICES

Food and Drug Administration

21 CFR Part 573

[Docket No. FDA–2003–F–0398] (formerly Docket No. 2003F–0048]

Food Additives Permitted in Feed and Drinking Water of Animals; Methyl Esters of Conjugated Linoleic Acid (Cis-9, Trans-11 and Trans-10, Cis-12-Octadecadienoic Acids)

AGENCY: Food and Drug Administration, HHS.

ACTION: Final rule.

SUMMARY: The Food and Drug Administration (FDA) is amending the regulations for food additives permitted in feed and drinking water of animals to provide for the safe use of methyl esters of conjugated linoleic acid (cis-9, trans-11 and trans-10, cis-12 octadecadienoic acids) as a source of fatty acids in swine diets. This action is in response to a food additive petition filed by BASF Corp. (BASF), 100 Campus Dr., Florham Park, NJ.

DATES: This rule is effective October 29, 2008. Submit written or electronic objections and requests for a hearing by December 29, 2008. See section V of this document for information on the filing of objections.

ADDRESSES: You may submit objections and a request for a hearing, identified by Docket No. FDA–2003–F–0398, by any of the following methods:

Electronic Submissions

Submit electronic objections in the following way:

• Federal eRulemaking Portal: *http://www.regulations.gov*. Follow the instructions for submitting comments.

Written Submissions

Submit written objections in the following ways:

• FAX: 301–827–6870.

• Mail/Hand delivery/Courier [For paper, disk, or CD-ROM submissions]: Division of Dockets Management (HFA–305), Food and Drug Administration, 5630 Fishers Lane, rm. 1061, Rockville, MD 20852.

To ensure more timely processing of objections, FDA is no longer accepting objections submitted to the agency by e-mail. FDA encourages you to continue to submit electronic objections by using

the Federal eRulemaking Portal, as described previously in the **ADDRESSES** portion of this document under *Electronic Submissions.*

Instructions: All submissions received must include the agency name and Docket No(s). and Regulatory Information Number (RIN) (if a RIN number has been assigned) for this rulemaking. All objections received may be posted without change to *http://www.regulations.gov*, including any personal information provided. For additional information on submitting objections, see the ''Objections and Hearing Requests'' heading of the **SUPPLEMENTARY INFORMATION** section of this document.

Docket: For access to the docket to read background documents or objections received, go to *http://www.regulations.gov* and insert the docket number(s), found in brackets in the heading of this document, into the ''Search'' box and follow the prompts and/or go to the Division of Dockets Management, 5630 Fishers Lane, rm. 1061, Rockville, MD 20852.

FOR FURTHER INFORMATION CONTACT: Michaela G. Alewynse, Center for Veterinary Medicine (HFV–228), Food and Drug Administration, 7519 Standish Pl., Rockville, MD 20855, 240–453–6866, e-mail: *mika.alewynse@fda.hhs.gov*.

SUPPLEMENTARY INFORMATION:

I. Background

In a notice published in the **Federal Register** of March 11, 2003 (68 FR 11567), FDA announced that a food additive petition (animal use) (FAP 2250) had been filed by BASF, 100 Campus Dr., Florham Park, NJ 07932. The petition proposed to amend the food additive regulations to provide for the safe use of methyl esters of conjugated linoleic acid (cis-9, trans-11 and trans-10, cis-12 octadecadienoic acids) as a source of fatty acids in swine diets. The notice of filing provided for a 60-day comment period on the petitioner's environmental information. No comments have been received.

II. Conclusion

FDA concludes that the data establish the safety and utility of methyl esters of conjugated linoleic acid (cis-9, trans-11 and trans-10, cis-12-octadecadienoic acids) for use as proposed with modification and that the food additive regulations should be amended as set forth in this document.

III. Public Disclosure

In accordance with § 571.1(h), the petition and the documents that FDA considered and relied upon in reaching its decision to approve the petition are available for inspection at the Center for Veterinary Medicine by appointment with the information contact person. As provided in § 571.1(h), the agency will delete from the documents materials that are not available for public disclosure before making the documents available for inspection.

IV. Environmental Impact

The agency has determined under 21 CFR 25.32(r) that this action is of a type that does not individually or cumulatively have a significant effect on the human environment. Therefore, neither an environmental assessment, nor an environmental impact statement is required.

V. Objections and Hearing Requests

Any person who will be adversely affected by this regulation may file with the Division of Dockets Management (see **ADDRESSES**) written or electronic objections by (see **DATES**). Each objection must be separately numbered, and each numbered objection must specify with particularity the provision of the regulation to which objection is made and the grounds for the objection. Each numbered objection on which a hearing is requested must state that a hearing is requested. Failure to request a hearing for any particular objection will constitute a waiver of the right to a hearing on that objection. Each numbered objection for which a hearing is requested must include a detailed description and analysis of the specific factual information intended to be presented in support of the objection in the event that a hearing is held. Failure to include such a description and analysis for any particular objection will constitute a waiver of the right to a hearing on the objection. Three copies of all documents must be submitted and must be identified with the docket number found in brackets in the heading of this document. Any objections received in response to the regulation may be seen in the Division of Dockets Management between 9 a.m. and 4 p.m., Monday through Friday.

List of Subjects in 21 CFR Part 573

Animal feeds, Food additives.

■ Therefore, under the Federal Food, Drug, and Cosmetic Act and under authority delegated to the Commissioner of Food and Drugs and redelegated to the Center for Veterinary Medicine, 21 CFR part 573 is amended as follows:

PART 573—FOOD ADDITIVES PERMITTED IN FEED AND DRINKING WATER OF ANIMALS

■ 1. The authority citation for 21 CFR part 573 continues to read as follows:

Authority: 21 U.S.C. 321, 342, 348.

■ 2. Add § 573.637 to read as follows:

§ 573.637 Methyl esters of conjugated linoleic acid (cis-9, trans-11 and trans-10, cis-12-octadecadienoic acids).

The food additive, methyl esters of conjugated linoleic acid (cis-9, trans-11 and trans-10, cis-12 octadecadienoic acids), may be safely used in swine feed in accordance with the prescribed conditions:

(a) The food additive is manufactured by the reaction of refined sunflower oil with methanol to produce fatty acid methyl esters, which then undergo conjugation to yield methyl esters of octadecadienoic acid. The additive consists of not less than 28 percent methyl ester of cis-9, trans-11-octadecadienoic acid, and not less than 28 percent methyl ester of trans-10, cis-12-octadecadienoic acid with the sum of the other methyl esters of octadecadienoic acid not to exceed 4 percent. The additive shall contain not less than 35 percent of other fatty acid esters composed of oleic acid, palmitic acid, stearic acid, linoleic acid, and other associated acid esters.

(b) The additive is used or intended for use in the feed of growing and finishing swine as a source of fatty acids at levels not to exceed 0.6% in the finished feed.

(c) The additive meets the following specifications:

(1) Free methyl alcohol not to exceed 0.015%.

(2) Insoluble impurities not to exceed 0.1%.

(3) Moisture not to exceed 0.5%.

(4) Unsaponifiable matter not to exceed 1.0%.

(d) To assure safe use of the additive, in addition to the other information required by the act:

(1) The label and labeling of the additive and any feed premix shall bear the following:

(i) The name of the additive.

(ii) A statement to indicate that methyl esters of conjugated linoleic acid (cis-9, trans-11 and trans-10, cis-12 octadecadienoic acids) must not be added to vitamin or mineral premixes.

(2) The label and labeling of the additive, any feed premix, or complete feed prepared therefrom shall bear adequate directions for use.

Dated: October 23, 2008.

William T. Flynn,

Acting Director, Center for Veterinary Medicine.

[FR Doc. E8–25719 Filed 10–28–08; 8:45 am]

BILLING CODE 4160–01–S

DEPARTMENT OF THE TREASURY

Alcohol and Tobacco Tax and Trade Bureau

27 CFR Part 9

[Docket No. TTB–2007–0066; T.D. TTB–71; Re: Notice No. 76]

RIN 1513–AB49

Establishment of the Leona Valley Viticultural Area (2007R–281P)

AGENCY: Alcohol and Tobacco Tax and Trade Bureau, Treasury.

ACTION: Final rule; Treasury decision.

SUMMARY: This Treasury decision establishes the 13.4-square mile ''Leona Valley'' American viticultural area in northeastern Los Angeles County, California. We designate viticultural areas to allow vintners to better describe the origin of their wines and to allow consumers to better identify wines they may purchase.

DATES: *Effective Date:* November 28, 2008.

FOR FURTHER INFORMATION CONTACT: N.A. Sutton, Regulations and Rulings Division, Alcohol and Tobacco Tax and Trade Bureau, 925 Lakeville St., No. 158, Petaluma, CA 94952; telephone 415–271–1254.

SUPPLEMENTARY INFORMATION:

Background on Viticultural Areas

TTB Authority

Section 105(e) of the Federal Alcohol Administration Act (FAA Act), 27 U.S.C. 205(e), authorizes the Secretary of the Treasury to prescribe regulations for the labeling of wine, distilled spirits, and malt beverages. The FAA Act requires that these regulations, among other things, prohibit consumer deception and the use of misleading statements on labels, and ensure that labels provide the consumer with adequate information as to the identity and quality of the product. The Alcohol and Tobacco Tax and Trade Bureau (TTB) administers the regulations promulgated under the FAA Act.

Part 4 of the TTB regulations (27 CFR part 4) allows the establishment of definitive viticultural areas and the use of their names as appellations of origin on wine labels and in wine advertisements. Part 9 of the TTB regulations (27 CFR part 9) contains the list of approved viticultural areas.

Definition

Section 4.25(e)(1)(i) of the TTB regulations (27 CFR 4.25(e)(1)(i)) defines a viticultural area for American wine as a delimited grape-growing region distinguishable by geographical features, the boundaries of which have been recognized and defined in part 9 of the regulations. These designations allow vintners and consumers to attribute a given quality, reputation, or other characteristic of a wine made from grapes grown in an area to its geographical origin. The establishment of viticultural areas allows vintners to describe more accurately the origin of their wines to consumers and helps consumers to identify wines they may purchase. Establishment of a viticultural area is neither an approval nor an endorsement by TTB of the wine produced in that area.

Requirements

Section 4.25(e)(2) of the TTB regulations outlines the procedure for proposing an American viticultural area and provides that any interested party may petition TTB to establish a grape-growing region as a viticultural area. Section 9.3(b) of the TTB regulations requires the petition to include—

- Evidence that the proposed viticultural area is locally and/or nationally known by the name specified in the petition;
- Historical or current evidence that supports setting the boundary of the proposed viticultural area as the petition specifies;
- Evidence relating to the geographical features, such as climate, soils, elevation, and physical features that distinguish the proposed viticultural area from surrounding areas;
- A description of the specific boundary of the proposed viticultural area, based on features found on United States Geological Survey (USGS) maps; and
- A copy of the appropriate USGS map(s) with the proposed viticultural area's boundary prominently marked.

Leona Valley Petition

Mr. Ralph Jens Carter submitted a petition for establishment of the 13.4-square mile Leona Valley viticultural area on behalf of the Antelope Valley Winegrowers Association, the Leona Valley Winery, and Donato Vineyards. The area currently includes 20 acres of vineyards, and more acreage for wine grape growing is under development. The proposed Leona Valley viticultural area boundary line does not affect or overlap any other proposed or established viticultural area.

The proposed boundary line defines an area where viticulture is already established or has potential for establishment. Consequently, the area defined is limited to the valley floor and side slopes. The distinguishing features of the proposed viticultural area include the physical characteristics of the San Andreas Fault system, the fault-controlled Leona Valley, and the surrounding, high-elevation mountains. The climate, geology, and soils distinguish the proposed viticultural area from areas outside of the proposed boundary line.

Name Evidence

According to the petitioner, the name ''Leona'' derives from an early rancher named Miguel Leonis, and in the 1880s, a homesteader from Nebraska called the area ''Leona Valley.'' The ''Leona Valley'' name identifies a valley, a town within the valley, a ranch (the Leona Valley Ranch), and a festival (the annual Leona Valley Cherry Festival).

The petitioner provides maps that show that the Leona Valley is located in the northeast part of Los Angeles County, California. The ''Leona Valley'' name appears on the USGS Ritter Ridge, Sleepy Valley, and Del Sur quadrangle maps, which the petitioner uses to define the boundary line of the proposed viticultural area. The Sleepy Valley map also identifies a small town in the valley as ''Leona Valley.'' A recent atlas identifies both a valley and small town within the proposed viticultural area as ''Leona Valley'' (The DeLorme Southern and Central California Atlas and Gazetteer, 2005, page 79).

Boundary Evidence

According to the petitioner, and as evidenced by the written boundary description and the USGS Sleepy Valley quadrangle map, the proposed viticultural area includes the town and valley which are both named ''Leona Valley.'' The proposed boundary line borders the Angeles National Forest to the west and the Antelope Valley and the Mojave Desert to the northeast. Mountains and hills surround all sides of the valley. The floor and side slopes of the Leona Valley influence the shape of the proposed viticultural area, which includes vineyards in remote, but suitable, areas, but excludes steep slopes where erosion is a hazard.

According to the petitioner, historically, the Native American Shoshone Tribe lived as hunters and gatherers in the Leona Valley area. In

the mid-1800s, when the Shoshone departed the area, immigrants from Spain and Mexico started cattle ranching. During the 1880s, homesteaders from Nebraska, France, and Germany divided the ranches into smaller parcels for farms.

In the early 1900s the John Ritter family began to plant grapes in the Leona Valley area. The Ritter family winery, Belvino Vineyards, aged wine in a cave for at least 5 years before bottling and selling the wine on national and international markets. During Prohibition, the Ritters ceased producing wine. The petitioner notes that local residents report that zinfandel and mission vines planted in the early 1900s are still growing.

Currently, the proposed Leona Valley viticultural area contains 20 acres of commercial wine grape production on the Reynolds Family Vineyard and an acreage of pinot noir grapes on land owned by Donato Vineyards. At the time of filing the petition, Donato Vineyards, at the southeast end of the Leona Valley, planned to develop another 10 acres for growing wine grapes.

Distinguishing Features

The petitioner states that the distinguishing features of the proposed Leona Valley viticultural area consist of climate, physical features, geology, and soils. As evidence of many of the distinguishing features of the proposed viticultural area, the petitioner cites the Soil Survey of the Antelope Valley Area, California (United States Department of Agriculture, Soil Conservation Service, in cooperation with the University of California Agricultural Experiment Station, 1970).

Climate

The petitioner explains that the soil survey designates the southern and western parts of the Antelope Valley and the Leona Valley as Major Land Resource Area (MLRA) 19, Southern California Coastal Plain. MLRA 19 has a distinctive combination of climate, soils, and mild temperatures, including an annual, 210- to 300-day frost-free period. Also, MLRA 19 is hot and dry in summer and cool and moist in winter. It is suitable to a wide variety of field, fruit, and nut crops. Annual precipitation ranges from 9 to 16 inches in MLRA 19, and irrigation use is routine. The soil survey shows that the land management techniques and cropping systems used in MLRA 19 are different from those used in the adjacent MLRA 30, Mojave Basin and Range, and MLRA 20, Southern California Mountains.

The petitioner also cites the Sunset Western Garden Book, which classifies the Leona Valley area as Zone No. 18, Southern California's Interior Valleys (Sunset Publishing Corporation, Menlo Park, California, 1995). In this zone the continental air mass is a major influence on climate, and the Pacific Ocean determines the climate in the valley only about 15 percent of the time.

According to the petitioner, annual precipitation within the proposed Leona Valley viticultural area ranges from 9 to 12 inches. In the Mojave Desert to the east of the Leona Valley, the range is only 4 to 9 inches. In the mountainous areas surrounding Leona Valley to the south, west, and north, the range is between 12 and 20 inches.

The petitioner states that the growing season of the proposed viticultural area consists of warm days and cool nights. The cool nights slow the ripening of the grapes, helping the grapes to retain their natural acidity. Air drainage off the slopes of the hills and mountains helps prevent spring frost damage to grapes.

The petitioner submitted comparative data based on the Winkler Climate Classification System. In the Winkler system, heat accumulation per year defines climatic regions for grape growing. As a measurement of heat accumulation during the growing season, 1 degree day accumulates for each degree Fahrenheit that a day's mean temperature is above 50 degrees, which is the minimum temperature required for grapevine growth (see ''General Viticulture,'' by Albert J. Winkler, University of California Press, 1974.) Climatic region I has less than 2,500 degree days per year; region II, 2,501 to 3,000; region III, 3,001 to 3,500; region IV, 3,501 to 4,000; and region V, 4,001 or more.

The petitioner states that the air temperatures during the growing season in the proposed viticultural area have an average heat summation of 4,060 degree days, which falls into the low range of region V. The annual heat summation totals of the regions in and around the proposed Leona Valley viticultural area are listed in the table below.

Region	Relative position with reference to Leona Valley	Average annual heat summation in degree days/climatic region
Leona Valley	Within	4,060 (low region V).
Sandberg	25 miles west-northwest	3,370 (mid region III).
Tehachapi	38 miles north-northwest	2,900 (high region II).
Lancaster	15 miles northeast	4,600 (high region V).

Physical Features

According to USGS maps of the region, the Leona Valley is a low, sloping landform with elevations between 2,932 and 3,800 feet. It is surrounded by higher hills, Portal Ridge, Ritter Ridge, Sierra Pelona, and the mountains of the Angeles National Forest, the highest of which has an elevation of 4,215 feet. According to the petitioner, the Leona Valley comprises isolated knolls of significantly different elevations and, in places, narrows to a width of a mile.

The petitioner explains that the San Andreas Fault, a major continental fault system, is a significant distinguishing feature of the proposed Leona Valley viticultural area. As shown on the USGS maps of the region, this fault and its tributary faults in the Leona Valley trend southeast to northwest. The petitioner explains that the Leona Valley formed either when two parallel fault lines lifted mountains beside a drop-down area or when erosion over thousands of years caused a deep dissection in the fault zone. Seismic movement along the fault line has formed ridges and isolated hills and exposed various rocks.

The petitioner states that ground water provides a plentiful supply of water for vineyard irrigation within the proposed Leona Valley viticultural area. As shown on the Ritter Ridge, Sleepy Valley, and Del Sur quadrangle USGS maps, many agricultural wells tap into the ground water.

Geology

The petitioner explains that relative displacement and a lack of continuity of the rocks on either side of the San Andreas Fault contribute to the complexity, weakening, and erosion of the parent rock. Near some portions of the fault the varying sedimentary strata determine the geologic formation.

Citing a California Department of Conservation Geologic Map, the

petitioner notes that the mostly nonmarine and unconsolidated alluvium on the Leona Valley floor is from the Quaternary Period, or about 2 million years old or less. The various types of schist, quartz, granite, and a complex of mixed, Precambrian igneous and metamorphic rocks in the valley contrast with the surrounding hills, which formed on Paleozoic or Mesozoic strata, 65 to 280 million years ago.

Soils

The petitioner explains that a fault increases the variety of rock exposed on the surface and eventually results in the formation of a greater variety of soil textures. Thus, the San Andreas fault influenced the properties and mineralogy of the soils in the Leona Valley.

The petitioner states that the soils on the Leona Valley floor differ from those beyond the boundary line of the proposed viticultural area. The surface layer of the soils in the Leona Valley formed in mixed decayed organic matter and soil material that originated on the surrounding mountains. Multiple rock types on the valley floor were the parent material of alluvial soils that have diverse mineralogy and texture. The soils on the valley floor are deep and moderately drained; those on the surrounding hills are shallow and excessively well drained.

According to the soil survey, the soils of the proposed Leona Valley viticultural area are mainly the Hanford-Ramona-Greenfield association on alluvial fans and terraces. This association consists of nearly level to moderately steep, well drained, very deep soils that have a surface layer of loamy sand to loam. Hanford soils are well drained. They do not have a hardpan or a compacted clay layer, and are easily worked.

According to the petitioner, Chino loam is in some areas of the proposed Leona Valley AVA. This soil is suited to use as pasture and to seeding to perennial grasses. It is very deep and poorly drained, and has a seasonal high water table. Permeability in this soil is slow. In some places water is ponded on this soil. Growers install drainage systems or manage their crops to counteract the poor drainage of this soil.

The petitioner explains that the Vista-Amagora association is among the dominant soils at higher elevations outside the boundary line of the proposed Leona Valley viticultural area. This association consists of strongly sloping to steep, well drained to excessively drained soils that have a surface layer of coarse sandy loam. South of the valley, in smaller areas, is the Anaverde-Godde association. It consists of moderately steep or steep, well drained soils that have a surface layer of sandy loam or loam.

Notice of Proposed Rulemaking and Comments Received

TTB published Notice No. 76 regarding the proposed Leona Valley viticultural area in the **Federal Register** (72 FR 65489) on November 21, 2007. In that notice, TTB invited comments by January 22, 2008, from all interested persons. We expressed particular interest in receiving comments on whether the proposed area name would result in a conflict with currently used brand names. We also solicited comments on the sufficiency and accuracy of the name, boundary, climatic, and other required information submitted in support of the petition. We received 13 comments from individuals and groups, including the Antelope Valley Winegrowers Association and the Antelope Valley Clean Air Group, in response to that notice. All 13 comments supported the establishment of the Leona Valley viticultural area as proposed.

TTB Finding

After careful review of the petition and the comments received, TTB finds that the evidence submitted supports the establishment of the proposed viticultural area. Therefore, under the authority of the Federal Alcohol Administration Act and part 4 of our regulations, we establish the ''Leona Valley'' American viticultural area in Los Angeles County, California, effective 30 days from the publication date of this document.

Boundary Description

See the narrative boundary description of the viticultural area in the regulatory text published at the end of this document.

Maps

The maps for determining the boundary of the viticultural area are listed below in the regulatory text.

Impact on Current Wine Labels

Part 4 of the TTB regulations prohibits any label reference on a wine that indicates or implies an origin other than the wine's true place of origin. With the establishment of this viticultural area and its inclusion in part 9 of the TTB regulations, its name, ''Leona Valley,'' is recognized under 27 CFR 4.39(i)(3) as a name of viticultural significance. The text of the new regulation clarifies this point. Consequently, wine bottlers using ''Leona Valley'' in a brand name, including a trademark, or in another label reference as to the origin of the wine, must ensure that the product is eligible to use the viticultural area's name as an appellation of origin. TTB has determined that only the full name ''Leona Valley'', and not ''Leona'' standing alone, has viticultural significance.

For a wine to be labeled with a viticultural area name or with a brand name that includes a viticultural area name or other term specified as having viticultural significance in part 9 of the TTB regulations, at least 85 percent of the wine must be derived from grapes grown within the area represented by that name or other term, and the wine must meet the other conditions listed in 27 CFR 4.25(e)(3). If the wine is not eligible to use the viticultural area name or other term of viticultural significance as an appellation of origin and that name or other term appears in the brand name, then the label is not in compliance and the bottler must change the brand name and obtain approval of a new label. Similarly, if the viticultural area name or other term of viticultural significance appears in another reference on the label in a misleading manner, the bottler would have to obtain approval of a new label.

Different rules apply if a wine has a brand name containing a viticultural area name or other term of viticultural significance that was used as a brand name on a label approved before July 7, 1986. See 27 CFR 4.39(i)(2) for details.

Regulatory Flexibility Act

We certify that this regulation will not have a significant economic impact on a substantial number of small entities. This regulation imposes no new reporting, recordkeeping, or other administrative requirement. Any benefit derived from the use of a viticultural area name is the result of a proprietor's efforts and consumer acceptance of wines from that area. Therefore, no regulatory flexibility analysis is required.

Executive Order 12866

This rule is not a significant regulatory action as defined by Executive Order 12866, 58 FR 51735. Therefore, it requires no regulatory assessment.

Drafting Information

N.A. Sutton of the Regulations and Rulings Division drafted this notice.

List of Subjects in 27 CFR Part 9

Wine.

The Regulatory Amendment

■ For the reasons discussed in the preamble, we amend title 27 CFR, chapter 1, part 9, as follows:

PART 9—AMERICAN VITICULTURAL AREAS

■ 1. The authority citation for part 9 continues to read as follows:

Authority: 27 U.S.C. 205.

■ 2. Amend subpart C by adding § 9.212 to read as follows:

Subpart C—Approved American Viticultural Areas

§ 9.212 Leona Valley.

(a) *Name.* The name of the viticultural area described in this section is ''Leona Valley''. For purposes of part 4 of this chapter, ''Leona Valley'' is a term of viticultural significance.

(b) *Approved maps.* The four United States Geological Survey 1:24,000 scale topographic maps used to determine the boundary of the Leona Valley viticultural area are titled:

(1) Ritter Ridge, Calif., 1958; Photorevised 1974;

(2) Sleepy Valley, CA, 1995;

(3) Del Sur, CA, 1995; and

(4) Lake Hughes, CA, 1995.

(c) *Boundary.* The Leona Valley viticultural area is located in Los Angeles County, California. The boundary of the Leona Valley viticultural area is as described below:

(1) From the beginning point on the Ritter Ridge map at the intersection of Elizabeth Lake Pine Canyon Road and the section 23 east boundary line, T6N, R13W, proceed straight south along the section 23 east boundary line approximately 0.1 mile to its intersection with the 3,000-foot elevation line, T6N, R13W; then

(2) Proceed west along the 3,000-foot elevation line to its intersection with the section 23 west boundary line, T6N, R13W; then

(3) Proceed south along the section 23 west boundary line to the southwest corner of section 23 at the 3,616-foot marked elevation point, T6N, R13W; then

(4) Proceed west along the section 22 south boundary line, crossing onto the Sleepy Valley map, and continuing along the section 21 south boundary line, crossing over Pine Creek, to its intersection with the 3,400-foot elevation line, T6N, R13W; then

(5) Proceed west along the 3,400-foot elevation line to its intersection with the section 19 south boundary line and Bouquet Canyon Road, T6N, R13W; then

(6) Proceed straight west along the section 19 south boundary line to its intersection with the 3,560-foot elevation line, an unimproved road, and a power transmission line, north of Lincoln Crest, T6N, R13W; then

(7) Proceed northeast along the 3,560-foot elevation line across section 19 to its east boundary line, T6N, R13W; then

(8) Proceed in a straight line north-northwest approximately 0.25 mile to its intersection with a trail and the 3,800-foot elevation line, T6N, R13W; then

(9) Proceed northwest along the meandering 3,800-foot elevation line through section 19 to its intersection with the section 13 southeast corner, T6N, R14W; then

(10) Proceed straight west, followed by straight north, along the marked Angeles National Forest border to the section 11 southeast corner; then

(11) Proceed straight north along the section 11 east boundary line to its intersection with the 3,400-foot elevation line south of an unimproved road, T6N, R14W; then

(12) Proceed generally northwest along the 3,400-foot elevation line through section 11, crossing onto the Del Sur map, to its intersection with the section 3 southeast corner, T6N, R14W; then

(13) Proceed straight west to the section 4 southeast corner, T6N, R14W; then

(14) Proceed straight north along the section 4 east boundary line approximately 0.05 mile to its intersection with the 3,600-foot elevation line, T6N, R14W; then

(15) Proceed northwest along the 3,600-foot elevation line, through section 4 and crossing onto the Lake Hughes map, to its intersection with the Angeles National Forest border and the section 4 western boundary line, T6N, R14W; then

(16) Proceed straight north along the section 4 western boundary line to its intersection with BM 3402, south of Andrade Corner, T7N, R14W; then

(17) Proceed in a line straight northeast, crossing onto the Del Sur map, to its intersection with the marked 3,552-foot elevation point, section 33, T7N, R14W; then

(18) Proceed in a line straight east-southeast to its intersection with the marked 3,581-foot elevation point, and continue in a straight line east-southeast to its intersection with the marked 3,637-foot elevation point, T6N, R14W; then

(19) Proceed in a line straight northeast to its intersection with the section 2 northwest corner, T6N, R14W; then

(20) Proceed straight east along the section 2 north boundary line 0.35 mile to its intersection with the 3,600-foot elevation line, T6N, R14W; then

(21) Proceed north and then generally southeast along the 3,600-foot elevation line that runs parallel to and south of the Portal Ridge to the elevation line's intersection with the section 7 east boundary line, T6N, R13W; then

(22) Proceed straight south along the section 7 east boundary line, crossing onto the Sleepy Valley map, to its intersection with the 3,400-foot elevation line north of the terminus of 90th Street, T6N, R13W; then

(23) Proceed generally east-southeast along the 3,400-foot elevation line that runs north of the San Andreas Rift Zone to its intersection with the section 16 east boundary line, T6N, R13W; then

(24) Proceed straight south along the section 16 east boundary line to its intersection with the 3,000-foot elevation line, between Goode Hill Road and Elizabeth Lake Pine Canyon Road, T6N, R13W; then

(25) Proceed generally southeast along the 3,000-foot elevation line, crossing onto the Ritter Ridge map, to its intersection with the section 23 east boundary line, north of the intermittent Amargosa Creek and Elizabeth Lake Pine Canyon Road, T6N, R13W; then

(26) Proceed straight south along the section 23 east boundary line, returning to the beginning point.

Signed: April 7, 2008.

John J. Manfreda,

Administrator.

Approved: August 26, 2008.

Timothy E. Skud,

Deputy Assistant Secretary (Tax, Trade, and Tariff Policy).

[FR Doc. E8–25747 Filed 10–28–08; 8:45 am]

BILLING CODE 4810–31–P

DEPARTMENT OF LABOR

Occupational Safety and Health Administration

29 CFR Part 1910

[Docket No. S–108C]

RIN 1218–AB95

Electrical Standard; Clarifications; Corrections

AGENCY: Occupational Safety and Health Administration, Labor.

ACTION: Final rule; clarifications; correcting amendments.

SUMMARY: The Occupational Safety and Health Administration (OSHA)

published a final rule revising its electrical installation standard for general industry on February 14, 2007. This notice clarifies the scope of one provision in the final standard and addresses some questions raised by stakeholders on the application of the provision. This also corrects two typographical errors located elsewhere in the final rule.

DATES: The corrections become effective on October 29, 2008.

FOR FURTHER INFORMATION CONTACT: Mr. David Wallis, Directorate of Standards and Guidance, Room N–3609, OSHA, U.S. Department of Labor, 200 Constitution Avenue, NW., Washington, DC 20210; telephone (202) 693–2222.

SUPPLEMENTARY INFORMATION: On February 14, 2007, OSHA published a revision of its electrical installation standard for general industry found in 29 CFR part 1910, subpart S (72 FR 7136). This final rule went into effect on August 13, 2007. Since the final rule was promulgated, the Agency has received some questions from the public regarding one provision, 29 CFR 1910.304(b)(3)(ii). At its meeting on August 1, 2007, in Oakland, CA, the Maritime Advisory Committee on Occupational Safety and Health (MACOSH) discussed the provision and several MACOSH members were uncertain about the extent of the application of this provision to shipyard employment and had questions on how the Agency would interpret the rule. Consequently, MACOSH recommended that the Agency use the best available means to assist employers in complying with the requirements of the provision and that the Agency delay the effective date of § 1910.304(b)(3)(ii) for a period of 6 months or until the Agency can clarify the standard.

In this notice, OSHA addresses these questions and makes one change to the regulatory text of the provision in order to clarify OSHA's intent regarding its scope. This change does not alter the substantive obligations of affected parties. Additionally, OSHA is correcting two typographical errors located in Table S–3 of the final rule.

Clarifications

1. What is the application of § 1910.304(b)(3)(ii)?

As originally published, the introductory text to § 1910.304(b)(3)(ii) read as follows:

> The following requirements apply to temporary wiring installations that are used during maintenance, remodeling, or repair of buildings, structures, or equipment or during similar construction-like activities.

A few members of MACOSH and two other individuals have raised questions regarding the meaning of this provision. Some of the questions stem from the structure of the text of the provision, which OSHA is changing in this notice to better match the Agency's intent. Other questions relate to the meaning of the terms ''construction-like'' activities and ''temporary wiring installations.''

a. Structure of the Regulatory Text

Paragraph (b)(3)(ii) was taken from Section 2–2.4.2 of the 2000 edition of NFPA 70E, which reads, in relevant part, as follows:

> 2–2.4.2 Ground-Fault Protection for Personnel. Ground-fault protection for personnel for all temporary wiring installations shall be provided to comply with 2–2.4.2.1 or 2–2.4.2.2 below. This section shall apply only to temporary wiring installations used to supply temporary power to equipment used by personnel during construction, remodeling, maintenance, repair, or demolition of buildings, structures, equipment or similar activities.

Both OSHA's final rule and NFPA 70E are intended to apply to temporary wiring installations used during the performance of construction-like activities. From questions the Agency has received about this provision, the intent of the rule may not be readily apparent from the text. Because part 1910 does not apply to construction, the Agency removed ''construction'' from the list of activities specifically mentioned in NFPA 70E and changed ''similar activities'' to ''similar construction-like activities.'' OSHA did not, however, intend to deviate from the underlying intent of the NFPA 70E provision, which was to limit its application to activities that were construction-like in nature. The Agency is concerned that the regulatory text of § 1910.304(b)(3)(ii) may be read to include activities that are not construction-like. To clarify the Agency's intent, OSHA is revising the introductory text to § 1910.304(b)(3)(ii) to read:

> The following requirements apply to temporary wiring installations that are used during *construction-like activities, including certain maintenance, remodeling, or repair activities, involving buildings, structures or equipment.* [Emphasis added.]

This change makes it clear that § 1910.304(b)(3)(ii) applies only to such activities.

b. Construction-Like Activities

When determining whether the provisions of § 1910.304(b)(3)(ii) apply, employers must determine whether a particular activity is ''construction-like'' in nature. The preamble to the final rule provided examples of what OSHA considers ''construction-like activities'' in the discussion of § 1910.305(a)(2)(iii) related to the use of temporary wiring over 600 volts (72 FR 7163).

It should be noted that the discussion of the term ''construction-like activities'' here and in the preamble to OSHA's final rule applies only to the use of this term in subpart S. It should also be noted that not all maintenance, remodeling, or repair work is construction-like.

Construction-like activities fall into two general categories: Activities that would be covered under OSHA's construction standards but for the fact that they are specifically covered by other OSHA standards, and all other activities that do not qualify as construction but involve electrical hazards similar to those typically found in construction work.

The vast majority of activities covered under subpart S are in the first category. For example, ship building and ship repair would be considered to meet the definition of ''construction'' because of their scale and complexity; nevertheless, the hazards associated with this work are specifically covered by OSHA's shipyard employment standards. However, the shipyard standards do not protect employees from all of the hazards addressed by paragraph (b)(3)(ii) of § 1910.304; in such instances, this paragraph applies to hazards not covered by the shipyard standards, as outlined in § 1910.5(c). (The application of subpart S to shipyard employment is discussed in more detail in the preamble to the final rule, 72 FR 7141.)

The remaining activities intended to be covered under subpart S fall into the second category of construction-like activities. This category includes certain ''maintenance, remodeling, or repair activities involving buildings, structures, or equipment'' that pose electrical hazards similar to those typically found in construction work. In this respect, OSHA intends the term ''construction-like'' to apply to activities that, while not construction, involve some of the hazards that are typically found in construction work. In general, these are activities that pose hazards that are similar to those associated with the use of temporary receptacles on construction sites—that is, hazards resulting from more severe use or environmental conditions. Examples of such activities include: Damage to a cord set [1] from rough use; exposure to

[1] A cord set is commonly known as an extension cord.

wet, damp, or conductive conditions, such as often encountered when working outside; and frequent reconfiguration and rearrangement of the electric equipment.

Some examples of this type of construction-like activity were given in the preamble to the final rule, including clean up and disaster remediation. To illustrate, if a storm blew over a tree on a factory's premises and temporary wiring was employed to power a chainsaw and other clean-up equipment, such remediation activity would be construction-like.

Other examples of construction-like activities follow.

Example A: Employees are engaged in a minor building repair using temporary wiring. The conditions are damp or an electric cord set is being used and is subjected to rough use or abuse.

Example B: Manufacturing prefabricated housing, in which houses or portions of houses are assembled in a manufacturing plant. This process poses some electrical hazards that are similar to those found during housing construction (for example, rough use of cord sets).

Example C: Performing heat exchanger tubing water-blasting (hydro-cleaning) using temporary wiring. This process is usually done outside in wet and conductive environmental conditions and may involve rough cord use.

Maintenance activities that do not involve electrical hazards similar to those found in construction are not ''construction-like,'' and therefore are not subject to § 1910.304(b)(3)(ii). Building maintenance activities such as floor polishing and vacuuming and drilling holes to hang pictures on walls, would be some common examples of such activities.

Activities that are large in scale, complex, or require significant time, materials, and tools to complete typically would be considered actual construction work instead of construction-like.[2] As such, these activities would be subject to the construction standards instead of subpart S. To illustrate, the stripping and repainting of a bridge would not be subject to subpart S, because it would be considered construction.

c. Temporary Wiring

In addition, paragraph (b)(3)(ii) applies only to temporary wiring installations. OSHA does not consider a single extension cord set connected to a permanent receptacle outlet to be a temporary wiring installation.[3] In such situations, extension cords are typically used to extend the length of the power supply cord on a tool or appliance to reach a nearby receptacle outlet. In this application, OSHA considers the extension cord set to be part of the utilization equipment.

Paragraph (a)(2)(v)(A) of § 1910.305 requires temporary wiring branch circuits to originate in an approved power outlet or panelboard. Normally, this is done through a portable distribution board, portable power outlet, or similar equipment. All the wiring extending from the portable power outlet or panelboard would be considered temporary wiring. However, in a permanent facility, it may be possible to run a series of cord sets from permanent outlets as a means of supplying power on a temporary basis. Although the NEC and NFPA make no clear distinction between temporary wiring and the use of extension cord sets, under certain conditions, the use of multiple cord sets would constitute a temporary wiring installation. A series of extension cord sets run from a single permanent outlet would constitute temporary wiring though such an installation would not strictly comply with the requirements relating to the origin of temporary branch circuits. Similarly, running a long extension cord set from a permanent outlet to power more than one piece of electric equipment would result in a temporary wiring installation.

Thus, for the purposes of § 1910.304(b)(3)(ii), OSHA will consider as ''temporary wiring'' the use of more than one extension cord (connected in series or otherwise) to a permanent outlet, or the temporary connection of more than one piece of utilization equipment to an extension cord set that is connected to a permanent receptacle outlet.[4]

OSHA notes, however, that this temporary wiring would only be covered by § 1910.304(b)(3)(ii) if it is used during ''construction-like activities.''

2. Does § 1910.304(b)(3)(ii) apply to all receptacles or only those on branch circuits?

Paragraph (b) of § 1910.304 applies only to branch circuits. The definition of ''branch circuit'' is ''[t]he circuit conductors between the final overcurrent device protecting the circuit and the outlets.'' The definition of ''outlet'' is ''[a] point on the wiring system at which current is taken to supply utilization equipment.'' Thus, the branch circuit extends from the final overcurrent device to points on the circuit where power is taken to supply utilization equipment (for example, an electric tool). Receptacles that are used to power downstream cord-connected overcurrent devices for additional circuits are not covered because they are not part of the branch circuit. For example, receptacles on a spider box that supply downstream spider boxes with overcurrent-protected circuits would not be covered by § 1910.304(b)(3)(ii). A spider box is a portable power outlet unit used with temporary wiring installations. The box, which is typically fed by a 125/250-volt, 50-ampere cord set, contains overcurrent protection for 125- or 250-volt, 15-, 20-, or 30-ampere receptacle outlets[5] and frequently contains a pass-through 50-ampere outlet for downstream spider boxes. The 50-ampere receptacle outlets are not receptacle outlets when they supply downstream spider boxes. They are receptacle outlets when they supply 50-ampere electric utilization equipment directly.

3. Does the standard recognize all forms of ground-fault protection devices or only ground-fault circuit interrupters approved by nationally recognized testing laboratories (NRTL)?

The standard requires ground-fault circuit interrupters for personnel protection in § 1910.304(b)(3)(ii)(A). As electric equipment, these GFCIs must be NRTL approved.[6] These devices have trip levels of approximately 5 milliamperes and trip in as little as 0.025 seconds. Devices such as ground-

[2] Note that confined space activities specified in OSHA Directive CPL 02–00–100, *Application of the Permit-Required Confined Spaces (PRCS) Standard, 29 CFR 1910.146,* are covered by the general industry confined space standard. Appendix E, Question 8, of that directive gives examples of activities covered by the general industry confined space standard that may be considered construction-like.

[3] It should be noted that the language in the GFCI provision in the construction standards is not the same as the language in subpart S. The construction standard (§ 1926.404(b)(1)) applies its GFCI criteria to receptacle outlets that are not a part of the permanent wiring without regard to whether they are used with a temporary wiring installation. Thus, under the construction standard, a GFCI is required for an extension cord set plugged into a permanent 120-volt, 15- or 20-ampere receptacle outlet unless the employer is using an assured equipment grounding conductor program.

[4] This interpretation does not apply to the connection of multiple pieces of electric equipment to an approved relocatable power taps used in accordance with its listing or labeling.

[5] Spider boxes are typically manufactured with built-in GFCI protection for these receptacles.

[6] Paragraph (a) of § 1910.303 requires all electric equipment to be approved. Under the definitions of ''approved'' and ''acceptable,'' this generally requires approval by an NRTL.

fault protection for equipment, earth-leakage detectors, and similar equipment are not acceptable substitutes. These devices, which may also be NRTL approved, interrupt the circuit at higher trip levels and, in some cases, do not function to trip the circuit automatically at all.

4. Does the standard require GFCIs to be used with branch circuits supplying temporary lighting?

The standard requires GFCI protection for temporary circuits supplying lighting only when those circuits also supply receptacles. Employers are not required by the standard to install GFCIs for lighting if the design of the temporary lighting is such that the circuits do not also supply receptacles.[7]

Exemptions From Notice and Comment and Delay in Effective Date

Under the Administrative Procedure Act (APA), an agency may make a ''good cause'' finding that notice and comment rulemaking procedures would be impracticable, unnecessary, or contrary to the public interest. 5 U.S.C. 553(b)(B); see also 26 CFR 1911.5 (permitting OSHA to promulgate minor changes or amendments to standards without notice and comment when the changes are accompanied by a statement of good cause for the absence of notice and comment). An agency may similarly make the rule effective upon publication when it determines that delaying the effective date of the rule, as normally required by 5 U.S.C. 553, is unnecessary and good cause exists to make the rule effective immediately. 5 U.S.C. 553(d)(3).

In this instance, OSHA finds that good cause exists under 5 U.S.C. 553(b)(B) and (d)(3) to forego public notice and comment for these minor amendments and to make them effective immediately upon publication in the **Federal Register**. Notice and comment procedures for the amendments herein, as well as a delay in the effective date of the amendments, are unnecessary because the amendments are minor clarifications and typographical corrections that do not affect the substantive requirements or coverage of the standards involved, modify or revoke existing rights and obligations, or establish new rights and obligations. Moreover, the clarifications respond to requests for immediate formal guidance to assist employers in complying with the existing standards.

List of Subjects in 29 CFR Part 1910

Electric power, Fire prevention, Hazardous substances, Occupational safety and health, Safety.

Authority

This document was prepared under the direction of Edwin G. Foulke, Jr., Assistant Secretary of Labor for Occupational Safety and Health, 200 Constitution Avenue, NW., Washington, DC 20210.

This action is taken pursuant to sections 4, 6, and 8 of the Occupational Safety and Health Act of 1970 (29 U.S.C. 653, 655, 657), Secretary of Labor's Order No. 5–2007 (72 FR 31160), and 29 CFR Part 1911.

Signed at Washington, DC, this 24th day of October 2008.

Edwin G. Foulke, Jr.,

Assistant Secretary of Labor for Occupational Safety and Health.

Part 1910 of Title 29 of the Code of Federal Regulations is amended as follows:

PART 1910—[AMENDED]

Subpart S—[Amended]

■ 1. The authority citation for subpart S is revised to read as follows:

Authority: Secs. 4, 6, 8, Occupational Safety and Health Act of 1970 (29 U.S.C. 653, 655, 657); Secretary of Labor's Order No. 8–76 (41 FR 25059), 1–90 (55 FR 9033), 5–2002 (67 FR 65008), 5–2007 (72 FR 31160), as applicable; 29 CFR part 1911.

§ 1910.303 General.

■ 2. Amend Table S–3 by correcting ''2.81'' and ''9.01,'' the first entries under the column heads ''m'' and ''ft,'' to read ''2.8'' and ''9.0,'' respectively.

■ 3. Revise the introductory text to § 1910.304(b)(3)(ii) to read as follows:

§ 1910.304 Wiring design and protection.

* * * * *

(b) * * *

(3) * * *

(ii) The following requirements apply to temporary wiring installations that are used during construction-like activities, including certain maintenance, remodeling, or repair activities, involving buildings, structures or equipment.

* * * * *

[FR Doc. E8–25789 Filed 10–28–08; 8:45 am]

BILLING CODE 4510–26–P

[7] OSHA notes that Section 590.4(D) of the 2005 National Electrical Code (NEC) prohibits the installation of receptacles on branch circuits that supply temporary lighting for construction sites. This requirement is intended to ensure that temporary lighting is not subject to tripping by the GFCIs required on construction sites. Subpart S does not contain a similar prohibition.

DEPARTMENT OF THE INTERIOR

Minerals Management Service

30 CFR Parts 203 and 260

RIN 1010–AD29

Royalty Relief for Deepwater Outer Continental Shelf Oil and Gas Leases—Conforming Regulations to Court Decision

AGENCY: Minerals Management Service (MMS), Interior.

ACTION: Final rule; delay of effective date.

SUMMARY: MMS is delaying until December 8, 2008, 60 days from the date of publication, the effective date of a rule that will conform the regulations at 30 CFR parts 203 and 260 to the Federal Court's decision in *Santa Fe Snyder Corp.* v. *Norton,* 385 F.3d 884 (5th Cir. 2004). This delay of effective date is necessary to comply with the Congressional review provisions of the Small Business Regulatory Enforcement Fairness Act of 1996, 5 U.S.C. 801 *et seq.* (the Congressional Review Act).

DATES: The effective date of the rule amending 30 CFR parts 203 and 260 published at 73 FR 58467, October 7, 2008 is delayed until December 8, 2008.

FOR FURTHER INFORMATION CONTACT: Marshall Rose, Chief, Economics Division, Minerals Management Service at (703) 787–1536.

SUPPLEMENTARY INFORMATION: The rule published October 7, 2008, amends 30 CFR parts 203 and 260 to conform the regulations to the decision in *Santa Fe Snyder*. That decision found that certain provisions of the MMS regulations interpreting section 304 of the Deep Water Royalty Relief Act are contrary to the requirements of the statute. Under the rule, MMS will determine lessees' royalty under leases subject to Deep Water Royalty Relief Act section 304, for both past and future periods, in a manner consistent with the decision in *Santa Fe Snyder*. As stated in the preamble therein, the final rule has been determined to be both ''major'' and ''economically significant.'' Accordingly, the Congressional Review Act requires that before this final rule can take effect, an agency shall submit the rule to Congress for review for a period of 60 days from the date of publication in the **Federal Register** or receipt of the rule by Congress, whichever is later. 5 U.S.C. 801(a)(3)(A). This delay of the effective date will assure ample time for that required review.

Dated: October 23, 2008.

C. Stephen Allred,

Assistant Secretary—Land and Minerals Management.

[FR Doc. E8–25815 Filed 10–28–08; 8:45 am]

BILLING CODE 4310–MR–P

DEPARTMENT OF DEFENSE

Department of the Navy

32 CFR Part 726

[USN–2008–0009]

RIN 0703–AA85

Payments of Amounts Due Mentally Incompetent Members of the Naval Service

AGENCY: Department of the Navy, DoD.

ACTION: Final rule.

SUMMARY: The Department of the Navy amends its rules to update existing sections relating to the authority and procedures to designate trustees for Navy and Marine Corps service members who have been determined to be mentally incompetent pursuant to 37 U.S.C. Chapter 11. The amendments will comport with current policy reflected in Chapter XIV of the Manual of the Judge Advocate General (JAGMAN).

DATES: This rule is effective October 29, 2008.

FOR FURTHER INFORMATION CONTACT: Lieutenant Commander Tanya M. Cruz, JAGC, U.S. Navy, Office of the Judge Advocate General (Administrative Law), Department of the Navy, 1322 Patterson Ave., SE., Suite 3000, Washington Navy Yard, DC 20374–5066, telephone: 703–614–7245.

SUPPLEMENTARY INFORMATION: The Department of the Navy published a proposed rule at 73 FR 38350 on July 7, 2008, to amend regulations concerning the authority and procedures to designate trustees for members of the Naval service who have been determined to be mentally incompetent in accordance with 37 U.S.C. Chapter 11. As a result of organizational change in the Office of the Judge Advocate General, the functions under Chapter XIV were transferred from the Judge Advocate General to the Defense Finance and Accounting Service-Cleveland Center (DFAS–CL), Office of Continuing Government Activity (CGA). No comments on the proposed rule were submitted. Accordingly, the Department of the Navy amends its rules concerning the authority and procedures to designate trustees for Navy and Marine Corps service members who have been determined to be mentally incompetent pursuant to 37 U.S.C. Chapter 11. It has been determined that this rule amendment is not a major rule within the criteria specified in Executive Order 12866, as amended by Executive Order 13258, and does not have substantial impact on the public.

Matters of Regulatory Procedure

Executive Order 12866, ''Regulatory Planning and Review.'' It has been determined that the changes to 32 CFR part 726 are not considered a ''significant regulatory action.'' The rule does not:

(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 the recipients thereof; or

(4) Raise novel legal or policy issues arising out of legal mandates, the President's priorities, or the principles set forth in this Executive Order.

Unfunded Mandates Reform Act (Sec. 202, Pub. L. 104–4). It has been certified that 32 CFR part 726 does not contain a Federal Mandate that may result in the expenditure by State, local, and tribal governments, in aggregate, or by the private sector, of $100 million or more in any one year.

Public Law 96–354, ''Regulatory Flexibility Act'' (5 U.S.C. 601). It has been determined that this rule is not subject to the Regulatory Flexibility Act (5 U.S.C. 601) because it would not, if promulgated, have a significant economic impact on a substantial number of small entities. This rule implements the processing of the proper administrative processing and consideration of claims on behalf of and against the United States, and does not economically impact the Federal government's relations with the private sector.

Public Law 96–511, ''Paperwork Reduction Act'' (44 U.S.C. Chapter 35). This rule does not impose collection of information requirements for purposes of the Paperwork Reduction Act (44 U.S.C. Chapter 35, 5 CFR part 1320). U.S.C. Chapter 35).

Executive Order 13132, ''Federalism''. It has been certified that 32 CFR part 726 does not have federalism implications as set forth in Executive Order 13132. This rule does not have substantial direct effects on:

(1) The States;

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

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

List of Subjects in 32 CFR Part 726

Administrative practice and procedure, Military personnel, Reporting and recordkeeping requirements, Trusts and trustees.

■ For the reasons set forth in the preamble, the Department of the Navy amends 32 CFR part 726 as follows:

PART 726—PAYMENTS OF AMOUNTS DUE MENTALLY INCOMPETENT MEMBERS OF THE NAVAL SERVICE

■ 1. The authority citation for 32 CFR part 726 is revised to read as follows:

Authority: 5 U.S.C. 301; 10 U.S.C. 5013, and 5148; 37 U.S.C. 601–604, and 1001; 32 CFR 700.105 and 700.312.

§ 726.1 [Amended]

■ 2. Section 726.1 is amended by removing the words ''title 11 of chapter 37'' and adding the words ''Chapter 11 of Title 37'' in their place.

§ 726.2 [Amended]

■ 3. Section 726.2 is amended by adding three new sentences to the end of paragraph (a) to read as follows:

§ 726.2 Scope.

(a) * * * The Secretary of the Navy has authority to designate a trustee in the absence of notice that a legal committee, guardian, or other legal representative has been appointed by a State court of competent jurisdiction (37 U.S.C. 601–604). This authority is exercised by the Defense Finance and Accounting Service-Cleveland Center (DFAS–CL), who has delegated it to DFAS–CL, Office of Continuing Government Activity (DFAS–CL(CGA)). Trustees receive the active duty pay and allowances, amounts due for accrued or accumulated leave, and retired pay or retainer pay, that are otherwise payable to a member found by competent medical authority to be mentally incapable of managing his affairs.

* * * * *

§ 726.3 [Amended]

■ 4. Section 726.3 is amended by removing ''The Judge Advocate General or his designee'' and adding ''DFAS–CL (CGA)'' in its place.

■ 5. Section 726.4 is revised to read as follows:

§ 726.4 Procedures.

(a) *Competency Board.* (1) The commanding officer of the cognizant Naval medical facility will convene a board of not less than three Medical Department officers or physicians, one of whom will be a Navy psychiatrist or clinical psychologist, when there is evidence that a member may be incapable of handling his financial affairs. The board will be convened in accordance with Chapter 18, Manual of the Medical Department (MANMED). The board may include members of the Reserve components on active or inactive duty. When active duty Navy or Marine Corps members are hospitalized in non-Naval medical facilities, the Military Medical Support Office will ensure compliance with Chapter 18, MANMED.

(2) DFAS–CL(CGA) may request the commanding officer of any Naval medical facility, or request the commanding officer of another service medical facility or administrator of a Department of Veterans Affairs medical facility, convene a competency board in accordance with this section to determine the mental capability of a member to manage his financial affairs.

(3) A finding of restoration of competency or capability to manage personal and financial affairs may be accomplished in the same manner specified in Chapter 18, MANMED, except that the board may consist of one or two Medical Department officers or physicians, one of whom must be a Navy psychiatrist or clinical psychologist.

(4) At least one officer on the competency board, preferably the psychiatrist or clinical psychologist, will personally observe the member and ensure that the member's medical record, particularly that portion concerning his mental health, is accurate and complete.

(5) The requirement to convene a competency board under this chapter is in addition to and separate from the medical board procedures. Each board member signs the report of the board and certifies whether the member is or is not mentally capable of managing his financial affairs. After approval by the convening authority, the original board report is forwarded to DFAS–CL(CGA).

(b) *Records.* The convening authority will forward the original of each board report to the Defense Finance and Accounting Service-Cleveland Center, Office of Continuing Government Activity (Code CGA), Post Office Box 998021, Room 2323, Cleveland, OH 44199–80216. If a member is found to be not mentally capable of managing his financial affairs, the forwarding endorsement will set forth the name, relationship, address, and telephone number(s) of the member's next of kin, and any other information that will assist to identify a prospective trustee.

■ 6. Section 726.5 is revised to read as follows:

§ 726.5 Procedures for designation of a trustee.

Upon receipt of a report of a competency board that a member has been found mentally incapable of managing his financial affairs, DFAS–CL(CGA) will initiate action to appoint a trustee, provided no notice of appointment of a committee, guardian, or other legal representative by a State court of competent jurisdiction has been received by DFAS–CL(CGA).

■ 7. Section 726.6 is revised to read as follows:

§ 726.6 Travel orders.

The Chief of Naval Personnel or the Deputy Commandant, Manpower & Reserve Affairs, may issue travel orders to a member to appear before a competency board convened to determine whether the member is mentally capable of managing his financial affairs. In the case of permanently retired members, travel will be at no cost to the Government.

■ 8. Section 726.7 is revised to read as follows:

§ 726.7 Status of pay account.

Upon notification by the commanding officer of the medical facility preparing the board report that a member has been declared mentally incapable of managing his financial affairs, DFAS–CL(CGA) will suspend the member's pay. Thereafter, DFAS–CL(CGA) or his designee will direct payment of monies to:

(a) The appointed trustee;

(b) The legal representative appointed by a State court of competent jurisdiction; or

(c) Directly to the member following a determination the member is capable of managing his financial affairs.

■ 9. Section 726.8 is revised to read as follows:

§ 726.8 Emergency funds and health and comfort.

Until a trustee is appointed, DFAS–CL(CGA) may appoint the member's designated next of kin to receive emergency funds equal to, but not to exceed the amount of pay due the incompetent member for a period of one month. These funds will be deducted from the member's pay account and will be used for the benefit of the member and any legal dependents.

■ 10. Section 726.9 is revised to read as follows:

§ 726.9 Reports and supervision of trustees.

(a) *Accounting reports.* The trustee designated by DFAS–CL(CGA) will submit accounting reports annually or at such other times as DFAS–CL(CGA) or his designee directs. DFAS–CL(CGA) will provide forms to be used by trustees for the required accounting report. The report will account for all funds received from the Navy or Marine Corps on behalf of the member. When payments to a trustee are terminated for any reason, the trustee will submit a final accounting report to DFAS–CL(CGA). Upon approval of the final accounting report, the trustee and the surety will be discharged from liability.

(b) *Failure to submit a report and default.* If an accounting report is not received by the date designated by DFAS–CL(CGA) or an accounting is unsatisfactory, DFAS–CL(CGA) will notify the trustee in writing. If a satisfactory accounting is not received by DFAS–CL(CGA) within the time specified, the trustee will be declared in default of the trustee agreement and will be liable for all unaccounted trustee funds. If a trustee is declared in default of the trustee agreement, DFAS–CL(CGA) will terminate payments to the trustee and, if necessary, a successor trustee may be appointed. The trustee and surety will be notified in writing by DFAS–CL(CGA) of the declaration of default. The notification will state the reasons for default, the amount of indebtedness to the Government, and will demand payment for the full amount of indebtedness. If payment in full is not received by DFAS–CL(CGA) within an appropriate period of time from notification of default, the account may be forwarded to the Department of Justice for recovery of funds through appropriate civil action.

Dated: October 21, 2008.

T.M. Cruz,

Lieutenant Commander, Judge Advocate General's Corps, U.S. Navy, Federal Register Liaison Officer.

[FR Doc. E8–25675 Filed 10–28–08; 8:45 am]

BILLING CODE 3810–FF–P

DEPARTMENT OF HOMELAND SECURITY

Coast Guard

33 CFR Part 105

[Docket Nos. TSA–2006–24191; USCG–2006–24196]

Transportation Worker Identification Credential (TWIC) Implementation in the Maritime Sector; Hazardous Materials Endorsement for a Commercial Driver's License

AGENCY: United States Coast Guard; DHS.

ACTION: Notice of extension of compliance date, Captain of the Port Zones Buffalo, Duluth, Detroit, Lake Michigan, and Sault Ste. Marie.

SUMMARY: This document informs owners and operators of facilities located within Captain of the Port Zones Buffalo, Duluth, Detroit, Lake Michigan, and Sault Ste. Marie that the date by which they must implement access control procedures utilizing TWIC has been extended to no later than December 1, 2008. This extension is due to a building-wide loss of power that occurred on October 21, 2008, at the government facility that houses the TWIC system, which affected the system's ability to activate TWICs.

DATES: The new compliance date for the TWIC regulations found in 33 CFR part 105 for Captain of the Port Zones Buffalo, Duluth, Detroit, Lake Michigan, and Sault Ste. Marie is December 1, 2008.

ADDRESSES: Comments and material received from the public, as well as documents mentioned in this document as being available in the docket, are part of dockets TSA–2006–24191 and USCG–2006–24196, and are available for inspection or copying at the Docket Management Facility, U.S. Department of Transportation, West Building Ground Floor, Room W12–140, 1200 New Jersey Avenue SE., Washington, DC 20590, between 9 a.m. and 5 p.m., Monday through Friday, except Federal holidays. You may also find this docket on the Internet at *http://www.regulations.gov.*

FOR FURTHER INFORMATION CONTACT: If you have questions on this document, call LCDR Jonathan Maiorine, telephone 1–877–687–2243. If you have questions on viewing the docket, call Renee V. Wright, Program Manager, Docket Operations, telephone 202–493–0402.

SUPPLEMENTARY INFORMATION:

I. Regulatory History

On May 22, 2006, the Department of Homeland Security (DHS) through the United States Coast Guard (Coast Guard) and the Transportation Security Administration (TSA) published a joint notice of proposed rulemaking entitled ''Transportation Worker Identification Credential (TWIC) Implementation in the Maritime Sector; Hazardous Materials Endorsement for a Commercial Driver's License'' in the **Federal Register** (71 FR 29396). This was followed by a 45-day comment period and four public meetings. The Coast Guard and TSA issued a joint final rule, under the same title, on January 25, 2007 (72 FR 3492) (hereinafter referred to as the original TWIC final rule). The preamble to that final rule contains a discussion of all the comments received on the NPRM, as well as a discussion of the provisions found in the original TWIC final rule, which became effective on March 26, 2007.

On May 7, 2008, the Coast Guard and TSA issued a final rule to realign the compliance date for implementation of the Transportation Worker Identification Credential. 73 FR 25562. The date by which mariners need to obtain a TWIC, and by which owners and operators of vessels and outer continental shelf facilities must implement access control procedures utilizing TWIC, is now April 15, 2009 instead of September 25, 2008. Owners and operators of facilities that must comply with 33 CFR part 105 will still be subject to earlier, rolling compliance dates, as set forth in 33 CFR 105.115(e). The Coast Guard announced the rolling compliance dates, as provided in 33 CFR 105.115(e), at least 90 days in advance via notices published in the **Federal Register**. The final compliance date for all COTP Zones will not be later than April 15, 2009.

On July 9, 2008, we announced the compliance date for COTP Zones Buffalo, Duluth, Detroit, Lake Michigan, and Sault Ste. Marie would be October 31, 2008. 73 FR 39323.

II. Notice of Facility Compliance Date—COTP Zones Buffalo, Duluth, Detroit, Lake Michigan, and Sault Ste. Marie

Title 33 CFR 105.115(e) currently states that ''[f]acility owners and operators must be operating in accordance with the TWIC provisions in this part by the date set by the Coast Guard in a Notice to be published in the **Federal Register**.'' Through this Notice, the Coast Guard informs the owners and operators of facilities subject to 33 CFR 105.115(e) located within COTP Zones Buffalo, Duluth, Detroit, Lake Michigan, and Sault Ste. Marie that the deadline for their compliance with Coast Guard and TSA TWIC requirements has been extended until December 1, 2008.

This extension is being granted due to the disruption to TWIC activations caused by a building-wide loss of power that occurred on October 21, 2008, at the government facility that houses the TWIC system. The TSA and Coast Guard have determined that the new compliance date provides sufficient time for those who were unable to activate their TWICs during the disruption to return to an enrollment center and complete activation.

We strongly encourage persons requiring unescorted access to facilities regulated by 33 CFR part 105 and located in this COTP Zone to enroll for their TWIC as soon as possible, if they haven't already. Additionally, we note that the TWIC Final Rule advises owners and operators of MTSA regulated facilities of their responsibility to notify employees of the TWIC requirements. Specifically, 33 CFR 105.200(b)(14) requires owners or operators of MTSA regulated facilities to ''[i]nform facility personnel of their responsibility to apply for and maintain a TWIC, including the deadlines and methods for such applications.'' Information on enrollment procedures, as well as a link to the pre-enrollment website (which will also enable an applicant to make an appointment for enrollment), may be found at *https://twicprogram.tsa.dhs.gov/TWICWebApp/.*

You may visit our Web site at *homeport.uscg.mil/twic* for a listing of all compliance dates by COTP Zone. This list is subject to change; any changes in compliance dates will appear on that website and be announced in the **Federal Register** as early as possible.

Dated: October 24, 2008.

David W. Murk,

Commander, U.S. Coast Guard, Acting Chief, Ports and Facilities Activities.

[FR Doc. E8–25933 Filed 10–27–08; 4:15 pm]

BILLING CODE 4910–15–P

DEPARTMENT OF VETERANS AFFAIRS

38 CFR Part 3

RIN 2900–AN04

Posttraumatic Stress Disorder

AGENCY: Department of Veterans Affairs.

ACTION: Interim final rule.

SUMMARY: The Department of Veterans Affairs (VA) is amending its

adjudication regulations regarding service connection for posttraumatic stress disorder (PTSD) by eliminating the requirement of evidence corroborating occurrence of the claimed in-service stressor in claims in which PTSD is diagnosed in service. This amendment is necessary to facilitate the proof of service connection in such claims. By this amendment, we intend to reduce claim-processing time for such claims.

DATES: *Effective Date:* This interim final rule is effective October 29, 2008. Comments must be received by VA on or before November 28, 2008.

Applicability Date: VA will apply this interim final rule to claims pending before VA on the effective date of this rule, as well as to claims filed after that date.

ADDRESSES: Written comments may be submitted through *www.Regulations.gov*; by mail or hand-delivery to the Director, Regulations Management (02REG), Office of the General Counsel, Department of Veterans Affairs, 810 Vermont Ave., NW., Room 1068, Washington, DC 20420; or by fax to (202) 273–9026. Comments should indicate that they are submitted in response to ''RIN 2900–AN04—Posttraumatic Stress Disorder.'' 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 *www.Regulations.gov*.

FOR FURTHER INFORMATION CONTACT: Maya Ferrandino, Regulations Staff (211D), Compensation and Pension Service, Veterans Benefits Administration, Department of Veterans Affairs, 810 Vermont Avenue, NW., Washington, DC 20420, (727) 319–5847. (This is not a toll-free number.)

SUPPLEMENTARY INFORMATION: The Secretary of Veterans Affairs has the authority to prescribe regulations governing the nature and extent of proof and evidence required to establish entitlement to benefits. 38 U.S.C. 501(a)(1). Under 38 CFR 3.303(a), one of the ways that service connection of a disability may be established is by affirmatively showing inception or aggravation during service of a disease or injury that resulted in that disability. However, in order to establish service connection for PTSD in cases in which a veteran did not engage in combat with the enemy or was not a prisoner of war, current 38 CFR 3.304(f) requires: (1) Medical evidence diagnosing PTSD; (2) medical evidence establishing a link between a veteran's current symptoms and an in-service stressor; and (3) credible supporting evidence that the claimed in-service stressor occurred.

The longstanding requirement in § 3.304(f) of credible supporting evidence that the claimed in-service stressor occurred is based on the American Psychiatric Association's Diagnostic and Statistical Manual of Mental Disorders, Fourth Edition (1994) (DSM–IV), to which a diagnosis of a mental disorder must conform. 38 CFR 3.304(f) and 4.125(a). According to DSM–IV at 427, the first diagnostic criterion for PTSD is:

> The person has been exposed to a traumatic event in which both of the following were present:
>
> (1) The person experienced, witnessed, or was confronted with an event or events that involved actual or threatened death or serious injury, or a threat to the physical integrity of self or others
>
> (2) The person's response involved intense fear, helplessness, or horror.

The symptoms of PTSD ''usually begin within the first 3 months after the trauma, although there may be a delay of months, or even years, before symptoms appear.'' DSM–IV at 426. Given the delay that may occur between the occurrence of a stressor and the onset of PTSD and the subjective nature of a person's response to an event, VA concluded, when it first promulgated § 3.304(f) in 1993, that it is reasonable to require corroboration of the in-service stressor, a conclusion with which the United States Court of Appeals for the Federal Circuit agreed. 58 FR 29109 (1993); *Nat'l Org. of Veterans' Advocates, Inc.* v. *Sec'y of Veterans Affairs*, 330 F.3d 1345, 1351–52 (Fed. Cir. 2003). Also, according to DSM–IV at 424–25, a ''person commonly makes deliberate efforts to avoid thoughts, feelings, or conversations about the traumatic event * * * and to avoid activities, situations, or people who arouse recollections of it. * * * This avoidance of reminders may include amnesia for an important aspect of the traumatic event.'' We believed that it was reasonable for § 3.304(f) to require corroboration of the occurrence of the stressor in order to substantiate aspects of the event that a veteran may not remember.

However, VA has found, based on claims submitted since September 11, 2001, that service members are increasingly being diagnosed with PTSD while still in service, rather than after discharge from service. The increased incidence of in-service diagnoses of PTSD is attributable to advances in medicine and increased monitoring of service members' mental health by the service departments. Given the ability to more quickly diagnose PTSD and the proximity between an in-service diagnosis of PTSD and the claimed occurrence of the stressor, VA no longer believes it is necessary to require evidence corroborating occurrence of the stressor in claims based on an in-service diagnosis.

We are therefore amending § 3.304(f) to relax the requirements for establishing service connection for PTSD that was diagnosed in service. We are adding a new paragraph, which provides that, if the evidence shows that the veteran's PTSD was diagnosed during service and the claimed stressor is related to that service, in the absence of clear and convincing evidence to the contrary, and provided that the claimed stressor is consistent with the circumstances, conditions, or hardships of the veteran's service, the veteran's lay testimony alone may establish the occurrence of the claimed in-service stressor. We believe that this change will contribute to faster processing of PTSD claims by eliminating the need for VA to develop evidence of occurrence of the in-service stressor in claims in which the veteran's PTSD was diagnosed during service.

For claims based on a postservice diagnosis of PTSD, we will continue to require credible supporting evidence of the occurrence of the claimed in-service stressor. The U.S. Court of Appeals for Veterans Claims (CAVC) has held that VA is ''not bound to accept [the claimant's] uncorroborated account'' of a stressor or a ''social worker's and psychiatrist's unsubstantiated * * * opinions that the alleged PTSD had its origins in appellant's [military service].'' *Wood* v. *Derwinski*, 1 Vet. App. 190, 192 (1991). Further, the CAVC stated that VA ''is not required to accept doctors' opinions that are based upon the appellant's recitation of medical history.'' *Godfrey* v. *Brown*, 8 Vet. App. 113, 121 (1995). A post-service diagnosis of PTSD is often based on a claimant's personal account of a stressful event that may have occurred many years before the doctor's examination. In order to ensure a competent and credible diagnosis of PTSD, there must be corroboration of the claimed in-service stressor. This standard is the same as that generally applied by VA when a post-service diagnosis of a disability is allegedly due to an injury incurred or disease contracted during service.

Also, we are eliminating the hyphen in the term ''post-traumatic stress disorder'' in § 3.304(f) to reflect current medical terminology.

Administrative Procedure Act

In accordance with 5 U.S.C. 553(b)(3)(B), the Secretary of Veterans Affairs finds that there is good cause to dispense with the opportunity for prior comment with respect to this rule, which eliminates the need for evidence to corroborate the occurrence of a stressor in claims in which a veteran was diagnosed with PTSD during service. The Secretary finds that it is impracticable, unnecessary, and contrary to the public interest to delay this regulation, which will speed up processing of PTSD claims, for the purpose of soliciting prior public comment because the regulation relieves an unnecessary proof requirement for certain veterans disabled by service-connected PTSD who need VA benefits as soon as possible to compensate for loss in wage-earning capacity. For the foregoing reasons, the Secretary of Veterans Affairs is issuing this rule as an interim final rule. The Secretary of Veterans Affairs will consider and address comments that are received within 30 days of the date this interim final rule is published in the **Federal Register**.

Paperwork Reduction Act

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 interim final rule 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 interim final rule will not affect any small entities. Only VA beneficiaries could be directly affected. Therefore, pursuant to 5 U.S.C. 605(b), this interim final rule 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), 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 interim final rule have been examined, and it has been determined not to be a significant regulatory action under 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 the expenditure by State, local, and tribal governments, in the aggregate, or by the private sector, of $100 million or more (adjusted annually for inflation) in any year. This interim final rule would have no such effect on State, local, and tribal governments, or on the private sector.

Catalog of Federal Domestic Assistance Numbers and Titles

The Catalog of Federal Domestic Assistance program numbers and titles for this rule are 64.109, Veterans Compensation for Service-Connected Disability and 64.110, Veterans Dependency and Indemnity Compensation for Service-Connected Death.

List of Subjects in 38 CFR Part 3

Administrative practice and procedure, Claims, Disability benefits, Health care, Pensions, Radioactive materials, Veterans, Vietnam.

Approved: October 7, 2008.

Gordon H. Mansfield,

Deputy Secretary of Veterans Affairs.

■ For the reasons set out in the preamble, VA is amending 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.

■ 2. Amend § 3.304(f) by:

■ a. Revising the paragraph heading and introductory text.

■ b. Redesignating paragraphs (1), (2), and (3) as paragraphs (2), (3), and (4), respectively, and by adding new paragraph (1).

■ c. Removing ''post-traumatic'' each place it appears and add, in its place, ''posttraumatic''.

The revisions and addition read as follows:

§ 3.304 Direct service connection; wartime and peacetime.

* * * * *

(f) *Posttraumatic stress disorder.* Service connection for posttraumatic stress disorder requires medical evidence diagnosing the condition in accordance with § 4.125(a) of this chapter; a link, established by medical evidence, between current symptoms and an in-service stressor; and credible supporting evidence that the claimed in-service stressor occurred. The following provisions apply to claims for service connection of posttraumatic stress disorder diagnosed during service or based on specified in-service stressors:

(1) If the evidence establishes a diagnosis of posttraumatic stress disorder during service and the claimed stressor is related to that service, in the absence of clear and convincing evidence to the contrary, and provided that the claimed stressor is consistent with the circumstances, conditions, or hardships of the veteran's service, the veteran's lay testimony alone may establish the occurrence of the claimed in-service stressor.

* * * * *

[FR Doc. E8–25735 Filed 10–28–08; 8:45 am]

BILLING CODE 8320–01–P

ENVIRONMENTAL PROTECTION AGENCY

40 CFR Part 52

[EPA–R03–OAR–2008–0656; FRL–8735–4]

Approval and Promulgation of Air Quality Implementation Plans; Virginia; Movement of Richmond and Hampton Roads 8-Hour Ozone Areas From the Nonattainment Area List to the Maintenance Area List

AGENCY: Environmental Protection Agency (EPA).

ACTION: Direct final rule.

SUMMARY: EPA is taking direct final action to approve a revision to the Virginia State Implementation Plan (SIP). This revision moves the Richmond and Hampton Roads 8-Hour Ozone Nonattainment Areas from the nonattainment areas list to the maintenance areas list. EPA is approving this revision to move the Richmond and Hampton Roads 8-Hour Ozone Nonattainment Areas from the list of nonattainment areas to the list of maintenance areas in accordance with the requirements of the Clean Air Act (CAA).

DATES: This rule is effective on December 29, 2008 without further notice, unless EPA receives adverse written comment by November 28, 2008. If EPA receives such comments, it will publish a timely withdrawal of the direct final rule in the **Federal Register** and inform the public that the rule will not take effect.

ADDRESSES: Submit your comments, identified by Docket ID Number EPA–R03–OAR–2008–0656 by one of the following methods:

A. *http://www.regulations.gov.* Follow the on-line instructions for submitting comments.

B. *E-mail: fernandez.cristina@epa.gov.*

C. *Mail:* EPA–R03–OAR–2008–0656, Cristina Fernandez, Chief, Air Quality Planning Branch, Mailcode 3AP21, U.S. Environmental Protection Agency, Region III, 1650 Arch Street, Philadelphia, Pennsylvania 19103.

D. *Hand Delivery:* At the previously listed EPA Region III 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–R03–OAR–2008–0656. EPA's policy is that all comments received will be included in the public docket without change, and may be made available online at *http://www.regulations.gov*, including any personal information provided, unless the comment includes information claimed to be Confidential Business Information (CBI) or other information whose disclosure is restricted by statute. Do not submit information that you consider to be CBI or otherwise protected through *http://www.regulations.gov* or e-mail. The *http://www.regulations.gov* Web site is an ''anonymous access'' system, which means EPA will not know your identity or contact information unless you provide it in the body of your comment. If you send an e-mail comment directly to EPA without going through *http://www.regulations.gov*, your e-mail address will be automatically captured and included as part of the comment that is placed in the public docket and made available on the Internet. If you submit an electronic comment, EPA recommends that you include your name and other contact information in the body of your comment and with any disk or CD–ROM you submit. If EPA cannot read your comment due to technical difficulties and cannot contact you for clarification, EPA may not be able to consider your comment. Electronic files should avoid the use of special characters, any form of encryption, and be free of any defects or viruses.

Docket: All documents in the electronic docket are listed in the *http://www.regulations.gov* index. Although listed in the index, some information is not publicly available, i.e., CBI or other information whose disclosure is restricted by statute. Certain other material, such as copyrighted material, is not placed on the Internet and will be publicly available only in hard copy form. Publicly available docket materials are available either electronically in *http://www.regulations.gov* or in hard copy during normal business hours at the Air Protection Division, U.S. Environmental Protection Agency, Region III, 1650 Arch Street, Philadelphia, Pennsylvania 19103. Copies of the State submittal are available at the Virginia Department of Environmental Quality, 629 East Main Street, Richmond, Virginia 23219.

FOR FURTHER INFORMATION CONTACT: Patrick Egan, (215) 814–3167, or by e-mail at *egan.patrick@epa.gov*.

SUPPLEMENTARY INFORMATION:

I. Background

On April 15, 2004, the Richmond and the Hampton Roads Areas were designated as nonattainment areas for the 8-Hour Ozone National Ambient Air Quality Standards (NAAQS). On September 20, 2006, Virginia Department of Environmental Quality (VADEQ) formally submitted a redesignation request for the Richmond Area along with a maintenance plan on September 25, 2006. On October 16, 2006, VADEQ formally submitted a redesignation request for the Hampton Roads Area, along with a maintenance plan on October 18, 2006. On June 1, 2007, (72 FR 30485 & 72 FR 30490) EPA published final rulemaking actions approving the redesignation request and maintenance plan for the Richmond and Hampton Roads Areas. On July 6, 2007, (72 FR 32895), EPA published a correction notice for the June 1, 2007 (72 FR 30490) **Federal Register** correcting the omission of York County as part of the Hampton Roads redesignation.

II. Summary of SIP Revision

On July 29, 2008, the Commonwealth of Virginia submitted a formal revision to its SIP. The SIP revision consists of a regulatory change that moves the Richmond Area 8-Hour Ozone Nonattainment Area (Counties of Charles City, Chesterfield, Hanover, Henrico, and Prince George; Cities of Colonial Heights, Hopewell, Petersburg, and Richmond) and the Hampton Roads 8-Hour Ozone Nonattainment Area (Counties of Gloucester, Isle of Wight, James City and York; Cities of Chesapeake, Hampton, Newport News, Portsmouth, Poquson, Norfolk, Suffolk, Virginia Beach and Williamsburg) from the list of nonattainment areas found in regulation 9 VAC 5–20–204 to the list of maintenance areas found in regulation 9 VAC 5–20–203.

III. General Information Pertaining to SIP Submittals From the Commonwealth of Virginia

In 1995, Virginia adopted legislation that provides, subject to certain conditions, for an environmental assessment (audit) ''privilege'' for voluntary compliance evaluations performed by a regulated entity. The legislation further addresses the relative burden of proof for parties either asserting the privilege or seeking disclosure of documents for which the privilege is claimed. Virginia's legislation also provides, subject to certain conditions, for a penalty waiver for violations of environmental laws when a regulated entity discovers such violations pursuant to a voluntary compliance evaluation and voluntarily discloses such violations to the Commonwealth and takes prompt and appropriate measures to remedy the violations. Virginia's Voluntary Environmental Assessment Privilege Law, Va. Code Sec. 10.1–1198, provides a privilege that protects from disclosure documents and information about the content of those documents that are the product of a voluntary environmental assessment. The Privilege Law does not extend to documents or information (1) that are generated or developed before the commencement of a voluntary environmental assessment; (2) that are prepared independently of the assessment process; (3) that demonstrate a clear, imminent and substantial danger to the public health or

environment; or (4) that are required by law.

On January 12, 1998, the Commonwealth of Virginia Office of the Attorney General provided a legal opinion that states that the Privilege Law, Va. Code Sec. 10.1–1198, precludes granting a privilege to documents and information ''required by law,'' including documents and information ''required by Federal law to maintain program delegation, authorization or approval,'' since Virginia must ''enforce Federally authorized environmental programs in a manner that is no less stringent than their Federal counterparts. * * *'' The opinion concludes that ''[r]egarding § 10.1–1198, therefore, documents or other information needed for civil or criminal enforcement under one of these programs could not be privileged because such documents and information are essential to pursuing enforcement in a manner required by Federal law to maintain program delegation, authorization or approval.''

Virginia's Immunity law, Va. Code Sec. 10.1–1199, provides that ''[t]o the extent consistent with requirements imposed by Federal law,'' any person making a voluntary disclosure of information to a state agency regarding a violation of an environmental statute, regulation, permit, or administrative order is granted immunity from administrative or civil penalty. The Attorney General's January 12, 1998, opinion states that the quoted language renders this statute inapplicable to enforcement of any Federally authorized programs, since ''no immunity could be afforded from administrative, civil, or criminal penalties because granting such immunity would not be consistent with Federal law, which is one of the criteria for immunity.''

Therefore, EPA has determined that Virginia's Privilege and Immunity statutes will not preclude the Commonwealth from enforcing its program consistent with the Federal requirements. In any event, because EPA has also determined that a state audit privilege and immunity law can affect only state enforcement and cannot have any impact on Federal enforcement authorities, EPA may at any time invoke its authority under the CAA, including, for example, sections 113, 167, 205, 211 or 213, to enforce the requirements or prohibitions of the state plan, independently of any state enforcement effort. In addition, citizen enforcement under section 304 of the CAA is likewise unaffected by this, or any, state audit privilege or immunity law.

IV. Final Action

EPA is approving the Commonwealth's revision to move the Richmond and Hampton Roads Area from 8-hour ozone nonattainment list to the 8-hour ozone maintenance list. EPA is publishing this rule without prior proposal because the Agency views this as a noncontroversial amendment and anticipates no adverse comment. However, in the ''Proposed Rules'' section of today's **Federal Register**, EPA is publishing a separate document that will serve as the proposal to approve the SIP revision if adverse comments are filed. This rule will be effective on December 29, 2008 without further notice unless EPA receives adverse comment by November 28, 2008. If EPA receives adverse comment, EPA will publish a timely withdrawal in the **Federal Register** informing the public that the rule will not take effect. EPA will address all public comments in a subsequent final rule based on the proposed rule. EPA will not institute a second comment period on this action. Any parties interested in commenting must do so at this time.

V. Statutory and Executive Order Reviews

A. General Requirements

Under the Clean Air Act, the Administrator is required to approve a SIP submission that complies with the provisions of the Act and applicable Federal regulations. 42 U.S.C. 7410(k); 40 CFR 52.02(a). Thus, in reviewing SIP submissions, EPA's role is to approve state choices, provided that they meet the criteria of the Clean Air Act. Accordingly, this action merely approves state law as meeting Federal requirements and does not impose additional requirements beyond those imposed by state law. For that reason, this action:

- Is not a ''significant regulatory action'' subject to review by the Office of Management and Budget under Executive Order 12866 (58 FR 51735, October 4, 1993);
- Does not impose an information collection burden under the provisions of the Paperwork Reduction Act (44 U.S.C. 3501 *et seq.*);
- Is certified as not having a significant economic impact on a substantial number of small entities under the Regulatory Flexibility Act (5 U.S.C. 601 *et seq.*);
- Does not contain any unfunded mandate or significantly or uniquely affect small governments, as described in the Unfunded Mandates Reform Act of 1995 (Pub. L. 104–4);
- Does not have Federalism implications as specified in Executive Order 13132 (64 FR 43255, August 10, 1999);
- Is not an economically significant regulatory action based on health or safety risks subject to Executive Order 13045 (62 FR 19885, April 23, 1997);
- Is not a significant regulatory action subject to Executive Order 13211 (66 FR 28355, May 22, 2001);
- Is not subject to requirements of Section 12(d) of the National Technology Transfer and Advancement Act of 1995 (15 U.S.C. 272 note) because application of those requirements would be inconsistent with the Clean Air Act; and
- Does not provide EPA with the discretionary authority to address, as appropriate, disproportionate human health or environmental effects, using practicable and legally permissible methods, under Executive Order 12898 (59 FR 7629, February 16, 1994).

In addition, this rule does not have tribal implications as specified by Executive Order 13175 (65 FR 67249, November 9, 2000), because the SIP is not approved to apply in Indian country located in the state, and EPA notes that it will not impose substantial direct costs on tribal governments or preempt tribal law.

B. Submission to Congress and the Comptroller General

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 action 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).

C. Petitions for Judicial Review

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 29, 2008. Filing a petition for reconsideration by the Administrator of this final rule does not affect the finality of this action 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 to approve the revision to move the Richmond Area and the Hampton Roads Area from the 8-hour ozone nonattainment list to the 8-hour ozone maintenance list may not be challenged later in proceedings to enforce its requirements. (See section 307(b)(2).)

List of Subjects in 40 CFR Part 52

Environmental protection, Air pollution control, Incorporation by reference, Nitrogen dioxide, Ozone, Reporting and recordkeeping requirements, Volatile organic compounds.

Dated: October 20, 2008.

Donald S. Welsh,

Regional Administrator, Region III.

■ 40 CFR part 52 is amended as follows:

PART 52—[AMENDED]

■ 1. The authority citation for 40 CFR part 52 continues to read as follows:

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

Subpart VV—Virginia

■ 2. In § 52.2420, the table in paragraph (c) is amended by revising the entries for Chapter 20, section 5–20–203 and 5–20–204 to read as follows:

§ 52.2420 Identification of plan.

* * * * *

(c) * * *

EPA-APPROVED VIRGINIA REGULATIONS AND STATUTES

State citation (9 VAC 5)	Title/subject	State effective date	EPA approval date	Explanation [former SIP citation]
*	*	*	*	*
Chapter 20 General Provisions				
*	*	*	*	*
Part II Air Quality Programs				
*	*	*	*	*
5–20–203	Air Quality Maintenance Areas	7/29/08	10/29/08 [Insert page number where the document begins].	Richmond and Hampton Roads 8-Hour Ozone Areas are added.
5–20–204	Nonattainment Areas	7/29/08	10/29/08 [Insert page number where the document begins].	Richmond and Hampton Roads 8-Hour Ozone Areas are deleted.
*	*	*	*	*

* * * * *

[FR Doc. E8–25673 Filed 10–28–08; 8:45 am]

BILLING CODE 6560–50–P

ENVIRONMENTAL PROTECTION AGENCY

40 CFR Part 52

[EPA–R05–OAR–2008–0198; FRL–8722–9]

Approval and Promulgation of Air Quality Implementation Plans; Illinois

AGENCY: Environmental Protection Agency (EPA).

ACTION: Direct final rule.

SUMMARY: EPA is approving a request submitted by the Illinois Environmental Protection Agency (IEPA) on January 24, 2008, to revise the Illinois State Implementation Plan (SIP) for volatile organic compounds (VOC). The approval revises the Illinois SIP by updating information regarding the packaging production facility of Cromwell-Phoenix, Incorporated, located in Alsip, Illinois. It acknowledges that the source has changed its name from Cromwell-Phoenix, Incorporated, to CP–D Acquisition Company, LLC, as a consequence of a change in ownership. The revision does not change any of the VOC control requirements and will not increase VOC emissions because no emission limits were increased.

DATES: This rule is effective on December 29, 2008, unless EPA receives adverse written comments by November 28, 2008. If EPA receives adverse comments, EPA will publish a timely withdrawal of the rule in the **Federal Register** and inform the public that the rule will not take effect.

ADDRESSES: Submit your comments, identified by Docket ID No. EPA–R05–OAR–2008–0198 by one of the following methods:

- *http://www.regulations.gov:* Follow the online instructions for submitting comments.
- *E-mail: mooney.john@epa.gov.*
- *Fax:* (312) 886–5824.
- *Mail:* John Mooney, Chief, Criteria Pollutant Section, Air Programs Branch (AR–18J), U.S. Environmental Protection Agency, 77 West Jackson Boulevard, Chicago, Illinois 60604.
- *Hand Delivery:* John Mooney, Chief, Criteria Pollutant Section, Air Programs Branch (AR–18J), U.S. Environmental Protection Agency, 77 West Jackson Boulevard, Chicago, Illinois 60604. Such deliveries are only accepted during the Regional Office normal hours of operation, and special arrangements should be made for deliveries of boxed information. The Regional Office official hours of business are Monday through Friday, 8:30 a.m. to 4:30 p.m. excluding Federal holidays.

Instructions: Direct your comments to Docket ID No. EPA–R05–OAR–2008–0198. EPA's policy is that all comments received will be included in the public docket without change and may be made available online at *http://www.regulations.gov*, including any personal information provided, unless

the comment includes information claimed to be Confidential Business Information (CBI) or other information whose disclosure is restricted by statute. Do not submit information that you consider to be CBI or otherwise protected through *http://www.regulations.gov* or e-mail. The *http://www.regulations.gov* Web site is an ''anonymous access'' system, which means EPA will not know your identity or contact information unless you provide it in the body of your comment. If you send an e-mail comment directly to EPA without going through *http://www.regulations.gov* your e-mail address will be automatically captured and included as part of the comment that is placed in the public docket and made available on the Internet. If you submit an electronic comment, EPA recommends that you include your name and other contact information in the body of your comment and with any disk or CD–ROM you submit. If EPA cannot read your comment due to technical difficulties and cannot contact you for clarification, EPA may not be able to consider your comment. Electronic files should avoid the use of special characters, any form of encryption, and be free of any defects or viruses.

Docket: All documents in the docket are listed in the *http://www.regulations.gov* index. Although listed in the index, some information is not publicly available, e.g., CBI or other information whose disclosure is restricted by statute. Certain other material, such as copyrighted material, will be publicly available only in hard copy. Publicly available docket materials are available either electronically in *http://www.regulations.gov* or in hard copy at the Environmental Protection Agency, Region 5, Air and Radiation Division, 77 West Jackson Boulevard, Chicago, Illinois 60604. This Facility is open from 8:30 a.m. to 4:30 p.m., Monday through Friday, excluding legal holidays. We recommend that you telephone Charles Hatten, Environmental Engineer, at (312) 886–6031 before visiting the Region 5 office.

FOR FURTHER INFORMATION CONTACT:

Charles Hatten, Environmental Engineer, Criteria Pollutant Section, Air Programs Branch (AR–18J), Environmental Protection Agency, Region 5, 77 West Jackson Boulevard, Chicago, Illinois 60604, (312) 886–6031, *hatten.charles@epa.gov*.

SUPPLEMENTARY INFORMATION:

Throughout this document whenever ''we,'' ''us,'' or ''our'' is used, we mean EPA. This supplementary information section is arranged as follows:

I. General Information
A. Does this action apply to me?
II. What revision did the State request be incorporated into the SIP?
III. What action is EPA taking?
IV. Statutory and Executive Order Reviews

I. General Information

A. Does this action apply to me?

This action only applies to the CP–D Acquisition Company, LLC, packaging production facility located in Alsip, Illinois (Cook County).

II. What revision did the State request be incorporated into the SIP?

The State has requested that EPA approve as a revision to the Illinois SIP the change in the source name from Cromwell-Phoenix, Inc. (Cromwell), to CP–D Acquisition Company, LLC (CP–D Acquisition).

Background

On September 18, 2003, the Opinion and Order of the Illinois Pollution Control Board (IPCB), AS 03–05, adopted the amendments to the paper coating rules in 35 Illinois Administrative Code (IAC) 218.204(c) for Cromwell's Alsip packaging production facility, subject to conditions and alternate requirements for this facility. The IEPA held a public hearing on this SIP amendment on August 7, 2003.

At the time the IPCB issued this Order, Cromwell was going through a name change. On November 7, 2003, Cromwell and CP–D Acquisition filed a joint motion to re-open Opinion and Order, AS 03–05, which granted Cromwell an adjusted standard from 35 IAC 218.204(c). Because the assets and ownership would not change, the IPCB re-opened the docket to re-issue the Opinion and Order, AS 03–05, granting the adjusted standard in the name of CP–D Acquisition. Therefore, under the Opinion and Order, AS 03–05, adopted on November 20, 2003, the IPCB transferred all of the requirements applicable to the operating assets of Cromwell to CP–D Acquisition. The revision does not change any of the control requirements and will not increase VOC emissions because no emission limits were increased relative to the adjusted standard approved by the EPA on December 13, 2007, and relative to other applicable VOC emission limits contained in the Illinois SIP. See 72 FR 70804, dated December 13, 2007.

The revision to the Illinois SIP is solely an administrative change to reference the new name of the packaging production facility from Cromwell to CP–D Acquisition Company, LLC.

III. What action is EPA taking?

We are approving a revision to the Illinois SIP to change the source name of the packaging production facility from Cromwell-Phoenix, Incorporated, to CP-D Acquisition Company, LLC.

We are publishing this action without prior proposal because we view this as a noncontroversial amendment and anticipate no adverse comments. However, in the proposed rules section of this **Federal Register** publication, we are publishing a separate document that will serve as the proposal to approve the state plan if relevant adverse written comments are filed. This rule will be effective December 29, 2008 without further notice unless we receive relevant adverse written comments by November 28, 2008. If we receive such comments, we will withdraw this action before the effective date by publishing a subsequent document that will withdraw the final action. All public comments received will then be addressed in a subsequent final rule based on the proposed action. The EPA will not institute a second comment period. Any parties interested in commenting on this action should do so at this time. If we do not receive any comments, this action will be effective December 29, 2008.

IV. Statutory and Executive Order Reviews

Under the Clean Air Act, the Administrator is required to approve a SIP submission that complies with the provisions of the Act and applicable Federal regulations. 42 U.S.C. 7410(k); 40 CFR 52.02(a). Thus, in reviewing SIP submissions, EPA's role is to approve state choices, provided that they meet the criteria of the Clean Air Act. Accordingly, this action merely approves state law as meeting Federal requirements and does not impose additional requirements beyond those imposed by state law. For that reason, this action:

- Is not a ''significant regulatory action'' subject to review by the Office of Management and Budget under Executive Order 12866 (58 FR 51735, October 4, 1993);
- Does not impose an information collection burden under the provisions of the Paperwork Reduction Act (44 U.S.C. 3501 *et seq.*);
- Is certified as not having a significant economic impact on a substantial number of small entities under the Regulatory Flexibility Act (5 U.S.C. 601 *et seq.*);

• Does not contain any unfunded mandate or significantly or uniquely affect small governments, as described in the Unfunded Mandates Reform Act of 1995 (Pub. L. 104–4);

• Does not have Federalism implications as specified in Executive Order 13132 (64 FR 43255, August 10, 1999);

• Is not an economically significant regulatory action based on health or safety risks subject to Executive Order 13045 (62 FR 19885, April 23, 1997);

• Is not a significant regulatory action subject to Executive Order 13211 (66 FR 28355, May 22, 2001);

• Is not subject to requirements of section 12(d) of the National Technology Transfer and Advancement Act of 1995 (15 U.S.C. 272 note) because application of those requirements would be inconsistent with the Clean Air Act; and

• Does not provide EPA with the discretionary authority to address, as appropriate, disproportionate human health or environmental effects, using practicable and legally permissible methods, under Executive Order 12898 (59 FR 7629, February 16, 1994).

In addition, this rule does not have tribal implications as specified by Executive Order 13175 (65 FR 67249, November 9, 2000), because the SIP is not approved to apply in Indian country located in the state, and EPA notes that it will not impose substantial direct costs on tribal governments or preempt tribal law.

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 action 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 29, 2008. Filing a petition for reconsideration by the Administrator of this final rule does not affect the finality of this action for the purposes of judicial review nor does it extend the time within which a petition for judicial review may be filed, and shall not postpone the effectiveness of such rule or action. This action may not be challenged later in proceedings to enforce its requirements. (See section 307(b)(2).)

List of Subjects in 40 CFR Part 52

Environmental protection, Air pollution control, Carbon monoxide, Incorporation by reference, Intergovernmental relations, Nitrogen dioxide, Ozone, Reporting and recordkeeping requirements, Sulfur oxides, Volatile organic compounds.

Dated: September 16, 2008.

Walter W. Kovalick, Jr,

Acting Regional Administrator, Region 5.

■ For the reasons stated in the preamble, part 52, chapter I, of title 40 of the Code of Federal Regulations is amended as follows:

PART 52—[AMENDED]

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

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

Subpart O—Illinois

■ 2. Section 52.720 is amended by adding paragraph (c)(183) to read as follows:

§ 52.720 Identification of plan.

* * * * *

(c) * * *

(183) On January 24, 2008, the Illinois Environmental Protection Agency submitted a revision to its state implementation plan for the packaging production facility of CP–D Acquisition Company, LLC. The revision changes the source name from Cromwell-Phoenix, Incorporated, to CP–D Acquisition Company, LLC.

(i) Incorporation by reference.

(A) November 20, 2003, Supplemental Opinion and Order of the Illinois Pollution Control Board, AS 03–05, effective November 20, 2003.

[FR Doc. E8–25657 Filed 10–28–08; 8:45 am]

BILLING CODE 6560–50–P

ENVIRONMENTAL PROTECTION AGENCY

40 CFR Parts 152, 156 and 165

[EPA–HQ–OPP–2005–0327; FRL–8387–2]

RIN A2070–AJ37

Pesticide Management and Disposal; Standards for Pesticide Containers and Containment

AGENCY: Environmental Protection Agency (EPA).

ACTION: Final rule.

SUMMARY: With this final rule, EPA is amending the pesticide container and containment regulations, which provide for the safe storage and disposal of pesticides as a means of protecting human health and the environment pursuant to the Federal Insecticide, Fungicide, and Rodenticide Act (FIFRA). This final rule extends the labeling compliance date from August 17, 2009 to August 17, 2010; changes the phrase ''sold or distributed'' to ''released for shipment'' as associated with all of the compliance dates; provides certain exceptions to label language requirements; allows for waivers of certain label requirements; and makes various minor editorial changes. In addition, the Agency is amending 40 CFR part 152 by establishing a definition for ''released for shipment.''

DATES: This final rule is effective December 29, 2008.

ADDRESSES: EPA has established a docket for this action under docket identification (ID) number EPA–HQ–OPP–2005–0327. All documents in the docket are listed in the docket index available at *http://www.regulations.gov*. Although listed in the index, some information is not publicly available, e.g., Confidential Business Information (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 in the electronic docket at *http://www.regulations.gov*, or, if only available in hard copy, at the OPP Regulatory Public Docket in Rm. S–4400, One Potomac Yard (South Bldg.), 2777 S. Crystal Dr., Arlington, VA. The Docket Facility is open from 8:30 a.m. to 4 p.m., Monday through Friday, excluding legal holidays. The Docket Facility telephone number is (703) 305–5805.

FOR FURTHER INFORMATION CONTACT: Jeanne Kasai, Field and External Affairs

Division (FEAD) (7506P), Office of Pesticide Programs, Environmental Protection Agency, 1200 Pennsylvania Ave., NW., Washington, DC 20460–0001; telephone number: (703) 308-3240; fax number: (703) 308-2962; e-mail address: *kasai.jeanne@epa.gov*, or Nancy Fitz, FEAD (7506P), OPP, Environmental Protection Agency, 1200 Pennsylvania Ave., NW., Washington, DC 20460-0001; telephone number: (703) 305-7385; fax number: (703) 308-2962; e-mail address: *fitz.nancy@epa.gov.*

SUPPLEMENTARY INFORMATION:

I. Does This Action Apply to Me?

You may be potentially affected by this action if you are a pesticide formulator, agrichemical dealer, an independent commercial applicator, or a custom blender. Potentially affected entities may include, but are not limited to:

- Pesticide formulators (NAICS code 32532), e.g., establishments that formulate and prepare insecticides, fungicides, herbicides or other pesticides from technical chemicals or concentrates produced by pesticide manufacturing establishments.
- Agrichemical dealers (NAICS code 44422), e.g., retail dealers that distribute or sell pesticides to agricultural users.
- Independent commercial applicators (NAICS code 115112), e.g., businesses that apply pesticides for compensation (by aerial and/or ground application) and that are not affiliated with agrichemical dealers.
- Custom blenders (NAICS code 44422), e.g., establishments that provide the service of mixing pesticides to a customer's specification (most custom blenders are also dealers).

This listing is not intended to be exhaustive, but rather provides a guide for readers regarding entities likely to be affected by this action. Other types of entities not listed in this unit could also be affected. The North American Industrial Classification System (NAICS) codes have been provided to assist you and others in determining whether this action might apply to certain entities. To determine whether you or your business may be affected by this action, you should carefully examine the applicability provisions in Units II.D., III., V.B., VI.C., VII.B., VIII.C., and IX.A. of the preamble to the final pesticide container and containment rule, 71 FR 47330 (August 16, 2006). If you have any questions regarding the applicability of this action to a particular entity, consult the person listed under **FOR FURTHER INFORMATION CONTACT**.

II. Background

A. What Action is the Agency Taking?

On June 11, 2008, EPA published the ''Pesticide Management and Disposal; Standards for Pesticide Containers and Containment: Proposed Amendments.'' (73 FR 33035). In that proposal, EPA proposed a number of revisions to the existing container and containment regulations, which had been finalized in August 2006 (71 FR 47330). The container and containment regulations include requirements for pesticide container design; procedures, standards, and label language to facilitate removal of pesticides from containers prior to their being used, recycled, or discarded; requirements for containment of pesticides in stationary containers; and procedures for container refilling operations.

The public comment period for the NPRM closed on July 11, 2008. EPA received nine comments from trade associations and a consultant. All comments were generally in favor of the changes, with several suggestions for additional revisions to the container and containment regulations.

With this final rule, EPA is amending the container and containment regulations by extending the labeling compliance date from August 17, 2009 to August 17, 2010; changing the phrase ''sold or distributed'' to ''released for shipment'' as associated with all of the compliance dates; providing certain exceptions to label language requirements; allowing for waivers of certain label requirements; and making various minor editorial changes. In addition, the Agency is amending 40 CFR part 152 by establishing a definition for ''released for shipment.''

B. What is the Agency's Authority for Taking this Action?

These final regulations are issued pursuant to the authority given the Administrator of EPA in sections 2 through 34 of FIFRA, 7 U.S.C. 136—136y. Sections 19(e) and (f) of FIFRA, 7 U.S.C. 136a(e) and (f), grant EPA broad authority to establish standards and procedures to assure the safe use, reuse, storage, and disposal of pesticide containers. FIFRA section 19(e) requires EPA to promulgate regulations for the design of pesticide containers that will promote the safe storage and disposal of pesticides. FIFRA section 19(f) requires EPA to promulgate regulations prescribing procedures and standards for the removal of pesticides from containers prior to disposal. FIFRA section 25(a), 7 U.S.C. 136w(a), authorizes EPA to issue regulations to carry out provisions of FIFRA.

III. Amendments to 40 CFR Part 152—Pesticide Registration and Classification Procedures

The Agency is amending § 152.3 by adding a new definition for ''released for shipment'' and is amending § 156.159, § 165.20, § 165.40, and § 165.60 to rely on this term. The proposed definition was as follows:

> A product is released for shipment when the producer has packaged and labeled it in the manner in which it will be shipped, or has stored it in an area where finished products are ordinarily held for shipment. An individual product is only released for shipment once, except where subsequent events constitute production (e.g., relabeling, repackaging).

Eight commenters expressed support for adding a definition of ''released for shipment.'' Several commenters suggested changes to the definition for clarification. In particular, commenters said that it was confusing whether a product had to satisfy either one of the two conditions (''1. Packaged and labeled'' or ''2. Stored in an area held for shipment'') or both conditions to be considered ''released for shipment.'' Another commenter indicated that the definition could be interpreted to mean that a product could be released for shipment a second time. One commenter suggested adding language to the definition so that the producer would have to identify whether a product was not yet released for shipment.

The Agency's intent was that either one of the conditions in the first sentence of the definition would have to be satisfied in order to be ''released for shipment.'' A product that is ''packaged and labeled in a manner in which it will be distributed or sold'' is reasonably considered to be ''released for shipment.'' Likewise, a product stored in an area where finished products are ordinarily held for shipment is also reasonably considered to be ''released for shipment.'' EPA is keeping the definition as ''packaged and labeled in a manner in which it will be distributed or sold, or stored in an area where finished products are ordinarily held for shipment'' so that inspectors can take product samples, for enforcement purposes, under either condition. For example, if the definition required both conditions for a product to be considered ''released for shipment,'' inspectors might not be authorized to collect samples from a loading dock or in transit, as they would not necessarily be ''stored in an area where products are ordinarily held for shipment.'' Conversely, inspectors might not be able to collect samples of mislabeled products even if they were stored in an

area where products were ordinarily held for shipment if, upon recognizing the error, a registrant announced that they were not ''packaged and labeled in the manner in which it will be distributed or sold.'' Therefore, the Agency is not changing ''or'' to ''and'' in the first sentence of the definition as suggested by commenters because EPA is maintaining its longstanding policy that either condition qualifies as released for shipment.

In the final rule, EPA changed the first condition from ''packaged and labeled in the manner in which it will be shipped'' to ''packaged and labeled in the manner in which it will be distributed or sold'' to make it clear that inspectors may collect samples of products in their final retail packaging, rather than limiting them to collecting products in shipping boxes, shrink-wrapped pallet loads, etc.

However, EPA is modifying the proposed definition as suggested by one commenter to allow that products not considered ready for shipment may be stored in an area where finished products are ordinarily held for shipment, provided that they are physically separated from products that are intended to be released for shipment and are marked as not yet released for shipment. The Agency is using the term ''marked'' instead of ''identified'' as suggested by the commenter to signify a tangible, physical indication apparent to workers and inspectors that the particular products are not released for shipment. A mere verbal instruction not to release certain products is not sufficient.

Also, EPA has revised the proposed definition to clarify that the term ''released for shipment'' refers to the earliest point in time that a product could be said to enter into commerce, and that the product remains in the condition of ''released for shipment'' through all subsequent distributions or sales, unless the pesticide product is consumed through the production of a new pesticide product. Thus, a product does not cease to be ''released for shipment'' as it moves through its distribution chain to the end user. In the context of FIFRA, an individual product is only ''released for shipment'' once, except where subsequent activities such as relabeling or repackaging, constitute production of a new pesticide product. To emphasize this point, EPA has replaced ''is released for shipment'' with ''becomes released for shipment'' in the final definition for ''released for shipment'' in § 152.3 which reads as follows:

A product becomes released for shipment when the producer has packaged and labeled it in the manner in which it will be distributed or sold, or has stored it in an area where finished products are ordinarily held for shipment. Products stored in an area where finished products are ordinarily held for shipment, but which are not intended to be released for shipment must be physically separated and marked as not yet released for shipment. Once a product becomes released for shipment, the product remains in the condition of being released for shipment unless subsequent activities, such as relabeling or repackaging, constitute production.

One commenter suggested that a sentence be added to clarify that the term ''released for shipment'' is not intended to have the same meaning as ''distribute or sell.'' It is true that it is not the Agency's intention that the terms ''released for shipment'' and ''distribute or sell'' have the same meaning. This clarification is being provided here and may be included in guidance documents, but will not be added to the definition in the regulatory text.

The Agency also asked for comment on the placement of the definition in parts 156 and 165 of the regulations. Two commenters were in favor of placing the definition of ''released for shipment'' in parts 156 and 165 of the regulations citing the potential for confusion with the definition of ''distribute or sell'' in § 152.3. These commenters also requested that language be added to clarify that for the purposes of implementing the container labeling requirements, ''released for shipment'' is not intended to have the same meaning as ''distribute or sell.'' The Agency has decided that the above definition is appropriate in the context of the definition of ''distribute or sell'' in § 152.3, and for all purposes under FIFRA. Accordingly, EPA is adding the definition of ''released for shipment'' to the generally applicable definitions in § 152.3, rather than placing it in the definition sections specific to parts 156 and 165. This revision does not give the term ''released for shipment'' a meaning identical to ''distribute or sell''. ''Released for shipment'' has a more narrow definition, and is part, but not the whole, of the term ''distribute or sell.''

IV. Amendments to 40 CFR Part 156—Labeling Requirements for Pesticides and Devices

The Agency is amending 40 CFR part 156 by adding a new definitions section, § 156.3, consisting of introductory text, a new definition for ''dilutable'' and the existing definition from § 165.3 of ''transport vehicle''; in § 156.140(a) by changing the phrase ''in this section'' to read ''of this section.''; in§§ 156.140(a)(5), (d), and (e) by exempting certain container types from container type label statements; in § 156.140(c), by providing a mechanism whereby the Agency can approve modifications to the container type label language on a case-by-case basis; in §§ 156.144(e), (f) and (g) by exempting certain pesticide product container types from the residue removal label requirements; in§§ 156.140(a) and (b) and § 156.144(a) by revising the introductory paragraphs to account for the new exemptions, and in § 156.159 by extending the compliance date by a year, and changing the phrase ''distributed or sold'' to ''released for shipment'' as associated with the compliance date.

The rest of this unit describes the comments on the proposed changes to 40 CFR part 156 and any changes EPA made to the proposed language in response to public comments. Unless otherwise indicated, EPA is adopting the changes as proposed.

A. Definitions Section

The Agency proposed adding a new definitions section at § 156.3, consisting of introductory text and a definition for ''dilutable.'' One commenter supported the proposed definition of ''dilutable.'' Another commenter pointed out that EPA proposed an exemption for transport vehicles in § 156.144(g) but only defines ''transport vehicle'' in § 165.3. To facilitate the understanding of the use of the term ''transport vehicle'' in 40 CFR part 156 subpart H, EPA will include the definition of ''transport vehicle'' in 40 CFR part 156 as well. Therefore, the Agency is adopting the proposed § 156.3, including the definition for ''dilutable'' and adding the definition for ''transport vehicle'' from § 165.3. In addition, EPA is making an editorial change to the second sentence of the introductory paragraph to improve clarity. In particular, EPA is changing the phrase ''the following terms shall apply'' to ''the following terms shall have the meanings set forth below.''

B. Label Language Identifying the Container Type

The Agency proposed to create a list (in § 156.140(a)(5)) of nonrefillable container types exempt from the ''identification of container type'' labeling requirements that identify the container as nonrefillable (§ 156.140(a)(1)) and prohibit or limit its reuse (§ 156.140(a)(2)). The Agency also proposed a provision in § 156.140(c) that would allow waivers and modifications of any of the ''container

type'' label requirements on a case-by-case basis and asked for comments on the approach of specifically exempting certain container types while also allowing waivers and modifications on a case-by-case basis.

Seven commenters were in support of adding a list of container types exempt from the nonrefillable container type and reuse statements. A few commenters suggested that, instead of having a long list of exempt container types, the Agency should exempt package types through guidance documents, a Pesticide Registration Notice, or the EPA's web site. The Agency has decided to keep a list in the rule (in § 156.140(a)(5)) of container types that are exempt from the nonrefillable container type and reuse statements. The Agency intends to maintain on the EPA pesticide program web site (*www.epa.gov/pesticides* under the subject ''Pesticide Container and Containment Rule'') summaries of modification and waiver decisions made pursuant to § 156.140(c).

EPA is also making two editorial changes to the proposed introductory text of § 156.140(a)(5) to improve clarity. Specifically, EPA is changing the phrase ''in the following nonrefillable containers'' to read ''in the following types of nonrefillable containers, and their packaging'' and the phrase ''in this section'' to read ''of this section.''

Four commenters suggested changes and additions to the container types that were proposed to be exempt from the requirements to have ''Nonrefillable container'' and reuse statements on their labels.

One commenter requested that the Agency specifically exempt products in polyethylene sleeve packages whose contents would need to be mixed with water. The commenter explained that the product user fills a container (such as a bucket) with water, opens a portion control packet and empties the entire contents into the water in the container. The portion control packet is not designed to be resealed and it does not appear likely to be reused. Although EPA considers this container type within the scope of the existing exemption for ''any package destroyed by the use of the product contained,'' the commenter asked EPA to specifically exempt this container type for clarity. The Agency has identified the rodenticide placepack as a similar type of product, in that it is also a portion control packet and in packaging destroyed by use of the product contained.

The Agency believes that one-time use portion control packets are sufficiently common that a specific exemption may assist the regulated community, even if not strictly necessary. Therefore, the Agency is exempting ''one-time use portion control packets, such as polyethylene sleeve packages or rodenticide placepacks'' from the nonrefillable container type and reuse statements in the final rule by adding this container type to the list of exempt container types in § 156.140(a)(5).

One commenter suggested that the proposed list lacks a major segment of bait station containers. This commenter suggested adding language to include ''prefilled, non-refillable ant, roach and termite insecticide bait stations not intended to be opened or activated in a manner that exposes the contents to human contact'' which includes any child-resistant bait station. Another commenter suggested that the term ''tamper-resistant bait station'' is generally used for rodent control products while ''child resistant packaging'' is generally used for insecticide bait stations. Therefore, the commenter suggested changing ''tamper-resistant bait stations'' to ''tamper-resistant insecticide and rodenticide bait stations.''

The Agency has decided to change ''tamper-resistant bait stations'' to ''one-time use bait stations.'' One-time use bait stations more clearly describes the category of products EPA intended to exempt: bait stations for any pest that are not designed to be refilled and usually cannot be opened without causing significant damage to them. Distinctions between tamper-resistant and child-resistant packaging, or between target pests, are not relevant to this exemption. ''Tamper-resistant cages for repellent or trapping strips'' is also being changed to ''one-time use cages for repellent or trapping strips'' for the same reasons.

For consistency, EPA is also changing the phrases ''nonrefillable'' and ''single use'' to ''one-time use'' in the description of other container types in § 156.140(a)(5). For clarity, EPA is also changing the last phrase in the description of caulking tubes and other squeezable tubes from ''for paste, gel, or other similar formulas'' to ''for paste, gel, or other similar substances.''

Shortly after the comment period, EPA received questions that highlighted other container types that could also be considered inherently nonrefillable. First, devices are exempt from registration under FIFRA section 3, but are subject to some of the requirements set forth in FIFRA and 40 CFR (per 40 CFR 152.500), including the label requirements in 40 CFR part 156. The labeling requirements added to 40 CFR part 156 by the container and containment rule were primarily intended to address the risks of chemical residues in containers, and generally are not relevant to devices. Second, another commenter pointed out that cattle ear tags are similar to pet flea and tick collars and therefore they should also be exempted from the requirements in §§ 156.140(a)(1) and (a)(2). For both types of products, the plastic matrix releases a pesticide active ingredient over time while on the animal and cannot be reused or ''reloaded'' with the pesticide active ingredient. Although these two comments were not submitted on time, EPA agrees that these products should be exempted from the labeling requirements to identify a container as a nonrefillable container and a reuse statement. Accordingly, EPA is exempting devices and ''animal ear tags, such as cattle ear tags'' from §§ 156.140(a)(1) and (a)(2). EPA is exempting ''animal ear tags, such as cattle ear tags'' so that the same exemption will apply in similar situations for other animals.

Therefore, EPA is revising proposed § 156.140(a)(5) to exempt pesticide products in the following container types, and their packaging, from the requirements to have statements on the label regarding ''Nonrefillable containers'' in § 156.140(a)(1) and ''reuse'' in § 156.140(a)(2):

- Aerosol cans;
- Devices as defined in 40 CFR 152.500;
- One-time use caulking tubes and other one-time use squeezable tube containers for paste, gel, or other similar substances (e.g., crack and crevice application devices, unit dose application tubes);
- Foil packets for water soluble packaging, repellent wipes, and other one-time use products;
- One-time use portion control packets, such as polyethylene sleeve packages or rodenticide placepacks;
- One-time use bait stations;
- One-time use cages for repellent or trapping strips;
- Pet collars or animal ear tags, such as cattle ear tags;
- One-time use semiochemical dispersion devices;
- Any container that is destroyed by the use of the product contained; and
- Any container that would be destroyed if reuse of the container were attempted (for example, bacteriostatic water filter cartridges, blister cards, etc).

The Agency notes that for products described in the list above, the label may be on the container itself, on outer packaging, or both. The Agency believes

that neither the listed containers nor their outer packaging presents the type of risks addressed by the ''Nonrefillable container'' statement in § 156.140(a)(1) and the reuse statement in § 156.140(a)(2), and therefore intends that the exemption of these product or container types should apply to both the container itself and any outer packaging. To make this consistent for all of the exempted products, EPA has moved the references to packaging into the introductory paragraph of § 156.140(a)(5), so that the outer packaging of any exempt container is also exempt. For these same reasons, the Agency is deleting ''packaging'' from the exemption for ''packaging for pet collars,'' as proposed and replacing the term ''packaging'' with the term ''container'' in §§ 156.140(a)(5)(x) and (a)(5)(xi).

EPA also notes that by specifying in § 156.140(a)(5) certain products as ''one-time use'' the Agency does not intend to suggest that other exempted products are not required to be one-time use products. All products that are eligible for the § 156.140(a)(5) exemption must be one-time use containers (as the § 165.3 definition of nonrefillable container specifies that they be ''designed and constructed for one-time use''). For most products exempted by § 156.140(a)(5) (e.g., aerosol cans, packaging destroyed by use), restating the one-time use limitation would serve no purpose. However, for products where both one-time use and multiple use versions are common (i.e., bait stations, cages and semiochemical dispersion devices), EPA has included the ''one-time use'' designation as a reminder for persons subject to these regulations. Lastly, EPA is changing the introductory sentence in § 156.140(a)(5) as proposed from ''*Exemptions*. Pesticide products packaged in the following nonrefillable containers are exempt from the requirements in paragraphs (a)(1) and (a)(2) in this section:'' to ''*Exemptions*. Pesticide products in the following types of nonrefillable containers, and their packaging, are exempt from the requirements in paragraphs (a)(1) and (a)(2) of this section:''. EPA is deleting ''...packaged...'' from the proposed text and adding ''...and their packaging...'' to make it clear that the exemption applies to the container itself and any outer packaging, as discussed above. EPA is also changing the proposed text by adding ''...types of...'' in front of ''nonrefillable containers'' for clarity and changing ''in this section'' to ''of this section'' for consistency.

Also, the Agency did not propose to automatically exempt these container types from the requirement to have a statement about recycling/reconditioning because the Agency wants to facilitate recycling wherever feasible. One commenter had a different opinion and remarked that a label statement encouraging recycling could conflict with the requirements of local recycling programs, noting that aerosol containers are not accepted by many recycling programs. EPA is aware of some local recycling programs that are designed to accept aerosol containers, and EPA believes that recycling programs generally are expanding and that it is important to encourage recycling where available. Moreover, the recycling statements in § 156.140(a)(3) take availability of a recycling program into account, such as ''Offer for recycling if available.'' Finally, as discussed below, registrants will now have the option of applying for a waiver from the recycling label statement requirement if recycling is not appropriate for a specific container or product. For these reasons, the Agency has decided not to automatically exempt these containers from the recycling/reconditioning statement.

In § 156.140(b), EPA is finalizing the proposed changes and one additional change suggested by a commenter. To improve clarity, EPA is changing the beginning of the second sentence from ''If placed on the label, it must be...'' to ''If placed on the label, the statement must be...''

In § 156.140(c), the Agency proposed to add a new paragraph that would allow EPA, on a case-by-case basis, to modify or waive any of the label statements required by § 156.140. This paragraph is being added to § 156.140(c) as proposed. One commenter suggested exempting package types through guidance documents or making the ''nonrefillable container'' statement optional for certain package types because of the burden to request waivers and the Agency to review waivers. Another commenter suggested keeping a list through a Pesticide Registration Notice or on EPA's web site so that repeat requests would not have to be made on the same container types. Lastly, another commenter supported the modification/waiver provision as long as it was in addition to the list of exempt product container types in 40 CFR 156.140(a)(5). The Agency intends to maintain on the EPA pesticide program web site (*www.epa.gov/pesticides* under the subject ''Pesticide Container and Containment Rule''), summaries of decisions on requests for modifications and waivers.

In § 156.140(d), the Agency proposed to exempt from the label statements required in § 156.140, pesticide-impregnated clothing or other repellent-impregnated objects that are registered as pesticides and are not packaged in a container. One commenter requested that this exemption be expanded to all objects registered as pesticide products but not packaged in a container. The commenter explained that there are objects registered as a pesticide that are not ''pesticide-impregnated'' and, with technology advancing, there will be innovations in pesticide delivery systems. One example given was EPA's registration of copper alloy as an antimicrobial pesticide that can be fabricated into objects such as hospital bed railings. The commenter maintained that the same considerations the Agency is giving to repellent-impregnated fabric objects should apply to copper alloy as well as other future objects. Another commenter recommended an editorial change that would generally exempt ''repellent-impregnated fabric objects'' while giving clothing, tents or mosquito netting as examples.

Based on these comments, EPA reconsidered the exemption for pesticide-impregnated objects that are registered as pesticides and are not packaged in a container as proposed. Upon re-evaluation, EPA believes that it is more appropriate to revise this paragraph to exempt pesticidal articles from all of the label statements required by § 156.140. Note that while § 152.25(a) exempts from all requirements of FIFRA certain articles treated with a pesticide to protect the article itself, this new § 156.140(d) provides a more narrow exception to a broader class of articles. As discussed above for devices, the container and containment labeling requirements in 40 CFR part 156 were primarily intended to address the handling of chemical residues in containers. The Agency expects that any packaging or shipping containers for pesticidal articles would have minimal chemical residues, so it is not necessary or appropriate for the labels of these pesticides to have the same container handling statements. EPA believes that the specific pesticide products that were identified in the proposed exemption, including repellent-impregnated clothing and other repellent-impregnated fabric articles, such as tents or mosquito netting, are also exempted by the exemption for pesticidal articles in § 156.140(d).

This new exemption complements the existing exemption in § 152.25(a) in that it addresses pesticidal articles that do not qualify for the § 152.25(a) exemption. Section 152.25(a) provides a complete exemption from all requirements of FIFRA for qualifying

articles or substances treated with, or containing a pesticide, if: (1) the incorporated pesticide is registered for use in or on the article or substance, and; (2) the sole purpose of the treatment is to protect the article or substance itself. To qualify for the treated articles exemption, both conditions stated above must be met. If both are not met, the article or substance does not qualify for the exemption and is subject to regulation under FIFRA. Articles that meet both criteria in § 152.25(a) are exempt from all requirements of FIFRA, including the labeling requirements in 40 CFR part 156. Where a pesticidal article does not meet both criteria, the article is subject to regulation under FIFRA and therefore must be registered as a pesticide product and comply with all of the FIFRA requirements. The purpose of § 156.140(d) is to exempt these articles from the identification of container type label statements in § 156.140.

EPA acknowledges that there are likely to be situations where the identification of container type label statements would not be appropriate for a specific pesticide, such as objects registered as pesticide products but not packaged in a container, as described by the commenter. Some of these situations may be covered by the exemption for pesticidal articles in § 156.140(d). However, some of the pesticide products identified by the commenter may not be exempted by § 156.140(d). Because EPA expects that the number of these situations is small, EPA believes that they can be handled effectively by the modification/waiver provision in § 156.140(c) and through the pesticide registration process.

Shortly after the comment period, EPA received a question about why transport vehicles were not proposed to be exempted from the refillable container type statements in § 156.140(b) similar to the proposal to exempt transport vehicles from the residue removal label statements. The commenter pointed out that the same logic applies to the refillable container type statement and the residue removal requirement – that the label language is not tailored to the unique nature of transport vehicle containers. EPA agrees that transport vehicles are generally intended to be refilled with other pesticides or other chemicals so it does not make sense for the labels of pesticides that are distributed only in transport vehicles to include the statement ''Refillable container. Refill this container with pesticide [or common chemical name] only. Do not reuse this container for any other purpose.'' Therefore, EPA is adding a new exemption in § 156.140(e) that exempts transport vehicles from the requirements in that section.

C. Residue Removal Instructions

As proposed, EPA is adding three exemptions from the residue removal instruction requirements in § 156.144. EPA has modified the proposed exemption for compressed gas cylinders to eliminate unneeded language about container types. In its final form, the exemption from the residue removal instruction requirements applies to all pesticides that are gases, regardless of container shape. EPA believes that this improves the clarity and covers all of the containers, including compressed gas cylinders that were covered by the proposed exemption.

In § 156.144(f), the Agency also proposed to exempt pesticide-impregnated objects that are registered as pesticides (and not packaged in a container) from the residue removal requirements. The Agency is revising the exemption in § 156.144(f) in the same way as in § 156.140(d), for the reasons discussed above.

EPA revised the exemption for transport vehicles in § 156.144(g) for clarity and to be consistent with the format in § 156.140(e) and the other exemptions in § 156.144. In addition, it is no longer appropriate to include the parenthetical example of a transport vehicle because the full definition of transport vehicle is being added to § 156.3. EPA believes that the transport vehicle exemption in the final rule has the same effect as the proposed exemption, but is more straightforward and easier to understand.

D. Compliance Date

The Agency proposed changing the compliance date in § 156.159 for labeling requirements, from August 17, 2009 to August 17, 2010, and replacing the phrase ''distributed or sold'' with ''released for shipment.'' Section 156.159 was proposed to read:

> As of August 17, 2010, all pesticide products released for shipment by a registrant must have labels that comply with §§ 156.10(d)(7), 156.10(f), 156.10(i)(2)(ix), 156.140, 156.144, 156.146, and 156.156.

The Agency received seven comments supporting the proposed 1–year extension of the compliance date for labeling requirements and replacing ''distributed or sold'' with ''released for shipment.'' Several of these commenters were concerned that the proposed language could be interpreted to mean that on August 17, 2010 registrants would have to re-label all products that had been previously released for shipment. As discussed above, EPA has revised the proposed definition of ''released for shipment'' to clarify that, for purposes of FIFRA, the action of releasing a product for shipment occurs only once for a given pesticide product, and that a product remains in the condition of ''released for shipment'' unless subsequent activities constitute production. Also, for clarity and consistency, EPA is changing the proposed language by replacing ''all'' with ''any'' in ''...all pesticide products released for shipment...'' and ''have labels'' with ''must bear a label'' in ''...must have labels that comply with...''. In addition, the Agency is adopting the following language to make it clear that the label requirements will apply only to products released for shipment after the compliance date:

> Any pesticide product released for shipment by a registrant after August 16, 2010 must bear a label that complies with §§ 156.10(d)(7), 156.10(f), 156.10(i)(2)(ix), 156.140, 156.144, 156.146, and 156.156.

Thus, pesticide products released for shipment on or before August 16, 2010 are not required to comply with the requirements cited in the sentence above. Similar changes have been made to the compliance date and associated language for nonrefillable containers in § 165.20(c). In § 165.40(c) and § 165.60(c) the Agency is changing the language regarding ''released for shipment'' and the compliance date from ''As of August 16, 2011...'' to ''...after August 16, 2011.'' The compliance date is being changed by one day so that all compliance dates will be ''...after August 16th...'' to help avoid confusion.

V. Amendments to 40 CFR Part 165—Pesticide Management and Disposal

EPA proposed a number of changes to the container and containment regulations in part 165 to provide clarification and to correct editorial and other errors. Unless otherwise indicated, EPA is adopting the changes as proposed.

For consistency, the Agency is changing the proposed introductory language ''In addition, as used in this part, the following terms shall apply.'' by replacing the term ''apply'' with the phrase ''have the meanings set forth below.'' In addition to adopting the proposed changes to the definitions in 165.3, the Agency is making editorial changes by renaming ''Pesticide compatible'' as applied to containment as ''Pesticide compatible as applied to containment'' and ''Pesticide compatible'' as applied to containers as ''Pesticide compatible as applied to containers.'' The Agency is making

other editorial changes as suggested by one commenter to the definitions of ''Pesticide compatible as applied to containment'' and ''Suspension concentrate.''

EPA is adopting the language as proposed with one minor revision suggested by a commenter, by replacing the word ''capacity'' with ''capability'' to avoid confusion with the new definition of ''capacity.''

The Agency proposed to use the existing definition for ''flowable concentrate'' but rename it as ''suspension concentrate'' as suggested by stakeholders. The proposed definition for ''suspension concentrate'' was ''...a stable suspension of active ingredients in a liquid intended for dilution with water before use.'' A commenter pointed out that as written, it could include capsule suspension (microencapsulated) as well as flowable concentrates, but to apply only to flowable concentrates it should read ''...a stable suspension of solid particulate active ingredients...'' The Agency is making this change as suggested because rinsing data shows that microencapsulated formulations are not as difficult to remove as stable suspensions of solid particulate active ingredients. Also, ''flowable concentrate'' is being replaced with ''suspension concentrate'' in § § 165.25(f)(2) and 165.27(b)(5).

The Agency is changing the following existing definitions in § 165.3 as suggested by a commenter: ''dry pesticide,'' ''nonrefillable container,'' ''rinsate,'' and ''washwater.''

The original definition of ''dry pesticide'' was ''...any pesticide that is in solid form and that has not been combined with liquids; this includes formulations such as dusts, wettable powders, dry flowable powders, granules, and dry baits.'' The list is being changed by replacing ''dry flowable powders'' with ''dry flowables'' and by adding ''water-soluble powders.'' A commenter explained that pesticide formulations described as ''dry flowable'' are formulated into small granules, not powder. ''Water-soluble powders'' is being added to the list because it is an example of a dry pesticide.

The original definition of ''nonrefillable container'' provided, in part, that they be ''for one time containment of a pesticide for sale or distribution.'' A commenter suggested that the term ''containment'' was used inappropriately in this definition because ''containment'' is used elsewhere in the container and containment rule to refer to various structures intended to contain spills, washwater, etc. To avoid any confusion, EPA is amending the definition for ''nonrefillable container'' by replacing ''one time containment of a pesticide for sale or distribution.'' with ''one-time use and is not intended to be filled again with a pesticide for sale or distribution.''

The original definition of ''rinsate'' was ''...the liquid produced from the rinsing of the interior of any equipment or container that has come in direct contact with any pesticide.'' The Agency is amending the definition to replace ''produced'' with ''resulting'' to avoid any confusion with the definition of ''produced'' as defined in FIFRA. Similarly, the original definition of ''washwater'' was ''...the liquid produced from the rinsing of the exterior of any equipment or containers that have or may have come in direct contact with any pesticide or system maintenance compound.'' The Agency is also amending the definition of ''washwater'' by replacing ''produced'' with ''resulting,'' and by adding examples of such liquids (i.e., such as oil or antifreeze).

The Agency is changing the language associated with the compliance date in § 165.20(c), § 165.40(c), and § 165.60(c) to be consistent with the revision in § 156.159, for the reasons discussed above. In addition, the Agency is changing the compliance date in § 165.40(c), and § 165.60(c) so that they all read ''...after August 16,...'' regardless of the year. The Agency is correcting errors in §§ 165.25(a), 165.25(b)(1), and 165.25(b)(2), as proposed, as well as in § 165.45(b)(2) by changing ''part 107 subpart B'' to read ''49 CFR part 107 subpart B.''

A commenter suggested that EPA provide a more detailed reference for the EPA test procedure ''Rinsing Procedures for Dilutable Pesticide Products in Rigid Containers'' cited in § 165.25(f)(1). The Agency considered this suggestion, but decided not to revise the regulatory text because the protocol is readily available. It is in the docket for the final rule and the Agency intends to keep it posted on the EPA pesticide program web site (*www.epa.gov/pesticides* under the subject ''Pesticide Container and Containment Rule''). EPA is correcting an error made in the proposed change to § 165.43(e)(1), by replacing ''is'' with ''if'' in the phrase that reads in part ''...to prevent an unreasonable adverse effect on the environment is all of the following conditions exist:''

In addition to making these changes, EPA is making several changes in 40 CFR part 165 in response to a commenter. Those changes are: inserting the specific regulations referenced (49 CFR parts 171-180) in § 165.45(e) and adding ''or'' as in ''equal to or greater than'' in § 165.45 (f). As suggested by a commenter, for consistency EPA is replacing ''stationary liquid pesticide container,'' with ''stationary container of liquid pesticides,'' ''stationary dry pesticide container'' with ''stationary container of dry pesticides,'' ''stationary liquid pesticide containment'' with ''secondary containment units for stationary containers of liquid pesticides,'' and ''stationary dry pesticide containment'' with ''secondary containment units for stationary containers of dry pesticides'' in § 165.45(f); § 165.85(c), (d) and (f); and § 165.87(c), (d) and (f).

EPA is changing slightly the wording of § 165.60(c) as proposed. The phrase ''must have been repackaged'' is changed to read ''must be repackaged.'' This change is being made for clarity since § 165.60 contains the general provisions of Subpart D – Standards for Repackaging Pesticide Products into Refillable Containers.

EPA is making minor editorial changes in § 165.67(d) and § 165.70(e)(5)(i) by replacing the word ''referenced'' with the word ''referred to.'' EPA is correcting a mistake made in proposed § 165.85(a)(3) and 165.87(a)(3) where the word ''able'' had been omitted in the proposed language the phrase ''compatible means to withstand'' is corrected to read ''compatible means able to withstand.''

In discussions with stakeholders, EPA was asked to consider a change to § 165.90(a)(5). The Agency's intention of requiring lockable valves on stationary pesticide containers (if required by § 165.45(f)) was to mitigate the risks associated with vandalism and theft. The Agency agrees with stakeholders that locking the entrances to the facility when it is unattended would achieve the same purpose. Therefore, the EPA is amending § 165.90(a)(5) to state that, when lockable valves are required, the owner or operator of a facility must ensure that the lockable valves on stationary containers are locked or that the facility itself is locked, whenever the facility is unattended.

EPA has also decided to amend § 165.90(b)(2) to expressly include weather among the factors relevant to determining whether repairs are completed ''within a time frame that is reasonable.'' EPA has always understood that weather affects operators' ability to seal cracks and gaps in a containment structure or appurtenances, and is making this explicit in the regulation.

VI. Economic Impacts

EPA prepared two Economic Analyses (EAs) of the potential costs and benefits associated with the August 16, 2006, Container and Containment Rule, one for the container requirements and another for the containment requirements. The EAs, entitled ''Economic Analysis of the Pesticide Container Design and Residue Removal Standards'' and ''Economic Analysis of the Bulk Pesticide Containment Structure Regulations,'' are available in the docket for the pesticide container and containment rule at *http://www.regulations.gov* under docket identification number EPA–HQ–OPP–2005–0327. The Agency has prepared an addendum to these EAs to address the changes in the estimated impacts resulting from this final rule. The addendum to the EA, entitled ''Addendum to the June 1, 2006, Economic Analysis of the Bulk Pesticide Container Design and Residue Removal Standards'' is briefly summarized here, and is available in the docket for this rulemaking.

EPA estimated the total annual cost of the August 16, 2006, Container and Containment Rule to be $11.3 million ($8.37 million for containers plus $2.93 million for containment) and the total annual benefits from the final rule to be $17 to $23.4 million. When the estimated cost of the August 16, 2006, rule is adjusted to consider the amendments being finalized, there is an annual cost reduction of approximately $0.23 to $0.32 million due to a reduction in the number of labels that would need to be revised. There is no difference in the total annual benefits from the August 16, 2006 rule.

VII. FIFRA Mandated Reviews

In accordance with FIFRA section 25(a), the Agency submitted a draft of this final rule to the Committee on Agriculture in the House of Representatives, the Committee on Agriculture, Nutrition, and Forestry in the United States Senate, and the FIFRA Scientific Advisory Panel (SAP). The SAP and the Secretary of Agriculture waived review of this final rule.

VIII. Statutory and Executive Order Reviews

A. Executive Order 12866

Under Executive Order 12866, entitled *Regulatory Planning and Review* (58 FR 51735, October 4, 1993), the Office of Management and Budget (OMB) has determined that this final rule is not a ''significant regulatory action'' because these requirements will not raise novel legal or policy issues arising out of legal mandates, the President's priorities, or the principles set forth in the Executive Order. As such, this final rule is not subject to review under Executive Order 12866.

B. Paperwork Reduction Act (PRA)

This action does not impose any new information collection burden or activities requiring approval under the Paperwork Reduction Act, 44 U.S.C. 3501 *et seq.* The information collection activities contained in the existing regulations are already approved under OMB control number 2070–0133, and are also identified under EPA ICR No. 1632. 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 (RFA)

Pursuant to section 605(b) of the Regulatory Flexibility Act (RFA) (5 U.S.C. 601 *et seq.*), the Agency hereby certifies that this final rule does not have a significant adverse economic impact on a substantial number of small entities. This final rule is expected to result in a slight 2% to 3% decrease in the estimated total costs of the Container and Containment Rule. As such, there are not expected to be any adverse economic impacts of affected entities, regardless of their size. The factual basis for the Agency's determination is presented in the addendum to the EA, entitled ''Addendum to the June 1, 2006, Economic Analysis of the Bulk Pesticide Container Design and Residue Removal Standards,'' prepared for this final rule, which is summarized in Unit VI., and a copy of which is available in the docket for this rulemaking. The following is a brief summary of the factual basis for this certification.

Under the RFA, small entities include small businesses, small organizations, and small governmental jurisdictions. For purposes of assessing the impacts of this final rule on small entities, small entity is defined in accordance with the RFA as: (1) A small business as defined by the Small Business Administration's (SBA) regulations at 13 CFR 121.201; (2) a small governmental jurisdiction that is a government of a city, county, town, school district, or special district with a population of less than 50,000; and (3) a small organization that is any not-for-profit enterprise which is independently owned and operated and is not dominant in its field.

Based on the industry profiles that EPA prepared as part of the EAs for the 2006 rulemaking, EPA determined that the 2006 rulemaking was not expected to impact any small not-for-profit organizations or small governmental jurisdictions. Since this is an amendment to that rulemaking, EPA has determined that this determination also applies to this final rule. As such, ''small entity'' for purposes of the addendum EA prepared for this final rule, is synonymous with ''small business.'' Using the size standards established by the Small Business Administration, ''small businesses'' potentially impacted by this final rule are expected to include the same types of businesses described in the EAs prepared for the 2006 rulemaking. As indicated in those EAs, the small business size standard varies based on the primary NAICS code associated with the business. Specifically, the small businesses size standards vary from 100 or fewer workers (e.g., NAICS code 422910, Farm Suppliers Wholesalers) to 1,000 or fewer workers (e.g., NAICS code 325188, Inorganic Chemical Manufacturing), with the majority of small businesses having 500 or fewer workers (e.g., NAICS code 325320, Pesticide/Agricultural Chemical Manufacturing).

In general, EPA strives to minimize potential adverse impacts on small entities when developing regulations to achieve the environmental and human health protection goals of the statute and the Agency. EPA solicits comments specifically about potential small business impacts.

D. Unfunded Mandates Reform Act (UMRA)

Title II of the Unfunded Mandates Reform Act of 1995 (UMRA), 2 U.S.C. 1531-1538, requires Federal agencies, unless otherwise prohibited by law, to assess the effects of their regulatory actions on State, local, and tribal governments and the private sector. Federal agencies must also develop a plan to provide notice to small governments that might be significantly or uniquely affected by any regulatory requirements. The plan must enable officials of affected small governments to have meaningful and timely input in the development of EPA regulatory proposals with significant Federal intergovernmental mandates and must inform, educate, and advise small governments on compliance with the regulatory requirements.

This rule does not contain a Federal mandate that may result in expenditures of $100 million or more for State, local, and tribal governments, in the aggregate, or for the private sector in any one year. As explained in Unit VI., EPA estimates

that the amendments being finalized will reduce the annual estimated costs of the pesticide container and containment regulations by approximately $0.23 to $0.32 million due to a reduction in the number of labels that would need to be revised. Thus, this rule is not subject to the requirements of sections 202 and 205 of UMRA.

This rule 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. Because State, local, and tribal governments are rarely pesticide applicants or registrants, this rule is not expected to affect small governments.

E. Executive Order 13132

Pursuant to Executive Order 13132, entitled *Federalism* (64 FR 43255, August 10, 1999), EPA has determined that this final rule does not have ''federalism implications,'' because it would not have substantial direct effects on the States, on the relationship between the national government and the States, or on the distribution of power and responsibilities among the various levels of government, as specified in the Order. Thus, Executive Order 13132 does not apply to this rule.

F. Executive Order 13175

This action does not have tribal implications, as specified in Executive Order 13175 (65 FR 67249, November 9, 2000). EPA has determined that this action does not have tribal implications because it will not have substantial direct effects on tribal governments, 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, as specified in the Order. EPA is not aware of any tribal governments which are pesticide registrants, refillers or dealers storing large quantities of pesticides. Thus, Executive Order 13175 does not apply to this action.

G. Executive Order 13045

Executive Order 13045, entitled *Protection of Children from Environmental Health Risks and Safety Risks* (62 FR 19885, April 23, 1997), does not apply to this action because it is not designated as a ''significant'' regulatory action as defined by Executive Order 12866 (see Unit VIII.A.), nor does it establish an environmental standard that is intended to have a negative or disproportionate effect on children. EPA interprets Executive Order 13045 as applying only to those regulatory actions that concern health or safety risks, such that the analysis required under section 5-501 of the Executive Order has the potential to influence the regulations. This action does not establish an environmental standard intended to mitigate health or safety risks.

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

This action is not subject to Executive Order 13211 (66 FR 28355, May 22, 2001) because it is not a significant regulatory action under Executive Order 12866.

I. National Technology Transfer Advancement Act

Section 12(d) of the National Technology Transfer and Advancement Act of 1995 (NTTAA), 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, business practices, etc.) that are developed or adopted by voluntary consensus standards bodies. NTTAA directs EPA to provide Congress, through OMB, explanations when the Agency decides not to use available and applicable voluntary consensus standards. This action does not impose any technical standards that would require Agency consideration of voluntary consensus standards.

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 final rule amends the existing container and containment regulations to extend the compliance date for the label changes, provide certain exemptions to label language requirements, and make changes to improve the clarity of the regulations. None of these changes affect the level of protection provided to human health or the environment by the container and containment regulations.

IX. Congressional Review Act

The Congressional Review Act, 5 U.S.C. 801 *et seq.*, generally provides that before a rule may take effect, the Agency promulgating the rule must submit a rule report to each House of the Congress and 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**. This rule is not a ''major rule'' as defined by 5 U.S.C. 804(2).

List of Subjects in 40 CFR Parts 152 and 156

Environmental protection, Labeling, Pesticides and pests.

List of Subjects in 40 CFR Part 165

Environmental protection, Packaging and containers, Containment structures, Pesticides and pests.

Dated: October 17, 2008.

Stephen L. Johnson,

Administrator.

■ Therefore, 40 CFR chapter I is amended as follows:

PART 152—[AMENDED]

■ 1. The authority citation for part 152 continues to read as follows:

Authority: 7 U.S.C. 136-136y; Subpart U is also issued under 31 U.S.C. 9701.

■ 2. Amend § 152.3 by adding alphabetically a definition for ''Released for Shipment'' to read as follows:

§ 152.3 Definitions.

* * * * *

Released for shipment. A product becomes released for shipment when the producer has packaged and labeled it in the manner in which it will be distributed or sold, or has stored it in an area where finished products are ordinarily held for shipment. Products stored in an area where finished products are ordinarily held for shipment, but which are not intended to be released for shipment must be physically separated and marked as not yet released for shipment. Once a product becomes released for shipment, the product remains in the condition of being released for shipment unless subsequent activities, such as relabeling or repackaging, constitute production.

* * * * *

PART 156—[AMENDED]

■ 3. The authority citation for part 156 continues to read as follows:

Authority: 7 U.S.C. 136 through 136y.

■ 4. Add § 156.3 to read as follows:

§ 156.3 Definitions.

Terms used in this part have the same meaning as in the Act and part 152 of this chapter. In addition, as used in this part, the following terms shall have the meanings set forth below.

Dilutable means that the pesticide product's labeling allows or requires the pesticide product to be mixed with a liquid diluent prior to application or use.

Transport vehicle means a cargo-carrying vehicle such as an automobile, van, tractor, truck, semitrailer, tank car or rail car used for the transportation of cargo by any mode.

■ 5. Amend § 156.140 by revising the introductory text of paragraph (a), by revising the introductory text of paragraph (b), and by adding paragraphs (a)(5), (c), (d) and (e) to read as follows:

§ 156.140 Identification of container types.

* * * * *

(a) *Nonrefillable container.* For nonrefillable containers, the statements in paragraphs (a)(1) through (a)(4) of this section are required except as provided in paragraphs (a)(5), (c), (d), and (e) of this section. If placed on the label, the statements in paragraphs (a)(1) through (a)(3) of this section must be under an appropriate heading under the heading ''Storage and Disposal.'' If any of the statements in paragraphs (a)(1) through (a)(3) of this section are placed on the container, an appropriate referral statement such as ''See container for recycling [or other descriptive word] information.'' must be placed on the label under the heading ''Storage and Disposal.''

* * * * *

(5) *Exemptions.* Pesticide products in the following types of nonrefillable containers, and their packaging, are exempt from the requirements in paragraphs (a)(1) and (a)(2) of this section:

(i) Aerosol cans.

(ii) Devices as defined in § 152.500 of this chapter.

(iii) One-time use caulking tubes and other one-time use squeezable tube containers for paste, gel, or other similar substances.

(iv) Foil packets for water soluble packaging, repellent wipes, and other one-time use products.

(v) One-time use portion control packets, such as polyethylene sleeve packages, or rodenticide placepacks.

(vi) One-time use bait stations.

(vii) One-time use cages for repellent or trapping strips.

(viii) Pet collars or animal ear tags, such as cattle ear tags.

(ix) One-time use semiochemical dispersion devices.

(x) Any container that is destroyed by the use of the product contained.

(xi) Any container that would be destroyed if reuse of the container were attempted.

(b) *Refillable container.* For refillable containers, one of the following statements is required, except as provided in paragraphs (c), (d), and (e) of this section. If placed on the label, the statement must be under the heading ''Storage and Disposal.'' If the statement is placed on the container, an appropriate referral statement, such as ''Refilling limitations are on the container.'' must be placed under the heading ''Storage and Disposal.''

* * * * *

(c) *Modification.* EPA may, on its own initiative or based on data or information submitted by any person, modify or waive the requirements of this section or permit or require alternative labeling statements.

(d) *Exemption for articles.* Pesticidal articles that are not exempted from FIFRA regulation by § 152.25(a) of this chapter are exempt from the requirements of this section.

(e) *Exemption for transport vehicles.* Transport vehicles are exempt from the requirements of this section.

■ 6. Amend § 156.144 by revising paragraph (a), and by adding paragraphs (e), (f), and (g) to read as follows:

§ 156.144 Residue removal instructions–general.

(a) *General.* Except as provided by paragraphs (c) through (g) of this section, the label of each pesticide product must include the applicable instructions for removing pesticide residues from the container prior to container disposal that are specified in § 156.146 and § 156.156. The residue removal instructions are required for both nonrefillable and refillable containers.

* * * * *

(e) *Exemption for gases.* Pesticide products that are gaseous at atmospheric temperature and pressure are exempt from the residue removal instruction requirements in this section through § 156.156.

(f) *Exemption for articles.* Pesticidal articles that are not exempted from FIFRA regulation by § 152.25(a) of this chapter are exempt from the residue removal instruction requirements in this section through § 156.156.

(g) *Exemption for transport vehicles.* Transport vehicles are exempt from the requirements in this section through § 156.156.

■ 7. Revise § 156.159 to read as follows:

§ 156.159 Compliance date.

Any pesticide product released for shipment by a registrant after August 16, 2010 must bear a label that complies with §§ 156.10(d)(7), 156.10(f), 156.10(i)(2)(ix), 156.140, 156.144, 156.146, and 156.156.

PART 165—[AMENDED]

■ 8. The authority citation for part 165 will continue to read as follows:

Authority: 7 U.S.C. 136 through 136y.

■ 9. Amend § 165.3 as follows:

■ a. By adding an introductory paragraph.

■ b. By revising the definitions for ''Agricultural pesticide'', ''Dry pesticide'', ''Nonrefillable container''.

■ c. By revising the introductory text of the definition of ''Pesticide compatible'' which immediately follows the definition for the term ''Owner''.

■ d. By revising the definition of the term ''Pesticide compatible'' which immediately precedes the definition of the term ''Pesticide dispensing area.''

■ e. By revising the definition of the terms ''Rinsate'', and ''Washwater.''

■ f. By adding alphabetically new definitions for ''Capacity,'' ''Dilutable,'' and ''Suspension concentrate''.

■ g. By removing the definitions for ''Flowable concentrate,'' ''Pressure rinse,'' and ''Triple rinse.''

§ 165.3 Definitions.

Terms used in this part have the same meaning as in the Act and part 152 of this chapter. In addition, as used in this part, the following terms shall have the meanings set forth below.

* * * * *

Agricultural pesticide means any pesticide product labeled for use in or on a farm, forest, nursery, or greenhouse.

* * * * *

Capacity means, as applied to containers, the rated capacity of the container.

* * * * *

Dilutable means that the pesticide product's labeling allows or requires the pesticide product to be mixed with a liquid diluent prior to application or use.

Dry pesticide means any pesticide that is in solid form and that has not been combined with liquids; this includes formulations such as dusts, wettable powders, dry flowables, water-soluble powders, granules, and dry baits.

* * * * *

Nonrefillable container means a container that is not a refillable container and that is designed and constructed for one-time use and is not intended to be filled again with a pesticide for sale or distribution. Reconditioned containers are considered to be nonrefillable containers.

* * * * *

Pesticide compatible as applied to containers means that the container construction materials will not chemically react with the formulation. A container is not compatible with the formulation if, for example, the formulation:

* * * * *

Pesticide compatible as applied to containment means that the containment construction materials are able to withstand anticipated exposure to stored or transferred substances without losing the capability to provide the required containment of the same or other substances within the containment area.

* * * * *

Rinsate means the liquid resulting from the rinsing of the interior of any equipment or container that has come in direct contact with any pesticide.

* * * * *

Suspension concentrate means a stable suspension of solid particulate active ingredients in a liquid intended for dilution with water before use.

* * * * *

Washwater means the liquid resulting from the rinsing of the exterior of any equipment or containers that have or may have come in direct contact with any pesticide or system maintenance compound, such as oil or antifreeze.

■ 10. Amend § 165.20 by revising paragraph (c) to read as follows:

§ 165.20 General provisions.

* * * * *

(c) *When do I have to comply?* Any pesticide product packaged in a nonrefillable container and released for shipment by you after August 16, 2009 must be packaged in a nonrefillable container that complies with the regulations of this subpart.

■ 11. Amend § 165.23 by revising the heading of paragraph (d) to read as follows:

§ 165.23 Scope of pesticide products included.

* * * * *

(d) *How will EPA determine if an antimicrobial pesticide product otherwise exempted must be subject to the regulations in this subpart to prevent an unreasonable adverse effect on the environment?* * * *

* * * * *

■ 12. Amend § 165.25 by revising paragraphs (a), (b), and (f)(2) to read as follows:

§ 165.25 Nonrefillable Container Standards.

(a) *What Department of Transportation (DOT) standards do my nonrefillable containers have to meet under this part if my pesticide product is not a DOT hazardous material?* A pesticide product that does not meet the definition of a hazardous material in 49 CFR 171.8 must be packaged in a nonrefillable container that, if portable, is designed, constructed, and marked to comply with the requirements of 49 CFR 173.4, 173.5, 173.6, 173.24, 173.24a, 173.24b, 173.28, 173.155, 173.203, 173.213, 173.240(c), 173.240(d), 173.241(c), 173.241(d), part 178, and part 180 that are applicable to a Packing Group III material, or, if subject to a special permit, according to the applicable requirements of 49 CFR part 107 subpart B. The requirements in this paragraph apply to the pesticide product as it is packaged for transportation in commerce.

(b) *What DOT standards do my nonrefillable containers have to meet under this part if my pesticide product is a DOT hazardous material?* (1) If your pesticide product meets the definition of a hazardous material in 49 CFR 171.8, the DOT requires your pesticide product to be packaged according to 49 CFR parts 171-180 or, if subject to a special permit, according to the applicable requirements of 49 CFR part 107 subpart B.

(2) For the purposes of these regulations, a pesticide product that meets the definition of a hazardous material in 49 CFR 171.8 must be packaged in a nonrefillable container that, if portable, is designed, constructed, and marked to comply with the requirements of 49 CFR parts 171-180 or, if subject to a special permit, according to the applicable requirements of 49 CFR part 107 subpart B. The requirements in this paragraph apply to the pesticide product as it is packaged for transportation in commerce.

* * * * *

(f) * * *

(2) The test must be conducted only if the pesticide product is a suspension concentrate or if EPA specifically requests the records on a case by case basis.

* * * * *

■ 13. Amend § 165.27 by revising the introductory text of paragraph (b) and the introductory text of paragraph (b)(5), and by adding paragraphs (b)(4)(iii) and (b)(5)(iii) to read as follows:

§ 165.27 Reporting and recordkeeping.

* * * * *

(b) *What recordkeeping do I have to do for my nonrefillable containers?* For each pesticide product that is subject to §§ 165.25 through 165.27 and is distributed or sold in nonrefillable containers, you must maintain the records listed in this section for as long as a nonrefillable container is used to distribute or sell the pesticide product

and for 3 years after that. You must furnish these records for inspection and copying upon request by an employee of EPA or any entity designated by EPA, such as a State, another political subdivision or a Tribe. You must keep the following records:

* * * * *

(4) * * *

(iii) A copy of EPA's approval of a request for a waiver from the container dispensing requirement.

(5) At least one of the following records pertaining to the nonrefillable container residue removal requirement in § 165.25(f) if the pesticide product is a suspension concentrate or if EPA specifically requests the records on a case-by-case basis:

* * * * *

(iii) A copy of EPA's approval of a request for a waiver from the residue removal standard requirement.

■ 14. Amend § 165.40 by adding paragraph (b)(3), and by revising paragraph (c) to read as follows:

§ 165.40 General provisions.

* * * * *

(b) * * *

(3) If you are a refiller of a pesticide product and you are not a registrant of the pesticide product, § 165.45(a)(2) provides an exemption from some of the requirements in § 165.45(a)(1) .

(c) *When do I have to comply?* Any pesticide product packaged in a refillable container and released for shipment by you after August 16, 2011 must be packaged in a refillable container that complies with the regulations of this subpart.

■ 15. Amend § 165.43 by revising the introductory text of paragraphs (c) and (d) and the heading of paragraph (e) and (e)(1), and by revising paragraphs (f) and (g) to read as follows:

§ 165.43 Scope of pesticide products included.

* * * * *

(c) *Which antimicrobial pesticide products are not subject to the regulations in this subpart?* The regulations in this subpart do not apply to a pesticide product if it satisfies all of the following conditions:

* * * * *

(d) *Which requirements must an antimicrobial swimming pool product comply with if it is not exempt from these regulations?* An antimicrobial swimming pool product that is not exempt by paragraph (a), (b), or (c) of this section must comply with all of the regulations in this subpart except § 165.45(d) regarding marking and § 165.45(e) regarding openings. For the purposes of this subpart, an antimicrobial swimming pool product is a pesticide product that satisfies both of the following conditions:

* * * * *

(e) *How will EPA determine if an antimicrobial pesticide product otherwise exempted must be subject to the regulations in this subpart to prevent an unreasonable adverse effect on the environment?* (1) EPA may determine that an antimicrobial pesticide product otherwise exempted by paragraph (c) of this section must be subject to the refillable container regulations in this subpart to prevent an unreasonable adverse effect on the environment if all of the following conditions exist:

* * * * *

(f) *What other pesticide products are subject to the regulations in this subpart?* The regulations in this subpart apply to all pesticide products other than manufacturing use products, plant-incorporated protectants, and antimicrobial products that are exempt by paragraph (c) of this section. Antimicrobial products covered under paragraph (d) of this section are subject to the regulations indicated in paragraph (d) of this section.

(g) *What does ''pesticide product'' or ''pesticide'' mean in the rest of this subpart?* In § 165.43(h) through § 165.47, the term ''pesticide product'' or ''pesticide'' refers only to a pesticide product or a pesticide that is subject to the regulations in this subpart as described in paragraphs (a) through (f) of this section.

* * * * *

■ 16. Amend § 165.45 by revising paragraphs (a)(1), (b), (e), the introductory text of paragraph (f) and paragraph (f)(2) to read as follows:

§ 165.45 Refillable container standards.

(a) * * *

(1) A pesticide product that does not meet the definition of a hazardous material in 49 CFR 171.8 must be packaged in a refillable container that, if portable, is designed, constructed, and marked to comply with the requirements of 49 CFR 173.4, 173.5, 173.6, 173.24, 173.24a, 173.24b, 173.28, 173.155, 173.203, 173.213, 173.240(c), 173.240(d), 173.241(c), 173.241(d), part 178, and part 180 that are applicable to a Packing Group III material, or, if subject to a special permit, according to the applicable requirements of 49 CFR part 107 subpart B. The requirements in this paragraph apply to the pesticide product as it is packaged for transportation in commerce.

* * * * *

(b) *What DOT standards do my refillable containers have to meet under this part if my pesticide product is a DOT hazardous material?* (1) If your pesticide product meets the definition of a hazardous material in 49 CFR 171.8, the DOT requires your pesticide product to be packaged according to 49 CFR parts 171-180 or, if subject to a special permit, according to the applicable requirements of 49 CFR part 107 subpart B.

(2) For the purposes of these regulations, a pesticide product that meets the definition of a hazardous material in 49 CFR 171.8 must be packaged in a refillable container that, if portable, is designed, constructed, and marked to comply with the requirements of 49 CFR parts 171-180 or, if subject to a special permit, according to the applicable requirements of 49 CFR part 107 subpart B. The requirements in this paragraph apply to the pesticide product as it is packaged for transportation in commerce.

* * * * *

(e) *What standards for openings do my refillable containers have to meet?* If your refillable container is a portable pesticide container that is designed to hold liquid pesticide formulations and is not a cylinder that complies with the DOT Hazardous Materials Regulations in 49 CFR parts 171-180, each opening of the container other than a vent must have a one-way valve, a tamper-evident device or both. A one-way valve may be located in a device or system separate from the container if the device or system is the only reasonably foreseeable way to withdraw pesticide from the container. A vent must be designed to minimize the amount of material that could be introduced into the container through it.

(f) *What standards do my stationary pesticide containers have to meet?* If a stationary pesticide container designed to hold undivided quantities of pesticides equal to or greater than 500 gallons (1,890 liters) of liquid pesticide or equal to or greater than 4,000 pounds (1,818 kilograms) of dry pesticide is located at the refilling establishment of a refiller operating under written contract to you, the stationary pesticide container must meet the following standards:

* * * * *

(2) Each stationary container of liquid pesticides must meet all of the following standards:

(i) Each stationary container of liquid pesticides must be equipped with a vent or other device designed to relieve

excess pressure, prevent losses by evaporation, and exclude precipitation.

(ii) External sight gauges, which are pesticide-containing hoses or tubes that run vertically along the exterior of the container from the top to the bottom, are prohibited on stationary containers of liquid pesticides.

(iii) Each connection on a stationary container of liquid pesticides that is below the normal liquid level must be equipped with a shutoff valve which is capable of being locked closed. A shutoff valve must be located within a secondary containment unit if one is required by subpart E of this part.

* * * * *

■ 17. Amend § 165.60 by revising paragraph (c) to read as follows:

§ 165.60 General provisions.

* * * * *

(c) *When do I have to comply?* Any pesticide product repackaged into a refillable container and released for shipment by you after August 16, 2011 must be repackaged in compliance with the regulations of this subpart.

■ 18. Amend § 165.63 by revising paragraph (d)(1) to read as follows:

§ 165.63 Scope of pesticide products included.

* * * * *

(d) * * * (1) An antimicrobial swimming pool product that is not exempt by paragraph (a), (b), or (c) of this section must comply with all of the regulations in this subpart except for the following requirements:

Requirement	Requirement for registrants who distribute or sell directly in refillable containers	Requirement for refillers who are not registrants
Recordkeeping specific to each instance of repackaging	§ 165.65(i)(2)	§ 165.70(j)(2)
Container inspection: criteria regarding a serial number or other identifying code	§ 165.65(e)(2)	§ 165.70(f)(2)
Container inspection: criteria regarding one-way valve or tamper-evident device	§ 165.65(e)(3)	§ 165.70(f)(3)
Cleaning requirement: criteria regarding one-way valve or tamper-evident device	§ 165.65(f)(1)	§ 165.70(g)(1)
Cleaning if the one-way valve or tamper-evident device is not intact	§ 165.65(g)	§ 165.70(h)

* * * * *

■ 19. Amend § 165.65 by revising paragraph (i)(2)(iii) to read as follows:

§ 165.65 Registrants who distribute or sell pesticide products in refillable containers.

* * * * *

(i) * * *

(2) * * *

(iii) The serial number or other identifying code of the refillable container.

■ 20. Amend § 165.67 by revising paragraphs (b)(2)(ii) and (d) to read as follows:

§ 165.67 Registrants who distribute or sell pesticide products to refillers for repackaging.

* * * * *

(b) * * *

(2) * * *

(ii) The pesticide product is repackaged by a refilling establishment registered with EPA as required by § 167.20 of this chapter at the site of a user who intends to use or apply the product.

* * * * *

(d) *When must I provide the written contract to the refiller?* If you allow a refiller to repackage your product as specified in paragraph (b) of this section you must provide the written contract referred to in paragraph (b)(3) of this section to the refiller before you distribute or sell the pesticide product to the refiller.

* * * * *

■ 21. Amend § 165.70 by revising paragraphs (b)(2)(ii), (e)(5)(i), and (j)(2)(iii) to read as follows:

§ 165.70 Refillers who are not registrants.

* * * * *

(b) * * *

(2) * * *

(ii) The pesticide product is repackaged by a refilling establishment registered with EPA as required by § 167.20 of this chapter at the site of a user who intends to use or apply the product.

* * * * *

(e) * * *

(5) * * *

(i) The written contract referred to in paragraph (b)(3) of this section from the pesticide product's registrant.

* * * * *

(j) * * *

(2) * * *

(iii) The serial number or other identifying code of the refillable container.

■ 22. Amend § 165.80 by revising paragraph (b)(1) to read as follows:

§ 165.80 General provisions.

* * * * *

(b) ***

(1) Refilling establishments who repackage agricultural pesticides and whose principal business is retail sale (i.e., more than 50% of total annual revenue comes from retail operations).

* * * * *

■ 23. Amend § 165.85 by revising paragraph (a)(3),the introductory text of paragraph (c), paragraphs (c)(1), (c)(2), (d)and (f) to read as follows:

§ 165.85 Design and capacity requirements for new structures.

(a) * * *

(3) The containment structure must be made of materials compatible with the pesticides stored. In this case, compatible means able to withstand anticipated exposure to stored or transferred substances and still provide containment of those same or other substances within the containment area.

* * * * *

(c) *For new secondary containment units for stationary containers of liquid pesticides and new containment pads in pesticide dispensing areas, what are the capacity requirements?* These are the capacity requirements:

(1) New secondary containment units for stationary containers of liquid pesticides, if protected from precipitation, must have a capacity of at least 100 percent of the volume of the largest stationary pesticide container plus the volume displaced by other

containers and appurtenances within the unit.

(2) New secondary containment units for stationary containers of liquid pesticides, if exposed to or unprotected from precipitation, must have a capacity of at least 110 percent of the volume of the largest stationary pesticide container plus the volume displaced by other containers and appurtenances within the unit.

* * * * *

(d) *For new secondary containment units for stationary containers of liquid pesticides, what are the specific design requirements?* You must either anchor or elevate each stationary container of liquid pesticides protected by a new secondary containment unit to prevent flotation in the event that the secondary containment unit fills with liquid.

* * * * *

(f) *For new secondary containment units for stationary containers of dry pesticides, what are the specific design requirements?* These are the specific design requirements for new secondary containment units for stationary containers of dry pesticides:

(1) The stationary containers of dry pesticides within the containment unit must be protected from wind and precipitation.

(2) Stationary containers of dry pesticides must be placed on pallets or a raised concrete platform to prevent the accumulation of water in or under the pesticide.

(3) The storage area for stationary containers of dry pesticides must include a floor that extends completely beneath the pallets or raised concrete platforms on which the stationary containers of dry pesticides must be stored.

(4) The storage area for stationary containers of dry pesticides must be enclosed by a curb a minimum of 6 inches high that extends at least 2 feet beyond the perimeter of the container.

■ 24. Amend § 165.87 by revising paragraph (a)(3),the introductory text of paragraph (c), paragraphs (c)(1), (d)and (f) to read as follows:

§ 165.87 Design and capacity requirements for existing structures.

(a) * * *

(3) The containment structure must be made of materials compatible with the pesticides stored. In this case, compatible means able to withstand anticipated exposure to stored or transferred substances and still provide containment of those same or other substances within the containment area.

* * * * *

(c) *For existing secondary containment units for stationary containers of liquid pesticides and existing containment pads in pesticide dispensing areas, what are the capacity requirements?* These are the capacity requirements:

(1) Existing secondary containment units for stationary containers of liquid pesticides must have a capacity of at least 100 percent of the volume of the largest stationary pesticide container plus the volume displaced by other containers and appurtenances within the unit.

* * * * *

(d) *For existing secondary containment units for stationary containers of liquid pesticides, what are the specific design requirements?* You must either anchor or elevate each stationary container of liquid pesticides protected by an existing secondary containment unit to prevent flotation in the event that the secondary containment unit fills with liquid.

* * * * *

(f) *For existing secondary containment units for stationary containers of dry pesticides, what are the specific design requirements?* These are the specific design requirements for existing secondary containment units for stationary containers of dry pesticides:

(1) The stationary containers of dry pesticides within the containment unit must be protected from wind and precipitation.

(2) Stationary containers of dry pesticides must be placed on pallets or a raised concrete platform to prevent the accumulation of water in or under the pesticide.

(3) The storage area for stationary containers of dry pesticides must include a floor that extends completely beneath the pallets or raised concrete platforms on which the stationary containers of dry pesticides must be stored.

(4) The storage area for stationary containers of dry pesticides must be enclosed by a curb a minimum of 6 inches high that extends at least 2 feet beyond the perimeter of the container.

■ 25. Amend § 165.90 by revising paragraphs (a)(2), (a)(5), (b)(1), (b)(2), and (b)(3) to read as follows:

§ 165.90 Operational, inspection and maintenance requirements for all new and existing containment structures.

(a) * * *

(2) Ensure that pesticide spills and leaks on or in any containment structure are collected and recovered in a manner that ensures protection of human health and the environment (including surface water and groundwater) and maximum practicable recovery of the pesticide spilled or leaked. Cleanup must occur no later than the end of the day on which pesticides have been spilled or leaked except in circumstances where a reasonable delay would significantly reduce the likelihood or severity of adverse effects to human health or the environment.

* * * * *

(5) Ensure that each lockable valve on a stationary pesticide container, if it is required by § 165.45(f), is closed and locked, or that the facility is locked, whenever the facility is unattended.

* * * * *

(b) * * *

(1) Inspect each stationary pesticide container and its appurtenances and each containment structure at least monthly during periods when pesticides are being stored or dispensed on the containment structure. Your inspection must look for visible signs of wetting, discoloration, blistering, bulging, corrosion, cracks or other signs of damage or leakage.

(2) Initiate repair to any areas showing visible signs of damage and seal any cracks and gaps in the containment structure or appurtenances with material compatible with the pesticide being stored or dispensed no later than the end of the day on which damage is noticed and complete repairs within a time frame that is reasonable, taking into account factors such as the weather, and the availability of cleanup materials, trained staff, and equipment.

(3) Not store any additional pesticide on a containment structure if the structure fails to meet the requirements of this subpart until suitable repairs have been made.

■ 26. Amend § 165.97 by revising paragraph (b)(1) to read as follows:

§ 165.97 States with existing containment programs.

* * * * *

(b) * * *

(1) The State must submit a letter and any supporting documentation to EPA. Supporting documentation must demonstrate that the State's program is providing environmental protection equivalent to or more protective than that expected to be provided by the Federal regulations in this subpart.

* * * * *

[FR Doc. E8–25665 Filed 10–28–08; 8:45 am]

BILLING CODE 6560–50–S

ENVIRONMENTAL PROTECTION AGENCY

40 CFR Part 180

[EPA–HQ–OPP–2008–0347; FRL–8388–1]

Carbaryl; Order Denying NRDC's Petition to Revoke Tolerances

AGENCY: Environmental Protection Agency (EPA).

ACTION: Order.

SUMMARY: In this Order, EPA denies a petition requesting that EPA revoke all pesticide tolerances for carbaryl under section 408(d) of the Federal Food, Drug, and Cosmetic Act (FFDCA). The petition was filed on January 10, 2005, by the Natural Resources Defense Council (NRDC).

DATES: This Order is effective October 29, 2008. Objections and requests for hearings must be received on or before December 29, 2008, and must be filed in accordance with the instructions provided in 40 CFR part 178 (see also Unit I.C. of the **SUPPLEMENTARY INFORMATION**).

ADDRESSES: EPA has established a docket for this action under docket identification (ID) number EPA–HQ–OPP–2008–0347. To access the electronic docket, go to *http://www.regulations.gov*, select ''Advanced Search,'' then ''Docket Search.'' Insert the docket ID number where indicated and select the ''Submit'' button. Follow the instructions on the regulations.gov website to view the docket index or access available documents. All documents in the docket are listed in the docket index available in regulations.gov. Although listed in the index, some information is not publicly available, e.g., Confidential Business Information (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 in the electronic docket at *http://www.regulations.gov*, or, if only available in hard copy, at the OPP Regulatory Public Docket in Rm. S–4400, One Potomac Yard (South Bldg.), 2777 S. Crystal Dr., Arlington, VA. The Docket Facility is open from 8:30 a.m. to 4 p.m., Monday through Friday, excluding legal holidays. The Docket Facility telephone number is (703) 305–5805.

FOR FURTHER INFORMATION CONTACT: Christina Scheltema, Special Review and Reregistration Division (7508P), Office of Pesticide Programs, Environmental Protection Agency, 1200 Pennsylvania Ave., NW., Washington, DC 20460–0001; telephone number: 703–308–2201; e-mail address: scheltema.christina@epa.gov.

SUPPLEMENTARY INFORMATION:

I. General Information

A. Does this Action Apply to Me?

In this document, EPA denies a petition by the NRDC to revoke pesticide tolerances. This action may be of interest to agricultural producers, food manufacturers, or pesticide manufacturers. Potentially affected entities may include, but are not limited to those engaged in the following activities:

- Crop production (NAICS code 111), e.g., agricultural workers; greenhouse, nursery, and floriculture workers; farmers.
- Animal production (NAICS code 112), e.g., cattle ranchers and farmers, dairy cattle farmers, livestock farmers.
- Food manufacturing (NAICS code 311), e.g., agricultural workers; farmers; greenhouse, nursery, and floriculture workers; ranchers; pesticide applicators.
- Pesticide manufacturing (NAICS code 32532), e.g., agricultural workers; commercial applicators; farmers; greenhouse, nursery, and floriculture workers; residential users.

This listing is not intended to be exhaustive, but rather to provide a guide for readers regarding entities likely to be affected by this action. Other types of entities not listed in this unit could also be affected. The North American Industrial Classification System (NAICS) codes have been provided to assist you and others in determining whether this action might apply to certain entities. If you have any questions regarding the applicability of this action to a particular entity, consult the person listed under **FOR FURTHER INFORMATION CONTACT**.

B. How Can I Access Electronic Copies of this Document?

In addition to accessing an electronic copy of this **Federal Register** document through the electronic docket at *http://www.regulations.gov*, you may access this **Federal Register** document electronically through the EPA Internet under the ''**Federal Register**'' listings at *http://www.epa.gov/fedrgstr*. You may also access a frequently updated electronic version of EPA's tolerance regulations at 40 CFR part 180 through the Government Printing Office's pilot e-CFR site at *http://www.gpoaccess.gov/ecfr*.

C. Can I File an Objection or Hearing Request?

Under section 408(g) of FFDCA, any person may file an objection to any aspect of this regulation and may also request a hearing on those objections. You must file your objection or request a hearing on this regulation in accordance with the instructions provided in 40 CFR part 178. To ensure proper receipt by EPA, you must identify docket ID number EPA–HQ–OPP–2008–0347 in the subject line on the first page of your submission. All requests must be in writing, and must be mailed or delivered to the Hearing Clerk as required by 40 CFR part 178 on or before December 29, 2008.

In addition to filing an objection or hearing request with the Hearing Clerk as described in 40 CFR part 178, please submit a copy of the filing that does not contain any CBI for inclusion in the public docket that is described in ADDRESSES. Information not marked confidential pursuant to 40 CFR part 2 may be disclosed publicly by EPA without prior notice. Submit this copy, identified by docket ID number EPA–HQ–OPP–2008–0347, by one of the following methods:

- *Federal eRulemaking Portal*: *http://www.regulations.gov*. Follow the on-line instructions for submitting comments.
- *Mail*: Office of Pesticide Programs (OPP) Regulatory Public Docket (7502P), Environmental Protection Agency, 1200 Pennsylvania Ave., NW., Washington, DC 20460–0001.
- *Delivery*: OPP Regulatory Public Docket (7502P), Environmental Protection Agency, Rm. S–4400, One Potomac Yard (South Bldg.), 2777 S. Crystal Dr., Arlington, VA. Deliveries are only accepted during the Docket's normal hours of operation (8:30 a.m. to 4 p.m., Monday through Friday, excluding legal holidays). Special arrangements should be made for deliveries of boxed information. The Docket Facility telephone number is (703) 305–5805.

II. Introduction

A. What Action Is the Agency Taking?

The NRDC filed a petition dated January 10, 2005 with EPA which, among other things, requested that EPA revoke all tolerances for the pesticide carbaryl established under section 408 of the FFDCA, 21 U.S.C. 346a (Ref. 1) This Order denies that aspect of the petition that sought the revocation of the carbaryl tolerances. This Order also denies NRDC's petition to cancel carbaryl pet collar registrations submitted as part of NRDC's comments on the *N*-methyl carbamate (NMC)

cumulative assessment and dated November 26, 2007, because NRDC is arguing that exposure to carbaryl pet collars makes the cumulative risks presented by carbaryl unsafe (Ref. 2).

B. What Is the Agency's Authority for Taking This Action?

Under section 408(d)(4) of the FFDCA, EPA is authorized to respond to a section 408(d) petition to revoke tolerances either by issuing a final rule revoking the tolerances, issuing a proposed rule, or issuing an order denying the petition. (21 U.S.C. 346a(d)(4)).

III. Statutory and Regulatory Background

A. FFDCA/FIFRA and Applicable Regulations

1. *In general*. EPA establishes maximum residue limits, or ''tolerances,'' for pesticide residues in food and feed commodities under section 408 of the FFDCA. (21 U.S.C. 346a). Without such a tolerance or an exemption from the requirement of a tolerance, a food containing a pesticide residue is ''adulterated'' under section 402 of the FFDCA and may not be legally moved in interstate commerce. (21 U.S.C. 331, 342). Monitoring and enforcement of pesticide tolerances are carried out by the U.S. Food and Drug Administration (FDA) and the U.S. Department of Agriculture (USDA). Section 408 was substantially rewritten by the Food Quality Protection Act of 1996 (FQPA), which added the provisions discussed below establishing a detailed safety standard for pesticides, additional protections for infants and children, and the estrogenic substances screening program. (Public Law 104–170, 110 Stat. 1489 (1996)).

EPA also regulates pesticides under the Federal Insecticide, Fungicide, and Rodenticide Act (FIFRA), (7 U.S.C. 136 et seq). While the FFDCA authorizes the establishment of legal limits for pesticide residues in food, FIFRA requires the approval of pesticides prior to their sale and distribution, (7 U.S.C. 136a(a)), and establishes a registration regime for regulating the use of pesticides. FIFRA regulates pesticide use in conjunction with its registration scheme by requiring EPA review and approval of pesticide labels and specifying that use of a pesticide inconsistent with its label is a violation of federal law. (7 U.S.C. 136j(a)(2)(G)). In the FQPA, Congress integrated action under the two statutes by requiring that the safety standard under the FFDCA be used as a criterion in FIFRA registration actions as to pesticide uses which result in dietary risk from residues in or on food, (7 U.S.C. 136(bb)), and directing that EPA coordinate, to the extent practicable, revocations of tolerances with pesticide cancellations under FIFRA. (21 U.S.C. 346a(l)(1)).

2. *Safety standard for pesticide tolerances*. A pesticide tolerance may only be promulgated or left in effect by EPA if the tolerance is ''safe.'' (21 U.S.C. 346a(b)(2)(A)(i)). This standard applies both to petitions to establish and petitions to revoke tolerances. ''Safe'' is defined by the statute to mean that ''there is a reasonable certainty that no harm will result from aggregate exposure to the pesticide chemical residue, including all anticipated dietary exposures and all other exposures for which there is reliable information.'' (21 U.S.C. 346a(b)(2)(A)(ii)). Section 408(b)(2)(D) directs EPA, in making a safety determination, to:

> consider, among other relevant factors—...
>
> (v) available information concerning the cumulative effects of such residues and other substances that have a common mechanism of toxicity; and
>
> (vi) available information concerning the aggregate exposure levels of consumers (and major identifiable subgroups of consumers) to the pesticide chemical residue and to other related substances, including dietary exposure under the tolerance and all other tolerances in effect for the pesticide chemical residue, and exposure from other non-occupational sources;
>
> (21 U.S.C. 346a(b)(2)(D)(v), (vi) and (viii)).

EPA must also consider, in evaluating the safety of tolerances, ''safety factors which . . . are generally recognized as appropriate for the use of animal experimentation data.'' (21 U.S.C. 346a(b)(2)(D)(ix).

Risks to infants and children are given special consideration. Specifically, section 408(b)(2)(C) states that EPA:

> shall assess the risk of the pesticide chemical based on—
>
> (II) available information concerning the special susceptibility of infants and children to the pesticide chemical residues, including neurological differences between infants and children and adults, and effects of *in utero* exposure to pesticide chemicals; and
>
> (III) available information concerning the cumulative effects on infants and children of such residues and other substances that have a common mechanism of toxicity. ...
>
> (21 U.S.C. 346a(b)(2)(C)(i)(II) and (III)).

This provision also creates a presumptive additional safety factor for the protection of infants and children. Specifically, it directs that ''[i]n the case of threshold effects, ... an additional tenfold margin of safety for the pesticide chemical residue and other sources of exposure shall be applied for infants and children to take into account potential pre- and post-natal toxicity and completeness of the data with respect to exposure and toxicity to infants and children.'' (21 U.S.C. 346a(b)(2)(C)). EPA is permitted to ''use a different margin of safety for the pesticide chemical residue only if, on the basis of reliable data, such margin will be safe for infants and children.'' (Id.). The additional safety margin for infants and children is referred to throughout this Order as the ''FQPA Safety Factor.''

3. *Procedures for establishing, amending, or revoking tolerances*. Tolerances are established, amended, or revoked by rulemaking under the unique procedural framework set forth in the FFDCA. Generally, a tolerance rulemaking is initiated by the party seeking to establish, amend, or revoke a tolerance by means of filing a petition with EPA. (See 21 U.S.C. 346a(d)(1)). EPA publishes in the **Federal Register** a notice of the petition filing and requests public comment. (21 U.S.C. 346a(d)(3)). After reviewing the petition, and any comments received on it, EPA may issue a final rule establishing, amending, or revoking the tolerance, issue a proposed rule to do the same, or deny the petition. (21 U.S.C. 346a(d)(4)).

Once EPA takes final action on the petition by establishing, amending, or revoking the tolerance or denying the petition, any party may file objections with EPA and seek an evidentiary hearing on those objections. (21 U.S.C. 346a(g)(2)). Objections and hearing requests must be filed within 60 days. (Id.). The statute provides that EPA shall ''hold a public evidentiary hearing if and to the extent the Administrator determines that such a public hearing is necessary to receive factual evidence relevant to material issues of fact raised by the objections.'' (21 U.S.C. 346a(g)(2)(B). EPA regulations make clear that hearings will only be granted where it is shown that there is ''a genuine and substantial issue of fact,'' the requestor has identified evidence ''which, if established, resolve one or more of such issues in favor of the requestor,'' and the issue is ''determinative'' with regard to the relief requested. (40 CFR 178.32(b)). EPA's final order on the objections is subject to judicial review. (21 U.S.C. 346a(h)(1)).

4. *Tolerance reassessment and FIFRA reregistration*. The FQPA required that EPA reassess the safety of all pesticide tolerances existing at the time of its enactment. (21 U.S.C. 346a(q)). EPA was given 10 years to reassess the

approximately 10,000 tolerances in existence in 1996. In this reassessment, EPA was required to review existing pesticide tolerances under the new ''reasonable certainty that no harm will result'' standard set forth in section 408(b)(2)(A)(i). (21 U.S.C. 346a(b)(2)(A)(i)). This reassessment was substantially completed by the August 3, 2006 deadline. Tolerance reassessment was generally handled in conjunction with a similar program involving reregistration of pesticides under FIFRA. (7 U.S.C. 136a–1). Reassessment and reregistration decisions were generally combined in a document labeled a Reregistration Eligibility Decision (''RED'').

B. EPA's Approach to Dietary Risk Assessment

EPA performs a number of analyses to determine the risks from aggregate exposure to pesticide residues. A short summary is provided below to aid the reader. For further discussion of the regulatory requirements of section 408 of the FFDCA and a complete description of the risk assessment process, see *http://www.epa.gov/fedrgstr/EPA–PEST/1999/January/Day–04/p34736.htm*.(64 FR 162)

To assess the risk of a pesticide tolerance, EPA combines information on pesticide toxicity with information regarding the route, magnitude, and duration of exposure to the pesticide. The risk assessment process involves three distinct steps: (1) identification of the toxicological hazards posed by a pesticide and determination of the exposure ''level of concern'' for humans; (2) estimation of human exposure; and (3) characterization of human risk based on comparison of human exposure to the level of concern.

1. *Hazard identification and determination of the level of concern.* Any risk assessment begins with an evaluation of a chemical's inherent properties, and whether those properties have the potential to cause adverse effects (i.e., hazard identification). EPA then evaluates the hazards to determine the most sensitive and appropriate adverse effect of concern, based on factors such as the effect's relevance to humans and the likely routes of exposure. Once a pesticide's potential hazards are identified, EPA determines a toxicological level of concern for evaluating the risk posed by human exposure to the pesticide. In this step of the risk assessment process, EPA essentially evaluates the levels of exposure to the pesticide at which effects might occur. An important aspect of this determination is assessing the relationship between exposure (dose) and response (often referred to as the dose-response analysis). Another aspect is the determination of whether the effect is associated with a threshold dose (i.e., the effect is seen only at or above a certain dose) or whether the effect can occur at any dose (such as some tumors).

In evaluating a chemical's dietary risks for threshold effects, EPA uses a reference dose (RfD) approach, which involves a number of considerations including:

- A 'point of departure'(PoD) - the value from a dose-response curve that is at the low end of the observable data (the no observed adverse effect level, or NOAEL, the lowest-observed adverse effect level or LOAEL, or an extrapolated benchmark dose) and that is the dose serving as the 'starting point' in extrapolating a risk to the human population;
- An uncertainty factor to address the potential for a difference in toxic response between humans and animals used in toxicity tests (i.e., interspecies extrapolation);
- An uncertainty factor to address the potential for differences in sensitivity in the toxic response across the human population (for intraspecies extrapolation); and
- The need for an additional safety factor to protect infants and children, as specified in FFDCA section 408(b)(2)(C).

EPA uses the chosen PoD to calculate a safe dose or RfD. The RfD is calculated by dividing the chosen PoD by all applicable safety or uncertainty factors. Typically in EPA risk assessments, a combination of safety or uncertainty factors providing at least a hundredfold (100X) margin of safety is used: 10X to account for interspecies extrapolation and 10X to account for intraspecies extrapolation. Further, in evaluating the dietary risks for pesticide chemicals, an additional safety factor of 10X is presumptively applied to protect infants and children, unless reliable data support selection of a different factor. In implementing FFDCA section 408, EPA also calculates a variant of the RfD referred to as a population adjusted dose (PAD). The PAD is the RfD divided by any portion of the children's safety factor that does not correspond to one of the traditional additional uncertainty/safety factors used in general Agency risk assessment. The reason for calculating PADs is so that other parts of the Agency, which are not governed by FFDCA section 408, can, when evaluating the same or similar substances, easily identify which aspects of a pesticide risk assessment are a function of the particular statutory commands in FFDCA section 408. For acute assessments, the risk is expressed as a percentage of a maximum acceptable dose or the acute PAD (i.e., the acute dose which EPA has concluded will be ''safe''). As discussed below in Unit V.C., dietary exposures greater than 100 percent of the acute PAD are generally cause for concern and would be considered ''unsafe'' within the meaning of FFDCA section 408(b)(2)(B). Throughout this document general references to EPA's calculated safe dose are denoted as an acute PAD, or aPAD, because the relevant point of departure for carbaryl is based on an acute risk endpoint.

In evaluating a chemical's dietary risk for non-threshold effects, such as cancer; EPA's default approach is to extrapolate a Q1* from the dose-response curve as a measure of cancer potency, and then to use this Q1* value in conjunction with estimated dietary exposure to estimate the probability of occurrence of additional adverse effects. The Q1*is the 95th percentile upper confidence limit from a tumor dose response curve extrapolated using a linear low-dose model. For non-threshold dietary cancer risks, EPA generally considers cancer risk to be negligible if the probability of increased cancer cases falls within the range of 1 in 1 million.

Animal studies show that carbaryl, like other NMC pesticides, causes transient, reversible inhibition of cholinesterase activity in brain, red blood cells, and plasma across all tested routes of exposure. Developmental toxicity was seen in rats and rabbits treated with carbaryl during gestation; effects included decreased fetal weight and incomplete ossification (bone formation). A carbaryl rat reproductive toxicity study showed decreased pup survival, and a rat developmental neurotoxicity study showed changes in fetal brain morphometry. In addition, a comparative cholinesterase study shows that young animals had increased sensitivity, compared with adults, to inhibition of brain cholinesterase from carbaryl. EPA used endpoints from the comparative cholinesterase study to assess human health risk in both the single chemical risk assessment for carbaryl and in the cumulative risk assessment for the NMC pesticides. Carbaryl is considered to be ''likely to be carcinogenic in humans'' based on tumors in male mice and EPA utilized the Agency default low-dose linear extrapolation (Q1*) approach to quantify cancer risk.

2. *Estimating human exposure levels.* Pursuant to section 408(b) of the FFDCA, EPA has evaluated carbaryl dietary risks based on ''aggregate

exposure'' to carbaryl. By ''aggregate exposure,'' EPA is referring to exposure to carbaryl alone by multiple pathways of exposure, including residues in food and water and exposure from use of carbaryl products in residential settings. EPA uses available data, together with assumptions designed to be protective of public health and standard analytical methods, to produce separate estimates of exposure for a highly exposed subgroup of the general population, for each potential pathway and route of exposure. For acute risks, EPA then calculates potential aggregate exposure and risk by using probabilistic techniques to combine distributions of potential exposures in the population for the dietary pathway, and uses single point estimates for the residential component in calculating aggregate exposure. For dietary analyses, the relevant sources of potential exposure to carbaryl are from the ingestion of residues in food and drinking water.

The Agency uses a combination of monitoring data and predictive models to evaluate environmental exposure of humans to carbaryl, which may occur from ingesting carbaryl residues in food or drinking water, or from using products containing carbaryl in residential settings. These are described below.

a. *Exposure from food*. Data on the residues of carbaryl in foods are available from a variety of sources. One of the primary sources of the data comes from federally-conducted surveys, including the Pesticide Data Program (PDP) conducted by the USDA. Further, market basket studies, which are typically performed by registrants, can provide additional residue data. These data generally provide a characterization of pesticide residues in or on foods consumed by the U.S. population that closely approximates real world exposures because they are sampled closer to the point of consumption in the chain of commerce than field trial data, which are generated to establish the maximum level of legal residues that could result from maximum permissible use of the pesticide. In certain circumstances, EPA will rely on field trial data, as it can provide more accurate exposure estimates. EPA estimated dietary exposure to carbaryl using residue data from a variety of sources, including USDA and FDA monitoring and crop field trial studies. These residue data were refined based on relevant processing factors. EPA also took into account information on the extent to which crops which may be treated with carbaryl are actually so treated.

EPA uses a computer program, the Dietary Exposure Evaluation Model (DEEM), and the USDA Food Commodity Intake database (FCID), to estimate exposure by combining data on human consumption amounts with residue values in food commodities. DEEM-FCID™ also compares exposure estimates to appropriate RfD or PAD values to estimate risk. EPA uses DEEM-FCID™ to estimate exposure for the general U.S. population as well as for 32 subgroups based on age, sex, ethnicity, and region. DEEM-FCID™ allows EPA to process extensive volumes of data on human consumption amounts and residue levels in making risk estimates. Matching consumption and residue data, as well as managing the thousands of repeated analyses of the consumption database conducted under probabilistic risk assessment techniques, requires the use of a computer.

DEEM-FCID™ contains consumption and demographic information on the individuals who participated in the USDA's Combined Survey of Food Intake by Individuals (CSFII) in 1994–1996 and 1998. The 1998 survey was a special survey required by the FQPA to supplement the number of children survey participants. DEEM-FCID™ also contains ''recipes'' that convert foods as consumed (e.g., pizza) back into their component raw agricultural commodities (e.g., wheat from flour, or tomatoes from sauce, etc.). This is necessary because residue data are generally gathered on raw agricultural commodities rather than on finished ready-to-eat food. Data on residue values for a particular pesticide and the RfD or PADs for that pesticide are inputs to the DEEM-FCID™ program to estimate exposure and risk.

For carbaryl's assessment, EPA used DEEM-FCID™ to calculate risk estimates based on a probabilistic distribution. DEEM-FCID™ combines the full range of residue values for each food with the full range of data on individual consumption amounts to create a distribution of exposure and risk levels. More specifically, DEEM-FCID™ creates this distribution by calculating an exposure value for each reported day of consumption per person (''person/day'') in USDA's CSFII, assuming that all foods potentially bearing the pesticide residue contain such residue at the chosen value. The exposure amounts for the thousands of person/days in the CSFII are then collected in a frequency distribution. EPA also uses DEEM-FCID™ to compute a distribution taking into account both the full range of data on consumption levels and the full range of data on potential residue levels in food. Combining consumption and residue levels into a distribution of potential exposures and risk requires use of probabilistic techniques.

Probabilistic analysis is used to predict the frequency with which variations of a given event will occur. By taking into account the actual distribution of possible consumption and pesticide residue values, probabilistic analysis for pesticide exposure assessments ''provides more accurate information on the range and probability of possible exposure and their associated risk values'' (Ref. 3). In capsule, a probabilistic pesticide exposure analysis constructs a distribution of potential exposures based on data on consumption patterns and residue levels and provides a ranking of the probability that each potential exposure will occur. People consume differing amounts of the same foods, including none at all, and a food will contain differing amounts of a pesticide residue, including none at all.

The probabilistic technique that DEEM-FCID™ uses to combine differing levels of consumption and residues involves the following steps:

(1) Identification of any food(s) that could bear the residue in question for each person/day in the CSFII;

(2) Calculation of an exposure level for each of the thousands of person/days in the CSFII database, based on the foods identified in Step #1 by randomly selecting residue values for the foods from the residue database;

(3) Repetition of Step #2 up to one thousand times for each person/day; and

(4) Collection of all of the hundreds of thousands of potential exposures estimated in Steps # 2 and 3 in a frequency distribution.

The resulting probabilistic assessment presents a range of exposure/risk estimates.

b. *Exposure from water*. EPA may use field monitoring data and/or simulation water exposure models to generate pesticide concentration estimates in drinking water. Monitoring and modeling are both important tools for estimating pesticide concentrations in water and can provide different types of information. Monitoring data can provide estimates of pesticide concentrations in water that are representative of the specific agricultural or residential pesticide practices in specific locations, under the environmental conditions associated with a sampling design (i.e., the locations of sampling, the times of the year samples were taken, and the frequency by which samples were collected). Although monitoring data

can provide a direct measure of the concentration of a pesticide in water, it does not always provide a reliable basis for estimating spatial and temporal variability in exposures because sampling may not occur in areas with the highest pesticide use, and/or when the pesticides are being used and/or at an appropriate sampling frequency to detect high concentrations of a pesticide that occur over the period of a day to several days.

Because of the limitations in most monitoring studies, EPA's standard approach is to use simulation water exposure models as the primary means to estimate pesticide exposure levels in drinking water. EPA's computer models use detailed information on soil properties, crop characteristics, and weather patterns to estimate water concentrations in vulnerable locations where the pesticide could be used according to its label. (69 FR 30042, May 26, 2004). These models calculate estimated water concentrations of pesticides using laboratory data that describe how fast the pesticide breaks down to other chemicals and how it moves in the environment at these vulnerable locations. The modeling provides an estimate of pesticide concentrations in ground and surface water. Daily concentrations can be estimated continuously over long periods of time, and for places that are of most interest for any particular pesticide.

EPA relies on models it has developed for estimating pesticide concentrations in both surface water and ground water. Typically EPA uses a two-tiered approach to modeling pesticide concentrations in surface and ground water. If the first tier model suggests that pesticide levels in water may be unacceptably high, a more ined model is used as a second tier assessment. For surface water assessments, the second tier model is actually a combination of two models: The Pesticide Root Zone Model (PRZM) and the Exposure Analysis Model System (EXAMS).

A detailed description of the models routinely used for exposure assessment is available from the EPA web site: *http://www.epa.gov/oppefed1/models/water/index.htm*. These models provide a means for EPA to estimate daily pesticide concentrations in surface water sources of drinking water (a reservoir) using local soil, site, hydrology, and weather characteristics along with pesticide application and agricultural management practices, and pesticide environmental fate and transport properties. Consistent with the recommendations of the FIFRA Science Advisory Panel (SAP), EPA also considers percent cropped area factors (PCA) which takes into account the potential extent of cropped areas that could be treated with pesticides in a particular area. The PRZM and EXAMS models used by EPA were developed by EPA's Office of Research and Development (ORD), and are used by many international pesticide regulatory agencies to estimate pesticide exposure in surface water. EPA's use of the percent cropped area factors and the Index Reservoir scenario was reviewed by the FIFRA SAP in 1999 and 1998, respectively (Refs. 4 and 5).

In modeling potential surface water concentrations, EPA attempts to model areas of the country that are highly vulnerable to surface water contamination rather than simply model ''typical'' locations occurring across the nation. Consequently, EPA models exposures occurring in small highly agricultural watersheds in different growing areas throughout the country. The scenarios are designed to capture residue levels in drinking water from reservoirs with small watersheds with a large percentage of land use in agricultural production. EPA believes these assessments are likely reflective of a small subset of the watersheds across the country that maintain drinking water reservoirs, representing a drinking water source generally considered to be more vulnerable to frequent high concentrations of pesticides than most locations that could be used for crop production.

When EPA completed the carbaryl Interim Reregistration Eligibility Decision (IRED)[1] in June 2003, EPA compared the estimated drinking water concentrations (EDWCs) of pesticides, from the PRZM/EXAMS model, with a drinking water level of concern (DWLOC), a value representing the concentration of a pesticide in drinking water that would represent the upper limit in light of total aggregate exposure to that pesticide from food, water, and residential uses of that pesticide. The DWLOC approach was developed in the mid 1990s as part of EPA's review of pesticides under FQPA, before the current risk assessment methodologies became available. EPA now uses the output of daily concentration values from tier two modeling as an input to DEEM-FCID™, which combines water concentrations with drinking water consumption information in the daily diet to generate a distribution of exposures from consumption of drinking water containing pesticide residues. These results are then used to calculate a probabilistic assessment of the aggregate human exposure and risk from residues in food and drinking water.

EPA also considers available surface water monitoring data, including data from the US Geological Survey (USGS) National Water Quality Assessment Program (NAWQA), in conducting drinking water assessments. For the 2007 carbaryl RED, EPA considered data from a variety of sources, including NAWQA, the joint USGS-EPA Mini Pilot Monitoring Program, Washington and California state monitoring data, and registrant voluntary water monitoring study measuring carbaryl in targeted community water systems associated with watersheds having high carbaryl use.

c. *Residential exposures*. Generally, in assessing residential exposure to pesticides EPA relies on its Standard Operating Procedures (SOPs) for Residential Exposure Assessment and subsequent amendments (Refs. 6, 7, and 8). The Residential SOPs establish the approaches used for estimating application and post-application exposures in a residential setting. SOPs have been developed for many common exposure scenarios including pesticide treatment of lawns, garden plants, trees, swimming pools, pets, and indoor surfaces including crack and crevice treatments. The SOPs are based on existing monitoring and survey data including information on activity patterns, particularly for children. Where available, EPA relies on pesticide-specific data in estimating residential exposures. Although limited carbaryl specific data were available at the time the carbaryl IRED was completed, additional data were submitted in response to the 2005 Data Call-In (DCI) for carbaryl. These data were reviewed and incorporated into the revised residential risk assessment used to support the final carbaryl RED. Residential exposure from carbaryl was estimated using EPA's Residential SOPs (as amended) as well as a turf dissipation study for carbaryl which quantified turf transferable residues after carbaryl application to turf and other monitoring data available to the Agency (e.g., residue decline studies on garden crops).

3. *Risk characterization*. The final step in the risk assessment is risk characterization. In this step, EPA combines information from the first three steps (hazard identification, level of concern/dose-response analysis, and human exposure assessment) to

[1] Because carbaryl is a member of the NMC group of pesticides, which share a common mechanism of toxicity, EPA was unable to complete the carbaryl Reregistration Eligibility Decision (RED) before completion of the NMC cumulative risk assessment in September 2007.

quantitatively estimate the risks posed by a pesticide. Separate characterizations of risk are conducted for different durations of exposure. Additionally, separate and, where appropriate, aggregate characterizations of risk are conducted for the different routes of exposure (dietary and non-dietary).

For threshold risks, EPA estimates risk in one of two ways. Where EPA has calculated an RfD/PAD, risk is estimated by expressing human exposure as a percentage of the RfD/PAD. Exposures lower than 100 percent of the RfD/PAD are generally not of concern. Alternatively, EPA may express risk by dividing the estimated human exposure into the PoD to derive a margin of exposure (MOE). The MOE is compared with a level of concern, which is the product of all applicable uncertainty/safety factors. In contrast to the RfD/PAD approach, the higher the MOE, the lower the risk concern for the pesticide. Accordingly, if the level of concern is 100, MOEs equal to or exceeding 100 would generally not be of concern.

As a conceptual matter, the RfD/PAD and MOE approaches are fundamentally equivalent. For a given risk and given exposure of a pesticide, if exposure to a pesticide were found to be acceptable under an RfD/PAD analysis it would also pass under the MOE approach, and vice-versa. However, for any specific pesticide, risk assessments for different exposure durations or routes may yield different results. This is a function not of the choice of the RfD/PAD or MOE approach but of the fact that the levels of concern and the levels of exposure may differ depending on the duration and route of exposure.

For non-threshold risks (generally, cancer risks), EPA uses the slope of the dose-response curve for a pesticide in conjunction with an estimation of human exposure to that pesticide to estimate the probability of occurrence of additional adverse effects. For non-threshold cancer risks, EPA generally considers cancer risk to be negligible if the probability of increased cancer cases falls within the range of 1 in 1 million. Risks exceeding values within that range would raise a risk concern.

C. Science Policy Considerations

1. *EPA policy on the children's safety factor.* As the above brief summary of EPA's risk assessment practice indicates, the use of safety factors plays a critical role in the process. This is true for traditional 10X safety factors to account for potential differences between animals and humans when relying on studies in animals (inter-species safety factor) and potential differences among humans (intra-species safety factor) as well as the FQPA's additional 10X children's safety factor.

In general, Section 408 of FFDCA provides that EPA shall apply an additional tenfold margin of safety for infants and children in the case of threshold effects to account for prenatal and postnatal toxicity and the completeness of the data base on toxicity and exposure unless EPA determines that a different margin of safety will be safe for infants and children. Margins of safety are incorporated into EPA assessments either directly through use of a margin of exposure analysis or through using uncertainty (safety) factors in calculating a dose level that poses acceptable risk to humans.

In applying the children's safety factor provision, EPA has interpreted the statutory language as imposing a presumption in favor of applying an additional 10X safety factor (Ref. 9). Thus, EPA generally refers to the additional 10X factor as a presumptive or default 10X factor. EPA has also made clear, however, that the presumption can be overcome if reliable data demonstrate that a different factor is safe for children (Id.). In determining whether a different factor is safe for children, EPA focuses on the three factors listed in section 408(b)(2)(C) - the completeness of the toxicity database, the completeness of the exposure database, and potential pre- and post-natal toxicity. In examining these factors, EPA strives to make sure that its choice of a safety factor, based on a weight-of-the-evidence evaluation, does not understate the risk to children. (Id.).

When EPA evaluated the carbaryl toxicological database in 2003 to determine the appropriate FQPA Safety Factor for use in the IRED, available studies included rat and rabbit teratology (developmental toxicity) studies, a rat developmental neurotoxicity study, a rat reproductive toxicity study, a 4–week dermal rat study, acute and subchronic neurotoxicity screening studies, and a chronic oral dog study (Ref. 10). Based on the weight of the evidence as evaluated in 2003, the FQPA Safety Factor was determined to be 3X due to the lack of a NOAEL in the chronic dog study. This was what the weight of the evidence showed in 2003.

The science has advanced since 2003; additional information on pharmacokinetics as well as additional acute cholinesterase data have become available for carbaryl and other NMCs. Due to the rapid recovery of cholinesterase activity, chronic exposure is no longer considered to be a concern for carbaryl. As the science has advanced, science policy has also evolved. As EPA acquired developmental neurotoxicity and comparative cholinesterase data on the NMCs, it became apparent that comparative cholinesterase studies measuring red blood cell (RBC) and brain cholinesterase inhibition in both maternal and young animals (postnatal day 11 (PND11) and postnatal day 17 (PND17)) were a more accurate predictor of age-related sensitivity than developmental neurotoxicity studies measuring behavioral and histopathological changes. Therefore, EPA informed registrants that, in the absence of comparative cholinesterase data for each pesticide, a 10X FQPA Safety Factor would be applied to that pesticide in the NMC cumulative risk assessment. If comparative cholinesterase data were available, EPA used a data derived approach for the FQPA Safety Factor by comparing the benchmark dose (BMD) at the 10% inhibition level for either brain or RBC acetyl cholinesterase inhibition between maternal animals and the juvenile animals (typically PND11).

2. *EPA Policy on cholinesterase inhibition as a regulatory endpoint.* Cholinesterase inhibition is a disruption of the normal process in the body by which the nervous system chemically communicates with muscles and glands. Communication between nerve cells and a target cell (i.e., another nerve cell, a muscle fiber, or a gland) is facilitated by the chemical, acetylcholine. When a nerve cell is stimulated it releases acetylcholine into the synapse (or space) between the nerve cell and the target cell. The released acetylcholine binds to receptors in the target cell, stimulating the target cell in turn. As EPA has explained, ''the end result of the stimulation of cholinergic pathway(s) includes, for example, the contraction of smooth (e.g., in the gastrointestinal tract) or skeletal muscle, changes in heart rate or glandular secretion (e.g., sweat glands) or communication between nerve cells in the brain or in the autonomic ganglia of the peripheral nervous system.'' (Ref. 11 at 10).

Acetylcholinesterase (AChE) is an enzyme that breaks down acetylcholine and terminates its stimulating action in the synapse between nerve cells and target cells. When AChE is inhibited, acetylcholine builds up prolonging the stimulation of the target cell. This excessive stimulation potentially results in a broad range of adverse effects on many bodily functions. Depending on

the degree of inhibition these effects can be serious, even fatal.

EPA's cholinesterase inhibition policy statement explains EPA's approach to evaluating the risks posed by cholinesterase-inhibiting pesticides such as carbaryl. (Id). The policy focuses on three types of effects associated with cholinesterase-inhibiting pesticides that may be assessed in animal and human toxicological studies: (1) physiological and behavioral/functional effects; (2) cholinesterase inhibition in the central and peripheral nervous system; and (3) cholinesterase inhibition in red blood cells and blood plasma. The policy discusses how such data should be integrated in deriving an acceptable dose (RfD/PAD) for a cholinesterase-inhibiting pesticide.

Clinical signs or symptoms of cholinesterase inhibition in humans, the policy concludes, provide the most direct evidence of the adverse consequences of exposure to cholinesterase-inhibiting pesticides. Nonetheless, as the policy notes, due to strict ethical limitations, studies in humans are ''quite limited.'' (Id. at 19). Although animal studies can also provide direct evidence of cholinesterase inhibition effects, animal studies cannot easily measure cognitive effects of cholinesterase inhibition such as effects on perception, learning, and memory. For these reasons, the policy recommends that ''functional data obtained from human and animal studies should not be relied on solely, to the exclusion of other kinds of pertinent information, when weighing the evidence for selection of the critical effect(s) that will be used as the basis of the RfD or RfC.'' (Id. at 20).

After clinical signs or symptoms, cholinesterase inhibition in the nervous system provides the next most important endpoint for evaluating cholinesterase-inhibiting pesticides. Although cholinesterase inhibition in the nervous system is not itself regarded as a direct adverse effect, it is ''generally accepted as a key component of the mechanism of toxicity leading to adverse cholinergic effects.'' (Id. at 25). As such, the policy states that it should be treated as ''direct evidence of potential adverse effects'' and ''data showing this response provide valuable information in assessing potential hazards posed by anticholinesterase pesticides.'' (Id.). AChE inhibition in brain and the peripheral nervous system is the initial adverse biological event which results from exposure to NMC pesticides, such as carbaryl, and with sufficient levels of inhibition leads to other effects. Thus, AChE inhibition provides the most appropriate effect to use in risk extrapolation for derivation of RfDs and PADs. Protecting against AChE inhibition ensures that the other adverse effects mentioned above do not occur.

In summary, EPA uses a weight of evidence approach to determine the toxic effect that will serve as the appropriate PoD for a risk assessment for AChE inhibiting pesticides, such as carbaryl (Id). The neurotoxicity that is associated with these pesticides can occur in both the central (brain) and the peripheral nervous system. In its weight of the evidence analysis, EPA reviews data, such as AChE inhibition data from the brain, peripheral tissues and blood (e.g., RBC or plasma), in addition to data on clinical signs and other functional effects related to AChE inhibition. Based on these data, EPA selects the most appropriate effect on which to regulate; such effects can include clinical signs of AChE inhibition, central or peripheral nervous tissue measurements of AChE inhibition or RBC AChE measures (Id). Although RBC AChE inhibition is not adverse in itself, it is a surrogate for inhibition in peripheral tissues when peripheral data are not available. As such, RBC AChE inhibition provides an indirect indication of adverse effects on the nervous system (Id.). Due to technical difficulties regarding dissection of peripheral nerves and the rapid nature of carbaryl toxicity, measures of AChE inhibition in the peripheral nervous system are very rare for NMC pesticides. For these reasons, other state and national agencies such as California, Washington, Canada, the European Union, as well as the World Health Organization (WHO), all use blood measures in human health risk assessment and/or worker safety monitoring programs.

3. *Benchmark dose*. EPA has relied on a benchmark dose approach for deriving the PoD from the available rat toxicity studies (Ref. 12). A benchmark dose, or BMD, is a point estimate along a dose-response curve that corresponds to a specific response level. For example, a BMD_{10} represents a 10% change from the background or typical value for the response of concern. Generically, the direction of change from background can be an increase or a decrease depending on the biological parameter and the chemical of interest. In the case of carbaryl, inhibition of AChE is the toxic effect of concern. Following exposure to carbaryl, the normal biological activity of the AChE enzyme is decreased (i.e., the enzyme is inhibited). Thus, when evaluating BMDs for carbaryl, the Agency is interested in a decrease in AChE activity compared to normal activity levels, which are also termed ''background'' levels. Measurements of ''background'' AChE activity levels are usually obtained from animals in experimental studies that are not treated with the pesticide of interest (i.e., ''negative control'' animals).

In addition to the BMD, a ''confidence limit'' was also calculated. Confidence limits express the uncertainty in a BMD that may be due to sampling and/or experimental error. The lower confidence limit on the dose used as the BMD is termed the BMDL, which the Agency uses as the PoD. Use of the BMDL for deriving the PoD rewards better experimental design and procedures that provide more precise estimates of the BMD, resulting in tighter confidence intervals. Use of the BMDL also helps ensure with high confidence (e.g., 95% confidence) that the selected percentage of AChE inhibition is not exceeded. From the PoD, EPA calculates the RfD and aPAD.

Numerous scientific peer review panels over the last decade have supported the Agency's application of the BMD approach as a scientifically supportable method for deriving PoDs in human health risk assessment, and as an improvement over the historically applied approach of using NOAELs or LOAELs. The NOAEL/LOAEL approach does not account for the variability and uncertainty in the experimental results, which are due to characteristics of the study design, such as dose selection, dose spacing, and sample size. With the BMD approach, all the dose response data are used to derive a PoD. Moreover, the response level used for setting regulatory limits can vary based on the chemical and/or type of toxic effect (Refs. 12, 13, 14, and 15). Specific to carbaryl and other NMCs, the FIFRA SAP has reviewed and supported the statistical methods used by the Agency to derive BMDs and BMDLs on two occasions, February 2005 and August 2005 (Refs. 14 and 15).

IV. Carbaryl Tolerances

A. Regulatory Background

Carbaryl is a carbamate insecticide and molluscide that was first registered in 1959 for use on cotton. Carbaryl has many trade names, but is most commonly known as Sevin®. In 1980, the Agency published a position document summarizing its conclusions from a Special Review of carbaryl, and concluded that risk concerns, particularly those related to teratogenicity, did not warrant cancellation of the registration for carbaryl. A Registration Standard, issued for carbaryl in 1984 and revised

in 1988, described the terms and conditions for continued registration of carbaryl. At the time carbaryl was assessed for purposes of reregistration, carbaryl was registered for use on over 400 agricultural and non–agricultural use sites, and there were more than 140 tolerances for carbaryl in the Code of Federal Regulations (40 CFR 180.169). For example, carbaryl was registered for domestic outdoor uses on lawns and gardens, and indoors in kennels and on pet sleeping quarters. It was also registered for direct application to cats and dogs (collar, powder, and dip) to control fleas and ticks.

EPA completed an IRED for carbaryl on June 30, 2003 (2003 IRED). The Agency amended the IRED on October 22, 2004 (2004 Amended IRED), and published a formal Notice of Availability for the document, which provided for a 60–day public comment period (Ref. 16). EPA received numerous comments on the carbaryl IRED, including the NRDC petition requesting that EPA cancel all carbaryl registrations and revoke all tolerances. The Agency published a Notice of Receipt for the petition in the **Federal Register**, which provided a public comment period. *Petition to Revoke or Modify Tolerances Established for Carbaryl; Notice of Availability*, 70 FR 16281 (March 30, 2005). The mitigation detailed in the 2004 Amended IRED for residential uses included: canceling liquid broadcast applications to home lawns pending EPA review of pharmacokinetic data to refine post-application risk estimates; home garden/ornamental dust products must be packaged in ready-to-use shaker can containers, with no more than 0.05 lbs. active ingredient per container; cancellation of the following uses and application methods: all pet uses (dusts and liquids) except collars, aerosol products for various uses, belly grinder applications of granular and bait products for lawns, hand applications of granular and bait products for ornamentals and gardens.

On March 9, 2005, EPA issued a cancellation order for the liquid broadcast use of carbaryl on residential turf to address post-application risk to toddlers (Ref. 17). In March 2005, EPA also issued generic and product-specific DCIs for carbaryl. The carbaryl generic DCI required several studies of the active ingredient carbaryl, including additional toxicology, worker exposure monitoring, and environmental fate data. The product-specific DCI required acute toxicity and product chemistry data for all pesticide products containing carbaryl; these data are being used for product labeling. EPA has received numerous studies in response to these DCIs, and, where appropriate, these studies were considered in the tolerance reassessment.

In response to the DCIs, many carbaryl registrants chose to voluntarily cancel their carbaryl products, rather than revise their labels or conduct studies to support these products. EPA published a notice of receipt of this request in the **Federal Register** on October 28, 2005 (70 FR 62112), followed by a cancellation order issued on July 3, 2006. One technical registrant, Burlington Scientific, chose to cancel their technical product, leaving Bayer CropScience (Bayer) as the sole technical registrant for carbaryl. Approximately two-thirds of all of the carbaryl products registered at the time of the 2003 IRED have been canceled through this process.

In addition, Bayer, the sole remaining technical registrant responsible for developing data, requested waivers of required exposure monitoring or residue studies because these use scenarios are not on any Bayer technical or product labels or were to be deleted from Bayer labels: carbaryl use in or on pea and bean, succulent shelled (*subgroup 6B*); millet; wheat; pre-plant root dip for sweet potato; pre-plant root dip/drench fpr nursery stocks, vegetable transplants, bedding plants, and foliage plants; use of granular formulations on leafy vegetables (except Brassica); ultra low volume (ULV) application for adult mosquito control; and dust applications in agriculture.

Bayer subsequently requested that all of their carbaryl registrations bearing any of these uses be amended to delete these uses; EPA published a Notice of receipt of this request in the **Federal Register** on August 20, 2008 (73 FR 49184), and plans to approve Bayer's request and issue a final order amending these registrations at the end of the comment period for the Notice. As a consequence, EPA has notified all affected registrants that these uses and application methods must be deleted from their carbaryl product labels. EPA has identified thirty four (34) product labels from 14 registrants (other than Bayer) bearing these end uses. All of these registrants have requested that their affected carbaryl product registrations be amended to delete these uses. EPA published a Notice of receipt of these requests in the **Federal Register** on August 20, 2008 and will publish a second Notice of Receipt of these requests on or about October 8, 2008.

In June 2006, EPA determined that the uses associated with 120 of the existing carbaryl tolerances are not significant contributors to the overall NMC cumulative risk and as a result these tolerances will have no effect on the retention or revocation of other NMC tolerances. Therefore, EPA considered these 120 tolerances for carbaryl as reassessed on June 29, 2006, and posted this decision on the internet site. (See *http://www.epa.gov/pesticides/cumulative/carbamates_commodity.pdf).*

Carbaryl is a member of the NMC class of pesticides which share a common mechanism of toxicity by affecting the nervous system via cholinesterase inhibition. Specifically, carbaryl is a reversible inhibitor of AChE. A cumulative risk assessment, which evaluates exposures based on a common mechanism of toxicity, was conducted to evaluate risk from food, drinking water, residential use, and other non-occupational exposures resulting from registered uses of NMC pesticides, including carbaryl.

In late November 2006, EPA received data from a carbaryl comparative cholinesterase study, conducted to determine the comparative sensitivity of adults and offspring to cholinesterase inhibition by carbaryl. These data were used to revise the FQPA Safety Factor for carbaryl for the NMC cumulative risk assessment and to select new toxicology endpoints (PoDs) for the risk assessment. The Agency determined that it was appropriate to use the new FQPA Safety Factor and revised PoDs in both the NMC cumulative risk assessment and the carbaryl-specific human health risk assessment. Because this necessitated a revision of the carbaryl human health aggregate risk assessment, EPA also considered additional new data generated in response to the DCI, new methodologies, and other new information in performing its most recent assessment of carbaryl and in responding to this Petition. EPA has thus, in effect, revised the carbaryl single chemical assessment in response to the issues raised during the public comment process as well as based upon more recent data and analytical methods.

On September 26, 2007, EPA issued the NMC cumulative risk assessment. EPA concluded that the cumulative risks associated with the NMC pesticides meet the safety standard set forth in section 408(b)(2) of the FFDCA, provided that the mitigation specified in the NMC cumulative risk assessment is implemented, such as cancellation of all uses of carbofuran, termination of methomyl use on grapes, etc. EPA has therefore terminated the tolerance reassessment process under 408(q) of

the FFDCA. (See Ref. 18 for additional information).

In conjunction with the NMC cumulative risk assessment, EPA completed a RED for carbaryl on September 24, 2007 and issued this RED on October 17, 2007 with a formal Notice of Availability in the **Federal Register** (72 FR 58844). In addition to relying on the NMC cumulative risk assessment to determine that the cumulative effects from exposure to all NMC residues, including carbaryl, was safe, the carbaryl RED relied upon the revised assessments and the mitigation that had already been implemented (e.g., cancellation of pet uses except for collars). In addition, the RED included additional mitigation with respect to granular turf products for residential use; namely, that product labels direct users to water the product in immediately after application. Subsequently, on August 25, 2008, EPA completed an addendum to the Carbaryl RED incorporating the results of a revised occupational risk assessment and modified mitigation measures for the protection of workers. Elsewhere in this issue of the **Federal Register** EPA is announcing the availability of the amendments to the Carbaryl RED.

B. FFDCA Tolerance Reassessment and FIFRA Pesticide Reregistration

As required by the Food Quality Protection Act of 1996, EPA reassessed the safety of the carbaryl tolerances under the safety standard established in the FQPA. In the September 2007 RED for carbaryl, EPA evaluated the human health risks associated with all currently registered uses of carbaryl and determined that there is a reasonable certainty that no harm will result from aggregate non-occupational exposure to the pesticide chemical residue. In making this determination, EPA considered dietary exposure from food and drinking water and all other non-occupational sources of pesticide exposure for which there is reliable information (Ref. 18). The Agency has concluded that with the adoption of the risk mitigation measures identified in the NMC cumulative risk assessment, all of the tolerances for carbaryl meet the safety standard as set forth in section 408(b)(2)(D) of the FFDCA. Therefore, the tolerances established for residues of carbaryl in/on raw agricultural commodities were considered reassessed as safe under section 408(q) of FFDCA, as amended by FQPA, in September 2007. These findings satisfied EPA's obligation to review the carbaryl tolerances under the FQPA safety standard.

To implement the carbaryl tolerance reassessment, EPA commenced with rulemaking in 2008. The Agency published a Notice of proposed tolerance actions in the May 21, 2008 **Federal Register** (73 FR 29456). This proposed rule provided for a 60 day public comment period. No comments relevant to carbaryl tolerances were received and EPA published a Notice of final tolerance actions in the September 10, 2008 **Federal Register** (73 FR 52607). This rule codifies the carbaryl tolerances in 40 CFR 180.169.

V. The Petition to Revoke Tolerances

NRDC filed a petition dated January 10, 2005 (Petition), requesting, among other things, that EPA cancel all carbaryl registrations and revoke all carbaryl tolerances (Ref. 1). In response to EPA's publication of the Petition pursuant to section 408(d) of the FFDCA, NRDC resubmitted its Petition and earlier comments in support of its Petition. (See Docket ID EPA–HQ–OPP–2005–0077–0066).

It should be noted that NRDC's January 10, 2005 submission is in the form of comments on and requests for changes to the Carbaryl Interim Reregistration Eligibility Decision published in the **Federal Register** on October 27, 2004, 70 FR 62663; (Ref. 16). Nonetheless, in the introduction to the comments, NRDC included a statement that NRDC is also petitioning the Agency to revoke all carbaryl tolerances. Among other things, NRDC raises issues with the dietary assessment and in particular its drinking water assessment that supported the 2004 IRED decision. NRDC also raises concerns about the data surrounding EPA's selection of a children's safety factor. NRDC's petition also includes some generic disagreements with how EPA conducts its assessments.

VI. Public Comment

In response to that portion of NRDC's petition seeking revocation of the carbaryl tolerances, EPA published notice of the Petition for comment on March 30, 2005 (70 FR 16281). EPA received approximately 5,230 comments in support of the Petition. The vast majority of these comments followed an identical or similar format expressing the commenters support for the Petition in general terms. These commenters uniformly protested the Agency's decision to continue allowing the use of carbaryl ''a chemical [EPA] consider[s] likely to cause cancer.'' As a preliminary note, although the Agency considers carbaryl to have the potential to cause cancer, exposure to carbaryl residues is so low that the actual risk of cancer from carbaryl is negligible. EPA is generally not concerned about cancer risks at or below the range of 1×10^{-6}, or 1 in a million. For carbaryl, the dietary cancer risk from residues in food and drinking water is estimated to be 3×10^{-8}, or 3 in 10 million. The estimated cancer risk from exposure to carbaryl in products used in a residential setting range from 1×10^{-8} to 10^{-13} (from 1 in 10 million to 1 in 10 trillion). Because EPA considers carbaryl to be a non-threshold carcinogen, the Agency uses the conservative, default linear low-dose linear method to quantify cancer risk. Even using this conservative approach to evaluate potential cancer risk from food, drinking water, and residential uses of carbaryl, EPA has not identified any cancer risks of concern.

Of the subset of comments not based upon a form letter, most related to ecological issues and in particular toxicity to bees and apple thinning uses. These comments are not relevant to the requested revocation of pesticide tolerances. EPA is responding to the Petition insofar as it seeks the cancellation of all carbaryl registrations separately and, therefore, these comments are not directly relevant here. One commenter, Bayer, the sole technical product registrant, submitted comments that purport to address all of the issues raised by NRDC (Ref. 19). In any event, these comments as a whole did not add any new information pertaining to whether the tolerances were in compliance with the FFDCA. Comments on the specific claims by NRDC are summarized in Unit VII immediately following the summary of NRDC's claim but prior to EPA's response to the claim.

VII. Ruling on Petition

This Order addresses NRDC's petition to revoke carbaryl tolerances. As noted above, this ''Petition'' was included as part of NRDC's comments on the carbaryl IRED. Thus, the Petition contains a number of comments that are just that, comments, and that do not provide a basis upon which to either cancel all carbaryl registrations or revoke all carbaryl tolerances. Where those comments are directly related to suggestions that the carbaryl tolerances do not meet the safety standard in section 408 of the FFDCA, the Agency has tried to address those comments in this petition response. However, EPA has not attempted to respond to every comment or suggestion for improvement made in NRDC's filing.

EPA has, to the extent possible, construed NRDC's comments as asserting various grounds as to why the carbaryl tolerances do not meet the

FQPA safety standard and should be revoked. EPA has divided NRDC's grounds for revocation into four categories - toxicology; dietary exposure; residential exposure; and risk characterization - and addressed separately each claim under these categories. Each specific claim of NRDC is summarized in Unit VII immediately prior to EPA's response to the claim.

This Order also constitutes a response to a petition dated November 26, 2007, to cancel carbaryl pet collar registrations submitted as part of NRDC's comments on the NMC cumulative assessment (NMC Petition) (Ref. 2). EPA's response to NRDC's petition to cancel pet collar registrations is addressed here because the basis for the petition to cancel pet collars rests on issues related to EPA's assessment of cumulative effects under the FFDCA.

EPA has not addressed claims that concern carbaryl uses that have been canceled, or application methods that have been discontinued since the time of the Petition. Nor is EPA addressing claims that concern carbaryl uses for which the registrant(s) has requested that the use be deleted or registration cancelled pursuant to section 6(f) of FIFRA. These include the liquid broadcast use of carbaryl on residential lawns and turf, cancelled in March 2005 (Ref. 17), and several other uses and application methods which have been or are in the process of cancellation because the registrants are not supporting these uses and application methods with the necessary data (73 FR 49184, August 20, 2008). The following carbaryl uses are in the process of being cancelled: wheat, millet, and fresh/succulent beans and peas (crop subgroup 6B); use of carbaryl drench or dip treatments of seedlings or seed pieces, dust formulations in agricultural crops, granular applications to leafy vegetables (except Brassica), direct applications of carbaryl (except for flea collars) to domestic animals (including dogs, cats, and other pets), and all indoor applications. Carbaryl registrations are also being amended to discontinue the following application methods: drenching dipping, hand held fogger, mosquito adulticide ULV, power backpack sprayer, and tree injection.

A. Dietary Exposure Issues

1. *Revised dietary exposure and risk assessment*. NRDC's petition challenges some aspects of EPA's 2003 proposed dietary exposure and risk assessment of carbaryl (Ref. 1 at 16-20). EPA has since updated its dietary exposure and risk assessment. These revisions were incorporated in and provided the basis for the RED. The main changes in the revised assessment include: (1) Use of the half-life value for carbaryl from a study that measures how quickly carbaryl degrades in an aerobic aquatic environment; (2) inclusion of updated percent crop treated data for evaluation of dietary exposure from residues in food; (3) inclusion of a comprehensive review of recent surface water monitoring data, including an investigation into the high carbaryl detection in groundwater reported in the 2003 IRED; (4) incorporation of the most recent food residue data from USDA's PDP; and (5) inclusion of drinking water exposure modeling and monitoring data for agricultural and nonagricultural uses of carbaryl. In addition, in a change from the 2003 assessment, the revised risk assessment did not evaluate dietary risk for long term (> 6 months) and chronic exposure to carbaryl due to the rapid reversibility of cholinesterase inhibition, the toxicological endpoint of concern. Specifically, recent data for carbaryl and the other NMCs show that cholinesterase inhibition is reversible, with recovery in less than 24 hours. Because the acute exposure from carbaryl is the main duration of concern, EPA determined that a chronic assessment is not appropriate for carbaryl.

These revisions effectively address NRDC's concerns and EPA is not reopening the issues here. Nonetheless, EPA is providing more specific information concerning the revised risk assessment in the context of the specific issues raised by NRDC.

2. *Drinking water assessment*—a. *NRDC's claims*. NRDC criticizes the Agency's drinking water assessment because it only considered agricultural sources. NRDC urged EPA to include all available information in its surface water assessment, including non-agricultural sources (Ref. 1 at 16). NRDC further notes that the drinking water levels of comparison (DWLOCs) ''exceeds acceptable levels.'' (Ref. 1 at 16). NRDC disagrees with EPA's conclusion that the DWLOC was nonetheless acceptable because the modeling is overly conservative and that actual concentrations of carbaryl in drinking water are likely to be ''much lower.'' NRDC faults the Agency for not defining the magnitude of ''much lower'' and not providing any support for this contention. In particular, NRDC argues that the modeling estimates are actually in agreement with some of the monitoring data, and therefore EPA should accept the modeling estimates as an accurate indicator of exposure. Specifically, NRDC argues that peak modeling estimates from Florida citrus use (646 ppb) match monitoring data from a well in New York (610 ppb), and therefore EPA should accept the modeling estimates as an accurate indicator of exposure. NRDC further argues that the Agency's rationale for concluding that the models overestimate actual concentrations in surface water is faulty.

b. *Public comments*. In its comments, Bayer took issue with NRDC's characterization that the monitoring data are in agreement with the model calculations, based upon a detection of 610 ppb in a well in New York and a maximum concentration value of 6.5 ppb in the USGS NAWQA data. Bayer argues that comparing an isolated ground water finding with predicted concentrations in surface water is scientifically inappropriate because of the different transport processes in ground water as compared to surface water. Bayer characterizes the ground water detection in NY as anomalous and notes that it has not been investigated or confirmed, and argues that it is not likely to be the result of normal movement though the soil.

Further, Bayer submitted a voluntary drinking water monitoring study for carbaryl, Surface Water Monitoring for Residue of Carbaryl in High Use Areas in the United States: Final Report (MRID 45788101). Bayer defends its drinking water study, stating that it was targeted to community water systems having watersheds with high carbaryl use and that showed lower concentrations than the NAWQA data. Bayer further argues that NRDC's assertion that monitoring can be spotty and is not designed to coincide with high use sites, seasonal application times, watershed characteristics, and urban and agricultural methods is misplaced. Bayer asserts that the monitoring program was targeted and did focus on high use sites, with a sampling program tailored to the application times, and covered both agricultural and non-agricultural uses.

Bayer also argues that the modeling is a worst case scenario and gives several reasons why EPA's model can overestimate movement of surface water, including assumptions regarding use intensity (100% of field treated at maximum rates for the maximum number of times). Bayer then asserts that the worst-case predictions are not confirmed by monitoring data ''specifically designed to capture high use areas and application times.'' (Ref. 19 at 5).

Another commenter from the Department of Entomology, Virginia Tech, notes that while NRDC complains that EPA makes assumptions in its risk

models, NRDC makes questionable assumptions of its own; namely, that EPA's model is more reliable than actual monitoring data. Similarly, NRDC emphasizes that most acreage is treated, implying that most acres received the full allowable rate. However, although carbaryl is allowed to be applied to apples during the growing season, apple growers use carbaryl mainly as a chemical thinner, which occurs early in the season and is much less likely to cause harvest residues. Other commenters (apple growers) submitted similar comments regarding the actual use and that the use of carbaryl for thinning is not likely to result in residues at harvest time as well as the importance of carbaryl for chemical thinning.

Another commenter from the University of Florida asserts that the acute drinking water concern is driven by Florida modeling, based upon a 38% crop treated assumption. According to the commenter, actual use in Florida is ''probably closer'' to one tenth of that amount. Again, according to the commenter, the National Agricultural Statistics Service (NASS) 2003 fruit data report percent crop treated amounts of 3% for Florida and 5% for grapefruit nationally. The commenter takes issue with NRDC's claim that the greater than 600 ppb spike in New York ''conforms'' to the results from the modeling. In so doing, the commenter asserts that carbaryl in New York degrades much slower than in Florida. The commenter then implies that it is significant that there are no Florida monitoring values that were in the hundred parts per billion concentration range.

c. *EPA's response*. EPA has addressed NRDC's concerns in the revised drinking water assessments supporting the carbaryl RED, which includes all available information including surface water monitoring data, new environmental fate data, and other new information and methodologies. EPA incorporated new half-life data from an aerobic aquatic metabolism study, regional percent cropped area factors, and the mitigation required in the carbaryl IRED into modeled estimates of carbaryl levels in surface water. In addition, the Agency used the PRZM-EXAMS model to generate a distribution of approximately 11,000 values, representing daily peak values over 30 years. This data set was used to create water residue data files for use in DEEM-FCID™. The range of annual peak water values was 13 to 108 parts per billion (ppb) over 30 years (Ref. 20 for further details of EPA's refined drinking water modeling). EPA incorporated this distribution of drinking water values directly into the exposure component of the dietary assessment, using the DEEM-FCID™ model. EPA also incorporated drinking water consumption data and reported body weights from the CSFII into the exposure assessment.

As mentioned above, the carbaryl drinking water assessment is no longer based upon the DWLOC approach. EPA officially withdrew the science policy paper describing the DWLOC approach on August 1, 2007 (72 FR 42082). In addition, EPA believes that the new approach is more protective of sensitive population subgroups, including infants and children, than the DWLOC approach used in the carbaryl IRED.

Although EPA did not model nonagricultural use of carbaryl, the Agency considered these uses in the process of evaluating all available water monitoring data for carbaryl for the 2007 carbaryl RED. EPA reviewed the most recent surface water monitoring data for carbaryl in urban and suburban areas for both the carbaryl IRED and the RED. Specifically, EPA considered data from NAWQA, the joint USGS-EPA Mini Pilot Monitoring Program, Washington and California state monitoring data, and a registrant voluntary water monitoring study measuring carbaryl in targeted community water systems associated with watersheds having high carbaryl use. The Agency also considered California monitoring data targeted to urban use of pesticides (Ref. 21).

EPA has also obtained additional information on the groundwater monitoring value of 610 micrograms/liter (µg/L) from Suffolk County New York reported in the carbaryl IRED. Because this value was significantly higher than any other monitoring values from ground or surface water, EPA contacted the Suffolk County government for more information about this particular groundwater sample. The sample associated with that concentration (the actual concentration was 61,000 µg/L, not 610 µg/L) was taken from a sump at a pesticide mixer/loader site as part of a pesticide spill investigation, not from a groundwater monitoring well. Therefore, this value should not have been reported in the Suffolk County water quality database (Suffolk County Department of Health 2007, personal communication); EPA has removed it from the carbaryl drinking water assessment. There were a small number of detections of carbaryl reported to OPP as a result of a quality control check of the Suffolk County database, ranging from 0.1 to 13 µg/L. These values are more in line with other monitoring data for carbaryl reported in the EPA assessment.

Finally, both the commenter from the University of Florida and NRDC are mistaken in their statements that that EPA's drinking water assessment relied on default percent crop treated assumptions. In particular, NRDC appears to have confused percent crop treated (PCT) data for the percentage of a food commodity treated with carbaryl with EPA's use of percent crop area (PCA) in the carbaryl drinking water assessment. The default PCA (87%) represents the largest fraction of a watershed that can be planted to any crop. This default PCA, which is based on Geographic Information Systems (GIS) analysis of fairly large watersheds[2], is used in drinking water assessments to account for the fact that not all land in a watershed is agricultural land (planted with crops). Regional PCAs reflect the greatest fraction of a watershed used in agriculture in each of the major drainage basins in the United States. In either case, the drinking water assessment assumes that carbaryl is applied to 100% of the agricultural land in the watershed, regardless of the fraction of the watershed that is used in agriculture.

In sum, the revised dietary risk assessment for food shows that acute dietary exposure and risk are below the Agency's level of concern for the general U.S. population and all population subgroups. The revised drinking water assessment also does not rely on the old methodology, using DWLOCs. The drinking water assessment was not limited to agriculture uses; EPA included the most recent available monitoring data for carbaryl in urban and suburban areas in the revised assessment. Last, estimated pesticide residues in drinking water were incorporated directly into the exposure component of the dietary assessment.

3. *CARES dietary exposure model*—a. *NRDC's claims*. NRDC asserts that EPA improperly relied upon Cumulative and Aggregate Risk Evaluation System (CARES), a ''confidential'' industry model to assess human health risks. While NRDC acknowledges that EPA may rely on a proprietary model, it insists that EPA has not provided sufficient detail about the model's ''built-in assumptions and calculation methodologies.'' (Ref. 1 at 19).

b. *Public comments*. Bayer asserts that during its development by industry, with input from EPA and USDA, CARES was ''freely'' available from CropLife

[2] Large watershed having an 8 digit hydrologic unit code (HUC-8).

America by request. Bayer also notes that the model was reviewed at two FIFRA SAP meetings in 2002 and 2004 (US EPA, SAP April 30 to May 1, 2002. CARES Model Review *http://www.epa.gov/scipoly/sap*; USEPA, SAP April 29 to 30, 2004. A Model Comparison: Dietary and Aggregate Exposure in Calendex, CARES and Lifeline. *http://www.epa.gov/scipoly/sap*). On completion of the model, it was donated to The International Life Sciences Institute (ILSI). CARES is now freely available from the ILSI web site (*http://www.ilsi.org*).

c. *EPA's Response*. In the 2003 IRED, EPA used the DEEM- FCID™ model to estimate dietary risks from carbaryl. The carbaryl registrant submitted an assessment derived from CARES, which EPA reviewed and compared with the Agency's results. However, the Agency did not rely upon the CARES model in the Carbaryl IRED. EPA relied upon the DEEM-FCID™ model for both the 2003 human health risk assessment supporting the IRED and the revised 2007 dietary assessment supporting the carbaryl RED. Thus, any concerns regarding the public availability of the CARES model are irrelevant to EPA's risk assessment for the 2003 IRED.

Nonetheless, it is worth noting that the CARES model has been transferred to the ILSI Research Foundation and the CARES program and source code is publicly available at no charge. In addition, in 2002, the FIFRA SAP reviewed the underlying science, computational approaches and ease of use of the CARES model. The FIFRA SAP's June 13, 2002 report (Ref. 22) provides results of the panel's deliberations. The FIFRA SAP provided a series of recommendations designed to improve the technical basis of the model and software system. In any case, CARES meets OPP's criteria for use in regulatory decision making with respect to public availability, transparency, and compliance with Agency policy guidelines and NRDC's objection in this regard are without merit.

4. *Farmers' markets and roadside produce stands*—a. *NRDC's claims*. NRDC asserts that EPA did not explicitly consider food purchased at farmer's markets, farm stands, ''U-PIK'' farms, or eaten from household gardens (Ref. 1 at 19-20). NRDC suggests that, in the absence of data to support EPA's belief that its exposure assessment adequately accounts for food purchased at such locals, EPA include an uncertainty factor to account for children who consume this source of food (Ref. 1 at 20).

b. *Public comments*. Bayer noted that EPA adequately responded to this issue in its October 26, 2004 Response to Comments on Phase 5 Risk Assessment (Docket ID No. EPA–HQ–OPP–2003–0376–00008).

c. *EPA's response*. In an Order responding to NRDC objections to tolerances for different pesticides, EPA has addressed NRDC's claims regarding pesticide exposure to persons who purchase food at roadside stands or farmers' markets. (70 FR 733; 72 FR 662, December 5, 2007). This is equally applicable to ''U-PIK'' farms and household gardens. As EPA explained there, whether EPA relies on data from crop field trials or monitoring data in estimating pesticide exposure, given the sampling methods in field trials and food monitoring residue levels identified from these sources are unlikely to understate residue levels at farm stands. Moreover, EPA does not believe it is reasonable to assume that farm stands sell food containing a significantly different residue profile than found in PDP monitoring data. Therefore, this factor introduces little to no uncertainty concerning the possibility of underestimation of residues into EPA's analysis. In any case, EPA hereby incorporates its prior response to these issues EPA relies on its prior response to this issue and finds NRDC's contentions without merit.

5. *Tolerances for cancelled uses*—a. *NRDC's claims*. NRDC is concerned that EPA proposed to increase tolerances for 20 commodities and establish new tolerances for 7 commodities (Ref. 1 at 14-15). Specifically, NRDC urges EPA not to make any tolerance reassessment determination prior to completion of the carbamate cumulative risk assessment. NRDC also insists that EPA revoke tolerances for all uses of carbaryl that have been voluntarily cancelled. NRDC is particularly concerned about imported food and products entering the United States with carbaryl residues without triggering action by the FDA. NRDC is also concerned about the effect that the failure to ''ban'' products will have on the international community and in particular developing countries. Specifically, NRDC asserts that manufacturers voluntarily cancel the registration of high risk products to avoid Prior Informed Consent (PIC) listings.

b. *Public comments*. Bayer asserts in its comments that in the carbaryl IRED EPA addressed NRDC's concern regarding the reassessment of tolerances prior to the completion of the NMC cumulative risk assessment. Bayer notes, however, that the IRED specifically provides that the establishment of new tolerances or raising tolerances will be deferred pending consideration of cumulative risk for the NMCs. The IRED further provides that, for purposes of that document, the term ''reassessed'' does not imply that all of the tolerances for carbaryl have been reassessed as required by FQPA, since these tolerances may only be reassessed once the cumulative risk assessment of all carbamate pesticides is considered. Rather, the IRED provided reassessed tolerances for carbaryl in/on various commodities, supported by all of the submitted residue data, only for the single carbamate chemical carbaryl (Ref. 16 at 67).

Bayer further expressed its belief that EPA's practice of revoking tolerances after a sufficient period of time that allows existing stocks bearing the use being cancelled to clear the channels of trade is in compliance with the requirements of the FQPA. Finally, Bayer argues that NRDC's concern about potential risk from new or increased tolerances being established for carbaryl are not justified because the tolerance reassessment process is not associated with labeling changes that increase the maximum application rates or frequency of application allowed by current labels. Bayer further notes that many of the labeling amendments required by the IRED serve to reduce potential human health and environmental risks. Bayer also notes that the pursuant to the IRED most tolerances will be either reduced, revoked, or left unchanged.

c. *EPA's response*. Notwithstanding NRDC's insistence that EPA revoke tolerances for uses that have been voluntarily canceled, NRDC has not provided any basis for determining that tolerances for uses that have been voluntarily cancelled do not meet the FFDCA standard such that the tolerance must be revoked. Be that as it may, EPA has now completed and released the cumulative risk assessment for the NMCs and, therefore, all carbaryl tolerances are considered reassessed at this time. With respect to tolerances associated with uses that have been cancelled and/or deleted pursuant to section 6(f)(1) of FIFRA, EPA has revoked the associated tolerances, except for the wheat tolerance, which is still needed to cover imported wheat and any domestic wheat that may receive inadvertent residues of carbaryl resulting from carbaryl use to control grasshoppers and/or Mormon crickets on pasture and rangeland. The Agency included carbaryl residues on wheat in the cumulative risk assessment for the NMCs.

The Agency has completed rulemaking proceedings to revoke and modify the existing carbaryl tolerances,

and correct commodity definitions. EPA published a proposed tolerance rule for carbaryl on May 21, 2008 (73 FR 29456) and a final tolerance rule on September 10, 2008 (73 FR 52607). The final carbaryl tolerance rule revokes tolerances associated with uses that have been cancelled and/or deleted to date pursuant to section 6(f)(1) of FIFRA, allowing sufficient time for existing stock to clear channels of trade, with the exception of the tolerance for wheat. As a result of the final tolerance rule, many existing carbaryl tolerances have been reassigned to crop groups, and old commodity specific tolerances have been revoked as new tolerances have been established for residues in/on various crop groups and subgroups. New tolerances were also established for carbaryl residues in/on the following raw agricultural commodities: aspirated grain fractions, proso millet hay, sorghum stover, and sugar beet roots. At the present time, sufficient data are available to determine an appropriate tolerance for residues in/on aspirated grain fractions (70 ppm), sugar beet roots (0.5 ppm), and sorghum stover (30.0 ppm). Separate tolerances have been established for residues in the following processed food/feed items: wet apple pomace (15.0 ppm), citrus fruit oil (20.0 ppm), raisins (12.0 ppm), and rice hulls (30.0 ppm).

Finally, to the extent that NRDC argues that tolerances must be revoked simply because an active ingredient or use is not registered in the United States, EPA disagrees. Nothing in the FFDCA requires that tolerances be limited to pesticides that have a U.S. registration. In fact, FIFRA explicitly recognizes that EPA may set import tolerances under the FFDCA. See Section 33 of FIFRA (establishing fees and decision review times for import tolerance applications). While EPA often proposes to revoke tolerances after the cancellation of associated uses because EPA believes the tolerances may no longer be necessary, EPA has always recognized that a revocation can not proceed on such grounds if foreign growers wish to rely on the tolerance. In such circumstances, a tolerance can only be revoked if necessary data to support the tolerance are not provided or if EPA determines that the tolerance does not meet the safety standard.

B. Risk Characterization

1. *New data*. In keeping with science policy developments for the NMCs, EPA used data from a comparative cholinesterase study comparing carbaryl-induced cholinesterase inhibition in adult and juvenile rats to calculate a revised FQPA Safety Factor for carbaryl and to derive the toxicology points of departure for risk assessment. Specifically, this study was conducted to determine whether young animals are more susceptible to the effects of carbaryl than adults. This oral study showed that juvenile 11–day-old (PND11) pups were more sensitive to inhibition of brain cholinesterase from carbaryl than adult rats.

EPA conducted a benchmark dose analysis for the carbaryl comparative cholinesterase study, using the same modeling methodology used in the NMC cumulative risk assessment. A benchmark dose analysis models the dose-response relationship with a dose-response curve, which allows selection of doses corresponding to a specified level of response, called a benchmark response. This analysis allows EPA to determine a more appropriate point of departure from a toxicology study rather than using the study NOAEL or LOAEL. (See Refs. 12, 23, and 24 for more information on benchmark dose modeling).

The Agency estimated the 10% benchmark dose response (BMD_{10}) and the $BMDL_{10}$, or lower 95% confidence limit of the benchmark dose, for this study. The Agency also conducted a full benchmark dose analysis of all rat oral toxicity studies for adults; this analysis showed that the BMDL10 for pups is also protective for adults. Because the brain is the target tissue for carbaryl, and the brain $BMDL_{10}$ of 1.1 milligrams/kilogram (mg/kg) is also protective of cholinesterase inhibition in blood, then the brain $BMDL_{10}$ is the appropriate point of departure for both children and adults in the revised carbaryl risk assessment. (See Ref. 23 and Ref. 24 for additional details regarding the comparative cholinesterase study).

2. *Revised FQPA safety factor*. To complete the carbaryl IRED in 2003, EPA evaluated the potential for special sensitivity of infants and children to carbaryl and the need for an additional FQPA Safety Factor. After evaluating the entire toxicity database available for carbaryl at that time, the FQPA Safety Factor, to account for special susceptibility of infants and children, was reduced from 10X to 1X for all scenarios, except for the chronic dietary endpoint where a 3X FQPA SF was used to account for the lack of a NOAEL. This decision and rationale is described in detail in the technical support documents for the carbaryl IRED.

As previously mentioned in Unit III.C.1. of this document, EPA has revised the FQPA Safety Factor for carbaryl using the most recent data on carbaryl age sensitivity. The new comparative cholinesterase study data was used to derive a new FQPA Safety Factor by comparing the BMD_{10} for brain cholinesterase inhibition between adults and pups at postnatal day 11. Pups were 1.8x more sensitive to brain cholinesterase inhibition than the adults; therefore, a 1.8X FQPA Safety Factor was applied to both the NMC cumulative and the carbaryl-specific risk assessments. This safety factor of 1.8X is applied to the dermal endpoint because there are no comparative cholinesterase data in offspring from dermal exposure, and because juvenile rats are 1.8X more sensitive than adults based on the oral comparative cholinesterase study in rats. The FQPA Safety Factor is 1X for oral and inhalation endpoints because these endpoints are selected from the comparative cholinesterase data for the most sensitive population (PND11 pups).

3. *Issues raised by NRDC concerning the FQPA safety factor*—a. *NRDC's claims*. NRDC objects to EPA's decision to reduce the FQPA Safety Factor to 1X in the IRED and repeats earlier arguments that a developmental neurotoxicity study (DNT) used by EPA in the 2004 IRED does not provide a basis for removing the FQPA Safety Factor because pups had effects at doses that did not produce effects in adults in the DNT study. (Ref. 1 at 17, 18) In addition, NRDC maintains that EPA should have applied an additional 3X uncertainty factor to account for the failure to identify a No Observable Adverse Effect Level (NOAEL) for brain morphometric changes in pups in the DNT study. Specifically, NRDC argues that the low and mid-dose samples were ''damaged and uninterpretable'' and thus this test did not produce a ''no observed adverse effect level.'' (Ref. 1 at 17-19).

b. *Public comments*. Bayer noted that EPA adequately responded to this issue in its October 26, 2004 Response to Comments on Phase 5 Risk Assessment (Docket ID No. 2003–0376–00008).

c. *EPA's response*. Since the 2004 IRED, EPA has incorporated new data into its assessment of carbaryl. In the process of completing the carbaryl RED and the cumulative risk assessment for the NMCs, EPA re-evaluated the toxicology database for carbaryl, which includes studies submitted since the completion of the IRED. EPA received pharmacokinetic data on the rapid reversibility of carbaryl effects (Ref. 25), a comparative cholinesterase study to inform age-related sensitivity to carbaryl (Ref. 23), and a dermal penetration study for carbaryl (Ref. 26). As a result, the Agency revised the FQPA Safety Factor in 2007 and selected new points

of departure using the new comparative cholinesterase data and benchmark dose modeling.

The comparative cholinesterase study was conducted specifically to provide age-related sensitivity data for carbaryl to be used in the NMC cumulative risk assessment. Experience with other NMCs has shown that comparative cholinesterase studies provide a more accurate indication of comparative adult and offspring sensitivity than the behavioral and histopathological changes evaluated in the DNT study. The carbaryl comparative cholinesterase study involved oral dosing of three age groups of rats, adults (97 days old) and juveniles 11 or 17 days old (postnatal day, PND, 11 or 17), followed by measurement of both brain and blood cholinesterase. Based on a benchmark dose analysis of the results of this study, EPA identified a clear point of departure (the equivalent of a NOAEL) for brain cholinesterase effects in the young and thus the sensitivity in the young is well-characterized. In these circumstances, EPA finds that it has reliable data on pre- and post-natal toxicity to remove (oral and inhalation) or reduce (dermal) the 10X FQPA Safety Factor.

Based on the results of the benchmark dose analysis from the comparative cholinesterase study, which provide the most sensitive data available to date on age related sensitivity to carbaryl, juvenile animals are 1.8X more sensitive to carbaryl induced cholinesterase inhibition than adults. EPA has thus derived an FQPA Safety Factor of 1.8X. This safety factor of 1.8X is applied to the dermal endpoint because there are no comparative cholinesterase data in offspring from dermal exposure, and because juvenile rats are 1.8X more sensitive than adults based on the oral comparative cholinesterase study in rats. The FQPA Safety Factor is 1X for oral and inhalation endpoints because these endpoints are selected from the comparative cholinesterase data for the most sensitive population (PND11 pups).

Moreover, NRDC's concern that EPA failed to apply an additional 3X uncertainty factor to account for the failure to detect a NOAEL in the DNT study is no longer relevant. Specifically, brain cholinesterase inhibition in the PND 11 animals in the comparative cholinesterase study was the most sensitive endpoint in this study; therefore, this endpoint of 1.1 mg/kg/day was used as the point of departure for the 2007 carbaryl risk assessment. This new endpoint occurs at a lower dose than NRDC's suggested extrapolated NOAEL (i.e., including a 3X uncertainty factor) of 3.3 mg/kg/day for brain morphometry from the DNT study. Because EPA's assessment is now based upon a lower endpoint, NRDC's contention that EPA failed to apply an additional 3X uncertainty factor to the point of departure derived from the DNT study is no longer relevant.

C. Residential Exposure

1. *Aggregating exposures*. The safety standard in FFDCA section 408 for tolerances requires that there be a reasonable certainty of no harm from ''aggregate exposure to the pesticide chemical residue, including all dietary exposures and all other exposure for which there is reliable information.'' (21 U.S.C. 346a(b)(2)(A)(ii)). Further, in evaluating the safety of tolerances EPA is directed to ''consider . . . available information concerning the aggregate exposures of consumers . . . to the pesticide chemical residue . . . including dietary exposure under [all] tolerance[s] . . . in effect for the pesticide chemical residue and exposure from other non-occupational sources.'' (21 U.S.C. 346a(b)(2)(D)(vi)).

Unit VII.B. discusses EPA's assessment of aggregate dietary exposure to carbaryl from residues in foods and water. That assessment showed that the dietary exposure and risk are below the Agency's level of concern for the general U.S. population and all population subgroups; exposure to carbaryl residues in food comprises <100% of the aPAD at the 99.9th percentile of exposure. Estimated dietary exposure for the general U.S. population is 29% of the aPAD; exposure to children age 1 to 2 years, the most highly exposed population subgroup, comprises 60% of the aPAD. Although refined, these exposure estimates still are likely to overstate exposure and risk.

Pesticide residues to which humans are exposed from residential uses of pesticides must be considered as part of section 408's aggregate exposure calculus. The concern, of course, is that pesticide tolerances should not be established or left in effect if dietary exposures when combined with other sources of exposure exceed safe levels.

2. *Residential exposure and risk assessment*. Since the 2004 Amended IRED, the Agency has revised the residential risk assessment for carbaryl to incorporate the revised toxicology endpoints and FQPA Safety Factor, the mitigation specified in the IRED (as well as the mitigation specified in the RED for residential use of granular formulations; namely, that granular formulations must be watered in immediately), and confirmatory data received as a result of the generic DCI for carbaryl. EPA received turf transferable residue (TTR) data for granular formulations of carbaryl, as well as additional data to support the use of carbaryl in pet collars. The granular TTR data were incorporated into the revised risk assessment; however, the pet collar data were considered but not incorporated because of data quality issues. In addition, the Agency incorporated data from several studies for pesticides applied to turf to estimate the percent of carbaryl transferred from turf to a person's hand. (See Ref. 27 for details of the revised carbaryl residential risk assessment).

3. *Pet collars*—a. *NRDC's claims*. In its Petition, NRDC expressed concern that EPA's assessment of pet collars significantly underestimates exposure. (Ref. 1 at 4). NRDC therefore requested that EPA provide information on the assumptions used to calculate flea collar exposures. In particular, NRDC is concerned that EPA's calculations do not take into account the possibility that pet sleep with children, share intimate spaces or share hugs/kisses with children. NRDC also contends that there are safer ''non-pesticide'' alternatives available.

In addition, in a November 2007 petition to cancel all carbaryl pet collar registrations, NRDC asserts that changes in this algorithm made from the preliminary NMC cumulative assessment result in a repeated and additive bias towards reducing the exposure estimate so that it ''appears'' that the pet collar uses do not exceed the Agency's level of concern. (Ref. 2 at 5-7). Specifically, NRDC takes issue with the following modifications made in the probabilistic assessment for carbaryl as part of the NMC cumulative risk assessment:

- Assuming a child mouths only one hand at a time, thereby dividing the hand-loading residues by 2X.
- Assuming the hand is fully replenished with residues from a contaminated surface on an hourly basis rather than assuming (as done previously with flea collar assessments) full replenishment between each mouthing event, which NRDC contends is a more likely scenario for children actively engaged with their pets.
- Assuming that the maximum time spent with a pet is 1.03 hrs./day. NRDC contends that EPA's assumption in previous assessments of 2 hrs./day is a much more likely scenario for pre-schoolers who are home all day with their pets and for school age children lying with their pets watching TV.
- Assuming that only 1% of the surface area of a single hand is mouthed, which is approximately 1/75

cm^2 surface area. NRDC contends that EPA's assumption in previous assessments of 20 cm^2 is a more reasonable and realistic estimate of the surface area likely to contact a child's mouth repeatedly.

• Assuming that only 20 to 50% of the pesticide is removed per mouthing event (saliva extraction factor). NRDC contends that EPA's assumption in previous assessments that all of the pesticide is removed is more reasonable and realistic.

NRDC also criticizes the Agency for not including inhalation as an exposure route for residential post-application of flea collars. NRDC also points out that inhalation was the only route of exposure that EPA estimated in an earlier RED decision on another pesticide used in flea collars.

NRDC argues that all of these modifications in the Agency's algorithm for calculating non-dietary hand-to-mouth exposures for children bias towards reducing the exposure estimate. NRDC also criticizes the Agency for stating that the modifications result from the recommendations from the August 2005 FIFRA SAP. To the contrary, NRDC contends that these modifications were never reviewed or recommended by the FIFRA SAP. NRDC therefore asserts that EPA cannot use this new method presented in the NMC cumulative assessment to ''reduce protections for children from pet uses of [carbamate] pesticides''. (Ref. 2 at 7).

b. *Public comments*. Bayer contends that NRDC is misinformed regarding ''non-pesticide'' alternatives. In particular, Bayer takes issue with NRDC's statement that ''[p]et products containing non-pesticide growth regulators also can stop fleas from reproducing successfully''. (Ref. 19 at 7, citing Ref. 1 at 4). Bayer points out that by definition any product that controls pest growth is a pesticide and that making pesticidal claims without registration is a violation of federal law. Bayer further asserts that unspecified ''non-pesticide'' alternatives have not been rigorously tested for efficacy or safety. Thus, Bayer asserts that NRDC offers no real alternative to the use of carbaryl-containing flea collars.

c. *EPA's response*. NRDC is concerned that while EPA has determined that pet collar uses are safe (with MOEs of greater than 1 million), EPA's calculations significantly underestimate exposure[3]. NRDC therefore requested that EPA provide information on the assumptions used to calculate flea collar exposures. In particular, NRDC is concerned that EPA's calculations do not take into account the possibility that pets sleep with children, share intimate spaces or share hugs/kisses with children.

As a preliminary matter, it is important to note that EPA assessed pet collars both in the individual chemical assessment and as part of the NMC cumulative risk assessment. The single chemical assessment done for carbaryl was a deterministic assessment. For the NMC cumulative risk assessment, EPA performed a probabilistic assessment.

With respect to the single chemical, deterministic assessment, the assumptions used are based upon Agency standard values for estimating exposure to pets as defined in the 1997 Draft SOPs for Residential Exposure Assessments and amendments. (Refs. 6, 7, and 8). Specifically, SOPs 9.2.1—*Postapplication Dermal Dose from Pesticide Residues on Pets* and 9.2.2 - *Postapplication Potential Dose Among Toddlers from Incidental Nondietary Ingestion of Pesticide Residues on Pets from Hand-to-Mouth Transfer* describe the algorithms that provided the basis for EPA's assessment. In addition, to the extent that EPA had chemical specific data (e.g., transferable residue data) or made chemical specific adjustments to the algorithms, they are explained in the Revised Phase 5, *Occupational and Residential Exposure Assessment and Recommendations for the Reregistration Eligibility Decision Document (RED)*, dated February 20, 2003.

In sum, for the single chemical assessment, exposures to children after contact with treated pets were addressed using the latest EPA methodology, as described below:

• Only toddlers are considered because their exposures are considered to be the most highly exposed population by the Agency;

• An equilibrium approach based on a single child ''hug'' of the treated animal is used to assess dermal exposure (i.e., the skin loads after a single contact with the treated animal and additional contacts don't proportionally add exposures) as described in the amendments to the residential SOPs (Ref. 6), the surface area of the dermal hug is based on a toddler's skin surface area and typical clothing;

• The Agency default for transferability of residues from fur is 20%; however, a pet collar transferable residue study (MRID 45792201) was submitted and used in the assessment for comparative purposes with the Agency's standard approach. The data from this study were used to develop an alternative transferability factor of 2.6% for dusts and liquid applications;

• The active lifetime of a collar is expected to be 120 days based on label statements which were used by the Agency, a daily emission term from the collar of 0.000290 mg/cm/gram ai/day[2] is also based on measured data from Mississippi State University for a pet collar. Additionally, data from a pet collar transferable residue study (MRID 45792201) was submitted and used in the assessment for comparative purposes with the Agency's standard approach the data from this study were used to complete risk calculations using direct measurements of transferable residue concentration on dogs;

• Risks are based on an even loading of residues across the entire surface of a 30 lb dog which has been chosen as a representative animal. The animal surface area was calculated using (12.3 * Body Weight (g) 0.65) from the Agency's 1993 Wildlife Exposure Factors Handbook (i.e., dog surface area of 5986 cm^2);

• The approach used to address the hand-to-mouth exposure pathway has been modified since the previous risk assessment. In the previous assessment, contact with dogs was based on 40 events per day, in each event, the palmar surface of the hands (i.e., 20 cm^2/event) is placed in the mouth of the child contributing to nondietary ingestion exposure. In the revised approach, the frequency term has been modified to an equilibrium approach analogous to the dermal exposure component (i.e., the frequency = 1) because the transferable residue concentrations are from measured concentrations on the hands following heavy rubbing/petting of a dog for 5 minutes. This would result in significantly higher concentrations on the hands than would be expected from a single contact.

With respect to the single chemical assessment, NRDC asserts that the Agency failed to properly take into account children hugging and sleeping with pets. To the contrary, EPA's assessment is in fact based upon toddler exposure through hugging and petting. Indeed, for maximum exposure, EPA's assessment is based upon assumptions of hugging and petting followed by mouthing activity. Thus, NRDC's concerns about EPA's assessment not taking hugging into account are misplaced.

The estimation of risk from dermal and oral exposures related to pet collars is best described by means of combining both routes of exposure. The Agency

[3] NRDC asserts that a MOE of 1 million relates to residential postapplication exposures associated with pet collars. This is incorrect. The MOE referred to relates to residential handler (applicator) exposure as assessed in the 2003 carbaryl IRED.

combines risks resulting from total exposures to individual chemicals when it is likely that they can occur simultaneously based on the use pattern and the behavior associated with the exposure population. For carbaryl, the Agency combined risk values (i.e., MOEs) for different kinds of exposures associated with the pet collar scenario (dermal and hand-to-mouth). These represent the standard set of exposures that are typically added together when chemicals are used on pets because it is logical that they can co-occur. It should be noted that the dermal and hand-to-mouth assessments are considered conservative and that combining the assessments is expected to provide a highly conservative assessment of children's incidental oral exposure.

EPA did not, however, separately assess exposure to toddlers while sleeping with (near or next to) pets wearing a pet collar impregnated with carbaryl. This is because EPA assumes that the ''hug'' or equilibrium approach is adequately protective for all activities in which a child engages that result in dermal exposure. EPA presented the concept of a pet hug to assess dermal exposure to the FIFRA SAP on September 21, 1999 (64 FR 48394, Ref. 28); this was considered to be a reasonable approach. (Ref. 26). As described in the 1999 Overview document presented to the SAP (Ref. 21), the residential pet SOP ''assumes a one to one transfer to the skin of surface area representing both hands. This assumption suggests equilibrium is established between the transferable residues on the pet and the residues on the hand after contact. The concept of equilibrium ... has utility in constructing scenarios such as a child hugging a dog or a child sleeping with a dog. This is possible by assuming direct transfer or transferable residue estimates to human surface area values.'' (Ref. 22 at 38 to 39).

NRDC also criticizes the Agency for not including inhalation as an exposure route for residential post-application of flea collars. In so doing, NRDC points out that inhalation was the only route of exposure that EPA estimated in an earlier RED decision on another pesticide used in flea collars.

EPA did not assess inhalation exposure to pet collars impregnated with carbaryl because EPA generally assumes that residential post-application inhalation exposures are negligible due to the low vapor pressures associated with many pesticides. In the case of carbaryl, this assumption is warranted. The vapor pressure of carbaryl is sufficiently low (4.1×10^{-5} mmHg at 25 °C) so that the inhalation route of exposure will contribute insignificantly to the overall estimated daily dose when compared to the combined exposures resulting from the combination of the dermal and oral (i.e., hand-to-mouth) routes. In other cases, this assumption might not be warranted. For example, dichlorvos, another pesticide used in impregnated pet collars, has a vapor pressure of 1.2×10^{-3} at 20 °C, which is considerably higher than that of carbaryl. The higher vapor pressure suggests rapid volatilization at room temperature; therefore, the Agency considered inhalation a potential route of exposure when assessing residential exposure to dischlorvos from impregnated pet collars. The Agency also considered dermal and hand-to-mouth routes of exposure, in addition to inhalation. All potential routes of exposure are considered for each pesticide on a case-by-case basis to determine which routes will be the most significant contributors to exposure and risk.

In addition, as the basis for petitioning the Agency to cancel all carbaryl pet collar registrations (submitted as part of NRDC's comments on the NMC cumulative assessment), NRDC asserts that changes in this algorithm made from the preliminary NMC cumulative assessment result in a repeated and additive bias towards reducing the exposure estimate so that it ''appears'' that the pet collar uses do not exceed the Agency's level of concern. NRDC also criticizes the Agency for stating that the modifications result from the recommendations from the August 2005 FIFRA SAP. To the contrary, NRDC contends that these modifications were never reviewed or recommended by the FIFRA SAP. NRDC then asserts that EPA cannot use this new method presented in the NMC cumulative assessment to ''reduce protections for children from pet uses of [carbamate] pesticides.'' (Ref. 2 at 7).

EPA disagrees with NRDC's assertion that the techniques used in the NMC cumulative assessment for pet collars results in an additive bias towards reducing exposures and risks. The main difference between the approach used to assess exposure to carbaryl from pet collars in the 2003 RED and the cumulative exposure assessment of the carbaryl pet collar is that the cumulative exposure assessment uses probabilistic techniques to estimate exposures and the single chemical assessment uses deterministic techniques to assess exposures. Probabilistic techniques have the advantage of using distributions of all available data to describe the myriad of potential combinations of residues and activity patterns that may occur as a child is interacting with a pet wearing a carbaryl-impregnated collar. These potential combinations of residues and activities provide a distribution of exposures for use in risk assessment. Deterministic techniques rely on point estimates of both residues and activity patterns. These point estimates may, for example, represent averages or absolute maximum values for residues and activity patterns.

The specific modifications and the reasons for adopting the modification are provided below:

- Assuming a child mouths only one hand at a time, thereby dividing the hand-loading residues by 2X.

This assumption is consistent with the way EPA has assessed hand-to-mouth exposure in the past. Both the EPA Residential SOP methodology (deterministic) and the revised hand-to-mouth algorithm used in the Revised NMC cumulative risk assessment (probabilistic) are based upon the assumption that a child can only place one hand in his/her mouth at a time.

- Assuming the hand is fully replenished with residues from a contaminated surface on an hourly basis rather than assuming (as done previously with flea collar assessments) full replenishment between each mouthing event, which NRDC contends is a more likely scenario for kids actively engaged with their pets.

As stated in the preliminary NMC cumulative risk assessment, previous assumptions regarding replenishment were overly conservative when used in a probabilistic model. These low MOEs were mainly due to the incorporation of micro-activity data into EPA's macro activity models (defined as human exposure models based on daily time step). The non-dietary ingestion pathway was the least refined of the residential exposure pathways modeled in the preliminary revised NMC cumulative risk assessment. This input is part of the revised approach that was developed in collaboration with ORD and is currently being used in the Stochastic Human Exposure and Dose Simulation (SHEDS) model. (For a full explanation of the implications of using microactivity data in a macro activity model, see Ref. 29 p. 91.) The data used in the revised assessment are based on a meta analysis provided by ORD. The meta analysis relies upon the best available observational data on children's mouthing frequency.

- Assuming that the maximum time spent with a pet is 1.03 hours/day. NRDC contends that EPA's assumption in previous assessments of 2 hours/day is a much more likely scenario for pre-

schoolers who are home all day with their pets and for school age kids lying with their pets watching TV.

This assumption is based on data that involved videotaping children's time spent with pets. (Ref. 30). As stated in the NMC Cumulative Risk Assessment document, the duration of exposure is assumed to be continuous contact rather than the intermittent contact normally associated with pet care (e.g. walking, feeding). OPP is attempting to draw the distinction between direct contact with a treated pet and the time spent with a pet where there is limited contact. For example, time spent with pets in and around the house may not result in direct contact for the entire duration. The pet collar scenario assessed in the revised NMC Risk Assessment uses pet fur residues transferred to individuals at a rate found during a study of shampooing and grooming for a duration of approximately 1 hour. Use of these data to represent residential exposure to pets is likely to encompass all other potential exposure scenarios involving direct or indirect contact with treated pets.

- Assuming that only 1% of the surface area of a single hand is mouthed, which is approximately 1/75 cm^2 surface area. NRDC contends that EPA's assumption in previous assessments of 20 cm2 is a more reasonable and realistic estimate of the surface area likely to contact a child's mouth repeatedly.

The Agency is unclear how NRDC determined that a surface area of 1% was used in the NMC cumulative risk assessment. It should be noted that the revised algorithm does not use a surface area (cm^2), but rather a distribution of fraction of the hand mouthed (unitless). The distribution of fraction of surface area of hand mouthed ranged from a mean of 0.129 to a maximum of 0.305. This is equivalent to approximately 13 to 30.5 cm^2, respectively (assuming a 100 cm^2 total palmar surface area of the hand). In addition, as a part of the algorithm used in SHEDS and CARES, the fraction of the surface area of the hand mouthed is based on the best available data. In some places in the revised NMC cumulative risk assessment, the fraction of hand mouthed is referred to as surface area mouthed in error.

- Assuming that only 20 to 50% of the pesticide is removed per mouthing event (saliva extraction factor). NRDC contends that EPA's assumption in previous assessments that all of the pesticide is removed is more reasonable and realistic.

The assumptions used in the hand-to-mouth assessment are based upon data from several studies (Refs. 31, 32, and 33). The studies were conducted to address the removal efficiency of residues from the hands by saliva and other substances (e.g., ethanol) during mouthing events. The resulting range, 20–50% removal efficiency, is the same used for hand-to-mouth assessment in the Draft Residential SOPs and in the NMC cumulative risk assessment; however, the Residential SOPs rely upon the upper percentile of the range (50%) while the NMC cumulative risk assessment made use of all available data to better estimate exposure using a probabilistic approach.

In sum, EPA made modifications in part because of the FIFRA SAP's comments with respect to the limitations of the approach used in the preliminary NMC cumulative risk assessment—most notable of which was that the approach used in the preliminary NMC cumulative risk assessment was likely to overestimate exposure and EPA should consider not assessing this exposure pathway at all until it has better data. EPA assessed this pathway (which the FIFRA SAP also suggested EPA) but modified the algorithm in an effort to further refine the assessment.

Furthermore, the FIFRA SAP provides independent scientific advice to the EPA on health and safety related issues related to pesticides. Thus, whether the FIFRA SAP reviewed and offered its recommendations on the specifics of the modifications does not preclude EPA from making such modifications (especially where the FIFRA SAP recommends that EPA consider how the approach should be modified). Similarly, review by the FIFRA SAP is not required in order for EPA to make a safety finding. Accordingly, the issues raised by NRDC do not provide a basis for revoking all carbaryl tolerances or cancelling pet collar registrations.

4. *Farm children*—a. *NRDC's claims*. Previously, NRDC had asserted that farm children are especially vulnerable to pesticide exposure and are not adequately considered. (Ref. 1. at 19). Notwithstanding EPA's previous response to this issue, NRDC maintains that the Agency still has not adequately addressed this issue.

b. *Public comments*. Bayer noted that EPA adequately responded to this issue in its October 26, 2004 Response to Comments on Phase 5 Risk Assessment (Docket ID No. 2003–0376–00008).

c. *EPA's response*. Simply asserting that the Agency has not (in NRDC's opinion) adequately addressed an issue is not a basis upon which to revoke a tolerance. In particular, NRDC has not provided any additional information or data, nor has NRDC suggested in what respect it finds the Agency's previous analysis and response to this issue is inadequate. See Imidacloprid; Order Denying Objections to Issuance of Tolerance, Final Order, 69 FR 30042 (May 26, 2004). EPA hereby incorporates its prior response to this issue and finds NRDC's contention without merit.

D. Conclusion

NRDC's petitions to revoke all carbaryl tolerances are denied. NRDC's arguments have not demonstrated that carbaryl tolerances are unsafe; to the contrary, EPA continues to believe that its risk assessments appropriately support its finding that the carbaryl tolerances pose a reasonable certainty of no harm.

VIII. Regulatory Assessment Requirements

As indicated previously, this action announces the Agency's order denying a petition filed, in part, under section 408(d) of FFDCA. As such, this action is an adjudication and not a rule. The regulatory assessment requirements imposed on rulemaking do not, therefore, apply to this action.

IX. Submission to Congress and the Comptroller General

The Congressional Review Act, (5 U.S.C. 801 et seq.), as added by the Small Business Regulatory Enforcement Fairness Act of 1996, does not apply because this action is not a rule for purposes of 5 U.S.C. 804(3).

X. References

1. NRDC comments to IRED and petition to cancel registrations dated January 10, 2005.

2. NRDC petition to cancel carbaryl registrations submitted as part of NRDC's comments to *N*-methyl carbamate NMC cumulative dated September 24, 2007.

3. USEPA. 2000a. ''Choosing a Percentile of Acute Dietary Exposure as a Threshold of Regulatory Concern.'' March 16, 2000. Available at: *http://www.epa.gov/pesticides/trac/science/trac2b054.pdf*

4. US EPA Office of Pesticide Programs. 1998. Proposed Methods for Basin-Scale Estimation of Pesticide Concentrations in Flowing Water and Reservoirs for Tolerance Reassessment. Presentation to the FIFRA SAP, July 29, 1998.

5. US EPA Office of Pesticide Programs. 1999. Proposed Methods for Determining Watershed-derived Percent Crop Areas and Consideration for Applying Crop Area Adjustments to

Surface Water Screening Models. Presentation to the FIFRA SAP, May 27, 1999.

6. US EPA. Office of Pesticide Programs. 1997. Standard Operating Procedures (SOPs) for Residential Exposure Assessments (Draft December 19, 1997).

7. US EPA Office of Pesticide Programs. 2001. Science Advisory Council for Exposure (ExpoSAC) Policy 12: Recommended Revisions to the Standard Operating Procedures (SOPs) for Residential Exposure Assessments. February 2001.

8. US EPA Office of Pesticide Programs. 2002a. ExpoSAC Policy 13: Postapplication Exposure Assessment for Children from Pet Treatments. January 2002.

9. US EPA Office of Pesticide Programs. 2002b. Office of Pesticide Programs' Policy on the Determination of the Appropriate FQPA Safety Factor(s) for Use in Tolerance Assessment. Available at *http://www.epa.gov/oppfead1/trac/science/determ.pdf.*

10. US EPA Office of Pesticide Programs. 2002c. Carbaryl: Updated Toxicology Chapter for RED. May 24, 2002. See docket ID EPA–HQ–OPP–2002–0138.

11. US EPA Office of Pesticide Programs. 2000b. The Use of Data on Cholinesterase Inhibition for Risk Assessments of Organophosphorous and Carbamate Pesticides (August 18, 2000).

12. US EPA. Office of Research and Development. 2000. Benchmark Dose Technical Guidance Document. Draft report. Risk Assessment Forum, Office of Research and Development, U.S. Environmental Protection Agency. Washington, DC. EPA/630/R–00/001.

13. FIFRA Science Advisory Panel. 2002. Methods Used to Conduct a Preliminary Cumulative Risk Assessment for Organophosphate Pesticides. Final Report from the FIFRA Scientific Advisory Panel Meeting of February 5–7, 2002 (Report dated March 19, 2002). FIFRA Scientific Advisory Panel, Office of Science Coordination and Policy, Office of Prevention, Pesticides and Toxic Substances, U.S. Environmental Protection Agency. Washington, DC. SAP Report 2002–01.

14. FIFRA Science Advisory Panel. 2005a. Final report on *N*-Methyl Carbamate Cumulative Risk Assessment: Pilot Cumulative Analysis. Final Report from the FIFRA Scientific Advisory Panel Meeting of February , 2005 (Report dated September 2, 1998). Available at: *http://www.epa.gov/scipoly/sap/2005/february/minutes.pdf.*

15. FIFRA Science Advisory Panel. 2005b. Final report on Preliminary *N*-Methyl Carbamate Cumulative Risk Assessment. Final Report from the FIFRA Scientific Advisory Panel Meeting of July 29–30, 2005 (Report dated September -, 2005). Available at: *http://www.epa.gov/scipoly/sap/2005/august/minutes.pdf.*

16. US EPA Office of Pesticide Programs. 2004. Interim Reregistration Eligibility Decision for Carbaryl. (October 22, 2004).

17. US EPA Office of Pesticide Programs. March 9, 2005 letter to Peg Cherney, Bayer Crop Science, Final Cancellation Order for Carbaryl Liquid Broadcast Application to Lawns/Turf; EPA Registration Numbers 264–324, 264–325, and 264–328.

18. US EPA Office of Pesticide Programs. 2007. Office of Prevention, Pesticides and Toxic Substances, EPA, Reregistration Eligibility Decision for Carbaryl (September 24, 2007).

19. BayerCropScience, Comments of BayerCropScience on the Petition to Revoke or Modify Tolerances Established for Carbaryl. May 31, 2005.

20. US EPA Office of Pesticide Programs. 2007. Carbaryl Refined Drinking Water Time Series Simulations Using Regional PCAs (March 13, 2007).

21. UP3 2007. Pesticides in Urban Surface Water. Urban Uses Trends Annual Report, available at *http://www.up3project.org/documents/FInal_UP3_Use_Report_2007.pdf.*

22. USEPA Office of Pesticide Programs. Report of the FIFRA SAP Meeting held April 30 to May 1, 2002. A Set of Scientific Issues Being Considered by the EPA regarding CARES model review. June 13. 2002. EPA SAP 2002–02.

23. US EPA. Office of Research and Development. 2007. Report on Comparative Cholinesterase Study of Carbaryl May 7, 2007).

24. US EPA Office of Pesticide Programs. 2007. Carbaryl: Updated Endpoint Selection for Single Chemical Risk Assessment (June 29, 2007).

25. Padilla S, Setzer W, Marshall RS, et al. 2007. Time Course of cholinesterase inhibition in adult rats treated acutely with carbaryl, carbofuran, formetanate, methonmy, methiocarb, oxamyl, or propoxur. *Toxicology and Applied Pharmacology* 219: 202–209.

26. US EPA Office of Pesticide Programs. 2007. Carbaryl: Review of in vitro Dermal Absorption Study (MRID 47151902). June 28, 2007.

27. US EPA Office of Pesticide Programs. 2007. Carbaryl: Revisions to Residential Exposure and Risk Assessment. June 29, 2007.

28. US EPA Office of Pesticide Programs. 1999. Overview of Issues Related to the Standard Operating Proceedures for Residential Exposure Assessment. Presented to the FIFRA SAP on September 21, 1999.

29. US EPA Office of Pesticide Programs. 2007. Revised *N*-methyl Carbamate Cumulative Risk Assessment. September 24, 2007. (EPA–HQ–OPP–2007–0935–0003).

30. Freeman, N. C. G., Jimenez, M., Reed, K. J., Gurunathan, S., Edwards, R. D., & Lioy, P. J. 2001. Quantitative Analysis of Children's Microactivity Patterns: The Minnesota Children's Pesticide Exposure Study. *Journal of Exposure Analysis and Environmental Epidemiology*. 11(6): 501–509.

31. Geno PW, Camann DE, Harding, HJ, Villalobos K, Lewis RG. 1995. Handwipe Sampling and Analysis Procedure for the Measurement of Dermal Contact with Pesticides. *Arch Environ Contam Toxicol*. 30:132–138.

32. Fenske R. and C. Lu. 1994. Determination of Handwash Removal Efficiency: Incomplete Removal of the Pesticide Chlorpyrifos from Skin by Standard Handwash Techniques. American Industrial Hygiene Association Journal. 55(5): 425–432.

33. Wester RC, and Maibach HI. 1989. Dermal Decontamination and Percutaneous Absorption. In: Percutaneous Absorption. 2nd ed. R. Bronaugh and H.I. Maibach, editors. New York: Marcel Dekker, pp 335–342.

List of Subjects in 40 CFR Part 180

Environmental protection, Carbaryl, Pesticides and pest.

Dated: September 30, 2008.

Debra Edwards,

Director, Office of Pesticide Programs.

[FR Doc. E8–25693 Filed 10–28–08; 8:45 am]

BILLING CODE 6560–50–S

ENVIRONMENTAL PROTECTION AGENCY

40 CFR Part 180

[EPA–HQ–OPP–2008–0609; FRL–8384–7]

Pyrimethanil; Pesticide Tolerances

AGENCY: Environmental Protection Agency (EPA).

ACTION: Final rule.

SUMMARY: This regulation amends the tolerances in the 40 CFR 180.518 for residues of the fungicide, pyrimethanil, 4,6-dimethyl-*N*-phenyl-2-pyrimidinamine, in or on pome fruit crop group 11, establishes tolerances for the residues of pyrimethanil in or on apple wet pomace, and amends the tolerances for residues of pyrimethanil

and its metabolites in or on milk, kidney of cattle, goat, horse and sheep. Pace International, LLC requested these tolerances under the Federal Food, Drug, and Cosmetic Act (FFDCA).

DATES: This regulation is effective October 29, 2008. Objections and requests for hearings must be received on or before December 29, 2008, and must be filed in accordance with the instructions provided in 40 CFR part 178 (see also Unit I.C. of the **SUPPLEMENTARY INFORMATION**).

ADDRESSES: EPA has established a docket for this action under docket identification (ID) number EPA–HQ–OPP–2008–0609. All documents in the docket are listed in the docket index available at *http://www.regulations.gov*. Although listed in the index, some information is not publicly available, e.g., Confidential Business Information (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 in the electronic docket at *http://www.regulations.gov*, or, if only available in hard copy, at the OPP Regulatory Public Docket in Rm. S–4400, One Potomac Yard (South Bldg.), 2777 S. Crystal Dr., Arlington, VA. The Docket Facility is open from 8:30 a.m. to 4 p.m., Monday through Friday, excluding legal holidays. The Docket Facility telephone number is (703) 305–5805.

FOR FURTHER INFORMATION CONTACT: Tamue L. Gibson, Registration Division (7505P), Office of Pesticide Programs, Environmental Protection Agency, 1200 Pennsylvania Ave., NW., Washington, DC 20460–0001; telephone number: (703) 305–9096; e-mail address: *gibson.tamue@epa.gov*.

SUPPLEMENTARY INFORMATION:

I. General Information

A. Does this Action Apply to Me?

You may be potentially affected by this action if you are an agricultural producer, food manufacturer, or pesticide manufacturer. Potentially affected entities may include, but are not limited to those engaged in the following activities:

- Crop production (NAICS code 111).
- Animal production (NAICS code 112).
- Food manufacturing (NAICS code 311).
- Pesticide manufacturing (NAICS code 32532).

This listing is not intended to be exhaustive, but rather to provide a guide for readers regarding entities likely to be affected by this action. Other types of entities not listed in this unit could also be affected. The North American Industrial Classification System (NAICS) codes have been provided to assist you and others in determining whether this action might apply to certain entities. If you have any questions regarding the applicability of this action to a particular entity, consult the person listed under **FOR FURTHER INFORMATION CONTACT**.

B. How Can I Access Electronic Copies of this Document?

In addition to accessing electronically available documents at *http://www.regulations.gov*, you may access this **Federal Register** document electronically through the EPA Internet under the ''**Federal Register**'' listings at *http://www.epa.gov/fedrgstr*. You may also access a frequently updated electronic version of EPA's tolerance regulations at 40 CFR part 180 through the Government Printing Office's pilot e-CFR site at *http://www.gpoaccess.gov/ecfr*.

C. Can I File an Objection or Hearing Request?

Under section 408(g) of FFDCA, 21 U.S.C. 346a, any person may file an objection to any aspect of this regulation and may also request a hearing on those objections. You must file your objection or request a hearing on this regulation in accordance with the instructions provided in 40 CFR part 178. To ensure proper receipt by EPA, you must identify docket ID number EPA–HQ–OPP–2008–0609 in the subject line on the first page of your submission. All requests must be in writing, and must be mailed or delivered to the Hearing Clerk as required by 40 CFR part 178 on or before December 29, 2008.

In addition to filing an objection or hearing request with the Hearing Clerk as described in 40 CFR part 178, please submit a copy of the filing that does not contain any CBI for inclusion in the public docket that is described in **ADDRESSES**. Information not marked confidential pursuant to 40 CFR part 2 may be disclosed publicly by EPA without prior notice. Submit this copy, identified by docket ID number EPA–HQ–OPP–2008–0609, by one of the following methods:

- *Federal eRulemaking Portal*: *http://www.regulations.gov*. Follow the on-line instructions for submitting comments.
- *Mail*: Office of Pesticide Programs (OPP) Regulatory Public Docket (7502P), Environmental Protection Agency, 1200 Pennsylvania Ave., NW., Washington, DC 20460–0001.
- *Delivery*: OPP Regulatory Public Docket (7502P), Environmental Protection Agency, Rm. S–4400, One Potomac Yard (South Bldg.), 2777 S. Crystal Dr., Arlington, VA. Deliveries are only accepted during the Docket Facility's normal hours of operation (8:30 a.m. to 4 p.m., Monday through Friday, excluding legal holidays). Special arrangements should be made for deliveries of boxed information. The Docket Facility telephone number is (703) 305–5805.

II. Petition for Tolerance

In the **Federal Register** of August 13, 2008 (73 FR 47164) (FRL–8377–9), EPA issued a notice pursuant to section 408(d)(3) of FFDCA, 21 U.S.C. 346a(d)(3), announcing the filing of a pesticide petition (PP 7F7250) by Pace International, LLC, 5661 Branch Road, Wapato, WA 98951. The petition requested that 40 CFR 180.518 be amended by increasing tolerances for residues of the fungicide pyrimethanil, 4,6-dimethyl-*N*-phenyl-2-pyrimidinamine, in or on pome fruit crop group, namely apples, crabapple, loquat, mayhaw, pear, including oriental pear, and quince to 14 parts per million (ppm), and pome fruit wet pomace to 56 ppm. The petitioner also proposed to increase the tolerances for the combined residues of the fungicide pyrimethanil, [4,6-dimethyl-*N*-phenyl-2-pyrimidinamine] and its metabolite 4-[4,6-dimethyl-2-(pyrimidinyl) amino]phenol in or on kidney of cattle, goat, horse, and sheep to 0.6 ppm, and to increase the tolerances for the combined residues of the fungicide pyrimethanil, 4, 6-dimethyl-*N*-phenyl-2-pyrimidinamine and its metabolite 4,6-dimethyl-2-(phenylamino)-5-pyrimidinol in milk to 0.06 ppm. That notice referenced a summary of the petition prepared by Pace International, LLC, the registrant, which is available to the public in the docket, *http://www.regulations.gov*. Comments were received on the notice of filing. EPA's response to these comments is discussed in Unit IV.C.

Pace International is seeking a tolerance increase for pyrimethanil to support the use of thermofogging as a viable method of application. It is generally recognized that thermofogging may result in variable residues dependent on a wide range of factors, and field studies on apples have demonstrated residue levels of pyrimethanil up to 9.47 ppm, which is greater than the existing pome fruit tolerance.

Based upon review of the data supporting the petition, EPA is establishing a lower tolerance for pome

fruit wet pomace and milk and a higher tolerance for kidney of cattle, goat, horse, and sheep than were proposed. The reason for these changes is explained in Unit IV.D.

III. Aggregate Risk Assessment and Determination of Safety

Section 408(b)(2)(A)(i) of FFDCA allows EPA to establish a tolerance (the legal limit for a pesticide chemical residue in or on a food) only if EPA determines that the tolerance is ''safe.'' Section 408(b)(2)(A)(ii) of FFDCA defines ''safe'' to mean that ''there is a reasonable certainty that no harm will result from aggregate exposure to the pesticide chemical residue, including all anticipated dietary exposures and all other exposures for which there is reliable information.'' This includes exposure through drinking water and in residential settings, but does not include occupational exposure. Section 408(b)(2)(C) of FFDCA requires EPA to give special consideration to exposure of infants and children to the pesticide chemical residue in establishing a tolerance and to ''ensure that there is a reasonable certainty that no harm will result to infants and children from aggregate exposure to the pesticide chemical residue. . . .''

Consistent with section 408(b)(2)(D) of FFDCA, and the factors specified in section 408(b)(2)(D) of FFDCA, EPA has reviewed the available scientific data and other relevant information in support of this action. EPA has sufficient data to assess the hazards of and to make a determination on aggregate exposure for the petitioned-for increased tolerances for residues of the fungicide pyrimethanil, 4,6-dimethyl-*N*-phenyl-2-pyrimidinamine, in or on pome fruit group 11 at 14 ppm, apple, wet pomace at 40 ppm, cattle, goat, horse and sheep, kidney at 2.5 ppm and milk at 0.05 ppm. EPA's assessment of exposures and risks associated with establishing tolerances follows.

A. Toxicological Profile

EPA has evaluated the available toxicity data and considered its validity, completeness, and reliability as well as the relationship of the results of the studies to human risk. EPA has also considered available information concerning the variability of the sensitivities of major identifiable subgroups of consumers, including infants and children.

Pyrimethanil is of low acute toxicity by the oral, inhalation, and dermal routes. It is slightly irritating to the eyes and non-irritating to the skin in rabbit studies. Pyrimethanil is not a dermal sensitizer. Subchronic and chronic repeated oral toxicity studies in rats, mice, and dogs primarily resulted in decreased body weight and body-weight gains, often accompanied by decreased food consumption. The major target organs in rats and mice were the liver and thyroid. In subchronic studies in rats and mice, liver toxicity was manifested as increased absolute and relative body weights. Histopathological changes in the liver were primarily associated with increased evidence of hypertrophy in centrilobular hepatocytes. In a subchronic toxicity study in mice, increases in absolute thyroid weight were observed, associated with exfoliative necrosis and pigmentation of follicular cells. In a subchronic toxicity study in rats, thyroid effects were manifested as an increased incidence and severity of follicular epithelial hypertrophy and follicular epithelial brown pigment. There was no quantitative or qualitative evidence of increased susceptibility following prenatal exposure (in rats and rabbits), or postnatal exposure (in rats). There were no effects on fertility or reproduction in the 2–generation reproduction study in rats.

No signs of neurotoxicity were evident at doses up to 392 milligrams/kilograms/day (mg/kg/day) in the subchronic neurotoxicity study in rats. No evidence of neuropathology was seen in neurotoxicity studies, subchronic or chronic studies in mice, rats, and dogs.

In a carcinogenicity study in mice, there was no increase in the incidence of any tumor types in either sex. In a carcinogenicity study in rats, the thyroid was the only tissue showing a higher incidence of tumors than those seen in the control group. In this study, benign follicular cell adenomas were seen in both sexes. A pair-wise comparison of the incidence in the high-dose treated males was not statistically significant when compared to the control group, while the high-dose females were determined to be statistically significant. EPA classified pyrimethanil as a Group C- possible human carcinogen; EPA is using a threshold or MOE approach to estimate cancer risk to humans based on its conclusion that the thyroid tumors associated with administration of pyrimethanil in Sprague-Dawley rats are likely to be due to a disruption in the thyroid-pituitary status. The mode of action for thyroid carcinogens such as pyrimethanil is a threshold effect that is well understood by the Agency. There is no concern for mutagenicity resulting from exposures to pyrimethanil.

In a 90–day oral toxicity study with rats, a slight decrease in thymus weight was observed at 529 mg/kg/day (highest dose tested; (HDT)). There were no histopathological findings noted in the thymus. There were no effects on the thymus in the chronic carcinogenicity study in rats at doses up to and including 221 mg/kg/day HDT. Therefore, decreases in thymus weight in the 90–day study are considered equivocal and not a trigger for immunotoxicity study.

Specific information on the studies received and the nature of the adverse effects caused by pyrimethanil, [4,6-dimethyl-*N*-phenyl-2-pyrimidinamine] as well as the no-observed-adverse-effect-level (NOAEL) and the lowest-observed-adverse-effect-level (LOAEL) from the toxicity studies can be found at *http://www.regulations.gov* in document *Pyrimethanil. Application for Amended Section 3 Registration of Xedathane A for Postharvest Use on Pome Fruits by Thermafog Application. Human-Health Risk Assessment*, page 17 in docket ID number EPA–HQ–OPP–2008–0609.

B. Toxicological Endpoints

For hazards that have a threshold below which there is no appreciable risk, a toxicological point of departure (POD) is identified as the basis for derivation of reference values for risk assessment. The POD may be defined as the highest dose at which no adverse effects are observed (the NOAEL) in the toxicology study identified as appropriate for use in risk assessment. However, if a NOAEL cannot be determined, the lowest dose at which adverse effects of concern are identified (the LOAEL) or a Benchmark Dose (BMD) approach is sometimes used for risk assessment. Uncertainty/safety factors (UFs) are used in conjunction with the POD to take into account uncertainties inherent in the extrapolation from laboratory animal data to humans and in the variations in sensitivity among members of the human population as well as other unknowns. Safety is assessed for acute and chronic dietary risks by comparing aggregate food and water exposure to the pesticide to the acute population adjusted dose (aPAD) and chronic population adjusted dose (cPAD). The aPAD and cPAD are calculated by dividing the POD by all applicable UFs. Aggregate short-term, intermediate-, and chronic-term risks are evaluated by comparing food, water, and residential exposure to the POD to ensure that the margin of exposure (MOE) called for by the product of all applicable UFs is not exceeded. This latter value is referred to as the Level of Concern (LOC).

For non-threshold risks, the Agency assumes that any amount of exposure will lead to some degree of risk. Thus, the Agency estimates risk in terms of the probability of an occurrence of the adverse effect greater than that expected in a lifetime. For more information on the general principles EPA uses in risk characterization and a complete description of the risk assessment process, see *http://www.epa.gov/pesticides/factsheets/riskassess.htm*.

A summary of the toxicological endpoints for pyrimethanil used for human risk assessment can be found at *http://www.regulations.gov* in document *Pyrimethanil. Application for Amended Section 3 Registration of Xedathane A for Postharvest Use on Pome Fruits by Thermafog Application*, page 17 in docket ID number EPA–HQ–OPP–2008–0609.

C. Exposure Assessment

1. *Dietary exposure from food and feed uses*. In evaluating dietary exposure to pyrimethanil, EPA considered exposure under the petitioned-for tolerances as well as all existing pyrimethanil tolerances in (40 CFR 180.518). EPA assessed dietary exposures from pyrimethanil in food as follows:

i. *Acute exposure*. Quantitative acute dietary exposure and risk assessments are performed for a food-use pesticide, if a toxicological study has indicated the possibility of an effect of concern occurring as a result of a 1–day or single exposure.

In estimating acute dietary exposure, EPA used food consumption information from the United States Department of Agriculture (USDA) 1994–1996 and 1998 Nationwide Continuing Surveys of Food Intakes by Individuals (CSFII). As to residue levels in food, EPA assumed tolerance-level residues, 100% crop treated (PCT), default processing factors as necessary, and empirical processing factors for orange and apple juice.

ii. *Chronic exposure*. In conducting the chronic dietary exposure assessment EPA used the food consumption data from the USDA 1994–1996 and 1998 CSFII. As to residue levels in food, EPA assumed tolerance-level residues, 100 PCT, default processing factors as necessary, and empirical processing factors for orange and apple juice.

iii. *Cancer*. The Agency has classified pyrimethanil as a Group C carcinogen based on thyroid follicular cell tumors in both sexes of the 2–year rat study. A non-linear approach was used to assess cancer risk using the same exposure estimates as discussed in Unit III.C.1.ii, chronic exposure.

iv. *Anticipated residue and PCT information*. EPA did not use anticipated residues and PCT information in the dietary assessment for pyrimethanil. Tolerance level residues and 100 PCT were assumed for all food commodities.

2. *Dietary exposure from drinking water*. The Agency used screening level water exposure models in the dietary exposure analysis and risk assessment for pyrimethanil in drinking water. These simulation models take into account data on the physical, chemical, and fate/transport characteristics of pyrimethanil. Further information regarding EPA drinking water models used in pesticide exposure assessment can be found at *http://www.epa.gov/oppefed1/models/water/index.htm*.

Based on the Pesticide Root Zone Model/Exposure Analysis Modeling System (PRZM/EXAMS)] and Screening Concentration in Ground Water (SCI-GROW) models, the estimated drinking water concentrations (EDWCs) of pyrimethanil and its major metabolite (2-amino-4,6-dimethylpyrimidine) for acute exposures are estimated to be 37.8 parts per billion (ppb) for surface water and 4.8 ppb for ground water and for chronic exposures are estimated to be 5.1 ppb for surface water and 4.8 ppb for ground water.

Modeled estimates of drinking water concentrations were directly entered into the dietary exposure model. For acute dietary risk assessment, the water concentration value of 37.8 ppb was used to assess the contribution to drinking water. For chronic dietary risk assessment, the water concentration value of 5.1 ppb was used to assess the contribution to drinking water.

3. *From non-dietary exposure*. The term ''residential exposure'' is used in this document to refer to non-occupational, non-dietary exposure (e.g., for lawn and garden pest control, indoor pest control, termiticides, and flea and tick control on pets).

Pyrimethanil is not registered for any specific use patterns that would result in residential exposure.

4. *Cumulative effects from substances with a common mechanism of toxicity*. Section 408(b)(2)(D)(v) of FFDCA requires that, when considering whether to establish, modify, or revoke a tolerance, the Agency consider ''available information'' concerning the cumulative effects of a particular pesticide's residues and ''other substances that have a common mechanism of toxicity.''

EPA has not found pyrimethanil to share a common mechanism of toxicity with any other substances, and pyrimethanil does not appear to produce a toxic metabolite produced by other substances. For the purposes of this tolerance action, therefore, EPA has assumed that pyrimethanil does not have a common mechanism of toxicity with other substances. For information regarding EPA's efforts to determine which chemicals have a common mechanism of toxicity and to evaluate the cumulative effects of such chemicals, see EPA's website at *http://www.epa.gov/pesticides/cumulative*.

D. Safety Factor for Infants and Children

1. *In general*. Section 408(b)(2)(c) of FFDCA provides that EPA shall apply an additional tenfold (10X) margin of safety for infants and children in the case of threshold effects to account for prenatal and postnatal toxicity and the completeness of the database on toxicity and exposure unless EPA determines based on reliable data that a different margin of safety will be safe for infants and children. This additional margin of safety is commonly referred to as the FQPA safety factor (SF). In applying this provision, EPA either retains the default value of 10X, or uses a different additional safety factor when reliable data available to EPA support the choice of a different factor.

2. *Prenatal and postnatal sensitivity*. Based on the results in developmental toxicity studies in rats and rabbits, there is no quantitative or qualitative evidence of increased susceptibility of rat or rabbit fetuses to *in utero* exposure to pyrimethanil. There were no effects on fertility or reproduction in the 2–generation reproduction study in rats. In a 90–day oral toxicity study with rats, a slight decrease in thymus weight was observed at 529 mg/kg/day HDT. There were no histopathological findings noted in the thymus. There were no effects on thymus in the chronic carcinogenicity study in rats at doses up to and including 221 mg/kg/day HDT. Therefore, decreases in thymus weight in the 90–day study are considered equivocal and not a trigger for an immunotoxicity study. Since an immunotoxicity study is now a data requirement in the revised 40 CFR part 158, it will be required as a condition of registration. However, a database uncertainty factor is not warranted since the effects (decreased thymus weight) were seen only in the 90–day study and not in a chronic study and the decrease in thymus weight was not associated with any histopathological finding. In addition, the current NOAEL of 17 mg/kg/day selected for cRfD would be protective of any potential immunotoxicity seen at a dose level of 529 mg/kg/day.

3. *Conclusion*. EPA has determined that reliable data show the safety of infants and children would be adequately protected if the FQPA SF was reduced to 1X. That decision is based on the following findings:

i. The toxicity database for pyrimethanil is adequate. EPA classified the submitted subchronic neurotoxicity study as unacceptable because it was not conducted at doses up to 1,000 mg/kg/day (limit-dose). Nonetheless, EPA determined that no additional data is needed on neurotoxicity because, given that no signs of neurotoxicity were evident at doses up to 392 mg/kg/day in the subchronic neurotoxicity study in rats and no evidence of neuropathology was seen in neurotoxicity studies, subchronic or chronic studies in mice, rats, and dogs, the results of a repeat study are not likely to impact the current endpoints used for risk assessment. EPA began requiring functional immunotoxicity testing (series 870.7800) of all food and non-food use pesticides on December 26, 2007. These studies are not yet available for pyrimethanil. In the absence of specific immunotoxicity studies, EPA has evaluated the available toxicity data for pyrimethanil and determined that an additional database uncertainty factor is not needed to account for potential immunotoxicity. In a 90–day oral toxicity study with rats, a slight decrease in thymus weight was observed at 529 mg/kg/day HDT. There were no histopathological findings noted in the thymus and a NOAEL of 54.5 mg/kg/day was established. There were no effects on thymus in the chronic carcinogenicity study in rats at doses up to and including 221 mg/kg/day HDT. Therefore, decreases in thymus weight in the 90–day study are considered equivocal and not a trigger for an immunotoxicity study. Since an immunotoxicity study is now a data requirement in the revised 40 CFR part 158, it will be required as a condition of registration. However, a database uncertainty factor is not warranted since the effects (decreased thymus weight) were seen only in the 90–day study and not in a chronic study, the effects were only seen at a relatively high dose, and the decrease in thymus weight was not associated with any histopathological finding.

ii. Based on the weight of evidence, a developmental neurotoxicity study is not required for pyrimethanil since there is no evidence of neuropathology and no neurotoxic signs up to 392 mg/kg/day in a subchronic neurotoxicity study in rats where the only evidence of neurotoxicity occurs after an acute dose level (1,000 mg/kg) much higher than the doses used to establish endpoints for risk assessment.

iii. There is no evidence that pyrimethanil results in increased susceptibility in *in utero* rats or rabbits in the prenatal developmental studies or in young rats in the 2–generation reproduction study.

iv. There are no residual uncertainties identified in the exposure databases. The dietary food exposure assessment utilizes tolerance-level residues and 100 PCT for all proposed/established commodities. By using these assumptions, the acute and chronic exposures/risks will not be underestimated. The dietary drinking water assessment utilizes water concentration values generated by models and associated modeling parameters which are designed to provide conservative, health-protective, high-end estimates of water concentrations which will not likely be exceeded. EPA made conservative (protective) assumptions in the ground and surface water modeling used to assess exposure to pyrimethanil in drinking water.

E. Aggregate Risks and Determination of Safety

EPA determines whether acute and chronic pesticide exposures are safe by comparing aggregate exposure estimates to the aPAD and cPAD. The aPAD and cPAD represent the highest safe exposures, taking into account all appropriate SFs. EPA calculates the aPAD and cPAD by dividing the POD by all applicable UFs. For linear cancer risks, EPA calculates the probability of additional cancer cases given the estimated aggregate exposure. Short-, intermediate-, and chronic-term risks are evaluated by comparing the estimated aggregate food, water, and residential exposure to the POD to ensure that the MOE called for by the product of all applicable UFs is not exceeded.

1. *Acute risk*. An acute aggregate risk assessment takes into account exposure estimates from acute dietary consumption of food and drinking water. Using the exposure assumptions discussed in this unit for acute exposure, the acute dietary exposure from food and water to pyrimethanil will occupy 33% of the aPAD for (all infants < 1 year old) the population group receiving the greatest exposure.

2. *Chronic risk*. Using the exposure assumptions described in this unit for chronic exposure, EPA has concluded that chronic exposure to pyrimethanil from food and water will utilize 59% of the cPAD for (children 1-2 years old) the population group receiving the greatest exposure and 12% of the aPAD for the U.S. population as a whole. There are no residential uses for pyrimethanil.

3. *Short-term risk*. Short-term aggregate exposure takes into account short-term residential exposure plus chronic exposure to food and water (considered to be a background exposure level). Pyrimethanil is not registered for any use patterns that would result in residential exposure. Therefore, the short-term aggregate risk is the sum of the risk from exposure to pyrimethanil through food and water and will not be greater than the chronic aggregate risk.

4. *Intermediate-term risk*. Intermediate-term aggregate exposure takes into account intermediate-term residential exposure plus chronic exposure to food and water (considered to be a background exposure level).

Pyrimethanil is not registered for any use patterns that would result in intermediate-term residential exposure. Therefore, the intermediate-term aggregate risk is the sum of the risk from exposure to pyrimethanil through food and water, which has already been addressed, and will not be greater than the chronic aggregate risk.

5. *Aggregate cancer risk for U.S. population*. A separate cancer dietary assessment was not conducted for pyrimethanil as the chronic assessment is considered protective for carcinogenic effects. Based upon chronic food plus water exposure of the general U.S. population, the MOE for cancer assessment is 830. For threshold cancer effects where the mode of action is well understood, like thyroid carcinogens such as pyrimethanil, the MOE that indicates a reasonable certainty of no harm would be 100 or greater (representing 2 factors of 10 for inter-species and intra-species extrapolation). Therefore, the aggregate cancer risk does not exceed the Agency's level of concern.

6. *Determination of safety*. Based on these risk assessments, EPA concludes that there is a reasonable certainty that no harm will result to the general population or to infants and children from aggregate exposure to pyrimethanil residues.

IV. Other Considerations

A. Analytical Enforcement Methodology

Adequate enforcement methodology, high performance liquid chromatography and liquid chromatography-mass spectrometry (HPLC and LC-MS/MS) are available to enforce the tolerance expression. The method may be required from: Chief, Analytical Chemistry Branch,

Environmental Science Center, 701 Mapes Rd., Ft. Mead, MD 20755–5350; telephone number: (410) 305–2905; e-mail address; *residuemethods@epa.gov*.

B. International Residue Limits

Codex maximum residue limits (MRLs) have been established for pyrimethanil *per se* in or on plant commodities. Codex MRLs have also been established for milk in terms of the sum of pyrimethanil and 2-anilino-4,6-dimethylpyrimidin-5-ol, expressed as pyrimethanil, and for livestock tissues (excluding poultry) as the sum of pyrimethanil and 2-(4-hydroxyanilino)-4,6-dimethylpyrimidine, expressed as pyrimethanil. Codex MRLs are listed for pome fruit at 7 ppm (postharvest), milk at 0.05 ppm, dry apple pomace at 40 ppm, and edible offal at 0.1 ppm. Except for apple pomace and milk, harmonization is not feasible at this time, presumably due to differences in good agricultural practices.

A Canadian MRL for pome fruit is established at 3 ppm. There are no Mexican MRLs established for residues of pyrimethanil on the crops associated with this tolerance petition.

C. Response to Comments

One comment was received from an anonymous commenter objecting to increasing the tolerances. The comments contained no scientific data or evidence to rebut the Agency's conclusions that there is reasonable certainty that no harm will result from aggregate exposure to pyrimethanil.

D. Revisions to Petitioned-For Tolerances

Based upon review of the dietary exposure levels and the residue data from an available ruminant feeding study, the existing pyrimethanil tolerances have been reassessed and the Agency has determined that the tolerances for residues in cattle, goat, horse, and sheep kidney should be increased to 2.5 ppm and the tolerance for residues in milk should be lowered to 0.05 ppm. Additionally, the apple, wet pomace residue tolerance should be lowered to 40 ppm.

V. Conclusion

Therefore, tolerances are amended to increase the residues of the fungicide, pyrimethanil, 4,6-dimethyl-*N*-phenyl-2-pyrimidinamine, in or on pome fruit group 11 at 14 ppm, apple, wet pomace at 40 ppm, cattle, goat, horse and sheep, kidney at 2.5 ppm and milk at 0.05 ppm.

VI. Statutory and Executive Order Reviews

This final rule establishes tolerances under section 408(d) of FFDCA in response to a petition submitted to the Agency. The Office of Management and Budget (OMB) has exempted these types of actions from review under Executive Order 12866, entitled *Regulatory Planning and Review* (58 FR 51735, October 4, 1993). Because this final rule has been exempted from review under Executive Order 12866, this final rule is not subject to Executive Order 13211, entitled *Actions Concerning Regulations That Significantly Affect Energy Supply, Distribution, or Use* (66 FR 28355, May 22, 2001) or Executive Order 13045, entitled *Protection of Children from Environmental Health Risks and Safety Risks* (62 FR 19885, April 23, 1997). This final rule does not contain any information collections subject to OMB approval under the Paperwork Reduction Act (PRA), 44 U.S.C. 3501 *et seq.*, nor does it require any special considerations under Executive Order 12898, entitled *Federal Actions to Address Environmental Justice in Minority Populations and Low-Income Populations* (59 FR 7629, February 16, 1994).

Since tolerances and exemptions that are established on the basis of a petition under section 408(d) of FFDCA, such as the tolerance in this final rule, do not require the issuance of a proposed rule, the requirements of the Regulatory Flexibility Act (RFA) (5 U.S.C. 601 *et seq.*) do not apply.

This final rule directly regulates growers, food processors, food handlers, and food retailers, not States or tribes, nor does this action alter the relationships or distribution of power and responsibilities established by Congress in the preemption provisions of section 408(n)(4) of FFDCA. As such, the Agency has determined that this action will not have a substantial direct effect on States or tribal governments, on the relationship between the national government and the States or tribal governments, or on the distribution of power and responsibilities among the various levels of government or between the Federal Government and Indian tribes. Thus, the Agency has determined that Executive Order 13132, entitled *Federalism* (64 FR 43255, August 10, 1999) and Executive Order 13175, entitled *Consultation and Coordination with Indian Tribal Governments* (65 FR 67249, November 9, 2000) do not apply to this final rule. In addition, this final rule does not impose any enforceable duty or contain any unfunded mandate as described under Title II of the Unfunded Mandates Reform Act of 1995 (UMRA) (Public Law 104–4).

This action does not involve any technical standards that would require Agency consideration of voluntary consensus standards pursuant to 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).

VII. Congressional Review Act

The Congressional Review Act, 5 U.S.C. 801 *et seq.*, generally provides that before a rule may take effect, the agency promulgating the rule must submit a rule report 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 this final rule in the **Federal Register**. This final rule is not a ''major rule'' as defined by 5 U.S.C. 804(2).

List of Subjects in 40 CFR Part 180

Environmental protection, Administrative practice and procedure, Agricultural commodities, Pesticides and pests, Reporting and recordkeeping requirements.

Dated: October 9, 2008.

Lois Rossi,

Director, Registration Division, Office of Pesticide Programs.

■ Therefore, 40 CFR chapter I is amended as follows:

PART 180—[AMENDED]

■ 1. The authority citation for part 180 continues to read as follows:

Authority: 21 U.S.C. 321(q), 346a and 371.

■ 2. Section 180.518 is amended by revising the following entries in the table in paragraphs (a)(1), (a)(2), and (a)(3) to read as follows:

§ 180.518 Pyrimethanil; tolerances for residues.

(a) * * *

(1) * * *

Commodity	Parts per million
* * *	* *
Apple, wet pomace	40
* * *	* *
Fruit, pome, group 11 (pre-harvest and post-harvest)	14
* * *	* *

(2) * * *

Commodity	Parts per million
* * *	* *
Cattle, kidney	2.5
* * *	* *
Goat, kidney	2.5
* * *	* *
Horse, kidney	2.5
* * *	* *
Sheep, kidney	2.5
* * *	* *

(3) * * *

Commodity	Parts per million
Milk	0.05

* * * * *

[FR Doc. E8–25676 Filed 10–28–08; 8:45 am]

BILLING CODE 6560–50–S

ENVIRONMENTAL PROTECTION AGENCY

40 CFR Parts 271 and 272

[EPA–R06–RCRA–2008–0144; FRL–8727–3]

Texas: Final Authorization of State-Initiated Changes and Incorporation by Reference of State Hazardous Waste Management Program

AGENCY: Environmental Protection Agency (EPA).

ACTION: Immediate final rule.

SUMMARY: During a review of Texas' regulations, the EPA identified a variety of State-initiated changes to its hazardous waste program under the Resource Conservation and Recovery Act (RCRA). We have determined that these changes are minor and satisfy all requirements needed to qualify for Final authorization and are authorizing the State-initiated changes through this Immediate Final action. In addition, today's document corrects technical errors made in the August 18, 1999 and June 14, 2005 **Federal Register** authorization documents for Texas.

The Solid Waste Disposal Act, as amended, commonly referred to as the Resource Conservation and Recovery Act (RCRA), allows the Environmental Protection Agency (EPA) to authorize States to operate their hazardous waste management programs in lieu of the Federal program. The EPA uses the regulations entitled ''Approved State Hazardous Waste Management Programs'' to provide notice of the authorization status of State programs and to incorporate by reference those provisions of the State statutes and regulations that will be subject to the EPA's inspection and enforcement. The rule codifies in the regulations the prior approval of Texas' hazardous waste management program and incorporates by reference authorized provisions of the State's statutes and regulations.

DATES: This regulation is effective December 29, 2008, unless the EPA receives adverse written comment on the codification of the Texas authorized RCRA program by the close of business November 28, 2008. If the EPA receives such comments, it will publish a timely withdrawal of this immediate final rule in the **Federal Register** informing the public that this rule will not take effect. The incorporation by reference of authorized provisions in the Texas statutes and regulations contained in this rule is approved by the Director of the Federal Register as of December 29, 2008 in accordance with 5 U.S.C. 552(a) and 1 CFR part 51.

ADDRESSES: Submit your comments, identified by Docket ID No. EPA–R06–RCRA–2008–0144 by one of the following methods:

1. *Federal eRulemaking Portal: http://www.regulations.gov*. Follow the online instructions for submitting comments.

2. *E-mail: patterson.alima@epa.gov* or *Banks.Julia@epa.gov*.

3. *Mail:* Alima Patterson, Region 6, Regional Authorization Coordinator, or Julia Banks, Codification Coordinator, State/Tribal Oversight Section (6PD–O), Multimedia Planning and Permitting Division, EPA Region 6, 1445 Ross Avenue, Dallas, Texas 75202–2733.

4. *Hand Delivery or Courier:* Deliver your comments to Alima Patterson, Region 6, Regional Authorization Coordinator, or Julia Banks, Codification Coordinator, State/Tribal Oversight Section (6PD–O), Multimedia Planning and Permitting Division, EPA Region 6, 1445 Ross Avenue, Dallas, Texas 75202–2733.

Instructions: Do not submit information that you consider to be CBI or otherwise protected through *http://www.regulations.gov*, or e-mail. The Federal *http://www.regulations.gov* Web site is an ''anonymous access'' system, which means the 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 the EPA without going through *http://www.regulations.gov*, your e-mail address will be automatically captured and included as part of the comment that is placed in the public docket and made available on the Internet. If you submit an electronic comment, the 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 the EPA cannot read your comment due to technical difficulties and cannot contact you for clarification, the 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. You can view and copy the documents that form the basis for this authorization and codification and associated publicly available materials from 8:30 a.m. to 4 p.m. Monday through Friday at the following location: EPA, Region 6, 1445 Ross Avenue, Dallas, Texas 75202–2733, phone number (214) 665–6444. Interested persons wanting to examine these documents should make an appointment with the office at least two weeks in advance.

FOR FURTHER INFORMATION CONTACT: Alima Patterson, Region 6 Regional Authorization Coordinator, or Julia Banks, Codification Coordinator, State/Tribal Oversight Section (6PD–O), Multimedia Planning and Permitting Division, EPA Region 6, 1445 Ross Avenue, Dallas, Texas 75202–2733, Phone number: (214) 665–8533, and e-mail address *patterson.alima@epa.gov* or *Banks.Julia@epa.gov*.

SUPPLEMENTARY INFORMATION:

I. Authorization of State-Initiated Changes

A. Why are Revisions to State Programs Necessary?

States which have received Final authorization from the EPA under RCRA section 3006(b), 42 U.S.C. 6926(b), must maintain a hazardous waste program that is equivalent to, consistent with, and no less stringent than the Federal hazardous waste program. As the Federal program changes, the States must change their programs and ask the EPA to authorize the changes. Changes to State hazardous waste programs may be necessary when Federal or State statutory or regulatory authority is modified or when certain other changes occur. Most commonly, States must change their programs because of changes to the EPA's regulations in 40 Code of Federal Regulations (CFR) parts 124, 260 through 268, 270, 273 and 279. States can also initiate their own changes to their hazardous waste program and these changes must then be authorized.

B. What Decisions Have We Made in This Rule?

We conclude that Texas' revisions to its authorized program meet all of the

statutory and regulatory requirements established by RCRA. We found that the State-initiated changes make Texas' rules more clear or conform more closely to the Federal equivalents and are so minor in nature that a formal application is unnecessary. Therefore, we grant Texas final authorization to operate its hazardous waste program with the changes described in the table at Section G below. Texas has responsibility for permitting Treatment, Storage, and Disposal Facilities (TSDFs) within its borders (except in Indian Country) and for carrying out all authorized aspects of the RCRA program, subject to the limitations of the Hazardous and Solid Waste Amendments of 1984 (HSWA). New Federal requirements and prohibitions imposed by Federal regulations that EPA promulgates under the authority of HSWA take effect in authorized States before they are authorized for the requirements. Thus, the EPA will implement those requirements and prohibitions in Texas, including issuing permits, until the State is granted authorization to do so.

C. What is the Effect of Today's Authorization Decision?

The effect of this decision is that a facility in Texas subject to RCRA will now have to comply with the authorized State requirements instead of the equivalent Federal requirements in order to comply with RCRA. Texas has enforcement responsibilities under its State hazardous waste program for violations of such program, but the EPA retains its authority under RCRA sections 3007, 3008, 3013, and 7003, which include, among others, authority to:

- Do inspections, and require monitoring, tests, analyses, or reports;
- Enforce RCRA requirements and suspend or revoke permits; and
- Take enforcement actions after notice to and consultation with the State.

This action does not impose additional requirements on the regulated community because the statutes and regulations for which Texas is being authorized by today's action are already effective and are not changed by today's action.

D. Why Wasn't There a Proposed Rule Before Today's Rule?

The EPA did not publish a proposal before today's rule because we view this as a routine program change and do not expect comments that oppose this approval. We are providing an opportunity for public comment now. In addition to this rule, in the Proposed Rules section of today's **Federal Register** we are publishing a separate document that proposes to authorize the State program changes.

E. What Happens If EPA Receives Comments That Oppose This Action?

If the EPA receives comments that oppose this authorization or the incorporation-by-reference of the State program, we will withdraw this rule by publishing a timely document in the **Federal Register** before the rule becomes effective. The EPA will base any further decision on the authorization of the State program changes, or the incorporation-by-reference, on the proposal mentioned in the previous paragraph. We will then address all public comments in a later final rule. If you want to comment on this authorization and incorporation-by-reference, you must do so at this time. If we receive comments that oppose only the authorization of a particular change to the State hazardous waste program or the incorporation-by-reference of the State program, we may withdraw only that part of this rule, but the authorization of the program changes or the incorporation-by-reference of the State program that the comments do not oppose will become effective on the date specified above. The **Federal Register** withdrawal document will specify which part of the authorization or incorporation-by-reference of the State program will become effective and which part is being withdrawn.

F. For What Has Texas Previously Been Authorized?

The State of Texas initially received final authorization on December 26, 1984 (49 FR 48300), to implement its Base Hazardous Waste Management Program. This authorization was clarified in a notice published March 26, 1985 (50 FR 11858). Texas received authorization for revisions to its program, effective October 4, 1985 (51 FR 3952), February 17, 1987 (51 FR 45320), March 15, 1990 (55 FR 7318), July 23, 1990 (55 FR 21383), October 21, 1991 (56 FR 41626), December 4, 1992 (57 FR 45719), June 27, 1994 (59 FR 16987), June 27, 1994 (59 FR 17273), November 26, 1997 (62 FR 47947), December 3, 1997 (62 FR 49163), October 18, 1999 (64 FR 44836), November 15, 1999 (64 FR 49673), September 11, 2000 (65 FR 43246), and June 14, 2005 (70 FR 34371).

G. What Changes Are We Authorizing With Today's Action?

The State has made amendments to the provisions listed in the document which follows. These amendments clarify the State's regulations and make the State's regulations more internally consistent. The State's laws and regulations, as amended by these provisions, provide authority which remains equivalent to and no less stringent than the Federal laws and regulations. These State-initiated changes satisfy the requirements of 40 CFR 271.21(a). We are granting Texas final authorization to carry out the following provisions of the State's program in lieu of the Federal program. These provisions are analogous to the indicated RCRA statutory provisions or RCRA regulations found at 40 CFR as of July 1, 2000. The Texas provisions are from the Texas Administrative Code (TAC), Title 30, effective December 31, 2001.

State requirement	Analogous Federal requirement
30 TAC 335.1(7) "Ancillary equipment"	40 CFR 260.10 "Ancillary equipment".
30 TAC 335.1(29) "Corrective action management unit" or "CAMU"	40 CFR 260.10 "Corrective action management unit" or "CAMU".
30 TAC 335.1(37) "Disposal"	40 CFR 260.10 "Disposal".
30 TAC 335.1(52) "Facility"	40 CFR 260.10 "Facility".
30 TAC 335.1(53) "Final closure"	40 CFR 260.10 "Final closure".
30 TAC 335.1(86) "Manifest"	40 CFR 260.10 "Manifest".
30 TAC 335.24(j)	40 CFR 261.6(a)(4).
30 TAC 335.24(k)	40 CFR 261.6(c)(1) related.
30 TAC 335.29(6)	40 CFR 261, Appendix IX.
30 TAC 335.78(j)	40 CFR 261.5(j).
30 TAC 335.504(1)	40 CFR 261.4(b)(13)–(15).
30 TAC 335.69(a)(1)(D) intro	40 CFR 262.34(a)(1)(iv) intro.
30 TAC 335.69(b)	40 CFR 262.34(b).
30 TAC 335.69(d)	40 CFR 262.34(c)(1).

State requirement	Analogous Federal requirement
30 TAC 335.69(f), except (f)(2) & (f)(4)	40 CFR 262.34(d), except (d)(2) & (d)(4).
30 TAC 335.69(f)(4), except (f)(4)(C)	40 CFR 262.34(d)(2).
30 TAC 335.504(1)	40 CFR 262.11(a).
30 TAC 335.11(a)(4)	40 CFR 263.20(a) (partial analog).
30 TAC 335.41(e)	40 CFR 264.1(g)(1).
30 TAC 335.152(c)(4), except (4)(B), (C), & (F)	40 CFR 264 related; no direct Federal analog.
30 TAC 335.152(c)(4)(B), (C), & (F)	40 CFR 264 related, no direct Federal analog.
30 TAC 335.205(a) intro.—(2)	40 CFR 264.18 related; no direct Federal analog.
30 TAC 335.41(e)	40 CFR 265.1(c)(5).
30 TAC 335.112(b)(3)	40 CFR 265 related; no direct Federal analog.
30 TAC 335.112(b)(4) intro through (b)(4)(D)	40 CFR 265 related; no direct Federal analog.
30 TAC 335.112(b)(4)(E) through (H)	40 CFR 265 related; no direct Federal analog.
30 TAC 335.112(b)(4)(K) & (L)	40 CFR 265 related; no direct Federal analog.
30 TAC 335.112(b)(5)	40 CFR 265 related; no direct analog.
30 TAC 335.112(b)(6)	40 CFR 265 related; no direct analog.
30 TAC 335.112(b)(8)–(10)	40 CFR 265 related; no direct analog.
30 TAC 335.124(e)	40 CFR 265.112 and 265.113 related.
30 TAC 335.221(a)(1)(A)	40 CFR 266.100 related.
30 TAC 335.225(b)	40 CFR 266.111 related; no direct Federal analog.
30 TAC 305.62(a)	40 CFR 124.5(a).
30 TAC 305.62(b)	40 CFR 270.42 related; no direct Federal analog.
30 TAC 305.62(d) except (d)(3), (d)(5) & (d)(6)	40 CFR 270.41(a) except 270.41(a) (3) & (a)(5).
30 TAC 305.125(1) & (3)	40 CFR 270.30(a) & (c).
30 TAC 305.50(4)(G)	40 CFR 270.10(e)(4).
30 TAC 324.2 intro	40 CFR 279.1 related.

H. Who Handles Permits After The Authorization Takes Effect?

This authorization does not affect the status of State permits and those permits issued by the EPA because no new substantive requirements are a part of these revisions.

I. How does Today's Action Affect Indian Country (18 U.S.C. 1151) in Texas?

Texas is not authorized to carry out its Hazardous Waste Program in Indian Country within the State. This authority remains with EPA. Therefore, this action has no effect in Indian Country.

II. Technical Corrections

A. Corrections to the August 18, 1999 (64 FR 44836) Authorization Document

1. There are date errors in the table of program revisions published in the above referenced authorization notice, specific to the following entries:

(a) Throughout the table, the effective date for TWCA (5.103, and THSCA §§ 361.017 and 361.024 should be ''September 1, 1995''.

(b) For Checklist 135 (Item 1), the effective date for TWCA (5.102 should be ''Vernon 1988 and 1998 Supplement, effective September 1, 1985''.

(c) For Checklist 137 (Item 3), the effective date for THSCA § 361.003 should be ''September 1, 1997''.

(d) For Checklist 140, the reference to ''September 18, 1998'' following the provision 30 TAC (335.29, is incorrect and should be ''October 19, 1998''. This correction applies to 30 TAC §§ 335.29(4) and (5).

2. In item 12 on page 44838 of the authorization document, ''Checklist 114'' should be corrected to read ''Checklist 144''.

B. Corrections to the June 14, 2005 (70 FR 34371) Authorization Document

1. For Checklist 159, the authorization document should include a reference to ''335.431(c)'' effective November 15, 2001.

2. For Checklist 166, the effective date for 335.24(c)(4)(A)–(C) should be ''April 4, 1999'' not ''April 14, 1999''.

3. For checklist 168, the reference to ''305.51(a)(8)'' is incorrect and should be ''305.51(c)(8)''.

4. For checklist 169 the following corrections should be made:

a. The authorization document entry should include a reference to ''335.24(c)(4)(C)''effective November 15, 2001;

b. The authorization document entry should include a reference to ''335.29(4)'' effective November 15, 2001; and,

c. The authorization document entry should include a reference to ''335.221(b)(2)'' effective November 15, 2001.

5. For checklist 175 the following corrections should be made:

a. The authorization document entry should include a reference to ''305.69(k) D.3.g and M.3'' effective November 15, 2001; and,

b. The authorization document entry should include a reference to ''335.1 (definition of miscellaneous unit)'' effective November 15, 2001.

6. For checklist 181, the authorization document entry should include a reference to ''335.1 (definition of lamp)''effective November 15, 2001.

III. Incorporation-By-Reference

A. What is Codification?

Codification is the process of placing a State's statutes and regulations that comprise the State's authorized hazardous waste management program into the Code of Federal Regulations (CFR). Section 3006(b) of RCRA, as amended, allows the Environmental Protection Agency (EPA) to authorize State hazardous waste management programs to operate in lieu of the Federal hazardous waste management regulatory program. The EPA codifies its authorization of State programs in 40 CFR part 272 and incorporates by reference State statutes and regulations that the EPA will enforce under sections 3007 and 3008 of RCRA and any other applicable statutory provisions.

The incorporation by reference of State authorized programs in the CFR should substantially enhance the public's ability to discern the current status of the authorized State program and State requirements that can be Federally enforced. This effort provides clear notice to the public of the scope of the authorized program in each State.

B. What Is the History of the Codification of Texas' Hazardous Waste Management Program?

The EPA incorporated by reference Texas' then authorized hazardous waste program effective December 3, 1997 (62

FR 49163) and November 15, 1999 (64 FR 49673). In this action, EPA is revising subpart SS of 40 CFR part 272 to include the recent authorization revision actions effective October 18, 1999 (64 FR 44836), September 11, 2000 (65 FR 43246), and June 14, 2005 (70 FR 34371).

C. What Codification Decisions Have We Made in This Rule?

The purpose of today's **Federal Register** document is to codify Texas' base hazardous waste management program and its revisions to that program. The EPA provided notices and opportunity for comments on the Agency's decisions to authorize the Texas program, and the EPA is not now reopening the decisions, nor requesting comments, on the Texas authorizations as published in the **Federal Register** notices specified in section F of this document.

This document incorporates by reference Texas' hazardous waste statutes and regulations and clarifies which of these provisions are included in the authorized and federally enforceable program. By codifying Texas' authorized program and by amending the Code of Federal Regulations, the public will be more easily able to discern the status of federally approved requirements of the Texas hazardous waste management program.

The EPA is incorporating by reference the Texas authorized hazardous waste program in subpart SS of 40 CFR part 272. Section 272.2201 incorporates by reference Texas' authorized hazardous waste statutes and regulations. Section 272.2201 also references the statutory provisions (including procedural and enforcement provisions) which provide the legal basis for the State's implementation of the hazardous waste management program, the Memorandum of Agreement, the Attorney General's Statements and the Program Description, which are approved as part of the hazardous waste management program under Subtitle C of RCRA.

D. What Is the Effect of Texas' Codification on Enforcement?

The EPA retains its authority under statutory provisions, including but not limited to, RCRA sections 3007, 3008, 3013, and 7003, and other applicable statutory and regulatory provisions to undertake inspections and enforcement actions and to issue orders in authorized States. With respect to these actions, the EPA will rely on Federal sanctions, Federal inspection authorities, and Federal procedures rather than any authorized State analogues to these provisions. Therefore, the EPA is not incorporating by reference such particular, approved Texas procedural and enforcement authorities. Section 272.2201(c)(2) of 40 CFR lists the statutory and regulatory provisions which provide the legal basis for the State's implementation of the hazardous waste management program, as well as those procedural and enforcement authorities that are part of the State's approved program, but these are not incorporated by reference.

E. What State Provisions Are Not Part of the Codification?

The public needs to be aware that some provisions of Texas (hazardous waste management program are not part of the Federally authorized State program. These non-authorized provisions include:

(1) Provisions that are not part of the RCRA subtitle C program because they are ''broader in scope'' than RCRA subtitle C (see 40 CFR 271.1(i));

(2) Federal rules for which Texas is not authorized, but which have been incorporated into the State regulations because of the way the State adopted Federal regulations by reference;

(3) Unauthorized amendments to authorized State provisions; and

(4) New unauthorized State requirements.

State provisions that are ''broader in scope'' than the Federal program are not part of the RCRA authorized program and EPA will not enforce them. Therefore, they are not incorporated by reference in 40 CFR part 272. For reference and clarity, 40 CFR 272.2201(c)(3) lists the Texas regulatory provisions which are ''broader in scope'' than the Federal program and which are not part of the authorized program being incorporated by reference. ''Broader in scope'' provisions cannot be enforced by EPA; the State, however, may enforce such provisions under State law.

Texas has adopted but is not authorized for the following Federal rules published in the **Federal Register** on April 12, 1996 (61 FR 16290); December 5, 1997 (62 *FR* 64504); November 8, 2000 (65 FR 67068); and December 26, 2000 (65 FR 81373). Therefore, these Federal amendments included in Texas' (adoption by reference at 30 Texas Administrative Code (TAC) sections: 335.1(123)(A)(iv), 335.112(a)(19) and (20), 335.152(a)(17) and (18), and 335.431(c)(1), are not part of the State's authorized program and are not part of the incorporation by reference addressed by today's **Federal Register** document.

Additionally, Texas' hazardous waste regulations include amendments which have not been authorized by the EPA. Since the EPA cannot enforce a State's requirements which have not been reviewed and authorized in accordance with RCRA section 3006 and 40 CFR part 271, it is important to be precise in delineating the scope of a State's authorized hazardous waste program. Regulatory provisions that have not been authorized by the EPA include amendments to previously authorized State regulations as well as new State requirements.

In those instances where Texas has made unauthorized amendments to previously authorized sections of State code, the EPA is identifying in 40 CFR 272.2201(c)(4) any regulations which, while adopted by the State and incorporated by reference, include language not authorized by the EPA. Those unauthorized portions of the State regulations are not Federally enforceable. Thus, notwithstanding the language in Texas hazardous waste regulations incorporated by reference at 40 CFR 272.2201(c)(1), the EPA will only enforce those portions of the State regulations that are actually authorized by the EPA. For the convenience of the regulated community, the actual State regulatory text authorized by the EPA for the citations listed at 272.2201(c)(4) (i.e., without the unauthorized amendments) is compiled as a separate document, *Addendum to the EPA Approved Texas Regulatory Requirements Applicable to the Hazardous Waste Management Program, June 2005.* This document is available from EPA Region 6, Sixth Floor, 1445 Ross Avenue, Dallas, Texas 75202–2733, Phone number: (214) 665–8533, EPA Resource and Conservation Recovery Act (RCRA) Docket Information Center (5305G), 1200 Pennsylvania Avenue., NW., Washington DC 20460, National Archives and Records Administration (NARA), for information on the availability of this material at NARA, call 202–741–6030, and also Texas Commission on Environmental Quality, 1700 N. Congress Avenue, Austin, Texas 78711–3087.

State regulations that are not incorporated by reference in today's rule at 40 CFR 272.2201(c)(1), or that are not listed in 40 CFR 272.2201(c)(3) (''broader in scope'') or 40 CFR 272.2201(c)(4) (''unauthorized amendments to authorized State provisions''), are considered new unauthorized State requirements. These requirements are not Federally enforceable.

With respect to any requirement pursuant to the Hazardous and Solid Waste Amendments of 1984 (HSWA) for which the State has not yet been authorized, the EPA will continue to enforce the Federal HSWA standards until the State is authorized for these provisions.

F. What Will Be the Effect of Federal HSWA Requirements on the Codification?

The EPA is not amending 40 CFR part 272 to include HSWA requirements and prohibitions that are implemented by EPA. Section 3006(g) of RCRA provides that any HSWA requirement or prohibition (including implementing regulations) takes effect in authorized and not authorized States at the same time. A HSWA requirement or prohibition supersedes any less stringent or inconsistent State provision which may have been previously authorized by the EPA (50 FR 28702, July 15, 1985). The EPA has the authority to implement HSWA requirements in all States, including authorized States, until the States become authorized for such requirement or prohibition. Authorized States are required to revise their programs to adopt the HSWA requirements and prohibitions, and then to seek authorization for those revisions pursuant to 40 CFR part 271.

Instead of amending the 40 CFR part 272 every time a new HSWA provision takes effect under the authority of RCRA section 3006(g), the EPA will wait until the State receives authorization for its analog to the new HSWA provision before amending the State's 40 CFR part 272 incorporation by reference. Until then, persons wanting to know whether a HSWA requirement or prohibition is in effect should refer to 40 CFR 271.1(j), as amended, which lists each such provision.

Some existing State requirements may be similar to the HSWA requirement implemented by the EPA. However, until the EPA authorizes those State requirements, the EPA can only enforce the HSWA requirements and not the State analogs. The EPA will not codify those State requirements until the State receives authorization for those requirements.

Statutory and Executive Order Reviews

The Office of Management and Budget has exempted this action from the requirements of Executive Order 12866 (58 FR 51735, October 4, 1993), and therefore, this action is not subject to review by OMB. This rule incorporated by reference Texas' authorized hazardous waste management regulations, and imposes no additional requirements beyond those imposed by State law. This final 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.*). Incorporation by reference will not impose any new burdens on small entities. Accordingly, I certify that this action will not have a significant economic impact on a substantial number of small entities under the Regulatory Flexibility Act (5 U.S.C. 601 *et. seq.*). Because this rule merely incorporates by reference certain existing State hazardous waste management program requirements which the EPA already approves under 40 CFR part 271, and does not impose any additional enforceable duty beyond that required by State law, it does not contain any unfunded mandate or significantly or uniquely affect small governments, as described in the Unfunded Mandates Reform Act of 1995 (Pub. L. 104–4).

This action 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 (64 FR 43255, August 10, 1999), because it merely incorporates by reference existing State hazardous waste management program requirements without altering the relationship or the distribution of power and responsibilities established by RCRA. This action also does not have Tribal implications within the meaning of Executive Order 13175 (65 FR 67249, November 6, 2000).

This action also is not subject to Executive Order 13045 (62 FR 19885, April 23, 1997), because it is not economically significant and it does not make decisions based on environmental health or safety risks. This action is not subject to Executive Order 13211, ''Actions Concerning Regulations That Significantly Affect Energy Supply Distribution or Use'' (66 FR 28344, May 22, 2001) because it is not a significant regulatory action under Executive Order 12866.

Under RCRA 3006(b), the EPA grants a State's application for incorporation by reference as long as the State meets the criteria required by RCRA. It would thus be inconsistent with applicable law for the EPA, when it reviews a State incorporation by reference application, to require the use of any particular voluntary consensus standard in place of another standard that otherwise satisfies the requirements of RCRA. Thus, the requirements of section 12(d) of the National Technology Transfer and Advancement Act of 1995 (15 U.S.C. 272) do not apply. The final rule does not include environmental justice issues that require consideration under Executive Order 12898 (59 FR 7629, February 16, 1994). The EPA has complied with Executive Order 12630 (53 FR 8859, March 15, 1988) by examining the takings implications of the rule in accordance with the ''Attorney General's Supplemental Guidelines for the Evaluation of Risk and Avoidance of Unanticipated Takings'' issued under the executive order. As required by section 3 of Executive Order 12988 (61 FR 4729, February 7, 1996), in issuing this rule, the EPA has taken the necessary steps to eliminate drafting errors and ambiguity, minimize potential litigation, and provide a clear legal standard for affected conduct.

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 prior to publication 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).

List of Subjects in 40 CFR Parts 271 and 272

Environmental protection, Administrative practice and procedure, Confidential business information, Hazardous waste, Hazardous waste transportation, Incorporation by reference, Indian lands, Intergovernmental relations, Penalties, Reporting and recordkeeping requirements.

Authority: This notice is issued under the authority of Sections 2002(a), 3006 and 7004(b) of the Solid Waste Disposal Act as amended 42 U.S.C. 6912(a), 6926, 6974(b).

Dated: September 17, 2008.

Richard E. Greene,

Regional Administrator, Region 6.

■ For the reasons set forth in the preamble, 40 CFR parts 271 and 272 are amended as follows:

PART 271—REQUIREMENTS FOR AUTHORIZATION OF STATE HAZARDOUS WASTE PROGRAMS

EPA is granting final authorization under part 271 to the State of Texas for revisions to its hazardous waste

program under the Resource Conservation and Recovery Act.

PART 272—APPROVED STATE HAZARDOUS WASTE MANAGEMENT PROGRAMS

■ 1. The authority citation for part 272 continues to read as follows:

Authority: Sections 2002(a), 3006, and 7004(b) of the Solid Waste Disposal Act, as amended by the Resource Conservation and Recovery Act of 1976, as amended, 42 U.S.C. 6912(a), 6926, and 6974(b).

Subpart SS—[Amended]

■ 2. Subpart SS is amended by revising § 272.2201 to read as follows:

§ 272.2201 Texas State-Administered Program: Final Authorization.

(a) Pursuant to section 3006(b) of RCRA, 42 U.S.C. 6926(b), the EPA granted Texas final authorization for the following elements as submitted to EPA in Texas' Base program application for final authorization which was approved by EPA effective on December 26, 1984. Subsequent program revision applications were approved effective on October 4, 1985, February 17, 1987, March 15, 1990, July 23, 1990, October 21, 1991, December 4, 1992, June 27, 1994, November 26, 1997, December 3, 1997, October 18, 1999, November 15, 1999, September 11, 2000, June 14, 2005, and December 29, 2008.

(b) The State of Texas has primary responsibility for enforcing its hazardous waste management program. However, EPA retains the authority to exercise its inspection and enforcement authorities in accordance with sections 3007, 3008, 3013, 7003 of RCRA, 42 U.S.C. 6927, 6928, 6934, 6973, and any other applicable statutory and regulatory provisions, regardless of whether the State has taken its own actions, as well as in accordance with other statutory and regulatory provisions.

(c) *State Statutes and Regulations.* (1) The Texas statutes and regulations cited in paragraph (c)(1)(i) of this section are incorporated by reference as part of the hazardous waste management program under Subtitle C of RCRA, 42 U.S.C. 6921 *et seq.* This incorporation by reference is approved by the Director of the Federal Register in accordance with 5 U.S.C. 552(a) and 1 CFR part 51. Copies of the Texas regulations that are incorporated by reference in this paragraph are available from West Publishing Company, 620 Opperman Drive, P.O. Box 64526, Saint Paul, MN 55164–0526; Phone: 1–800–328–4880; Web site: *http://west.thomson.com.*

(i) The Binder entitled ''EPA Approved Texas Statutory and Regulatory Requirements Applicable to the Hazardous Waste Management Program'', dated June 2005

(ii) [Reserved]

(2) The following provisions provide the legal basis for the State's implementation of the hazardous waste management program, but they are not being incorporated by reference and do not replace Federal authorities:

(i) Texas Health and Safety Code (THSC) Annotated, (Vernon, 2001); Chapter 361, The Texas Solid Waste Disposal Act, sections 361.002, 361.016, 361.017, 361.018, 361.024(e), 361.032, 361.033, 361.036, 361.037(a), 361.061, 361.063, 361.064, 361.066(b), 361.067, 361.068(a), 361.069 first two sentences, 361.078, 361.079, 361.080(a), 361.082(b), 381.082(c) (except second sentence), 361.082(e), 361.083, 361.084 (except 361.084(a) and (c)), 361.084(c) (except the phrase '', or evidence of * * * waste management''), 361.085, 361.088(a) and (b), 361.088(c) (except the phrase ''Except as provided by Subsection (e)'', 361.089, 361.090, 361.095(b)–(f), 361.096, 361.097, 361.098(a) (except the phrase ''Except as provided in Subsections (b) and (c),''), 361.099(a), 361.100, 361.101, 361.102(a) (except the phrase ''Except as provided by Subsections (b) and (c)''), 361.103 through 361.108, 361.109(a), 361.301, 361.321(a) and (b), 361.321(c) (except the phrase ''Except as provided by Section 361.322(a)''), 361.321(d), and 361.321(e) (except the phrase ''Except as provided by Section 361.322(e)''); Chapter 371, Texas Oil Collection, Management, and Recycling Act, sections 371.0025(b) and (c), 371.024(a), 371.024(c) and (d), 371.026(a) and (b), 371.028, and 371.043(b).

(ii) Texas Health and Safety Code (THSC) Annotated, (Vernon, 2002 Supplement), effective September 1, 2001: Chapter 361, The Texas Solid Waste Disposal Act, sections 361.082(h), 361.084(a), 361.088(g), and 361.114.

(iii) Texas Water Code (TWC), Texas Codes Annotated (Vernon, 2000), effective September 1, 1999, as amended: Chapter 5, sections 5.102 through 5.105, 5.112, 5.351, and 5.501; Chapter 7, sections 7.051(a), 7.053 through 7.062, 7.064 through 7.069, 7.075, 7.101, 7.102, 7.104, 7.107, 7.110, 7.162, 7.163, 7.176, 7.187, 7.189, 7.190, 7.252(1), 7.351, 7.353; Chapter 26, section 26.011; and Chapter 27, sections 27.018 and 27.019.

(iv) Texas Water Code (TWC), Texas Codes Annotated (Vernon, 2002), effective September 1, 2001, as amended: Chapter 5, section 5.177; Chapter 7, sections 7.031, 7.052(a), and 7.102.

(v) Texas Government Code (Vernon, 1998), section 311.027, effective May 11, 1993.

(vi) Texas Administrative Code (TAC), Title 30, Environmental Quality, 1994, as amended, effective through January 1, 1994: Chapter 305, sections 305.91 through 305.93, 305.98, and 305.99.

(vii) Texas Administrative Code (TAC), Title 30, Environmental Quality, 1997, as amended, effective through January 1, 1997: Chapter 281, sections 281.17(d)–(f); Chapter 305, sections 305.29(b)–(d), 305.94 and 305.95, 305.97, 305.100, 305.101 (except 305.101(c)), 305.102, 305.103, and 305.105.

(viii) Texas Administrative Code (TAC), Title 30, Environmental Quality, 2002, as amended, effective through December 31, 2001: Chapter 39, sections 39.13 (except (10)), 39.413 (except (10)); Chapter 50, sections 50.13, 50.19, 50.39, 50.113, 50.119, and 50.139; Chapter 55, sections 55.27 (except (b)), 55.201 (except as applicable to contested case hearings), and 55.211 (except as applicable to contested case hearings); Chapter 70, section 70.10; Chapter 281, sections 281.1 (except the clause ''except as provided by * * * Prioritization Process)''), 281.2 introductory paragraph, 281.2(4), 281.3(a) and (b), 281.5 (except the clause ''Except as provided by * * * Discharge Permits)'' and the phrase ''radioactive material''), 281.18(a) (except for the sentence ''For applications for radioactive * * * within 30 days.'', 281.19(a) (except the last sentence), 281.19(b) (except the phrase ''Except as provided in subsection (c) of this section,''), 281.20, 281.21(a) (except the phrase ''and the Texas Radiation Control Act * * * Chapter 401.''), 281.21(b), 281.21(c) (except the phrase ''radioactive materials,'' in 281.21(c)(2)), 281.21(d) introductory paragraph (except the phrase ''and the Texas Radiation Control Act * * * Chapter 401.'' and the phrase ''For applications for minor amendments * * * summary is not necessary.''), 281.21(d)(1)–(6) (except the phrase ''and, for radioactive * * * radiation safety'' in 281.21(d)(3)), 281.22(a) (except the phrase ''For applications for radioactive * * * to deny the license.''), 281.22(b) (except the phrase ''or an injection well,'' in the first sentence and the phrase ''For underground injection wells * * * the same facility or activity.''), 281.23(a), 281.24; Chapter 305, sections, 305.64(d) and (f), 305.66(c), 305.66(e) (except for the last sentence), 305.66(f)–(l), 305.123 (except the phrase ''and 401 * * *

regulation)'', 305.125(1) and (3), 305.125(20), 305.127(1)(B)(i), 305.127(4)(A) and (C), 305.127(6), 305.401(a), 305.401(b) (except the text ''§ 39.3 of this title (relating to Purpose) * * * § 55.21 of this title (relating to Requests for Contested Case Hearings, Public Comment''), 305.401(d)–(h); and Chapter 335, sections 335.2(b), 335.43(b), 335.206, 335.391 through 335.393.

(3) The following statutory and regulatory provisions are broader in scope than the Federal program, are not part of the authorized program, and are not incorporated by reference:

(i) Texas Health and Safety Code (THSC) Annotated, (Vernon 2001): Chapter 361, The Texas Solid Waste Disposal Act, sections 361.131 through 140; Chapter 371, Texas Oil Collection, Management, and Recycling Act, sections 371.021, 371.022, 371.024(e), 371.0245, 371.0246, 371.025, and 371.026(c).

(ii) Texas Administrative Code (TAC), Title 30, Environmental Quality, 2002, as amended, effective through December 31, 2001: Chapter 305, sections 305.53, 305.64(b)(4), 305.127(1)(G); Chapter 335, sections 335.321 through 335.332, and Appendices I and II.

(4)(i) *Unauthorized State Amendments.* The following authorized provisions of the Texas regulations include amendments published in the Texas Register that are not approved by EPA. Such unauthorized amendments are not part of the State's authorized program and are, therefore, not Federally enforceable. Thus, notwithstanding the language in the Texas hazardous waste regulations incorporated by reference at paragraph (c)(1)(i) of this section, EPA will enforce the State provisions that are actually authorized by EPA. The effective dates of the State's authorized provisions are listed in the following Table.

State provision	Effective date of authorized provision	Unauthorized State Amendments	
		Texas register reference	Effective date
335.2(c)	11/7/91	18 TexReg 2799	5/12/93
		18 TexReg 8218	11/23/93
35.6(a)	7/29/92	18 TexReg 2799	5/12/93
		22 TexReg 12060	12/15/97
		23 TexReg 10878	10/19/98
335.6(c) introductory paragraph	7/29/92	17 TexReg 8010	
		20 TexReg 2709	11/27/92
		20 TexReg 3722	4/24/95
		21 Tex Reg 1425	5/30/95
		21 TexReg 2400	3/01/96
		22 TexReg 12060	3/06/96
		23 TexReg 10878	12/15/97
			10/19/98
335.6(g)	7/29/92	18 TexReg 3814	6/28/93
		22 TexReg 12060	12/15/97
		23 TexReg 10878	10/19/98
335.10(b)(22)	7/27/88	17 TexReg 8010	11/27/92
335.24(b) introductory paragraph	3/1/96	21 TexReg 10983	11/20/96
		23 TexReg 10878	10/19/98
335.24(c) introductory paragraph	3/1/96	21 TexReg 10983	11/20/96
		23 TexReg 10878	10/19/98
335.41(c)	9/1/86	18 TexReg 8218	11/23/93
335.45(b)	9/1/86	17 TexReg 5017	7/29/92
335.204(a)(1)	5/28/86	16 TexReg 6065	11/07/91
335.204(b)(1)	5/28/86	16 TexReg 6065	11/07/91
335.204(b)(6)	5/28/86	16 TexReg 6065	11/07/91
335.204(c)(1)	5/28/86	16 TexReg 6065	11/07/91
335.204(d)(1)	5/28/86	16 TexReg 6065	11/07/91
335.204(e)(6)	5/28/86	16 TexReg 6065	11/07/91

(ii) The actual State regulatory text authorized by EPA (i.e., without the unauthorized amendments) is available as a separate document, *Addendum to the EPA-Approved Texas Regulatory and Statutory Requirements Applicable to the Hazardous Waste Management Program, June, 2005.* Copies of the document can be obtained from U.S. EPA Region 6, 1445 Ross Avenue, Suite 1200, Dallas, TX 75202.

(5) *Memorandum of Agreement.* The Memorandum of Agreement between EPA Region VI and the State of Texas, signed by the Executive Director of the Texas Natural Resource Conservation Commission (TNRCC) on April 26, 2000, and by the EPA Regional Administrator on June 14, 2000, is referenced as part of the authorized hazardous waste management program under subtitle C of RCRA, 42 U.S.C. 6921 *et seq.*

(6) *Statement of Legal Authority.* ''Attorney General's Statement for Final Authorization'', signed by the Attorney General of Texas on May 22, 1984 and revisions, supplements, and addenda to that Statement dated November 21, 1986, July 21, 1988, December 4, 1989, April 11, 1990, July 31, 1991, February 25, 1992, November 30, 1992, March 8, 1993, January 7, 1994, August 9, 1996, October 16, 1996, as amended February 7, 1997, March 11, 1997, January 5, 1999, November 2, 1999, and March 1, 2002 are referenced as part of the authorized hazardous waste management program under Subtitle C of RCRA, 42 U.S.C. 6921 *et seq.*

(7) *Program Description.* The Program Description and any other materials submitted as part of the original application or as supplements thereto are referenced as part of the authorized hazardous waste management program under subtitle C of RCRA, 42 U.S.C. 6921 *et seq.*

3. Appendix A to part 272, State Requirements, is amended by revising

the listing for ''Texas'' to read as follows:

Appendix A to Part 272—State Requirements

* * * * *

Texas

The statutory provisions include:

Texas Health and Safety Code (THSC) Annotated, (Vernon 2001): Chapter 361, The Texas Solid Waste Disposal Act, sections 361.003 (except (3), (4), (19), (27), (35), and (39)), 361.066(a), 361.082(a), 361.082(f), 361.086, 361.087, 361.093, 361.094, 361.095(a), 361.099(b), and 361.110; Chapter 371, The Texas Oil Collection, Management, and Recycling Act, sections 371.003, 371.024(b), 371.026(d), and 371.041.

Copies of the Texas statutes that are incorporated by reference are available from West Publishing Company, 620 Opperman Drive, P. O. Box 64526, St. Paul, Minnesota 55164–0526; Phone: 1–800–328–4880; Web site: *http://west.thomson.com.*

The regulatory provisions include:

Texas Administrative Code (TAC), Title 30, Environmental Quality, 2002, as amended, effective through December 31, 2001. Please note that the 2002 TAC, Title 30 is the most recent version of the Texas authorized hazardous waste regulations. For a few provisions, the authorized version is found in the TAC, Title 30, Environmental Quality dated January 1, 1994, January 1, 1997, or December 31, 1999. Texas made subsequent changes to these provisions but these changes have not been authorized by EPA. The provisions from earlier sets of regulations are noted in the table below.

Chapter 20, Section 20.15; Chapter 35, Section 35.402(e); Chapter 39, Sections 39.5(g), 39.11, 39.103(a)(2), (b), (d)(4), and (g), 39.405(f)(1), 39.411 (except (b)(4)(B), (b)(10), (11), and (13)), 39.503(d); Chapter 55, Sections 55.25(b)(1)–(3), 55.152(b), 55.154, and 55.156(b)(1); Chapter 281, Section 281.3(c);

Chapter 305—Sections 305.1(a) (except the reference to Chapter 401, relative to Radioactive Materials); 305.2 introductory paragraph (except the references to Chapter 401, relative to Radioactive Materials), 305.2(1), (6), (12), (13), (16), (17), (21), (25), (27)–(29), (32), and (41)–(43); 305.29(a), (January 1, 1997); 305.30; 305.41 (except the reference to Chapter 401, relative to Radioactive Materials); 305.42(a), (b), and (d); 305.43(b); 305.44 (except (d)); 305.45(a) (except (a)(7)(I) and the phrase ''§ 305.54 of this title * * * Content of Applications),'' in 305.45(a)(8)(C)); 305.45(b); 305.47; 305.50 introductory paragraph–(3) (except the last two sentences in 305.50(2)); 305.50(4) introductory paragraph and (A); 305.50(4)(B)–(D), (January 1, 1994); 305.50(4)(G); 305.50(5)–(8), (13) and (14); 305.51; 305.61; 305.62(a) (except the phrase in the first sentence ''§ 305.70 of this title * * * Solid Waste Class I Modifications'' and the phrase in the fifth sentence ''If the permittee requests a modification of a municipal solid waste permit * * * § 305.70 of this title.''); 305.62(b); 305.62(c), (January 1, 1997); 305.62(d) (except (d)(6)); 305.62(e)–(h); 305.63(a) introductory paragraph (except first sentence); 305.63(a)(1) and (2); 305.63(a)(3) (except last sentence); 305.63(a)(4)–(6); 305.64(a), 305.64(b) (except (4) and (5)); 305.64(c); 305.64(e); 305.64(g), (December 31, 1999); 305.66(a) (except (7)–(9)); 305.66(d); 305.67 (except (c)); 305.69(a)–(h), (January 1, 1997); 305.69(i)–(k) (except (k) A.8–A.10); 305.121 (except the phrase ''radioactive material disposal''); 305.122(a)–(c); 305.124; 305.125 (except (1), (3), the last two sentences in (5), (6), (9)(C), the phrase ''as otherwise required by Chapter 336 of this title'' relative to Radioactive Substances in (11)(B), (20), and (22)); 305.125(6), (January 1, 1997); 305.127 introductory paragraph; 305.127(1)(B)(iii), (E) and (F); 305.127(2); 305.127(3)(A) (except the last two sentences); 305.127(3)(B) and (C); 305.127(4)(B) and (5)(C); 305.128; 305.141 through 305.145; 305.146 introductory paragraph and (1), (January 1, 1997); 305.150; 305.171 through 305.175; 305.181 through 305.184; 305.191 through 305.194; 305.401(c); 305.571 through 305.573;

Chapter 324—Used Oil—Sections 324.1 through 324.2(6); 324.2(7)–(9), (January 1, 1997); 324.3; 324.4, (January 1, 1997); 324.6; 324.7, (January 1, 1997); 324.11 through 324.14; 324.15, (January 1, 1997); 324.16; 324.21, (January 1, 1997);

Chapter 335, Subchapter A—Industrial Solid Waste and Municipal Hazardous Waste in General—Sections 335.1 introductory paragraph—(4), (6)–(13), (17), (18), (20)–(24), (27), (29), (30), (32)–(39), (40) (except for the phrase ''or is used for neutralizing the pH of non-hazardous industrial solid waste''), (41)–(43), (45)–(50), (52)–(58), (61)–(70), (72)–(79), (80)–(85) (except the phrase ''solid waste or'' in each subsection), (86)–(89), (90) (except the phrase ''solid waste or''), (91)–(105), (107) (except the phrase ''solid waste''), (108), (112), (113) (except the phrase ''solid waste''), (114)–(117); 335.1(119) (December 31, 1999); 335.1(121)–(125), (127), (128), (129)(A)–(G) (except the phrase ''Except for materials described in subparagraph (H) of this paragraph.'', at (129)(D) and (G) introductory paragraphs, (129)(I) and (J), (130), (132)–(141) (except the phrase ''solid waste or'' at (134), (137) and (139)), (142) (except the phrase ''or industrial solid''), (143), (144), (145) (except the phrase ''or industrial solid''), (146) (except the phrase ''or industrial solid''), (148)–(150), (151) (except the phrase ''solid waste or''), (152)–(157), (158) (except the phrase ''or industrial solid''), (159)–(160), (161) (except the phrase ''solid waste or''); 335.2(a) and (c); 335.2(d), (January 1, 1997); 335.2(e)–(g); 335.2(i), (j) and (l); 335.4; 335.5; 335.6(a); 335.6(b), (January 1, 1997); 335.6(c); 335.6(d) and (e), (January 1, 1994); 335.6(f)–(j); 335.7, (December 31, 1999); 335.8(a)(1) and (2); 335.9(a) (except (a)(2) and (3)); 335.9(a)(2) and (3), (January 1, 1997); 335.9(b), (January 1, 1994); 335.10(a) introductory paragraph and (a)(1), (January 1, 1994); 335.10(a)(3) (except the phrase, ''unless the generator is identified in paragraph (2) of this section''); 335.10(a)(4); 335.10(a)(6); 335.10(b) (except 335.10(b)(5), (8), and (18)); 335.10(b)(5), (8), and (18), (January 1, 1994); 335.10(c) (except the phrase ''the United States customs official,''); 335.10(d)–(f); 335.11 (except 11(d)); 335.12 (except 335.12(a)(5) and (d)); 335.13(a), (January 1, 1997); 335.13(c) and (d), (January 1, 1994); 335.13(e) and (f), (January 1, 1997); 335.13(g), (January 1, 1994); 335.14; 335.15 introductory paragraph, (January 1, 1994); 335.15(1); 335.17(a); 335.18 (except 335.18(b)); 335.19 (except 335.19(d)); 335.20 through 335.22; 335.23 (except 335.23(2)); 335.23(2), (January 1, 1994); 335.24(a)–(f); 335.24(j) and (k); 335.29 through 335.31;

Chapter 335, Subchapter B—Hazardous Waste Management General Provisions—335.41(a)–(h); 335.41(j); 335.43 and 335.44, (December 31, 1999); 335.45; 335.47 (except 335.47(b) and the second sentence in 335.47(c)(3)); 335.47(b), (December 31, 1999);

Chapter 335, Subchapter C—Standards Applicable to Generators of Hazardous Waste—335.61 (except (f)); 335.62; 335.63; 335.65 through 335.69 (except 335.69(i)); 335.70; 335.71, (January 1, 1994); 335.73; 335.74; 335.76 (except 335.76(a), (b)(1), (f) and (h)); 335.76(a), (b)(1), and (f), (January 1, 1997); 335.77; 335.78 (except (b), (d)(2), (e) introductory paragraph, (f)(2), and (g)(2)); 335.78(b), (e) introductory paragraph, (f)(2), and (g)(2), (January 1, 1997);

Chapter 335, Subchapter D—Standards Applicable to Transporters of Hazardous Waste—335.91 (except 335.91(e)); 335.92; 335.93 (except 335.93(e)); 335.93(e), (December 31, 1999); 335.94 (except the phrase ''owned or operated by a registered transporter'' in (a) introductory paragraph);

Chapter 335, Subchapter E—Interim Standards for Owners and Operators of Hazardous Waste Storage, Processing, or Disposal Facilities—335.111; 335.112 (except (a)(7), (a)(17), (b)(4)(I) and (J), and (b)(7)); 335.112(a)(7), (January 1, 1997); 335.113; 335.114, (January 1, 1997); 335.115 introductory paragraph, (January 1, 1997); 335.115 (1)–(4); 335.116; 335.117 (except (a)(2)(B), (a)(2)(C), and (b)(2)); 335.117(a)(2)(B), (a)(2)(C), and (b)(2) (January 1, 1997); 335.118 through 335.127;

Chapter 335, Subchapter F—Permitting Standards for Owners and Operators of Hazardous Waste Storage, Processing, or Disposal Facilities—335.151; 335.152 (except (a)(4), (a)(6), and (c)(5)–(7)); 335.152(a)(4), (a)(6), (January 1, 1997); 335.153; 335.154, (January 1, 1997); 335.155 introductory paragraph, (January 1, 1997); 335.155 (1)–(3); 335.156 through 335.166; 335.167(a); 335.167(b) and (c), (December 31, 1999); 335.168 through 335.178;

Chapter 335, Subchapter G—Location Standards for Hazardous Waste Storage, Processing, or Disposal—335.201 (a) (except (a)(3)); 335.201(c); 335.202 introductory paragraph, (2), (4), (9)–(11), (13), (15)–(18); 335.203; 335.204(a) introductory paragraph—(5); 335.204(b)(1)–(6); 335.204(c)(1)–(5); 335.204(d)(1)–(5); 335.204(e) introductory paragraph; 335.204(e)(1) introductory paragraph (except the phrase ''Except as * * * (B) of this paragraph,'' and the word ''event'' at the end of the paragraph); 335.204(e)(2)–(7); 335.204(f); 335.205(a) introductory paragraph—(2) and (e);

Chapter 335, Subchapter H—Standards for the Management of Specific Wastes and Specific Types of Facilities—335.211; 335.212; 335.213, (January 1, 1997); 335.214; 335.221 (except (a)(1)(B)); 335.222 through

335.225; 335.241 (except (b)(4) and (d)); 335.241(d), (January 1, 1997); 335.251; 335.261 (except (e)); 335.271; 335.272;

Chapter 335, Subchapter O—Land Disposal Restrictions—335.431; Chapter 335, Subchapter R—Waste Classification—335.504 introductory paragraph—(2); 335.504(3) and (4), (December 31, 1999).

Copies of the Texas regulations that are incorporated by reference are available from West Publishing Company, 620 Opperman Drive, P.O. Box 64526, St. Paul, Minnesota 55164–0526; Phone: 1–800–328–4880; Web site: *http://west.thomson.com.*

* * * * *

[FR Doc. E8–25589 Filed 10–28–08; 8:45 am]

BILLING CODE 6560–50–P

FEDERAL COMMUNICATIONS COMMISSION

47 CFR Part 76

[CS Docket No. 98–120; FCC 08–224]

Carriage of Digital Television Broadcast Signals

AGENCY: Federal Communications Commission.

ACTION: Final rule.

SUMMARY: In this document, the Commission clarifies a number of existing rules relating to cable carriage of digital signals. As explained, the carriage elections that must be made by October 1, 2008, will determine a station's carriage rights throughout the entire 2009–2011 carriage election cycle. We also clarify the channel placement options applicable to digital must-carry stations, based upon the *First Report and Order* and the statute. Also, for those low-power stations that have the right to demand carriage by cable operators, we clarify that their statutory carriage rights extend to broadcasting in digital.

DATES: Effective October 29, 2008.

ADDRESSES: You may submit comments, identified by FCC 08–224, by any of the following methods:

- *Federal eRulemaking Portal: http://www.regulations.gov.* Follow the instructions for submitting comments.
- *Federal Communications Commission's Web Site: http://www.fcc.gov/cgb/ecfs/.* Follow the instructions for submitting comments.
- *People with Disabilities:* Contact the FCC to request reasonable accommodations (accessible format documents, sign language interpreters, CART, etc.) by e-mail: *FCC504@fcc.gov* or phone: 202–418–0530 or TTY: 202–418–0432.

For detailed instructions for submitting comments and additional information on the rulemaking process, see the **SUPPLEMENTARY INFORMATION** section of this document.

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 Declaratory Ruling in FCC 08–224, adopted September 24, 2008, and released September 26, 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. Pursuant to section 614(b)(4)(B) of the Communications Act of 1934, as amended (the ''Act''), the Commission initiated this proceeding in 1998 to address the responsibilities of cable television operators with respect to carriage of digital broadcasters in light of the significant changes to the broadcasting and cable television industries resulting from the Nation's transition to digital television. Now that Congress has established February 17, 2009, as the date certain for the end of analog broadcasts by full-power television licensees, and low-power and class A television licensees are beginning their transition to digital broadcast, we must further clarify the digital carriage responsibilities of cable operators.

2. Specifically, we clarify that the carriage elections that must be made by October 1, 2008, will determine a station's carriage rights throughout the entire 2009–2011 carriage election cycle. We also clarify the channel placement options applicable to digital must-carry stations, based upon the *First Report and Order*, 66 FR 16533, March 26, 2001, and the statute. Low-power broadcasters, while not required to make their transition to digital by February 17, 2009, nevertheless are doing so in increasing numbers, and will continue to do so of their own volition. For those low-power stations that have the right to demand carriage by cable operators, we clarify that their statutory carriage rights extend to broadcasting in digital.

II. Background

3. Under the Act, cable systems are presumptively required to carry all local television stations in all television markets they serve. Commercial television stations may, however, choose to be carried pursuant to voluntary retransmission consent agreements rather than by mandatory carriage. Generally, every three years commercial television stations must elect to either grant retransmission consent or pursue their mandatory carriage rights. Noncommercial television stations may only elect mandatory carriage, but are nonetheless free to negotiate carriage with cable operators.

4. In this docket, the Commission has determined the broadcast signal carriage responsibilities of cable television operators during and after the transition is completed. The statutory provision triggering this rulemaking is found in section 614(b)(4)(B) of the Act, which states:

5. At such time as the Commission prescribes modifications of the standards for television broadcast signals, the Commission shall initiate a proceeding to establish any changes in the signal carriage requirements of cable television systems necessary to ensure cable carriage of such broadcast signals of local commercial television stations which have been changed to conform with such modified standards.

6. The Notice of Proposed Rulemaking (''1998 NPRM'') in this proceeding sought to amend the cable television broadcast signal carriage rules, embodied in must-carry and retransmission consent, to accommodate the carriage of digital broadcast television signals.

7. The Commission's *First Report and Order and Further Notice of Proposed Rulemaking* in this proceeding adopted rules for carriage of digital broadcast signals pursuant to retransmission consent and mandatory carriage when a local television station is broadcasting only a digital signal. The Commission

decided that a commercial television station broadcasting both an analog signal and a digital signal may choose must-carry or retransmission consent for its analog signal and retransmission consent for its digital signal. The Commission acknowledged that the Act does not specifically require mandatory carriage for noncommercial digital television signals, but concluded that Congress did not intend to exclude such signals from mandatory carriage. As an interim measure during the transition, a digital-only television station may demand that one of its video programming streams be carried on the cable system for delivery to subscribers in an analog format.

8. In the *First Report and Order,* the Commission also concluded that the statutory term ''primary video'' required cable operators to carry only a single digital programming stream of a local digital television station as well as content related to that stream. The Commission further found that section 614(b)(4)(B) of the Act neither requires cable operators to carry nor prohibits them from carrying both the broadcaster's analog and digital signals (*i.e.*, ''dual carriage'') during the transition period.

9. In February 2005, the Commission issued the *Second Report and Order and First Order on Reconsideration.* Among other things, the *Second Report and Order* declined to require cable operators to carry any more than one programming stream of a digital television station that multicasts. The Commission's actions in the *Second Report and Order* were limited to questions of carriage of multiple signals or streams, however. In September 2007, we adopted the *Third Report and Order and Third Further Notice of Proposed Rulemaking* (''*Viewability Order*'') in order to address two important remaining issues.

10. The *Viewability Order* ensures that all cable TV viewers, including the 98 million analog-only cable TV viewers, retain the same access to their local stations after the transition as they have today. The rules will require cable operators to comply with the statutory viewability requirement by choosing to either: (1) Carry digital signals in analog format, or (2) for all-digital systems, carry the signals only in digital format, provided that all subscribers have the necessary equipment to view the broadcast content. This decision rendered moot the outstanding questions about post-transition carriage of broadcast signals on a ''basic tier'' under 47 U.S.C. 543(b)(7) (raised in the *First Report and Order*). The requirement that signals carried pursuant to mandatory carriage be made actually viewable to all subscribers, regardless of their equipment or level of service, means that a cable operator may provide those signals solely in digital so long as all subscribers are capable of receiving and viewing digital signals. If some subscribers can only view analog signals, however, broadcast stations carried pursuant to mandatory carriage must also be made viewable to them. The viewability requirements will be in force from the date of the transition through February 2012, subject to review by the Commission during the last year of this period. The Commission also reaffirmed the existing material degradation standard for cable carriage of digital broadcast signals, prohibiting preferential treatment of cable programmers or retransmission consent stations and reiterating the requirement that cable systems carry high definition (''HD'') broadcast signals in HD format.

11. Now, the conclusion of the transition approaches. Therefore, in this Order we explain the carriage election process for stations that will make their final transition from analog signals to digital signals for the February 17, 2009, transition deadline.

12. In addition, although low-power broadcasters are not required to participate in the full-power digital transition, many have chosen to begin their transition. We therefore also take this opportunity to clarify the effect on carriage rights of a voluntary transition to digital by a low-power broadcaster that is qualified for mandatory carriage of its analog signal.

III. Discussion

13. As we approach the deadline for the full-power digital transition, we clarify that the full-power carriage elections that must be made by October 1, 2008, will determine a station's carriage rights throughout the entire 2009–2011 carriage election cycle. Low-power broadcasters, while not required to make their transition to digital by February 17, 2009, nevertheless are doing so in increasing numbers, and will continue to do so of their own volition. For those low-power stations that have the right to demand carriage by cable operators, we clarify that their statutory carriage rights apply to digital broadcasting.

A. Full-Power Carriage Elections

1. Effect of October 1, 2008 Elections

14. The Cable Television Consumer Protection and Competition Act of 1992 established the requirement that ''television stations, within one year after the date of enactment of [the Act] and every three years thereafter, make an election between the right to grant retransmission consent'' to cable operators or the right to mandatory carriage by those cable operators. In compliance with this statutory mandate, the Commission established a regular schedule for carriage elections. The election in 1996 covered 1997–1999, the election in 1999 covered 2000–2002, etc. In accordance with this schedule, the Act requires broadcasters to elect, by October 1, 2008, whether they wish to engage in retransmission consent negotiations with cable operators or demand carriage on their systems for the three year period beginning January 1, 2009. Full-power broadcasters may choose to be carried on all of those cable systems in the same DMA to which they can deliver a good quality signal (must-carry), or they may choose to require those cable systems to seek the broadcaster's consent before carrying the signal (retransmission consent). The broadcaster must notify affected cable systems if electing retransmission consent, or the station's status will default to must-carry. 47 CFR 76.64. As noted above, full-power broadcasters will cease all analog broadcasts by midnight on February 17, 2009.

15. We take this opportunity to clarify that the October 1, 2008, election determines carriage of a station's signal for the entire 2009–2011 carriage cycle. The carriage election rule for stations that voluntarily return their analog spectrum allocation and begin operating as digital-only prior to the 2009–2011 carriage cycle in which the DTV transition concludes provides that ''stations that return their analog spectrum allocation and broadcast in digital only shall make their initial election any time between 60 days prior to commencing broadcast and 30 days after * * * commencing broadcasting in digital only; such initial election shall take effect 90 days after it is made.'' 47 CFR 76.64(f)(4). If a station elects must-carry on October 1, 2008, for the 2009–2011 carriage cycle, the cable operator(s) will provide carriage of the station's analog signal beginning (or continuing) on January 1, 2009, and concluding no earlier than the actual termination of analog service by that broadcaster. Once the station terminates analog service and begins broadcasting in digital, the carrier shall commence carriage of the station's digital signal without any gap in carriage. To facilitate carriage and the final transition process, beginning January 1, 2009, cable operators must immediately commence carriage of the digital signal of stations that cease analog broadcasting prior to the

February 17, 2009, statutory deadline; provided, however, that broadcasters must notify the cable operator(s) 30 days before the date on which they anticipate termination of their analog signal if it will be earlier than February 17, 2009.

2. Channel Placement

16. We clarify that the channel placement options in sections 614(b)(6) and 615(g)(5) of the Act, as implemented in § 76.57 of the Commission's Rules, remain in effect after the digital transition. Section 614(b)(6) of the Act generally provides that commercial television stations carried pursuant to the mandatory carriage provision are entitled to be carried on a cable system on the same channel number on which the station broadcasts over-the-air. Under section 615(g)(5) noncommercial television stations generally have the same right. The Act also permits commercial and noncommercial television stations to negotiate a mutually agreeable channel position with the cable operator. Historically, channel positioning has been part of the carriage election process, with must-carry stations choosing from among the statutory options as part of the must-carry election. 47 U.S.C. 534(b)(6), 535(g)(5). There are four channel positioning options in the Act for commercial television stations. The statutory options are ''the channel on which it was carried on July 19, 1985,'' ''the channel on which it was carried on January 1, 1992,'' ''the channel number on which the local commercial television station is broadcast over the air'', or any alternative channel by mutual agreement. Noncommercial stations may not elect the channel number on which they were carried on January 1, 1992, but otherwise have identical options.

17. As noted above, one of those statutory options is carriage on the broadcast channel number. In digital broadcasting, a broadcast station's channel number is no longer identified by reference to its over-the-air radio frequency. Instead, in compliance with the ATSC standard, the station's ''major channel number'' is identified in its program and system information protocol (''PSIP''). The Program and System Information Protocol (''PSIP'') contains metadata about both the program currently being aired and broadcast signal as a whole. One of the most important elements in the PSIP is the Major Channel Number (''MCN''), the channel ''location'' identified with a given station regardless of its over-the-air broadcast frequency. ATSC receivers (whether a TV set in a home or a receiver at a cable headend) can use this data to determine the information that will be displayed to viewers. Therefore, if the analog signal of a station was broadcast on channel 12, its digital signal will appear on channel 12 when tuned by an over-the-air viewer, even if the signal is being broadcast on a frequency corresponding to, for instance, channel 37. *See Program and System Information Protocol for Terrestrial Broadcast and Cable,* ATSC Document A/65 (Dec. 23, 1997). This usually corresponds to the radio frequency at which the station previously broadcast its analog signal. Therefore, in the *First Report and Order,* the Commission required that channel mapping information be passed through as part of the PSIP, linking the digital channel number with the appropriate primary video and program-related content. Thus, the cable operator can identify the correct channel location by reference to the PSIP.

18. We clarify that any station carried pursuant to mandatory carriage may demand carriage on its major channel number as broadcast in the station's PSIP. We also clarify that although the *First Report and Order* did not specifically address the significance of the statutory provisions and rules with respect to the ''historic'' carriage options, these statutory options remain available to digital must-carry broadcasters, who will make digital channel placement elections pursuant to §§ 76.57(a) or (b) just as they previously have for analog channel placement elections. § 76.57(c), adopted in the *First Report and Order,* should be read as clarifying the manner in which cable operators are to determine the channel number on which a local commercial or qualified NCE station is ''broadcast over the air'' when implementing such a station's election under §§ 76.57(a) or (b). The statute also permits carriage on ''such other channel number as is mutually agreed upon by the station and the cable operator.'' This negotiated option, as reflected in our Rules, also remains an option. We also note that § 76.57(f) continues to apply to determine where a station must be carried if it makes no affirmative election.

B. Low-Power Carriage Rights

19. NCN Cable Advertising, licensee of WKFK–LP, Pascagoula, Mississippi (''WKFK''), filed a petition for a declaratory ruling that the FCC's cable must-carry rules apply to the digital signals of Class A, LPTV and TV translator stations after those stations flash-cut to digital operation and cease operating their analog signals. Currently, our Rules provide for cable carriage of low-power stations (including Class A) in specific and limited circumstances. WKFK argues that a clarifying order is necessary to eliminate uncertainty about digital carriage rights for low-power stations. WKFK is not seeking new or additional carriage for low-power stations but rather a confirmation that low-power stations will have the same carriage rights for their digital signals as they currently have for their analog signals. In addition, WKFK wants low-power stations to have the same downconversion option for their digital-only signals as digital-only full-power stations have for their digital signals.

1. Applicability of 76.55(d) to Low-Power Digital Broadcasters

20. Under Section 614(c) of the Act and § 76.56(b)(3) of our Rules, a cable operator is, in some circumstances, required to carry the signal of one or two ''qualified low-power stations.'' Like full-power commercial broadcast stations, low-power stations can earn must-carry status with regard to a specific cable system by conforming to a series of requirements (laid out in section 614(h)(2) of the Act). 47 U.S.C. 534(h)(2). The Commission's Rules implementing this section state that a low-power station becomes qualified for mandatory carriage if the station conforms to the Commission's LPTV rules, broadcasts for at least the minimum number of hours required of commercial broadcast stations by the Commission, and adheres to certain Commission requirements regarding non-entertainment programming and employment. However, an LPTV station will not be qualified unless the Commission determines that the provision of programming by such station would address local news and informational needs not being adequately served by full-power television stations, because such full-power stations are distant from the LPTV station's community of license. In addition, the LPTV station must comply with the Commission's interference regulations for LPTV stations; it must be within 35 miles of the cable system's principal headend and deliver to the headend a good quality over-the-air signal; its community of license and the franchise area of the cable system must both have been located outside of the largest 160 Metropolitan Statistical Areas (''MSAs'') on June 30, 1990, and the population of the LPTV station's community of license on that date must not have exceeded 35,000; and there cannot be any full-power television station licensed to any community

within the county or other political subdivision (of a State) served by the cable system. 47 CFR 76.55(d). As noted above, the Commission has previously made clear that Section 614(a) of the Act, which applies to both commercial full-power and low-power stations, ''does not distinguish between analog and digital signals and supports the argument that digital signals are entitled to mandatory carriage.'' As the Commission stated in 2001, when a broadcast station that is otherwise entitled to carriage terminates its analog signals and operates as a digital-only station, it does not lose its carriage rights. We clarify here that this determination applies equally to full- and low-power stations. The *First Report and Order* determined that, for a ''limited time,'' digital-only full-power stations could either demand carriage in digital or pay to downconvert their signal to analog for carriage in analog. This interim viewability rule has been in effect since 2001, giving full-power must-carry stations the option to demand analog downconversion in order to make their signals as widely viewable as possible.

21. Although the *First Report and Order* did not specifically address the carriage of digital low-power stations, the Commission did tentatively conclude that, as to commercial full-power stations, low-power stations, and noncommercial educational stations it had ''no need to deviate from the existing eligibility requirements for these three categories of stations.'' The provisions establishing mandatory carriage of low-power stations, at section 614(h)(2) of the Act, make no distinction between digital and analog low-power stations. Indeed, by their terms these provisions apply to ''any television broadcast station'' conforming to the Part 74 Rules and the elements of section 614(h)(2). The Commission found in 2001 that simply the absence of a distinction between analog and digital supported mandatory digital carriage, and the stronger wording of section 614(h)(2) is significantly more persuasive. But, because of the growing number of low-power stations broadcasting in digital, and the potential for uncertainty, we see a need to provide additional guidance in this matter. We therefore clarify that qualified low-power digital-only stations should be accorded the carriage rights they could have demanded for their analog signal. The Communications Act at section 614(b)(7) requires that all stations carried pursuant to mandatory carriage, including low-power stations, be made viewable to all subscribers. Nonetheless, in the period remaining before the full-power DTV transition, we will permit cable operators to carry low-power digital-only stations in the same manner as full-power digital-only stations—in either analog or digital, at the broadcaster's discretion. Thus, if a qualified low-power station becomes digital-only, it may elect carriage of its signal in digital, or may choose to pay to downconvert the signal for carriage in analog. As of February 18, 2009, all signals carried pursuant to mandatory carriage must again be made viewable to all subscribers.

22. Although the language of the Act and our Rules does not distinguish between analog and digital-only stations, we do find that the Note to § 76.55(d) is no longer fully accurate, as it addresses only the signal strength of analog signals. Just as for commercial full-power stations, the Note currently states that a good quality signal level for analog is −45 dBm for UHF signals and −49 dBm for VHF signals. The Cable Act, which established the −45/−49 dBm standard for commercial full-power stations, is silent on the definition of ''good quality signal'' for the purposes of carriage of low-power stations. Acknowledging this, in a *Memorandum Opinion and Order* issued to finalize several questions regarding implementation of the Cable Act, the Commission, on its own motion, adopted the full-power commercial signal quality standards for low-power stations (and noncommercial stations). In the *1998 NPRM,* the Commission asked whether ''new good quality signal parameters'' were necessary for digital signals, and, consistent with the rules established in 1994, made no distinction among commercial, noncommercial, and low-power stations. In the *First Report and Order,* the Commission established −61 dBm as the signal level necessary to provide a ''good quality digital television signal at a cable system's principal headend,'' again making no distinction among commercial, noncommercial, and low-power stations.

23. In line with the Commission's consistent practice of aligning the ''good quality signal'' standards for commercial, noncommercial, and low-power stations, we find good cause to adopt, on a temporary basis, a digital signal strength requirement for carriage of low-power stations also using −61 dBm at the cable system headend. WKFK's Petition makes clear that a delay in resolution of this question could inhibit investment on the part of low-power station owners who seek to transition their stations to digital. As discussed above, there is ample history supporting an alignment of the full-power and low-power standards, and thus no basis on which an industry participant might have reasonably assumed that there would be a distinction between them in digital. Furthermore, the Commission sought comment on what would constitute a ''good quality signal'' for all digital signals in the *1998 NPRM,* and there is no evidence in the record that would support making any distinction among digital signals from different sources. Thus, pending the adoption of a final amendment to the Note to § 76.55(d), we will permit low-power mandatory-carriage analog stations that begin broadcasting in digital-only to demand carriage of their digital signal so long as they provide a signal strength of at least −61 dBm to the cable system's headend.

2. Petition for Declaratory Ruling of WKFK

24. In light of this clarification, we grant WKFK's request for a declaratory ruling. If WKFK begins broadcasting in digital-only, it will have rights of carriage on the systems on which it may now demand carriage, so long as it provides a signal strength of −61 dBm at each system's headend.

IV. Ordering Clauses

25. It is ordered that, pursuant to the authority contained in sections 1, 4, 303, 614, and 615 of the Communications Act of 1934, as amended, 47 U.S.C. 151, 154, 303, 534, and 535, this *Declaratory Order* is adopted.

26. It is further ordered that the Petition for Declaratory Ruling filed by NCN Cable Advertising, licensee of WKFK–LP, Pascagoula, Mississippi, is granted to the extent described herein.

Federal Communications Commission.

Marlene H. Dortch,

Secretary.

[FR Doc. E8–25798 Filed 10–28–08; 8:45 am]

BILLING CODE 6712–01–P

DEPARTMENT OF COMMERCE

National Oceanic and Atmospheric Administration

50 CFR Part 223

[Docket No. 070801431–81370–02]

RIN 0648–AU92

Endangered and Threatened Species; Conservation of Threatened Elkhorn and Staghorn Corals

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

ACTION: Final rule.

SUMMARY: We, the National Marine Fisheries Service (NMFS), publish this final rule to apply all the prohibitions enumerated in section 9(a)(1) of the Endangered Species Act (ESA) to elkhorn (*Acropora palmata*) and staghorn (A. cervicornis) corals, with limited exceptions for two specified classes of activities that contribute to the conservation of the listed corals. We have determined that extending these prohibitions with two exceptions is necessary and advisable to provide for the conservation of the species.

DATES: The effective date of this rule is November 28, 2008.

ADDRESSES: NMFS, Southeast Regional Office, Protected Resources Division, 263 13th Ave. South, St. Petersburg, FL 33701–5505.

FOR FURTHER INFORMATION CONTACT: Jennifer Moore or Sarah Heberling, NMFS, Southeast Region, at the address above or at (727) 824–5312, or Marta Nammack, NMFS, Office of Protected Resources, at (301) 713–1401. Reference materials and supporting documents regarding this rule are available upon request or on the Internet at *http://sero.nmfs.noaa.gov*.

SUPPLEMENTARY INFORMATION:

Background

On May 9, 2006, we published a final rule listing elkhorn (*Acropora palmata*) and staghorn (A. cervicornis) corals as threatened under the ESA (71 FR 26852). The final listing rule describes the background of the listing actions for elkhorn and staghorn corals and provides a summary of our conclusions regarding the status of the listed corals. For additional background and a summary of Acropora spp. natural history and threats to the species, the reader is referred to the March 3, 2005, Atlantic *Acropora* Status Review report and final listing rule (available at *http://sero.nmfs.noaa.gov/pr/esa/acropora.htm*).

Section 4(d) of the ESA provides that, whenever a species is listed as threatened, the Secretary of Commerce (Secretary) shall issue such regulations as the Secretary deems necessary and advisable to provide for the conservation of the species. Such regulations may include any or all of the prohibitions in ESA section 9(a)(1) that apply automatically to species listed as endangered. Those section 9(a)(1) prohibitions make it unlawful, with limited specified exceptions, for any person subject to the jurisdiction of the United States to: ''(A) import any such species into, or export any such species from the United States; (B) take any such species within the United States or the territorial sea of the United States; (C) take any such species upon the high seas; (D) possess, sell, deliver, carry, transport, or ship, by any means whatsoever, any such species taken in violation of subparagraphs (B) and (C); (E) deliver, receive, carry, transport, or ship in interstate or foreign commerce, by any means whatsoever and in the course of a commercial activity, any such species; (F) sell or offer for sale in interstate or foreign commerce any such species; or (G) violate any regulation pertaining to such species or to any threatened species of fish or wildlife listed pursuant to section 1533 of this title and promulgated by the Secretary pursuant to authority provided by this chapter.'' Section 11 of the ESA provides for civil and criminal penalties for violation of section 9 or regulations issued under the ESA.

On December 16, 2007, we proposed protective regulations under section 4(d) of the ESA to apply all the prohibitions enumerated in section 9(a)(1)(A)-(F) of the ESA to these two coral species, with limited exceptions for two specified classes of activities that contribute to the conservation of the listed corals. In *Response:*to our request for public comments, we received written comments from 30 commenters.

Summary of Comments Received

Below we address the comments received pertaining to the proposed 4(d) rule for the Acroporid corals.

Comment 1: One commenter requested an extension of the comment period and public hearings to educate reef users about the 4(d) rule.

Response: We do not believe that extension of the comment period or additional hearings are necessary in order to finalize this rule. We provided a 60–day comment period on the proposed rule. In connection with the proposed listing of the species, we conducted public hearings during the comment period, during which we received comments on activities likely to result in take of the species. Further, after the final listing rule was published, we conducted public workshops to discuss issues that might be associated with a 4(d) rule or a critical habitat designation.

Comment 2: One commenter asked if the proposed prohibitions apply to only ''live'' coral or dead coral skeleton also.

Response: The ESA section 9(a)(1) prohibitions apply to any listed species of fish or wildlife. Section 3 of the ESA defines the term ''fish or wildlife'' to mean ''any member of the animal kingdom, including without limitation any mammal, fish, bird , amphibian, reptile, mollusk, crustacean, arthropod or other invertebrate, and includes any part, product, egg, or offspring thereof, or the dead body or parts thereof.'' Therefore, the ESA section 9(a)(1) prohibitions extended through this rule apply to live coral and dead coral skeleton.

Comment 3: One commenter requested clarification on the use of the terms ''habitat'' and ''critical habitat'', including examples.

Response: In this rule, the term habitat is used broadly to describe the physical and biological environment in which the species occur. ''Habitat'' is used to further explain what may constitute ''harm'' under the definition of take. Activities that constitute harm may include significant habitat modification or degradation that actually kills or injures fish or wildlife by significantly impairing essential behavioral patterns including breeding, spawning, rearing, migrating, feeding or sheltering (50 CFR 222.102). In this rule, the use of the term habitat is not the same as the narrower term ''critical habitat.'' Critical habitat is defined in section 3 of the ESA as: ''(i) the specific areas within the geographical area occupied by the species, at the time it is listed in accordance with the provisions of section 1533 of this title, on which are found those physical or biological features (I) essential to the conservation of the species and (II) which may require special management considerations or protection; and (ii) specific areas outside the geographical area occupied by the species at the time it is listed in accordance with the provisions of section 1533 of this title, upon a determination by the Secretary that such areas are essential for the conservation of the species.'' We proposed a critical habitat designation for elkhorn and staghorn corals on February 6, 2008 (73 FR 6895).

Comment 4: One commenter requested that we apply the prohibitions of this rule to fused-staghorn coral (A. prolifera), which is a hybrid of elkhorn and staghorn coral, given that it is listed in local guides and literature as a species or sub-species.

Response: In our final rule listing elkhorn and staghorn corals under the ESA (71 FR 26852), we determined that fused-staghorn coral did not warrant ESA-listing because it is a first-generation hybrid of elkhorn and staghorn corals. Thus, it is not possible to extend the section 9 prohibitions to fused-staghorn corals. In addition, while section 4(d) of the ESA gives us the authority to issue regulations necessary and advisable to provide for the conservation of threatened species, we did not identify any threats affecting elkhorn or staghorn corals to be associated with fused-staghorn coral or conservation needs of these species that are dependent upon regulating take of fused-staghorn coral. Therefore, we do not believe that specific 4(d) regulations applicable to fused-staghorn coral are warranted.

Comment 5: In the preamble to the proposed rule, we stated that the ESA section 9(a)(1) prohibitions are necessary and advisable for the conservation of the two species, specifically to address the lesser stressors included in the proposed rule that are amenable to management. One commenter suggested that we add to the list of lesser stressors: ''habitat degradation due to uncontrolled coastal development and ecosystem shifts due to overfishing.''

Response: In the Atlantic Acropora Status Review Document (BRT, 2005) and the Final Listing Determinations for Elkhorn Coral and Staghorn Coral (71 FR 26852; May 9, 2006), we categorized threats to elkhorn and staghorn corals as sources, stressors, or *Response:*. Sources were considered natural or anthropogenic processes that create stressful conditions for organisms (e.g., climate variability and change, coastal development). A stressor is the specific condition that causes stress to the organisms (e.g., elevated sea surface temperature or sediment runoff). The response of the organisms to that stressor is often in the form of altered physiological processes (e.g., bleaching, reduced fecundity or growth) or mortality. We determined that the following lesser stressors are contributing to the threatened status of the species: sedimentation, anthropogenic abrasion and breakage, competition, excessive nutrients, predation, contaminants, loss of genetic diversity, African dust, elevated carbon dioxide levels, and sponge boring. While coastal development and ecosystem shift due to overfishing are not listed as stressors in this rule, they are known to be sources of identified stressors. Sedimentation, anthropogenic abrasion and breakage, excessive nutrients, contaminants, and elevated carbon dioxide levels are all stressors whose source can be coastal construction and development. The stressor identified as competition is caused by macroalgae outcompeting the corals for space on the reef, the result of which is the ecosystem shift from coral-dominated reefs to macroalgae-dominated reefs. Macroalgae proliferation is caused by two factors: elevated nutrients and reduction of herbivores.

Comment 6: Two Federal agencies commented on the examples of activities that could result in a violation of the ESA under section 9, listed in the proposed rule at 71 FR 71,108 (December 16, 2007). One agency requested inclusion of language limiting the range of actionable offenses to those that are reasonably foreseeable. The second agency and a separate commenter listed examples of specific activities occurring or causing impacts in their managed areas and in Florida, respectively, that they believe meet several of the enumerated examples of violations.

Response: The list of activities that may violate the prohibitions for listed corals, which is not exhaustive, is intended to increase the public's awareness of the potential effects of this rule on proposed and ongoing activities within a species' range. The entity proposing or conducting an activity would have the information to determine if their specific activity may result in a violation. For Federal agencies, the interagency coordination requirements of section 7 of the ESA already apply without the implementation of this rule and provide additional procedural mechanisms to evaluate the effects of a particular action on listed species. Federal agencies must consult with NMFS if their actions 'may affect' listed corals. Further, upon the effective date of this rule, incidental take of the threatened corals that may result from a Federal action would be identified and may be authorized in a biological opinion through the section 7 consultation process, if the action is not likely to jeopardize a listed species' continued existence. Inclusion of a reasonably foreseeable standard for actions that constitute violations of the 4(d) prohibitions would be inappropriate as section 11 of the ESA establishes the applicable standards. In the context of section 7, our consultation regulations require us to evaluate all the direct and indirect effects of a proposed Federal action on listed species, and indirect effects are those that are reasonably certain to occur. 50 CFR § 402.02.

With regard to the comments identifying specific examples of activities that may constitute violations of the prohibitions, we reiterate that the fact that activities fall within one of the categories does not mean that a specific activity is a per se violation. Activities that do not result in take do not constitute violations.

Comment 7: One Federal agency expressed concern about monitoring and data collection requirements that may be imposed on them as a result of the rule, and the costs that could add to their activities.

Response: All Federal agencies are required to consult with NMFS under ESA section 7 if they approve, fund, or implement actions that may affect a listed species. This consultation requirement is not a result of the proposed 4(d) rule. As part of their consultation responsibilities, Federal agencies must make determinations about the effects of their actions on listed species based on the best scientific and commercial data available at the time the activity is being proposed. This information standard generally does not include a requirement for collection of new information. In addition, if a Federal agency's action will have adverse effects on listed species including these coral species, and a biological opinion is issued for the action, existing consultation regulations require the Federal agency to conduct monitoring to validate the assumptions and predictions in the opinion, and to ensure that the incidental take limit is not exceeded. Although take of these threatened corals was not prohibited by the listing, the monitoring requirement to ensure the continuing validity of a ''no jeopardy'' opinion became applicable as soon as the corals were listed.

Comment 8: One Federal agency asked whether and when ESA section 7 consultation would be required in connection with the categories of activities that have been excepted from the prohibitions through this rule.

Response: Though take of coral as a result of the activities excepted from the prohibitions through this rule will not constitute violations of section 9 of the ESA, the activities may nonetheless cause adverse effects to the corals that will require Federal agencies to consult with us under section 7 to ensure that

the effects will not rise to the level of jeopardizing the continued existence of the species. For example, collection of and research on elkhorn or staghorn corals under the auspices of one of the excepted research permitting programs will still constitute take of the species, though the take is not prohibited. If Federal agencies are permitting or conducting the research, they must continue to consult with NMFS to ensure their action is not jeopardizing the continued existence of the listed corals.

Comment 9: One commenter requested that NMFS ensure its 4(d) rule avoids unnecessarily duplicating existing laws and regulations, and discussed a number of state, Federal, and international laws providing protection to the corals from anthropogenic impacts.

Response: ESA section 4(d) instructs us to issue regulations that are necessary and advisable to provide for the conservation of the threatened corals. While we realize there are numerous existing regulations that protect corals in general, few protect elkhorn and staghorn corals specifically, and none protect these species for the specific purpose of achieving their recovery. Further, as part of the listing process, we conducted a thorough review of existing regulatory mechanisms and determined they were inadequate to protect elkhorn and staghorn corals, contributing to their threatened status. In this rulemaking, we determined, due to the species' population status and the threats affecting them, it is necessary and advisable to extend the ESA section 9 prohibitions to listed corals.

Comment 10: Several commenters identified specific federally-regulated activities occurring in Florida that they believe require profound changes in order to promote recovery of the threatened corals, such as open ocean outfalls and beach renourishment projects.

Response: We are currently reviewing Federal projects that may affect the listed corals through interagency consultation pursuant to ESA section 7. A Federal agency's responsibility to consult with us is triggered by the listing of a species and proposal of an action that may affect such species; therefore, we have been consulting on projects since the species were listed in May 2006. This rule allows us to issue an incidental take statement, with reasonable and prudent measures (RPMs) to reduce the impact of take, for projects that result in incidental take of the species. For projects that do not have a Federal nexus, an ESA section 10(a)(1)(B) permit may be obtained to receive authorization for incidental take. In that case, we would work with the applicant to develop a conservation plan to minimize the impacts to the species.

Comment 11: One commenter requested more discussion regarding the costs and benefits of our proposed project modifications for beach renourishment projects and more consideration of the coastal engineering literature. The commenter stated that many of the project modifications are similar to the conditions that would be imposed under State of Florida rules, but some (unidentified by the commenter) examples in the draft Regulatory Impact Review (RIR)/Initial Regulatory Flexibility Analysis (IRFA) indicated we had a different understanding of physical coastal processes. The commenter also expressed concern about additional delays in permitting beach nourishment projects that may result from the rule.

Response: In the draft RIR/IRFA, we identified the following project modifications that may be applicable to beach renourishment projects to address adverse impacts to the threatened corals: Project relocation, coral relocation and monitoring, conditions monitoring, diver assisted anchoring or mooring buoy use, pipe collars or cable anchoring, sand bypassing, shoreline protection measures to reduce frequency of beach nourishment events, upland or artificial sources of sand, and sediment and turbidity control measures. In the draft report, we discuss how each project modification may reduce impacts to the species. The commenter did not indicate which particular project modifications indicated we had a different understanding of physical coastal processes, thus precluding a more specific *Response:*

The project modifications were identified as those already being implemented for beach renourishment projects as well as those described in the Report from the Southeast Florida Coral Reef Initiative Maritime Industry and Coastal Construction Impacts Workshop (TetraTech, 2007). The project modifications were also identified as the activities that may be necessary or appropriate to minimize the impact of incidental take on the two listed species of corals. It was not our intention that all project modifications identified for a particular category of activity be implemented for all individual projects. Rather, whether a particular project modification is imposed will depend on the specifics of the individual project. Further, project modifications, here likely imposed as RPMs through section 7 consultation, must be commensurate with the project for which they are imposed and cannot alter the basic design, location, scope, duration, and timing of the action and may only involve minor changes (50 CFR 402.14(i)(2)). Therefore, whether we impose a particular project modification will depend on whether that modification is necessary and appropriate in that instance and will take into consideration the physical coastal processes within the proposed action area. Lastly, as discussed in the RIR, consultation is already required if beach nourishment projects may affect the listed corals, and we do not expect that identification of RPMs will measurably increase the time required to complete consultation and delay project permitting.

Comment 12: One commenter expressed confusion on how maintenance dredging or deep water ports will be evaluated through ESA section 7 consultation. The commenter stated the economic impact data in the draft RIR/IRFA does not discuss many aspects of these ports' importance to the local economy and does not discuss the Port of Palm Beach at all. The commenter requested more information on the costs and benefits of NMFS' intentions.

Response: In the draft RIR/IRFA, we identified, and described in detail, several project modifications that may be applicable to maintenance dredging and disposal projects: Project relocation, conditions monitoring, GPS and DPV protocol, diver assisted anchoring or mooring buoy use, pipe collars or cable anchoring, and sediment and turbidity control measures. As we described in the draft RIR/IRFA, it is likely that neither species of coral would be present within the footprint of dredging projects in ports and navigation channels. It is possible that the species may be present within the dredge material disposal area or within the areas adjacent to the dredging area. In these instances it is possible that the species may be impacted by sediments or turbidity, vessel operations, or construction equipment. The identified project modifications would reduce the impact of take that may result from the project. Further, the identified project modifications are in most cases the same as those currently required by existing authorities.

We did not discuss the benefits to local economies of existing ports because we do not believe that there will be a change in the benefits the ports provide as a result of this rule. The imposition of project modifications must be reasonable and prudent for the particular project being proposed.

Therefore, it is not likely that the identified project modifications for maintenance dredging of an existing port would impact the operation of the port to the extent that it would reduce the benefits the port provides to local economies.

Comment 13: One state agency questioned the assertion that Florida's reefs provide protective value as storm surge barriers, and noted the absence of discussion about the considerable economic benefit of Florida's beaches and associated tourist recreation to the state's economy.

Response: Coastal nations and states, including the State of Florida, recognize the protection from storm surge and waves that offshore reefs provide to coastal communities and resources, including protection of beaches from erosion. The storm protection value may vary depending on the reefs and location, as the commenter indicates. We did not discuss the economic value of Florida's sand beaches because we do not believe that those values will be diminished by the proposed rule; specifically, we do not expect the proposed rule to interfere with beach renourishment projects to the extent that the values beaches provide will be impacted. As discussed above, if a beach renourishment project is expected to result in take of the listed corals, but will not jeopardize the corals' continued existence, modifications that may be required to minimize the impact of that take must be commensurate with the project and cannot alter the basic design, location, scope, duration, and timing of the project and may only involve minor changes.

Comment 14: One state agency commented that it regulates upland construction seaward of the Coastal Construction Control Line (CCL), which does not require any Federal agency permitting. The commenter asked if we were proposing a requirement for an Incidental Take Permit (ITP) for at least some of the activities. The commenter stated an ITP would add considerable time delay, especially in post-hurricane situations, and add to the agency's workload, but that we did not consider administrative cost to the agency or cost to any public or private entities.

Response: The commenter is correct that non-federal projects are not subject to section 7 consultation under the ESA, but may need an ESA Section 10(a)(1)(B) ITP if the activity results in the incidental take of listed species. When the state engages in an activity that does not require Federal funding or authorization, and that activity results in the incidental take of listed species, the state may apply for an ITP to request authorization for the take. However, if an activity occurs shoreward of the CCL and landward of the mean high water line (MHW) line, and has effects in the waters of the United States, such as discharges of sediments or other pollutants, a Federal permit may be required for that activity, potentially under the Clean Water Act or other statutes, depending on the location. Such permits would constitute a Federal agency action requiring a section 7 consultation on affected species listed under the ESA; incidental take of listed corals could be authorized through a biological opinion resulting from the consultation.

Comment 15: One state commenter discussed the range of actions being taken under state, local, and Federal laws to address wastewater and stormwater discharge impacts, particularly in the Florida Keys, and asked if or how the rule will affect implementation of their programs, if there is no conclusive evidence that such discharges are impacting offshore reefs.

Response: Programs that permit discharges to marine waters that result in incidental take of the listed corals will be impacted by the rule. Modifications to the program that minimize the impact of any incidental take of the listed corals may be appropriate, either through a section 10(a)(1)(B) ITP, or a section 7 consultation if the program is implementing the Federal Clean Water Act.

Comment 16: Two commenters expressed concern that reef users' fears about the rule's take prohibitions would effectively restrict access to and enjoyment of coral reefs through boating and recreational activities, and through commercial fishing.

Response: As stated previously, this rule does not prohibit any specific activity, only take of the species. Many existing regulations already prohibit injury or damage to coral reefs during the conduct of lawful activities such as boating and fishing. Therefore, by prohibiting take of elkhorn and staghorn corals, the rule does not present an undue burden on coral reef user groups.

Comment 17: One commenter stated that the rule should include exceptions to the prohibitions for unintentional take that cannot be prevented, specifically for take caused by vessels loosed from moorings or grounded during hurricanes. The commenter also stated that rebuilding coastal communities after hurricanes should not be unreasonably delayed due to the need for consultation and potential permits.

Response: Section 11 of the ESA provides for assessing different types and severity of penalties for violating the ESA or its implementing regulations. Knowing violations of the statute or regulations may lead to higher penalties, and the specific facts of an individual violation, for example a take, would determine whether the violation is ''knowing''. We have conducted section 7 consultations for community and major infrastructure repair and rebuilding activities in the wake of previous hurricanes, and we expect that any similar future consultations required due to potential impacts on the listed corals can be accomplished without unduly delaying projects.

Comment 18: One commenter requested an exemption for a buffer area around the entrance channel and harbor to allow for shipping activities and facility maintenance at the Port of Key West.

Response: This rule does not prohibit any activity generally, and specifically does not prohibit shipping activities and facility maintenance of the Port of Key West. This rule does prohibit the take of elkhorn and staghorn corals. Therefore, any activity that may result in take of either species would need to be modified to avoid taking the species. If the activity cannot be modified to avoid take, incidental take that will not jeopardize the species' continued existence can be authorized through the ESA section 7 consultation process or section 10(a)(1)(B) permitting. Further, any maintenance of the port may require a permit from the U.S. Army Corps of Engineers, who would consult with us under ESA section 7 if the project may affect listed corals.

Comment 19: One Federal natural resource management agency asked whether they need to obtain an ESA section 10 permit for incidental take that may result from visitor use of their managed areas.

Response: No. ESA section 10(a)(1)(B) permits are required for incidental take that results from an otherwise legal activity conducted by anyone other than a Federal agency. Federal agencies must consult with NMFS on activities that they conduct, fund, or authorize to ensure their activities do not result in jeopardy pursuant to ESA section 7(a)(2). Once section 9 take prohibitions are extended to threatened species, section 7 consultation will provide authorization for incidental take that results from said activity. Therefore, the commenting agency does not need a section 10 permit, but should enter into ESA section 7 consultation on activities under their management plan that may

affect the listed corals to obtain authorization for incidental take.

Comment 20: Several comments were received regarding the exception for scientific research and enhancement activities conducted under six existing Federal, state, or territorial research permitting programs. Specifically, there was confusion and concern about the Puerto Rico Department of Natural and Environmental Resources' (DNER) permit program. The confusion regarded a perception that we were delegating our ESA section 10(a)(1)(A) permitting authority to DNER. Concerns were raised as to the efficiency and adequacy of DNER's permit program.

Response: The exception for scientific research and enhancement activities does not delegate ESA section 10(a)(1)(A) permitting authority to the six specific programs identified in this rule. Rather, the exception removes the requirement for an individual to obtain an ESA section 10(a)(1)(A) permit if they have a valid permit from one of the identified programs.

We evaluated the DNER's research permitting program criteria and found the program to provide for the conservation of the species and to have requirements commensurate with the ESA section 10(a)(1)(A) permit. The comments received did not provide specific information to warrant reconsidering our determination. Further, eliminating redundant permitting requirements where state and Federal permitting programs already exist and provide for the conservation of the species will improve administrative efficiency, reduce regulatory burdens on research and enhancement activities, and thereby facilitate collection of scientific information and advance the recovery of these species.

Comment 21: One commenter suggested that enforcement of the scientific research and enhancement exception for import and export may be difficult due to the number of agencies issuing import and export permits. The commenter suggested that one agency be designated to issue the import and export permits.

Response: Although six agencies were identified as having the authority to issue permits for which the scientific research and enhancement exception would apply, only one, the U.S. Fish and Wildlife Service (FWS), has the authority to issue export permits for elkhorn and staghorn corals, which are required under the Convention on International Trade of Endangered Species (CITES), because these species are included in Appendix II of the Convention. We acknowledge that our exception may have been confusing and we have clarified our intent in this final rule.

We also proposed that import of elkhorn and staghorn coral necessary to conduct scientific research and enhancement activities would be excepted from the section 9(a)(1)(A) import prohibition. However, section 9(c) of the ESA specifically addresses the importation of species listed under Appendix II of CITES. This section provides that species listed as threatened under the ESA that are also included in Appendix II of the Convention, may be imported into the United States provided that all applicable requirements of CITES have been satisfied and the importation is not made in the course of a commercial activity. Because elkhorn and staghorn corals are listed under Appendix II of CITES, compliance with section 9(c) is required for the import of elkhorn and staghorn corals into the United States. Thus, we are not providing an exception to the section 9(a)(1)(A) import prohibition through this rulemaking, and we have removed the word ''import'' from the exception for scientific research and enhancement. We have also added an explicit reference to the statutory exception to the import prohibition provided by section 9(c) of the ESA.

The exception to the ESA section 9(a)(1)(A) prohibition on export provided in this rule allows for the export of elkhorn or staghorn corals from the United States if the applicable CITES permit has been obtained from FWS, as long as the purpose of the export is for scientific research or enhancement. Proof of the purpose of the export will be a copy of the valid collection permit from the applicable agency. The application of the exception from the export prohibition for scientific research and enhancement is consistent with the commenter's intent, because only one agency, FWS, has the authority to issue the required CITES export permit.

Comment 22: One of the six natural resource management agencies identified in the exception for scientific research and enhancement questioned whether scientific research conducted by agency staff under the authority of the management plan alone would qualify as excepted research, or whether the agency would need to issue itself a scientific research permit.

Response: We evaluated the research permitting programs of each of the six identified agencies and found that they provide for the conservation of the listed corals. Therefore, if the natural resource management agency is conducting research within their jurisdiction, they would have to issue themselves a permit to ensure compliance with the criteria we evaluated, and to qualify for the research and enhancement exception in this rule.

Comment 23: One commenter expressed concern that the qualifier ''immediate'' in the definition of excepted restoration activities excludes certain activities that are regularly part of Acropora restoration, and suggested that we omit the term.

Response: We agree that the word ''immediate'' inappropriately narrows the intended scope of the exception for restoration activities. Our intent is to extend an exception for the range of activities that have the objective of rescuing injured elkhorn and staghorn specimens and restoring them in their reef habitats. To the extent that existing restoration authorities allow for activities to be conducted at some time after the discovery of the injury, the restoration exception will apply. Therefore, we are removing the word immediate from the definition of restoration activity in this rule.

Comment 24: One commenter questioned whether the restoration exception only applied to corals injured by vessel groundings.

Response: The rule does not limit the types of impacts resulting in injury to corals for which the restoration exception applies. The exception for restoration activities is available to specified Federal, state, or local natural resource agencies conducting the activities under their authorizing laws. Therefore, the limits on activities covered by the exception are the limits imposed by the existing laws identified in the rule.

Comment 25: One commenter suggested that non-governmental organizations should be allowed to engage in a broad spectrum of restoration activities. Further, the same commenter stated that the definition of activities that qualify for the restoration exception does not include coral nurseries.

Response: Non-governmental organizations can play an important role in coral conservation, including through restoration activities. These organizations may apply for and receive permits for scientific or enhancement purposes from NMFS, under the provisions of paragraph 223.208(c)(3) of this rule, and from the agencies identified in § 223.208(c)(1) of this rule. We did not propose providing a regulatory authorization for non-governmental entities to conduct restoration activities, since restoration activities require intergovernmental

coordination and highly qualified personnel. We do not believe it advisable to extend authorization to take listed species broadly to unidentified entities with unevaluated qualifications, although identified entities may become authorized through these permits.

In our proposed rule, and as amended in this rule, we defined restoration activity as ''the methods and processes used to provide aid to injured individuals.'' The establishment or maintenance of coral nurseries does not fit within this limited definition. We believe in many cases a coral nursery may qualify for the research and enhancement exceptions at 223.208(c)(1) or (c)(3). In addition, please see our *Response:*to the previous comment. Continued non-commercial holding and use of elkhorn or staghorn corals that were in captivity or a controlled environment on or before May 9, 2006, when the two species were listed as threatened under the ESA, would not be prohibited by this rule.

Comment 26: Two commenters suggested that we not limit the Puerto Rico statutes pertaining to marine managed areas in Table 1 to Tres Palmas de Rincon Marine Preserve. Another commenter requested that we add Florida Statute § 20.331 to the same table.

Response: Table 1 has been updated to include all of the Puerto Rico statutory provisions that authorize restoration activities in marine managed areas and to include the Florida statute that authorizes the Florida Fish and Wildlife Conservation Commission to conduct restoration activities.

Comment 27: Two commenters requested a permit or a ''grandfather clause'' with respect to aquarists who possess, trade, and sell the listed corals.

Response: Section 9(b) of the ESA, Species Held in Captivity or Controlled Environment, speaks specifically to this comment. As that section applies to these listed corals, we cannot prohibit, through this 4(d) rule, the holding or use of elkhorn or staghorn corals that were held in captivity or a controlled environment on May 9, 2006, ''[p]rovided that such holding and any subsequent holding or use of [the listed coral] was not in the course of a commercial activity.'' This section provides further that ''there shall be a rebuttable presumption that the fish or wildlife involved in such act is not entitled to the exemption contained in this subsection.'' In other words, the burden of proof would fall on the aquarist to demonstrate that any specimens were in captivity or a controlled environment on May 9, 2006, and that they are not being held or used in the course of a commercial activity. Because Congress clearly intended with this language that commercial activities involving listed species held in captivity at the time of listing not be allowed, we will not provide a ''grandfather clause'' for the commercial trade or sale of listed corals by aquarists. The continued non-commercial possession and transportation of these specimens would be allowed under this rule, consistent with ESA sections 9(a) and (b).

Comment 28: One commenter questioned whether the rule would require permitting to transfer possession of corals that were held in captivity at the time of listing to approved research institutions. The commenter also questioned what effect the rule's prohibition on the sale of listed corals would have on the recovery of expenses, if corals held in captivity at the time of listing are provided for research and restoration projects.

Response: Regarding the necessity to obtain a permit for the transfer of possession of the corals, please see the *Response:*to comment 19. The extension of the ESA section 9(a)(1)(E) prohibition will make it illegal to deliver, receive, carry, transport, or ship either species in interstate or foreign commerce and in the course of a commercial activity. Similarly, the extension of the ESA section 9(a)(1)(F) prohibition will make it illegal to sell, or offer for sale, either species in interstate or foreign commerce. The ESA defines ''commercial activity'' as ''all activities of industry and trade, including, but not limited to, the buying or selling of commodities and activities conducted for the purpose of facilitating such buying and selling '' The FWS has defined the clause ''industry or trade'' in the definition of commercial activity to mean ''the actual or intended transfer of wildlife or plants from one person to another person in the pursuit of gain or profit.'' 50 CFR 17.3(c). In *Humane Society of the United States* v. *Lujan*, 1992 U.S. Dist. LEXIS 16140 (D.D.C., Oct. 19, 1992), the court found FWS' interpretation to be a ''reasonable construction'' of the ambiguous definition of commercial activity in the statute. Though NMFS has not issued parallel regulatory definitions, we believe that FWS' interpretation provides for a reasonable application of the statutory prohibitions to elkhorn and staghorn corals. Thus, so long as the activity described in the comment is not conducted in the pursuit of gain or profit, and is otherwise consistent with all other applicable regulations, it is not prohibited.

Comment 29: One commenter expressed the opinion that Alternative 3 described in the Draft Environmental Assessment (EA), which included exceptions to the incidental take prohibition for activities conducted in accordance with approved resource management plans (RMP), is superior to the preferred alternative included in the proposed rule. The commenter suggested that the approval of such plans would reduce the time-lag and paperwork burden on the public and non-federal agencies that occur through ESA section 7 consultation or the application for an ESA section 10 permit.

Response: As described in the EA, the loss of our ability to monitor and minimize incidental take that would be inherent in Alternative 3 was judged to be a significant shortcoming of this alternative. In addition, the greater amounts of undocumented take we believed would have resulted under Alternative 3 would reduce the quality and quantity of goods and services that derive from these corals, and the income generated from direct and indirect use of the corals. Further, the time-lag and paperwork burden would not likely be reduced by adoption of the RMP alternative; we would be required to conduct an ESA section 7 consultation on our action of approving each RMP. Additionally, existing RMPs that we reviewed would all likely require modification in order to provide for conservation of the threatened corals.

Comment 30: Several commenters suggested that education and outreach will be key to the success of this rule. Further, they suggested that partnerships with stakeholders will enhance the effectiveness of the education and outreach effort in abating the threats to the species.

Response: We appreciate the suggestion to use education and outreach to enhance the effectiveness of this rule and welcome the opportunity to continue to work with stakeholders. We intend to implement this suggestion through our ongoing recovery planning and implementation efforts.

Comment 31: We received many helpful comments of an editorial nature. These comments noted inadvertent errors in the proposed rule and offered non-substantive but nonetheless clarifying changes to wording.

Response: We have incorporated these editorial-type comments in the final rule. As these comments do not result in substantive changes to this final rule, we have not detailed the changes made.

In addition to the specific comments detailed above relating to the proposed 4(d) rule, the following were also

received: (1) general support for the proposed rule; (2) peer-reviewed journal articles regarding water quality impacts on Florida reefs; and (3) a request that we establish blanket regulations that automatically extend the ESA section 9 prohibitions to all threatened species. After careful consideration, we conclude the additional information received, as summarized in this paragraph, was considered previously or did not pertain to the determination to issue protective regulations necessary and advisable for the conservation of elkhorn and staghorn corals.

Summary of Changes From the Proposed Protective Regulations

Based on the comments received, we have made three substantive changes to the proposed rule. As discussed in the *Response:*to comment 18 (above), we are removing the word ''immediate'' from the definition of restoration activity excepted from the prohibitions by this final rule. We have also corrected the list of statutes authorizing the Puerto Rico DNER and the Florida Fish and Wildlife Commission to conduct restoration of injured elkhorn or staghorn corals. Additionally, we have omitted the exception to the section 9(a)(1)(A) import prohibition provided in the proposed rule for scientific research and enhancement activities, because section 9(c) controls imports of species listed in CITES Appendix II, which includes elkhorn and staghorn corals. We do not detail minor changes of an editorial nature (see *Response:* to Comment 23, above).

Evaluation of Regulations Necessary and Advisable for the Conservation of Elkhorn and Staghorn Corals

Whether ESA section 9(a)(1) prohibitions or other regulations are necessary and advisable to provide for the conservation of a species depends in large part upon the biological status of the species, the potential impacts of various activities on the species, and on factors such as the existence and efficacy of other conservation activities. The two acroporid coral species have survived for millions of years through cycles in ocean conditions and climate. However, as a part of the listing process, we concluded their abundances have been dramatically reduced to less than three percent of former population levels by disease, elevated sea surface temperature, and hurricanes. Additionally, given the extremely reduced population sizes of these species, we determined that the following lesser stressors contribute to the threatened status of the species: sedimentation, anthropogenic abrasion and breakage, competition, excessive nutrients, predation, contaminants, loss of genetic diversity, African dust, elevated carbon dioxide levels, and sponge boring. We concluded that, within the jurisdiction of the United States, existing regulations have abated the threat posed by collection of the two species; however, existing regulatory mechanisms are inadequate to abate the myriad other threats causing the species' threatened status. Although elkhorn and staghorn corals are not currently endangered, they are likely to become so within the foreseeable future because of a combination of four of the five factors listed in section 4(a)(1) of the ESA, and this status is not sufficiently ameliorated by state or foreign government efforts to protect the species. Therefore, we have determined it is necessary and advisable in most circumstances to apply the section 9 prohibitions to both these threatened coral species, in order to provide for their conservation.

Application of Section 9 Prohibitions to Listed Corals

As discussed above, the two coral species have declined to less than three percent of their former abundances and are currently impacted by myriad stressors that act simultaneously on the species throughout their ranges. We determined the major stressors (i.e., disease, elevated sea surface temperature, and hurricanes) to these species' persistence are severe, unpredictable, likely to increase in the foreseeable future, and, at current levels of knowledge, unmanageable. While the lesser stressors, enumerated above, have not been the primary causes of the species' decline, managing them will contribute to the conservation of the two species by slowing the rate of decline and reducing the synergistic effects of multiple stressors on the species. Therefore, we believe that the ESA section 9(a)(1) prohibitions are necessary and advisable for the conservation of threatened elkhorn and staghorn corals, specifically to address the lesser stressors that are amenable to management. We believe that the prohibitions are not necessary and advisable in specific circumstances, and we implement specific exceptions for exportation and take, which are more fully described in the next section. Below is our discussion of the section 9 prohibitions that we extend to the two listed corals.

Section 9(a)(1)(A) prohibits the importation and exportation of endangered species to or from the United States. We believe that it is necessary and advisable to extend this prohibition to elkhorn and staghorn corals. Existing laws prohibit and restrict extraction and trade of live elkhorn and staghorn corals. International agreement restricts international trade of both elkhorn and staghorn corals (CITES). Federal regulations prohibit harvest or possession of elkhorn or staghorn coral in Federal waters (e.g., regulations implementing the Caribbean and Gulf of Mexico and South Atlantic Coral Fisheries Management Plans at 50 CFR part 622), and the Lacey Act prohibits trade of illegally obtained specimens. Sale of coral extracted from any waters is illegal in the U.S.V.I, Puerto Rico, and Florida, except that the sale of live elkhorn and staghorn corals extracted from Florida waters (F.A.C. 68B–42.009(2)) or the Exclusive Economic Zone (EEZ) (50 CFR 622.41) is legal when these corals are products of aquaculture (e.g., the corals have settled and grown on live rock products). Thus, this rule prohibits an activity that is currently allowed under Florida law and the Federal Magnuson-Stevens Fishery Conservation and Management Act. Neither threatened coral species, however, is a product of commercial aquaculture anywhere within the United States, nor is there a directed market for either elkhorn or staghorn corals. More information on the specific Federal, state, and local laws and regulations concerning the import and export of corals is available in the Atlantic Acropora Status Review Document (BRT, 2005) and the RIR for this rule.

As discussed in the status review document, prior to listing the two species as threatened under the ESA, we determined that there was no evidence of extraction of live specimens from Federal or state waters, nor evidence of trade of live specimens taken from foreign waters and imported into the United States for aquaria or other uses. Lack of extraction and trade of live specimens prior to the listing of these corals can be attributed mostly to existing laws and regulations. However, it is possible that the ESA listing might encourage a black market for the trade of these species, as evidenced by the trade of other threatened and endangered species (e.g., sturgeon eggs, elephant ivory). The increased public exposure to these rare corals due to the ESA listing may make the two species more desirable for aquaria or other uses. Therefore, to prevent this activity and to support existing regulations concerning the import and export of these corals, we find it necessary and advisable to extend the ESA section 9(a)(1)(A)

prohibition to elkhorn and staghorn corals in order to provide for the conservation of the two species.

Section 9(a)(1)(B) of the ESA prohibits the take of endangered species within the United States or the territorial sea of the United States, and section 9(a)(1)(C) of the ESA prohibits the take of endangered species upon the high seas for any person subject to the jurisdiction of the United States. Take means to harass, harm, pursue, hunt, shoot, wound, kill, trap, capture, or collect, or to attempt to engage in any such conduct. Activities that constitute harm may include significant habitat modification or degradation that actually kills or injures fish or wildlife by significantly impairing essential behavioral patterns including breeding, spawning, rearing, migrating, feeding, or sheltering (50 CFR 222.102). At the time of the drafting of the ESA, the high seas were defined as those waters not under any country's legal jurisdiction, and no country had yet designated an EEZ (i.e., 200 nautical miles (370.4 km)). Thus, ''take on the high seas'' is interpreted as take beyond any country's territorial seas. Based on available information, the territorial seas of countries within the range of the two threatened coral species end no more than 12 nautical miles NM (22.2 km) offshore (See, ''Table of claims to maritime jurisdiction'' as of December 29, 2006, at *http://www.un.org/Depts/los/LEGISLATIONANDTREATIES/PDFFILES/table__summary__of__claims.pdf).*

A range of private and public activities have the potential to result in take of the listed corals, including recreational and commercial activities. Take can result knowingly or otherwise, by direct and indirect impacts, intentionally or incidentally. Protecting listed corals from all direct forms of take, such as physical injury or killing, will help preserve the species' remaining populations and slow their rate of decline. Protecting listed corals from indirect forms of take, such as harm that results from habitat degradation, will likewise help preserve the species' populations and also decrease synergistic, negative effects from other stressors. We therefore propose to extend the ESA section 9(a)(1)(B) prohibition to elkhorn and staghorn corals to manage for these threats. There are likely few locations where elkhorn and staghorn corals occur farther than 12 NM (22.2 km) from land, because corals cannot typically survive in these depths. However, due to the dramatic decline in abundance and the myriad threats facing them, it is necessary and advisable for these species' conservation to protect the species from take everywhere they occur, including on the high seas, and thus we propose extending the ESA section 9(a)(1)(C) prohibition to the listed corals. Ensuring that take is prohibited everywhere the corals may be found will also avoid difficulty in enforcing these regulations based on claims about the origin of coral specimens.

Sections 9(a)(1)(D), (E), and (F) of the ESA prohibit, among other things, the possession, sale, and transport of endangered species that are taken illegally or that are entered into interstate or foreign commerce. For the same reasons discussed above regarding the prohibition pursuant to ESA section 9(a)(1)(A), it is necessary and advisable to extend these prohibitions to the two corals. The ESA listing of these two species may make them a desirable commodity and encourage a black market. Therefore, the extension of these prohibitions will discourage the development of a black market and reinforce existing regulations on commercial activities involving corals.

Lastly, we extend the section 9(a)(1)(G) prohibition against violating this and any other regulations we promulgate pertaining to these two corals.

Summary of Exceptions to Section 9 Prohibitions

The ESA allows for specific exceptions to the section 9 prohibitions through interagency consultation as prescribed by ESA section 7, a permit issued pursuant to section 10, or compliance with the requirements for imports of CITES-listed species pursuant to section 9(c). With the finalization of this rule, these exceptions apply.

Section 7 of the ESA requires all Federal agencies to consult with us if actions they fund, authorize, or carry out may affect threatened corals or any other species listed under the ESA. We consult on a broad range of activities conducted, funded, or authorized by Federal agencies. These activities include, but are not limited to, national water quality standards and discharge permits, coastal and nearshore construction, the dredge or discharge of fill material, navigation regulation, fishery regulation, and live-rock aquaculture. Incidental take of these two threatened corals that results from federally funded, authorized, or implemented activities for which section 7 consultations are completed, will not constitute violations of section 9 prohibitions against take, provided the activities are conducted in accord with all RPMs and terms and conditions contained in any biological opinion and incidental take statement.

Sections 10(a)(1)(A) and 10(a)(1)(B) of the ESA provide us with the authority to grant exceptions to the ESA's prohibitions. Section 10(a)(1)(A) scientific research and enhancement permits may authorize exceptions to any of the section 9 prohibitions and may be issued to Federal and non-Federal entities conducting research or conservation activities that involve a directed take of listed species. A directed take refers to the intentional take of listed species. Section 10(a)(1)(B) incidental take permits may be issued to non-Federal entities performing activities that may incidentally take listed species in the course of an otherwise lawful activity; these permits provide an exception to the section 9(a)(1)(B) prohibitions.

Section 9(c) of the ESA allows for the importation of species listed as threatened under the ESA that are also listed in Appendix II of CITES, provided that all the requirements of CITES have been satisfied and the import is not in the course of a commercial activity.

We determined that in certain circumstances described below, extending the ESA section 9(a)(1)(A), (B), and (C) prohibitions to elkhorn and staghorn corals is not necessary and advisable. We except these prohibitions for two classes of activities that provide for the conservation of listed corals. Under specified conditions, (1) scientific research and enhancement activities conducted under six specific existing Federal, state, or territorial research permitting programs are excepted from the section 9(a)(1)(A) export, and subsections (B) and (C) take prohibitions; and (2) restoration activities carried out by an authorized (under current laws) Federal, state, territorial, or local natural resource agency are excepted from the section 9(a)(1)(B) and (C) take prohibitions. These exceptions are described in more detail in the following sections. These classes of activities are not excepted from the Section 9(a)(1)(D) through (F) prohibitions because allowing commercial activities does not provide for the conservation of the two species. The 9(a)(1)(G) prohibition applies to these activities so that it is unlawful to violate this rule or subsequent rules that we may promulgate under the ESA and pertaining to the corals.

Exception to Prohibitions for Scientific Research and Enhancement Activities

This exception applies to both threatened corals covered by this rule. In carrying out their resource

management responsibilities, several Federal, state, and territorial natural resource management agencies permit scientific research and enhancement activities, including monitoring and other studies that are directed at, and occur within the geographic areas occupied by, the listed corals. Research or enhancement activities may involve collection of specimens from one location for study in another location, thus requiring an exception to the export, as well as the take, prohibitions. However, since elkhorn and staghorn corals are listed in Appendix II to CITES, a CITES export permit must be obtained from the FWS if such export is necessary to conduct the research or enhancement activities excepted from the prohibitions by this rule. Similarly, if excepted research or enhancement activities require importing elkhorn or staghorn corals into the United States from another country, a scientist must contact FWS to ensure that the importation can be conducted in accordance with section 9(c) of the ESA.

The following six agencies have permit programs that include corals, and we have evaluated these programs and found that they provide for the conservation of the listed corals: National Ocean Service (National Marine Sanctuary Program), National Park Service, FWS, Florida Fish and Wildlife Conservation Commission, Puerto Rico DNER, and the U.S.V.I. Department of Planning and Natural Resources (DPNR). We compared each of these programs' substantive and procedural requirements to ESA section 10(a)(1)(A) scientific research and enhancement permit regulations. Review of the permitting process used by each of the six specific programs identified above revealed that each of these permit programs allow research activities that yield sufficient data to support the research objectives while limiting, to the maximum extent practicable, the amount of resources collected or impacted. We determined that the programs are restrictive enough to provide important conservation benefits to the listed corals without the additional requirements of section 10(a)(1)(A) scientific research permits. Additionally, we reviewed examples of the types of acroporid research that have been permitted in the past by these agencies (e.g., gene flow, disease etiology) and concluded that the continuation and future permitting of these types of research will provide for the conservation of these species by improving our understanding of the status and risks facing these threatened corals and by providing critical information for assessing the effectiveness of current and future management practices. Each of these permit programs has application requirements similar to those of the ESA section 10 permitting program. Each requires detailed background information, justifications, and descriptions of expected impacts prior to approval for all proposed scientific research. Additionally, each of these permitting programs has data reporting requirements and the ability to apply stringent terms and conditions on issued permits. If research directed at elkhorn and staghorn coral is in compliance with one of the permit programs listed above, any exportation or take that occurs under such a permit would not constitute a violation of the prohibitions, and an ESA section 10(a)(1)(A) permit would not be required. A copy of the issued permit must be carried and available for inspection during the research or enhancement activity. Further, if export is necessary to conduct the research or enhancement activities excepted from the prohibitions by this rule, a CITES permit must be obtained and a copy of the applicable collection permit will provide proof of the purpose of the collection.

Exception to Prohibitions for Certain Restoration Activities

This exception applies to both threatened corals and would except certain Federal, state, and territorial agency personnel, or their designees as applicable, from the prohibitions on taking when they are performing specific restoration activities directed at the listed corals under an existing legal authority that provides for such restoration. For purposes of this exception, a ''restoration activity'' is the methods and processes used to provide aid to injured individual elkhorn or staghorn corals. For example, reattachment of colonies or fragments dislodged or broken by vessel groundings onto suitable hard substrates would be excepted from the prohibition when it is implemented under an existing legal authority. Thus, Florida Keys National Marine Sanctuary staff actions under the National Marine Sanctuaries Act's authority to undertake all necessary actions to prevent or minimize the destruction or loss of, or injury to, sanctuary resources (16 U.S.C. 1441 *et seq.*), would be excepted from the prohibitions when the restoration activity described in this prohibition is implemented for either of the two acroporid corals. Through this exception, we do not authorize any activities that are not currently authorized under an existing statute, rather we except these activities from the section 9(a)(1)(B) and (C) take prohibitions for the two listed corals. The activity that caused the injury is not excepted by this rule. Any person claiming this exception shall, upon request by a law enforcement agent, provide proof they are acting under the authority of the listed laws.

Several Federal, state, and territorial government agencies have authorization to engage in the specific type of restoration activities covered by this exception. We have included response removal, or remedial authority under several Federal statutes in this exception, because one or more of these authorities have been interpreted to include the type of natural resource restoration activity described above; for example, actions required to respond to a substantial threat of a discharge may dislodge or break coral fragments, and reattaching those fragments are legitimate response activities. The following table lists the authorizing statute, the specific provision, and specific agencies or offices authorized under existing statutes to implement the coral restoration activities defined in this exception.

FEDERAL:		
Agency/Person	Statute and Specific Provision(s)	Description of Authority
NOAA, National Ocean Service (NOS)	National Marine Sanctuaries Act 16 U.S.C. 1433	Authorized to conduct, among other things, all necessary actions to prevent or minimize actual or imminent risk of destruction or loss of, or injury to, Sanctuary resources.
NOAA NOS	Coral Reef Conservation Act, 16 U.S.C. 6406	Authorized to conduct activities to conserve coral reefs, including restoration.

FEDERAL:		
Agency/Person	Statute and Specific Provision(s)	Description of Authority
Commandant, U.S. Coast Guard (USCG), Authorized representatives of States or Indian Tribes.	″Oil Pollution Act″ 33 U.S.C. 2702	Authorized to conduct the removal of discharges of oil, including the prevention, minimization or mitigation of substantial threats of discharges.
Designated Federal, State or Indian tribal natural resources trustees, including NOAA, Department of Interior (DOI), Florida Department of Environmental Protection (FDEP), Puerto Rico DNER, and U.S. Virgin Islands DPNR.	33 U.S.C. 2706	Authorized to restore or rehabilitate trust natural resources injured, destroyed or lost as a result of discharges of oil, or substantial discharges of oil.
Administrator, Environmental Protection Agency (EPA) or Commandant, USCG; Authorized representatives of States.	″Clean Water Act″ 33 U.S.C. 1321	Authorized to conduct removal of and mitigation or prevention of substantial threats of discharges of oil or hazardous substances to certain waters; protection, rescue, and rehabilitation of, and minimization of risk of damage to, fish and wildlife resources harmed by, or that may be jeopardized by, discharges;
Designated Federal, State or Indian tribal natural resources trustees, including NOAA, DOI, FDEP, DNER, and DPNR.		Authorized to conduct restoration or rehabilitation of public trust natural resources damaged or destroyed as a result of discharges.
Administrator of the EPA; States or Indian Tribes in cooperative agreements with EPA; Heads of other federal agencies where release is from vessel or facility solely under their control.	″Superfund Act″ (CERCLA) 42 U.S.C. 9604	Authorized to conduct removal and other remedial action for releases or substantial threats of releases of hazardous substances into the environment.
Administrator of the EPA	42 U.S.C. 9606	Authorized to conduct abatement actions in response to imminent and substantial endangerment to the public health or welfare or the environment from actual or threatened releases of hazardous substances.
Designated Federal, State or Indian tribal natural resources trustees, including NOAA, DOI, FDEP, DNER, and DPNR	42 U.S.C. 9607	Authorized to conduct restoration and rehabilitation of natural resources injured, destroyed or lost as a result of actual or threatened releases of hazardous substances.
DOI, National Park Service (NPS)	Park System Resource Protection Act, 16 U.S.C. 19jj 16 U.S.C. 668dd-668ee (National Wildlife Refuge System)	Authorized to conduct all necessary actions to prevent or minimize actual or imminent risk of destruction, loss of, or injury to Park System resources, and to restore such resources.
DOI	National Wildlife Refuge System Administration Act, 16 U.S.C. 668	Authorized to administer refuges for the conservation of fish and wildlife within refuges.
FLORIDA:		
The Board of Trustees of the Internal Improvement Trust Fund	State Lands; Board of Trustees to Administer FL Statute § 253.03	Authorized, among other things, to administer, manage, conserve, and protect all lands owned by the State or any of its agencies, departments, boards or commissions.
	Duty of Board to Protect, etc. FL Statute. § 253.04 FDEP	Authorized to protect, conserve, and prevent damage to state-owned lands; FDEP authorized to assess civil penalties for damage to coral reefs in state waters.
Governor and Cabinet; FDEP	Land Acquisition for Conservation or Recreation; Conservation and Recreation Lands Trust Fund FL Statute § 259.032	Authorized to use monies in the Fund to, among other things, promote restoration activities, and manage lands acquired under this section to protect or restore their natural resource values.

FEDERAL:		
Agency/Person	Statute and Specific Provision(s)	Description of Authority
FDEP	Pollutant Discharge Prevention and Removal; Liability for Damage to Natural Resources FL Statute § 376.121	Authorized to recover the costs of restoration of state natural resources damages by pollution discharges, and to use funds recovered for, among other purposes, restoration of the damaged resources.
FDEP	Land and Water Management; Coral Reef Restoration FL Statute § 390.0558	Authorized to use monies in the Ecosystem Management and Restoration Trust Fund to restore or rehabilitate injured or destroyed coral reefs.
Florida Fish and Wildlife Conservation Commission	Fish and Wildlife Conservation Commission FL Statute § 20.331	Assigned, among other things, the powers, duties, responsibilities, and functions to develop restoration and management techniques for habitat and enhancement of plant and animal populations; and respond to and provide critical technical support for catastrophes including oil spills, ship groundings, major species die-offs, hazardous spills, and natural disasters.
U.S. VIRGIN ISLANDS:		
DPNR	DPNR; Powers and Duties of Department 3 V.I.C. § 401	Authorized to undertake programs and projects for, among other things, the conservation of natural resources of the U.S.V.I., for the restoration and preservation of the scenic beauty of the U.S.V.I., and for the conservation, maintenance and management of U.S.V.I. wildlife, the resources thereof, and its habitat.
DPNR	Conservation; Croix East End Marine Park Established; 12 V.I.C. § 98	Authorized to protect territorially significant marine resources, including coral reefs, in the St. Croix East End Marine Park.
PUERTO RICO:		
DNER	Conservation; Protection, Conservation and Management of Coral Reefs 12 L.P.R.A. §§ 241-241g *et seq.*	Authorized to, among other things, take all measures needed for the protection, conservation and management of coral reefs and coral communities throughout the territorial waters of the Commonwealth of Puerto Rico.
DNER	Conservation; Natural Patrimony Program 12 L.P.R.A. § 1227	Authorized to acquire, restore and manage lands, natural communities and habitats identified as, among other things, deserving preservation for their natural resource values.
DNER	Conservation; Tres Palmas de Rincon Marine Reserve 12 L.P.R.A. § 5063	Authorized to administer, rehabilitate and conserve the reserve.

Identification of Those Activities That Would Constitute a Violation of Section 9 of the ESA

On July 1, 1994, NMFS and FWS published a policy (59 FR 34272) that requires us to identify, to the maximum extent practicable at the time a species is listed, those activities that would or would not constitute a violation of section 9 of the ESA. The intent of this policy is to increase public awareness of the effect of a listing on proposed and ongoing activities within a species' range. We must identify to the extent known, specific activities not considered likely to result in violations of section 9, as well as activities that will be considered likely to result in violations. We believe that, based on the available information, the following actions will not result in a violation of section 9:

1. Collection, handling, and possession of listed corals that are acquired lawfully through an ESA section 10(a)(1)(A) permit or through one of the exceptions in this rule; or

2. Activities that result in incidental take authorized by an incidental take statement issued through a biological opinion pursuant to section 7 or permitted through section 10(a)(1)(B) of the ESA.

Based on available information, we believe the following categories of activities are those most likely to result in a violation of the ESA section 9 prohibitions. We emphasize that whether a violation results from a particular activity is entirely dependent upon the facts and circumstances of each incident. The mere fact that an activity may fall within one of these *categories* does not mean that the specific *activity* will cause a violation; due to such factors as location and scope, specific actions may not result in direct or indirect adverse effects on the species. Further, an activity not listed may in fact result in a violation. However, the following types of activities are those that may be most

likely to violate the prohibitions in section 9, which are being extended to the listed corals through this rule:

1. Removing, damaging, poisoning, or contaminating elkhorn or staghorn corals.
2. Removing, poisoning, or contaminating plants, wildlife, or other biota required by listed corals for feeding, sheltering, or other essential behavioral patterns.
3. Harm to the species' habitat resulting in injury or death of the species, such as removing or altering substrate, vegetation, or other physical structures.
4. Altering water flow or currents to an extent that impairs spawning, feeding, or other essential behavioral patterns of listed corals.
5. Discharging pollutants, such as oil, toxic chemicals, radioactivity, carcinogens, mutagens, teratogens, or organic nutrient-laden water, including sewage water, into listed corals' habitat to an extent that harms or kills listed corals.
6. Releasing non-indigenous or artificially propagated species into listed corals' habitat or locations from where they may access the habitat of listed corals.
7. Activities conducted in shallow water coral reef areas, including boating, anchoring, fishing, recreational SCUBA diving, and snorkeling, that result in abrasion of or breakage to the listed corals.
8. Interstate and foreign commerce dealing in listed corals, and importing or exporting listed corals other than for permitted scientific research or enhancement.
9. Shoreline and riparian disturbances (whether in the riverine, estuarine, marine, or floodplain environment) that may harm or kill listed corals, for instance by disrupting or preventing the reproduction, settlement, reattachment, development, or normal physiology of listed corals. Such disturbances could include land development, run-off, dredging, and disposal activities that result in direct deposition of sediment on corals, shading, or covering of substrate for fragment reattachment or larval settlement.
10. Activities that modify water chemistry in coral habitat to an extent that disrupts or prevents the reproduction, development, or normal physiology of listed corals.
11. Local activities that result in elevated water temperatures in coral habitat that cause bleaching or other degradation of physiological function of listed corals. For example, in our economic analysis of this rule, we identified discharges of cooling water effluent from power plants as an activity that may result in elevated sea surface temperature.

This list provides examples of the types of activities that could have a high risk of causing a violation, but it is by no means exhaustive. It is intended to help people avoid violating the ESA and to encourage efforts to recover the threatened corals addressed in this rule.

Persons or entities concluding that their activity is likely to violate the ESA are encouraged to immediately adjust that activity to avoid violations and to seek authorization under: (a) an ESA section 10(a)(1)(B) incidental take permit; (b) an ESA section 10(a)(1)(A) research and enhancement permit; or (c) an ESA section 7 consultation. The public is encouraged to contact us (see **FOR FURTHER INFORMATION CONTACT**) for assistance in determining whether circumstances at a particular location, involving these activities or any others, might constitute a violation of this rule.

In making a determination that it is not necessary and advisable to impose ESA section 9 take prohibitions on certain activities, we recognize that new information may require a reevaluation of that conclusion. For any of the exceptions from the prohibitions described in this rule, we will evaluate periodically the activity's effect on the conservation of listed corals. If we determine that it becomes necessary and advisable for the conservation of the species, we will impose take prohibitions, through appropriate rulemaking, on the activities previously excepted.

Final Determination

Based on the status of the species and the threats affecting them, we believe that the ESA section 9(a)(1) prohibitions are necessary and advisable for the conservation of threatened elkhorn and staghorn corals. We believe that the prohibitions are not necessary and advisable in specific circumstances, and we are providing two exceptions for scientific research and enhancement and restoration activities, when conducted by specified entities under specified legal authorities.

Classification

We determined that this action is consistent to the maximum extent practicable with the enforceable policies of the approved coastal management programs of Florida, Puerto Rico, and U.S.V.I. This determination was submitted for review by the responsible state agencies under section 307 of the Coastal Zone Management Act. We did not receive *Response:* from Puerto Rico or the U.S.V.I; Florida found the regulation consistent with its approved coastal management programs.

This rule has been determined not to be significant under Executive Order (E.O.) 12866.

We prepared a final regulatory flexibility analysis (FRFA), pursuant to section 604 of the Regulatory Flexibility Act (5 U.S.C. 601 *et seq.*), that describes the economic impact this rule would have on small entities. A description of the need for, and objectives of, the action is included in the preamble of this rule. Small entities may be affected if a project they seek to implement requires ESA section 7 consultation and may adversely affect the listed coral species, requiring RPMs, which are minor changes to the project to lessen impacts on the corals. We did not identify any private activity that would involve incidental take that would require an ESA section 10(a)(1)(B) incidental take permit because the activities and take would be covered by a section 7 consultation and incidental take statement. Reporting requirements of the rule would be associated with implementation of the required section 7 RPMs. No record keeping requirements are implemented specifically by this rulemaking. No existing Federal rules or laws duplicate or conflict with this rule. Existing Federal rules and laws overlap the rule only to the extent that they provide for the protection of natural resources or corals in general. Public comments concerning the economic impacts of the rule are addressed earlier in the preamble and did not result in any changes to the regulatory flexibility analysis. A summary of the impacts analysis follows.

In the FRFA, we found that, given existing Federal, state, or local laws that in some form or another prohibit take, possession, or sale of, and/or damage to, corals, few private activities that are now legal would have to be altered or abandoned. Puerto Rico and U.S.V.I. law prohibit the take and sale of elkhorn and staghorn corals. Florida law (F.A.C. 68B–42.009(2)) and Federal regulations (50 CFR 622.41) prohibit take of these corals, with an exception provided for corals that attach to rock placed by aquaculture operations (i.e., live rock) that have appropriate permits. There is no historical evidence of any live rock operations selling live rock with these species attached in the past 10 years of observations reported by live rock producers. Existing regulations allow sales of dead elkhorn or staghorn coral skeletons with proof that the specimens were not taken illegally. There is anecdotal evidence that Florida shell shops have sold dead specimens of

these species. There is also no historical evidence of international trade of either of these species.

It is anticipated that, on average, approximately 44 non-Federal grantees or permittees, or their contractors, could be affected annually with the implementation of this rule. Historically, the projects undertaken by these entities have involved pipeline installation and maintenance, mooring construction and maintenance, dock/pier construction and repair, marina construction, bridge repair and construction, new dredging, maintenance dredging, National Pollutant Discharge Elimination System (NPDES)/water quality standards, cable installation, beach renourishment, shoreline stabilization, reef ball construction and installation, and port construction. Our database does not track whether applicants have been small entities or any particulars that would allow us to make such a determination, so it is impossible to determine the number of future grantees, permittees, or contractors that may be small entities. There is no indication that affected project applicants or their contractors would be limited to, nor disproportionately comprised of, small entities.

The rule will not result in an increase in the number of ESA section 7 consultations; rather, any additional costs would result from the identification and implementation of RPMs to minimize the effects of the action on the listed species. Based on our experience with section 7 consultations for other species, incremental administrative costs of identifying RPMs will be negligible, compared to the analytical requirements and associated costs already required by the duty to consult to ensure the action does not jeopardize listed species. Hence, we have assumed there will be no administrative costs of consultation associated with this rule. Though we have characterized the costs in the RIR/FRFA associated with individual types of RPMs for the projected future activities, no total cost of this rule can be identified because the lack of specific information on the design and location of projected future projects limits our ability to forecast the exact type and amount of modifications required. However, the majority of the RPMs that NMFS would likely specify for these actions are currently required by other regulatory agencies. In addition, current ESA regulations require that RPMs cannot alter the basic design, location, scope, duration, and timing of an action and may only involve minor changes.

We considered four alternatives for extending section 9(a)(1) prohibitions to threatened corals. These included a preferred alternative (i.e., this rule), a no action alternative, and two additional alternatives. The no action alternative was not selected because it did not meet the conservation objectives of the section 4(d) of the ESA. The remaining two alternatives (Alternatives B and C) were not selected because they (1) were judged to have less conservation value for the corals, and (2) could result in smaller annual incomes generated by small businesses that rely on resident and visitor use of coral reefs. Alternative B, in addition to the exceptions from the ESA section 9 prohibitions for conservation research and restoration included in the preferred alternative, would except incidental take from the take prohibitions where such take results from activities managed under a NMFS-approved management plan. Persons engaged in activities covered by an approved management plan would not be required to obtain an ESA section 10 incidental take permit. This alternative would be expected to have the same costs of implementing section 7 RPMs as the preferred alternative. However, this alternative was predicted to result in increased take of these species, and thus smaller annual incomes generated from small businesses, such as those in the tourism sector, that rely on resident and visitor use of coral reefs. Alternative C would eliminate the exception for research and restoration activities and require Federal, State, territorial, and local governments or their designees to acquire an ESA section 10 permit for restoration activities directed at listed corals, even when emergency actions are warranted to save either listed coral as a result of a natural or technological disaster or other event that has injured these corals. This alternative is also expected to have the same costs of implementing section 7 RPMs as the preferred alternative. Similar to Alternative B, the resulting increase in mortality of these corals could reduce revenues received from small businesses that benefit from resident and tourist use of coral reefs.

This action does not contain a collection-of-information requirement for purposes of the Paperwork Reduction Act.

This rule is consistent with E.O. 13089, which is intended to preserve and protect the biodiversity, health, heritage, and social and economic value of U.S. coral reef ecosystems and the marine environment.

List of Subjects in 50 CFR Part 223

Endangered and threatened species, Exports, Imports, Transportation.

Dated: October 22, 2008.

Samuel D. Rauch III,

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

■ For the reasons set out in the preamble, 50 CFR part 223 is amended as follows:

PART 223—THREATENED MARINE AND ANADROMOUS SPECIES

■ 1. The authority citation for part 223 continues to read as follows:

Authority: 16 U.S.C. 1531 1543; subpart B, § 223.201 202 also issued under 16 U.S.C. 1361 *et seq.*; 16 U.S.C. 5503(d) for § 223.206(d)(9).

■ 2. In subpart B of part 223, add § 223.208 to read as follows:

§ 223.208 Corals.

(a) *Prohibitions.* (1) The prohibitions of section 9(a)(1) of the ESA (16 U.S.C. 1538(a)(1)) relating to endangered species apply to elkhorn (*Acropora palmata*) and staghorn (*A. cervicornis*) corals listed as threatened in § 223.102(d), except as provided in § 223.208(c).

(2) It is unlawful for any person subject to the jurisdiction of the United States to do any of the following:

(i) Fail to comply immediately, in the manner specified at § 600.730 (b) through (d) of this title, with instructions and signals specified therein issued by an authorized officer, including instructions and signals to haul back a net for inspection;

(ii) Refuse to allow an authorized officer to board a vessel, or to enter an area where fish or wildlife may be found, for the purpose of conducting a boarding, search, inspection, seizure, investigation, or arrest in connection with enforcement of this section;

(iii) Destroy, stave, damage, or dispose of in any manner, fish or wildlife, gear, cargo, or any other matter after a communication or signal from an authorized officer, or upon the approach of such an officer or of an enforcement vessel or aircraft, before the officer has an opportunity to inspect same, or in contravention of directions from the officer;

(iv) Assault, resist, oppose, impede, intimidate, threaten, obstruct, delay, prevent, or interfere with an authorized officer in the conduct of any boarding, search, inspection, seizure, investigation, or arrest in connection with enforcement of this section;

(v) Interfere with, delay, or prevent by any means, the apprehension of another

person, knowing that such person committed an act prohibited by this section;

(vi) Resist a lawful arrest for an act prohibited by this section;

(vii) Make a false statement, oral or written, to an authorized officer or to the agency concerning applicability of the exceptions enumerated in paragraph (c) of this section relating to elkhorn and staghorn corals;

(viii) Make a false statement, oral or written, to an authorized officer or to the agency concerning the fishing for, catching, taking, harvesting, landing, purchasing, selling, or transferring fish or wildlife, or concerning any other matter subject to investigation under this section by such officer, or required to be submitted under this part 223; or

(ix) Attempt to do, solicit another to do, or cause to be done, any of the foregoing.

(b) *Affirmative defense.* In connection with any action alleging a violation of this section, any person claiming the benefit of any exception, exemption, or permit under this section has the burden of proving that the exception, exemption, or permit is applicable, was granted, and was valid and in force at the time of the alleged violation, and that the person fully complied with the exception, exemption, or permit.

(c) *Exceptions.* Exceptions to the prohibitions of section 9(a)(1) of the ESA (16 U.S.C. 1538(a)(1)) applied in paragraph (a) of this section relating to elkhorn and staghorn corals are described in the following paragraphs (1) through (6):

(1) Permitted scientific research and enhancement. Any export or take of elkhorn or staghorn corals resulting from conducting scientific research or enhancement directed at elkhorn and staghorn corals is excepted from the prohibitions in ESA sections 9(a)(1)(A), (B) and (C) provided a valid research or enhancement permit has been obtained from one of the following Federal or state agencies: NOAA National Ocean Service National Marine Sanctuary Program, National Park Service, U.S. Fish and Wildlife Service, Florida Fish and Wildlife Conservation Commission, Puerto Rico Department of Natural and Environmental Resources, or the U.S. Virgin Islands Department of Planning and Natural Resources. The exportation or take must be in compliance with the applicable terms and conditions of the applicable research or enhancement permit, and the permit must be in the possession of the permittee while conducting the activity. Export of elkhorn or staghorn corals from the United States to conduct excepted research or enhancement activities requires a CITES export permit from the U.S. Fish and Wildlife Service in addition to the research permit for collection. Import of elkhorn or staghorn corals into the United States to conduct excepted research or enhancement activities must be in compliance with the provisions of section 9(c) of the ESA.

(2) Restoration activities. Any agent or employee of governmental agencies listed in Table 1 may take listed elkhorn or staghorn corals without a permit, when acting in the course of conducting a restoration activity directed at elkhorn or staghorn coral which is authorized by an existing authority (see Table 1 to this section). Take of elkhorn or staghorn corals during such restoration activity is excepted from the prohibitions in ESA sections 9(a)(1)(B) and (C). An excepted restoration activity is defined as the methods and processes used to provide aid to injured individual elkhorn or staghorn coral.

(3) Section 10 scientific and enhancement permits. The Assistant Administrator may issue permits authorizing activities that would otherwise be prohibited under § 223.208(a) for scientific purposes or to enhance the propagation or survival of elkhorn or staghorn corals, in accordance with and subject to the conditions of part 222, subpart C-General Permit Procedures.

(4) Section 10 incidental take permits. The Assistant Administrator may issue permits authorizing activities that would otherwise be prohibited under § 223.208(a) in accordance with section 10(a)(1)(B) of the ESA (16 U.S.C. 1539(a)(1)(B)), and in accordance with, and subject to the conditions of part 222 of this chapter. Such permits may be issued for the incidental taking of elkhorn and staghorn corals.

(5) Section 7 Interagency consultation. Any incidental taking that is in compliance with the terms and conditions specified in a written statement provided under section 7(b)(4)(C) of the ESA (16 U.S.C. 1536(b)(4)(C)) shall not be considered a prohibited taking of elkhorn and staghorn corals pursuant to paragraph (o)(2) of section 7 of the ESA (16 U.S.C. 1536(o)(2)).

(6) Importation under the Convention on International Trade of Endangered Species. Any importation of elkhorn or staghorn corals in compliance with the provisions of section 9(c) of the ESA (16 U.S.C. 1538(c)) shall not be considered a violation of any provision of the ESA or any regulation issued pursuant to the ESA.

TABLE 1 TO §223.208. AGENCIES AND AUTHORIZING STATUTES WHOSE CORAL RESTORATION ACTIVITIES ARE EXCEPTED FROM CERTAIN PROHIBITIONS IN PARAGRAPH (a) OF THIS SECTION.

FEDERAL:	
Agency/Person	Statute and Specific Provision(s)
NOAA, National Ocean Service (NOS)	National Marine Sanctuaries Act 16 U.S.C. 1431 *et seq.*
NOAA, NOS	Coral Reef Conservation Act 16 U.S.C. 6406
Commandant, U.S. Coast Guard (USCG), Authorized representatives of States or Indian Tribes.	″Oil Pollution Act″ 33 U.S.C. 2702
Designated Federal, State or Indian tribal natural resources trustees, including NOAA, Department of Interior (DOI), Florida Department of Environmental Protection (FDEP), Puerto Rico Department of Natural and Environmental Resources (DNER), and U.S. Virgin Islands Department of Planning and Natural Resources (DPNR)	33 U.S.C. 2706
Administrator, Environmental Protection Agency (EPA) or Commandant, USCG; Authorized representatives of States.	″Clean Water Act″ 33 U.S.C. 1321
Designated Federal, State or Indian tribal natural resources trustees, including NOAA, DOI, FDEP, DNER, and DPNR.	
Administrator of the EPA; States or Indian Tribes in cooperative agreements with EPA; Heads of other Federal agencies where release is from vessel or facility solely under their control.	″Superfund Act″ (CERCLA) 42 U.S.C. 9604
Administrator of the EPA	42 U.S.C. 9606
Designated Federal, State or Indian tribal natural resources trustees, including NOAA, DOI, FDEP, DNER, and DPNR	42 U.S.C. 9607
DOI, National Park Service (NPS)	Park System Resource Protection Act, 16 U.S.C. 19jj 16 U.S.C. 668dd–668ee (National Wildlife Refuge System)
DOI	National Wildlife Refuge System Administration Act, 16 U.S.C. 668
FLORIDA:	
The Board of Trustees of the Internal Improvement Trust Fund	State Lands; Board of Trustees to Administer FL Statute § 253.03 Duty of Board to Protect, etc. FL Statute. § 253.04 FDEP
Governor and Cabinet; FDEP	Land Acquisition for Conservation or Recreation; Conservation and Recreation Lands Trust Fund FL Statute § 259.032
FDEP	Pollutant Discharge Prevention and Removal; Liability for Damage to Natural Resources FL Statute § 376.121
FDEP	Land and Water Management; Coral Reef Restoration FL Statute § 390.0558
Florida Fish and Wildlife Conservation Commission	Fish and Wildlife Conservation Commission FL Statute § 20.331

TABLE 1 TO §223.208. AGENCIES AND AUTHORIZING STATUTES WHOSE CORAL RESTORATION ACTIVITIES ARE EXCEPTED FROM CERTAIN PROHIBITIONS IN PARAGRAPH (a) OF THIS SECTION.—Continued

FEDERAL:	
Agency/Person	Statute and Specific Provision(s)
U.S. VIRGIN ISLANDS:	
DPNR	DPNR; Powers and Duties of Department 3 V.I.C. § 401
DPNR	Conservation; Croix East End Marine Park Established; 12 V.I.C. § 98
PUERTO RICO:	
DNER	Conservation; Protection, Conservation and Management of Coral Reefs 12 L.P.R.A. §§ 241-241g *et seq.*
DNER	Conservation; Natural Patrimony Program 12 L.P.R.A. § 1225 *et seq.*
DNER	Conservation; Natural Resources; Declarations of Marine Reserves (and other protected areas) containing elkhorn and staghorn corals 12 L.P.R.A.; Subtitle 6A; Chapter 252; §§ 5011 *et seq.*

[FR Doc. E8–25820 Filed 10–28–08; 8:45 am]
BILLING CODE 3510–22–S

Proposed Rules

Federal Register
Vol. 73, No. 210
Wednesday, October 29, 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 HOMELAND SECURITY

6 CFR Chapter I

[DHS 2008–0076]

RIN 1601–AA52

Secure Handling of Ammonium Nitrate Program

AGENCY: National Protection and Programs Directorate, Department of Homeland Security.

ACTION: Advance notice of proposed rulemaking.

SUMMARY: This Advance Notice of Proposed Rulemaking (ANPRM) seeks comment on a recent amendment to the Homeland Security Act entitled the Secure Handling of Ammonium Nitrate. The amendment requires the Department of Homeland Security (DHS or Department) to ''regulate the sale and transfer of ammonium nitrate by an ammonium nitrate facility * * * to prevent the misappropriation or use of ammonium nitrate in an act of terrorism.''

DATES: Written comments must be submitted on or before December 29, 2008.

ADDRESSES: You may submit comments, identified by docket number 2008–0076, by one of the following methods:

- *Federal eRulemaking Portal: http://www.regulations.gov.* Follow the instructions for submitting comments.
- *Mail:* U.S. Department of Homeland Security, National Protection and Programs Directorate, Office of Infrastructure Protection, Infrastructure Security Compliance Division, Mail Stop 8100, Washington, DC 20528.

FOR FURTHER INFORMATION CONTACT: Dennis Deziel, Office of Infrastructure Protection, Infrastructure Security Compliance Division, Mail Stop 8100, Washington, DC 20528, telephone number (703) 235–5263.

SUPPLEMENTARY INFORMATION:

Abbreviations and Terms Used in This Document

AN—Ammonium Nitrate
ANFO—Ammonium Nitrate/Fuel Oil
ANPRM—Advance Notice of Proposed Rulemaking
CFATS—Chemical Facility Anti-Terrorism Standards
COI—Chemicals of Interest
DHS or Department—Department of Homeland Security
DOT—Department of Transportation
IED—Improvised Explosive Device
IP—Office of Infrastructure Protection
ISCD—Infrastructure Security Compliance Division
NPPD—National Protection and Programs Directorate
POS—Point of Sale
STQ—Screening Threshold Quantity
TSDB—Terrorist Screening Database
USDA—United States Department of Agriculture

I. Public Participation

Interested persons are invited to participate in this rulemaking by submitting written data, views, or arguments on all aspects of the advance notice of proposed rulemaking (ANPRM). The Department also invites comments that relate to the economic, environmental, or federalism effects that might result from any final rule consequent from this ANPRM. Comments that will provide the most assistance to the Department in developing these procedures will refer to a specific provision of the ANPRM or the Secure Handling of Ammonium Nitrate provisions in the Homeland Security Act, explain the reason for any comments, and include other information or authority that supports such comments.

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.*

II. Background

Section 563 of the 2008 Consolidated Appropriations Act, Subtitle J, Secure Handling of Ammonium Nitrate (''Section 563''), Public Law 110–161, amends the Homeland Security Act of 2002. The amendment requires the Department to ''regulate the sale and transfer of ammonium nitrate by an ammonium nitrate facility * * * to prevent the misappropriation or use of ammonium nitrate in an act of terrorism.''

A. Ammonium Nitrate (AN)

AN is a chemical that exists in multiple concentrations and physical forms, each of which may have different security implications. DHS is primarily concerned with AN when used as an explosive or as a fertilizer mixed with fuel oil to create an explosive mixture known as Ammonium Nitrate/Fuel Oil (ANFO). Both of these forms (i.e., explosive and fertilizer coupled with liquid fuel oil) in the hands of terrorists have the potential to be detonated and when there is sufficient exposure may create significant adverse consequences for human life or health. AN fertilizer is commonly found in agriculture-related operations nationwide and, given the availability of small-scale packaging (e.g., 50-pound bags), could be susceptible to theft and misuse in making an improvised explosive device (IED). AN is also used commercially as an explosive (in the mining industry, for example), and in that form, could be stolen and detonated by terrorists.

Terrorist organizations have and will likely continue to use explosives, including AN-based explosives, in future terrorist attacks. While preventing the misappropriation and misuse of AN on American soil could mitigate national risk, AN is only one of many chemicals that are susceptible to misuse by terrorists.

B. AN and the Chemical Facility Anti-Terrorism Standards (CFATS) Regulation

In addition to the authority granted to DHS by section 563 of the 2008 Consolidated Appropriations Act, the Department has authority under an earlier statute to regulate the security of certain facilities that possess AN. In October 2006, Congress enacted section 550 of the Homeland Security Appropriations Act of 2007 (Pub. L. 109–295), which required the Department to issue regulations for the security of high-risk chemical facilities. Under that authority, the Department promulgated an interim final rule called the Chemical Facility Anti-Terrorism

Standards (CFATS), 6 CFR Part 27. *See* 72 FR 17688 (April 9, 2007). To help the Department identify high-risk chemical facilities under the CFATS regulation, the Department adopted a final list of chemicals of interest (COI) as Appendix A to CFATS. *See* 72 FR 65396 (November 20, 2007). Any chemical facility that possesses any COI at or above the applicable screening threshold quantity (STQ) specified in Appendix A for that COI must complete and submit to DHS certain consequence-based information (the ''Top-Screen''). Any facility preliminarily determined to be high-risk after DHS review of the facility's Top-Screen must then meet additional security-related requirements under CFATS. Due to the risks AN may pose if exploded on-site or if stolen or diverted to produce IEDs, AN (in both explosive and specified fertilizer form) was one of over 300 chemicals of interest that DHS listed in Appendix A to CFATS. *See* 72 FR 65407–65408, 65410.[1]

While both section 563 and the CFATS rule share a goal of reducing terrorist risks associated with AN, the scope and methods of regulation under section 563 and CFATS are expected to be very different. The CFATS rule—which addresses hundreds of chemicals in addition to AN—is directed at the security of high-risk facilities. The CFATS rule does not, however, impose any limitations on the sale or transfer of AN. By contrast, section 563 does not address the physical security of AN facilities. Instead, section 563 imposes certain conditions on sales or other transfers of AN—without regard to the quantities involved—e.g., by requiring that AN can only be transferred between registered AN purchasers (or their agents) and AN facilities. In developing the rules required by section 563, DHS intends to draw on information gained under the CFATS program about AN, especially its use by the agricultural community, so that CFATS and the new program under Section 563 complement each other.

[1] The listing of AN in explosive form in Appendix A to CFATS covers any commercial grade of ammonium nitrate (with more than 0.2 percent combustible substances, including any organic substance calculated as carbon, to the exclusion of any other added substance). The screening threshold quantities for this form of AN are 5,000 lbs (as a release-explosive) and 400 lbs when in transportation packaging (as a theft-explosive). Appendix A also lists AN in solid form (with a nitrogen concentration of 23% or greater) with an STQ of 2000 lbs. This form of AN is commonly used as a fertilizer in the agricultural community and, when used in a mixture, will count toward the STQ if the mixture contains a minimum concentration of 33% or more of solid AN.

III. Section 563: Secure Handling of Ammonium Nitrate Act

Pursuant to section 563, DHS will develop and implement a regulatory program covering the sale and transfer of AN for the purpose of preventing the misappropriation or use of AN in acts of terrorism. Consistent with section 563, DHS expects to include the following categories of activities and sub-activities in that program:

Category 1: Registration Activities

A. *Registration Applications.* DHS would require AN facilities and prospective AN purchasers to apply for registration numbers from DHS in order to sell, transfer, and/or purchase AN. Prospective registrants would have to provide specific identifying information to DHS.

B. *Terrorist Screening Database (TSDB) Checks.* DHS would conduct checks of identifying information of all prospective registrants against identifying information that appears in the TSDB.

C. *Registration Numbers.* DHS generally would plan to issue or deny registration numbers within 72 hours of receipt of an AN facility or AN purchaser's complete registration application.

Category 2: Point-of-Sale (POS) Activities

A. *Seller Verification of Purchaser's Registration and Identity.* At points-of-sale, AN facilities would have to verify that potential AN purchasers are registered with DHS (including verifying each AN purchaser's identity and registration number).

B. *Recordkeeping.* DHS would require all AN facilities to keep records of sales or transfers of AN for at least two years after each transaction, with penalties for failing to maintain records appropriately.

Category 3: Additional Regulatory Activities/Requirements

A. *Reporting Theft or Loss of AN.* DHS would require AN facilities and AN purchasers to report the theft or loss of AN to Federal law enforcement authorities within one calendar day of discovery of the theft or loss.

B. *Inspections and Audits.* DHS would conduct or oversee regulatory compliance inspections and audits of AN facilities' records to ensure that regulated facilities are properly maintaining records, to monitor compliance with the requirements of section 563, and to deter or prevent misappropriation of AN for terrorist acts.

C. *Guidance Materials and Posters.* DHS would develop guidance materials that 1) set forth procedures for appealing a denial of an application for a registration number, and 2) help AN facilities identify suspicious AN purchases, attempted purchases, and transfers and determine the appropriate course of action. DHS would also develop posters providing information on sellers' record-keeping requirements and penalties for violating those requirements.

Category 4: Administrative Activities

Appeals and Penalties. The Department would establish an expedited appeals process for applicants denied a registration number. Specifically, section 563 requires the Department to resolve such an appeal within 72 hours of receiving a denied individual's request for appeal. Additionally, the Department has the authority to assess civil penalties of up to $50,000 per violation of the regulations and thus will establish a process for managing both the assessment and potential appeal of those penalties.

Establishing Threshold Level of AN in a Substance. Under section 563, DHS would establish a threshold percentage of AN in a substance as a prerequisite for that substance to be considered AN for purposes of complying with the statute. While pure, or ''straight,'' AN with a sufficient concentration of nitrates can be used as an explosives precursor, there is some scientific uncertainty regarding the specific detonability of pure AN. Experts in various governmental and non-governmental organizations continue to research the minimum quantity (i.e., critical mass) of straight AN required for detonation, the size of conventional explosive charge (i.e., booster) necessary to detonate straight AN, and the actual yield (i.e., the explosive energy) from a straight AN detonation.

IV. Questions for Commenters

Comments that will provide the most assistance to DHS in this rulemaking include, but are not limited to, the following:

a. Comments regarding submission of registration applications (e.g., whether applications should be submitted electronically or in paper form; whether applications should be available only through DHS or through Local Cooperative Extension Service Offices or at United States Post Offices).

b. Comments regarding the technical capabilities (e.g., access to computers; access to Internet; average level of computing skills; frequency of use of

integrated Information Technology systems) of AN manufacturers, distributors, sellers, and end-users.

c. Comments regarding DHS distribution of AN registration letters or certificates (e.g., whether DHS should use email or regular mail).

d. Comments regarding a verification process for registrations and AN purchases, including methods for verifying the identity of any AN purchaser, as well as the identity of designated agents purchasing AN on behalf of registered AN purchasers.

e. Comments on the detonability of AN at certain concentrations, including research being conducted concerning the detonability of AN.

f. Comments on how likely AN fertilizer users would be to use an alternative fertilizer that is potentially less detonable, such as, for example, *Sulf-N® 26 Fertilizer Process and Product* (ammonium sulfate nitrate fertilizer) which DHS recently ''designated'' as a Qualified Anti-Terrorism Technology (QATT) pursuant to 6 U.S.C. 441–444 (the Support Anti-terrorism by Fostering Effective Technologies Act of 2002, or SAFETY Act). *See http://www.safetyact.gov.*

g. Comments on how best to conduct or oversee regulatory compliance inspections and audits of AN facilities' records to ensure that regulated facilities are properly maintaining records, to monitor compliance with the requirements of Section 563, and to deter or prevent misappropriation of AN for terrorist acts.

h. Comments on the economic impacts (both long-term and short-term, quantifiable and qualitative) of the implementation of section 563, including potential impacts on State, local, and tribal governments of the United States; potential impacts on agri-business, including AN manufacturers, importers, packagers, distributors, retailers, and end-users including farmers (e.g., whether current AN purchasers would likely reduce their AN purchases as a result of a new regulatory regime); and potential impacts on small businesses.

i. Comments on the monetary and other costs anticipated to be incurred by U.S. citizens and others as a result of the new compliance requirements, such as the costs in time and money that an individual may incur to obtain an AN registration. These costs may or may not be quantifiable and may include actual monetary outlays, transitional costs incurred to obtain alternative documents, and the costs that will be incurred in connection with potential delays at the point of sale.

j. Comments on a possible fee structure to address some or all of the costs of this new program, such as registration, TSDB checks, and issuance of registration numbers.

k. Comments on the benefits of this rulemaking.

l. Comments on any alternative methods of complying with the legislation.

m. Comments on the best methods or processes for interacting with state and local governments regarding AN security.

Michael Chertoff,

Secretary of Homeland Security, Department of Homeland Security.

[FR Doc. E8–25821 Filed 10–28–08; 8:45 am]

BILLING CODE 4410–10–P

DEPARTMENT OF TRANSPORTATION

Federal Aviation Administration

14 CFR Part 39

[Docket No. FAA–2008–1138; Directorate Identifier 2008–CE–059–AD]

RIN 2120–AA64

Airworthiness Directives; Aircraft Industries a.s. (Type Certificate G60EU Previously Held by LETECKÉ ZÁVODY a.s. and LET Aeronautical Works) Model L 23 Super Blanik Sailplane

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

ACTION: Notice of proposed rulemaking (NPRM).

SUMMARY: We propose to adopt a new airworthiness directive (AD) for the products listed above. This proposed AD results from mandatory continuing airworthiness information (MCAI) originated by an aviation authority of another country to identify and correct an unsafe condition on an aviation product. The MCAI describes the unsafe condition as:

This Airworthiness Directive (AD) is prompted by the discovery on L 23 SUPER–BLANIK sailplanes of cracks in zones where the front and aft control levers attach the connecting rod designated as ''control bridge'' on the relevant Illustrated Parts Catalogues (IPC). If left uncorrected cracks could propagate and lead to the breakage of the connecting rod with subsequent loss of control of the sailplane.

The proposed AD would require actions that are intended to address the unsafe condition described in the MCAI.

DATES: We must receive comments on this proposed AD by November 28, 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.

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: Greg Davison, Aerospace Engineer, FAA, Small Airplane Directorate, 901 Locust, Room 301, Kansas City, Missouri 64106; telephone: (816) 329–4130; fax: (816) 329–4090.

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–20**–****; Directorate Identifier 2008–CE–059–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

The European Aviation Safety Agency (EASA), which is the Technical Agent

for the Member States of the European Community, has issued EASA AD No. 2007–0261, dated October 2, 2007 (referred to after this as ''the MCAI''), to correct an unsafe condition for the specified products. The MCAI states:

This Airworthiness Directive (AD) is prompted by the discovery on L 23 SUPER–BLANIK sailplanes of cracks in zones where the front and aft control levers attach the connecting rod designated as ''control bridge'' on the relevant Illustrated Parts Catalogues (IPC). If left uncorrected cracks could propagate and lead to the breakage of the connecting rod with subsequent loss of control of the sailplane.

For the reasons described above, this AD requires an inspection for cracks of the control bridge and its replacement, as necessary. In addition, this AD requires an update of the aircraft Maintenance Manual (MM) to incorporate repetitive inspections of the control bridge.

You may obtain further information by examining the MCAI in the AD docket.

Relevant Service Information

LET Aircraft Industries, a.s. has issued Mandatory Bulletin MB No. L23/050a Revision No. 2, dated September 12, 2007. The actions described in this service information are intended to correct the unsafe condition identified in the MCAI.

FAA's Determination and Requirements of the Proposed AD

This product has been approved by the aviation authority of another country, and is approved for operation in the United States. Pursuant to our bilateral agreement with this State of Design Authority, they have notified us of the unsafe condition described in the MCAI and service information referenced above. We are proposing this AD because we evaluated all information and determined the unsafe condition exists and is likely to exist or develop on other products of the same type design.

Differences Between This Proposed AD and the MCAI or Service Information

We have reviewed the MCAI and related service information and, in general, agree with their substance. But we might have found it necessary to use different words from those in the MCAI to ensure the AD is clear for U.S. operators and is enforceable. In making these changes, we do not intend to differ substantively from the information provided in the MCAI and related service information.

We might also have proposed different actions in this AD from those in the MCAI in order to follow FAA policies. Any such differences are highlighted in a NOTE within the proposed AD.

Costs of Compliance

We estimate that this proposed AD will affect 105 products of U.S. registry. We also estimate that it would take about 2 work-hours per product to comply with the basic requirements of this proposed AD. The average labor rate is $80 per work-hour.

Based on these figures, we estimate the cost of the proposed AD on U.S. operators to be $16,800, or $160 per product.

In addition, we estimate that any necessary follow-on actions would take about 7 work-hours and require parts costing $2,000, for a cost of $2,560 per product. We have no way of determining the number of products that may need these actions.

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.

We prepared a regulatory evaluation of the estimated costs to comply with this proposed AD and placed it in the AD docket.

List of Subjects in 14 CFR Part 39

Air transportation, Aircraft, Aviation safety, Incorporation by reference, 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:

Aircraft Industries a.s. (Type Certificate G60EU previously held by LETECKÉ ZÁVODY a.s. and LET Aeronautical Works): Docket No. FAA–2008–1138; Directorate Identifier 2008–CE–059–AD.

Comments Due Date

(a) We must receive comments by November 28, 2008.

Affected ADs

(b) None.

Applicability

(c) This AD applies to Model L 23 Super Blanik sailplanes, all serial numbers, certificated in any category.

Subject

(d) Air Transport Association of America (ATA) Code 27: Flight Controls.

Reason

(e) The mandatory continuing airworthiness information (MCAI) states:

This Airworthiness Directive (AD) is prompted by the discovery on L 23 SUPER–BLANIK sailplanes of cracks in zones where the front and aft control levers attach the connecting rod designated as ''control bridge'' on the relevant Illustrated Parts Catalogues (IPC). If left uncorrected cracks could propagate and lead to the breakage of the connecting rod with subsequent loss of control of the sailplane.

For the reasons described above, this AD requires an inspection for cracks of the control bridge and its replacement, as necessary. In addition, this AD requires an update of the aircraft Maintenance Manual (MM) to incorporate repetitive inspections of the control bridge.

Actions and Compliance

(f) Unless already done, do the following actions:

(1) Within the next 3 months after the effective date of this AD and repetitively thereafter at intervals not to exceed 12 months, visually inspect the control bridge in areas of juncture with the two control sticks for cracks. Do the inspection following paragraph A of LET Aircraft Industries, a.s. Mandatory Bulletin MB No. L23/050a Revision No. 2, dated September 12, 2007, except use a 10X magnifier and do a dye penetrant inspection following the procedures in chapter 5, section 5, of FAA Advisory Circular AC 43.13–1B CHG 1, dated September 27, 2001.

(2) If cracks are found in the control bridge bedding during any inspection required in paragraph (f)(1) of this AD, before further flight, replace the defective control bridge bedding, Dwg. No. A740 371N, in the control bridge assembly, Dwg. No. A740 370N, following LET Aircraft Industries, a.s. Mandatory Bulletin MB No. L23/050a Revision No. 2, dated September 12, 2007; and Appendix No. 1, ''Replacement of Bearings 608 CSN 024630 at Control Bridge Dwg. No. A740 370N in a Bedding Dwg. No. A740 371N,'' to LET Aircraft Industries, a.s. Mandatory Bulletin MB No. L23/050a Revision No. 2, dated September 12, 2007.

(3) Doing the replacement required in paragraph (f)(2) of this AD terminates the 12-month repetitive inspection required in paragraph (f)(1) of this AD. After the replacement required in paragraph (f)(2) of this AD, perform subsequent inspections on the new control bridge assembly according to LET Aircraft Industries, a.s. Documentation Bulletin No.: L23/020 d, dated August 6, 2007.

FAA AD Differences

Note: This AD differs from the MCAI and/or service information as follows:

1. The service information requires a visual inspection with a 6X magnifier. We are requiring a dye penetrant inspection and a 10X magnifier to detect cracks that could go undetected using only a 6X magnifier.

2. The MCAI requires updating the maintenance manuals to add repetitive inspections of the control bridge. Since the maintenance manual is only one way of establishing a maintenance program, the only way we can mandate these repetitive inspections is through an AD action.

Other FAA AD Provisions

(g) The following provisions also apply to this AD:

(1) Alternative Methods of Compliance (AMOCs): The Manager, Standards Office, FAA, has the authority to approve AMOCs for this AD, if requested using the procedures found in 14 CFR 39.19. Send information to ATTN: Greg Davison, Aerospace Engineer, FAA, Small Airplane Directorate, 901 Locust, Room 301, Kansas City, Missouri 64106; telephone: (816) 329–4130; fax: (816) 329–4090. Before using any approved AMOC on any sailplane 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.

(2) Airworthy Product: For any requirement in this AD to obtain corrective actions from a manufacturer or other source, use these actions if they are FAA-approved. Corrective actions are considered FAA-approved if they are approved by the State of Design Authority (or their delegated agent). You are required to assure the product is airworthy before it is returned to service.

(3) Reporting Requirements: For any reporting requirement in this AD, under the provisions of the Paperwork Reduction Act (44 U.S.C. 3501 et seq.), the Office of Management and Budget (OMB) has approved the information collection requirements and has assigned OMB Control Number 2120–0056.

Related Information

(h) Refer to MCAI European Aviation Safety Agency (EASA) AD No. 2007–0261, dated October 2, 2007; LET Aircraft Industries, a.s. Mandatory Bulletin MB No. L23/050a Revision No. 2, dated September 12, 2007; Appendix No. 1, ''Replacement of Bearings 608 CSN 024630 at Control Bridge Dwg. No. A740 370N in a Bedding Dwg. No. A740 371N,'' to LET Aircraft Industries, a.s. Mandatory Bulletin MB No. L23/050a Revision No. 2, dated September 12, 2007; and LET Aircraft Industries, a.s. Documentation Bulletin No.: L23/020 d, dated August 6, 2007, for related information.

Issued in Kansas City, Missouri, on October 21, 2008.

John R. Colomy,

Acting Manager, Small Airplane Directorate, Aircraft Certification Service.

[FR Doc. E8–25661 Filed 10–28–08; 8:45 am]

BILLING CODE 4910–13–P

DEPARTMENT OF TRANSPORTATION

Federal Aviation Administration

14 CFR Part 39

[Docket No. FAA–2008–1117; Directorate Identifier 2008–NM–106–AD]

RIN 2120–AA64

Airworthiness Directives; Boeing Model 727 Airplanes

AGENCY: Federal Aviation Administration (FAA), DOT.

ACTION: Notice of proposed rulemaking (NPRM).

SUMMARY: We propose to adopt a new airworthiness directive (AD) for all Boeing Model 727 airplanes. This proposed AD would require inspections for cracking of the left- and right-side shear ties and web posts of the kickload beam and the adjacent structure in the vertical stabilizer, and corrective actions if necessary. This proposed AD results from a report of cracking of the left- and right-side web posts and shear ties of the kickload beam. We are proposing this AD to detect and correct cracking of the left- and right-side web posts and shear ties of the kickload beam, which, when coupled with failures in the adjacent structure, could result in structural failure of the vertical stabilizer, and loss of control of the airplane.

DATES: We must receive comments on this proposed AD by December 15, 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–2008–1117; Directorate Identifier 2008–NM–106–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 have received a report of cracking of the left- and right-side web posts and shear ties of the kickload beam. The cracking was discovered during a scheduled maintenance visit of an airplane with 65,000 total flight hours and 42,000 total flight cycles. The reported cracking of the left- and right-side web posts, which attach to the kickload beam and the left- and right-side stringer 11 in the vertical stabilizer, was due to stress corrosion caused by elevated fit up stress. Cracking in the left- and right-side shear ties, which attach to the kickload beam, was a result of fatigue caused by compensation for cracking in the web posts. Cracking of the shear ties and web posts can diminish the effectiveness of both left- and right-side stringer 11. When coupled with failures in the rear spar chord or stringer 10, the critical crack length at which limit load can be sustained is reduced, rendering the existing inspection intervals for stringer 10 and the rear spar chord insufficient. This condition, if not corrected, could result in structural failure of the vertical stabilizer, which could lead to loss of control of the airplane.

Relevant Service Information

We have reviewed Boeing Special Attention Service Bulletin 727–55–0093, dated March 12, 2008. The service bulletin describes procedures for doing repetitive high frequency eddy current (HFEC) and low frequency eddy current (LFEC) inspections for cracking of the left- and right-side shear ties, left- and right-side web posts, left- and right-side stringers 10 and 11, rear spar chord, associated critical fasteners, and adjacent surfaces in the vertical stabilizer. For airplanes on which any cracking is found in the shear ties or web posts, the service bulletin describes replacing the cracked parts with new parts and inspecting all open fastener holes in the kickload beam web and chords for cracking. For airplanes on which cracking is found in stringer 10 or 11, rear spar chord and skin, associated critical fasteners, adjacent surfaces of the vertical stabilizer, or areas other than the shear ties and web posts, the service bulletin specifies contacting Boeing for repair instructions. The service bulletin specifies the following compliance times:

COMPLIANCE TIMES

Airplanes/condition	Compliance time (whichever occurs first)		Repetitive interval
Less than 52,000 total flight hours or 39,000 total flight cycles.	Before 56,000 total flight hours	Before 42,000 total flight cycles ...	10,000 flight hours or 7,500 flight cycles, whichever occurs first.
More than 52,000 total flight hours or 39,000 total flight cycles.	Within 4,000 flight hours after the date of the service bulletin.	Within 3,000 flight cycles after the date of the service bulletin.	10,000 flight hours or 7,500 flight cycles, whichever occurs first.
Any cracking found	Before further flight	.....	(None).

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(se) same type design(s). This proposed AD would require accomplishing the actions specified in the service information described previously, except as discussed under ''Differences Between the Proposed AD and the Service Bulletin.''

Differences Between the Proposed AD and the Service Bulletin

Boeing Special Attention Service Bulletin 727–55–0093, dated March 12, 2008, specifies to contact the manufacturer for instructions on how to repair certain conditions, but this proposed AD would require repairing those conditions in one of the following ways:

- Using a method that we approve; or
- Using data that meet the certification basis of the airplane, and that have been approved by an Authorized Representative for the Boeing Commercial Airplanes Delegation Option Authorization Organization, whom we have authorized to make those findings.

The service bulletin does not specify a compliance time for airplanes with exactly 52,000 total flight hours or 39,000 total flight cycles. We have grouped those airplanes with airplanes having ''less than'' 52,000 total flight hours or 39,000 total flight cycles, as specified in paragraph (g) of this proposed AD.

Interim Action

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

Costs of Compliance

We estimate that this proposed AD would affect 364 airplanes of U.S. registry. The following table provides the estimated costs for U.S. operators to comply with this proposed AD.

ESTIMATED COSTS

Action	Work hours	Average labor rate per hour	Parts	Cost per product	Number of U.S.-registered airplanes	Fleet cost
Inspection	10	$80	$0	$800, per inspection cycle	364	$291,200, 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, Incorporation by reference, 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–2008–1117; Directorate Identifier 2008–NM–106–AD.

Comments Due Date

(a) We must receive comments by December 15, 2008.

Affected ADs

(b) None.

Applicability

(c) This AD applies to all Boeing Model 727, 727C, 727–100, 727 –100C, 727–200, and 727–200F series airplanes, certificated in any category.

Unsafe Condition

(d) This AD results from a report of cracking of the left- and right-side web posts and shear ties of the kickload beam. We are issuing this AD to detect and correct cracking of the left- and right-side web posts and shear ties of the kickload beam, which, when coupled with failures in the adjacent structure, could result in structural failure of the vertical stabilizer, and loss of control of the airplane.

Compliance

(e) Comply with this AD within the compliance times specified, unless already done.

Inspections and Corrective Actions

(f) At the times specified in paragraph 1.E., ''Compliance,'' of Boeing Special Attention Service Bulletin 727–55–0093, dated March 12, 2008 (''the service bulletin''), except as provided by paragraphs (g) and (h) of this AD: Do the inspections to detect cracking of the left- and right-side web posts and shear ties of the kickload beam, by doing all of the actions specified in Part 2 and the applicable corrective actions specified in Part 3 of the Accomplishment Instructions of the service bulletin, except as provided by paragraph (i) of this AD. Do all applicable corrective actions before further flight. Repeat the inspections thereafter at the intervals specified in paragraph 1.E. of the service bulletin.

Clarification and Exception to the Specified Compliance Times

(g) To determine the compliance times for airplanes having exactly 52,000 total flight hours or 39,000 total flight cycles, for the purposes of this AD, these airplanes are grouped with airplanes having ''less than'' 52,000 total flight hours or 39,000 total flight cycles, as specified in paragraph 1.E., ''Compliance,'' of Boeing Special Attention Service Bulletin 727–55–0093, dated March 12, 2008.

(h) Where Boeing Special Attention Service Bulletin 727–55–0093, dated March 12, 2008, specifies a compliance time after the date on the service bulletin, this AD requires compliance within the specified compliance time after the effective date of this AD.

Exception to the Specified Corrective Actions

(i) If any cracking is found during any inspection required by this AD, and Boeing Special Attention Service Bulletin 727–55–0093, dated March 12, 2008, specifies contacting Boeing for appropriate action: Before further flight, repair the cracking or damage using a method approved by the Manager, Seattle Aircraft Certification Office (ACO), FAA. For a repair method to be approved by the Manager, Seattle ACO, as required by this paragraph, the Manager's approval letter must specifically refer to this AD.

Alternative Methods of Compliance (AMOCs)

(j)(1) The Manager, Seattle ACO, FAA, ATTN: Berhane Alazar, Aerospace Engineer, Airframe Branch, ANM–120S, 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 October 10, 2008.

Ali Bahrami,

Manager, Transport Airplane Directorate, Aircraft Certification Service.

[FR Doc. E8–25758 Filed 10–28–08; 8:45 am]

BILLING CODE 4910–13–P

DEPARTMENT OF THE TREASURY

Alcohol and Tobacco Tax and Trade Bureau

27 CFR Part 9

[Docket No. TTB–2008–0009; Notice No. 91; Re: Notice No. 90]

RIN 1513–AB57

Proposed Expansions of the Russian River Valley and Northern Sonoma Viticultural Areas; Reopening of Comment Period

AGENCY: Alcohol and Tobacco Tax and Trade Bureau, Treasury.

ACTION: Notice of proposed rulemaking; reopening of comment period.

SUMMARY: In response to an industry member request, the Alcohol and Tobacco Tax and Trade Bureau is reopening the comment period for Notice No. 90, Proposed Expansions of the Russian River Valley and Northern Sonoma Viticultural Areas, a notice of proposed rulemaking published in the **Federal Register** on August 20, 2008.

DATES: Written comments on Notice No. 90 must now be received on or before December 19, 2008.

ADDRESSES: You may send comments on Notice No. 90 to one of the following addresses:

- *http://www.regulations.gov* (via the online comment form for this notice as posted within Docket No. TTB–2008–0009 on Regulations.gov, the Federal e-rulemaking portal); or
- *Mail:* Director, Regulations and Rulings Division, Alcohol and Tobacco Tax and Trade Bureau, P.O. Box 14412, Washington, DC 20044–4412; or

You may view copies of this notice, Notice No. 90, and any comments we receive about Notice No. 90 at *http://www.regulations.gov*. A direct link to the appropriate Regulations.gov docket is available under Notice No. 90 on the TTB Web site at *http://www.ttb.gov/wine/wine_rulemaking.shtml*. You also may view copies of this notice, Notice No. 90, and any comments we receive about Notice No. 90 by appointment at the TTB Information Resource Center, 1310 G Street, NW., Washington, DC 20220. To make an appointment, call 202–927–2400.

FOR FURTHER INFORMATION CONTACT: Jennifer Berry, Regulations and Rulings Division, Alcohol and Tobacco Tax and Trade Bureau, P.O. Box 18152, Roanoke, VA 24014; telephone 540–344–9333.

SUPPLEMENTARY INFORMATION: On August 20, 2008, the Alcohol and Tobacco Tax and Trade Bureau (TTB) published Notice No. 90, Proposed Expansions of the Russian River Valley and Northern Sonoma Viticultural Areas, in the **Federal Register** (73 FR 49123). In that notice of proposed rulemaking, TTB requested public comment on its proposed expansions of the Russian River Valley and Northern Sonoma viticultural areas in Sonoma County, California. The 60-day comment period for Notice No. 90, when published, was scheduled to close on October 20, 2008.

After publication of Notice No. 90, TTB received a request from Merry Edwards on behalf of the Russian River Valley Boundary Integrity Coalition, a group of area vineyards and wineries, to extend the comment period for Notice No. 90 for an additional 60 days. Ms. Edwards noted in support of the request that members of the coalition are currently immersed in the grape harvest in the Russian River Valley. Ms. Edwards states that this extension will allow members to focus on the petition after harvest activities are complete.

In response to this request, TTB reopens the comment period for Notice No. 90 for an additional 60 days beyond the original closing date, thus leaving Notice No. 90 open to public comment for a total of 4 months. We believe this time period will allow industry members and the public to fully consider the proposals outlined in Notice No. 90. Therefore, comments on Notice No. 90 are now due on or before December 19, 2008.

Drafting Information: Jennifer Berry of the Regulations and Rulings Division drafted this notice.

Signed: October 22, 2008.

William H. Foster,

Assistant Administrator, Headquarters Operations.

[FR Doc. E8–25748 Filed 10–28–08; 8:45 am]

BILLING CODE 4810–31–P

DEPARTMENT OF THE TREASURY

Alcohol and Tobacco Tax and Trade Bureau

27 CFR Part 19

[Notice No. 92; Re: Notice Nos. 83 and 86; Docket No. TTB–2008–0004]

RIN 1513–AA23

Proposed Revision of Distilled Spirits Plant Regulations (2001R–194P); Extension of Comment Period

AGENCY: Alcohol and Tobacco Tax and Trade Bureau, Treasury.

ACTION: Notice of proposed rulemaking; extension of comment period.

SUMMARY: In response to an industry association request, the Alcohol and Tobacco Tax and Trade Bureau extends the comment period for Notice No. 83, Proposed Revision of Distilled Spirits Plant Regulations, a notice of proposed rulemaking published in the **Federal Register** on May 8, 2008, for an additional 90 days.

DATES: Written comments on Notice No. 83 must now be received on or before February 3, 2009.

ADDRESSES: You may send comments on Notice No. 83 to one of the following addresses:

- *http://www.regulations.gov* (via the online comment form for this notice as posted within Docket No. TTB–2008–0004 on Regulations.gov, the Federal e-rulemaking portal); or
- *Mail:* Director, Regulations and Rulings Division, Alcohol and Tobacco Tax and Trade Bureau, P.O. Box 14412, Washington, DC 20044–4412; or
- *Hand Delivery/Courier in Lieu of Mail:* Alcohol and Tobacco Tax and Trade Bureau, 1310 G Street, NW., Suite 200–E, Washington, DC 20005.

You may view copies of this notice, Notice No. 83, and any comments we receive about Notice No. 83 at *http://www.regulations.gov*. A direct link to the appropriate Regulations.gov docket is available under Notice No. 83 on the TTB Web site at *http://www.ttb.gov/spirits/spirits_rulemaking.shtml*. You also may view copies of this notice, Notice No. 83, Notice No. 86, and any comments we receive about Notice No. 83 by appointment at the TTB Information Resource Center, 1310 G Street, NW., Washington, DC 20220. To make an appointment, call 202–927–2400.

FOR FURTHER INFORMATION CONTACT: Daniel J. Hiland, Regulations and Rulings Division, Alcohol and Tobacco Tax and Trade Bureau, 1310 G Street, NW., Suite 200–E, Washington, DC 20220; telephone 202–927–8176.

SUPPLEMENTARY INFORMATION: On May 8, 2008, the Alcohol and Tobacco Tax and Trade Bureau (TTB) published Notice No. 83, Proposed Revision of Distilled Spirits Plant Regulations, in the **Federal Register** (73 FR 26200). In that notice of proposed rulemaking, TTB requested public comment on its proposed comprehensive revision of the regulations governing distilled spirits plants. The 90-day comment period for Notice No. 83, when published, was scheduled to close on August 6, 2008. However, TTB received a request from E. & J. Gallo Winery to extend the comment period for Notice No. 83 for an additional 120 days. In response to that request, TTB, on August 1, 2008, published Notice No. 86 in the **Federal Register** (73 FR 44952) extending the comment period for Notice No. 83 for an additional 90 days. Thus, comments on Notice No. 83 became due on or before November 5, 2008.

On October 20, 2008, TTB received another comment period extension request, from the Distilled Spirits Council of the United States, Inc. (DISCUS), a national trade association representing producers and marketers of distilled spirits sold in the United States. DISCUS requested a further 90-day extension of the comment period for Notice No. 83. DISCUS noted in support of its request that the vicissitudes confronting the marketplace and

American business as a whole necessitates additional time for industry to focus on the complexities of the proposed rule. DISCUS further asserted that the regulations in question have a major impact on the requirements to operate distilled spirits plants and that the opportunity to streamline and modernize those regulations is of critical importance, particularly in light of today's economy.

In response to this latest request, TTB extends the comment period for Notice No. 83 for an additional 90 days, which together with the original 90-day comment period and the first 90-day extension of the comment period will leave Notice No. 83 open to public comment for 9 months. We believe this time period will allow industry members and the public to fully consider the proposals outlined in Notice No. 83. Therefore, comments on Notice No. 83 are now due on or before February 3, 2009.

Drafting Information: Gabriel J. Hiza of the Regulations and Rulings Division drafted this notice.

Signed: October 22, 2008.

William H. Foster,

Assistant Administrator, Headquarters Operations.

[FR Doc. E8–25896 Filed 10–28–08; 8:45 am]

BILLING CODE 4810–31–P

DEPARTMENT OF AGRICULTURE

Forest Service

36 CFR Part 223

RIN 0596–AC80

Sale and Disposal of National Forest System Timber; Downpayment and Periodic Payments

AGENCY: Forest Service, USDA.

ACTION: Proposed rule; request for comments.

SUMMARY: The Forest Service is proposing to amend the Downpayment rule and the Periodic payments rule to reflect changes in contracting procedures adopted in the April 2004 and June 2006 timber sale contracts. These changes reflect stewardship contracting authorities, and reflect changes in forest products markets since these rules were adopted in 1991. The proposed changes also would remove obsolete references and procedures; make downpayments and periodic payments optional for stewardship contracts; allow downpayment and periodic payment amounts to be recalculated when contracts receive a rate redetermination; revise the procedure for releasing the downpayment; and would allow downpayments to be temporarily reduced when Forest Service authorizes certain additions of contract time.

The intended effect of this proposed rule is to protect the Government's financial security while providing financial relief to timber purchasers during periods when forest products prices drastically decline or purchasers receive additional contract time for periods when they are not expected to operate.

DATES: Comments must be received in writing by December 29, 2008.

ADDRESSES: Mail written comments to the Director of Forest Management, MAIL STOP 1105, Forest Service, USDA, 1400 Independence Avenue, SW., Washington, DC 20250–1105; via e-mail to *downpayment@fs.fed.us;* or via facsimile to (202) 205–1045. All comments, including names and addresses when provided, are placed in the record and are available for public inspection and copying. The public may inspect comments received on this proposed rule in the office of the Director of Forest Management, Third Floor, Northwest Wing, Yates Building, 201 14th Street, SW., Washington, DC. Visitors are encouraged to call ahead to (202) 205–0893 to facilitate entry into the building.

FOR FURTHER INFORMATION CONTACT: Lathrop Smith, Forest Management, (202) 205–0858.

SUPPLEMENTARY INFORMATION:

Background

The current downpayment regulation (36 CFR 223.49) and periodic payments regulation (36 CFR 223.50) were adopted on July 31, 1991, (56 FR 36099) to protect the Government's financial interests, reduce speculative bidding, encourage purchasers to harvest timber in a timely manner and to comply with section 2d of the Federal Timber Contract Payment Modification Act (Pub. L. 98–478, 98 Stat 2213; 16 U.S.C. 618) (Buy-out Act).[1]

Under the current downpayment regulations, a purchaser must deposit cash in the timber sale account at the time of sale award equal to 10 percent of the total advertised value of the sale plus 20 percent of the bid premium. This cash is held by the Forest Service and cannot be used by the purchaser for any other purpose until (1) on scaled sales stumpage representing 25 percent of the total bid value has been charged and paid for, or (2) on tree measurement sales until stumpage value representing 25 percent of the total bid value is shown on the timber sale statement of account to have been cut, removed, and paid for (36 CFR 223.49(d)).

Under the current periodic payments regulation, periodic payments are ''amounts specified in the contract that a purchaser must pay by the periodic payment determination date(s) unless reduced by amounts paid as stumpage for volume removed.'' (36 CFR 223.50(a)(4)). The initial periodic payment is equal to 35 percent of the total contract value or 50 percent of the bid premium, whichever is greater. Where an additional periodic payment is required by the contract, the payment will equal 75 percent of the total contract value. The amount of the periodic payment(s) will be reduced if the payment would result in the purchaser's credit balance for timber charges exceeding the current contract value. (36 CFR 223.50(c)).

Proposed Amendments to the Downpayment Requirements

The following changes are proposed. Sections 223.49 and 223.50 will be reformatted accordingly.

1. In § 223.49(a)(2), the definition for *ineffective purchaser credit* would be removed. Section 329 of the Department of the Interior and Related Agencies Appropriations Act, 1999 (as contained in section 101(e) of division A of Public Law 105–277; 16 U.S.C. 535a) directed, among other things, that the procedure known as ''purchaser credit'' be eliminated no later than April 1, 1999. The use of purchaser credit was discontinued in timber sales advertised after March 31, 1999 by making changes in timber sale contract provisions (File code 2450 letter to Regional Foresters dated February 19, 1999). As of March 30, 2008, only $6,000 worth of ineffective purchaser credit was being used to cover downpayment requirements. Because no additional purchaser credit is being earned, references to ineffective purchaser credit in the downpayment regulation are obsolete and unnecessary.

2. In § 223.49(b), the option of using effective purchaser credit would be eliminated for the same reasons cited above, and to make downpayments for stewardship contracts optional. Section 323 of the Department of the Interior and Related Agencies Appropriations Act, 2003 (as contained in division F of Pub. L. 108–7; 16 U.S.C. 2104 Note) (Stewardship Contracting Act),

[1] Section 2(d) provides that ''[e]ffective January 1, 1985, in any contract for the sale of timber from the National Forests, the Secretary of Agriculture shall require a cash down-payment at the time the contract is executed and periodic payments to be made over the remaining period of the contract.''

authorizes the Forest Service, until September 30, 2013, to enter into stewardship contracting projects for up to 10 years with private persons or public or private entities, by contract or by agreement, to perform services to achieve land management goals for the national forests or public lands that meet local and rural community needs. In addition to other items, the Stewardship Contracting Act authorizes the Forest Service to apply the value of timber or other forest products removed under a stewardship project as an offset against the cost of service work performed under the contract or agreement.

On October 5, 2004, the Forest Service implemented interim Integrated Resource Timber Contracts FS–2400–13 and FS–2400–13T for use in stewardship end result contracting. The Forest Service awards stewardship contracts on the basis of best value as described in the Federal Acquisition Regulations. (FSH 2409.19, chapter 60). Awarding stewardship contracts on a best value basis virtually eliminates the potential for speculative bidding because factors other than price are used to determine best value.

Further, offsetting the value of timber against the cost of service work within a stewardship contract accomplishes the dual functions of providing financial security to the Government and establishing incentive for the contractor to harvest timber and perform the service work in a timely manner. In addition, the government's financial security is safeguarded on most stewardship contracts without a downpayment. Specifically, the government's risk of financial loss is minimized if the contractor performs the service work before harvesting timber. Alternatively, the contractor must pay in advance for any timber cut prior to performing service work. For these reasons, the Forest Service has adopted the policy that most stewardship contracts do not need a downpayment.

However, there can be exceptions. For example, if the value of the timber greatly exceeded the costs of the services, a downpayment may be needed to encourage the contractor to harvest the timber in a timely manner. Forest Service Handbook (FSH) 2409.19, chapter 60, currently requires the contracting officer to determine what bonds will be required for individual stewardship contracts. That chapter will be amended to include determining whether a downpayment should be required on a stewardship contract.

3. In § 223.49(c) the obsolete references to converting units of measure other than board feet to board feet would be deleted, and a requirement would be added to include recalculating the amount of the downpayment when stumpage rates are redetermined. The downpayment amount is calculated as a percentage of sale value without regard to unit of measure for the timber. Timber sale contracts contain procedures to redetermine stumpage rates for (1) Environmental modification, (2) catastrophic damage, (3) market change that occurs after Forest Service orders a suspension or delay, and (4) a market change emergency rate redetermination. None of these stumpage rate redetermination procedures includes a process for concurrently recalculating the amount of the downpayment or periodic payments. The amount of cash deemed necessary to protect the Government's financial security and encourage purchasers to harvest timber in a timely manner is based on a percentage the contract's value at time of award. Therefore, when the contract value changes substantially as a result of a stumpage rate redetermination, the downpayment and periodic payments should also be recalculated commensurate with the change in sale value. The Government's financial security is maintained because it retains the same percentage of total contract value before and after the rates are redetermined.

4. Section 223.49(d) would be amended to clarify when the downpayment can be released. In § 223.49(d), purchasers of scaled sales cannot apply the amount deposited as a downpayment to cover other obligations on the sale until 25 percent of the total bid value of the sale has been charged and paid for; on tree measurement sales, the purchaser cannot apply the downpayment to cover other obligations until stumpage value representing 25 percent of the total bid value of the sale shown on the timber sale statement of account to have been cut, removed and paid for. On sales subject to stumpage rate adjustment, prices can decline so much that the amount of the downpayment can exceed the value of timber remaining to be harvested without triggering the release of the downpayment. For example: Sale A contains 4000 ccf of timber advertised at $50/ccf and bid up to $70/ccf for a total sale bid value of $280,000. Pursuant to § 223.49(c) the downpayment amount is $36,000 and pursuant to § 223.49(d), $70,000 of timber must be charged and paid for before the purchaser can apply the amount deposited as the downpayment to cover other obligations on the sale. As a result of stumpage rate adjustments in a rapidly declining market current contract rates de-escalate to $14/ccf for a total contract value of $56,000. The purchaser harvests 2000 ccf at $14/ccf and pays $28,000. The Forest Service is still holding the $36,000 downpayment even though it is greater than the $28,000 remaining value of the sale.

The Forest Service never intended to hold a downpayment greater than the value of timber remaining to be harvested which is evidenced by the following: (1) § 223.49(d), which specifies that for lump sum sales the downpayment may be applied to payment for release of the single payment unit, and (2) § 223.49(h), which authorizes release of the downpayment for sales subject to the additional downpayment requirement in § 223.49(g) when the value of timber remaining to be harvested is equal to or less than the amount of the downpayment. The amendment to § 223.49(d) will allow a downpayment to be released when it equals or exceeds the value of timber remaining to be harvested. Section 223.49(d)(1) would be added to address the procedure on scaled sales and § 223.49(d)(2) would be added to address the procedure on tree measurement sales.

5. Amend § 223.49(g) to allow the downpayment amount on contracts subject to § 223.49(e)'s higher downpayment requirement to be recalculated when stumpage rates are redetermined for the same reasons cited in the description of changes for § 223.49(c).

6. Remove § 223.49(g)(1) to eliminate the obsolete reference to ineffective purchaser credit.

7. Remove § 223.49(g)(2) to eliminate obsolete references to converting units of measure other than board feet to board feet for the same reasons cited in the description of changes for § 223.49(a)(2).

8. Add § 223.49(k) to allow a temporary reduction of downpayments. Timber sales on contract forms dated April 2004 and later contain provisions for temporarily reducing the amount of the downpayment when Forest Service orders a delay or interruption of the contract for 30 days or more when the contract would be operating but for the order. That procedure went through a public review process in 2004 (69 FR 25367), and is included in the proposed § 223.49(k). This amendment proposes expanding that procedure to include when a purchaser's scheduled operations are delayed or interrupted for 30 consecutive days or more for any of the following reasons: (1) Forest Service

requests or orders purchaser to delay or interrupt operations for reasons other than breach; (2) a contract term addition pursuant to purchaser shifting operations to a sale designated by the Forest Service as in urgent need of harvesting; or (3) an extension of the contract term authorized upon a determination of substantial overriding public interest (SOPI), including a market-related contract term addition (MRCTA), or urgent removal contract term extension under 36 CFR 223.53. During the qualifying period of delay, interruption, or extension, the downpayment may be reduced to $1000 or two (2) percent of the downpayment amount stated in the contract, whichever is greater. Upon purchaser's receipt of the bill for collection and written notice from the contracting officer that the basis for the delay or interruption no longer exists, the purchaser shall restore the downpayment to the full amount stated in the contract within 15 days after the date the bill for collection is issued. Purchaser shall not conduct operations until the downpayment amount stated in the contract is fully restored.

Under normal market conditions, purchasers have an incentive to harvest enough timber to release the downpayment; that is not always the case when forest products markets have drastically declined. Although the Forest Service does not require purchasers to operate sales receiving additional time pursuant to a SOPI, the current regulation requires purchasers to maintain their full downpayment during a SOPI extension. Requiring purchasers to maintain their full cash downpayment as an inducement to operate a sale receiving additional time pursuant to a SOPI, or because the Forest Service requested or authorized a purchaser to harvest other timber in more urgent need of harvesting is unnecessary. In addition, the Forest Service does not believe that the temporary downpayment reductions allowed by § 223.49(k) will impact the regulation's effectiveness in reducing speculative bidding.

Further, the Forest Service has determined that the benefits of temporarily reducing downpayments under § 223.49(k) outweigh the potential increased risks to the government's financial security. First, the Forest Service believes that temporarily reducing downpayments on sales that the Agency requested or ordered be interrupted or delayed minimizes the Agency's potential financial liability under the contract. Second, allowing purchasers to temporarily reduce downpayments when they shift their operations to other timber designated as in urgent need of harvesting may result in purchasers buying urgent need timber that otherwise would not be sold. Finally, allowing purchasers to temporarily reduce downpayments on contracts extended by a SOPI determination may help purchasers and the Forest Service meet the challenges associated with drastic declines in forest products markets, which have become apparent during the current prolonged softwood and hardwood lumber market declines. Following is an example showing how both parties can benefit from a temporary reduction in downpayment on sales receiving a SOPI extension pursuant to the MRCTA regulation.

When a purchaser harvests a sale, the downpayment is released and the purchaser receives revenue from selling or processing the timber. The purchaser uses some of that cash to cover the bid guarantee and downpayment on a new sale that will be operated in the future. Presently that cash flow is interrupted when harvesting activities are put on hold because the sale is receiving MRCTA to allow time for market conditions to improve. The cash tied up covering the downpayment and lack of revenue being generated from the inactive sale dries up the cash needed to buy a new sale. This leads to the Government not receiving a bid on a new sale that is offered at prices reflecting the depressed market. The purchaser can't operate the high priced sale receiving MRCTA without suffering losses and can't afford to buy a new less expensive sale that could be operated. With its revenue stream broken, the purchaser starts laying off workers and has logging equipment repossessed as payments fall behind. By the time market conditions improve the purchaser has lost the ability to complete the sale that had received the MRCTA and defaults. Defaults are costly for the Government to process and often lead to loss of industry infrastructure needed to accomplish forest management objectives in a cost effective manner and industry infrastructure needed for dependent communities. The Government can apply the downpayment it is still holding towards default damages but the purchaser is now gone and not available to buy and harvest future sales. But the current depressed market conditions aren't affecting just one purchaser; they are affecting virtually all purchasers. While many purchasers will be able hold on until market conditions improve, many will not. As those numbers increase, there will be an increase in the number of sales not receiving any bids. The costs of completing forest management work such as treating fuels in a Wildland Urban Interface area will increase if that work has to be performed with a service contract that generates no offsetting revenue to the Government. Temporarily reducing downpayments as proposed will help a purchaser's cash flow and potentially head off the drastic economic chain of events described above. This won't prevent all purchasers from failing or prevent all contracts from defaulting during drastic market declines. But, the amount of financial security the Government may forgo by temporarily reducing downpayments on contracts that ultimately default will be more than offset by the economic benefits derived from the increased number of contracts that don't default because of helping purchasers with their cash flow.

Proposed Amendments to the Periodic Payment Requirements

1. Section 223.50(b) would be amended to clarify that periodic payments are not required for stewardship contracts for the same reasons that downpayments are not required for stewardship contracts.

2. Section 223.50(f) would be amended to remove obsolete contract modification procedures and add procedures for recalculating the amount of the periodic payment(s) following a rate redetermination authorized under the contract. The obsolete procedures being removed required purchasers of pre-1991 contracts to make a written request by December 31, 1991, to receive market-related contract term additions. The addition of procedures for recalculating the amount of the periodic payment(s) following a rate redetermination are for the same reasons as cited for § 223.49(c) above.

Conclusion

The proposed rule will modify the downpayment regulation (36 CFR 223.49) and the periodic payments regulation (36 CFR 223.50) to provide financial relief to timber purchasers during times of significant market declines. The small amount of financial security the Government may forgo by temporarily reducing downpayments on contracts that ultimately default will be more than offset by the economic benefits derived from the increased number of contracts that don't default because of helping purchasers with their cash flow.

The proposed rule will add flexibility to the regulations on downpayment and periodic payments for stewardship sales

consistent with existing Forest Service policy. Finally, the proposed rule will eliminate out of date references to purchaser credit and to modifying contracts awarded prior to July 1, 1991.

Regulatory Certifications

Regulatory Impact

This proposed rule has been reviewed under USDA procedures and Executive Order 12866 on Regulatory Planning and Review. The Office of Management and Budget (OMB) has determined that this is not a significant regulatory action and is not subject to OMB review. This rule will not have an annual effect of $100 million or more on the economy nor adversely affect productivity, competition, jobs, the environment, public health or safety, nor State or local Governments. This rule will not interfere with an action taken or planned by another agency nor raise new legal or policy issues. This rule consists of technical administrative changes to regulations affecting the administration of commercial timber sales on National Forest lands. Finally, this action will not alter the budgetary impact of entitlements, grants, user fees, or loan programs or the rights and obligations of recipients of such programs. Accordingly, this proposed rule is not subject to OMB review under Executive Order 12866.

Regulatory Flexibility Act

This proposed rule has been considered in light of the Regulatory Flexibility Act (5 U.S.C. 601 *et seq.*), and it is hereby certified that this rule will not have a significant economic impact on a substantial number of small entities. This rule makes only technical administrative changes to existing regulations affecting the administration of commercial timber sales on National Forest System land. The proposed rule imposes minimal additional requirements on all timber purchasers while providing economic relief from current market conditions. The information required is easily within the capability of small entities to produce.

Unfunded Mandates Reform

Pursuant to Title II of the Unfunded Mandates Reform Act of 1995, which the President signed into law on March 22, 1995, the Department has assessed the effects of this rule on State, local, and Tribal Governments and the private sector. This proposed rule does not compel the expenditure of $100 million or more by any State, local, or tribal Government or anyone in the private sector. Therefore, a statement under section 202 of the Act is not required.

Environmental Impact

This proposed rule establishes uniform criteria to be followed when consideration is being given to temporarily reduce or change the downpayment requirements on a timber sale. Downpayments in timber sales have been required for many years and this requirement remains. Only the amount of downpayment is being revised and will be controlled at the local level by the Timber Sale Contracting Officer. Section 31.12 of Forest Service Handbook 1909.15 (February 15, 2007) excludes from documentation in an environmental assessment or impact statement ''rules, regulations, or policies to establish Service-wide administrative procedures, program processes, or instructions'' that do not significantly affect the quality of the human environment. The agency's preliminary assessment is that this rule falls within this category of actions and that no extraordinary circumstances exist which would require preparation of an environmental assessment or environmental impact statement. The intent of this proposed rule is to provide authority to allow for changes in the downpayment requirements while maintaining financial protection to the Government.

No Takings Implications

This rule has been analyzed in accordance with the principles and criteria contained in Executive Order 12630. It has been determined that the rule does not pose the risk of a taking of private property. There are no private property rights to be affected because the rule applies to commercial timber sale on National Forest lands.

Civil Justice Reform Act

This rule has been reviewed under Executive Order 12988, Civil Justice Reform. If this rule were adopted, (1) All State and local laws and regulations that are in conflict with this rule or which would impede its full implementation would be preempted; (2) no retroactive effect may be given to this rule; and (3) it does not require administrative proceedings before parties may file suit in court challenging it provisions.

Controlling Paperwork Burdens on the Public

This proposed rule does not contain any recordkeeping or reporting requirements or other information collection requirement as defined in 5 CFR Part 1320, Controlling Paperwork Burdens on the Public. Accordingly, the review provisions of the Paperwork Reduction Act of 1995 (44 U.S.C. 3501 *et seq.*) and its implementing regulations at 5 CFR part 1320 do not apply.

List of Subjects in 36 CFR Part 223

Administrative practice and procedures, Exports, Forests and forest products, Government contracts, National Forests, Reporting and recordkeeping requirements.

For the reasons set forth in the preamble, the Forest Service proposes to amend Part 223 of Title 36 of the Code of Federal Regulations as follows:

PART 223—SALE AND DISPOSAL OF NATIONAL FOREST SYSTEM TIMBER

1. The authority citation for part 223 continues to read as follows:

Authority: 90 Stat. 2958, 16 U.S.C. 472a; 98 Stat. 2213; 16 U.S.C. 618, 104 Stat. 714–726, 16 U.S.C. 620–620j, unless otherwise noted.

Subpart B—[Amended]

2. Revise § 223.49 to read as follows:

§ 223.49 Downpayments.

(a) For the purposes of this section, the terms listed in this paragraph shall have the following meaning:

(1) *Total bid value* is the sum of the products obtained by multiplying the rate the purchaser bid for each species by the estimated volume listed in the contract.

(2) *Bid premium* is the amount in excess of the advertised value that a purchaser bids for timber offered.

(3) *Lump sum timber sales* are premeasured sales where the entire value of the sale is paid in one payment at time of release for cutting.

(4) *Affiliate.* Concerns or individuals are affiliates if directly or indirectly, either one controls or has the power to control the other, or a third party controls or has the power to control both. In determining whether or not affiliation exists, the Forest Service shall consider all appropriate factors, including, but not limited to, common ownership, common management, and contractual relationships.

(b) Timber sale contracts shall include provisions that require purchasers to make a downpayment in cash at the time a timber sale contract is executed, except that a downpayment is not required for stewardship contracts unless the contracting officer determines that a downpayment is needed to ensure the Government's financial security.

(c) The minimum downpayment shall be equivalent to 10 percent of the total advertised value of each sale, plus 20 percent of the bid premium, except in those geographic areas where the Chief of the Forest Service determines that it

is necessary to increase the amount of the downpayment in order to deter speculation. The amount of the downpayment shall be redetermined when contract rates for timber are redetermined under the terms of the contract for:

(1) Environmental modification,

(2) Catastrophic damage,

(3) Market change, or

(4) An emergency rate redetermination.

For the purpose of recalculating the minimum downpayment, total advertised value shall be replaced with total redetermined value.

(d) A purchaser cannot apply the amount deposited as a downpayment to cover other obligations due on that sale until:

(1) On scaled sales stumpage value representing 25 percent of the total bid value of the sale has been charged and paid for, or the estimated value of unscaled timber is equal to or less than the amount of the downpayment; or

(2) On tree measurement sales stumpage value representing 25 percent of the total bid value of the sale is shown on the timber sale statement of account to have been cut, removed, and paid for, or the estimated value of timber remaining to be cut, removed and paid for as shown on the timber sale statement of account is equal to or less than the amount of the downpayment, except that on lump sum sales, the downpayment amount may be applied to payment for release of the single payment unit.

(e) A purchaser or any affiliate of that purchaser awarded a Forest Service timber sale contract must meet the additional downpayment requirements of paragraph (g) of this section under the following circumstances:

(1) The purchaser or its affiliate after September 29, 1988, has failed to perform in accordance with the terms of a Forest Service or Bureau of Land Management timber sale contract which results in notification by a Contracting Officer that a contract has expired uncompleted or is terminated for cause; and

(2) The estimated value of the unscaled timber on scaled sales, or the estimated value of the timber outstanding on tree measurement sales, included in those terminated or expired contracts exceeds $100,000, and

(3) Unpaid damages claimed by the Government remain outstanding prior to award of the new sale at issue and corrective action has not been taken to avoid future deficient performance.

(f) A subsequent final determination by the Contracting Officer or by a court of competent jurisdiction that a contract was improperly classified under the criteria in paragraph (e) of this section will result in the refund or credit of any unobligated portion of the amount of downpayment exceeding that required by paragraphs (c) and (d) of this section and the limitations of paragraph (h) of this section on application of downpayment shall no longer apply.

(g) Notwithstanding the provisions of paragraphs (c) and (d) of this section, a purchaser meeting the criteria of paragraph (e) of this section must make a minimum downpayment equal to 20 percent of the total advertised value of that sale, plus 40 percent of the total bid premium. This higher downpayment requirement applies throughout the National Forest System, except in those areas where the Chief of the Forest Service determines, before advertisement of the sale, that another downpayment rate is necessary to achieve the management objectives of the National Forest System. The amount of the downpayment shall be redetermined in accordance with this paragraph when contract rates for timber are redetermined under the terms of the contract for:

(1) Environmental modification,

(2) Catastrophic damage,

(3) Market change, or

(4) An emergency rate redetermination.

For the purpose of redetermining the downpayment total advertised value shall be replaced with total redetermined value.

(h) A purchaser subject to the additional downpayment requirements of paragraph (g) of this section cannot apply the amount deposited as a downpayment to other uses until:

(1) *On scaled sales*, the estimated value of the unscaled timber is equal to or less than the amount of the downpayment; or

(2) *On tree measurement sales*, the estimated value remaining to be cut and removed as shown on the timber sale statement of account is equal to or less than the amount of the downpayment.

(i) For the purpose of releasing funds deposited as downpayment by a purchaser subject to paragraph (f) of this section, the Forest Service shall compute the estimated value of timber as follows:

(1) *On scaled sales*, the estimated value of the unscaled timber is the sum of the products obtained by multiplying the current contract rate for each species by the difference between the advertised volume and the volume that has been scaled of that species.

(2) *On tree measurement sales*, the estimated value of the timber outstanding (that not shown on the timber sale statement of account as cut and removed) is the sum of the products obtained by multiplying the current contract rate for each species by the difference between the advertised volume and the volume that has been shown on the timber sale statement to have been cut and removed of the species. The current contract rate for each species is that specified in each Forest Service timber sale contract.

(j) In order to deter speculation, the Chief of the Forest Service may increase the period for retention of the downpayment for future contracts subject to such criteria as the Chief may adopt after giving the public notice and opportunity to comment.

(k) The Forest Service may temporarily reduce the downpayment when a purchaser's scheduled operations are delayed, interrupted, or extended for 30 or more consecutive days for any of the following reasons:

(1) Forest Service requests or orders purchaser to delay or interrupt operations for reasons other than breach;

(2) A contract term addition pursuant to purchaser shifting operations to a sale designated by the Forest Service as in urgent need of harvesting; or

(3) An extension of the contract term authorized upon a determination of substantial overriding public interest, including a market-related contract term addition, or an urgent removal contract term extension under 36 CFR 223.53.

(l) During the qualifying period of delay, interruption, or extension that meets the conditions of paragraph (k) of this section, the Forest Service may reduce the downpayment to $1000 or two (2) percent of the downpayment amount stated in the contract, whichever is greater. Upon purchaser's receipt of the bill for collection, and written notice from the contracting officer that the basis for the delay, interruption, or extension no longer exists, the purchaser must restore the downpayment to the full amount stated in the contract within 15 days after the date the bill for collection is issued. Purchaser shall not conduct operations until the downpayment amount stated in the contract is fully restored.

3. In § 223.50 revise paragraphs (b) introductory text and (f), and add a new paragraph (b)(3) to read as follows:

§ 223.50 Periodic payments.

* * * * *

(b) Except for lump sum sales each timber sale contract of more than one full normal operating season shall provide for periodic payments. The number of periodic payments required will be dependent upon the number of

normal operating seasons within the contract, but shall not exceed two such payments during the course of the contract. Periodic payments must be made by the periodic payment determination date, except that the amount of the periodic payment shall be reduced to the extent that timber has been removed and paid for by the periodic payment determination date. Should the payment fall due on a date other than normal billing dates, the contract shall provide that the payment date will be extended to coincide with the next timber sale statement of account billing date.

* * * * *

(3) Notwithstanding paragraph (b) of this section, periodic payments are not required for stewardship contracts unless the contracting officer determines that periodic payments are needed to ensure the government's financial security.

* * * * *

(f) The amount of any periodic payment(s) not yet reached shall be revised when rates are redetermined under the terms of the contract. The revised periodic payment amounts shall be based on a recalculated total contract value using the same procedures described in paragraphs (c) and (d) of this section . The recalculated total contract value is the current contract value following the rate redetermination plus:

(1) The total value of timber scaled prior to establishing redetermined rates in a scale sale, or

(2) The total value of timber shown on the timber sale statement of account as having been cut, removed and paid for in a tree measurement sale.

Dated: October 23, 2008.

Abigail R. Kimball,

Chief, Forest Service.

[FR Doc. E8–25799 Filed 10–27–08; 11:15 am]

BILLING CODE 3410–11–P

ENVIRONMENTAL PROTECTION AGENCY

40 CFR Part 52

[EPA–R05–OAR–2008–0198; FRL–8723–1]

Approval and Promulgation of Air Quality Implementation Plans; Illinois

AGENCY: Environmental Protection Agency (EPA).

ACTION: Proposed rule.

SUMMARY: EPA is proposing to approve a request submitted by the Illinois Environmental Protection Agency (IEPA) on January 24, 2008, to revise the Illinois State Implementation Plan (SIP) for volatile organic compounds (VOC). The proposed approval revises the Illinois SIP by updating information regarding the packaging production facility of Cromwell-Phoenix, Incorporated, located in Alsip, Illinois. It acknowledges that the source has changed its name from Cromwell-Phoenix, Incorporated, to CP–D Acquisition Company, LLC, as a consequence of a change in ownership. The revision does not change any of the VOC control requirements and will not increase VOC emissions because no emission limits were increased.

DATES: Comments must be received on or before November 28, 2008.

ADDRESSES: Submit your comments, identified by Docket ID No. EPA–R05–OAR–2008–0198 by one of the following methods:

- *www.regulations.gov:* Follow the on-line instructions for submitting comments.
- *E-mail: mooney.john@epa.gov.*
- *Fax:* (312) 886–5824.
- *Mail:* John Mooney, Chief, Criteria Pollutant Section, Air Programs Branch (AR–18J), U.S. Environmental Protection Agency, 77 West Jackson Boulevard, Chicago, Illinois 60604.
- *Hand Delivery:* John Mooney, Chief, Criteria Pollutant Section, Air Programs Branch (AR–18J), U.S. Environmental Protection Agency, 77 West Jackson Boulevard, Chicago, Illinois 60604. Such deliveries are only accepted during the Regional Office normal hours of operation, and special arrangements should be made for deliveries of boxed information. The Regional Office official hours of business are Monday through Friday, 8:30 a.m. to 4:30 p.m. excluding Federal holidays.

Please see the direct final rule which is located in the Rules section of this **Federal Register** for detailed instructions on how to submit comments.

FOR FURTHER INFORMATION CONTACT: Charles Hatten, Environmental Engineer, Criteria Pollutant Section, Air Programs Branch (AR–18J), Environmental Protection Agency, Region 5, 77 West Jackson Boulevard, Chicago, Illinois 60604, (312) 886–6031, *hatten.charles@epa.gov.*

SUPPLEMENTARY INFORMATION: In the Final Rules section of this **Federal Register**, EPA is approving the State's SIP submittal as a direct final rule without prior proposal because the Agency views this as a noncontroversial submittal and anticipates no adverse comments. A detailed rationale for the approval is set forth in the direct final rule. If no adverse comments are received in response to this rule, no further activity is contemplated. If EPA receives adverse comments, the direct final rule will be withdrawn and all public comments received will be addressed in a subsequent final rule based on this proposed rule. EPA will not institute a second comment period. Any parties interested in commenting on this action should do so at this time. Please note that if EPA receives adverse comment on an amendment, paragraph, or section of this rule, and if that provision may be severed from the remainder of the rule, EPA may adopt as final those provisions of the rule that are not the subject of the adverse comment. For additional information, see the direct final rule which is located in the Rules section of this **Federal Register**.

Dated: September 16, 2008.

Walter W. Kovalick, Jr.,

Acting Regional Administrator, Region 5.

[FR Doc. E8–25659 Filed 10–28–08; 8:45 am]

BILLING CODE 6560–50–P

ENVIRONMENTAL PROTECTION AGENCY

40 CFR Part 52

[EPA–R03–OAR–2008–0656; FRL–8735–5]

Approval and Promulgation of Air Quality Implementation Plans; Virginia; Movement of Richmond and Hampton Roads 8-Hour Ozone Areas From the Nonattainment Area List to the Maintenance Area List

AGENCY: Environmental Protection Agency (EPA).

ACTION: Proposed rule.

SUMMARY: EPA is proposing to approve the State Implementation Plan (SIP) revision submitted by the Commonwealth of Virginia for the purpose of moving the Richmond and the Hampton Roads 8-Hour Ozone Nonattainment Areas from the nonattainment areas list to the maintenance areas list. In the Final Rules section of this **Federal Register**, EPA is approving the Commonwealth's SIP submittal as a direct final rule without prior proposal because the Agency views this as a noncontroversial submittal and anticipates no adverse comments. A detailed rationale for the approval is set forth in the direct final rule. If no adverse comments are received in response to this action, no further activity is contemplated. If EPA receives adverse comments, the direct final rule will be withdrawn and all

public comments received will be addressed in a subsequent final rule based on this proposed rule. EPA will not institute a second comment period. Any parties interested in commenting on this action should do so at this time.

DATES: Comments must be received in writing by November 28, 2008.

ADDRESSES: Submit your comments, identified by Docket ID Number EPA–R03–OAR–2008–0656 by one of the following methods:

A. *www.regulations.gov.* Follow the on-line instructions for submitting comments.

B. *E-mail: fernandez.cristina@epa.gov.*

C. *Mail:* EPA–R03–OAR–2008–0656, Cristina Fernandez, Chief, Air Quality Planning Branch, Mailcode 3AP21, U.S. Environmental Protection Agency, Region III, 1650 Arch Street, Philadelphia, Pennsylvania 19103.

D. *Hand Delivery:* At the previously-listed EPA Region III 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–R03–OAR–2008–0656. 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.

Docket: All documents in the electronic docket are listed in the *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 *www.regulations.gov* or in hard copy during normal business hours at the Air Protection Division, U.S. Environmental Protection Agency, Region III, 1650 Arch Street, Philadelphia, Pennsylvania 19103. Copies of the State submittal are available at the Virginia Department of Environmental Quality, 629 East Main Street, Richmond, Virginia 23219.

FOR FURTHER INFORMATION CONTACT: Patrick Egan, (215) 814–3167, or by e-mail at *egan.patrick@epa.gov.*

SUPPLEMENTARY INFORMATION: For further information, please see the information provided in the direct final action, Approval of Virginia's Revision to move the Richmond and the Hampton Roads 8-Hour Ozone Nonattainment Areas from the list of nonattainment areas to the list of maintenance areas that is located in the ''Rules and Regulations'' section of this **Federal Register** publication.

Dated: October 20, 2008.

Donald Welsh,

Regional Administrator, Region III.

[FR Doc. E8–25671 Filed 10–28–08; 8:45 am]

BILLING CODE 6560–50–P

ENVIRONMENTAL PROTECTION AGENCY

40 CFR Parts 271 and 272

[EPA–R06–RCRA–2008; FRL–8727–4]

Texas: Final Authorization of State-Initiated Changes and Incorporation by Reference of State Hazardous Waste Management Program

AGENCY: Environmental Protection Agency (EPA).

ACTION: Proposed rule.

SUMMARY: During a review of Texas' regulations, EPA identified a variety of State-initiated changes to Texas' hazardous waste program under the Resource Conservation and Recovery Act, as amended (RCRA), for which the State had not previously sought authorization. EPA proposes to authorize the State for the program changes. In addition, EPA proposes to codify in the regulations entitled ''Approved State Hazardous Waste Management Programs'', Texas' authorized hazardous waste program. EPA will incorporate by reference into the Code of Federal Regulations (CFR) those provisions of the State regulations that are authorized and that EPA will enforce under RCRA. In the ''Rules and Regulations'' section of this **Federal Register**, the EPA is authorizing the changes to the Texas program, and codifying and incorporating by reference the State's hazardous waste program as an immediate final rule. EPA did not make a proposal prior to the immediate final rule because we believe these actions are not controversial and do not expect comments that oppose them. We have explained the reasons for this authorization and incorporation by reference in the preamble to the immediate final rule. Unless we get written comments which oppose this authorization and incorporation by reference during the comment period, the immediate final rule will become effective on the date it establishes, and we will not take further action on this proposal. If we get comments that oppose these actions, we will withdraw the immediate final rule and it will not take effect. We will then respond to public comments in a later final rule based on this proposal. You may not have another opportunity for comment. If you want to comment on this action, you must do so at this time.

DATES: Send written comments by November 28, 2008.

ADDRESSES: Send written comments to Alima Patterson, Region 6, Regional Authorization Coordinator, or Julia Banks, Codification Coordinator, (6PD–O), Multimedia Planning and Permitting Division at the address shown below. You can examine copies of the materials that form the basis for this authorization and incorporation by reference during normal business hours at the following location: EPA Region 6, 1445 Ross Avenue, Dallas, Texas 75202–2733, phone number (214) 665–8533 or (214) 665–8178. Comments may also be submitted electronically or through hand delivery/courier; please follow the detailed instructions in the **ADDRESSES** section of the immediate final rule which is located in the Rules section of this **Federal Register**.

FOR FURTHER INFORMATION CONTACT: Alima Patterson, (214) 665–8533.

SUPPLEMENTARY INFORMATION: For additional information, please see the immediate final rule published in the

''Rules and Regulations'' section of this **Federal Register**.

Dated: September 17, 2008.

Richard E. Greene,

Regional Administrator, EPA Region 6.

[FR Doc. E8–25587 Filed 10–28–08; 8:45 am]

BILLING CODE 6560–50–P

DEPARTMENT OF COMMERCE

National Oceanic and Atmospheric Administration

50 CFR Parts 622 and 640

[Docket No. O70717349–7570–02]

RIN 0648–AV61

Fisheries of the Caribbean, Gulf of Mexico, and South Atlantic; Amendments to the Spiny Lobster Fishery Management Plans for the Caribbean and Gulf of Mexico and South Atlantic

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

ACTION: Proposed rule; request for comments.

SUMMARY: NMFS issues this proposed rule that would implement Amendment 4 to the Fishery Management Plan for the Spiny Lobster Fishery of Puerto Rico and the U.S. Virgin Islands (Caribbean FMP) prepared by the Caribbean Fishery Management Council (Caribbean Council) and Amendment 8 to the Fishery Management Plan for the Spiny Lobster Fishery of the Gulf of Mexico and South Atlantic (Gulf and South Atlantic FMP) prepared by the Gulf of Mexico and South Atlantic Fishery Management Councils (Gulf and South Atlantic Councils). This proposed rule would establish two minimum size restrictions for importation of spiny lobster into the United States -one applicable to spiny lobster imported into any place subject to the jurisdiction of the United States other than Puerto Rico or the U.S. Virgin Islands, and a more restrictive minimum size limit that applies to Puerto Rico and the U.S. Virgin Islands. In addition, this proposed rule would prohibit importation of egg-bearing spiny lobsters and importation of spiny lobster tail meat that is not in whole tail form with the exoskeleton attached. The intended effect of this proposed rule is to enhance the conservation of the spiny lobster resource and improve effectiveness of law enforcement related to such conservation.

DATES: Written comments must be received on or before December 15, 2008.

ADDRESSES: You may submit comments on the proposed rule, identified by 0648–AV61, by any of the following methods:

- Electronic Submissions: Submit all electronic public comments via the Federal e-Rulemaking Portal: *http://www.regulations.gov*. Follow the instructions for submitting comments.
- Mail: Jason Rueter, Southeast Regional Office, NMFS, 263 13th Avenue South, St. Petersburg, FL 33701.
- Fax: 727–824–5308; Attention: Jason Rueter.

Instructions: All comments received are a part of the public record and will generally be posted to *http://www.regulations.gov* without change. All Personal Identifying Information (for example, name, address, etc.) voluntarily submitted by the commenter may be publicly accessible. Do not submit Confidential Business Information or otherwise sensitive or protected information.

NMFS will accept anonymous comments (enter N/A in the required fields if you wish to remain anonymous). You may submit attachments to electronic comments in Microsoft Word, Excel, WordPerfect, or Adobe PDF file formats only.

Copies of the combined Amendments 4 and 8, which include a draft environmental impact statement (DEIS), an initial regulatory flexibility analysis (IRFA), a regulatory impact review (RIR), and a social impact assessment/fishery impact statement may be obtained from Jason Rueter, Southeast Regional Office, NMFS, 263 13th Avenue South, St. Petersburg, FL 33701 or may be downloaded from the Southeast Regional Office website at *http://sero.nmfs.noaa.gov*.

FOR FURTHER INFORMATION CONTACT: Jason Rueter, telephone 727–824–5305; fax 727–824–5308; e-mail *jason.rueter@noaa.gov*.

SUPPLEMENTARY INFORMATION: The spiny lobster fishery of the Caribbean is managed under the Caribbean FMP prepared by the Caribbean Council and is implemented through regulations at 50 CFR part 622. The spiny lobster fishery of the Gulf of Mexico and South Atlantic is managed under the Gulf and South Atlantic FMP prepared by the Gulf and South Atlantic Councils and is implemented through regulations at 50 CFR part 640. Both regulations are implemented under the authority of the Magnuson-Stevens Fishery Conservation and Management Act (Magnuson-Stevens Act).

Background

Fisheries for spiny lobster (*Panulirus argus*) exist throughout its range in the Caribbean and tropical western Atlantic. Foreign and U.S. scientists and fisheries managers concur that the spiny lobster stock is fully exploited or over-exploited in much of its range.

Spiny lobster have a long (approximately 1-year) planktonic larval phase during which the larvae can be widely distributed by ocean currents over large geographic areas. Spiny lobster resources off Florida and the U.S. Caribbean are dependent, in part, on recruitment of larvae from areas in the Caribbean basin, outside the U.S. EEZ. Large quantities of spiny lobster are being harvested outside the U.S. exclusive economic zone (EEZ) at a size less than the respective continental U.S. and U.S. Caribbean minimum size limits, which are designed to prohibit harvest prior to the average size at sexual maturity. Much of this harvest outside the U.S. EEZ also involves spiny lobster less than the minimum size limits of the various foreign countries where such harvest occurs; however, enforcement has not been effective in curtailing this illegal activity.

Large-scale harvest of sexually immature, i.e. undersized, spiny lobster outside the U.S. EEZ adversely impacts the reproductive capacity of the spiny lobster resources and subsequent recruitment throughout the Caribbean and Florida. A reduction of fishing effort on undersized, sexually immature spiny lobster and a more comprehensive and effective enforcement mechanism would increase spawning stock biomass and increase potential yield from the fisheries. Representatives of the spiny lobster seafood industry have recognized that large-scale harvest of undersized spiny lobster adversely affect the spiny lobster resource throughout large portions of its range including areas subject to U.S. jurisdiction and have asked respective governments to address the illegal harvest and exportation of undersized spiny lobster tails to the United States.

The United States is a major importer of spiny lobster -importing over 194 million lb (88 million kg) over the past 10 years. The United States imports over 90 percent of the spiny lobster harvested in South and Central America and other Caribbean countries. The major exporters to the United States are the Bahamas, Brazil, Honduras, and Nicaragua.

There are two main issues associated with addressing the importation of undersized spiny lobster. First is the importation of spiny lobster that are

below the domestic size limits, and concurrently the mean size at sexual maturity, that were legally harvested in another nation's waters. Second is the importation of spiny lobster below the domestic size limits, that were illegally harvested in violation of harvest restrictions in other nations. This second activity is already illegal, as the Lacey Act prohibits the importation of spiny lobster harvested in violation of the laws of another nation.

Establishing minimum sizes for imports would address both of these issues. Prohibiting the importation of spiny lobster smaller than the domestic size limits will severely limit, if not eliminate, the market for legally and illegally harvested undersized spiny lobster. This is expected to serve as an incentive for countries that do not currently have such measures to implement consistent size limits to protect juvenile spiny lobster.

This proposed rule would also establish measures to enhance protection of egg-bearing spiny lobster and to enhance enforcement of the size requirements.

Measures Contained in This Proposed Rule

Minimum Size Limits for Importation of Spiny Lobster

This proposed rule would prohibit the importation of undersized, sexually immature spiny lobster into the United States by establishing minimum tail-weight requirements. Spiny lobster are rarely, if ever, imported as whole animals, but instead are imported as frozen tails. It is estimated over 99 percent of spiny lobster product enters the U.S. in frozen-tail form. It is standard industry practice for spiny lobster destined for importation into the United States to be marketed, sorted, shipped, stored, and sold based on tail-weight categories. In addition, U.S. Customs' entry documents and the seafood industry's sales, storage and bills of lading documents typically include the tail weights (in ounces), making this measurement an effective enforcement tool to track undersized lobster, even after it enters a U.S. port.

This proposed rule would establish two minimum size limits that would apply to importation of spiny lobster into the United States -one that would apply any place subject to the jurisdiction of the United States other than Puerto Rico or the U.S. Virgin Islands, and a more restrictive minimum size limit that would apply to Puerto Rico and the U.S. Virgin Islands. First, this proposed rule would prohibit any person from importing spiny lobster with less than 5 ounces (142 grams) tail weight (5 ounces (142 grams) is defined as a tail that weighs 4.2–5.4 ounces (119–153 grams)) into any place subject to the jurisdiction of the United States other than Puerto Rico or the U.S. Virgin Islands. If the documentation accompanying an imported spiny lobster (including but not limited to product packaging, customs entry forms, bills of lading, brokerage forms, or commercial invoices) indicates that the product does not satisfy the minimum tail-weight requirement, the person importing such spiny lobster would have the burden to prove that such spiny lobster actually does satisfy the minimum tail-weight requirement or that such spiny lobster has a tail length of 5.5 inches (13.97 cm) or greater or that such spiny lobster has or had a carapace length of greater than 3.0 inches (7.62 cm). If the imported product itself does not satisfy the minimum tail-weight requirement, the person importing such spiny lobster would have the burden to prove that such spiny lobster has a tail length of 5.5 inches (13.97 cm) or greater or that such spiny lobster has or had a carapace length of greater than 3.0 inches (7.62 cm). If the burden is satisfied, such spiny lobster would be considered to be in compliance with the minimum 5–ounce (142–gram) tail-weight requirement.

Second, the proposed rule would also prohibit any person from importing into Puerto Rico or the U.S. Virgin Islands any spiny lobster of less than 6.0 ounces (170 grams) tail weight (6 ounces (170 grams) is defined as a tail that weighs 5.9–6.4 ounces (167–181 grams)). If the documentation accompanying an imported spiny lobster (including but not limited to product packaging, customs entry forms, bills of lading, brokerage forms, or commercial invoices) indicates that the product does not satisfy the minimum tail-weight, the person importing such spiny lobster would have the burden to prove that such spiny lobster actually does satisfy the minimum tail-weight requirement or that such spiny lobster has a tail length of 6.2 inches (15.75 cm) or greater or that such spiny lobster has or had a carapace length of 3.5 inches (8.89 cm) or greater. If the imported product itself does not satisfy the minimum tail-weight requirement, the person importing such spiny lobster would have the burden to prove that such spiny lobster has a tail length of 6.2 inches (15.75 cm) or greater or that such spiny lobster has or had a carapace length of 3.5 inches (8.89 cm) or greater. If the burden is satisfied such spiny lobster would be considered to be in compliance with the minimum 6–ounce (170–gram) tail-weight requirement.

These proposed minimum tail-weight requirements correspond to the existing minimum size limits applicable to the U.S. fisheries in the continental United States and in Puerto Rico and the U.S. Virgin Islands, respectively.

Other Import Restrictions

This proposed rule would also prohibit importation of spiny lobster tail meat in other than whole tail form with the exoskeleton attached and would prohibit importation of egg-bearing spiny lobster or those from which eggs or the abdominal appendages to which eggs attach (swimmerets or pleopods) have been removed or stripped. Prohibiting importation of tail meat in other than whole tail form is necessary for effective enforcement of the tail-weight (or tail-length) requirement. Because the vast majority of tail meet is imported in whole tail form, any associated adverse economic impacts are expected to be minimal and would be offset by conservation benefits. The prohibitions related to egg-bearing spiny lobster would provide further protection for sexually mature female spiny lobster and would enhance the reproductive capacity of the resource.

Availability of Amendments 4 and 8

Additional background and rationale for the measures discussed above are contained in Amendments 4 and 8. The availability of Amendments 4 and 8 was announced in the **Federal Register** on October 15, 2008 (73 FR 61015). Written comments on Amendments 4 and 8 must be received by 5 p.m., eastern time, on December 15, 2008. All comments received on Amendments 4 and 8 or on this proposed rule during their respective comment periods will be addressed in the preamble to the final rule.

Classification

Pursuant to section 304(b)(1)(A) of the Magnuson-Stevens Act, the NMFS Assistant Administrator has determined that this proposed rule is consistent with Amendments 4 and 8, other provisions of the Magnuson-Stevens Act, and other applicable law, subject to further consideration after public comment.

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

NMFS prepared a DEIS for this amendment. A notice of availability for the DEIS was published on June 27, 2008 (73 FR 36503).

NMFS prepared an IRFA, as required by section 603 of the Regulatory Flexibility Act, for this proposed rule. The IRFA describes the economic impact this proposed rule, if adopted, would have on small entities. A description of the action, why it is being considered, and the objectives of, and legal basis for this action are contained at the beginning of this section in the preamble and in the **SUMMARY** section of the preamble. A copy of the full analysis is available from NMFS (see **ADDRESSES**). A summary of the IRFA follows.

The Magnuson-Stevens Act provides the statutory basis for the proposed rule. The proposed rule would implement importation standards for spiny lobster, *Panulirus argus*.

The purpose of the proposed rule is to implement importation standards that will increase law enforcement's ability to effectively prevent the importation of undersized spiny lobster, spiny lobster with eggs or from which eggs have been removed, and spiny lobster tail meat in any form other than a whole tail with the exoskeleton attached.

No duplicate, overlapping or conflicting Federal rules have been identified.

The primary entities that are expected to be affected would be businesses that import spiny lobster into the United States from countries: (1) with legal minimum size standards that are less than those proposed or without such standards, and (2) without legal prohibitions against harvesting female lobsters with eggs, detaching their eggs and/or removing pleopods (swimmerets), or (3) without prohibitions on marketing spiny lobster tail meat in a form other than a whole tail with the exoskeleton attached.

Businesses that import spiny lobster are expected to be within the following industries: Fish and Seafood Merchant Wholesalers (NAICS 424460), Fish and Seafood Markets (NAICS 445220), Fish and Frozen Seafood Processing (NAICS 311712), Packaged Frozen Food Merchant Wholesalers (NAICS 424420), and Supermarkets and Other Grocery, Except Convenience, Stores (NAICS 445110). The Small Business Administration (SBA) has established that a business in one of these industries is a small business if it is independently owned and operated, not dominant in its field of operation (including its affiliates), and if it has no more than 100 employees (NAICS 424460 and 424420), 500 employees (NAICS 311712), $6.5 million in annual receipts (NAICS 445220) or $25 million in annual receipts (NAICS 445110). According to Firm Size Data (*www.sba.gov/advo/research/data.html*), in 2005 there were: 2,243 firms in NAICS 424460 and at least 1,935 of those firms were small businesses; 2,761 firms in NAICS 424420 and at least 2,113 of them were small businesses; 504 firms in NAICS 311712 and 482 of them were small businesses; 43,686 firms in NAICS 445110 and at least 35,511 of them were small businesses; and 2,118 firms in NAICS 445220 and at least 2,008 were small businesses.

The U.S. is the largest importer of spiny lobster. From 2002 through 2007, U.S. rock lobster imports, which includes spiny lobster, originated from 17 countries that harvest spiny lobster (Brazil, Bahamas, Belize, Colombia, Costa Rica, Dominican Republic, Guatemala, Haiti, Honduras, Jamaica, Martinique, Mexico, Nicaragua, Panama, Trinidad and Tobago, Turks and Caicos Islands, and Venezuela), and of these countries, only Costa Rica, Guatemala, and Trinidad and Tobago have no harvest-size standards for spiny lobster. Additionally, a preliminary review of Panama fishing laws has not shown such a standard. Of the 13 countries with known harvest-size standards, 7 have legal size standards for spiny lobster that meet or exceed the proposed 5–ounce (142–gram) minimum tail weight that would apply anywhere subject to the jurisdiction of the United States (excluding Puerto Rico and the U.S. Virgin Islands where a more restrictive 6–ounce (170–gram) minimum tail weight would apply). These 7 countries are: The Bahamas, Colombia, Dominican Republic, Honduras, Turks and Caicos Islands, Nicaragua, and Venezuela. Thus, the 5–ounce (142–gram) minimum tail weight proposed by this rule would affect small businesses that import frozen spiny lobster from the following countries of origin into anywhere subject to the jurisdiction of the U.S., excluding Puerto Rico or the U.S. Virgin Islands: The Bahamas, Belize, Brazil, Colombia, Jamaica, Martinique, Mexico, Nicaragua, Panama, and Trinidad and Tobago.

Many of the 17 countries of origin that harvest spiny lobster also prohibit harvest of berried (egg-bearing) lobsters and removal of pleopods. The Bahamas, Brazil, Belize, Colombia, Costa Rica, Dominican Republic, Haiti, Honduras, Jamaica, Mexico, Nicaragua, Panama, Turks and Caicos Islands, and Venezuela prohibit taking of berried lobsters. Hence, the prohibition against importation of berried lobsters would not affect these countries. However, the prohibition against importation of berried lobsters could affect spiny lobster imports from Guatemala, Martinique and Trinidad and Tobago. The Bahamas and Belize have laws that prohibit the removal of pleopods. Consequently, the prohibition against importation of spiny lobster with their pleopods removed may affect imports from Brazil, Colombia, Costa Rica, Dominican Republic, Guatemala, Haiti, Honduras, Jamaica, Martinique, Mexico, Nicaragua, Panama, Trinidad and Tobago, Turks and Caicos Islands, and Venezuela.

U.S. Customs data show there were no imports of rock lobster into the U.S. Virgin Islands from 2001 through 2007. Consequently, it is expected that there are no small businesses that import spiny lobster into the U.S. Virgin Islands and would be affected by this proposed rule. The same data show imports of rock lobster into Puerto Rico originated from The Bahamas, Dominican Republic and Honduras, which have legal size standards less than the minimum legal standards of Puerto Rico and the U.S. Virgin Islands. Both Puerto Rico and the U.S. Virgin Islands, however, prohibit the possession of spiny lobster with a carapace less than 3.5 inches (8.89 cm), which, in turn, prohibits the importation of lobsters that do not meet their size standard. Puerto Rico also prohibits possession of berried lobsters. Therefore, the proposed prohibition against importation of berried lobsters should not affect small businesses that import spiny lobster into Puerto Rico. Furthermore, preliminary evidence suggests little to none of the spiny lobster imports into Puerto Rico include meat with the exoskeleton removed.

This proposed rule would also prohibit importation of spiny lobster with their pleopods removed. Most imports of spiny lobster are parts of or whole lobster with the meat attached to the exoskeleton. Hence, this particular prohibition is expected to affect a small minority of imports.

The Western Central Atlantic Fishery Commission has reported that harvesting and trading of spiny lobster below the minimum legal size is a serious problem, especially in Brazil. It has also been reported to be a problem in Nicaragua, Honduras and the Bahamas. From 2002 through 2007, of the top four countries of origin of imported frozen rock lobster and other sea crawfish (HS 030611000) that harvest spiny lobster, about 32 percent of frozen rock lobster and other sea crawfish by value were imported from Brazil, followed by about 21 percent from the Bahamas, about 18 percent from Honduras, and 16 percent from Nicaragua, for a total of about 86 percent of the frozen rock lobster imports from countries that harvest spiny lobster. The

remaining countries of origin are Colombia (about 4 percent), Belize (about 3 percent), Mexico (about 3 percent), Jamaica (about 2 percent), Panama (about 1 percent), and Dominican Republic, Turks and Caicos Islands, Haiti, Costa Rica, Guatemala, Venezuela, Trinidad and Tobago, and Martinique, all under one percent.

During the same period, U.S. imports of non-frozen rock lobster and other sea crawfish (HS 030621000) from countries of origin that also harvest spiny lobster were Costa Rica, Guatemala, Honduras, Jamaica, Mexico, Nicaragua, Turks and Caicos Islands, and Venezuela. Because Honduras, Nicaragua, Turks and Caicos Islands, and Venezuela have minimum size standards that are equivalent to the proposed size standards that would apply anywhere subject to the United States, except Puerto Rico or the U.S. Virgin Islands, this proposed rule would affect small businesses that import non-frozen spiny lobster from the following countries of origin: Costa Rica, Guatemala, Jamaica, and Mexico. About 93 percent of the non-frozen rock lobster imports by value from countries of origin that harvest spiny lobster are from Mexico, and increasingly these imports from Mexico have been live lobsters. Collectively, the imports of non-frozen rock lobster from these four countries of origin (Costa Rica, Guatemala, Jamaica, and Mexico) represent about 94 percent of the non-frozen imports by value for countries that harvest spiny lobster.

Frozen imports of rock lobster represent the large majority of rock lobster imports. During the period from 2002 through 2007, of the top four countries of origin that harvest spiny lobster, about 32 percent of frozen rock lobster and other sea crawfish were imported from Brazil, followed by about 21 percent from the Bahamas, about 18 percent from Honduras, and 16 percent from Nicaragua, for a total of about 86 percent of the rock lobster imports from these countries.

Customs data from January 22, 2004, through December 31, 2007, for frozen rock lobster imports from the top four countries of origin (Brazil, Bahamas, Honduras, and Nicaragua), indicate 98 businesses imported frozen rock lobster from these 4 countries. Thirteen of these businesses are foreign-based, and at least 3 are subsidiaries of much larger companies. Of the remaining 82 businesses, 45 of them imported frozen rock lobster in 1 year, followed by 17 businesses in 2 years, 10 in 3 years, and 10 in 4 years. The number of small businesses in any 1 year that imported frozen rock lobster from one or more of these countries ranged from 47 to 32 from 2004 through 2007, with an average of 38 annually. Therefore, 86 percent of the annual imports of frozen rock lobster from countries that harvest spiny lobster are brought in by an average of 38 small businesses. This is indicative that this proposed rule would not have an adverse impact on a substantial number of small or large businesses.

List of Subjects

50 CFR Part 622

Fisheries, Fishing, Puerto Rico, Reporting and recordkeeping requirements, Virgin Islands.

50 CFR Part 640

Fisheries, Fishing, Incorporation by reference, Reporting and recordkeeping requirements.

Dated: October 23, 2008.

Samuel D. Rauch III,

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

For the reasons set out in the preamble, 50 CFR parts 622 and 640 are proposed to be amended as follows:

PART 622—FISHERIES OF THE CARIBBEAN, GULF, AND SOUTH ATLANTIC

1. The authority citation for part 622 continues to read as follows:

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

2. In § 622.1, a sentence is added to the end of paragraph (b) to read as follows:

§ 622.1 Purpose and scope.

* * * * *

(b) * * * This part also governs importation of Caribbean spiny lobster into Puerto Rico or the U.S. Virgin Islands.

* * * * *

3. In § 622.2, the definition of ''Import'' is added in alphabetical order to read as follows:

§ 622.2 Definitions and acronyms.

* * * * *

Import means, for the purpose of §§ 622.1(b) and 622.50 only,—

(1) To land on, bring into, or introduce into, or attempt to land on, bring into, or introduce into, Puerto Rico or the U.S. Virgin Islands, whether or not such landing, bringing, or introduction constitutes an importation within the meaning of the customs laws of the United States; but

(2) Does not include any activity described in paragraph (1) of this definition with respect to fish caught in the U.S. exclusive economic zone by a vessel of the United States.

* * * * *

4. In § 622.3, paragraph (a) is revised and paragraph (f) is added to read as follows:

§ 622.3 Relation to other laws and regulations.

(a) The relation of this part to other laws is set forth in § 600.705 of this chapter and paragraphs (b) through (f) of this section.

* * * * *

(f) Regulations pertaining to additional prohibitions on importation of spiny lobster into any place subject to the jurisdiction of the United States other than Puerto Rico or the U.S. Virgin Islands are set forth in part 640 of this chapter.

5. In § 622.7, paragraph (ii) is added to read as follows:

§ 622.7 Prohibitions.

* * * * *

(ii) Fail to comply with the Caribbean spiny lobster import prohibitions, as specified in § 622.50.

6. Section 622.50 is added to subpart C to read as follows:

§ 622.50 Caribbean spiny lobster import prohibitions.

(a) *Minimum size limits for imported spiny lobster.* There are two minimum size limits that apply to importation of spiny lobster into the United States -one that applies any place subject to the jurisdiction of the United States other than Puerto Rico or the U.S. Virgin Islands, and a more restrictive minimum size limit that applies to Puerto Rico and the U.S. Virgin Islands.

(1) No person may import a Caribbean spiny lobster with less than a 6–ounce (170–gram) tail weight into Puerto Rico or the U.S. Virgin Islands. For the purposes of paragraph (a) of this section, a 6–ounce (170–gram) tail weight is defined as a tail that weighs 5.9–6.4 ounces (167–181 grams). If the documentation accompanying an imported Caribbean spiny lobster (including but not limited to product packaging, customs entry forms, bills of lading, brokerage forms, or commercial invoices) indicates that the product does not satisfy the minimum tail-weight, the person importing such Caribbean spiny lobster has the burden to prove that such Caribbean spiny lobster actually does satisfy the minimum tail-weight requirement or that such Caribbean spiny lobster has a tail length of 6.2 inches (15.75 cm) or greater or that such Caribbean spiny lobster has or had a carapace length of 3.5 inches (8.89 cm) or greater. If the imported product itself

does not satisfy the minimum tail-weight requirement, the person importing such Caribbean spiny lobster has the burden to prove that such Caribbean spiny lobster has a tail length of 6.2 inches (15.75 cm) or greater or that such Caribbean spiny lobster has or had a carapace length of 3.5 inches (8.89 cm) or greater. If the burden is satisfied such Caribbean spiny lobster will be considered to be in compliance with the minimum 6–ounce (170–gram) tail-weight requirement.

(2) See § 640.27 of this chapter regarding the minimum size limit that applies to spiny lobster imported into any place subject to the jurisdiction of the United States other than Puerto Rico or the U.S. Virgin Islands.

(b) *Additional Caribbean spiny lobster import prohibitions*—(1) *Prohibition related to tail meat*. No person may import into any place subject to the jurisdiction of the United States Caribbean spiny lobster tail meat that is not in whole tail form with the exoskeleton attached.

(2) *Prohibitions related to egg-bearing spiny lobster*. No person may import into any place subject to the jurisdiction of the United States Caribbean spiny lobster with eggs attached or Caribbean spiny lobster from which eggs or pleopods (swimmerets) have been removed or stripped. Pleopods (swimmerets) are the first five pairs of abdominal appendages.

PART 640—SPINY LOBSTER FISHERY OF THE GULF OF MEXICO AND SOUTH ATLANTIC

7. The authority citation for part 640 continues to read as follows:

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

8. Section 640.1 is revised to read as follows:

§ 640.1 Purpose and scope.

(a) The purpose of this part is to implement the Fishery Management Plan for the Spiny Lobster Fishery of the Gulf of Mexico and South Atlantic prepared by the South Atlantic and Gulf of Mexico Fishery Management Councils under the Magnuson-Stevens Act.

(b) This part governs conservation and management of spiny lobster and slipper (Spanish) lobster in the EEZ in the Atlantic Ocean and Gulf of Mexico off the Atlantic and Gulf of Mexico states from the Virginia/North Carolina border south and through the Gulf of Mexico. This part also governs importation of spiny lobster into any place subject to the jurisdiction of the United States.

(c) An owner or operator of a vessel that has legally harvested spiny lobsters in the waters of a foreign nation and possesses spiny lobster, or separated tails, in the EEZ incidental to such foreign harvesting is exempt from the requirements of this part 640, except for § 640.27 with which such an owner or operator must comply, provided proof of lawful harvest in the waters of a foreign nation accompanies such lobsters or tails.

9. In § 640.2, the definition for ''Regional Director'' is removed, the definition for ''Spiny lobster'' is revised, and definitions for ''Import'' and ''Regional Administrator'' are added in alphabetical order to read as follows:

§ 640.2 Definitions.

* * * * *

Import means—

(1) To land on, bring into, or introduce into, or attempt to land on, bring into, or introduce into, any place subject to the jurisdiction of the United States, whether or not such landing, bringing, or introduction constitutes an importation within the meaning of the customs laws of the United States; but

(2) Does not include any activity described in paragraph (1) of this definition with respect to fish caught in the U.S. exclusive economic zone by a vessel of the United States.

* * * * *

Regional Administrator (RA) ,for the purposes of this part, means the Administrator, Southeast Region, NMFS, 263 13th Avenue South, St. Petersburg, FL 33701, or a designee.

* * * * *

Spiny lobster means the species *Panulirus argus*, or a part thereof.

* * * * *

10. In § 640.3, paragraph (a) is revised, and paragraph (c) is added to read as follows:

§ 640.3 Relation to other laws.

(a) The relation of this part to other laws is set forth in § 600.705 of this chapter and paragraphs (b) and (c) of this section.

* * * * *

(c) Regulations pertaining to additional prohibitions on importation of spiny lobster into Puerto Rico or the U.S. Virgin Islands are set forth in part 622 of this chapter.

11. In § 640.7, introductory text is revised, and paragraph (w) is added to read as follows:

§ 640.7 Prohibitions.

In addition to the general prohibitions specified in § 600.725 of this chapter, it is unlawful for any person to do any of the following:

* * * * *

(w) Fail to comply with the spiny lobster import prohibitions, as specified in § 640.27.

12. Section 640.8 is revised to read as follows:

§ 640.8 Facilitation of enforcement.

See § 600.730 of this chapter.

13. Section 640.9 is revised to read as follows:

§ 640.9 Penalties.

See § 600.735 of this chapter.

14. Section 640.27 is added to subpart B to read as follows:

§ 640.27 Spiny lobster import prohibitions.

(a) *Minimum size limits for imported spiny lobster*. There are two minimum size limits that apply to importation of spiny lobster into the United States -one that applies any place subject to the jurisdiction of the United States other than Puerto Rico or the U.S. Virgin Islands, and a more restrictive minimum size limit that applies to Puerto Rico and the U.S. Virgin Islands.

(1) No person may import a spiny lobster with less than a 5–ounce (142–gram) tail weight into any place subject to the jurisdiction of the United States excluding Puerto Rico and the U.S. Virgin Islands. For the purposes of paragraph (a) of this section, a 5–ounce (142–gram) tail weight is defined as a tail that weighs 4.2–5.4 ounces (119–153 grams). If the documentation accompanying an imported spiny lobster (including but not limited to product packaging, customs entry forms, bills of lading, brokerage forms, or commercial invoices) indicates that the product does not satisfy the minimum tail-weight requirement, the person importing such spiny lobster has the burden to prove that such spiny lobster actually does satisfy the minimum tail-weight requirement or that such spiny lobster has a tail length of 5.5 inches (13.97 cm) or greater or that such spiny lobster has or had a carapace length of greater than 3.0 inches (7.62 cm). If the imported product itself does not satisfy the minimum tail-weight requirement, the person importing such spiny lobster has the burden to prove that such spiny lobster has a tail length of 5.5 inches (13.97 cm) or greater or that such spiny lobster has or had a carapace length of greater than 3.0 inches (7.62 cm). If the burden is satisfied, such spiny lobster will be considered to be in compliance with the minimum 5–ounce (142–gram) tail-weight requirement.

(2) See § 622.50 of this chapter regarding a more restrictive minimum

size limit that applies to spiny lobster imported into Puerto Rico or the U.S. Virgin Islands.

(b) Additional spiny lobster import prohibitions -(1) Prohibition related to tail meat. No person may import into any place subject to the jurisdiction of the United States spiny lobster tail meat that is not in whole tail form with the exoskeleton attached.

(2) Prohibitions related to egg-bearing spiny lobster. No person may import into any place subject to the jurisdiction of the United States spiny lobster with eggs attached or spiny lobster from which eggs or pleopods (swimmerets) have been removed or stripped. Pleopods (swimmerets) are the first five pairs of abdominal appendages.

PART 640—[AMENDED]

15. In addition to the amendments set forth above, in 50 CFR part 640, remove the words ''Magnuson Act'' and ''Regional Director'' and add in their places the words ''Magnuson-Stevens Act'' and ''Regional Administrator'', respectively, wherever they occur.

[FR Doc. E8–25823 Filed 10–28–08; 8:45 am]

BILLING CODE 3510–22–S

Notices

Federal Register
Vol. 73, No. 210
Wednesday, October 29, 2008

This section of the FEDERAL REGISTER contains documents other than rules or proposed rules that are applicable to the public. Notices of hearings and investigations, committee meetings, agency decisions and rulings, delegations of authority, filing of petitions and applications and agency statements of organization and functions are examples of documents appearing in this section.

DEPARTMENT OF AGRICULTURE

Food and Nutrition Service

Agency Information Collection Activities: Proposed Collection; Comment Request National School Lunch Program

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 this proposed information collection. This collection is an extension to a currently approved collection for the National School Lunch Program.

DATES: Written comments must be submitted by December 29, 2008.

ADDRESSES: Comments may be sent to: Lynn Rodgers-Kuperman, Chief, Program Analysis and Monitoring Branch, Child Nutrition Division, Food and Nutrition Service, U.S. Department of Agriculture, 3101 Park Center Drive, Alexandria, VA 22302. Comments will also be accepted through the Federal eRulemaking Portal. Go to *http://www.regulation.gov*, and follow the online instructions for submitting comments electronically.

Comments are invited on: (a) Whether the proposed collection of information is necessary for the proper performance of the functions of the agency, including whether the information shall have practical utility; (b) the accuracy of the agency's estimate of the burden of the proposed collection of information, 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 use of appropriate automated, electronic, mechanical, or other technological collection techniques or other forms of information technology.

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, Alexandria, Virginia 22302, Room 640.

All responses to this notice will be summarized and included in the request for OMB approval. All comments will be a matter of public record.

FOR FURTHER INFORMATION CONTACT: Requests for additional information should be directed to Ms. Lynn Rodgers-Kuperman at (703) 305–2590.

SUPPLEMENTARY INFORMATION:

Title: 7 CFR Part 210, National School Lunch Program.

OMB Number: 0584–0006.

Expiration Date: 03/31/2009.

Type of Request: Extension of currently approved information collection.

Abstract: The Richard B. Russell National School Lunch Act authorizes the National School Lunch Program (NSLP). The Department of Agriculture provides States with general and special cash assistance and donations of foods to assist schools in serving nutritious lunches to children each school day. Participating schools must serve lunches that are nutritionally adequate and to the extent practicable, ensure that participating children gain a full understanding of the relationship between proper eating and good health. The Department of Agriculture prescribes the nutritional and other programmatic requirements for those school lunches in accordance with Section 9 of the NSLP, 42 U.S.C. 1758.

The reporting and recordkeeping burdens associated with administration of the NSLP by States and participating schools proposed for extension under this notice reflect both those in place since this collection was extended in 2006, and an increase made in support of implementation of the Department of Agriculture's rule, Procurement Requirements for the National School Lunch, School Breakfast and Special Milk Programs. The public received an opportunity to comment on this increase when the proposed rule was published (69 FR 78340 *et seq.*, December 30, 2004); the final rule was published on October 31, 2007 (72 FR 61479, *et seq.*), and the associated reporting and recordkeeping burden was approved by the Office of Management and Budget under OMB Control Number 0584–0544. The Department of Agriculture subsequently merged this increased burden with the overall burden associated with the NSLP under OMB Control Number 0584–0006, effective February 15, 2008. Therefore, while no new (unapproved) burdens are proposed under this extension, the notice invites the general public and other public agencies to comment on the consolidated NSLP information collection burden for the first time since the new procurement rule took effect.

Burden: This information is required to administer and operate this program in accordance with the NSLA. The Program is administered at the State and school food authority (SFA) levels and the operations include the submission and approval of applications, execution of agreements submission of claims, payment of claims, providing monitoring and technical assistance. All of the reporting and recordkeeping requirements associated with the NSLP are currently approved by the Office of Management and Budget and in force.

Affected Public: 57 State Agencies, 20,710 School Food Authorities, 100,398 Schools.

Estimated Number of Respondents: 121,165.

Estimated Number of Responses per Respondent: 19.94.

Estimated Total Annual Responses: 2,416,184.

Estimated Time per Response: 0.542.

Estimated Total Reporting Annual Burden Hours: 1,309,918.

Number of Recordkeepers: 121,335.

Estimated Number of Responses per Respondent: 242.

Estimated Total Annual Responses: 29,385,446.

Estimated Time per Response: .28.

Estimated Total Annual Recordkeeping Burden Hours: 8,173,313.

Total Request Annual Reporting and Recordkeeping Burden Hours: 9,483,232.

Dated: October 23, 2008.

Eric Steiner,

Acting Administrator, Food and Nutrition Service.

[FR Doc. E8–25770 Filed 10–28–08; 8:45 am]

BILLING CODE 3410–30–P

APPALACHIAN STATES LOW-LEVEL RADIOACTIVE WASTE COMMISSION

Annual Meeting

Time and Date: 10 a.m.–12:30 p.m. November 7, 2008.

Place: Harrisburg Hilton and Towers, One North Second Street, Harrisburg, PA 17101.

Status: The meeting will be open to the public. However, the executive session will be closed to the public.

Matters To Be Considered:

Portions Open To the Public: The primary purpose of this meeting is to (1) Review the independent auditors' report of Commission's financial statements for fiscal year 2007–2008; (2) Review the Low-Level Radioactive Waste (LLRW) generation information for 2007; (3) Consider a proposal budget for fiscal year 2009–2010; (4) Review regional and national issues regarding LLRW storage, management and disposal; and (5) Elect the Commission's Officers.

Portions Closed To the Public: Executive Session, if deemed necessary, will be announced at the meeting.

Contact Person for More Information: Rich Janati, Administrator of the Commission, at 717–787–2163.

Rich Janati,

Administrator, Appalachian Compact Commission.

[FR Doc. E8–25774 Filed 10–28–08; 8:45 am]

BILLING CODE 0000–00–P

DEPARTMENT OF COMMERCE

Submission for OMB Review; Comment Request

The Department of Commerce will submit to the Office of Management and Budget (OMB) for clearance the following proposal for collection of information under the provisions of the Paperwork Reduction Act (44 U.S.C. Chapter 35).

Agency: International Trade Administration (ITA).

Title: Survey of International Air Travelers (SIAT)

Form Number(s): None.

OMB Control Number: 0625–0227.

Type of Request: Extension of a currently approved collection.

Burden Hours: 24,850.

Number of Respondents: 99,400.

Average Hours per Response: 15 minutes.

Needs and Uses: The International Trade Administration, Manufacturing and Services, Office of Travel and Tourism Industries' (OTTI)—''Survey of International Air Travelers'' is the only source for estimating international travel and passenger fare exports and imports for this country. This program also supports the U.S. Department of Commerce, Bureau of Economic Analysis mandate to collect and report this type of information which is used to calculate Gross Domestic Products for the United States. In addition, this project serves as the core data source for the OTTI. Numerous reports and analyses are developed to assist businesses in increasing U.S. exports in international travel. An economic impact of international travel on state economies, visitation estimates, traveler profiles, presentations and reports are generated by the OTTI to help Federal Government agencies and the travel industry better understand the international market. The data have been a staple of information for the U.S. Departments of State and Transportation in support of their ''Open Skies'' negotiations with foreign trading partners. It is also a service that Department of Commerce provides to travel industry businesses seeking to increase international travel and passenger fare exports for the country. It provides the only comparable estimates of nonresident visitation to the states and cities within the U.S. as well as U.S. resident travel abroad. Traveler characteristics data are also collected to help travel related businesses better understand the international travelers to and from the U.S. so they can develop targeted marketing and other planning related materials.

Affected Public: Individuals or households.

Frequency: Monthly.

Respondent's Obligation: Voluntary.

OMB Desk Officer: Wendy Liberante, (202) 395–3647.

Copies of the above information collection proposal can be obtained by calling or writing Diana Hynek, Departmental Paperwork Clearance Officer, (202) 482–0266, Department of Commerce, Room 6625, 14th and Constitution Avenue, NW., Washington, DC 20230 (or via the Internet at *dHynek@doc.gov*.

Written comments and recommendations for the proposed information collection should be sent within 30 days of publication of this notice to Wendy Liberante, OMB Desk Officer, Fax number (202) 395–7285 or via the Internet at *Wendy_L._Liberante@omb.eop.gov*.

Dated: October 23, 2008.

Gwellnar Banks,

Management Analyst, Office of the Chief Information Officer.

[FR Doc. E8–25730 Filed 10–28–08; 8:45 am]

BILLING CODE 3510–DR–P

DEPARTMENT OF COMMERCE

Bureau of Industry and Security

Proposed Information Collection; Comment Request; Requests to Appointment of a Technical Advisory Committee

AGENCY: Bureau of Industry and Security, Department of 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 29, 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 Larry Hall, BIS ICB Liaison, (202) 482–4895, *lhall@bis.doc.gov*.

SUPPLEMENTARY INFORMATION:

I. Abstract

This collection of information is required by Export Administration Regulations and the Federal Advisory Committee Act. The Technical Advisory Committees (TACs) were established to advise and assist the U.S. Government on export control matters. Under this collection, interested parties may submit a request to BIS to establish a new TAC. BIS provides administrative support for these Committees.

II. Method of Collection

Submitted in paper form.

III. Data

OMB Control Number: 0694–0100.

Form Number(s): None.

Type of Review: Regular submission.

Affected Public: Business or other for-profit organization; not-for-profit institutions.

Estimated Number of Respondents: 1.

Estimated Time Per Response: 5 hours.

Estimated Total Annual Burden Hours: 5 hours.

Estimated Total Annual Cost to Public: $0.

IV. Request for Comments

Comments are invited on: (a) Whether the proposed collection of information is necessary for the proper performance of the functions of the agency, including whether the information shall have practical utility; (b) the accuracy of the agency's estimate of the burden (including hours and cost) of the proposed collection of information; (c) ways to enhance the quality, utility, and clarity of the information to be collected; and (d) ways to minimize the burden of the collection of information on respondents, including through the use of automated collection techniques or other forms of information technology.

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 23, 2008.

Gwellnar Banks,

Management Analyst, Office of the Chief Information Officer.

[FR Doc. E8–25703 Filed 10–28–08; 8:45 am]

BILLING CODE 3510–33–P

DEPARTMENT OF COMMERCE

Bureau of Industry and Security

[Docket No. 0810091342–81349–01]

Effectiveness of Licensing Procedures for Agricultural Commodities to Cuba

AGENCY: Bureau of Industry and Security, Commerce.

ACTION: Request for comments.

SUMMARY: The Bureau of Industry and Security (BIS) is requesting public comments on the effectiveness of its licensing procedures as defined in the Export Administration Regulations for the export of agricultural commodities to Cuba. BIS will include a description of these comments in its biennial report to the Congress, as required by the Trade Sanctions Reform and Export Enhancement Act of 2000 (22 U.S.C. 7201 *et seq.*), as amended.

DATES: Comments must be received by November 28, 2008.

ADDRESSES: Written comments may be sent by email to *publiccomments@bis.doc.gov* with a reference to ''TSRA 2008 Report'' in the subject line. Written comments may be submitted by mail to Regulatory Policy Division, Bureau of Industry and Security, U.S. Department of Commerce, Room 2705, Washington, DC 20230 with a reference to ''TSRA 2008 Report.''

FOR FURTHER INFORMATION CONTACT: Alan W. Christian, Office of Nonproliferation and Treaty Compliance, Telephone: (202) 482–4252. Additional information on BIS procedures and our previous biennial report under the Trade Sanctions Reform and Export Enhancement Act, as amended, are available at *http://www.bis.doc.gov/licensing/TSRA_TOC.html*. Copies of these materials may also be requested by contacting the Office of Nonproliferation and Treaty Compliance.

The public comments are displayed on BIS's Freedom of Information Act (FOIA) Web site at *http://www.bis.doc.gov/foia*. If you have technical difficulties accessing this Web site, please call BIS's Office of Administration at (202) 482–2165 for assistance.

SUPPLEMENTARY INFORMATION: The Bureau of Industry and Security (BIS) authorizes exports of agricultural commodities to Cuba pursuant to section 906(a) of the Trade Sanctions Reform and Export Enhancement Act of 2000 (TSRA) (22 U.S.C. 7205(a)), under the procedures set forth in section 740.18 of the Export Administration Regulations (EAR) (15 CFR 740.18). These are the only licensing procedures in the EAR currently in effect pursuant to the requirements of section 906(a) of TSRA.

Under the provisions of section 906(c) of TSRA (22 U.S.C. 7205(c)), BIS must submit a biennial report to the Congress on the operation of the licensing system implemented pursuant to section 906(a) for the preceding two-year period. This report is to include the number and types of licenses applied for, the number and types of licenses approved, the average amount of time elapsed from the date of filing of a license application until the date of its approval, the extent to which the licensing procedures were effectively implemented, and a description of comments received from interested parties during a 30-day public comment period about the effectiveness of the licensing procedures. BIS is currently preparing a biennial report on the operation of the licensing system for the two-year period from October 1, 2006 through September 30, 2008.

By this notice, BIS requests public comments on the effectiveness of the licensing procedures for the export of agricultural commodities to Cuba set forth under section 740.18 of the EAR. Parties submitting comments are asked to be as specific as possible. All comments received by the close of the comment period will be considered by BIS in developing the report to Congress.

All information relating to the notice will be a matter of public record and will be available for public inspection and copying. In the interest of accuracy and completeness, BIS requires written comments.

Dated: October 24, 2008.

Christopher R. Wall,

Assistant Secretary for Export Administration.

[FR Doc. E8–25834 Filed 10–28–08; 8:45 am]

BILLING CODE 3510–33–P

DEPARTMENT OF COMMERCE

International Trade Administration

A–549–817

Certain Hot–Rolled Carbon Steel Flat Products from Thailand: Extension of Time Limit for Final Results of Changed Circumstances Review

AGENCY: Import Administration, International Trade Administration, Department of Commerce.

SUMMARY: The U.S. Department of Commerce (''the Department'') is extending the time limit for the final results of the changed circumstances review of the antidumping duty order on certain hot–rolled carbon steel flat products (''hot–rolled steel'') from Thailand. The period of review is October 1, 2005, through September 30, 2006. This extension is made pursuant to 19 CFR 351.216(e).

FOR FURTHER INFORMATION CONTACT: John Drury or Angelica Mendoza, AD/CVD Operations, Office 7, Import Administration, International Trade Administration, U.S. Department of Commerce, 14th Street and Constitution Avenue NW, Washington, DC 20230; telephone: (202) 482–0195 or (202) 482–3019, respectively.

SUPPLEMENTARY INFORMATION: BACKGROUND: On November 29, 2001, the Department published the antidumping duty order on hot–rolled steel from Thailand. *See Antidumping Duty Order: Certain Hot–Rolled Carbon Steel Flat Products From Thailand*, 66 FR 59562 (November 29, 2001) (''*Hot–Rolled Steel Order*''). In November 2004, in the course of the 2003 - 2004 administrative review, Sahaviriya Steel Industries Public Company Limited (''SSI'') requested revocation of the Hot–Rolled Steel Order with respect to its sales of subject merchandise. *See Certain Hot–Rolled Carbon Steel Flat Products From Thailand; Preliminary Results of Antidumping Duty Administrative Review and Intent to*

Revoke and Rescind in Part, 70 FR 73197 (December 9, 2005).

In its revocation request, SSI agreed to immediate reinstatement in the Hot–Rolled Steel Order, so long as any producer or reseller is subject to the order, should the Department determine that SSI ''sold the subject merchandise at less than normal value.'' *See* SSI's November 30, 2004, letter to the Department requesting revocation. On May 17, 2006, the Department revoked the antidumping duty order with respect to SSI after having determined that SSI sold the merchandise at not less than normal value for a period of at least three consecutive years.[1] *See Revocation*.

As the result of an adequate allegation from a domestic interested party in this proceeding (*i.e.*, United States Steel Corporation), the Department, pursuant to section 751(b)(1) of the Tariff Act of 1930, as amended (''the Act''), is now conducting a changed circumstances review to determine whether SSI has resumed dumping hot–rolled steel and whether the antidumping order should be reinstated for hot–rolled steel from Thailand manufactured and exported by SSI. *See Initiation of Antidumping Duty Changed Circumstances Review: Certain Hot–Rolled Carbon Steel Flat Products from Thailand*, 73 FR 18766 (April 7, 2008).

Extension of Time Limits for Final Results

Under 19 CFR 351.216(e), the Department will issue the final results of a changed circumstances review within 270 days after the date on which the Department initiates the changed circumstances review. Currently, the final results of this antidumping duty changed circumstances review on hot–rolled steel from Thailand are due by December 23, 2008. Due to the nature of this changed circumstances review and the complexities of the issues, the Department finds that it is not practicable to complete the review within this time period. Moreover, the Department plans to conduct verification of SSI's sales responses. As a result, pursuant to 19 CFR 351.302(b), we are extending the time limit for completion of the review by 120 days. *See Certain Pasta from Italy: Notice of Extension of Final Results of Antidumping Duty Changed Circumstances Review*, 73 FR 46871 (August 12, 2008), and *Polyethylene Terephthalate Film Sheet and Strip from the Republic of Korea: Extension of Time Limit for Final Results of Changed Circumstances Review*, 73 FR 6931 (February 6, 2008). Therefore, the final results will be due no later than April 22, 2009. The Department intends to issue the preliminary results of the changed circumstances review no later than December 23, 2008.

This notice is published in accordance with sections 751(b) and 771(i) of the Act.

Dated: October 23, 2008.

Stephen J. Claeys,

Deputy Assistant Secretary for Import Administration.

[FR Doc. E8–25825 Filed 10–28–08; 8:45 am]

BILLING CODE 3510–DS–S

[1] The three administrative reviews forming the basis of the revocation are: 1) the May 3, 2001, through October 31, 2002, review, *Certain Hot-Rolled Carbon Steel Flat Products From Thailand: Final Results and Partial Rescission of Antidumping Duty Administrative Review*, 69 FR 19388 (April 13, 2004); 2) the November 1, 2002, through October 31, 2003, review, *Certain Hot-Rolled Carbon Steel Flat Products from Thailand: Rescission of Antidumping Duty Administrative Review*, 69 FR 18349 (April 7, 2004); and 3) the November 1, 2003, through October 31, 2004, review, *Certain Hot-Rolled Carbon Steel Flat Products from Thailand: Final Results of Antidumping Duty Administrative Review, Partial Revocation of Antidumping Duty Order and Partial Rescission of Antidumping Duty Administrative Review*, 71 FR 28659 (May 17, 2006)(''*Revocation*'').

DEPARTMENT OF COMMERCE

International Trade Administration

A–583–816

Certain Stainless Steel Butt–Weld Pipe Fittings from Taiwan: Extension of Time Limit for the Final Results of Antidumping Duty Administrative Review

AGENCY: Import Administration, International Trade Administration, Department of Commerce.

SUMMARY: The Department of Commerce (the Department) is extending the time limit for the final results of the administrative review of the antidumping duty order on certain stainless steel butt–weld pipe fittings from Taiwan. The period of review is June 1, 2006, through May 31, 2007. This extension is made pursuant to section 751(a)(3)(A) of the Tariff Act of 1930, as amended (the Act).

EFFECTIVE DATE: October 29, 2008.

FOR FURTHER INFORMATION CONTACT: John Drury or Angelica Mendoza, Office 7, AD/CVD Operations, Import Administration, International Trade Administration, U.S. Department of Commerce, 14th Street and Constitution Avenue, NW, Washington, DC 20230, telephone: (202) 482–0195 and (202) 482–3019, respectively.

SUPPLEMENTARY INFORMATION:

Background

On July 8, 2008, the Department published the preliminary results of the administrative review of the antidumping duty order on certain stainless steel butt–weld pipe fittings from Taiwan covering the period June 1, 2006, through May 31, 2007. *See Certain Stainless Steel Butt–Weld Pipe Fittings from Taiwan: Preliminary Results of Antidumping Duty Administrative Review and Notice of Intent to Rescind in Part*, 73 FR 38972 (July 8, 2008). The final results for the antidumping duty administrative review of certain stainless steel butt–weld pipe fittings from Taiwan are currently due no later than November 5, 2008.

Extension of Time Limits for Final Results

Section 751(a)(3)(A) of the Act requires the Department to issue the final results in an administrative review within 120 days of the publication of the preliminary results. However, if it is not practicable to complete the review within this time period, section 751(a)(3)(A) of the Act allows the Department to extend the time limit for the final results to 180 days (or 300 days if the Department does not extend the time limit for the preliminary results) from the date of publication of the preliminary results.

In accordance with section 751(a)(3)(A) of the Act, and 19 CFR 351.213(h)(2), the Department finds that it is not practicable to complete the review within the original time frame (*i.e.*, by November 5, 2008). Specifically, the Department requires additional time to review complex issues raised in parties' case briefs including substantive comments relating to the respondent's qualification for a constructed export price offset and the Department's use of facts available with respect to certain aspects of respondent's cost reporting. Because it is not practicable to complete this administrative review within the time limit mandated by section 751(a)(3)(A) of the Act and 19 CFR 351.213(h)(2), the Department is extending the time limit for completion of the final results of this administrative review by 60 days, to no later than January 4, 2009. Because January 4, 2009 falls on a Sunday, the new deadline for the final results will be the next business day, Monday, January 5, 2009. See 19 CFR 351.303(b).

This notice is published pursuant to section 751(a)(3)(A) of the Act.

Dated: October 23, 2008.

Stephen J. Claeys,

Deputy Assistant Secretary for Import Administration.

[FR Doc. E8–25827 Filed 10–28–08; 8:45 am]

BILLING CODE 3510–DS–S

DEPARTMENT OF COMMERCE

International Trade Administration

Initiation of Antidumping and Countervailing Duty Administrative Reviews and Deferral of Administrative Review

AGENCY: Import Administration, International Trade Administration, Department of Commerce.

SUMMARY: The Department of Commerce (the Department) has received requests to conduct administrative reviews of various antidumping and countervailing duty orders and findings with September anniversary dates. In accordance with the Department's regulations, we are initiating those administrative reviews. The Department also received a request to defer the initiation of an administrative review for one antidumping duty order.

EFFECTIVE DATE: October 29, 2008.

FOR FURTHER INFORMATION CONTACT: Sheila E. Forbes, Office of AD/CVD Operations, Customs Unit, Import Administration, International Trade Administration, U.S. Department of Commerce, 14th Street and Constitution Avenue, NW, Washington, DC 20230, telephone: (202) 482–4697.

SUPPLEMENTARY INFORMATION:

Background

The Department has received timely requests, in accordance with 19 CFR 351.213(b) (2007), for administrative reviews of various antidumping and countervailing duty orders and findings with September anniversary dates. The Department also received a request in accordance with 19 CFR 351.213(c) to defer for one year the initiation of the August 1, 2008 through July 31, 2008, antidumping duty administrative review of the antidumping duty order on Floor–Standing Metal–Top Ironing Tables from the People's Republic of China.

Notice of No Sales

Under 19 CFR 351.213(d)(3), the Department may rescind a review where there are no exports, sales, or entries of subject merchandise during the respective period of review listed below. If a producer or exporter named in this notice of initiation had no exports, sales, or entries during the period of review, it should notify the Department within 30 days of publication of this notice in the **Federal Register**. The Department will consider rescinding the review only if the producer or exporter, as appropriate, submits a properly filed and timely statement certifying that it had no exports, sales, or entries of subject merchandise during the period of review. All submissions must be made in accordance with 19 CFR 351.303 and are subject to verification in accordance with section 782(i) of the Tariff Act of 1930, as amended (the Act). Six copies of the submission should be submitted to the Assistant Secretary for Import Administration, International Trade Administration, Room 1870, U.S. Department of Commerce, 14th Street & Constitution Avenue, NW, Washington, DC 20230. Further, in accordance with 19 CFR 351.303(f)(1)(i), a copy of each request must be served on every party on the Department's service list.

Respondent Selection

In the event the Department limits the number of respondents for individual examination for administrative reviews, the Department intends to select respondents based on U.S. Customs and Border Protection (CBP) data for U.S. imports during the period of review (POR). We intend to release the CBP data under Administrative Protective Order (APO) to all parties having an APO within five days of publication of this initiation notice and to make our decision regarding respondent selection within 20 days of publication of this **Federal Register** notice. The Department invites comments regarding the CBP data and respondent selection within 10 calendar days of publication of this **Federal Register** notice.

Separate Rates

In proceedings involving non–market economy (NME) countries, the Department begins with a rebuttable presumption that all companies within the country are subject to government control and, thus, should be assigned a single antidumping duty deposit rate. It is the Department's policy to assign all exporters of merchandise subject to an administrative review in an NME country this single rate unless an exporter can demonstrate that it is sufficiently independent so as to be entitled to a separate rate.

To establish whether a firm is sufficiently independent from government control of its export activities to be entitled to a separate rate, the Department analyzes each entity exporting the subject merchandise under a test arising from the *Final Determination of Sales at Less Than Fair Value: Sparklers from the People's Republic of China*, 56 FR 20588 (May 6, 1991) (Sparklers), as amplified by *Final Determination of Sales at Less Than Fair Value: Silicon Carbide from the People's Republic of China*, 59 FR 22585 (May 2,1994) (*Silicon Carbide*).

In accordance with the separate–rates criteria, the Department assigns separate rates to companies in NME cases only if respondents can demonstrate the absence of both *de jure* and *de facto* government control over export activities.

All firms listed below that wish to qualify for separate–rate status in the administrative reviews involving NME countries must complete, as appropriate, either a separate–rate application or certification, as described below. For these administrative reviews, in order to demonstrate separate–rate eligibility, the Department requires entities for whom a review was requested, that were assigned a separate rate in the most recent segment of this proceeding in which they participated, to certify that they continue to meet the criteria for obtaining a separate rate. The Separate Rate Certification form will be available on the Department's website at http://www.trade.gov/ia on the date of publication of this **Federal Register**. In responding to the certification, please follow the ''Instructions for Filing the Certification'' in the Separate Rate Certification. Separate Rate Certifications are due to the Department no later than 30 calendar days after publication of this **Federal Register** notice. The deadline and requirement for submitting a Certification applies equally to NME–owned firms, wholly foreign–owned firms, and foreign sellers who purchase and export subject merchandise to the United States.

For entities that have not previously been assigned a separate rate, to demonstrate eligibility for such, the Department requires a Separate Rate Status Application.

The Separate Rate Status Application will be available on the Department's website at http://www.trade.gov/ia on the date of publication of this **Federal Register** notice. In responding to the Separate Rate Status Application, refer to the instructions contained in the application. Separate Rate Status Applications are due to the Department no later than 60 calendar days of publication of this **Federal Register** notice. The deadline and requirement for submitting a Separate Rate Status Application applies equally to NME–owned firms, wholly foreign–owned firms, and foreign sellers that purchase and export subject merchandise to the United States.

INITIATION OF REVIEWS:

In accordance with sections 19 CFR 351.221(c)(1)(i), we are initiating administrative reviews of the following antidumping and countervailing duty orders and findings. We intend to issue the final results of these reviews not later than September 30, 2009. Also, in accordance with 19 CFR 351.213(c) we are deferring for one year the initiation of the August 1, 2007 through July 31, 2008 administrative review of the antidumping duty order on Floor–Standing Metal–Top Ironing Tables from the People's Republic of China (A–570–888) with respect to one exporter.

Antidumping Duty Proceedings	Period to be Reviewed
INDIA: Certain Lined Paper Products.	
A–533–843	9/1/07 - 8/31/08
Agility Logistics Pvt. Ltd..	
Blue Bird India Ltd..	
Ceal Shipping Logistics Pvt. Ltd..	
Cello International Pvt. Ltd..	
Corporate Stationary Pvt. Ltd..	
Creative Divya.	
Exel India Pvt. Ltd..	
FFI International.	
Global Art India Inc..	
International Greetings Pvt. Ltd..	
Karim General Handmade Paper DIAR.	
Kejriwal Paper Limited.	
M/S Super ImpEx.	
Magic International.	
Marigold ExIm Pvt. Ltd..	
Marisa International.	
Navneet Publications (India) Ltd..	
Pentagon Waterlines Pvt. Ltd..	
Pioneer Stationery Pvt. Ltd..	
Rajvansh International.	
Ria ImpEx Pvt. Ltd..	
Riddhi Enterprises.	
SAB International.	
TKS Overseas.	
Unlimited Accessories Worldwide.	
V. Joshi Co..	
THE PEOPLE'S REPUBLIC OF CHINA: Certain Lined Paper Products[1].	
A–570–901	9/1/07 - 8/31/08
Watanabe Group (consisting of the following companies):.	
Watanabe Paper Products (Shanghai) Co., Ltd..	
Watanabe Paper Products (Linqing) Co., Ltd..	
Hotrock Stationery (Shenzhen) Co., Ltd..	
Shanghai Lian Li Paper Products Co., Ltd..	
THE PEOPLE'S REPUBLIC OF CHINA: Freshwater Crawfish Tail Meat[2].	
A–570–848	9/1/07 - 8/31/08
Shanghai Now Again International Trading Co., Ltd..	
Xiping Opeck Food Co., Ltd..	
Yancheng Hi–King Agriculture Developing Co., Ltd..	
Countervailing Duty Proceedings.	
INDIA: Certain Lined Paper Products.	
C–533–844	1/1/07 - 12/31/07
Blue Bird India Ltd..	
Navneet Publications (India) Ltd..	
Suspension Agreements.	
None..	
Deferral of Initiation of Administrative Review.	
PEOPLE'S REPUBLIC OF CHINA: Floor–Standing Metal–Top Ironing Tables.	
A–570–888	8/1/07 - 7/31/08
Since Hardware (Guangzhou) Co., Ltd.[3].	

[1] If one of the above named companies does not qualify for a separate rate, all other exporters of certain lined paper products from the People's Republic of China who have not qualified for a separate rate are deemed to be covered by this review as part of the single PRC entity of which the named exporters are a part.

[2] If one of the above named companies does not qualify for a separate rate, all other exporters of freshwater crawfish tail meat from the People's Republic of China who have not qualified for a separate rate are deemed to be covered by this review as part of the single PRC entity of which the named exporters are a part.

[3] In the initiation notice that published on 09/30/2008 (73 FR 56795), we inadvertently overlooked Since Hardware's request for deferral of initiation for the 2007-2008 administrative review. We hereby correct this oversight and are deferring the initiation of this review, pursuant to 19 CFR 351.213(c).

During any administrative review covering all or part of a period falling between the first and second or third and fourth anniversary of the publication of an antidumping duty order under 19 CFR 351.211 or a determination under 19 CFR 351.218(f)(4) to continue an order or suspended investigation (after sunset

review), the Secretary, if requested by a domestic interested party within 30 days of the date of publication of the notice of initiation of the review, will determine, consistent with *FAG Italia v. United States*, 291 F.3d 806 (Fed. Cir. 2002), as appropriate, whether antidumping duties have been absorbed by an exporter or producer subject to the review if the subject merchandise is sold in the United States through an importer that is affiliated with such exporter or producer. The request must include the name(s) of the exporter or producer for which the inquiry is requested.

Interested parties must submit applications for disclosure under administrative protective orders in accordance with 19 CFR 351.305.

These initiations and this notice are in accordance with section 751(a) of the Act, (19 USC 1675(a)) and 19 CFR 351.221(c)(1)(I).

Dated: October 23, 2008.

Stephen J. Claeys,

Deputy Assistant Secretary for Import Administration.

[FR Doc. E8–25828 Filed 10–28–08; 8:45 am]

BILLING CODE 3510–DS–S

DEPARTMENT OF COMMERCE

International Trade Administration

North American Free-Trade Agreement, Article 1904; NAFTA Panel Reviews: Notice of Completion of Panel Review

AGENCY: NAFTA Secretariat, United States Section, International Trade Administration, Department of Commerce.

ACTION: Notice of Completion of Panel Review of the final injury determination in the five year antidumping review by the U.S. International Trade Commission, in the matter of Stainless Steel Sheet and Strip from Mexico, Secretariat File No. USA–MEX–2005–1904–06.

SUMMARY: Pursuant to the Order of the Binational Panel dated September 10, 2008, affirming the final determination described above, the panel review was completed on September 22, 2008.

FOR FURTHER INFORMATION CONTACT: Marsha Ann Y. Iyomasa, Deputy United States Secretary, NAFTA Secretariat, Suite 2061, 14th and Constitution Avenue, NW., Washington, DC 20230, (202) 482–5438.

SUPPLEMENTARY INFORMATION: On September 10, 2008, the Binational Panel issued an order affirming the final determination of the United States International Trade Commission (ITC) concerning stainless steel sheet and strip from Mexico. The Secretariat was instructed to issue a Notice of Completion of Panel Review on the 31st day following the issuance of the Notice of Final Panel Action, if a request for an Extraordinary Challenge was not filed. No such request was filed. Therefore, on the basis of the Panel Order and Rule 80 of the *Article 1904 Panel Rules,* the Panel Review was completed and the panelists discharged from their duties effective October 23, 2008.

Dated: October 23, 2008.

Marsha Ann Y. Iyomasa,

Deputy United States Secretary, NAFTA Secretariat.

[FR Doc. E8–25750 Filed 10–28–08; 8:45 am]

BILLING CODE 3510–GT–P

DEPARTMENT OF COMMERCE

International Trade Administration

Withdrawal of Application for Duty–Free Entry of Scientific Instruments

Pursuant to Section 6(c) of the Educational, Scientific and Cultural Materials Importation Act of 1966 (Pub. L. 89–651; as amended by Pub. L. 106–36; 80 Stat. 897; 15 CFR part 301), the Department of Commerce determines whether instruments of equivalent scientific value, for the purposes for which the instruments shown below are intended to be used, are being manufactured in the United States. Applications may be examined between 8:30 A.M. and 5:00 P.M. in Room 2104, Statutory Import Programs Staff, U.S. Department of Commerce 14th and Constitution Ave., NW, Room 2104 Washington, D.C. 20230.

Docket Number: 08–046. Applicant: Rice University, 6100 Main Street MS–61, Houston, TX 77005. Instrument: Gemstar camera with photon counting sensitivity. Manufacturer: Photonic Science, United Kingdom. Intended Use: The instrument is intended to be used to record x–ray diffraction from lipidic structures. Application accepted by Commissioner of Customs and Border Protection: August 22, 2008.

The Department of Commerce received the Rice University application from Customs and Border Protection on September 2, 2008. The application was reviewed and the Department determined that the application did not have sufficient information for the Department to determine whether an equivalent instrument was being produced in the United States. In accordance with section 301.5(a)(2), the Department contacted the University to afford them an opportunity to supplement the application by providing further information regarding the purpose of the instrument and whether an equivalent instrument was being produced in the United States. Rice University then informed the Department that they had discovered price was the determining factor in selecting the instrument. The University decided to withdraw the application for the x–ray Gemstar Camera with Photon counting sensitivity since they had been made aware that price could not be considered a pertinent specification in the comparison of instruments, in accordance with section 301.2(s).

.

Therefore, the Department of Commerce had discontinued the processing of this application, in accordance with section 301.5(g) of the regulations. *See 15 CFR 301.5(g).*

Faye Robinson,

Director, Statutory Import Programs Staff, Import Administration.

[FR Doc. E8–25824 Filed 10–28–08; 8:45 am]

BILLING CODE 3510–DS–S

DEPARTMENT OF COMMERCE

National Oceanic and Atmospheric Administration

RIN 0648–AW65

Atlantic Highly Migratory Species; Atlantic Shark Management Measures

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

ACTION: Extension of comment period.

SUMMARY: In order to provide additional opportunities for the public, the Atlantic Regional Fishery Management Councils, the Atlantic and Gulf States Marine Fisheries Commissions, and other interested parties to comment on the Notice of Intent (NOI) and issues and options scoping presentation for Amendment 3 to the 2006 Consolidated Highly Migratory Species (HMS) Fishery Management Plan (FMP), NMFS is extending the scoping comment period for this action. On May 7, 2008, NMFS published an NOI to initiate an amendment to the 2006 Consolidated HMS FMP, including an Environmental Impact Statement. On July 2, 2008, NMFS published a notice that announced the availability of an issues and options scoping presentation describing potential measures for inclusion in Amendment 3 to the 2006 Consolidated HMS FMP and provided

details for four scoping meetings to discuss and collect comments on these issues. Based on the July 2, 2008, notice, the comment period was scheduled to conclude on October 31, 2008. NMFS is now extending the comment period until November 14, 2008. Comments received by NMFS on the NOI and issues and options scoping presentation as well as in the scoping meetings will be used in the development of Amendment 3 to the 2006 Consolidated HMS FMP.

DATES: The deadline for comments on the NOI and the issues and options scoping presentation has been extended from October 31, 2008, as published on July 2, 2008 (73 FR 37932), to 5:00 p.m. on November 14, 2008.

ADDRESSES: As published on July 2, 2008 (73 FR 37932), written comments on this action should be sent to Karyl Brewster–Geisz, Highly Migratory Species Management Division, by any of the following methods:

• E–mail: *SCS__Scoping@noaa.gov*. Include the following identifier in the subject line: ''Scoping Comments on Amendment 3 to Consolidated HMS FMP''.

• Written: 1315 East–West Highway, Silver Spring, MD 20910. Please mark the outside of the envelope ''Scoping Comments on Amendment 3 to Consolidated HMS FMP.''

• Fax: (301) 713–1917.

For a copy of the related stock assessments or any other related documents, please contact Jessica Beck at (301) 713–2347.

FOR FURTHER INFORMATION CONTACT: Jessica Beck at (301) 713–2347, or Jackie Wilson at (240) 338–3936.

SUPPLEMENTARY INFORMATION: The Atlantic shark fisheries are managed under the authority of the Magnuson–Stevens Fishery Conservation and Management Act (Magnuson–Stevens Act). The 2006 Consolidated HMS FMP is implemented by regulations at 50 CFR part 635.

On May 7, 2008 (73 FR 25665), NMFS published an NOI that summarized the 2007 Small Coastal Shark (SCS) stock assessment conducted for Atlantic sharpnose, blacknose, bonnethead, and finetooth sharks. The NOI also described NMFS's determination of the status of these stocks based on the results of the 2007 stock assessment, including the determination that blacknose sharks are overfished with overfishing occurring. As a result of this determination, NMFS is taking steps to amend current shark management measures via a third FMP amendment to the 2006 Consolidated HMS FMP. On July 2, 2008 (73 FR 37932), NMFS published a notice that announced the availability of an issues and options scoping presentation describing potential measures for inclusion in Amendment 3 to the 2006 Consolidated HMS FMP and provided details for four scoping meetings to discuss and collect comments on these issues. NMFS anticipates completing this amendment and any related documents by January 1, 2010.

Due to the timing of the Gulf of Mexico Fishery Management Council's meeting at the end of October, NMFS is extending the comment period to provide additional opportunity for the public, the Atlantic Regional Fishery Management Councils, the Atlantic and Gulf States Marine Fisheries Commissions, and other interested parties to comment on potential SCS management measures. These comments will assist NMFS in determining the options for rulemaking to conserve and manage shark resources and fisheries, consistent with the Magnuson–Stevens Act and the 2006 Consolidated HMS FMP.

Dated: October 24, 2008.

Emily H. Menashes,

Acting Director, Office of Sustainable Fisheries, National Marine Fisheries Service.

[FR Doc. E8–25830 Filed 10–28–08; 8:45 am]

BILLING CODE 3510–22–S

DEPARTMENT OF DEFENSE

GENERAL SERVICES ADMINISTRATION

NATIONAL AERONAUTICS AND SPACE ADMINISTRATION

[OMB Control No. 9000–XXXX]

Submission for OMB Review; Small Business Size Rerepresentation

AGENCIES: Department of Defense (DOD), General Services Administration (GSA), and National Aeronautics and Space Administration (NASA).

ACTION: Notice of request for comments regarding a new OMB clearance.

SUMMARY: Under the provisions of the Paperwork Reduction Act of 1995 (44 U.S.C. Chapter 35), the Federal Acquisition Regulation (FAR) Secretariat will be submitting to the Office of Management and Budget (OMB) a request for approval of a new information collection requirement regarding small business size rerepresentation. A request for public comments was published in the **Federal Register** at 72 FR 36852, July 5, 2007. No comments were received.

DATES: Submit comments on or before: November 28, 2008.

ADDRESSES: Submit comments regarding this burden estimate or any other aspect of this collection of information, including suggestions for reducing this burden to the Regulatory Secretariat (VPR), General Services Administration, Room 4041, 1800 F Street, NW., Washington, DC 20405. Please cite OMB Control No. 9000–XXXX, Small Business Size Rerepresentation, in all correspondence.

FOR FURTHER INFORMATION CONTACT Ms. Rhonda Cundiff, Contract Policy Division, GSA (202) 501–0044.

SUPPLEMENTARY INFORMATION:

A. Purpose

The purpose of implementing small business rerepresentation in the FAR is to ensure that small business size status is accurately represented and reported over the life of long-term contracts. The FAR also provides for provisions designed to ensure more accurate reporting of size status for contracts that are novated, merged or acquired by another business. This information is used by the SBA, Congress, Federal agencies and the general public for various reasons such as determining if agencies are meeting statutory goals, set-aside determinations, and market research.

B. Annual Reporting Burden

Respondents: 10,000.
Responses Per Respondent: 1.
Hours Per Response: 0.5.
Total Burden Hours: 5,000.

OBTAINING COPIES OF PROPOSALS: Requesters may obtain a copy of the information collection documents from the General Services Administration, Regulatory Secretariat (VPR), 1800 F Street, NW, Room 4041, Washington, DC 20405, telephone (202) 501–4755. Please cite OMB Control No. 9000–XXXX, Small Business Size Rerepresentation, in all correspondence.

Dated: October 23, 2008.

Al Matera,

Director, Office of Acquisition Policy.

[FR Doc. E8–25745 Filed 10–28–08; 8:45 am]

BILLING CODE 6820–EP–S

DEPARTMENT OF EDUCATION

Notice of Proposed Information Collection Requests

AGENCY: Department of Education.

SUMMARY: The IC Clearance Official, Regulatory Information Management Services, Office of Management, invites comments on the proposed information

collection requests as required by the Paperwork Reduction Act of 1995.

DATES: Interested persons are invited to submit comments on or before December 29, 2008.

SUPPLEMENTARY INFORMATION: Section 3506 of the Paperwork Reduction Act of 1995 (44 U.S.C. Chapter 35) requires that the Office of Management and Budget (OMB) provide interested Federal agencies and the public an early opportunity to comment on information collection requests. OMB may amend or waive the requirement for public consultation to the extent that public participation in the approval process would defeat the purpose of the information collection, violate State or Federal law, or substantially interfere with any agency's ability to perform its statutory obligations. The IC Clearance Official, Regulatory Information Management Services, Office of Management, publishes that notice containing proposed information collection requests prior to submission of these requests to OMB. Each proposed information collection, grouped by office, contains the following: (1) Type of review requested, e.g. new, revision, extension, existing or reinstatement; (2) Title; (3) Summary of the collection; (4) Description of the need for, and proposed use of, the information; (5) Respondents and frequency of collection; and (6) Reporting and/or Recordkeeping burden. OMB invites public comment.

The Department of Education is especially interested in public comment addressing the following issues: (1) Is this collection necessary to the proper functions of the Department; (2) will this information be processed and used in a timely manner; (3) is the estimate of burden accurate; (4) how might the Department enhance the quality, utility, and clarity of the information to be collected; and (5) how might the Department minimize the burden of this collection on the respondents, including through the use of information technology.

Dated: October 23, 2008.

Angela C. Arrington,

IC Clearance Official, Regulatory Information Management Services, Office of Management.

Federal Student Aid

Type of Review: Revision.

Title: Student Assistance General Provisions—Subpart I—Immigration—Status Confirmation.

Frequency: On occasion.

Affected Public: Businesses or other for-profit; Not-for-profit institutions; State, Local, or Tribal Gov't, SEAs or LEAs.

Reporting and Recordkeeping Hour Burden:

Responses: 78,848.

Burden Hours: 19,712.

Abstract: Collection of this information used for immigration status confirmation which reduces the potential of fraud and abuse caused by ineligible aliens receiving Federally subsidized student financial assistance under Title IV of the Higher Education Act of 1965, as amended (HEA). The respondent population is institutions of higher education which must submit a USCIS Form G–845 when automated secondary confirmation of the applicant's immigration match status fails.

Requests for copies of the proposed information collection request may be accessed from *http://edicsweb.ed.gov,* by selecting the ''Browse Pending Collections'' link and by clicking on link number 3897. When you access the information collection, click on ''Download Attachments'' to view. Written requests for information should be addressed to U.S. Department of Education, 400 Maryland Avenue, SW., LBJ, Washington, DC 20202–4537. Requests may also be electronically mailed to *ICDocketMgr@ed.gov* or faxed to 202–401–0920. Please specify the complete title of the information collection when making your request.

Comments regarding burden and/or the collection activity requirements should be electronically mailed to *ICDocketMgr@ed.gov.* Individuals who use a telecommunications device for the deaf (TDD) may call the Federal Information Relay Service (FIRS) at 1–800–877–8339.

[FR Doc. E8–25777 Filed 10–28–08; 8:45 am]

BILLING CODE 4000–01–P

DEPARTMENT OF EDUCATION

Notice of Proposed Information Collection Requests

AGENCY: Department of Education.

SUMMARY: The IC Clearance Official, Regulatory Information Management Services, Office of Management, invites comments on the proposed information collection requests as required by the Paperwork Reduction Act of 1995.

DATES: Interested persons are invited to submit comments on or before December 29, 2008.

SUPPLEMENTARY INFORMATION: Section 3506 of the Paperwork Reduction Act of 1995 (44 U.S.C. Chapter 35) requires that the Office of Management and Budget (OMB) provide interested Federal agencies and the public an early opportunity to comment on information collection requests. OMB may amend or waive the requirement for public consultation to the extent that public participation in the approval process would defeat the purpose of the information collection, violate State or Federal law, or substantially interfere with any agency's ability to perform its statutory obligations. The IC Clearance Official, Regulatory Information Management Services, Office of Management, publishes that notice containing proposed information collection requests prior to submission of these requests to OMB. Each proposed information collection, grouped by office, contains the following: (1) Type of review requested, e.g., new, revision, extension, existing or reinstatement; (2) Title; (3) Summary of the collection; (4) Description of the need for, and proposed use of, the information; (5) Respondents and frequency of collection; and (6) Reporting and/or Recordkeeping burden. OMB invites public comment.

The Department of Education is especially interested in public comment addressing the following issues: (1) Is this collection necessary to the proper functions of the Department; (2) will this information be processed and used in a timely manner; (3) is the estimate of burden accurate; (4) how might the Department enhance the quality, utility, and clarity of the information to be collected; and (5) how might the Department minimize the burden of this collection on the respondents, including through the use of information technology.

Dated: October 23, 2008.

Angela C. Arrington,

IC Clearance Official, Regulatory Information Management Services, Office of Management.

Federal Student Aid

Type of Review: Revision.

Title: Student Assistance General Provisions—Subpart J—Approval of Independently Administered Tests.

Frequency: On Occasion.

Affected Public: Businesses or other for-profit; Not-for-profit institutions; State, Local, or Tribal Gov't, SEAs or LEAs.

Reporting and Recordkeeping Hour Burden:

Responses: 360,010.

Burden Hours: 181,110.

Abstract: This request is for approval of the reporting requirements that are contained in the Student Assistance General Provisions regulations—Subpart J, governing the approval of State processes for assessments used to measure a student's skills and abilities,

as well as private test publisher submissions for approval by the Secretary and the administration of tests that may be used to determine a student's eligibility for assistance for the Title IV student financial assistance programs authorized under the Higher Education Act of 1965, as amended (HEA). The Secretary publishes a list of approved tests which can be used to establish the ability to benefit for a student who does not have a high school diploma or its equivalent for Title IV, HEA eligibility purposes.

Requests for copies of the proposed information collection request may be accessed from *http://edicsweb.ed.gov,* by selecting the ''Browse Pending Collections'' link and by clicking on link number 3877. When you access the information collection, click on ''Download Attachments'' to view. Written requests for information should be addressed to U.S. Department of Education, 400 Maryland Avenue, SW., LBJ, Washington, DC 20202–4537. Requests may also be electronically mailed to *ICDocketMgr@ed.gov* or faxed to 202–401–0920. Please specify the complete title of the information collection when making your request.

Comments regarding burden and/or the collection activity requirements should be electronically mailed to *ICDocketMgr@ed.gov.* Individuals who use a telecommunications device for the deaf (TDD) may call the Federal Information Relay Service (FIRS) at 1–800–877–8339.

[FR Doc. E8–25781 Filed 10–28–08; 8:45 am]

BILLING CODE 4000–01–P

DEPARTMENT OF EDUCATION

Teaching American History Grant Program

Catalog of Federal Domestic Assistance (CFDA) Number 84.215X.

AGENCY: Office of Innovation and Improvement, Department of Education.

ACTION: Notice of proposed revisions to selection criteria.

SUMMARY: The Assistant Deputy Secretary for Innovation and Improvement proposes to amend the final selection criteria governing the Teaching American History Grant Program (TAH) as published in the notice of final selection criteria and other application requirements (2005 Notice) in the **Federal Register** on April 15, 2005 (70 FR 19939). The 2005 Notice required the Secretary to use specific selection criteria when evaluating grant applications for the TAH program. The changes proposed in this notice would allow the Secretary to use an approach similar to that in 34 CFR 75.200 for establishing selection criteria in grant competitions. That is, the Secretary would have the flexibility to use selection criteria (i) established for the TAH program in the 2005 Notice, (ii) from the menu of general selection criteria in the Education Department General Administrative Regulations (EDGAR) in 34 CFR 75.210, (iii) based on statutory provisions in accordance with 34 CFR 75.209, or (iv) from any combination of (i) through (iii) for competitions in fiscal year (FY) 2009 and in subsequent years.

DATES: We must receive your comments on or before November 28, 2008.

ADDRESSES: Address all comments about this notice to Mia Howerton, U.S. Department of Education, 400 Maryland Avenue, SW., Room 4W212, Washington, DC 20202–5960.

If you prefer to send your comments by e-mail, use the following address: *Mia.Howerton@ed.gov.* You must include the term ''Teaching American History'' in the subject line of your electronic message.

FOR FURTHER INFORMATION CONTACT: Mia Howerton. Telephone: (202) 205–0147 or e-mail: *Mia.Howerton@ed.gov.*

If you use a telecommunications device for the deaf (TDD), call the Federal Relay Service (FRS), toll free, at 1–800–877–8339.

SUPPLEMENTARY INFORMATION:

Invitation to Comment: We invite you to submit comments regarding this notice. We invite you to assist us in complying with the specific requirements of Executive Order 12866 and its overall requirement of reducing regulatory burden that might result from this regulatory action. Please let us know of any further ways we could reduce potential costs or increase potential benefits while preserving the effective and efficient administration of the program.

During and after the comment period, you may inspect all public comments on this notice in room 4W212, 400 Maryland Avenue, SW., Washington, DC, between the hours of 8:30 a.m. and 4 p.m., Washington, DC, time, Monday through Friday of each week except Federal holidays.

Assistance to Individuals with Disabilities in Reviewing the Rulemaking Record: On request we will provide an appropriate accommodation or auxiliary aid to an individual with a disability who needs assistance to review the comments or other documents in the public rulemaking record for this regulatory action. If you want to schedule an appointment for this type of accommodation or auxiliary aid, please contact the person listed under **FOR FURTHER INFORMATION CONTACT**.

Purpose of Program: TAH is authorized under Title II, Part C, Subpart 4 of the Elementary and Secondary Education Act of 1965, as amended by the No Child Left Behind Act of 2001. The goal of the TAH program is to support activities that raise student achievement by improving teachers' knowledge, understanding, and appreciation of American history.

Program Authority: 20 U.S.C. 6721–6722.

Proposed Selection Criteria

Background

The Department's regulations in EDGAR govern, among other things, the Department's use of selection criteria to evaluate discretionary grant applications. Under § 75.200, the Secretary may use selection criteria based on statutory provisions in accordance with 34 CFR 75.209, selection criteria in program-specific regulations, selection criteria established under 34 CFR 75.210, or any combination of these. Section 75.210 provides a menu of selection criteria. For a competition, the Department selects from the menu one or more criteria that best enable us to identify the highest-quality applications consistent with the program purpose, statutory requirements, and any priorities established. Within each criterion, the Secretary may further define the criterion by selecting one or more specific factors.

The 2005 Notice established specific selection criteria by which the Department would evaluate TAH applications (Project Quality, Significance, Quality of Project Evaluation, and Quality of Management Plan) and other application requirements.

After using these specific criteria for the last three years, we have determined that the Department needs greater flexibility in using selection criteria to evaluate TAH program applications. Accordingly, we are proposing in this notice that, in addition to the criteria established for the TAH program in the 2005 Notice, the Secretary also may use selection criteria under § 75.210 and criteria based on the program statute under § 75.209, or any combination of these criteria for the purpose of evaluating grant applications under the TAH program. We believe that by expanding the range of selection criteria that could be used in a specific grant competition, we will be able to administer the TAH program more

effectively, better meet the program's statutory purposes and requirements, and better ensure that TAH projects are improving teacher content knowledge of traditional American history and improving student achievement in history.

Proposed Revision to Selection Criteria

The Assistant Deputy Secretary for Innovation and Improvement proposes that in addition to the selection criteria established in the 2005 Notice, the Secretary may use any of the selection criteria in § 75.210, criteria based on statutory requirements under § 75.209, or any combination of these when establishing selection criteria for a particular TAH competition. We may apply one or more of these criteria in any year in which this program is in effect. In the notice inviting applications or the application package, or both, we will announce the maximum possible points assigned to each criterion.

Note: This notice does *not* solicit applications. In any year in which we choose to use one or more selection criteria, we invite applications through a notice in the **Federal Register**.

Executive Order 12866

Potential Costs and Benefits

Under Executive Order 12866, we have assessed the potential costs and benefits of this regulatory action.

The potential costs associated with this proposed regulatory action are those resulting from statutory requirements and those we have determined to be necessary for administering this program effectively and efficiently.

In assessing the potential costs and benefits—both quantitative and qualitative—of this regulatory action, we have determined that the benefits would justify the costs.

We have also determined that this regulatory action would not unduly interfere with State, local, and tribal governments in the exercise of their governmental functions.

Summary of Potential Costs and Benefits

This proposed regulatory action affects only local educational agencies (LEAs) that are applying for assistance under the TAH program. This regulatory action would create flexibility for the Department to use selection criteria, other than those published in the 2005 Notice, for the 2009 TAH grant competition and those in subsequent years. We believe that any criterion from 34 CFR 75.209 or 34 CFR 75.210 that would be used in a future grant competition would not impose a financial burden that LEAs would not otherwise incur in the development and submission of a grant application under the TAH program and, under some circumstances, could reduce the financial burden of preparing a TAH grant application by a modest amount if, for example, the use of this flexibility resulted in fewer criteria or factors to be addressed in a grant application.

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.

This document provides early notification of our specific plans and actions for this program.

Alternative Format: Individuals with disabilities can obtain this document in an alternative format (e.g., braille, large print, audiotape, or computer diskette) on request to the program contact person listed under **FOR FURTHER INFORMATION CONTACT**.

Electronic Access to This Document: You can view this document, as well as all other documents of this Department published in the **Federal Register**, in text or Adobe Portable Document Format (PDF) on the Internet at the following site: *http://www.ed.gov/news/fedregister*.

To use PDF you must have Adobe Acrobat Reader, which is available free at this site. If you have questions about using PDF, call the U.S. Government Printing Office (GPO), toll free, at 1–888–293–6498; or in the Washington, DC, area at (202) 512–1530.

You may also view this document in text or PDF at the following site: *http://www.ed.gov/programs/teachinghistory/index.html*.

Note: The official version of this document is the document published in the **Federal Register**. Free Internet access to the official edition of the **Federal Register** and the Code of Federal Regulations is available on GPO Access at: *http://www.gpoaccess.gov/nara/index.html*.

Dated: October 24, 2008.

Douglas B. Mesecar,

Assistant Deputy Secretary for Innovation and Improvement.

[FR Doc. E8–25811 Filed 10–28–08; 8:45 am]

BILLING CODE 4000–01–P

DEPARTMENT OF ENERGY

Environmental Management Site-Specific Advisory Board, Paducah

AGENCY: Department of Energy (DOE).

ACTION: Notice of open meeting.

SUMMARY: This notice announces a meeting of the Environmental Management Site-Specific Advisory Board (EM SSAB), Paducah. The Federal Advisory Committee Act (Pub. L. No. 92–463, 86 Stat. 770) requires that public notice of this meeting be announced in the **Federal Register**.

DATES: Thursday, November 20, 2008; 6 p.m.

ADDRESSES: Barkley Centre, 111 Memorial Drive, Paducah, Kentucky 42001.

FOR FURTHER INFORMATION CONTACT: Reinhard Knerr, Deputy Designated Federal Officer, Department of Energy Paducah Site Office, Post Office Box 1410, MS–103, Paducah, Kentucky 42001, (270) 441–6825.

SUPPLEMENTARY INFORMATION:

Purpose of the Board: The purpose of the Board is to make recommendations to DOE in the areas of environmental restoration, waste management and related activities.

Tentative Agenda:

- Call to Order, Introductions, Review of Agenda.
- Deputy Designated Federal Officer's Comments.
- Federal Coordinator's Comments.
- Liaisons' Comments.
- Presentations.
- Public Comments.
- Administrative Issues.
  - Motions.
  - Recommendations.
- Final Comments.
- Adjourn.

Breaks taken as appropriate.

Public Participation: The meeting is open to the public. Written statements may be filed with the Board either before or after the meeting. Individuals who wish to make oral statements pertaining to agenda items should contact Reinhard Knerr at the address or telephone number listed above. Requests must be received five days prior to the meeting and reasonable provision will be made to include the presentation in the agenda. The Deputy Designated Federal Officer is empowered to conduct the meeting in a fashion that will facilitate the orderly conduct of business. Individuals wishing to make public comment will be provided a maximum of five minutes to present their comments.

Minutes: Minutes will be available by writing or calling Reinhard Knerr at the

address and phone number listed above. Minutes will also be available at the following Web site: *http://www.pgdpcab.org/minutes.htm.*

Issued at Washington, DC on October 23, 2008.

Rachel Samuel,

Deputy Committee Management Officer.

[FR Doc. E8–25771 Filed 10–28–08; 8:45 am]

BILLING CODE 6450–01–P

DEPARTMENT OF ENERGY

Federal Energy Regulatory Commission

Combined Notice of Filings, #1

October 22, 2008.

Take notice that the Commission received the following electric corporate filings:

Docket Numbers: EC09–8–000.

Applicants: Consolidated Edison Co. of New York, Inc.

Description: Consolidated Edison Company of New York, Inc.'s application for authorization under Section 203 of the Federal Power Act regarding purchase of a capacitor facility that New Athens Generating Company will construct.

Filed Date: 10/17/2008.

Accession Number: 20081021–0105.

Comment Date: 5 p.m. Eastern Time on Friday, November 7, 2008.

Docket Numbers: EC09–9–000.

Applicants: Niagara Mohawk Power Corporation, Empire Generating Company.

Description: Joint Application of Niagara Mohawk Power Corp and Empire Generating Co. for Authorization of Lease Transaction Regarding Certain Jurisdictional Facilities Under Section 203 of the FPA.

Filed Date: 10/21/2008.

Accession Number: 20081021–5080.

Comment Date: 5 p.m. Eastern Time on Wednesday, November 12, 2008.

Take notice that the Commission received the following electric rate filings:

Docket Numbers: ER96–2495–031; ER97–4143–020; ER07–1130–002; ER98–2075–025; ER98–542–021.

Applicants: AEP Power Marketing, Inc., AEP Service Corporation, AEP Energy Partners, Inc., CSW Energy Services, Inc., Central and South West Services, Inc.

Description: AEP Power Marketing, Inc. *et al.* submits revised market-base rate tariffs.

Filed Date: 10/20/2008.

Accession Number: 20081021–0229.

Comment Date: 5 p.m. Eastern Time on Monday, November 10, 2008.

Docket Numbers: ER99–2541–011; ER05–731–005; ER97–3556–019; ER04–582–009, ER99–221–014; ER99–220–016; ER01–1764–008; ER97–3553–007; ER08–387–007; ER09–32–001; ER09–33–001; ER06–200–017; ER07–254–010; ER03–1326–017; ER07–460–008; ER05–534–018; ER05–365–018; ER09–30–001; ER09–31–001; ER05–1262–018; ER06–1093–014; ER03–296–020; ER08–912–003; ER01–3121–019; ER02–418–018; ER03–416–021; ER05–332–018; ER07–287–011; ER08–933–004; ER07–195–010; ER08–934–005; ER07–242–011, ER03–951–020; ER04–94–018; ER02–2085–013; ER02–417–018; ER07–1378–009; ER05–1146–018; ER05–481–018; ER07–240–012

Applicants: Carthage Energy, LLC, Central Maine Power Company, Energetix, Inc., Hartford Steam Company, New York State Electric & Gas Corporation, NYSEG Solutions, Inc., PEI Power II, LLC, Rochester Gas and Electric Corporation, Atlantic Renewable Projects II, LLC, Barton Windpower LLC, Barton Windpower II LLC, Big Horn Wind Project LLC, Casselman Windpower LLC, Colorado Green Holdings LLC, Dillon Wind LLC, Eastern Desert Power LLC, Elk River Windfarm LLC, Elm Creek Wind, LLC, Farmers City Wind, LLC, Flat Rock Windpower LLC, Flat Rock Windpower II LLC, Flying Cloud Power Partners, LLC, IBERDROLA RENEWABLES, Inc., Klamath Energy LLC, Klamath Generation LLC, Klondike Wind Power LLC, Klondike Wind Power II LLC, Klondike Wind Power III LLC, Lempster Wind, LLC, Locust Ridge Wind Farm, LLC, Locust Ridge Wind Farm II, LLC, MinnDakota Wind LLC, Moraine Wind LLC, Mountain View Power Partners III LLC, Northern Iowa Windpower II LLC, Phoenix Wind Power LLC, Providence Heights Wind, LLC, Shiloh I Wind Project, LLC, Trimont Wind I LLC, Twin Buttes Wind LLC

Description: The Iberdrola Renewables Companies notifies FERC of a non-material change in status resulting from the facts noted.

Filed Date: 10/16/2008.

Accession Number: 20081021–0051.

Comment Date: 5 p.m. Eastern Time on Thursday, November 6, 2008.

Docket Numbers: ER06–759–004

Applicants: Selkirk Cogen Partners, L.P.

Description: Selkirk Cogen Partners, LP submits a revised tariff in compliance with the standardized tariff requirements of Order 697–A.

Filed Date: 10/20/2008.

Accession Number: 20081022–0367.

Comment Date: 5 p.m. Eastern Time on Monday, November 10, 2008.

Docket Numbers: ER08–1519–000.

Applicants: Ohio Valley Electric Corporation.

Description: Request to Withdraw 9/10/08 Submission of Service Agreement 51.

Filed Date: 10/14/2008.

Accession Number: 20081014–5122.

Comment Date: 5 p.m. Eastern Time on Tuesday, November 4, 2008.

Docket Numbers: ER08–1531–001.

Applicants: Southern Company Services, Inc.

Description: Southern Company Services, Inc. on behalf of Alabama Power Co. submits an Amended Interconnection Agreement with Tenaska Alabama Partners, LP.

Filed Date: 10/17/2008.

Accession Number: 20081020–0224.

Comment Date: 5 p.m. Eastern Time on Friday, November 7, 2008.

Docket Numbers: ER09–71–000.

Applicants: Otay Mesa Energy Center, LLC.

Description: Otay Mesa Energy Center, LLC submits an application for market based rate authorization.

Filed Date: 10/17/2008.

Accession Number: 20081021–0104.

Comment Date: 5 p.m. Eastern Time on Friday, November 7, 2008.

Docket Numbers: ER09–86–000.

Applicants: Southwestern Electric Power Company.

Description: Southwestern Electric Co submits a Power Supply Agreement with the City of Minden, Louisiana, FERC Rate Schedule 128.

Filed Date: 10/17/2008.

Accession Number: 20081020–0223.

Comment Date: 5 p.m. Eastern Time on Friday, November 7, 2008.

Docket Numbers: ER09–87–000.

Applicants: Cleco Power LLC.

Description: Cleco Power, LLC submits an amendment to their Open Access Transmission Tariff, to update Attachment E.

Filed Date: 10/17/2008.

Accession Number: 20081020–0222.

Comment Date: 5 p.m. Eastern Time on Friday, November 7, 2008.

Docket Numbers: ER09–91–000.

Applicants: Midwest Independent Transmission System Operator Inc, Midwest ISO Transmission Owners.

Description: Midwest ISO *et al.* propose to revise portions of Attachments O and GG of the Midwest ISO Tariff.

Filed Date: 10/17/2008.

Accession Number: 20081021–0050.

Comment Date: 5 p.m. Eastern Time on Friday, November 7, 2008.

Docket Numbers: ER09–92–000.

Applicants: Southern Company Services, Inc.

Description: Southern Companies submits a Cost-Based Rate Tariff, to become effective 1/1/09.
Filed Date: 10/17/2008.
Accession Number: 20081021–0049.
Comment Date: 5 p.m. Eastern Time on Friday, November 7, 2008.

Docket Numbers: ER09–93–000.
Applicants: Portland General Electric Company.
Description: Portland General Electric Company submits limited revisions to their FERC Electric Tariff, First Revised Volume 12, Rate Schedule for the Sale, Assignment, or Transmission Rights.
Filed Date: 10/17/2008.
Accession Number: 20081021–0047.
Comment Date: 5 p.m. Eastern Time on Friday, November 7, 2008.

Docket Numbers: ER09–94–000.
Applicants: PJM Interconnection, L.L.C.
Description: PJM Interconnection, LLC submits an executed Interim Interconnection Service Agreement and an executed Interconnection Construction Service Agreement with Exelon Generation Co, LLC *et al.*
Filed Date: 10/20/2008.
Accession Number: 20081021–0224.
Comment Date: 5 p.m. Eastern Time on Monday, November 10, 2008.

Docket Numbers: ER09–95–000.
Applicants: Southern California Edison Company.
Description: Southern California Edison Co. submits revisions to its Transmission Owner Tariff, FERC Electric Tariff, Second Revised Volume No. 6 *et al.*
Filed Date: 10/20/2008.
Accession Number: 20081021–0236.
Comment Date: 5 p.m. Eastern Time on Monday, November 10, 2008.

Docket Numbers: ER09–96–000.
Applicants: Portland General Electric Company.
Description: Portland General Electric Co. submits First Revised Rate Schedule 108, an Exchange Agreement with Bonneville Power Administration.
Filed Date: 10/20/2008.
Accession Number: 20081021–0223.
Comment Date: 5 p.m. Eastern Time on Monday, November 10, 2008.

Docket Numbers: ER09–97–000.
Applicants: Midwest Independent Transmission System Operator, Inc.
Description: Midwest Independent Transmission System Operator, Inc. submits proposed revisions to its Open Access Transmission, Energy and Operating Reserve Markets Tariff.
Filed Date: 10/20/2008.
Accession Number: 20081021–0226.
Comment Date: 5 p.m. Eastern Time on Monday, November 10, 2008.

Docket Numbers: ER09–98–000.
Applicants: Ameren Services Company.
Description: Ameren Services, agent for Central Illinois Public Service Co, submits a Letter Agreement for installation of metering facilities with Illinois Municipal Electric Agency etc.
Filed Date: 10/20/2008.
Accession Number: 20081021–0227.
Comment Date: 5 p.m. Eastern Time on Monday, November 10, 2008.

Docket Numbers: ER09–99–000; ER99–100–000; ER09–101–000; ER09–102–000; ER09–103–000.
Applicants: AEP Power Marketing, Inc., AEP Service Corporation, AEP Energy Partners, Inc., CSW Energy Services, Inc., Central and South West Services, Inc.
Description: AEP Power Marketing, Inc. *et al.* submit new cost-based tariffs for the sale of capacity and energy.
Filed Date: 10/20/2008.
Accession Number: 20081021–0228.
Comment Date: 5 p.m. Eastern Time on Monday, November 10, 2008.

Docket Numbers: ER09–105–000.
Applicants: Midwest Independent Transmission System Operator, Inc.
Description: Midwest Independent Transmission System Operator Inc. submits an executed Amended and Restated Interconnection and Operating Agreement with White Pine Electric Power LLC etc.
Filed Date: 10/21/2008.
Accession Number: 20081021–0325.
Comment Date: 5 p.m. Eastern Time on Wednesday, November 12, 2008.

Docket Numbers: ER09–106–000.
Applicants: Midwest Independent Transmission System Operator, Inc.
Description: Midwest Independent Transmission System Operator, Inc's Amended and Restated Interconnection and Operating Agreement with High Prairie Wind Farm II, LLC etc.
Filed Date: 10/21/2008.
Accession Number: 20081021–0326.
Comment Date: 5 p.m. Eastern Time on Wednesday, November 12, 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. E8–25718 Filed 10–28–08; 8:45 am]
BILLING CODE 6717–01–P

DEPARTMENT OF ENERGY

Federal Energy Regulatory Commission

Combined Notice of Filings, #1

October 23, 2008.

Take notice that the Commission received the following electric corporate filings:

Docket Numbers: EC09–10–000.
Applicants: Noble Great Plains Windpark, LLC, Bankers Commercial Corporation.
Description: Application of Noble Great Plains Windpark, LLC, *et al.* for Section 203 Authorization of Transaction, and Request for Waivers of Filing Requirements, Confidential Treatment of Transaction Documents, and Expedited Consideration.
Filed Date: 10/22/2008.

Accession Number: 20081022–5046.
Comment Date: 5 p.m. Eastern Time on Wednesday, November 12, 2008.

Take notice that the Commission received the following electric rate filings:

Docket Numbers: ER08–387–008; ER07–254–011; ER08–912–004; ER08–933–005; ER07–195–011; ER08–934–006; ER07–1378–010.
Applicants: Atlantic Renewables Projects II LLC, Cassleman Windpower LLC, IBERDROLA RENEWABLES, Inc., Lempster Wind, LLC, Locust Ridge Wind Farm LLC, Locust Ridge II, LLC, Providence Heights Wind, LLC.
Description: Iberdrola Renewables Northeast Sellers (Atlantic Renewables Projects II LLC *et al.*) submits revised tariff sheets to their respective market-based rate tariffs to reflect that they have become Category 2 Sellers.
Filed Date: 10/21/2008.
Accession Number: 20081023–0114.
Comment Date: 5 p.m. Eastern Time on Wednesday, November 12, 2008.

Docket Numbers: ER08–1509–002.
Applicants: Burgess Capital LLC.
Description: Burgess Capital LLC submits Amended Petition for Acceptance of Initial Tariff, Waivers and Blanket Authority.
Filed Date: 10/22/2008.
Accession Number: 20081023–0109.
Comment Date: 5 p.m. Eastern Time on Wednesday, November 12, 2008.

Docket Numbers: ER09–104–000.
Applicants: Wheelabrator Bridgeport, L.P.
Description: Petition of Wheelabrator Bridgeport, LP for order accepting market-based rate tariff for filing and granting waivers and blanket approvals.
Filed Date: 10/21/2008.
Accession Number: 20081023–0131.
Comment Date: 5 p.m. Eastern Time on Wednesday, November 12, 2008.

Docket Numbers: ER09–109–000.
Applicants: Scotia Capital Energy Inc.
Description: Scotia Capital Energy Inc's petition for an expedited order accepting market-based rate tariff and granting of waivers and blanket approvals.
Filed Date: 10/22/2008.
Accession Number: 20081023–0315.
Comment Date: 5 p.m. Eastern Time on Wednesday, November 12, 2008.

Docket Numbers: ER09–110–000.
Applicants: Virginia Electric and Power Company.
Description: Virginia Electric and Power Company submits Revised Wholesale Distribution Service Agreement with Southeastern Public Service Authority *et al.*
Filed Date: 10/22/2008.
Accession Number: 20081023–0106.
Comment Date: 5 p.m. Eastern Time on Wednesday, November 12, 2008.

Docket Numbers: ER09–111–000.
Applicants: IBERDROLA RENEWABLES, Inc.
Description: Iberdrola Renewables, Inc submits Notice of Termination to cancel PPM Energy, Inc's Rate Schedule FERC 3, effective 10/1/07.
Filed Date: 10/22/2008.
Accession Number: 20081023–0103.
Comment Date: 5 p.m. Eastern Time on Wednesday, November 12, 2008.

Docket Numbers: ER09–113–000.
Applicants: Midwest Independent Transmission System Operator, Inc.
Description: Midwest Independent Transmission System Operator, Inc. submits Facilities Construction Agreement with Wisconsin Power and Light Company.
Filed Date: 10/22/2008.
Accession Number: 20081023–0105.
Comment Date: 5 p.m. Eastern Time on Wednesday, November 12, 2008.

Docket Numbers: ER09–115–000.
Applicants: PJM Interconnection, LLC.
Description: PJM Interconnection, LLC submits an executed Wholesale Market Participation Agreement for Highland New Wind Development, LLC *et al.*
Filed Date: 10/22/2008.
Accession Number: 20081023–0102.
Comment Date: 5 p.m. Eastern Time on Wednesday, November 12, 2008.

Take notice that the Commission received the following PURPA 210(m)(3) filings:

Docket Numbers: QM09–2–000.
Applicants: Montana-Dakota Utilities Co.
Description: Application of Montana-Dakota Utilities Co for authorization to terminate the mandatory obligation to purchase power from qualified facilities over twenty megawatts on a service territory-wide basis.
Filed Date: 10/22/2008.
Accession Number: 20081023–0121.
Comment Date: 5 p.m. Eastern Time on Wednesday, November 19, 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. E8–25786 Filed 10–28–08; 8:45 am]
BILLING CODE 6717–01–P

ENVIRONMENTAL PROTECTION AGENCY

[EPA–HQ–OECA–2008–0297; FRL–8736–1]

Agency Information Collection Activities; Submission to OMB for Review and Approval; Comment Request; NESHAP for Coke Oven Batteries (Renewal), EPA ICR Number 1362.08, OMB Control Number 2060–0253

AGENCY: Environmental Protection Agency (EPA).
ACTION: Notice.

SUMMARY: In compliance with the Paperwork Reduction Act (44 U.S.C.

3501 *et seq.*), this document announces that an Information Collection Request (ICR) has been forwarded to the Office of Management and Budget (OMB) for review and approval. This is a request to renew an existing approved collection. The ICR which is abstracted below describes the nature of the collection and the estimated burden and cost.

DATES: Additional comments may be submitted on or before November 28, 2008.

ADDRESSES: Submit your comments, referencing docket ID number EPA–HQ–OECA–2008–0297, to (1) EPA online using *http://www.regulations.gov* (our preferred method), or by email to *docket.oeca@epa.gov*, or by mail to: EPA Docket Center (EPA/DC), Environmental Protection Agency, Enforcement and Compliance Docket and Information Center, mail code 1201T, 2200 Pennsylvania Avenue, NW., Washington, DC 20460, and (2) OMB at: Office of Information and Regulatory Affairs, Office of Management and Budget (OMB), Attention: Desk Officer for EPA, 725 17th Street, NW., Washington, DC 20503.

FOR FURTHER INFORMATION CONTACT: María Malavé, Compliance Assessment and Media Programs Division, Mail Code 2223A, Office of Compliance, Environmental ProtectionAgency, 1200 Pennsylvania Avenue, NW., Washington, DC 20460; telephone number: (202) 564–7027; fax number: (202) 564–0050; e-mail address: *malave.maria@epa.gov*.

SUPPLEMENTARY INFORMATION: EPA has submitted the following ICR to OMB for review and approval according to the procedures prescribed in 5 CFR 1320.12. On May 30, 2008 (73 FR 31088), EPA sought comments on this ICR pursuant to 5 CFR 1320.8(d). EPA received no comments. Any additional comments on this ICR should be submitted to EPA and OMB within 30 days of this notice.

EPA has established a public docket for this ICR under docket ID number EPA–HQ–OECA–2008–0297, which is available for public viewing online at *http://www.regulations.gov*, in person viewing at the Enforcement and Compliance Docket in the EPA Docket Center (EPA/DC), EPA West, Room 3334, 1301 Constitution Avenue, NW., Washington, DC. The EPA Docket Center Public Reading Room is open from 8:30 a.m. to 4:30 p.m., Monday through Friday, excluding legal holidays. The telephone number for the Reading Room is (202) 566–1744, and the telephone number for the Enforcement and Compliance Docket is (202) 566–1927.

Use EPA's electronic docket and comment system at *http://www.regulations.gov*, to submit or view public comments, access the index listing of the contents of the docket, and to access those documents in the docket that are available electronically. Once in the system, select ''docket search,'' then key in the docket ID number identified above. Please note that EPA's policy is that public comments, whether submitted electronically or in paper, will be made available for public viewing at *http://www.regulations.gov*, as EPA receives them and without change, unless the comment contains copyrighted material, Confidential Business Information (CBI), or other information whose public disclosure is restricted by statute. For further information about the electronic docket, go to *http://www.regulations.gov*.

Title: NESHAP for Coke Oven Batteries (Renewal)

ICR Numbers: EPA ICR Number 1362.08, OMB Control Number 2060–0253

ICR Status: This ICR is scheduled to expire on December 31, 2008. Under OMB regulations, the Agency may continue to conduct or sponsor the collection of information while this submission is pending at OMB. An Agency may not conduct or sponsor, and a person is not required to respond to, a collection of information unless it displays a currently valid OMB control number. The OMB control numbers for EPA's regulations in title 40 of the CFR, after appearing in the **Federal Register** when approved, are listed in 40 CFR part 9, and displayed either by publication in the **Federal Register** or by other appropriate means, such as on the related collection instrument or form, if applicable. The display of OMB control numbers in certain EPA regulations is consolidated in 40 CFR part 9.

Abstract: The National Emissions Standards Hazardous Air Pollutants (NESHAP) for Coke Oven Batteries were proposed on December 4, 1992 and promulgated on October 27, 1993. These standards apply to all coke oven batteries, whether existing, new, reconstructed, rebuilt or restarted. It also applies to all batteries using the conventional by-product recovery, the nonrecovery process, or any new recovery process. Under this rule, all existing batteries must choose a compliance track. Two compliance approaches are available under the rule: the ''MACT (Maximum Achievable Control Technology)'' track, and the ''LAER (Lowest Achievable Emission Rate)'' extension track, and straddling both tracks (until January 1, 1998). Applicability dates vary depending on the emission limitation the affected facility is subject to. This information is being collected to assure compliance with 40 CFR part 63, subpart L.

Owners or operators of coke oven batteries, whether existing, new, reconstructed, rebuilt or restarted, are required to comply with monitoring, recordkeeping and reporting requirements. Owners or operators of the affected facilities described must make one-time-only notifications to select a compliance track and to certify initial compliance. Owners or operators are also required to maintain records of the occurrence and duration of any startup, shutdown, or malfunction in the operation of an affected facility, or any period during which the monitoring system is inoperative. Monitoring requirements specific to coke oven batteries provide information on the operation of the emissions control device and compliance with the visible emissions standard. Semiannual reports of compliance certifications are required. These notifications, reports, and records will be used by EPA and the states to: (1) Identify batteries subject to the standards; (2) ensure that MACT and LAER are properly applied; and (3) ensure that daily monitoring and work practice requirements are implemented as required.

Burden Statement: The annual public reporting and recordkeeping burden for this collection of information is estimated to average 1,908 hours per response. Burden means the total time, effort, or financial resources expended by persons to generate, maintain, retain, or disclose or provide information to or for a Federal agency. This includes the time needed to review instructions; develop, acquire, install, and utilize technology and systems for the purposes of collecting, validating, and verifying information, processing and maintaining information, and disclosing and providing information; adjust the existing ways to comply with any previously applicable instructions and requirements which have subsequently changed; train personnel to be able to respond to a collection of information; search data sources; complete and review the collection of information; and transmit or otherwise disclose the information. Respondents/Affected Entities: Plants with coke oven batteries using the conventional by-product recovery, the nonrecovery process, or any new recovery process.

Estimated Number of Respondents: 19

Frequency of Response: Initially, semiannually, and on occasion.

Estimated Total Annual Hour Burden: 80,121 hours

Estimated Annual Costs: $6,564,165 exclusively in Labor cost; there are neither annualized capital/startup nor O&M costs associated with this ICR.

Changes in the Estimates: Although the assumptions in the burden calculation for this ICR remain the same as in the previous ICR, there is a small change in the labor hours due to the correction of rounding errors. The assumptions remain the same as in the previous ICR due to two considerations: (1) The regulations have not changed over the past three years and are not anticipated to change over the next three years; and (2) the growth rate for the industry is very low, negative or non-existent, so there is no significant change in the overall burden.

Dated: October 23, 2008.

Sara Hisel-McCoy,

Director, Collection Strategies Division.

[FR Doc. E8–25803 Filed 10–28–08; 8:45 am]

BILLING CODE 6560–50–P

ENVIRONMENTAL PROTECTION AGENCY

[EPA–HQ–OECA–2008–0422; FRL–8736–2]

Agency Information Collection Activities; Submission to OMB for Review and Approval; Comment Request; NSPS for Metal Coil Surface Coating, EPA ICR Number 0660.10, OMB Control Number 2060–0107

AGENCY: Environmental Protection Agency (EPA).

ACTION: Notice.

SUMMARY: In compliance with the Paperwork Reduction Act (44 U.S.C. 3501 *et seq.*), this document announces that an Information Collection Request (ICR) has been forwarded to the Office of Management and Budget (OMB) for review and approval. This is a request to renew an existing approved collection. The ICR that is abstracted below describes the nature of the collection and the estimated burden and cost.

DATES: Additional comments may be submitted on or before November 28, 2008.

ADDRESSES: Submit your comments, referencing docket ID number EPA–HQ–OECA–2008–0422, to (1) EPA online using *http://www.regulations.gov* (our preferred method), or by e-mail to *docket.oeca@epa.gov*, or by mail to: EPA Docket Center (EPA/DC), Environmental Protection Agency, Enforcement and Compliance Docket and Information Center, mail code 2201T, 1200 Pennsylvania Avenue, NW., Washington, DC 20460, and (2) OMB at: Office of Information and Regulatory Affairs, Office of Management and Budget (OMB), Attention: Desk Officer for EPA, 725 17th Street, NW., Washington, DC 20503.

FOR FURTHER INFORMATION CONTACT: John Schaefer, Office of Air Quality Planning and Standards, Sector Policies and Programs Division (D243–05), Measurement Policy Group, Environmental Protection Agency, Research Triangle Park, North Carolina 27711; telephone number: (919) 541–0296; fax number: (919) 541–3207; e-mail address: *schaefer.john@epa.gov*.

SUPPLEMENTARY INFORMATION: EPA has submitted the following ICR to OMB for review and approval according to the procedures prescribed in 5 CFR 1320.12. On May 30, 2008 (73 FR 31088), EPA sought comments on this ICR pursuant to 5 CFR 1320.8(d). EPA received no comments. Any additional comments on this ICR should be submitted to EPA and OMB within 30 days of this notice.

EPA has established a public docket for this ICR under docket ID number EPA–HQ–OECA–2008–0422, which is available for public viewing either online at *http://www.regulations.gov*, or in person viewing at the Enforcement and Compliance Docket in the EPA Docket Center (EPA/DC), EPA West, Room 3334, 1301 Constitution Avenue, NW., Washington, DC. The EPA Docket Center Public Reading Room is open from 8:30 a.m. to 4:30 p.m., Monday through Friday, excluding legal holidays. The telephone number for the Reading Room is (202) 566–1744 and the telephone number for the Enforcement and Compliance Docket is (202) 566–1927.

Use EPA's electronic docket and comment system at *http://www.regulations.gov* to submit or view public comments, access the index listing of the contents of the docket, and to access those documents in the docket that are available electronically. Once in the system, select ''docket search,'' then key in the docket ID number identified above. Please note that EPA's policy is that public comments, whether submitted electronically or in paper, will be made available for public viewing at *http://www.regulations.gov*, as EPA receives them and without change, unless the comment contains copyrighted material, Confidential Business Information (CBI), or other information whose public disclosure is restricted by statute. For further information about the electronic docket, go to *http://www.regulations.gov*.

Title: NSPS for Metal Coil Surface Coating (Renewal).

ICR Numbers: EPA ICR Number 0660.10, OMB Control Number 2060–0107.

ICR Status: This ICR is scheduled to expire on February 28, 2009. Under OMB regulations, the Agency may continue to conduct or sponsor the collection of information while this submission is pending at OMB. An Agency may not conduct or sponsor, and a person is not required to respond to, a collection of information unless it displays a currently valid OMB control number. The OMB control numbers for EPA's regulations in title 40 of the CFR, after appearing in the **Federal Register** when approved, are listed in 40 CFR part 9, and displayed either by publication in the **Federal Register** or by other appropriate means, such as on the related collection instrument or form, if applicable. The display of OMB control numbers in certain EPA regulations is consolidated in 40 CFR part 9.

Abstract: New Source Performance Standards (NSPS) for the regulations published at 40 CFR part 60, subpart TT were proposed on January 5, 1981 and promulgated on November 1, 1982. These regulations apply to the following surface coating lines in the metal coil surface coating industry: each prime coat operation, each finish coat operation, and each prime and finish coat operation cured simultaneously where the finish coat is applied wet on wet over the prime coat.

In general, all New Source Performance Standards (NSPS) require initial notifications, performance tests, and periodic reports. Owners or operators are also required to maintain records of the occurrence and duration of any startup, shutdown, or malfunction in the operation of an affected facility, or any period during which the monitoring system is inoperative. These notifications, reports, and records are essential in determining compliance, and are required of all sources subject to NSPS.

Burden Statement: The annual public reporting and recordkeeping burden for this collection of information is estimated to average 41 hours per response. Burden means the total time, effort, or financial resources expended by persons to generate, maintain, retain, or disclose or provide information to or for a Federal agency. This includes the time needed to review instructions; develop, acquire, install, and utilize technology and systems for the purposes of collecting, validating, and verifying information, processing and maintaining information, and disclosing and providing information; adjust the existing ways to comply with any

previously applicable instructions and requirements which have subsequently changed; train personnel to be able to respond to a collection of information; search data sources; complete and review the collection of information; and transmit or otherwise disclose the information.

Respondents/Affected Entities: Owners or operators of metal coil surface coating facilities.

Estimated Number of Respondents: 158

Frequency of Response: Initially, occasionally, semiannually, and annually

Estimated Total Annual Hour Burden: 15,643

Estimated Total Annual Cost: $1,594,680, which is comprised of $331,800 in Operations and Maintenance (O&M) cost, $1,262,880 in annual labor costs, and no capital/startup costs.

Changes in the Estimates: There is a change of $200 in the total estimated burden currently identified in the OMB Inventory of Approved ICR Burdens since the O&M cost, which was previously rounded to the nearest thousand, has been actually reduced by $200.00.

Dated: October 23, 2008.

Sara Hisel-McCoy,

Director, Collection Strategies Division.

[FR Doc. E8–25804 Filed 10–28–08; 8:45 am]

BILLING CODE 6560–50–P

ENVIRONMENTAL PROTECTION AGENCY

[EPA–HQ–OPP–2007–0941; FRL–8389–2]

Carbaryl RED Amendment and Response to Petition to Cancel Registrations; Notice of Availability

AGENCY: Environmental Protection Agency (EPA).

ACTION: Notice.

SUMMARY: This notice announces the availability of an amendment to EPA's Reregistration Eligibility Decision (RED) for Carbaryl, and EPA's response to a petition from the Natural Resources Defense Council (NRDC), insofar as the petition seeks to have EPA cancel all registrations for carbaryl. In the carbaryl RED amendment, EPA is modifying certain worker risk mitigation measures that were imposed as a result of the 2004 Interim RED for the pesticide carbaryl. EPA is amending the carbaryl RED to incorporate the revised occupational exposure and risk assessment for carbaryl. EPA reevaluated the carbaryl risk assessments and regulatory decision in response to public comments received from numerous parties, new data submitted by the technical registrant, Bayer CropSciences, and new science and new methodologies developed in the time between the completion of the Interim RED for carbaryl and the completion of the cumulative risk assessment for the N-methyl carbamate group of pesticides. This notice also announces the availability of EPA's response to a petition from NRDC insofar as it seeks to have EPA cancel all uses of carbaryl under the Federal Insecticide, Fungicide, and Rodenticide Act (FIFRA). Elsewhere in today's **Federal Register**, EPA is publishing its response to NRDC's petition insofar as it seeks to have EPA revoke all tolerances for carbaryl under the Federal Food, Drug, and Cosmetic Act (FFDCA).

FOR FURTHER INFORMATION CONTACT: Christina Scheltema, Special Review and Reregistration Division (7508C), Office of Pesticide Programs, Environmental Protection Agency, 1200 Pennsylvania Ave., NW., Washington, DC 20460–0001; telephone number: (703) 308–2201; fax number: (703) 308–2201; e-mail address: *scheltema.christina@epa.gov*.

SUPPLEMENTARY INFORMATION:

I. General Information

A. Does this Action Apply to Me?

This action is directed to the public in general, and may be of interest to a wide range of stakeholders including environmental, human health, and agricultural advocates; the chemical industry; pesticide users; and members of the public interested in the sale, distribution, or use of pesticides. Since others also may be interested, the Agency has not attempted to describe all the specific entities that may be affected by this action. If you have any questions regarding the applicability of this action to a particular entity, consult the person listed under **FOR FURTHER INFORMATION CONTACT**.

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

1. *Docket*. EPA has established a docket for this action under docket identification (ID) number EPA–HQ–OPP–2007–0941. Publicly available docket materials are available either in the electronic docket at *http://www.regulations.gov*, or, if only available in hard copy, at the Office of Pesticide Programs (OPP) Regulatory Public Docket in Rm. S–4400, One Potomac Yard (South Bldg.), 2777 S. Crystal Dr., Arlington, VA. The hours of operation of this Docket Facility are from 8:30 a.m. to 4 p.m., Monday through Friday, excluding legal holidays. The Docket Facility telephone number is (703) 305–5805.

2. *Electronic access*. You may access this **Federal Register** document electronically through the EPA Internet under the ''**Federal Register**'' listings at *http://www.epa.gov/fedrgstr*.

II. Background

A. What Action is the Agency Taking?

This notice announces the availability of an amendment to EPA's Reregistration Eligibility Decision (RED) for Carbaryl. EPA is amending the carbaryl RED to incorporate the revised occupational exposure and risk assessment for carbaryl, which was not included in the September 2007 carbaryl RED. As a result, EPA is modifying certain worker risk mitigation measures that were imposed in the 2004 Interim RED for the pesticide carbaryl.

Under section 4 of FIFRA, EPA is reevaluating existing pesticides to ensure that they meet current scientific and regulatory standards. In 2007, EPA issued a RED for carbaryl under section 4(g)(2)(A) of FIFRA. In 2004, EPA issued an interim RED for carbaryl. In response to a notice of availability published in the **Federal Register** of October 27, 2004 (69 FR 62663) (FRL–7679–9), the Agency received comments from the carbaryl registrant and others, including NRDC.

This notice also announces the availability of EPA's response to a petition submitted by NRDC insofar as the petition seeks to have EPA cancel all registrations for carbaryl. (EPA's response to this petition is available in the carbaryl RED docket, EPA–HQ–OPP–2007–0941.) Elsewhere in today's **Federal Register**, EPA is publishing its response to NRDC's petition insofar as it seeks to have EPA revoke all tolerances for carbaryl under FFDCA. (See docket EPA–HQ–OPP–2008–0347.)

B. What is the Agency's Authority for Taking this Action?

Section 4(g)(2) of FIFRA, as amended, directs that, after submission of all data concerning a pesticide active ingredient, ''the Administrator shall determine whether pesticides containing such active ingredient are eligible for reregistration,'' before calling in product-specific data on individual end-use products and either reregistering products or taking other ''appropriate regulatory action.''

List of Subjects

Environmental protection, Carbaryl, Pesticides.

Dated: October 21, 2008.

Steven Bradbury,

Director, Special Review and Reregistration Division, Office of Pesticide Programs.

[FR Doc. E8–25664 Filed 10–28–08; 8:45 am]

BILLING CODE 6560–50–S

ENVIRONMENTAL PROTECTION AGENCY

[FRL–8736–3; Docket ID No. EPA–HQ–ORD–2008–00461]

Draft Toxicological Review of Tetrachloroethylene (Perchloroethylene): In Support of the Summary Information in the Integrated Risk Information System (IRIS); Correction

AGENCY: Environmental Protection Agency (EPA).

ACTION: Notice of Peer-Review Meeting; correction.

SUMMARY: EPA announced on October 16, 2008 (73 FR 61416), that the National Academy of Sciences (NAS) will convene an independent panel of experts and organize and conduct a review of the draft document titled, ''Toxicological Review of Tetrachloroethylene (Perchloroethylene): In Support of Summary Information on the Integrated Risk Information System (IRIS)'' (EPA/635/R–08/011A). The document contained an incorrect meeting location.

Correction

In the **Federal Register** of October 16, 2008, in FR Doc. E8–24595, on page 61417, in the first column, correct the **ADDRESSES** section to read:

The peer-review panel meeting will be held at The National Academy of Sciences, 2100 C Street, NW., Room 150, Washington, DC 20418. For details about registering for and attending the meeting, please see the NAS's Web site at *http://www8.nationalacademies.org/cp/projectview.aspx?key=48697.*

FOR FURTHER INFORMATION CONTACT: Questions regarding information, registration, access or services for individuals with disabilities, or logistics for the external peer-review panel meeting should be directed to NAS. For further information, please see the NAS's Web site *http://www8.nationalacademies.org/cp/projectview.aspx?key=48697.* For technical information about the document, please contact the Information Management Team, National Center for Environmental Assessment, U.S. EPA; telephone: 703–347–8561; facsimile: 703–347–8691; e-mail *nceadc.comment@epa.gov.*

Dated: October 23, 2008.

Rebecca Clark,

Acting Director, National Center for Environmental Assessment.

[FR Doc. E8–25805 Filed 10–28–08; 8:45 am]

BILLING CODE 6560–50–P

ENVIRONMENTAL PROTECTION AGENCY

[EPA–HQ–OPP–2005–0283; FRL–8380–9]

Ethylene Oxide; Preliminary Determination to Terminate Special Review

AGENCY: Environmental Protection Agency (EPA).

ACTION: Notice.

SUMMARY: This notice announces EPA's preliminary determination to terminate the Special Review of ethylene oxide (ETO). On January 27, 1978, EPA initiated Special Review based on developmental toxicity, mutagenicity, and neurotoxic effects in workers (43 FR 3801). In the early 1980s, the carcinogenicity of ETO became of concern and was added to the Special Review. Since the initiation of the Special Review, additional data and more comprehensive reviews of potential risks associated with ETO exposure have been completed, including those described in the 2006 Tolerance Reassessment and Risk Management Decision (TRED) *(http://www.epa.gov/oppsrrd1/REDs/ethylene_oxide_tred.pdf)* and the 2008 Reregistration Eligibility Decision (RED) *(http://www.epa.gov/oppsrrd1//REDs/ethylene-oxide-red.pdf)* for ETO. In the 2008 RED, the Agency addressed occupational risk concerns that were the focus of the Special Review. During the reregistration process EPA conducted a public, intensive review of ETO risks and benefits to determine whether or not ETO registrations meet the Federal Insecticide, Fungicide, Rodenticide Act (FIFRA) standard for registration. The Agency determined that the benefits of ETO use outweigh the occupational risks associated with its use provided that the risk mitigation measures outlined in the RED are adopted and label amendments are made to reflect those measures. Because the risks that were the basis of the Special Review have been evaluated and the Agency has made a determination under FIFRA, as outlined above, the Agency is proposing to terminate the Special Review of ETO.

DATES: Comments must be received on or before November 28, 2008.

ADDRESSES: Submit your comments, identified by docket identification (ID) number EPA–HQ–OPP–2005–0283, by one of the following methods:

• *Federal eRulemaking Portal*: *http://www.regulations.gov*. Follow the on-line instructions for submitting comments.

• *Mail*: Office of Pesticide Programs (OPP) Regulatory Public Docket (7502P), Environmental Protection Agency, 1200 Pennsylvania Ave., NW., Washington, DC 20460–0001.

• *Delivery*: OPP Regulatory Public Docket (7502P), Environmental Protection Agency, Rm. S–4400, One Potomac Yard (South Bldg.), 2777 S. Crystal Dr., Arlington, VA. Deliveries are only accepted during the Docket Facility's normal hours of operation (8:30 a.m. to 4 p.m., Monday through Friday, excluding legal holidays). Special arrangements should be made for deliveries of boxed information. The Docket Facility telephone number is (703) 305–5805.

Instructions: Direct your comments to docket ID number EPA–HQ–OPP–2005–0283. EPA's policy is that all comments received will be included in the docket without change and may be made available on-line at *http://www.regulations.gov*, including any personal information provided, unless the comment includes information claimed to be Confidential Business Information (CBI) or other information whose disclosure is restricted by statute. Do not submit information that you consider to be CBI or otherwise protected through regulations.gov or e-mail. The regulations.gov website 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 regulations.gov, your e-mail address will be automatically captured and included as part of the comment that is placed in the docket and made available on the Internet. If you submit an electronic comment, EPA recommends that you include your name and other contact information in the body of your comment and with any disk or CD-ROM you submit. If EPA cannot read your comment due to technical difficulties and cannot contact you for clarification, EPA may not be able to consider your comment. Electronic files should avoid the use of special characters, any form of encryption, and be free of any defects or viruses.

Docket: All documents in the docket are listed in the docket index available

at *http://www.regulations.gov*. Although listed in the index, some information is not publicly available, e.g., CBI or other information whose disclosure is restricted by statute. Certain other material, such as copyrighted material, is not placed on the Internet and will be publicly available only in hard copy form. Publicly available docket materials are available either in the electronic docket at *http://www.regulations.gov*, or, if only available in hard copy, at the OPP Regulatory Public Docket in Rm. S–4400, One Potomac Yard (South Bldg.), 2777 S. Crystal Dr., Arlington, VA. The hours of operation of this Docket Facility are from 8:30 a.m. to 4 p.m., Monday through Friday, excluding legal holidays. The Docket Facility telephone number is (703) 305–5805.

FOR FURTHER INFORMATION CONTACT: Susan Bartow, Special Review and Reregistration Division (7508P), Office of Pesticide Programs, Environmental Protection Agency, 1200 Pennsylvania Ave., NW., Washington, DC 20460–0001; telephone number: 703-603-0065; fax number: 703-308-8005; e-mail address: *bartow.susan@epa.gov*.

SUPPLEMENTARY INFORMATION:

I. General Information

A. Does this Action Apply to Me?

This action is directed to the public in general, and may be of interest to a wide range of stakeholders including environmental, human health, and agricultural advocates; the chemical industry; pesticide users; and members of the public interested in the sale, distribution, or use of pesticides. Since others also may be interested, the Agency has not attempted to describe all the specific entities that may be affected by this action. If you have any questions regarding the applicability of this action to a particular entity, consult the person listed **UNDER FOR FURTHER INFORMATION CONTACT**.

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

1. *Submitting CBI*. Do not submit this information to EPA through regulations.gov or e-mail. Clearly mark the part or all of the information that you claim to be CBI. For CBI information in a disk or CD-ROM that you mail to EPA, mark the outside of the disk or CD-ROM as CBI and then identify electronically within the disk or CD-ROM the specific information that is claimed as CBI. In addition to one complete version of the comment that includes information claimed as CBI, a copy of the comment that does not contain the information claimed as CBI must be submitted for inclusion in the public docket. Information so marked will not be disclosed except in accordance with procedures set forth in 40 CFR part 2.

2. *Tips for preparing your comments*. When submitting comments, remember to:

i. Identify the document by docket ID number and other identifying information (subject heading, **Federal Register** date and page number).

ii. 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.

iii. Explain why you agree or disagree; suggest alternatives and substitute language for your requested changes.

iv. Describe any assumptions and provide any technical information and/or data that you used.

v. If you estimate potential costs or burdens, explain how you arrived at your estimate in sufficient detail to allow for it to be reproduced.

vi. Provide specific examples to illustrate your concerns and suggest alternatives.

vii. Explain your views as clearly as possible, avoiding the use of profanity or personal threats.

viii. Make sure to submit your comments by the comment period deadline identified.

II. Background

A. What Action is the Agency Taking?

On January 27, 1978, EPA initiated Special Review based on developmental toxicity, mutagenicity, and neurotoxic effects in workers (43 FR 3801). In the early 1980s, the carcinogenicity of ETO became of concern and was added to the Special Review. Since the initiation of the Special Review, additional data and more comprehensive reviews of potential risks associated with ETO exposure have been completed, including those described in the 2006 TRED *(http://www.epa.gov/oppsrrd1/REDs/ethylene_oxide_tred.pdf)* and the 2008 RED *(http://www.epa.gov/oppsrrd1//REDs/ethylene-oxide-red.pdf)* for ETO. In the 2008 RED, the Agency addressed occupational risk concerns that were the focus of the Special Review. During the reregistration process EPA conducted a public, intensive review of ETO risks and benefits to determine whether or not ETO registrations meet the FIFRA standard for registration. The Agency determined that the benefits of ETO use outweigh the occupational risks associated with its use provided that the risk mitigation measures outlined in the RED are adopted and label amendments are made to reflect those measures. The final risk management decision regarding the risk to workers exposed to ETO was completed with the 2008 RED. A detailed description of the rationale and supporting documents can be found in *http://www.regulations.gov* under EPA–HQ–OPP–2005–0203. As described above and in the 2008 RED, concerns were addressed under FIFRA and no further action is required at this time. Because the risks that were the basis of the Special Review have been evaluated and the Agency has made a determination under FIFRA, as outlined above, the Agency is proposing to terminate the Special Review of ETO.

B. What is the Agency's Authority for Taking this Action?

A pesticide product may be sold or distributed in the United States only if it is registered or exempt from registration under the Federal Insecticide, Fungicide and Rodenticide Act (FIFRA) as amended (7 U.S.C. 136 *et seq.*). Before a product can be registered it must be shown, among other things, that it can be used without causing ''unreasonable adverse effects on the environment,'' FIFRA section 3(c)(5). The term unreasonable adverse effects on the environment means:

(1) Any unreasonable risk to man or the environment, taking into account the economic, social, and environmental costs and benefits of the use of any pesticide; or

(2) A human dietary risk from residues that result from a use of a pesticide in or on any food inconsistent with the standard under section 408 of the Federal Food, Drug and Cosmetic Act FIFRA section 2(bb).

The burden of proving that a pesticide meets this standard for registration is, at all times, on the proponent of initial or continued registration. If at any time the Agency determines that a pesticide no longer meets this standard, the Administrator may cancel this registration under section 6 of FIFRA.

The Special Review process provides a mechanism to permit public participation in EPA's deliberations prior to issuance of any Notice of Final Determination pursuant to a Special Review describing the regulatory action which the Administrator has selected. The Special Review process, which was previously called the Rebuttable Presumption Against Registration (RPAR) process, is set forth in 40 CFR part 154, published in the **Federal Register** of November 27, 1985 (50 FR 49015). The purpose of this process is to help the Agency determine whether to initiate procedures to cancel, deny, or

reclassify registration of a pesticide product because uses of that product may cause unreasonable adverse effects on the environment, in accordance with FIFRA.

Prior to formal initiation of a Special Review, a preliminary notification is sent to registrants and applicants for registration pursuant to 40 CFR 154.21 announcing that the Administrator may initiate a Special Review of a pesticide use. Registrants and applicants for registration are allowed 30 days from receipt of the notification to comment on the Agency's preliminary notification that it may commence a Special Review.

If the Agency determines, after issuance of a notification pursuant to 40 CFR 154.21, that it will initiate a Special Review, 40 CFR 154.25(c) requires the Administrator to publish a Notice of Special Review in the **Federal Register**. To conclude the Special Review after a Special Review has been initiated, 40 CFR 154.31 requires the Administrator to first publish a Notice of Preliminary Determination in the **Federal Register**. This notice concerning ETO is being issued pursuant to 40 CFR 154.31.

That regulation requires the Administrator to respond to all significant comments received on the Notice of Special Review and, among other things, make a preliminary determination of whether any of the applicable risk criteria have been satisfied. Finally, after receipt and evaluation of comments on the Notice of Preliminary Determination, 40 CFR 154.33 requires that the Administrator publish in the **Federal Register** a Notice of Final Determination, including the reasons for the determination.

List of Subjects

Environmental protection, Pesticides, Pests.

Dated: October 21, 2008.

James B. Gulliford

Assistant Administrator, Office of Prevention, Pesticides and Toxic Substances.

[FR Doc. E8–25674 Filed 10–28–08; 8:45 am]

BILLING CODE 6560–50–S

ENVIRONMENTAL PROTECTION AGENCY

[EPA–HQ–OPP–2007–1019; FRL–8387–5]

Nicotine; Notice of Receipt of Request to Voluntarily Cancel a Pesticide Registration

AGENCY: Environmental Protection Agency (EPA).

ACTION: Notice.

SUMMARY: In accordance with section 6(f)(1) of the Federal Insecticide, Fungicide, and Rodenticide Act (FIFRA), as amended. EPA is issuing a notice of receipt of a request by the registrant to voluntarily cancel its registration for a product containing the pesticide nicotine. The request would terminate nicotine use on greenhouse-grown ornamentals. The request would terminate the last nicotine product registered for use in the United States. EPA intends to grant this request at the close of the comment period for this announcement unless the Agency receives substantive comments within the comment period that would merit its further review of the request, or unless the registrant withdraws its request within this period. Upon acceptance of this request, any sale, distribution, or use of products listed in this notice will be permitted only if such sale, distribution, or use is consistent with the terms as described in the final order.

DATES: Comments must be received on or before April 27, 2009.

ADDRESSES: Submit your comments, identified by docket identification (ID) number EPA–HQ–OPP–2007–1019, by one of the following methods:

• *Federal eRulemaking Portal*: *http://www.regulations.gov*. Follow the on-line instructions for submitting comments.

• *Mail*: Office of Pesticide Programs (OPP) Regulatory Public Docket (7502P), Environmental Protection Agency, 1200 Pennsylvania Ave., NW., Washington, DC 20460–0001.

• *Delivery*: OPP Regulatory Public Docket (7502P), Environmental Protection Agency, Rm. S–4400, One Potomac Yard (South Bldg.), 2777 S. Crystal Dr., Arlington, VA. Deliveries are only accepted during the Docket Facility's normal hours of operation (8:30 a.m. to 4 p.m., Monday through Friday, excluding legal holidays). Special arrangements should be made for deliveries of boxed information. The Docket Facility telephone number is (703) 305–5805.

Instructions: Direct your comments to docket ID number EPA–HQ–OPP–2007–1019. EPA's policy is that all comments received will be included in the docket without change and may be made available on-line at *http://www.regulations.gov*, including any personal information provided, unless the comment includes information claimed to be Confidential Business Information (CBI) or other information whose disclosure is restricted by statute. Do not submit information that you consider to be CBI or otherwise protected through regulations.gov or e-mail. The regulations.gov website 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 regulations.gov, your e-mail address will be automatically captured and included as part of the comment that is placed in the docket and made available on the Internet. If you submit an electronic comment, EPA recommends that you include your name and other contact information in the body of your comment and with any disk or CD-ROM you submit. If EPA cannot read your comment due to technical difficulties and cannot contact you for clarification, EPA may not be able to consider your comment. Electronic files should avoid the use of special characters, any form of encryption, and be free of any defects or viruses.

Docket: All documents in the docket are listed in the docket index available at *http://www.regulations.gov*. Although listed in the index, some information is not publicly available, e.g., CBI or other information whose disclosure is restricted by statute. Certain other material, such as copyrighted material, is not placed on the Internet and will be publicly available only in hard copy form. Publicly available docket materials are available either in the electronic docket at *http://www.regulations.gov*, or, if only available in hard copy, at the OPP Regulatory Public Docket in Rm. S–4400, One Potomac Yard (South Bldg.), 2777 S. Crystal Dr., Arlington, VA. The hours of operation of this Docket Facility are from 8:30 a.m. to 4 p.m., Monday through Friday, excluding legal holidays. The Docket Facility telephone number is (703) 305–5805.

FOR FURTHER INFORMATION CONTACT: Jill Bloom, Special Review and Reregistration Division (7508P), Office of Pesticide Programs, Environmental Protection Agency, 1200 Pennsylvania Ave., NW., Washington, DC 20460–0001; telephone number: (703) 308–8019; fax number: (703) 308–7070; e-mail address: *bloom.jill@epa.gov*.

SUPPLEMENTARY INFORMATION:

I. General Information

A. Does this Action Apply to Me?

This action is directed to the public in general, and may be of interest to a wide range of stakeholders including environmental, human health, and agricultural advocates; the chemical industry; pesticide users; and members of the public interested in the sale, distribution, or use of pesticides. Since others also may be interested, the

Agency has not attempted to describe all the specific entities that may be affected by this action. If you have any questions regarding the applicability of this action to a particular entity, consult the person listed under **FOR FURTHER INFORMATION CONTACT**.

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

1. *Submitting CBI.* Do not submit this information to EPA through regulations.gov or e-mail. Clearly mark the part or all of the information that you claim to be CBI. For CBI information in a disk or CD-ROM that you mail to EPA, mark the outside of the disk or CD-ROM as CBI and then identify electronically within the disk or CD-ROM the specific information that is claimed as CBI. In addition to one complete version of the comment that includes information claimed as CBI, a copy of the comment that does not contain the information claimed as CBI must be submitted for inclusion in the public docket. Information so marked will not be disclosed except in accordance with procedures set forth in 40 CFR part 2.

2. *Tips for preparing your comments.* When submitting comments, remember to:

i. Identify the document by docket ID number and other identifying information (subject heading, **Federal Register** date and page number).

ii. 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.

iii. Explain why you agree or disagree; suggest alternatives and substitute language for your requested changes.

iv. Describe any assumptions and provide any technical information and/or data that you used.

v. If you estimate potential costs or burdens, explain how you arrived at your estimate in sufficient detail to allow for it to be reproduced.

vi. Provide specific examples to illustrate your concerns and suggest alternatives.

vii. Explain your views as clearly as possible, avoiding the use of profanity or personal threats.

viii. Make sure to submit your comments by the comment period deadline identified.

II. Background on the Receipt of Requests to Cancel and/or Amend Registrations to Delete Uses

This notice announces receipt by EPA of a request from the registrant, Fuller System, Inc., (Fuller) to cancel one of its product registrations. The affected nicotine product is labeled for use on greenhouse-grown ornamentals such as poinsettia, chrysanthemum, and bedding plants for the control of aphids, thrips, and whiteflies. In a letter dated February 25, 2008, Fuller requested that EPA cancel the affected product registration identified in this notice (see Table 1). Specifically, the Agency became aware during its assessment of the reregistration eligibility of nicotine that the pesticide-specific database for nicotine was insufficient, even when taking into account information available in the open literature. Had the registration been allowed to continue, this lack of data would have necessitated that the Agency issue a Data Call-In notice for specific nicotine data elements, particularly toxicity data. Fuller decided to request product phase-out rather than develop these data. Fuller requested that:

1. It be permitted to produce and sell its nicotine product until December 31, 2013.

2. Distributors be permitted to sell the product until December 31, 2014.

3. Users be permitted to use the product until stocks are depleted.

In addition, Fuller has agreed to implement several risk–reduction measures in the interim before cancellation becomes effective. The measures will take the form of revised labeling that:

1. Prohibits the use of the nicotine product in non-commercial greenhouses.

2. Prohibits the use of the nicotine product on plants grown for cut flowers.

3. Prohibits worker reentry into a treated greenhouse for at least 24 hours after application and until Worker Protection Standards (WPS) ventilation criteria have been met, except for appropriately trained and equipped workers.

4. Prohibits the sale or transfer of treated plants for 24 hours following application. These measures address potential risks of concern identified by the Agency in the nicotine Reregistration Eligibility Decision (RED).

Fuller's nicotine product is used only on greenhouse-grown ornamentals; this action would terminate the last nicotine pesticide product registered in the United States for any use.

III. What Action is the Agency Taking?

This notice announces receipt by EPA of a request from a registrant to cancel a nicotine product registration. The affected product and the registrant making the request are identified in Tables 1 and 2 of this unit.

Under section 6(f)(1)(A) of FIFRA, registrants may request, at any time, that their pesticide registrations be canceled or amended to terminate one or more pesticide uses. Section 6(f)(1)(B) of FIFRA requires that before acting on a request for voluntary cancellation, EPA must provide a 30–day public comment period on the request for voluntary cancellation or use termination. In addition, section 6(f)(1)(C) of FIFRA requires that EPA provide a 180–day comment period on a request for voluntary cancellation or termination of any minor agricultural use before granting the request, unless:

1. The registrants request a waiver of the comment period, or

2. The Administrator determines that continued use of the pesticide would pose an unreasonable adverse effect on the environment.

The nicotine registrant has not requested that EPA waive the 180–day comment period. EPA will provide a 180–day comment period on the request for cancellation.

Unless a request is withdrawn by the registrant within 180 days of publication of this notice, or if the Agency determines that there are substantive comments that warrant further review of this request, an order will be issued canceling the affected registration.

TABLE 1.—NICOTINE PRODUCT REGISTRATION WITH A PENDING REQUEST FOR CANCELLATION

Registration Number	Product Name	Company
1327-41	Fulex Nicotine Fumigator	Fuller System, Inc.

Table 2 of this unit shows the name and address of record for the registrant of the product listed in Table 1 of this unit.

TABLE 2.—REGISTRANT REQUESTING VOLUNTARY CANCELLATION

EPA Company Number	Company Name and Address
1327	Fuller System, Inc. P.O. Box 3053 Woburn, MA 01888

IV. What is the Agency's Authority for Taking this Action?

Section 6(f)(1) of FIFRA provides that a registrant of a pesticide product may at any time request that any of its pesticide registrations be canceled or amended to terminate one or more uses. FIFRA further provides that, before

acting on the request, EPA must publish a notice of receipt of any such request in the **Federal Register**. Thereafter, following the public comment period, the Administrator may approve such a request.

V. Procedures for Withdrawal of Request and Considerations for Reregistration of Fulex Nicotine Fumigator

Registrants who choose to withdraw a request for cancellation must submit such withdrawal in writing to the person listed under **FOR FURTHER INFORMATION CONTACT**, postmarked before April 27, 2009. This written withdrawal of the request for cancellation will apply only to the applicable FIFRA section 6(f)(1) request listed in this notice. If the product registration has been subject to a previous cancellation action, the effective date of cancellation and all other provisions of any earlier cancellation action are controlling.

VI. Provisions for Disposition of Existing Stocks

Existing stocks are those stocks of registered pesticide products which are currently in the United States and which were packaged, labeled, and released for shipment prior to the effective date of the cancellation action.

In any order issued in response to this request for cancellation of a product registration, EPA proposes to include the following provisions for the treatment of any existing stocks of the products identified or referenced in Table 1 in Unit III. Fuller will be permitted to produce and sell its nicotine product (Fulex Nicotine Fumigator, EPA Registration Number 1327–41) until December 31, 2013.Distributors will be permitted to sell this product until December 31, 2014. The use of this product will be permitted until existing stocks are depleted.

If the request for voluntary cancellation is granted, the Agency intends to publish the cancellation order in the **Federal Register**.

List of Subjects

Environmental protection, Pesticides and pests.

Dated: October 21, 2008.

Steven Bradbury,

Director, Special Review and Reregistration Division, Office of Pesticide Programs.

[FR Doc. E8–25831 Filed 10–28–08; 8:45 am]

BILLING CODE 6560–50–S

ENVIRONMENTAL PROTECTION AGENCY

[EPA–HQ–OPP–2008–0344; FRL–8385–5]

Pesticide Product Registration Approval

AGENCY: Environmental Protection Agency (EPA).

ACTION: Notice.

SUMMARY: This notice announces Agency approval of an application to register the pesticide product Bedoukian e,e-9,11-Tetradecdienyl Acetate Technical Pheromone] containing an active ingredient not included in any previously registered products pursuant to the provisions of section 3(c)(5) of the Federal Insecticide, Fungicide, and Rodenticide Act (FIFRA), as amended.

FOR FURTHER INFORMATION CONTACT: Chris Pfeifer, Biopesticides and Pollution Prevention Division (7511P), Office of Pesticide Programs, Environmental Protection Agency, 1200 Pennsylvania Ave., NW., Washington, DC 20460–0001; telephone number: (703) 308–0031; e-mail address: *pfeifer.chris@epa.gov*.

SUPPLEMENTARY INFORMATION:

I. General Information

A. Does this Action Apply to Me?

You may be potentially affected by this action if you are an agricultural producer, food manufacturer, or pesticide manufacturer. Potentially affected entities may include, but are not limited to:

- Crop production (NAICS code 111).
- Animal production (NAICS code 112).
- Food manufacturing (NAICS code 311).
- Pesticide manufacturing (NAICS code 32532).

This listing is not intended to be exhaustive, but rather provides a guide for readers regarding entities likely to be affected by this action. Other types of entities not listed in this unit could also be affected. The North American Industrial Classification System (NAICS) codes have been provided to assist you and others in determining whether this action might apply to certain entities. If you have any questions regarding the applicability of this action to a particular entity, consult the person listed under **FOR FURTHER INFORMATION CONTACT**.

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

1. *Docket*. EPA has established a docket for this action under docket identification (ID) number EPA–HQ–OPP–2008–0344 Publicly available docket materials are available either in the electronic docket at *http://www.regulations.gov*, or, if only available in hard copy, at the Office of Pesticide Programs (OPP) Regulatory Public Docket in Rm. S–4400, One Potomac Yard (South Bldg.), 2777 S. Crystal Dr., Arlington, VA. The hours of operation of this Docket Facility are from 8:30 a.m. to 4 p.m., Monday through Friday, excluding legal holidays. The Docket Facility telephone number is (703) 305–5805.

In accordance with section 3(c)(2) of FIFRA, a copy of the approved label, the list of data references, the data and other scientific information used to support registration, except for material specifically protected by section 10 of FIFRA, are also available for public inspection. Requests for data must be made in accordance with the provisions of the Freedom of Information Act and must be addressed to the Freedom of Information Office A–101, 1200 Pennsylvania Ave., NW., Washington, DC 20460–0001. Such requests should: Identify the product name and registration number and specify the data or information desired.

A paper copy of the fact sheet, which provides more detail on this registration, may be obtained from the National Technical Information Service (NTIS), 5285 Port Royal Rd., Springfield, VA 22161.

2. *Electronic access*. You may access this **Federal Register** document electronically through the EPA Internet under the ''**Federal Register**'' listings at *http://www.epa.gov/fedrgstr*.

II. Did EPA Approve the Application?

The Agency approved the application after considering all required data on risks associated with the proposed use of [9,11-tetradecadien-1-ol, 1-acetate, (9E,11E), and information on social, economic, and environmental benefits to be derived from use. Specifically, the Agency has considered the nature of the chemical and its pattern of use, application methods and rates, and level and extent of potential exposure. Based on these reviews, the Agency was able to make basic health and safety determinations which show that use of 9,11-tetradecadien-1-ol, 1-acetate, (9E,11E) when used in accordance with widespread and commonly recognized practice, will not generally cause

unreasonable adverse effects to the environment.

III. Approved Application

EPA issued a notice, published in the **Federal Register** of May 16, 2008 (73 FR 28466) (FRL– 8363-1), which announced that [Bedoukian Research, Inc.; 21 Finance Drive, Danbury, CT 06810-4192, had submitted an application to register the pesticide product, Bedoukian e,e-9,11-Tetradecdienyl Acetate Technical Pheromone, a straight-chain lepidopteran pheromone (SCLP) (EPA File Symbol 52991-EE), containing 94% of the active ingredient 9,11-tetradecadien-1-ol, 1-acetate, (9E,11E). This product was not previously registered.

The application was approved on August 5, 2008, as Bedoukian e,e-9,11-Tetradecdienyl Acetate Technical Pheromone (EPA Registration Number 52991–22) for incorporation into end use products intended to control the Light Brown Apple Moth (LBAM). (J.Pfeifer).

List of Subjects

Environmental protection, Chemicals, Pests and pesticides.

Dated: October 9, 2008.

W. Michael McDabit,

Acting Director, Biopesticides and Pollution Prevention Division, Office of Pesticide Programs.

[FR Doc. E8–25408 Filed 10–28–08; 8:45 a.m.]

BILLING CODE 6560–50–S

ENVIRONMENTAL PROTECTION AGENCY

[EPA–HQ–OPP–2007–0306; FRL–8385–8]

Pesticide Product Registration; Conditional Approval

AGENCY: Environmental Protection Agency (EPA).

ACTION: Notice.

SUMMARY: This notice announces Agency approval of an application submitted by Syngenta Seeds, Inc., to conditionally register the pesticide product VipCot containing new active ingredients not included in any previously registered products pursuant to the provisions of section 3(c)(7)(C) of the Federal Insecticide, Fungicide, and Rodenticide Act (FIFRA), as amended.

FOR FURTHER INFORMATION CONTACT: Alan Reynolds, Biopesticides and Pollution Prevention Division (7511P), Office of Pesticide Programs, Environmental Protection Agency, 1200 Pennsylvania Ave., NW., Washington, DC 20460–0001; telephone number: (703) 605–0515; e-mail address: *reynolds.alan@epa.gov*.

SUPPLEMENTARY INFORMATION:

I. General Information

A. Does this Action Apply to Me?

You may be potentially affected by this action if you are an agricultural producer, food manufacturer, or pesticide manufacturer. Potentially affected entities may include, but are not limited to:

- Crop production (NAICS code 111).
- Animal production (NAICS code 112).
- Food manufacturing (NAICS code 311).
- Pesticide manufacturing (NAICS code 32532).

This listing is not intended to be exhaustive, but rather provides a guide for readers regarding entities likely to be affected by this action. Other types of entities not listed in this unit could also be affected. The North American Industrial Classification System (NAICS) codes have been provided to assist you and others in determining whether this action might apply to certain entities. If you have any questions regarding the applicability of this action to a particular entity, consult the person listed under **FOR FURTHER INFORMATION CONTACT**.

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

1. *Docket*. EPA has established a docket for this action under docket identification (ID) number EPA–HQ–OPP–2007–0306. Publicly available docket materials are available either in the electronic docket at *http://www.regulations.gov*, or, if only available in hard copy, at the Office of Pesticide Programs (OPP) Regulatory Public Docket in Rm. S–4400, One Potomac Yard (South Bldg.), 2777 S. Crystal Dr., Arlington, VA. The hours of operation of this Docket Facility are from 8:30 a.m. to 4 p.m., Monday through Friday, excluding legal holidays. The Docket Facility telephone number is (703) 305–5805.

In accordance with section 3(c)(2) of FIFRA, a copy of the approved label, the list of data references, the data and other scientific information used to support registration, except for material specifically protected by section 10 of FIFRA, are also available for public inspection. Requests for data must be made in accordance with the provisions of the Freedom of Information Act and must be addressed to the Freedom of Information Office (A–101), 1200 Pennsylvania Ave., NW., Washington, DC 20460–0001. Such requests should: Identify the product name and registration number and specify the data or information desired.

Electronic versions of the fact sheet and Biopesticide Regulatory Action Document are available at *http://www.epa.gov/oppbppd1/biopesticides/pips/pip_list.htm.*

2. *Electronic access*. You may access this **Federal Register** document electronically through the EPA Internet under the ''**Federal Register**'' listings at *http://www.epa.gov/fedrgstr*.

II. Did EPA Conditionally Approve the Application?

A conditional registration may be granted under section 3(c)(7)(C) of FIFRA for a new active ingredient where certain data are lacking, on condition that such data are received by the end of the conditional registration period and do not meet or exceed the risk criteria set forth in 40 CFR 154.7; that use of the pesticide during the conditional registration period will not cause unreasonable adverse effects; and that use of the pesticide is in the public interest. The Agency has considered the available data on the risks associated with the proposed use of *Bacillus thuringiensis* Vip3Aa19 (vector pNOV3001; OECD Unique Identifier SYN-IR102-7) and modified Cry1Ab (vector pNOV4641; OECD Unique Identifier SYN-IR67B-1) insecticidal proteins and the genetic material necessary for their production in VipCot cotton, and information on social, economic, and environmental benefits to be derived from such use. Specifically, the Agency has considered the nature and its pattern of use, application methods and rates, and level and extent of potential exposure. Based on these reviews, the Agency was able to make basic health and safety determinations which show that use of *Bacillus thuringiensis* Vip3Aa19 (vector pNOV3001; OECD Unique Identifier SYN-IR102-7) and modified Cry1Ab (vector pNOV4641; OECD Unique Identifier SYN-IR67B-1) insecticidal proteins and the genetic material necessary for their production in VipCot cotton during the period of conditional registration will not cause any unreasonable adverse effect on the environment, and that use of the pesticides are, in the public interest.

Consistent with section 3(c)(7)(C) of FIFRA, the Agency has determined that these conditional registrations are in the public interest. Use of the pesticides are of significance to the user community, and appropriate labeling, use directions, and other measures have been taken to

ensure that use of the pesticides will not result in unreasonable adverse effects to man and the environment.

III. Approved Conditional Application

EPA issued a notice, published in the **Federal Register** of May 30, 2007 (72 FR 29999) (FRL–8131–7), which announced that Syngenta Seeds, Inc., 3054 Cornwallis Road, P.O. Box 12257, Research Triangle Park, NC 27709, had submitted an application to conditionally register the pesticide product, VipCot, Plant-Incorporated Protectant (EPA File Symbol 67979–O), containing *Bacillus thuringiensis* Vip3Aa19 (vector pNOV3001) and modified Cry1Ab (vector pNOV4641) insecticidal proteins and the genetic material necessary for their production in VipCot cotton containing active ingredients not included in any previously registered product.

The application was conditionally approved on June 26, 2008, as VipCot Cotton (EPA Registration Number 67979–9). The product is a plant-incorporated protectant for use on cotton.

List of Subjects

Environmental protection, Chemicals, Pests and pesticides.

Dated: October 9, 2008.

W. Michael McDavit,

Acting Director, Biopesticides and Pollution Prevention Division, Office of Pesticide Programs.

[FR Doc. E8–25314 Filed 10–28–08; 8:45 am]

BILLING CODE 6560–50–S

ENVIRONMENTAL PROTECTION AGENCY

[EPA–HQ–OPP–2008–0751; FRL–8386–2]

Pesticide Products; Registration Applications

AGENCY: Environmental Protection Agency (EPA).

ACTION: Notice.

SUMMARY: This notice announces receipt of applications to register pesticide products containing new active ingredients not included in any currently registered products pursuant to the provisions of section 3(c)(4) of the Federal Insecticide, Fungicide, and Rodenticide Act (FIFRA), as amended.

DATES: Comments must be received on or before November 28, 2008.

ADDRESSES: Submit your comments, identified by docket identification (ID) number EPA–HQ–OPP–2008–0751, by one of the following methods:

• *Federal eRulemaking Portal*: *http://www.regulations.gov*. Follow the on-line instructions for submitting comments.

• *Mail*: Office of Pesticide Programs (OPP) Regulatory Public Docket (7502P), Environmental Protection Agency, 1200 Pennsylvania Ave., NW., Washington, DC 20460–0001.

• *Delivery*: OPP Regulatory Public Docket (7502P), Environmental Protection Agency, Rm. S–4400, One Potomac Yard (South Bldg.), 2777 S. Crystal Dr., Arlington, VA. Deliveries are only accepted during the Docket Facility's normal hours of operation (8:30 a.m. to 4 p.m., Monday through Friday, excluding legal holidays). Special arrangements should be made for deliveries of boxed information. The Docket Facility telephone number is (703) 305–5805.

Instructions: Direct your comments to docket ID number EPA–HQ–OPP–2008–0751. EPA's policy is that all comments received will be included in the docket without change and may be made available on-line at *http://www.regulations.gov*, including any personal information provided, unless the comment includes information claimed to be Confidential Business Information (CBI) or other information whose disclosure is restricted by statute. Do not submit information that you consider to be CBI or otherwise protected through regulations.gov or e-mail. The regulations.gov website 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 regulations.gov, your e-mail address will be automatically captured and included as part of the comment that is placed in the docket and made available on the Internet. If you submit an electronic comment, EPA recommends that you include your name and other contact information in the body of your comment and with any disk or CD-ROM you submit. If EPA cannot read your comment due to technical difficulties and cannot contact you for clarification, EPA may not be able to consider your comment. Electronic files should avoid the use of special characters, any form of encryption, and be free of any defects or viruses.

Docket: All documents in the docket are listed in the docket index available at *http://www.regulations.gov*. Although listed in the index, some information is not publicly available, e.g., CBI or other information whose disclosure is restricted by statute. Certain other material, such as copyrighted material, is not placed on the Internet and will be publicly available only in hard copy form. Publicly available docket materials are available either in the electronic docket at *http://www.regulations.gov*, or, if only available in hard copy, at the OPP Regulatory Public Docket in Rm. S–4400, One Potomac Yard (South Bldg.), 2777 S. Crystal Dr., Arlington, VA. The hours of operation of this Docket Facility are from 8:30 a.m. to 4 p.m., Monday through Friday, excluding legal holidays. The Docket Facility telephone number is (703) 305–5805.

FOR FURTHER INFORMATION CONTACT: Chris Pfeifer, Biopesticides and Pollution Prevention Division (7511P), Office of Pesticide Programs, Environmental Protection Agency, 1200 Pennsylvania Ave., NW., Washington, DC 20460–0001; telephone number: (703) 308–0031; e-mail address: *pfeifer.chris@epa.gov*.

SUPPLEMENTARY INFORMATION:

I. General Information

A. Does this Action Apply to Me?

You may be potentially affected by this action if you are an agricultural producer, food manufacturer, or pesticide manufacturer. Potentially affected entities may include, but are not limited to:

• Crop production (NAICS code 111).

• Animal production (NAICS code 112).

• Food manufacturing (NAICS code 311).

• Pesticide manufacturing (NAICS code 32532).

This listing is not intended to be exhaustive, but rather provides a guide for readers regarding entities likely to be affected by this action. Other types of entities not listed in this unit could also be affected. The North American Industrial Classification System (NAICS) codes have been provided to assist you and others in determining whether this action might apply to certain entities. If you have any questions regarding the applicability of this action to a particular entity, consult the person listed under **FOR FURTHER INFORMATION CONTACT**.

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

1. *Submitting CBI*. Do not submit this information to EPA through regulations.gov or e-mail. Clearly mark the part or all of the information that you claim to be CBI. For CBI information in a disk or CD-ROM that you mail to EPA, mark the outside of the disk or CD-ROM as CBI and then identify electronically within the disk or CD-ROM the specific information that is

claimed as CBI. In addition to one complete version of the comment that includes information claimed as CBI, a copy of the comment that does not contain the information claimed as CBI must be submitted for inclusion in the public docket. Information so marked will not be disclosed except in accordance with procedures set forth in 40 CFR part 2.

2. *Tips for preparing your comments.* When submitting comments, remember to:

i. Identify the document by docket ID number and other identifying information (subject heading, **Federal Register** date and page number).

ii. 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.

iii. Explain why you agree or disagree; suggest alternatives and substitute language for your requested changes.

iv. Describe any assumptions and provide any technical information and/or data that you used.

v. If you estimate potential costs or burdens, explain how you arrived at your estimate in sufficient detail to allow for it to be reproduced.

vi. Provide specific examples to illustrate your concerns and suggest alternatives.

vii. Explain your views as clearly as possible, avoiding the use of profanity or personal threats.

viii. Make sure to submit your comments by the comment period deadline identified.

II. Registration Applications

EPA received applications as follows to register pesticide products containing active ingredients not included in any previously registered products pursuant to the provision of section 3(c)(4) of FIFRA. Notice of receipt of these applications does not imply a decision by the Agency on the applications.

File Symbol: 53575-GG. *Applicant*: Pacific Biocontrol Corporation, 14615 NE 13th Court, Suite A, Vancouver, WA 98685. *Product name*: Isomate® – LBAM Plus. *Active ingredient*: (E,E)-9,11-Tetradecadien-1-y1 Acetate at 2.64%. *Proposal classification/Use*: Straight-chain lepidopteron pheromone for the mating disruption of the Light Brown Apple Moth (LBAM). (J. Pfeifer).

List of Subjects

Environmental protection, Pesticides and pest.

Dated: October 9, 2008.

W. Michael McDavit,

Acting Director, Biopesticides and Pollution Prevention Division, Office of Pesticide Programs.

[FR Doc. E8–25406 Filed 10–28–08; 8:45 am]

BILLING CODE 6560–50–S

ENVIRONMENTAL PROTECTION AGENCY

[EPA–HQ–OPP–2008–0742; FRL–8386–5]

Pesticide Products; Registration Applications

AGENCY: Environmental Protection Agency (EPA).

ACTION: Notice.

SUMMARY: This notice announces receipt of applications to register pesticide products containing new active ingredients not included in any currently registered products pursuant to the provisions of section 3(c)(4) of the Federal Insecticide, Fungicide, and Rodenticide Act (FIFRA), as amended.

DATES: Comments must be received on or before November 28, 2008

ADDRESSES: Submit your comments, identified by docket identification (ID) number EPA–HQ–OPP–2008–0742, by one of the following methods:

• *Federal eRulemaking Portal*: *http://www.regulations.gov*. Follow the on-line instructions for submitting comments.

• *Mail*: Office of Pesticide Programs (OPP) Regulatory Public Docket (7502P), Environmental Protection Agency, 1200 Pennsylvania Ave., NW., Washington, DC 20460–0001.

• *Delivery*: OPP Regulatory Public Docket (7502P), Environmental Protection Agency, Rm. S–4400, One Potomac Yard (South Bldg.), 2777 S. Crystal Dr., Arlington, VA. Deliveries are only accepted during the Docket Facility's normal hours of operation (8:30 a.m. to 4 p.m., Monday through Friday, excluding legal holidays). Special arrangements should be made for deliveries of boxed information. The Docket Facility telephone number is (703) 305–5805.

Instructions: Direct your comments to docket ID number EPA–HQ–OPP–2008–0742. EPA's policy is that all comments received will be included in the docket without change and may be made available on-line at *http://www.regulations.gov*, including any personal information provided, unless the comment includes information claimed to be Confidential Business Information (CBI) or other information whose disclosure is restricted by statute. Do not submit information that you consider to be CBI or otherwise protected through regulations.gov or e-mail. The regulations.gov website 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 regulations.gov, your e-mail address will be automatically captured and included as part of the comment that is placed in the docket and made available on the Internet. If you submit an electronic comment, EPA recommends that you include your name and other contact information in the body of your comment and with any disk or CD-ROM you submit. If EPA cannot read your comment due to technical difficulties and cannot contact you for clarification, EPA may not be able to consider your comment. Electronic files should avoid the use of special characters, any form of encryption, and be free of any defects or viruses.

Docket: All documents in the docket are listed in the docket index available at *http://www.regulations.gov*. Although listed in the index, some information is not publicly available, e.g., CBI or other information whose disclosure is restricted by statute. Certain other material, such as copyrighted material, is not placed on the Internet and will be publicly available only in hard copy form. Publicly available docket materials are available either in the electronic docket at *http://www.regulations.gov*, or, if only available in hard copy, at the OPP Regulatory Public Docket in Rm. S–4400, One Potomac Yard (South Bldg.), 2777 S. Crystal Dr., Arlington, VA. The hours of operation of this Docket Facility are from 8:30 a.m. to 4 p.m., Monday through Friday, excluding legal holidays. The Docket Facility telephone number is (703) 305–5805.

FOR FURTHER INFORMATION CONTACT:

The Regulatory Action Leader, Biopesticides and Pollution Prevention Division (7511P), listed in the table in this unit:

Regulatory Action Leader	Telephone Number and E-mail Address	Mailing Address	File Symbol
Denise Greenway	(703) 308-8263 *greenway.denise@epa.gov*	Biopesticides and Pollution Prevention Division (7511P), Office of Pesticide Programs, Environmental Protection Agency, 1200 Pennsylvania, Ave., NW., Washington, DC 20460–0001	11312-I
Denise Greenway	(703) 308-8263 *greenway.denise@epa.gov*	Do.	75747-R
Denise Greenway	(703) 308-8263 *greenway.denise@epa.gov*	Do.	75747-E
Susanne Cerrelli	(703) 308-8077 *cerrelli.susanne@epa.gov*	Do.	80289-O
Susanne Cerrelli	(703) 308-8077 *cerrelli.susanne@epa.gov*	Do.	80289-RR
Susanne Cerrelli	(703) 308-8077 *cerrelli.susanne@epa.gov*	Do.	80289-RN

SUPPLEMENTARY INFORMATION:

I. General Information

A. Does this Action Apply to Me?

You may be potentially affected by this action if you are an agricultural producer, food manufacturer, or pesticide manufacturer. Potentially affected entities may include, but are not limited to:

- Crop production (NAICS code 111).
- Animal production (NAICS code 112).
- Food manufacturing (NAICS code 311).
- Pesticide manufacturing (NAICS code 32532).

This listing is not intended to be exhaustive, but rather provides a guide for readers regarding entities likely to be affected by this action. Other types of entities not listed in this unit could also be affected. The North American Industrial Classification System (NAICS) codes have been provided to assist you and others in determining whether this action might apply to certain entities. If you have any questions regarding the applicability of this action to a particular entity, consult the person listed under **FOR FURTHER INFORMATION CONTACT**.

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

1. *Submitting CBI*. Do not submit this information to EPA through regulations.gov or e-mail. Clearly mark the part or all of the information that you claim to be CBI. For CBI information in a disk or CD-ROM that you mail to EPA, mark the outside of the disk or CD-ROM as CBI and then identify electronically within the disk or CD-ROM the specific information that is claimed as CBI. In addition to one complete version of the comment that includes information claimed as CBI, a copy of the comment that does not contain the information claimed as CBI must be submitted for inclusion in the public docket. Information so marked will not be disclosed except in accordance with procedures set forth in 40 CFR part 2.

2. *Tips for preparing your comments*. When submitting comments, remember to:

i. Identify the document by docket ID number and other identifying information (subject heading, **Federal Register** date and page number).

ii. 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.

iii. Explain why you agree or disagree; suggest alternatives and substitute language for your requested changes.

iv. Describe any assumptions and provide any technical information and/or data that you used.

v. If you estimate potential costs or burdens, explain how you arrived at your estimate in sufficient detail to allow for it to be reproduced.

vi. Provide specific examples to illustrate your concerns and suggest alternatives.

vii. Explain your views as clearly as possible, avoiding the use of profanity or personal threats.

viii. Make sure to submit your comments by the comment period deadline identified.

II. Registration Applications

EPA received applications as follows to register pesticide products containing active ingredients not included in any previously registered products pursuant to the provision of section 3(c)(4) of FIFRA. Notice of receipt of these applications does not imply a decision by the Agency on the applications.

File Symbol: 11312-I. *Applicant*: Interregional Research Project Number 4 (IR-4), Rutgers University, 500 College Rd. East, Suite 201 W, Princeton, NJ, 08540 for United States Department of Agriculture-Agricultural Research Service-Appalachian Fruit Research Station, 2217 Wiltshire Rd., Kearneysville, WV 25430. *Product name*: C5 HoneySweet Plum. Plant-incorporated protectant. *Active ingredient*: Plum pox virus resistance gene (plum pox viral coat protein gene) at 0.0005%. *Proposal classification/Use*: Plum pox virus control. (D. Greenway).

File Symbol: 75747-R. *Applicant*: Botry-Zen, Ltd., 21 Willis St., PO Box 5664, Dunedin, New Zealand. *Product name: Ulocladium oudemansii* Technical. Fungicide *Active ingredient: Ulocladium oudemansii* (U3 Strain) at 100%. *Proposal classification/Use*: Manufacturing use (D. Greenway).

File Symbol: 75747-E. *Applicant*: Botry-Zen, Ltd., 21 Willis St., PO Box 5664, Dunedin, New Zealand. *Product name*: BOTRY-Zen®. Fungicide *Active ingredient: Ulocladium oudemansii* (U3 Strain) at 45.0%. *Proposal classification/Use*: For control of *Botrytis cinerea* and *Sclerotinia sclerotiorum* in fruit and vegetable crops, and in ornamental plants. (D. Greenway).

File Symbol: 80289-0. *Applicant*: Isagro S.p.A., Centro Uffici San-Edifico D-ala 3, Via Caldera, 21-20153 Milan, Italy. *Product name*: Bioten™ WP. Fungicide *Active ingredient:*

Trichoderma asperellum (strain ICC 012) at 2% and *Trichoderma gamsii* (strain ICC 080) at 2 %. *Proposal classification/Use*: To prevent soil borne fungal diseases in fruit and vegetable crops, herbs, ornamentals, and turf. (S. Cerrelli).

File Symbol: 80289-RR. *Applicant*: Isagro S.p.A., Centro Uffici San-Edifico D-ala 3, Via Caldera, 21-20153 Milan, Italy. *Product name: Trichoderma asperellum* ICC 012 technical. Fungicide *Active ingredient: Trichoderma asperellum* (strain ICC 012) at 99.90%. *Proposal classification/Use*: Manufacturing use. (S. Cerrelli).

File Symbol: 80289-RN. *Applicant*: Isagro S.p.A., Centro Uffici San-Edifico D-ala 3, Via Caldera, 21-20153 Milan, Italy. *Product name: Trichoderma gamsii* ICC. 080 technical. Fungicide *Active ingredient: Trichoderma gamsii* (strain ICC 080) at 99.90%. *Proposal classification/Use*: Manufacturing use. (S. Cerrelli).

List of Subjects

Environmental protection, Pesticides and pests.

Dated: October 16, 2008.

W. Michael McDavit,

Acting Director, Biopesticides and Pollution Prevention Division, Office of Pesticide Programs.

[FR Doc. E8–25515 Filed 10–28–08; 8:45 am]

BILLING CODE 6560–50–S

ENVIRONMENTAL PROTECTION AGENCY

[EPA–HQ–OPP–2008–0761; FRL–8387–3]

Notice of Receipt of Requests for Amendments to Delete Uses in Certain Pesticide Registrations

AGENCY: Environmental Protection Agency (EPA).

ACTION: Notice.

SUMMARY: In accordance with section 6(f)(1) of the Federal Insecticide, Fungicide, and Rodenticide Act (FIFRA), as amended, EPA is issuing a notice of receipt of request for amendments by registrants to delete uses in certain pesticide registrations. Section 6(f)(1) of FIFRA provides that a registrant of a pesticide product may at any time request that any of its pesticide registrations be amended to delete one or more uses. FIFRA further provides that, before acting on the request, EPA must publish a notice of receipt of any request in the **Federal Register**.

DATES: The deletions are effective by April 27, 2009 or November 28, 2008 for registrations for which the registrant requested a waiver of the 180–day comment period. The Agency will consider withdrawal requests postmarked no later than April 27, 2009 or November 28, 2008, whichever is applicable. Comments must be received on or before April 27, 2009 or November 28, 2008, for those registrations where the 180–day comment period has been waived.

Users of these products who desire continued use on crops or sites being deleted should contact the applicable registrant on or before April 27, 2009 or November 28, 2008 for registrations for which the registrant requested a waiver of the 180–day comment period.

ADDRESSES: Submit your withdrawal request, identified by docket identification (ID) number EPA–HQ–OPP–2008–0761, by one of the following methods:

•*Mail*: Office of Pesticide Programs (OPP) Regulatory Public Docket (7502P), Environmental Protection Agency, 1200 Pennsylvania Ave., NW., Washington, DC 20460–0001.

• *Delivery*: OPP Regulatory Public Docket (7502P), Environmental Protection Agency, Rm. S–4400, One Potomac Yard (South Bldg.), 2777 S. Crystal Dr., Arlington, VA. Deliveries are only accepted during the Docket Facility's normal hours of operation (8:30 a.m. to 4 p.m., Monday through Friday, excluding legal holidays). Special arrangements should be made for deliveries of boxed information. The Docket Facility telephone number is (703) 305–5805.

FOR FURTHER INFORMATION CONTACT: John Jamula, Information Technology and Resources Management Division (7502P), Office of Pesticide Programs, Environmental Protection Agency, 1200 Pennsylvania Ave., NW., Washington, DC 20460–0001; telephone number: (703) 305–6426; e-mail address: *jamula.john@epa.gov*.

SUPPLEMENTARY INFORMATION:

I. General Information

A. Does this Action Apply to Me?

This action is directed to the public in general. Although this action may be of particular interest to persons who produce or use pesticides, the Agency has not attempted to describe all the specific entities that may be affected by this action. If you have any questions regarding the information in this notice, consult the person listed under **FOR FURTHER INFORMATION CONTACT**.

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

1. *Docket*. EPA has established a docket for this action under docket ID number EPA–HQ–OPP–2008–0761. Publicly available docket materials are available either in the electronic docket at *http://www.regulations.gov*, or, if only available in hard copy, at the Office of Pesticide Programs (OPP) Regulatory Public Docket in Rm. S–4400, One Potomac Yard (South Bldg.), 2777 S. Crystal Dr., Arlington, VA. The hours of operation of this Docket Facility are from 8:30 a.m. to 4 p.m., Monday through Friday, excluding legal holidays. The Docket Facility telephone number is (703) 305–5805.

2. *Electronic access*. You may access this **Federal Register** document electronically through the EPA Internet under the ''**Federal Register**'' listings at *http://www.epa.gov/fedrgstr*.

II. What Action is the Agency Taking?

This notice announces receipt by the Agency of applications from registrants to delete uses in certain pesticide registrations. These registrations are listed in Table 1 of this unit by registration number, product name, active ingredient, and specific uses deleted:

TABLE—REGISTRATIONS WITH REQUESTS FOR AMENDMENTS TO DELETE USES IN CERTAIN PESTICIDES

EPA Reg. No.	Product Name	Active Ingredient	Delete From Label
000149–00016	Sweeney's Poison Peanuts Mole & Gopher Bait	Zinc Phosphide	Golf Courses
000264–00452	Iprodione Technical	Iprodione	Rice
000264–00469	MOCAP 20% Granular Lock n Load	Ethoprone	Corn and Potato
000264–00482	Rovral Brand 4 Flowable Fungicide	Iprodione	Rice

TABLE—REGISTRATIONS WITH REQUESTS FOR AMENDMENTS TO DELETE USES IN CERTAIN PESTICIDES—Continued

EPA Reg. No.	Product Name	Active Ingredient	Delete From Label
000264–00524	Roval Brand WG Fungicide	Iprodione	Rice
000264–00532	Roval Brand 50 SP Fungicide	Iprodione	Rice
000264–00689	Roval Brand 75 WG Fungicide	Iprodione	Rice
000279–02712	Furadan 10G Insecticide/Nematicide	Carbofuran	Cucumbers, Melons, Squash
000279–02876	Furadan 4F Insecticide/Nematicide	Carbofuran	Alfalfa, Cotton (at plant use only), Ornamentals, Pine Seedlings (except SE U.S) Popcorn, Potatoes (except Pacific NW ID,OR,WA) Small Grains, Sugarcane, Sweet Corn, Tobacco
000279–03023	Furadan 15G Insecticide/Nematicide	Carbofuran	Cucumbers, Melons, Squash
000279–03310	Furadan LFR Insecticide/Nematicide	Carbofuran	Alfalfa, Cotton (at plant use only), Ornamentals, Pine Seedlings (except SE U.S) Popcorn, Potatoes (except Pacific NW ID,OR,WA) Small Grains, Sugarcane, Sweet Corn, Tobacco
000464–00670	AMICAL 48	diiodmethyl p-tolyl sulfone	Metalworking, Nitrocellulose and Preservation of Drains, Grease Traps and Septic Systems Maintenance
000464–00672	AMICAL WP Antimicrobial Agent	diiodmethyl p-tolyl sulfone	Metalworking, Nitrocellulose and Preservation of Drains, Grease Traps and Septic Systems Maintenance
000464–00672	AMICAL WP Antimicrobial Agent	diodomethyl p-tolyl sulfone	Textiles and Non-Wovens, Wood, Rubber, and Plastic Uses
000464–00673	AMICAL Flowable Antimicrobial Agent	diiodmethyl p-tolyl sulfone	Metalworking, Nitrocellulose and Preservation of Drains, Grease Traps and Septic Systems Maintenance
002749–00521	Phorate 20G	Phorate	Sugarcane
005785–00008	Bromo-O-Gas .50%	Methyl Bromide	Residential Structures, Other Non-Commodity Structures (i.e. Warehouses, Industrial Sites, Processing Plants) excluding Fumigation of Any Structurs Containing Post-Harvest Food, non-Food Materials Consisting of Bags, Boxes, etc.
005785–00055	Bromo-O-Gas .25%	Methyl Bromide	Residential Structures, Other Non-Commodity Structures (i.e. Warehouses, Industrial Sites, Processing Plants) excluding Fumigation of Any Structurs Containing Post-Harvest Food, non-Food Materials Consisting of Bags, Boxes, etc.
008356–00002	Chloropicrin 100 Fumigant	Chloropicrin	Fumigation of Enclosed Spaces, Treatment of Wood, Timbers, Poles, Piles and Glue-Laminated Beams for Control of Internal Wood Decay by Fungi and Insects
008622–00017	Metrabrom 99	Methyl Bromide	Residential Structures, Other Non-Commodity Structures (i.e. Warehouses, Industrial Sites, Processing Plants) excluding Fumigation of Any Structurs Containing Post-Harvest Food, non-Food Materials Consisting of Bags, Boxes, etc.
008622–00055	Metrabrom Q	Methyl Bromide	Residential Structures, Other Non-Commodity Structures (i.e. Warehouses, Industrial Sites, Processing Plants) excluding Fumigation of Any Structurs Containing Post-Harvest Food, non-Food Materials Consisting of Bags, Boxes, etc.

TABLE—REGISTRATIONS WITH REQUESTS FOR AMENDMENTS TO DELETE USES IN CERTAIN PESTICIDES—Continued

EPA Reg. No.	Product Name	Active Ingredient	Delete From Label
009198–00196	Fertilizer with TGR POA Annual Control	Paclobutrazol	Residential, Home Lawn Uses
009198–00199	TGR Winter Overseeding Enhancer	Paclobutrazol	Residential, Home Lawn Uses
009198–00205	TGR Turf Enhancer 2SC	Paclobutrazol	Residential, Home Lawn Uses
009198–00215	The Andersons Fertilizer with 0.25% Paclobutrazol	Paclobutrazol	Residential, Home Lawn Uses
039967–00010	Preventol A8 Technical Fungicide	Tebuconazole	Paint
039967–00013	Preventol A8 Preservative	Tebuconazole	Paint
043813–00002	FUNGAFLOR Technical	Imazalil	Formulating Use for Wheat and Barley Seed Treatment Products
043813–00006	FUNGAFLOR 500 EC	Imazalil	Seed Treatment Use for Wheat and Barley
058266–00002	Tri-Clor Fumigant	Chloropicrin	Fumigation of Enclosed Spaces, Treatment of Wood, Timbers, Poles, Piles and Glue-Laminated Beams for Control of Internal Wood Decay by Fungi and Insects
062719–003911≤	KERB 50-W For Manufacturing Use	Propyzamide	Residential Use
062719–00397	KERB 50-W Herbicide	Propyzamide	Residential Use
062719–00541	Delegate WG	Spinetoram	Sorghum and Millet
062719–00545	Radiant SC	Spinetoram	Sorghum and Millet
062719–00578	KERB 3.3 SC Herbicide	Propyzamide	Residential Use
066222–00144	Nevado 4F	Iprodione	Rice
066330–00356	Acephate 90SP	Acephate	Cotton Seed Hopper Box Treatment, Peanut Planter Box Seed Treatment, Tobacco Soil Treatment, Specialty Uses Non Crop Areas, Mound Treatment of Fire Ants, Outdoor and Perimeter Spray
067760–00034	Fyfanon ULV Mosquito	Malathion	Agricultural Uses, Alfalfa, Clover, Beans, Blueberry, Cereal Crops,Grain Crops, Corn, Grain Sorghum, Cherries, Cotton, and Rice
067760–00040	Fyfanon 57EC	Malathion	Anise, Beans (Dry and Succulent), Commercial/Institutional/Industrial Equipment (indoors), Dried Parsley, Greenhouse (Vegetables Grown in Commercial Greenhouses), Lentils, Peanuts, Safflower, Stored Products, Sunflower, Tobacco, fruit dump
083504–00001	Technical Fosetyl-Al	Fosetyl-Al	Tobacco

Users of these products who desire continued use on crops or sites being deleted should contact the applicable registrant before April 27, 2009 or November 28, 2008 for registrations for which the registrant requested a waiver of the 180–day comment period to discuss withdrawal of the application for amendment. This time period will also permit interested members of the public to intercede with registrants prior to the Agency's approval of the deletion. A request to waive the 180–day comment period has been received for the following registrations: 769–574; 769–728; 769–971; 769–972; 769–976; 39967–10; 39967–13; 43813–2; 43813–6.

Table 2 of this unit includes the names and addresses of record for all registrants of the products listed in Table 1 of this unit, in sequence by EPA company number.

TABLE 2—REGISTRANTS REQUESTING AMENDMENTS TO DELETE USES IN CERTAIN PESTICIDE PRODUCTS

EPA Company no.	Company Name and Address
000149	Delta Analytical Corp., Agent For: Senoret Chemical Co., Inc., 12510 Prosperity Drive, Suite 160, Silver Spring, MD 20904.
000264	Bayer Cropscience LP, 2 T.W. Alexander Drive, Research Triangle Park, NC 27709.
000279	FMC Corp. Agricultural Products Group, 1735 Market St., Philadelphia, PA 19103.
000464	The Dow Chemical Co., Agent For: Dow Chemical Co., The, 1500 E. Lake Cook Rd., Buffalo Grove, IL 60089.
000769	Value Gardens Supply, Llc, d/b/a Value Garden Supply, PO Box 585, Saint Joseph, MO 64502.
002749	Aceto Agriculture Chemicals Corp., One Hollow Lane, Lake Success, NY 11042–1215.
005785	Great Lakes Chem Corp., Director of Regulatory Affairs, PO Box 2200, West Lafayette, IN 47996–2200.

TABLE 2—REGISTRANTS REQUESTING AMENDMENTS TO DELETE USES IN CERTAIN PESTICIDE PRODUCTS—Continued

EPA Company no.	Company Name and Address
008622	ICL-IP America, Inc., 95 Maccorkle Ave. Southwest, South Charleston, WV 25303–1411.
009198	The Andersons Lawn Fertilizer Division, Inc., dba/ Free Flow Fertilizer, PO Box 119, Maumee, OH 43537.
039967	Lanxess Corp., 111 Ridc Park W. Drive, Pittsburgh, PA 15275–1112.
043813	Janssen PMP, Janssen Pharmaceutica NV, 1125 Trenton-Harbourton Rd, Titusville, NJ 08560–0200.
058266	Shadow Mountain Products Corp., PO Box 1327, Hollister, CA 95024
062719	Dow Agrosciences LIC, 9330 Zionsville Rd 308/2e, Indianapolis, IN 46268–1054.
066222	Makhteshim-Agan of North America Inc., 4515 Falls of Neuse Rd, Suite 300, Raleigh, NC 27609.
067760	Cheminova, Inc., 1600 Wilson Blvd., Suite 700, Arlington, VA 22209.
083504	Kerley Trading, Inc., PO Box 15627, Phoenix, AZ 85060–5627.

III. What is the Agency's Authority for Taking this Action?

Section 6(f)(1) of FIFRA provides that a registrant of a pesticide product may at any time request that any of its pesticide registrations be amended to delete one or more uses. The FIFRA further provides that, before acting on the request, EPA must publish a notice of receipt of any such request in the **Federal Register**. Thereafter, the Administrator may approve such a request.

IV. Procedures for Withdrawal of Request

Registrants who choose to withdraw a request for use deletion must submit the withdrawal in writing to John Jamula using the methods in **ADDRESSES**. Requests for withdrawal must be received on or before April 27, 2009 or November 28, 2008, for those registrations where the 180–day comment period has been waived.

V. Provisions for Disposition of Existing Stocks

The Agency has authorized the registrants to sell or distribute product under the previously approved labeling for a period of 18 months after approval of the revision, unless other restrictions have been imposed, as in special review actions.

List of Subjects

Environmental protection, Pesticides and pests.

Dated: October 16, 2008.

Katryn Bouvé,

Director, Information Technology and Resources Management Division.

[FR Doc. E8–25517 Filed 10–28–08; 8:45 am]

BILLING CODE 6560–50–S

ENVIRONMENTAL PROTECTION AGENCY

[EPA–HQ–OPP–2007–1082; FRL–8387–4]

Sulfluramid Registration Review Final Decision; Notice of Availability

AGENCY: Environmental Protection Agency (EPA).

ACTION: Notice.

SUMMARY: This notice announces the availability of EPA's final registration review decision for the pesticide case sulfluramid. Registration review is EPA's periodic review of pesticide registrations to ensure that each pesticide continues to satisfy the statutory standard for registration, that is, that the pesticide can perform its intended function without causing unreasonable adverse effects on human health or the environment. Through this program, EPA is ensuring that each pesticide's registration is based on current scientific and other knowledge (including its effects on human health and the environment).

ADDRESSES: *Docket*: All documents in the docket are listed in the docket index available in regulations.gov. To access the electronic docket, go to *http://www.regulations.gov*; select ''Advanced Search,'' then ''Docket Search.'' Insert the docket ID number where indicated

and select the ''Submit'' button. Follow the instructions on the regulations.gov website to view the docket index or access available documents. Although, listed in the index, some information is not publicly available, e.g., CBI or other information whose disclosure is restricted by statute. Certain other material, such as copyrighted material, is not placed on the Internet and will be publicly available only in hard copy form. Publicly available docket materials are available either in the electronic docket at *http://www.regulations.gov*, or, if only available in hard copy, at the OPP Regulatory Public Docket in Rm. S–4400, One Potomac Yard (South Bldg.), 2777 S. Crystal Dr., Arlington, VA. The hours of operation of this Docket Facility are from 8:30 a.m. to 4 p.m., Monday through Friday, excluding legal holidays. The Docket Facility telephone number is (703) 305–5805.

FOR FURTHER INFORMATION CONTACT: Rosanna Louie, Special Review and Reregistration Division (7508P), Office of Pesticide Programs, Environmental Protection Agency, 1200 Pennsylvania Ave., NW., Washington, DC 20460–0001; telephone number: (703) 308–0037; fax number: (703) 308–8005; e-mail address: *louie.rosanna@epa.gov.*

For general questions on the registration review program, contact Kevin Costello, Special Review and Reregistration Division (7508P), Office of Pesticide Programs, Environmental Protection Agency, 1200 Pennsylvania Ave., NW., Washington, DC 20460–0001; telephone number: (703) 305–5026; fax number: (703) 308–8090; e-mail address: *costello.kevin@epa.gov.*

SUPPLEMENTARY INFORMATION:

I. General Information

Does this Action Apply to Me?

This action is directed to the public in general, and may be of interest to a wide range of stakeholders including environmental, human health, and agricultural advocates; the chemical industry; pesticide users; and members of the public interested in the sale, distribution, or use of pesticides. Since others also may be interested, the Agency has not attempted to describe all the specific entities that may be affected by this action. If you have any questions regarding the applicability of this action to a particular entity, consult the person listed under **FOR FURTHER INFORMATION CONTACT**.

II. Background

A. What Action is the Agency Taking?

This notice announces the final registration review decisions for the sulfluramid case as shown in Table 1.

TABLE 1.—REGISTRATION REVIEW DOCKET - FINAL DECISION

Registration Review Case Name and Number	Pesticide Docket ID Number	Regulatory Contact name, Phone Number, E-mail Address
Sulfluramid Case 7411	EPA–HQ–OPP–2007–1082	Rosanna Louie (703) 308–0037 Louie.rosanna@epa.gov

The docket for registration review of this pesticide case includes the final registration review decision document as well as other relevant documents related to the registration review of the subject case. The proposed registration review decision was posted to the docket for the above case and the public was invited to submit any comments or new information. During the 60–day comment period, no public comments were received for the sulfluramid case.

Background on the registration review program is provided at: *http://www.epa.gov/oppsrrd1/registration_review/*. Quick links to earlier documents related to the registration review of this pesticide are provided at: *http://www.epa.gov/oppsrrd1/registration_review/sulfluramid/index.htm*.

B. What is the Agency's Authority for Taking this Action?

FIFRA Section 3(g) and 40 CFR 155.57 and 155.58 provide authority for this action.

A registration review decision is the Agency's determination whether a pesticide meets, or does not meet, the standard for registration in FIFRA. This final decision continues to be supported by the rationales included in the proposed final decision for sulfluramid. The documents in the docket describe the Agency's rationale for issuing a registration review final decision for sulfluramid. No additional risk mitigation measures are required or specified for products containing sulfluramid and no labeling changes are currently required as a result of this final decision.

List of Subjects

Environmental protection, Registration review, Pesticides, Pests, and Sulfluramid.

Dated: October 20, 2008.

Steven Bradbury,

Director, Special Review and Reregistration Division, Office of Pesticide Programs.

[FR Doc. E8–25667 Filed 10–28–08; 8:45 a.m.]

BILLING CODE 6560–50–S

ENVIRONMENTAL PROTECTION AGENCY

[EPA–HQ–OPP–2007-0513; FRL–8388–8]

Triclosan; Reregistration Eligibility Decision; Notice of Availability

AGENCY: Environmental Protection Agency (EPA).

ACTION: Notice.

SUMMARY: This notice announces the availability of EPA's Reregistration Eligibility Decision (RED) for the pesticide triclosan, and opens a public comment period on this document. The Agency's risk assessments and other related documents also are available in the triclosan Docket. Triclosan is regulated by both the U.S. EPA and the U.S. Food and Drug Administration (FDA). The EPA regulates the antimicrobial uses of triclosan when used as a bacteriostat, fungistat, mildewstat, and deodorizer. EPA has reviewed triclosan through the public participation process that the Agency uses to involve the public in developing pesticide reregistration and tolerance reassessment decisions. Through these programs as mentioned in Unit II.A. of the **SUPPLEMENTARY INFORMATION**. EPA is ensuring that all pesticides meet current health and safety standards.

DATES: Comments must be received on or before December 29, 2008.

ADDRESSES: Submit your comments, identified by docket identification (ID) number EPA–HQ–OPP–2007-0513, by one of the following methods:

• *Federal eRulemaking Portal*: *http://www.regulations.gov*. Follow the on-line instructions for submitting comments.

• *Mail*: Office of Pesticide Programs (OPP) Regulatory Public Docket (7502P), Environmental Protection Agency, 1200 Pennsylvania Ave., NW., Washington, DC 20460–0001.

• *Delivery*: OPP Regulatory Public Docket (7502P), Environmental Protection Agency, Rm. S–4400, One Potomac Yard (South Bldg.), 2777 S. Crystal Dr., Arlington, VA. Deliveries are only accepted during the Docket Facility's normal hours of operation (8:30 a.m. to 4 p.m., Monday through Friday, excluding legal holidays). Special arrangements should be made for deliveries of boxed information. The Docket Facility telephone number is (703) 305–5805.

Instructions: Direct your comments to docket ID number EPA–HQ–OPP–2007-0513. EPA's policy is that all comments received will be included in the docket without change and may be made available on-line at *http://www.regulations.gov*, including any personal information provided, unless the comment includes information claimed to be Confidential Business Information (CBI) or other information whose disclosure is restricted by statute. Do not submit information that you consider to be CBI or otherwise protected through regulations.gov or e-mail. The regulations.gov website 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 regulations.gov, your e-mail address will be automatically captured and included as part of the comment that is placed in the docket and made available on the Internet. If you submit an electronic comment, EPA recommends that you include your name and other contact information in the body of your comment and with any disk or CD-ROM you submit. If EPA cannot read your comment due to technical difficulties and cannot contact you for clarification, EPA may not be able to consider your comment. Electronic files should avoid the use of special characters, any form of encryption, and be free of any defects or viruses.

Docket: All documents in the docket are listed in the docket index available at *http://www.regulations.gov*. Although listed in the index, some information is not publicly available, e.g., CBI or other information whose disclosure is restricted by statute. Certain other material, such as copyrighted material, is not placed on the Internet and will be publicly available only in hard copy form. Publicly available docket materials are available either in the electronic docket at *http://www.regulations.gov*, or, if only available in hard copy, at the OPP Regulatory Public Docket in Rm. S–4400, One Potomac Yard (South Bldg.), 2777 S. Crystal Dr., Arlington, VA. The hours of operation of this Docket Facility are from 8:30 a.m. to 4 p.m., Monday through Friday, excluding legal holidays. The Docket Facility telephone number is (703) 305–5805.

FOR FURTHER INFORMATION CONTACT:

Heather Garvie, Antimicrobials Division (7510P), Office of Pesticide Programs, Environmental Protection Agency, 1200 Pennsylvania Ave., NW., Washington, DC 20460–0001; telephone number: (703) 308-0034; fax number: (703) 305-5620; e-mail address: *garvie.heather@epa.gov*.

SUPPLEMENTARY INFORMATION:

I. General Information

A. Does this Action Apply to Me?

This action is directed to the public in general, and may be of interest to a wide range of stakeholders including environmental, human health, and agricultural advocates; the chemical industry; pesticide users; and members of the public interested in the sale, distribution, or use of pesticides. Since others also may be interested, the Agency has not attempted to describe all the specific entities that may be affected by this action. If you have any questions regarding the applicability of this action to a particular entity, consult the person listed under **FOR FURTHER INFORMATION CONTACT.**

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

1. *Submitting CBI*. Do not submit this information to EPA through regulations.gov or e-mail. Clearly mark the part or all of the information that you claim to be CBI. For CBI information in a disk or CD-ROM that you mail to EPA, mark the outside of the disk or CD-ROM as CBI and then identify electronically within the disk or CD-ROM the specific information that is claimed as CBI. In addition to one complete version of the comment that includes information claimed as CBI, a copy of the comment that does not contain the information claimed as CBI must be submitted for inclusion in the public docket. Information so marked will not be disclosed except in accordance with procedures set forth in 40 CFR part 2.

2. *Tips for preparing your comments*. When submitting comments, remember to:

i. Identify the document by docket ID number and other identifying information (subject heading, **Federal Register** date and page number).

ii. 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.

iii. Explain why you agree or disagree; suggest alternatives and substitute language for your requested changes.

iv. Describe any assumptions and provide any technical information and/or data that you used.

v. If you estimate potential costs or burdens, explain how you arrived at your estimate in sufficient detail to allow for it to be reproduced.

vi. Provide specific examples to illustrate your concerns and suggest alternatives.

vii. Explain your views as clearly as possible, avoiding the use of profanity or personal threats.

viii. Make sure to submit your comments by the comment period deadline identified.

II. Background

A. What Action is the Agency Taking?

Under section 4 of the Federal Insecticide, Fungicide, and Rodenticide Act (FIFRA), EPA is reevaluating existing pesticides to ensure that they meet current scientific and regulatory standards. EPA has completed a RED for the pesticide, triclosan under section 4(g)(2)(A) of FIFRA. Triclosan is regulated by both EPA and the U.S. Food and Drug Administration (FDA). EPA regulates the antimicrobial uses of triclosan when used as a bacteriostat, fungistat, mildewistat, and deodorizer. Triclosan is used in commercial, institutional and industrial premises and equipment; residential and public access premises; and as material preservative. Commercial, institutional and industrial premises and equipment uses include conveyor belts, fire hoses, dye bath vats and ice making equipment. As a material preservative, triclosan is used in many products including adhesives, fabrics, vinyl, plastics (toys, toothbrushes), polyethylene, polyurethane, polypropylene, floor wax emulsions, textiles (footwear, clothing), caulking compounds, sealants, rubber, and latex paints. There are a multitude of residential and public access premises uses including direction application to HVAC coils (limited to commercial applicators), and use as a materials

preservative in toys, paints, mattresses, clothing, brooms, mulch, floors, shower curtains, awnings, tents, toilet bowls, urinals, garbage cans, refuse container liners, insulation, concrete mixtures, grouts, and upholstery fabrics. The FDA-regulated uses include hand soaps, toothpaste, deodorants, laundry detergent, fabric softeners, facial tissues, antiseptics for wound care, and medical devices. Although these uses are not regulated under pesticide law, EPA considered these exposures in the aggregate risk assessment. EPA used population-based biological monitoring data to assess the co-occurrence of uses to develop an aggregate exposure assessment.

EPA has determined that the data base to support reregistration is substantially complete and that products containing triclosan are eligible for reregistration provided the risks are mitigated either in the manner described in the RED or by another means that achieves equivalent risk reduction. Upon submission of any required product specific data under section 4(g)(2)(B) of FIFRA and any necessary changes to the registration and labeling (either to address concerns identified in the RED or as a result of product specific data), EPA will make a final reregistration decision under section 4(g)(2)(C) of FIFRA for products containing triclosan.

Although the triclosan RED was signed on September 18, 2008, certain components of the document, which did not affect the final regulatory decision, were undergoing final editing at that time. These components, the appendices, have been added to the triclosan RED document.

EPA is applying the principles of public participation to all pesticides undergoing reregistration and tolerance reassessment. The Agency's Pesticide Tolerance Reassessment and Reregistration; Public Participation Process, published in the **Federal Register** on May 14, 2004, (69 FR 26819) (FRL–7357–9) explains that in conducting these programs, EPA is tailoring its public participation process to be commensurate with the level of risk, extent of use, complexity of issues, and degree of public concern associated with each pesticide. Due to its uses, risks, and other factors, triclosan was reviewed through the modified 4–Phase process. Through this process, EPA worked extensively with stakeholders and the public to reach the regulatory decisions for triclosan.

The reregistration program is being conducted under congressionally mandated time frames, and EPA recognizes the need both to make timely decisions and to involve the public. The Agency is issuing the triclosan RED for public comment. This comment period is intended to provide an additional opportunity for public input and a mechanism for initiating any necessary amendments to the RED. All comments should be submitted using the methods in **ADDRESSES**, and must be received by EPA on or before the closing date. These comments will become part of the Agency Docket for triclosan. Comments received after the close of the comment period will be marked ''late.'' EPA is not required to consider these late comments.

The Agency will carefully consider all comments received by the closing date and will provide a Response to Comments Memorandum in the Docket and regulations.gov. If any comment significantly affects the document, EPA also will publish an amendment to the RED in the **Federal Register**. In the absence of substantive comments requiring changes, the triclosan RED will be implemented as it is now presented.

B. What is the Agency's Authority for Taking this Action?

Section 4(g)(2) of FIFRA, as amended, directs that, after submission of all data concerning a pesticide active ingredient, the Administrator shall determine whether pesticides containing such active ingredient are eligible for reregistration, before calling in product specific data on individual end-use products and either reregistering products or taking other ''appropriate regulatory action.''

List of Subjects

Environmental protection, Pesticides and pests, antimicrobials, triclosan.

Dated: October 23, 2008.

Joan Harrigan Farrelly,

Director, Antimicrobials Division, Office of Pesticide Programs.

[FR Doc. E8–25829 Filed 10–28–08; 8:45 am]

BILLING CODE 6560–50–S

EQUAL EMPLOYMENT OPPORTUNITY COMMISSION

SES Performance Review Board

AGENCY: U.S. Equal Employment Opportunity Commission (EEOC).

ACTION: Notice of Membership of the EEOC Performance Review Board.

SUMMARY: Notice is hereby given of the appointment of members to the EEOC Performance Review Board.

FOR FURTHER INFORMATION CONTACT: Joann C. Riggs, Acting Chief Human Capital Officer, Office of Human Resources, U.S. Equal Employment Opportunity Commission, 1801 L Street, NW., Washington, DC 20507, (202) 663–4306.

SUPPLEMENTARY INFORMATION: Publication of the Performance Review Board (PRB) is required by 5 U.S.C. Section 4314(c)(4). The PRB reviews and evaluates the initial appraisal of a senior executive's performance by the supervisor, and makes written recommendations regarding performance ratings, performance awards, potential Presidential Rank Award nominees, and performance-based pay adjustments to the Chair. The Board shall consist of at least three voting members. When evaluating a career appointee's initial appraisal or recommending a career appointee for a performance award, more than half of the members must be career appointees. The names and titles of the PRB members and alternates are as follows:

Primary Members:

Anthony J. Kaminski, Chief Operating Officer (Chairperson);
Michel C. Fetzer, Director, Dallas District Office;
Kimberly J. Hancher, Chief Information Officer;
Jeffrey Smith, Chief Financial Officer; and
A. Jacy Thurmond, Jr. Esq., Senior Advisor to the Commissioner, Social Security Administration.

Alternates:

John Czajkowski, Assistant Inspector General for Management, Department of Treasury;
Peggy R. Mastroianni, Associate Legal Counsel; and
Roy J. Ruff, Jr., Director, Houston District Office.

DATES: Membership is effective on the date of this notice.

Signed at Washington, DC, on this 23rd day of October 2008.

For the Commission.

Naomi C. Earp,

Chair.

[FR Doc. E8–25794 Filed 10–28–08; 8:45 am]

BILLING CODE 6570–01–P

FEDERAL COMMUNICATIONS COMMISSION

[DA 08–2338]

Consumer Advisory Committee

AGENCY: Federal Communications Commission.

ACTION: Notice.

SUMMARY: The Commission announces the date and agenda of the next meeting of its Consumer Advisory Committee ''Committee''.

DATES: The next meeting of the Committee will take place on Friday, November 14, 2008,9 a.m. to 4 p.m., at the Commission's Headquarters Building, Room TW–C305, 445 12th Street, SW., Washington, DC 20554.

ADDRESSES: Federal Communications Commission, 445 12th Street, NW., Washington, DC 20554.

FOR FURTHER INFORMATION CONTACT: Scott Marshall, Consumer & Governmental Affairs Bureau, (202) 418–2809 (voice), (202) 418–0179 (TTY), or e-mail *scott.marshal@fcc.gov*.

SUPPLEMENTARY INFORMATION: On October 22, 2008, the Commission released Public Notice DA 08–2338, announcing the agenda, date and time of the Committee's next meeting.

At its November 14, 2008 meeting, the Committee will continue its consideration of digital television (DTV) transition issues. The Committee may also consider recommendations regarding broadband/universal service, captioning and relay services, the provision of auditory access to televised programming containing emergency information, as well as other consumer issues within the jurisdiction of the Commission. A limited amount of time on the agenda will be available for oral comments from the public. The Committee is organized under and operates in accordance with the provisions of the Federal Advisory Committee Act, 5 U.S.C. App. 2 (1988). The meeting is open to the public. Members of the public may address the Committee or may send written comments to: Scott Marshall, Designated Federal Officer of the Committee, at the address indicated on the first page of this document.

The meeting site is fully accessible to people using wheelchairs or other mobility aids. Sign language interpreters, open captioning, assistive listening devices, and Braille copies of the agenda and handouts will be provided on site. Other reasonable accommodations for people with disabilities are available upon request. Include a description of the accommodation you will need, and a way we can contact you if we need more information. Last minute requests will be accepted, but may be impossible to fill. Send an e-mail to: *fcc504@fcc.gov* or call the Consumer & Governmental Affairs Bureau at 202–418–0530 (voice), 202–418–0432 (TTY).

Federal Communications Commission.

Thomas Wyatt,

Deputy Bureau Chief, Consumer Outreach & Intergovernmental Affairs, CGB.

[FR Doc. E8–25800 Filed 10–28–08; 8:45 am]

BILLING CODE 6712–01–P

FEDERAL MARITIME COMMISSION

Notice of Agreements Filed

The Commission hereby gives notice of the filing of the following agreements under the Shipping Act of 1984. Interested parties may submit comments on agreements to the Secretary, Federal Maritime Commission, Washington, DC 20573, within ten days of the date this notice appears in the **Federal Register**. Copies of agreements are available through the Commission's Web site (*http://www.fmc.gov*) or contacting the Office of Agreements at (202) 523–5793 or *tradeanalysis@fmc.gov.*

Agreement No.: 010977–060.

Title: Hispaniola Discussion Agreement.

Parties: Crowley Liner Services; Seaboard Marine Ltd.; and Tropical Shipping and Construction Co. Ltd.

Filing Party: Wayne R. Rohde, Esq.; Sher & Blackwell; 1850 M Street, NW.; Suite 900; Washington, DC 20036.

Synopsis: The amendment adds authority for the parties to collect, exchange, and discuss certain trade data.

Agreement No.: 010979–047.

Title: Caribbean Shipowners Association.

Parties: Bernuth Lines, Ltd.; CMA CGM, S.A.; Crowley Caribbean Services, LLC/Crowley Liner Services, Inc.; Seaboard Marine, Ltd.; Seafreight Line, Ltd.; Tropical Shipping and Construction Co., Ltd.; Sea Star Line Caribbean, LLC; and Zim Integrated Shipping Services, Ltd.

Filing Party: Wayne R. Rohde, Esq.; Sher and Blackwell; 1850 M Street, NW., Suite 900; Washington, DC 20036.

Synopsis: The amendment would add Crowley Caribbean Services, LLC, acting as a single party in conjunction with Crowley Liner Services, Inc.

Agreement No.: 010982–045.

Title: Florida-Bahamas Shipowners and Operators Association.

Parties: Atlantic Caribbean Line, Inc.; Bernuth Lines, Ltd.; Crowley Caribbean Services LLC/Crowley Liner Services, Inc.; Seaboard Marine, Ltd.; Seafreight Line, Ltd.; and Tropical Shipping and Construction Co., Ltd.

Filing Party: Wayne R. Rohde, Esq.; Sher & Blackwell LLP; 1850 M Street, NW.; Suite 900; Washington, DC 20036.

Synopsis: The amendment would add Crowley Caribbean Services, LLC, acting as a single party in conjunction with Crowley Liner Services, Inc.

Agreement No.: 011953–007.

Title: Florida Shipowners Group Agreement.

Parties: The member lines of the Caribbean Shipowners Association and the Florida-Bahamas Shipowners and Operators Association.

Filing Party: Wayne R. Rohde, Esq.; Sher & Blackwell, LLP; 1850 M Street, NW.; Suite 900; Washington, DC 20036.

Synopsis: The amendment would add Crowley Caribbean Services, LLC, acting as a single party in conjunction with Crowley Liner Services, Inc.

Agreement No.: 011961–004.

Title: The Maritime Credit Agreement.

Parties: Alianca Navegacao e Logistica Ltda. & Cia; A.P. Moller-Maersk A/S; China Shipping Container Lines Co., Ltd.; CMA CGM, S.A.; Companhia Libra de Navegacao; Compania Libra de Navegacion Uruguay S.A.; Compania Sudamericana de Vapores, S.A.; COSCO Container Lines Company Limited; Dole Ocean Cargo Express; Hamburg-Süd; Hoegh Autoliners A/S; Independent Container Line Ltd.; Kawasaki Kisen Kaisha, Ltd.; Norasia Container Lines Limited; Safmarine Container Lines N.V.; Tropical Shipping & Construction Co., Ltd.; United Arab Shipping Company (S.A.G.); Wallenius Wilhelmsen Logistics AS; and Zim Integrated Shipping Services, Ltd.

Filing Party: Wayne R. Rohde, Esq.; Sher & Blackwell LLP; 1850 M Street, NW.; Suite 900; Washington, DC 20036.

Synopsis: The amendment deletes Atlantic Container AB as a party to the agreement.

Agreement No.: 012054.

Title: EUKOR/NYK Venezuela Space Charter Agreement.

Parties: EUKOR Car Carriers, Inc. and Nippon Yusen Kaisha.

Filing Party: Michael B. Holt, Esq.; Vice President & General Counsel; NYK Line (North America), Inc.; 300 Lighting Way 5th Floor; Secaucus, NJ 07094.

Synopsis: The agreement authorizes EUKOR to charter space to NYK in the trade between Baltimore, MD and Venezuela.

Agreement No.: 201198.

Title: Marine Terminal Operators of Hampton Roads Discussion Agreement.

Parties: APM Terminals Virginia, Inc. and Virginia International Terminals, Inc.

Filing Party: Wayne R. Rohde, Esq.; Sher and Blackwell; 1850 M Street, NW.; Suite 900; Washington, DC 20036.

Synopsis: The agreement would authorize the parties to discuss and

agree on marine terminal rates, charges, and conditions of service, and engage in other cooperative working arrangements.

By order of the Federal Maritime Commission.

Dated: October 24, 2008.

Karen V. Gregory,

Secretary.

[FR Doc. E8–25818 Filed 10–28–08; 8:45 am]

BILLING CODE 6730–01–P

FEDERAL MARITIME COMMISSION

Ocean Transportation Intermediary License Applicants

Notice is hereby given that the following applicants have filed with the Federal Maritime Commission an application for license as a Non-Vessel Operating Common Carrier and Ocean Freight Forwarder—Ocean Transportation Intermediary pursuant to section 19 of the Shipping Act of 1984 as amended (46 U.S.C. Chapter 409 and 46 CFR part 515).

Persons knowing of any reason why the following applicants should not receive a license are requested to contact the Office of Transportation Intermediaries, Federal Maritime Commission,Washington, DC 20573.

Non-Vessel Operating Common Carrier Ocean Transportation Intermediary Applicants

AJC Logistics, LLC dba Eagle Logistics Systems, 5188 Roswell Road, Atlanta, GA 30342.Officer: Christopher Swartz, Vice President, (Qualifying Individual).

Vin Worldwide Transport, LLC dba Vinship Line, 485 B Route 1, Iselin, NJ 08830. Officer: Martin J. Aranha, President, (Qualifying Individual).

M&M Cargo Line, Inc., 485–B Route 1, Iselin, NJ 08830. Officer: Martin J. Aranha, President, (Qualifying Individual).

Unlimited Freight Solutions Inc., 32 Via Costa Verdes, Rancho Palos Verdes, CA 90275.Officers: Ruth Chieng, Secretary, (Qualifying Individual), Wan-Ping W. Yu, CEO.

Atlantic Pacific Shipping, Inc., 58 Pyles Lane, New Castle, DE 19720. Officer: Daniel S. Cabellos, President, (Qualifying Individual).

Universe Express Inc., 39–06 Ackerman Drive, Fair Lawn, NJ 07410. Officers: Yecenia Blanco, Secretary, (Qualifying Individual), Eytan Shaya, CEO.

Columbia River Logistics Service Company, dba Colo Lines dba Colo Logistics, 30900 Launch Lane, Umatilla, OR 97882. Officer: Jeff Vandel, Vice President, (Qualifying Individual).

Non-Vessel Operating Common Carrier and Ocean Freight Forwarder Transportation Intermediary Applicants

Global Freight Company Inc., 6485 Shiloh Road, #B500, Alpharetta, GA 30005. Officer: Dmitri Taygankov, President, (Qualifying Individual).

Ioplus Logistics, LLC dba Plus Logistics, 10300 NW 19th Street, Miami, FL 33172. Officers: Carlos Perez, General Manager, (Qualifying Individual).

Barcarella Transportation Services, Inc., dba BTX Sea Freight, 731 Main Street, Monroe, CT 06468.Officer: Rosario Barcarella, Vice President, (Qualifying Individual).

Nautica Cargo Services Inc. dba Navinsa Line, 7911 NW 72nd Ave. 219B, Miami, FL 33166.Officer: Vivian Gonzalez, President, (Qualifying Individual).

Valcad Construction, LLC, 3211 W. Northwest Highway, #200, Dallas, TX 75220.Officer: Nild Ortiz, Vice President, (Qualifying Individual).

Ambyth Shipping Micronesia, Inc. dba Ambyth Logistics, Pacific Trading Bldg., Chalan Pale Arnold Road, Saipan, MP 96950. Officer: Andrew J. Miller, Treasurer, (Qualifying Individual).

Ambyth Shipping & Trading, Inc. dba Ambyth Logistics, 193 Rojas Street, Harmon Industrial Park, Tamuning, GU 96913. Officer: (Qualifying Individual).

Sinclair Communication Center LLC dba Shipping Made Easy, 87 Elm Street, Manchester, NH 03101. Officer: Luke Sinclair, Member, (Qualifying Individual).

Two Brothers, LLC, 2080 NW 79th Avenue, Miami, FL 33122. Officers: Jose L. Grinovero, Member Manager, (Qualifying Individual), Hector R. Squef, Member Manager.

Dulles World Cargo, Inc., 23480 Rock Haven Way, #110 Dulles, VA 20166. Officer:Michael R. Greene, President, (Qualifying Individual).

Nabu Trading, LLC, 1432 NW. 82 Avenue, Miami, FL 33126. Officers: Orlando Paz, Cargo Agent, (Qualifying Individual), Juan P. Luchau, President.

NGL Airfreight, LLC, 21061 S. Western Avenue, Torrance, CA 90501. Officer: William D. Brady, V. Pres. of Customs, (Qualifying Individual).

Ocean Freight Forwarder—Ocean Transportation Intermediary Applicants

Bremol, Inc. dba Molcan Freight Forwarding Services, 13501 SW. 16 Court, Davie, FL 33325.Officers: Molesa C. King, Vice President, (Qualifying Individual), Brenton J. King, President.

Cartrans International, LLC, 17707 NW. Miami Ct., Miami, FL 33169. Officer: Arthur Moroz, CEO, (Qualifying Individual).

Secure Shipping, Inc., 10400 Courthouse Road, #242, Spotsylvania, VA 22553. Officers: Stanley Egwuonwu, Manager, (Qualifying Individual), Christine A. Egwuonwu, Secretary.

T.C.H. Incorporated, 1415 E. University Drive, Phoenix, AZ 85034. Officers: David R. Coles, President, (Qualifying Individual), Thomas W. Heisler, Vice President.

Dated: October 24, 2008.

Karen V. Gregory,

Secretary.

[FR Doc. E8–25819 Filed 10–28–08; 8:45 am]

BILLING CODE 6730–01–P

FEDERAL RESERVE SYSTEM

Change in Bank Control Notices; Acquisition of Shares of Bank or Bank Holding Companies

The notificants listed below have applied under the Change in Bank Control Act (12 U.S.C. 1817(j)) and § 225.41 of the Board's Regulation Y (12 CFR 225.41) to acquire a bank or bank holding company. The factors that are considered in acting on the notices are set forth in paragraph 7 of the Act (12 U.S.C. 1817(j)(7)).

The notices are available for immediate inspection at the Federal Reserve Bank indicated. The notices also will be available for inspection at the office of the Board of Governors. Interested persons may express their views in writing to the Reserve Bank indicated for that notice or to the offices of the Board of Governors. Comments must be received not later than November 14, 2008.

A. Federal Reserve Bank of Minneapolis (Jacqueline G. King, Community Affairs Officer) 90 Hennepin Avenue, Minneapolis, Minnesota 55480–0291:

1. Norlin G. Boyum, Minneapolis, Minnesota; John B. Boyum, Arlington, Virginia; and Stephanie J. Boyum, New York, New York, as a group acting in concert, to acquire voting shares of Citizens Bancshares of Woodville, Inc., and thereby indirectly acquire voting shares of Citizens State Bank, both of Hudson, Wisconsin.

Board of Governors of the Federal Reserve System, October 24, 2008.

Robert deV. Frierson,

Deputy Secretary of the Board.

[FR Doc. E8–25783 Filed 10–28–08; 8:45 am]

BILLING CODE 6210–01–S

FEDERAL RESERVE SYSTEM

Formations of, Acquisitions by, and Mergers of Bank Holding Companies

The companies listed in this notice have applied to the Board for approval, pursuant to the Bank Holding Company Act of 1956 (12 U.S.C. 1841 *et seq.*) (BHC Act), Regulation Y (12 CFR Part 225), and all other applicable statutes and regulations to become a bank holding company and/or to acquire the assets or the ownership of, control of, or the power to vote shares of a bank or bank holding company and all of the banks and nonbanking companies owned by the bank holding company, including the companies listed below.

The applications listed below, as well as other related filings required by the Board, are available for immediate inspection at the Federal Reserve Bank indicated. The applications also will be available for inspection at the offices of the Board of Governors. Interested persons may express their views in writing on the standards enumerated in the BHC Act (12 U.S.C. 1842(c)). If the proposal also involves the acquisition of a nonbanking company, the review also includes whether the acquisition of the nonbanking company complies with the standards in section 4 of the BHC Act (12 U.S.C. 1843). Unless otherwise noted, nonbanking activities will be conducted throughout the United States. Additional information on all bank holding companies may be obtained from the National Information Center website at *www.ffiec.gov/nic/*.

Unless otherwise noted, comments regarding each of these applications must be received at the Reserve Bank indicated or the offices of the Board of Governors not later than November 24, 2008.

A. Federal Reserve Bank of San Francisco (Kenneth Binning, Vice President, Applications and Enforcement) 101 Market Street, San Francisco, California 94105–1579:

1. Eggemeyer Advisory Corp., WJR Corp., Castle Creek Capital LLC, Castle Creek Capital Partners Fund IIA LP, and Castle Creek Capital Partners Fund IIB LP, all of Rancho Santa Fe, California, to acquire approximately 8.1 percent of the voting shares of First Chicago Bancorp, and thereby indirectly acquire voting shares of First Chicago Bank & Trust, both of Itasca, Illinois.

In connection with this application, Applicants also have applied to acquire indirect control of Union Acceptance Company LLC, Indianapolis, Indiana, and Coastal Credit LLC, Virginia Beach, Virginia, and thereby indirectly engage in auto lending and financing, pursuant to section 225.28(b)(1) of Regulation Y.

Board of Governors of the Federal Reserve System, October 24, 2008.

Robert deV. Frierson,

Deputy Secretary of the Board.

[FR Doc.E8–25784 Filed 10–28–08; 8:45 am]

BILLING CODE 6210–01–S

FEDERAL RESERVE SYSTEM

Notice of Proposals to Engage in Permissible Nonbanking Activities or to Acquire Companies that are Engaged in Permissible Nonbanking Activities

The companies listed in this notice have given notice under section 4 of the Bank Holding Company Act (12 U.S.C. 1843) (BHC Act) and Regulation Y (12 CFR Part 225) to engage *de novo*, or to acquire or control voting securities or assets of a company, including the companies listed below, that engages either directly or through a subsidiary or other company, in a nonbanking activity that is listed in § 225.28 of Regulation Y (12 CFR 225.28) or that the Board has determined by Order to be closely related to banking and permissible for bank holding companies. Unless otherwise noted, these activities will be conducted throughout the United States.

Each notice is available for inspection at the Federal Reserve Bank indicated. The notice also will be available for inspection at the offices of the Board of Governors. Interested persons may express their views in writing on the question whether the proposal complies with the standards of section 4 of the BHC Act. Additional information on all bank holding companies may be obtained from the National Information Center website at *www.ffiec.gov/nic/*.

Unless otherwise noted, comments regarding the applications must be received at the Reserve Bank indicated or the offices of the Board of Governors not later than November 14, 2008.

A. Federal Reserve Bank of Chicago (Burl Thornton, Assistant Vice President) 230 South LaSalle Street, Chicago, Illinois 60690–1414:

1. Garnavillo Bank Corporation, Garnavillo, Iowa, to engage *de novo* in extending credit and servicing loans, pursuant to section 225.28(b)(1) of Regulation Y.

Board of Governors of the Federal Reserve System, October 24, 2008.

Robert deV. Frierson,

Deputy Secretary of the Board.

[FR Doc.E8–25785 Filed 10–28–08; 8:45 am]

BILLING CODE 6210–01–S

DEPARTMENT OF HEALTH AND HUMAN SERVICES

Centers for Disease Control and Prevention

[60 Day–09–0213]

Proposed Data Collections Submitted for Public Comment and Recommendations

In compliance with the requirement of Section 3506(c) (2)(A) of the Paperwork Reduction Act of 1995 for opportunity for public comment on proposed data collection projects, the Centers for Disease Control and Prevention (CDC) will publish periodic summaries of proposed projects. To request more information on the proposed project or to obtain a copy of data collection plans and instruments, call the CDC Reports Clearance Officer on 404–639–5960 or send comments to CDC Assistant Reports Clearance Officer, 1600 Clifton Road, MS D–74, Atlanta, GA 30333 or send an e-mail to *omb@cdc.gov*.

Comments are invited on: (a) Whether the proposed collection of information is necessary for the proper performance of the functions of the agency, including whether the information shall have practical utility; (b) the accuracy of the agency's estimate of the burden of the proposed collection of information; (c) ways to enhance the quality, utility, and clarity of the information to be collected; and (d) ways to minimize the burden of the collection of information on respondents, including the use of automated collection techniques or other forms of information technology. Written comments should be received within 60 days of this notice.

Proposed Project

National Vital Statistics Report Forms (0920–0213)—Extension—National Center for Health Statistics (NCHS), Centers for Disease Control and Prevention (CDC).

Background and Brief Description

The compilation of national vital statistics dates back to the beginning of the 20th century and has been conducted since 1960 by the Division of Vital Statistics of the National Center for Health Statistics, CDC. The collection of the data is authorized by 42 U.S.C. 242k.

The National Vital Statistics Report forms provide counts of monthly occurrences of births, deaths, infant deaths, marriages, and divorces. Similar data have been published since 1937 and are the sole source of these data at the National level. The data are used by the Department of Health and Human Services and by other government, academic, and private research and commercial organizations in tracking changes in trends of vital events.

Respondents for the Monthly Vital Statistics Report Form are registration officials in each State and Territory, the District of Columbia, and New York City; in addition, 60 local (county) officials in New Mexico who record marriages occurring and divorces and annulments granted in each county of New Mexico will use this form. This form is designed to collect counts of monthly occurrences of births, deaths, infant deaths, marriages, and divorces immediately following the month of occurrence.

The Annual Marriage and Divorce Statistical Report Form collects final annual counts of marriages and divorces by month for the United States and for each State. The statistical counts requested on this form differ from provisional estimates obtained on the Monthly Vital Statistics Report Form in that they represent complete counts of marriages, divorces, and annulments occurring during the months of the prior year. These final counts are usually available from State or county officials about eight months after the end of the data year. The data are widely used by government, academic, private research, and commercial organizations in tracking changes in trends of family formation and dissolution.

Respondents for the Annual Marriage and Divorce Statistical Report Form are registration officials in each State, the District of Columbia, New York City, Guam, Puerto Rico, Virgin Islands, Northern Marianas, and American Samoa. In addition, counts of marriages will be collected from individual counties in New Mexico, and counts of divorces will be collected from individual counties in California, Colorado, Indiana, Louisiana, New Mexico, and the boroughs of New York City due to a lack of centralized complete collections in these registration areas.

This submission requests approval for three years. There are no costs to respondents other than their time; the data are routinely available in each reporting office as a by-product of ongoing activities.

ESTIMATED ANNUALIZED BURDEN TABLE

Type of respondents	Form name	Number of respondents	Number of responses per respondent	Average burden per response (in hours)	Total burden (in hours)
State, Territory and New Mexico County officials.	Monthly Vital Statistics Report	117	12	30/60	702
State, Territory and selected County, Borough and City officials.	Annual Marriage and Divorce Statistical Report.	404	1	30/60	202
Total					904

Dated: October 20, 2008.

Maryam I. Daneshvar,

Acting Reports Clearance Officer, Office of the Chief Science Officer,Centers for Disease Control and Prevention.

[FR Doc. E8–25779 Filed 10–28–08; 8:45 am]

BILLING CODE 4163–18–P?≤

DEPARTMENT OF HEALTH AND HUMAN SERVICES

Administration for Children and Families

Proposed Information Collection Activity; Comment Request

Proposed Projects

Title: Help America Vote Act (HAVA) Voting Access Annual Report.

OMB No.: 0970–0327.

Description: This is a revision to include the application for the previously cleared Help America Vote Act (HAVA) Annual Report, Payments to States and Units of Local Government, 42 U.S.C. 15421.

The Help America Vote Act (HAVA) application to States and Units of Local Government is required by federal statute and regulation. Each State or Unit of Local Government must prepare an application to receive funds under the Help America Vote Act (HAVA), Public Law 107–252, Title II, Subtitle D, Part 2, Sections 261 to 265, Payments to States and Units of Local Government to Assure Access for Individuals with Disabilities (42 U.S.C. 15421–25). The application is provided in writing to the Administration for Children and Families, Administration on Developmental Disabilities.

An annual report is required by Federal statute (the Help America Vote Act (HAVA) of 2002, Public Law 107–252, Section 261, Payments to States and Units of Local Government, 42 U.S.C. 15421). Each State or Unit of Local Government must prepare and submit an annual report at the end of every fiscal year. The report addresses the activities conducted with the funds provided during the year. The information collected from the annual report will be aggregated into an annual profile of how States have utilized the funds and establish best practices for election officials. It will also provide an overview of the State election goals and accomplishments and permit the Administration on Developmental Disabilities to track voting progress to monitor grant activities.

Respondents: Secretaries of State, Directors, State Election Boards, State Chief Election officials.

ANNUAL BURDEN ESTIMATES

Instrument	Number of respondents	Number of responses per respondent	Average burden hours per response	Total burden hours
Help America Vote Act (HAVA) Voting Access Annual Report	50	1	24	1,200
Help America Vote Act (HAVA) Voting Access Application	55	1	50	2,750
Estimated Total Annual Burden Hours				3,950

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 Administration, Office of Information Services, 370 L'Enfant Promenade, SW., Washington, DC 20447, Attn: ACF Reports Clearance Officer. E-mail address: *infocollection@acf.hhs.gov*. All requests should be identified by the title of the information collection.

The Department specifically requests comments on: (a) Whether the proposed collection of information is necessary for the proper performance of the functions of the agency, including whether the information shall have practical utility; (b) the accuracy of the agency's estimate of the burden of the proposed collection of information; (c) the quality, utility, and clarity of the information to be collected; and (d) ways to minimize the burden of the collection of information on respondents, including through the use of automated collection techniques or other forms of information technology. Consideration will be given to comments and suggestions submitted within 60 days of this publication.

Dated: October 24, 2008.

Janean Chambers,

Reports Clearance Officer.

[FR Doc. E8–25752 Filed 10–28–08; 8:45 am]

BILLING CODE 4184–01–P

DEPARTMENT OF HEALTH AND HUMAN SERVICES

Food and Drug Administration

[Docket No. FDA–2008–D–0030] (formerly Docket No. 2004D–0466)

Agency Information Collection Activities; Announcement of Office of Management and Budget Approval; Substantiation for Dietary Supplement Claims Made Under the Federal Food, Drug, and Cosmetic Act

AGENCY: Food and Drug Administration, HHS.

ACTION: Notice.

SUMMARY: The Food and Drug Administration (FDA) is announcing that a collection of information entitled ''Substantiation for Dietary Supplement Claims Made Under the Federal Food, Drug, and Cosmetic Act'' 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 April 25, 2008 (73 FR 22423), 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 0910–0626. 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 22, 2008.

Jeffrey Shuren,

Associate Commissioner for Policy and Planning.

[FR Doc. E8–25791 Filed 10–28–08; 8:45 am]

BILLING CODE 4160–01–S

DEPARTMENT OF HEALTH AND HUMAN SERVICES

Food and Drug Administration

[Docket No. FDA–2008–N–0543]

Agency Information Collection Activities; Proposed Collection; Comment Request; Waiver of In Vivo Demonstration of Bioequivalence of Animal Drugs in Soluble Powder Oral Dosage Form Products and Type A Medicated Articles

AGENCY: Food and Drug Administration, HHS.

ACTION: Notice.

SUMMARY: The Food and Drug Administration (FDA) is announcing an opportunity for public comment on the proposed collection of certain information by the agency. Under the Paperwork Reduction Act of 1995 (the PRA), Federal agencies are required to publish notice in the **Federal Register** concerning each proposed collection of information, including each proposed extension of an existing collection of information, and to allow 60 days for public comment in response to the notice. This notice solicits comments on the waiver requirement procedures that are recommended by the agency for in vivo demonstration of bioequivalence for generic soluble powder oral dosage form products and Type A medicated articles.

DATES: Submit written or electronic comments on the collection of information by December 29, 2008.

ADDRESSES: Submit electronic comments on the collection of information to *http://www.regulations.gov*. Submit written comments on the collection of information to the Division of Dockets Management (HFA–305), Food and Drug Administration, 5630 Fishers Lane, rm.1061, Rockville, MD 20852. All comments should be identified with the docket number found in brackets in the heading of this document.

FOR FURTHER INFORMATION CONTACT: Denver Presley, Jr., Office of Information Management (HFA–710), Food and Drug

Administration, 5600 Fishers Lane, Rockville, MD 20857, 301–796–3793.

SUPPLEMENTARY INFORMATION: Under the PRA (44 U.S.C. 3501–3520), Federal agencies must obtain approval from the Office of Management and Budget (OMB) for each collection of information they conduct or sponsor. ''Collection of information'' is defined in 44 U.S.C. 3502(3) and 5 CFR 1320.3(c) and includes agency requests or requirements that members of the public submit reports, keep records, or provide information to a third party. Section 3506(c)(2)(A) of the PRA (44 U.S.C. 3506(c)(2)(A)) requires Federal agencies to provide a 60-day notice in the **Federal Register** concerning each proposed collection of information, including each proposed extension of an existing collection of information, before submitting the collection to OMB for approval. To comply with this requirement, FDA is publishing notice of the proposed collection of information set forth in this document.

With respect to the following collection of information, FDA invites comments on these topics: (1) Whether the proposed collection of information is necessary for the proper performance of FDA's functions, including whether the information will have practical utility; (2) the accuracy of FDA's estimate of the burden of the proposed collection of information, including the validity of the methodology and assumptions used; (3) ways to enhance the quality, utility, and clarity of the information to be collected; and (4) ways to minimize the burden of the collection of information on respondents, including through the use of automated collection techniques, when appropriate, and other forms of information technology.

Waiver of In Vivo Demonstration of Bioequivalence of Animal Drugs in Soluble Powder Oral Dosage Form Products and Type A Medicated Articles—21 CFR Part 514 (OMB Control Number 0910–0575)—Extension

The Center for Veterinary Medicine has written this guidance to address a perceived need for agency guidance in its work with the animal health industry. This guidance describes the procedures that the agency recommends for the review of requests for waiver of in vivo demonstration of bioequivalence for generic soluble powder oral dosage form products and Type A medicated articles.

The Generic Animal Drug and Patent Term Registration Act of 1988 permitted the generic drug manufacturers to copy those pioneer drug products that were no longer subject to patent or other marketing exclusivity protection. The approval for marketing these generic products is based, in part, upon a demonstration of bioequivalence between the generic product and the pioneer product. This guidance clarifies circumstances under which FDA believes the demonstration of bioequivalence required by the statute does not need to be established on the basis of in vivo studies for soluble powder oral dosage form products and Type A medicated articles. The data submitted in support of the waiver request are necessary to validate the waiver decision.

The requirement to establish bioequivalence through in vivo studies (blood level bioequivalence or clinical endpoint bioequivalence) may be waived for soluble powder oral dosage form products or Type A medicated articles in either of two alternative ways. A biowaiver may be granted if it can be shown that the generic soluble powder oral dosage form product or Type A medicated article contains the same active and inactive ingredient(s) and is produced using the same manufacturing processes as the approved comparator product or article. Alternatively, a biowaiver may be granted without direct comparison to the pioneer product's formulation and manufacturing process if it can be shown that the active pharmaceutical ingredient(s) (API) is the same as the pioneer product, is soluble, and that there are no ingredients in the formulation likely to cause adverse pharmacologic effects. For the purpose of evaluating soluble powder oral dosage form products and Type A medicated articles, solubility can be demonstrated in one of two ways: (1) ''USP definition'' approach, or (2) ''Dosage adjusted'' approach.

The respondents for this collection of information are pharmaceutical companies manufacturing animal drugs.

FDA estimates the burden for this collection of information as follows:

TABLE 1—ESTIMATED ANNUAL REPORTING BURDEN FOR WATER SOLUBLE POWDERS[1]

	No. of Respondents	Annual Frequency per Response	Total Annual Responses	Hours per Response	Total Hours
Same formulation/manufacturing process approach	1	1	1	5	5
Same API/ solubility approach	5	5	5	10	50
Total burden hours					55

[1] There are no capital costs or operating and maintenance costs associated with this collection of information.

TABLE 2—ESTIMATED ANNUAL REPORTING BURDEN FOR TYPE A MEDICATED ARTICLES[1]

	No. of Respondents	Annual Frequency of Responses	Total Annual Responses	Hours per Response	Total Hours
Same formulation/manufacturing process approach	2	2	2	5	10
Same API/ solubility approach	10	10	10	20	200
Total burden hours					210

[1] There are no capital costs or operating and maintenance costs associated with this collection of information.

The sources of the previous data are records of generic drug applications over the past 10 years.

Please note that on January 15, 2008, the FDA Division of Dockets Management Web site transitioned to the Federal Dockets Management System (FDMS). FDMS is a Government-wide, electronic docket management system. Electronic comments or submissions will be accepted by FDA only through FDMS at *http://www.regulations.gov*.

Dated: October 22, 2008.

Jeffrey Shuren,

Associate Commissioner for Policy and Planning.

[FR Doc. E8–25741 Filed 10–28–08; 8:45 am]

BILLING CODE 4160–01–S

DEPARTMENT OF HEALTH AND HUMAN SERVICES

Food and Drug Administration

[Docket No. FDA–2008–N–0043]
[FDA No. 225–07–1000]

Memorandum of Understanding With the National Heart, Lung, and Blood Institute, a Part of the National Institutes of Health

AGENCY: Food and Drug Administration, HHS.

ACTION: Notice.

SUMMARY: The Food and Drug Administration (FDA) is providing notice of a memorandum of understanding (MOU) between FDA's Center for Biologics Evaluation and Research (CBER) and the National Heart, Lung, and Blood Institute (NHLBI), a part of the National Institutes of Health (NIH). This MOU outlines the terms of collaboration between CBER and NHLBI in areas of mutual concern for protecting and improving the public health. Specifically this MOU provides for the implementation of a plan for promoting better communication and understanding of regulations, policies, and statutory responsibilities, and to serve as a forum for discussion of scientific and clinical topics, questions, and problems that may arise. This MOU also provides the framework for sharing of information.

DATES: The agreement became effective September 11, 2008.

FOR FURTHER INFORMATION CONTACT: Keith Wonnacott, Cellular Therapy Branch (HFM–720), Center for Biologics Evaluation and Research, Food and Drug Administration, 1401 Rockville Pike, suite 200N, Rockville, MD 20852–1448, 301–827–5102; or John W. Thomas, Division of Blood Diseases and Resources, National Heart, Lung, and Blood Institute MSC 7950, 6701 Rockledge Dr., Rockledge II, rm. 9150, Bethesda, MD 20892–7950, 301–435–0065.

SUPPLEMENTARY INFORMATION: In accordance with 21 CFR 20.108(c), which states that all written agreements and MOUs between FDA and others shall be published in the **Federal Register**, the agency is publishing notice of this MOU.

Dated: October 15, 2008.

Jeffrey Shuren,

Associate Commissioner for Policy and Planning.

BILLING CODE 4160–01–S

FDA MOU No. 225-07-1000

MEMORANDUM OF UNDERSTANDING FOR SHARING OF NON-PUBLIC INFORMATION
between the
FOOD AND DRUG ADMINISTRATION
CENTER FOR BIOLOGICS EVALUATION AND RESEARCH
and the
NATIONAL INSTITUTES OF HEALTH
NATIONAL HEART, LUNG, AND BLOOD INSTITUTE

I. PURPOSE

This Memorandum of Understanding (MOU) between the Food and Drug Administration/Center for Biologics Evaluation and Research (FDA/CBER) and the National Institutes of Health/National Heart, Lung, and Blood Institute (NIH/NHLBI) provides a framework for coordination and collaborative efforts between these two parties, which are both components of the Department of Health and Human Services. This MOU also provides the principles and procedures by which information sharing between FDA/CBER and NIH/NHLBI will take place.

II. BACKGROUND

FDA and NIH are agencies within the Department of Health and Human Services (DHHS). Both FDA and NIH exist and work to protect the public health but have different statutory mandates and responsibilities.

FDA is a science-based regulatory agency responsible for protecting the public health through the regulation of food, cosmetics, radiation-emitting devices, and medical products, including human drugs, biological products, animal drugs, and medical devices. FDA administers the Federal Food, Drug, and Cosmetic Act and relevant sections of the Public Health Service Act, among other statutes. Among its duties, FDA reviews and monitors the use of investigative articles in clinical studies, conducts on-site inspections of biomedical research, approves pre-market applications, conducts regulatory research, conducts inspections of manufacturing facilities, and monitors post-marketing adverse events. FDA also refers civil and criminal cases to the Department of Justice to enforce applicable laws and regulations. Within FDA, CBER's mission is to protect and enhance the public health through regulation of biological and related products including blood, vaccines, human cells, tissues, or cellular or tissue-based products, allergenics, and many combination products according to statutory authorities in Sections 351 and 361 of the Public Health Service Act and in specific sections of the Federal Food, Drug, and Cosmetic Act. The regulation of these products is founded on science and law to ensure their safety, purity, and potency, including effectiveness.

The NIH is the Federal focal point for biomedical research in the United States. The NIH mission is to uncover new knowledge that will lead to better health for everyone. The NIH works toward that mission by conducting research in its own laboratories; supporting the

research of non-Federal scientists in universities, medical schools, hospitals and research institutions throughout the country and abroad; helping in the training of research investigators; and fostering communication of medical information. Within the NIH, the NHLBI, a component of the NIH, is the nation's leading supporter of biomedical research on disorders of the heart, lung, and blood systems and the mission of the NHLBI is to reduce the burden of disease in this areas. To achieve its mission of reducing the public health burden associated with heart, lung, and blood diseases, the NHLBI conducts, fosters, coordinates, and guides research on the causes, prevention, diagnosis, and treatment of heart, vascular, lung, blood, and sleep disorders, including basic research in related scientific areas.

The missions of FDA and the NIH are complementary and may overlap depending upon the subject matter. The agencies work collaboratively to protect and improve public health. There are occasions when FDA/CBER or NIH/NHLBI may have information that could be useful to the other party in that party's performance of its responsibilities. Timely sharing of information between FDA/CBER and NIH/NHLBI may often be critical to protecting and improving the public health.

III. SUBSTANCE OF AGREEMENT AND RESPONSIBILITIES OF EACH AGENCY

A. Coordination and Collaboration Relative to Public Health Activities

It is mutually agreed that, on an as needed basis and as resources permit:

1. FDA/CBER and NIH/NHLBI will coordinate and collaborate with each other to protect and improve the public health. Each party will utilize the expertise, resources, and relationships of the other in order to increase its own capability and responsiveness, but all activities under this MOU are subject to the availability of personnel, resources, and appropriated funds. In addition, each party will designate central contact points[1] to coordinate communications from the other concerning matters covered by this agreement.

2. Each party will participate in periodic meetings to promote better communication and understanding of regulations, policies, and statutory responsibilities, and to serve as a forum for discussion of scientific and clinical topics, questions and problems that may arise.

3. Each party may notify the other when important issues of mutual concern regarding the public health become evident to the extent such notification does not interfere with the public health, oversight, enforcement, or compliance responsibilities of the notifying agency.

[1] See section V. of this MOU.

4. The parties will work together to create an Implementation Work Plan. This Implementation Work Plan will itemize specific projects and activities that constitute the substance of the collaborative arrangement between the two agencies, and is intended to serve as a general working plan for each Office within FDA/CBER and NIH/NHLBI program areas to use in carrying out this agreement. The parties will follow the principles and procedures set forth in this MOU when creating and carrying out the Implementation Work Plan.

5. This agreement does not preclude FDA/CBER or NIH/NHLBI from entering into other agreements that may enable special programs to be handled more efficiently and expertly.

B. Principles and Procedures for the Sharing of Non-Public Information

FDA/CBER and NIH/NHLBI agree that the following principles and procedures will govern the sharing of non-public information, as resources permit, between the two parties.

Although there is no legal requirement that FDA/CBER and NIH/NHLBI exchange information in all areas, FDA/CBER and NIH/NHLBI agree that there should be a presumption in favor of full and free sharing of information between FDA/CBER and NIH/NHLBI. As public health agencies within DHHS, there are no legal prohibitions that preclude FDA or the NIH from sharing with each other most information in the possession of either agency. Both parties recognize and acknowledge, however, that all non-public information shared between FDA/CBER and NIH/NHLBI, whether written or oral, must be protected from any disclosure not authorized by law or regulation. See e.g., 18 U.S.C. § 1905; 21 U.S.C. § 331(j); 21 CFR Parts 20 and 21; 42 U.S.C. § 241(d); 45 CFR Parts 5 and 5b. Safeguards are needed to protect shared non-public information, both written and oral, such as trade secrets and confidential commercial information; identities of study participants and other personal privacy information; privileged and/or pre-decisional agency information; research proposals, progress reports, and/or unpublished data; or national security information. Such safeguards also help ensure FDA/CBER's and NIH/NHLBI's compliance with other applicable laws and regulations.

To facilitate the sharing of non-public information, whether written or oral, FDA/CBER and NIH/NHLBI will implement procedures to ensure that such sharing is appropriate and that the recipient party will guard the confidentiality of all information received.[2] Both parties are committed to responding to requests for information in a complete and timely manner, consistent with budgetary and resource constraints, and to the extent permitted by law, regulation, and agency policy and practice. The party receiving shared non-public

[2] Each party has implemented or will implement the agency's data and information security statutory, regulatory, policy, or procedural requirements and has implemented or will implement, to the extent necessary and practicable, all data and information security recommendations suggested by the other agency.

information (requesting party), whether written or oral, will be responsible for protecting that information from any unauthorized disclosure. Provisions for sharing of non-public information, both written and oral, in accordance with applicable statutes or regulations are set out below:

1. The requesting party must specify, in writing,[3] the information requested (to facilitate identification of relevant information), provide a brief statement of why the information is needed, and include the following requesting party template language: "This request is made pursuant to the Memorandum of Understanding for Sharing of Non-Public Information between FDA/CBER and NIH/NHLBI, dated [insert date agreement was signed]. [Requesting party] agrees not to disclose any non-public information shared between FDA/CBER and NIH/NHLBI whether orally or in writing, in any manner." This request will state which internal unit offices and/or individuals are requesting the information.

2. The party receiving the request (sharing party) will determine, based upon the request described in section III.B.1 above, whether it is appropriate and practicable to share the requested non-public information.

3. The requesting party will comply with the following conditions:

   a. The requesting party will limit the dissemination of shared non-public information it receives to internal unit offices and/or employees that have been identified in its written request. The unit official who signs the request letter will be responsible for ensuring that there are no inappropriate recipients of the information.

   b. The requesting party will agree in writing not to disclose any shared non-public information in any manner not authorized by law or regulation, including disclosure in publications and public meetings, or in the context of other agency collaborations. If the requesting party wishes to disclose shared information that the sharing party has designated as non-public, the requesting party will ask the sharing party whether the information's non-public status has changed, and if so, will first obtain written confirmation and permission from the sharing party before disclosing that information. If the requesting party receives a Freedom of Information Act (FOIA) request for shared information, the requesting party will: (a) refer the FOIA request to the information-sharing contact person or designee for the sharing party to respond directly to the FOIA requester regarding the releaseability of the information, and (b) notify the FOIA requester of the referral and that a response will issue directly from the sharing party. The requesting party will leave all final disclosure decisions up to the sharing party, including decisions on whether the records are responsive and whether they must be disclosed. Accordingly, the requesting party will not indicate to the FOIA

[3] The term "writing" used throughout this MOU includes a writing by electronic means.

requester whether the sharing party has responsive records or releaseable records. The sharing party will include a response in writing along with any agency information shared. The response will indicate the type of information (e.g., confidential commercial information, personal privacy, pre-decisional, etc.), and will include the following sharing party template language: "Pursuant to the Memorandum of Understanding for Sharing of Non-Public Information between the FDA/CBER and the NIH/NHLBI, dated [insert date agreement was signed], the non-public information provided in this communication may not be disclosed or shared in any manner." Any shared documents containing non-public information should be stamped "***Do not disclose or further distribute.***"

c. The requesting party will promptly notify the contact person or designee of the sharing party of any attempt by a third party to obtain shared non-public information by compulsory process, including, but not limited to, a FOIA request, subpoena, discovery request, or litigation complaint or motion.

d. The requesting party will notify the sharing party before complying with any judicial order that compels the release of shared non-public information, so that the parties may determine the appropriate measures to take, including, where appropriate, legal action.

IV. NAME AND ADDRESS OF PARTICIPATING PARTIES

Food and Drug Administration
Center for Biologics Evaluation and Research
29 Lincoln Drive (HFM-1)
Bethesda, MD 20892-4555
Telephone: (301) 827-0548
Fax: (301) 827-0440

National Institutes of Health
National Heart, Lung, and Blood Institute
Building 31, Room 5A48
31 Center Drive MSC 2486
Telephone: (301) 496-5166
Fax: (301) 402-0818

FDA MOU No. 225-07-1000

V. LIAISON OFFICERS

Liaison Officers will participate in the management, coordination and oversight of this agreement. The Liaison Officers will constitute a Steering Committee consisting of an equal number of member representatives from FDA/CBER and NIH/NHLBI. Two Liaison Officers, one designate from each participating agency, will serve as co-chairs of the Committee.

Member appointments will be authorized by the signatories to this agreement. The Liaison Officer Steering Committee will meet at least once every six months for the first year of this agreement and then at least once annually thereafter to review the progress of this agreement, resolve any issues and disputes that may arise, and oversee necessary modifications to the agreement.

A. For FDA/CBER

Keith Wonnacott, Ph.D.
Chief, Cellular Therapy Branch
Office of Cellular, Tissue and Gene Therapies
Center for Biologics Evaluation and Research
US Food and Drug Administration
1401 Rockville Pike, Suite 200N
Mail Code: HFM-720
Rockville, MD 20852-1448
Telephone: (301) 827-5102
Fax: (301) 827-9796
E-mail: keith.wonnacott@fda.hhs.gov

Kimberly Benton, Ph.D.
Deputy Director, Division of Cell and Gene Therapy
Office of Cellular, Tissue and Gene Therapies
Center for Biologics Evaluation and Research
US Food and Drug Administration
Division of Cell and Gene Therapies
Office of Cellular, Tissue and Gene Therapies
1401 Rockville Pike, Suite 200N
Mail Code: HFM-720
Rockville, MD 20852-1448
Telephone: 301-827-5102
Fax: 301-827-9796
E-mail: kimberly.benton@fda.hhs.gov

FDA MOU No. 225-07-1000

B. For NIH/NHLBI

John W. Thomas, Ph.D.
Division of Blood Diseases and Resources
National Heart, Lung, and Blood Institute
6701 Rockledge Drive, MSC 7950
Rockledge II, Room 9150
Bethesda, MD 20892-7950
Telephone: (301) 435-0065
E-mail: ThomasJ@nhlbi.nih.gov

Carol J. Blaisdell, M.D.
Division of Lung Diseases
National Heart, Lung, and Blood Institute
6701 Rockledge Drive, MSC 7952
Room 10178, Rockledge II
Bethesda, MD 20892-7952
Telephone: (301) 435-0222
E-mail: blaisdellcj@nhlbi.nih.gov

Denis Buxton, Ph.D.
Division of Cardiovascular Diseases
National Heart, Lung, and Blood Institute
Rockledge II, Room 8216
6701 Rockledge Drive, Mail Stop 8902
Bethesda, MD 20892-8902
Telephone: (301) 435-0513
E-mail: buxtond@nhlbi.nih.gov

FDA MOU No. 225-07-1000

VI. PERIOD OF AGREEMENT

This agreement becomes effective upon signature of both parties and will continue in effect for five (5) years. This agreement may be modified by mutual written consent or terminated by either party upon 120 days written notice. Not later than 120 days prior to the expiration of this agreement, each party will provide a recommendation regarding the extension of the agreement, including any modifications to the agreement.

APPROVED AND ACCEPTED FOR THE NATIONAL INSTITUTES OF HEALTH
National Heart, Lung, and Blood Institute

By: _____

Elizabeth G. Nabel, M.D.
Director
National Heart, Lung, and Blood Institute
National Institutes of Health

Date: 9·11·08

APPROVED AND ACCEPTED FOR THE FOOD AND DRUG ADMINISTRATION
Center for Biologics Evaluation and Research

By: _____

Jesse L. Goodman, M.D., M.P.H.
Center Director
Center for Biologics Evaluation and Research
Food and Drug Administration

Date: 9/8/08

[FR Doc. E8–25738 Filed 10–28–08; 8:45 am]
BILLING CODE 4160–01–C

DEPARTMENT OF HEALTH AND HUMAN SERVICES

Food and Drug Administration

[Docket No. FDA–2008–N–0043]
[FDA No. 225–08–6000]

Memorandum of Understanding With the U.S. Army Medical Research Institute of Infectious Diseases

AGENCY: Food and Drug Administration, HHS.

ACTION: Notice.

SUMMARY: SUMMARY: The Food and Drug Administration (FDA) is providing notice of a memorandum of understanding (MOU) with the U.S. Army Research Institute of Infectious Diseases (USAMRIID). This MOU identifies the terms of collaboration between FDA and USAMRIID in the area of emergency preparedness. Specifically this MOU provides for the sharing of information and collaborative activities related to biological threat agents and diagnostics to detect such biological threat agents in order to assist both parties in more efficiently preparing for and responding to emergencies in which such diagnostic tests may be used.

DATES: The agreement became effective September 5, 2008.

FOR FURTHER INFORMATION CONTACT: Nancy J. Pluhowski, Senior Regulatory Health Scientist, Center for Devices and Radiological Health (HFZ–001), Food and Drug Administration, 9200 Corporate Blvd., Rockville, MD 20850, 240–276–3816, or

Dan Coffman, Business Plans and Programs Office, USAMRIID, 1425 Porter St., Fort Detrick, MD 21702–5011, 301–619–6886.

SUPPLEMENTARY INFORMATION: In accordance with 21 CFR 20.108(c), which states that all written agreements and MOUs between FDA and others shall be published in the **Federal Register**, the agency is publishing notice of this MOU.

Dated: October 15, 2008.

Jeffrey Shuren,

Associate Commissioner for Policy and Planning.

FDA Record No. 225-08-6000

MEMORANDUM OF UNDERSTANDING BETWEEN UNITED STATES FOOD AND DRUG ADMINISTRATION AND U.S. ARMY MEDICAL RESEARCH INSTITUTE OF INFECTIOUS DISEASES

PURPOSE

This Memorandum of Understanding (MOU) between the U.S. Food and Drug Administration (FDA) and the U.S. Army Medical Research Institute of Infectious Diseases (USAMRIID) (hereinafter also referred to as "Federal Partners" or "Partners") is established to formalize the development of collaborative activities between the two parties in the area of emergency preparedness. The FDA and the USAMRIID, both United States Federal Government entities, agree to share information related to biological threat agents and diagnostic tests for biological threat agents in order to assist both parties in preparing for emergencies in which these tests may be used. Sharing of information between FDA and USAMRIID will facilitate appropriate planning for and response to an emergency involving a biological threat agent. The purpose of the MOU is to enhance knowledge and efficiency by providing for more robust and efficient sharing of information and expertise between the Federal Partners.

BACKGROUND

a. FDA Center for Devices and Radiological Health (CDRH), Office of In Vitro Diagnostics (OIVD) is the lead FDA component responsible for the regulation of in vitro diagnostic products that are devices under the Federal Food, Drug, and Cosmetic Act (FFDCA). (See 21 U.S.C. 321(h).) FDA Center for Biologics Evaluation and Research (CBER), Office of Blood Research and Review (OBRR) is the lead FDA component responsible for maintaining a safe supply of blood and blood products and screening for biothreat agents that could be transmitted through blood transfusions. FDA CBER's Office of Cellular, Tissues and Gene Therapies (OCTGT) is the lead FDA component for maintaining a safe supply of tissues and screening for biothreat agents that could be transmitted through tissue transplantations.

b. USAMRIID is the lead Department of Defense (DoD) laboratory for developing tests to identify biological threat agents for diagnostic purposes. USAMRIID coordinates and collaborates with numerous organizations within and outside the DoD community.

c. Both Federal Partners are engaged in efforts to prepare for a potential emergency involving a biological threat agent. Responses to such emergencies may include the use of diagnostic tests.

FDA Record No. 225-08-6000

RESPONSIBILITIES/ACTIVITIES

In furtherance of the purpose identified, the Federal Partners agree to the following:

USAMRIID agrees to:

- Provide information on research and development efforts for diagnostic test development at USAMRIID and within the DoD.
- Provide information and subject matter expertise on biothreat agents that will assist FDA CDRH OIVD and CBER OBRR and OCTGT in evaluation and regulation of diagnostic tests for these agents.
- Participate in meetings to support these goals.

FDA agrees to:

- Provide information regarding application of requirements of the FFDCA to tests for biothreat agents developed or used by DoD, including pathways for use of tests not yet approved or cleared by FDA.
- Provide feedback to USAMRIID in support of DoD efforts to obtain FDA premarket approval, premarket clearance, or emergency use authorization, as applicable, for tests developed in the DoD.
- Participate in meetings to support these goals.

INFORMATION SHARING

The Federal Partners agree that any initial request for information under this MOU will be made by and transmitted to the Agency program liaisons. Subsequent communications pertaining to that issue may occur between other staff with the approval of the liaisons.

The Federal Partners agree that either Partner may decide not to share information or expertise in response to a particular request for information made according to this MOU, or to limit the scope of information and expertise sharing in response to a particular request. A decision not to share information in response to a specific request may be based on several factors, including, for example, the amount of resources necessary to fulfill the request, the reasonableness of the request, the responding Federal Partner's priorities, or legal restrictions, which are described in more detail below.

Proprietary or non-public information will not be disclosed under this MOU unless such disclosure is permitted by Federal law and the Federal Partners otherwise agree to share it. The Federal Partners recognize that information transmitted between them in any medium, and from any source, that contains any of the following types of information must be protected from unauthorized disclosure: (1) confidential commercial information, such as the information that would be protected from public disclosure pursuant to Exemption 4 of

the Freedom of Information Act (FOIA); (2) personal privacy information, such as the information that would be protected from public disclosure pursuant to Exemption 6 or 7(c) of the FOIA; or (3) information that is otherwise protected from public disclosure by Federal statutes and their implementing regulations (e.g., Trade Secrets Act (18 U.S.C. § 1905), the Privacy Act (5 U.S.C. § 552a), the Freedom of Information Act (5 U.S.C. § 552), the Federal Food, Drug, and Cosmetic Act (21 U.S.C. 301 et seq.), and the Health Insurance Portability and Accountability Act (HIPAA), Pub. L. 104-191).

RESOURCE OBLIGATIONS

This MOU represents the broad outline of the Federal Parties' present intent to enter into specific agreements for collaborative efforts in intellectual areas of mutual interest. It does not create binding, enforceable obligations against either Partner. All activities undertaken pursuant to the MOU are subject to the availability of personnel, resources, and funds. This MOU does not affect or supersede any existing or future agreements or arrangements among the Partners and does not affect the ability of the Partners to enter into other agreements or arrangements related to this MOU. This MOU and all associated agreements will be subject to the applicable policies, rules, regulations, and statutes under which the Federal Partners operate. Nothing in this MOU shall obligate the Federal Partners to any current or future expenditure of resources in advance of the availability of appropriations from Congress.

LIASON OFFICERS

To facilitate the activities carried out under this MOU, each Federal partner will establish a single agency administrative liaison and one or more agency program liaisons. The initial liaisons will be:

For FDA: CDRH will be the lead center:

<u>Administrative Liaison (CDRH):</u>
Nancy J. Pluhowski
Senior Regulatory Health Scientist, and
Director, Medical Device Fellowship Program
FDA, CDRH, Office of the Center Director
9200 Corporate Blvd Mail Code: HFZ-001
Rockville, MD 20850
Phone: 240-276-3816
Fax: 240-276-0652
Email: nancy.pluhowski@fda.hhs.gov

<u>Administrative Liaison (CBER)</u>
Carolyn Wilson, Ph.D.
Associate Director for Research
FDA Center for Biologics Evaluation and Research
8800 Rockville Pike

FDA Record No. 225-08-6000

Bethesda, MD 20892
Phone: 301-827-0481
Fax: 301-827-0449
Email: carolyn.wilson@fda.hhs.gov

Program liaison (CDRH):
Dr. Claudia Gaffey
Division of Microbiology Devices
FDA, CDRH, OIVD
2098 Gaither Road
Rockville, MD 20850-4017
Phone: 240 276-0718
Fax: 240- 276-0652
Email: claudia.gaffey@fda.hhs.gov

Program Liaisons (CBER)
Dr. Melissa A. Greenwald
Directory, Regulatory
Division of Human Tissues
Office of Cellular, Tissues, and Gene Therapies Branch
1410 Rockville Pike
Rockville, MD 20852
Phone: 301-827-2002
Fax: 301-827-2844
Email: melissa.greenwald@fda.hhs.gov

Dr. Hira Nakhasi
Supervisory Research Chemist
Office of Blood Research and Review
8800 Rockville Pike
Bethesda, MD 20892
Phone: 301-827-3008
Fax: 301-480-7928
Email: hira.nakhasi@fda.hhs.gov

For USAMRIID:

Administrative Liaison:
Dan Coffman
Business Plans and Programs Office
USAMRIID
1425 Porter Street
Fort Detrick, MD 21702-5011
Phone: 301-619-6886
Fax: 301-619-8379
Email: james.coffman@amedd.army.mil

FDA Record No. 225-08-6000

Program Liaisons:
LTC David Shoemaker
Diagnostic Systems Division
USAMRIID
1425 Porter Street
Fort Detrick, MD 21702-5011
Phone : 301-619-4734
Fax : 301-619-2492
Email: david.shoemaker@amedd.army.mil

Dr. David Norwood
Diagnostic Systems Division
USAMRIID
1425 Porter Street
Fort Detrick, MD 21702-5011
Phone : 301-619-4721
Fax : 301-619-2492
Email : david.norwood@amedd.army.mil

Each Federal Partner may designate new liaisons at any time by notifying the other Partner's administrative liaison in writing. If at any time, an individual designated as a liaison under this agreement becomes unavailable to fulfill those functions, the Federal Partner will name a new liaison within 2 weeks and notify the other Partner through the designated administrative liaison.

TERM, TERMINATION AND MODIFICATION

This MOU shall be effective upon the date of the last signatory to the MOU and will automatically expire five (5) years from effective date unless written notice is given and there is and mutual agreement between the Federal Partners to revise it. This MOU may be terminated by either party by giving at least 60 days advance written notice. This MOU may be terminated by either party immediately upon written notice in the event that a Federal statute is enacted or regulations are issued by either Federal Partner that materially affects this MOU. This MOU may be amended at any time upon mutual consent of the parties.

FDA Record No. 225-08-6000

SIGNATURES OF RESPONSIBLE PARTIES

UNITED STATES FOOD AND DRUG ADMINISTRATION

BY: _____ 9/5/08
Signature of authorized representative Date

FRANK M. TORTI, MD, MPH
Principal Deputy Commissioner and Chief Scientist
U.S Food and Drug Administration

UNITED STATES ARMY MEDICAL RESEARCH INSTITUTE OF INFECTIOUS DISEASES

BY: _____ 27 Aug 08
Signature of authorized representative Date

John P. Skvorak
Colonel, US Army
Commanding
U.S. Army Medical Research Institute of Infectious Diseases

[FR Doc. E8–25740 Filed 10–29–08; 8:45 am]
BILLING CODE 4160–01–C

DEPARTMENT OF HEALTH AND HUMAN SERVICES

Health Resources and Services Administration

Council on Graduate Medical Education; Notice of Meeting

In accordance with section 10(a)(2) of the Federal Advisory Committee Act (Pub. L. 92–463), notice is hereby given of the following meeting:

Name: Council on Graduate Medical Education (COGME).

Dates and Times: November 19, 2008, 8:30 a.m.–5 p.m. November 20, 2008, 8:30 a.m.–2:30 p.m.

Place: The Legacy Hotel and Meeting Centre, 1775 Rockville Pike, Rockville, Maryland 20852, Telephone: 301–881–2300.

Status: The meeting will be open to the public.

Agenda: On the morning of November 19, following the welcoming remarks from the COGME Chair and the Executive Secretary of COGME, there will be a panel discussion of the International Physician Workforce Conference held in Scotland, followed by (1) a presentation on the GAO Study Initiative on trends in Medical Residencies and Specialty choice and (2) a StudyInitiative on Primary Care Projections. In the afternoon there will be an update of Modeling and Analysis for Determining Supply of and Demand for Residency Positions by Specialty. There will be breakouts of Council members into two task groups.

On November 20, there will be reports of the two task groups and further discussion on Variables and Scenarios for modeling the impact on physician specialty distribution.

Agenda items are subject to change as priorities dictate.

For Further Information Contact: Jerald M. Katzoff, Executive Secretary, COGME, Division of Medicine and Dentistry, Bureau of Health Professions, Parklawn Building, Room 9A–27, 5600 Fishers Lane, Rockville, Maryland 20857, Telephone (301) 443–4443.

Dated: October 23, 2008.

Alexandra Huttinger,

Director, Division of Policy Review and Coordination.

[FR Doc. E8–25775 Filed 10–28–08; 8:45 am]
BILLING CODE 4165–15–P

DEPARTMENT OF HEALTH AND HUMAN SERVICES

National Institutes of Health

National Heart, Lung, and Blood Institute; 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 Heart, Lung, and Blood Institute Special Emphasis Panel, Institutional National Research Service Awards (T32's).

Date: November 18, 2008.

Time: 11:30 a.m. to 1 p.m.

Agenda: To review and evaluate grant applications.

Place: National Institutes of Health, Rockledge Two, 6701 Rockledge Drive, Room 7192, Bethesda, MD 20892 (Telephone Conference Call).

Contact Person: Mark Roltsch, PhD, Scientific Review Administrator, Review Branch/DERA, National Heart, Lung, and Blood Institute, 6701 Rockledge Drive, Room 7192, Bethesda, MD 20892–7924, 301–435–0287, *roltschm@nhlbi.nih.gov.*

Name of Committee: National Heart, Lung, and Blood Institute Special Emphasis Panel, Research Projects in Statin Therapy.

Date: November 18, 2008.

Time: 1 p.m. to 3 p.m.

Agenda: To review and evaluate grant applications.

Place: National Institutes of Health, 6701 Rockledge Drive, Bethesda, MD 20892 (Telephone Conference Call).

Contact Person: Youngsuk Oh, PhD, Scientific Review Officer, Review Branch/DERA, National Heart, Lung, and Blood Institute, 6701 Rockledge Drive, Room 7182, Bethesda, MD 20892–7924, 301–435–0277, *yoh@mail.nih.gov.*

Name of Committee: National Heart, Lung, and Blood Institute Special Emphasis Panel, Research Projects in Hydroxyurea.

Date: November 19, 2008.

Time: 1 p.m. to 3 p.m.

Agenda: To review and evaluate grant applications.

Place: National Institutes of Health, 6701 Rockledge Drive, Bethesda, MD 20892 (Telephone Conference Call).

Contact Person: Youngsuk Oh, PhD, Scientific Review Officer, Review Branch/DERA, National Heart, Lung, and Blood Institute, 6701 Rockledge Drive, Room 7182, Bethesda, MD 20892–7924, 301–435–0277, *yoh@mail.nih.gov.*

Name of Committee: National Heart, Lung, and Blood Institute Special Emphasis Panel, Patient Oriented Research (K23, 24, and 25's) Career Enhancement Awards.

Date: November 20–21, 2008.

Time: 8 a.m. to 5 p.m.

Agenda: To review and evaluate grant applications.

Place: Courtyard by Marriott, Crystal City, VA.

Contact Person: Mark Roltsch, PhD, Scientific Review Administrator, Review Branch/DERA, National Heart, Lung, and Blood Institute, 6701 Rockledge Drive, Room 7192, Bethesda, MD 20892–7924, 301–435–0287, *roltschm@nhlbi.nih.gov.*

(Catalogue of Federal Domestic Assistance Program Nos. 93.233, National Center for Sleep Disorders Research; 93.837, Heart and Vascular Diseases Research; 93.838, Lung Diseases Research; 93.839, Blood Diseases and Resources Research, National Institutes of Health, HHS)

Dated: October 22, 2008.

Jennifer Spaeth,

Director, Office of Federal Advisory Committee Policy.

[FR Doc. E8–25835 Filed 10–28–08; 8:45 am]

BILLING CODE 4140–01–P

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; Mentored Patient-Oriented Research Career Development Award.

Date: November 20, 2008.

Time: 2 p.m. to 3 p.m.

Agenda: To review and evaluate grant applications.

Place: National Institutes of Health, 6700B Rockledge Drive, Bethesda, MD 20817 (Telephone Conference Call).

Contact Person: Annie Walker-Abbey, PhD, Scientific Review Officer, Scientific Review Program, Division of Extramural Activities, National Institutes of Health/NIAID/DHHS, 6700B Rockledge Drive, RM. 3126, Bethesda, MD 20892–7616, (301) 451–2671, *aabbey@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 22, 2008.

Jennifer Spaeth,

Director, Office of Federal Advisory Committee Policy.

[FR Doc. E8–25817 Filed 10–28–08; 8:45 am]

BILLING CODE 4140–01–P

DEPARTMENT OF HOMELAND SECURITY

Coast Guard

[USCG–2008–0968]

National Boating Safety Advisory Council

AGENCY: Coast Guard, DHS.

ACTION: Notice of meetings; schedule changes.

SUMMARY: On October 1, 2008, The United States Coast Guard published a notice in the **Federal Register** (73 FR 57126) announcing a meeting of the National Boating Safety Advisory Council (NBSAC) and its subcommittees to discuss issues relating to recreational boating safety. A scheduling conflict has required changes to the subcommittees' meeting times as follows: The Boats and Associated Equipment Subcommittee will meet on Saturday afternoon, November 1, 2008; the Prevention through People Subcommittee will meet on Sunday morning, November 2, 2008; and the Recreational Boating Safety Strategic Planning Subcommittee will meet on Sunday afternoon, November 2, 2008.

DATES: NBSAC will meet on Saturday, November 1, 2008, from 8 a.m. to 11:30 a.m., and on Monday, November 3, 2008, from 8:30 a.m. to 4 p.m. The Boats and Associated Equipment Subcommittee will meet on Saturday, November 1, 2008, from 1 p.m. to 5 p.m. The Prevention through People Subcommittee will meet on Sunday, November 2, 2008, from 8 a.m. to 12 noon. The Recreational Boating Safety Strategic Planning Subcommittee will meet on Sunday, November 2, 2008, from 1:30 p.m. to 5 p.m. These meetings may close early if all business is finished. On Sunday, November 2, 2008, the Recreational Boating Safety Strategic Planning Subcommittee meeting may start earlier if the preceding Subcommittee meeting closes early.

ADDRESSES: NBSAC and its Subcommittees will meet at the Holiday Inn Arlington, 4610 Fairfax Drive, Arlington, VA 22203. Please send written material, comments, and requests to make oral presentations to Mr. Jeff Ludwig, Executive Secretary of NBSAC, Commandant (CG–54221), U.S. Coast Guard Headquarters, 2100 Second Street, SW., Washington, DC 20593–0001. This notice is available on the Internet at *http://www.regulations.gov* or the Boating Safety Division's Web site at: *http://www.uscgboating.org/nbsac/nbsac.htm.*

FOR FURTHER INFORMATION CONTACT: Mr. Jeff Ludwig, Executive Secretary of NBSAC, COMDT (CG–54221), 2100 2nd Street, SW., Washington, DC 20593; (202) 372–1061; *Jeffrey.a.ludwig@uscg.mil.*

SUPPLEMENTARY INFORMATION: Notice of these meetings is given under the Federal Advisory Committee Act, 5 U.S.C. App. 2. NBSAC and its Subcommittee will meet for the purpose of discussing issues related to recreational boating safety.

Tentative Agendas of Meetings

National Boating Safety Advisory Council (NBSAC)

Saturday, November 1, 2008:
(1) Remarks—Mr. James P. Muldoon, NBSAC Chairman.
(2) Chief, Office of Auxiliary and Boating Safety Update on NBSAC Resolutions and Recreational Boating Safety Program report.
(3) Executive Secretary's report.
(4) Chairman's session.
(5) TSAC Liaison's report.
(6) NAVSAC Liaison's report.
(7) National Association of State Boating Law Administrators report.
(8) Prevention Through People Subcommittee report.
(9) Boats and Associated Equipment Subcommittee report.
(10) Recreational Boating Safety Strategic Planning Subcommittee report.
(11) Boats and Associated Equipment Subcommittee meeting.
Sunday, November 2, 2008:
(12) Prevention Through People Subcommittee meeting.
(13) Recreational Boating Safety Strategic Planning Subcommittee meeting.
Monday, November 3, 2008:
(14) National Youth Marine Alliance Presentation.
(15) U.S. Rowing Presentation.
(16) Bombardier Recreational Products Presentation.
(17) Boats and Associated Equipment Report.
(18) Prevention through People Report.
(19) Recreational Boating Safety Strategic Planning Report.

A more detailed agenda can be found at: *http://www.uscgboating.org/nbsac/nbsac.htm*, after October 24, 2008.

NBSAC Subcommittees

Prevention Through People Subcommittee: Discuss current regulatory projects, grants, contracts, and new issues affecting the prevention of boating accidents through outreach and education of boaters.

Boats and Associated Equipment Subcommittee: Discuss current regulatory projects, grants, contracts, and new issues affecting boats and associated equipment.

Recreational Boating Safety Strategic Planning Subcommittee: Discuss current status of the strategic planning process and any new issues or factors that could impact, or contribute to, the development of the strategic plan for the recreational boating safety program.

Information on Services for Individuals with Disabilities: For information on facilities or services for individuals with disabilities or to request special assistance at the meetings, contact the Executive Secretary of NBSAC as soon as possible.

Dated: October 21, 2008.

Frank J. Sturm,

Captain, U.S. Coast Guard, Director of Prevention Policy (Acting).

[FR Doc. E8–25832 Filed 10–28–08; 8:45 am]

BILLING CODE 4910–15–P

DEPARTMENT OF HOMELAND SECURITY

U.S. Customs and Border Protection

Importer Self-Assessment Product Safety Pilot

AGENCY: U.S. Customs and Border Protection, Department of Homeland Security.

ACTION: General notice.

SUMMARY: This document announces the expansion of the Importer Self-Assessment Program (ISA) to include the Importer Self-Assessment–Product Safety Pilot (ISA–PS). The ISA–PS is a partnership that will be created among CBP, the Consumer Product Safety Commission (CPSC), and importers which will strive to maintain a high level of product safety compliance, and to achieve the goals of the Interagency Working Group on Import Safety by working collaboratively to prevent unsafe imports. The ISA–PS is a voluntary approach to product safety compliance, which will provide recognition and support to participating companies. Application to the ISA–PS is open to all importers who are participants in the ISA. CBP and CPSC staff will designate a limited number of importers from the initial applicants and determine their eligibility for participation in the pilot program. This document contains information on the application process, the benefits, and continued participation requirements.

DATES: *Effective Date:* This pilot program will be open to applications from qualified importers on October 29, 2008.

FOR FURTHER INFORMATION CONTACT: Cathy Sauceda, Director, Import Safety and Interagency Requirements Division, Office of International Trade, Customs and Border Protection, (202) 863–6556.

SUPPLEMENTARY INFORMATION:

Background

ISA Program

U.S. Customs and Border Protection (CBP) is committed to encouraging importers to share the responsibility for compliance with trade laws and regulations. In order to enable interested importers to participate in a program that allows them to assess their own compliance with CBP laws and regulations on a continuing basis, CBP (then known as the U.S. Customs Service, Department of the Treasury) announced the Importer Self-Assessment (ISA) program on June 17, 2002 in a notice in the **Federal Register** (67 FR 41298). The ISA program is a trade facilitation partnership program that recruits trade compliant companies in order to reduce both CBP and company resources required during entry and post entry, and to build cooperative relationships that strengthen trade compliance with trade laws. The ISA program is based on the premise that importers with strong internal controls achieve the highest level of compliance with CBP laws and regulations, and provides a means to recognize and support importers that have implemented such systems.

Since the ISA program started in 2002, over 172 importers under 760 different Importer of Record numbers have been approved to participate in the program. The compliance measurement program has shown that ISA program participants have continued to hold the highest rate of compliance with major trade laws among major importing groups. In FY 2007, merchandise imported by ISA participants comprised 15% of the total value imported into the United States and the compliance rate for ISA importers was 99.4%.

Import Safety

On July 18, 2007, President George W. Bush issued Executive Order 13439, which established an Interagency Working Group on Import Safety (''Working Group''). The Working Group, a cabinet-level panel of designated members, includes CBP (acting as a designee of the Secretary of Homeland Security) and the Chairman of the U.S. Consumer Product Safety Commission (CPSC). The mission of the Working Group is to identify actions and appropriate steps that can be pursued, within existing resources, to

promote the safety of imported products by (i) Reviewing and assessing current import safety procedures and methods aimed at ensuring the safety of imported products, (ii) identifying potential means to promote all appropriate steps by U.S. importers to enhance safety of imported products, and (iii) surveying the authorities and practices of Federal, State, and local government agencies regarding the safety of imports to identify best practices and enhance coordination among agencies. Executive Order 13439 required the Working Group to provide recommendations within 60 days to the President regarding these actions and steps.

On September 10, 2007, the Working Group submitted a comprehensive strategic framework entitled *Protecting Americans Every Step of the Way: A strategic framework for continual improvement in import safety* (''Strategic Framework''), which outlined an approach that can build upon existing efforts to improve the safety of imported products, while facilitating trade. On November 6, 2007, the Working Group followed the submission of the Strategic Framework by presenting an *Action Plan for Import Safety: A roadmap for continual improvement* (''Action Plan''). The Action Plan takes the form of 14 broad recommendations and 50 specific action steps based on the Strategic Framework.

Three organizing principles form the keystones of the Strategic Framework and the Action Plan recommendations: (i) Preventing harm resulting from the importation of unsafe products; (ii) intervening when risks are identified; and, (iii) responding rapidly after harm has occurred. Within each of these organizing principles are cross-cutting building blocks that departments and agencies should use to guide their programs. These ''building blocks'' include the advancement of a common vision across the federal government, as well as fostering a culture of collaboration among federal departments and agencies.

CBP is responsible for multiple action steps in the Action Plan, including harmonizing government procedures concerning imports, creating an automated system reflecting a ''single window'' concept, and being an active participant in establishing good importer practices for foreign collaboration, capacity building and developing voluntary certification programs. Taking the lead for a significant amount of the action steps, CBP leads the Working Group in its mission to implement the Action Plan and Strategic Framework by working collaboratively with other government agencies and focusing on import safety issues.

The Working Group is comprised of multiple government agencies, including CPSC. CBP and CPSC have a strong history of partnership in combating unsafe imports, and the two agencies have worked diligently on several significant product recalls including those on lead in toys, cribs, and children's sleepwear. This collaboration has strengthened as both agencies have worked together in the Working Group to implement the Action Plan and the Strategic Framework. In November of 2007, CBP officials worked closely with CPSC officials to formulate a response to the recall of the toy Aquadots after it was discovered that some of the imported toys contained a toxic chemical that resulted in the illness and hospitalization of some children who ingested the toys. The two agencies devised a plan to seize and recover shipments of Aquadots bound for the U.S. or that were already in the U.S. and still subject to redelivery, and thereby successfully prevented the unsafe toys from further distribution.

Currently, to more precisely target consumer products that present a safety risk, CPSC staff and CBP are collaborating on action steps to further improve import safety. CBP and CPSC staff are working collectively with the trade community in the development of a trilateral partnership to facilitate the trade of safe products. Since the development of the ISA program, CBP and CPSC staff have worked with the Departmental Advisory Committee on Commercial Operations of Customs and Border Protection and Related Homeland Security Functions (COAC) to expand the ISA program to include a product safety component, and thereby extend the ISA program to include compliance with other agency requirements.

Expansion of ISA Program To Include Import Safety

In order to further the goals of the Working Group's Strategic Framework and Action Plan, this document announces the expansion of the ISA to include the Importer Self-Assessment-Product Safety Pilot (ISA–PS). The ISA–PS is envisioned to be a partnership among CBP, CPSC, and importers to maintain a high level of product safety compliance, and to thereby achieve the objective of the Strategic Framework and Action Plan, that is, working collaboratively to prevent unsafe imports. The ISA–PS is a voluntary approach to product safety compliance, which provides recognition and support to participating companies. CBP and CPSC staff have developed a list of best practices to ensure compliance with CPSC's current regulations and will be working through this program to adapt those best practices to meet CPSC's new statutory scheme. Within the realm of their respective authorities, CBP and CPSC will verify that companies have adequate controls and processes in place to ensure product safety at all points in the product life-cycle of imported products and to comply with these mandatory standards. CPSC staff and CBP have worked to develop CPSC-based benefits to encourage participation in this expanded pilot program. Acceptance into the program is by mutual agreement of CPSC and CBP.

Description of the Importer Self-Assessment Product Safety Pilot

Overview

The Importer Self-Assessment-Product Safety Pilot (ISA–PS) is envisioned to be a partnership among CBP, the Consumer Product Safety Commission (CPSC) and importers to maintain a high level of product safety compliance. ISA–PS is a voluntary approach to product safety compliance, which provides recognition and support to participating companies.

ISA–PS Participation Requirements

In order to participate in ISA–PS, an importer must:

1. Be an active member in ISA and comply with all ISA requirements and obligations.

2. Complete an ISA–PS/CPSC Questionnaire and sign an ISA–PS/CPSC Addendum.

3. Agree to comply with all laws and regulations administered by CBP, as well as the CPSC including, but not limited to: the Consumer Product Safety Improvement Act of 2008, Public Law 110–314, 122 Stat. 3016 (August 14, 2008), the Consumer Product Safety Act (codified at 15 U.S.C. 2051–2089), the Federal Hazardous Substances Act (codified at 15 U.S.C. 1261–1278), the Flammable Fabrics Act (codified at 15 U.S.C. 1191–1204), the Poison Prevention Packaging Act (codified at 15 U.S.C. 1471–1476), the Refrigerator Safety Act (codified at 15 U.S.C. 1211–1214), the Virginia Graeme Baker Pool and Spa Safety Act (codified at 15 U.S.C. 8001–8008), and the Children's Gasoline Burn Prevention Act, Public Law 110–278, 122 Stat. 2602 (July 17, 2008).

4. Maintain an internal control system that ensures the integrity of product safety.

5. Notify CBP of any major organizational changes that may impact the importer's product safety controls.

6. Submit an annual written notification to CBP that sets forth the importer's ISA–PS point of contact and acknowledges that the importer continues to meet the requirements of ISA–PS.

Application Process

1. Required Information

Interested applicants (importers that are already active members of ISA) may send an e-mail requesting an application to *isa@dhs.gov*, and will receive an electronic ISA–PS/CPSC Questionnaire and an ISA–PS/CPSC Addendum. Completed ISA–PS/CPSC Questionnaires may be submitted electronically via e-mail to *isa@dhs.gov.*

2. CBP Review of Application

After the applicant has submitted the ISA–PS/CPSC Questionnaire and ISA–PS/CPSC Addendum, CBP and CPSC staff will review the applicant's submission. For a limited number of applicants, the review will include a CPSC risk assessment to determine the applicant's readiness to assume responsibilities for self-assessment. The risk assessment will include an examination of the applicant as identified by the Importer of Record (IOR) number(s) listed on the ISA–PS/CPSC Questionnaire and its scope will include the laws and regulations administered by CPSC requirements set forth above (in ISA–PS Participation Requirements, Item 3). CBP and CPSC will perform a formal domestic site visit with the importer. At the discretion of CBP and CPSC it may also be necessary to perform a formal visit with the applicant at a foreign facility. The purpose of these site visits is to determine if the applicant is ready to assume the responsibilities of self-assessment and to equip CBP and CPSC with the knowledge of the importers internal control procedures as appropriate. If CBP and CPSC determine that the applicant is not ready to assume the responsibilities of self-assessment, CBP and CPSC staff will continue to work with the applicant to strengthen their product safety program. If CBP and CPSC staff determine that the applicant is ready to assume all the responsibilities of self-assessment, they will sign the ISA–PS/CPSC Addendum and return a copy to the importer. CBP and CPSC staff reserve the right, in their discretion, to approve or disapprove an application. Further, in selecting applicants for participation in ISA–PS, CBP and CPSC staff reserve the right to establish priorities for the processing and approval of applications.

ISA–PS Potential Benefits

In addition to the benefits received as a participant in ISA, once accepted into the ISA–PS, the participant also becomes eligible for the following benefits:

1. CPSC will provide the participant with a product-specific CPSC point of contact who can assist in providing National Electronic Injury Surveillance System (NEISS) Product Codes for entry lines.

2. CPSC will provide access to the participant with special training concerning product safety compliance, internal controls, and CPSC audit trails.

3. CPSC will allow the participant the opportunity to apply for external participation coverage of multiple business units (multiple IOR numbers) identified in the ISA–PS/CPSC Addendum.

4. CPSC will consider expansion of benefits to all products of approved participants if the entry line(s) contains all the applicable NEISS product code(s).

5. CPSC will reduce product safety tests on goods imported by ISA–PS participants.

6. CPSC laboratories will grant priority ''front of the line testing'' to ISA–PS participants when product safety testing is conducted.

7. CPSC may allow products to be destroyed by the ISA–PS participant in lieu of requesting redelivery to CBP of the product.

8. CPSC will acknowledge the participation of ISA–PS in CPSC's ''Fast-Track Product Recall Program.''

9. Additional benefits tailored to specific industry needs may later become available.

Additionally, the ISA–PS participant will enjoy greater business certainty because a reliable system of internal controls ensures compliant product safety transactions.

ISA–PS Continuing Participation Requirements

Each ISA–PS participant must remain an active member in ISA and comply with all ISA requirements and obligations, available at *http://www.cbp.gov/linkhandler/cgov/trade/trade_programs/trade_compliance/importer_self_assessment/isahb.ctt/isahb.doc.* Additionally, each ISA–PS participant must remain in compliance with the requirements of the ISA–PS/CPSC Addendum and provide annual written notification to CBP that it continues to meet the requirements of ISA–PS. In connection with this notification, CBP and CPSC staff will determine if additional discussions or reviews of company controls or documentation are necessary. In addition, ISA–PS participants are responsible for making appropriate ongoing changes to internal controls as needed.

If a participant fails to remain an active member in ISA or fails to meet the requirements of the ISA–PS/CPSC Addendum, or is determined to have violated a law or regulation administered by CBP or the CPSC, the participant may be subject to penalties, liquidated damages, and/or removal from the ISA removal from the ISA–PS. If CBP and CPSC staff believe that there is a basis for removal of an ISA–PS participant, a written notice proposing removal with a description of the facts or conduct warranting removal, will be provided to such participant. The participant will be offered the opportunity to respond to the proposed removal notice within 30 days of the date of the notice. CBP and CPSC will issue a final written decision on the proposed removal within 30 days of the receipt of the response to the proposed removal notice, if one was timely received. In the case of a public health interest and/or safety concern, a participant may be removed immediately from the ISA–PS. The participant will be given an opportunity to respond within 30 days to the notice providing for immediate removal.

Evaluation of Pilot

CBP and CPSC staff intend to review the ISA–PS pilot two years after its effective date to measure its effects and achievements, and recommend to CBP and the Commission whether ISA–PS shall become a permanent program.

Dated: October 21, 2008.

Jayson P. Ahern,

Acting Commissioner, Customs and Border Protection.

[FR Doc. E8–25551 Filed 10–28–08; 8:45 am]

BILLING CODE 9111–14–P

DEPARTMENT OF HOMELAND SECURITY

U.S. Customs and Border Protection

Quarterly IRS Interest Rates Used in Calculating Interest on Overdue Accounts and Refunds on Customs Duties

AGENCY: Customs and Border Protection, Department of Homeland Security.

ACTION: General notice.

SUMMARY: This notice advises the public of the quarterly Internal Revenue Service interest rates used to calculate interest on overdue accounts (underpayments) and refunds (overpayments) of customs duties. For the calendar quarter beginning October 1, 2008, the interest rates for overpayments will be 5 percent for corporations and 6 percent for non-corporations, and the interest rate for underpayments will be 6 percent. This notice is published for the convenience of the importing public and Customs and Border Protection personnel.

DATES: *Effective Date:* October 1, 2008.

FOR FURTHER INFORMATION CONTACT: Ron Wyman, Revenue Division, Collection and Refunds Branch, 6650 Telecom Drive, Suite #100, Indianapolis, Indiana 46278; telephone (317) 614–4516.

SUPPLEMENTARY INFORMATION:

Background

Pursuant to 19 U.S.C. 1505 and Treasury Decision 85–93, published in the **Federal Register** on May 29, 1985 (50 FR 21832), the interest rate paid on applicable overpayments or underpayments of customs duties must be in accordance with the Internal Revenue Code rate established under 26 U.S.C. 6621 and 6622. Section 6621 was amended (at paragraph (a)(1)(B) by the Internal Revenue Service Restructuring and Reform Act of 1998, Public Law 105–206, 112 Stat. 685) to provide different interest rates applicable to overpayments: one for corporations and one for non-corporations.

The interest rates are based on the Federal short-term rate and determined by the Internal Revenue Service (IRS) on behalf of the Secretary of the Treasury on a quarterly basis. The rates effective for a quarter are determined during the first-month period of the previous quarter.

In Revenue Ruling 2008–47, the IRS determined the rates of interest for the calendar quarter beginning October 1, 2008, and ending on December 31, 2008. The interest rate paid to the Treasury for underpayments will be the Federal short-term rate (3%) plus three percentage points (3%) for a total of six percent (6%). For corporate overpayments, the rate is the Federal short-term rate (3%) plus two percentage points (2%) for a total of five percent (5%). For overpayments made by non-corporations, the rate is the Federal short-term rate (3%) plus three percentage points (3%) for a total of six percent (6%). These interest rates are subject to change for the calendar quarter beginning January 1, 2009, and ending March 31, 2009.

For the convenience of the importing public and Customs and Border Protection personnel the following list of IRS interest rates used, covering the period from before July of 1974 to date, to calculate interest on overdue accounts and refunds of customs duties, is published in summary format.

Beginning date	Ending date	Under-payments (percent)	Over-payments (percent)	Corporate overpayments (Eff. 1–1–99) (percent)
070174	063075	6	6	
070175	013176	9	9	
020176	013178	7	7	
020178	013180	6	6	
020180	013182	12	12	
020182	123182	20	20	
010183	063083	16	16	
070183	123184	11	11	
010185	063085	13	13	
070185	123185	11	11	
010186	063086	10	10	
070186	123186	9	9	
010187	093087	9	8	
100187	123187	10	9	
010188	033188	11	10	
040188	093088	10	9	
100188	033189	11	10	
040189	093089	12	11	
100189	033191	11	10	
040191	123191	10	9	
010192	033192	9	8	
040192	093092	8	7	
100192	063094	7	6	
070194	093094	8	7	
100194	033195	9	8	
040195	063095	10	9	
070195	033196	9	8	
040196	063096	8	7	
070196	033198	9	8	
040198	123198	8	7	
010199	033199	7	7	6
040199	033100	8	8	7
040100	033101	9	9	8
040101	063001	8	8	7
070101	123101	7	7	6
010102	123102	6	6	5
010103	093003	5	5	4
100103	033104	4	4	3
040104	063004	5	5	4
070104	093004	4	4	3
100104	033105	5	5	4
040105	093005	6	6	5

Beginning date	Ending date	Under-payments (percent)	Over-payments (percent)	Corporate overpayments (Eff. 1–1–99) (percent)
100105	063006	7	7	6
070106	123107	8	8	7
010108	033108	7	7	6
040108	063008	6	6	5
070108	093008	5	5	4
100108	123108	6	6	5

Dated: October 24, 2008.

Jayson P. Ahern,

Acting Commissioner, U.S. Customs and Border Protection.

[FR Doc. E8–25812 Filed 10–28–08; 8:45 am]

BILLING CODE 9111–14–P

DEPARTMENT OF HOUSING AND URBAN DEVELOPMENT

[Docket No. FR–5187–N–59]

Loan Guarantees for Indian Housing

AGENCY: Office of the Chief Information Officer, HUD.

ACTION: Notice.

SUMMARY: The proposed information collection requirement described below has been submitted to the Office of Management and Budget (OMB) for review, as required by the Paperwork Reduction Act. The Department is soliciting public comments on the subject proposal.

The information collected determines if the Department will guarantee loans and mortgage insurance made by private lenders to Native American borrowers on restricted land.

DATES: *Comments Due Date:* November 28, 2008.

ADDRESSES: Interested persons are invited to submit comments regarding this proposal. Comments should refer to the proposal by name and/or OMB approval number (2577–0200) and should be sent to: HUD Desk Officer, Office of Management and Budget, New Executive Office Building, Washington, DC 20503; fax: 202–395–6974.

FOR FURTHER INFORMATION CONTACT: Lillian Deitzer, Reports Management Officer, QDAM, Department of Housing and Urban Development, 451 Seventh Street, SW., Washington, DC 20410; e-mail Lillian Deitzer at *Lillian_L._Deitzer@HUD.gov* or telephone (202) 402–8048. This is not a toll-free number. Copies of available documents submitted to OMB may be obtained from Ms. Deitzer.

SUPPLEMENTARY INFORMATION: This notice informs the public that the Department of Housing and Urban Development has submitted to OMB a request for approval of the information collection described below. This notice is soliciting comments from members of the public and affecting agencies concerning the proposed collection of information to: (1) Evaluate whether the proposed collection of information is necessary for the proper performance of the functions of the agency, including whether the information will have practical utility; (2) Evaluate the accuracy of the agency's estimate of the burden of the proposed collection of information; (3) Enhance the quality, utility, and clarity of the information to be collected; and (4) Minimize the burden of the collection of information on those who are to respond; including through the use of appropriate automated collection techniques or other forms of information technology, e.g., permitting electronic submission of responses.

This Notice Also Lists the Following Information

Title of Proposal: Loan Guarantees for Indian Housing.

OMB Approval Number: 2577–0200.

Form Numbers: HUD 53036, HUD 53038, FNMA forms 2003, 1003A, 1005, and 1006.

Description of the Need for the Information and its Proposed Use:

Information collected determines if the Department will guarantee loans and mortgage insurance made by private lenders to Native American borrowers on restricted land.

Frequency of Submission: On occasion.

	Number of respondents	Annual responses	×	Hours per response	=	Burden hours
Reporting Burden:	1,500	2		0.17		500

Total Estimated Burden Hours: 500.

Status: Extension of a currently approved collection.

Authority: Section 3507 of the Paperwork Reduction Act of 1995, 44 U.S.C. 35, as amended.

Dated: October 23, 2008.

Lillian L. Deitzer,

Departmental Paperwork Reduction Act Officer,Office of the Chief Information Officer.

[FR Doc. E8–25736 Filed 10–28–08; 8:45 am]

BILLING CODE 4210–67–P

DEPARTMENT OF THE INTERIOR

Fish and Wildlife Service

[FWS–R8–ES–2008–N0286; 80221–1113–0000–F5]

Endangered Species Recovery Permit Applications

AGENCY: Fish and Wildlife Service, Interior.

ACTION: Notice of receipt of permit applications; request for comment.

SUMMARY: We invite the public to comment on the following applications to conduct certain activities with endangered species.

DATES: Comments on these permit applications must be received on or before November 28, 2008.

ADDRESSES: Written data or comments should be submitted to the U.S. Fish and Wildlife Service, Endangered Species Program Manager, Region 8, 2800 Cottage Way, Room W–2606, Sacramento, CA, 95825 (telephone: 916–414–6464; fax: 916–414–6486). Please refer to the respective permit number for each application when submitting comments. All comments received, including names and addresses, will

become part of the official administrative record and may be made available to the public.

FOR FURTHER INFORMATION CONTACT: Daniel Marquez, Fish and Wildlife Biologist, see **ADDRESSES**, (telephone: 760–431–9440; fax: 760–431–9624).

SUPPLEMENTARY INFORMATION: The following applicants have applied for scientific research permits to conduct certain activities with endangered species pursuant to section 10(a)(1)(A) of the Endangered Species Act (16 U.S.C. 1531 *et seq.*). The U.S. Fish and Wildlife Service (''we'') solicits review and comment from local, State, and Federal agencies, and the public on the following permit requests. 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.

Permit No. TE–195251

Applicant: Christopher B. Clifford, Davis, California

The applicant requests a permit to take (capture, collect, and kill) the Conservancy fairy shrimp (*Branchinecta conservatio*), the longhorn fairy shrimp (*Branchinecta longiantenna*), the Riverside fairy shrimp (*Streptocephalus wootoni*), the San Diego fairy shrimp (*Branchinecta sandiegonensis*), and the vernal pool tadpole shrimp (*Lepidurus packardi*) in conjunction with surveys throughout the range of each species in California for the purpose of enhancing their survival.

Permit No. TE–195286

Applicant: Scott T. Cashen, Walnut Creek, California

The applicant requests a permit to take (survey and set up remote camera systems) the Peninsular bighorn sheep (*Ovis canadensis*) in conjunction with population and demographic research studies within Imperial County, California for the purpose of enhancing its survival.

Permit No. TE–195305

Applicant: Andres Aguilar, Merced, California

The applicant requests a permit to take (capture, collect, and kill) the vernal pool tadpole shrimp (*Lepidurus packardi*) in conjunction with surveys and genetic research within Merced County, California for the purpose of enhancing their survival.

Permit No. TE–195306

Applicant: Riley J. Swift, Rocklin, California

The applicant requests a permit to take (capture, collect, and kill) the Conservancy fairy shrimp (*Branchinecta conservatio*), the longhorn fairy shrimp (*Branchinecta longiantenna*), the Riverside fairy shrimp (*Streptocephalus wootoni*), the San Diego fairy shrimp (*Branchinecta sandiegonensis*), and the vernal pool tadpole shrimp (*Lepidurus packardi*) in conjunction with surveys throughout the range of each species in California and within Jackson and Klamath Counties in Oregon for the purpose of enhancing their survival.

Permit No. TE–195304

Applicant: Michael J. Farmer, Rancho Cordova, California

The applicant requests a permit to take (capture, collect, and kill) the Conservancy fairy shrimp (*Branchinecta conservatio*), the longhorn fairy shrimp (*Branchinecta longiantenna*), the Riverside fairy shrimp (*Streptocephalus wootoni*), the San Diego fairy shrimp (*Branchinecta sandiegonensis*), and the vernal pool tadpole shrimp (*Lepidurus packardi*) in conjunction with surveys throughout the range of each species in California for the purpose of enhancing their survival.

Permit No. TE–195891

Applicant: Dr. Justen B. Whittall, Santa Clara, California

The applicant requests a permit to remove/remove to possession the *Erysimum capitatum* var. *angustatum* (Contra Costa wallflower) from federal lands in conjunction with genetic sampling for the purpose of enhancing their survival.

Permit No. TE–117947

Applicant: Kevin B. Clark, San Diego, California

The applicant requests an amendment to take (play taped vocalizations) the lease Bell's vireo (*Vireo bellii pusillus*) in conjunction with surveys and monitoring, and take (survey by pursuit) the Quino checkerspot butterfly (*Euphydryas editha quino*) in conjunction with surveys throughout the range of each species within the jurisdiction of the Carlsbad Fish and Wildlife Office, in California for the purpose of enhancing its survival.

Permit No. TE–807078

Applicant: Point Reyes Bird Observatory Conservation Services, Petaluma, California

The applicant requests an amendment to take (locate/monitor nests) the California clapper rail (*Rallus longirostris obsoletus*) in conjunction with surveys and population monitoring studies within Marin, Sonoma, Napa, Solano, and Contra Costa Counties, California, for the purpose of enhancing its survival.

We solicit public review and comment on each of these recovery permit applications. Comments and materials we receive will be available for public inspection, by appointment, during normal business hours at the address listed in the **ADDRESSES** section of this notice.

Dated: October 23, 2008.

Michael Fris,

Acting Regional Director, Region 8, Sacramento, California.

[FR Doc. E8–25772 Filed 10–28–08; 8:45 am]

BILLING CODE 4310–55–P

DEPARTMENT OF THE INTERIOR

Fish and Wildlife Service

[FWS–R4–R–2008–N0195; 40136–1265–0000–S3]

Waccamaw National Wildlife Refuge, Georgetown, Horry, and Marion Counties, SC

AGENCY: Fish and Wildlife Service, Interior.

ACTION: Notice of availability: final comprehensive conservation plan and finding of no significant impact.

SUMMARY: We, the Fish and Wildlife Service (Service), announce the availability of our final comprehensive conservation plan (CCP) and finding of no significant impact (FONSI) for Waccamaw National Wildlife Refuge. In the final CCP, we describe how we will manage this refuge for the next 15 years.

ADDRESSES: A copy of the CCP may be obtained by writing to: Waccamaw National Wildlife Refuge, 1601 North Fraser Street, Georgetown, SC 29440. The plan may also be accessed and downloaded from the Service's Web site: *http://southeast.fws.gov/planning.*

FOR FURTHER INFORMATION CONTACT: Mr. Craig Sasser, Refuge Manager, Waccamaw National Wildlife Refuge; Telephone: 843/527–8069; Fax: 843/527–8494.

SUPPLEMENTARY INFORMATION:

Introduction

With this notice, we finalize the CCP process for Waccamaw National Wildlife Refuge. We started this process through a notice in the **Federal Register** on March 29, 2006 (71 FR 15757). For more about the process, see that notice.

Waccamaw National Wildlife Refuge is currently 18,251 acres in size (within an approved acquisition boundary of 54,000 acres), and was established in 1997 for the following purposes: (1) To protect and manage diverse habitat components within an important coastal river ecosystem for the benefit of threatened and endangered species, freshwater and anadromous fish, migratory birds, and forest wildlife, including a wide array of plants and animals associated with bottomland hardwood habitats; and (2) to provide compatible wildlife-dependent recreational activities, including hunting, fishing, wildlife observation, wildlife photography, and environmental education and interpretation.

The refuge acquisition boundary includes large sections of the Waccamaw and Great Pee Dee Rivers and a small section of the Little Pee Dee River. The wetland diversity of this refuge is what distinguishes it from most others found along the east coast. Wetland habitats range from historic, broken, and actively managed tidal rice fields, to black water and alluvial floodplain forested wetlands. These tidal freshwater wetlands are some of the most diverse freshwater wetland systems found in North America and they offer many important habitats for migratory birds, fish, and resident wildlife.

Over 400 species of animals are supported by the variety of habitats in the refuge acquisition area, including several endangered species. Birds, such as the swallow-tailed kite, osprey, wood stork, white ibis, prothonotary warbler, and many species of waterfowl, can be observed on a seasonal basis, while mammals, such as the American black bear, frequent the refuge's forests year-round. Notably, the refuge acquisition area supports the highest density of nesting swallow-tailed kites in South Carolina and is the northernmost documented nesting area for this raptor within its range.

Additionally, the refuge's wetlands play a critical role in the filtration and storm water retention of the primary drinking water resource for the greater Grand Strand region.

Popular recreation uses of the refuge include hunting and both recreational and commercial fishing. Wildlife viewing and photography programs, as well as environmental education and interpretation, are also being developed on the refuge, especially in conjunction with a visitor center now under construction.

We announce our decision and the availability of the final CCP and FONSI for Waccamaw National Wildlife Refuge in accordance with the National Environmental Policy Act (NEPA) (40 CFR 1506.6(b)) requirements. We completed a thorough analysis of impacts on the human environment, which we included in the draft comprehensive conservation plan and environmental assessment (Draft CCP/EA).

The CCP will guide us in managing and administering Waccamaw National Wildlife Refuge for the next 15 years. Alternative C, as we described in the final CCP, is the foundation for the CCP.

The compatibility determinations for (1) Hunting; (2) fishing; (3) wildlife observation and photography; (4) environmental education and interpretation; (5) bicycling; (6) commercial services; (7) commercial fishing; (8) research; (9) camping; (10) rights-of-way; and (11) forest management—commercial timber harvest are also available within the final CCP.

Background

The National Wildlife Refuge System Improvement Act of 1997 (16 U.S.C. 668dd–668ee) (Improvement Act), which amended the National Wildlife Refuge System Administration Act of 1966, requires us to develop a CCP for each national wildlife refuge. The purpose for developing a CCP is to provide refuge managers with a 15-year plan 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 our policies. In addition to outlining broad management direction on conserving wildlife and their habitats, CCPs identify wildlife-dependent recreational opportunities available to the public, including opportunities for hunting, fishing, wildlife observation, wildlife photography, and environmental education and interpretation. We will review and update the CCP at least every 15 years in accordance with the Improvement Act.

Comments

Approximately 200 copies of the Draft CCP/EA were made available for a 30-day public review period as announced in the **Federal Register** on February 13, 2008 (73 FR 8343). Ninety-four written comments were received from private citizens and a number of non-governmental organizations, including American Rivers, Baruch Marine Field Laboratory (University of South Carolina), Charleston Audubon, Coastal Conservation League, Coastal Expeditions, Five Rivers Coalition, Georgetown County League of Women Voters, Grand Strand Surfrider Foundation, Historic Charleston Foundation, Morgan Park Committee, National Rifle Association of America, The Nature Conservancy, Palmetto Conservation Foundation, Republican Women of Myrtle Beach, SEWEE Association, Swallow-tailed Kite Conservation Alliance, Waccamaw Watershed Academy (Coastal Carolina University), Waccamaw Audubon Society, and Winyah Rivers Foundation. Almost all commenters supported the Service's proposed alternative, Alternative D.

Selected Alternative

After considering the comments we received, we have selected Alternative D for implementation. This alternative is judged to be the most effective management action for meeting the purposes of the refuge by optimizing habitat management and visitor services throughout the refuge. The Service would aim to improve wintering waterfowl habitat on approximately 600 acres on Unit 1 by restoring hydrology. We would also continue to conduct informal surveys on swallow-tailed kites and Swainson's warblers on an occasional basis. Management of black bears would be stepped up, and would include annual surveys and enlisting public participation in gathering, recording, and compiling sightings.

Management of threatened and endangered species would involve restoring the hydrology on Unit 1 to enhance the existing wood stork rookery, restoring wood stork feeding areas on Unit 3, and red-cockaded woodpecker nesting and foraging habitat on Unit 2. Recreational use of the refuge would continue. This alternative would expand on hunting opportunities for deer and hog by considering a hunt by mobility-impaired individuals. It would potentially include a youth waterfowl hunt on refuge management lands. Over the lifetime of the CCP, this alternative would call for reducing deer herd density to improve herd health and to improve habitat quality for other species.

This alternative would identify the 4,600-acre Bull Island as a proposed Wilderness Study Area. The Service would maintain its wilderness

character, and within 10 years of approval of the CCP, would prepare a wilderness study report and additional NEPA documentation on whether Bull Island should be formally designated by Congress as a unit of the National Wilderness Preservation System. The refuge would prepare and implement a Visitor Services' Plan and expand most wildlife-dependent public uses in a number of ways.

Authority: This notice is published under the authority of the National Wildlife Refuge System Improvement Act of 1997, Public Law 105–57.

Dated: July 22, 2008.

Cynthia K. Dohner,

Acting Regional Director.

Editorial Note: This document was received in the Office of the Federal Register on October 24, 2008.

[FR Doc. E8–25840 Filed 10–28–08; 8:45 am]

BILLING CODE 4310–55–P

DEPARTMENT OF THE INTERIOR

Fish and Wildlife Service

[FWS–R4–R–2008–N0217; 40136–1265–0000–S3]

Pee Dee National Wildlife Refuge, Anson and Richmond Counties, NC

AGENCY: Fish and Wildlife Service, Interior.

ACTION: Notice of availability: Final comprehensive conservation plan and finding of no significant impact.

SUMMARY: We, the Fish and Wildlife Service (Service), announce the availability of our final comprehensive conservation plan (CCP) and finding of no significant impact (FONSI) for Pee Dee National Wildlife Refuge. In the final CCP, we describe how we will manage this refuge for the next 15 years.

ADDRESSES: A copy of the CCP may be obtained by writing to: Jeffrey Bricken, Refuge Manager, Pee Dee National Wildlife Refuge, 5770 U.S. Highway 52 North, Wadesboro, NC 28170. The CCP may also be accessed and downloaded from the Service's Internet Site: *http://southeast.fws.gov/planning.*

FOR FURTHER INFORMATION CONTACT: Jeffrey Bricken; telephone: 704/694–4424.

SUPPLEMENTARY INFORMATION:

Introduction

With this notice, we finalize the CCP process for Pee Dee National Wildlife Refuge. We started this process through a notice of intent in the **Federal Register** on November 7, 2006 (71 FR 65122). For more about the process, see that notice.

Established in 1963, Pee Dee National Wildlife Refuge is located approximately 48 miles east of Charlotte, North Carolina, in Anson and Richmond Counties. The 8,433-acre refuge includes a diversity of habitats consisting of bottomland hardwoods, upland pine forests, croplands, open fields, moist-soil units, and mixed-pine hardwoods. These areas support a variety of wildlife and plant species, including waterfowl and other migratory birds, as well as federal- and state-listed species. Pee Dee National Wildlife Refuge straddles several miles of the Pee Dee River, and contains numerous creeks, lakes, and ponds. In addition, the refuge protects historical and archaeological sites.

We announce our decision and the availability of the final CCP and FONSI for Pee Dee National Wildlife Refuge in accordance with National Environmental Policy Act (NEPA) (40 CFR 1506.6(b)) requirements. We completed a thorough analysis of impacts on the human environment, which we included in the draft comprehensive conservation plan and environmental assessment (Draft CCP/EA).

The CCP will guide us in managing and administering Pee Dee National Wildlife Refuge for the next 15 years. Alternative C, as we described in the final CCP, is the foundation for the CCP.

The compatibility determinations for (1) boating; (2) deer and feral hog hunting; (3) turkey hunting; (4) small game hunting; (5) fishing; (6) wildlife observation and photography; (7) environmental education and interpretation; (8) bicycling and jogging; (9) horseback riding; (10) forest management/timber harvest; and (11) cooperative farming are also available in the CCP.

Background

The National Wildlife Refuge System Improvement Act of 1997 (16 U.S.C. 668dd–668ee) (Improvement Act), which amended the National Wildlife Refuge System Administration Act of 1966, requires us to develop a CCP for each national wildlife refuge. The purpose for developing a CCP is to provide refuge managers with a 15-year plan 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 our policies. In addition to outlining broad management direction on conserving wildlife and their habitats, CCPs identify wildlife-dependent recreational opportunities available to the public, including opportunities for hunting, fishing, wildlife observation, wildlife photography, and environmental education and interpretation. We will review and update the CCP at least every 15 years in accordance with the Improvement Act.

Comments

We solicited comments on the Draft CCP/EA for a 30-day period as announced in the **Federal Register** on April 22, 2008 (73 FR 21641). All comments were analyzed and changes were made to the CCP where warranted.

Selected Alternative

The Draft CCP/EA identified and evaluated three alternatives for managing the refuge. After considering the comments we received and based on the professional judgment of the planning team, we have selected Alternative C for implementation. Under this alternative, refuge management will focus on maintaining biodiversity, restoring habitats, improving conditions for threatened and endangered species, and increasing public use opportunities.

Authority: This notice is published under the authority of the National Wildlife Refuge System Improvement Act of 1997, Public Law 105–57.

Dated: August 25, 2008.

Cynthia K. Dohner,

Acting Regional Director.

[FR Doc. E8–25778 Filed 10–28–08; 8:45 am]

BILLING CODE 4310–55–P

DEPARTMENT OF THE INTERIOR

Bureau of Land Management

[UT–LLUT02000–08–14300000–FR0000–241A.00; UTU–66588–02]

Recreation & Public Purposes Act Classification; Utah

AGENCY: Bureau of Land Management, Interior.

ACTION: Notice of Realty Action.

SUMMARY: The Bureau of Land Management (BLM) has determined that public lands in Tooele County, Utah have been examined and found suitable for classification for conveyance to the City of Wendover, Utah under the provisions of the Recreation and Public Purposes Act, as amended (43 U.S.C. 869).

DATES: Comments regarding the proposed conveyance must be received by the BLM on or before December 15, 2008. Comments should reference the serial number UTU–66588–02.

Comments on the classification are restricted to whether the land is physically suited for the proposal, whether the use will maximize use or uses of the land, whether the use is consistent with local planning and zoning, or if the use is consistent with State and Federal Programs.

ADDRESSES: Comments may be submitted to the Bureau of Land Management, Salt Lake City Field Office, 2370 South 2300 West, Salt Lake City, UT 84119. 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 FUTHER INFORMATION CONTACT: David Watson, Realty Specialist, BLM Salt Lake Field Office, (801) 977–4368, *David_S_Watson@blm.gov*.

SUPPLEMENTARY INFORMATION: The City of Wendover has filed an application under the provisions of the R&PP Act of June 14, 1926, as amended (43 U.S.C. 869) to purchase the public land described above for a city cemetery, which they have managed under a R&PP Lease for the past 18 years. The R&PP Act provides for purchase of public lands by units of local government for public purposes such as cemeteries at one half their fair market value. The City of Wendover proposes to continue to use the following described public land for a city cemetery.

Salt Lake Meridian, Utah.

T. 1 S., R. 19 W.,
Sec. 7: Lot 7.

Contains approximately 10 acres in Tooele County, Utah.

The land is not needed for any Federal purposes. Conveyance is consistent with current BLM land use planning, The Pony Express Resource Management Plan—1990, and would be in the public interest.

The patent, when issued, will be subject to the following terms, conditions and reservations:

1. Provisions of the Recreation and Public Purposes Act and all applicable regulations of the Secretary of the Interior.

2. A rights-of-way for ditches or canals constructed by authority of the United States, Act of August 30, 1890 (43 U.S.C. 945).

3. All valid existing rights.

4. The United States will reserve all mineral together with the right to prospect for, mine and remove the minerals under applicable laws and such regulations as the Secretary of the Interior may prescribe, including all necessary access and exit rights.

5. The patentee, its successors or assigns, by accepting a patent, agrees to indemnify, defend, and hold harmless the United States, its officers, agents, representatives, and employees (hereinafter ''United States'') from any costs, damages, claims, causes of action in connection with the patentee's use, occupancy, or operations on the patented real property. This agreement includes, but is not limited to, acts or omissions of the patentee and its employees, agents, contractors, lessees, or any third party arising out of, or in connection with, the patentee's use, occupancy, or operations on the patented real property which cause or give rise to, in whole or in part: (1) Violations of Federal, State, and local laws and regulations that are now, or may in the future become, applicable to the real property and/or applicable to the use, occupancy, and/or operations thereon; (2) judgments, claims, or demands of any kind assessed against the United States; (3) costs, expenses, or damages of any kind incurred by the United States; (4) releases or threatened releases of solid or hazardous waste(s) and/or hazardous substances(s), pollutant(s), or contaminants(s), and/or petroleum product(s) or derivative(s) of a petroleum product, as defined by Federal or State environmental laws; of, on, into, or under land, property, and other interests of the United States; (5) other activities by which solid or hazardous substance(s) or waste(s), pollutant(s) or contaminant(s), or petroleum product(s) or derivative(s) of a petroleum product as defined by Federal or State environmental laws are generated, stored, used, or otherwise disposed of on the patented real property, and any cleanup response, remedial action, or other actions related in any manner to the said solid or hazardous substance(s) or waste(s) or contaminant(s), or petroleum product(s) or derivative(s) of a petroleum product as defined by Federal or State laws. Patentee shall stipulate that it will be solely responsible for compliance with all applicable Federal, State, and local environmental laws and regulatory provisions, throughout the life of the facility, including any closure and/or post-closure requirements that may be imposed with respect to any physical plant and/or facility upon the real property under any Federal, State, or local environmental laws or regulatory provisions. In the case of a patent being issued, this covenant shall be construed as running with the patented real property and may be enforced by the United States in a court of competent jurisdiction.

Classification Comments: Additional detailed information concerning this Notice of Realty Action, including environmental records, is available for review at the BLM Salt Lake Field Office, at the above address. Office hours are 8 a.m. to 4:30 p.m., Monday through Friday except holidays.

Application Comments: Interested parties may submit comments regarding the specific use proposed in the application and plan of development, whether the BLM followed proper administrative procedures in reaching the decision, or any other factor not directly related to the suitability of the land for a cemetery.

Upon publication of this notice in the **Federal Register** the lands covered by the application shall be segregated to the extent that they will not be subject to appropriation under the public land laws including the general mining laws except for conveyance under the Recreation and Public Purposes Act.

The State Director will review any adverse comments. In the absence of any adverse comments, the classification will become effective 60 days from the date of publication in the **Federal Register**.

Dated: October 23, 2008.

Jeff Rawson,

Acting State Director.

[FR Doc. E8–25780 Filed 10–28–08; 8:45 am]

BILLING CODE 4310–DQ–P

DEPARTMENT OF THE INTERIOR

Bureau of Land Management

[UT–LLUT11000–08–L14300000–FR0000–241A.00; UTU–76680]

Recreation and Public Purposes Act Classification; Utah

AGENCY: Bureau of Land Management, Interior.

ACTION: Notice of Realty Action.

SUMMARY: The Bureau of Land Management (BLM) has determined that certain public lands located in Kane County, Utah, are suitable for classification for conveyance to the Western Kane County Special Services District under the authority of the Recreation and Public Purposes (R&PP) Act, June 14, 1926, as amended (43 U.S.C. 869).

DATES: Comments regarding the proposed conveyance must be received by the BLM on or before December 15, 2008. Only written comments will be accepted.

ADDRESSES: Detailed information concerning this action, including but not limited to documentation related to compliance with applicable environmental and cultural resource laws, is available for review at the BLM Kanab Field Office. Address all written comments concerning this notice to Harry Barber, Kanab Field Office Manager, 318 North 100 East, Kanab, Utah 84741. 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: Hugh Wolfe, Realty Specialist, BLM Kanab Field Office, (435) 644–4608, *Hugh_Wolfe@blm.gov*.

SUPPLEMENTARY INFORMATION: The following described public land in Kane County, Utah, has been examined and found suitable for conveyance to the Western Kane County Special Services District under the provisions of the R&PP Act, as amended:

Salt Lake Meridian, Utah

T. 40 S., R. 7 W.,
Sec. 26, S½NE¼SW¼SW¼SW¼, S½SW¼SW¼SW¼;
Sec. 35, NW¼NE¼NW¼, NE¼NW¼NW¼.

The area described above contains approximately 26.25 acres in Kane County, Utah.

In 1989, Western Kane County Special Services District received a patent from the BLM for 10 acres of land for the purpose of developing a landfill in the western portion of Kane County. This landfill was subsequently developed and serves as the repository for solid waste in this area. Since that time, there has been tremendous growth in the area (mainly from development of and visitation to Cedar Mountain and surrounding areas) resulting in increased pressure and use of the existing landfill. This increased pressure and use is causing the original 10-acre landfill site to be used up much more rapidly than previously anticipated. With the explosive population growth in the Las Vegas, Nevada and St. George, Utah areas (where much of the Cedar Mountain development and visitation comes from), the need for additional solid waste disposal will only increase as well. The landfill site would serve important public objectives, including efficient and orderly disposal of solid waste with a minimum solid waste transportation distance for the majority of Long Valley and Cedar Mountain residents.

The proposed conveyance is consistent with the BLM Zion Management Framework Plan approved April 22, 1981, and amended March 10, 1998 (MFP). This 1998 Land Tenure Adjustment Amendment allows the BLM to consider land tenure adjustments (including R&PP leases/patents) if the action meets one or more criteria. One of these criteria was that the action ''is in the public interest and accommodates the needs of state, local, or private entities, including needs for the economy, community growth and expansion and [is] in accordance with other land use goals and objectives and MFP planning decisions.'' This action is consistent with the goals, objectives, and decisions of the Zion MFP, and would not conflict with other decisions throughout the plan. The proposed action is therefore in conformance with the Zion MFP and would serve important public objectives which cannot be achieved prudently or feasibly elsewhere.

The land contains no other known public values. The subject parcel has not been identified for transfer to the State or any other local government or nonprofit organization.

The patent, when issued, will be subject to the following terms, conditions, and reservations:

1. Provisions of the Recreation and Public Purposes Act and all applicable regulations of the Secretary of the Interior. In particular, statutory provisions governing the conveyance of new disposal sites are to be found at 43 U.S.C. 869–2(b), regulatory provisions at 43 CFR 2743.2 and 2343.2–1.

2. A right of way for ditches or canals constructed by the authority of the United States, Act of August 30, 1890 (43 U.S.C. 945).

3. All valid existing rights.

4. The United States will reserve all minerals together with the right to prospect for, mine, and remove the minerals under applicable laws and such regulations as the Secretary of the Interior may prescribe, including all necessary access and exit rights.

5. These parcels are subject to the requirements of section 120(h) of the Comprehensive Environmental Response, Compensation and Liabilities Act, 42 U.S.C. 9620(h) (CERCLA), as amended by the Superfund Amendments and Reauthorization Act of 1988, Sat. 1670. **Federal Register**/Vol. 72, No. 134/Friday, July 13, 2007/Notices.

6. The patentee, its successors or assigns, by accepting a patent, agrees to indemnify, defend, and hold harmless the United States, its officers, agents, representatives, and employees (hereinafter ''United States'') from any costs, damages, claims, causes of action in connection with the patentee's use, occupancy, or operations on the patented real property. This agreement includes, but is not limited to, acts or omissions of the patentee and its employees, agents, contractors, lessees, or any third party arising out of, or in connection with, the patentee's use, occupancy, or operations on the patented real property which cause or give rise to, in whole or in part: (1) Violations of Federal, State, and local laws and regulations that are now, or may in the future become, applicable to the real property and/or applicable to the use, occupancy, and/or operations thereon; (2) judgments, claims, or demands of any kind assessed against the United States; (3) costs, expenses, or damages of any kind incurred by the United States; (4) releases or threatened releases of solid or hazardous waste(s) and/or hazardous substances(s), pollutant(s), or contaminants(s), and/or petroleum product(s) or derivative(s) of a petroleum product, as defined by Federal or State environmental laws; of, on, into, or under land, property, and other interests of the United States; (5) other activities by which solid or hazardous substance(s) or waste(s), pollutant(s) or contaminant(s), or petroleum product(s) or derivative(s) of a petroleum product as defined by Federal or State environmental laws are generated, stored, used, or otherwise disposed of on the patented real property, and any cleanup response, remedial action, or other actions related in any manner to the said solid or hazardous substance(s) or waste(s) or contaminant(s), or petroleum product(s) or derivative(s) of a petroleum product as defined by Federal or State laws. Patentee shall stipulate that it will be solely responsible for compliance with all applicable Federal, State, and local environmental laws and regulatory provisions, throughout the life of the facility, including any closure and/or post-closure requirements that may be imposed with respect to any physical plant and or facility upon the real property under any Federal, State, or

local environmental laws or regulatory provisions. In the case of a patent being issued, this covenant shall be construed as running with the patented real property and may be enforced by the United States in a court of competent jurisdiction.

Additional detailed information concerning this Notice of Realty Action, including environmental records, is available for review at the BLM Kanab Field Office, at the above address. Office hours are 7:45 a.m. to 4:30 p.m., Monday through Friday except holidays.

Upon publication of this notice in the **Federal Register**, the land described above will be segregated from appropriation under the public land laws, including the mining laws, except for conveyance under the R&PP Act.

Classification Comments: You may submit comments regarding the proposed classification or conveyance of the land to the BLM Kanab Field Office Manager at the address stated above. You may submit comments involving the suitability of the lands for a sanitary landfill site. Comments on the classification are restricted to the following four subjects:

(1) Whether the land is physically suited for the proposal;

(2) Whether the use will maximize the future use or uses of the land;

(3) Whether the use is consistent with local planning and zoning; and

(4) If the use is consistent with State and Federal programs.

Application Comments: You may submit comments regarding the specific use proposed in the Service District's application; and whether the BLM followed proper administrative procedures in reaching the decision. Comments received during this process, including respondent's name, address, and other contact information will be available for public review.

The State Director will review any adverse comments. In the event the public does not submit adverse comments, the classification will become 60 days from the date of publication in the **Federal Register**. The land will not be offered for conveyance until after the classification becomes effective.

(Authority: 43 CFR Subpart 2741.)

Dated: October 23, 2008.

Jeff Rawson,

Actg. State Director.

[FR Doc. E8–25782 Filed 10–28–08; 8:45 am]

BILLING CODE 4310–DQ–P

DEPARTMENT OF THE INTERIOR

National Park Service

Notice of Intent to Repatriate Cultural Items: U.S. Department of the Interior, National Park Service, Intermountain Region, Santa Fe, NM; Correction

AGENCY: National Park Service, Interior.

ACTION: Notice; correction.

This notice is published as part of the National Park Service's administrative responsibilities under NAGPRA, 25 U.S.C. 3003 (d)(3). The determinations in this notice are the sole responsibility of the NAGPRA coordinator, Intermountain Region.

This notice corrects the number of sacred objects affiliated with the Pueblo of Santa Ana, New Mexico in a Notice of Intent to Repatriate published on July 23, 2008, in the **Federal Register** (FR Doc. E8-16732, page 42827) from three to one. Based on additional information received when the items were to be repatriated, the NAGPRA coordinator, Intermountain Region, determined that two of the sacred objects are not culturally affiliated with the Pueblo of Santa Ana, New Mexico. The cultural affiliation of those two objects is undetermined at this time. Repatriation of the sacred object described as a bundle with eagle feathers in the July 23, 2008, Notice of Intent to Repatriate is not affected by this correction.

In the **Federal Register** of July 23, 2008, (FR Doc. E8-16732, page 42827), paragraph numbers 3–5 are corrected by substituting the following three paragraphs:

In 1994, the National Park Service assisted the Federal Bureau of Investigation and the United States Fish and Wildlife Service with the investigation of a Migratory Bird Treaty Act violation. The evidence included a collection of Native American objects confiscated from the East-West Trading Post in Santa Fe, NM. Preliminary subject matter expert review of the collection indicated that the objects were historically significant and potentially subject to NAGPRA. The collection was accessioned in 2002 into the Southwest Regional Office collections, now called the Intermountain Region Office. The cultural item covered in this notice is one bundle with eagle feathers.

Following adjudication of the case, a detailed assessment of the object was made by Intermountain Region (IMR) NAGPRA program staff in close collaboration with the IMR Museum Services program staff and in consultation with representatives of potentially affiliated tribes. During consultation, representatives of the Pueblo of Santa Ana, New Mexico, identified the cultural item as a specific ceremonial object needed by traditional Pueblo of Santa Ana religious leaders for the practice of a traditional Native American religion by their present-day adherents. Oral tradition evidence presented by representatives of the Pueblo of Santa Ana, New Mexico, and the written repatriation request received by the Intermountain Region further articulated the ceremonial significance of the cultural item to the Pueblo of Santa Ana, New Mexico. Based on anthropological information, court case documentation, oral tradition, museum records, consultation evidence, and expert opinion, there is a cultural affiliation between the Pueblo of Santa Ana, New Mexico, and the sacred object.

Officials of the Intermountain Region have determined that, pursuant to 25 U.S.C. 3001(3)(C), the cultural item described above is a specific ceremonial object needed by traditional Native American religious leaders for the practice of traditional Native American religions by their present-day adherents. Officials of the Intermountain Region also have determined that, pursuant to 25 U.S.C. 3001(2), there is a relationship of shared group identity that can be reasonably traced between the sacred object and the Pueblo of Santa Ana, New Mexico. Repatriation of the sacred object to the Pueblo of Santa Ana, New Mexico, occurred after the 30 day comment period expired for the original July 23, 2008, Notice of Intent to Repatriate.

The Intermountain Region is responsible for notifying the Apache Tribe of Oklahoma; Fort Sill Apache Tribe of Oklahoma; Hopi Tribe of Arizona; Jicarilla Apache Nation, New Mexico; Mescalero Apache Tribe of the Mescalero Reservation, New Mexico; Navajo Nation, Arizona, New Mexico & Utah; Ohkay Owingeh, New Mexico (formerly the Pueblo of San Juan); Pueblo of Acoma, New Mexico; Pueblo of Cochiti, New Mexico; Pueblo of Jemez, New Mexico; Pueblo of Isleta, New Mexico; Pueblo of Laguna, New Mexico; Pueblo of Nambe, New Mexico; Pueblo of Picuris, New Mexico; Pueblo of Pojoaque, New Mexico; Pueblo of San Felipe, New Mexico; Pueblo of San Ildefonso, New Mexico; Pueblo of Sandia, New Mexico; Pueblo of Santa Ana, New Mexico; Pueblo of Santa Clara, New Mexico; Pueblo of Santo Domingo, New Mexico; Pueblo of Taos,

New Mexico; Pueblo of Tesuque, New Mexico; Pueblo of Zia, New Mexico; San Carlos Apache Tribe of the San Carlos Reservation, Arizona; Tonto Apache Tribe of Arizona; Ute Mountain Tribe of the Ute Mountain Reservation, Colorado, New Mexico & Utah; White Mountain Apache Tribe of the Fort Apache Reservation, Arizona; Yavapai-Apache Nation of the Camp Verde Indian Reservation, Arizona; Ysleta Del Sur Pueblo of Texas; and Zuni Tribe of the Zuni Reservation, New Mexico that this correction has been published.

Dated: October 6, 2008

Sherry Hutt,

Manager, National NAGPRA Program.

[FR Doc. E8–25760 Filed 10–28–08; 8:45 am]

BILLING CODE 4312–50–S

DEPARTMENT OF THE INTERIOR

National Park Service

Notice of Inventory Completion: U.S. Department of the Interior, Bureau of Indian Affairs, Washington, DC, and New York State Museum, Albany, NY

AGENCY: National Park Service, Interior.

ACTION: Notice.

Notice is here given in accordance with the Native American Graves Protection and Repatriation Act (NAGPRA), 25 U.S.C 3003, of the completion of an inventory of human remains and associated funerary objects in the control of the U.S. Department of the Interior, Bureau of Indian Affairs, Washington, DC, and in the possession of the New York State Museum, Albany, NY. The human remains and associated funerary objects were removed from Dukes County, MA.

This notice is published as part of the National Park Service's administrative responsibilities under NAGPRA, 25 U.S.C 3003 (d)(3). The determinations in this notice are the sole responsibility of the museum, institution, or Federal agency that has control of the Native American human remains and associated funerary objects. The National Park Service is not responsible for the determinations in this notice.

A detailed assessment of the human remains was made by New York State Museum professional staff in consultation with representatives of the Wampanoag Tribe of Gay Head (Acquinnah) of Massachusetts.

In 1966, human remains representing a minimum of two individuals were recovered from the Howland 2 Site, Dukes County, Martha's Vineyard Island, MA, during an archeological survey conducted by Frank Schambach, New York State Museum staff. No known individuals were identified. The nine associated funerary objects are eight wrought iron nails with wood adhering and a fragment of deer bone scapula.

The Howland 2 Site is located on Shotnine Hill overlooking Squibnocket Pond within the historic boundaries of the community of Gay Head. The human remains were found in two separate locations on the same site. Wrought iron nails associated with one of the individuals dates the burial to post-European contact, dated to circa 18th–19th centuries. Although the only funerary object found with the second individual consisted of a fragment of animal bone, the depth of the burial, which was over 4 1/2 feet deep, and its proximity to the other individual of historic age, indicates that these human remains may also date to a post-contact time period.

Historic records indicate that the Wampanoag have maintained a continuous presence on Martha's Vineyard, despite colonization of the island by Euroamericans in A.D. 1641. In 1711, Gay Head was established as a reservation for the Wampanoag Gay Head Indians by the Society for the Propogation of the Gospel in New England. In 1714, the community was closed off to the public by a ditch and gate enclosure, along what is now the boundary with Chilmark. The Howland 2 Site is located within this boundary. Its location within the historic boundary of Gay Head suggests that the site was used for burial by residents of the Wampanoag community, rather than by Euroamericans.

Historic information indicates that the area of the Howland 2 Site has been part of Wampanoag-use lands since 1711. Archeological evidence indicates that the burials most likely date to a time subsequent to the establishment of the Gay Head community for the Wampanoag Indians by the Society for the Propagation of the Gospel in New England. Based on this historical and archeological evidence, officials of the New York State Museum have determined that the human remains and funerary objects are culturally affiliated with the Wampanoag Tribe of Gay Head (Aquinnah) of Massachusetts. Officials of the Bureau of Indian Affairs concur with the determinations in this notice.

Officials of the Bureau of Indian Affairs and New York State Museum have determined that, pursuant to 25 U.S.C. 3001 (9–10), the human remains described above represent the physical remains of two individuals of Native American ancestry. Officials of the Bureau of Indian Affairs and New York State Museum have also determined that, pursuant to 25 U.S.C. 3001 (3)(A), the nine objects described above are reasonably believed to have been placed with or near individual human remains at the time of death or later as part of the death rite or ceremony. Lastly, officials of the Bureau of Indian Affairs and New York State Museum have determined that, pursuant to 25 U.S.C. 3001(2), there is a relationship of shared group identity that can be reasonably traced between the Native American human remains and associated funerary objects and the Wampanpoag Tribe of Gay Head (Aquinnah) of Massachusetts.

Representatives of any other Indian tribe that believes itself to be culturally affiliated with the human remains and associated funerary objects should contact Lisa M. Anderson, NAGPRA Coordinator, New York State Museum, 3049 CEC, Albany, NY 12230, telephone (518) 486–2020, before November 28, 2008. Repatriation of the human remains and associated funerary objects to the Wampanpoag Tribe of Gay Head (Aquinnah) of Massachusetts may proceed after that date if no additional claimants come forward.

The New York State Museum is responsible for notifying the Wampanpoag Tribe of Gay Head (Aquinnah) of Massachusetts that this notice has been published.

Dated: September 30, 2008

Sherry Hutt,

Manager, National NAGPRA Program.

[FR Doc. E8–25763 Filed 10–28–08; 8:45 am]

BILLING CODE 4312–50–S

DEPARTMENT OF THE INTERIOR

National Park Service

Notice of Inventory Completion: U.S. Department of the Interior, U.S. Fish and Wildlife Service, Region 7, Anchorage, AK

AGENCY: National Park Service, Interior.

ACTION: Notice.

Notice is here given in accordance with the Native American Graves Protection and Repatriation Act (NAGPRA), 25 U.S.C. 3003, of the completion of an inventory of human remains in the possession of the U.S. Department of the Interior, U.S. Fish and Wildlife Service, Region 7, Anchorage, AK. The human remains were removed from Carlisle Island in the Islands of the Four Mountains area of the Aleutian Islands chain in Alaska.

This notice is published as part of the National Park Service's administrative

responsibilities under NAGPRA, 25 U.S.C. 3003 (d)(3). The determinations in this notice are the sole responsibility of the museum, institution, or Federal agency that has control of the Native American human remains. The National Park Service is not responsible for the determinations in this notice.

A detailed assessment of the human remains was made by U.S. Fish and Wildlife Service, Region 7 professional staff with assistance from the Alaska State Office of History and Archaeology and University of Alaska, Anchorage, in consultation with representatives of the Aleut Corporation and Unangan Repatriation Commission, a non-federally recognized Native Alaskan group.

In 1949, human remains representing a minimum of one individual were removed from Carlisle Island, in the Islands of the Four Mountains area of the Aleutian Islands chain in Alaska, during an expedition by William S. Laughlin, a physical anthropologist. No known individual was identified. No associated funerary objects are present.

There are no radiocarbon dates available for the human remains. All known dated cave burials from the Aleutians are younger than 2,000 years old (Black 1982, pg 24; Black 2003, pg 36; Hayes 2002). The burial context and physical traits of the human remains are consistent with those observed for pre-contact Aleut populations. Human remains and associated grave goods from sites in the Aleutians that were collected by Dr. Laughlin were sent to the University of Connecticut. In 2002, most of the Aleutian Island human remains were sent to The Museum of the Aleutians in Unalaska, AK.

Analysis, including cranio-metric analysis, by the University of Alaska, Anchorage and with the assistance of the Alaska State Office of History and Archaeology, were done on the human remains. Radiocarbon dates were not obtained by the University of Alaska Anchorage or the State Office of History and Archaeology. Skeletal morphology of present-day Aleut populations is similar to that of prehistoric Aleut populations and demonstrates biological affiliation between present-day Aleut groups and prehistoric populations in the Aleutian Islands.

Cultural affiliation between the prehistoric population on Carlisle Island and the Chaluka Corporation and Native Village of Nikolski is demonstrated by recent historical records. In 1741, Russian explorers made contact with the people of the Islands of the Four Mountains. These people and their culture are not well known, but were a distinct variant of the Aleutian culture. In the late 1700s, with Russian assistance, the Umnak Aleuts waged war on the people of the Islands of the Four Mountains. Survivors of the conflict were removed to villages on Umnak Island and absorbed into the population and the population of the Islands of the Four Mountains was ''no more'' by 1790 (Black 1982, pg 20). Based on scientific studies, aboriginal occupation, historical records, and burial context, it is reasonably believed that the descendants of the people of the Islands of the Four Mountains, including Carlisle Island, are members of the present-day Chaluka Corporation and Native Village of Nikolski, which is represented by the Nikolski IRA Council.

Officials of the U.S. Fish and Wildlife Service, Region 7 have determined that, pursuant to 25 U.S.C. 3001 (9–10), the human remains described above represent the physical remains of one individual of Native American ancestry. Officials of the U.S. Fish and Wildlife Service, Region 7 also have determined that, pursuant to 25 U.S.C. 3001(2), there is a relationship of shared group identity that can be reasonably traced between the Native American human remains and the Chaluka Corporation and Native Village of Nikolski.

Representatives of any other Indian tribe that believes itself to be culturally affiliated with the human remains should contact Debra Corbett, U.S. Fish and Wildlife Service, 1011 East Tudor Road, Anchorage, AK 99503, telephone (907) 786–3399, before November 28, 2008. Repatriation of the human remains to the Chaluka Corporation and Native Village of Nikolski may proceed after that date if no additional claimants come forward.

U.S. Fish and Wildlife Service, Region 7 is responsible for notifying the Chaluka Corporation Native Village of Nikolski, and Nikolski IRA Council that this notice has been published.

Dated: September 30, 2008

Sherry Hutt,

Manager, National NAGPRA Program.

[FR Doc. E8–25764 Filed 10–28–08; 8:45 am]

BILLING CODE 4312–50–S

DEPARTMENT OF THE INTERIOR

National Park Service

Notice of Inventory Completion: U.S. Department of the Interior, Bureau of Indian Affairs, Washington, DC, and Northwest Museum of Arts & Culture, Spokane, WA

AGENCY: National Park Service, Interior.

ACTION: Notice.

Notice is here given in accordance with the Native American Graves Protection and Repatriation Act (NAGPRA), 25 U.S.C. 3003, of the completion of an inventory of human remains in the control of the U.S. Department of the Interior, Bureau of Indian Affairs, Washington, DC, and in the possession of the Northwest Museum of Arts & Culture, Spokane, WA. The human remains were removed from the Spokane Indian Reservation which is predominantly situated in Stevens County, WA, with an exception of a small plot of land and a section of the Spokane River that are located in Lincoln County, WA.

This notice is published as part of the National Park Service's administrative responsibilities under NAGPRA, 25 U.S.C. 3003 (d)(3). The determinations in this notice are the sole responsibility of the museum, institution, or Federal agency that has control of the Native American human remains. The National Park Service is not responsible for the determinations in this notice.

A detailed assessment of the human remains was made by the Northwest Museum of Arts & Culture professional staff, on behalf of the U.S. Department of the Interior, Bureau of Indian Affairs, in consultation with representatives of the Spokane Tribe of the Spokane Reservation, Washington.

Around the early 1900s, human remains representing a minimum of two individuals were removed from an unknown location on the Spokane Indian Reservation in Stevens County, WA, probably by Mr. Daniel Dwight, a well-known collector of Spokane Indian relics. The human remains were in Mr. Dwight's possession until his passing in 1982 when many of the Indian artifacts he amassed over the years were donated to the Museum of Native American Culture, Spokane, WA (Accn. Number 1982.37). The Dwight Collection was stored by the Museum of Native American Culture until the museum's closure in 1991. Subsequently, the majority of the Museum of Native American Culture's collections was taken over by the Cheney Cowles Museum, later named the Northwest

Museum of Arts & Culture. No known individuals were identified. No associated funerary objects are present.

Based on museum records, as well as consultation with the late Robert Sherwood, a cultural representative of the Spokane Tribe, the human remains were most likely removed during the early 1900s from the Spokane Reservation. The human remains include two human skulls and mandibles. Though un-numbered, these human remains are reasonable believed to be a part of a group of bones listed in the Daniel Dwight donation of 1982. The collection records include crania metatarsal, and vertebra bone fragments, and are consistent with the inventory of human remains listed above.

Based on provenience, museum records, consultation, and the donor's collection history, the officials of the Bureau of Indian Affairs and Northwest Museum of Arts & Cultural reasonably believe that the human remains are culturally affiliated with the Spokane Tribe of the Spokane Reservation, Washington.

Officials of the Bureau of Indian Affairs and Northwest Museum of Arts & Culture have determined that, pursuant to 25 U.S.C. 3001 (9–10), the human remains described above represent the physical remains of two individuals of Native American ancestry. Officials of the Bureau of Indian Affairs and Northwest Museum of Arts & Culture also have determined that, pursuant to 25 U.S.C. 3001 (2), there is a relationship of shared group identity that can be reasonably traced between the Native American human remains and the Spokane Tribe of the Spokane Reservation, Washington.

Representatives of any other Indian tribe that believes itself to be culturally affiliated with the human remains should contact Mr. Michael Holloman, Museum of Arts & Culture, 2316 West First Avenue, Spokane, WA 99201–5906, telephone (509) 363–5337, before November 28, 2008 Repatriation of the human remains to the Spokane Tribe of the Spokane Reservation, Washington may proceed after that date if no additional claimants come forward.

The Northwest Museum of Arts & Culture is responsible for notifying the Spokane Tribe of the Spokane Reservation, Washington that this notice has been published.

Dated: October 1, 2008

Sherry Hutt,

Manager, National NAGPRA Program.

[FR Doc. E8–25765 Filed 10–28–08; 8:45 am]

BILLING CODE 4312–50–S

INTERNATIONAL TRADE COMMISSION

[Investigation No. 337–TA–642]

In the Matter of Certain Catheters, Consoles and Other Apparatus for Cryosurgery and Components Thereof; Notice of Decision Not To Review an Initial Determination Granting a Joint Motion To Terminate the Investigation Based on a Settlement Agreement

AGENCY: U.S. International Trade Commission.

ACTION: Notice.

SUMMARY: Notice is hereby given that the U.S. International Trade Commission has determined not to review an initial determination (''ID'') (Order No. 19) issued by the presiding administrative law judge (''ALJ'') terminating the investigation based on a settlement agreement.

FOR FURTHER INFORMATION CONTACT: Mark B. Rees, Office of the General Counsel, U.S. International Trade Commission, 500 E Street, SW., Washington, DC 20436, telephone (202) 205–3116. Copies of non-confidential documents filed in connection with this investigation are or will be available for inspection during official business hours (8:45 a.m. to 5:15 p.m.) in the Office of the Secretary, U.S. International Trade Commission, 500 E Street, SW., Washington, DC 20436, telephone (202) 205–2000. General information concerning the Commission may also be obtained by accessing its Internet server at *http://www.usitc.gov*. The public record for this investigation may be viewed on the Commission's electronic docket (EDIS) at *http://edis.usitc.gov*. Hearing-impaired persons are advised that information on this matter can be obtained by contacting the Commission's TDD terminal on (202) 205–1810.

SUPPLEMENTARY INFORMATION: On March 27, 2008, the Commission instituted this investigation based on the complaint, as supplemented, of CryoCor, Inc. of San Diego, California (''CryoCor'') and AMS Research Corporation of Minnetonka, Minnesota (''AMS''). The complaint alleges violations of section 337 of the Tariff Act of 1930 (19 U.S.C. 1337) in the importation into the United States, the sale for importation, and the sale within the United States after importation of certain catheters, consoles, and other apparatus for cryosurgery, and components thereof, that infringe certain claims of U.S. Patent Nos. 6,471,694; 6,572,610; and RE 40,049. The respondent is CryoCath Technologies, Inc. of Quebec, Canada (''CryoCath''). 73 FR 17998 (Apr. 2, 2008); 73 FR 18562 (Apr. 4, 2008).

On September 25, 2008, complainants CryoCor and AMS and respondent CryoCath jointly moved to terminate the investigation based on a settlement agreement. On October 1, 2008, the Commission investigative attorney filed a response in support of the motion. On October 6, 2008, the ALJ determined to grant the motion based on his findings that the parties complied with the requirements of Commission rule 210.21(b) (19 CFR 210.21(b)) and that termination of the investigation on the basis of the settlement would not be contrary to the public health and welfare, competitive conditions in the United States economy, the production of like or directly competitive articles in the United States, or United States consumers. No petitions for review of the subject ID were filed.

The Commission has determined not to review this ID.

The authority for the Commission's determination is contained in section 337 of the Tariff Act of 1930, as amended (19 U.S.C. 1337), and section 210.42 of the Commission's Rules of Practice and Procedure (19 CFR 210.42).

By order of the Commission.

Issued: October 23, 2008.

Marilyn R. Abbott,

Secretary to the Commission.

[FR Doc. E8–25790 Filed 10–28–08; 8:45 am]

BILLING CODE 7020–02–P

NATIONAL INSTITUTE FOR LITERACY

National Institute for Literacy Advisory Board

AGENCY: National Institute for Literacy.

ACTION: Notice of a Closed Teleconference Meeting.

SUMMARY: This notice sets forth the schedule and proposed agenda of an upcoming closed meeting of the National Institute for Literacy Advisory Board. The notice also describes the functions of the Committee. Notice of this meeting is required by Section 10(a)(2) of the Federal Advisory Committee Act and is intended to notify the public of its opportunity to attend. Due to scheduling difficulties, this notice is appearing in the **Federal Register** less than 15 days prior to the meeting date.

DATES: October 30, 2008.

Time: 4 p.m.–5 p.m. Eastern Standard Time.

ADDRESSES: The National Institute for Literacy, 1775 I St., NW., Suite 730, Washington, DC 20006.

FOR FURTHER INFORMATION CONTACT: Steve Langley, Staff Assistant, the National Institute for Literacy; 1775 I St., NW., Suite 730; phone: (202) 233–2025; fax: (202) 233–2050; e-mail: *slangley@nifl.gov.*

SUPPLEMENTARY INFORMATION: The National Institute for Literacy Advisory Board is authorized by section 242 of the Workforce Investment Act of 1998, Public Law 105–220 (20 U.S.C. 9252). The Board consists of 10 individuals appointed by the President with the advice and consent of the Senate. The Board advises and makes recommendations to the Interagency Group that administers the Institute. The Interagency Group is composed of the Secretaries of Education, Labor, and Health and Human Services. The Interagency Group considers the Board's recommendations in planning the goals of the Institute and in implementing any programs to achieve those goals. Specifically, the Board performs the following functions: (a) Makes recommendations concerning the appointment of the Director and the staff of the Institute; (b) provides independent advice on operation of the Institute; and (c) receives reports from the Interagency Group and the Institute's Director.

The purpose of this meeting is to discuss the Director position for the Institute. The discussion is likely to disclose information of a personal nature where disclosure would constitute a clearly unwarranted invasion of personal privacy. The discussion must therefore be held in closed session under exemptions 2 and 6 of the Government in the Sunshine Act, 5 U.S.C. 552b(c)(2) and (6). A summary of the activities at the closed session and related matters that are informative to the public and consistent with the policy of 5 U.S.C. 552b will be available to the public within 14 days of the meeting.

Request for Public Written Comment. The public may send written comments to the Advisory Board to Steve Langley at the National Institute for Literacy, 1775 I St., NW., Suite 730, Washington, DC 20006, e-mail: *slangley@nifl.gov.*

Records are kept of all Committee proceedings and are available for public inspection at the National Institute for Literacy, 1775 I St., NW., Suite 730, Washington, DC 20006, from the hours of 9 a.m. to 5 p.m., Eastern Time Monday through Friday.

Electronic Access to This Document: You may view this document, as well as all other documents of this Department published in the **Federal Register**, in text or Adobe Portable Document Format (PDF) on the Internet at the following site: *http://www.ed.gov/news/federegister.*

To use PDF you must have Adobe Acrobat Reader, which is available free at this site. If you have questions about using PDF, call the U.S. Government Printing Office (GPO), toll free at 1–888–293–6498; or in the Washington, DC, area at (202) 512–1530.

Note: The official version of this document is the document published in the **Federal Register**. Free Internet access to the official edition of the **Federal Register** and the Code of Federal Regulations is available on GPO Access at: *www.gpoaccess.gov/nara/index.html.*

Dated: October 24, 2008.

Daniel Miller,

Acting Director, The National Institute for Literacy.

[FR Doc. E8–25822 Filed 10–28–08; 8:45 am]

BILLING CODE 6055–01–P

NUCLEAR REGULATORY COMMISSION

[Docket No. 50–302]

Florida Power Corporation; Notice of Withdrawal of Application for Amendment to Facility Operating License

The U.S. Nuclear Regulatory Commission (NRC, the Commission) has granted the request of Florida Power Corporation (the licensee) to withdraw its October 25, 2007, application for proposed amendment to Facility Operating License No. DPR–72 for the Crystal River Unit 3 Nuclear Generating Plant (CR–3) located in Citrus County, Florida.

The proposed amendment would have revised the CR–3 Technical Specifications to impose more restrictive voltage and frequency limits during surveillance testing of the emergency diesel generators.

The Commission had previously issued a Notice of Consideration of Issuance of Amendment published in the **Federal Register** on January 29, 2008 (73 FR 5223). However, by letter dated August 26, 2008, the licensee withdrew the proposed change.

For further details with respect to this action, see the application for amendment dated October 25, 2007, and the licensee's letter dated August 26, 2008, which withdrew the application for license amendment. Documents may be examined and/or copied for a fee at the NRC's Public Document Room (PDR) located at One White Flint North, Public File Area 01 F21, 11555 Rockville Pike (first floor), Rockville, Maryland. Publicly available records will be accessible electronically from the Agencywide Documents Access and Management System (ADAMS) Public Electronic Reading Room on the internet at the NRC Web site, *http://www.nrc.gov/reading-rm.html.* Persons who do not have access to ADAMS or who encounter problems in accessing the documents located in ADAMS should contact the NRC PDR Reference staff by telephone at 1–800–397–4209 or 301–415–4737, or by e-mail to *pdr@nrc.gov.*

Dated at Rockville, Maryland, this 20th day of October 2008.

For the Nuclear Regulatory Commission.

Farideh E. Saba,

Senior Project Manager, Plant Licensing Branch 11–2, Division of Operating Reactor Licensing, Office of Nuclear Reactor Regulation.

[FR Doc. E8–25773 Filed 10–28–08; 8:45 am]

BILLING CODE 7590–01–P

POSTAL REGULATORY COMMISSION

[Docket Nos. MC2009–1 and CP2009–2; Order No. 119]

Parcel Return Service Contract 1

AGENCY: Postal Regulatory Commission.

ACTION: Notice.

SUMMARY: The Commission is noticing a recently-filed Postal. Service Parcel Return Service Contract 1 negotiated service agreement. This action is consistent with changes in a recent law governing postal operations.

DATES: 1. Postal Service answers due on or before October 27, 2008.

2. Public comments due on October 29, 2008.

FOR FURTHER INFORMATION CONTACT: Stephen L. Sharfman, General Counsel, 202–789–6820 or *stephen.sharfman@prc.gov.*

SUPPLEMENTARY INFORMATION:

I. Introduction

On October 15, 2008, the Postal Service filed a formal request pursuant to 39 U.S.C. 3642 and 39 CFR 3020.30 *et seq.* to add Parcel Return Service Contract 1 to the competitive product list.[1] The Postal Service asserts that the Parcel Return Service Contract 1 product is a competitive product ''not of general applicability'' within the meaning of 39 U.S.C. 3632(b)(3). *Id.* at

[1] Request of the United States Postal Service to Add Parcel Return Service Contract to Competitive Product List and Notice of Establishment of Rates and Class Not of General Applicability, October 15, 2008 (Request).

1. The Request has been assigned Docket No. MC2008–8.

The Postal Service contemporaneously filed a contract related to the proposed new product pursuant to 39 U.S.C. 3632(b)(3) and 39 CFR 3015.5. The contract is assigned Docket No. CP2009–2. The Postal Service represents that the contract fits within the proposed Mail Classification Schedule (MCS) language.

Request. The Request incorporates (1) a redacted version of the Governors' Decision authorizing the new product; (2) a redacted version of the contract; (3) requested changes in the MCS product list; (4) a statement of supporting justification as required by 39 CFR 3020.32; and (5) certification of compliance with 39 U.S.C. 3633(a).[2] Substantively, it requests that the Parcel Return Service Contract 1 product be added to the competitive product list. Request at 1–2. The Postal Service states the service to be provided under the contract will cover its attributable costs and make a positive contribution to coverage of institutional costs. *Id.,* Attachment D. The Postal Service also asserts that the contract will increase contribution toward the requisite 5.5 percent of the Postal Service's total institutional costs. *Id.,* Attachment E. As a result, the Request contends there will be no issue of subsidization of competitive products by market dominant products as a result of this contract. *Id.* at 1.

Related Contract. A redacted version of the specific Parcel Return Service Contract 1 is included with the Request. The contract is for 2 years and is to be effective 1 day after the Commission approves the required addition of this product to the product list. The Postal Service represents that the contract is consistent with 39 U.S.C. 3633(a) and 39 CFR 3015.7(c). *See* Request, Attachment to Governors' Decision and Attachment E. It notes that actual performance under this contract could vary from estimates, but concludes that the contract will remain profitable. *Id.,* Attachment to Governors' Decision.

[2] Attachment A to the Request consists of the redacted Decision of the Governors of the United States Postal Service on Establishment of Rates and Classes Not of General Applicability for Parcel Return Service (Governors' Decision No. 08–12). The Governors' Decision includes an attachment which is an analysis of the proposed Parcel Return Service Contract 1. Attachment B is the redacted version of the contract. Attachment C shows the requested changes to the MCS product list. Attachment D provides a statement of supporting justification for this Request. Attachment E provides the certification of compliance with 39 U.S.C. 3633(a). Unredacted documents and additional supporting information were filed under seal.

The Postal Service filed much of the supporting materials, including the Governors' Decision and the specific Parcel Return Service Contract 1, under seal. In its Request, the Postal Service maintains that the contract and related financial information, including the customer's name and the accompanying analyses that provide prices, terms, conditions and financial projections should remain under seal. Request at 2.

II. Notice of Filings

The Commission establishes Docket Nos. MC2009–1, and CP2009–2 for consideration of the Request pertaining to the Parcel Return Service Contract 1 product and the related contract. In keeping with practice, these dockets are addressed on a consolidated basis for purposes of this Order; however, future filings should be made in the specific docket in which issues being addressed pertain.

Interested persons may submit comments on whether the Postal Service's filings in the captioned dockets are consistent with the policies of 39 U.S.C. 3632, 3633, or 3642 and 39 CFR part 3015 and 39 CFR 3020 subpart B. Comments are due no later than October 29, 2008. The public portions of these filings can be accessed via the Commission's Web site (*http://www.prc.gov*).

The Commission appoints Paul L. Harrington to serve as Public Representative in these dockets.

III. Confidentiality

As noted, the Postal Service filed much of the supporting materials under seal, including, among other things, (1) the Governor's certification and voting record, and (2) the signatures, printed names, titles and dates executing the contract on behalf of the Postal Service. The foregoing material would not appear to warrant confidential treatment. The Postal Service should file unredacted copies of the foregoing no later than October 27, 2008. Alternatively, if the Postal Service believes that such material should remain confidential, it shall file a detailed justification for its position no later than October 27, 2008.

The Commission takes its responsibility to protect confidential information very seriously. For the Commission to adequately differentiate confidential information from non-confidential information, participants should appropriately label every page of a confidential document as confidential. This duty to label extends to all sheets of supporting spreadsheets submitted by participants. The Postal Service is urged to employ this practice.

IV. Supplemental Information

The Commission has reviewed the Postal Service's filings in these dockets. Pursuant to 39 CFR 3015.6, the Commission requests the Postal Service to provide written responses to the following questions. Answers should be provided as soon as practicable, but no later than October 27, 2008.

1. The following Excel spreadsheet incorporates several cost savings measures: ContractFinancialAnalysisPRS[contract partner].xls. Please provide a narrative describing the basis for these cost savings.

2. Please provide the supporting data and narrative explanation for the value for the following Excel file: ContractFinancialAnalysisPRS[contract partner].xls tab: PartnerProfile cell:C5.

3. (a) Please provide the formulas and the underlying data supporting them for all ''hardcoded'' numbers for the Excel file identified in Question 2.

(b) Do the underlying data reflect volume shifts due to this contract? If not, please explain.

4. Will the methodology approved in Docket No. RM2008–6 be used for purposes of updating costs for subsequent years of this contract?

It is ordered:

1. The Commission establishes Docket Nos. MC2009–1 and CP2009–2 for consideration of the matters raised in each docket.

2. Pursuant to 39 U.S.C. 505, Paul L. Harrington is appointed to serve as officer of the Commission (Public Representative) to represent the interests of the general public in these proceedings.

3. Comments by interested persons in these proceedings are due no later than October 29, 2008.

4. The Postal Service is directed to respond to the Commission's inquiries with respect to confidentiality and supplemental information as set forth in Sections III and IV of this Order no later than October 27, 2008.

5. The Secretary shall arrange for publication of this Order in the **Federal Register**.

By the Commission.

Issued October 22, 2008.

Judith M. Grady,

Acting Secretary.

[FR Doc. E8–25743 Filed 10–28–08; 8:45 am]

BILLING CODE 7710–FW–P

SECURITIES AND EXCHANGE COMMISSION

[Release No. IC–28465; 812–13576]

The Reserve Fund; Notice of Application

October 24, 2008.

AGENCY: Securities and Exchange Commission (''Commission'').

ACTION: Notice of application for a temporary order under Section 22(e)(3) of the Investment Company Act of 1940 (the ''Act'').

SUMMARY OF APPLICATION: Applicant filed an application for a temporary order to permit two of its series to suspend the right of redemption of their outstanding redeemable securities and to postpone payment for shares which have been submitted for redemption for which payment has not been made. The Commission issued an order on September 22, 2008 granting the requested order and is now providing an opportunity for interested persons to request a hearing.

APPLICANT: The Reserve Fund (the ''Applicant''), on behalf of two of its series, the Primary Fund and the U.S. Government Fund (the ''Funds'').

DATES: *Filing Date:* The application was filed on September 22, 2008.

HEARING OR NOTIFICATION OF HEARING: Interested persons may request a hearing by writing to the Commission's Secretary and serving Applicant with a copy of the request, personally or by mail. Hearing requests should be received by the Commission by 5:30 p.m. on November 13, 2008, and should be accompanied by proof of service on Applicant, in the form of an affidavit or, for lawyers, a certificate of service. Hearing requests should state the nature of the writer's interest, the reason for the request, and the issues contested. Persons who wish to be notified of a hearing may request notification by writing to the Commission's Secretary.

ADDRESSES: Secretary, U.S. Securities and Exchange Commission, 100 F Street, NE., Washington, DC 20549–1090. Applicant, 1250 Broadway, New York, NY 10001–3701.

FOR FURTHER INFORMATION CONTACT: Brian P. Murphy, Senior Counsel, at (202) 551–6825 (Division of Investment Management, Office of Chief Counsel).

SUPPLEMENTARY INFORMATION: The complete application may be obtained for a fee at the Commission's Public Reference Room, 100 F Street, NE., Washington, DC 20549–1520 (tel. 202–551–5850).

Based on the representations provided by the Applicant in its application, including those relating to the current extraordinary market conditions and the actions by the Funds' board of trustees (the ''board'') on September 17th, the Commission issued an Order on September 22, 2008 pursuant to Section 22(e)(3) of the Act as requested by the Applicant (the ''Order'').[1] Under the circumstances described in the Order, which required immediate action in order to protect Fund shareholders, the Commission concluded that it was not practicable to give notice or an opportunity to request a hearing before it issued the Order and that the Order should be effective as of the date of the actions of the Funds' board. The Commission is now providing an opportunity for interested persons to request a hearing.

By the Commission.

Florence E. Harmon,

Acting Secretary.

[FR Doc. E8–25807 Filed 10–28–08; 8:45 am]

BILLING CODE 8011–01–P

[1] In the Matter of the Reserve Fund, Investment Company Act Release No. 28386 (Sept. 22, 2008).

SECURITIES AND EXCHANGE COMMISSION

[Release No. 34–58838; File No. SR–CTA/CQ–2008–04]

Consolidated Tape Association; Notice of Filing and Immediate Effectiveness of the Fourteenth Substantive Amendment to the Second Restatement of the Consolidated Tape Association Plan and the Tenth Substantive Amendment to the Restated Consolidated Quotation Plan

October 23, 2008.

Pursuant to Section 11A of the Securities Exchange Act of 1934 (''Act''),[1] and Rule 608 thereunder,[2] notice is hereby given that on October 21, 2008, the Consolidated Tape Association (''CTA'') Plan and Consolidated Quotation (''CQ'') Plan participants (''Participants'')[3] submitted to the Securities and Exchange Commission (''Commission'') proposals to amend the CTA and CQ Plans (collectively, the ''Plans'').[4] The proposals represent the fourteenth substantive amendment to the Second Restatement of the CTA Plan (''Fourteenth Amendment to the CTA Plan'') and the tenth substantive amendment to the Restated CQ Plan (''Tenth Amendment to the CQ Plan''), and seek to add BATS Exchange, Inc. as a new Participant to each Plan.

Pursuant to Rule 608(b)(3)(ii) under the Act,[5] the Participants designated the Amendments as concerned solely with the administration of the Plans. As a result, the Amendments have become effective upon filing with the Commission. At any time within 60 days of the filing of the Amendments, the Commission may summarily abrogate the Amendments and require that the Amendments be refiled in accordance with paragraph (a)(1) of Rule 608 and reviewed in accordance with paragraph (b)(2) of Rule 608, if it appears to the Commission that such action is necessary or appropriate in the public interest, for the protection of investors, or the maintenance of fair and orderly markets, to remove impediments to, and perfect the mechanisms of, a national market system or otherwise in furtherance of the purposes of the Act. The Commission is publishing this notice to solicit comments from interested persons.

I. Rule 608(a)

A. Description and Purpose of the Amendments

The Amendments propose to add BATS Exchange, Inc. as a new Participant to each Plan. The text of the proposed Amendments is available on the CTA's Web site (*http://www.nysedata.com/cta*), at the principal office of the CTA, and at the Commission's Public Reference Room.

B. Additional Information Required by Rule 608(a)

1. Governing or Constituent Documents

Not applicable.

[1] 15 U.S.C. 78k–1.

[2] 17 CFR 242.608.

[3] The Participants are the American Stock Exchange LLC (n/k/a NYSE Alternext U.S. LLC); Boston Stock Exchange, Inc., (n/k/a NASDAQ OMX BX, Inc.); Chicago Board Options Exchange, Incorporated; Chicago Stock Exchange, Inc.; Financial Industry Regulatory Authority, Inc., International Securities Exchange, LLC; The NASDAQ Stock Market LLC; National Stock Exchange, Inc.; New York Stock Exchange LLC; NYSE Arca, Inc.; and Philadelphia Stock Exchange, Inc. (n/k/a NASDAQ OMX PHLX, Inc.)

[4] *See* Securities Exchange Act Release Nos. 10787 (May 10, 1974), 39 FR 17799 (order approving CTA Plan); 15009 (July 28, 1978), 43 FR 34851 (August 7, 1978) (order temporarily approving CQ Plan); and 16518 (January 22, 1980), 45 FR 6521 (order permanently approving CQ Plan). The CTA Plan, pursuant to which markets collect and disseminate last sale price information for listed securities, is a ''transaction reporting plan'' under Rule 601 under the Act, 17 CFR 242.601, and a ''national market system plan'' under Rule 608 under the Act, 17 CFR 242.608. The CQ Plan, pursuant to which markets collect and disseminate bid/ask quotation information for listed securities, is also a ''national market system plan'' under Rule 608 under the Act, 17 CFR 242.608.

[5] 17 CFR 242.608(b)(3)(ii).

2. Implementation of the Amendments

Because the Amendments constitute Ministerial Amendments under both clause (1) of Section IV(b) of the CTA Plan and clause (1) of Section IV(c) of the CQ Plan, the Chairman of CTA and the CQ Plan's Operating Committee may submit these Amendments to the Commission on behalf of the Participants in the Plans. Pursuant to Rule 608(b)(3)(ii) under the Act,[6] the Participants designated Ministerial Amendments as amendments concerned solely with the administration of the Plans, and therefore the Amendments become effective upon filing with the Commission.

3. Development and Implementation Phases

See Item B(2) above.

4. Analysis of Impact on Competition

The proposed Amendments do not impose any burden on competition that is not necessary or appropriate in furtherance of the purposes of the Exchange Act. The Participants do not believe that the proposed plan Amendments introduce terms that are unreasonably discriminatory for the purposes of Section 11A(c)(1)(D) of the Exchange Act.[7]

5. Written Understanding or Agreements Relating to Interpretation of, or Participation in, Plan

Not applicable.

6. Approval by Sponsors in Accordance With Plan

See Item B(2) above.

7. Description of Operation of Facility Contemplated by the Proposed Amendment

a. *Terms and Conditions of Access*
See Item A above.
b. *Method of Determination and Imposition, and Amount of, Fees and Charges*
See Item A above.
c. *Method of Frequency of Processor Evaluation*
Not applicable.
d. *Dispute Resolution*
Not applicable.

II. Rule 601(a)

A. Equity Securities for Which Transaction Reports Shall be Required by the Plan

Not applicable.

B. Reporting Requirements

Not applicable.

C. Manner of Collecting, Processing, Sequencing, Making Available and Disseminating Last Sale Information

Not applicable.

D. Manner of Consolidation

Not applicable.

E. Standards and Methods Ensuring Promptness, Accuracy and Completeness of Transaction Reports

Not applicable.

F. Rules and Procedures Addressed to Fraudulent or Manipulative Dissemination

Not applicable.

G. Terms of Access to Transaction Reports

Not applicable.

H. Identification of Marketplace Execution

Not applicable.

III. Solicitation of Comments

Interested persons are invited to submit written data, views, and arguments concerning the foregoing, including whether the proposed Amendments are consistent with the Act. Comments may be submitted by any of the following methods:

Electronic Comments

- Use the Commission's Internet comment form (*http://www.sec.gov/rules/sro.shtml*); or
- Send an e-mail to *rule-comments@sec.gov*. Please include File Number SR–CTA/CQ–2008–04 on the subject line.

Paper Comments

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

All submissions should refer to File Number SR–CTA/CQ–2008–04. This file number should be included on the subject line if e-mail is used. To help the Commission process and review your comments more efficiently, please use only one method. The Commission will post all comments on the Commission's Internet Web site (*http://www.sec.gov/rules/sro.shtml*). Copies of the submission, all subsequent amendments, all written statements with respect to the Amendments that are filed with the Commission, and all written communications relating to the Amendments between the Commission and any person, other than those that may be withheld from the public in accordance with the provisions of 5 U.S.C. 552, will be available for inspection and copying in the Commission's Public Reference Room, on official business days between the hours of 10 a.m. and 3 p.m. Copies of the Amendments also will be available for inspection and copying at the principal office of the CTA. All comments received will be posted without change; the Commission does not edit personal identifying information from submissions. You should submit only information that you wish to make available publicly. All submissions should refer to File Number SR–CTA/CQ–2008–04 and should be submitted on or before November 19, 2008.

For the Commission, by the Division of Trading and Markets, pursuant to delegated authority.[8]

Florence E. Harmon,

Acting Secretary.

[FR Doc. E8–25806 Filed 10–28–08; 8:45 am]

BILLING CODE 8011–01–P

[6] 17 CFR 242.608(b)(3)(ii).

[7] 15 U.S.C. 78k–1(c)(1)(D).

[8] 17 CFR 200.30–3(a)(27).

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 Thursday, November 6, 2008 at 2 p.m.

Commissioners, Counsel to the Commissioners, the Secretary to the Commission, and recording secretaries will attend the Closed Meeting. Certain staff members who have an interest in the matters 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)(3), (5), (6), (7), 9(B) and (10) and 17 CFR 200.402(a)(3), (5), (6), (7), 9(ii) and (10) permit consideration of the scheduled matters at the Closed Meeting.

Commissioner Aguilar, as duty officer, voted to consider the items listed for the Closed Meeting in closed session.

The subject matter of the Closed Meeting scheduled for Thursday, November 6, 2008 will be:

Formal orders of investigation;

Institution and settlement of injunctive actions;

Institution and settlement of administrative proceedings of an enforcement nature;

Adjudicatory matters; 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 23, 2008.

Florence E. Harmon,

Acting Secretary.

[FR Doc. E8–25715 Filed 10–28–08; 8:45 am]

BILLING CODE 8011–01–P

SECURITIES AND EXCHANGE COMMISSION

[File No. 500–1]

Hat Trick Beverage, Inc.; Order of Suspension of Trading

October 27, 2008.

It appears to the Securities and Exchange Commission that the public interest and the protection of investors require a suspension of trading in the securities of Hat Trick Beverage, Inc. because there is a lack of current and accurate information concerning its securities. Questions have arisen concerning the accuracy and adequacy of statements in the company's press releases regarding its business operations. Hat Trick Beverage, Inc., a company that has made no public filings with the Commission, is quoted on the Pink Sheets under the ticker symbol HKBV.

The Commission is of the opinion that the public interest and the protection of investors require a suspension of trading in securities of the above-listed company. Therefore, it is ordered, pursuant to Section 12(k) of the Securities Exchange Act of 1934, that trading in the securities of the above-listed company is suspended for the period from 9:30 a.m. ET, October 27, 2008, through 11:59 p.m. ET, on November 7, 2008.

By the Commission.

J. Lynn Taylor,

Assistant Secretary.

[FR Doc. E8–25881 Filed 10–27–08; 11:15 am]

BILLING CODE 8011–01–P

SECURITIES AND EXCHANGE COMMISSION

[Release No. 34–58832; File No. SR–FINRA–2008–053]

Self-Regulatory Organizations; Financial Industry Regulatory Authority, Inc.; Notice of Filing of Proposed Rule Change To Amend Section 4(c) of Schedule A of the FINRA By-Laws To Increase Certain Qualification Examination Fees

October 22, 2008.

Pursuant to Section 19(b)(1) of the Securities Exchange Act of 1934 (''Act'') [1] and Rule 19b–4 thereunder,[2] notice is hereby given that on October 15, 2008, Financial Industry Regulatory Authority, Inc. (''FINRA'') (f/k/a National Association of Securities Dealers, Inc. (''NASD'')) filed with the Securities and Exchange Commission (''SEC'' or ''Commission'') the proposed rule change as described in Items I, II, and III below, which Items have been prepared by FINRA. The Commission is publishing this notice to solicit comments on the proposed rule change from interested persons.

I. Self-Regulatory Organization's Statement of the Terms of Substance of the Proposed Rule Change

FINRA is proposing to amend Section 4(c) of Schedule A to the FINRA By-Laws (''Schedule A'') to increase certain qualification examination fees. Below is the text of the proposed rule change. Proposed new language is italicized; proposed deletions are in brackets.

* * * * *

Schedule A to the By-Laws of the Corporation

* * * * *

Section 4—Fees

(a) and (b) No change

(c) The following fees shall be assessed to each individual who registers to take an examination as described below. These fees are in addition to the registration fee described in paragraph (b).

[1] 15 U.S.C. 78s(b)(1).

[2] 17 CFR 240.19b–4.

Series 4	Registered Options Principal	[$80] *$90*
Series 6	Investment Company Products/Variable Contracts Representative	[$75] *$85*
Series 7	General Securities Representative	[$250] *$265*
Series 9	General Securities Sales Supervisor—Options Module	[$60] *$70*
Series 10	General Securities Sales Supervisor—General Module	[$100] *$110*
Series 11	Assistant Representative—Order Processing	[$60] *$70*
Series 14	Compliance Official	[$300] *$320*
Series 16	Supervisory Analyst	[$200] *$210*
Series 17	Limited Registered Representative	[$65] *$70*
Series 22	Direct Participation Programs Representative	[$75] *$85*
Series 23	General Securities Principal Sales Supervisor Module	[$75] *$85*
Series 24	General Securities Principal	[$95] *$105*
Series 26	Investment Company Products/Variable Contracts Principal	[$75] *$85*
Series 27	Financial and Operations Principal	[$95] *$105*
Series 28	Introducing Broker[/]-Dealer Financial and Operations Principal	[$75] *$85*
Series 37	Canada Module of S7 (Options Required)	[$150] *$160*
Series 38	Canada Module of S7 (No Options Required)	[$150] *$160*
Series 39	Direct Participation Programs Principal	[$75] *$80*
Series 42	Registered Options Representative	[$60] *$65*
Series 55	Limited Representative—Equity Trader	[$85] *$95*
Series 62	Corporate Securities Limited Representative	[$75] *$80*
Series 72	Government Securities Representative	[$85] *$95*
Series 82	Limited Representative—Private Securities Offering	[$75] *$80*
Series 86	Research Analyst—Analysis	[$150] *$160*
Series 87	Research Analyst—Regulatory	[$105] *$115*

(1) through (3) No change

(d) through (h) No change

* * * * *

II. Self-Regulatory Organization's Statement of the Purpose of, and Statutory Basis for, the Proposed Rule Change

In its filing with the Commission, FINRA included statements concerning the purpose of and basis for the proposed rule change and discussed any comments it received on the proposed rule change. The text of these statements may be examined at the places specified in Item IV below. FINRA has prepared summaries, set forth in sections A, B, and C below, of the most significant aspects of such statements.

A. Self-Regulatory Organization's Statement of the Purpose of, and Statutory Basis for, the Proposed Rule Change

1. Purpose

Any person associated with a member firm who is engaged in the securities business of the firm must register with FINRA. As part of the registration process, securities professionals must pass a qualification examination to demonstrate competence in each area in which they intend to work. These mandatory qualification examinations cover a broad range of subjects on the markets, products, a person's responsibilities in a given position, securities industry rules and the regulatory structure. Some qualification examinations are sponsored (*i.e.*, developed) solely by FINRA while others are sponsored by the Municipal Securities Rulemaking Board (''MSRB''), the North American Securities Administrators Association (''NASAA''), the National Futures Association (''NFA''), the Federal Deposit Insurance Corporation (''FDIC''), other self-regulatory organizations (''SROs'') or jointly among these entities.[3]

FINRA administers qualification examinations via computer through the PROCTOR® system[4] at test centers operated by vendors under contract with FINRA. FINRA charges an examination fee to candidates for FINRA-sponsored and co-sponsored examinations. For qualification examinations sponsored by a FINRA client and administered/delivered by FINRA, FINRA charges a delivery fee that represents either a portion of or the entire examination fee for a particular examination.

The proposed rule change would amend Schedule A to increase certain qualification examination fees.[5] Each year, FINRA conducts a comprehensive review of the examination fee structure, including an analysis of the costs of developing, administering and delivering qualification examinations. FINRA's 2008 review revealed that certain operational costs have increased and will continue to increase over the next few years. In particular, these costs consist of: (1) the cost of providing the extensive network of test delivery centers; and (2) technology costs required to maintain the PROCTOR® system. Based on these findings, the proposed rule change would increase examination fees with no single examination increasing more than $20. FINRA believes that the proposed rule change would result in a better alignment of program fees to associated operating costs.

Specifically, the proposed rule change would amend Schedule A as follows:

Series 4	Registered Options Principal (Sponsored jointly by NYSE Alternext,CBOE, FINRA, NYSE Arca and Phlx).	From $80 to $90
Series 6	Investment Company Products/Variable Contracts Representative	From $75 to $85
Series 7	General Securities Representative	From $250 to $265
Series 9	General Securities Sales Supervisor—Options Module (Sponsored jointly by NYSE Alternext, CBOE, FINRA, MSRB, NYSE Arca and Phlx).	From $60 to $70

[3] For example, FINRA administers and delivers the Series 6, 24 and 27 examinations, which are sponsored by FINRA. FINRA also administers and delivers client-sponsored examinations, such as the Series 9 and 10, which are sponsored jointly by several SROs (NYSE Alternext U.S. LLC (''NYSE Alternext'') (formerly American Stock Exchange), Chicago Board Options Exchange (''CBOE''), MSRB, FINRA, NYSE Arca, Inc. (''NYSE Arca'') (formerly Pacific Stock Exchange, Inc.) and NASDAQ OMX PHLX, Inc. (''Phlx'') (formerly Philadelphia Stock Exchange)).

[4] PROCTOR® is a technology system that supports computer-based testing and training.

[5] Schedule A sets forth examination fees for those examinations that are sponsored or co-sponsored by FINRA and/or that may be required by FINRA for its members.

Series 10	General Securities Sales Supervisor—General Module (Sponsored jointly by NYSE Alternext, CBOE, FINRA, MSRB, NYSE Arca and Phlx).	From $100 to $110
Series 11	Assistant Representative—Order Processing	From $60 to $70
Series 14	Compliance Official	From $300 to $320
Series 16	Supervisory Analyst	From $200 to $210
Series 17	Limited Registered Representative	From $65 to $70
Series 22	Direct Participation Programs Representative	From $75 to $85
Series 23	General Securities Principal Sales Supervisor Module	From $75 to $85
Series 24	General Securities Principal	From $95 to $105
Series 26	Investment Company Products/Variable Contracts Principal	From $75 to $85
Series 27	Financial and Operations Principal	From $95 to $105
Series 28	Introducing Broker-Dealer Financial and Operations Principal	From $75 to $85
Series 37	Canada Module of S7 (Options Required)	From $150 to $160
Series 38	Canada Module of S7 (No Options Required)	From $150 to $160
Series 39	Direct Participation Programs Principal	From $75 to $80
Series 42	Registered Options Representative	From $60 to $65
Series 55	Limited Representative-Equity Trader	From $85 to $95
Series 62	Corporate Securities Limited Representative	From $75 to $80
Series 72	Government Securities Representative	From $85 to $95
Series 82	Limited Representative—Private Securities Offering	From $75 to $80
Series 86	Research Analyst—Analysis	From $150 to $160
Series 87	Research Analyst—Regulatory	From $105 to $115

The effective date of the proposed rule change would be January 2, 2009. Specifically, the proposed examination fees would become effective for ''120-day examination windows'' opened in the CRD® on or after January 2, 2009.

2. Statutory Basis

FINRA believes that the proposed rule change is consistent with the provisions of Section 15A(b)(5) of the Act,[6] which requires, among other things, that FINRA rules provide for the equitable allocation of reasonable dues, fees and other charges among members and issuers and other persons using any facility or system that FINRA operates or controls. FINRA believes that the proposed rule change to increase certain qualification examination fees in the fee table in Schedule A reflects FINRA's increased costs in developing, administering and delivering qualification examinations.

B. Self-Regulatory Organization's Statement on Burden on Competition

FINRA does not believe that the proposed rule change will result in any burden on competition that is not necessary or appropriate in furtherance of the purposes of the Act.

C. Self-Regulatory Organization's Statement on Comments on the Proposed Rule Change Received From Members, Participants, or Others

Written comments were neither solicited nor received.

III. Date of Effectiveness of the Proposed Rule Change and Timing for Commission Action

Within 35 days of the date of publication of this notice in the **Federal Register** or within such longer period (i) as the Commission may designate up to 90 days of such date if it finds such longer period to be appropriate and publishes its reasons for so finding or (ii) as to which the self-regulatory organization consents, the Commission will:

(A) By order approve such proposed rule change, or

(B) Institute proceedings to determine whether the proposed rule change should be disapproved.

IV. Solicitation of Comments

Interested persons are invited to submit written data, views, and arguments concerning the foregoing, including whether the proposed rule change is consistent with the Act. Comments may be submitted by any of the following methods:

Electronic Comments

- Use the Commission's Internet comment form (*http://www.sec.gov/rules/sro.shtml*); or
- Send an e-mail to *rule-comments@sec.gov*. Please include File Number SR–FINRA–2008–053 on the subject line.

Paper Comments

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

All submissions should refer to File Number SR–FINRA–2008–053. This file number should be included on the subject line if e-mail is used. To help the Commission process and review your comments more efficiently, please use only one method. The Commission will post all comments on the Commission's Internet Web site (*http://www.sec.gov/rules/sro.shtml*). Copies of the submission, all subsequent amendments, all written statements with respect to the proposed rule change that are filed with the Commission, and all written communications relating to the proposed rule change between the Commission and any person, other than those that may be withheld from the public in accordance with the provisions of 5 U.S.C. 552, will be available for inspection and copying in the Commission's Public Reference Room, 100 F Street, NE., Washington, DC 20549, on official business days between the hours of 10 a.m. and 3 p.m. Copies of such filing also will be available for inspection and copying at the principal office of FINRA. All comments received will be posted without change; the Commission does not edit personal identifying information from submissions. You should submit only information that you wish to make available publicly. All submissions should refer to File Number SR–FINRA–2008–053 and should be submitted on or before November 19, 2008.

For the Commission, by the Division of Trading and Markets, pursuant to delegated authority.[7]

Florence E. Harmon,

Acting Secretary.

[FR Doc. E8–25808 Filed 10–28–08; 8:45 am]

BILLING CODE 8011–01–P

[6] 15 U.S.C. 78*o*–3(b)(5).

[7] 17 CFR 200.30–3(a)(12).

SECURITIES AND EXCHANGE COMMISSION

[Release No. 34–58840; File No. SR–NASDAQ–2008–081]

Self-Regulatory Organizations; The NASDAQ Stock Market LLC; Notice of Filing and Immediate Effectiveness of Proposed Rule Change Related to Rules Governing Options Trading

October 23, 2008.

Pursuant to Section 19(b)(1) of the Securities Exchange Act of 1934 (''Act''),[1] and Rule 19b–4 thereunder,[2] notice is hereby given that on October 10, 2008, The NASDAQ Stock Market LLC (''Nasdaq'' or ''Exchange''), filed with the Securities and Exchange Commission (''Commission'') the proposed rule change as described in Items I, II, and III below, which Items have been substantially prepared by Nasdaq. The Exchange has designated the proposed rule change as constituting a ''non-controversial'' rule change under Rule 19b–4(f)(6) under the Act,[3] which renders the proposal effective upon filing with the Commission. The Commission is publishing this notice to solicit comments on the proposed rule change from interested persons.

I. Self-Regulatory Organization's Statement of the Terms of the Substance of the Proposed Rule Change

Nasdaq proposes to amend the Nasdaq Options Market Rules (''NOM Rules'') to eliminate the requirement for separate designations of Senior Registered Options Principal (''SROP'') and Compliance Registered Options Principal (''CROP''), to require a member to integrate the responsibility for supervision of its public customer options business into its overall supervisory and compliance program, and to make certain related changes to the NOM Rules. The rule proposal, which is effective upon filing with the Commission, shall become operative 30 days after filing pursuant to Rule 19b–4(f)(6) of the Act. The text of the proposed rule is available on the Exchange's Web site at *http://nasdaqomx.cchwallstreet.com*, at the Exchange's principal office, and at the Commission's Public Reference Room.

II. Self-Regulatory Organization's Statement of the Purpose of, and Statutory Basis for, the Proposed Rule Change

In its filing with the Commission, Nasdaq included statements concerning the purpose of, and basis for, the proposed rule change and discussed any comments it received on the proposed rule change. The text of these statements may be examined at the places specified in Item IV below. Nasdaq has prepared summaries, set forth in Sections A, B and C below, of the most significant aspects of such statements.

A. Self-Regulatory Organization's Statement of the Purpose of, and Statutory Basis for, the Proposed Rule Change

1. Purpose

The Exchange proposes to amend the NOM Rules to integrate the responsibility for supervision of a member's public customer options business into its overall supervisory and compliance program. The proposed rule change is substantively similar to recent amendments to the rules of Financial Industry Regulatory Authority (''FINRA''), which were approved by the Commission.[4] As part of these changes, the Exchange proposes to eliminate the requirement that a firm must designate a SROP and CROP to be responsible for the overall supervision and compliance programs, respectively, for a member's public customer options activities. Nasdaq believes that the supervisory and compliance function of a member's public customer options activities would be better integrated into the matrix of a firm's overall supervisory and compliance functions rather than separately vested in a SROP and CROP.

The Exchange does not believe that eliminating the SROP and CROP requirements would lead to a reduction in supervision, as firms have an obligation to designate an appropriately registered principal(s) to supervise their public customer options activities pursuant to Nasdaq Rule 3010, which requires Nasdaq members to comply with NASD Rule 3010[5] as if such Rule were part of Nasdaq's Rules. In this regard, the Exchange proposes to amend NOM Rules Chapter II, Section 2(g)(1) to delete the reference to the SROP and CROP and to clarify that if a person is engaged in the supervision of options and security futures sales practices, including a person designated pursuant to NASD Rule 3010(a)(2),[6] then such person must be registered as a Registered Options and Security Futures Principal. The Exchange believes that the proposed rule change would provide firms greater flexibility to incorporate supervision into existing, firm-wide supervisory structures.

The proposed rule change also makes two technical changes. First, all references to ''Options Principal'' would be changed to ''Registered Options and Security Futures Principal'' to reflect the correct title of such principals, consistent with the other NOM Rules. Second, all references to ''put and call'' would be deleted before options, and ''options'' will mean all types of options.

In addition, the proposed rule change would amend NOM Rules Chapter XI in several respects. First, Section 7, paragraph (f), which relates to the opening of accounts, would be amended to delete the reference to the SROP and CROP and require that a specific Registered Options and Security Futures Principal(s) be designated to be responsible for approving customer accounts that do not meet the specific criteria and standards for writing uncovered short option transactions and for maintaining written records of the reasons for every account so approved. The proposed rule change would allow members the flexibility to assign this responsibility, which currently rests with the SROP and/or CROP, to a specific Registered Options and Security Futures Principal.

Second, references to the SROP and CROP would be deleted and a new paragraph (a) would be inserted into Section 8, which relates to supervision of accounts. The new paragraph (a) would make clear that a member that conducts a public customer options business must ensure its written supervisory system policies and procedures pursuant to NASD Rules 3010, 3012, and 3013 adequately address its public customer options business. Although the proposed rule change would eliminate entirely the positions and titles of the SROP and CROP, a member would still be required pursuant to NASD Rule 3010(a)(2) to designate ''an appropriately registered principal(s) with authority to carry out the supervisory responsibilities of the member for each type of business in which it engages for which registration as a broker/dealer is required,'' which would include designating an Options Principal to supervise a member's public customer options activities.

Third, Nasdaq proposes amending Section 10, which relates to discretionary accounts, to eliminate references to the CROP and SROP, and

[1] 15 U.S.C. 78s(b)(1).

[2] 17 CFR 240.19b–4.

[3] 17 CFR 240.19b–4(f)(6).

[4] Securities Exchange Act Release No. 57775 (May 5, 2008), 73 FR 26453 (May 9, 2008) (SR–FINRA–2007–035) (approval order)

[5] NASD Rule 3010 sets forth member firms' responsibilities with respect to supervision.

[6] NASD Rule 3010(a)(2) requires that members designate ''an appropriately registered principal(s) with authority to carry out the supervisory responsibilities of the member for each type of business in which it engages for which registration as a broker/dealer is required.''

require that a specific Registered Options and Security Futures Principal(s) be designated to be responsible for the review of the acceptance of discretionary accounts. Under the proposed rule change, each firm would be required to have a Registered Options and Security Futures Principal other than the Registered Options and Security Futures Principal who accepted the account review the acceptance of each discretionary account to determine that the Registered Options and Security Futures Principal accepting the account had a reasonable basis for believing that the customer was able to understand and bear the risk of the strategies or transactions proposed. The firm must maintain a record of the basis for such determination. In addition, the proposed rule change would eliminate the requirement in paragraph (a)(ii) that discretionary options orders be approved and initialed on the day of entry by the branch office manager or other Options Principal, or confirmed within a reasonable time by an Options Principal if the branch office manager is not an Options Principal. Under the proposed rule change, discretionary orders would be required to receive frequent appropriate supervisory review by a Registered Options and Security Futures Principal who is not exercising discretionary authority (instead of a CROP) and be reviewed in accordance with a member's written supervisory procedures. The proposed rule change would ensure that supervisory responsibilities are assigned to specific Registered Options and Security Futures Principal-qualified individuals, thereby enhancing the quality of supervision.

Proposed NOM Rules Chapter XI, Section 10(e) would allow a participant to exercise time and price discretion on orders for the purchase or sale of a definite number of options contracts in a specified security. The Exchange proposes to limit the duration of this discretionary authority to the day it is granted, absent written authorization to the contrary. Additionally, the proposed rule would require any exercise of time and price discretion to be reflected on the customer order ticket. The proposed one-day limitation would not apply to time and price discretion exercised for orders affected with or for an institutional account (as defined in the NOM Rules) pursuant to valid Good-Till Cancelled instructions issued on a ''not held'' basis.

The Exchange believes that investors will receive greater protection by clarifying the time such discretionary orders remain pending.

Nasdaq also proposes to add NOM Rules Chapter XI, Section 10(f), which requires any participant that does not utilize computerized surveillance tools for the frequent and appropriate review of discretionary account activity to establish and implement procedures to require Registered Options and Security Futures-qualified individuals who have been designated to review discretionary accounts to approve and initial each discretionary order on the day entered. The Exchange believes that any member that does not use computerized tools for the frequent and adequate surveillance of options discretionary account activity should continue to be required to perform the daily manual review of discretionary orders.

2. Statutory Basis

Nasdaq believes that the proposed rule change is consistent with the provisions of Section 6 of the Act,[7] in general, and with Section 6(b)(5) of the Act,[8] in particular, in that the proposal is designed to prevent fraudulent and manipulative acts and practices, to promote just and equitable principles of trade, to foster cooperation and coordination with persons engaged in regulating, clearing, settling, processing information with respect to, and facilitating transactions in securities, to remove impediments to and perfect the mechanism of a free and open market and a national market system, and, in general, to protect investors and the public interest. The Exchange believes that the supervisory and compliance function of a member's public customer options activities would be better integrated into the matrix of a firm's overall supervisory and compliance functions rather than separately vested in a SROP and CROP.

B. Self-Regulatory Organization's Statement on Burden on Competition

The Exchange does not believe that the proposed rule change will result in any burden on competition that is not necessary or appropriate in furtherance of the purposes of the Act.

C. Self-Regulatory Organization's Statement on Comments on the Proposed Rule Change Received From Members, Participants, or Others

No written comments were solicited nor were any received with respect to the proposed rule change.

[7] 15 U.S.C. 78f.

[8] 15 U.S.C. 78f(b)(5).

III. Date of Effectiveness of the Proposed Rule Change and Timing for Commission Action

The Exchange has designated the proposed rule change as one that does not: (i) Significantly affect the protection of investors or the public interest; (ii) impose any significant burden on competition; and (iii) become operative for 30 days from the date on which it was filed, or such shorter time as the Commission may designate. Therefore, the foregoing rule change has become effective pursuant to Section 19(b)(3)(A) of the Act[9] and Rule 19b–4(f)(6) thereunder.[10]

At any time within 60 days of the filing of the proposed rule change, the Commission may summarily abrogate such rule change if it appears to the Commission that such action is necessary or appropriate in the public interest, for the protection of investors, or otherwise in furtherance of the purposes of the Act.

IV. Solicitation of Comments

Interested persons are invited to submit written data, views, and arguments concerning the foregoing, including whether the proposed rule change is consistent with the Act.

Comments may be submitted by any of the following methods:

Electronic Comments

- Use the Commission's Internet comment form (*http://www.sec.gov/rules/sro.shtml*); or
- Send an e-mail to *rule-comments@sec.gov.* Please include File Number SR–NASDAQ–2008–081 on the subject line.

Paper Comments

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

All submissions should refer to File Number SR–NASDAQ–2008–081. This file number should be included on the subject line if e-mail is used. To help the Commission process and review your comments more efficiently, please use only one method. The Commission will post all comments on the Commission's Internet Web site (*http://www.sec.gov/rules/sro.shtml*).

[9] 15 U.S.C. 78s(b)(3)(A).

[10] 17 CFR 240.19b–4(f)(6). In addition, Rule 19b–4(f)(6)(iii) requires a self-regulatory organization to provide the Commission with written notice of its intent to file the proposed rule change, along with a brief description and text of the proposed rule change, at least five business days prior to the date of filing of the proposed rule change, or such shorter time as the Commission may designate. The Exchange had satisfied the five business-day pre-filing requirement.

Copies of the submission, all subsequent amendments, all written statements with respect to the proposed rule change that are filed with the Commission, and all written communications relating to the proposed rule change between the Commission and any person, other than those that may be withheld from the public in accordance with the provisions of 5 U.S.C. 552, will be available for inspection and copying in the Commission's Public Reference Room, 100 F Street, NW., Washington, DC 20549, on official business days between the hours of 10 a.m. and 3 p.m. Copies of such filing also will be available for inspection and copying at the principal office of Nasdaq.

All comments received will be posted without change; the Commission does not edit personal identifying information from submissions. You should submit only information that you wish to make available publicly.

All submissions should refer to File Number SR–NASDAQ–2008–081 and should be submitted on or before November 19, 2008.

For the Commission, by the Division of Trading and Markets, pursuant to delegated authority.[11]

Florence Harmon,

Acting Secretary.

[FR Doc. E8–25810 Filed 10–28–08; 8:45 am]

BILLING CODE 8011–01–P

[11] 17 CFR 200.30–3(a)(12).

SECURITIES AND EXCHANGE COMMISSION

[Release No. 34–58845; File No. SR–NYSE–2008–46]

Self-Regulatory Organizations; New York Stock Exchange LLC; Notice of Filing of Amendment Nos. 2 and 3 and Order Granting Accelerated Approval to a Proposed Rule Change, as Modified by Amendment Nos. 1, 2, and 3, To Create a New NYSE Market Model, With Certain Components To Operate as a One-Year Pilot, That Would Alter NYSE's Priority and Parity Rules, Phase Out Specialists by Creating a Designated Market Maker, and Provide Market Participants With Additional Abilities To Post Hidden Liquidity

October 24, 2008.

I. Introduction

On June 12, 2008, the New York Stock Exchange LLC[1] (''NYSE'' or ''Exchange'') filed with the Securities and Exchange Commission (''SEC'' or ''Commission''), pursuant to Section 19(b)(1) of the Securities Exchange Act of 1934 (''Act'')[2] and Rule 19b–4 thereunder,[3] a proposed rule change to establish a new market model (''New Model''). The New Model would implement significant changes in NYSE's market structure, including, most notably: (i) The phasing out of the specialist system and adopting a Designated Market Maker (''DMM'') structure; (ii) the alteration of NYSE's priority and parity rules, most significantly to allow DMMs to trade on parity with orders on NYSE's Display Book® (''Display Book''); and (iii) the introduction of new order functionality, including the DMM Capital Commitment Schedule (''CCS'') and hidden orders.[4]

On July 15, 2008, the Exchange filed Amendment No. 1 to the proposed rule change. The proposed rule change, as modified by Amendment No. 1, was published for public comment in the **Federal Register** on July 23, 2008.[5] The Exchange filed Amendment No. 2 to the proposed rule change on August 29, 2008. The Exchange filed Amendment No. 3 to the proposed rule change on October 7, 2008. The Commission received no comment letters regarding proposed rule change. This order provides notice of filing of Amendment Nos. 2 and 3 to the proposed rule change, and grants accelerated approval to the proposed rule change, as modified by Amendment Nos. 1, 2 and 3.

II. Description of the Proposal

A. Background: NYSE's Hybrid Market and the Evolution of Electronic Trading

Section 11(b) of the Act[6] allows the rules of a national securities exchange to permit a member to be registered as a specialist and act as both a broker and a dealer. Historically, the NYSE specialist was responsible for overseeing the execution of all orders coming into the Exchange, for conducting auctions on the Floor, and for maintaining an orderly market in assigned securities. Specialists' dealer activities are governed, in part, by the negative and affirmative trading obligations. Rule 11b–1 under the Act[7] requires exchanges that permit members to register as specialists to have rules governing specialists' dealer transactions so that their proprietary trades conform to the negative and affirmative obligations. The negative obligation as set forth in Rule 11b–1 under the Act requires that a specialist's dealings be restricted, so far as practicable, to those reasonably necessary to permit the specialist to maintain a fair and orderly market.[8] The affirmative obligation as set forth in Rule 11b–1 under the Act requires a specialist to engage in a course of dealings for its own account to assist in the maintenance, so far as practicable, of a fair and orderly market.[9] NYSE has adopted these obligations in its current Rule 104.[10] In 2006, the Exchange began implementation of its NYSE HYBRID MARKET™ (''Hybrid Market''),[11] under which Exchange systems assumed the function of matching and executing electronically-entered orders. As part of the Hybrid Market, the Exchange programmed its systems to provide specialists with an order-by-order advance ''look'' at incoming orders.

The rise of the electronic Hybrid Market has fundamentally altered NYSE's trading environment. Traditionally, price discovery on the Exchange took place almost exclusively on the Floor in the form of face-to-face interactions among brokers and specialists. These interactions have diminished as electronic trading has become more important on the Exchange.

In addition, information that once was exclusive to the Floor, such as the most up-to-date quotes and last sale prices, is now widely available off the Floor through electronic means. At the same time, the Exchange believes that it is no longer the dominant trading market for many NYSE-listed securities, as competition from other market centers has increased.

The increase in electronic executions on the Exchange as well as the increase in the use of smart routing engines by market participants of all types has reduced the advantages once enjoyed by Floor brokers and specialists. Indeed, NYSE has argued that the informational advantage has shifted ''upstairs'' where

[1] Formerly known as the New York Stock Exchange, Inc.

[2] 15 U.S.C. 78s(b)(1).

[3] 17 CFR 240.19b–4.

[4] Currently, specialists must yield to customer orders on the Display Book. *See* NYSE Rule 92(a).

[5] Securities Exchange Act Release No. 58184 (Jul. 17, 2008), 73 FR 42853 (''Notice'').

[6] 15 U.S.C. 78k(b).

[7] 17 CFR 240.11b–1.

[8] 17 CFR 240.11b–1(a)(2)(iii).

[9] 17 CFR 240.11b–1(a)(2)(ii).

[10] NYSE Rule 104(a) reflects NYSE's adoption of the negative obligation and states that ''no specialist shall effect on the Exchange purchases or sales of any security in which such specialist is registered, for any account in which he or his member organization * * * is directly or indirectly interested, unless such dealings are reasonably necessary to permit such specialist to maintain a fair and orderly market * * *.''

[11] *See* Securities Exchange Act Release No. 53539 (March 22, 2006), 71 FR 16353 (March 31, 2006) (SR–NYSE–2004–05).

orders are now first ''shopped'' within a firm and then to others before being sent to the Floor for execution and, even then, orders are likely to be sent in pieces to multiple markets.[12]

Because of these changes, NYSE is proposing to adopt its New Model, which the Exchange believes would provide a more robust trading model on the Floor while preserving the existing framework for trading and some of the key responsibilities of its market participants that NYSE believes make it unique. The Exchange believes that the proposed changes would improve market quality in the form of tighter spreads, greater liquidity, and opportunities for price improvement.

B. Proposed Changes to Exchange Systems

1. Overview of NYSE's Proposed New Model

The Exchange proposes to eliminate the ''specialist'' category of market participants and create a new category of market participants, DMMs.[13] The Exchange intends to implement the New Model in two phases: Phase 1, beginning as of the date of this order (''Approval Date'') and ending no more than five weeks after the Approval Date, and Phase 2, beginning upon completion of the Phase 1 implementation and ending no more than ten weeks after the Approval Date.[14] Though DMMs would still be ''specialists'' during Phase 1, once Phase 1 has been fully implemented and Phase 2 begins, DMMs would no longer be ''specialists'' under the Act. Once Phase 2 has been implemented, DMMs would no longer serve on the Exchange in the capacity of responsible broker-dealer for orders on NYSE's book, and DMM trading activity on the Exchange would be limited to proprietary trading.[15] In addition, during Phase 2, the Exchange will eliminate the order-by-order advance ''look'' specialists currently receive. Because, with the implementation of Phase 2, they would no longer be specialists, DMMs would not be subject to a specialist's negative obligation not to trade for its own account unless reasonably necessary to the maintenance of a fair and orderly market.[16] The Exchange believes this would give the DMM greater freedom to manage the trading risks associated with their reduced responsibilities to the NYSE market. Like specialists today, DMMs would be able to generate orders through an algorithm that interacts directly with the Display Book. In addition, in the New Model, DMMs would be able to commit additional liquidity in advance to fill incoming orders via the Capital Commitment Schedule or CCS. The CCS is a liquidity schedule setting forth various price points where the DMM is willing to interact with incoming orders.

As part of the redesign of its market, NYSE proposes to amend the rules governing allocation of shares among the participants in a trade with an incoming order.[17] First, NYSE's proposal would amend the Exchange's priority rules relating to displayed interest that establishes the Exchange's best bid or best offer (collectively ''Exchange BBO'' [18]), most notably by providing such priority interest with the first 15% of any execution and by allowing such interest to maintain priority until it is exhausted.[19] Second, in the proposed New Model, all market participants would receive executions on an equal basis (''parity'') with other interest available at that price.[20] Similar to the NYSE's current market model, the Exchange would classify each individual Floor broker and the DMM registered in a security as separate market participants, while all off-Floor orders entered in Exchange systems for such security would together constitute a single market participant (''Off-Floor Participant'') for the purpose of share allocation. The Exchange's proposed parity rule represents a significant change from its current requirement that specialists yield to all off-Floor orders on the Display Book.

The Exchange also proposes to provide all market participants with the ability to maintain non-displayed ''hidden interest''—*i.e.*, reserve interest without a minimum display requirement.[21] Along with the DMM's CCS interest, the Exchange believes this ability of market participants to maintain hidden interest on NYSE's book will contribute to the Exchange's liquidity and depth of market.

2. Updating the Roles of the Various Exchange Market Participants

As indicated above, the New Model proposal includes proposed changes to the roles of the Exchange's various market participant groups to reflect new patterns of trading and new obligations. These include the phasing out of NYSE's specialist system and the adoption of a Designated Market Maker structure. In addition, the Exchange is making changes to the role of, and tools available to, Floor brokers, and is giving new tools to off-Floor participants that will enable them to participate in the market more directly. These changes are described in more detail below.

(a) Designated Market Makers

(1) Overview

The Exchange believes that its new market model requires a new type of market maker [22]—the Designated Market Maker—with the ability (and affirmative obligation) to contribute liquidity in a security by trading competitively for its dealer account. The Exchange therefore proposes to phase out the existing specialist system and to replace specialists with Designated Market Makers who would be employees of Designated Market Maker Units (''DMM Units'').[23]

As described in further detail below, the Exchange proposes to give DMM Units tools and opportunities that are not available to specialists currently, along with modified obligations, that the Exchange believes are more commensurate with trading in electronic markets. At the same time, the Exchange would preserve several aspects of the specialist system that it believes are beneficial to the market and the investing public.

[12] *See* Notice, *supra* note 5, at 42861.

[13] *See infra* Section II.B.2.(a) for a more detailed description of the Exchange's proposal regarding DMMs.

[14] The Exchange proposes to roll out each phase of the New Model initially in three or four securities, with progressive implementation of the New Model rules for additional securities over the duration of each phase. Certain provisions of the proposed rules for the New Model would be implemented on a one-year pilot basis. *See infra* Section II.B.5 for a more detailed description of the implementation of the proposed New Model.

[15] The DMM would also be responsible for effecting manual executions in certain circumstances on the Exchange. *See infra* notes 38–39 and accompanying text.

[16] *See supra,* notes 8–10 and accompanying text. The Exchange has determined to impose certain affirmative obligations on DMMs (including an obligation to provide quotes at the National Best Bid or Offer (''NBBO'') a minimum percentage of the trading day).

[17] Proposed NYSE Rule 72 (Priority of Bids and Offers and Allocation of Executions).

[18] The term ''Exchange BBO'' refers to the best bid or the best offer on NYSE. It should not be confused with the defined terms ''national best bid'' and ''national best offer'' as defined in Rule 600(b)(42) of Regulation NMS Rule 242.600(b)(42) under the Act.

[19] *See infra* Section II.B.3.(b) for a more detailed description of the Exchange's proposal regarding priority.

[20] *See infra* Section II.B.3.(b) for a more detailed description of the Exchange's proposal regarding parity.

[21] *See infra* Section II.B.3.(a) for a more detailed description of the Exchange's proposal regarding reserve interest.

[22] The term ''market maker'' shall have the same meaning as that term in Section (3)(a)(38) of the Act.

[23] As of the implementation of Phase 2, pursuant to proposed Rule 104(f)(iv), DMMs will be designated as ''market makers'' on the Exchange for purposes of the Act.

Current NYSE Rule 104, relating to specialist dealings, will be amended and renamed 104T and will be operative and effective through the end of Phase 1. The Exchange also proposes a new Rule 104 that will be implemented during Phase 2.[24]

(2) DMMs and DMM Units Approved by the Exchange

The Exchange proposes to require that member organizations who want to operate a DMM Unit file an application in writing and be approved by NYSE Regulation prior to operating a DMM Unit. The application and approval requirement would be waived for existing NYSE specialist firms that decide to create a DMM Unit.[25] In deciding whether to approve an application, NYSE Regulation will consider, among other things, the member organization's market making ability, the capital that the member is willing or able to make available for market making and such other factors as NYSE Regulation deems appropriate.[26]

DMMs employed by DMM Units to work on the Floor of the Exchange will be required to be approved and registered with the Exchange. In order to obtain such approval, applicants will need to submit an application to NYSE Regulation, Inc., which will assess an applicant's regulatory fitness, and successfully complete a qualifications examination prescribed by the Exchange.[27]

(3) DMMs Not Responsible Broker-Dealer

The Exchange proposes to amend the provision in Exchange rules that makes specialists the ''responsible broker-dealer'' for purposes of Limit Order Display and other obligations under both the Act and regulations promulgated thereunder. Under NYSE Rule 60, specialists are currently solely responsible for quoting the highest bids and lowest offers on the Exchange for all reported securities.

The Exchange is of the view that this rule is appropriate in a manual trading environment, where the specialist post is the primary locus for trading in securities and where the specialist oversees the reporting of all executions. The Exchange believes this rule makes less sense in an automated market. Market participants who are not specialists post their interest electronically in the form of DOT orders or e-Quotes (broker agency interest files), and Exchange systems process and publish that interest automatically. The Exchange's quote today now includes the Floor broker's agency interest, specialist interest, and electronically entered interest of off-Floor participants, and all interest included in the Exchange's quote is identifiable by the Exchange's systems.

Given the automated processing of participant orders, quotations, and executions, the Exchange believes that the notion that the specialist is the sole responsible broker-dealer is obsolete. And, because various obligations may attach based on whether a participant is designated as the responsible broker-dealer, the Exchange believes that designating the DMM as the ''responsible broker-dealer'' could place these obligations on a nominal participant while relieving the logically responsible participant of that same obligation. To address these limitations, NYSE is proposing to amend NYSE Rule 60 to reflect that the member or member organization entering a bid or offer in a security is the ''responsible broker-dealer'' to the extent of such bid or offer.[28]

(4) DMMs' Affirmative Obligation

Although the Exchange does not propose to require DMMs to act as ''responsible broker-dealers,'' the Exchange does propose to impose on each DMM affirmative obligations with respect to the quality of the markets in securities assigned to it. The Exchange's proposed Rule 104 sets forth the DMMs' affirmative obligation as follows:

The function of a member acting as a DMM on the Floor of the Exchange includes the maintenance, in so far as reasonably practicable, of a fair and orderly market on the Exchange in the stocks in which he or she is so acting. The maintenance of a fair and orderly market implies the maintenance of price continuity with reasonable depth, to the extent possible consistent with the ability of participants to use reserve orders, and the minimizing of the effects of temporary disparity between supply and demand. In connection with the maintenance of a fair and orderly market, it is commonly desirable that a member acting as DMM engage to a reasonable degree under existing circumstances in dealings for the DMM's own account when lack of price continuity, lack of depth, or disparity between supply and demand exists or is reasonably to be anticipated.[29]

In addition, DMM Units would be required to maintain adequate minimum capital[30] based on their registered securities, and would be required to use their capital to engage in a course of dealings for their own accounts to assist in the maintenance, so far as practicable, of a fair and orderly market. Transactions on the Exchange by a DMM for the DMM Unit's account are to be effected in a reasonable and orderly manner in relation to the condition of the general market and the market in the particular stock.[31] To support this requirement, the Exchange would continue to provide depth guidelines[32] for each security, and NYSE Regulation would continue to surveil for and enforce DMM compliance with the guidelines.[33]

DMMs would further be required to maintain a bid or offer at the National Best Bid or National Best Offer (''inside'') for securities in which the DMM is registered for a certain percentage of the trading day based on the average daily volume of the security. For securities that have a consolidated average daily volume of less than one million shares per calendar month, a DMM Unit must maintain a bid or an offer at the NBBO for at least 10% of the trading day (calculated as an average over the course of a calendar month). For securities that have a consolidated average daily volume of equal to or greater than one million shares per calendar month, a DMM Unit must maintain a bid or an offer at the NBBO for at least 5% or more of the trading day (calculated as an average over the courts of a calendar month). Reserve or

[24] *See infra* Section II.B.5 for a more detailed description of the phased implementation of the proposed New Model.

[25] *See* Proposed NYSE Rule 103(b)(ii).

[26] *See* Proposed NYSE Rule 103(b)(i).

[27] For a full discussion of the DMM registration and approval process, including provisions for Relief DMMs and Temporary DMMs, *see* Notice, *supra* note 5, at 42862.

[28] *See* 17 CFR § 240.602(b)(i).

[29] *See* Proposed NYSE Rule 104(f)(ii).

[30] The proposed capital requirements for DMMs are identical to the current capital requirements computed for specialists in accordance with Rule 15c3–1 and current NYSE Rule 104. The Exchange proposes to move the placement of these requirements into proposed NYSE Rule 103.

[31] *See* Proposed NYSE Rule 104(g)(i).

[32] Currently, the Exchange provides each security with a daily depth guideline and depth sequence size that reflects its individual trading characteristics including intra-day price volatility. Depth sequence sizes over which depth is calculated and the depth guidelines against which the calculated depth movements are compared are dynamically updated each day for each symbol based on the symbol's recent trading characteristics. These characteristics include: its previous NYSE closing price; its NYSE adjusted volume; and its intra-day consolidated high/low range. Systemic calculations of these values occur each day and are used in the creation of a formulaic individualized depth guideline and depth sequence size that is unique for each security. The Exchange proposes to provide DMMs with the same information pursuant to proposed NYSE Rule 104(f)(iii).

[33] Specialist compliance with the depth guidelines is reviewed by the Market Surveillance division of NYSE Regulation on a patterns and practices basis. A specialist's failure to comply with the guidelines may result in referral to NYSE Regulation's Enforcement division for investigation and possible disciplinary action.

other hidden orders entered by the DMM would not be included in the inside quote calculations.[34]

The Exchange further proposes that DMMs retain the re-entry requirements currently imposed on specialists contained in NYSE Rule 104. As such, DMMs effecting Neutral, Non-Conditional and Conditional transactions would still be required to re-enter liquidity on the opposite side of the market depending on the type of transaction executed by the DMM.[35]

(5) DMMs and Order Information

Once Phase 2 has been implemented, DMMs would not receive an order-by-order advance ''look'' at incoming orders.[36] The DMM Unit's trading algorithms would have access to information with respect to orders entered on the Exchange, Floor broker agency interest files, or reserve interest to the extent such information is made publicly available. DMM unit algorithms would receive the same information that is disseminated to the public by the Exchange, at the same time that it is available to other market participants, with respect to orders entered on the Exchange, Floor broker agency interest files, or reserve interest.[37]

Although the DMM would no longer receive order by order information, there are certain times during which the Exchange believes human interaction is essential to market quality and maintaining a fair and orderly market; specifically, during opening and re-opening transactions, closing transactions, block transactions, gap quote situations, and when trading reaches liquidity replenishment points (''LRPs'') that would lock or cross the market.[38] During these specific situations, DMMs would be responsible for determining the price[39] and effecting executions of orders at that price.

(6) DMMs Would Not Retain the Specialists' Negative Obligation

The Exchange believes that due to the transformation of the equities markets in the United States, the specialists' negative obligation no longer makes sense and should be eliminated. Historically, in a manual, floor-based market, specialists often had a significant informational advantage from being at the center of substantially all of the exchange's activity in a given security. Similarly, in the Hybrid Market, the specialist's advance ''look'' at incoming orders provided the specialist with a unique and potentially significant informational advantage over other market participants.

Given the real-time availability of market information and resultant increase in market transparency in today's markets and the Exchange's proposed elimination of the advance ''look'' at incoming orders by the DMM, the Exchange believes that the imposition of a negative obligation on DMMs is unnecessary. Accordingly, the Exchange is proposing that, beginning with the implementation of Phase 2, DMMs would no longer be deemed to be ''specialists'' or to be subject to the negative obligation.

DMMs, however, would continue to facilitate manual transactions on the Exchange. When DMMs are facilitating manual transactions, Exchange systems would provide DMMs the total volume of all orders eligible to participate[40] in the transaction. All eligible orders would be aggregated by the Exchange system and shown to DMMs as interest available to participate in the manual execution. With this tool, DMMs would have the necessary information to appropriately price opening, re-opening, and closing transactions and to trade out of gap quote and certain LRP situations. DMMs would not have access to such information on an order-by-order basis, as Exchange specialists do today.[41]

(7) DMMs Interest for Quoting and Trading

Although DMMs would no longer be restricted by a negative obligation, DMMs would have an affirmative obligation to contribute to the maintenance of a fair and orderly market by committing capital in order to add liquidity to the market when there is little or no liquidity, and bridge the gaps in supply and demand by trading for their own account. To assist DMMs in meeting these market making responsibilities, DMMs would be permitted to maintain systems that employ algorithms to make trading and quoting decisions (''DMM Interest'') on behalf of each DMM.

DMM Interest would be permitted to: (i) Supplement the size of the existing Exchange BBO; (ii) maintain displayed and non-displayed DMM Interest, as described more fully below;[42] (iii) layer interest at varying prices outside the Exchange BBO; (iv) partially or completely fill an order at the Exchange BBO or at a sweep price; (v) trade at and through the Exchange BBO; (vi) trade in a sweep transaction; (vii) provide price improvement; and (viii) match better bids and offers published by other market centers where automatic executions are immediately available. Exchange systems would prevent DMM Interest from executing against itself (*i.e.,* executing wash trades).

(8) DMM Capital Commitment Schedule

In addition to DMM Interest, DMMs would be permitted to transmit to the Display Book a Capital Commitment Schedule (''CCS'') setting forth additional liquidity that the DMM would be willing to provide at specific price points. The CCS would inform the Display Book of the amount of shares that the DMM is willing to trade at price points outside, at, and inside the Exchange BBO. The CCS is separate and distinct from the DMM Interest. DMM algorithms would send the Exchange this schedule of additional non-displayed trading interest.

CCS interest would be accessed by the Exchange's systems in two ways,

[34] For a more detailed discussion of how DMM compliance with the quoting requirement is measured and an example of a quoting requirement calculation, *see* Notice, *supra* note 5, at 42863–4.

[35] Pursuant to proposed NYSE Rule 104(g)(i)(A), DMMs would be subject to the same requirements currently imposed on specialists in current NYSE Rule 104.10(5)–(6). Currently Conditional Transactions operate as a separate pilot; through this filing the Exchange seeks to incorporate those provisions into the New Model Pilot through proposed NYSE Rule 104(g)(i)(A).

[36] In SR–NYSE–2008–67, the Exchange modified the order flow sent to the Specialist Application Programmed Interface, or ''SAPI.'' Commencing with two securities (to ultimately apply to all Exchange securities), the Exchange's systems will send only copies of the following types of orders to the Specialist Algorithm: (i) market orders; (ii) buy limit orders priced at the NYSE bid price or sell limit orders priced at the NYSE offer price; (iii) limit orders priced in between the NYSE bid price and the NYSE offer price; and (iv) limit orders that are priced at or through the opposite side quote (*i.e.*, below the bid in the case of an order to sell or at or above the offer in the case of an order to buy). *See* Securities Exchange Act Release No. 58628 (July 30, 2008), 73 FR 46122 (August 7, 2008).

[37] The Exchange notes that the DMM algorithm would receive ''Book State'' information, which is the same information that is available to other market participants that subscribe to NYSE market data feeds, and shows aggregated displayed interest at various price points.

[38] *See* Proposed NYSE Rule 104(a)(2)–(5).

[39] In an opening and reopening trade, Display Book would verify that all interest that must be executed in the opening or reopening can be executed at the price chosen by the DMM. If all the interest that must be executed in the transaction cannot be executed at that price, the Display Book would block the execution. In addition, when executing blocks (10,000 shares or more or value of $200,000 or more), trading out of a gap quote situation or an LRP that locks or crossed the market, the Display Book may adjust the execution price if there is enough interest on the Display Book to complete the transaction at a better price.

[40] This information would not include customers' Non-Displayed Reserve Orders and Floor broker agency interest that is designated ''Do Not Display.'' *See infra* Section II.B.3.(a).(2).

[41] Odd-lot orders are a temporary exception to this principle, due to limitations of the Exchange's systems that process odd-lot orders. *See infra* notes 57–60 and accompanying text.

[42] *See infra* Section II.B.3.(a).

depending on whether an incoming order is inside, at, or through the NYSE BBO. When an order is received that would trade at or through the NYSE BBO, the Exchange's system would review all the liquidity available on the Display Book, including CCS interest, and determine the price at which the full size of the order can be satisfied (the ''completion price''). When determining the completion price, Exchange systems would take into account all eligible displayed and non-displayed interest available in the Display Book (inside, at, and through the NYSE BBO); any protected bids or offers on markets other than the Exchange (''away interest''); and the DMM's CCS interest at a particular price. Exchange systems would then compare the amount of liquidity required from the DMM's CCS at the completion price with the number of CCS shares offered at the next price that is one minimum price variation (''MPV'')[43] or more higher (in the case of an order to sell) or lower (in the case of an order to buy) (the ''better price'').

If the number of shares that would be allocated to the CCS interest at the better price is greater than the number of shares that would be allocated to the CCS interest at the completion price, then the CCS interest would participate at the better price (with CCS interest yielding to any other interest in Exchange systems at that price). Any remaining balance of the incoming order would be executed at the completion price against displayable and non-displayable interest pursuant to NYSE Rule 72.[44] If the number of shares that would be allocated to the CCS interest at the completion price is equal to or greater than the number of shares that would be allocated to the CCS interest at the better price, the CCS interest will participate at the completion price (with CCS interest yielding to any other interest in Exchange systems at that price).[45]

A DMM's CCS interest inside the Exchange BBO would be accessed by Exchange systems to provide price improvement to incoming orders and to match better-priced bids and offers if available on away market centers. DMMs would not be required to be represented in the bid or the offer in order to provide CCS interest inside the Exchange BBO.

Pursuant to proposed NYSE Rule 1000(e), CCS interest priced inside the Exchange BBO could trade with interest arriving in the Exchange market that: (i) Is eligible to trade at or through the Exchange BBO; (ii) is eligible to trade at the price of non-displayable reserve interest of Reserve Orders and Floor broker agency interest files reserve interest (''hidden interest''); or (iii) is eligible to route to away market interest for execution, if the total volume of CCS interest, d-Quote interest in Floor broker agency interest files, and any other hidden interest would be sufficient to fully execute the incoming order at a price inside the Exchange BBO. The Display Book would determine the price point inside the Exchange BBO at which the maximum volume of CCS interest would trade, taking into account the available d-Quotes and hidden interest. The CCS interest would then participate at that price, on parity with all other interest at that price (i.e., d-Quotes and non-displayed reserve interest). Any reserve interest of the DMM that is also eligible to trade at the price inside the Exchange BBO at which the CCS interest would participate would be aggregated with the DMM's CCS interest at that price when the trade execution is allocated. In this manner, an incoming order may be executed at multiple price points inside the Exchange BBO against d-quotes, non-displayable reserve interest of all participants, and CCS interest. However, CCS interest may only participate once if more than one execution is required to fill the order.

(b) Floor Brokers

(1) Elimination of Percentage Orders

The Exchange proposes to amend NYSE Rule 13 and to delete NYSE Rules 70.25(d)(i)(A), 123A.30 and 1000(d)(2)(D) to eliminate percentage orders. As a result of these proposed amendments, Floor brokers would no longer be permitted to enter CAP–DI orders. In place of this order type, the Exchange intends to provide Floor brokers access to algorithmic technology that would replicate the trading strategy achieved by the use of CAP–DI orders through the Floor broker's handheld electronic device.

The Exchange believes that this change is necessary to improve the efficiency of the Display Book. CAP–DI orders require the system to monitor and calculate many variables, and passively converted CAP–DI orders impede the specialist's ability to function efficiently in an automated market because the specialist must manually complete the passive conversion.[46]

(2) d-Quote Trading With Non-Marketable IOC Orders and at the Open and Close

The Exchange further proposes to amend NYSE Rule 70 to enhance the functionality of the Floor broker d-Quote to increase the liquidity available for executions on the Exchange. Specifically, the Exchange proposes to allow d-Quotes to partially or completely fill a non-marketable immediate or cancel order (''IOC''), which includes NYSE IOC, Reg NMS IOC, and Intermarket Sweep Orders,[47] that are within the d-Quote's discretionary range.[48] In allowing the d-Quote to interact with a non-marketable IOC, the Exchange seeks to provide the IOC an opportunity to receive a partial or complete execution with price improvement. In instances where the d-Quote only partially completes the order, the remaining portion of the non-marketable IOC will be automatically and immediately cancelled.

To further increase the liquidity available at the opening and closing transaction, the Exchange proposes to amend NYSE Rule 70.25(a)(ii) to allow d-Quotes to be active in the opening and closing transactions.

(3) Floor Broker Interest Published to OpenBook

The Exchange proposes to have Floor broker interest published in the OpenBook system at every price point (unless designated ''Do Not Display'' or ''DND''). The displayable portions of Floor broker interest that is designated DND will only be published in OpenBook when such interest is at the Exchange BBO. Floor broker agency interest employing Non-Displayed Reserve functionality, as described further below,[49] will not be published in OpenBook.

3. Changes to NYSE Order Types and Order Processing

(a) Additional Undisplayed Liquidity

Floor brokers, off-Floor participants, and DMMs would continue to have the

[43] Pursuant to NYSE Rule 62, the MPV is currently one cent ($0.01) except that, with respect to equity securities trading on the Exchange at a price of $100,000 or greater, the minimum price variation shall be ten cents ($0.10).

[44] A DMM's CCS interest may only participate once in the execution of an incoming order. As such, CCS interest that may exist at the completion price is ineligible to trade with any remaining balance of the incoming order if the DMM's CCS interest was included in the execution of any portion of such order at the better price.

[45] For examples of the CCS, *see* Notice, *supra* note 5, at 42866–67.

[46] For additional discussion regarding the Exchange's proposed elimination of CAP–DI orders, *see* Notice, *supra* note 5, at 42868.

[47] *See* NYSE Rule 13. By their definition, these order types are never quoted but must be automatically executed. Any remaining unfilled portion is immediately and automatically cancelled. Non-marketable IOC orders are immediately and automatically cancelled.

[48] *See* Proposed NYSE Rule 70.25(d)(ix).

[49] *See infra* Section II.B.3.(a).(2).

ability to maintain reserve liquidity on the Exchange; however, NYSE proposes to modify each market participant's ability to provide reserve interest. As a threshold matter, the Exchange proposes to amend NYSE Rule 13 to label all undisplayed off-Floor interest ''Reserve Orders.'' Within that category, the Exchange proposes to create two types of reserve interest, ''Minimum Display'' and ''Non-Displayed Reserve.''

(1) Minimum Display Orders

Under the proposed rule change, ''Minimum Display Orders'' require that a minimum of one round lot of the order be designated for display. The Exchange proposes to make permanent NYSE Rule 13 governing Reserve Orders, and also proposes to provide Floor brokers and DMMs with equivalent functionality via a conforming amendment to proposed NYSE Rules 70(e) and 104. Collectively, this minimum display reserve functionality is referred to as ''Minimum Display Interest.'' Each time a Minimum Display Order is replenished from reserve interest, a new time-stamp is created for the replenished portion of that Minimum Display Order, while the remaining reserve interest retains the time-stamp of its original entry. Minimum Display Interest would be eligible to participate in manual executions, but would not be identifiable to the DMM on an order-by-order basis. Exchange systems would include all Minimum Display Interest in the aggregate order information available for execution at a price point when the DMM facilitates a manual transaction.

The Exchange further proposes that the aggregate of Minimum Display Interest be included in the aggregate interest available to be seen by the DMM in order to provide information about orders available in Exchange systems for response to a Floor broker's market probe request pursuant to NYSE Rule 115. Currently, during a manual execution, Floor broker DND reserve interest that has a displayed quantity and Reserve Orders pursuant to NYSE Rule 13 are included in the aggregated order information displayed to the specialist only during manual executions (*e.g.*, the opening and closing trade on the Exchange, resuming trades after a LRP is reached, or during a gap quote situation). Pursuant to Exchange Rule 70.20(h), access to the Display Book system for information on reserve interest is only for the purpose of effecting transactions that are reasonably imminent.[50] The Exchange proposes to amend NYSE Rules 13, 70.20 and 115 to specifically state that the aggregated Minimum Display Interest will be included in the information disseminated in response to a Floor broker's market probe request pursuant to NYSE Rule 115.

Pursuant to NYSE Rule 115(iii) a specialist may provide information about orders contained in the Display Book, referred to also as a market probe, to provide information about buying or selling interest in the market. This information can include aggregated buying or selling interest contained in Floor broker agency interest files other than interest the broker has chosen to exclude from the aggregated buying and selling interest in response to an inquiry from a member conducting a market probe in the normal course of business.

The Exchange further proposes to amend NYSE Rule 70.20(h)(ii) to remove the prohibition against specialist's ability to provide information about Floor broker reserve interest. The Exchange proposes that all Floor broker interest not designated DND be included in the information eligible for dissemination pursuant to NYSE Rule 115.

(2) Non-Displayed Reserve Orders

In addition to Minimum Display Interest, the Exchange further proposes to provide all market participants with the ability to maintain non-displayed interest. This proposed type of reserve interest would not require any of the order to be designated for display and would be available to all market participants. The Exchange proposes to create the ''Non-Displayed Reserve Order'' for off-Floor participants and provide Floor brokers and DMMs with equivalent functionality. Non-Displayed Reserve Orders of off-Floor customers would not be included in the information available to the DMM for manual execution.

Floor brokers would also be able to utilize non-displayed reserve functionality to enter reserve interest. If the Floor broker uses this functionality, there is no interest displayed in the published quotation, but the interest will be eligible for manual executions because the DMM has the ability to view the Floor broker agency interest in the aggregate. Floor broker agency interest file reserve interest may also be designated as Do Not Display or ''DND,'' meaning such interest will not be available to the DMM for manual executions. As such, Non-Displayed Reserve Orders and Floor broker non-displayed reserve interest that is designated DND would not participate at the open or the close, during a gap quote situation, or when a manual execution is required to trade out of an LRP that locks or crosses the market. Therefore, these types of interest may be executed at an inferior price, and will not be protected in any manual trade—at the choice of the customer. DMM interest employing Non-Displayed Reserve functionality would, however, be eligible to participate in a manual transaction.

Off-Floor participants that want to have non-displayed liquidity participate in a manual transaction would be required to send a Minimum Display Order. Similarly, Floor brokers that choose to have non-displayed liquidity participate in a manual transaction must not designate such interest DND.

(b) Execution of Bids and Offers

The Exchange proposes to amend NYSE Rule 72 to provide to all market participants the ability to receive executions on an equal basis with other interest available at that price. As with NYSE's current parity rules, individual Floor brokers and the DMM registered in the security would each constitute a single market participant, but all orders received by the Display Book directly from off-Floor participants would together constitute a single market participant, the Off-Floor Participant, for the purpose of share allocation. However, unlike specialist interest, which under current NYSE rules must yield to all off-Floor interest residing on the Display Book, DMM Interest would be on parity and would not be required to yield to any off-Floor interest.

(1) Priority and Parity for Setting Interest

Proposed NYSE Rule 72 would modify the concept of priority to provide that, where there is more than one bidder (offerer) participating in an execution and one of the bids (offers) was established as the first at a particular price and such bid or offer is the only interest when such price is or becomes the best bid or offer published by the Exchange (the ''Setting Interest''), the displayed portion of such Setting Interest is entitled to priority. In order to qualify as Setting Interest, it must have been the only[51] interest quoted at

[50] NYSE Rule 70.20(h)(ii) provides, ''Specialists, trading assistant and anyone acting on their behalf are prohibited from using the Display Book system to access information about Floor broker agency interest excluded from the aggregated agency interest other than for the purpose of effecting transactions that are reasonably imminent where such Floor broker agency interest information is necessary to effect such transaction.''

[51] If, at the time of quoting, Non-Displayed Reserve Orders, Floor broker interest or DMM interest employing Non-Displayed Reserve

a price. Only the quoted (*i.e.*, displayed) portion of the Setting Interest is entitled to priority (''Priority Interest'').

Exchange systems would allocate the first 15% of any execution (subject to a minimum of one round lot) [52] at that price to the Priority Interest. For the remainder of that execution, Setting Interest would receive executions on parity with other interest available at that price. Exchange systems would repeat the allocation logic for the Setting Interest until the Priority Interest is completely executed. Any remaining non Priority Interest of the Setting Interest would be executed on parity.

The Exchange proposes to have Priority Interest retain its standing even if the Exchange BBO moves away from the price point. In this case, if the Exchange BBO returns to that price point later in the same trading session, the remaining portion of the Priority Interest would again enjoy priority until it is executed or cancelled, trading in the stock is halted, the trading session ends, or the BBO moves away again.

Partial cancellations would count first against the non-Priority Interest of any Setting Interest. All allocations to the Setting Interest would be decremented from the Priority Interest first whether the allocation is based on priority or parity. Setting Interest may be executed on parity with no priority allocation if the quote moves to a better price point and thereafter an incoming order exceeds the shares available for execution at the newly established Exchange BBO. In those instances, the Setting Interest will be executed on parity and the Priority Interest will be decremented first.

(2) Priority and Parity in the Absence of Setting Interest

Where there is no Setting Interest, Exchange systems would divide the size of the executing order by the number of participants. The total number of shares to be allocated to each participant (*i.e.*, the single Off-Floor Participant, the DMM, and each Floor broker) would be distributed equally among the market participants, subject to the need to allocate in round lots. Within the single Off-Floor Participant, shares executed would be allocated in order of time priority of receipt of orders from off-Floor customers into Exchange systems. Executions would be allocated in round lots. In the event the number of shares to be executed at the price point is insufficient to allocate round lots to all the participants eligible to receive an execution at the price point, the Exchange systems would create an allocation wheel of the eligible participants at the price point and the available shares would be distributed to the participants in turn.

On each trading day, the allocation wheel for each security would be set to begin with the participant whose interest is entered or retained first on a time basis. Thereafter, participants would be added to the wheel as their interest joins existing interest at a particular price point. If a participant cancels its interest and then rejoins, that participant would join as the last position on the wheel at that time.

Non-displayed interest at price points within the Exchange BBO would also trade on parity at each price point. Thus, non-displayed interest that is priced within the Exchange BBO would be eligible to be executed on parity at each price point against incoming orders.

The Exchange further proposes to modify its overall allocation logic to require that, for all executions at or through the Exchange BBO, displayable interest trades ahead of non-displayable interest available for execution at the same price point. Once all displayable interest has been satisfied at a given price point, the remainder of the incoming order would execute against non-displayable interest at that price point. All categories of non-displayable interest would trade on parity, with the exception of the DMM's CCS interest, which yields to all other interest at the same price.

4. Additional Proposed Rule Changes

In addition to the proposed rule changes discussed above, the Exchange has proposed numerous minor substantive changes and conforming changes throughout the Exchange's rule book in order to conform NYSE's rules to the proposed New Model.[53]

5. Implementation Schedule

The proposed amendments herein require the Exchange to make significant modifications to Exchange systems. The Exchange therefore proposes that the proposed rule change be implemented in stages pursuant to the schedule outlined below.

(a) Non-Pilot Rules

The Exchange proposes that the amendments to NYSE Rule 13 regarding the establishment of Reserve Order types and the elimination of CAP orders would be implemented upon Commission approval as permanent changes to the NYSE rulebook. Similarly, all conforming changes to other Exchange rules to enable Floor brokers and DMMs to use equivalent reserve order functionality would be implemented upon Commission approval as permanent changes to the NYSE rulebook. In addition, the Exchange proposes that amendments to NYSE Rules 2 and 103 establishing the DMMs and DMM units also would be implemented upon Commission approval as permanent changes to the NYSE rulebook.

The Exchange further proposes that the proposed amendments to NYSE Rule 70 that: (i) Allow for the publication of Floor broker interest to OpenBook; (ii) allow d-Quote instructions to be active during the open and close; and (iii) allow d-Quotes to trade with non-marketable IOC orders would be implemented upon Commission approval as a permanent change to the NYSE rulebook.

(b) Pilot Rules

The Exchange further proposes to implement certain provisions of the New Model proposal on a pilot basis (''New Model Pilot'') upon Commission approval of the proposed rule change. The New Model Pilot would operate until October 1, 2009.

During Phase 1 of the New Model Pilot, the Exchange would implement proposed NYSE Rule 72 and proposed NYSE Rule 104T.[54] During the operation of Phase 1, pursuant to proposed Rule 72, all market participants, including DMMs, would have the ability to receive executions on parity with other interest available at that price. In addition, during Phase 1, DMMs would still receive the order-by-order ''look'' that the specialists currently receive. During this period, DMMs would still be considered ''specialists'' under the Act, subject to applicable affirmative and negative obligations.

With the implementation of Phase 2, NYSE Rule 104T would cease operation and new NYSE Rule 104 would supersede it. Beginning in Phase 2, the

Functionality exist at the price point along with a single order or quote that has a published quantity, the single order would be deemed to be a setting order even if the Hidden Reserve Orders and Floor broker and DMM interest employing Hidden Reserve Functionality arrived first. In addition, if prior to quoting, there are two orders at the price point and one of those orders cancels, the remaining order that is the only interest quoted at the price would be considered the Setting Interest. *See* Proposed Rule 72(a)(ii).

[52] All allocations will be done on a round lot basis. If 15% would result in the Priority Interest receiving a mixed lot, Exchange systems will round up to the nearest round lot.

[53] For a full discussion of these additional proposed rule changes, *see* the Notice, *supra* note 5, at 42870–1.

[54] Proposed NYSE Rule 104T is a temporary rule that would operate through the end of Phase 1 and cease operation with the implementation of Phase 2.

DMM would no longer receive any order-by-order information. In addition, under proposed Rule 104, DMMs would no longer be subject to a negative obligation. Also as of that date, the portion of Rule 1000 relating to the DMM's CCS interest would be implemented.

During the operation of the New Model Pilot, the Exchange has committed to provide the Commission's Division of Trading and Markets and Office of Economic Analysis with statistics related to market quality, trading activity, and sample statistics as requested by the Commission.

C. Amendment No. 2

In Amendment No. 2 to the proposed rule change, the Exchange proposes to: (i) Clarify how odd-lot information will be transmitted to the DMM Unit algorithm prior to the opening; (ii) retain and expand the restriction, currently applicable to specialists, trading assistants, and anyone acting on their behalf from accessing certain Exchange systems and apply it to DMMs, trading assistants, and anyone acting on their behalf; (iii) make technical amendments to NYSE Rules 13, 52, 72, 299A, and 1000; (iv) reconcile the rule language of NYSE Rules 98, 98A, 99, 104T, 105, 113 and 460 with amendments approved by the Commission pursuant to filing SR–NYSE–2008–45 (''2008–45 Amendments''); [55] (v) reconcile the rule language of NYSE Rule 104T with the NYSE's immediate effectiveness filing SR–NYSE–2008–73 (''2008–73 Amendments''); [56] and (vi) describe the data that the Exchange will provide the Commission to monitor the New Model Pilot.

Specifically, Amendment No. 2 proposes to clarify that, while the individual DMM would have access only to aggregate order information as it pertains to round-lot and odd-lot orders, the DMM Unit algorithm would receive odd-lot information on an order-by-order basis prior to the opening. Odd-lot orders on the Exchange are processed in a separate system from the Exchange systems that execute round-lot orders. Odd-lots are executed systemically by Exchange systems designated solely for odd-lot orders (the ''odd-lot System'').[57] The odd-lot System executes all odd-lot orders against the specialist [58] as the contra party. In order for the DMM Unit algorithm to effectively facilitate an opening transaction, the DMM Unit algorithm would also be provided odd-lot information prior to the opening. Constraints inherent in the odd-lot System require that odd-lot information be transmitted to the DMM Unit algorithm on an order-by-order basis prior to the opening.[59] As such, prior to the opening, Exchange systems will transmit to the DMM Unit algorithm odd-lot order information excluding e-Quote odd-lots, odd-lot cancellations, Stop odd-lot orders and Good 'til Cancel odd-lot orders.[60] Once the security is opened, Exchange systems would not provide any order-by-order odd-lot information to the DMM Unit algorithm.

In addition, Amendment No. 2 proposes to clarify that the Exchange seeks to retain and expand the restriction, currently applicable to specialists, trading assistants, and anyone acting on their behalf from accessing certain Exchange systems other than for the purpose of effecting transactions that are reasonably imminent, and apply it to DMMs, trading assistants, and anyone acting on their behalf.[61] In addition, the Exchange seeks to add information pertaining to Minimum Display Reserve Orders to the restriction and move the restriction from NYSE Rule 70 to the rules governing DMM requirements.[62] The proposed rule would prohibit DMMs, trading assistants, and anyone acting on their behalf from using the Display Book system to access information about Floor broker agency interest excluded from the aggregated agency interest and Minimum Display Reserve Order information other than for the purpose of effecting transactions that are reasonably imminent, and where such Floor broker agency and Minimum Display Reserve Order interest information is necessary to effect such transaction.

Amendment No. 2 also proposes technical corrections to the rule text. Specifically, the Exchange proposes to change the word ''specialist'' to ''DMM'' in NYSE Rule 13 because during the editing process the word specialist was inadvertently left in this rule. The Exchange further amended their proposal to remove previously proposed changes to NYSE Rule 52 that the Exchange instead intends to be the subject of a separate future filing. Also, rule language designating proposed Rule 72 as operating in the New Model Pilot was inadvertently not underscored. The Exchange proposes to add the required underscoring to designate that text as new language pursuant to this filing. In addition, Amendment 2 reflects the Exchange's proposal to delete subparagraph (b)(2) of the Supplemental Material .10 of NYSE Rule 299A because, similarly to specialists under the current NYSE market model, DMMs will not be allowed to ''stop'' stock. Further, in order to correct lettering errors in NYSE Rule 1000, the Exchange proposes to move the language denoting the Rule as operating in the New Model Pilot to directly after the name of the rule and retain the original lettering.

On August 7, 2008, the Commission approved the 2008–45 Amendments which, among other things, modified the rule text of NYSE Rules 98, 98A, 99, 104T, 105, 113 and 460. Through Amendment No. 2, the Exchange seeks to change the term ''specialist'' to DMM in NYSE Rules 98 and 98A to reflect the new language approved in the 2008–45 Amendments.

In addition, on August 13, 2008, the Exchange filed with the Commission for immediate effectiveness a proposal to amend NYSE Rule 104(b) to provide for an automated opening message that is effectuated through the specialist Application Programmed Interface to allow specialists to automatically open a security on a transaction. Through Amendment No. 2, the Exchange proposes to amend Rule 104T(b)(ii) to incorporate the rule language from the 2008–73 Amendments.

Finally, during the operation of the New Model Pilot, the Exchange is committed to providing the Commission's Division of Trading and Markets and the Office of Economic Analysis with statistics related to market quality, trading activity, and sample statistics. The metrics discussed below, along with any other metrics the Exchange may choose to provide, will be transmitted to the Commission on a monthly basis. The Exchange will maintain average measures for each

[55] *See* Securities Exchange Act Release No. 58328 (August 7, 2008), 73 FR 48260 (August 18, 2008) (SR–NYSE–2008–45).

[56] *See* Securities Exchange Act Release No. 58351 (August 13, 2008), 73 FR 48416 (August 19, 2008) (SR–NYSE–2008–73).

[57] *See* NYSE Rule 124(a).

[58] Odd-lot orders will continue to be executed against the DMM as the contra. *See* proposed NYSE Rules 104(e) and 124(a).

[59] The Exchange is currently working on modifications to its odd-lot system that would allow for the transmission of aggregate odd-lot information to DMM unit algorithms in the third quarter of 2009 so that order-by-order transmission would no longer be required.

[60] *See* proposed NYSE Rule 104 Supplementary Material .05.

[61] Specifically, NYSE Rule 70.20(h)(ii) provides in pertinent part that:''Specialists, trading assistants and anyone acting on their behalf are prohibited from using the Display Book® system to access information about Floor broker agency interest excluded from the aggregated agency interest other than for the purpose of effecting transactions that are reasonably imminent where such Floor broker agency interest information is necessary to effect such transaction.''

[62] *See* proposed NYSE Rules 104T(j) and 104(a)(6).

trading day during a particular month[63] in order to provide such information to the Commission upon request.

On or before the 20th day of the second calendar month following the Approval Date,[64] the Exchange will provide the Commission with the data described below, which will include data for all the trades in the two months prior to the commencement of the New Model Pilot. The data to be provided on such date will include the following:

1. The specialist time at the NBBO by security.
2. The effective spread by security.
3. The specialist volume broken out by ''specialist interest type'' (*e.g.*, s-Quote and s-Quote employing reserve functionality). The Exchange will further provide the total shares traded expressed in twice total volume (''TTV'') where both the buy and sell shares are counted for each trade to allow the Commission to track the direction of the overall specialist participation rate over time.
4. The average depth at the NBBO for specialists.

On the 20th day of the month following the initial provision of data, the Exchange will provide the Commission with the data described below, which will include data for all the trade dates in the months directly following the Approval Date through the last trade date of the previous month. On the same date, the Exchange will additionally provide data related to the average depth at the NBBO for Floor brokers and orders represented in the Display Book for the two months prior to the commencement of the New Model Pilot.[65] Thereafter the Exchange will provide the data described below on the 20th day[66] of each calendar month until the end of the New Model Pilot. The data will reflect the trading activity of the prior calendar month. The specific data to be provided until the end of the New Model Pilot is as follows:

1. The DMM time at the NBBO by security.
2. The effective spread by security.
3. The DMM volume broken out by ''DMM interest type'' (*e.g.*, CCS, s-Quote). The Exchange will further provide the total shares traded expressed in TTV where both the buy and sell shares are counted for each trade to allow the Commission to track the direction of the overall DMM participation rate over time.
4. The average depth at the NBBO by market participant (DMMs, Floor brokers, and orders represented in the Display Book).
5. The ratio of (i) shares not executed on the Display Book due to DMM execution to (ii) the shares executed by the DMM.
6. Effective spread for: (a) orders that involve DMM liquidity provision and (b) orders that are executed without DMM liquidity (for similar order size categories).

D. Amendment No. 3

In Amendment No. 3 to the proposed rule change, the Exchange proposes to: (i) Modify the dates that the Exchange is required to provide data to the Commission; (ii) amend the operative dates of certain rules; (iii) clarify the implementation schedule of the New Model Pilot; and (iv) make technical amendments to NYSE Rules 98 and 98 Former (*e.g.*, changing the term ''specialty stocks'' to ''registered security'').

In Amendment No. 3, the Exchange clarified that the implementation of the New Model Pilot would occur in two phases, Phase 1 and Phase 2. Each phase of the New Model Pilot would commence initially in three or four securities. The Exchange proposes that after a period of monitoring the system operation, NYSE would progressively implement each phase of the New Model Pilot in additional securities until that phase is operative in all securities traded on the Floor. The rules applicable to each phase of the New Model Pilot would apply to trading in securities as they are added to each phase. Implementation of Phase 1 will be completed no later than five weeks after the Approval Date, and implementation of Phase 2 will be completed no later than ten weeks after the Approval Date.

III. Discussion and Commission Findings

After careful review, we find that the proposed rule change, as amended, is consistent with the requirements of the Act and the rules and regulations thereunder applicable to a national securities exchange. In particular, we find that the proposed rule change, as amended, is consistent with Section 6(b)(5) of the Act[67] which requires, among other things, an exchange to have rules that are designed to promote just and equitable principles of trade, to remove impediments to and perfect the mechanism of a free and open market and a national market system, and, in general, to protect investors and the public interest; and are not designed to permit unfair discrimination between customers, issuers, brokers, or dealers.[68] The Commission also finds that the proposed rule change is consistent with Section 6(b)(8) of the Act,[69] which requires that the rules of an exchange not impose any burden on competition that is not necessary or appropriate in furtherance of the purposes of the Act.

A. Redefinition of the Role of the Specialist; Designated Market Makers

One major element of NYSE's New Model is the elimination of specialists and the introduction of Designated Market Makers. DMMs would be assigned affirmative obligations, some of which are similar to those currently imposed on specialists. Specifically, DMMs would have an obligation to use the firm's own capital to contribute to the maintenance of a fair and orderly market on the Exchange in its assigned securities, would be subject to depth guidelines,[70] and would have an obligation to maintain a bid or an offer at the National Best Bid or National Best Offer for a certain percentage of the trading day.[71] In addition, DMMs would be required to facilitate transactions in their assigned securities during certain specified periods, namely for opening and re-opening transactions, closing transactions, block transactions, gap quote situations and when trading reaches LRPs that would lock or cross the market. DMMs would be responsible for choosing the price and for the executions of the orders at that price during those specific situations. The Exchange has also proposed to eliminate for DMMs the advance ''look'' at incoming orders that NYSE specialists currently receive during Phase 2 of the implementation, which will be

[63] The average per security may be provided across volume deciles.

[64] The timing of the provision of the market quality, trading activity, andother statistics to the Commission was set forth in Amendment No. 3.

[65] The Exchange represents that it is unable to provide this data in therequested format prior to this date.

[66] In the event the 20th day of the calendar month is a non-business day,the Exchange would provide the data on the next business day following the 20th day of that month.

[67] 15 U.S.C. 78f(b)(5).

[68] In approving the proposed rule change, the Commission has consideredits impact on efficiency, competition, and capital formation. 15 U.S.C. 78c(f).

[69] 15 U.S.C. 78f(b)(8).

[70] For more information regarding depth guidelines, *see* Notice, *supra* note 5, at 42863, n. 115.

[71] For securities that have a consolidated average daily volume of less thanone million shares per calendar month, a DMM Unit would be required to maintain a bid or an offer at the NBBO for at least 10% of the trading day (calculated as an average over the course of a calendar month). For securities that have a consolidated average daily volume of equal to or greater than one million shares per calendar month, a DMM Unit would be required to maintain a bid or an offer at the NBBO for at least 5% or more of the trading day (calculated as an average over the course of a calendar month). *See supra* note 34 and accompanying discussion.

completed within ten weeks of the Approval Date.[72]

In exchange for these obligations, NYSE has proposed that DMMs be permitted to freely trade for their own account on parity with other market participants (*i.e.*, the negative obligation and the requirement to yield to public customer orders on the Display Book, imposed on specialists under NYSE's current market model, would be eliminated).[73] The Exchange would no longer consider DMMs to be the ''responsible broker-dealer'' with respect to executions on the Exchange. In addition, a DMM would be permitted to transmit to the Display Book a Capital Commitment Schedule for its assigned securities setting forth additional liquidity that the DMM commits to provide at specific price points.[74] This proposed functionality would permit a DMM to participate in executions against incoming orders that would execute at or through the NYSE BBO, and allow the DMM to participate at the incoming order's completion price (or at the price one minimum price variation better, depending upon the circumstances). CCS interest priced inside the Exchange BBO could also be accessed by Exchange systems to provide price improvement to incoming orders and to match better-priced bids and offers available on away market centers.

Section 6(b)(5) of the Act requires that the rules of a national securities exchange protect investors and the public interest.[75] In addition, the Act requires that such rules promote just and equitable principles of trade and not be designed to permit unfair discrimination between customers, issuers, brokers, or dealers.[76] Likewise, Section 11A of the Act emphasizes that the national market system should promote the public interest, the protection of investors, and the maintenance of fair and orderly markets.[77] In considering the proposed rules of a national securities exchange, we must therefore take into account their effect not only on the participants of the given market, but their impact on investors and the public interest generally.

We recognize that the participation of market makers in exchange markets may benefit public customers by promoting more liquid and efficient trading, and that an exchange may legitimately confer benefits on market participants willing to accept substantial responsibilities to contribute to market quality.[78] However, while the rules of an exchange may confer special or unique benefits to certain types of participants, they must ensure, among other things, that investors and the public interest are protected.[79]

We carefully review trading rule proposals that seek to offer special advantages to market makers. Although an exchange may reward such participants for the benefits they provide to the exchange's market, such rewards must not be disproportionate to the services provided.[80] In considering NYSE's New Model provisions relating to DMMs, we have assessed whether the rewards granted to DMMs—including granting DMMs parity with respect to orders from off-Floor participants and giving DMMs unique hidden interest functionality via the proposed CCS—are commensurate with their obligations under the New Model.

Under NYSE's current market model, specialists are designated as the ''responsible broker-dealer'' for orders resting on the Display Book. NYSE specialists, by virtue of their advance ''look'' at incoming orders and their position on the trading floor, also have an informational advantage over other market participants which, if unchecked, could permit them to adjust their trading interest to the disadvantage of orders residing on the book. Because of this, specialists are required to yield to all off-Floor participant orders on the Display Book and are subject to the negative obligation not to trade for their own account in any security in which the specialist is registered ''unless such dealings are reasonably necessary to permit such specialist to maintain a fair and orderly market.''[81]

In support of its proposal to eliminate the negative obligation and allow the specialists' successors, DMMs, to trade on parity with public customer orders, NYSE argues that the negative obligation is ''an outmoded vestige of trading in a wholly different market environment and is unnecessary.''[82] The Exchange believes that advances in technology, including electronic trading and the availability of real-time market information, make it difficult, if not impossible, for any single market participant, including a specialist, to have a time-and-place advantage over other market participants. In addition, the Exchange believes that the fragmentation of liquidity in the marketplace has lessened the importance of the specialist's influence over its registered securities. Moreover, NYSE proposes to eliminate for DMMs, during Phase 2 of the implementation, the advance ''look'' at incoming orders that specialists currently receive under the Exchange's current rules.

We generally agree that, given the widespread adoption of electronic, automated trading, the ability of market participants to avail themselves of robust real-time market information, and the reduction in NYSE's market share in recent years, the historic time-and-place advantage of specialists has been reduced in today's market environment, though we do not believe that such advantage has been completely eliminated.[83] The Exchange has proposed to fully eliminate the advance ''look'' specialists currently receive during Phase 2 of the implementation. In doing so, the Exchange has represented that, other than for odd-lot orders,[84] a DMM Unit's algorithm would receive the same information with respect to orders entered on the Exchange, Floor broker agency interest files, or reserve interest as is disseminated to the public by the Exchange, and would receive such information no sooner than it is available to other market participants.

We believe that the proposed elimination of the specialist's ''look''—when viewed in conjunction with the obligations imposed upon DMMs, including a general affirmative obligation on the DMM to use its capital to contribute to the maintenance of a fair and orderly market in its assigned securities; an obligation to quote at the

[72] For so long as DMMs retain the ''look'' for particularsecurities, they would still be considered ''specialists'' under the Act in such securities, subject to applicable affirmative and negative obligations.

[73] In addition, the proposed parity and allocation rules would provideDMMs with preferential allocations to the extent that there are multiple orders of off-Floor customers in the Display Book at the execution price. *See infra* Part III.B.

[74] *See supra* Part II.B.2.a.(8).

[75] 15 U.S.C. 78f(b)(5).

[76] *Id.*

[77] 15 U.S.C. 78k–1(a)(2).

[78] *See* Securities Exchange Act Release No. 58092 (July 3, 2008), 73 FR 40144 (July 11, 2008) at 40148.

[79] 15 U.S.C. 78f(b)(5).

[80] *See* Securities Exchange Act Release No. 58092 (July 3, 2008), 73 FR 40144 (July 11, 2008) at 40148 (''Market makers can play an important role in providing liquidity to the market, and an exchange can appropriately reward them for that as well as the services they provide to the exchange's market, so long as the rewards are not disproportionate to the services provided.'') (citation omitted).

[81] *See* current Rule 104(a).

[82] *See* Notice, *supra* note 5, at 42865.

[83] The Commission notes that, while NYSE's overall market share in NYSE-listed securities has fallen dramatically in recent years, it continues to execute a higher percentage of the volume in certain of these securities than any other single exchange. In addition, while the move to largely electronic trading has substantially reduced the information advantage gained from a presence on the Exchange Floor, DMMs retain some informational advantage to the extent there continue to be manual negotiations and executions on the Floor.

[84] *See supra* Part II.C.

National Best Bid or National Best Offer for a certain percentage of time; an obligation to facilitate transactions during specified periods; and depth guidelines [85]—reflects an appropriate balance of DMM obligations against the benefits provided to DMMs under this proposal, including providing DMMs parity with other market participants (and preferential allocations to the extent there are multiple orders of off-Floor participants in the Display Book at the execution price) and providing DMMs unique functionality through the CCS. However, given the significant advantage DMMs would receive by being on parity with market participants (discussed below in Part III.B), we are seeking further evidence that the benefits proposed for DMMs are not disproportionate to their obligations.[86]

In addition, while we believe that the proposed operation of the DMM's unique CCS functionality is designed to provide a slightly better execution price for a portion of a large incoming order because that portion of the order could receive an execution price of a penny better than it would have received absent the CCS interest, we note that the CCS would provide DMMs the opportunity to obtain its CCS execution at an advantageous price with minimal risk, and with no contribution to the visible depth of the market.

Accordingly, we are approving the proposal's provisions with regard to the elimination of specialists and the creation of DMMs, but we are approving certain key provisions on a pilot basis until October 1, 2009, as discussed more fully below in Part III.D.

B. Order Allocation

NYSE proposes to revise the order allocation methodology of Rule 72 to provide that: (i) All market participants would receive executions on parity; (ii) ''Setting Interest'' that establishes the Exchange BBO would be entitled to priority and would receive the first 15% of any incoming order (subject to a minimum of one round lot) in advance of the regular allocation of such order; and (iii) for executions occurring outside the Exchange BBO, all displayable interest would be executed before any non-displayable interest.

One of the most significant changes in the Exchange's proposal is the elimination of the requirement currently imposed upon specialists to yield to off-Floor participant orders on the Display Book. Once the specialist's advance ''look'' at incoming orders is fully eliminated, and DMMs are no longer subject to the specialist's agency responsibilities with respect to orders on the Display Book, we agree that it would no longer be necessary to require DMMs to yield to off-Floor participant orders on the Display Book. However, the Exchange's proposal does not merely eliminate the requirement to yield to off-Floor participants, but rather provides DMMs with a substantial advantage over off-Floor orders sent to the Display Book. As the Exchange stated in its proposal, it is amending its Rule 72 ''to provide to all market participants the ability to receive executions on an equal basis ('parity') with other interest available at that price.'' [87] The Exchange's concept of parity hinges on its definition of ''market participant.'' According to the Exchange's definition, the DMM registered in a given security and each individual Floor broker representing orders in such a security would each constitute a single market participant. In contrast to the Exchange's DMM and Floor brokers, all off-Floor orders would be aggregated together to constitute a single market participant, the Off-Floor Participant.[88] Because of the aggregated nature of the Off-Floor Participant, in many cases a DMM's interest would be assured of receiving some execution while the Off-Floor Participant, even if composed of multiple Display Book orders and even if such orders constituted a large volume of shares, would receive an allocation equal to that received by the DMM. Particularly in instances when there is more than one off-Floor order resting in the Display Book at a particular price point at the time of execution, the result would likely be that some orders in the Display Book would remain unexecuted, despite potentially having been entered into the Display Book prior to the DMM's interest having been submitted.

In addition, NYSE's proposal would permit an interim period—from the approval of this proposed rule change through completion of Phase 2—when DMMs would have parity with other market participants (*i.e.*, including off-Floor orders) while retaining the current specialists' advance ''look.'' [89] This period, albeit short, would provide DMMs with a significant informational advantage over other market participants, while also providing them parity in executing their interest.

For these reasons, we are concerned about the effects the proposed parity rule may have on market quality, book depth, and the execution rates of public customer orders posted to Display Book. Therefore, we have determined to approve proposed Rule 72 on a pilot basis, as discussed more fully below in Part III.D.

With respect to the priority provisions for Setting Interest under proposed Rule 72(a), in addition to the proposed 15% priority allocation, the Setting Interest would also participate on parity with other market participants (as it would even if it were not the Setting Interest) in the allocation of the remaining 85% of an incoming order.[90] Moreover, the Setting Interest maintains its priority status until the interest is completely executed. Thus, proposed Rule 72(a) is designed to reward aggressive quoting by market participants—which contributes to market quality—by allowing the price setter to take the first portion of an execution at that price. We believe that the proposed priority rule constitutes an appropriate approach, consistent with the Act, for incentivizing and rewarding market participants who quote aggressively to set the Exchange BBO.

Finally, we believe that the proposed provisions designed to ensure that all

[85] The Commission notes that the proposed obligations of DMMs would also differ significantly from those imposed on specialists currently on the Exchange in that DMMs would no longer be the ''responsible broker-dealer'' for orders resting on the Display Book and the specialists' negative obligation would be eliminated. We note that the DMM's duties in connection with order executions on Hybrid are substantially reduced under the proposed rules. Whereas Rule 60 currently requires the specialist, as ''responsible broker-dealer,'' to collect, process, and publish quotations, in fact in the current automated market, virtually all orders submitted to the Display Book are processed, published, and executed automatically, with no handling by the specialist. Given the substantially reduced duties of the DMM in connection with order executions, the Commission believes it is appropriate for the Exchange to no longer consider the DMM to be the ''responsible broker-dealer'' for orders on the Display Book, and instead consider the broker-dealer that submitted the order to the Exchange to be in such a position.

[86] For a description of the metrics the Exchange has agreed to provide, *see supra* Part II.C.

[87] *See* Notice, *supra* note 5, at 42869.

[88] *See id.; see also* proposed Rule 72(c)(ii).

[89] The Exchange will eliminate the ''look'' for a particular security upon implementation of Phase 2 for such security. Amendment No. 3 to the proposed rule change establishes a deadline of ten weeks after the Approval Date for completion of Phase 2. Any extension of this deadline would require NYSE to file a proposed rule change under Section 19(b) of the Exchange Act for Commission review.

[90] The Commission also notes that there is a requirement that the Setting Interest receive a minimum of one round lot, typically 100 shares. *See* proposed NYSE Rule 72(c)(iii). Given the reduction in average execution sizes on the Exchange recently, the Commission notes that the Setting Interest would likely often receive more than 15% because of the round lot minimum requirement. *See, e.g.*, Securities Exchange Act Release No. 56599 (October 2, 2007), 72 FR 57622 (October 10, 2007) (SR–NYSE–2007–93) at fn. 6 (noting that average execution size had declined from 334 shares in November 2006 to 254 shares in August 2007).

displayable interest trades ahead of any non-displayable interest for executions occurring outside the Exchange BBO are consistent with the Act. Currently, NYSE rules are designed to ensure that all displayed interest at the Exchange BBO is fully executed prior to any execution of undisplayed interest at the Exchange BBO. We believe that these proposed amendments to Rule 72, which are designed to ensure that the same requirement is applied to executions outside the Exchange BBO, are consistent with the Act, since preferencing interest that is displayed or designated for display over hidden interest should contribute to price discovery, and thus is consistent with the requirements of Section 6(b)(5) of the Act that exchange rules be designed to perfect the mechanism of a free and open market and the national market system and not be unfairly discriminatory.

C. Reserve Order Functionality

In April 2008, the Exchange implemented a pilot program that provides reserve order functionality for orders with a minimum display quantity of one round lot, now proposed to be called Minimum Display Reserve Orders, to off-Floor market participants.[91] Minimum Display Reserve Orders give off-Floor participants a reserve functionality substantially similar to the reserve functionality of Floor brokers' d-Quote and specialists' s-Quotes. The Exchange now proposes to make this pilot program permanent. In addition, the Exchange proposes to create hidden interest functionality (*i.e.*, with no minimum display requirement), known as Non-Displayed Reserve Orders, for off-Floor participants. This functionality would also be available to Floor brokers and DMMs.

We believe that extending the hidden interest functionality of Minimum Display and Non-Displayed Reserve Orders to all market participants would help level the playing field among NYSE members on and off the Floor, and is consistent with the Section 6(b)(5) of the Act, because it is designed to promote just and equitable principles of trade among Exchange customers and members and is not unfairly discriminatory. In addition, we agree that these additional order types, by expanding the opportunities for market participants to post different types of liquidity on the exchange, should result in deeper liquidity and thus may contribute to overall market quality. We note that the rules of other national securities exchanges also provide for similar order functionality.[92]

However, the Exchange's proposed treatment of hidden interest is not identical among market participants, particularly with respect to manual executions.[93] While all Minimum Display interest is included in the manual execution template, the same is not true of hidden interest. A DMM's hidden interest would be eligible to participate in manual transactions since this interest would always be known to the DMM. In contrast, Non-Displayed Reserve Orders of off-Floor participants, which would be fully hidden from the DMM, would never be eligible for participation in manual transactions. Finally, Floor brokers' hidden interest would be included in the manual execution template and eligible to participate in manual transactions unless the Floor broker, at his or her option, marked the order ''Do Not Display.'' [94]

Though these functionality differences exist in the proposed implementation of hidden interest among different market participants, we note that all participants have the ability to ensure that their interest participates in manual transactions if they so choose. Floor brokers could do so by not designating their hidden interest as ''Do Not Display,'' while off-Floor participants could instead send their interest to the Exchange as a Minimum Display Reserve Order, which requires the display of one round lot and is eligible to participate in its entirety in manual transactions. Accordingly, we believe that NYSE's proposed rules regarding reserve functionality are not unfairly discriminatory and otherwise are consistent with the Act.

D. New Model Pilot Program

As discussed in Part II.B.5.(b) above, several key provisions of the Exchange's New Model proposal are being approved today on a pilot basis (collectively, the ''Pilot provisions''). The New Model Pilot will include: (i) The changes to NYSE's priority and order allocation structure under proposed Rule 72; (ii) the dealings and responsibilities of DMMs, including the affirmative obligation to market quality, the quoting obligation, the re-entry requirements following certain transactions for the DMM's own account, and, implicitly, the elimination of the negative obligation, set forth in proposed Rule 104; and (iii) the provisions related to DMM CCS interest set forth in proposed Rule 1000.

As discussed above, we have concerns regarding certain aspects of the Exchange's proposal and are therefore approving the provisions described above on a pilot basis for a period ending October 1, 2009. Before we decide what action to take on any NYSE proposal to extend the operation of the Pilot provisions or to establish the Pilot provisions on a permanent basis, we believe that NYSE must provide data and analysis on the impact of the Pilot provisions. Specifically, we believe that to be able to take any further action on an NYSE proposal with regard to the Pilot, NYSE must provide to us on a regular, ongoing basis, statistics relating to market quality and trading activity.[95] The Exchange has committed to providing us with these metrics on a monthly basis. The Exchange has also represented that it will maintain average measures for each trading day during a particular month in order to provide such information to us upon request.[96] Analysis of the requested statistics will assist the Commission, among other things, in evaluating the effects of the Pilot provisions on NYSE's market quality, and in determining whether the New Model Pilot should be permanently approved, if so requested by the Exchange, with or without adjustments, consistent with the Act.

The Commission intends to closely examine these statistics and other information relating to the impact of the Pilot provisions on investors and other market participants. If the Commission

[91] *See* Securities Exchange Act Release No. 57688 (April 18, 2008), 73 FR 22194 (April 24, 2008) (SR–NYSE–2008–30).

[92] *See* NYSE Rule 13. *See also, e.g.,* Nasdaq Rules 4756(c)(3) and 4757; NYSE Arca Equities Rule 7.31(h)(3); and ISE Rule 715(g)(1).

[93] In the New Model, DMMs would continue to facilitate manual transactions on the Exchange in a limited number of situations. *See supra,* Part III.A. Orders eligible for manual execution are aggregated by Exchange systems and shown to the DMM in the Display Book's manual execution template.

[94] In Amendment No. 2, the Exchange proposed to prohibit DMMs, their trading assistants, and others acting on their behalf from using Display Book to access information about Floor broker agency interest excluded from the aggregated agency interest and Minimum Display Reserve Order information other than for the purpose of effecting transactions that are reasonably imminent where such information is necessary to effect the transaction. Because this restriction is designed to prevent DMMs from gleaning an informational advantage from access to ordinarily hidden information on the Display Book that is not necessary to the performance of their obligations, we find that the retention and expansion of this provision is consistent with the Act, including Section 6(b)(5) thereunder, which requires that proposed rules promote just and equitable principles of trade, and not be designed to permit unfair discrimination between customers, issuers, brokers, and dealers.

[95] For a description of the metrics the Exchange has agreed to provide, *see supra* Part II.C.

[96] The average per security may be provided across volume deciles.

determines, upon expiration of the Pilot period or at any earlier time, that implementation of the New Model Pilot is having a detrimental effect on investors or other market participants, the Commission will consider what action it should take to address any detrimental effect.

E. Other Proposed Changes

Several of NYSE's proposed changes, such as the approval procedures for DMMs and DMM Units, elimination of Floor broker percentage orders, changes to the handling of Floor broker d-Quotes, and inclusion of additional Floor broker interest in OpenBook, raise policy issues that we have considered previously, and resolve such policy issues in a manner consistent with our prior approvals. The remainder of NYSE's proposed changes are technical, non-substantive changes intended, for example, to update the terminology of NYSE's existing rules to conform them to the proposed New Model, or to delete archaic rule provisions or provisions that have sunset according to their terms. We believe that these proposed changes are consistent with the Act.

IV. Accelerated Approval

We find good cause, pursuant to Section 19(b)(2) of the Act,[97] for approving the proposed rule change, as modified by Amendment Nos. 1, 2 and 3, prior to the thirtieth day after publication of notice of filing of Amendment Nos. 2 and 3 in the **Federal Register**.

In Amendment No. 2, the Exchange proposes to clarify how odd-lot information will be transmitted to the DMM Unit algorithm prior to the opening. The Exchange has represented that current technical constraints in its odd-lot System require that odd-lot information be transmitted to the DMM Unit algorithm on an order-by-order basis prior to the opening. The Exchange has represented that it is currently working on modifications to its systems that would allow the transmission of odd-lot order information on an aggregated basis prior to the open. The Exchange has stated that these system changes will be effective by the third quarter of 2009, at which time odd-lot information on an order-by-order basis would no longer be required for the DMM Unit algorithm to effectively facilitate the opening. We find that the clarification with respect to the way in which odd-lot information would be transmitted to the DMM Unit algorithm is consistent with the Act[98] and note that the Exchange has committed to implement the necessary technical changes to its system that will obviate the need for the sending of order-by-order odd-lot information to the DMM Unit algorithm.

In Amendment No. 2, the Exchange has also proposed to retain the restriction currently applicable to specialists prohibiting them, their trading assistants, and others acting on their behalf from using the Display Book system to access information about Floor broker agency interest excluded from the aggregated agency interest other than for the purpose of effecting transactions that are reasonably imminent where such Floor broker agency interest information is necessary to effect such transaction. The Exchange's proposal would apply this restriction to DMMs and include information pertaining to Minimum Display Reserve Orders within the restriction. Because this restriction is designed to prevent DMMs from gleaning an informational advantage from their access to ordinarily hidden information on the Display Book that is not necessary to the performance of their obligations, we find that the retention and expansion of this provision is consistent with the Act, including Section 6(b)(5) thereunder, which requires that proposed rules promote just and equitable principles of trade, and not be designed to permit unfair discrimination between customers, issuers, brokers, and dealers.

In this amendment, the Exchange has made minor edits to its rule text (in particular, in NYSE Rules 13, 52, 72, 299A and 1000) that are technical or clarifying in nature. Finally, in Amendment No. 2, the Exchange has committed to provide us with specific metrics on an ongoing basis that relate to market quality and certain of its rules that are subject to the New Model Pilot. We believe that this data will be important in helping the Commission analyze the impact of the New Model Pilot, and in determining whether to permanently approve or modify it, if so requested by the Exchange. Therefore, we find that these proposed changes are consistent with the Act.

In Amendment No. 3, the Exchange modified the dates that the Exchange is required to provide data to the Commission, amended the implementation dates of certain rules, and clarified the implementation schedule of the New Model Pilot. Finally, in Amendment No. 3, the Exchange proposed technical changes to Rule 98 and 98 Former to replace the term ''specialty stocks'' with ''registered security.''

The Exchange has requested that the proposed rule change, as modified by Amendment Nos. 1, 2, and 3, be approved prior to the 30th day after publication of notice of filing of Amendment Nos. 2 and 3 in the **Federal Register**. The changes proposed in Amendment Nos. 2 and 3, discussed above, are either technical in nature, raise policy issues that we have considered previously (and address them in a manner consistent with our prior approvals), do not differ substantively from the changes proposed in the original filing as modified by Amendment No. 1, notice of which was published for public comment in the **Federal Register** on July 23, 2008, or strengthen the proposal.

For example, NYSE's commitment in Amendment No. 2 to provide certain data to enable us to evaluate the effects of the Pilot provisions strengthens the proposal by specifying what data the Exchange must provide and when it must be provided. Clarification of the Exchange's implementation schedule for the New Model Pilot in Amendment No. 3 strengthens the proposal by setting a deadline of ten weeks following the date of this order by which the Exchange will fully implement the Pilot provisions, and thus eliminate the DMM's advance ''look'' at incoming orders.

Accordingly, we find that good cause exists, consistent with Sections 6(b)(5) of the Act,[99] and Section 19(b) of the Act[100] to approve the proposed rule change, as modified by Amendment Nos. 1 2, and 3 on an accelerated basis.

V. Solicitation of Comments

Interested persons are invited to submit written data, views, and arguments concerning Amendment Nos. 2 and 3, including whether Amendment Nos. 2 and 3 are consistent with the Act. Comments may be submitted by any of the following methods:

Electronic Comments

- Use the Commission's Internet comment form (*http://www.sec.gov/rules/sro.shtml*); or
- Send an e-mail to *rule-comments@sec.gov*. Please include File Number SR–NYSE–2008–46 on the subject line.

[97] 15 U.S.C. 78s(b)(2). Pursuant to Section 19(b)(2) of the Act, the Commission may not approve any proposed rule change, or amendment thereto, prior to the thirtieth day after the date of publication of the notice thereof, unless the Commission finds good cause for so doing.

[98] 15 U.S.C. 78f(b)(5).

[99] 15 U.S.C. 78f(b)(5).

[100] 15 U.S.C. 78s(b).

Paper Comments

• Send paper comments in triplicate to Secretary, Securities and Exchange Commission, 100 F Street, NE., Washington, DC 20549–1090.

All submissions should refer to File Number SR–NYSE–2008–46. 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. We will post all comments on the SEC's Internet Web site (*http://www.sec.gov/rules/sro.shtml*). Copies of the submission, all subsequent amendments, all written statements with respect to the proposed rule change that are filed with us, and all written communications relating to the proposed rule change between us and any person, other than those that may be withheld from the public in accordance with the provisions of 5 U.S.C. 552, will be available for inspection and copying in the SEC's Public Reference Room, 100 F Street, NE., Washington, DC 20549, on official business days between the hours of 10 a.m. and 3 p.m. Copies of such filing also will be available for inspection and copying at the principal office of the Exchange. 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. All submissions should refer to File Number SR–NYSE–2008–46 and should be submitted on or before November 19, 2008.

VI. Conclusion

For the foregoing reasons, we find that the proposed rule change, as amended, is consistent with the Act and the rules and regulations thereunder applicable to a national securities exchange.

It is therefore ordered, pursuant to Section 19(b)(2) of the Act,[101] that the proposed rule change (SR–NYSE–2008–46), as modified by Amendment Nos. 1, 2, and 3 be, and it hereby is,approved on an accelerated basis.

By the Commission.

Florence E. Harmon,

Acting Secretary.

[FR Doc. E8–25797 Filed 10–28–08; 8:45 am]

BILLING CODE 8011–01–P

[101] 15 U.S.C. 78f(b)(2).

SECURITIES AND EXCHANGE COMMISSION

Release No. 34–58834; File No. SR–NYSE–2008–93]

Self-Regulatory Organizations; The New York Stock Exchange LLC; Notice of Filing and Order Granting Accelerated Approval of Proposed Rule Change to Temporarily Suspend the Operation of NYSE Rule 123D(3) to Respond to Market Conditions for Thornburg Mortgage, Inc. (TMA) on September 29, 2008

October 23, 2008.

Pursuant to Section 19(b)(1) [1] of the Securities Exchange Act of 1934 (the ''Act'') [2] and Rule 19b–4 thereunder,[3] notice is hereby given that, on October 10, 2008, New York Stock Exchange LLC (''NYSE'' or the ''Exchange'') filed with the Securities and Exchange Commission (the ''Commission'') the proposed rule change as described in Items I and II below, which Items have been prepared by the self-regulatory organization. This order provides notice of the proposed rule change and approves the proposed rule change on an accelerated basis.

I. Self-Regulatory Organization's Statement of the Terms of Substance of the Proposed Rule Change

The Exchange proposes to temporarily suspend the operation of NYSE Rule 123D(3) to respond to market conditions for Thornburg Mortgage, Inc. (TMA) on September 29, 2008.

The text of the proposed rule change is available at the Exchange, *http://www.nyse.com,* and the Commission's Public Reference Room.

II. Self-Regulatory Organization's Statement of the Purpose of, and Statutory Basis for, the Proposed Rule Change

In its filing with the Commission, the self-regulatory organization included statements concerning the purpose of, and basis for, the proposed rule change and discussed any comments it received on the proposed rule change. The text of those statements may be examined at the places specified in Item III below. The Exchange has prepared summaries, set forth in sections A, B, and C below, of the most significant parts of such statements.

[1] 15 U.S.C. 78s(b)(1).

[2] 15 U.S.C. 78a.

[3] 17 CFR 240.19b–4.

A. Self-Regulatory Organization's Statement of the Purpose of, and Statutory Basis for, the Proposed Rule Change

1. Purpose

The Exchange is proposing to temporarily suspend the operation of NYSE Rule 123D(3) with respect to the opening transactions on September 29, 2008, in the common stock and preferred Series E of Thornburg Mortgage, Inc. (''Thornburg''), a NYSE-listed company (TMA).

Background

Thornburg is a single-family residential mortgage lender that originates, acquires, and retains investments in adjustable-rate and variable-rate mortgage assets. On September 26, 2008, the common stock of TMA underwent a one-for-10 reverse stock split pursuant to which every ten shares of common stock were combined into one share of new common stock. As part of the stock split, TMA issued new stock certificates representing the new issue.[4] Generally, reverse stock splits are intended to increase the value of the common stock of a company.

Because Thornburg issued new stock certificates, the Exchange considers the trading of TMA on September 29, 2008 to be a new issue, notwithstanding prior trading in the stock.[5] Accordingly, in anticipation of TMA trading at the Exchange on September 29, 2008, the Exchange received multiple orders for TMA to participate in the opening transaction.

To ensure a fair and orderly market, and in particular, to ensure that orders in TMA that have been submitted to the Exchange get executed, the Exchange is proposing to suspend the operation of NYSE Rule 123D(3) on September 29, 2008 for Thornburg's common stock and the Preferred Series E (''TMA securities'') [6] that would open at a price of $1.05 or less. This proposed suspension relates only to the opening transactions of TMA securities on September 29, 2008. Immediately following the opening of such securities, the Exchange intends to halt trading of TMA securities pursuant to NYSE Rule 123D(3) and invoke a Sub-penny trading condition.

[4] *See* Thornburg Mortgage, Inc., Form 8–K (Sept. 26, 2008).

[5] TMA has been the subject of a Sub-penny trading condition at the Exchange and closed Friday, September 26, 2008 at $0.28 in away markets.

[6] *See* TMA and TMA–PE.

NYSE Rule 123D(3)

Sub-penny Trading Condition

NYSE Rule 123D(3) provides that if a security would open on the Exchange at a price of $1.05 or less, trading on the Exchange shall be immediately halted because of a ''Sub-penny trading'' condition. The Exchange adopted Rule 123D(3) in part to be compliant with Regulation NMS.

Regulation NMS, adopted by the Securities and Exchange Commission (''SEC'') in April 2005,[7] provides that each trading center intending to qualify for trade-through protection under Regulation NMS Rule 611[8] is required to have a Regulation NMS-compliant trading system fully operational by March 5, 2007 (the ''Trading Phase Date'').[9]

For stocks priced below $1.00 per share, Regulation NMS Rule 612[10] permits markets to accept bids, offers, orders and indications of interest in increments smaller than a $0.01, but not less than $0.0001, and to quote and trade such stocks in sub-pennies. Markets may choose not to accept such bids, offers, orders or indications of interest and the NYSE has done so, maintaining a minimum trading and quoting variation of $0.01 for all securities trading below $100,000. *See* NYSE Rule 62.

The Commission's interpretation of Rule 612 requires a market that routes an order to another market in compliance with Rule 611 and receives a sub-penny execution, to accept the sub-penny execution, report that execution to the customer, and compare, clear, and settle that trade. Failure to do so constitutes a violation of Rule 611's Order Protection Rule. However, pursuant to Rule 611(b)(3) of Regulation NMS,[11] transactions that constitute a single-priced opening, reopening, or closing transaction by a trading center are excepted from the Order Protection Rule. Accordingly, a sub-penny execution at the opening that trades through another market center does not constitute a violation of Regulation NMS Rule 611's Order Protection Rule.

The Exchange adopted Rule 123D(3) to provide for a ''Sub-penny trading'' condition because the Exchange's trading systems did not then accommodate sub-penny executions on orders routed to better-priced protected quotations, nor could it recognize a quote disseminated by another market center if such quote had a sub-penny component and, therefore, could have inadvertently traded through better protected quotations. The rule requires the Exchange to halt trading in a security whose price was about to fall below $1.00, without delisting the security, so that the security could continue to trade on other markets that deal in bids, offers, orders or indications of interest in sub-penny prices, until the price of the security had recovered sufficiently to permit the Exchange to resume trading in minimum increments of no less than one penny or the issuer is delisted for failing to correct the price condition within the time provided under NYSE rules.[12]

A subsequent amendment established that any orders received by the NYSE in a security subject to a ''Sub-penny trading'' condition would be routed to NYSE Arca, Inc. (''NYSE Arca'') and handled in accordance with the rules governing that market.[13] When a ''Sub-penny trading'' condition is invoked, all open limit orders in such security at the Exchange will be cancelled and will not be routed to NYSE Arca.

Proposed Suspension of Rule 123D(3) for TMA Securities

Because of reverse stock split in the common stock of Thornburg on September 26, 2008, the Exchange considered trading in that security on September 29, 2008 as a new issue. Accordingly, prior to the opening, the Exchange received pre-opening orders in the common stock. The Exchange also received pre-opening orders in the Preferred Series E of Thornburg. If the Exchange were to invoke a ''Sub-penny trading'' condition for those securities prior to the opening, such orders would be cancelled and would not be routed to NYSE Arca. Therefore, such orders would not be executed, potentially harming the investing public that routed such orders to the Exchange before the Exchange's announcement of a sub-penny trading halt.

The Exchange notes that while such an opening transaction would be a violation of NYSE Rule 123D(3), an execution at a sub-penny price at the opening at the Exchange would not be a violation of Regulation NMS. Accordingly, because a sub-penny execution at the opening would not constitute a violation of the Regulation NMS Rule 611 Order Protection Rule, the Exchange believes that the harm to the investing public in not having their orders in TMA securities executed at the opening outweighs any harm that may result from a violation of NYSE Rule 123D(3). The Exchange therefore proposes a one-day suspension of the operation of NYSE Rule 123D(3) that would be in effect only for the opening transactions of TMA securities on September 29, 2008.

After trading in TMA securities opened at the Exchange, the Exchange halted any further trading in TMA securities and invoked a ''Sub-penny trading'' condition for such securities.

2. Statutory Basis

The proposed rule change is consistent with Section 6(b)[14] of the Act, in general, and furthers the objectives of Section 6(b)(5)[15] in particular in that it is designed to prevent fraudulent and manipulative acts and practices, to promote just and equitable principles of trade, to foster cooperation and coordination with persons engaged in facilitating transactions in securities, and to remove impediments to and perfect the mechanism of a free and open market and a national market system.

B. Self-Regulatory Organization's Statement on Burden on Competition

The Exchange does not believe that the proposed rule change will impose any burden on competition that is not necessary or appropriate in furtherance of the purposes of the Act.

C. Self-Regulatory Organization's Statement on Comments on the Proposed Rule Change Received From Members, Participants or Others

No written comments were solicited or received with respect to the proposed rule change.

III. Solicitation of Comments

Interested persons are invited to submit written data, views, and arguments concerning the foregoing, including whether the proposed rule change is consistent with the Act. Comments may be submitted by any of the following methods:

Electronic Comments

- Use the Commission's Internet comment form (*http://www.sec.gov/rules/sro.shtml*); or

[7] *See* Securities Exchange Act Release No. 51808 (June 9, 2005), 17 CFR parts 200, 201, 230, 240, 242, 249 and 270.

[8] *See* 17 CFR 242.611.

[9] *See* Securities Exchange Act Release No. 55160 (January 24, 2007), 72 FR 4202 (January 30, 2007)(S7–10–04).

[10] *See* 17 CFR 242.612. Rule 612 originally was to become effective on August 29, 2005, but the date was later extended to January 29, 2006. *See* Securities Exchange Act Release No. 52196 (Aug. 2, 2005), 70 FR 45529 (Aug. 8, 2005).

[11] *See* 17 CFR 242.611(b)(3).

[12] *See* Securities and Exchange Commission Release No. 34–55398; File No. SR–NYSE–2007–25 (Mar. 5, 2007).

[13] *See* Securities and Exchange Commission Release No. 34–55537; File No. SR–NYSE–2007–30 (Mar. 27, 2007).

[14] 15 U.S.C. 78f(b).

[15] 15 U.S.C. 78f(b)(5).

• Send an e-mail to *rule-comments@sec.gov.* Please include File Number SR–NYSE–2008–93 on the subject line.

Paper Comments

• Send paper comments in triplicate to Secretary, Securities and Exchange Commission, 100 F Street, NE., Washington, DC 20549–1090.

All submissions should refer to File Number SR–NYSE–2008–93. This file number should be included on the subject line if e-mail is used. To help the Commission process and review your comments more efficiently, please use only one method. The Commission will post all comments on the Commission's Internet Web site (*http://www.sec.gov/rules/sro.shtml*). Copies of the submission, all subsequent amendments, all written statements with respect to the proposed rule change that are filed with the Commission, and all written communications relating to the proposed rule change between the Commission and any person, other than those that may be withheld from the public in accordance with the provisions of 5 U.S.C. 552, will be available for inspection and copying in the Commission's Public Reference Room, 100 F Street, NE., Washington, DC 20549, on official business days between the hours of 10 a.m. and 3 p.m. Copies of such filing also will be available for inspection and copying at the principal offices of the Exchange. All comments received will be posted without change; the Commission does not edit personal identifying information from submissions. You should submit only information that you wish to make available publicly. All submissions should refer to File Number SR–NYSE–2008–93 and should be submitted on or before November 19, 2008.

IV. Commission's Findings and Order Granting Accelerated Approval of the Proposed Rule Change

After careful review, the Commission finds that the proposed rule change is consistent with the requirements of Section 6 of the Act and the rules and regulations thereunder applicable to a national securities exchange.[16] In particular, the Commission finds that the proposed rule change is consistent with Section 6(b)(5) of the Act,[17] which requires that an exchange have rules designed, among other things, to promote just and equitable principles of trade, to remove impediments to and perfect the mechanism of a free and open market and a national market system, and, in general, to protect investors and the public interest.

The Exchange previously filed this rule proposal on September 29, 2008 for immediate effectiveness pursuant to Section 19(b)(3)(A)[18] of the Act and Rule 19b–4(f)(6)[19] thereunder; however the proposed rule change was rejected for technical, non-substantive reasons. In that prior rule filing, the Exchange noted that the proposal should be effective on September 29, 2008 because of the immediate nature of the relief requested. Specifically, the Exchange received pre-opening orders of TMA securities in response to the reverse stock split, which did not have the intended consequences. Instead, pre-opening interest was below $0.70. By temporarily suspending operation of Rule 123D(3) for opening transactions of TMA securities on September 29, 2008, the Exchange was able to execute the pre-opening orders it received in TMA securities.

As noted above, the Exchange previously submitted a proposed rule change for immediate effectiveness on September 29, 2008 that was rejected by the Commission for technical non-substantive reasons. The Commission is granting accelerated approval of this proposed rule change on a retroactive basis to September 29, 2008. The Commission finds good cause for approving this proposal before the thirtieth day after the date of publication of notice of this filing in the **Federal Register**.

V. Conclusion

It is therefore ordered, pursuant to Section 19(b)(2) of the Act,[20] that the proposed rule change (SR–NYSE–2008–93) be, and it hereby is, approved on an accelerated basis.

For the Commission, by the Division of Trading and Markets, pursuant to delegated authority.[21]

Florence E. Harmon,

Acting Secretary.

[FR Doc. E8–25809 Filed 10–28–08; 8:45 am]

BILLING CODE 8011–01–P

[16] In approving this rule change, the Commission notes that it has considered the proposed rule's impact on efficiency, competition, and capital formation. *See* 15 U.S.C. 78c(f).

[17] 15 U.S.C. 78f(b)(5).

[18] 15 U.S.C. 78s(b)(3)(A).

[19] 17 CFR 240.19b–4(f)(6).

[20] 15 U.S.C. 78s(b)(2).

[21] 17 CFR 200.30–3(a)(12).

DEPARTMENT OF TRANSPORTATION

Office of the Secretary

Applications of Prescott Support Company, Inc., for Certificate Authority

AGENCY: Department of Transportation.

ACTION: Notice of Order to Show Cause (Order 2008–10–27),Dockets DOT–OST–2008–0187 and DOT–OST–2008–0188.

SUMMARY: The Department of Transportation is directing all interested persons to show cause why it should not issue orders finding Prescott Support Company, Inc., fit, willing, and able, and awarding it certificates of public convenience and necessity to engage in interstate and foreign charter air transportation of property and mail.

DATES: Persons wishing to file objections should do so no later than.

ADDRESSES: Objections and answers to objections should be filed in Dockets DOT–OST–2008–0187 and DOT–2008–0188 and addressed to U.S. Department of Transportation Dockets, 1200 New Jersey Avenue, SE., West Building Ground Floor, Rm. W12–140, Washington, DC 20590, and should be served upon the parties listed in Attachment A to the order.

FOR FURTHER INFORMATION CONTACT: Mr. Scott A. Faulk, Air Carrier Fitness Division (X–56, Room W86–487), U.S. Department of Transportation, 1200 New Jersey Avenue, SE., West Building, Washington, DC 20590, (202) 366–9967.

Dated: October 22, 2008.

Michael W. Reynolds,

Acting Assistant Secretary for Aviation and International Affairs.

[FR Doc. E8–25757 Filed 10–28–08; 8:45 am]

BILLING CODE 4910–9X–P

DEPARTMENT OF TRANSPORTATION

Federal Aviation Administration

Executive Committee of the Aviation Rulemaking Advisory Committee; Meeting

AGENCY: Federal Aviation Administration (FAA), DOT.

ACTION: Notice of meeting.

SUMMARY: The FAA is issuing this notice to advise the public of a meeting of the Executive Committee of the Aviation Rulemaking Advisory Committee.

DATES: The meeting will be on December 10, 2008, at 10 a.m.

ADDRESSES: The meeting will take place at the Federal Aviation Administration, 800 Independence Avenue, SW.,

Washington, DC 20519, 10th floor, MacCracken Room.

FOR FURTHER INFORMATION CONTACT: Gerri Robinson, Federal Aviation Administration, 800 Independence Avenue, SW., Washington, DC 20591, telephone (202) 267–9678; fax (202) 267–5075; e-mail *Gerri.Robinson@faa.gov*.

SUPPLEMENTARY INFORMATION: Under section 10(a)(2) of the Federal Advisory Committee Act (5 U.S.C. App. 2), we are giving notice of a meeting of the Executive Committee of the Aviation Rulemaking Advisory Committee taking place on December 10, 2008, at the Federal Aviation Administration, 800 Independence Avenue, SW., Washington, DC 20519. The agenda includes:

1. Introduction of new Assistant Chairs.
2. Part 147 Working Group Report.
3. Issue Area Status Reports from Assistant Chairs.
4. Continuous Improvement (Committee Process).
5. Regulatory Agenda Discussion.
6. Rulemaking Harmonization Discussion.
7. Off-agenda remarks from other EXCOM members.

Attendance is open to the interested public but limited to the space available. The FAA will arrange teleconference service for individuals wishing to join in by teleconference if we receive notice by December 1. Arrangements to participate by teleconference can be made by contacting the person listed in the **FOR FURTHER INFORMATION CONTACT** section. Callers outside the Washington metropolitan area are responsible for paying long-distance charges.

The public must arrange by December 1 to present oral statements at the meeting. The public may present written statements to the executive committee by providing 25 copies to the Executive Director, or by bringing the copies to the meeting.

If you are in need of assistance or require a reasonable accommodation for this meeting, please contact the person listed under the heading **FOR FURTHER INFORMATION CONTACT**.

Issued in Washington, DC on October 23, 2008.

Pamela A. Hamilton-Powell,

Executive Director, Aviation Rulemaking Advisory Committee.

[FR Doc. E8–25722 Filed 10–28–08; 8:45 am]

BILLING CODE 4910–13–P

DEPARTMENT OF TRANSPORTATION

Federal Railroad Administration

Notice of Application for Approval of Discontinuance or Modification of a Railroad Signal System or Relief From the Requirements of Title 49 Code of Federal Regulations Part 236

Pursuant to Title 49 Code of Federal Regulations (CFR) Part 235 and 49 U.S.C. 20502(a), the following railroad has petitioned the Federal Railroad Administration (FRA) seeking approval for the discontinuance or modification of the signal system or relief from the requirements of 49 CFR part 236, as detailed below.

Docket Number: FRA–2008–0102.

Applicant: Canadian National Railway, Mr. Timothy R. Luhm, Senior Manager of S&C, 1625 Depot Street, Stevens Point, Wisconsin 54481.

The Canadian National Railway Company (CN) seeks approval of the proposed discontinuance and removal of an automatic block signal system from Milepost 40.2 to Milepost 41.9 on the Dresser slide fence, CN Lake Zone, Dresser Subdivision, Wisconsin. The reason for the proposed changes is that the slide fence is not required with the current restricted speed requirement. A 10 miles per hour speed restriction will extend through the entire slide area.

Interested parties are invited to participate in these proceedings by submitting written views, data, or comments. FRA does not anticipate scheduling a public hearing in connection with these proceedings since the facts do not appear to warrant a hearing. If any interested party desires an opportunity for oral comment, they should notify FRA, in writing, before the end of the comment period and specify the basis for their request.

All communications concerning these proceedings should identify the appropriate docket number (Docket No. FRA–2008–0102) and may be submitted by any of the following methods:

- *Web site: http://www.regulations.gov.* Follow the online instructions for submitting comments.
- *Fax:* 202–493–2251.
- *Mail:* Docket Operations Facility, U.S. Department of Transportation, 1200 New Jersey Avenue, SE., W12–140, Washington, DC 20590.
- *Hand Delivery:* 1200 New Jersey Avenue, SE., Room W12–140, Washington, DC 20590, between 9 a.m. and 5 p.m., Monday through Friday, except Federal Holidays.

Communications received within 45 days of the date of this notice will be considered by FRA before final action is taken. Comments received after that date will be considered as far as practicable. All written communications concerning these proceedings are available for examination during regular business hours (9 a.m.–5 p.m.) at the above facility. All documents in the public docket are also available for inspection and copying on the Internet at the docket facility's Web site at *http://www.regulations.gov.*

Anyone is able to search the electronic form of any written communications and comments received into any of our dockets by the name of the individual submitting the comment (or signing the comment, if submitted on behalf of an association, business, labor union, etc.). You may review DOT's complete Privacy Act Statement in the **Federal Register** published on April 11, 2000 (Volume 65, Number 70; Pages 19477–78).

Issued in Washington, DC on October 22, 2008.

Grady C. Cothen, Jr.,

Deputy Associate Administrator for Safety Standards and Program Development.

[FR Doc. E8–25769 Filed 10–28–08; 8:45 am]

BILLING CODE 4910–06–P

DEPARTMENT OF TRANSPORTATION

Federal Railroad Administration

Petition for Special Approval of Alternate Standard

In accordance with Part 238.21 of Title 49 Code of Federal Regulations (CFR), notice is hereby given that the Federal Railroad Administration (FRA) received a request for approval of an Alternate Standard of compliance with certain requirements of its safety standards. The individual petition is described below, including the party seeking relief, the regulatory provisions involved, the nature of the relief being requested, and the petitioner's arguments in favor of relief.

Long Island Railroad and Metro-North Railroad (Special Approval Petition Docket Number FRA–2004–17099)

The Long Island Railroad (LIRR) and Metro-North Railroad (MNCW) further identified herein as the railroads, seeks approval to amend a previously granted alternate standard to be used in accordance with the *Passenger Equipment Safety Standards,* 49 CFR part 238, section 309, periodic maintenance of MU locomotive equipment brakes. Section 309(b)(2) requires periodic brake equipment maintenance to be performed at an interval not to exceed every 1,104 days.

The railroads were granted an alternate standard July 4, 2004, for M7–MU locomotives that required that periodic brake equipment maintenance be performed at an interval not to exceed every 1,840 days.

The railroads most recent request dated September 12, 2008, states that the M7 MU locomotive tests are near their completion and the railroad requests to extend the testing beyond the 1,840 days and perform age exploration similar to the testing of electronic brake systems on more traditional freight and passenger locomotives. The M7 air brake system is integrated with the propulsion system, and a full pneumatic back up of the emergency brake application function is available through the emergency brake valve and conductors valve. The M7 utilizes various systems to monitor, diagnose, and report brake equipment functions to a centralized diagnostic system on board the equipment. At the original submission, the railroads provided required technical documentation, a Preliminary Hazard Analysis, Failure Modes and Effect Analysis, Maintainability Analysis, and has served a copy of the petition on designated representatives of its employees. A list of the names and addresses of the persons served is available at the DOT docket site contained in this notice.

Interested parties are invited to participate in these proceedings by submitting written views, data, or comments. FRA does not anticipate scheduling a public hearing in connection with these proceedings since the facts do not appear to warrant a hearing. If any interested party desires an opportunity for oral comment, they should notify FRA, in writing, before the end of the comment period and specify the basis for their request.

All communications concerning these proceedings should identify the appropriate docket number (*e.g.*, Waiver Petition Docket Number FRA–2004–17099) and may be submitted by any of the following methods:

- *Web site: http://www.regulations.gov.* Follow the online instructions for submitting comments.
- *Fax:* 202–493–2251.
- *Mail:* Docket Operations Facility, U.S. Department of Transportation, 1200 New Jersey Avenue, SE., W12–140, Washington, DC 20590.
- *Hand Delivery:* 1200 New Jersey Avenue, SE., Room W12–140, Washington, DC 20590, between 9 a.m. and 5 p.m., Monday through Friday, except Federal holidays.

Communications received within 45 days of the date of this notice will be considered by FRA before final action is taken. Comments received after that date will be considered as far as practicable. All written communications concerning these proceedings are available for examination during regular business hours (9 a.m.–5 p.m.) at the above facility. All documents in the public docket are also available for inspection and copying on the Internet at the docket facility's Web site at *http://www.regulations.gov.*

Anyone is able to search the electronic form of any written communications and comments received into any of our dockets by the name of the individual submitting the comment (or signing the comment, if submitted on behalf of an association, business, labor union, etc.). You may review DOT's complete Privacy Act Statement in the **Federal Register** published on April 11, 2000 (Volume 65, Number 70; Pages 19477–78).

Issued in Washington, DC on October 22, 2008.

Grady C. Cothen, Jr.,

Deputy Associate Administrator for Safety Standards and Program Development.

[FR Doc. E8–25768 Filed 10–28–08; 8:45 am]

BILLING CODE 4910–06–P

DEPARTMENT OF TRANSPORTATION

Pipeline and Hazardous Materials Safety Administration

Office of Hazardous Materials Safety; Notice of Delays in Processing of Special Permits Applications

AGENCY: Pipeline and Hazardous Materials Safety Administration (PHMSA), DOT.

ACTION: List of Applications Delayed more than 180 days.

SUMMARY: In accordance with the requirements of 49 U.S.C. 5117(c), PHMSA is publishing the following list of special permit applications that have been in process for 180 days or more. The reason(s) for delay and the expected completion date for action on each application is provided in association with each identified application.

FOR FURTHER INFORMATION CONTACT: Delmer F. Billings, Director, Office of Hazardous Materials Special Permits and Approvals, Pipeline and Hazardous Materials Safety Administration, U.S. Department of Transportation, East Building, PHH–30, 1200 New Jersey Avenue, SE., Washington, DC 20590–0001, (202) 366–4535.

Key to "Reason for Delay"

1. Awaiting additional information from applicant.
2. Extensive public comment under review.
3. Application is technically complex and is of significant impact or precedent-setting and requires extensive analysis.
4. Staff review delayed by other priority issues or volume of special permit applications.

Meaning of Application Number Suffixes

N—New application.

M—Modification request.

PM—Party to application with modification request.

Issued in Washington, DC, on October 22, 2008.

Delmer F. Billings,

Director, Office of Hazardous Materials, Special Permits and Approvals.

MODIFICATION TO SPECIAL PERMITS

Application No.	Applicant	Reason for delay	Estimated date of completion
14167–M	Trinityrail, Dallas, TX	4	10–31–2008
8723–M	Alaska Pacific Powder Company, Anchorage, AK	1	10–31–2008
135 83–M	Structural Composites Industries, Pomona, CA	1	10–31–2008
10950–M	The Fertilizer Institute, Washington, DC	1	10–31–2008

NEW SPECIAL PERMIT APPLICATIONS

Application No.	Applicant	Reason for delay	Estimated date of completion
14643–N	World Airways, Inc., Peachtree City, GA	3	11–30–2008
14664–N	Century Arms, Inc., Fairfax, VT	4	10–31–2008
14689–N	Trinity Industries, Inc., Dallas, TX	2, 3	11–30–2008
14668–N	Lincoln Composites, Lincoln, NE	1	02–28–2009

[FR Doc. E8–25742 Filed 10–28–08; 8:45 am]
BILLING CODE 4910–60–M

DEPARTMENT OF THE TREASURY

Office of the Assistant Secretary for International Affairs; Survey of U.S. Ownership of Foreign Securities as of December 31, 2008

AGENCY: Departmental Offices, Department of the Treasury.

ACTION: Notice of reporting requirements.

SUMMARY: By this Notice and in accordance with 31 CFR 129, the Department of the Treasury is informing the public that it is conducting a mandatory survey of U.S. ownership of foreign securities as of December 31, 2008. This Notice constitutes legal notification to all United States persons (defined below) who meet the reporting requirements set forth in this Notice that they must respond to, and comply with, this survey. Additional copies of the reporting form SHCA (2008) and instructions may be printed from the Internet at: *http://www.treas.gov/tic/forms-sh.html*.

Definition: Pursuant to 22 U.S.C. 3102 a U.S. person is any individual, branch, partnership, associated group, association, estate, trust, corporation, or other organization (whether or not organized under the laws of any State), and any government (including a foreign government, the United States Government, a state, provincial, or local government, and any agency, corporation, financial institution, or other entity or instrumentality thereof, including a government-sponsored agency), who resides in the United States or is subject to the jurisdiction of the United States.

Who Must Report: The panel for this survey is based upon the level of U.S. holdings of foreign securities reported on the December 2006 benchmark survey of U.S. holdings of foreign securities, and will consist primarily of the largest reporters on that survey. Entities required to report will be contacted individually by the Federal Reserve Bank of New York. Entities not contacted by the Federal Reserve Bank of New York have no reporting responsibilities.

What to Report: This report will collect information on holdings by U.S. residents of foreign securities, including equities, long-term debt securities, and short-term debt securities (including selected money market instruments).

How to Report: Copies of the survey forms and instructions, which contain complete information on reporting procedures and definitions, can be obtained at the Web site address given above in the **SUMMARY**, or by contacting the survey staff of the Federal Reserve Bank of New York at (212) 720–6300, e-mail: *SHC.help@ny.frb.org*. The mailing address is: Federal Reserve Bank of New York, Statistics Function, 4th Floor, 33 Liberty Street, New York, NY 10045–0001. Inquiries can also be made to Dwight Wolkow at (202) 622–1276, e-mail: *comments2TIC@do.treas.gov*.

When to Report: Data must be submitted to the Federal Reserve Bank of New York, acting as fiscal agent for the Department of the Treasury, by March 6, 2009.

Paperwork Reduction Act Notice: This data collection has been approved by the Office of Management and Budget (OMB) in accordance with the Paperwork Reduction Act and assigned control number 1505–0146. An agency may not conduct or sponsor, and a person is not required to respond to, a collection of information unless it displays a valid control number assigned by OMB. The estimated average annual burden associated with this collection of information is 48 hours per respondent for end-investors and custodians that file Schedule 3 reports covering their securities entrusted to U.S. resident custodians, 145 hours per respondent for large end-investors filing Schedule 2 reports, and 700 hours per respondent for large custodians of securities filing Schedule 2 reports. Comments concerning the accuracy of this burden estimate and suggestions for reducing this burden should be directed to the Department of the Treasury, Attention Administrator, International Portfolio Investment Data Reporting Systems, Room 5422, Washington, DC 20220, and to OMB, Attention Desk Officer for the Department of the Treasury, Office of Information and Regulatory Affairs, Washington, DC 20503.

Dwight Wolkow,

Administrator, International Portfolio Investment Data Reporting Systems.

[FR Doc. E8–25733 Filed 10–28–08; 8:45 am]
BILLING CODE 4810–25–P

DEPARTMENT OF THE TREASURY

Alcohol and Tobacco Tax and Trade Bureau

Proposed Information Collections; Comment Request

AGENCY: Alcohol and Tobacco Tax and Trade Bureau (TTB), Treasury.

ACTION: Notice and request for comments.

SUMMARY: As part of our continuing effort to reduce paperwork and respondent burden, and as required by the Paperwork Reduction Act of 1995, we invite comments on the proposed or continuing information collections listed below in this notice.

DATES: We must receive your written comments on or before December 29, 2008.

ADDRESSES: You may send comments to Mary A. Wood, Alcohol and Tobacco Tax and Trade Bureau, at any of these addresses:

- P.O. Box 14412, Washington, DC 20044–4412;
- 202–927–8525 (facsimile); or
- *formcomments@ttb.gov* (e-mail).

Please send separate comments for each specific information collection listed below. You must reference the information collection's title, form or recordkeeping requirement number, and OMB number (if any) in your comment. If you submit your comment via facsimile, send no more than five 8.5 x 11 inch pages in order to ensure electronic access to our equipment.

FOR FURTHER INFORMATION CONTACT: To obtain additional information, copies of the information collection and its instructions, or copies of any comments received, contact Mary A. Wood, Alcohol and Tobacco Tax and Trade

Bureau, P.O. Box 14412, Washington, DC 20044–4412; or telephone 202–927–8210.

SUPPLEMENTARY INFORMATION:

Request for Comments

The Department of the Treasury and its Alcohol and Tobacco Tax and Trade Bureau, as part of their continuing effort to reduce paperwork and respondent burden, invite the general public and other Federal agencies to comment on the proposed or continuing information collections listed below in this notice, as required by the Paperwork Reduction Act of 1995 (44 U.S.C. 3501 *et seq.*).

Comments submitted in response to this notice will be included or summarized in our request for Office of Management and Budget (OMB) approval of the relevant information collection. All comments are part of the public record and subject to disclosure. Please not do include any confidential or inappropriate material in your comments.

We invite comments on: (a) Whether this information collection is necessary for the proper performance of the agency's functions, including whether the information has practical utility; (b) the accuracy of the agency's estimate of the information collection's burden; (c) ways to enhance the quality, utility, and clarity of the information collected; (d) ways to minimize the information collection's burden on respondents, including through the use of automated collection techniques or other forms of information technology; and (e) estimates of capital or start-up costs and costs of operation, maintenance, and purchase of services to provide the requested information.

Information Collections Open for Comment

Currently, we are seeking comments on the following records and forms:

Title: Change of Bond (Consent of Surety).

OMB Number: 1513–0013.

TTB Form Number: 5000.18.

Abstract: A Change of Bond (Consent of Surety) is executed by both the bonding company and a proprietor and acts as a binding legal agreement between the two parties to extend the terms of a bond. A bond is necessary to cover specific liabilities on the revenue produced from untaxpaid commodities. The Change of Bond (Consent of Surety) is filed with TTB and a copy is retained by TTB as long as it remains current and in force.

Current Actions: We are making minor corrections to this information collection and are submitting it as a revision.

Type of Review: Revision of a currently approved collection.

Affected Public: Business or other for-profit.

Estimated Number of Respondents: 2,000.

Estimated Total Annual Burden Hours: 2,000.

Title: Taxable Articles without Payment of Tax.

OMB Number: 1513–0027.

TTB Form Number: 5200.14.

Abstract: The tobacco manufacturer or export warehouse proprietor is liable for the tax on tobacco products until execution of the certification by Customs or an authorized receiving officer on TTB F 5200.14, which indicates verification of export or bonded transfer. TTB needs this information to protect the revenue. If this TTB form is not properly completed, TTB will assess the tax on the manufacturer of tobacco products or cigarette papers and tubes or on the proprietor of the export warehouse or customs manufacturing warehouse for products not exported or properly disposed of.

Current Actions: We are making minor corrections to this information collection and are submitting it as a revision.

Type of Review: Revision of a currently approved collection.

Affected Public: Business or other for-profit and Federal Government.

Estimated Number of Respondents: 272.

Estimated Total Annual Burden Hours: 59,840.

Title: Application and Permit under 26 U.S.C. 5181—Alcohol Fuel Producer.

OMB Number: 1513–0051.

TTB Form Number: 5110.74.

Abstract: This form is used by persons who wish to produce and receive spirits for the production of alcohol fuels as a business or for their own use and for State and local registration where required. The form describes the person(s) applying for the permit, location of the proposed operation, type of material used for production, and amount of spirits to be produced.

Current Actions: We are making minor corrections to this information collection and are submitting it as a revision.

Type of Review: Revision of a currently approved collection.

Affected Public: Business or other for-profit, Individuals or households, Farms.

Estimated Number of Respondents: 219.

Estimated Total Annual Burden Hours: 394.

Title: Excise Tax Return—Alcohol and Tobacco.

OMB Number: 1513–0083.

TTB Form Number: 5000.24.

Abstract: Businesses report their Federal excise tax liability on distilled spirits, wine, beer, tobacco products, and cigarette papers and tubes on TTB F 5000.24. TTB needs this form to identify the taxpayer and to determine the amount and type of taxes due and paid.

Current Actions: We are making minor corrections to this information collection and are submitting it as a revision.

Type of Review: Revision of a currently approved collection.

Affected Public: Business and other for-profit.

Estimated Number of Respondents: 30,000.

Estimated Total Annual Burden Hours: 22,500.

Title: Excise Tax Return—Alcohol and Tobacco (Puerto Rico).

OMB Number: 1513–0090.

TTB Form Number: 5000.25.

Abstract: Businesses in Puerto Rico report their Federal excise tax liability on distilled spirits, wine, beer, tobacco products, and cigarette papers and tubes on TTB F 5000.25. TTB needs this form to identify the taxpayer and to determine the amount and type of taxes due and paid.

Current Actions: We are making minor corrections to this information collection and are submitting it as a revision.

Type of Review: Revision of a currently approved collection.

Affected Public: Business and other for-profit.

Estimated Number of Respondents: 24.

Estimated Total Annual Burden Hours: 356.

Title: COLAs Online Access Request.

OMB Number: 1513–0111.

TTB Form Number: 5013.2.

Abstract: The information on this form will be used by TTB to authenticate end users on the COLAs Online system who electronically file Certificates of Label Approval (COLAs). The system will authenticate end users by comparing information submitted to records in multiple databases.

Current Actions: We are making minor corrections to this information collection and are submitting it as a revision.

Type of Review: Revision of a currently approved collection.

Affected Public: Business or other for-profit.

Estimated Number of Respondents: 1,147.

Estimated Total Annual Burden Hours: 363.

Title: Formulas for Fermented Products.

OMB Number: 1513–0118.

TTB Reporting Requirement Number: 5052/1.

Abstract: The collection is used, along with other supporting documents, to establish that the standards for production are followed for a given type and style of beer. Also, TTB examines the formula information to determine if the product may be produced at a brewery and if it is to be taxpaid at the rate applicable to beer and sake.

Current Actions: We are making minor corrections to this information collection and are submitting it as a revision.

Type of Review: Revision of a currently approved collection.

Affected Public: Business and other for-profit.

Estimated Number of Respondents: 100.

Estimated Total Annual Burden Hours: 500.

Title: Formula and Process for Alcohol Beverages.

OMB Number: 1513–0122.

TTB Form Number: 5100.51.

Abstract: TTB F 5100.51 is used to determine the classification of distilled spirits, wine, and malt beverages for labeling and for consumer protection. The form describes the person filing, the type of product to be made, and restrictions to the label and/or manufacturing process. The form will be used by TTB to ensure that a product is made and labeled properly and to audit distilled spirits, wine, and malt beverage operations. Records are kept indefinitely for this information collection.

Current Actions: We are making minor corrections to this information collection and are submitting it as a revision.

Type of Review: Revision of a currently approved collection.

Affected Public: Business or other for-profit.

Estimated Number of Respondents: 2,000.

Estimated Total Annual Burden Hours: 8,000.

Dated: October 22, 2008.

Francis W. Foote,

Director, Regulations and Rulings Division.

[FR Doc. E8–25749 Filed 10–28–08; 8:45 am]

BILLING CODE 4810–31–P

Federal Register

Wednesday,
October 29, 2008

Part II

Department of Labor

Employment and Training Administration

29 CFR Part 29

Apprenticeship Programs, Labor Standards for Registration, Amendment of Regulations; Final Rule

DEPARTMENT OF LABOR

Employment and Training Administration

29 CFR Part 29

RIN 1205–AB50

Apprenticeship Programs, Labor Standards for Registration, Amendment of Regulations

AGENCY: Employment and Training Administration, Labor.

ACTION: Final rule.

SUMMARY: The Department of Labor (DOL or Department) is issuing this final rule to update regulations that implement the National Apprenticeship Act of 1937. 29 U.S.C. 50. DOL issued a notice of proposed rulemaking (NPRM) on December 13, 2007, outlining proposed updates to labor standards, policies and procedures for the registration, cancellation and deregistration of apprenticeship programs, apprenticeship agreements, and administration of the National Apprenticeship System. 72 FR 71020, Dec. 13, 2007.

DATES: *Effective date:* The final rule will become effective December 29, 2008.

FOR FURTHER INFORMATION CONTACT: John Ladd, Administrator, Office of Apprenticeship, 200 Constitution Avenue, NW., Room N5311, Washington, DC 20210, e-mail *ladd.john@dol.gov*; Telephone (202) 693–2796 (this is not a toll-free number) or (877) 889–5627 (TTY/TDD).

SUPPLEMENTARY INFORMATION: This preamble is divided into three sections. Section I provides general background information on the development of the final rule. Section II discusses the comments and regulatory changes in the final rule. Section III covers the administrative requirements for this final rule as mandated by statute and executive order.

I. Background

On December 13, 2007, the Department published an NPRM (72 FR 71020, Dec. 13, 2007) proposing to revise the regulations that implement the National Apprenticeship Act of 1937. We initially invited comments for a 60-day period through February 12, 2008. Several commenters submitted requests for an extension of the comment period. In response, we published a notice (73 FR 7693, Feb. 11, 2008) extending the comment period by 30 days. The comment period closed on March 12, 2008.

Unique, individual comments received during the comment period following publication of the NPRM have been posted on *www.regulations.gov*. Although we considered all comments, duplicate copies of comments were not posted.

The National Apprenticeship Act of 1937 authorized DOL to formulate and promote the furtherance of labor standards necessary to safeguard the welfare of apprentices, to extend the application of such standards by encouraging their inclusion in contracts of apprenticeship, to bring together employers and labor for the formulation of programs of apprenticeship, and to cooperate with State agencies engaged in the formulation and promotion of standards of apprenticeship.

The Department promulgated regulations for implementing the National Apprenticeship Act in 1977. The regulations govern the National Apprenticeship System in which the Department, State agencies, industry leaders, employers, employer associations, labor-management organizations (primarily consisting of labor organizations and employers), and educational institutions collaborate, develop, operate, and oversee apprenticeship programs that draw on the skills and knowledge that business and industry needs from its employees, to ensure that apprentices develop up-to-date and relevant skills. In the 30 years since, the Department and its partners in the National Apprenticeship System have recognized that technological advances, demographic changes, and globalization have significantly altered the context in which apprenticeship programs operate. The Department and its partners recognize that for registered apprenticeship to keep pace with these changes, and to continue apprenticeship's vital role in developing a skilled, competitive workforce, the regulatory framework for registration of apprenticeship programs and administration of the National Apprenticeship System must be updated. For example, many program sponsors have requested more flexibility in the requirements for provision of related technical instruction. Other program sponsors, particularly in industries that have not traditionally used registered apprenticeship, have sought flexibility in the requirements for length of time in the on-the-job learning component so that apprentices could progress toward program completion based on demonstration of competencies. The Government Accountability Office's August 2005 report, ''Registered Apprenticeship Programs: Labor Can Better Use Data to Target Oversight,'' and the Office of Management and Budget's Program Assessment Rating Tool (PART) review of Registered Apprenticeship, have emphasized the need to improve program quality and accountability in the National Apprenticeship System.

The December 13, 2007 NPRM proposed to revise 29 CFR part 29 based on these developments and in consultation with the Advisory Committee on Apprenticeship (ACA), the National Association of State and Territorial Apprenticeship Directors (NASTAD), and State Apprenticeship Agencies. This final rule implements changes to 29 CFR part 29 that will increase flexibility, enhance program quality and accountability, and promote apprenticeship opportunity in the 21st century, while continuing to safeguard the welfare of apprentices. In addition to the specific changes discussed below, we have made minor editorial changes throughout the final rule.

The final rule takes effect on December 29, 2008. However, States will have up to a 2-year period in which to make the changes to State law, regulation and/or policy needed to come into compliance with this final rule before having to apply for continued recognition under § 29.13(c). The Department will work with States to make as seamless as possible the transition from State laws recognized under current regulations to State laws recognized under the final rule.

II. Discussion of the Comments and Regulatory Changes

Summary of Comments

The Department received 2,660 submissions commenting on the NPRM by the close of the comment period. All comments were carefully reviewed. We found 2,437 to be cover letters, form letters or duplicates, a preponderance of which were from members of a single employer association supporting the proposed regulatory changes. Of the 223 non-duplicative comments, the majority were from labor organizations and employer associations that sponsor registered apprenticeship programs, and state government entities. All relevant comments are discussed below. In response to these comments we made several substantive changes which are discussed below.

Twenty-five commenters expressed general support for the NPRM and agreed that the proposed changes will update, improve, and advance the mission of the National Apprenticeship System to meet the needs of today's industry and economy. Other commenters generally commended the Department for improving and

promoting registered apprenticeship and the National Apprenticeship System.

Twenty-five commenters generally preferred the current regulatory framework for registered apprenticeship over the proposed changes, stating that the current regulations work well and that the proposed changes are unnecessary. We also received comments indicating disapproval of the proposed changes due to concerns over the potential impact on State agencies. Additional commenters suggested that the proposed changes may impact certain apprenticeship programs more than others. A few commenters disapproved of the proposed changes due to the potential implications for apprentices.

Discussion of Comments

Purpose and Scope (§ 29.1)

A few commenters agreed with the addition to the Purpose and Scope of the phrase ''promote apprenticeship opportunity.'' They noted that this addition is a fundamental objective of the National Apprenticeship Act and should be expressly included in DOL regulations.

Response: After review of the comments we will promulgate the rule as proposed.

Definitions (§ 29.2)

Section 29.2 clarifies and redesignates existing definitions and establishes new definitions for certain terms used in the registration of apprenticeship programs and in the ongoing operations of the National Apprenticeship System. We proposed to carry forward the following existing definitions for terms defined in the original regulations: ''administrator,'' ''apprentice,'' ''apprenticeship program,'' ''cancellation,'' ''Department,'' ''employer,'' ''Federal purposes,'' ''registration of an apprenticeship agreement,'' ''registration of an apprenticeship program,'' ''sponsor,'' and ''State.'' Accordingly, we did not invite comments on these terms. Similarly, the final rule carries forward the definitions for these terms, as contained in the existing regulations. Of the proposed new and amended definitions, we did not receive comments on the definitions for ''Office of Apprenticeship,'' ''Registration Agency,'' ''technical assistance,'' and ''State office.'' We made no changes to the proposed definitions of these terms.

We received one comment about the definitions in general. The commenter argued that the definitions in § 29.2 would require State Apprenticeship Agencies to control and direct State Apprenticeship Councils, thus reversing traditional authority without any clear explanation of why the Department wants to change the council-agency relationship. The commenter also asserted that the definitions are an unauthorized intrusion on a State's legislative rights and priorities.

Response: We have determined that State Apprenticeship Agencies are the appropriate entities to receive the Department's grant of authority to register apprenticeship programs and apprentices for Federal purposes. For reasons enumerated below, we require the State Apprenticeship Agency to determine the role of the State Apprenticeship Council. Under the existing regulatory scheme, the Department's oversight of the National Apprenticeship System has been complicated by the fact that States in which the Registration Agencies are State Apprenticeship Councils vary considerably in their policies and procedures for the administration of registered apprenticeship for Federal purposes. For example, we have found it difficult to hold State Apprenticeship Councils accountable for conformity with the requirements of part 29 because the Councils are sometimes comprised of independent, appointed individuals, who may not be answerable to the State government agency that actually operates the daily functions of registered apprenticeship for Federal purposes in the State. In another case, the State Apprenticeship Council's limited involvement in the full time operations of the State's registered apprenticeship operations has impeded the Department's working relationship with the State Apprenticeship Council. In other instances, State Apprenticeship Councils have not made determinations about approval of apprenticeship program standards in a timely manner. In order to achieve consistency within the National Apprenticeship System for the promotion of registered apprenticeship opportunities and for the registration of apprenticeship standards that meet the requirements of this part, we have determined that the relationship between the Federal government and the entities that act on our behalf must be between two government agencies: DOL and the cabinet-level government agency in each State's government that operates and manages the functions of registered apprenticeship in that State. At the same time, we recognize the considerable value that State Apprenticeship Councils provide for the promotion and establishment of apprenticeship programs. State Apprenticeship Council members are often closely associated with apprenticeship program sponsors and can directly facilitate linkages between apprentices and program sponsors. As explained below in the discussion of § 29.13(a)(2), States seeking recognition from the Department are still required to establish State Apprenticeship Councils for advisory and or regulatory purposes. Under the revised regulatory framework, where a State has been ''recognized,'' the State Apprenticeship Council must operate at the direction of the State Apprenticeship Agency. Having given full consideration to the general comment about the impact of the proposed definitions on the relationship between State Apprenticeship Councils and State Apprenticeship Agencies, we are promulgating the definitions for State Apprenticeship Agency and State Apprenticeship Council as proposed.

''Apprenticeship Committee (Committee)''

Five commenters addressed the proposed definition of ''apprenticeship committee,'' which clarified that an apprenticeship agreement is between an apprentice and either the apprentice's program sponsor, or an apprenticeship committee acting as an agent for the program sponsor. One commenter supported the definition as proposed. Other commenters noted that use of the term ''worker'' may be confusing in the parenthetical notation in paragraph (b), which defines a non-joint committee as ''a unilateral or group non-joint (may include workers) committee [which] has employer representatives but does not have a bona fide collective bargaining agent as a participant.'' The commenter suggested that for consistency, the term ''employee'' should replace the term ''worker.'' Another commenter suggested that the incumbent workforce of a program sponsor is a stakeholder that should be included in the definition of ''apprenticeship committee,'' regardless of the status of a collective bargaining agreement in a program sponsor's workplace. Another commenter recommended removing the terms ''non-joint,'' in paragraph (b), and ''joint'' in paragraph (a), which specifies that ''a joint committee is composed of equal number of representatives of the employer(s) and of the employees represented by a bona fide collective bargaining agent.'' The commenter suggested the phrase, ''unilateral or group, which shall include equal numbers from employer(s) and employees.'' Another commenter suggested that the proposed change in which an apprenticeship committee acts

as an agent of the apprenticeship program sponsor, is not the apprenticeship program sponsor, and is to be subordinate to the apprenticeship program sponsor, appears to be inconsistent with the core concepts of the Employee Retirement Income Security Act of 1974 (ERISA).

Response: We agree with the suggestion that the use of the term ''workers,'' in place of ''employees,'' may cause confusion, and so we have changed the definition by replacing ''workers'' with ''employees'' in paragraph (2). We do not agree with the suggestion to delete the terms ''joint and non-joint.'' The commenters suggested replacement wording does not adequately provide the flexibility needed to address the variety of circumstances faced by apprenticeship committees across the nation. Nor are we convinced that the terms ''joint and non-joint'' are problematic. These terms are well-recognized and used throughout the National Apprenticeship System. Accordingly, we have kept the terms ''joint and non-joint.'' We also do not agree with the suggestion that a program sponsor's incumbent workforce should be required members of an apprenticeship committee. The determination to include employees on an apprenticeship committee is most appropriately addressed by the program sponsor, not DOL. As mentioned, one comment noted that the definition of ''apprenticeship committee'' may be inconsistent with ERISA because it might be read as requiring the apprenticeship committee to always act in the sponsor's interest, rather than in the interest of the participants when the committee is carrying out fiduciary responsibilities. Although we do not agree with this reading of the definition, we have modified the definition to avoid confusion on this point.

''Certification or Certificate''

Three commenters expressed concern over the potential effect of paragraph (a) of the proposed definition of ''certification or certificate'' on individual programs that are currently using State-approved industry standards. Paragraph (a) provides that in order to receive certification from the Office of Apprenticeship, national guidelines for apprenticeship standards which are developed by a national committee or organization for policy or guideline use by local affiliates must conform to the standards of apprenticeship set forth in § 29.5. Commenters stated that standards approved by State Apprenticeship Agencies are more trade-specific and protective of apprentices' safety than any proposed national guidelines for apprenticeship standards. They also stated that it would be problematic to allow an outside ''national committee or organization'' to dictate the direction of individual programs and concluded that national guidelines for apprenticeship standards will ''erode apprenticeship standards by trade, and blend multiple trades into one standard.'' In addition, a few commenters questioned who would set the standards used in national guidelines for apprenticeship standards.

Response: These comments appear to reflect a misunderstanding of the current definitions of ''certification or certificate.'' The purpose of national guidelines for apprenticeship standards, as established by the definition of ''certification'' in the existing regulations, is to provide policy and guidance to local affiliates of national organizations in developing standards for approval and registration. National Guideline Standards are developed by national committees or organizations, joint or unilateral, and are certified by DOL's Office of Apprenticeship as substantially conforming to the requirements of 29 CFR parts 29 and 30. When local affiliates develop local standards for registration, even though the local standards may be based upon the organizations' National Guideline Standards, they must meet all the requirements of and be approved by the Registration Agency in that State. Thus, the approval of national guidelines for apprenticeship standards in no way precludes a State Apprenticeship Agency or a local sponsor from developing apprenticeship standards that are more trade-specific or protective. This flexibility does not, however, authorize a State Apprenticeship Agency to develop or approve standards that improperly restrict registered apprenticeship opportunities. Therefore, we are promulgating the definition of ''certification or certificate'' as proposed.

''Competency''

Sixteen commenters weighed in on the proposed definition of ''competency,'' which means ''the attainment of manual or technical skills and knowledge, as specified by an occupational standard.'' Many expressed apprehension over the implications of the definition, suggesting that it does not clearly articulate how competency will be measured (e.g., on a set of validated industry and trade-specific standards). Others noted that the definition does not mandate specific types of training (e.g., on-the-job, classroom) that are often critical to meet industry accepted guidelines for journey-level status. Finally, others raised concerns that with this definition, journeyworker status will be determined in a subjective manner, without strict standards for objective program administration.

Response: We agree that the definition needs to address the measurement of competency with greater specificity. Therefore, we have revised the proposed definition to provide for the ''attainment of manual, mechanical or technical skills and knowledge, as specified by an occupational standard and demonstrated by an appropriate written and hands-on measurement of proficiency.'' To align with the criteria for apprenticeable occupations established under § 29.4(c), the final rule adds the term ''mechanical'' as a descriptor of the skills and knowledge that are attained.

Regarding concerns that the definition does not require specific types of training and that journeyworker status will be determined in a subjective manner, we have concluded that apprenticeship programs need flexibility when setting the requirements for training and the attainment of journeyworker status, so that the program standards can take into account the circumstances of particular occupations and programs. Additionally, we note that the requirement for an apprenticeable occupation to include on-the-job learning as specified in § 29.4(c), and the requirements for apprenticeship program standards to include on-the-job learning as specified in § 29.5(b)(2) and related instruction specified in § 29.5(b)(4), address concerns regarding specific training. Therefore, we do not adopt the comments that favor a more prescriptive approach to those matters in the definition of ''competency.''

''Completion Rate''

Several commenters requested a formal definition of the term ''completion rate,'' stating that further guidance was necessary for evaluating program performance based on a completion rate.

Response: We agree that a definition of ''completion rate'' is necessary to facilitate compliance with the requirement in § 29.6 to evaluate the performance of apprenticeship programs, which is a critical component of strengthening accountability for program outcomes. The final rule adds a definition for the term ''completion rate'' to mean ''the percentage of an apprenticeship cohort who receive a certificate of apprenticeship completion within 1 year of the projected

completion date. An apprenticeship cohort is the group of individual apprentices registered to a specific program during a 1 year time frame.'' This definition is consistent with the methodology used by other Federal employment and training programs, which measure program outcomes by calculating rates of program participants who successfully achieve a specific outcome such as entering employment or retaining employment. Consistency in methodology will minimize the implementation burden on Registration Agencies and will further align registered apprenticeship with other workforce investment programs.

''Electronic Media''

Although commenters did not provide any comments specific to the proposed definition for ''electronic media,'' many raised concerns that the use of electronic media in the proposed revision to related instruction could supplant, reduce, or eliminate an apprentice's interface with an instructor in a lab or classroom setting. They emphasized the importance of classroom and hands-on learning for the successful acquisition of skills and knowledge necessary for completion of an apprenticeship program.

Response: We recognize the validity of this concern, as addressed further in the discussion of § 29.5(b)(4). However, we have determined that the inclusion of electronic media in the definition of ''related instruction'' is necessary to align the National Apprenticeship System with technological advances in the delivery of related instruction. We have made no change to the proposed definition of ''electronic media.''

''Interim Credential''

Some commenters suggested that the proposed definition for ''interim credential,'' which is ''a credential issued by the Registration Agency, upon the request of the sponsor, as certification of competency attainment by an apprentice,'' does not sufficiently include requirements for the recipient to meet an objective, external standard associated with the subject matter for which an interim credential is issued. Others asserted that the definition of ''interim credential'' could diminish the meaning and significance of the status of ''journeyworker'', and that the use of interim credentials in the National Apprenticeship System may serve as a disincentive to completing an apprenticeship program.

Response: We recognize these concerns and address them below in our discussion of the requirements for program standards in § 29.5(b). We have made no change to the proposed definition of ''interim credential.''

Issuance of interim credentials will be determined by the program sponsor's choice of approach for an apprentice's progression through an apprenticeship program: Competency-based, time-based, or hybrid. Program sponsors must identify and define all interim credentials in the program standards that are registered with the Registration Agency. Interim credentials may be issued only for industry-recognized components of an apprenticeable occupation. Therefore, if an apprenticeship program's standards do not include provisions for issuance of interim credentials for specific components of an apprenticeable occupation, the Registration Agency with which the program is registered may not issue interim credentials to apprentices registered with that program.

We reiterate that interim credentials are issued by the Registration Agency, upon request of the appropriate sponsor, as certification of an apprentice's attainment of competency. Further, the regulations do not require program sponsors to include interim credentials in their program standards, nor do they require sponsors to request that a Registration Agency issue interim credentials to apprentices registered in their apprenticeship programs. The Department also recognizes that some Registration Agencies may find the issuance of interim credentials to be unduly burdensome and beyond their capabilities. Therefore, Registration Agencies, other than the Office of Apprenticeship, may opt not to offer this additional service.

We have concluded that the revised regulatory framework does not detract from the overall goal of the National Apprenticeship System to support and enable apprentices to complete an apprenticeship program. Through the authorization of interim credentials, the National Apprenticeship System recognizes that some industries and occupations are more amenable to an incremental recognition of an apprentice's increasing skills, knowledge, and abilities. In such industries the use of interim credentials can, thereby, afford multiple opportunities for apprentices to grow and expand their knowledge and their capacity to meet current, new, and emerging industry advances. Use of interim credentials also recognizes the fact that not all apprentices will complete their apprenticeship programs and offers opportunities for recognition of what these individuals have learned. Therefore, interim credentials will also enable apprentices to obtain portable credentials commensurate with the skills and competencies acquired and demonstrated throughout an apprenticeship. Notwithstanding the value of interim credentials, the issuance of a certificate of completion of apprenticeship, and the associated ''journeyworker'' status, remains the ultimate goal for the National Apprenticeship System.

''Journeyworker''

Ten comments were submitted on the proposed definition of ''journeyworker.'' One commenter requested inserting the word ''abilities'' to the definition to read ''a worker who has attained a level of skills, abilities, and competencies recognized within an industry,'' asserting that use of the term ''abilities'' provided a more thorough recognition of a journeyworker's qualifications. Multiple commenters recommended using industry standard definitions for ''journeyworker,'' asserting that permitting employers to recognize other definitions would leave the National Apprenticeship System open to abuse. Others asserted that by expanding the term to refer to a mentor, technician, specialist or other skilled worker gives the employer the authority to determine journeyworker status. One commenter argued for retention of the term ''journeyman,'' because in the traditional sense it is not and has not been gender-specific, and that it refers to rank or status in a skilled trade.

Response: We agree with the suggestion to expand the definition to include ''abilities,'' and have revised the definition accordingly. We disagree with the assertion that by granting individual employers the authority to designate journeyworker status, the term ''journeyworker'' will be subject to abuse in the National Apprenticeship System. Currently, program sponsors designate an individual as a journeyworker when that individual has sufficient skills, abilities, and competencies to be recognized by the employer as a journeyworker. The revised regulatory framework carries forward this approach currently used in the National Apprenticeship System. With regard to the use of the term ''journeyworker,'' the Department of Labor is committed to avoiding the use of terms that are or may appear to be gender-specific, even if the historic usage of the term has not been so. We disagree with the assertion that the term journeyman is not gender-specific. Accordingly, the final rule retains the term ''journeyworker.''

''Provisional Registration''

Several comments on proposed revisions to § 29.3(g) and § 29.3(h) regarding provisional registration indicate that the proposed definition of ''provisional registration'' did not adequately specify the process by which a provisionally registered program would receive permanent registration, continuance of provisional registration, or rescission of registration.

Response: We agree with these comments and have clarified the requirements by expanding the definition of ''provisional registration'' to refer to the relevant criteria in § 29.3(g) and § 29.3(h), which provide for provisional registration and review of provisionally registered programs. These additions will avoid any ambiguity between the proposed definition of provisional registration in § 29.2, and the subsequent opportunity for additional review and/or removal of the provisional status after the first full training cycle. Accordingly, in the final rule ''provisional registration'' is defined to mean, ''the 1-year initial approval of newly registered programs that meet the required standards for program registration, after which program approval may be made permanent, continued as provisional, or rescinded following a review by the Registration Agency, as provided for in the criteria described in § 29.3(g) and § 29.3(h).''

''Quality Assurance Assessment''

In their discussion of program performance standards in proposed § 29.6, some commenters recommended establishing a clear definition of ''quality assurance assessment.''

Response: We agree that § 29.6 will be improved by adding a formal definition for ''quality assurance assessment,'' so that programs are assessed consistently and fairly across the National Apprenticeship System. Accordingly, in the final rule ''quality assurance assessment'' means, ''a comprehensive review conducted by a Registration Agency regarding all aspects of an apprenticeship program's performance, including but not limited to determining if apprentices are receiving: On-the-job training in all phases of the apprenticeable occupation; scheduled wage increases consistent with the registered standards; related instruction through appropriate curriculum and delivery systems; and that the Registration Agency is receiving notification of all new registrations, cancellations, and completions as required in this part.'' This definition codifies the Office of Apprenticeship's existing practice of reviewing programs for quality based on the factors described above.

''Registration Agency''

A commenter asserted that by expanding the definition of ''Registration Agency'' to include registration of apprentices and programs, providing technical assistance, and conducting reviews for compliance with parts 29 and 30, and quality assurance assessments, the Department is attempting to retain the services of a State Apprenticeship Agency without Federal funding or State legislative approval.

Response: We disagree with these assertions. The definition of ''Registration Agency'' codifies existing practice in the National Apprenticeship System in which a Registration Agency, whether it is the Office of Apprenticeship or a recognized State Apprenticeship Agency, provides guidance and assistance to help program sponsors comply with this part; reviews registered programs; and registers apprentices and programs. We view these functions as necessary to properly administer the National Apprenticeship System. Further, the definition is intended to emphasize consistency across the National Apprenticeship System regarding the types of support and assistance that registered apprenticeship program sponsors should receive from a Registration Agency, regardless of their geographic location. It should also be noted that State Apprenticeship Agency recognition as a Registration Agency, for Federal purposes, is voluntary. We have made no change to the proposed definition of ''Registration Agency.''

''Related Instruction''

Several commenters noted that the proposed separation of apprenticeship's theoretical instruction into two terms, ''related technical instruction'' and ''supplemental instruction,'' creates undue complications. On the other hand, a commenter praised the addition of ''supplemental instruction,'' stating that such instruction will increase opportunities for learning, as well as provide additional opportunities to create and ensure equitable classroom and worksite environments. Other commenters asserted that ''related instruction'' should not be limited to ''core'' requirements. Further, the commenters noted that safety processes like CPR/first-aid training may be part of a related training for many apprenticeable occupations and expressed concern that valuable training would be marginalized.

Response: We agree that the commenters have raised valid concerns and we have therefore deleted the proposed definition of ''supplemental instruction.'' Our intent in separating the two terms was to clarify that instruction specific to a particular occupation is ''related instruction,'' and instruction that is relevant but not necessarily occupationally-specific is ''supplemental instruction.'' However, we recognize that the proposed elements of supplemental instruction, such as job site management, leadership, communications, first-aid/CPR, field trips, and new technologies/processes, and in particular those pertaining to health and safety, have been long-standing facets of the term ''related instruction.'' The final rule retains the existing term ''related instruction'' and thus carries forward existing practice in the National Apprenticeship System which incorporates the components of the proposed definition of ''supplemental instruction.'' We have also deleted the term ''core'' from the definition of ''related instruction,'' to indicate that all components of related instruction that are related to the occupation are important to an apprenticeship program, whether or not they are occupation-specific. We have also added a comma after the phrase ''such instruction may be given in a classroom,'' to make the definition consistent with the substantive provisions in § 29.5(b)(4). Therefore, in the final rule, ''related instruction'' means, ''an organized and systematic form of instruction designed to provide the apprentice with the knowledge of the theoretical and technical subjects related to the apprentice's occupation. Such instruction may be given in a classroom, through occupational or industrial courses, or by correspondence courses of equivalent value, electronic media, or other forms of self-study approved by the Registration Agency.''

''State Apprenticeship Agency''

We received two comments on the definition of ''State Apprenticeship Agency.'' One commenter stated that the proposed definition of ''State Apprenticeship Agency'' would allow for the State Apprenticeship Agency to assume the powers of the State Apprenticeship Council. The other commenter sought clarification on the proposed definition.

Response: The proposed definition of ''State Apprenticeship Agency'' as ''an agency of a State government that has responsibility and accountability for apprenticeship within the State,'' reflects the Department's determination

that only State government entities should be recognized as Registration Agencies, in order to ensure accountability for oversight and management of a State's apprenticeship system for Federal purposes. As discussed above, where a State Apprenticeship Agency has been ''recognized,'' the State Apprenticeship Agency must establish and maintain a State Apprenticeship Council. Additionally, as explained in the discussion of § 29.13(a)(2), we have clarified that the Council operates at the direction of the State Apprenticeship Agency. Therefore, we have made no changes to the proposed definition of ''State Apprenticeship Agency'' nor to the State Apprenticeship Agency's role as the only entity authorized to register and oversee apprenticeship programs and agreements for Federal purposes.

''State Apprenticeship Council''

Two commenters questioned if the definition of ''State Apprenticeship Council'' would mean that the Council would only serve an advisory role rather than a regulatory role.

Response: Our intent in the proposed rule was to provide that the State Apprenticeship Council could serve in either an advisory role or regulatory role. As explained further in the discussion of § 29.13(a)(2), we have clarified that a State Apprenticeship Council operates at the direction of the State Apprenticeship Agency. Depending on how this direction is exercised, a State Apprenticeship Council could serve either a regulatory or an advisory role. The requirements for operation of a State Apprenticeship Council are set forth in §§ 29.13(a)(2) and (b)(3). We have made no change to the proposed definition of ''State Apprenticeship Council.''

''Transfer''

Several commenters noted that the proposed revisions regarding apprentice transfers in § 29.5(b) and the proposed new definition of ''transfer'' in § 29.2 raise questions about approval and consent for transfer and the potential impact on apprenticeship program sponsors. Several commenters questioned the need for apprentices to initiate requests for transfers, asserting that such latitude could enable apprentices to transfer registration without regard to negative impact on program sponsors. Other commenters suggested that program sponsors could use the provisions of this definition to transfer an apprentice to another program or to another employer without the apprentice's consent, thereby potentially negatively impacting the safety and welfare of the apprentice.

Response: We do not foresee that the transfer of apprenticeship registration from one program to another or from one employer to another would occur frequently or on a regular basis. The intent of this provision is to provide flexibility for an apprentice to continue his or her apprenticeship in changing circumstances, such as the need for geographic relocation for personal reasons. However, we agree that all parties to the transfer must be in agreement in order to avoid potential negative impacts. Accordingly, we have revised the definition to clarify that in order for a transfer to occur, the affected parties (i.e., the apprentice and each apprenticeship committee or program sponsor) must reach agreement regarding the shift of the apprentice's registration from one program to another or from one employer within a program to another employer within that same program.

Eligibility and Procedure for Registration of an Apprenticeship Program (§ 29.3)

This section addresses the criteria and process used by a Registration Agency to register apprenticeship programs. In general, the comments we received supported the proposed changes which were designed to ensure high quality for registered apprenticeship programs, assist program sponsors through early intervention and technical assistance, and foster closer working relationships between the apprenticeship sponsors and Registration Agencies.

Resources

Several commenters raised concerns about the adequacy of the resources available to the DOL and the Office of Apprenticeship for follow through requirements pertaining to provisional registration. Two commenters asked who would pay for technical assistance provided to new programs.

Response: As under current regulations, the resources necessary to carry out the requirements of § 29.3 would be the responsibility of the Registration Agency, including provision of technical assistance. States seeking registration authority for Federal purposes must be prepared to provide resources necessary for these responsibilities.

Provisional Registration

Proposed § 29.3(g) is a new provision which establishes provisional approval for 1 year of new programs that the Registration Agency preliminarily determines comply with part 29. Most commenters supported the concept of provisional registration for new programs, but expressed concern that DOL currently appears to be understaffed and would not have adequate resources to perform the reviews required at the end of a program's first year to determine if the program should receive full recognition. Some commenters asserted that the determination to grant provisional program approval, regardless of length, belongs to State Apprenticeship Agencies.

Response: As discussed in the NPRM, the ''provisional registration'' concept was added to enhance monitoring of the performance of apprenticeship programs registered for Federal purposes by the Office of Apprenticeship and recognized State Apprenticeship Agencies (i.e., the Registration Agencies). As we have repeatedly emphasized, the States derive any authority they exercise, for Federal purposes, from the recognition accorded by the Department. Therefore, provisional program approval does not impinge on State authority.

We recognize that adequate resources are required to successfully address the additional workload associated with provisional registration procedures. Accordingly, we are realigning resources to provide these services in States where the Office of Apprenticeship serves as the Registration Agency. As discussed below under § 29.13, Recognition of State Apprenticeship Agencies, States seeking registration authority for Federal purposes must provide sufficient resources to perform all the functions of a Registration Agency. We have revised § 29.3(g) to clarify that the Registration Agency is responsible for reviewing programs for quality and conformity with the requirements of this part at the end of the first year after registration. A program that conforms to the requirements of part 29 may be permanently approved, or the provisional approval may be extended through the end of the first training cycle. A program not in operation or not conforming to the regulations during the provisional approval period must be recommended for deregistration procedures.

Program Reviews

Proposed § 29.3(h) provides that a satisfactory review at the end of the first full training cycle will result in removal of provisional approval, and provides that subsequent reviews will be conducted no less frequently than on a five-year cycle. A few commenters questioned how this five-year cycle of program reviews, which generally

corresponds to the completion of the first full training cycle, aligns with competency-based or hybrid programs that may have training cycles of different lengths. Other commenters questioned if the five-year cycle provided in § 29.3(h) would conflict with a State Apprenticeship Agency's program review cycle that might occur more frequently.

Response: Competency-based and hybrid programs also have requirements for on-the-job work experience associated with program completion, but the cycles of each may vary in length from traditional apprenticeship programs. To address this, § 29.3(h) of the final rule clarifies that subsequent reviews will be completed after a satisfactory review at the end of the first full training cycle, and must be conducted no less frequently than every 5 years. Section 29.3(h) does not preclude a State Apprenticeship Agency from conducting reviews more frequently than prescribed. If a review demonstrates that a provisionally registered program has satisfactorily met the requirements of this part in a timeframe shorter than the typical 5 years, provisional registration may be transformed to permanent registration.

Timeframe for Approval of Proposals and Modifications

A few commenters questioned the requirement in § 29.3(i) for a Registration Agency to make a determination on whether to approve sponsor proposals or applications for modifications to registered programs within 45 days from the date of receipt. Existing regulations simply provide for ''prompt'' submission of requests for modification and set no timeframe for a Registration Agency and provide no guidance on what the Registration Agency must do to process the application or modification. Commenters asserted that 45 days does not provide sufficient time for review and comment. In particular, this proposed requirement would not align with schedules for State Apprenticeship Councils that only meet quarterly or every 90 days, to review proposals and modifications for registered apprenticeship programs. Other commenters did support the proposed 45-day timeframe for the Registration Agency to make a determination whether to approve such submissions.

Response: In light of the quarterly meeting schedule used by many State Apprenticeship Councils and State Apprenticeship Agencies for review of proposals and modifications, a 90-day timeframe is more appropriate for the Registration Agency to make determinations whether to approve such submissions. We have also clarified that if approved, the Registration Agency will record and acknowledge the modifications within 90 days of approval. Final § 29.3(i) also clarifies that if the modifications are not approved, the Registration Agency will notify the sponsor of the disapproval, and provide reasons therefore. Final § 29.3(i) has been changed accordingly.

Criteria for Apprenticeable Occupations (§ 29.4)

Section 29.4 revises the criteria for determining when an occupation qualifies as apprenticeable. The revisions proposed in the NPRM align § 29.4 with changes to ways to progress through an apprenticeship program, as discussed further in the discussion of § 29.5(b)(2). Some commenters raised questions and concerns about deletion of the term ''skilled trade'' and inconsistency between an apprenticeable occupation's requirement for hours of on-the-job learning and the competency-based approach for completion of an apprenticeship program, provided by final § 29.5(b)(2).

Deletion of ''Skilled Trade''

A few commenters raised concerns about the deletion of the term ''skilled trade'' in describing an apprenticeable occupation, asserting that the term is recognized nationally in the construction industry, and is commonly used.

Response: We acknowledge that the term ''skilled trade'' is a nationally recognized term in the construction industry, and emphasize that deletion of this term in the regulations for the National Apprenticeship System is not meant to discourage continued use of this term. However, as apprenticeship expands into new industries, we have determined that more generic approach better reflects the terminology used by a variety of industries. Accordingly, we have not added ''skilled trade'' to the final rule.

Hours of On-The-Job Learning

Some commenters suggested that requiring at least 2,000 hours of on-the-job work experience in § 29.4(c) conflicts with the competency-based approach outlined in § 29.5(b)(2).

Response: The 2000 hour standard in § 29.4(c) is solely for the purpose of helping to define an apprenticeable occupation. In order for an occupation to be considered apprenticeable it must be an occupation which, if learning were conducted in the traditional on-the-job manner, would require at least 2,000 hours of on-the-job learning. As is discussed more fully in the next section on standards of apprenticeship, only ''time-based'' apprenticeship programs will be required to provide for at least 2000 hours of actual on-the-job learning. ''Competency-based'' and ''hybrid'' programs also will be required to provide for on-the-job learning, but the required hours will vary by program.

The comments on this section have brought to light an inconsistent and interchangeable use of the terms ''on-the-job training'' and ''work experience'' throughout the proposed rule to refer to the on-the-job learning component of registered apprenticeship, as required in § 29.4(c) and § 29.5(b)(2). We have replaced the terms ''on-the-job training'' and ''on-the-job work experience'' with the term ''on-the-job learning'' throughout the final rule.

Standards of Apprenticeship (§ 29.5)

Proposed changes to § 29.5 regarding standards of apprenticeship received many comments; over 132 comments pertained to the use of a competency-based approach to progression through an apprenticeship. Other significant areas of interest centered on related instruction, apprentice instructor certification, advanced standing or credit, transfers, interim credentials, and cancellation rate.

Three Approaches to Completion of Apprenticeship

Section 29.5(b)(2), which is based on the existing requirement that on-the-job learning must be consistent with industry practice, presents three methods by which an individual apprentice may progress toward the industry standard for work experience. These methods are: (i) A time-based approach involving completion of at least 2,000 of hours of on-the-job work experience; (ii) a competency-based approach involving successful demonstration of acquired skills and knowledge by an apprentice, as verified by the program sponsor, plus an on-the-job learning component; and (iii) a hybrid approach involving completion of a specified minimum number of hours plus the successful demonstration of competency.

Many commenters raised questions and asked for clarification about the proposed three approaches. Many commenters questioned whether the competency-based model would require on-the-job learning. Most commenters expressed concern that the proposed terms were not adequately defined, that industries should be equipped to monitor validity and achieve standardization, and that existing

minimum standards would be compromised. A community-based organization praised the proposed three approaches, citing studies that indicate that nontraditional apprentices, such as women, are more likely to complete programs if such requisites as pre-apprenticeship training programs were recognized in a competency-based or hybrid approach. Several commenters expressed concern that the competency-based and the hybrid methods for completion of an apprenticeship would allow apprentices to circumvent on-the-job learning and related technical instruction with a demonstration of acquired skills and knowledge. Other commenters expressed apprehension over the potential for safety compromise, particularly in the construction industry, and the need to ''safeguard the welfare of apprentices.'' One commenter asserted that a competency-based apprenticeship program would not require an apprentice to demonstrate competency in a ''real time, distracting, sometimes noisy, sometimes dirty, and often unpredictable environment.'' Many commenters interpreted proposed § 29.5(b)(2) to mean that all program sponsors would have to adopt all three approaches for completion of apprenticeship.

Response: This rule carries forward the traditional model because it has worked well in many occupations that have used a time-based approach for registered apprenticeship; we expect that most program sponsors in those occupations will continue using this approach. However, as part of the Department's strategic emphasis on meeting the training needs of business and workers, and our policy of expanding apprenticeship, it has become clear that the traditional time-based approach to training does not fit the norms of all industries or occupations seeking to use the registered apprenticeship model. The final rule acknowledges the needs of industries that prefer to continue to use a time-based approach for registered apprenticeship, as well as those industries that require more flexibility in how an apprentice can attain the journeyworker level of proficiency.

We agree that clarifying language is required for all three approaches to ensure that on-the-job learning is a required component of all apprenticeship programs. Paragraph (ii) of § 29.5(b)(2) has been revised to include additional language specifying that programs using the competency-based approach must still require an apprentice to complete the on-the-job learning component of registered apprenticeship. We emphasize that on-the-job learning remains the primary method by which apprentices gain the competencies necessary for successful completion of a competency-based or hybrid apprenticeship program. An apprenticeship program's use of a competency-based or hybrid approach does not exempt apprentices from participating in the fundamental elements of registered apprenticeship: on-the-job learning and related instruction.

The Office of Apprenticeship guidance on competency-based and hybrid apprenticeship in Circular 2005–03 describes how program sponsors and apprentices can comply with the requirements for minimum on-the-job learning for each major work process using the competency-based or hybrid approach outlined in § 29.5(b)(2). Additionally, materials available on the CareerOneStop Web site (*http://www.careeronestop.org/competencymodel*) provide examples of recently approved competency-based apprenticeship programs in the advanced manufacturing and health care industries. These examples showcase the depth and breadth of the information required to define a ''competency,'' establish a proficiency level for that competency, and develop a test and evaluation for said competency. This guidance reinforces that the competency-based model does not negate requirements for on-the-job learning and related instruction. Such requirements will ensure that all apprentices are exposed to workplace conditions and properly trained in the safety requirements essential to the industry.

Neither the proposed nor the final rule requires program sponsors or Registration Agencies to adopt all three approaches. A new paragraph (iv) has been added to § 29.5(b)(2) to clarify that the determination of the appropriate approach for the program standards is made by the program sponsor, subject to approval by the Registration Agency of the determination as appropriate to the apprenticeable occupation for which the program standards are registered.

We seek to provide a variety of industries with greater flexibility and options for approaches to addressing their talent-development needs through apprenticeship. As discussed in the NPRM, business, industry, and labor have requested a more flexible and accountable National Apprenticeship System that meets their workforce development needs. Through pilot programs in which sponsors measured apprentices' attainment of certain skills and competencies rather than using the traditional, time-based approach, many new business, labor, and industry partners in National Apprenticeship System have found that competency-based apprenticeship provides the flexibility and accountability necessary to use registered apprenticeship in their respective industries and occupations. Final § 29.5(b)(2) provides greater flexibility for registered apprenticeship programs to address career development plans of registered apprentices. As we emphasized in the NPRM, the three approaches reflect the experience of the traditional building and construction trades and industrial sectors' use of time-based apprenticeship, while addressing the needs of new and emerging industries seeking to participate in the National Apprenticeship System. Therefore, we anticipate that program sponsors will use the approach that best meets the needs of their particular industry. We do not intend to discourage the use of the time-based approach in those occupations in which it has proven successful nor for any new occupations that lend themselves to that approach.

Related Instruction

The majority of comments on provisions for related and supplemental instruction stated that training through the use of electronic media as proposed in § 29.5(b)(4) should not supplant or replace an apprentice's ongoing, face-to-face interaction and classroom time with an instructor. Some commenters suggested that the Department clarify that electronic media can be used to supplement classroom instruction, but that it is not a substitute for instructor/apprentice interaction. Many suggested that electronic media should not be allowed as the sole method for related technical instruction, as it would be open to widespread misuse and mismanagement. Others suggested that the regulations require that a majority of, or a significant portion of related instruction should be provided through in-person instruction. Other commenters supported the use of electronic media in related instruction, because it enhances flexibility in registered apprenticeship and recognizes new training methods and technologies.

Response: The inclusion of electronic media for related instruction is critical to aligning the National Apprenticeship System with technological advances and appropriate industry application of such advances. Section 29.5(b)(4) does not require that all industries and apprenticeship programs must use electronic media; rather, it permits use of electronic media as a tool to support

industry learning styles. Section 29.5(b)(4) retains other methods of related instruction such as classroom, occupation, or industry courses, or other instruction approved by the Registration Agency. The extent to which an apprenticeship program incorporates electronic media into the provision of related instruction depends on the learning objectives for the particular occupation associated with that program. Therefore, the regulatory framework for apprenticeship should not specify how related technical instruction will be delivered. Such decisions are most appropriately determined by program sponsors, subject to approval by the Registration Agency. Through the provisional registration process and the review of modifications to registered programs established in § 29.3(g), (h), and (i), Registration Agencies will coordinate with program sponsors to identify the appropriate method(s) of providing related technical instruction. The Registration Agency's evaluation of program performance in the quality assurance assessment process, as established in § 29.6(b), will identify and assess any changes in related technical instruction and its effect on the overall operation and quality of the program. To further address concerns regarding inappropriate, ineffective use of electronic media in the provision of related technical instruction, the Office of Apprenticeship will consult with State Apprenticeship Agencies to develop and issue further guidance illustrating the appropriate use of electronic media.

Apprenticeship Instructor Qualifications

Proposed requirements for an apprenticeship instructor would be similar to States' requirements such as meeting the State Department of Education's requirements for a vocational-technical instructor, and/or being recognized as a subject matter expert, and would require that instructors have training in teaching techniques and adult learning styles. A few commenters generally supported the proposed qualifications for apprenticeship instructors in § 29.5(b)(4) because they would raise the quality of apprenticeship instruction. Some commenters stated the proposed changes did not adequately define ''subject matter expert'' or provide guidance on how an apprenticeship program or Registration Agency should make a determination of who may be considered a ''subject matter expert.'' Others agreed with the concept of improving the quality of apprenticeship instructors, but stated the proposed changes would be overly restrictive by requiring all instructors to be certified as having met the state vocational education instructor requirements. Other commenters questioned whether journeyworkers would have to be certified by the State vocational education entity in order to teach the related instruction component of registered apprenticeship. Some commenters asserted that the proposed text would eliminate the use of journeyworkers as subject matter experts or technical experts. Some commenters supported the proposed requirement in § 29.5(b)(4) that apprenticeship instructors have training in teaching techniques and adult learning styles. Others requested clarification on this requirement.

Response: We agree that the proposed rule did not provide adequate guidance and flexibility for instruction qualifications. Accordingly, we have revised § 29.5(b)(4) to clarify that an apprenticeship instructor must either meet the State Department of Education's requirements for a vocational-technical instructor or be a subject matter expert. The rule also clarifies that subject matter experts are individuals who are recognized within an industry as having expertise in a specific occupation. Journeyworkers can be considered subject matter experts, and therefore may be appropriate instructors of related technical instruction. Provisions in § 29.5(b)(4) requiring instructors to have training in teaching techniques and adult learning styles will further ensure quality of instruction in the National Apprenticeship System. Training in and an understanding of teaching techniques and adult learning styles will enhance instructors' effectiveness, thereby improving the learning experiences of individual apprentices and the overall National Apprenticeship System. Such training may be provided by the apprenticeship program, or through an accredited institution of higher learning, and may occur before or after the apprenticeship instructor has started to provide the related technical instruction.

Probationary Period

Seventeen commenters expressed concern that the length of the probationary period was not defined in proposed § 29.5(b)(19), which provided simply that cancellations during an apprentice's probationary period will not adversely impact the sponsor's completion rate. The completion rate is a new factor for evaluation of program performance proposed in §§ 29.6(b) and (c). Several commenters suggested defining a specific ''not to exceed'' time for probationary periods, such as 15 percent or 20 percent of a program's length. Many commenters were concerned that without a time limit on the probationary period, the proposed regulations could permit an apprenticeship program to leave apprentices in probationary status for an extended period of time in an effort to improve the program's performance ratings or conceal the program's deficiencies.

Response: We agree that without a limit to the probationary period, the regulation could allow the information used in calculating completion rates to be skewed, thereby impacting the evaluation of program performance. In recognition of the concerns of the commenters, we have added language to § 29.5(b)(8) limiting the length of the probationary period. Historically, national guidelines for apprenticeship standards recognized by the Office of Apprenticeship have used 25 percent of the length of the program as the benchmark. Accordingly, the final rule provides that the probationary period cannot exceed 25 percent of the length of the program, or one year, whichever is shorter.

Advanced Standing or Credit

Two commenters discussed § 29.5(b)(12), which provides for granting an apprentice advanced standing or credit to take into account demonstrated competencies. One commenter asserted that the proposed rule could reduce on-the-job learning, possibly compromising safety and health. The other commenter expressed concerns about how sponsors would evaluate competencies.

Response: The provisions for granting an apprentice advanced standing or credit would not negatively impact safety and health because, as discussed above, apprentices are still required to have on-the-job learning and related instruction that enable the apprentices to recognize and protect themselves from safety and health hazards. With regard to evaluating competency, sponsors would use the definition of ''competency'' in § 29.2, which provides that sponsors use an appropriate written or hands-on proficiency measurement. Provisions of final § 29.5(b)(12) are necessary to support the flexible approach to progression through apprenticeship identified in § 29.5(b)(2). Accordingly, no changes have been made to the provisions for granting advanced standing or credit.

Transfer

Twenty-seven commenters raised questions about the proposed changes to § 29.5(b)(13) which require program sponsors or committees to: Provide the transferring apprentice with a transcript of related training and on-the-job learning completed; permit transfers to either the same or a related occupation; allow an apprentice, the employer or the program sponsor to initiate the transfer; and stipulate that a transfer must occur without adverse impact on the apprentice, the employer, or the program.

Many commenters raised concerns about how a transfer would be initiated and the process for executing the transaction. Commenters questioned whether the proposed provisions would permit an apprentice to unilaterally transfer from one program to another without the consent of program sponsors. Two commenters suggested that transfers should be amicable for all sides and that transferring apprentices should be tested to ensure proper placement in the new apprenticeship program. Other commenters asserted that an involuntary transfer could adversely impact the affected apprentice and the affected apprenticeship program sponsors or committees. Another commenter questioned whether the proposed rule requires acceptance of transfers. Three commenters stated that modifying this section of the rule should be solely a State and sponsor responsibility.

Response: We agree that the commenters have valid concerns about unilateral decisions for apprentices to transfer and the potential for an adverse impact on one of the affected parties. Accordingly, we have revised § 29.5(b)(13) to provide that a transfer must be based on agreement between the apprentice and the affected apprenticeship committees or program sponsors. An apprentice cannot unilaterally transfer from one program to another or from one employer to another employer in the same program, without the consent of the affected apprenticeship committees or program sponsors.

We disagree that modifications to § 29.5(b)(13) should be solely a State and sponsor responsibility. The regulatory framework for the National Apprenticeship System, established by this part, must address the issue of transfer to ensure that all apprentices regardless of geographic location and program sponsor have equal and uniform access to the same provisions for transfer. However, procedural and administrative issues associated with the transfer of apprentices, such as testing and determination of appropriate placement of the apprentice and the means of reaching agreement among affected parties, are more appropriately addressed in policy guidance to be issued by the Office of Apprenticeship, rather than in the regulatory framework for the National Apprenticeship System. Accordingly, the Office of Apprenticeship will consult with apprenticeship program sponsors and State Apprenticeship Agencies to develop and issue guidance that effectively addresses these concerns.

Several commenters said provisions in proposed § 29.5(b)(13)(ii) which would permit transfer to a related occupation or within the same occupation would not benefit apprentices, especially if a program sponsor or employer were to shift apprentices between jobs and tasks without ensuring proper skills and knowledge development. Three commenters suggested that transfers must be within the same occupation or trade. One commenter noted that many apprenticeship programs in the building and construction industries have provisions in their standards for transfer of apprentices to other programs within their occupations.

Response: The proposed revisions to the requirements for transfers were intended to benefit the apprentice by providing greater flexibility should he or she demonstrate that transferring to another apprenticeship program was necessary to accommodate variations in his or her career development plans. The proposed changes were not intended to provide program sponsors with unlimited latitude to move apprentices among different occupations to accommodate the sponsors' workforce needs. We have been persuaded by commenters' assertions that an apprentice does not become a journeyworker in a skilled trade by transferring from skilled trade to skilled trade; such as an operating engineer working as a carpenter, electrician or painter. Also, there is some validity to the concern that reference to a ''related occupation'' could be ambiguous and overly broad and could result in transfers to different trades or occupations for which the apprentice has no training under the guise of being ''related.'' Further it would be unreasonable to expect an employer to pay a transferring apprentice commensurate period wages without appropriate occupational experience. Therefore, the final rule carries forward existing provisions which limit transfer to the same occupation.

Other commenters suggested that provisions in proposed § 29.5(b)(13)(i) requiring that the committee or program provide a transferring apprentice a transcript of related instruction and on-the-job learning would encourage recruitment between apprenticeship programs instead of focusing on greater outreach.

Response: We have not changed the requirement that the transferring apprentice must be provided a transcript. The requirement for a program sponsor or committee to provide a transferring apprentice a transcript of related instruction and on-the-job learning is necessary to further align the National Apprenticeship System with post-secondary training and education systems, and credentialing systems. Those systems provide participants with documentation of what they have learned through a particular course, series of instructions, or training program. Additionally, the provisions in the final rule requiring agreement among the apprentice and the affected apprenticeship committees or program sponsors for a transfer will mitigate the potential for program sponsors to focus on recruitment between programs. As discussed above, the program with which the apprentice is originally registered must agree to the transfer.

In addition, the final rule continues to serve the purpose of existing § 29.5(b)(13), which allows an employer to transfer its training obligation to another employer, with the consent of the apprentice and the apprenticeship committee or program sponsor. As discussed above, the Department does not foresee that transfers of apprenticeship registration from one program to another or from one employer to another would occur frequently or with regularity. The intent of this provision is to provide flexibility for an apprentice to continue his or her apprenticeship in changing circumstances.

Interim Credentials

Changes to proposed § 29.5(b)(15) would add a provision for issuance of an interim credential in recognition that an apprentices has attained skills or satisfied certain requirements as he or she progresses through a competency-based or hybrid apprenticeship program. The proposed revision also carries forward the existing requirement for issuance of a certificate of completion in recognition of successful completion of an apprenticeship program. We received 93 comments on proposed § 29.5(b)(15). Some commenters expressed support for

interim credentials. Several commenters questioned the need for provisions on interim credentials, while others noted that program sponsors, employers, and others, already issue such credentials.

Response: Section 29.5(b)(15) continues to provide, as does the existing rule, for a certificate that documents the successful completion of an apprenticeship program. However, the commenters have raised some valid concerns as to the proposed requirements for interim credentials. To address these issues and to further clarify the requirement for interim credentials, the final rule separates requirements for interim credentials into a new, discrete paragraph, § 29.5(b)(16), and renumbers all subsequent paragraphs in § 29.5(b) as final § 29.5(b)(17) through final § 29.5(b)(23).

The proposed provisions for interim credentials were not intended to require all program sponsors to issue interim credentials, nor even to require that all sponsors choosing to use the competency-based approach or hybrid approach issue interim credentials. Final § 29.5(b)(16) clarifies that program standards for apprenticeship program sponsors that choose to use the competency-based or the hybrid approach for completion of an apprenticeship and that choose to issue interim credentials must clearly identify the interim credentials, demonstrate how these credentials link to the components of the apprenticeable occupations, and establish the process for assessing an individual apprentice's demonstration of competency associated with the particular interim credential. Further, interim credentials must only be issued for recognized components of an apprenticeable occupation, thereby linking interim credentials specifically to the knowledge, skills, and abilities associated with those components of the apprenticeable occupation.

Commenters expressed concern that the use of interim credentials would redefine what journeyworker status means. Over twenty commenters asserted that provisions for interim credentials would diminish the value of or deter trainees from obtaining journeyworker status. Other commenters misinterpreted the provisions for interim credentials as permitting program sponsors to reduce requirements for on-the-job learning necessary to achieve particular skills and abilities, thereby producing inadequately trained journeyworkers. Some commenters stated that these provisions could weaken the workforce by producing workers with specialized, rather than comprehensive, training for parts of an occupation. Other commenters asserted that ultimately, issuance of interim credentials could lead to a segment of the workforce working for lower wages, with less job security.

Response: We disagree with the assertions that interim credentials may potentially negatively impact the workforce and the value of journeyworker status. As discussed above, in some industries program sponsors in pilots of competency-based apprenticeship programs already are using interim credentials, having determined that some apprenticeable occupations are capable of being segregated into discrete competencies or levels of skill attainment which can serve as discrete milestones on the path to journeyworker status. Providing an interim credential to show that an apprentice has reached those milestones merely acknowledges that fact. Therefore, interim credentials are not intended to narrow the breadth and depth of the training component of registered apprenticeship. Rather, they provide opportunities for apprentices to obtain portable credentials commensurate with the skills and competencies acquired and demonstrated throughout an apprenticeship. Therefore, attainment of an interim credential may provide the apprentice who must leave the program with the means to obtain a better job than he or she could without the credential.

As discussed above in the discussion of the definition of interim credentials, the issuance of a certificate of completion of apprenticeship, and the associated ''journeyworker'' level status, remain the ultimate goal for the National Apprenticeship System. Interim credentials do not indicate that the apprentice has met all of the requirements of the apprenticeship, nor that he or she has successfully mastered the full range of skills and competencies required for an occupation. The certificate of completion is the only credential that properly conveys that the apprentice has successfully met the requirements of the apprenticeship program. Therefore, designation of ''journeyworker'' and the associated status will not be affected by use of interim credentials. However, in recognition of stakeholders concerns over the impact of interim credentials, the Department will establish a process to assess implementation of interim credentials. Initially, Registration Agencies and program sponsors will use the quality assurance assessment process to identify and assess any impact of interim credentials on program operations and outcomes. Following consultation with stakeholders of the National Apprenticeship System, the Office of Apprenticeship intends to issue policy guidance on the review of interim credentials.

Thirty commenters expressed concern about potential negative impacts for the National Apprenticeship System if interim credentials are based on sponsor standards instead of industry standards. These commenters asserted that national standards are necessary so that the credential can be portable and meaningful to employers across different regions.

Response: In the National Apprenticeship System, a sponsor can only register standards for apprenticeship programs that train and employ an apprentice in occupations that have been determined ''apprenticeable.'' The Office of Apprenticeship has established criteria and procedures for recognizing an apprenticeable occupation that require industry verification and validation of the skills and knowledge necessary for the occupation. This process intentionally incorporates industry participation so that the credentials associated with progression through an apprenticeship program for an apprenticeable occupation will be portable and have meaning to employers nationwide. As discussed above, new § 29.5(b)(16) clarifies that interim credentials must only be issued for recognized components of an apprenticeship occupation. Therefore, the interim credentials associated with the specific skills and knowledge for an apprenticeable occupation are verified and validated by industry through the process of approving the apprenticeable occupation.

Numerous commenters suggested that provisions on interim credentials would place additional resource (e.g., time and documentation) burdens on Registration Agencies with no apparent provisions for verification of the credential's validity. Some commenters recommended that the use of interim credentials should not be mandated or should be left to the discretion of States to mandate.

Response: While we consider interim credentials to be a valuable tool for furthering apprenticeship, we emphasize that program sponsors are not required to develop and register standards of apprenticeship that include interim credentials, nor are recognized State Apprenticeship Agencies required to issue interim credentials. We anticipate that such credentials will be used most frequently by programs that

take the competency-based or hybrid approach to progression through apprenticeship. Further, in the Department's pilots with competency-based apprenticeship programs, Registration Agencies have provided technical assistance to sponsors to help identify the appropriate procedures and criteria for determining if and when an apprentice merits receiving an interim credential. The Department anticipates that Registration Agencies will continue to provide such technical assistance in the development of competency-based and hybrid apprenticeship programs, and issuance of interim credentials associated with these programs. As with certificates of completion, Registration Agencies are the entities responsible for issuing interim credentials, at the request of a program sponsor.

The Department acknowledges that instituting a process for the issuance of interim credentials would constitute an additional burden for those State Apprenticeship Agencies that currently do not issue such certifications. Based on comments expressing concern about potential time and documentation burdens, we agree that State Apprenticeship Agencies should not be required to issue interim credentials as a pre-condition for recognition. Accordingly, while recognized State Apprenticeship Agencies may choose to issue interim credentials using their own procedures in compliance with this part, the final rule does not require them to do so. However, in order to maintain uniformity across the National Apprenticeship System and further apprentices' progression through apprenticeship, the Department has determined that opportunities must be available nationwide for program sponsors to register program standards that use a competency-based or hybrid approach for completion of apprenticeship and that issue interim credentials. Therefore, the Office of Apprenticeship will offer to issue interim credentials, nationwide, where the prerequisites are met. If a recognized State Apprenticeship Agency registers program standards that use a competency-based or hybrid approach, but does not issue interim credentials, the program sponsor may request that the Office of Apprenticeship issue interim credentials to apprentices who have successfully met the requirements of an interim credential established in the program standards for their respective apprenticeship programs. If a recognized State Apprenticeship Agency does not register program standards that use a competency-based or hybrid approach, then a program sponsor can petition to register the apprenticeship standards with the Office of Apprenticeship for Federal purposes, and the Office of Apprenticeship will issue interim credentials, when prerequisites are met.

Two commenters maintained that mandating the use of interim credentials would cause apprenticeship programs to incur the enormous costs of developing testing to determine whether apprentices are entitled to interim credentials.

Response: As discussed above, the final rule does not mandate use of interim credentials. Program sponsors that chose to register standards for competency-based or hybrid programs that provide for the issuance of interim credentials would bear the costs associated with developing and operating these apprenticeship programs. All registered apprenticeship program sponsors voluntarily operate apprentice programs and choose to incur the costs associated with the programs

Cancellation Rate

Seventeen commenters expressed concern that the length of the probationary period was not defined in proposed § 29.5(b)(19), which provided simply that cancellations during an apprentice's probationary period will not adversely impact the sponsor's completion rate. The completion rate is a new factor for evaluation of program performance proposed in §§ 29.6(b) and (c). Several commenters suggested defining a specific ''not to exceed'' time for probationary periods, such as 15 percent or 20 percent of a program's length. Many commenters were concerned that without a time limit on the probationary period, the proposed regulations could permit an apprenticeship program to leave apprentices in probationary status for an extended period of time in an effort to improve the program's performance ratings or conceal the program's deficiencies.

Twelve commenters believed that not counting cancellations during the probationary period, or allowing programs to adjust the length of the probationary period, could artificially improve completion rates. Others felt that cancellation rates during the probationary period, if properly categorized, can be used to evaluate program performance. Some commenters stated that it would be important to monitor programs that have a high rate of attrition during probationary period to check for abuses. Others advocated that only cancellations that were due to failure to provide training in accordance with the sponsor's approved standards should be counted in completion rates, asserting that the proposed rule's inclusion of cancellation rates after the probationary period in calculation of completion rates did not distinguish between those cancellations that were the fault of the program and those over which the program has little if any control.

Response: We agree that it is important to monitor programs with a high cancellation rate during probationary periods. For many years the Office of Apprenticeship has included cancellation rates as a factor for consideration when staff members conduct quality assurance assessments, and if appropriate, has used this information in the provision of technical assistance to program sponsors. Although the final rule does not provide for inclusion of cancellations that occur during probationary periods in the calculation of completion rates, this important information is reviewed, evaluated, and addressed through the quality assurance assessment process.

We also agree that without a limit to the probationary period, the regulation could allow the information used in calculating completion rates to be skewed, thereby impacting the evaluation of program performance. In recognition of the concerns of the commenters, we have added language to § 29.5(b)(8) limiting the length of the probationary period. Historically, National Guideline for Apprenticeship Standards recognized by the Office of Apprenticeship have used 25 percent of the length of the program as the benchmark. Accordingly, the final rule provides that the probationary period cannot exceed 25 percent of the length of the program, or one year, whichever is shorter.

We disagree that only cancellations due to the failure to provide training in accordance with the sponsor's approved standards should be counted in completion rates. Program sponsors' policies and administrative procedures such as not providing steady work experience reduce the apprentices' opportunities to earn wages, and thereby can impact an apprentice's ability to remain registered in a program. Therefore, analysis of a program's cancellations rates can provide important indications of the need to further evaluate a program's operations, policies, and procedures, and if needed provide technical assistance. As discussed further in the discussion of program performance standards, we emphasize that a Registration Agency's evaluation of

completion rates will include analysis of mitigating factors. No substantive changes have been made to proposed § 29.5(b)(19); which will be promulgated as § 29.5(b)(20).

Program Performance Sandards (§ 29.6)

Section 29.6 is a new section that focuses on the quality and performance of registered apprenticeship programs. A few commenters generally supported the proposed changes to this section, but questioned the Office of Apprenticeship's ability to successfully evaluate all of the registered programs, given current budget and staffing levels.

Response: The Department agrees that a Registration Agency requires adequate resources to successfully evaluate all registered programs under the provisions of this section. The Office of Apprenticeship staff has been conducting quality assurance assessments and Equal Employment Opportunity Compliance Reviews as part of their normal responsibilities for helping to ensure that program sponsors comply with the requirements of these regulations and part 30. The processes for conducting these reviews currently include assessing a program's performance against key indicators including completion and cancellations rates. Therefore, the functions of calculating completion rates, conducting quality assurance assessments and Employment Opportunity Compliance Reviews, and providing technical assistance, as required by final § 29.6 have effectively been a part of the Office of Apprenticeship's current practices for evaluating and monitoring programs. To the extent that the Office of Apprenticeship's current resources may become constrained by requirements of this section, we may realign resources internally to effectively and efficiently conduct these activities.

At Least One Registered Apprentice

Section 29.6(a) provides that every program must have at least one registered apprentice in order to be designated and retain designation as a registered apprenticeship program for Federal purposes. Commenters observed concern that there may be times when a program is between training cycles and has no apprentices for a short period of time. Other commenters asserted that this provision does not adequately address apprenticeship programs with one or a few apprentices who never graduate. Some commenters suggested establishing time frames for determining if programs have an active apprentice or apprentices.

Response: We agree that there may be times when a sponsor may have a lag between training cycles and be without a registered apprentice for a short period of time. However, when a program lies dormant for a substantial period of time, it is appropriate to consider the program as no longer viable. Therefore, we agree with the suggestion to establish time frames for determining if a program has an active apprentice to account for the short lag times mentioned in the comment and other reasonable periods of inactivity that may occur in otherwise active programs. We consider a period of up to 1 year to be a reasonable period of inactivity. We have determined that the time frame for a program to not have an apprentice registered with a Registration Agency should not exceed 1 year. We have revised § 29.6(a) accordingly.

With regard to commenters assertion that this provision does not adequately address programs that never graduate an apprentice, the requirements set forth in 29.6(b) will hold those programs accountable.

Evaluation of Program Performance

Twenty-eight comments addressed § 29.6(b), which provides a non-exclusive list of tools and factors that must be considered in evaluating the performance of a registered apprenticeship program. Nine commenters expressed concern that there is no proposed definition of ''quality assurance assessment,'' one of the tools and factors to be considered in evaluating performance. Many requested a definition of ''completion rate.'' Other commenters requested that the Department clarify the intended purpose of each of the performance tools and factors and how they are to be used. One commenter suggested adding a requirement that the ''tools and factors'' be consistent with Federal standards and goals so that States could not add factors that conflicted with this part, 29 CFR part 30, or the National Apprenticeship Act.

Response: We agree that definitions for the terms ''completion rate'' and ''quality assurance assessment'' would provide greater clarity to the proposed performance accountability framework established by the final rule. Accordingly, as discussed above, we have added definitions for the terms ''completion rate'' and ''quality assurance assessment'' to § 29.2.

The three performance factors specifically required are quality assurance assessments, Equal Employment Opportunity Compliance Reviews, and completion rates. As discussed above in the discussion of the definitions in § 29.2, quality assurance assessments are comprehensive reviews conducted by a Registration Agency to determine if an apprenticeship program is addressing its program standards and meeting the requirements of this part. Equal Employment Opportunity Compliance Reviews are required under part 30. Data on a program's completion rates are intended to provide Registration Agencies with information useful to support technical assistance efforts to improve program performance. We emphasize that any additional tools and factors used by Registration Agencies in evaluating program performance must adhere to the goals and policies of the Department articulated in this part and in guidance issued by the Office of Apprenticeship.

Completion Rate

A Registration Agency's use of completion rates in evaluating program performance, provided by proposed §§ 29.6(b) and (c), received mixed reviews. One commenter asserted that the proposed rule will likely result in an annual effect on the economy of $100 million or more, and therefore the proposed rule qualifies as a major rule under Executive Order 12866 and the Small Business Regulatory Enforcement Act (SBREFA). The commenter asserted that State and local governments are including bid provisions that require contractors to have apprentices who have successfully completed an apprenticeship program approved by the Department or a recognized State Apprenticeship Agency as a condition of bidding and participating on a project. The commenter asserted that such bid requirements will likely foreclose unilateral apprenticeship program sponsors from being able to bid on, and be awarded State and local construction projects, which will likely have an annual adverse impact on the economy exceeding $100 million. Although the comment did not mention a particular section of the rule, we have determined that the commenter's estimate of anticipated impact was primarily based on the expected costs of compliance with §§ 29.6 (b) and (c). The commenter recommended that the Department withdraw the proposed provisions for completion rates, so that the Office of Apprenticeship can conduct further study and discussion with interested stakeholders.

Many commenters noted that evaluating apprenticeship programs on the basis of completion rates would align the National Apprenticeship System with other Federal education programs that make eligibility for receipt of Federal funding dependent, in

part, on the program's achievement of minimal graduation rates. Others stated that the evaluation would improve program accountability, ensure high-quality training, or reflect the effectiveness of programs. However, another commenter asserted that reference to completion rates could unfairly penalize programs that make an affirmative effort to recruit apprentices from non-traditional pools, as the drop-out rate for those recruited from riskier groups may be higher than normal. Other commenters stated that use of completion rates could also penalize small programs, whose completion rates could be affected dramatically by the cancellation of only one or two apprenticeship agreements.

Some commenters opposed provisions of proposed § 29.6(c) that provide for evaluation of completion rates of programs located in the same geographical areas, and as necessary, further review and provision of technical assistance to maintain and improve program performance. One commenter asserted that it was onerous and short-sighted to compare programs, rather than individually evaluate programs based on their merits. Another commenter characterized this particular proposed provision as highly subjective and ambiguous, suggesting that the standard should set a minimum completion rate above which a program's completion rate will not be deemed a negative factor. Another remarked on the absence of firm standards in this proposed regulation. Others asserted that this proposed requirement would favor union-operated programs and do nothing to improve apprenticeship programs.

Response: The Department does not agree that evaluating completion rates as an indicator of program quality would unfairly penalize programs that recruit from non-traditional applicant pools, nor do we agree that completion rates would penalize small programs whose completion rates could be affected dramatically by cancellation of one or two apprenticeship agreements. The primary purpose of the completion rate evaluation is not to penalize programs. As described below, our goal is to establish an assessment mechanism to identify programs that will benefit from technical assistance to become high performing programs. Only when programs demonstrate a persistent and significant failure to perform successfully will poor completion rates factor into potential deregistration proceedings.

We agree that comparing like programs, particularly when there may only be one comparable program in a geographical are, may not be a feasible, effective approach for the evaluation of completion rates. We also agree with the suggestion to establish a minimum completion rate above which a program's completion rate will not be deemed a negative factor. We have determined that the national average for apprenticeship completions would be a reasonable benchmark to use in evaluating the performance of registered apprenticeship programs for purposes of identifying programs in need of technical assistance. Accordingly, we have revised § 29.6(c) to require that a Registration Agency review a program's completion rates in comparison to the national average for completion rates. Programs with completion rates lower than the national average will receive technical assistance from a Registration Agency. As stated in the NPRM, the use of completion rates in program reviews is not intended to limit or terminate existing apprenticeship programs that are receiving technical assistance from a Registration Agency and demonstrating improved program performance, or to impede prospective apprenticeship program sponsors. Rather, the use of completion rates is intended to strengthen the program outcomes and quality in the National Apprenticeship System by setting a benchmark that identifies programs that could benefit from technical assistance.

In order to reflect the focus on technical assistance for programs with completion rates below that national average, we have dropped the reference that appeared in proposed § 29.6(c) for the Registration Agency to ''take other appropriate action'' against such programs. Deletion of this phrase is meant to clarify that simply falling below that national average for completion rates does not lead to deregistration procedures. Completion rates may potentially factor into deregistration procedures only when they demonstrate an ongoing pattern of very low completion rates over a period of several years (see discussion of ''persistent and significant failure to perform'' below).

Rather than specifying the details for implementation of program performance standards in registered apprenticeship, we believe the best use of § 29.6 is to establish a regulatory framework that provides the basis for the Office of Apprenticeship to issue more detailed guidance. The Office of Apprenticeship will consult with apprenticeship program sponsors and recognized State Apprenticeship Agencies to develop and issue guidance regarding program performance standards and accountability in the National Apprenticeship System. This consultation process would also be responsive to a commenter's recommendation to further discuss provisions for completion rates with interested stakeholders. This approach is similar to the Department's regulatory framework and performance management system established for the programs under the Workforce Investment Act.

The Department disagrees with assertions that there is a relationship between bid requirements for State and local construction projects and provisions for completion rates in §§ 29.6(b) and (c) which will likely have an annual impact on the economy exceeding $100 million. None of the provisions in final § 29.6 nor any other provision in the final rule provide for or relate to the establishment bid requirements for State and local construction projects.

Cancellation of Apprenticeship Agreements During Probationary Period

Many commenters opposed provisions of § 29.6(d) which provided that the cancellation of apprenticeship agreements during the probationary period would not have an adverse impact on a sponsor's completion rate. One commenter stated that all cancellations should be considered in program reviews, particularly to deter program sponsors who register programs primarily to meet contract requirements for Federal works projects under the Davis-Bacon Act.

Response: Existing regulations provide for a probationary period, in recognition that both the apprenticeship sponsor and the apprentice should have sufficient time to determine if the apprenticeship agreement is beneficial. During the probationary period, apprentices may have many reasons for cancelling their agreements, which may have nothing to do with the program. Including apprenticeship agreement cancellations during the probationary period in the calculation of completion rates may inadvertently cause program sponsors to adopt more stringent selection requirements, in an effort to minimize being penalized. More stringent selection requirements could reduce or limit apprenticeship opportunities that would otherwise have been available. We seek to avoid a regulatory framework that would unintentionally reduce apprenticeship opportunities. However, Registration Agencies do include cancellation rates as important information in their oversight of registered apprenticeship programs. Cancellation rates, including those that occur during the probationary

period, are reviewed in conjunction with the Equal Employment Opportunity compliance reviews. If appropriate, Registration Agencies use this information for the provision of technical assistance. Therefore, we have determined that the proposal for the cancellation of an apprenticeship agreement not to have an adverse impact on a sponsor's completion rate if the cancellation occurs during the apprentice's probationary period is an appropriate balance between the need to hold program sponsors accountable and the need to promote apprenticeship opportunities. We have made no changes to § 29.6(d).

Apprenticeship Agreement (§ 29.7)

We received three comments on proposed § 29.7, regarding requirements for apprenticeship agreements, none of which advocated for major changes to the proposed provisions. The proposed changes update terminology, align the apprenticeship agreement with the three approaches to apprenticeship progression (time-based, competency-based, or hybrid), and add space on the agreement in which apprentices would voluntarily provide their Social Security Number. The Registration Agency will use apprentices' Social Security Numbers for performance management and Davis-Bacon Act purposes; in particular, for use in calculating employment outcomes of the National Apprenticeship System as defined in the Department's common measures for Federal job training programs. The Department has an approved information collection request for the use of Social Security Number information on an apprenticeship agreement (OMB Control Number 1205–0223). One commenter suggested that the proposed changes will result in an undue time and financial burden for State Apprenticeship Agencies. Two commenters suggested additional requirements for collection of equal employment opportunity information, which are beyond the scope of revisions to part 29.

Response: While revising forms will require the expenditure of resources, the changes and resulting revisions to the form will be minimal. Moreover, the changes are necessary for the National Apprenticeship System to continue to align with changes in approaches to on-the-job learning, as well as the broader environment in which apprenticeship programs operate.

We note that the non-discrimination provisions in § 29.7 are limited to the prohibitions that are applicable under part 30, regulations for Equal Employment Opportunity in Apprenticeship and Training, and do not describe the full range of Equal Employment Opportunity protections that may be applicable to registered apprenticeship programs. Registered apprenticeship programs are subject to other Federal, State and local laws and regulations regarding Equal Employment Opportunity in employment and training, such as the Americans with Disabilities Act, the Age Discrimination in Employment Act, and Title VII of the Civil Rights Act of 1964.

Upon further review, we have determined that there are three minor changes necessary to align this section with revisions to the definitions and standards of apprenticeship discussed above. With the deletion of the definition for ''supplemental instruction,'' as discussed above in the discussion of definitions, this term is no longer appropriate for requirements in § 29.7(e)(2) regarding number of hours in related instruction. We have revised § 29.7(e)(2) accordingly. For consistency with final § 29.5(b)(2)(ii), which specifies that competency-based programs must still require an apprentice to complete the on-the-job learning component of registered apprenticeship, we have revised the requirement in § 29.7(e) for competency-based programs to include statements about on-the-job learning. We have also replaced the term ''school time'' in 29.7(g) with a more appropriate term, ''related instruction,'' to describe whether or not the apprentice is compensated during the related instruction component of registered apprenticeship.

Deregistration of a Registered Program (§ 29.8)

Section 29.8 clarifies the provisions for deregistration of registered apprenticeship programs. We have corrected a mistake in proposed § 29.8(b)(1) by replacing ''and'' with ''or'' to clarify that the Registration Agency may undertake deregistration proceedings when a program is not conducted, operated *or* administered in accordance with the program's registered provisions or with the requirements of 29 CFR part 29.

Five commenters addressed proposed changes in § 29.8, which clarifies existing § 29.7 provisions for deregistration of registered apprenticeship programs. One commenter requested clarification as to whether a program would automatically enter the deregistration process if it is without an apprentice for 15 or more days. Two comments expressed concern about the Department's ability to sufficiently address the burdens associated with deregistration procedures, emphasizing that deregistration should be conducted at the local level rather than the Federal level. Three commenters asserted that the proposed rule would usurp power from State Apprenticeship Agencies.

Response: A program that is without an apprentice for 15 days is not subject to deregistration. As discussed with regard to Program Performance Standards above, revised § 29.6(a) allows for a time lag of up to 1 year between training cycles, during which a program could be without a registered apprentice. To address ambiguity regarding a relationship between failure to meet the new program performance standards established in § 29.6 and requirements for deregistration of a registered program established in § 29.8, we have also revised in the final rule § 29.8(b)(1) to clarify the circumstances in which deregistration proceedings may be undertaken for failure to conduct, operate or administer the program in accordance with the requirements of part 29. These circumstances include: the failure to meet longstanding standards of the National Apprenticeship System, such as failure to provide on-the-job learning, failure to provide related instruction, and failure to pay the apprentice a progressively increasing schedule of wages consistent with the apprentice's skills. In addition, the persistent and significant failure to perform successfully under the new performance standards established in section 29.6 may also lead to deregistration. However, a persistent and significant failure to perform successfully does not occur simply when a program's completion rate falls below the national average. Deregistration proceedings apply to programs with severe performance problems. A persistent and significant failure to perform successfully occurs when a program sponsor consistently fails to register at least one apprentice, shows a pattern of poor quality assessment results over a period of several years, demonstrates an ongoing pattern of very low completion rates over a period of several years, or shows no indication of improvement in the areas identified by the Registration Agency during a review process as requiring corrective action.

With regard to concerns about burdens associated with deregistration procedures and usurping power from the State Apprenticeship Agency, § 29.8 deletes the term ''Bureau (Office of Apprenticeship) registered programs'' and uses the term ''Registration Agency'' to clarify that program

deregistration procedures outlined in §§ 29.8(a) and (b) are conducted at the State level, by the Registration Agency. In States where the State Apprenticeship Agency is the Registration Agency, deregistration proceedings will be conducted by the State Apprenticeship Agency. Any such proceeding would be required to comply with § 29.8.

We emphasize that final § 29.8 carries forward existing practice that has evolved under current regulations, in which the Department has deferred to recognized State Apprenticeship Agency authority in matters of program deregistration. Therefore, the Department anticipates having sufficient resources to address any burdens associated with deregistration procedures, as these matters will primarily pertain to deregistration proceedings in States where the Department is the Registration Agency.

Final § 29.8(b)(7) clarifies that if a sponsor requests a hearing, the Administrator refers the matter to an Administrative Law Judge, who will convene a hearing and issue a decision in accordance with § 29.10(c). This clarification aligns the final rule with Secretary's Order 1–2002, 67 FR 64272, Oct. 17, 2002, which provides that an Administrative Law Judge's decision in a program deregistration is only subject to discretionary review by the Administrative Review Board.

Reinstatement of Program Registration (§ 29.9)

The Department received one comment on this section. The commenter agreed with the proposed text on reinstatement of program registration.

Response: We are promulgating final § 29.9 as proposed.

Hearings for Deregistration (§ 29.10)

Four commenters addressed proposed changes to § 29.10, which sets the requirements for deregistration hearings. One commenter agreed with the proposed changes. Another commenter opposed the provisions in this section on the basis that hearings for deregistration should be kept at the State level. A third commenter asked if this section applies to programs registered with State Apprenticeship Agencies. Another commenter indicated that the public had not been allowed sufficient time to review the Office of Administrative Law Judges hearing rules at 29 CFR part 18, which will apply to deregistration hearings. This commenter also suggested that the proposed changes to the method of appeal in existing § 29.9 would reduce access to due process of law. The commenter suggested that a hearing before an Administrative Law Judge, as established in § 29.10, differs considerably from proceedings before a hearing officer or a trial by jury.

Response: We disagree with the commenter's assertions that the Administrative Law Judge procedures would reduce access to due process and that the public has not been allowed sufficient time to review the Office of Administrative Law Judges hearing rules at 29 CFR part 18. The applicable rules of procedure at 29 CFR part 18 provide uniform rules for the conduct of hearings for a wide range of Department of Labor programs. These rules are consistent with the Administrative Procedure Act's requirements for the conduct of agency adjudications. However, upon review further, we have determined that it is more appropriate for the notice from the Administrative Law Judge to refer to the request as a request for a hearing, rather than a request for a review, as proposed in the NPRM. We have revised 29.10(b) accordingly.

We disagree with the commenter's assertion that hearings for reinstatement of program registration should be kept at the State level. Under existing § 29.9 such hearings are conducted at the Federal level. Final § 29.10 merely changes the Federal official conducting the hearing.

We note that the requirements for hearings for deregistration apply to all programs that have been registered for Federal purposes, regardless of whether the program is registered with the Office of Apprenticeship or for Federal purposes with a recognized State Apprenticeship Agency.

Except as noted, we will promulgate final § 29.10 as proposed.

Limitations (§ 29.11) and Complaints (§ 29.12)

One comment was received on each of these two proposed provisions, both expressing support.

The Department will promulgate § 29.11 and § 29.12 as proposed.

Recognition of State Apprenticeship Agencies (§ 29.13)

Proposed § 29.13 revises the provisions in existing § 29.12 that address the recognition of State Apprenticeship Agencies for Federal purposes and clarifies how the Office of Apprenticeship oversees the National Apprenticeship System. We received 125 comments on this section overall, 110 of which addressed specific provisions, including limiting recognition to the State Apprenticeship Agency; role of the State Apprenticeship Council; linkages with economic development and workforce investment systems; location of a State Apprenticeship Agency; requirements for resources to carry out the functions of a Registration Agency; reciprocal approval of programs and standards in the building and construction industries; Departmental review and approval of State apprenticeship legislation, regulations, policies, and operational procedures; application for recognition; and renewal and maintenance of recognition. Several commenters strongly opposed the revisions, asserting that the proposed changes were overly prescriptive and would significantly limit a State's authority to oversee registered apprenticeship functions within its jurisdiction. It is our responsibility to ensure that States recognized as having such authority continue to conform to the Federal requirements on which the recognition is based. As described below, the Department's recognition of a State Apprenticeship Agency pertains to granting Federal-State partnership in which the Department grants the State authority to act on our behalf as a Registration Agency. The provisions of parts 29 and 30 set the conditions for a State to obtain and maintain that authority; these provisions are not meant to impact State authority to regulate apprenticeship for State purposes.

Roles of State Apprenticeship Agencies

Twelve comments focused on proposed § 29.13(a), which provides for ''recognition'' only of a State Apprenticeship Agency, and not a State Apprenticeship Council, and provides that the Department's recognition of the State Apprenticeship Agency confers ''non-exclusive authority'' to determine whether an apprenticeship program meets published standards and is eligible for those Federal purposes which require such a determination. Some commenters asserted that these changes conflict with their States' current law, whereby a State Apprenticeship Council oversees the State's apprenticeship system or promulgates regulations that oversee a State Apprenticeship Agency's work. Thus, the proposed changes would require revisions to State apprenticeship law and regulation. Another suggested that the Department should not dictate to the States the nature and structure of their government.

Response: Our experience has shown that a government-to-government relationship with a State Apprenticeship Agency facilitates the

smooth functioning of the National Apprenticeship System, thus best protecting apprentices' interests. Although the members of a State Apprenticeship Council represent diverse employer, labor, and public interests and have knowledge and experience that enables them to be strong advocates for apprenticeship, many of them are not State officials. Therefore, members of the State Apprenticeship Council are not, ultimately, accountable to the State or to the Department for their actions. Such accountability is essential to the functioning of the National Apprenticeship System, especially where it comes to safeguarding the welfare of apprentices and promoting apprenticeship opportunity. State officials represent the interests of the entire State and are accountable for their actions. Accordingly, our proposal to extend recognition only to State Apprenticeship Agencies is necessary to ensure that the entity that is held accountable for conformity with part 29 is clearly identified. This proposal does not dictate the nature and structure of State government; it merely identifies the State government entity to which the Department will grant authority to act on our behalf as a Registration Agency. The existing regulations do not specify that a recognized Registration Agency must be a government cabinet-level agency. Changes to § 29.13(a) clarify this requirement and further align the proposed regulations for the National Apprenticeship System with the National Apprenticeship Act, which states that the Department is to ''cooperate with *State agencies* engaged in the formulation and promotion of standards of apprenticeship.'' Therefore, we have made no changes to § 29.13(a)(1).

Role of State Apprenticeship Councils

We received twenty (20) comments regarding proposed § 29.13(a)(2), which consolidates the provisions on State Apprenticeship Councils. Several commenters asserted that the current roles and responsibilities of State Apprenticeship Councils and State Apprenticeship Agencies work well, and questioned the need to adjust this system. Many expressed concern that we are eliminating State Apprenticeship Councils. One commenter suggested that removing a State Apprenticeship Council's decision-making role would significantly reduce the level of participation from key stakeholders, potentially creating far-reaching negative effects for apprenticeship programs. Another commenter questioned why the proposed regulations do not identify acceptable State Apprenticeship Council membership, as provided in existing part 29.

Response: As described above, we have determined that the effective functioning of the Federal-State partnership in the registered apprenticeship system requires a direct relationship between Federal and State agencies. However, while we no longer recognize State Apprenticeship Councils for registration purposes, we are not eliminating the requirement to establish a State Apprenticeship Council for regulatory or advisory purposes. Members of State Apprenticeship Councils will continue to be critical stakeholders, whose active participation is essential for the successful operation of registered apprenticeship programs in their States. Based on the new organizational system, we are limiting our direct regulation to requirements applicable to recognized State Apprenticeship Agencies. Given that the final rule makes recognized State Apprenticeship Agencies responsible for registered apprenticeship for Federal purposes in their States, we have determined that it is appropriate for such Registration Agencies to direct the operations of the corresponding State Apprenticeship Councils. Accordingly, we have revised § 29.13(a)(2) to clarify that a State Apprenticeship Council operates under the direction of the State Apprenticeship Agency. We reiterate that §§ 29.13(a)(2)(i) and (ii) carry forward provisions from the existing regulations pertaining to State Apprenticeship Council membership criteria. Except as noted, we are promulgating § 29.13(a)(2) as proposed.

Linkages With Economic Development and Workforce Investment

Two commenters asserted that the Department lacked statutory authority to require or mandate that the State Apprenticeship Agency integrate with the State's economic development strategies and public workforce investment system, as provided in § 29.13(a)(6). Another commenter expressed support for this provision, and suggested that the Department also should encourage registered apprenticeship programs to develop agreements with community colleges.

Response: The National Apprenticeship Act's broad mandate to safeguard the welfare of apprentices fully authorizes the proposed requirement for integration of registered apprenticeship into economic and workforce development efforts. This requirement is part of a broader trend among Federal and State workforce development programs to increase coordination across programs in an effort to more effectively meet the needs of businesses, workers, and regional areas. As part of the workforce investment system, registered apprenticeship programs should align closely with regionally coordinated talent development strategies aimed at providing workers with the 21st century skills that businesses and industries demand. However, upon review, we have concluded that the terms of proposed § 29.13(a)(6) regarding linkages and coordination with economic development and the workforce investment system fit within proposed § 29.13(a)(4), which pertains to basic standards, criteria, and requirements for program registration and/or approval. Therefore, proposed § 29.13(a)(6) has been consolidated into § 29.13(a)(4). Further, we have revised terminology that refers to the workforce system so it includes the phrase ''publicly-funded workforce investment system,'' to clarify that public funding can support these linkages and coordination across State Apprenticeship Agencies and the States' workforce investment and economic development strategies. This revision aligns with efforts to expand apprenticeship into high-growth, high-demand occupations.

Location of State Apprenticeship Agency

We received ten comments opposing the proposed deletion of existing § 29.12(b)(1), which sets requirements for the location of the State Apprenticeship Agency in the State Department of Labor or in the agency of State government having jurisdiction of laws and regulations governing wages, hours, and working conditions. Eight commenters suggested that relocating a State Apprenticeship Agency would likely diminish the safety, health, and welfare of apprentices in the workplace. One commenter stated that as a result of the rule change, the apprenticeship program could be placed within a department or division of State government that is not familiar with or qualified to address issues pertaining to registered apprenticeship. Another commenter stated that the rule change is counter to the integration of apprenticeship into the public workforce development system and would interfere with seamless integration of worker protection considerations. One commenter stated that as a result of the rule change, the apprenticeship program could be placed within a department or division of State

government that is not familiar with or qualified to address issues pertaining to registered apprenticeship.

Response: We disagree that the proposed deletion of regulatory provisions specifying the location of a State Apprenticeship Agency will negatively impact the welfare of apprentices, and that it counters efforts to integrate registered apprenticeship with the public workforce development system. Historically, registered apprenticeship functions have resided in the area of State government that oversees wage and hour functions, and this approach has functioned very well for most States. However, many State governments have reorganized, and the various State governments function differently. In light of these organizational changes, the final rule affords the flexibility necessary for States to determine the most appropriate location for registered apprenticeship, based on their organizational configuration. Regardless of that location, a recognized State Apprenticeship Agency still must meet the requirements of this part, including provisions in § 29.5 that safeguard the welfare of the apprentice, and provisions in § 29.13(a)(4) requiring demonstration of linkages with the State's economic development strategies and public workforce system. Further, the effective functioning of the Federal-State partnership for registered apprenticeship does not require specificity for the organizational location of the State government agency.

Resources

Proposed § 29.13(b)(2), which required that State Apprenticeship Agencies provide sufficient budget and staff to carry out the functions of a Registration Agency, also generated considerable opposition. Four commenters stated that the proposed requirements in § 29.13(b)(2) are worthwhile guidelines for Registration Agencies, but asserted that the Department does not allocate sufficient staff and budget to carry out its responsibilities in the twenty-five States where the Office of Apprenticeship is the Registration Agency. Four commenters indicated that the Department does not have the authority to dictate budget mandates to the States.

Response: The Department is currently the Registration Agency in 25 States, and provides dedicated staff and resources sufficient to fulfill its responsibilities for registered apprenticeship for Federal purposes in those States. In the other 25 States, where we have conferred recognition to States to register apprentices and apprenticeship programs for Federal purposes under the current regulations, it is our responsibility to ensure that we provide recognition to States that have dedicated the necessary resources for such functions. The proposed rule's provisions for sufficient resources do not dictate budget mandates; the responsibility for establishing budget mandates remains with State governments. However, we have been persuaded by comments that it is more appropriate to use language that is less prescriptive than ''allocate sufficient budget and staff'' to describe how a Registration Agency will address these functions. Therefore, we have revised final rule § 29.13(b)(2) to require simply that the State provide ''sufficient resources'' to carry out the functions of a Registration Agency. In the final rule, provisions establishing that the functions of a Registration Agency, which include outreach and education, registration of programs and apprentices, provision of technical assistance, and monitoring, as required to fulfill the requirements of this part are unchanged.

Reciprocal Approval

We received thirty-eight comments about proposed § 29.13(b)(7), which would expand current provisions for reciprocal approval by eliminating the exception for programs and standards in the building and construction industries. The majority of comments opposed the proposal, and many requested that DOL reinstate the exception for building and construction industries. Two commenters asked DOL to clarify why the exemption was originally granted, why the proposed revisions would eliminate the exemption, and how this action will impact other related regulations, such as those pertaining to Federal works projects subject to the Davis-Bacon Act.

More than a dozen commenters raised issues associated with variations among State Apprenticeship Agency requirements for program registration. One set of commenters addressed variations in wage rates, asserting that it is unfair and economically disruptive to allow trades from one State to use the pay scale from their own State to bid on work in other States, particularly for apprentices employed on projects subject to the Davis-Bacon Act. Other commenters asserted that States have different quality (e.g., training hours) and licensing standards, which the proposed rule fails to recognize. A commenter stated that the proposed rule lacks language that would require a visiting sponsor registered in another State to meet or exceed existing local requirements for apprenticeship registration. A State asked DOL to clarify whether the host State's laws or the home State's laws would apply to the apprentice.

Response: The exemption for reciprocal approval for apprenticeship programs in the construction industry in the current regulations was based on the view that the seasonality of construction work could potentially interrupt an apprentice's on-the-job learning, require that an apprentice be supervised by several employers, and require provision of related instruction in several places, rather than one location, thereby negatively impacting the quality of apprenticeship programs in the construction industry. With advances in technology to assist in the provision of related instruction and supervision of apprentices, the Department believes that these arguments for exempting construction industry programs from reciprocal approval are no longer valid. In particular, the use of electronic media in related instruction, as permitted by final § 29.2, will provide construction apprenticeship programs with the ability to ensure consistency in related technical instruction across the country, regardless of geographic location. High quality standards for apprenticeship programs can be attained in the construction industry, regardless of the seasonal nature of construction work. Therefore, the extension of reciprocal approval to construction industry programs, as well as to non-construction programs, will enable the National Apprenticeship System to further address the apprenticeship needs of businesses and labor.

We acknowledge that commenters have raised important concerns about differences between the home States' and the host States' requirements. Revisions to § 29.13(b)(7) were intended to provide program sponsors registered for Federal purposes in one State with fairness in contractor bidding on Federal public works projects in another State that are subject to the Davis-Bacon Act, while still safeguarding the welfare of registered apprentices. We agree that the application of a home State's wage and hour and apprentice ratios in a host State could confer an unfair advantage to an out-of-state contractor bidding on a Federal public works project. Such an outcome would be unacceptable. That is why, in all instances where we have negotiated memoranda of understanding with recognized States to arrange for reciprocal approval of apprenticeship programs in the building and construction trades, we have consistently required that the wage and hour and apprenticeship ratio

requirements of the host State apply. As stated in the Federalism section of the Administrative Requirements discussion in the NPRM, the extension of reciprocal approval to the construction industry programs allows a State Registration Agency to retain authority to enforce its State labor law, such as provisions covering apprentice wage rates and ratios. For further explanation, we have added language to the final rule to clarify that the program sponsor seeking reciprocal approval must comply with the host State's wage and hour and apprentice ratio standards. With this clarification, final § 29.13(b)(7) prohibits an out-of-state program sponsor seeking reciprocal approval from a host State from gaining a competitive advantage in registering and operating apprenticeship programs for Federal purposes. Extension of reciprocal approval in final § 29.13(b)(7) will not impact a State's implementation of regulations pertaining to Federal works projects subject to the Davis Bacon Act. We further emphasize that final § 29.13(b)(7) does not address other aspects of a host State's legislative, regulatory, or procedural requirements for registered apprenticeship for State or local purposes because part 29 pertains to registered apprenticeship for Federal purposes. Issues such as licensure requirements and contributions to a State apprenticeship training fund are State matters and are not covered by the requirements for reciprocal approval for Federal purposes in final § 29.13(b)(7).

State Apprenticeship Legislation, Regulations, Policies, and Operational Procedures

Twenty-seven commenters expressed concerns about proposed § 29.13(b)(9), which explicitly requires State Apprenticeship Agencies to submit proposed modifications in the State's apprenticeship legislation, regulations, policies, and/or operational procedures for Departmental review and approval, prior to implementation, for conformity with the National Apprenticeship Act and the implementing regulations in 29 CFR parts 29 and 30.

Many comments expressed concern that proposed § 29.13(b)(9) ignores a State's authority to set policy and establish law to meet the unique needs of its industry and citizens. One commenter asserted that this change usurps States' authority and exceeds the authority granted by the National Apprenticeship Act. Other commenters asserted that the Office of Apprenticeship's required review will inhibit the State regulatory process and decrease State government's responsiveness to the public.

Response: Given the National Apprenticeship Act's broad mandate for the Department to safeguard the welfare of apprentices, the proposed requirement for Departmental review, prior to implementation, of a State's revision to an approved apprenticeship law is within our authority under the Act.

Further, the requirement is necessary for the Department's management of the National Apprenticeship System. Before it is permitted to register apprentices and apprenticeship programs, for Federal purposes, a State wishing to participate in the National Apprenticeship System must submit its apprenticeship law and other information (§§ 29.13(a) and (b)) to the Department for a determination that they conform to the requirements of Federal apprenticeship law. But, the State Apprenticeship Agency's responsibility to follow Federal law does not end there. Rather, a recognized State Apprenticeship Agency must continue to conform with the requirements of Federal law, particularly when the Agency wants to make changes to is own laws or regulations. Recent experience with reviews of recognized State Apprenticeship Agencies has underscored the need for the Department to monitor States' efforts to modify their apprenticeship laws, as they pertain to registered apprenticeship for Federal purposes. The Office of Apprenticeship's reviews have repeatedly identified provisions of State laws and regulations that were not consistent with Federal apprenticeship law; this has led to our requiring State Apprenticeship Agencies to take the corrective action necessary for them to attain conformity with parts 29 and 30 and with the National Apprenticeship Act.

Notice to the Office of Apprenticeship and an opportunity to review proposed changes to a State's apprenticeship law, regulation, and policies are necessary for Departmental oversight. However, the effect of purpose of proposed § 29.13(b)(9) will be to facilitate the Department's management of the National Apprenticeship System, not to usurp State authority to establish State law and policy. Accordingly, and in recognition of the concerns raised by commenters, we have revised § 29.13(b)(9) to provide that a State must submit all proposed modifications in apprenticeship legislation, regulations, policies and/or operational procedures for Office of Apprenticeship review and *concurrence*, rather than *approval*. The Office of Apprenticeship's ''concurrence'' will simply reflect a finding that the proposed modification conforms to part 29 and that implementation of the proposal will not affect the State's recognition status. If the Office of Apprenticeship finds that a proposed modification does not conform to part 29, it will notify the State of its concerns and work with the State to resolve them, providing technical assistance as appropriate. This will provide the State and Office of Apprenticeship with an opportunity to identify and work out issues that potentially affect a State's recognition status before the proposals take effect and must be undone to preserve recognition. The State will be notified of the Office of Apprenticeship's findings as to conformity within 45 days from the date that the Office of Apprenticeship receives the proposed modification, as provided by § 29.13(e)(4).

Although the process for Office of Apprenticeship review and concurrence of a State's apprenticeship legislation, regulations, policies, and/or operational procedures may extend the time necessary for modifications, the potential imposition of additional time is justified by the need to ensure that revisions to State apprentice law, regulations, policies, and procedures conform to parts 29 and 30 and the National Apprenticeship Act.

Registration Agencies can help to maximize the efficiency of the process by notifying the Department of any modifications under consideration at the earliest opportunity. Further, States that proceed with revisions prior to completion of the Department's review and concurrence process can minimize the disruption that would result from subsequent Departmental non-concurrence through the inclusion of a saving clause. Such a clause could, for example, revive the text which was superseded by a modification to which the Department did not concur, or place the reader on notice that the revision would take effect only if or when the Department concurred with the change.

Application for Recognition

Three commenters raised concerns about proposed § 29.13(c), which establishes requirements for State Apprenticeship Agencies to apply for recognition from the Department. One commenter suggested that State Apprenticeship Agencies recognized by the Department under the current regulations should only be required to renew their status, not reapply for recognition. Another commenter asserted that requiring State

Apprenticeship Agencies to reapply for recognition diverts resources from program implementation and would interfere with funding and budget planning. Another stated that DOL currently has the authority to withdraw its recognition of State Apprenticeship Agencies for failure to conform to this part, and there is no need to place further reporting and oversight requirements on State Apprenticeship Agencies to reapply for recognition within 1 year of the effective date of the rule.

Response: This rulemaking significantly revises the substantive provisions of part 29. Although the reapplication process for recognition will require use of resources to prepare and submit materials specified in § 29.13(c), we have determined that it is absolutely essential to ensure that State Apprenticeship Agencies comprehensively conform to the new requirements of part 29, as a pre-condition for recognition. However, we acknowledge that an adequate and reasonable response to these new requirements will likely require more than the 1 year provided by the NPRM. Therefore, final § 29.13(c) establishes a 2-year time frame from the effective date of the final rule for currently recognized States seeking continued recognition to submit required documentation to the Office of Apprenticeship. This means that States seeking continued recognition will have 2 years from the effective date of this final rule to make any changes necessary for compliance with this part. We also recognize that circumstances may arise which provide good cause for extension of this 2 year time frame. Final § 29.13(c) carries forward a proposed provision that allows States to submit written requests for extension of time within which to comply with the requirements of this part. Except as noted, final § 29.13(c) is promulgated as proposed.

Renewal and Maintenance of Recognition

Five commenters addressed proposed § 29.13(d), which establishes a 5 year period for recognition of a State Apprenticeship Agency by the Department and provides a process for renewal and maintenance of recognition. Four commenters stated that DOL currently has the authority to withdraw recognition of a State Apprenticeship Agency for failure to conform to part 29 so there is no need to place further requirements on State Apprenticeship Agencies to renew their recognition every 5 years. One commenter asserted that requiring State Apprenticeship Agencies to renew their recognition diverts resources from program implementation and would interfere with funding and budget planning.

Response: Existing regulations confer open-ended recognition on State Apprenticeship Agencies for Federal purposes and do not clearly specify that a State Apprenticeship Agency must continue to meet regulatory requirements for continued recognition. When the Department confers recognition on a State Apprenticeship Agency to register apprenticeship programs for Federal purposes, it is our responsibility to ensure that the basis for recognition, State apprenticeship law, regulation, policies, plans, and procedures, continues to conform to Federal requirements. We anticipate periodic change, as State Apprenticeship Agencies respond to the changing workforce needs of business, industry, and labor. Section 29.13(d) establishes requirements for renewal and maintenance of recognition to ensure that the Department has the opportunity to review and determine if the State apprenticeship laws, regulations, policies, plans, and procedures continue to conform to Federal requirements.

In the Department's view, a 5 year period provides a reasonable level of continuity for State Apprenticeship Agencies, while providing an efficient way to ensure that State Apprenticeship Agencies remain in conformity with Federal requirements. As discussed in the NPRM, the monitoring and reviews outlined in § 29.13(e) will form the basis for the Office of Apprenticeship's decision whether to continue recognition every 5 years. Therefore, the burden on State Apprenticeship Agencies for this 5 year renewal and maintenance of recognition will be minimal. We have revised final § 29.13(d) to clarify that the notification to States regarding conformity with this part will be based on the Office of Apprenticeship's monitoring of a State Registration Agency's compliance, as provided by § 29.13(e). We have revised § 29.13(d) accordingly.

Compliance

No comments were received on proposed § 29.13(e), which is a new provision that provides for on-site review, self-assessment, and monitoring of the State's apprenticeship law and procedures, and is based on the Department's existing procedures for determining if State Apprenticeship Agencies are complying with part 29. However, upon further review we noted two non-substantive changes were necessary to correct grammatical errors, and we have revised final § 29.13(e) accordingly.

Accountability/Remedies for Non-conformity

One comment was received on proposed § 29.13(f), a new provision which provides for the steps to be taken if a State Apprenticeship Agency is found to be out of compliance with part 29. Those steps, which are based on the Department's current practice of compliance assistance, include the provision of technical assistance, and, where problems are found, conferral of ''Conditional Recognition'' for 45 days during which the State Apprenticeship Agency must submit a corrective action plan to remedy the conforming activity for failure to maintain compliance. The commenter suggested extending the period of ''Conditional Recognition'' to 90 days, asserting that additional time might be necessary to change State law that was found to be out of conformity with 29 CFR part 29.

Response: We disagree with the recommendation to extend the period of Conditional Recognition to 90 days. The period of Conditional Recognition established by 29.13(f)(ii) pertains to the time frame during which the State Apprenticeship Agency must submit its corrective action plan. Paragraph (f)(ii) does not establish the time frame in which a State must actually remedy the non-conforming activity. The 45 day period is consistent with current practice, and provides sufficient time to submit a corrective action plan. However, upon further review we have noted that the requirements for submission of a corrective action plan did not specify where the corrective action plan should be submitted. Therefore, we have revised § 29.13(f) to clarify that a State Apprenticeship Agency that was placed on Conditional Recognition must submit a corrective action plan to the Office of Apprenticeship.

Denial of State Apprenticeship Agency Recognition

No comments were received on proposed § 29.13(g), which is based on existing § 29.12(d) and simplifies and clarifies the process for determining whether to deny a State Apprenticeship Agency recognition and provides the procedures for appeal of that decision. However, upon further review we have determined that further clarification was needed with regard to informing a State Apprenticeship Agency about a request for administrative review of a denial of recognition. We have revised § 29.13(g) to clarify that the written notice to a State Apprenticeship Agency denying

recognition must also specify that a request for administrative review of a denial of recognition may be made within 30 calendar days of receipt of a notice of denial from the Department. We have also added provisions to paragraph (4) to clarify that the Administrative Review Board must decide any case it accepts for review within 180 days of the close of the record and that, if not so decided, the Administrative Law Judge's decision constitutes final agency action. This clarification aligns final § 29.13(g) with provisions for administrative review in final § 29.10(c).

State Apprenticeship Programs

No comments were received on proposed § 29.13(h), which carried forward provisions for registration with the Office of Apprenticeship in the event that a State Apprenticeship Agency is not recognized by the Office of Apprenticeship for Federal purposes, that such recognition has been withdrawn, or that no State Apprenticeship Agency exists. Section 29.14(e) also establishes requirements for registration with the Office of Apprenticeship for program sponsors affected by derecognition of a State Apprenticeship Agency. To avoid duplication in the final rule, we have deleted proposed § 29.13(h)(2) and revised final § 29.14(e) to incorporate provisions from proposed § 29.13(h)(2) that provide opportunities for a program sponsor to request registration with the Office of Apprenticeship where a State Apprenticeship Agency does not exist or a State Apprenticeship Agency is not recognized by the Office of Apprenticeship for Federal purposes.

No comments were received on proposed § 29.13(i) and § 29.13(j). Therefore, we are promulgating 29.13(i) and 29.13(j) as proposed.

Derecognition of State Agencies (§ 29.14)

The Department received one comment on proposed revisions to the rules on derecognition of State Apprenticeship Agencies (existing § 29.13, proposed § 29.14). The commenter generally supported the Department's proposed changes to § 29.14, but suggested new penalties such as clarification that Federal funds will be withheld from State Apprenticeship Agencies that unfairly restrict apprenticeship opportunities in a manner inconsistent with parts 29 and 30 and the National Apprenticeship Act.

Response: The commenter did not provide sufficient justification for the establishment of an additional penalty beyond derecognition. Further, since the Department provides no funds to State Apprenticeship Agencies, the Department does not have the statutory authority to withhold Federal funds from State Apprenticeship Agencies.

Upon further review, we have also added provisions to § 29.14(c)(3)(i) to clarify that the Administrative Review Board must decide any case it accepts for review within 180 days of the close of the record and that, if not so decided, the Administrative Law Judge's decision constitutes final agency action. This clarification aligns final § 29.14(c) with provisions for administrative review in final § 29.10(c).

Also, as discussed above § 29.14(e) has been revised to incorporate provisions for a program sponsor to request registration with the Office of Apprenticeship where a State Apprenticeship Agency does not exist or a State Apprenticeship Agency is not recognized by the Office of Apprenticeship for Federal purposes.

III. Administrative Requirements for the Rule

Executive Order (E.O.) 12866

This final rule to revise 29 CFR part 29 is a significant regulatory action under § 3(f) of Executive Order 12866 because it raises ''novel legal or policy issues arising out of legal mandates, the President's priorities, or the principles'' set forth in the E.O. Accordingly, pursuant to the Executive Order, it was reviewed by OMB. Revisions to 29 CFR part 29 pertain to the terms and conditions for an apprenticeship program sponsor to register program standards and apprentices for Federal purposes, and for the Department to grant authority to a State Registration Agency to act on behalf of the Department to register apprenticeship programs and standards for Federal purposes. The benefits of recognition of an apprenticeship program and apprentices for Federal purposes are to meet requirements of a Federal contract, grant, agreement or arrangement dealing with apprenticeship; and requirements for any Federal financial or other assistance, benefit, privilege, contribution, allowance, exemption, preference or right pertaining to apprenticeship. Since this final rule is the first revision to regulations for the National Apprenticeship System since the Department first promulgated the rule in 1977, it raises novel policy issues. However, the Department has determined that the costs to program sponsors and State Registration Agencies associated with registering apprenticeship programs and apprentices under these revised terms and conditions are only minimally different from those pertaining to the current requirements of the current 29 CFR part 29. These revisions will not have an annual effect on the economy of $100 million or more nor will they adversely affect the economy, a sector of the economy, productivity, competition, jobs, the environment, public health or safety, or State, local, or tribal governments or communities in any material way. Therefore, we conclude that this final rule is not economically significant and it is not subject to § 6(a)(3)(C) of the Executive Order.

Paperwork Reduction Act

This final rule requires Registered Apprenticeship Program Sponsors and apprentices to submit Apprenticeship Agreement forms to DOL or to the appropriate State Registration Agency. These requirements were previously reviewed and approved for use by OMB under 29 U.S.C. 50 and 29 CFR 29.1, and assigned OMB control number 1205–0223 under the provisions of the Paperwork Reduction Act of 1995, 44 U.S.C. 3501 (PRA). Additionally, OMB previously approved the Department's information collection request for the Apprenticeship Agreement in § 29.7, including collection of the apprentice's Social Security Number (OMB Control Number 1205–0223, expiration date of October 31, 2008. The Department is in the process of obtaining an extension of this form for three additional years). The Department has determined that this final rule contains no new information collection requirements, nor that any of these requirements are substantively or materially modified by the changes contained herein.

Executive Order 13132: Federalism

The Department has reviewed the final rule in accordance with E.O. 13132 and has determined that it has Federalism implications because it has substantial direct effects on States and the relationship between the National government and the States. As noted in the NPRM, the Department developed the proposed rule based upon advice from the Advisory Committee on Apprenticeship (ACA), and in consultation with State Apprenticeship Agencies and the National Association of State and Territorial Apprenticeship Directors (NASTAD), the organization representing apprenticeship officials from the District of Columbia, 27 States, and three Territories. The ACA, which contains representatives of two associations of State labor and apprenticeship officials (including NASTAD), offered specific suggestions on matters relating to apprenticeship

program standards, and registration and deregistration of apprenticeship programs. The proposed rule incorporated the ACA's recommendations, and as discussed above in the comments and regulatory changes, the final rule carries forward these recommendations.

Although NASTAD and State Apprenticeship Agencies did not have direct input into the development of sections in the proposed and final rule that directly affect States and the relationship between the National government and the States, the Department gave thorough consideration to NASTAD's recommendations on existing regulations submitted in a letter from the President of NASTAD in December 2006, in response to a request from the Office of Apprenticeship. NASTAD's recommendations for the proposed rule pertained to the roles of State Apprenticeship Councils and State Apprenticeship Agencies, composition of State Apprenticeship Councils, requirements for reciprocal approval for programs registered in one State seeking recognition in another State, the final rule's effect on recognition status for currently recognized States Registration Agencies, and the name of the DOL entity responsible for oversight of the National Apprenticeship System.

As stated in the NPRM and discussed further below, we considered this input and adopted most of NASTAD's recommendations in developing the proposed and final rule. Additionally, in our review of comments submitted by NASTAD and States on the proposed rule, we have identified six areas of concern for States, some of which are consistent with NASTAD's recommendations for revisions. The areas are: increased administrative burdens on States; impact on a State's internal organizational structure; requirements for linkages with the workforce investment system; expansion of reciprocal approval for programs and standards in the building and construction industries; Departmental review of State apprenticeship laws, regulations, policies and procedures; and recognition status of currently recognized States Registration Agencies.

Where appropriate and feasible for the effective functioning of the Federal-State partnership over registered apprenticeship for Federal purposes, we have revised the final rule to ease the administrative burdens on States. For other issues pertaining to this Federal-State partnership, we have determined that proposed requirements in the final rule are necessary to ensure conformity with Federal law, and consistency across the National Apprenticeship System.

As noted in the NPRM and in discussions above, the final rule affects internal State organizational structures with regard to State Apprenticeship Agencies and State Apprenticeship Councils. Although no changes have been made to the final rule regarding limiting recognition to State Apprenticeship Agencies, we have set forth further explanation for this requirement. We have determined that because a direct relationship between Federal and State agencies is necessary for the smooth functioning of the National Apprenticeships System, the Department will only grant recognition to a State Apprenticeship Agency to act as a Registration Agency for registered apprenticeship for Federal purposes. The final rule requires recognized States to establish and continue to use a State Apprenticeship Council, which may serve either an advisory or a regulatory role. Accordingly, compliance with the final rule may require a State seeking recognition as a Registration Agency to modify its internal organizational structures pertaining to its State Apprenticeship Agency and its State Apprenticeship Council.

We recognize that the National Apprenticeship Act and the Workforce Investment Act do not authorize the Department to mandate that a State's workforce investment system and economic development strategies include registered apprenticeship. Although the Department encourages integration, and a State Apprenticeship Agency may seek such integration, the authority for internal State organizational issues remains with the State. Therefore, the final rule simply requires a State Apprenticeship Agency seeking recognition to demonstrate how it is pursuing linkages and coordination with the State's publicly funded workforce investment system and economic development strategies. As discussed in the NPRM, through increased coordination, State Apprenticeship Agencies can promote registered apprenticeship to a broader audience and further expand apprenticeship into high growth, high demand occupations.

The NPRM also noted that the proposed extension of requirements for reciprocal approval of programs in building and construction industries registered in other States may also raise questions regarding which States' registration requirements would apply. As discussed above, the final rule clarifies that program sponsors seeking reciprocal approval from a ''host'' State must meet the host State's wage and hour provisions and apprenticeship ratio standards. Therefore, State Registration Agencies retain the authority to enforce wage and hour provisions and apprenticeship ratio standards in their respective State's labor law.

Commenters asserted that the requirement for Office of Apprenticeship review and approval of proposed modifications to State apprenticeship legislation, regulation, policies and procedures prior to implementation usurps State authority. The final rule clarifies that the National Apprenticeship Act's broad mandate for the Department to safeguard the welfare of apprentices provides the Department with authority to ensure that a recognized State Apprenticeship Agency remains accountable for its conformity with Federal law. However, we recognize that a State has sovereign power and authority to establish State law and policy. To balance the interests of these two authorities (State authority to promulgate State law and policy, with the Department's authority to ensure that a recognized State remains accountable for conformity with Federal law), the final rule provides for the Office of Apprenticeship's concurrence on proposed modifications to State apprenticeship legislation, regulation, policies and procedures for Federal purposes. Provisions for review and concurrence are intended to provide a reasonable opportunity for the Department to inform recognized States of areas of nonconformity; the provisions are not intended to diminish or restrict a State's authority to establish State law and policy. A State's decision to establish State law or policy that does not conform to requirements of Federal apprenticeship law or regulations has consequences, which may include the derecognition of the State Apprenticeship Agency as the Registration Agency authorized to register apprenticeship programs and standards for Federal purposes. However, such recognition does not affect the State's authority to register apprenticeship programs and standards for State purposes.

We have also extended the time frame for States seeking new or continued recognition as a Registration Agency to submit documentation specified in § 29.13(a). The NPRM provided 1 year from the effective date of the final rule; the final rule provides 2 years from the effective date of the final rule in recognition of the burdens associated with transition period.

Finally, we reiterate that the final rule pertains to registered apprenticeship for

Federal purposes. As with existing regulations, the final rule remains silent on matters pertaining to a State's registration and oversight of apprenticeship programs and apprentices for State or local purposes. The distinction between registered apprenticeship for Federal purposes and registered apprenticeship for State and local purposes serves to limit the scope of the Federal government's role in State government functions.

Unfunded Mandates Reform Act of 1995

This regulatory action has been reviewed in accordance with the Unfunded Mandates Reform Act of 1995, 2 U.S.C. 1531, and E.O. 12875. The Department has determined that this rule does not include any Federal mandate that may result in increased expenditures by State, local or tribal governments, in the aggregate, or by the private sector, of $100 million or more in any one year, adjusted by the rate of inflation between 1995 and 2008 ($130 million). Accordingly, the Department has not included a budgetary impact estimate.

Assessment of Federal Regulations and Policies on Families

The Department certifies that this final rule has been assessed according to § 654 of Public Law 105–277, 112 Stat. 2681, for its effect on family well-being. The Department concludes that the rule will not adversely affect the well-being of the Nation's families. Rather, it should have a positive effect by safeguarding the welfare of registered apprentices.

Regulatory Flexibility Act (RFA)/ Small Business Regulatory Enforcement Fairness Act of 1996 (SBREFA)

The Department has notified the Chief Counsel for Advocacy, Small Business Administration, and made the certification pursuant to the RFA at 5 U.S.C. 605(b), that this final rule will not have a significant economic impact on a substantial number of small entities. Under the RFA, no regulatory flexibility analysis is required where the rule will not have a significant economic impact on a substantial number of small entities. A small entity is defined as a small business, small not-for-profit organization, or small governmental jurisdiction. 5 U.S.C. 601(3)–(5). The definition of the term ''small entity'' does not include States or individuals. This rule revises and updates procedures for labor standards for registered apprenticeship programs administered by the States and the Department, and not by small governmental jurisdictions. There are approximately 250,000 separate employers who participate in roughly 29,000 registered apprenticeship programs. There are an estimated 468,000 apprentices in the National Apprenticeship System.

Although there may be a substantial number of small businesses impacted by this rulemaking (at the most 250,000 employers), the Department does not believe that there will be a significant economic impact to these entities. Small businesses will not incur additional incremental costs from this rulemaking because the aspect of the rule most likely to impact small entities, program oversight, primarily applies to the responsibilities of Registration Agencies to monitor registered apprenticeship programs rather than imposing requirements on the registered apprenticeship programs. For example, final § 29.5 carries forward current program oversight requirements for program sponsors to comply with 29 CFR part 30, Equal Employment Opportunity regulations, which includes compliance reviews conducted by Registration Agencies. Final § 29.6 imposes on Registration Agencies a new regulatory requirement to perform quality assurance assessments on registered apprenticeship programs as part of the Agencies' performance accountability responsibilities. While this is a new provision in part 29, the requirement to perform quality assurance assessments is long-standing. Pursuant to Circular 92–02, the Office of Apprenticeship guidance on quality assurance assessments issued in 1991, Registration Agencies have assessed apprenticeship program performance to identify areas of strength and opportunities for improvement. The final rule's provisions for Equal Employment Opportunity Compliance Reviews and quality assurance assessments impose no assessment responsibilities on small programs or other programs. Compliance costs to program sponsors associated with program oversight will be the same as under current regulations.

However, through comments on the NPRM, it has come to our attention that the program performance provisions in § 29.6 may place an unintended burden on small apprenticeship program sponsors such as small businesses by potentially increasing the cost of maintaining conformity with this part or by potentially leading to deregistration of small apprenticeship programs. In particular, we are aware of concerns that the requirement in § 29.6(c) that Registration Agencies evaluate program performance by comparing completion rates of programs in like industries, occupations, and geographic areas could possibly unfairly penalize programs operated by small businesses. We are also aware of concerns that the proposed § 29.6(a) requirement that every program must have at least one registered apprentice could unfairly impact small apprenticeship programs that may experience short periods of time without any apprentices. To avoid such unintended consequences, the Department has made changes to these provisions in the final rule discussed below.

As discussed above in the definitions in § 29.2, program performance standards in § 29.6, and program deregistration in § 29.8, the Department has clarified the relevant provisions in the final rule to address concerns about compliance costs and burdens on small entities potentially associated with a Registration Agency's evaluation of programs' performance. In § 29.6(a), the NPRM provided that every program must have at least one registered apprentice in order to be designated and retain designation as a registered apprenticeship program for Federal purposes. We are persuaded that there may be times when a sponsor may have a lag between training cycles and be without a registered apprentice for a short period of time and we recognize that small programs with fewer apprentices may encounter such situations more frequently than larger programs. Therefore, the final rule establishes a 1 year time frame during which a program sponsor may be without a registered apprentice so that normal program cycles will not lead to deregistration of small apprenticeship programs. By providing a period of up to one year so that the rule will not affect small programs that are without apprentices during the periods between training cycles, the revised § 29.6(a) reduces administrative costs and burdens associated with small program sponsors potentially having to re-register their program(s) that could have otherwise been cancelled for nonconformity with proposed § 29.6(a).

We have revised § 29.6(c) to address potential concerns that the requirement that Registration Agencies evaluate program performance by comparing completion rates of programs in like industries, occupations, and geographic areas could negatively impact small apprenticeship programs if Registration Agencies used these comparisons of completion rates to unfairly penalize programs operated by small businesses. To address these concerns and to minimize any potential unfair impact from the performance accountability provisions on small apprenticeship

programs, final § 29.6(c) removes comparisons of completion rates across geographic areas, industries, and occupations; drops the reference that appeared in proposed § 29.6(c) for the Registration Agency to ''take other appropriate action'' against such programs; and provides for evaluation of performance of registered apprenticeship programs based on comparison to the national average for completion rates. The preamble discussion of these provisions clearly explains that completion rate information is intended for a Registration Agency's use in identifying programs that may benefit from technical assistance and will not automatically lead to program deregistration. The final rule clarifies that completion rates may potentially factor into deregistration procedures only when the program demonstrates an ongoing pattern of very low completion rates over several years. The function of calculating completion rates and the provision of technical assistance by discussing ways to improve a program's completion rates has effectively been a part of a Registration Agency's oversight operations. These requirements will not create new compliance costs to program sponsors and the changes made to the final rule minimize burdens on programs sponsored by small entities by eliminating the risk of unnecessary program deregistration proceedings that may have been possible under proposed § 29.6(c).

With the addition of definitions for quality assurance assessment and completion rate in the definitions in final § 29.2; and clarifications and revisions to program performance in final § 29.6 and program deregistration in final § 29.8, the final rule minimizes compliance costs and reduces any potential burdens on small entities that may have resulted from the NPRM. Therefore, the Department certifies that this proposed rule will not have a significant impact on a substantial number of small entities, and as a result no regulatory flexibility analysis is required.

As discussed above with regard to program performance standards in final § 29.6, one commenter asserted the impact of the provisions for evaluation of apprenticeship programs qualifies the rule as a major rule under E.O. 12866 and SBREFA. The Department disagrees. As noted above, provisions for evaluation of program performance are necessary to ensure program quality and accountability in the National Apprenticeship System, and do not pertain to the establishment bid requirements for State and local construction projects. Therefore, the Department certifies that this final rule is not a major rule as defined by § 804 of the SBREFA. 5 U.S.C. 804.

Executive Order 13175: Consultation and Coordination With Indian Tribal Governments

The Department has reviewed this final rule in accordance with E.O. 13175 and has determined that it does not have ''tribal implications.'' The proposed rule does not ''have substantial direct effects on one or more Indian tribes, on the relationship between the Federal government and Indian tribes, or on the distribution of power and responsibilities between the Federal government and Indian tribes.''

Executive Order 12988: Civil Justice

This final rule has been drafted and reviewed in accordance with E.O. 12988, Civil Justice Reform, and will not unduly burden the Federal court system. The rule has been written so as to minimize litigation and provide a clear legal standard for affected conduct, and has been reviewed carefully to eliminate drafting errors and ambiguities.

Plain Language

The Department drafted this Final Rule in plain language.

Catalogue of Federal Domestic Assistance Number

This program is listed in the Catalog of Federal Domestic Assistance at Number 17.201.

List of Subjects in 29 CFR Part 29

Apprentice agreement and complaints, Apprenticeability criteria, Program standards, registration and deregistration, Sponsor eligibility, State Apprenticeship Agency recognition and derecognition.

Signed at Washington, DC, on October 15, 2008.

Brent R. Orrell,

Deputy Assistant Secretary, Employment and Training Administration.

■ For reasons stated in the preamble, the Department of Labor revises 29 CFR part 29 to read as follows:

PART 29—LABOR STANDARDS FOR THE REGISTRATION OF APPRENTICESHIP PROGRAMS

Sec.

29.1 Purpose and scope.
29.2 Definitions.
29.3 Eligibility and procedure for registration of an apprenticeship program.
29.4 Criteria for apprenticeable occupations.
29.5 Standards of apprenticeship.
29.6 Program performance standards.
29.7 Apprenticeship agreement.
29.8 Deregistration of a registered program.
29.9 Reinstatement of program registration.
29.10 Hearings for deregistration.
29.11 Limitations.
29.12 Complaints.
29.13 Recognition of State apprenticeship agencies.
29.14 Derecognition of State apprenticeship agencies.

Authority: Section 1, 50 Stat. 664, as amended (29 U.S.C. 50; 40 U.S.C. 276c; 5 U.S.C. 301) Reorganization Plan No. 14 of 1950, 64 Stat. 1267 (5 U.S.C. App. P. 534).

§ 29.1 Purpose and scope.

(a) The National Apprenticeship Act of 1937, section 1 (29 U.S.C. 50), authorizes and directs the Secretary of Labor ''to formulate and promote the furtherance of labor standards necessary to safeguard the welfare of apprentices, to extend the application of such standards by encouraging the inclusion thereof in contracts of apprenticeship, to bring together employers and labor for the formulation of programs of apprenticeship, to cooperate with State agencies engaged in the formulation and promotion of standards of apprenticeship, and to cooperate with the Office of Education under the Department of Health, Education, and Welfare * * *.'' Section 2 of the Act authorizes the Secretary of Labor to ''publish information relating to existing and proposed labor standards of apprenticeship,'' and to ''appoint national advisory committees * * *.'' (29 U.S.C. 50a).

(b) The purpose of this part is to set forth labor standards to safeguard the welfare of apprentices, promote apprenticeship opportunity, and to extend the application of such standards by prescribing policies and procedures concerning the registration, for certain Federal purposes, of acceptable apprenticeship programs with the U.S. Department of Labor, Employment and Training Administration, Office of Apprenticeship. These labor standards, policies and procedures cover the registration, cancellation and deregistration of apprenticeship programs and of apprenticeship agreements; the recognition of a State agency as an authorized agency for registering apprenticeship programs for certain Federal purposes; and matters relating thereto.

§ 29.2 Definitions.

Administrator means the Administrator of the Office of Apprenticeship, or any person specifically designated by the Administrator.

Apprentice means a worker at least 16 years of age, except where a higher minimum age standard is otherwise fixed by law, who is employed to learn an apprenticeable occupation as provided in § 29.4 under standards of apprenticeship fulfilling the requirements of § 29.5.

Apprenticeship Agreement means a written agreement, complying with § 29.7, between an apprentice and either the apprentice's program sponsor, or an apprenticeship committee acting as agent for the program sponsor(s), which contains the terms and conditions of the employment and training of the apprentice.

Apprenticeship Committee (Committee) means those persons designated by the sponsor to administer the program. A committee may be either joint or non-joint, as follows:

(1) A joint committee is composed of an equal number of representatives of the employer(s) and of the employees represented by a bona fide collective bargaining agent(s).

(2) A non-joint committee, which may also be known as a unilateral or group non-joint (which may include employees) committee, has employer representatives but does not have a bona fide collective bargaining agent as a participant.

Apprenticeship Program means a plan containing all terms and conditions for the qualification, recruitment, selection, employment and training of apprentices, as required under 29 CFR parts 29 and 30, including such matters as the requirement for a written apprenticeship agreement.

Cancellation means the termination of the registration or approval status of a program at the request of the sponsor, or termination of an Apprenticeship Agreement at the request of the apprentice.

Certification or Certificate means documentary evidence that:

(1) The Office of Apprenticeship has approved a set of National Guidelines for Apprenticeship Standards developed by a national committee or organization, joint or unilateral, for policy or guideline use by local affiliates, as conforming to the standards of apprenticeship set forth in § 29.5;

(2) A Registration Agency has established that an individual is eligible for probationary employment as an apprentice under a registered apprenticeship program;

(3) A Registration Agency has registered an apprenticeship program as evidenced by a Certificate of Registration or other written indicia;

(4) A Registration Agency has determined that an apprentice has successfully met the requirements to receive an interim credential; or

(5) A Registration Agency has determined that an individual has successfully completed apprenticeship.

Competency means the attainment of manual, mechanical or technical skills and knowledge, as specified by an occupational standard and demonstrated by an appropriate written and hands-on proficiency measurement.

Completion rate means the percentage of an apprenticeship cohort who receive a certificate of apprenticeship completion within 1 year of the projected completion date. An apprenticeship cohort is the group of individual apprentices registered to a specific program during a 1 year time frame, except that a cohort does not include the apprentices whose apprenticeship agreement has been cancelled during the probationary period.

Department means the U.S. Department of Labor.

Electronic media means media that utilize electronics or electromechanical energy for the end user (audience) to access the content; and includes, but is not limited to, electronic storage media, transmission media, the Internet, extranet, lease lines, dial-up lines, private networks, and the physical movement of removable/transportable electronic media and/or interactive distance learning.

Employer means any person or organization employing an apprentice whether or not such person or organization is a party to an Apprenticeship Agreement with the apprentice.

Federal Purposes includes any Federal contract, grant, agreement or arrangement dealing with apprenticeship; and any Federal financial or other assistance, benefit, privilege, contribution, allowance, exemption, preference or right pertaining to apprenticeship.

Interim credential means a credential issued by the Registration Agency, upon request of the appropriate sponsor, as certification of competency attainment by an apprentice.

Journeyworker means a worker who has attained a level of skill, abilities and competencies recognized within an industry as having mastered the skills and competencies required for the occupation. (Use of the term may also refer to a mentor, technician, specialist or other skilled worker who has documented sufficient skills and knowledge of an occupation, either through formal apprenticeship or through practical on-the-job experience and formal training.)

Office of Apprenticeship means the office designated by the Employment and Training Administration to administer the National Apprenticeship System or its successor organization.

Provisional registration means the 1-year initial provisional approval of newly registered programs that meet the required standards for program registration, after which program approval may be made permanent, continued as provisional, or rescinded following a review by the Registration Agency, as provided for in the criteria described in § 29.3(g) and (h).

Quality Assurance Assessment means a comprehensive review conducted by a Registration Agency regarding all aspects of an apprenticeship program's performance, including but not limited to, determining if apprentices are receiving: on-the-job training in all phases of the apprenticeable occupation; scheduled wage increases consistent with the registered standards; related instruction through appropriate curriculum and delivery systems; and that the registration agency is receiving notification of all new registrations, cancellations, and completions as required in this part.

Registration Agency means the Office of Apprenticeship or a recognized State Apprenticeship Agency that has responsibility for registering apprenticeship programs and apprentices; providing technical assistance; conducting reviews for compliance with 29 CFR parts 29 and 30 and quality assurance assessments.

Registration of an apprenticeship agreement means the acceptance and recording of an apprenticeship agreement by the Office of Apprenticeship or a recognized State Apprenticeship Agency as evidence of the apprentice's participation in a particular registered apprenticeship program.

Registration of an apprenticeship program means the acceptance and recording of such program by the Office of Apprenticeship, or registration and/or approval by a recognized State Apprenticeship Agency, as meeting the basic standards and requirements of the Department for approval of such program for Federal purposes. Approval is evidenced by a Certificate of Registration or other written indicia.

Related instruction means an organized and systematic form of instruction designed to provide the apprentice with the knowledge of the theoretical and technical subjects related to the apprentice's occupation. Such instruction may be given in a classroom, through occupational or industrial courses, or by correspondence

courses of equivalent value, electronic media, or other forms of self-study approved by the Registration Agency.

Secretary means the Secretary of Labor or any person designated by the Secretary.

Sponsor means any person, association, committee, or organization operating an apprenticeship program and in whose name the program is (or is to be) registered or approved.

State means any of the 50 States of the United States, District of Columbia, or any Territory or possession of the United States.

State Apprenticeship Agency means an agency of a State government that has responsibility and accountability for apprenticeship within the State. Only a State Apprenticeship Agency may seek recognition by the Office of Apprenticeship as an agency which has been properly constituted under an acceptable law or Executive Order, and authorized by the Office of Apprenticeship to register and oversee apprenticeship programs and agreements for Federal purposes.

State Apprenticeship Council is an entity established to assist the State Apprenticeship Agency. A State Apprenticeship Council is ineligible for recognition as the State's Registration Agency. A regulatory State Apprenticeship Council may promulgate apprenticeship law at the direction of the State Apprenticeship Agency. An advisory State Apprenticeship Council provides advice and guidance to the State Apprenticeship Agency on the operation of the State's apprenticeship system.

State office means that individual office or division of State government designated as the point of contact for the State Apprenticeship Agency.

Technical assistance means guidance provided by Registration Agency staff in the development, revision, amendment, or processing of a potential or current program sponsor's Standards of Apprenticeship, Apprenticeship Agreements, or advice or consultation with a program sponsor to further compliance with this part or guidance from the Office of Apprenticeship to a State Apprenticeship Agency on how to remedy nonconformity with this part.

Transfer means a shift of apprenticeship registration from one program to another or from one employer within a program to another employer within that same program, where there is agreement between the apprentice and the affected apprenticeship committees or program sponsors.

§ 29.3 Eligibility and procedure for registration of an apprenticeship program.

(a) Eligibility for registration of an apprenticeship program for various Federal purposes is conditioned upon a program's conformity with the apprenticeship program standards published in this part. For a program to be determined by the Secretary as being in conformity with these published standards, the program must apply for registration and be registered with the Office of Apprenticeship or with a State Apprenticeship Agency recognized by the Office of Apprenticeship. The determination by the Secretary that the program meets the apprenticeship program standards is effectuated only through such registration.

(b) Only an apprenticeship program or agreement that meets the following criteria is eligible for Office of Apprenticeship or State Apprenticeship Agency registration:

(1) It is in conformity with the requirements of this part and the training is in an apprenticeable occupation having the characteristics set forth in § 29.4 of this part; and

(2) It is in conformity with the requirements of the Department's regulation on Equal Employment Opportunity in Apprenticeship and Training in 29 CFR part 30, as amended.

(c) Except as provided under paragraph (d) of this section, apprentices must be individually registered under a registered program. Such individual registration may be affected:

(1) By filing copies of each individual apprenticeship agreement with the Registration Agency; or

(2) Subject to prior Office of Apprenticeship or recognized State Apprenticeship Agency approval, by filing a master copy of such agreement followed by a listing of the name, and other required data, of each individual when apprenticed.

(d) The names of persons in probationary employment as an apprentice under an apprenticeship program registered by the Office of Apprenticeship or a recognized State Apprenticeship Agency, if not individually registered under such program, must be submitted within 45 days of employment to the Office of Apprenticeship or State Apprenticeship Agency for certification to establish the apprentice as eligible for such probationary employment.

(e) The appropriate Registration Agency must be notified within 45 days of persons who have successfully completed apprenticeship programs; and of transfers, suspensions, and cancellations of apprenticeship agreements and a statement of the reasons therefore.

(f) Operating apprenticeship programs, when approved by the Office of Apprenticeship, are accorded registration evidenced by a Certificate of Registration. Programs approved by recognized State Apprenticeship Agencies must be accorded registration and/or approval evidenced by a similar certificate or other written indicia. When approved by the Office of Apprenticeship, National Apprenticeship Guideline Standards for policy or guidance will be accorded a certificate.

(g) Applications for new programs that the Registration Agency determines meet the required standards for program registration must be given provisional approval for a period of 1 year. The Registration Agency must review all new programs for quality and for conformity with the requirements of this part at the end of the first year after registration. At that time:

(1) a program that conforms with the requirements of this part:

(i) may be made permanent; or

(ii) may continue to be provisionally approved through the first full training cycle.

(2) a program not in operation or not conforming to the regulations during the provisional approval period must be recommended for deregistration procedures.

(h) The Registration Agency must review all programs for quality and for conformity with the requirements of this part at the end of the first full training cycle. A satisfactory review of a provisionally approved program will result in conversion of provisional approval to permanent registration. Subsequent reviews must be conducted no less frequently than every five years. Programs not in operation or not conforming to the regulations must be recommended for deregistration procedures.

(i) Any sponsor proposals or applications for modification(s) or change(s) to registered programs or certified National Guidelines for Apprenticeship Standards must be submitted to the Registration Agency. The Registration Agency must make a determination on whether to approve such submissions within 90 days from the date of receipt. If approved, the modification(s) or change(s) will be recorded and acknowledged within 90 days of approval as an amendment to such program. If not approved, the sponsor must be notified of the disapproval and the reasons therefore and provided the appropriate technical assistance.

(j) Under a program proposed for registration by an employer or employers' association, where the standards, collective bargaining agreement or other instrument provides for participation by a union in any manner in the operation of the substantive matters of the apprenticeship program, and such participation is exercised, written acknowledgement of union agreement or no objection to the registration is required. Where no such participation is evidenced and practiced, the employer or employers' association must simultaneously furnish to an existing union, which is the collective bargaining agent of the employees to be trained, a copy of its application for registration and of the apprenticeship program. The Registration Agency must provide for receipt of union comments, if any, within 45 days before final action on the application for registration and/or approval.

(k) Where the employees to be trained have no collective bargaining agreement, an apprenticeship program may be proposed for registration by an employer or group of employers, or an employer association.

§ 29.4 Criteria for apprenticeable occupations.

An apprenticeable occupation is one which is specified by industry and which must:

(a) Involve skills that are customarily learned in a practical way through a structured, systematic program of on-the-job supervised learning;

(b) Be clearly identified and commonly recognized throughout an industry;

(c) Involve the progressive attainment of manual, mechanical or technical skills and knowledge which, in accordance with the industry standard for the occupation, would require the completion of at least 2,000 hours of on-the-job learning to attain; and

(d) Require related instruction to supplement the on-the-job learning.

§ 29.5 Standards of apprenticeship.

An apprenticeship program, to be eligible for approval and registration by a Registration Agency, must conform to the following standards:

(a) The program must have an organized, written plan (program standards) embodying the terms and conditions of employment, training, and supervision of one or more apprentices in an apprenticeable occupation, as defined in this part, and subscribed to by a sponsor who has undertaken to carry out the apprentice training program.

(b) The program standards must contain provisions that address:

(1) The employment and training of the apprentice in a skilled occupation.

(2) The term of apprenticeship, which for an individual apprentice may be measured either through the completion of the industry standard for on-the-job learning (at least 2,000 hours) (time-based approach), the attainment of competency (competency-based approach), or a blend of the time-based and competency-based approaches (hybrid approach).

(i) The time-based approach measures skill acquisition through the individual apprentice's completion of at least 2,000 hours of on-the-job learning as described in a work process schedule.

(ii) The competency-based approach measures skill acquisition through the individual apprentice's successful demonstration of acquired skills and knowledge, as verified by the program sponsor. Programs utilizing this approach must still require apprentices to complete an on-the-job learning component of Registered Apprenticeship. The program standards must address how on-the-job learning will be integrated into the program, describe competencies, and identify an appropriate means of testing and evaluation for such competencies.

(iii) The hybrid approach measures the individual apprentice's skill acquisition through a combination of specified minimum number of hours of on-the-job learning and the successful demonstration of competency as described in a work process schedule.

(iv) The determination of the appropriate approach for the program standards is made by the program sponsor, subject to approval by the Registration Agency of the determination as appropriate to the apprenticeable occupation for which the program standards are registered.

(3) An outline of the work processes in which the apprentice will receive supervised work experience and training on the job, and the allocation of the approximate amount of time to be spent in each major process.

(4) Provision for organized, related instruction in technical subjects related to the occupation. A minimum of 144 hours for each year of apprenticeship is recommended. This instruction in technical subjects may be accomplished through media such as classroom, occupational or industry courses, electronic media, or other instruction approved by the Registration Agency. Every apprenticeship instructor must:

(i) Meet the State Department of Education's requirements for a vocational-technical instructor in the State of registration, or be a subject matter expert, which is an individual, such as a journeyworker, who is recognized within an industry as having expertise in a specific occupation; and

(ii) Have training in teaching techniques and adult learning styles, which may occur before or after the apprenticeship instructor has started to provide the related technical instruction.

(5) A progressively increasing schedule of wages to be paid to the apprentice consistent with the skill acquired. The entry wage must not be less than the minimum wage prescribed by the Fair Labor Standards Act, where applicable, unless a higher wage is required by other applicable Federal law, State law, respective regulations, or by collective bargaining agreement.

(6) Periodic review and evaluation of the apprentice's performance on the job and in related instruction; and the maintenance of appropriate progress records.

(7) A numeric ratio of apprentices to journeyworkers consistent with proper supervision, training, safety, and continuity of employment, and applicable provisions in collective bargaining agreements, except where such ratios are expressly prohibited by the collective bargaining agreements. The ratio language must be specific and clearly described as to its application to the job site, workforce, department or plant.

(8) A probationary period reasonable in relation to the full apprenticeship term, with full credit given for such period toward completion of apprenticeship. The probationary period cannot exceed 25 percent of the length of the program, or 1 year, whichever is shorter.

(9) Adequate and safe equipment and facilities for training and supervision, and safety training for apprentices on the job and in related instruction.

(10) The minimum qualifications required by a sponsor for persons entering the apprenticeship program, with an eligible starting age not less than 16 years.

(11) The placement of an apprentice under a written Apprenticeship Agreement that meets the requirements of § 29.7 or the State apprenticeship law of a recognized Registration Agency. The agreement must directly, or by reference, incorporate the standards of the program as part of the agreement.

(12) The granting of advanced standing or credit for demonstrated competency, acquired experience, training, or skills for all applicants equally, with commensurate wages for any progression step so granted.

(13) The transfer of an apprentice between apprenticeship programs and within an apprenticeship program must be based on agreement between the apprentice and the affected apprenticeship committees or program sponsors, and must comply with the following requirements:

(i) The transferring apprentice must be provided a transcript of related instruction and on-the-job learning by the committee or program sponsor;

(ii) Transfer must be to the same occupation; and

(iii) A new apprenticeship agreement must be executed when the transfer occurs between program sponsors.

(14) Assurance of qualified training personnel and adequate supervision on the job.

(15) Recognition for successful completion of apprenticeship evidenced by an appropriate certificate issued by the Registration Agency.

(16) Program standards that utilize the competency-based or hybrid approach for progression through an apprenticeship and that choose to issue interim credentials must clearly identify the interim credentials, demonstrate how these credentials link to the components of the apprenticeable occupation, and establish the process for assessing an individual apprentice's demonstration of competency associated with the particular interim credential. Further, interim credentials must only be issued for recognized components of an apprenticeable occupation, thereby linking interim credentials specifically to the knowledge, skills, and abilities associated with those components of the apprenticeable occupation.

(17) Identification of the Registration Agency.

(18) Provision for the registration, cancellation and deregistration of the program; and for the prompt submission of any program standard modification or amendment to the Registration Agency for approval.

(19) Provision for registration of apprenticeship agreements, modifications, and amendments; notice to the Registration Agency of persons who have successfully completed apprenticeship programs; and notice of transfers, suspensions, and cancellations of apprenticeship agreements and a statement of the reasons therefore.

(20) Authority for the cancellation of an apprenticeship agreement during the probationary period by either party without stated cause; cancellation during the probationary period will not have an adverse impact on the sponsor's completion rate.

(21) Compliance with 29 CFR part 30, including the equal opportunity pledge prescribed in 29 CFR 30.3(b); an affirmative action plan complying with 29 CFR 30.4; and a method for the selection of apprentices authorized by 29 CFR 30.5, or compliance with parallel requirements contained in a State plan for equal opportunity in apprenticeship adopted under 29 CFR part 30 and approved by the Department. The apprenticeship standards must also include a statement that the program will be conducted, operated and administered in conformity with applicable provisions of 29 CFR part 30, as amended, or, if applicable, an approved State plan for equal opportunity in apprenticeship.

(22) Contact information (name, address, telephone number, and e-mail address if appropriate) for the appropriate individual with authority under the program to receive, process and make disposition of complaints.

(23) Recording and maintenance of all records concerning apprenticeship as may be required by the Office of Apprenticeship or recognized State Apprenticeship Agency and other applicable law.

§ 29.6 Program performance standards.

(a) Every registered apprenticeship program must have at least one registered apprentice, except for the following specified periods of time, which may not exceed 1 year:

(1) Between the date when a program is registered and the date of registration for its first apprentice(s); or

(2) Between the date that a program graduates an apprentice and the date of registration for the next apprentice(s) in the program.

(b) Registration Agencies must evaluate performance of registered apprenticeship programs.

(1) The tools and factors to be used must include, but are not limited to:

(i) Quality assurance assessments;

(ii) Equal Employment Opportunity (EEO) Compliance Reviews; and

(iii) Completion rates.

(2) Any additional tools and factors used by the Registration Agency in evaluating program performance must adhere to the goals and policies of the Department articulated in this part and in guidance issued by the Office of Apprenticeship.

(c) In order to evaluate completion rates, the Registration Agency must review a program's completion rates in comparison to the national average for completion rates. Based on the review, the Registration Agency must provide technical assistance to programs with completion rates lower than the national average.

(d) Cancellation of apprenticeship agreements during the probationary period will not have an adverse impact on a sponsor's completion rate.

§ 29.7 Apprenticeship agreement.

The apprenticeship agreement must contain, explicitly or by reference:

(a) Names and signatures of the contracting parties (apprentice, and the program sponsor or employer), and the signature of a parent or guardian if the apprentice is a minor.

(b) The date of birth and, on a voluntary basis, Social Security number of the apprentice.

(c) Contact information of the Program Sponsor and Registration Agency.

(d) A statement of the occupation in which the apprentice is to be trained, and the beginning date and term (duration) of apprenticeship.

(e) A statement showing:

(1) The number of hours to be spent by the apprentice in work on the job in a time-based program; or a description of the skill sets to be attained by completion of a competency-based program, including the on-the-job learning component; or the minimum number of hours to be spent by the apprentice and a description of the skill sets to be attained by completion of hybrid program; and

(2) The number of hours to be spent in related instruction in technical subjects related to the occupation, which is recommended to be not less than 144 hours per year.

(f) A statement setting forth a schedule of the work processes in the occupation or industry divisions in which the apprentice is to be trained and the approximate time to be spent at each process.

(g) A statement of the graduated scale of wages to be paid to the apprentice and whether or not the required related instruction is compensated.

(h) Statements providing:

(1) For a specific period of probation during which the apprenticeship agreement may be cancelled by either party to the agreement upon written notice to the registration agency, without adverse impact on the sponsor.

(2) That, after the probationary period, the agreement may be:

(i) Cancelled at the request of the apprentice, or

(ii) Suspended or cancelled by the sponsor, for good cause, with due notice to the apprentice and a reasonable opportunity for corrective action, and with written notice to the apprentice and to the Registration Agency of the final action taken.

(i) A reference incorporating as part of the agreement the standards of the apprenticeship program as they exist on the date of the agreement and as they may be amended during the period of the agreement.

(j) A statement that the apprentice will be accorded equal opportunity in all phases of apprenticeship employment and training, without discrimination because of race, color, religion, national origin, or sex.

(k) Contact information (name, address, phone, and e-mail if appropriate) of the appropriate authority designated under the program to receive, process and make disposition of controversies or differences arising out of the apprenticeship agreement when the controversies or differences cannot be adjusted locally or resolved in accordance with the established procedure or applicable collective bargaining provisions.

§ 29.8 Deregistration of a registered program.

Deregistration of a program may be effected upon the voluntary action of the sponsor by submitting a request for cancellation of the registration in accordance with paragraph (a) of this section, or upon reasonable cause, by the Registration Agency instituting formal deregistration proceedings in accordance with paragraph (b) of this section.

(a) Deregistration at the request of the sponsor. The Registration Agency may cancel the registration of an apprenticeship program by written acknowledgment of such request stating the following:

(1) The registration is cancelled at the sponsor's request, and the effective date thereof;

(2) That, within 15 days of the date of the acknowledgment, the sponsor will notify all apprentices of such cancellation and the effective date; that such cancellation automatically deprives the apprentice of individual registration; that the deregistration of the program removes the apprentice from coverage for Federal purposes which require the Secretary of Labor's approval of an apprenticeship program, and that all apprentices are referred to the Registration Agency for information about potential transfer to other registered apprenticeship programs.

(b) Deregistration by the Registration Agency upon reasonable cause.

(1)(i) Deregistration proceedings may be undertaken when the apprenticeship program is not conducted, operated, or administered in accordance with the program's registered provisions or with the requirements of this part, including not but limited to: failure to provide on-the-job learning; failure to provide related instruction; failure to pay the apprentice a progressively increasing schedule of wages consistent with the apprentices skills acquired; or persistent and significant failure to perform successfully. Deregistration proceedings for violation of equal opportunity requirements must be processed in accordance with the provisions under 29 CFR part 30.

(ii) For purposes of this section, persistent and significant failure to perform successfully occurs when a program sponsor consistently fails to register at least one apprentice, shows a pattern of poor quality assessment results over a period of several years, demonstrates an ongoing pattern of very low completion rates over a period of several years, or shows no indication of improvement in the areas identified by the Registration Agency during a review process as requiring corrective action.

(2) Where it appears the program is not being operated in accordance with the registered standards or with requirements of this part, the Registration Agency must notify the program sponsor in writing.

(3) The notice sent to the program sponsor's contact person must:

(i) Be sent by registered or certified mail, with return receipt requested;

(ii) State the shortcoming(s) and the remedy required; and

(iii) State that a determination of reasonable cause for deregistration will be made unless corrective action is effected within 30 days.

(4) Upon request by the sponsor for good cause, the 30-day term may be extended for another 30 days. During the period for corrective action, the Registration Agency must assist the sponsor in every reasonable way to achieve conformity.

(5) If the required correction is not effected within the allotted time, the Registration Agency must send a notice to the sponsor, by registered or certified mail, return receipt requested, stating the following:

(i) The notice is sent under this paragraph;

(ii) Certain deficiencies were called to the sponsor's attention (enumerating them and the remedial measures requested, with the dates of such occasions and letters), and that the sponsor has failed or refused to effect correction;

(iii) Based upon the stated deficiencies and failure to remedy them, a determination has been made that there is reasonable cause to deregister the program and the program may be deregistered unless, within 15 days of the receipt of this notice, the sponsor requests a hearing with the applicable Registration Agency; and

(iv) If the sponsor does not request a hearing, the entire matter will be submitted to the Administrator, Office of Apprenticeship, for a decision on the record with respect to deregistration.

(6) If the sponsor does not request a hearing, the Registration Agency will transmit to the Administrator a report containing all pertinent facts and circumstances concerning the nonconformity, including the findings and recommendation for deregistration, and copies of all relevant documents and records. Statements concerning interviews, meetings and conferences will include the time, date, place, and persons present. The Administrator will make a final order on the basis of the record presented.

(7) If the sponsor requests a hearing, the Registration Agency will transmit to the Administrator a report containing all the data listed in paragraph (b)(6) of this section, and the Administrator will refer the matter to the Office of Administrative Law Judges. An Administrative Law Judge will convene a hearing in accordance with § 29.10, and issue a decision as required in § 29.10(c).

(8) Every order of deregistration must contain a provision that the sponsor must, within 15 days of the effective date of the order, notify all registered apprentices of the deregistration of the program; the effective date thereof; that such cancellation automatically deprives the apprentice of individual registration; that the deregistration removes the apprentice from coverage for Federal purposes which require the Secretary of Labor's approval of an apprenticeship program; and that all apprentices are referred to the Registration Agency for information about potential transfer to other registered apprenticeship programs.

§ 29.9 Reinstatement of program registration.

Any apprenticeship program deregistered under § 29.8 may be reinstated upon presentation of adequate evidence that the apprenticeship program is operating in accordance with this part. Such evidence must be presented to the Registration Agency.

§ 29.10 Hearings for deregistration.

(a) Within 10 days of receipt of a request for a hearing, the Administrator of the Office of Apprenticeship must contact the Department's Office of Administrative Law Judges to request the designation of an Administrative

Law Judge to preside over the hearing. The Administrative Law Judge shall give reasonable notice of such hearing by registered mail, return receipt requested, to the appropriate sponsor. Such notice will include:

(1) A reasonable time and place of hearing;

(2) A statement of the provisions of this part pursuant to which the hearing is to be held; and

(3) A concise statement of the matters pursuant to which the action forming the basis of the hearing is proposed to be taken.

(b) The procedures contained in 29 CFR part 18 will apply to the disposition of the request for hearing except that:

(1) The Administrative Law Judge will receive, and make part of the record, documentary evidence offered by any party and accepted at the hearing. Copies thereof will be made available by the party submitting the documentary evidence to any party to the hearing upon request.

(2) Technical rules of evidence will not apply to hearings conducted pursuant to this part, but rules or principles designed to assure production of the most credible evidence available and to subject testimony to test by cross-examination will be applied, where reasonably necessary, by the Administrative Law Judge conducting the hearing. The Administrative Law Judge may exclude irrelevant, immaterial, or unduly repetitious evidence.

(c) The Administrative Law Judge should issue a written decision within 90 days of the close of the hearing record. The Administrative Law Judge's decision constitutes final agency action unless, within 15 days from receipt of the decision, a party dissatisfied with the decision files a petition for review with the Administrative Review Board, specifically identifying the procedure, fact, law or policy to which exception is taken. Any exception not specifically urged is deemed to have been waived. A copy of the petition for review must be sent to the opposing party at the same time. Thereafter, the decision of the Administrative Law Judge remains final agency action unless the Administrative Review Board, within 30 days of the filing of the petition for review, notifies the parties that it has accepted the case for review. The Administrative Review Board may set a briefing schedule or decide the matter on the record. The Administrative Review Board must decide any case it accepts for review within 180 days of the close of the record. If not so decided, the Administrative Law Judge's decision constitutes final agency action.

§ 29.11 Limitations.

Nothing in this part or in any apprenticeship agreement will operate to invalidate:

(a) Any apprenticeship provision in any collective bargaining agreement between employers and employees establishing higher apprenticeship standards; or

(b) Any special provision for veterans, minority persons, or women in the standards, apprentice qualifications or operation of the program, or in the apprenticeship agreement, which is not otherwise prohibited by law, Executive Order, or authorized regulation.

§ 29.12 Complaints.

(a) This section is not applicable to any complaint concerning discrimination or other equal opportunity matters; all such complaints must be submitted, processed and resolved in accordance with applicable provisions in 29 CFR part 30, or applicable provisions of a State Plan for Equal Employment Opportunity in Apprenticeship adopted pursuant to 29 CFR part 30 and approved by the Department.

(b) Except for matters described in paragraph (a) of this section, any controversy or difference arising under an apprenticeship agreement which cannot be adjusted locally and which is not covered by a collective bargaining agreement, may be submitted by an apprentice, or the apprentice's authorized representative, to the appropriate Registration Authority, either Federal or State, which has registered and/or approved the program in which the apprentice is enrolled, for review. Matters covered by a collective bargaining agreement are not subject to such review.

(c) The complaint must be in writing and signed by the complainant, or authorized representative, and must be submitted within 60 days of the final local decision. It must set forth the specific matter(s) complained of, together with relevant facts and circumstances. Copies of pertinent documents and correspondence must accompany the complaint.

(d) The Office of Apprenticeship or recognized State Apprenticeship Agency, as appropriate, will render an opinion within 90 days after receipt of the complaint, based upon such investigation of the matters submitted as may be found necessary, and the record before it. During the 90-day period, the Office of Apprenticeship or recognized State Apprenticeship Agency will make reasonable efforts to effect a satisfactory resolution between the parties involved. If so resolved, the parties will be notified that the case is closed. Where an opinion is rendered, copies will be sent to all interested parties.

(e) Nothing in this section precludes an apprentice from pursuing any other remedy authorized under another Federal, State, or local law.

(f) A State Apprenticeship Agency may adopt a complaint review procedure differing in detail from that given in this section provided it is submitted for review and approval by the Office of Apprenticeship.

§ 29.13 Recognition of State apprenticeship agencies.

(a) *Recognition.* The Department may exercise its authority to grant recognition to a State Apprenticeship Agency. Recognition confers non-exclusive authority to determine whether an apprenticeship program conforms to the published standards and whether the program is, therefore, eligible for those Federal purposes which require such a determination by the Department. Such recognition shall be accorded upon the State's submission of, the Department's approval of, and the State's compliance with the following:

(1) The State Apprenticeship Agency must submit a State apprenticeship law, whether instituted through statute, Executive Order, regulation, or other means, that conforms to the requirements of 29 CFR parts 29 and 30;

(2) The State Apprenticeship Agency must establish and continue to use a State Apprenticeship Council, which operates under the direction of the State Apprenticeship Agency. The State Apprenticeship Council may be either regulatory or advisory and must meet the following requirements:

(i) It must be composed of persons familiar with apprenticeable occupations, and

(ii) It must include an equal number of representatives of employer and of employee organizations and include public members who shall not number in excess of the number named to represent either employer or employee organizations;

(3) The State Apprenticeship Agency must submit a State Plan for Equal Employment Opportunity in Apprenticeship that conforms to the requirements published in 29 CFR part 30;

(4) The State Apprenticeship Agency's submission must include a description of the basic standards, criteria, and requirements for program registration and/or approval, and

demonstrate linkages and coordination with the State's economic development strategies and publicly-funded workforce investment system; and

(5) The State Apprenticeship Agency's submission must include a description of policies and operating procedures which depart from or impose requirements in addition to those prescribed in this part.

(b) *Basic requirements*. In order to obtain and maintain recognition as provided under paragraph (a) of this section, the State Apprenticeship Agency must conform to the requirements of this part. To accomplish this, the State must:

(1) Establish and maintain an administrative entity (the State Apprenticeship Agency) that is capable of performing the functions of a Registration Agency under 29 CFR part 29;

(2) Provide sufficient resources to carry out the functions of a Registration Agency, including: Outreach and education; registration of programs and apprentices; provision of technical assistance, and monitoring as required to fulfill the requirements of this part;

(3) Clearly delineate the respective powers and duties of the State office, the State Apprenticeship Agency, and the State Apprenticeship Council;

(4) Establish policies and procedures to promote equality of opportunity in apprenticeship programs pursuant to a State Plan for Equal Employment Opportunity in Apprenticeship which adopts and implements the requirements of 29 CFR part 30, and to require apprenticeship programs to operate in conformity with such State Plan and 29 CFR part 30;

(5) Prescribe the contents of apprenticeship agreements, in conformity with § 29.7;

(6) Ensure that the registration of apprenticeship programs occurs only in apprenticeable occupations, as provided in § 29.4, including occupations in high growth and high demand industries;

(7) Accord reciprocal approval for Federal purposes to apprentices, apprenticeship programs and standards that are registered in other States by the Office of Apprenticeship or a Registration Agency if such reciprocity is requested by the apprenticeship program sponsor. Program sponsors seeking reciprocal approval must meet the wage and hour provisions and apprentice ratio standards of the reciprocal State;

(8) Provide for the cancellation and/or deregistration of programs, and for temporary suspension, cancellation, and/or deregistration of apprenticeship agreements; and

(9) Submit all proposed modifications in legislation, regulations, policies and/or operational procedures planned or anticipated by a State Apprenticeship Agency, either at the time of application for recognition or subsequently, to the Office of Apprenticeship for review and obtain the Office of Apprenticeship's concurrence prior to implementation.

(c) *Application for recognition*. A State Apprenticeship Agency desiring new or continued recognition as a Registration Agency must submit to the Administrator of the Office of Apprenticeship the documentation specified in paragraph (a) of this section. A currently recognized State desiring continued recognition by the Office of Apprenticeship must submit to the Administrator of the Office of Apprenticeship the documentation specified in paragraph (a) of this section within 2 years of the effective date of the final rule. The recognition of a currently recognized State shall continue for up to 2 years from the effective date of this regulation and during any extension period granted by the Administrator. An extension of time within which to comply with the requirements of this part may be granted by the Administrator for good cause upon written request by the State, but the Administrator shall not extend the time for submission of the documentation required by paragraph (a) of this section. Upon approval of the State Apprenticeship Agency's application for recognition and any subsequent modifications to this application as required under paragraph (b)(9) of this section, the Administrator shall so notify the State Apprenticeship Agency in writing.

(d) *Duration of recognition*. The recognition of a State Apprenticeship Agency shall last for 5 years from the date recognition is granted under paragraph (c) of this section. The Administrator shall notify each State Registration Agency at least 180 days prior to the expiration of the 5-year period whether the Registration Agency is in conformity with this part, based on reviews conducted by the Office of Apprenticeship, as required by paragraph (e) of this section. If the notification states that the State Apprenticeship Agency is in conformity, recognition will be renewed for an additional 5-year period. If the notification states that the State Apprenticeship Agency is not in conformity, the notification shall specify the areas of non-conformity, require corrective action, and offer technical assistance. After the Administrator determines that a State Apprenticeship Agency has corrected the identified non-conformities, recognition will be renewed for an additional 5-year period.

(e) *Compliance*. The Office of Apprenticeship will monitor a State Registration Agency for compliance with the recognition requirements of this part through:

(1) On-site reviews conducted by Office of Apprenticeship staff.

(2) Self-assessment reports, as required by the Office of Apprenticeship.

(3) Review of State Apprenticeship Agency legislation, regulations, policies, and/or operating procedures required to be submitted under paragraphs (a)(1), (a)(5) and (b)(9) of this section for review and approval as required under § 29.13(a).

(4) Determination whether, based on the review performed under paragraphs (e)(1), (2), and (3) of this section, the State Registration Agency is in compliance with part 29. Notice to the State Registration Agency of the determination will be given within 45 days of receipt of proposed modifications to legislation, regulations, policies, and/or operational procedures required to be submitted under paragraphs (a)(1), (a)(5) and (b)(9) of this section.

(f) *Accountability/Remedies for non-conformity*. (1) State Registration Agencies that fail to maintain compliance with the requirements of this part, as provided under paragraph (e) of this section, will:

(i) Receive technical assistance from the Office of Apprenticeship in an effort to remedy the non-conforming activity; and

(ii) Be placed on ''Conditional Recognition'' for a period of 45 days during which the State Apprenticeship Agency must submit a corrective action plan to remedy the non-conforming activity to the Office of Apprenticeship. Upon request from the State Apprenticeship Agency, for good cause, the 45-day period may be extended.

(2) Failure to comply with these requirements will result in rescission of recognition, for Federal Purposes as provided under § 29.14.

(g) *Denial of State Apprenticeship Agency Recognition*. A denial by the Office of Apprenticeship of a State Apprenticeship Agency's application for new or continued recognition must be in writing and must set forth the reasons for denial. The notice must be sent by certified mail, return receipt requested. In addition to the reasons stated for the denial, the notice must specify the remedies which must be undertaken prior to consideration of a resubmitted request, and must state that a request for

administrative review of a denial of recognition may be made within 30 calendar days of receipt of the notice of denial from the Department. Such request must be made by mail and addressed to the Chief Administrative Law Judge for the Department. The mailing address is Office of Administrative Law Judges, U.S. Department of Labor, Suite 400 North, 800 K Street, NW., Washington, DC 20001–8002. Within 30 calendar days of the filing of the request for review, the Administrator must prepare an administrative record for submission to the Administrative Law Judge designated by the Chief Administrative Law Judge.

(1) The procedures contained in 29 CFR part 18 will apply to the disposition of the request for review except that:

(i) The Administrative Law Judge will receive, and make part of the record, documentary evidence offered by any party and accepted at the hearing. Copies thereof will be made available by the party submitting the documentary evidence to any party to the hearing upon request.

(ii) Technical rules of evidence will not apply to hearings conducted under this part, but rules or principles designed to assure production of the most credible evidence available and to subject testimony to test by cross-examination will be applied, where reasonably necessary, by the Administrative Law Judge conducting the hearing. The Administrative Law Judge may exclude irrelevant, immaterial, or unduly repetitious evidence.

(2) The Administrative Law Judge should submit proposed findings, a recommended decision, and a certified record of the proceedings to the Administrative Review Board within 90 calendar days after the close of the record.

(3) Within 20 days of the receipt of the recommended decision, any party may file exceptions. Any party may file a response to the exceptions filed by another party within 10 days of receipt of the exceptions. All exceptions and responses must be filed with the Administrative Review Board with copies served on all parties and amici curiae.

(4) After the close of the period for filing exceptions and responses, the Administrative Review Board may issue a briefing schedule or may decide the matter on the record before it. The Administrative Review Board must decide any case it accepts for review within 180 days of the close of the record. If not so decided, the Administrative Law Judge's decision constitutes final agency action. The decision of the Administrative Review Board constitutes final action by the Department.

(h) *Withdrawal from recognition.* Where a State Apprenticeship Agency voluntarily relinquishes its recognition for Federal purposes, the State must:

(1) Send a formal notice of intent to the Administrator of the Office of Apprenticeship;

(2) Provide all apprenticeship program standards, apprenticeship agreements, completion records, cancellation and suspension records, Equal Employment Opportunity Compliance Review files and any other documents relating to the State's apprenticeship programs, to the Department; and

(3) Cooperate fully during a transition period.

(i) *Retention of authority.* Notwithstanding any grant of recognition to a State Apprenticeship Agency under this section, the Office of Apprenticeship retains the full authority to register apprenticeship programs and apprentices in all States and Territories where the Office of Apprenticeship determines that such action is necessary to further the interests of the National Apprenticeship System.

(j) *State apprenticeship programs.* (1) An apprenticeship program submitted to a State Registration Agency for registration must, for Federal purposes, be in conformity with the State apprenticeship law, regulations, and with the State Plan for Equal Employment Opportunity in Apprenticeship as submitted to and approved by the Office of Apprenticeship pursuant to 29 CFR part 30.

(2) In the event that a State Apprenticeship Agency is not recognized by the Office of Apprenticeship for Federal purposes or that such recognition has been withdrawn, or if no State Apprenticeship Agency exists, registration with the Office of Apprenticeship may be requested. Such registration must be granted if the program is conducted, administered and operated in accordance with the requirements of this part and the equal opportunity regulation in 29 CFR part 30, as amended.

§ 29.14 Derecognition of State Apprenticeship Agencies.

The recognition for Federal purposes of a State Apprenticeship Agency may be withdrawn for the failure to fulfill, or operate in conformity with, the requirements of parts 29 and 30. Derecognition proceedings for reasonable cause will be instituted in accordance with the following:

(a) Derecognition proceedings for failure to adopt or properly enforce a State Plan for Equal Employment Opportunity in Apprenticeship must be processed in accordance with the procedures prescribed in 29 CFR part 30.

(b) For causes other than those under paragraph (a) of this section, the Office of Apprenticeship must notify the respondent and appropriate State sponsors in writing, by certified mail, with return receipt requested. The notice must set forth the following:

(1) That reasonable cause exists to believe that the respondent has failed to fulfill or operate in conformity with the requirements of this part;

(2) The specific areas of nonconformity;

(3) The needed remedial measures; and

(4) That the Office of Apprenticeship proposes to withdraw recognition for Federal purposes unless corrective action is taken, or a hearing request mailed, within 30 days of the receipt of the notice.

(c) If, within the 30-day period, the State Apprenticeship Agency:

(1) Acknowledges that the State is out of conformity, specifies its proposed remedial action and commits itself to remedying the identified deficiencies, the Office of Apprenticeship will suspend the derecognition process to allow a reasonable period of time for the State Apprenticeship Agency to implement its corrective action plan.

(i) If the Office of Apprenticeship determines that the State's corrective action has addressed the identified concerns, the Office of Apprenticeship must so notify the State and the derecognition proceedings shall be terminated.

(ii) If the Office of Apprenticeship determines that the State has not addressed or failed to remedy the identified concerns, the Administrator must notify the State, in writing, of its failure, specifying the reasons therefore, and offer the State an opportunity to request a hearing within 30 days.

(2) Fails to comply or to request a hearing, the Office of Apprenticeship shall decide whether recognition should be withdrawn. If the decision is in the affirmative, the Administrator must begin the process of transferring registrations in paragraph (d).

(3) Requests a hearing. The Administrator shall refer the matter to the Office of Administrative Law Judges. An Administrative Law Judge will convene a hearing in accordance with

§ 29.13(g) and submit proposed findings and a recommended decision to the Administrative Review Board for final agency action. The Administrative Review Board must decide any case it accepts for review within 180 days of the close of the record. If not so decided, the Administrative Law Judge's decision constitutes final agency action.

(d) If the Administrative Review Board determines to withdraw recognition for Federal purposes or if the Office of Apprenticeship has decided that recognition should be withdrawn under paragraph (c)(2) of this section, the Administrator must:

(1) Notify the registration agency and the State sponsors of such withdrawal and effect public notice of such withdrawal.

(2) Notify the sponsors that, 30 days after the date of the order withdrawing recognition of the State's registration agency, the Department shall cease to recognize, for Federal purposes, each apprenticeship program registered with the State Apprenticeship Agency, unless within that time, the sponsor requests registration with the Office of Apprenticeship.

(e) In the event that a State Apprenticeship Agency is not recognized by the Office of Apprenticeship for Federal purposes or that such recognition has been withdrawn, or if no State Apprenticeship Agency exists, apprenticeship program sponsors may request registration with the Office of Apprenticeship in accordance with the following:

(1) The Office of Apprenticeship may grant the request for registration on an interim basis. Continued recognition will be contingent upon its finding that the State apprenticeship program is operating in accordance with the requirements of this part and of 29 CFR part 30.

(2) The Office of Apprenticeship must make a finding on this issue within 30 days of receipt of the request.

(3) If the finding is in the negative, the State sponsor must be notified in writing that the interim registration with the Office of Apprenticeship has been revoked and that the program will be deregistered unless the sponsor requests a hearing within 15 days of the receipt of the notice. If a hearing is requested, the matter will be forwarded to the Office of Administrative Law Judges for a hearing in accordance with § 29.10.

(4) If the finding is in the affirmative, the State sponsor must be notified in writing that the interim registration with the Office of Apprenticeship has been made permanent based upon compliance with the requirements of this part.

(f) If the sponsor fails to request registration with the Office of Apprenticeship, the written notice to such State sponsor must further advise the recipient that any actions or benefits applicable to recognition for Federal purposes are no longer available to the participants in its apprenticeship program as of the date 30 days after the date of the order withdrawing recognition.

(g) Such notice must also direct the State sponsor to notify, within 15 days, all its registered apprentices of the withdrawal of recognition for Federal purposes; the effective date thereof; and that such withdrawal removes the apprentice from coverage under any Federal provision applicable to their individual registration under a program recognized or registered by the Secretary of Labor for Federal purposes. Such notice must direct that all apprentices are referred to the Office of Apprenticeship for information about potential transfer to other registered apprenticeship programs.

(h) Where a State Apprenticeship Agency's recognition for Federal purposes has been withdrawn; the State must:

(1) Provide all apprenticeship program standards, apprenticeship agreements, completion records, cancellation and suspension records, Equal Employment Opportunity Compliance Review files and any other documents relating to the State's apprenticeship programs, to the Department; and

(2) Cooperate fully during a transition period.

(i) A State Apprenticeship Agency whose recognition has been withdrawn under this part may have its recognition reinstated upon presentation of adequate evidence that it has fulfilled the requirements established in § 29.13(i) and § 29.14(g) and (h) and is operating in conformity with the requirements of this part.

[FR Doc. E8–24917 Filed 10–28–08; 8:45 am]

BILLING CODE 4510–FR–P

Federal Register

Wednesday,
October 29, 2008

Part III

Department of Education

34 CFR Part 200

Title I—Improving the Academic Achievement of the Disadvantaged; Final Rule

DEPARTMENT OF EDUCATION

34 CFR Part 200

RIN 1810–AB01

[Docket ID ED–2008–OESE–0003]

Title I—Improving the Academic Achievement of the Disadvantaged

AGENCY: Office of Elementary and Secondary Education, Department of Education.

ACTION: Final regulations.

SUMMARY: The Secretary amends the regulations governing programs administered under Part A of Title I of the Elementary and Secondary Education Act of 1965, as amended, to clarify and strengthen current Title I regulations in the areas of assessment, accountability, public school choice, and supplemental educational services.

DATES: These regulations are effective November 28, 2008.

FOR FURTHER INFORMATION CONTACT: Zollie Stevenson, Jr., Director, Student Achievement and School Accountability Programs, Office of Elementary and Secondary Education, U.S. Department of Education, 400 Maryland Avenue, SW., room 3W230, Washington, DC 20202–6132. Telephone: (202) 260–1824.

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: These regulations amend regulations in 34 CFR part 200, implementing certain provisions of Title I, Part A of the Elementary and Secondary Education Act of 1965 (ESEA), as amended by the No Child Left Behind Act of 2001 (NCLB), which are designed to help disadvantaged children meet high academic standards. On April 23, 2008, the Secretary published a notice of proposed rulemaking (NPRM) for the Title I, Part A program in the **Federal Register** (73 FR 22020).

These final regulations reflect an effort to respond to the results of six years of implementation of the reforms introduced into the ESEA by NCLB. The accountability reforms implemented during that time—including annual testing in reading and mathematics, school and local educational agency (LEA) accountability for the achievement of all students (including students in certain subgroups), the measurement of school performance and identification for improvement where necessary, and the provision of public school choice and supplemental educational services (SES) options to parents and their children—have resulted in fundamental changes in the way that States and LEAs approach the challenge of educating all students to high standards. Parents and educators now have more information and data than ever before on how our schools are performing and where schools and LEAs need to make changes. Superintendents, principals, and teachers are hard at work developing and implementing strategies for raising student achievement and improving school performance, including by fundamentally restructuring chronically poor-performing schools. Nearly all States are reporting increases in student achievement, as measured by their own assessments in reading and mathematics in grades 3 through 8 and high school, and all States have put in place comprehensive plans for ensuring that all students are proficient in reading and mathematics by 2014.

These final regulations build on and strengthen the advances States have made with their assessment and accountability systems. We believe a small number of significant regulatory changes can make a real difference in sustaining and advancing the reforms brought about by NCLB, pending reauthorization of the ESEA. The final regulations reflect careful consideration of comments we received on our proposed regulations and include a number of changes made in response to those comments, while remaining consistent with the policy goals of the NPRM.

The most far-reaching change in these regulations is in how States, LEAs, and schools are held accountable for graduating students from high school. We believe that establishing a uniform and more accurate measure of calculating graduation rate that is comparable across States is a critical and essential step forward in improving high school accountability. New requirements governing the provision of SES and public school choice will help ensure that parents and students are informed of their options in a timely and effective manner and that LEAs make effective use of their funds to provide public school choice and SES. The changes to the regulations regarding SES will also help ensure that SES providers offer high-quality services. Changes addressing the inclusion of student subgroups in school and LEA adequate yearly progress (AYP) determinations will ensure greater accountability for the achievement of all groups of students. Amendments to the regulations governing restructuring of schools in improvement will help ensure that LEAs take significant reform actions to improve chronically underperforming schools, as required by the statute. Requiring the inclusion of State data from the National Assessment of Educational Progress (NAEP) on State and local report cards will provide parents and the public with additional important information about the performance of the students in their State.

The other provisions of these final regulations make important clarifications or technical changes to existing policies. The regulations permit all States to request authority to include measures of student growth in their AYP determinations so long as States' growth proposals meet certain criteria. The regulations also codify the creation of the National Technical Advisory Council (National TAC) and the Department's current policy regarding the identification of schools and LEAs for improvement. Amendments to the assessment regulations clarify that the term ''multiple measures'' in the statute means that States may use single or multiple question formats, or multiple assessments within a subject area. Lastly, technical changes to the definition of ''highly qualified teacher'' align the Title I regulations with the Individuals with Disabilities Education Act (IDEA).

In the absence of reauthorization, we believe these final regulations are necessary to further the interests of parents and children and to improve the implementation of NCLB in order to continue progress toward the goal of 100 percent student proficiency in reading and mathematics by 2014.

Major Changes in the Regulations

The following is a summary of the major substantive changes in these final regulations from the regulations proposed in the NRPM. (The rationale for each of these changes is discussed in the *Analysis of Comments and Changes* section elsewhere in this preamble.)

- In § 200.7(a)(2)(iii) (disaggregation of data), the final regulations require each State to submit its revised Consolidated State Application Accountability Workbook (Accountability Workbook), which would include any changes to its minimum group size and other components of AYP, to the Department for peer review in time for any changes

to be in effect for AYP determinations based on 2009–2010 assessment results.

• Section 200.11 (participation in NAEP) clarifies the NAEP data that State and LEA report cards must contain: the percentage of students at each achievement level reported on the NAEP, in the aggregate and, for State report cards, disaggregated for each subgroup described in § 200.13(b)(7)(ii); and participation rates for students with disabilities and limited English proficient (LEP) students.

• The final regulations make a number of changes to § 200.19 (other academic indicators). The section is reorganized to separate the requirements for other academic indicators for elementary and middle schools from the requirements for calculating graduation rate (the required ''other academic indicator'' for high schools). The final regulations maintain the current requirements for the other academic indicators for elementary and middle schools; however, they make a number of changes for calculating graduation rate.

—Section 200.19(b)(1)(ii)(A) adds a definition of ''students who transfer into the cohort'' to mean those students who enroll after the beginning of the entering cohort's first year in high school, up to and including in grade 12.

—Section 200.19(b)(1)(ii)(B) makes clear that a student who emigrates to another country may be removed from the cohort and clarifies that a school or LEA must confirm *in writing* that a student transferred out, emigrated to another country, or is deceased.

—Section 200.19(b)(1)(ii)(B)(*1*) clarifies that, to confirm that a student transferred out, the school or LEA must have official written documentation that the student enrolled in another school or educational program that culminates in the award of a regular high school diploma.

—Section 200.19(b)(1)(iii) clarifies that the term ''students who graduate in four years'' means students who earn a regular high school diploma at the conclusion of their fourth year, before the conclusion of their fourth year, or during a summer session immediately following their fourth year.

—Section 200.19(b)(1)(v) permits a State, in addition to calculating a four-year adjusted cohort graduation rate, to propose to the Secretary for approval an ''extended-year adjusted cohort graduation rate.''

—Section 200.19(b)(1)(v)(A) defines an extended-year adjusted cohort graduation rate as the number of students who graduate in four years or more with a regular high school diploma divided by the number of students who form the adjusted cohort for the four-year adjusted cohort graduation rate, provided that the adjustments account for any students who transfer into the cohort by the end of the year of graduation being considered minus the number of students who transfer out, emigrate to another country, or are deceased by the end of that year.

—Section 200.19(b)(1)(v)(B) permits a State to calculate one or more extended-year adjusted cohort graduation rates.

—The final regulations do not require a State to use the Averaged Freshman Graduation Rate (AFGR) prior to the State's ability to use an adjusted cohort graduation rate.

—Section 200.19(b)(2) permits a State to use a transitional graduation rate before being required to use the four-year adjusted cohort graduation rate, if that transitional rate meets the graduation rate requirements in the current regulations.

—Section 200.19(b)(3)(i) requires a State to set a single graduation rate goal that represents the rate the State expects all high schools in the State to meet and annual graduation rate targets that reflect continuous and substantial improvement from the prior year toward meeting or exceeding the State's graduation rate goal.

—Section 200.19(b)(3)(ii) requires a State to hold any high school or LEA that serves grade 12 and the State accountable for meeting the State's graduation rate goal or targets beginning with AYP determinations based on school year 2009–2010 assessment results.

—Section 200.19(b)(4)(ii) requires a State and its LEAs to report the four-year adjusted cohort graduation rate in the aggregate and disaggregated by the subgroups described in § 200.13(b)(7)(ii) beginning with report cards providing results of assessments administered in the 2010–2011 school year. If a State adopts an extended-year adjusted cohort graduation rate, the State and its LEAs must report this rate separately from its four-year rate beginning with the first year for which the State calculates such a rate.

—Section 200.19(b)(5) requires a State, beginning with AYP determinations based on school year 2011–2012 assessment results, to use the four-year adjusted cohort graduation rate to calculate AYP at the school, LEA, and State levels, in the aggregate and disaggregated by the subgroups described in § 200.13(b)(7)(ii).

—Prior to calculating AYP under § 200.20(a)(1)(ii) (meeting the State's annual measurable objectives) based on school year 2011–2012 assessment results, a State must calculate graduation rate in the aggregate at the school, LEA, and State levels using the four-year adjusted cohort graduation rate or the transitional graduation rate.

—Section 200.19(b)(6) requires a State to revise its Accountability Workbook to include certain information and submit its revisions to the Department for technical assistance and peer review in time for any changes to be in effect for AYP determinations based on 2009–2010 assessment results.

—Section 200.19(b)(7) permits a State that cannot meet the regulatory deadline for reporting a four-year adjusted cohort graduation rate to request an extension of time from the Secretary, provided the State submits, by March 2, 2009, evidence satisfactory to the Secretary demonstrating that it cannot meet that deadline and a detailed plan and timeline addressing the steps the State will take to implement, as expeditiously as possible, the four-year adjusted cohort graduation rate. Even if a State receives an extension, it must calculate graduation rate at the school, LEA, and State levels both in the aggregate and disaggregated by the subgroups described in § 200.13(b)(7)(ii) beginning with AYP determinations based on school year 2011–2012 assessment results.

• Section 200.22(b)(1) (National TAC) makes clear that the National TAC must include members who have knowledge of and expertise in designing and implementing standards, assessments, and accountability systems for all students, including students with disabilities and LEP students.

• Section 200.37(b)(5)(ii)(B) (notice of identification for improvement, corrective action, or restructuring) requires an LEA to indicate, in its notice to parents, those SES providers who are able to serve students with disabilities or LEP students.

• Section 200.39(c)(1) (responsibilities resulting from identification for school improvement) requires an LEA to display certain information regarding public school choice and SES on its Web site in a timely manner to ensure that parents have current information. Paragraph (c)(2) requires an SEA to post on its Web site the required information for any

LEA that does not have its own Web site.

• Section 200.43 (restructuring) contains two changes. First, paragraph (a)(4) makes clear that, if a school begins to implement a restructuring option as a corrective action, the school need not implement a significantly more rigorous and comprehensive reform at the restructuring stage. Second, paragraph (b)(3)(v) clarifies that a major restructuring of a school's governance may include replacing the principal so long as this change is part of a broader reform effort.

• Section 200.44(a)(2) (public school choice) makes clear that an LEA must offer, through the 14-day notice required under § 200.37, the option to parents to transfer their child so that the child may transfer in the school year following the school year in which the LEA administered the assessments that resulted in its identification of the school for improvement, corrective action, or restructuring.

• Section 200.47 (SEA responsibilities for SES) contains several changes.

—Paragraph (a)(1)(ii)(B) requires an SEA to post on its Web site, for each LEA, the amount of funds the LEA must spend on choice-related transportation and SES and the maximum per-pupil amount the LEA must spend for SES.

—Paragraph (a)(3)(ii) requires an SEA to indicate on its list of approved SES providers those that are able to serve students with disabilities or LEP students.

—Paragraph (b)(2)(ii)(C) requires an LEA to ensure that the instruction a provider gives and the content a provider uses are of high quality, research-based, and specifically designed to increase the academic achievement of eligible children.

• Section 200.48 (funding for choice-related transportation and SES) contains several changes.

—Paragraph (d)(1)(i) no longer requires an LEA to obtain approval from its SEA before spending less than an amount equal to at least 20 percent of its Title I, Part A allocation (the ''20 percent obligation'') on choice-related transportation, SES, and parent outreach and assistance. Instead, revised paragraph (d)(2) requires an LEA that wishes to use unspent choice-related transportation and SES funds for other allowable activities to (1) meet, at a minimum, certain criteria specified in paragraph (d)(2)(i), (2) maintain records demonstrating that it has met those criteria, (3) notify the SEA that it has met the criteria and that it intends to spend the remainder of its 20 percent obligation on other allowable activities, and (4) specify the amount of the remainder.

—Paragraph (d)(3) requires SEAs to ensure an LEA's compliance with the criteria in paragraph (d)(2)(i) through its regular monitoring process. However, in addition to its regular monitoring process, for any LEA that (1) the SEA determines has spent a significant portion of its 20 percent obligation for other allowable activities and (2) has been the subject of multiple complaints, supported by credible evidence, regarding its implementation of the Title I public school choice or SES requirements, the SEA must review the LEA's compliance with the criteria in paragraph (d)(2)(i) by the beginning of the next school year.

—Paragraph (d)(4)(i) provides that, if an SEA finds that an LEA has failed to meet any of the criteria in paragraph (d)(2)(i), the LEA must (1) spend an amount equal to the remainder specified in paragraph (d)(2)(iii)(B) in the subsequent school year, in addition to its 20 percent obligation for that year, on choice-related transportation costs, SES, or parent outreach and assistance; or (2) meet the criteria in paragraph (d)(2)(i) and obtain permission from the SEA before using any unspent choice-related transportation and SES funds for other allowable activities in that subsequent school year.

—Under paragraph (d)(4)(ii), an SEA may not grant permission to an LEA to spend less than the amount in paragraph (d)(4)(i)(A) unless the SEA has confirmed the LEA's compliance with the criteria in paragraph (d)(2)(i) for that subsequent school year.

—Paragraph (d)(2)(i)(A) requires an LEA that wishes to use unspent funds from its 20 percent obligation for other allowable activities to partner, ''to the extent practicable,'' with outside groups, such as faith-based organizations, other community-based organizations, and business groups to help inform eligible students and their families of the opportunities to transfer or receive SES.

—Paragraph (d)(2)(i)(B)(*3*) requires an LEA to provide a minimum of two enrollment ''windows,'' at separate points in the school year, that are of sufficient length to enable parents of eligible students to make informed decisions about requesting supplemental educational services and selecting a provider.

• Section 200.56 (definition of ''highly qualified teacher'') makes clear that a special education teacher is a ''highly qualified teacher'' under the ESEA if the teacher meets the requirements for a ''highly qualified special education teacher'' under the Individuals with Disabilities Education Act (IDEA).

Analysis of Comments and Changes

In response to the Secretary's invitation in the NPRM, 400 parties submitted comments on the proposed regulations. An analysis of the comments and changes in the regulations since publication of the NPRM follows.

We discuss substantive issues under the sections of the regulations to which they pertain. Generally, we do not address technical or minor changes, and suggested changes that we are not authorized to make under the law.

Section 200.2 State Responsibilities for Assessment

Comment: Numerous commenters argued that the definition of multiple measures, as proposed in § 200.2(b)(7), is far too narrow and should be expanded to permit States to include, in their AYP definitions, other measures of student performance such as written and oral presentations and projects, student portfolios, performance assessments, local assessments, teacher-designed assessments, and curriculum-embedded assessments. Other commenters stated that formative and adaptive assessments are widely used at the local level and asked that they be specifically referenced in the regulations. One commenter stated that student learning needs to be assessed throughout the year with several assessments in order to determine how much students learn during the school year. Several commenters recommended that the regulations specifically reference alternate assessments based on grade-level achievement standards as one way to meet the multiple measures requirement.

Discussion: The Secretary's intent in amending § 200.2(b)(7) was to clarify the meaning of ''multiple measures'' in the context of State assessment systems required under section 1111(b)(3) of the ESEA, particularly in light of frequent criticisms that school accountability should not be based only on a single assessment of student achievement. Section 1111(b)(3)(C)(vi) of the ESEA requires that State assessments ''involve multiple up-to-date measures of student academic achievement, including measures that assess higher-order thinking skills and understanding.'' In proposed § 200.2(b)(7), we clarified that this requirement could be met by using

single or multiple question formats that range in cognitive complexity within a single assessment or by using multiple assessments within a subject area. We did not in any way intend to narrow the basic definition of the term or to permit States to use only certain types of assessments.

The requirement that State assessments involve multiple measures of academic achievement is one of a number of requirements in section 1111(b)(3)(C) of the ESEA that *all* State assessments must meet (e.g., that State assessments are used to measure the achievement of all children; that they are aligned with the State's challenging academic content and student academic achievement standards; that they are valid and reliable; and that they are of adequate technical quality for each purpose used). These requirements do not prevent a State from using, in determining AYP, results from other measures of student achievement such as those mentioned by the commenters (e.g., local assessments; curriculum-embedded assessments; performance assessments), provided those measures are submitted for peer review and determined by the Secretary to meet the statutory and regulatory requirements.

The Secretary does not believe it is necessary or appropriate to refer to specific types of assessments, such as formative assessments, adaptive assessments, and portfolio assessments, in § 200.2(b)(7). The key point is not the type of measure but the fact that any assessment used by a State for accountability determinations must meet the requirements in section 1111(b)(3)(C) of the ESEA and be approved by the Secretary.

Changes: None.

Comment: Many commenters recommended that non-test-based measures such as attendance rates, grade-point averages, graduation and dropout rates, in-school retention rates, and the percentage of students taking honors and advanced placement classes be included in AYP determinations.

Discussion: The ESEA and the Department's current regulations already both require and permit States to use non-test-based measures, such as those recommended by the commenters, in AYP determinations. Specifically, both section 1111(b)(2)(C)(vi) of the ESEA and current § 200.19(a)(1) (new § 200.19(a) and (b)) require a State to include at least one other academic indicator in its AYP determinations, which must be the graduation rate for high schools and an academic indicator of the State's choosing for elementary and middle schools. A State may, at its discretion, also include additional academic indicators. Current § 200.19(b) (new § 200.19(c)) provides examples of additional academic indicators that a State may use, which include additional State or local assessments, the percentage of students completing advanced placement courses, and retention rates. As outlined in current § 200.19(c) (new § 200.19(d)), however, a State's other academic indicators must be valid and reliable; consistent with relevant, nationally recognized professional and technical standards, if any; and consistent throughout the State within each grade span. Moreover, under § 200.19(e), a State may not use its other academic indicators to reduce the number of, or change, the schools that would otherwise be subject to school improvement, corrective action, or restructuring.

Changes: None.

Comment: One commenter stated that the Department should provide more flexibility for LEAs to experiment with various assessment systems that are aligned with the State's academic content and student academic achievement standards, but developed with community and local involvement and input.

Discussion: Section 200.3 specifically permits a State to include, in the State assessment system that it uses to determine AYP, a combination of State and local assessments. If a State permits the inclusion of local assessments, however, the State must, among other things, establish technical criteria to ensure that each local assessment meets, for example, the statutory and regulatory requirements for validity, reliability, and technical quality, and demonstrate that the local assessments are equivalent to one another in their content coverage, difficulty, and quality; have comparable validity and reliability with respect to subgroups of students; and provide unbiased, rational, and consistent determinations of the annual progress of schools and LEAs within the State. Moreover, locally developed assessments that are not included as part of the annual State assessment system under section 1111(b)(3) of the ESEA may be used as an additional other academic indicator under current § 200.19(b) (new § 200.19(c)).

Changes: None.

Comment: Numerous commenters supported the proposed changes in § 200.2(b)(7). One of these commenters, however, expressed concern that there may be continued confusion about the differences between the use of multiple measures and the use of multiple non-academic indicators in accountability determinations.

Discussion: Section 200.2(b)(7) addresses only the requirement in section 1111(b)(3)(C)(vi) of the ESEA that State assessments involve multiple, up-to-date measures of student academic achievement. As discussed earlier, such measures must meet all the statutory and regulatory requirements applicable to State assessments. Separate and apart from this requirement is the flexibility for a State to include multiple, additional academic indicators in making AYP determinations, consistent with section 1111(b)(2)(C)(vii) and (b)(2)(D) of the ESEA and current § 200.19(b) (new § 200.19(c)). These indicators, however, may not be used to reduce the number of, or change, the schools that would otherwise be subject to school improvement, corrective action, or restructuring (see § 200.19(e)).

Changes: None.

Comment: One commenter expressed concern that requiring multiple types of questions on a State assessment could delay the reporting of results. One commenter stated that including different types of questions to assess higher-order thinking skills would add complexity to an assessment and may increase the time it takes to score the assessment and make AYP determinations. Another commenter stated that the language in the proposed regulations did not describe how States should assess higher-order thinking skills.

Discussion: We wish to emphasize that the new language in § 200.2(b)(7) is intended merely to clarify the several ways a State may involve multiple measures in the State's assessment system. If a State chooses to make a substantive revision to its assessment system by changing the way it implements the multiple measures requirement in § 200.2(b)(7), it must submit its proposed change to the Department for peer review. Otherwise, no actions are required by States as a result of the amendment to this section.

Changes: None.

Comment: One commenter stated that the regulations on multiple measures set a bar that any State could currently claim to meet. Another commenter asked why the requirement to use multiple measures to assess student achievement and higher-order thinking skills was not negotiated as a part of the original State accountability plans, given the statutory mandate that such measures be used. Another commenter asked why the Department is only now emphasizing that multiple assessments may be used in States' accountability systems. One commenter stated that the Department objected to multiple

measures in the early implementation of the NCLB amendments to the ESEA and asked why the Department has changed its position.

Discussion: The Secretary explained in the preamble to the NPRM that the changes to § 200.2(b)(7) simply clarify section 1111(b)(3)(C)(vi) of the ESEA, which requires State accountability systems to include multiple up-to-date measures of student academic achievement. We believe it is necessary to make these clarifications based on our understanding that some parents, teachers, and administrators mistakenly believe that the ESEA requires the use of a single assessment. The changes do not impose new requirements or require States to change their current assessment systems; nor do they represent a change in the Department's position. The Department has consistently made clear to States, since the early implementation of NCLB, that multiple assessments may be used to measure student achievement in a subject area in order to assess mastery of the breadth of a particular content domain, provided that all assessments used to determine AYP meet the applicable statutory and regulatory requirements. There are States, for example, that currently use reading and writing assessments to calculate AYP in reading/language arts or use algebra and probability assessments to calculate AYP in mathematics. These policies may continue under the revised regulation.

Changes: None.

Comment: One commenter requested clarification regarding whether a State that uses multiple assessments to measure achievement must ensure that those assessments are uniform throughout the State.

Discussion: Section 1111(b)(1)(B) of the ESEA and § 200.1 make clear that a State must adopt challenging academic content and student achievement standards, which must be the same standards the State applies to all students. A State's assessments must be aligned with those standards. Therefore, a State's assessments, although they need not necessarily be uniform, must measure the same content and the same level of achievement.

Changes: None.

Comment: One commenter objected to the provision in proposed § 200.2(b)(7)(i), which stated that multiple measures may include a single-question format to measure student achievement. The commenter recommended removing the words ''single or'' in § 200.2(b)(7)(i).

Discussion: We believe that States should have the flexibility to assess student academic achievement, as defined by the State, using a single-question format. Assessments that use one type of question format are able to, and in fact are required to, assess varying levels of cognitive complexity and higher-order thinking skills. Therefore, we decline to make the change suggested by the commenter.

Changes: None.

Comment: One commenter stated that the proposed regulation would define multiple measures in a way that undermines the ESEA by subsuming the multiple-measures requirement within the requirement to assess higher-order thinking skills and understanding of challenging content. The commenter stated that the purpose of multiple measures is to ensure the validity and reliability of judgments about proficiency, as required by the ESEA, by providing multiple ways for students to demonstrate proficiency in the same skills and knowledge. The commenter maintained that the regulation, as drafted, implies that the purpose of multiple measures is to assess higher-order thinking skills and understanding of challenging content. The commenter recommended that the Department (1) remove the proposed language and retain the language in the current regulations; (2) clarify that, in order to achieve the overall purpose of ensuring validity and reliability of the proficiency determinations made under the ESEA, multiple measures must include different ways of measuring the same proficiencies of students in the knowledge and skills identified in the State's standards; and (3) provide guidance on how multiple measures can be combined in order to make valid and reliable determinations of a student's proficiencies.

Discussion: The regulations provide clarifications that are necessary to ensure that States understand that their assessments may include single or multiple question formats and that they may use multiple assessments to measure achievement in a specific content domain. They also refer to assessments that measure objectives within a particular content domain and assessments with items that both measure higher-order thinking skills (e.g., reasoning, synthesis, and analysis) and knowledge and recall items that assess the depth and breadth of mastery of a particular content domain. The changes requested by the commenter are not necessary given the purpose of the amendments to this particular section of the regulations.

Changes: None.

Comment: Many commenters recommended that the final regulations in § 200.2(b)(7) include language requiring that assessments use the principles of ''universal design'' in order to increase the accessibility of assessments for a wide variety of students.

Discussion: Although we agree that using the principles of universal design in developing assessments would increase the accessibility of assessments, we do not believe it is necessary to include such a requirement in these regulations. Section 200.2(b)(2) already requires State assessments to be ''designed to be valid and accessible for use by the widest possible range of students, including students with disabilities and students with limited English proficiency.'' In addition, the regulations in 34 CFR 300.160(g) implementing the IDEA require States to use universal design principles, to the extent possible, in developing all general State and district-wide assessment programs, including assessments described under section 1111 of the ESEA.

Changes: None.

Section 200.7 Disaggregation of Data

Comment: Many commenters objected to the Department's proposal to amend § 200.7, which would require a State to determine the minimum number of students sufficient to yield statistically reliable information for each purpose for which disaggregated data are used and to ensure, to the maximum extent practicable, that all student subgroups are included, particularly at the school level, for purposes of making accountability decisions. Several commenters did not agree with the statement in the preamble to the NPRM that nearly 2 million students are not counted in NCLB subgroup accountability determinations at the school level because States set unnecessarily large minimum group sizes. The commenters asserted that this statement is not based on peer-reviewed research by reputable scholars. One of the commenters argued that the statement ignores the fact that every child is included in at least one group (the ''all students'' group) either at the school or LEA level. Other commenters objected to statements in the preamble that the commenters interpreted to be a suggestion by the Department that States set their minimum group size in order to exclude certain subgroups and minority students from accountability determinations. These commenters maintained that States set minimum group sizes in order to protect the privacy of students and not to exclude certain subgroups and minority students from accountability determinations.

Another commenter stated that the proposed changes would result in schools being identified for improvement based on the scores of too few students.

Discussion: The Secretary's intent in amending § 200.7 was to ensure that schools and LEAs are held accountable for the achievement of all their students. The Department recognizes that, when reporting information to the public, States must balance the need to maintain student privacy and the need for statistically reliable information with the clear intent of the statute to hold schools and LEAs accountable for the achievement of their subgroups. Further, if schools and LEAs are held accountable only for the achievement of their students as a whole, the importance that the ESEA places on disaggregated data and subgroup accountability would be diminished.

Section 1111(b)(2)(C)(v) of the ESEA requires a State to define AYP so that its annual measurable objectives apply to all students as well as to specific subgroups of students—that is, economically disadvantaged students, students from major racial and ethnic groups, students with disabilities, and LEP students. Section 1111(b)(2)(I) of the ESEA makes clear that, for a school or LEA to make AYP, all students as well as each subgroup of students must meet or exceed the State's annual measurable objectives. This emphasis on subgroup accountability is one of the major changes that Congress made to the ESEA's accountability provisions when it enacted NCLB. In fact, as stated in section 1001(3) of the ESEA, one of the primary purposes of NCLB is to close the achievement gap between high- and low-performing students, especially the achievement gaps between minority and non-minority students and between disadvantaged children and their more advantaged peers. This purpose could not be accomplished without subgroup accountability.

Disaggregated accountability is tempered only by the need to ensure statistical reliability and to protect student privacy. Thus, section 1111(b)(2)(C)(v) of the ESEA and § 200.7 do not require accountability determinations by student subgroup if the size of the subgroup is too small to yield statistically reliable information or is such that personally identifiable information about individual students would be revealed. Logically, the larger a State's minimum group size, the less likely that students in a subgroup will constitute an accountability group, particularly at the school level, and that the school will be held accountable for the performance of that subgroup. Thus, it is appropriate that the regulations require States to find the optimal minimum group size that maximizes the inclusion of student subgroups in accountability decisions.

It is important to note that these regulations amend § 200.7(a), which is intended to ensure that the minimum group size that is used by a State to calculate proficiency rates in AYP determinations yields statistically reliable information. Section 200.7(b) of the current regulations includes an additional requirement with which a State must comply when reporting information to the public. Specifically under this section, a State may not report achievement results if the results would reveal personally identifiable information about an individual student in accordance with the Family Educational Rights and Privacy Act (FERPA). 20 U.S.C. 1232g; 34 CFR part 99. Because the threshold (i.e., the number of students) that a State uses to ensure that it does not reveal personally identifiable information is generally lower than the threshold it uses for ensuring its proficiency calculations yield statistically reliable information, a State can, and often does, establish separate minimum group sizes for calculating proficiency rates and for reporting assessment results.

Changes: None.

Comment: Some commenters stated that the proposed regulations did not go far enough to ensure that States use statistically reliable methods to determine minimum group size. Several commenters recommended that the Department establish a uniform minimum group size for all States. A few commenters recommended a minimum group size of between 10 and 20 with confidence intervals that do not exceed 95 percent. Another commenter recommended a minimum group size of no greater than 30 and no confidence intervals greater than 90 percent. Several commenters supported a minimum group size of 67.

Other commenters argued that a State should be permitted to use confidence intervals along with their minimum group size in making AYP determinations. One commenter stated that a small minimum group size requires larger confidence intervals to make accurate school and LEA AYP determinations. Some commenters, however, stated that confidence intervals exceeding 95 percent are unwarranted. Still other commenters argued that confidence intervals greater than 90 percent should not be allowed.

Discussion: The diversity of recommendations by commenters reflects the lack of consensus in the education community on a uniform minimum group size that all States would be required to use. Given this lack of consensus, as well as the lack of research supporting the use of a specific number, we believe the requirements in § 200.7 establish a reasonable approach to ensuring that States establish minimum group sizes that appropriately balance statistical reliability and privacy with the statutory emphasis on disaggregation and subgroup accountability.

A State's minimum group size must be large enough to produce statistically reliable information and protect students' privacy, yet small enough to maximize the inclusion of student subgroups in accountability decisions. Further, the Department believes that a State's minimum group size must be considered along with other components of a State's AYP definition. Therefore, § 200.7(a)(2)(ii) requires a State to explain how a State's minimum group size interacts with the other components of its AYP definition to affect the statistical reliability of the data, and to ensure the maximum inclusion of students and student subgroups in AYP determinations.

The National TAC will provide advice to the Department on how a State should consider the interactions of the various components in its AYP definition (such as the interaction of minimum group size and confidence intervals). In addition, external peer reviewers will review the evidence submitted by a State in order to help ensure that the State is establishing a system that leads to statistically sound AYP determinations and also maximizes the inclusion of all students and student subgroups while ensuring student privacy.

Changes: None.

Comment: A few commenters requested that the Department consider requiring States and LEAs to include additional groups in the student subgroups referenced in proposed § 200.7(a)(2). One commenter suggested that the Department require States and LEAs to disaggregate data for AYP determinations not only for students with disabilities but by disability category.

Discussion: Although the Secretary understands the intent of these comments, we do not think it is appropriate to expand the subgroups covered by this regulation beyond those specified in the ESEA and § 200.13(b)(7)(ii). We believe that the inclusion of these subgroups is sufficient to ensure meaningful and comprehensive accountability for all students. Further, the more specific the

categories (e.g., individual disability categories), the smaller the groups would be and, therefore, the less likely they would meet a State's minimum group size and be reflected in accountability determinations.

Changes: None.

Comment: Another commenter, wanting to gain more information about the extent to which accountability systems exclude highly mobile students from accountability determinations, suggested that proposed § 200.7(a)(2) require States to provide information about the number of students excluded from accountability determinations due to student mobility.

Discussion: We agree with the commenter and believe § 200.7(a)(2)(ii)(C) already requires a State to provide information in its Accountability Workbook about students excluded from accountability determinations due to student mobility. Section 200.7(a)(2)(ii)(C) requires a State to provide information regarding the number and percentage of students and student subgroups excluded from school-level accountability determinations. This requirement encompasses subgroups that are excluded from school-level accountability determinations as a result of the State's minimum group size and other statistical principles, as well as students excluded from school-level accountability determinations as a result of not attending the same school for a ''full academic year.''

Changes: None.

Comment: One commenter stated that lowering a State's minimum group size would have a profound impact on small schools because the assessment results from one or two students could affect AYP determinations.

Discussion: It is true that if a State, through the process outlined in the final regulations, adopts a smaller minimum group size, the number of schools with student subgroups included in AYP calculations is likely to increase. A State's minimum group size, however, would still need to be of sufficient size to yield statistically reliable information and protect the privacy of individual students. Thus, it is unlikely that one or two students would have a deleterious effect on AYP determinations, except when a subgroup is at or near a State's minimum group size. In that case, the performance of one or two students could affect AYP determinations no matter what the minimum group size is. We believe that the requirement that States adopt an optimal minimum group size strikes a balance between the need to produce statistically reliable information and the goal of maximizing inclusion of student subgroups in accountability. When this balance is achieved, students in all schools, including small schools, benefit because their schools are held accountable for their achievement.

Changes: None.

Comment: One commenter recommended that States be allowed to use a specific number or percentage of a population in their definition of minimum group size.

Discussion: Any State that uses or wishes to use a minimum group size that is based on a specific number or percentage of the school population would need to demonstrate how this method yields statistically reliable information for each purpose for which disaggregated data are used and ensure that, to the maximum extent practicable, all groups are included for the purposes of making accountability determinations, consistent with § 200.7(a)(2)(i).

Changes: None.

Comment: One commenter recommended that the regulations clarify whether the minimum group size applies to graduation rate calculations.

Discussion: Section 200.7(a)(2)(i)(A) requires a State to establish a minimum group size that yields statistically reliable information for each purpose for which disaggregated data are used. Therefore, minimum group size, and the requirements that accompany it, applies to determining whether a group has met the State's annual measurable objectives; whether it has at least a 95 percent participation rate; whether it made AYP based on ''safe harbor;'' and whether it met the State's objectives for the other academic indicators, including graduation rate. Minimum group size also applies to reporting achievement data to the public. The Department believes that the current language is clear and declines to amend the regulations.

Changes: None.

Comment: Many commenters expressed concerns regarding the provision in proposed § 200.7(a)(2)(ii) that would require a State to revise its Accountability Workbook to include information about its minimum group size and the students and student subgroups excluded from school-level accountability determinations. Several commenters representing States asserted that revising their Accountability Workbook would be an unnecessary fiscal and staffing burden. Others stated that the time and resources needed to revise the Accountability Workbook were significantly underestimated in the *Summary of Costs and Benefits* in the NPRM. One commenter stated that requiring a State to revise its Accountability Workbook gives the perception that the State is concealing its data.

A number of other commenters supported proposed § 200.7(a)(2)(ii). Several commenters recommended making information about the exclusion of students from accountability determinations more transparent by requiring a State to report: (a) The results of empirical or simulation studies and the process the State used to select its minimum group size; and (b) the number and percentage of subgroups that made AYP using the ''safe harbor'' provision or confidence intervals. The commenters recommended including information about the exclusion of students from accountability determinations on State and LEA report cards because the public is more likely to read a report card than an Accountability Workbook.

Discussion: Transparency is a key element of NCLB. The Department believes it is appropriate for a State to explain in its Accountability Workbook the effect that the various components of the State's AYP definition have on the inclusion of students and student subgroups in accountability determinations. Making this information available through a State's Accountability Workbook will enable the public to gain a better understanding of how schools are being held accountable for the performance of their students and student subgroups.

We disagree that the requirements in § 200.7(a)(2)(ii) are unnecessary or give the impression that a State is concealing data. We believe that the benefits of increasing transparency and accountability greatly outweigh the costs to a State of revising its Accountability Workbook. We address the specific concerns about the costs of revising Accountability Workbooks in the *Summary of Costs and Benefits* section later in this preamble.

We do not believe it is necessary to require a State to submit the additional information recommended by the commenters. Although some States may include the information recommended by the commenters in their Accountability Workbook, we believe that States should have flexibility in how they address the requirements in § 200.7(a)(2)(ii). We also do not agree that the information included in a State's Accountability Workbook should be included on State and LEA report cards. The information in § 200.7(a)(2)(ii) that a State is required to submit to the Department is more appropriately provided in the State's Accountability Workbook where the

various elements of the State's AYP definition are outlined and to ensure peer review of those elements.

Changes: None.

Comment: Several commenters objected to requiring a State to submit a revised Accountability Workbook six months following the effective date of the final regulations. The commenters stated that a six-month timeline is too short and is unrealistic given that each State would need to conduct an extensive policy review to establish its minimum group size. Other commenters requested that the Department wait until Congress reauthorizes the ESEA before requiring a State to revise its Accountability Workbook because reauthorization will likely require additional changes to States' accountability systems.

Discussion: In order to have a cohesive accountability system, a State must understand how the various components of its AYP determinations fit together to provide accurate accountability decisions. The Secretary believes that now, more than six years after the implementation of NCLB, is an appropriate time for a State to reexamine its policies to ensure that there is a balance between, on the one hand, the need for statistical reliability of AYP determinations and students' privacy and, on the other hand, the need to ensure maximum inclusion of students and student subgroups in accountability determinations. Since receiving initial approval for its accountability system, every State has amended its Accountability Workbook with respect to the definition of AYP. Although the Department has worked to ensure that any amendments to a State's AYP definition are considered within the context of other components in the definition, we believe that now is an appropriate time to reexamine how the components fit together to ensure that sound accountability decisions are made.

However, the Department recognizes that it will take some time for the National TAC to provide input on the types of evidence the Secretary should consider in reviewing a State's Accountability Workbook and for the Department to provide guidance to States. Therefore, we have revised § 200.7(a)(2)(iii) to require a State to submit the required information in time for changes to be in effect for school year 2010–2011 AYP determinations using school year 2009–2010 assessment results.

Changes: We have revised § 200.7(a)(2)(iii) to require each State to submit a revised Consolidated State Application Accountability Workbook in accordance with paragraph (a)(2)(ii) to the Department in time for any changes to be in effect for school year 2010–2011 AYP determinations based on school year 2009–2010 assessment results.

Comment: A few commenters recommended that § 200.7(a)(2)(ii)(C) be revised to refer to ''school-level subgroup accountability'' rather than ''school-level accountability.'' The commenters stated that students in an excluded group would still be included in the overall school AYP calculation and that it is important to be clear that the concern is with students who are excluded from school-level accountability determinations.

Discussion: We believe § 200.7(a)(2)(ii)(C) appropriately requires each State to provide information regarding the number and percentage of students and student subgroups that are excluded from school-level accountability determinations, which will include, but not be limited to, students from various subgroups who are excluded from accountability determinations. In addition to a State's minimum group size, other factors in a State's AYP definition affect the inclusion of students at the school level. For example, a State's definition of ''full academic year'' also affects the number of students who are excluded from school-level accountability determinations. We believe it is important to understand the full impact of the components that converge to make up a State's definition of AYP at both the school and subgroup levels. Therefore, we decline to make the suggested change.

Changes: None.

Comment: A few commenters supported the requirements in § 200.7(a)(2)(ii) regarding the submission of Accountability Workbooks, but stated that the additional data collection will be costly. The commenters requested that Congress provide additional funding and resources to allow States to upgrade their data systems.

Discussion: Section 200.7(a)(2)(ii) requires a State, in its Accountability Workbook, to: (a) Explain how the State's minimum group size yields statistically reliable information and ensures that all student subgroups, to the maximum extent practicable, are included in AYP determinations; (b) explain how components of the State's definition of AYP, in addition to the minimum group size, interact to affect the statistical reliability of the data and to ensure the maximum inclusion of all students and student subgroups; and (c) provide information regarding the number and percentage of students and student subgroups excluded from school accountability determinations. Considering that a State uses this information each year to make AYP determinations, the Department believes that the State should have this information readily available and should not have to collect additional data. In addition, evaluating a State's definition of AYP is a statutory requirement and part of what is required in an Accountability Workbook. We address other more specific concerns about the costs of revising Accountability Workbooks in the *Summary of Costs and Benefits* section.

With regard to the commenters' request for additional funding and resources for a State to upgrade its data systems, the Department's Institute of Education Sciences (IES) Statewide Longitudinal Data Systems program has provided almost $122 million to 27 States to design, develop, and implement statewide longitudinal data systems that can accurately manage, analyze, disaggregate, and use individual student data. The President's fiscal year 2009 budget request for this program is $100 million, a significant increase intended to support new awards to States that have not yet received funding, as well as to support the expansion of systems in previously funded States. The 2009 request would support approximately 32 awards for developing longitudinal data systems or expanding existing data systems.

Changes: None.

Comment: One commenter suggested that the Department identify States that need to change their minimum group size and require only those States to revise their Accountability Workbooks. Another commenter recommended that the Department establish a specific minimum group size and require States that want a different minimum group size to revise their Accountability Workbooks.

Discussion: The Department believes that each State should re-examine its minimum group size, along with the other components of its AYP definition, in order to ensure that the components interact to provide statistically reliable information while maximizing the inclusion of students and student subgroups in accountability determinations. Section 200.7(a)(2)(ii) is focused not only on a State's minimum group size, but also on ensuring that the entirety of a State's AYP definition is coherent and results in statistically reliable accountability determinations. For the reasons stated previously in this section, at this time, we do not believe

it is appropriate to establish one minimum group size for all States.

Changes: None.

Comment: One commenter expressed concern that decisions regarding minimum group size would be partisan and biased if States were required to justify their minimum group size to the National TAC.

Discussion: The National TAC will not evaluate States' minimum group size. Rather, the National TAC will provide advice to the Department on how States should consider the interactions of the various components in their AYP definition and will provide recommendations to the Secretary that the Secretary and peer reviewers may consider when reviewing each State's revised Accountability Workbook. We note that the National TAC is a nonpartisan group that is subject to Federal Advisory Committee Act (FACA) requirements, thus guarding against any perception that its recommendations are based on anything but sound education policy.

Changes: None.

Comment: None.

Discussion: In the course of our internal review of the proposed regulations, we determined that the regulations should refer to ''minimum group size'' rather than ''minimum subgroup size'' because AYP determinations are made for the ''all students'' group as well as student subgroups.

Changes: We have revised § 200.7(a)(2)(ii) to change the term ''minimum subgroup size'' to ''minimum group size.''

Section 200.11 Participation in NAEP

Section 200.11(c) Report Cards

Comment: Many commenters supported the proposal in § 200.11(c) that States and LEAs be required to include results from the NAEP on their report cards, stating that this information provides an important tool to help the public evaluate and compare results across States and to help parents learn more about how the rigor of their State's standards and assessments might compare with other States and with national benchmarks.

However, several commenters recommended that the regulations encourage, but not require, States to include NAEP results on State and LEA report cards. One commenter maintained that States should have the discretion to determine whether information on the NAEP would be valuable to the public and, if so, how to disseminate it. Several commenters stated that it is unnecessary to require States to include NAEP results on State and LEA report cards because many States already post NAEP results on their Web sites. Other commenters recommended requiring NAEP results to be posted on State and LEA Web sites instead of requiring that they be included on SEA and LEA report cards. One commenter stated that State Web sites are the most appropriate vehicle for making publicly available comparisons of results from State assessments and the NAEP and for communicating the relationship between the NAEP and State assessments. Finally, several commenters stated that this proposed requirement could be viewed as an effort to push States to adopt a national curriculum that is aligned with the standards and curriculum implicit in the NAEP.

Discussion: The NAEP is the only nationally representative and continuing assessment of what America's students know and can do in various grades and subject areas and, therefore, is an important source of information about student achievement. The Secretary believes that NAEP data should be easily accessible and available to parents and the public in order to provide them with a tool for comparing how students in a State are performing on the NAEP with how students in the State are performing on State assessments.

The Department does not believe that giving States the option to include NAEP data on State and LEA report cards or requiring only that they post NAEP results on State or LEA Web sites would be sufficient. We believe that including NAEP results on State and LEA report cards provides the greatest transparency and gives parents easy access to an important tool for assessing the educational performance of students in their State. We also do not agree with commenters who stated that requiring the inclusion of NAEP data on State and LEA report cards may be viewed as an effort to push States to adopt a national curriculum aligned with the standards and curriculum implicit in the NAEP. The purpose of requiring State and LEA report cards to include NAEP results is to ensure that NAEP results are easily accessible and available to parents and the public.

Changes: None.

Comment: A number of commenters supported requiring NAEP results on State report cards, but not on LEA report cards. One commenter stated that State NAEP results on LEA report cards would be irrelevant to parents because the data would not help a parent decide which school their child should attend. Other commenters stated that including the information on LEA report cards would lead parents and the public to conclude, mistakenly, that students in that LEA participated in the NAEP.

Discussion: While we agree that including NAEP results on LEA report cards will not likely help a parent decide which school their child should attend, we believe that the data will give parents an important comparison between the percent of students proficient according to State standards and assessments and the percent of students proficient on the NAEP. Therefore, we disagree with commenters who recommended that we require NAEP results to be included only on State report cards.

Changes: None.

Comment: Several commenters recommended amending the regulations to make clear that NAEP results must be reported on State and LEA report cards disaggregated by subgroup, including subgroups for students from major ethnic and racial groups, LEP students, and students with disabilities. The commenters also recommended that we require States and LEAs to include on their report cards information about the participation of students with disabilities on the NAEP. Other commenters recommended that we require State and LEA report cards to include the State's average scale score for the NAEP mathematics and reading assessments in comparison with the national average scale score for the NAEP mathematics and reading assessments.

Discussion: The Secretary agrees that the regulations should be more specific about the State NAEP data that are to be reported on State and LEA report cards. In order to provide parents and the public with sufficient information to compare how students in a State are performing on the NAEP with their performance on State assessments, we believe the data should, at a minimum, be reported in terms of the percentage of students, at each achievement level reported on the NAEP (below basic, basic, proficient, advanced) in the aggregate on State and LEA report cards. Recognizing commenters' concerns, as described later in this section regarding the burden of including NAEP data on State and LEA report cards, however, we are revising the regulations to require that the achievement data be disaggregated for each subgroup for which AYP determinations are made only on the State's report card.

We also agree with commenters that the participation rates for students with disabilities and the participation rates for LEP students should be included on

both State and LEA report cards. States and LEAs may include additional NAEP data, such as scale scores, but we decline to require them to do so.

Changes: We have revised § 200.11(c) to make clear that each State and LEA must include on its report card the most recent available academic achievement results in grades four and eight on the State's NAEP reading and mathematics assessments. We also have added two paragraphs to this section to make clear that State and LEA report cards must include: (1) The percentage of students at each achievement level reported on the NAEP in the aggregate and, for State report cards, disaggregated by economically disadvantaged students, students from major racial and ethnic groups, students with disabilities, and LEP students; and (2) the participation rates for students with disabilities and the participation rates for LEP students.

Comment: Numerous commenters opposed the proposed regulations, stating that NAEP results would be misinterpreted by parents and the public and create an inappropriate comparison because the results reflect different types of tests that are developed for different purposes and that have different constructs, different standards-setting procedures, and different ''cut scores.'' Many commenters stated that parents already receive an abundance of data on the academic performance of their child, and on their child's school and LEA, and that adding NAEP results to report cards would be cumbersome, confusing, and of little value to parents. Other commenters stated that the NAEP and State assessments test different groups of students and are not administered at the same time in the school year, and that NAEP results are not disaggregated by the same subgroups required under the ESEA.

A number of commenters stated that it is important to clarify on report cards, using simple and clear terms, that only limited comparisons can be made between the NAEP results and the results on State assessments and to clearly explain that NAEP results are based on Statewide samples of students and not necessarily on the same students whose results are reported on the State assessments. Several commenters stated that the Department has not provided guidance on how to interpret NAEP results and to explain the differences between the NAEP and State assessments. One commenter asked whether the Department will provide technical assistance to help States accurately interpret and explain the differences between the NAEP and State assessments.

Discussion: The Secretary recognizes that simple comparisons of student performance on the NAEP and State assessments cannot be made without some understanding of the key differences between the two assessments. Just as States and LEAs provide information about their State assessments to help parents and the public interpret assessment data, we encourage States and LEAs to provide information on interpreting NAEP results. We believe that providing parents and the public with information about the differences between the NAEP and State assessments, in a manner that is easily accessible and understandable, will allay commenters' concerns that NAEP results would be misinterpreted, misleading, confusing, or of little value to parents and the public. The Department intends to provide guidance to States on how best to convey this information to parents and the public in simple and clear terms.

Changes: None.

Comment: A number of commenters stated that the Department exceeded its statutory authority by requiring State and LEA report cards to include NAEP results. The commenters stated that the ESEA prescribes in detail the information that must be included on State and LEA report cards, as well as other information that may be included. Because the ESEA does not require the inclusion of NAEP results on report cards, and does not indicate that States and LEAs may include this information on their report cards, the commenters stated that the Department lacks the authority to add to these requirements.

Discussion: We agree with the commenters that section 1111(h)(1) and (2) of the ESEA sets out specific information that States and LEAs must include on their report cards and also permits States and LEAs to include additional optional information. We note that section 1111(h)(1)(D) specifically expresses the rationale for including optional information on report cards: to ''best provide parents, students, and other members of the public with information regarding the progress of each of the State's public elementary schools and public secondary schools.'' Congress obviously believed that participation in the NAEP is important because, in sections 1111(c)(2) and 1112(b)(1)(F) of the ESEA, it required each State and LEA, if selected, to participate in NAEP's reading and mathematics assessments in fourth and eighth grades as a condition of receiving Title I, Part A funds. For the reasons stated previously, we believe that including State NAEP results on State and LEA report cards is consistent with Congress' reason for permitting additional information on report cards—that is, to best provide parents, students, and the public information regarding the academic progress of students in the State. Accordingly, the Secretary has exercised her specific regulatory authority in section 1901(a) of the ESEA and her general regulatory authority in section 410 of the General Education Provisions Act, 20 U.S.C. 1221e–3, to require States and LEAs to include State NAEP data on their report cards to provide another significant indicator of student achievement in the State.

Changes: None.

Comment: One commenter stated that the proposed amendment to § 200.11 conflicts with language in Executive Order 12866 on reducing regulatory burden.

Discussion: Executive Order 12866, which governs Federal agencies' regulatory planning and review, requires agencies to adhere to a number of principles when considering and promulgating regulations. Among those Principles of Regulation is the principle that each agency tailor its regulations to impose the least burdens on society, including individuals, businesses of differing sizes, and other entities (including small communities and governmental entities), consistent with obtaining the agency's objectives, taking into account, among other things and to the extent practicable, the costs of cumulative regulations.

Thus, although Executive Order 12866 encourages agencies to take efforts to reduce regulatory burden, it also recognizes that some burden may be necessary for an agency to achieve its objectives. The Executive Order, therefore, also requires an agency to analyze the costs and the benefits of a regulation and ''to propose or adopt a regulation only upon a reasoned determination that the benefits of the intended regulation justify its costs.'' As we discuss elsewhere in this section, we believe that the benefits of requiring States and LEAs to include NAEP data on their respective report cards significantly outweigh the burden of complying with this requirement. The NAEP is the only nationally representative and continuing assessment of student achievement. We believe that keeping parents and the public informed about student achievement is worth the additional time and resources needed to make this information readily available. Accordingly, we disagree with the commenter that the NAEP requirement conflicts with Executive Order 12866.

Changes: None.

Comment: One commenter stated that the amount of time and effort that would be required to ensure accurate and appropriate use of NAEP results far outweighs any potential benefits. A number of commenters stated that NAEP results are already available to States and the public and that requiring the data to be included on report cards would place an undue burden on States and LEAs and require additional resources. The commenters stated that changes to report cards require significant staff time and resources because States must seek input from stakeholders, obtain State Board of Education approval, and pay the costs for reproduction. Several commenters stated that the Department should provide States with sufficient time to make these changes.

Discussion: We disagree with the comment that the amount of time and effort required to ensure accurate and appropriate use of NAEP results outweighs any potential benefits of including this information on report cards. We believe that the benefits of providing parents and the public with information that will help them evaluate student achievement and the State's educational system outweigh the additional time and resources needed to make this information readily available. Further, we do not agree that the amount of time and effort required to include NAEP data (and appropriate interpretations of those data) will be substantial. State NAEP results are available on the Web site of the Department's National Center for Education Statistics (NCES), as well as through other sources, and obtaining these data should not pose a significant burden. That said, as we have noted previously, we are revising the regulations to provide that only State report cards must include disaggregated achievement data.

Finally, we note that States and LEAs may use their Title I, Part A administrative funds to pay for the staff time and resources needed to make these changes to their report cards, which we expect to be implemented when States and LEAs report the results from assessments administered in the 2008–2009 school year. We address the specific concerns about the costs of making these changes to State and LEA report cards in the *Summary of Costs and Benefits section*.

Changes: We have revised § 200.11(c) to make clear in paragraph (c)(1) that only State report cards must include NAEP achievement data disaggregated by subgroup.

Comment: One commenter recommended that, in addition to the results from State NAEP reading and mathematics assessments, States and LEAs should be required to report NAEP results on assessments for all academic subjects, including history, civics, government, economics, and geography.

Discussion: We agree that including NAEP results on State and LEA report cards for all academic subjects would be informative. Given that AYP determinations are based on student performance in reading/language arts and mathematics, however, we believe that, at a minimum, NAEP results for these two subjects must be included on State and LEA report cards. There is nothing in these regulations that would prevent a State or LEA from reporting the results from other NAEP assessments on their report cards if they so choose.

Changes: None.

Comment: One commenter agreed with the proposal to require NAEP results on State and LEA report cards, provided that the most recent data are used and that the Department ranks State assessments for rigor so that stakeholders can determine whether their State's assessments reflect the same level of rigor as the NAEP. One commenter expressed concern that NAEP results would not be available in time to report them with the State assessment data. Another commenter recommended that the regulations establish a specific date by which NAEP results will be provided so that there would be no delay in reporting State assessment data. The commenter recommended that the Department not enforce the NAEP requirement if there is a delay in releasing NAEP data.

Discussion: Section 200.11(c) requires States and LEAs to include only the most recently available academic achievement results from the State's NAEP reading and mathematics assessments on their report cards. In other words, States and LEAs will include on their report cards the most recent NAEP data that are available (whatever year's data happen to be most recent). A delay in the release of NAEP data therefore would not affect the timing of report cards. With regard to the commenters' recommendation that the Department rank order State assessments for rigor, NCES has conducted several analyses comparing the results from the NAEP with results from State assessments in reading and mathematics (*see http://nces.ed.gov/nationsreportcard/researchcenter/statemapping.asp*).

Changes: None.

Comment: One commenter opposed requiring States to report NAEP results on State and LEA report cards because of deficiencies in the NAEP mathematics assessment. The commenter recommended that, because the National Mathematics Advisory Panel report identified a deficiency with the NAEP mathematics assessment, the Department correct this problem before requiring States and LEAs to include NAEP results on their report cards.

Discussion: NCES is responsible by law for carrying out the NAEP. *See* 20 U.S.C. 9010. The National Assessment Governing Board, appointed by the Secretary but independent of the Department, sets policy for the NAEP and is responsible for developing the framework and test specifications that serve as the blueprint for the assessments. NCES and the National Assessment Governing Board take seriously the criticisms of the National Mathematics Advisory Panel and are considering the Panel's recommendations.

In the meantime, we note that one of the resources upon which the National Mathematics Advisory Panel relied in making its recommendations for NAEP and State tests was the 2007 *Validity Study of the NAEP Mathematics Assessment: Grades 4 and 8*. Although that report identified some areas for improvement, it concluded that, ''The NAEP mathematics assessment is sufficiently robust to support the main conclusions that have been drawn about United States and state progress since 1990.'' [1] The Task Group on Assessment of the Mathematics Advisory Panel found that NAEP employs acceptable processes for setting standards and cut scores.[2] Based on the findings of these reviews, the Secretary continues to believe that NAEP is still the best indicator of student achievement in mathematics and that the inclusion of NAEP data on State and local report cards should not be delayed until NCES makes revisions in response to the National Mathematics Advisory Panel's recommendations.

Changes: None.

Section 200.19 Other Academic Indicators

Reorganization of § 200.19

Comment: None.

Discussion: In light of the significant number of changes the Department is including in the final regulations on the ''other academic indicator'' for high

[1] Daro, P., Stancavage, F., Ortega, M., DeStefano, L., & Linn, R. (2007). *Validity Study of the NAEP Mathematics Assessment: Grades 4 and 8*. (pp. ii and 119).

[2] U.S. Department of Education, *Standards for Success: The National Mathematics Advisory Panel, Reports of the Task Groups and Subcommittees*. (2008). Washington, DC: Author.

schools, we have reorganized § 200.19 to group all the requirements for high schools in new paragraph (b) and all the requirements for elementary and middle schools in new paragraph (a). We believe that this reorganization makes this section of the regulations more accessible and will aid readers' understanding of the new high school graduation requirements.

Changes: Section 200.19 has been reorganized as follows:

- Section 200.19(a) sets forth all of the requirements for elementary and middle schools with respect to other academic indicators.
- Section 200.19(b) sets forth all of the requirements for high schools with respect to the other academic indicator—graduation rate.
- Section 200.19(c) incorporates the requirements from current § 200.19(b) regarding additional academic indicators.
- Section 200.19(d) incorporates the requirements from current § 200.19(c) regarding statistical quality of data.
- Section 200.19(e) is substantively unchanged from the current regulation and has been changed only to update cross-references to other paragraphs within this section.

New § 200.19(b) (Proposed § 200.19(a)(1)) Definition of Adjusted Cohort Graduation Rate

General

Comment: Many commenters supported the Department's proposal to require States to use an adjusted cohort graduation rate, as defined in proposed § 200.19(a)(1), to calculate graduation rate for purposes of determining whether a high school has made AYP. The commenters noted that the proposed definition closely follows the definition of graduation rate adopted by the National Governors Association (NGA) in 2005. Commenters also stated that using a uniform method of calculating graduation rate would allow policymakers to make more meaningful cross-State comparisons and would give parents and other interested individuals a more accurate picture of high school completion in their communities. In addition, the commenters stated that information gained from using this graduation rate would allow school leaders to make more targeted adjustments in high school curriculum and programs in order to improve the transition of students from school to work and from school to college.

Other commenters, however, opposed our proposal regarding the definition of graduation rate. Several of these commenters suggested that the Department conduct studies of the implications of using an adjusted cohort graduation rate before requiring the use of such a rate for LEA-or school-level accountability determinations. Other commenters stated that the proposed regulations were too prescriptive and punitive and recommended that the Department instead take a broader approach and provide technical assistance to States in the design, development, and implementation of initiatives that would result in improved graduation rates.

Several commenters argued that, while establishing a uniform method for calculating graduation rate is a commendable endeavor, the regulations do not provide for the support system and services necessary to address the causes of low graduation rates. One commenter suggested that any additional focus on graduation rate be coupled with support for research on and development of career and technical education strategies.

Discussion: The Secretary appreciates the commenters' support for the proposed regulations. We do not agree with those commenters who believe that studies are needed before States are required to use an adjusted cohort rate. Nor do we agree that the regulations are prescriptive or punitive. The regulations requiring States to use a uniform and accurate cohort-based method of calculating high school graduation rates reflect broad consensus in the field. In August 2004, NCES released a report synthesizing the recommendations of a panel of experts on graduation rate calculations that recommended the use of an adjusted cohort graduation rate.[3] Additionally, in 2005, the lead recommendation of the NGA Task Force on High School Graduation Rate Data was for all States to immediately adopt and begin taking steps to implement a standard four-year adjusted cohort graduation rate (the ''NGA rate''), consistent with that proposed by the NCES panel.[4] All 50 governors agreed to adopt the NGA rate.

An adjusted cohort graduation rate will improve our understanding of the characteristics of the population of students who do not earn regular high school diplomas or who take longer than four years to graduate. An approach that provides technical assistance to States in designing programs to increase high school graduation is not sufficient. Moreover, all 50 States have already agreed to adopt the NGA rate, a rate similar to the four-year adjusted cohort graduation rate, and most States have made significant progress in implementing the rate. NGA's recent report (2008) states that 16 States already use the NGA rate to calculate their high school graduation rate; five more States plan to report the NGA rate in late 2008, eight more in 2009, nine more in 2010, six more in 2011, and one more in 2012; five States are uncertain about their plans to use the NGA rate.[5] In summary, the great majority of States are planning to implement the NGA rate within the next few years. Later in this preamble, we provide data suggesting that all but one State will have the capability to implement an adjusted cohort graduation rate within four years.

We agree that better and more data alone will not increase graduation rates, but those data will provide States, LEAs, and schools with critical information that is necessary for understanding the reasons for low graduation rates and for designing better programs and services to help students graduate.

Changes: None.

Comment: Several commenters questioned whether the Secretary has the authority to define how each State must calculate its graduation rate.

Discussion: We believe these regulations, which require a uniform definition of graduation rate that each State must use for NCLB purposes, are clearly within the Secretary's regulatory authority. Section 1111(b)(2)(C)(vi) of the ESEA requires a State to include, in determining AYP, a measure of graduation rate, defined as ''the percentage of students who graduate from secondary school with a regular diploma in the standard number of years.'' The legislative history accompanying NCLB makes clear that this definition must track students who graduate ''on time''—that is, ''within four years of starting the ninth grade for high schools that begin with the ninth grade''—and must avoid counting a dropout as a transfer. H.R. Rep. No. 334, 107th Cong, 1st Sess. 713 (2001). To date, each State has used its own definition. Some of those definitions, however, do not track a cohort of students from entry in high school through graduation. Moreover, many do

[3] National Institute of Statistical Sciences and Education Statistics Services Institute. (2004). *National Institute of Statistical Sciences/Education Statistics Services Institute Task Force on Graduation, Completion, and Dropout Indicators* (NCES 2005–105). U.S. Department of Education. Washington, DC: National Center for Education Statistics.

[4] National Governors Association. (2006). *Graduation Counts: A Report of the National Governors Association Task Force on High School Graduation Rate Data.* Washington, DC: Author.

[5] National Governors Association. (2008). *Implementing Graduation Counts: State Progress to Date, 2008.* Washington, DC: Author.

not sufficiently account for students who drop out, thereby overstating a school's graduation rate. Section 1901(a) of the ESEA authorizes the Secretary to ''issue such regulations as are necessary to reasonably ensure that there is compliance with [Title I].'' Accordingly, the Secretary has chosen to require that States use a uniform and accurate method of calculating graduation rate in order to hold schools, LEAs, and States accountable for increasing the number of students who graduate on time with a regular high school diploma.

Changes: None.

Comment: Several commenters stated that adopting an adjusted cohort definition of graduation rate has significant costs because States would be required to establish data systems that can track students individually. Other commenters contended that States do not have the data-system capacity to track students who transfer between LEAs and that current budget constraints are affecting States' development of longitudinal data systems. Other commenters suggested that the Federal government provide technical assistance and funding to help States build capacity and the infrastructure needed to track transferring students. One commenter recommended that the Department provide incentives and funding to help States develop longitudinal data systems that can track individual students over time, whether they drop out of high school and re-enter at a later date, enroll in a General Education Development (GED) program, enter an alternative school, or are placed in a juvenile detention center.

Discussion: The definition of graduation rate in the final regulations is very similar to the one that States' governors endorsed and requires the same data system capacity. In addition, the NGA reports that 36 States now have the information systems they need to collect longitudinal data and are tracking cohorts of students as they progress through the school system and, within four years, 49 States should have high school cohort data that will allow them to use the NGA rate.[6] Again, these data reflect activities that States initiated in the absence of these regulations. Moreover, the Department supports States' development of longitudinal student data systems through the Department's Statewide Longitudinal Data Systems program. As noted earlier, for fiscal years 2005 (when the program began) through 2008, Congress appropriated more than $122 million for this program and, through fiscal year 2007, 27 States have received these grants. In addition, the President, in his fiscal year 2009 budget request, has asked Congress to more than double funding for this program to $100 million. Thus, we believe that the regulations would not impose significant costs on States that they were not already likely to assume in the absence of these regulations or that they would have to support with non-Federal funds.

Changes: None.

Comment: One commenter argued that the proposed definition of graduation rate would unfairly penalize a school for students who drop out of school in order to get a job because, under the proposed definition, a dropout could not be removed from the cohort. This commenter stated that some students do not function well in a regular school setting and may need to enter the workforce early; in these cases, the commenter said that dropping out of school may be in the best interest of all concerned.

Discussion: The Secretary strongly disagrees that it would be best for the educational system and students if certain students drop out of high school to join the workforce instead of graduating from high school. Numerous reports and statistics from the U.S. Department of Labor (DOL) indicate the importance of a high school diploma. For example, in 2006, the unemployment rate for high school dropouts aged 25 and older was more than 1.5 times the rate of individuals who had a high school diploma (6.8 percent compared to 4.3 percent, respectively). Data for the same year also show that median annual earnings for high school graduates were $29,000, or nearly 32 percent higher than the $22,000 earned by those who did not receive a high school diploma.[7] These data make very clear the high economic costs of not completing high school.

Changes: None.

Comment: Several commenters questioned the Department's proposal to require States to use an adjusted graduation cohort rate that is based on ''first-time in 9th grade'' cohorts because, according to the commenters, the rate would not account for the 9th grade ''bulge'' reported in nearly all high schools (i.e., a larger enrollment of students in 9th grade due to student retention). Several commenters suggested that the adjusted cohort graduation rate allow States to use actual 9th grade enrollment rather than an estimated enrollment. One commenter recommended that the Department consider requiring States to use an alternative definition of graduation rate that would use an age rather than a grade as the starting point. Another commenter noted that there are students who drop out of school prior to entering high school and recommended that, because the adjusted cohort graduation rate would not include these students, the Department should adopt an approach that measures the high school graduation rate of students who graduate from middle or junior high school.

Discussion: Including ''first-time 9th graders'' in the definition of graduation rate in the final regulation is explicitly intended to account for the 9th grade ''bulge,'' which otherwise would distort the adjusted cohort rate by counting retained students in multiple cohorts. For example, unless the cohort is based on a count of first-time 9th graders, a student who is retained in 9th grade, but successfully completes the next four years of high school and receives a regular diploma, would be counted as a four-year graduate, even though the student spent five years in high school. To avoid such inaccuracies in measuring a school's graduation rate, a State must have data allowing it to determine ''first-time'' status for each student in 9th grade and thus count, not estimate, the number of such students in order to accurately identify the 9th grade cohort for a given year. Note that high schools in which the 10th grade is the earliest grade would use first-time 10th graders as the initial cohort. Further, we decline to adopt the recommendation that the Department base the adjusted cohort graduation rate on the age of students. Nor do we agree that the Department should be measuring the graduation rate of students starting with middle school graduates as the baseline. The ESEA specifically requires a measurement of on-time graduation from high school as a means of holding high schools accountable; a measure that is either based on age or uses middle school graduation as the starting point most likely would not meet that requirement.

Changes: None.

Adjusted Cohort Graduation Rate—Standard Number of Years and Extended-year Graduation Rate

Comment: Some commenters supported proposed § 200.19(a)(1)(i)(C)(*1*), which would have defined the term ''standard number of years'' to mean four years unless a high school begins after ninth grade, in which case the standard number of years is the number of grades

[6] *Id.*

[7] U.S. Department of Education. (2008). *Condition of Education 2008.* Washington, DC: Author.

in the school. Many commenters, however, opposed this definition. A number of these commenters expressed concern that applying this definition would penalize schools serving students who typically take longer to graduate, such as students with disabilities; LEP students; returning dropouts; students with necessary medical leave; children of immigrants; children of migrant workers; children with parents serving in the military; incarcerated students; students involved in the foster care, juvenile justice, or homeless shelter systems; students in alternative education programs; and students who enter high school performing at a State's lowest level of achievement. The commenters stated that the effect of this provision would be to undermine the education and accomplishments of these struggling students. Other commenters stated that schools and LEAs should not be penalized in AYP calculations for any student who takes more than four years to graduate, no matter how long that student takes. Some commenters argued that the proposed definition did not recognize the investments that SEAs and LEAs have made in programs that provide additional time and services to students who need more support to meet challenging content standards and pass rigorous exit exams. Some commenters argued that early college high schools and alternative education settings, such as those designed for students who are ''under-credited'' or have dropped out of high school, that award a regular high school diploma should be provided a waiver from meeting the four-year requirement for accountability purposes. Some commenters expressed concern that subgroups singled out for not reaching a ''standard number of years'' target would be stigmatized and that this regulation could promote discrimination. One commenter asked if there was a research basis for our proposed definition of ''standard number of years.''

One commenter recommended that the graduation rate calculation take into account that some students graduate high school in less than the ''standard number of years'' and ensure that these students are not counted as dropouts.

Discussion: Section 1111(b)(2)(C)(vi) of the ESEA requires that graduation rate be defined as the percentage of students who graduate from secondary school with a regular diploma in the ''standard number of years.'' We have interpreted and continue to interpret the ''standard number of years'' to be four years because the vast majority of high schools in this country provide four years of education and expect students to graduate at the end of those four years with a regular high school diploma. Rather than using the phrase ''standard number of years,'' however, we now use ''students who graduate in four years'' and define that phrase in § 200.19(b)(1)(iii) to make clear that it includes not only students who earn a regular high school diploma at the conclusion of their fourth year but also those who graduate early or during a summer session immediately following their fourth year. Moreover, as described in greater detail later in this preamble, we have added a provision in § 200.19(b)(1)(v) that addresses many of the commenters' concerns about students who need more than four years to graduate by permitting a State also to include in its AYP definition, subject to approval by the Secretary, an ''extended-year adjusted cohort graduation rate.'' This extended-year graduation rate would include students who graduate in four years or more with a regular high school diploma. States may decide to include one or more years beyond the standard four years (e.g., an extended-year graduation rate that combines a five-year rate and a six-year rate). A State may also choose to have more than one extended-year graduation rate (e.g., a five-year rate and a six-year rate) without combining those rates into one extended-year graduation rate. Examples of ways in which extended-year graduation rates may be used in AYP determinations can be found later in this preamble in the discussion of new § 200.19(b)(6)(i)(F). If a State chooses to calculate an extended-year graduation rate, such rate should not be limited to groups of students based on their characteristics (e.g., students with disabilities, LEP students).

Changes: New § 200.19(b)(1)(i)(A) (proposed § 200.19(a)(1)(i)(A)(*1*)) defines ''four-year adjusted cohort graduation rate'' as the number of students who graduate in four years with a regular high school diploma divided by the number of students who form the adjusted cohort for that graduating class. New § 200.19(b)(1)(ii)(A) defines ''students who transfer into the cohort'' to mean the students who enroll after the beginning of the entering cohort's first year in high school, up to and including in grade 12. New § 200.19(b)(1)(iii) defines ''students who graduate in four years'' as students who earn a regular high school diploma at the conclusion of their fourth year, before the conclusion of their fourth year, or during a summer session immediately following their fourth year. (For ease of reference, we sometimes refer to this rate elsewhere in the preamble as the ''four-year rate.'') The following formula shows the calculation of the four-year adjusted cohort graduation rate reported in the summer of 2006 (based on the class entering 9th grade in the fall of 2002).

$$\frac{\text{Number of cohort members who earned regular high school diplomas through summer 2006}}{\text{Number of first-time 9th graders in fall 2002 (starting cohort) plus transfers in minus students who transfer out, emigrate, or die during school years 2002-2003, 2003-2004, 2004-2005, and 2005-2006}}$$

We also have revised the regulations in § 200.19(b)(1)(v) to provide that, in addition to calculating a four-year rate, a State may propose to the Secretary for approval an extended-year adjusted cohort graduation rate. This rate is defined as the number of students who graduate in four years or more with a regular high school diploma divided by the number of students who form the adjusted cohort for the four-year rate, accounting for any students who transfer into the cohort by the end of the year of graduation being considered and for students who transfer out, emigrate to another country, or are deceased by the end of that year. A State may calculate one or more extended-year adjusted cohort graduation rates. (For ease of reference, we sometimes refer to the extended-year adjusted cohort graduation rate or rates elsewhere in the preamble as the ''extended-year rate.'') The following formula shows the calculation of a five-year extended-year rate reported in the summer of 2007 (based on the class entering 9th grade in the fall of 2002).

$$\frac{\text{Numerator in the 4-year adjusted cohort graduation rate plus cohort members who earned a regular high school diploma through summer 2007}}{\text{Denominator in the 4-year adjusted cohort graduation rate plus transfers in during the 2006-2007 school year minus students who transfer out, emigrate, or die during the 2006-2007 school year}}$$

Appendix A provides an example of how the four-year and extended-year adjusted cohort graduation rates would be calculated.

Comment: Several commenters argued that the definition of ''standard number of years'' should not apply to students with disabilities because the IDEA allows students with disabilities to receive special education services through 21 years of age. The commenters stated that this requirement in the IDEA should supersede the ESEA requirements and that the definition of adjusted cohort graduation rate should provide an exception for students with disabilities who require additional time to (1) complete the requirements for a regular high school diploma, (2) meet their individualized education program (IEP) goals, or (3) fulfill the requirements for other State-approved diplomas.

Discussion: As we noted in response to the previous comments, we are revising the regulations, in new § 200.19(b)(1)(v), to permit a State, in addition to calculating a four-year rate, to calculate an extended-year rate that includes, as graduates, students who graduate in four years or more with a regular high school diploma. Therefore, students with disabilities who need additional time to complete the requirements for a regular high school diploma and who graduate with a regular high school diploma may be included as graduates in an extended-year rate (if a State chooses to use an extended-year rate). Students with disabilities who fulfill requirements for any other State-approved alternative award, certificate of attendance, or GED credential or who complete their IEP goals but do not receive a regular high school diploma may not be counted as graduating in either the four-year or extended-year rate, consistent with the definition of regular high school diploma in new § 200.19(b)(1)(iv).

Changes: As previously noted, we have revised the regulations to provide in new § 200.19(b)(1)(v) that, in addition to calculating a four-year rate, a State may calculate an extended-year adjusted cohort graduation rate.

Comment: One commenter asked how the definition of ''standard number of years'' in proposed § 200.19(a)(1)(i)(C)(*1*) would apply to a school that does not have four grades.

Discussion: New § 200.19(b)(1)(i)(B) provides that, if a high school does not have four grades (e.g., does not have a 9th grade), then the State uses the number of grades in the school to calculate its adjusted cohort graduation rate. For example, if a school has three grades, then the adjusted cohort will be made up of those three grades. Any student who graduates in more than three years would be included in an extended-year rate, if a State chooses to use an extended-year rate.

Changes: None.

Comment: Some commenters supported proposed § 200.19(a)(1)(i)(C)(*2*), which would have permitted a State to propose, for approval by the Secretary, an alternate definition of ''standard number of years'' that would apply to limited categories of students who, under certain conditions, may take longer to graduate. These commenters stated that schools and LEAs should receive credit for students who take longer than four years to graduate. However, the majority of commenters opposed this proposal for a variety of reasons. Several commenters expressed concern that the criteria the Department would use to evaluate a State's alternate definition of ''standard number of years'' would be subjective and stated that further discussion was necessary to ensure that the Department establishes a clear, transparent process and timeline for approving States' alternate definitions. The commenters contended that, if States are permitted to propose their own categories of students and alternate definitions of ''standard number of years,'' graduation rates will remain difficult, if not impossible, to compare across States. Some commenters, on the other hand, argued that States should have the flexibility to propose an alternate definition of ''standard number of years'' without seeking approval from the Department. Other commenters objected to this provision because they wanted schools and States to be accountable for graduating all students within four years and stated that no exceptions should be allowed for students who may take longer to graduate.

Discussion: The Secretary has amended the final regulations to remove the provision for a State to propose an alternate definition of ''standard number of years'' when calculating the four-year adjusted cohort graduation rate. Accordingly, each school, LEA, and State must calculate a four-year adjusted cohort graduation rate, in accordance with § 200.19(b)(1)(i) through (iv). This provision will ensure use of an accurate, uniform method of calculating graduation rate that will be comparable across States. To address the commenters' concerns that some students need more time to graduate with a regular high school diploma, new § 200.19(b)(1)(v) permits a State to also establish an extended-year adjusted cohort graduation rate because we recognize it is important for schools and LEAs to receive credit for successfully graduating students, even if some students take longer to graduate for a variety of reasons.

Changes: As previously noted, new § 200.19(b)(1)(i)(A) provides for a four-year adjusted cohort graduation rate. New § 200.19(b)(1)(v) provides that, in addition to calculating a four-year rate, a State may calculate an extended-year adjusted cohort graduation rate, subject to approval by the Secretary.

Cohort Reassignment

Comment: Many commenters opposed proposed § 200.19(a)(1)(i)(C)(*2*), which would have allowed States to propose and use, if approved by the Secretary, an alternate definition of the ''standard number of years'' required for high school graduation because it would have allowed States to reassign students from their original cohort to a subsequent cohort if those students were not expected to graduate in the ''standard number of years.'' Commenters identified three major problems with using cohort reassignment. First, according to the commenters, cohort reassignment would allow States to predetermine how many years certain categories of students would take to graduate high school with a regular high school diploma, thereby reducing State accountability for those students and causing schools to ignore the educational needs of individual students. This potential outcome was

particularly troubling to commenters because, according to these commenters, the populations that are most likely to be reassigned are students who already suffer from low expectations (e.g., students with disabilities and LEP students). Second, many commenters stated that cohort reassignment is complicated and lacks transparency. These commenters argued that it is difficult to know which students and how many were reassigned to later cohorts and to identify the cohorts to which they were reassigned. They claimed that, therefore, cohort reassignment would make the adjusted cohort rate less useful as a tool for determining whether a school is graduating its students on time. Third, some commenters argued that permitting cohort reassignment would be inconsistent with the Department's overall goal of having States use a consistent, accurate, and uniform method for calculating graduation rate. Many of these commenters recommended use of an extended-year graduation rate.

Discussion: As noted previously, after considering the public comments, the Secretary has revised the regulations to remove the provision that would have allowed a State to propose and use an alternate definition of ''standard number of years.'' We recognize, however, that some students may take longer to graduate than others. Accordingly, rather than permitting cohort reassignment, we have revised the regulations to require States to calculate and report a four-year adjusted cohort graduation rate. If a State chooses to do so, and receives approval from the Secretary, it may also calculate and report an extended-year graduation rate. We believe that, with these changes, schools and LEAs will be held accountable for their performance in graduating students in four years while also receiving credit for graduating additional students in a cohort over a longer time frame. We agree with the commenters that cohort reassignment could reduce State and local accountability for students who are reassigned to a different cohort, would add complexity and reduce transparency in graduation rate calculations, and would undermine comparability in graduation rates across States.

Changes: As previously stated, new § 200.19(b)(1)(i)(A) requires States to calculate a four-year adjusted cohort graduation rate. New § 200.19(b)(1)(v) provides that, in addition to calculating a four-year rate, a State may calculate an extended-year adjusted cohort graduation rate.

Adjusted Cohort Graduation Rate—Removing Students From the Cohort

Comment: None.

Discussion: In reviewing the comments on documenting student transfers, we realized that the proposed definition of the adjusted cohort graduation rate did not provide for removing a student from the cohort who emigrates to another country and is no longer in the United States. We believe such a student should not continue to be included in the cohort and have revised the regulations accordingly.

Changes: We have revised new § 200.19(b)(1)(ii)(B) to include students who emigrate to another country among the students whom a school or LEA may, with written confirmation (as discussed in the following paragraphs), remove from the cohort.

Comment: A number of commenters expressed concern about requiring States to document that a student has transferred before removing the student from an adjusted cohort. Several commenters requested that we modify the requirement in proposed § 200.19(a)(1)(i)(A)(*2*) that would require a school or LEA to have official documentation that the student has enrolled in a program of study in another school, LEA, or other educational program that culminates in the award of a regular high school diploma in order to confirm that a student has transferred. These commenters appeared to assume that, in proposing to require ''official documentation,'' we meant to require a school to receive a request for a student's transcript. These commenters argued that, in many cases, it would be very difficult for schools to obtain this specific documentation and suggested the Department consider other types of documentation. They also stated that documenting transfers can be challenging because some families move and withdraw from school without any notification to school officials, especially in the case of migrant students, children of undocumented immigrants, or students who move outside the United States. The commenters specifically noted that there is no national database with common student identifiers to track students who transfer across State lines and that parents are not required under most State laws to notify their child's school when they move out of an LEA or to provide the child's former school with the name of the student's new high school.

One commenter questioned why proof of enrollment in another school would be required when a family moves. The commenter stated that, in these circumstances, a school should be required only to obtain evidence that a family has moved in order to count the student as a transfer. Several commenters suggested that a school or LEA should only be required to have ''reasonable evidence'' (rather than ''official documentation'') that the student has enrolled in a program of study in another school, LEA, or other educational program that culminates in the award of a regular high school diploma. These commenters suggested that ''reasonable evidence'' that a student has transferred could include: a records request from the receiving high school; an approved application for home schooling, or enrollment in a virtual school or distance education program; signed documentation from the student's parent or legal guardian that the family is moving out of the LEA, State, or country and that the student will be enrolled in school in the new location; and telephone or other personal contact with a responsible adult who verifies that the student's family has moved out of the LEA and that the adult believes the student is attending school elsewhere. These commenters also stated that ''reasonable evidence'' that a student has died may include a written statement to that effect. One commenter recommended that, if a student transfers to another school in the same State, confirmation that the student appears on the receiving school's enrollment list in the State's student record system should be required.

Discussion: We agree with the commenters that further clarification is needed regarding the documentation that is needed to confirm that a student has transferred out, emigrated to another country, or died. New § 200.19(b)(1)(ii)(B) therefore requires a school or LEA, before removing a student from the cohort, to confirm in writing that the student transferred out, emigrated to another country, or is deceased. Unless a school or LEA can confirm that a student has transferred out, emigrated to another country, or is deceased, the school or LEA must consider that student to still be in the cohort for purposes of the graduation rate calculation. Too often, any student who leaves the cohort for any reason is classified as a transfer, even if the student does not enroll in another program of study that culminates in the award of a regular high school diploma.

With respect to a student who transfers out, in particular, new § 200.19(b)(1)(ii)(B)(*1*) requires the school or LEA to have official written documentation that the student has

enrolled in another school or in an educational program that culminates in the award of a regular high school diploma. Official written documentation that a student transferred out may include several different types of documentation, such as a request for records from the receiving high school; an approved application for home schooling or distance education; evidence of a transfer that is recorded in a State's data system; or a letter from an official in the receiving school acknowledging the student's enrollment. Documentation must be in writing rather than a telephone conversation or other verbal communication with a parent, relative, or neighbor so that the transfer can be verified through audits or monitoring.

Although the Secretary appreciates that it may be difficult for a school or LEA to confirm through official written documentation that a student has transferred to another school or educational program that awards a regular high school diploma, we believe that it is critically important for school officials to do so in order to have an accurate measure of the school's and LEA's graduation rates.

With respect to students who are deceased or who have emigrated to another country, the school or LEA also must confirm this fact in writing but need not obtain official documentation. For example, written confirmation of a student who has emigrated might include a school administrator's memo to the student's file, based on a phone conversation with a parent, stating that the student is leaving the country. The Department plans to provide non-regulatory guidance on ways that States can obtain official written documentation of a student's transfer to another school or educational program and can obtain appropriate written confirmation of a student's emigration or death before removing the student from the cohort.

Finally, regarding the comment that it is difficult to confirm the transfer of migrant students, the Department is currently implementing the Migrant Student Information Exchange system. This system contains information on migrant students that can be accessed by all States and LEAs to help ensure that the academic records of these highly mobile students are preserved despite frequent moves, and should be of great assistance to States in need of documentation of the re-enrollment of students in another school or in an educational program that results in the award of a regular high school diploma.

Changes: Section 200.19(b)(1)(ii)(B) has been amended to clarify that, to remove a student from the cohort, a school or LEA must confirm in writing that the student transferred out, emigrated to another country, or is deceased. Section 200.19(b)(1)(ii)(B)(*1*) has been amended to require that, when confirming that a student has transferred out, a school or LEA must have official written documentation that the student has enrolled in another school or in an educational program that culminates in the award of a regular high school diploma.

Comment: Several commenters recommended that schools and LEAs not be penalized if, after multiple attempts, they are unsuccessful in contacting the parents or student to confirm that a student has transferred. Several other commenters, however, recommended that we specifically prohibit States from removing a student from a cohort as an ''error'' simply because the school could not confirm the student's final status.

Discussion: Although we recognize that in some cases it may be difficult for an LEA to obtain official written documentation of a student's transfer, we decline to allow a State to remove a student from the cohort simply because the student's status cannot be confirmed. Currently, in many cases, a student who is documented as a transfer to another school has dropped out of school, and removal of such a student from the cohort produces an inaccurate graduation rate. It is critical that LEAs accurately calculate high school graduation rates in order to give parents and the public important information about the success of a school, LEA, and State in graduating students and to ensure that AYP determinations are based on valid graduation rate calculations.

With respect to commenters who requested that we specifically prohibit the removal of students whose status cannot be confirmed as ''errors,'' we believe the regulation is clear that students may not be removed from the cohort in this situation and believe that no further change in the regulations is necessary.

Changes: None.

Comment: One commenter stated that many youth leave school and then enter workforce programs and adult basic education programs, and even go directly into community colleges, and do not necessarily return to high school. This commenter recommended that LEA data systems document and take these transitions into account.

Discussion: Although LEAs may choose to track and report on students who leave school and enter workforce programs, adult basic education programs, and community colleges, they may not count these students as transfers in the four-year adjusted cohort graduation rate. These students must be counted as dropouts unless they earn a regular high school diploma or enroll in another school or in an educational program that culminates in the award of a regular high school diploma (not including an alternative degree, such as a GED credential).

Changes: None.

Comment: Several commenters recommended that the regulations more specifically address the issue of creating uniform exit code policies across States. One commenter stated that, without transparency and common guidelines for exit codes, inconsistent coding practices undermine the accuracy of graduation rates and contribute to a lack of comparability among States. One commenter recommended that the Department require, through these regulations, that States submit to the Secretary for approval a plan for how State exit codes will be considered in calculating graduation rate in order to help ensure that the use of exit codes does not undermine the accuracy, comparability, and transparency of graduation rates.

Discussion: Although we agree with the commenter that it is important for States to create and maintain exit code rules, we do not think it is appropriate that the Department require standardized exit codes across States. However, the Department, through NCES, has provided guidance for the inclusion of exit codes in State data systems. In 2006, a Task Force of NCES' National Forum on Education Statistics (Task Force) developed a system of voluntary student exit codes designed for use with student information systems. The Task Force's goal was to construct a taxonomy that could account, at any point in time, for all students enrolled (or previously enrolled) in a particular school or LEA. Through careful review of coding systems used by States and LEAs, six broad categories emerged that were mutually exclusive and covered every possible situation. The six major exit code categories are: still enrolled in the same LEA; transferred; dropped out; completed school; not enrolled, eligible to return (e.g., a student who is participating in a foreign exchange program); and exited—neither completed nor dropped out (e.g., a student who is deceased). This work was published in a guidebook that can be found at: *http://nces.ed.gov/pubs2006/2006804.pdf*. The Department will continue to provide guidance to States in this area and encourages States

as they develop their data systems to consider the recommendations of the Task Force.

Changes: None.

Comment: One commenter recommended that the Department clarify in the regulations that the requirements for calculating an adjusted cohort graduation rate apply to States as well as schools and LEAs, and that States may not remove students from a cohort without acceptable confirmation and documentation from an LEA.

Discussion: We do not anticipate that a State would remove students from a cohort without confirmation from an LEA. Because a State must calculate the same graduation rate that is required for its schools and LEAs, we do not believe it is necessary to make any additional clarifications in the regulations specific to calculating States' graduation rates.

Changes: None.

Comment: One commenter suggested requiring an SEA- or LEA-administered audit in any school or LEA in which 20 percent or more of the entering 9th grade class is removed from the cohort on the basis of having transferred prior to graduation, or in any school or LEA in which documentation is lacking for more than 10 percent of students who are removed from the cohort as transfer students. This commenter also suggested that the Department direct the Office of Inspector General (OIG), as a priority activity, to review graduation rate data, conduct audits to determine the accuracy of State-reported graduation rates, and evaluate the adequacy of State policies regarding data quality and accuracy.

Discussion: Although we agree that States may determine that either an SEA- or an LEA-administered audit is necessary in schools or LEAs in which a certain percentage of students are removed from the cohort, we do not believe it is appropriate for the Federal government to require these audits. We also decline to direct the OIG to review the accuracy of State-reported graduation rates and State policies regarding data quality and accuracy because the Secretary does not set OIG priorities. We do, however, monitor State compliance with these regulations, and implementation of the four-year adjusted cohort graduation rate will certainly be a component of the Department's monitoring of Title I programs.

Changes: None.

Comment: One commenter recommended that the Department specifically state in the regulations that ''marginalized'' students, such as incarcerated students, must remain in the cohort and be included in the denominator of the adjusted cohort rate. Several commenters expressed concern that using an adjusted cohort rate would allow States to remove students who are in prison from the cohort. The commenters stated that this should not be permitted and suggested requiring States that want to remove incarcerated students from the cohort to propose, for approval by the Secretary, evidence that a State has in place (1) a plan to educate children in prison that will allow those students to receive a regular high school diploma; and (2) measures to ensure a full accounting of every child removed from any school's cohort. One commenter recommended that the regulations make clear that students who are incarcerated may be removed from the adjusted cohort. Another commenter recommended that States be permitted to remove students in alternative programs from the adjusted cohort.

Discussion: New § 200.19(b)(1)(ii)(B) makes clear that, in order to remove a student from the adjusted cohort, a school or LEA must confirm in writing that the student (1) transferred to another school or in an educational program that culminates in the award of a regular high school diploma; (2) emigrated to another country, or (3) is deceased. Unless a student, such as an incarcerated student or a student in an alternative program, meets one of these three conditions, the student may not be removed from the adjusted cohort and must remain in the denominator in calculations of the four-year rate for the school, LEA, and State in which the student last attended high school.

Changes: None.

Comment: We received a number of comments about how the proposed regulations would affect the tracking of students who are homeless or otherwise highly mobile. One commenter suggested that, because LEAs may not have much control over how long it takes highly mobile students to graduate, the regulations should allow States to assign these students to a cohort based on a student's grade-level placement at the time of the transfer. Another commenter opposed use of the adjusted cohort rate because it assumes a relatively stable student cohort beginning with the 9th grade and, according to the commenter, some programs with students who are highly mobile have no cohort to track. Another commenter stated that the proposed regulations would provide a disincentive for an LEA to which a highly mobile student has transferred to promote the continued education of this student who might not graduate on time. Another commenter asked that the Department clarify how calculation of the adjusted cohort graduation rate would be affected by school boundary changes within an LEA.

Discussion: The adjusted cohort rate does not assume stable cohorts, but does assume that a State has in place an accurate student record system that can track the progress of all individual students over time. States must account for students who are highly mobile in the same way that they track students who do not move frequently. If a student transfers out of a school, and the transfer can be documented, the student is placed in the corresponding cohort at the new school or program. This should provide an incentive, not a disincentive, for a receiving school to graduate that student on time. Schools that undergo a boundary change should be able to obtain the proper documentation from the LEA necessary to account for transfers out of a given cohort, and to place transfers into their proper cohorts.

Changes: None.

Comment: Several commenters noted that rapid and sustained enrollment increases or decreases will either mask or exaggerate graduation rates.

Discussion: The adjusted cohort graduation rate is based on data that follow the trajectory of individual students over time. States should not encounter problems with either masked or exaggerated graduation rates.

Changes: None.

Regular High School Diploma

Comment: Some commenters expressed concern about our proposal to define a regular high school diploma as the standard high school diploma that is awarded to students in the State, that is fully aligned with the State's academic content standards or is a higher diploma, and that is not a GED credential, certificate of attendance, or any alternative award. The commenters stated that allowing States to set their own high school graduation requirements would reduce the comparability of graduation rates due to differing standards for graduation. Another commenter remarked that the proposed regulations did not provide a definition of what graduation itself means. This commenter stated that State governors and educators generally agree that graduation should attest to the readiness of a student for postsecondary education or for productive work and that our regulations should reflect this definition. Some commenters argued that the graduation rate should include students who pass local requirements but not State assessment requirements for graduation.

Discussion: State requirements for earning a regular high school diploma vary across States, and it is the role of States, not the Federal government, to define what high school graduation means, based on a State's content standards, which indicate what students should know and be able to do by the time they leave high school. In fact, under section 1905 of the ESEA, as well as other similar provisions, the Secretary is specifically prohibited from mandating, directing, or controlling a State's, LEA's, or school's ''specific instructional content, academic achievement standards and assessments, curriculum, or program of instruction.'' To regulate on what constitutes ''graduation'' or what curricula a student must complete to receive a ''regular high school diploma'' would violate this prohibition. We, therefore, are not authorized to make the commenters' recommended changes to the regulations.

Changes: None.

Comment: Many commenters stated that the proposed definition of regular high school diploma was too narrow and that it should include any type of graduation diploma issued to a student. Some commenters suggested that the definition should include GED credentials. These commenters argued that a GED credential is accepted as an alternative to a regular high school diploma and satisfies eligibility requirements for entrance into postsecondary training opportunities, such as colleges and technical schools, as well as entrance into the job market.

Some commenters argued that modified or special education diplomas should be considered regular high school diplomas because not including these types of diplomas penalizes high schools for meeting the needs of students with disabilities. Several commenters recommended that the regulations explain that States have the option to craft a definition of ''regular diploma'' that encompasses high-quality accredited alternative education programs or special-purpose schools with curricula that are aligned with State academic standards and offer students a regular high school diploma based on graduation requirements that may differ from those applied to other schools in the State. One commenter recommended that States be more transparent about the requirements for earning a regular high school diploma.

Discussion: It is important that only students who receive a regular high school diploma (which could include a higher diploma) that is fully aligned with a State's academic content standards be included in the four-year rate in order to ensure that graduation rates accurately reflect the percentage of students who graduate with a diploma that represents what the State determines all students should know and be able to do by the end of 12th grade; alternative credentials, such as a GED credential and modified special education diplomas, do not meet these requirements. Furthermore, research demonstrates that GED recipients earn less than, and are generally not as successful in the labor market and in postsecondary education as, students who earn a regular high school diploma.[8] We agree with the commenter that States should be transparent about their diploma requirements and encourage States to make that information widely available.

Changes: None.

Comment: Another commenter noted that the definition of graduation rate proposed by the Department differs from the graduation rate adopted by the NGA. The commenter stated that, under the NGA rate, students who earn modified diplomas, such as special education diplomas, count as graduates if the modified diploma is the standard that the State and the school system have set for a student with an IEP.

Discussion: The commenter is correct that the NGA rate allows students who graduate with modified high school diplomas to count as graduates. Section 1111(b)(2)(C)(iv) of the ESEA, however, defines graduation rate as the ''percentage of students who graduate from secondary school with a regular diploma in the standard number of years.'' The legislative history accompanying this provision makes clear that Congress intended a ''regular diploma'' to exclude ''an alternative degree that may not be fully aligned with State academic standards, such as a certificate or GED.'' H.R. Rep. No. 334, 107th Cong, 1st Sess. 713 (2001). The four-year rate required in these regulations, therefore, does not permit students who receive modified or other diplomas that are not regular high school diplomas to be counted in the rate. For this reason, we no longer refer to the ''NGA rate'' when discussing the four-year adjusted cohort graduation rate, as defined in new § 200.19(b)(1).

Changes: None.

Comment: Some commenters recommended that we authorize States to establish procedures allowing schools and LEAs to count as graduates some students with the most significant cognitive disabilities who perform at a proficient level on a State's alternate assessment based on alternate academic achievement standards, but in no case more than one percent of all students assessed.

Discussion: In order for students to be counted as graduates, they must graduate with a regular high school diploma. Typically, students with the most significant cognitive disabilities do not receive regular high school diplomas but, instead, are working to meet their IEP goals or fulfill the requirements for a State-approved alternative diploma. Performing at a proficient level on a State's alternate assessment based on alternate academic achievement standards is not equivalent to receiving a regular high school diploma. Any student graduating with a credential other than a regular high school diploma may not be counted as a graduate for purposes of determining AYP; however, a State may choose to report the rate of students who successfully meet their IEP goals in order to highlight this important work. The final regulations also permit a State to set its graduation rate goal at less than 100 percent in recognition that students who are assessed based on alternate academic achievement standards, for example, may not receive a regular high school diploma. We discuss these provisions later in this preamble.

Changes: None.

Timeline for Use of the Four-Year Adjusted Cohort Graduation Rate

Comment: Several commenters opposed the requirement in proposed § 200.19(a)(1)(i) that would require States to use the four-year adjusted cohort rate definition no later than the 2012–2013 school year. Other commenters recommended that the Department require States to use the four-year adjusted cohort graduation rate earlier than the proposed 2012–2013 school year deadline; some commenters suggested that the deadline be the 2010–2011 school year, while others recommended a 2011–2012 school year deadline. One commenter suggested that States, LEAs, and schools be required to report the adjusted cohort graduation rate no later than the 2010–2011 school year and to use the rate for AYP determinations no later than the 2011–2012 school year. Some of the commenters who suggested requiring implementation earlier than the proposed deadline stated that the Department should provide States that do not have the technical capacity to implement the four-year adjusted cohort graduation rate by the new deadline additional time to do so. Most of the commenters who suggested requiring an earlier deadline stated that in no case should the Department permit a State to

[8] *Id.*

implement the adjusted cohort graduation rate any later than the 2012–2013 school year.

Discussion: We agree with the commenters who recommended requiring States to implement the four-year adjusted cohort graduation rate earlier than the 2012–2013 school year, given that, based on data from the recent NGA report,[9] we believe the great majority of States will be able to do so. We believe that an earlier deadline will help maximize the number of States using this rate as soon as possible. Accordingly, the final regulations require States to (a) report the four-year rate beginning with report cards providing results of assessments administered in the 2010–2011 school year and (b) calculate the four-year rate for determining AYP based on school year 2011–2012 assessment results.

Under the heading, *Implementation Timelines,* later in this notice, we have summarized the implementation timeline for the graduation rate requirements.

Changes: We have revised the regulations as follows:

- New § 200.19(b)(4) provides that States must calculate, for reporting purposes, the four-year adjusted cohort graduation rate, in the aggregate and disaggregated by subgroup, beginning with report cards providing assessment results for the 2010–2011 school year.
- New § 200.19(b)(5) requires a State to calculate the four-year rate, in the aggregate and disaggregated by subgroups, for purposes of determining AYP, beginning with AYP determinations based on school year 2011–2012 assessment results.

Comment: Some commenters requested that the Department allow flexibility for States that do not have the capacity to implement the four-year adjusted cohort graduation rate by the deadline proposed in the regulations. These commenters noted that States may need additional time, beyond the deadline proposed, to develop their longitudinal data systems and to train staff on implementing the new requirements. Several commenters recommended that States that currently do not have the capacity to implement the adjusted rate, or States that would not be able to meet the proposed 2012–2013 deadline, be required to demonstrate why they do not have the capacity, what changes they must make in order to attain that capacity, and the timeline for making those changes. Commenters suggested a range of ways a State could demonstrate this. Some commenters suggested that this justification be required in the State's Accountability Workbook; one commenter suggested that the Department enter into compliance agreements or timeline waivers with any States that do not implement the rate using the adjusted cohort definition by the deadline.

Commenters made various suggestions as to the information a State should be required to provide, such as an affirmation that it lacks the data system to report the data; an explanation of what changes will need to be made to its data systems; the transitional rate the State will use in the meantime; a timeline for creating the capacity and using the data; and an agreement to file interim reports on its progress.

Discussion: We understand, based on the NGA report, that some States will not be able to begin using the four-year rate for reporting and AYP determinations by the deadlines and agree with the commenters who suggested States be able to request more time to do so. We also agree with commenters that if these States need more time, these final regulations should require States to explain why they do not have that capacity, what changes they will make in order to develop that capacity, and their timeline for making those changes. We, therefore, have added new § 200.19(b)(7), which permits a State that is unable to meet the 2010–2011 deadline for reporting the four-year adjusted cohort graduation rate to request an extension of that deadline from the Secretary. To receive an extension, a State must submit, by March 2, 2009, evidence satisfactory to the Secretary demonstrating that it cannot meet the deadline and a detailed plan and timeline addressing the steps the State will take to implement, as expeditiously as possible, a graduation rate consistent with § 200.19(b)(1)(i) through (iv). As a condition of approving an extension, the Secretary may require the State to use a more rigorous transitional graduation rate than it has been using until such time as the State is able to implement the four-year adjusted cohort graduation rate. The Department will use the State's plan and timeline to provide technical assistance and support to the State to implement the four-year rate as soon as possible. In addition, fiscal year 2009 grantees under the Statewide Longitudinal Data Systems grant program that lack the capacity to implement the four-year rate may use their grant to develop the data capabilities needed to implement that rate.

Any State that cannot meet the 2010–2011 deadline for reporting the four-year adjusted cohort graduation rate and does not submit a request for an extension by March 2, 2009, which is subsequently approved by the Secretary, will be out of compliance with the regulations. Should a State not meet the 2010–2011 deadline, the Secretary has the authority to take appropriate action, including, but not limited to placing a condition on a State's Title I, Part A grant, requiring the State to enter into a Compliance Agreement with the Department, or withholding Title I, Part A funds.

Changes: We have added the following regulations:

- New § 200.19(b)(7)(i) provides that, if a State cannot meet the deadline for reporting the four-year rate in § 200.19(b)(4)(ii)(A), the State may request an extension of that deadline from the Secretary.
- New § 200.19(b)(7)(ii) requires that, to receive an extension, a State must submit, by March 2, 2009, evidence satisfactory to the Secretary demonstrating that the State cannot meet the deadline in § 200.19(b)(4)(ii)(A), and a detailed plan and timeline addressing the steps the State will take to implement, as expeditiously as possible, a graduation rate consistent with § 200.19(b)(1)(i) through (iv).

Comment: Some commenters asked whether proposed § 200.19(a)(1)(ii)(A) would have required States that can calculate the adjusted cohort graduation rate to begin using it immediately for reporting and AYP purposes (i.e., for the 2008–2009 school year), ahead of the timeline that we proposed in the NPRM. Some commenters argued that, given that most States have or are close to having the data systems necessary to calculate the adjusted cohort graduation rate, the regulations should specify that States that can immediately calculate the adjusted cohort graduation rate must do so. On the other hand, some commenters opposed any requirement that States be required to use the adjusted cohort graduation rate immediately.

Discussion: The final regulations do not require immediate use of the four-year adjusted cohort graduation rate by States that have the systems and data required to calculate this rate. According to NGA, only 16 States currently have the ability to calculate the four-year rate.[10] The Secretary has decided not to require these 16 States to use the four-year adjusted cohort graduation rate for accountability

[9] *Id.*

[10] *Id.*

purposes before the deadlines in § 200.19(b)(4) and (5). However, we encourage such States to use the four-year rate as soon as possible.

Changes: None.

New § 200.19(b)(2) (Proposed § 200.19(a)(1)(i))—Transitional Graduation Rate

Comment: One commenter supported our proposal in the NPRM to require States that are not yet able to calculate the adjusted cohort graduation rate to use the AFGR on a transitional basis. Another commenter supported the use of the AFGR for reporting purposes because, according to the commenter, it would be useful to compare the AFGR to what States are currently reporting for graduation rate. However, for several reasons, the vast majority of commenters opposed requiring the AFGR as the transitional measure of graduation rate for accountability purposes. First, commenters argued that the AFGR is an inadequate substitute for a true longitudinal rate and stated that they did not agree with the statement in the NPRM that research has shown the AFGR to be a reliable, accurate estimate of the high school graduation rate. According to the commenters, the AFGR would likely over-estimate graduation rates in high schools in which students drop out before the beginning of 10th grade, a common occurrence in schools serving large numbers of minority and low-income students. The commenters also stated that the AFGR is inaccurate in communities with significant in-or out-migration because the AFGR calculation has no mechanism for reassigning students whose families enter or leave an LEA. Second, commenters expressed concern that requiring States to use the AFGR as a transitional measure would create additional administrative, technical, and financial burdens and hinder States' efforts to transition to the adjusted cohort graduation rate, as well as hinder efforts to educate and inform high schools and the public of the pending adoption of the adjusted cohort graduation rate. Third, commenters argued that making a significant change now in defining graduation rate, and then again when the adjusted cohort graduation rate definition is implemented, would only create confusion, undermine public confidence regarding graduation rate data and school accountability systems in general, and complicate longitudinal analyses due to the use of as many as three different rates as well as multiple sets of goals and targets. Overall, commenters stated that the problems potentially created by using the AFGR as the transitional measure of graduation rate greatly outweigh the possible benefits of its increased accuracy compared to the rates currently used by some States.

Other commenters recommended alternatives to using the AFGR. Some commenters recommended that States be allowed to continue using their current graduation rate definitions until they can implement the adjusted cohort graduation rate. One commenter suggested that the AFGR be required as a transitional measure only for States that, by 2009, have not collected at least two years of data necessary to compute the adjusted cohort graduation rate. One commenter recommended the use of what the commenter said was a more reliable estimate of graduation rate, the Cumulative Promotion Index (CPI) method. Another commenter recommended that States be allowed to propose, for Secretarial approval, an interim rate that measures or estimates the number of graduates compared to the number of students in a high school's entering grade; does not use dropout data; counts as graduates only those students who receive a regular high school diploma; can be disaggregated; and can be used on an annual basis to determine a rate of growth.

Discussion: Although we believe the AFGR is a more valid and reliable graduation rate measure than some States currently use, we are persuaded by the commenters' reasons for not requiring the use of the AFGR as the transitional measure. To respond to these concerns, we have revised the regulations to focus States, LEAs, and schools on moving toward a uniform and more accurate method of calculating high school graduation rate—the four-year adjusted cohort graduation rate—in order to provide parents and the public with important information about the number of students graduating in four years with a regular high school diploma, and to ensure that AYP determinations are based on valid graduation rate calculations. We now believe that requiring the use of any interim alternative graduation rate, whether the AFGR or the alternatives suggested by the commenters, would not necessarily produce increases in accuracy and reliability, compared to current rates used by States, sufficient to compensate for the risks of slowing progress toward fully implementing the four-year rate.

Changes: We have removed the requirement in proposed § 200.19(a)(1)(ii) to use the AFGR as the transitional measure for those States that cannot yet calculate the four-year rate. Instead, under new § 200.19(b)(2), a State must use either the four-year adjusted cohort graduation rate or, on a transitional basis, a graduation rate that meets the requirements in current § 200.19(a)(1)—*i.e.*, measures the percentage of students from the beginning of high school who graduate with a regular high school diploma in the standard number of years, or another definition, developed by the State and approved by the Secretary, that more accurately measures the rate of student graduation from high school with a regular high school diploma.

Comment: One commenter questioned the apparent inconsistency in the proposed regulations that would have required use of the AFGR in school-level ''safe harbor'' AYP determinations but not for other school-level AYP determinations.

Discussion: The proposed regulations would not have required disaggregated AFGR results at the school level, except in the case of ''safe harbor'' calculations, because we did not have sufficient confidence in the validity of disaggregated AFGR results with small populations of students. However, because section 1111(b)(2)(I)(i) of the ESEA requires disaggregation of the other academic indicator—in this case, the graduation rate—in calculating ''safe harbor'' at the school level, we had no choice but to propose requiring disaggregation of the AFGR for ''safe harbor'' calculations. We note that this apparent inconsistency is not present in the final regulations, which do not require use of the AFGR.

Changes: As noted previously, we have removed the requirement in proposed § 200.19(a)(1)(ii) to use the AFGR as the transitional measure for those States that cannot yet calculate the four-year rate.

Comment: One commenter recommended that the Department publish State-level AFGRs for every State through 2012–2013.

Discussion: The Department currently publishes State-level AFGRs at the following Web site: *http://nces.ed.gov/programs/digest/d07/tables/dt07_102.asp?referrer=list.*

Changes: None.

Comment: One commenter asked specific questions about how to calculate the AFGR.

Discussion: As stated previously, we are removing the requirement to use the AFGR as the transitional graduation rate measure. However, information about the AFGR is available at the following Web site: *http://nces.ed.gov/pubs2007/dropout05/DefiningAveragedFreshman.asp.*

Changes: None.

New § 200.19(b)(3) (Proposed § 200.19(d)(1))—Goal and Targets

Comment: Several commenters supported proposed § 200.19(d) (new § 200.19(b)(3)), which would require States to set a graduation rate goal that represents the rate that the State expects all high schools to meet and to define how schools and LEAs must demonstrate continuous and substantial improvement from the prior year toward meeting or exceeding the State's graduation rate goal. However, some of these commenters expressed concern that the proposed regulations did not go far enough in specifying what the Department would consider to be rigorous goals and targets, arguing that States are not likely to make needed improvements in their graduation goals and targets if they are allowed to set their own goals and targets and are required only to undergo another round of Secretarial review. One commenter noted that the proposed regulations would not have required States' goals and targets to be peer reviewed and did not provide specific guidance on how States should set their goals and targets. Another commenter requested clarification about the role the Department would play in approving States' goals and targets.

Some commenters noted that the term ''continuous and substantial improvement'' in proposed § 200.19(d)(1)(ii) (new § 200.19(b)(3)(i)(B)) was not defined and suggested that the regulations indicate more clearly what standards States' goals and targets would be expected to meet. Many commenters suggested changes intended to ensure adoption of rigorous goals and targets, including requiring all States to use the same goals and targets (in part, to promote comparability), requiring ''high, ambitious end goals'' and growth targets, and requiring States to set a minimum increase in the rate each year that is ''aggressive, attainable, and uniform.''

Other recommendations included adding specific goals (e.g., 90 percent) and targets (e.g., three percent increase annually), requiring higher targets for five-year graduation rates than for four-year rates, setting targets that would eliminate subgroup differences in graduation rates within four years, or establishing goals that reflect the economic needs of a State's employers.

On the other hand, one commenter supported flexibility in this area and urged the Department not to impose rigid standards for approving a State's goal and targets. The commenter requested that the Department use a transparent peer review process and permit States to use a variety of approaches in setting their goals and targets, including, for example, goals that increase over time and definitions of progress that use an averaging model.

Discussion: The Secretary believes that high schools and LEAs with low rates of graduation should not make AYP by simply maintaining the same low rate or minimally increasing it from year to year. At a time when a high school diploma is the absolute minimum credential needed for success in the labor force, the Secretary believes States must set aggressive goals and hold LEAs and high schools accountable for graduating more of their students. However, given the variation in State assessment and accountability systems and differences in State graduation requirements, the Secretary believes that States should have the flexibility to establish their own graduation rate goal and targets and, therefore, declines to specify in these regulations what the goal and targets must be for each State or to define ''continuous and substantial improvement.''

We agree that the proposed regulations should have been clearer in requiring States to set a single graduation goal and to set specific targets towards meeting or exceeding that goal. Therefore, we have amended proposed § 200.19(d)(1) (new § 200.19(b)(3)(i)) to require States to set a single graduation rate goal that represents the rate the State expects all high schools in the State to meet and to set annual graduation rate targets that reflect continuous and substantial improvement from the prior year toward meeting or exceeding the graduation rate goal.

Regarding questions about the Department's role in approving States' goal and targets, the final regulations require each State to submit its graduation rate goal and targets to the Department as part of its revised Accountability Workbook, which will be peer reviewed.

Changes: We have made the following changes in new § 200.19(b)(3)(i) (proposed § 200.19(d)(1)):

- Section 200.19(b)(3)(i)(A) requires a State to set a single graduation rate goal that represents the rate it expects all high schools in the State to meet.
- Section 200.19(b)(3)(i)(B) requires a State to set annual graduation rate targets that reflect continuous and substantial improvement from the prior year toward meeting or exceeding the State's goal.

We also have added new § 200.19(b)(6)(i), which requires each State to revise its Accountability Workbook to include the following:

- The State's graduation rate definition that the State will use to determine AYP based on school year 2009–2010 assessment results (new § 200.19(b)(6)(i)(A)).
- The State's progress toward meeting the deadline in § 200.19(b)(4)(ii)(A) for calculating and reporting the graduation rate defined in § 200.19(b)(1)(i) through (iv) (new § 200.19(b)(6)(i)(B)).
- The State's graduation rate goal and targets (new § 200.19(b)(6)(i)(C)).
- An explanation of how the State's graduation rate goal represents the rate the State expects all high schools in the State to meet and how the State's targets demonstrate continuous and substantial improvement from the prior year toward meeting or exceeding the goal (new § 200.19(b)(6)(i)(D)).
- The graduation rate for the most recent school year of the high school at the 10th percentile, the 50th percentile, and the 90th percentile in the State, ranked in terms of graduation rate (new § 200.19(b)(6)(i)(E)).
- If a State uses an extended-year adjusted cohort graduation rate, a description of how it will use that rate with its four-year rate to determine whether its schools and LEAs have made AYP (new § 200.19(b)(6)(i)(F)).

In addition, we have added new § 200.19(b)(6)(ii) to require each State to submit, consistent with the timeline in § 200.7(a)(2)(iii), its revised Accountability Workbook to the Department for technical assistance and peer review.

Comment: Several commenters stated that rules or policies on establishing graduation rate goals and targets need to be reasonable and realistic for alternative schools, including early college high schools and schools designed to serve former or potential dropout students, so as to ensure that these schools are not penalized for helping struggling students successfully complete high school.

One commenter suggested that States be permitted to set different goals for different schools based on each school's present level of performance, rather than one statewide goal. This commenter suggested that setting the same goal, with the same time frame, for a high school that currently has a graduation rate of 60 percent and a high school with a current graduation rate of 80 percent means that the bar is set too high for the first school and too low for the second school.

Discussion: We agree that States should carefully consider graduation rate targets for alternative and early college high schools. However, we do

not agree that the State graduation rate goal for alternative schools should be lower than those for other schools because, as with the annual measurable objectives set for reading and math proficiency under NCLB, States must have the same high expectations regarding graduation rate for *all* schools. The Secretary believes strongly that States must set a graduation rate goal that represents the rate a State expects *all* high schools to meet, but acknowledges that it may be appropriate for schools to have different graduation rate targets. For example, a State might propose targets for schools with the lowest graduation rates that are more aggressive than targets for schools that are very close to meeting the State goal since schools with the lowest graduation rates will need to make more progress to reach the State's goal. A State might propose a target that represents a percent reduction from the prior year in the number of students not reaching the graduation rate goal. When approving a State's goal and targets, the Department intends to consider the relationship between the State's goal and its targets.

Changes: As noted previously, new § 200.19(b)(3)(i)(A) requires a State to set a single graduation rate goal that represents the rate it expects all high schools to meet. Also, new § 200.19(b)(3)(i)(B) requires a State to set annual graduation rate targets that reflect continuous and substantial improvement from the prior year toward the State's goal, but does not require that those targets be the same for every high school.

Comment: Several commenters requested that the regulations require States to be transparent in setting their graduation rate goals and targets and suggested requiring States to hold public meetings or to report to the public on their graduation rate goals and targets. Some commenters recommended that States explain how they set their goals and targets and how they plan to meet them. One commenter suggested that LEAs be required to hold public meetings that are accessible for individuals with limited English proficiency and individuals with disabilities, and are well advertised in advance, including through schools and, where available, minority and alternative language media outlets to discuss the establishment of the State's graduation goal and targets. One commenter recommended that each State be required to report to the public on how its goal and targets would lead to 100 percent of students graduating and the number of years that would be required to meet this 100-percent graduation goal. Finally, one commenter recommended requiring each State, in setting its goal and targets, to consider the views of experts on the needs of students at the highest risk of dropping out, including racial, ethnic, and language minority students, children from low-income families and neighborhoods of concentrated poverty, students with disabilities, pregnant students or students who are parents, and students whose families move frequently during their school years.

Discussion: In general, the Secretary agrees that each State should use an open and ''transparent'' process to set its graduation rate goal and targets. We encourage States and LEAs to involve parents and the public, as appropriate, in this process. However, we decline to regulate on any specific requirements for such a process. We believe these decisions are best left to States.

At the same time, we believe it is appropriate to require each State to include additional information on its graduation rate goal and targets in its Accountability Workbook. Therefore, as noted earlier, we have amended the final regulations to require each State to include in its Accountability Workbook, in addition to the State's graduation rate goal and targets, an explanation of how the State's graduation rate goal represents the rate the State expects all high schools to meet and of how the State's targets demonstrate continuous and substantial improvement from the prior year toward meeting or exceeding the goal. In order for the Department and the public to consider the approximate number of years it will take for a State to reach its graduation rate goal, we are also requiring States to include in their Accountability Workbook, the graduation rate of the school at the 10th percentile, the 50th percentile, and the 90th percentile in the State (ranked in terms of graduation rate). We believe these three points depict the range of graduation rates among a State's high schools and provide context for considering the goal and targets the State has chosen.

For example, a State might report in its Accountability Workbook that it proposes to set its graduation rate goal at 90 percent and its target as a five percent increase per year, and that the school at the 10th percentile has a graduation rate of 50 percent, which would indicate that the State will hold its lowest-performing schools accountable for reaching the State's graduation rate goal in at least eight years.

Changes: As previously noted, new § 200.19(b)(6)(i)(E) has been added to require each State to include in its Accountability Workbook the graduation rate for the most recent school year of the high school at the 10th percentile, 50th percentile, and 90th percentile in the State (ranked in terms of graduation rate).

Comment: Two commenters suggested that the Department allow each State to wait until the State implements the four-year adjusted cohort rate before requiring a more rigorous definition of its graduation rate goal and continuous and substantial improvement towards meeting that goal.

Discussion: The purpose of setting a meaningful graduation rate goal and targets, whether a State has adopted the four-year rate in new § 200.19(b)(1) or is using a transitional rate until it can calculate the four-year rate, is to focus attention on graduation rates and motivate efforts to improve these rates as soon as possible. The Secretary does not believe that we can afford to wait one, two, or three years to begin addressing the human and economic costs of education systems under which, on average, roughly one-quarter of the Nation's high school students leave school without a diploma. When a State changes to the four-year rate, it may reset its goal and targets to align with that graduation rate and resubmit any changes to the Secretary for approval.

Changes: None.

Comment: Several commenters argued that only Congress, not the Secretary, has the authority to require States to set a graduation rate goal and targets, and that any new graduation rate requirements should be considered only in the context of comprehensive changes to the overall Title I accountability system.

Discussion: Section 1901(a) of the ESEA authorizes the Secretary to ''issue such regulations as are necessary to reasonably ensure that there is compliance with [Title I].'' The Secretary has chosen to require a more accurate, uniform definition of graduation rate in order to raise expectations and to hold high schools, LEAs, and States accountable for increasing the number of students who graduate on time with a regular high school diploma. Given the ever-increasing importance of a high school diploma, allowing high schools and LEAs with low rates of graduation to make AYP by simply maintaining the same low rate or minimally increasing the number of graduates from the previous year would not provide for appropriate and meaningful accountability. Moreover, although new § 200.19(b)(3) requires a State to set a graduation rate goal and targets, the regulations leave to the States the

determination of what the goal and targets should be. The Secretary is promulgating these regulations now because Congress has not yet completed the reauthorization of the ESEA, and because she believes strongly that we should continue to address the needs of students and their parents while Congress considers various reauthorization proposals.

Changes: None.

Comment: Several commenters argued that the proposed 2008–2009 timeline for establishing the new goal and targets would not provide adequate lead time because many States must undergo a thorough review and approval process for any changes to their policies, including, for example, reviews by stakeholder groups, State boards of education, and State legislatures.

Discussion: The Department agrees that additional time is needed for States to implement new graduation rate goals and targets, particularly given that States have different procedures they must follow in adopting and implementing new State policies. Therefore, we have changed the timeline to require that a State's graduation goal and targets under new § 200.19(b)(3)(ii) first be used for AYP determinations based on school year 2009–2010 assessment results.

Changes: New § 200.19(b)(3)(ii) requires a State to use its graduation rate goal and targets for the first time with AYP determinations based on school year 2009–2010 assessment results.

Comment: Some commenters opposed including graduation rate goals and targets in AYP determinations, as proposed § 200.19(d) would have required, because, according to the commenters, including goals and targets would significantly increase the number of high schools and LEAs that are identified for improvement. The commenters also stated that requiring all States to resubmit their Accountability Workbooks would result in unnecessary expenditures of time and money for both the States and the Department.

Discussion: We agree that the inclusion of a graduation rate goal and targets in AYP calculations is likely to increase the number of high schools and LEAs identified for improvement, although it is difficult to estimate the extent of any increase because the proportion of schools and LEAs identified for improvement already is rising due to higher annual proficiency objectives as we move toward the goal of ensuring that all students are proficient in reading and mathematics by 2013–2014. We believe that any additional identifications for improvement that occur because high schools or LEAs miss a State's graduation rate goal or targets would be entirely appropriate as part of the overall effort to improve graduation rates, which is the purpose of these regulations. In addition, we believe that the benefits of more meaningful accountability for graduation rates far exceed the costs of implementing these new requirements.

Changes: None.

New § 200.19(b)(6)(i)(F)—Determining AYP With an Extended-Year Rate

Comment: Many of the commenters who supported allowing the use of an extended-year graduation rate also recommended various ways to include the extended-year rate with the four-year adjusted cohort graduation rate in determining AYP. Many commenters recommended basing AYP determinations primarily on the four-year rate but giving schools and LEAs credit for students who graduate in five years or more. These commenters stated that the four-year rate should constitute a high and specific percentage (e.g., 90 percent) of the AYP calculation. Another commenter recommended requiring a weighted graduation index that combines a four-year adjusted cohort graduation rate (weighted no less than 70 percent of the index), a five-year adjusted cohort graduation rate, and a longer-term adjusted cohort graduation rate. One commenter suggested that the Department allow States to propose rules under which schools receive full credit for graduating students in four years and partial credit for students graduating in more than four years (e.g., students who fall behind in credit accumulation or otherwise struggle to complete graduation requirements). One commenter recommended weighting the graduation rate calculation by giving 75 percent of the weight to the four-year rate and the remaining 25 percent to the extended-year rate. Some commenters recommended requiring States to set higher graduation rate targets for students graduating in four years, compared to those graduating in more than four years. Several commenters recommended that AYP determinations based on the four-year and extended-year graduation rates be calculated in the same manner across all States to ensure comparability; otherwise, any differences in four-year and five-year graduation rates should be indicated in reports on high school graduation rates.

Discussion: As previously discussed, the Secretary agrees that States should be permitted to use an extended-year adjusted cohort graduation rate, in addition to the required four-year adjusted cohort graduation rate, for purposes of determining AYP. The Secretary offers this flexibility for States but prefers that they adopt AYP definitions that hold LEAs and schools accountable for graduating the vast majority of their students in four years. For example, a State might use an index that weights the four-year rate significantly more than the extended-year rate (e.g., 80 percent for the four-year rate and 20 percent for the extended-year rate) or a State might use a higher target for the four-year rate than for the extended-year rate (e.g., an increase of 5 percent for the four-year rate versus an increase of 3 percent for the extended-year rate) and require that an LEA or school meet both targets in order to make AYP. The Department plans to issue non-regulatory guidance providing more specific examples of how a State might use its four-year rate and extended-year rate in AYP calculations. Regardless of the methodology a State uses to calculate AYP, a State must report its four-year rate separately from any extended-year rate, consistent with § 200.19(b)(4)(ii)(B).

We believe it is important that a State have the flexibility to consider how to use its four-year rate and an extended-year rate in AYP calculations, subject to peer review and approval by the Secretary. Therefore, as previously noted, we have added new § 200.19(b)(6)(i)(F) to require a State that uses an extended-year graduation rate to submit to the Department, for technical assistance and peer review, a description, in its Accountability Workbook, of how it will use an extended-year rate along with its four-year rate to determine whether its schools and LEAs make AYP.

Changes: We have added new § 200.19(b)(6)(i)(F) to provide that, if a State uses an extended-year cohort graduation rate, the State must submit as part of its Accountability Workbook, for peer review and approval by the Secretary, a description of how it will use its extended-year rate with its four-year rate to determine whether its schools and LEAs have made AYP.

Section 200.19(b)(5) (Proposed § 200.19(e))—Disaggregation for Determining AYP

Comment: Some commenters expressed support for the requirement to disaggregate graduation rates in proposed § 200.19(e) because, according to the commenters, disaggregation of data is vital to realizing the goals of improving graduation rates for subgroups with below-average graduation rates. Some commenters

supported reporting disaggregated graduation rates but opposed the use of these rates in AYP determinations because, according to the commenters, it would add another level of complexity and confusion to AYP calculations and potentially erode support for the core principles of NCLB.

Many commenters opposed the requirement to use disaggregated data in AYP determinations because they believed more schools and LEAs would not make AYP based on disaggregated data. Other commenters opposed the regulation because, they claimed, it would disproportionately affect the most diverse schools. One commenter argued that this requirement increases the Federal role in education, rather than diminishing it, and focuses on process instead of achievement. One commenter urged caution because of the likely variability in graduation rates among small subgroups, while another claimed that verifying disaggregated results could make it difficult for a State to release AYP results before the start of the school year.

Discussion: When the current regulations were issued in 2002 (67 FR 71710, 71742 (Dec. 2, 2002)), the Department believed that permitting States to use aggregate graduation rate data for the purpose of determining AYP, while requiring disaggregation for reporting, would be sufficient to ensure school and LEA accountability for the achievement of all groups of students and would avoid overburdening State accountability systems. Six years later, we now know that simply reporting disaggregated graduation rate data is not sufficient to ensure that graduation rates improve for all students. Although we recognize that the use of disaggregated graduation rates in AYP determinations may increase the number of schools and LEAs identified for improvement, we decline to eliminate this requirement because we believe too many high schools currently are not being held accountable for improving graduation rates that are well below the national average. Moreover, it is evident that there are significant disparities in outcomes among subgroups. For example, data provided by NCES show significant gaps in subgroup AFGRs. Data from the 2005–2006 school year found that the average AFGR for white students was 80.6 percent, whereas the average AFGR for Hispanic, black, and American Indian/Alaska Native students was 61.4 percent, 59.1 percent, and 61.8 percent, respectively.[11] Similar to the importance of disaggregating assessment results to ensure that high performance by the ''all students'' group does not mask low performance by subgroups of students, we believe schools and LEAs need to be held accountable for the differences in graduation rates among subgroups.

Changes: None.

Comment: A number of commenters recommended that the Department wait to require disaggregation of graduation rates until the ESEA is reauthorized. Some commenters, for example, opposed the use of disaggregated graduation rates in determining AYP until the rates can be considered in the context of the overall structure of States' accountability systems. Some commenters stated that now is not the right time to add new data cells for determining AYP when efforts to improve the ESEA's accountability system, such as the Department's differentiated accountability pilot, have not had a chance to take effect on a large scale.

Discussion: As discussed previously, the Secretary proposed new graduation rate regulations precisely because Congress has not yet completed the reauthorization of the ESEA, and because she believes strongly that we cannot delay addressing this critical area. The Secretary has chosen to regulate use of a uniform definition of graduation rate and disaggregation of that rate for accountability purposes in order to raise expectations and to hold high schools, LEAs, and States accountable for increasing the number of students who graduate on time with a regular high school diploma. We note that the final regulations in new § 200.19(b)(5) would not require disaggregation of graduation rates for AYP purposes until a State makes AYP determinations based on school year 2011–2012 assessment results.

Changes: None.

Comment: Several commenters recommended requiring disaggregation of graduation rate data for AYP purposes earlier than the timelines in proposed § 200.19(e). Other commenters, who generally supported the regulations, suggested a later timeline to coincide with the use of the adjusted cohort graduation rate or, to ensure comparable data, after the adjusted cohort rate has been implemented fully for at least two years.

Discussion: Proposed § 200.19(e)(2) would have required States, beginning in the 2008–2009 school year, to disaggregate graduation rate data (either the AFGR or the adjusted cohort graduation rate) at the LEA and State levels for determining AYP, and at the school, LEA, and State levels for reporting. All States would have been required to use the adjusted cohort graduation rate and disaggregate graduation rate for AYP and reporting purposes no later than the 2012–2013 school year.

The Secretary has modified the timeline for disaggregating graduation rate data in the final regulations to require States to report disaggregated data for the four-year adjusted cohort graduation rate one year before disaggregated data are required for AYP determinations. The Secretary believes that this timeline will enable a State to resolve any data quality and accuracy issues associated with calculating the four-year rate and disaggregating the results prior to using those disaggregated results to determine AYP based on school year 2011–2012 assessment results.

States that cannot meet the 2010–2011 deadline for calculating the four-year rate and receive an extension from the Secretary, as provided in new § 200.19(b)(7)(iii), must make AYP determinations using a transitional graduation rate, as provided in new § 200.19(b)(2), in the aggregate and disaggregated by subgroups at the same time as States that implement the four-year rate—that is, for AYP determinations based on school year 2011–2012 assessment results.

Changes: We have made the following changes in the final regulations to reflect the modifications to the timeline for disaggregating graduation rates:

Reporting

- New § 200.19(b)(4)(ii)(A) requires reporting the four-year adjusted cohort graduation rate in the aggregate and disaggregated by subgroups at the high school, LEA, and State levels on report cards providing results of assessments administered in the 2010–2011 school year.
- New § 200.19(b)(4)(ii)(B) requires that, if a State adopts an extended-year adjusted graduation cohort rate, the State must report that rate separately from the four-year rate, in the aggregate and disaggregated by subgroups, beginning with the first year for which the State calculates such a rate.
- New § 200.19(b)(4)(ii)(C) requires, prior to school year 2010–2011, reporting of graduation rate, in the aggregate and disaggregated by subgroups, at the high school, LEA, and State levels using either the four-year adjusted cohort graduation rate or the transitional rate.

[11] National Center for Education Statistics. (2008). *Public School Graduates and Dropouts from the Common Core of Data: School Year 2005–2006.* Washington, DC: Author.

Determining AYP

• New § 200.19(b)(5)(i) requires that a State use the four-year adjusted cohort graduation rate, in the aggregate and disaggregated by subgroups, at the high school, LEA, and State levels for determining AYP beginning with AYP determinations based on school year 2011–2012 assessment results.

• New § 200.19(b)(5)(ii) requires that, prior to school year 2011–2012, a State calculate graduation rate, in the aggregate, using either the four-year adjusted cohort graduation rate or the transitional rate, for determining AYP at the high school, LEA, and State levels, although disaggregation is required for ''safe harbor.''

• New § 200.19(b)(7)(iii) provides that a State that cannot meet the school year 2010–2011 deadline for calculating and reporting the four-year rate and receives an extension from the Secretary, must make AYP determinations based on school year 2011–2012 assessment results, in the aggregate and disaggregated by subgroups, using the State's transitional graduation rate under § 200.19(b)(2).

Comment: One commenter expressed concern that requiring graduation rates to be disaggregated for the purpose of calculating AYP may be a disincentive for States to set an aggressive graduation rate goal and targets.

Discussion: Although we understand this commenter's concern, as noted previously the Secretary will review each State's graduation rate goal and targets to ensure that the State sets (1) a single goal that represents the on-time graduation rate the State expects all high schools to meet, and (2) targets that demonstrate continuous and substantial improvement toward meeting or exceeding that goal, in order to make AYP.

Changes: None.

Comment: Several commenters argued that requiring States to use disaggregated graduation rate data in AYP determinations exceeds the Secretary's legal authority and has no basis in statute. One of these commenters further argued that requiring States to use disaggregated graduation rate data in AYP determinations appears to contradict section 1111(b)(2)(C)(vi) and (vii) of the ESEA, which, according to the commenter, gives States the authority to determine their own other academic indicators.

Discussion: We believe the commenter has misunderstood the statutory requirements regarding the need to use other academic indicators in determining AYP. Section 1111(b)(2)(C)(vi) of the ESEA requires a State to select one other academic indicator (in addition to assessment results and assessment participation rates) to be used in determining AYP, but also specifies that, for high schools, that indicator must be the graduation rate. Thus, graduation rate is a required element of determining AYP for high schools, not an element that, at a State's discretion, may or may not be adopted. A State has discretion to select the other academic indicator for elementary and middle schools. In addition under section 1111(b)(2)(C)(vii) of the ESEA, a State has discretion to select other academic indicators, in addition to those required by section 1111(b)(2)(C)(vi), that must be measured separately for each group described in section 1111(b)(2)(C)(v) of the ESEA, provided those additional indicators do not reduce the number of or change the schools that would otherwise be subject to school improvement.

Section 1111(b)(2)(C)(vi) of the ESEA does not explicitly address, and thus does not prohibit, the use of results disaggregated by subgroup for the other academic indicators required for AYP determinations, including graduation rate. We believe that stronger subgroup accountability with respect to graduation rate is needed in order to accomplish the statutory purpose of Title I—that is, ''to ensure that *all* children have a fair, equal, and significant opportunity to obtain a high-quality education'' by closing the achievement gap between high- and low-performing students, especially between minority and non-minority students and between disadvantaged students and their more advantaged peers, and to hold schools and LEAs accountable for improving the achievement of all students (*see* section 1001 of the ESEA). We believe the best way to close the gap in graduation rates among subgroups is to hold schools accountable for the graduation rate of those groups. Accordingly, the Secretary has decided to require disaggregation of graduation rate data for calculating AYP as well as for reporting and believes this regulation is well within her regulatory authority under section 1901(a) of the ESEA to ''issue such regulations as are necessary to reasonably ensure that there is compliance with [Title I].''

Changes: None.

Comment: Several commenters stated that minimum group size should be considered before including a subgroup's graduation rate in AYP determinations. One commenter suggested that the danger in using the graduation rate for relatively small subgroups is that small shifts in counts of students could generate large changes in graduation rates. Some commenters suggested that the same minimum group size used for including subgroups in AYP determinations be used for graduation rate subgroup accountability. Several commenters also asked whether any of the statistical measures allowed in current AYP calculations, including multi-year averaging of data and confidence intervals, would be allowed for the graduation rate indicator. One of these commenters recommended that these statistical measures be permitted in order to minimize the effect of normal yearly fluctuations among cohorts of students on AYP determinations.

Discussion: Section 200.7(a) requires that a State determine the minimum number of students sufficient to yield statistically reliable information for each purpose for which disaggregated data are used. This requirement applies to graduation rates used for AYP calculations; States are permitted to set minimum group sizes and to use other statistical measures, such as multi-year averaging, to ensure statistical reliability. Some statistical measures, however, such as confidence intervals, which generally are used with samples of a population rather than an entire population, would likely not be appropriate if applied to graduation rates, which are actual counts of individual students in a cohort. The Department will review any proposed application of statistical measures to graduation rates as part of its review of States' Accountability Workbooks under new § 200.19(b)(6).

Changes: None.

Comment: One commenter stated that the proposed regulations erred in requiring a State and its LEAs to report disaggregated graduation rates only for the subgroups in § 200.13(b)(7)(ii), which does not include gender and migrant status as required by section 1111(h) of the ESEA. (Section 200.13(b)(7)(ii) describes the subgroups for AYP accountability as economically disadvantaged students; students from major racial and ethnic groups; students with disabilities as defined in section 9101(5) of the ESEA; and students with limited English proficiency as defined in section 9101(25) of the ESEA.) The commenter claimed that, by removing gender and migrant status from the statutory list of subgroups that must be used for reporting purposes, the Department exceeded its rulemaking authority.

Discussion: The Secretary disagrees with the commenter that the proposed regulations erred in requiring disaggregation only for the subgroups

described in § 200.13(b)(7)(ii) (subgroups for determining AYP), rather than the subgroups listed in section 1111(h)(1)(C)(i) of the ESEA (report cards). The list in section 1111(h)(1)(C)(i), which includes gender and migrant status in addition to the subgroups in § 200.13(b)(7)(ii), pertains to reporting disaggregated achievement results on a State's academic assessments. Section 1111(h)(1)(C)(vi) of the ESEA, which requires reporting graduation rates for secondary school students, contains no similar list of disaggregation categories. Accordingly, we have taken our cue from section 1111(b)(2)(C)(v)(II) of the ESEA and § 200.13(b)(7)(ii), which list the subgroups for which a State must disaggregate data for AYP purposes. It is these categories that a State uses to calculate ''safe harbor'' and that these regulations now require for disaggregating AYP results. Therefore, we believe it is appropriate to require reporting of disaggregated graduation rates only by the categories that are used for other AYP purposes, because graduation rate data will already be disaggregated by those categories.

Changes: None.

Comment: A number of commenters recommended changes to the subgroups for which graduation rates must be disaggregated. Several commenters, for example, questioned the need to disaggregate by race or ethnicity because, they argued, substantial evidence exists to show that socioeconomic status is a more meaningful indicator than race when it comes to student performance. On the other hand, some commenters suggested requiring further disaggregation of student racial subgroups by socioeconomic status to reveal a more accurate picture of student performance in each subgroup. One commenter recommended that disaggregation be required for former LEP students and recently arrived LEP students in addition to LEP students in general. One commenter suggested requiring disaggregation by additional ethnic subgroups, particularly Asian subgroups. Several commenters suggested that the regulations require reporting graduation rates in a format that can be cross-tabulated so that users of the data can identify and evaluate the interplay of race, ethnicity, disability, poverty, and other factors. One commenter recommended requiring a State and its LEAs to report data on students who do not graduate, disaggregated by the reasons for not graduating.

Discussion: Although the Department understands the intent of these commenters, we do not think it would be appropriate or beneficial to change the requirements for disaggregating graduation rates beyond the subgroups described in § 200.13(b)(7)(ii) that are used for determining AYP. We believe that requiring disaggregation of data for these subgroups is sufficient to ensure meaningful and comprehensive accountability for all high schools and LEAs with respect to graduation rate. Further, we are concerned that the more specific the subgroup categories, the less likely they would actually be reflected in accountability decisions because too few students would likely fall into a given category. Further, we note that each State determines which major racial and ethnic categories in the State will be used in accountability determinations. Although we agree that cross-tabulation of subgroups could be informative, we believe that requiring cross-tabulation would be excessively burdensome and costly for States and also could raise privacy concerns if the resulting groups are small. Although a State may not eliminate subgroups from those described in § 200.13(b)(7)(ii), a State is not prohibited from adding reporting categories that may provide additional insights on why students do not graduate from high school.

Changes: None.

Comment: One commenter recommended that the regulations require standardized business rules across States with regard to how they calculate graduation rates for certain subgroups (e.g., the LEP subgroup or the students with disabilities subgroup) in which students may enter or exit during their four years of high school (e.g., reporting graduation rates by subgroup based on a student's status as a first time 9th grader).

Discussion: Under current § 200.19(d)(2)(ii), States have been required to include disaggregated graduation rates on their State report cards since December 2002. States should, therefore, already have business rules for determining how to count students who enter or exit a subgroup during high school. We agree with the commenter that it is important for States to create and maintain these kinds of rules and will provide guidance to States on ways to count students who enter or exit a subgroup during high school. However, we believe it would be inappropriate for the Department to require specific business rules across States.

Changes: None.

Comment: Some commenters stated that a student who falls within more than one subgroup should not be counted in the graduation rate more than once. The commenters recommended that the Department develop special formulas to address students belonging to more than one subgroup so as not to affect unfairly the graduation rate and resulting AYP status of schools and LEAs. One commenter recommended permitting States to explain to the public that students may be counted in more than one subgroup.

Discussion: The Department declines to address the issue of student membership in multiple subgroups in the final regulations. Section 1111(b)(2)(C)(v) requires AYP to be defined so that it applies separately to the achievement of all public elementary and secondary school students as well as to the achievement of students in each of four specific subgroups: economically disadvantaged, major racial and ethnic groups, students with disabilities, and LEP students. This provision serves a very important purpose: to focus attention on those schools and LEAs in which the ''all students'' group may be achieving but in which particular subgroups may not be achieving. The statute does not authorize, either expressly or implicitly, a State to choose to omit certain subgroups, to ''prioritize'' subgroups and thus give greater weight to students in some subgroups over others, or to randomly select one of several subgroups to which a student would be assigned. There simply is no support in the statute for a State to include a student in some but not all of the subgroups in which the student is a member. To do so would misrepresent the achievement of subgroups.

We believe it is important to know how each subgroup performs with respect to graduation rate. Even if it were possible to develop a special formula for assigning students to only one subgroup for the purpose of disaggregating graduation rates, such an approach would skew the data for particular subgroups, because not all students who fall within each subgroup would be counted. However, States may, if they choose, explain on their report cards that students may be counted in more than one subgroup.

Changes: None.

Comment: One commenter asked why high schools must be held accountable for subgroup performance for graduation rate when elementary and middle schools are not held accountable for subgroup performance for their other academic indicators.

Discussion: The Secretary is requiring disaggregation only of graduation rates for determining AYP because she believes it is critically important to improve the graduation rates of

subgroups. By holding schools and LEAs accountable for ensuring that each subgroup either meets or exceeds the State's graduation rate goal or meets its annual target, we hope to focus greater attention on improving graduation rates for all students. Moreover, there is no single indicator for elementary or middle schools that has an impact comparable to graduation rate on the lives and economic opportunities of millions of students. We do not believe that requiring disaggregation of the other academic indicators for elementary or middle schools would have the same critical effect of improving student outcomes that it will for high schools.

Change: None.

New § 200.19(b)(4) (Proposed § 200.19(e))—Reporting

Comment: Some commenters recommended that States be required to report three-, five-, six- and seven-year graduation rates in addition to a four-year rate. One commenter recommended requiring States to report an aggregated graduation rate, as well as disaggregated data, on the number and percentage of students who drop out of high school, attend high school but do not graduate, ''age out'' (i.e., reach the State's maximum age for public education and leave high school without a regular diploma), transfer to another school, or die. Another commenter requested that the regulatory requirements for reporting graduation rates be clear so that State reports are accurate and comparable. Several commenters suggested that the Department require schools to track and report the graduation rates of students who are pregnant and students who are parents. One commenter recommended requiring States to report dropout rates (aggregated and disaggregated), completion rates for students enrolled in alternative programs, GED credential completion rates, and rates of students who complete high school course requirements but do not pass State high school graduation examinations.

Discussion: States and LEAs must report a four-year rate, as well as any extended-year rate they use in AYP calculations, in the aggregate and disaggregated by the subgroups described in § 200.13(b)(7)(ii). As discussed earlier, the final regulations require each State and its LEAs to report a four-year rate, consistent with new § 200.19(b)(1). In addition, under new § 200.19(b)(1)(v), a State may, but is not required to, adopt an extended-year rate. If a State does not calculate a four-year rate before the deadline specified in new § 200.19(b)(4), the State must use a transitional graduation rate, consistent with new § 200.19(b)(2). The requirements in new § 200.19(b)(2) are virtually identical to the graduation rate definition in current § 200.19(a).

If a State adopts an extended-year rate, the extended-year rate must be reported separately from the four-year rate in order to ensure that LEAs and schools are held accountable both for their performance in graduating students in the four-year timeframe and for their success in teaching students who need more time to obtain a regular high school diploma. A State must also report its transitional rate if it does not calculate a four-year adjusted cohort graduation rate before the deadlines specified in new § 200.19(b)(4).

We agree that information about the total number of students in the graduating cohort, the number who graduated in four years, and the number who graduated in more than four years would provide a more complete description of how high schools are addressing the needs of their students. We also believe that the data would provide the Department, States, LEAs, and schools with information that is essential in understanding the reasons for low graduation rates and for designing better programs and services to help students graduate from high school who are at risk of dropping out and those who have dropped out. The Department plans to propose that States report these data to the ED*Facts* system, the centralized portal through which States submit their education data to the Department. States are currently required to submit aggregated and disaggregated graduation rates to ED*Facts* (OMB collection 1810–0614). Requiring these additional data to be reported through ED*Facts* will not add a significant burden to States because these data are needed to calculate the four-year adjusted cohort graduation rate required in new § 200.19(b)(1)(i) through (iv) and any extended-year adjusted cohort graduation rate in new § 200.19(b)(1)(v). Almost all States have begun the process of developing the data systems and data definitions needed to calculate a four-year rate. The Department will notify the public of its plans to collect these data through a notice in the **Federal Register** and provide the public with an opportunity to comment on these new data collection requirements.

We agree that the other high school data that commenters recommended States collect and report (e.g., dropout rates; the number of students who age out, become pregnant, or are parents; transfer students; and deceased students) might provide useful information. However, we do not believe that this information (with the exception of dropout rates) is essential and, therefore, decline to add burden to States by requiring them to collect and report these data. We note that data on the number of students who drop out are currently collected as part of the Common Core of Data, and we will continue to collect these data. A disaggregated State-level dropout rate is currently collected as part of the Consolidated State Performance Report. The Department does not anticipate any additional reporting requirements for dropout data at this time.

Changes: As noted earlier, we have revised the final regulations to provide in new § 200.19(b)(4) that a State and its LEAs, beginning with report cards providing assessment results for the 2010–2011 school year, must report, under section 1111(h) of the ESEA (annual report cards), the four-year adjusted cohort graduation rate at the school, LEA, and State levels in the aggregate and disaggregated by the subgroups in § 200.13(b)(7)(ii). In addition, new § 200.19(b)(4)(ii)(B) requires a State that adopts an extended-year rate to report, beginning in the first year for which the State calculates such a rate, the extended-year rate separately from the four-year rate.

Comment: Several commenters stated that the definition of ''graduation'' under the IDEA and the ESEA are not the same and recommended that graduation rate calculations and reporting under the two laws be better aligned. Some commenters suggested that the Department align the data systems and reporting requirements under the IDEA and the ESEA, specifically related to post-school transition outcomes.

Discussion: Neither the IDEA nor the ESEA regulations define ''graduation,'' but the use of the term is consistent across the programs. New § 200.19(b)(1)(iv) of the ESEA regulations and § 300.102(a)(3)(iv) of the IDEA regulations make clear that a regular high school diploma does not include an alternative degree that is not fully aligned with the State's academic standards, such as a certificate or a GED credential.

In new § 200.19(b)(1), the Department has established a uniform method for calculating graduation rate under the ESEA, rather than the multiple methods that were permitted under current § 200.19(a)(1). Section 612(a)(15) of the IDEA requires States to establish performance goals for children with disabilities that are the same as the annual measurable objectives in the State's definition of AYP under the

ESEA and that address graduation rate, among other factors. We are aware that some States do not report the same graduation rates in their IDEA State Performance Plans (SPPs) and in their Annual Performance Reports (APRs) that they use for calculating AYP under the ESEA. In the future, States will be required to use the four-year adjusted cohort graduation rate and any extended-year rate in their IDEA SPPs and APRs, consistent with the timelines in these regulations, and align the IDEA SPP graduation rate goals with the goal and targets that a State uses for accountability under Title I.

However, some differences in reported graduation rates are unavoidable. In particular, section 618 of the IDEA requires the Department to collect and report by State each year the number and percentage of children with disabilities, from age 14 through 21, who stopped receiving special education and related services and the reasons why those students stopped receiving special education and related services. Based on these data, the Department considers the ratio of 14 through 21 year old students with disabilities who stopped receiving special education and related services (i.e., the denominator) with the number of students with disabilities who graduated from high school with a regular high school diploma (i.e., the numerator). The Department uses these data to report, for Government Performance Results Act purposes, a rate of children with disabilities who graduate with a regular high school diploma for each State that is computed differently than the graduation rate under new § 200.19(b)(1).

Finally, with regard to the recommendation that the Department align the data reporting requirements related to post-school transition outcomes, we note that, although States are required to report annually to the Department post-secondary outcome data related to students with disabilities as part of their APRs under the IDEA, there is no similar requirement under the ESEA; thus there is nothing to align.

Changes: None.

Section 200.20(h) Making Adequate Yearly Progress

Comment: Numerous commenters expressed support for our proposal in § 200.20(h) to permit all States to request authority to incorporate individual student academic growth (using what is often referred to as a ''growth model'') in a State's definition of AYP. One commenter stated that the criteria established in § 200.20(h)(2) are sufficiently rigorous to ensure that the lowest-achieving students must make the greatest gains in order for schools to make AYP using measures of individual student growth, while also providing useful information about student achievement and growth. Another commenter, however, recommended that we adopt clearer and more specific approval criteria. Several commenters objected to proposed § 200.20(h)(2)(i)(B), which would require a State's annual growth targets to be based on meeting the State's proficient level of academic achievement on the State's assessments and not on individual student background characteristics. These commenters stated that a school should receive credit for any growth, regardless of whether the growth is sufficient to achieve proficiency by 2013–2014. Alternatively, two commenters expressed concern that students who are already far behind their peers will never reach proficiency and close the achievement gap if they make only the same amount of progress as their peers. These commenters acknowledged that students who are below grade level must make more than a year's growth in a school year to reach proficiency by 2013–2014. These commenters also expressed concern that States lack the technical knowledge necessary to set appropriate growth targets for LEP students.

Discussion: We believe that § 200.20(h) establishes the criteria necessary to ensure that schools continue to be held accountable for the achievement of all students, while providing flexibility for States to propose a variety of growth models that provide schools and teachers with useful information on how their students are progressing towards grade-level proficiency.

Consistent with section 1111(b)(2)(F) of the ESEA, a State's accountability system must ensure that all students are proficient by 2013–2014. The Secretary's intent in these regulations is to allow States to include accurate measures of individual student academic progress in AYP calculations, not to lower expectations for student achievement.

The criteria established in § 200.20(h)(2) help ensure that States develop growth models that hold schools accountable for the achievement of all students to State standards. It is not sufficient to provide ''credit for any growth'' as this would not encourage efforts to close the achievement gap, which by definition requires accelerated growth.

In response to the commenters who suggested that States do not have the technical expertise to set appropriate targets for LEP students, § 200.2(h)(2)(i)(A) and (B) specifically requires a State to establish annual targets for individual students that will lead to all students being proficient by the 2013–2014 school year and that the annual targets be based on meeting the State's proficient level of academic achievement on the State's assessments, not on an individual student's background. Therefore, setting growth targets does not require expertise in the achievement of particular groups of students (e.g., LEP students). Rather, States must have the technical understanding of how to establish appropriate student academic growth targets that result in all students reaching grade-level proficiency. Schools must make the greatest gains with the lowest-achieving students because the expectation for reaching or exceeding grade-level proficiency remains the same for all students and groups of students. Thus, in order for a school or LEA to make AYP using its growth model, the achievement gap must continue to close. Moreover, although growth models must measure the growth of students who are at or above proficiency in order to provide information to schools and parents, their performance may not be used to mask the lack of growth for students who are below proficient.

Changes: None.

Comment: A number of commenters disagreed with the criterion proposed in § 200.20(h)(2)(iv), which would require a State's growth model to be based on State assessments that produce comparable results from grade to grade and from year to year in mathematics and reading/language arts, have been in use by the State for more than one year, and have received full approval from the Secretary. Some commenters argued that States should be allowed to use adaptive and formative assessments in their growth models. One commenter recommended revising the criterion to permit a specified amount of annual growth through the use of pre- and post-test gains as a more accurate measure of accountability for instructional gains.

Discussion: Section 1111(b)(3) of the ESEA requires States to develop and implement student academic assessments and to use the results of those assessments in reading/language arts and mathematics to determine AYP. Because strong accountability depends on the quality of those assessments, section 1111(b)(3)(C) sets forth a number of requirements that a State's assessments must meet. The Secretary believes strongly that these requirements must also be the basis for

measuring individual student growth. The regulations do not prohibit a State from using any particular form of assessment, such as adaptive assessments or pre- and post-test gains to measure student achievement for determining AYP, provided those assessments meet the requirements in section 1111(b)(3)(C) of the ESEA and §§ 200.2 and 200.3.

Changes: None.

Comment: A few commenters objected to the requirement in § 200.20(h)(2)(iv)(C) that allows a State to use a growth model only if the State has a fully approved standards and assessment system. One commenter suggested that States with partial approval of their assessment systems be allowed to implement a growth measure using the approved assessments. The commenter argued that disapproval of a State's alternate assessment that, even if approved, would not be able to measure student growth accurately should not preclude a State from using a growth model. Another commenter expressed concern that the requirement for full approval of a State's assessment system potentially excludes many States that use additional assessments at the high school level that are not used for AYP determinations under NCLB and, therefore, are not approved by the Secretary through the peer review process. This commenter recommended amending the criteria in § 200.20(h)(2)(iv)(C) to permit the use of State assessments to measure individual student academic growth at the high school level if at least one assessment used in the growth model calculation receives full approval by the Secretary and if the other assessments used in the growth model, while not required to receive the Secretary's approval, produce results comparable to the results from assessments approved by the Secretary.

Discussion: The foundation of a State's accountability model is its standards and assessments in reading/language arts and mathematics. The desire to incorporate individual student growth into AYP determinations is not a rationale for undermining that foundation. The Secretary believes strongly that for a State to be eligible to implement a growth model it must have fully approved assessments in reading/language arts and mathematics, which include alternate assessments for students with disabilities. States must be able to demonstrate that they have the capacity to develop and administer such assessments and ensure that all students are validly and reliably assessed before turning their attention to developing a model to measure individual student academic growth.

Changes: None.

Comment: We received several comments about how to account for students with disabilities in a State's growth model. One commenter stated that a State's growth model should measure the achievement of students with disabilities based on progress in meeting their IEP goals in order to be consistent with the IDEA. Others stated that the criteria for growth models should specifically require States to include the scores of students with disabilities who take alternate assessments based on alternate, modified, or grade-level academic achievement standards.

Discussion: The Department has previously addressed in other rulemakings whether States may measure the achievement of students with disabilities against the goals in their IEPs, rather than against grade-level academic achievement standards for purposes of determining AYP. The Department's position has consistently been that this practice does not comply with the ESEA (*see* 68 FR 68698 (Dec. 9, 2003)) and we have no reason to adopt a different position now. Section 1111(b)(1)(B) of the ESEA requires a State to apply the same grade-level academic content and academic achievement standards to all students in the State, including students with disabilities. Section 1111(b)(3)(C)(ix) of the ESEA requires a State's assessment system, which is based on these grade-level achievement standards, to assess students with disabilities, with or without appropriate accommodations. Except for the small population of students with disabilities for whom the Department's regulations in § 200.6(a)(2) permit a State to measure achievement with alternate assessments based on alternate or modified academic achievement standards, students with disabilities must be assessed based on the State's grade-level academic achievement standards, not a student's IEP goals. There is no reason that measuring individual student academic growth should be based on anything different.

We agree with the comment that students with disabilities who are assessed with an alternate assessment should, to the extent possible, be included in a State's growth model. The Department believes it is possible to include results from alternate assessments based on alternate academic achievement standards in a growth model. Currently, two of the 11 States approved in the growth model pilot include results from their alternate assessments based on alternate academic achievement standards in the State's growth model. The Department strongly encourages States to pursue models that include the results of alternate assessments based on alternate academic achievement standards.

However, we understand that not all alternate assessments can support a growth measure. In many cases, the technical complexity needed for a State's growth model may not be supported by alternate assessments based on alternate or modified academic achievement standards. Alternate assessments based on modified academic achievement standards, in particular, are still in their infancy, not having been permitted until the Department's April 2007 Title I regulations,[12] and currently no State has met all ESEA requirements for these assessments. As such, it may be difficult for a State that is developing an alternate assessment based on modified academic achievement standards to achieve the stability in those assessments necessary to meaningfully and validly include the results in its growth model. The Department will continue to work with States on understanding how these assessments can best be included in growth models and encourages States to pursue models that support the inclusion of alternate assessments based on modified academic achievement standards. States submitting growth model proposals to the Department for peer review should include all students in their growth model, to the extent possible, and must provide a justification for the exclusion of any students. We note, however, that all students, including students with disabilities who take alternate assessments must be included in AYP determinations under § 200.20(a)(1) (''status'') and § 200.20(b) (''safe harbor'').

Changes: None.

Comment: Several commenters supported the use of growth models generally, but stated that it is too early to allow all States to use a growth model because there is still much to be learned from the original growth model pilot. The commenters recommended that a report on the lessons learned from the original growth model pilot be completed before the Department allows all States to adopt growth models.

Discussion: The Secretary believes that these commenters may have misunderstood the intent of the proposed regulations. The regulations do not provide blanket authority for all States to incorporate individual student

[12] 12 FR 17748, April 9, 2007.

academic progress in their definitions of AYP. Rather, the regulations establish the criteria that a State must meet before the State may implement such a model. We believe that the criteria in proposed § 200.20(h) provide sufficient rigor to ensure that schools are held accountable for the grade-level achievement of all students, while giving schools the opportunity to demonstrate progress toward this goal. Therefore, although the regulations afford all States the opportunity to implement a growth model, in order to implement such a model a State must demonstrate that its growth model meets all seven criteria described in § 200.20(h)(2)(i) through (vii). Moreover, as with the proposals submitted in the growth model pilot, a State's proposal to use a growth model must be approved by the Department through its peer review process.

Changes: None.

Comment: One commenter supported the expanded use of growth models, but encouraged the Department to ensure that States have data systems that are technically capable of supporting a growth model.

Discussion: The Department agrees with this commenter that it is important for a State using a growth model to have a data system that can accurately measure student academic growth on the State's assessments from grade to grade. Section 200.2(h)(2)(iv) and (v) require that a State wishing to incorporate student academic growth in its definition of AYP have a fully approved assessment system that has been operational for more than one year and a data system that can track student progress through the State data system. This is particularly important for students who move between schools or LEAs over time. Through the Department's peer review process, we will ensure that a State's data system is sufficiently robust to support the State's growth model.

Changes: None.

Comment: One commenter recommended that the regulations reflect the urgency of high school accountability by promoting States' efforts to incorporate individual student academic progress into high school accountability determinations.

Discussion: The Department agrees that there is a need for greater accountability at the high school level. The ESEA, however, requires only one year of testing at the high school level. As a result, it is difficult for a State to accurately measure growth from a student's 8th grade assessment to his or her high school assessment. For this reason, the Secretary does not believe it would be appropriate to require States to incorporate individual student academic progress into high school accountability determinations; however, we welcome and encourage States to find innovative ways to include individual student academic progress in measures of academic achievement at the high school level.

Changes: None.

Comment: One commenter requested that the Department add a requirement for LEAs to provide a plan for measuring student academic growth for students who transfer or transition out of traditional high school settings into alternative educational settings, such as workforce training or post-secondary ''bridge'' programs. The commenter stated that growth models are particularly helpful for alternative educational settings that cater to struggling students.

Discussion: A State that implements individual student academic growth measures at the high school level should include students who transfer to alternative high schools. Tracking such students should be possible because § 200.20(h)(2)(v) requires a State to demonstrate that it has a data system capable of tracking students as they move between schools or LEAs over time. However, as explained in the response to the previous comment, because most States administer a high school assessment in only one grade, it is often difficult to measure student growth at the high school level, regardless of whether students are transferring schools. As a result, the Secretary declines to adopt the commenter's suggestion.

Changes: None.

Comment: One commenter supported the proposal to permit States to incorporate individual student academic growth in their definitions of AYP, but asked that the Department also increase scientifically based research on the development of growth models. The commenter also recommended requiring States to obtain stakeholder input in the development of their growth models.

Discussion: The Department recognizes the importance of scientifically based research and is supporting an external evaluation of the growth model pilot, which will inform the field and increase the level of knowledge about successful growth models that other States might replicate.

With regard to the recommendation to require States to obtain stakeholder input, we agree that stakeholder input in the development of a State's growth model is important, particularly given that most growth models include very complex mathematical formulas and computations that require technical expertise. However, we believe that each State is in the best position to determine how and when to involve stakeholders in the process of developing its growth model.

Changes: None.

Comment: Several commenters supported the proposed regulations, stating that they will add consistency to how growth models are approved and implemented. However, these commenters questioned how the regulations would affect the Department's ability to approve flexibility agreements under section 9401 of the ESEA. Specifically, these commenters stated that the purpose of section 9401 is to permit and support innovation by States through waivers of statutory or regulatory requirements, and that the constraints included in proposed § 200.20(h) would potentially undermine that purpose. These commenters requested clarification regarding whether the Secretary would retain authority to approve applications for flexibility under section 9401, including growth model applications.

Discussion: The Secretary's intent in promulgating the criteria in § 200.20(h) that a State's growth model must meet is to establish clear criteria that the Department can apply consistently in approving flexibility agreements proposing the use of growth models under section 9401 of the ESEA. To the extent that a State's growth model proposal is particularly innovative or unique in ways that conflict with the regulatory criteria in § 200.20(h), the Secretary may exercise her authority in section 9401 to waive those criteria, as she can with most other statutory and regulatory requirements. Given that § 200.20(h) reflects the criteria that the Secretary deems essential for quality growth models, however, we do not anticipate that the Secretary will need to waive those criteria in many, if any, circumstances. These regulations in no way constrain the Secretary's authority to approve flexibility agreements under section 9401 with regard to other matters.

Changes: None.

Comment: Several commenters stated that the criteria in proposed § 200.20(h)(2) are too restrictive and that the models that the Department would allow under the regulations are really trajectory models that do not give full credit for gains in student achievement. One of the commenters added that, because of the restrictions imposed by the criteria in § 200.20(h)(2), the growth models approved by the Department would produce the same results as status models.

Discussion: The Department disagrees that the requirements established by § 200.2(h)(2) are too restrictive. Through the growth model pilot, the Department approved a variety of models. These models include trajectories of student performance, as well as value tables that assign points based on movement across achievement levels. In response to the comment that growth models produce the same results as status models because the Department's criteria for growth models are restrictive, we note that the relevant question for growth models is whether they truly measure gains in student achievement in a school or LEA, not the degree to which AYP determinations may vary using a growth model versus a status model or as a way for more schools to make AYP. We believe that growth models can strengthen accountability by providing more useful information on the performance of individual students to schools, teachers, and parents.

Changes: None.

Comment: One commenter objected to the statement in the preamble in the NPRM that encouraged States to include a teacher identifier in their data systems. The commenter argued that this statement was included to promote teacher pay-for-performance initiatives. The commenter noted that experts do not believe it is possible to validly isolate and evaluate the effect of teachers on student achievement. Another commenter, however, supported the statement.

Discussion: We believe that the information gained by including a teacher identifier could provide States, schools, and teachers with valuable information to guide a number of policy objectives; for example, linking student performance with specific teachers could guide professional development or other instructional improvement strategies. We note, however, that the criteria in § 200.20(h)(2) do not require a State's growth model to include a teacher identifier.

Changes: None.

Comment: One commenter requested that funds be appropriated to support States in implementing a longitudinal student information system.

Discussion: Through the IES' Statewide Longitudinal Data Systems program, the Department has provided almost $122 million to 27 States to design, develop, and implement statewide longitudinal data systems that can accurately manage, analyze, disaggregate, and use individual student data. In addition, the President's fiscal year 2009 budget request for this program is $100 million, a significant increase intended to support new awards to States that have not yet received funding under the program, while also supporting the expansion of systems in previously funded States. The 2009 budget request could support approximately 32 new awards for developing longitudinal data systems or expanding existing data systems to include postsecondary and workforce information, as well as funding for State coordinators and data coordination. It is the Congress, however, and not the Department, that makes the final decision on Federal education appropriations.

Changes: None.

Comment: Several commenters agreed that States should be permitted to use individual student academic growth measures when determining AYP, but asked that the Department permit any State that would like to use such a model to do so.

Discussion: Section 200.20(h) does not limit the number of States that may incorporate individual student academic growth into their AYP definitions, but establishes specific criteria growth models must meet to ensure that they produce technically sound results that uphold the core tenets of the NCLB. The criteria outlined in § 200.20(h) are designed to promote ingenuity while ensuring that States have the capacity to implement growth measures through stable standards and assessments that are part of data systems that can track student progress and measure student achievement over time so as to ensure accountability for grade-level proficiency in reading and mathematics.

Changes: None.

Comment: A few commenters suggested amending § 200.20(h) to allow States to implement other types of growth measures, particularly for States that do not have the capacity to measure individual student progress.

Discussion: The intent of § 200.20(h) is to guide the development and implementation of measures of individual student academic progress. A State with an innovative growth model that does not measure individual student academic progress may request permission to use that model for purposes of determining AYP through a flexibility agreement under section 9401 of the ESEA that the Secretary may grant, at her discretion. States that do not have the capacity to measure individual student progress are already using a group measure of progress through what is referred to as ''safe harbor.'' This approach allows a school to make AYP when the percent of students who were not proficient from one year to the next decreases by at least 10 percent. This is, in fact, a measure of school progress already allowed and used by every State.

Changes: None.

Comment: A few commenters requested that the Department expand upon § 200.20(h)(3), which requires a State's growth model proposal to be peer reviewed. These commenters suggested that experts in the teaching and learning of LEP students and students with disabilities be a part of the peer review process.

Discussion: The Department intends, throughout the peer review of State growth model proposals, to continue to include peers with expertise in assessing students with diverse needs, as has been the case under the growth model pilot.

Changes: None.

Section 200.22 National Technical Advisory Council (National TAC)

Section 200.22(a) Purpose of the National TAC

Comment: One commenter stated that establishing the National TAC should not result in another layer of review of State accountability plans, like the Title I peer review process, that could prevent States from implementing innovative accountability solutions. One commenter recommended that the expert findings from the National TAC inform the peer review process and provide guidelines to States on what constitutes acceptable practice in technical areas. Another commenter stated that there appeared to be overlap in the roles of the National TAC and the peer review process and asked how the peer review panels and the National TAC would coordinate their responsibilities. The commenter stated that the membership of the National TAC appears to focus primarily on individuals with technical knowledge in statistics and psychometrics, which appears inconsistent with the requirements for the peer review process in section 1111(e) of the ESEA. Another commenter stated that the purpose of the National TAC should be to review and approve or deny State accountability plans.

Discussion: The functions of the peer review process and the National TAC are different, but complementary. Section 1111(e)(1)(A) of the ESEA requires the Secretary to establish a peer review process for the review of State plans and to appoint peer reviewers who are representative of parents, teachers, SEAs, and LEAs, and familiar with educational standards, assessments, accountability, the needs of low-performing schools, and other

educational needs of students. The National TAC will not replace this peer review process and will not review, or recommend for approval or disapproval, individual State accountability plans. Rather, the National TAC will consider complex technical issues that affect all States, and on which the Department would benefit from discussions with experts in the fields of educational standards, assessments, accountability, statistics, and psychometrics (e.g., the appropriate use of confidence intervals and performance indexes). The Department intends to use the advice from the National TAC to inform the peer review process and provide guidance to States. In sum, the National TAC will have a broad advisory role but will not participate in the review and approval of individual State accountability plans.

Changes: None.

Comment: One commenter stated that creating a National TAC to advise the Secretary empowers the current Secretary or future secretaries with additional authority well beyond that which is circumscribed by the law creating the U.S. Department of Education.

Discussion: We do not agree that creating the National TAC is beyond the authority of the Department of Education Organization Act (DEOA) (Pub. L. 96–88), 20 U.S.C. 3401 *et seq.* There is a long history of the Federal government seeking advice from the public on Federal policies and programs. Recognizing the value of advice from the public, Congress enacted the Federal Advisory Committee Act (FACA) (Pub. L. 92–463), 5 U.S.C. App. 2, in 1972. Section 3(2) of FACA specifically provides that committees may be established by statute, reorganization plan, or the President, or by a Federal agency. The Department will ensure that the National TAC adheres to the requirements of FACA and operates in a transparent and open manner, including by providing opportunities for the public to comment.

Changes: None.

Comment: Numerous commenters supported the formation of the National TAC so long as it includes widely respected scholars and practitioners and is non-partisan. However, one commenter questioned the value of and compelling need for the National TAC at this time, and a few commenters stated that appointments to the National TAC should be made by a new Administration. Another commenter stated that establishing the National TAC is in direct conflict with the effective and efficient administration of Title I.

Discussion: We agree that the National TAC should include widely respected scholars and practitioners and be nonpartisan. That is why § 200.22(b)(3) requires a very public and open process for soliciting nominations from the public for National TAC members and § 200.22(b)(1) requires the National TAC to include persons who have knowledge of and expertise in the design and implementation of educational standards, assessments, and accountability systems, including experts with technical knowledge related to statistics and psychometrics.

On August 13, 2008, Secretary Spellings announced the appointment of 16 members to the National TAC. All members are experts in assessment and accountability and represent a range of backgrounds from academicians and researchers to national, State, and local policymakers. The following Web site has a list of the council members and their affiliations: *http://www.ed.gov/news/pressreleases/2008/08/08132008.html*. Proposed § 200.22(b)(2) would have provided for 10 to 15 National TAC members. We have changed the number of members to 10 to 20 to conform with the Secretary's desire to appoint 16 members to the National TAC.

We do not agree that creation of the National TAC is in direct conflict with the effective and efficient administration of Title I, or that appointments to the National TAC should be made by a new Administration. There are a number of complex technical issues related to State standards, assessments, and accountability systems that we have identified as important issues to be considered by the National TAC. For example, the appropriate use of confidence intervals and performance indexes in determining AYP are issues that would benefit from immediate consideration by the National TAC. In addition, we plan to use the National TAC to advise the Department on how a State should determine an appropriate minimum group size taking into consideration other elements of the State's AYP definition, consistent with the amendments to § 200.7 that we are adopting. We believe that addressing these issues as soon as possible will benefit the Department, States, and, ultimately, students in ensuring that State standards and assessments are of the highest technical quality and that State accountability systems hold schools and LEAs accountable for the achievement of all students.

Changes: The number of National TAC members has been changed from ''10 to 15'' to ''10 to 20'' in § 200.22(b)(2).

Comment: One commenter stated that the Department should not rely solely on the National TAC for advice, but should utilize existing resources in the Department (e.g., IES) and other agencies (e.g., National Science Foundation), as well as commissioned studies (e.g., by the Government Accountability Office (GAO)) in making decisions on technical issues related to standards, assessments, and accountability.

Discussion: We agree with the commenter. The Department values the information provided by existing resources in the Department, as well as information provided by other agencies and commissioned studies. The Department will continue to avail itself of these resources, along with the advice of the National TAC, in addressing technical issues related to the design and implementation of standards, assessments, and accountability systems.

Changes: None.

Comment: One commenter supported the creation of the National TAC, but stressed that it should be sensitive to State authority and the need to permit latitude for States to develop their own innovative approaches to standards, assessments, and accountability systems. Several commenters expressed concern that the National TAC not adhere to a ''one-size-fits-all'' approach.

Discussion: The Department has no intention of using the National TAC to arrive at a single national answer to every issue it is asked to address, nor do we believe that the regulatory language implies or suggests that this is the Department's intent. We recognize a State's authority to develop its own standards, assessments, and accountability system.

Changes: None.

Comment: One commenter recommended that States receive technical assistance from the National TAC at least six months prior to the date a State's revised accountability plan is due.

Discussion: The purpose of the National TAC is to advise the Secretary on key technical issues related to State standards, assessments, and accountability systems that are part of State plans. We do not anticipate that the National TAC will provide direct technical assistance to States. However, we do anticipate using the advice that we receive from the National TAC to provide technical assistance to States on improving their accountability systems.

Changes: None.

Comment: One commenter suggested that the National TAC consider how the Carl D. Perkins Career and Technical Education Act of 2006, Public Law 109–270, 20 U.S.C. 2301 (Perkins Act), relates to NCLB and examine ways to better align the Perkins Act with NCLB and to incorporate the learning that takes place in work-based settings into accountability determinations.

Discussion: The National TAC will focus on key technical issues related to State standards, assessments, and accountability systems that are part of State plans under Title I. Examining the alignment of the Perkins Act with NCLB would not be in keeping with the Department's intentions for the National TAC. However, the National TAC may consider requirements under the Perkins Act that are related to State standards, assessments, and accountability under Title I.

Changes: None.

Comment: One commenter recommended that the National TAC (a) focus on ensuring that the reauthorized ESEA meets the needs of the education community; (b) work with the education research community to develop new research that is informed by and useful to education practitioners; (c) provide advice to the Department about how the Department can develop guidance with recommendations that can be most effectively implemented in schools; and (d) offer guidance about how the Department can best communicate with teachers and the larger education community.

Discussion: The recommendations provided by the commenter are not in keeping with the Department's intention for the National TAC, which is that it advises the Secretary on key technical issues related to State standards, assessments, and accountability systems that are part of State plans under Title I.

Changes: None.

Section 200.22(b) Members of the National TAC

Comment: Various commenters recommended that parents; current K–12 teachers and practitioners; principals; professional groups concerned with measuring student achievement; educators with an understanding of career and technical education; and individuals representing all core academic subjects, including social studies, music, and other arts, be required members of the National TAC. Other commenters stated that the National TAC should include a cross-section of experts, including practitioners in the areas of curriculum, standards, measurement, statistics, psychometrics, policy, and State and LEA accountability systems. Several commenters stated that the National TAC should not be limited to experts, but include practitioners, members of community-based organizations, and professionals who reflect the interests of LEAs and communities.

Discussion: The purpose of the National TAC is to advise the Secretary on key technical issues related to State standards, assessments, and accountability systems. The National TAC will consider complex issues that affect all States, as well as issues that would benefit from discussions with experts in the field. Section 200.22(b)(1) specifically requires the members of the National TAC to have knowledge of and expertise in the design and implementation of educational standards, assessments, and accountability systems, including technical knowledge related to statistics and psychometrics. Individuals who meet these criteria and who are also parents, current K–12 teachers and practitioners, principals, educators with an understanding of career and technical education, representatives of professional groups concerned with measuring student achievement, members of community-based organizations, individuals with expertise in core academic subjects, and others would bring important perspectives to the National TAC. However, we do not agree that such individuals without technical expertise in standards, assessments, and accountability should be required members of the National TAC.

Changes: None.

Comment: Many commenters emphasized the importance of ensuring that National TAC members are trusted by the States and include experts with knowledge about the operational aspects of administering assessments and with experience in handling the practical challenges that States and LEAs face in implementing assessment and accountability systems. Other commenters emphasized the importance of including local education practitioners as members of the National TAC in order to ensure that the realities of NCLB implementation in schools and LEAs are considered. A few commenters recommended that at least 50 percent of the members be individuals who are directly responsible for implementing the requirements of NCLB.

Discussion: We agree that it is important to include experts with first-hand knowledge of and experience in assessments and accountability at the State and local levels as members of the National TAC. That is why § 200.22(b)(1) requires the National TAC to include members with knowledge and expertise in the design and implementation of educational standards, assessments, and accountability systems. The 16 members that the Secretary appointed to the National TAC on August 13, 2008 reflect her desire for the National TAC to include experts with State and local experience in assessments and accountability. We believe that experts with experience in these areas, regardless of whether they are currently directly responsible for implementing NCLB, have valuable information and experiences to contribute to the National TAC. Moreover, the primary purpose of the National TAC is to advise the Secretary on technical issues (such as statistical validity and reliability) related to the standards, assessments, and accountability systems required by NCLB. For this reason, the membership of the National TAC is necessarily weighted toward individuals with technical expertise.

Changes: None.

Comment: A number of commenters objected to the Secretary appointing the members of the National TAC. One commenter stated that National TAC members should be selected independently and suggested that the President of the National Academy of Sciences screen and select members. Another commenter recommended that the members be appointed by their peers. Several commenters recommended that States and LEAs play a role in appointing members to the National TAC. Other commenters stated that stakeholder organizations should be permitted to elect a member with appropriate expertise to serve on the National TAC. Another commenter urged the Department to ensure that the process for selecting National TAC members is fully transparent, explicit, and inclusive and that the selection process for the National TAC meets the requirements of FACA so as to ensure a fair and balanced council. The commenter stated that it is critical to include diverse viewpoints and identify potential conflicts of interest when decision-makers are being chosen so that processes remain fair and open. One commenter stated that the specific criteria used in the selection process were not included in the regulations and that, unless a more transparent and inclusive process to select the members is provided, the National TAC would have no credibility.

Discussion: Section 200.22(b)(3) requires the use of a very public and open process to solicit nominations

from the public for National TAC members. The selection of National TAC members complied with the requirements of FACA that the council be fairly balanced in terms of points of view, including the members' backgrounds and qualifications. We believe that this requirement, along with the requirements in § 200.22(b)(1) that members of the National TAC have knowledge of and expertise in the design and implementation of educational standards, assessments, and accountability systems, sufficiently outlines the criteria for selecting National TAC members.

The members of the National TAC are Special Government Employees (SGEs) and, as such, are subject to all Federal conflict-of-interest laws and regulations. Consistent with FACA and the members' status as SGEs, the Department provided prospective members of the National TAC with information regarding the Department's standards of conduct, including those imposed by Federal conflict-of-interest statutes. As required in § 200.22(b)(4), the Secretary screened nominees for membership on the National TAC for potential conflicts of interest in order to prevent, to the extent possible, such conflicts, or the appearance thereof, in the National TAC's performance of its responsibilities under this section.

We do not agree that the selection of the National TAC members should be made by anyone other than the Secretary. The purpose of the National TAC is to advise the Secretary on key technical issues related to State standards, assessments, and accountability systems. It would defeat the purpose of the National TAC for the Secretary and the Department to select members of the National TAC who did not represent a range of perspectives, from a variety of fields, and with diverse viewpoints. That is why the regulations specifically require that the National TAC include persons who have knowledge of and expertise in the design and implementation of educational standards, assessments, and accountability systems, including experts with technical knowledge related to statistics and psychometrics.

Changes: None.

Comment: Several commenters recommended that the National TAC include members who represent the diverse needs and situations of States. The commenters stated that the National TAC should include members from different geographic regions of the United States, and members from States that differ in terms of their size and populations. Several commenters stated that the National TAC should include members with knowledge of and expertise with diverse student populations. A number of commenters supported the creation of the National TAC so long as it includes at least one member with expertise on assessment and accountability for students with disabilities, including students with the most significant cognitive disabilities. Several commenters recommended requiring at least one member of the National TAC to have knowledge in the design and implementation of educational standards, assessments, and accountability systems for LEP students.

Discussion: We agree that the National TAC should include members who have experience with diverse populations, such as students with disabilities and LEP students and have modified § 200.22(b)(1) to require inclusion of members with that expertise. We note that the members of the National TAC appointed by the Secretary on August 13, 2008 include such experts. Regarding the comment that members come from different regions of the United States and from small and large States, we do not believe that selecting members based on where they live would be beneficial in enabling the National TAC to fulfill its purpose and, therefore, decline to make the change suggested by the commenter. Nevertheless, we also note that the members of the National TAC appointed in August represent a cross section of the Nation.

Changes: We have revised § 200.22(b)(1) to require the National TAC to include persons who have knowledge of and expertise in the design and implementation of educational standards, assessments, and accountability systems for all students, including students with disabilities and LEP students.

Comment: One commenter asked for information about the tenure of National TAC members, including whether there will be a rotation schedule for selecting members and whether membership on the National TAC will be connected to a specific Secretary's tenure. Another commenter recommended requiring that appointments to the National TAC be made at the discretion of the Secretary and not include fixed terms of service.

Discussion: All members serve at the pleasure of the Secretary. The next Secretary may appoint new members at his or her discretion. That said, the charter provides that each member appointed by the Secretary shall serve a term of three years, except that the terms of the initial members shall be staggered as follows: One year for five members; two years for five members; and three years for six members. Initial terms of members are determined by a random selection process at the time of appointment. No member may serve more than two terms.

Changes: None.

Section 200.22(d) Rules of Procedure for the National TAC

Comment: Several commenters asked how the Department and the Secretary will ensure that there is a balanced perspective on issues considered by the National TAC. A number of commenters emphasized the importance of ''transparency'' in the operation of the National TAC. Several commenters urged that the meetings of the National TAC be public so that States and the public can participate and understand the recommendations made to the Department. One commenter recommended requiring transparency so that members of the public would not have to exercise their rights under the Freedom of Information Act. One commenter supported the National TAC in theory, but opposed the proposed regulation, stating that the process for creating the National TAC lacked safeguards against bias. Another commenter expressed concern that a small group of people would have the power to drive assessment policies and stated that the proposed regulations gave too much power to an advisory council that the public would not be able to hold accountable. The commenter stated that the Secretary and Congress should not rely on a single source of advice, but should obtain advice from a variety of professionals, practitioners, and organizations representing many fields of expertise in order to ensure that a broad cross-section of the public will be heard and to mitigate against a panel skewed by ideology or special interests.

Discussion: The National TAC operates in a manner that is open and transparent to the public and provides opportunities for a fair and balanced discussion of the issues. The National TAC strictly adheres to FACA, which requires that meetings be announced at least fifteen days in advance and that meetings are presumed to be open to the public except in certain limited circumstances. In short, the provisions of FACA require that the Department: (a) Arrange meetings of the National TAC at reasonably accessible and convenient locations and times; (b) publish advance notice of meetings in the **Federal Register**; (c) open National TAC meetings to the public; (d) make available for public inspection, subject to the exceptions of the Freedom of Information Act, papers and records, including detailed minutes of each

meeting; and (e) maintain records of expenditures.

In addition, as required by FACA, the Department has appointed a full-time Federal employee (Designated Federal Official, or DFO) who will (a) call, attend, and adjourn meetings of the National TAC; (b) approve agendas; (c) maintain required records on costs and membership; (d) ensure efficient operations; (e) maintain records for availability to the public; and (f) provide copies of council reports to the Department's Committee Management Officer for forwarding to the Library of Congress.

We believe that the commenter's concerns that a small group of people would have the power to drive assessment policies are unfounded. The National TAC is an advisory committee, not a policy-making body. As such, it will provide the Secretary with advice, which the Secretary will consider along with information from other resources within the Department and from outside sources.

Changes: None.

Comment: One commenter requested more detail on the creation, organization, and governance of the National TAC. The commenter requested information on who creates the internal governance procedures for the council; whether the procedures can be amended; and the parameters of the work of the council. Another commenter requested that the regulations elaborate on the National TAC members' specific duties and terms and the meetings that the National TAC will hold.

Discussion: We believe that the parameters of the National TAC's work are clearly stated in § 200.22(a). The Department followed all FACA requirements, including rules on governance, in establishing the National TAC. As required by FACA, the National TAC published a charter that includes detailed information about the purpose of the council, its structure, meetings, estimated annual cost, and reporting requirements. The Department filed the charter for the National TAC on April 7, 2008 with the relevant committees of the U.S. House of Representatives and the U.S. Senate, the Library of Congress, the Secretary, and the General Services Administration (GSA), as required by FACA. The charter is posted on the Department's Web site at *http://www.ed.gov/about/bdscomm/list/ntac/index.html*.

We believe that this detailed information is more appropriate for inclusion in the National TAC's charter and, therefore, decline to follow the commenter's recommendation to include these procedures in the regulations. In response to the commenter who asked about amending the National TAC's procedures, changing the National TAC's procedures would require amending the charter, which can be done if the need arises.

Changes: None.

Comment: One commenter encouraged the Department to permit ongoing and regular access to the National TAC by States and to allow States to bring forward complex issues for the National TAC to consider. Another commenter recommended changing the regulations to require that the findings and recommendations of the National TAC be publicly available through the Department's Web site.

Discussion: The Department will include time for public comment at each meeting of the National TAC. This will provide an opportunity for States, as well as the public, to have regular opportunities to comment on the work of the National TAC. We agree that the findings and recommendations of the National TAC should be publicly available through the Department's Web site, but decline to follow the recommendation to add a regulation to achieve this goal. We believe this action is unnecessary because the National TAC's charter states that the Council will, in lieu of an annual report, provide a summary of the proceedings, prepared by the DFO and reviewed and approved by the Council, to the public after every meeting. The meeting summary will, at a minimum, contain the topics discussed, a summary of the discussion, and recommendations for the Department, including, as appropriate, recommendations on research that the Department might undertake. The meeting summaries, along with a transcript of every meeting, will be posted on the Department's Web site. As noted previously, this Web site is *http://www.ed.gov/about/bdscomm/list/ntac/index.html*.

Changes: None.

Comment: One commenter stated that it is not clear what authority the National TAC will have and whether decisions made by the National TAC will be binding on the Department in its consideration of future policies.

Discussion: The National TAC operates under the rules and requirements of FACA. Under section 9(b) of FACA, agencies are not required to implement the advice or recommendations of their Federal advisory committees; advisory committees are by definition advisory and, therefore, the recommendations and advice of the National TAC are not binding on the Department.

Changes: None.

Commenter: A few commenters, while supportive of establishing the National TAC, questioned whether it was necessary to include the requirement to establish the National TAC in the Department's regulations. Another commenter noted that the Department published a notice in the **Federal Register** on March 18, 2008, establishing the National TAC, and stated that proposing the National TAC in the NPRM was unnecessary because it was clear that decisions about the National TAC had already been made.

Discussion: Although we did not necessarily need to codify the authority to establish the National TAC in our regulations, we chose to do so in the interest of transparency and continuity. We intended that, by including our proposals concerning the National TAC in the NPRM, the public would have a greater opportunity to comment and make recommendations on how the National TAC might be structured and operated. The input we received has been very helpful and, as a result of public comments, we have changed the regulations to require the National TAC to include members with expertise in standards, assessments, and accountability for students with disabilities and LEP students. Providing for the establishment of the National TAC in the regulations also will ensure that the Department continues to benefit from the advice of experts in the field and that the public continues to have the opportunity to provide input on overarching standards, assessment, and accountability issues. Just as States have established State technical advisory committees to advise them on the development and implementation of their State standards, assessments, and accountability systems, we believe that regular access to a group of experts will benefit the Department, States, and, ultimately, students in ensuring that State standards and assessments are of the highest technical quality and that State accountability systems hold schools and LEAs accountable for the achievement of all students.

Changes: None.

Sections 200.32 and 200.50 Identification of Schools and LEAs for Improvement

Comment: Many commenters supported our proposed changes to § 200.32 to codify current Department policy that an LEA may base identification of a school for improvement on whether the school did not make AYP because it did not meet the annual measurable objective (AMO) in the same subject for two consecutive

years, but may not limit such identification to those schools that did not meet the AMO in the same subject for the same subgroup for two consecutive years. We proposed a similar change to § 200.50, regarding State identification of LEAs for improvement.

Several commenters misunderstood the proposed regulation and thought that the regulation permitted LEAs to limit identification of schools for improvement to schools that did not meet the AMO in the same subject for the same subgroup every year. In addition, the majority of those who commented opposed the regulatory changes, stating that they are overly rigid and would restrict States' and LEAs' authority and flexibility to target LEAs and schools that are truly in need of improvement. Several commenters stated that the Department is exceeding its administrative authority by promulgating a regulation that is not expressly authorized in the statute.

Discussion: As stated in the preamble to the NPRM, we are codifying the Department's current policy in order to establish clear parameters for LEAs and States to use when identifying schools and LEAs for improvement. We believe that this policy and the final regulations are consistent with the statute, its emphasis on proficiency in separate subjects, and its requirement to include, in AYP calculations, separate participation rates for mathematics and reading/language arts assessments.

Section 1116(b)(1) of the ESEA requires an LEA to identify for school improvement any Title I school that fails, for two consecutive years, to make AYP as defined under section 1111(b)(2). Section 1116(c)(3) contains a similar requirement for identifying LEAs for improvement. There is flexibility in section 1111(b)(2) to permit an LEA to identify schools (and a State to identify LEAs) in need of improvement on the basis of not making AYP in the same subject for two consecutive years. This flexibility stems from other provisions in the statute that treat reading and mathematics independently (e.g., separate starting points and AMOs). These provisions recognize that student achievement in reading and mathematics in a State may start at very different points and, thus, that the State would need to establish different trajectories for reaching 100 percent proficiency in each subject. As a result, it makes sense to permit an LEA to identify schools (and a State to identify LEAs) in need of improvement based on not making AYP for two years in the same subject.

Subgroups, on the other hand, are not treated differently in the ESEA and, thus, the statute does not support identifying schools or LEAs for improvement on the basis of ''same-subgroup'' performance for two consecutive years. Moreover, such a policy would be inconsistent with the accountability provisions in section 1111(b)(2)(C) of the ESEA, which require that each subgroup meet the State's AMOs in each subject each year. The intent of school identification is not to lay blame on a particular group of students, as a ''same subgroup/same subject'' approach would do, but to identify the instructional and academic areas that need to be improved. A school or LEA that is identified for improvement should look to specific instructional remedies in the subject area, other indicator, or participation rate that resulted in its identification.

Changes: None.

Section 200.37 Notice of Identification for Improvement, Corrective Action, or Restructuring

Section 200.37(b)(4)(iv) Notification of Available School Choices

Comment: A number of commenters expressed support for the requirement in § 200.37(b)(4)(iv) that LEAs notify the parents of eligible students of their Title I public school choice options at least 14 calendar days before the start of the school year (14-day notification requirement). At the same time, a number of commenters objected to the 14-day notification requirement because, according to the commenters, most SEAs cannot release AYP data to LEAs in time for LEAs to determine students' eligibility for public school choice and notify families about their public school choice options 14 days before the start of the school year. Commenters stated that the 14-day notification requirement does not acknowledge the complexities of making AYP determinations, which involve scoring assessments, ensuring that test scores are received on time, verifying the accuracy of the data, and computing AYP for the seven required grades, all of which can result in delaying AYP determinations. Other commenters noted that, although parental notification is an LEA responsibility, LEAs do not control when test results or AYP data are available and would not be able to meet the 14-day notification requirement unless States provide AYP determinations to LEAs in a timely manner.

Some commenters expressed concern that States may need to amend their assessment policies or renegotiate their contracts with testing companies in order to meet the 14-day notification requirement. Other commenters suggested that the 14-day notification requirement would pressure States to test students too early in the school year or lead to increases in testing and scoring errors and less time to verify assessment results. One commenter suggested that the 14-day notification requirement would complicate LEAs' participation in the Department's SES pilot project, which permits certain LEAs to offer SES to students enrolled in schools that are in year one of improvement status.

Discussion: The Secretary strongly believes that early notification to parents of their public school choice options is essential for parents to have a genuine opportunity to exercise those options. At the same time, the Secretary recognizes the practical challenges that some LEAs may face in meeting the 14-day notification requirement and acknowledges that AYP determinations take time and that States may need to consider changes to their assessment policies and contracts. Nevertheless, the goal of the 14-day notification requirement is to ensure that parents have sufficient time, in advance of the school year, to make an informed decision about transferring their child to another school. The Secretary believes the 14-day notification requirement strikes a reasonable balance between the needs of parents for early notification and the practical realities of assessment reporting and AYP determinations.

With regard to the comment that the 14-day notification requirement would complicate LEAs' participation in the Department's SES pilot project, we disagree. LEAs participating in the SES pilot, which allows schools in the LEA to provide SES or choice to students enrolled in schools that are in year one of improvement status, must follow the same timelines as all other schools, including the 14-day notification requirement.

Changes: None.

Comment: A number of commenters recommended that the Department revise the 14-day notification requirement. Some commenters stated that 14 days should be the minimum time and that more time would be better, with some commenters recommending a 30-day notification requirement. One commenter recommended requiring LEAs to notify parents about their Title I public school choice options in the spring or early summer, at the same time LEAs offer other school choice programs. Another commenter recommended a 30-day

notification requirement, except when a State's late release of AYP determinations prevents an LEA from meeting this requirement. In such cases, the commenter recommended that an LEA base student eligibility for public school choice on the previous year's AYP data. One commenter suggested that the Department survey States to determine if they report assessment results in time for LEAs to meet the 14-day notification requirement; for States that do not report assessment results in time to meet the 14-day notification requirement, the commenter suggested giving LEAs an additional 30 days to notify parents of their public school choice options.

Several commenters recommended that the Department require, when the State does not notify its LEAs of the final AYP status of their schools at least 21 days in advance of the start of the school year, an LEA to notify parents no later than 14 days after the LEA receives AYP results from the State. One commenter recommended requiring States to give LEAs final AYP determinations for schools 21 or more days before the school year begins, and another recommended requiring LEAs to notify parents no later than seven days before the start of the school year. Another commenter suggested that the Department give States the flexibility to submit plans to the Department on how the State would ensure that more parents have timely information about a school's improvement status and parents' public school choice options; for example, States might propose requiring schools that are currently in school improvement to meet the 14-day notification requirement, while requiring schools that are newly identified for improvement to notify parents by the first day of school. Finally, a commenter suggested that, if an LEA is not able to execute parents' transfer requests within a 14- to 21-day time period, the LEA should be required to notify parents early enough to accommodate parents' requests in a timely manner.

Discussion: The Secretary appreciates the recommendations made by these commenters, all of which appear to reflect sincere efforts to address the complexity and variability in State accountability systems. However, most of the suggested alternatives primarily address the needs of States and LEAs, rather than the needs and concerns of parents with children struggling to reach proficiency in reading and mathematics in schools identified for improvement, corrective action, or restructuring. The result, in nearly every case, would be less time for parents to consider their transfer options before the start of the school year or, in some cases, a deferral of that process until well after the start of the school year, by which time few parents seriously consider transferring their children to a new school.

In sum, while we appreciate the differences in State accountability systems and the practical concerns of making timely AYP determinations, we believe that the 14-day notification requirement strikes the appropriate balance to ensure that parents have sufficient time to make an informed decision on whether to transfer their children to another public school.

Changes: None.

Comment: One commenter supported the 14-day notification requirement but stated that receiving 14 days' notice would not help parents in LEAs that do not offer the option to transfer to conveniently located public schools or cannot accommodate all eligible students who wish to transfer.

Discussion: The Department acknowledges that some LEAs may not be able to provide transfer options because: (1) The LEA only has a single school at a grade level; (2) all schools at a grade level are in school improvement; or (3) the distances between schools make changing schools impracticable. In such situations, section 1116(b)(11) of the ESEA requires that the LEA, to the extent practicable, enter into a cooperative agreement with neighboring LEAs to provide a transfer option. In addition, an LEA may offer SES to students attending schools in the first year of improvement (*see* § 200.44(h)(2)). However, under § 200.44(d), an LEA may not use lack of capacity as a reason to deny public school choice to students in schools identified for improvement, corrective action, or restructuring.

Changes: None.

Comment: Some commenters who objected to the 14-day notification requirement recommended that LEAs be required to comply with a specific notification requirement only for schools that were in improvement in the previous school year and will continue to be in improvement in the upcoming school year whether or not they make AYP. These commenters said that, for newly identified schools, LEAs should be required to provide notification of public school choice options to parents no later than the first day of school.

Discussion: We decline to accept the commenters' suggestion to require differential treatment of students who attend schools that have been previously identified for improvement and students who attend schools newly identified for improvement. The Department recognizes, however, that it would be much easier for LEAs and most beneficial for students and parents identified if LEAs provided early notice of available choice options to the parents of students attending schools already identified for improvement and whose obligation to provide public school choice would continue irrespective of their next AYP determination. We, therefore, encourage LEAs to take advantage of such situations and provide notice to parents of students in previously identified schools as early as possible, preferably in the spring or early summer, before the start of the school year.

Changes: None.

Comment: A number of commenters stated that unstable enrollments in high-poverty schools, such as Title I schools, often make it impossible for an LEA to know 14 days prior to the start of the school year which students are eligible for public school choice.

Discussion: High rates of student mobility in many high-poverty areas do not relieve an LEA of its responsibility to provide parents of eligible students with timely notification of public school choice options. Indeed, such students often are precisely those who would most benefit from the opportunity to transfer to another public school. Where high mobility makes it difficult to obtain accurate enrollment data prior to the beginning of the school year, an LEA must provide notice using the best available data to identify and notify eligible parents at least 14 calendar days before school starts.

Changes: None.

Comment: One commenter asked the Department to consider whether an LEA should be required to notify parents of students who enroll in a school after the LEA has already sent out public school choice and SES notifications.

Discussion: The Department encourages LEAs to be as flexible as possible with newly enrolled students. If a student enrolls in a school identified for improvement, corrective action, or restructuring early in the school year, we encourage the LEA to make every effort to accommodate parents who wish to transfer their child to another public school. Likewise, we encourage an LEA to offer SES to newly enrolled students who are eligible and who would have sufficient time remaining in the school year to complete an SES program. An LEA that provides two enrollment windows, as required under § 200.48(d)(2) for LEAs that wish to spend less than the amount needed to meet the 20 percent obligation, could accommodate, in many instances,

eligible students who enroll in a school after the start of the school year and wish to participate in SES. We believe that many LEAs will choose to provide two enrollment windows in anticipation of needing to meet this requirement in order to use unspent choice-related transportation and SES funds on other allowable activities. Finally, we note that the 14-day notification requirement applies only to public school choice and not to SES.

Changes: None.

Comment: A few commenters questioned whether the lack of timely notification is the primary reason that more parents do not choose to transfer their child to another public school under the Title I public school choice provisions. These commenters suggested that there are other explanations, such as parents believing that their child's school is doing well despite being identified for improvement, a desire to keep their child in the school closest to home, and a willingness to participate actively in school improvement efforts.

Discussion: The Secretary agrees that there are valid reasons unrelated to LEA notification practices, such as those described by the commenters, why eligible parents decide not to transfer their child to another public school under the public school choice provisions. However, evaluation data indicate that the timing of notification is a significant factor in influencing whether parents choose to transfer their child, and that LEAs that notify parents about their public school choice options prior to the first day of school have higher participation rates than LEAs that provide notification later.[13] The 14-day notification requirement in § 200.37(b)(4)(iv) is a direct response to the evaluation data and is intended to give families more time to make informed decisions about available public school choice options.

Changes: None.

Comment: One commenter expressed support for the 14-day notification requirement and recommended requiring LEAs to offer parents of eligible children detailed academic information on their public school choice options. The commenter suggested that LEAs could make available for each public school choice option the academic report cards required under section 1111(h) of the ESEA.

Discussion: Section 200.37(b)(4)(ii) already requires LEAs to provide parents of eligible children academic information on the school or schools to which their child may transfer. The Department believes that LEAs are in the best position to determine the academic information that would be most useful in helping families decide on transfer options. We note, for example, that the local report cards required under section 1111(h) are LEA report cards and, therefore, would include academic information on all schools in an LEA. Depending on the number of schools in an LEA, providing the LEA's report card may confuse parents who are interested only in the achievement data for their available public school choice options.

Changes: None.

Comment: A number of commenters stated that the 14-day notification requirement in proposed § 200.37(b)(4)(iv) conflicts with § 200.44(a), which implements section 1116(b)(1)(E)(i) of the ESEA and requires an LEA to provide all eligible students enrolled in the LEA with the option to transfer to another public school not later than the first day of the school year.

Discussion: The Department does not agree that the 14-day notification requirement conflicts with either statutory or regulatory language regarding the provision of public school choice to eligible students. Rather, the 14-day notification requirement defines, pursuant to the Secretary's regulatory authority in section 1901 of the ESEA, the minimum amount of time before the start of school that is required for notice of public school choice to be meaningful, *i.e.*, to give a parent sufficient time to make an informed decision about transferring his or her eligible child to another public school. We encourage LEAs to allow students to enroll in their school of choice as soon as possible following receipt of the transfer request from parents.

We agree that there is a discrepancy between the 14-day notification requirement in proposed § 200.37(b)(4)(iv), which was referenced in proposed § 200.44(a)(2)(ii), and the language in proposed § 200.44(a)(2)(i), which would have required an LEA to offer public school choice options not later than the first day of the school year. We have revised § 200.44(a)(2) to eliminate this discrepancy.

Changes: We have revised § 200.44(a)(2) to make clear that an LEA must offer parents the opportunity to transfer their child to another public school, through the notice required in § 200.37, so that students may transfer in the school year following the year in which the LEA administered the assessments that resulted in identification of the school for improvement, corrective action, or restructuring.

Comment: Several commenters stated that compliance with the 14-day notification requirement would create administrative burdens for LEAs. Two commenters asserted that the requirement would increase local administrative costs; one commenter contended that those costs would not be paid for with Federal funds. Another commenter asserted that in many LEAs there may not be sufficient staff available to produce the notifications 14 days before the start of the school year.

Discussion: The Secretary believes strongly that § 200.37(b)(4)(iv) is necessary so that parents have sufficient time, prior to the start of the school year, to make important decisions about the school their child will attend. We note that LEAs may use Title I, Part A funds, as well as other authorized Federal funds, to support the costs of notifying parents of their public school choice options. Additionally, we are adopting in these final regulations the changes we proposed in the NPRM to § 200.48(a)(2)(iii)(C). Under these changes, an LEA is allowed to count parent outreach costs toward the funds it is required to spend for choice-related transportation and SES, up to an amount equal to 0.2 percent of the LEA's Title I, Part A, subpart 2 allocation. Those funds may be used to implement the 14-day notification requirement.

Changes: None.

Comment: Several commenters argued that, in States that issue both preliminary and final AYP data, the regulations would require LEAs to send out multiple notices reflecting changes in public school choice options as a result of final AYP determinations. Two other commenters argued that, because final AYP determinations may not be made 14 days before the start of school, § 200.37(b)(4)(iv) could require LEAs to provide and pay for public school choice for students attending schools that ultimately are not identified for improvement, which would confuse parents, waste Title I funds, and not increase participation rates.

Discussion: The 14-day notification requirement is not intended to cause LEAs to offer public school choice before receiving final AYP determinations. We note that, under section 1116(b)(1)(B) of the ESEA, final AYP determinations must take place prior to the start of the school year. We encourage LEAs to prepare notices and

[13] Stullich, S., Eisner, E., & McCrary, J. (2007). *National Assessment of Title I: Final Report, Volume I: Implementation.* Washington, DC: National Center for Education Evaluation and Regional Assistance, Institute of Education Sciences, U.S. Department of Education.

make provisional transportation plans in advance of receiving final AYP determinations, when necessary, in order to expedite notifying parents of their child's eligibility for public school choice when final AYP determinations are available, in accordance with the 14-day notification requirement.

Changes: None.

Comment: Several commenters expressed concern about how the 14-day notification requirement would affect (1) year-round schools, (2) States with rolling start dates, rather than a single, statewide start date; and (3) schools that open in early August.

Discussion: In each of these situations, LEAs must notify parents of their public school choice options 14 days before the beginning of the ''school year,'' as that term is defined by the SEA or LEA.

Changes: None.

Comment: Two commenters stated that the proposed requirements in § 200.37, including the 14-day notification requirement and expanded notice requirements for both public school choice and SES, are an inappropriate attempt to ''micromanage'' schools and LEAs.

Discussion: The new requirements in § 200.37 respond to evaluation and monitoring data suggesting that public school choice and SES are poorly implemented by too many LEAs, more than six years after public school choice and SES options were first required by the ESEA. For example, evaluation data show that SES notifications often are confusing, incomplete, and even discourage the use of SES.[14] The final regulations are a direct response to these data and part of the Department's overall effort to promote more effective implementation of Title I public school choice and SES.

Changes: None.

Section 200.37(b)(5) Annual SES Notice

Comment: Several commenters expressed support for proposed § 200.37(b)(5)(ii)(C), which would require an LEA's annual notice to parents of the availability of SES to include an explanation of the benefits of receiving SES, and proposed § 200.37(b)(5)(iii), which would require this notice to be clear and concise and clearly distinguishable from other school improvement information sent to parents. One of these commenters recommended strengthening these requirements by encouraging LEAs to inform parents directly about the merits of particular SES programs.

Discussion: The Secretary appreciates the commenters' support for improved SES notice requirements. Regarding the comment to encourage LEAs to inform parents directly about specific SES programs, LEAs are currently required, under section 1116(e)(2)(A)(iii) of the ESEA and § 200.37(b)(5)(ii)(B), to provide parents with a brief description of the services, qualifications, and demonstrated effectiveness of each provider that is available within the LEA.

Changes: None.

Comment: One commenter interpreted the proposed changes to §§ 200.37(b)(5)(ii)(C) and 200.37(b)(5)(iii) as requiring LEAs to notify parents about the availability of SES prior to the start of the school year.

Discussion: The commenter appears to have misunderstood the proposed regulations. Although the Secretary supports timely notification to parents of their child's eligibility for SES, the regulations do not require that LEAs notify parents about SES prior to the start of the school year.

Changes: None.

Comment: Two commenters stated that the Department should require LEAs to include, in their annual notice of the availability of SES, information on whether available SES providers are qualified to serve students with disabilities and LEP students.

Discussion: Section 200.46(a)(4) requires an LEA to ensure that eligible students with disabilities and LEP students are able to receive appropriate SES and accommodations in the provision of those services. We agree that it would be helpful for parents to know whether particular SES providers are able to serve students with disabilities or LEP students. Therefore, we have revised § 200.37, regarding LEA notices, and § 200.47, regarding SEA responsibilities for SES.

Changes: We have revised § 200.37(b)(5)(ii)(B) to provide that an LEA's notification to parents regarding SES include an indication of those providers that are able to serve students with disabilities or LEP students. We also have restructured § 200.47(a)(3) and added a new paragraph (a)(3)(ii) requiring an SEA to indicate on its list of approved providers those providers that are able to serve students with disabilities or LEP students.

Comment: A few commenters suggested that LEAs include, in the notice on SES, information about whether there is independent evidence from an evaluation or scientifically based research about the effectiveness of each provider's services and indicate whether a provider has been removed from any State's list of approved providers.

Discussion: Section 1116(e)(2)(A)(iii) of the ESEA and § 200.37(b)(5)(ii)(B) already require LEAs to include information on providers' effectiveness in their notices to parents, and § 200.47(b)(3)(i) requires States to consider, in their approval of providers, whether a provider has been removed from another State's list. Additionally, under § 200.47(b)(2)(ii)(C), a State may not include a provider on the State's list of approved SES providers unless the provider agrees to ensure that the instruction it will provide is of high quality, research-based, and specifically designed to increase the academic achievement of eligible children. The Department does not believe further regulation is required in this area.

Changes: None.

Comment: Many commenters opposed the SES notice requirements in § 200.37(b)(5)(ii)(C) and § 200.37(b)(5)(iii). Some of these commenters stated that these requirements are examples of over-regulation by the Department. Other commenters argued that requiring the SES notice to be concise is illogical, given the numerous items required to be included in the notice. Some commenters argued that the requirements are ambiguous and that it would be difficult for LEAs to comply with them and for SEAs to monitor implementation by LEAs. A few commenters recommended that the Department provide a model notice for LEAs to use, while another commenter stated that using a model notice should be optional, not required.

One commenter argued that the proposed requirements would be burdensome because LEAs would need to send two notices to parents whose children are eligible for SES—one on SES and one with information about school improvement. Another commenter recommended that LEAs have flexibility to notify parents in the most appropriate manner for the communities they serve. One commenter recommended that the Department clarify that the SES notice may be sent to parents with other materials so long as it is clearly distinguishable from those materials.

Another commenter recommended eliminating the requirement that SES notification letters be ''clearly distinguishable'' from other information sent home to parents. This commenter suggested that the requirement would draw attention to the SES notice at the expense of other LEA and school information, and that it is not the Department's responsibility to tell LEAs

[14] *Id.*

and schools how to provide their notifications to parents.

Other commenters asserted that there is little evidence available on the benefits of SES. Another commenter recommended that the Department modify the regulations to require LEAs to include only those benefits of SES that are based on scientifically based research. Another commenter recommended that § 200.37(b)(5)(ii)(C) be changed to require an LEA to explain only the ''potential'' benefits of SES until there is research verifying that SES increases student achievement.

Discussion: The Secretary believes that it is important for LEAs' communication to parents of their SES options be as straightforward and easy for parents to understand as possible. During our monitoring and outreach visits, we have seen examples of LEAs' notices to parents that were unclear, incomplete, and negative in tone. We also know from evaluation data that parents of eligible students often report that they have not received a notice about SES from their LEA.[15] To address these problems, the Secretary believes it is necessary and in students' and parents' best interests to require LEAs to send parents SES notification letters that are clear and concise and explain the benefits of SES. In order to assist LEAs in meeting this requirement, we intend to provide, through Department guidance, one or more sample notification letters that include the elements required by these regulations.

Section 200.37(b)(5)(iii) does not require an LEA to send an SES notice that is separate from its school improvement notice; rather, the SES notice must be ''distinguishable'' from other improvement information. This does not preclude an LEA, therefore, from including the SES notice in the same mailing with other information about school improvement.

We believe that LEAs should have the discretion to determine what information on the benefits of SES to include in the notice to parents. In addition to benefits substantiated by research conducted by the Department or by States, LEAs, or other entities, an LEA's notice could include, for example, the fact that supplemental educational services are available at no cost to parents and make productive use of a student's out-of-school time in a safe environment; that parents may select the approved provider of their choice that best meets their child's academic needs; and that supplemental educational services have the potential to improve a student's academic proficiency.

Changes: None.

Comment: Several commenters recommended that all notices and information on public school choice and SES be provided to parents in a language parents can understand.

Discussion: Section 1116(b)(6) of the ESEA and § 200.36(b)(2) already require that, to the extent practicable, LEAs provide notices on public school choice and SES to parents in a language parents can understand. Therefore, it is unnecessary to regulate further in this area.

Changes: None.

Comment: One commenter recommended several changes to § 200.37 in order to improve access to public school choice and SES for ''disconnected'' youth. This commenter suggested that the regulations be revised to require LEAs to: (1) Provide public school choice and SES information to parents of disconnected youth whose cohort is either still in school or has graduated less than three years ago, and to parents of youth who have transferred from traditional high schools into alternative educational settings; and (2) encourage LEAs to be more proactive when informing parents and students of their SES options through provider fairs, SES informational sessions, and other means.

Discussion: The Secretary appreciates the commenter's concern for disconnected youth. Disconnected youth who are from low-income families and enrolled in a Title I elementary or secondary school in improvement status (in year two of improvement for SES eligibility), including an alternative high school, are eligible for public school choice and SES. Disconnected youth who are not enrolled in a public Title I school in improvement status, however, are not eligible. The Department strongly encourages LEAs to actively notify parents of their options for public school choice and SES using multiple methods and venues, such as those recommended by the commenter.

Changes: None.

Section 200.39 Responsibilities Resulting From Identification for School Improvement

Comment: A number of commenters expressed support for the Department's proposed amendments to § 200.39(c), which would require LEAs to post on their Web sites information on the number of students who were eligible for and the number of students who participated in Title I public school choice and SES, a list of the SES providers approved by the State to serve the LEA and the locations where services are provided, and a list of available schools for the current school year to which eligible students may transfer. One commenter stated, however, that, although the requirements in § 200.39(c) are not unreasonable, the commenter doubted that these requirements would lead to an increase in participation for public school choice and SES.

Discussion: The National Assessment of Title I (NATI) report (2007) and information from the Department's monitoring and outreach visits show that parents are more likely to be aware of and take advantage of Title I public school choice and SES options when they hear about their options from more than one source.[16] For this reason, the Department believes that expanding the mediums through which parents receive information on their public school choice and SES options will make it more likely that parents know about, understand, and take advantage of their options.

Changes: None.

Comment: A number of commenters stated that it would be difficult for LEAs to maintain an up-to-date list of SES providers and their locations, because this information changes over the course of a school year. One of these commenters raised similar concerns about keeping track of available public school choice options, which may change due to shifting enrollment and other factors. Precisely because the availability of SES providers can change throughout the year, another commenter recommended requiring LEAs to update their Web sites on an ongoing basis.

Two commenters recommended requiring LEAs to post the information no later than 30 days following the end of the previous school year. Another commenter stated that, while LEAs should be able to report information about SES providers at the beginning of a school year, data on the number of students who participate in SES would not be available until the end of the school year.

Discussion: The Department recognizes that information on SES providers may change during the school year; indeed, the primary reason we proposed § 200.39(c) was because Web sites can be easily updated with the most current information. However, we understand the administrative

[15] *Id.*

[16] Stullich, S., Eisner, E., & McCrary, J. (2007). *National Assessment of Title I: Final Report, Volume I: Implementation.* Washington, DC: National Center for Education Evaluation and Regional Assistance, Institute of Education Sciences, U.S. Department of Education.

challenges of continuously updating data on public school choice options and SES providers. Therefore, we have revised § 200.39(c)(1) to require LEAs to post the information required in § 200.39(c) in a timely manner to ensure that parents have current information on their public school choice and SES options. In addition, LEAs might request that SES providers submit regular updates about their locations to facilitate making useful and timely information available to parents.

Changes: Section 200.39(c)(1) has been revised to clarify that an LEA must post the information regarding choice and SES on its Web site ''in a timely manner to ensure that parents have current information.''

Comment: A number of commenters expressed concern that the requirements in § 200.39(c) would increase the reporting and administrative burden for schools and LEAs. Several commenters suggested that one way to alleviate the burden would be to permit an SEA to post the required information on its Web site and for LEAs to create appropriate links on their Web sites to their SEA's Web site.

One commenter recommended that, in addition to the information in proposed § 200.39(c), LEAs should be required to display on their Web sites information on the number of applications for SES, the number of students placed with SES providers, the number of students currently served by SES providers, and the number of students served by each SES provider.

Discussion: The Secretary does not agree that the requirements in proposed § 200.39(c) will add substantially to LEAs' reporting and administrative requirements. As indicated in the *Summary of Costs and Benefits* section, we estimate that it would take an LEA an average of 25 hours to prepare the information for its Web site. LEAs already report student eligibility and participation data on public school choice and SES to their States for inclusion in State reports to the Secretary. Additionally, under § 200.37(b)(4) and (b)(5), LEAs must provide information on SES providers and public school choice options to parents through written notifications. Therefore, although the requirement for LEAs to display this information on their Web sites is new, LEAs already are required to collect and report these data, which will minimize the administrative burden of the new requirements.

With regard to requiring LEAs to include additional SES data on their Web sites (e.g., the number of applications for SES, the number of students placed with SES providers, and the number of students served by each SES provider), LEAs would have to collect new data. We believe that requiring LEAs to collect and report these new data would add burden on LEAs with little added benefit for parents. Therefore, we decline to require LEAs to report on the additional data recommended by the commenter.

Finally, although some SEAs may display information on public school choice and SES on their Web sites, such information may not be easily accessible to parents seeking information about their own LEA. SEA Web sites typically include information about education at all levels across a State. As a result, many of these sites can be difficult to navigate. LEA Web sites, by contrast, generally are less complex and easier to navigate. In addition, parents are more likely to be familiar with LEA Web sites than SEA Web sites and are more likely to visit the former in order to obtain local school information (e.g., school menus, events calendars). Because the goal of § 200.39(c) is to make information about local Title I public school choice and SES options accessible to parents and other interested parties, we believe this information should be displayed directly on LEA Web sites. Therefore, we decline to permit LEAs to meet the requirements in § 200.39(c) by providing a link to the information on SEA Web sites.

Changes: None.

Comment: One commenter observed that many LEAs, particularly small, rural LEAs, do not have Web sites and asked whether these LEAs would be required to establish and maintain a Web site to comply with § 200.39(c). The commenter added that many of these same LEAs are not able to provide either public school choice or SES to their students and, thus, would have little or none of the information that § 200.39(c) would require them to post on their Web sites, even if they had one. Another commenter recommended that LEAs without Web sites be permitted to communicate the information required in § 200.39(c) through other means.

Discussion: The requirements in § 200.39(c) do not apply to LEAs that do not have to provide public school choice or SES options to their students, either because they do not have any schools identified for improvement, corrective action, or restructuring or because they are unable to provide such options due to a lack of available public school choice options or SES providers. However, for LEAs that provide public school choice and SES options to their eligible students, but do not have their own Web sites, we believe it would be appropriate and reasonable to require the SEA to display the LEA data required in § 200.39(c) on the SEA's Web site and have made this change in the regulations.

Changes: A new paragraph (c)(2) has been added to § 200.39, which provides that if an LEA does not have its own Web site, the SEA must include on the SEA's Web site the required information for the LEA.

Comment: One commenter asked the Department to clarify the requirement in proposed § 200.39(c)(1)(iii) that LEAs post on their Web sites information on the locations where SES services are provided. The commenter asked whether LEAs must post the specific addresses where services are provided or if they may post more general information about the types of locations where services are provided. The commenter noted that the location of services may change as locations are added to accommodate increasing SES enrollment. The commenter also expressed concern that the list of available schools offered as Title I public school choice options could be confusing to parents if, as is typically the case, their actual choices are limited to a few schools and not all schools on the list.

Discussion: Our rationale for requiring LEAs to post certain information related to public school choice and SES on their Web sites is to ensure that current information is readily available to interested parents. For this reason, the list of approved SES providers on LEA Web sites should include the most current information available, including the address or addresses where services are offered. The Department recognizes that requiring LEAs to update their Web sites continuously as provider information changes would be administratively burdensome and, as noted earlier, has revised the regulations to require in new § 200.39(c)(1) the posting of the information required in a timely manner to ensure that parents have current information.

In addition, we encourage LEAs to include, in their list of public school transfer options, any explanatory material necessary to ensure that parents understand the school choices available to their child.

Changes: As noted previously, § 200.39(c)(1) has been revised to clarify that an LEA must post the information required for choice and SES on its Web site in a timely manner to ensure that parents have current information.

Comment: Several commenters recommended requiring LEAs to post the information on public school choice and SES required in proposed

§ 200.39(c) on their Web sites in languages other than English. One commenter recommended requiring LEAs to post the information in any language spoken by any significant number of LEP parents. Two commenters also recommended requiring LEAs to make this information available in print, including in languages other than English, and to ensure that this information is sent home to parents.

Discussion: We decline to adopt the commenters' suggestion to require an LEA to post the information required in § 200.39(c) in languages other than English. We note that the notice requirements in § 200.37 are the primary means through which LEAs provide written notification to parents of the Title I public school choice and SES options for their eligible children. Section 200.36 requires that such notification be provided directly to parents, by such means as the U.S. mail, and, to the extent practicable, in a language that parents can understand. We believe that many LEAs serving large numbers of LEP students and their families provide notices and other materials for parents in multiple languages and will likely do the same in complying with § 200.39(c).

The purpose of § 200.39(c) is to ensure that, in addition to the written notification already required, LEAs make such information widely and publicly available by posting it on their Web sites. The Secretary believes that, to require home delivery of the information required in § 200.39(c) would be overly burdensome for LEAs. Again, the primary vehicle for informing parents of their options—the notice required in § 200.37(b)(4) and (5)—already must be provided directly to parents by such means as the U.S. mail.

Changes: None.

Comment: Two commenters expressed concern that LEA Web sites are not easily accessible to parents and individuals, particularly those from low-income families, seeking information about public school choice and SES options.

Discussion: The Secretary recognizes that not every family, particularly those with low incomes, has a personal computer with Internet access in the home. However, the number of families with Internet access is growing as the cost of both personal computers and Internet access continues to decline. In addition, libraries and community centers typically make available to the public, at no charge, computers connected to the Internet, and many of these facilities maintain evening and weekend hours that are convenient for working parents. Also, although LEAs have the flexibility to use a variety of strategies to notify parents, ranging from written materials delivered by mail or sent home with students, to newspaper announcements, enrollment fairs, or open houses, each of these strategies has the disadvantage of being a ''one-time only'' notification event, potentially making it difficult for a parent who missed the event to obtain the desired information. The Secretary believes that § 200.39(c) provides an additional, low-cost method of informing parents that has the advantage of making information about public school choice and SES options readily available to parents on an ongoing basis.

Changes: None.

Comment: One commenter asserted that the requirements in § 200.39(c) do not go far enough, and that posting information on LEA Web sites is not sufficient to ensure that parents and students receive the information they need in a timely manner. This commenter recommended that LEAs provide additional support to help low-income families learn about the educational options for their children.

Discussion: The final regulations, in their entirety, reflect the Secretary's strong agreement that multiple avenues of communication are needed to ensure that all parents of eligible students receive timely information that gives them a genuine opportunity to make an informed choice when selecting from available public school choice and SES options. For example, in addition to the new requirements in § 200.39(c), the final regulations in new § 200.48(d)(2)(i)(A) (proposed § 200.48(d)(1)(i)) require LEAs, before using unspent choice-related transportation and SES funds for other allowable activities, to partner with outside groups, such as faith-based organizations, other community-based organizations, and business groups to help inform parents of their public school choice and SES options. Another criterion for effective implementation of SES in new § 200.48(d)(2)(i)(B)(*2*) (proposed § 200.48(d)(1)(ii)(B)) is ensuring that sign-up forms for SES ''are distributed directly to all eligible students and their parents and are made widely available and accessible through broad means of dissemination, such as the Internet, other media, and communications through public agencies serving eligible students and their families.'' Finally, the requirement in § 200.37(b)(4)(iv) that LEAs notify the parents of eligible students of their Title I public school choice options at least 14 calendar days before the start of the school year will help ensure that the parents of eligible low-income students also have sufficient time to make an informed decision about transferring their children to another public school. The Department believes that all of these provisions, in combination, go a long way toward providing the ''additional support to help low-income families learn about the educational options for their children,'' as recommended by the commenter, and declines to regulate further in this area.

Changes: None.

Comment: A number of commenters recommended requiring LEAs to include on their Web sites the names of SES providers that have been removed from the lists of approved providers in other States. Two commenters also recommended requiring LEAs to identify SES providers that evaluations have shown to be effective, as well as SES providers that do not serve LEP students or students with disabilities. Other commenters recommended requiring LEAs to post information on whether providers are able to serve LEP students and students with disabilities.

Discussion: Section 200.47(b)(3) requires an SEA, in approving SES providers, to consider information from a provider on whether the provider has been removed from any State's approved provider list, as well as evaluation results, if any, demonstrating that the provider's instructional program has improved student achievement. The SEA must also determine that the prospective provider has a demonstrated record of effectiveness in increasing the academic achievement of students. Thus, it is an SEA's responsibility to consider this information in approving prospective providers. Once an SEA has made a decision to approve a provider, we do not believe this information is pertinent to LEAs.

As we noted in our discussion of § 200.37, we agree that it is important for parents to know which SES providers are able to serve students with disabilities or LEP students. Accordingly, we have added a requirement in § 200.37(b)(5)(ii)(B) and § 200.47(a)(3)(ii) that an LEA and SEA, respectively, indicate on its list of approved SES providers those providers that are able to serve these students.

Changes: Sections 200.37(b)(5)(ii)(B) and 200.47(a)(3)(ii) have been revised to require an LEA and SEA, respectively to indicate on its list of approved SES providers those providers that are able to serve students with disabilities or LEP students.

Comment: Two commenters expressed concern that the public school choice and SES participation

information that LEAs will be required to post on their Web sites under § 200.39(c) could be misleading due to the limited funding to support such options.

Discussion: The Secretary agrees that raw participation data may not always be a true measure of an LEA's success in implementing public school choice and SES because, in an LEA with many schools identified for improvement, the number of students eligible for SES and choice may greatly exceed the number that may be served with available funds. However, LEAs are free to explain, along with the participation data required in § 200.39(c), how available funding may affect the number of students transferring to new schools or obtaining SES.

Changes: None.

Comment: Two commenters claimed that public reporting on eligibility and participation in public school choice and SES, as required in § 200.39(c), would be misleading without an explanation of the personal and private factors that influenced parental decision-making.

Discussion: The Secretary believes that information on student eligibility and participation in public school choice and SES are useful both for increasing parental awareness of the availability of these options and for providing a rough measure of how well LEAs are implementing the public school choice and SES requirements. LEAs are free to add an explanation of the factors that they believe contribute to or explain participation rates.

Changes: None.

Comment: Two commenters stated that publicly posting a list of approved SES providers is meaningless because the general public does not participate in SES.

Discussion: It may be true that the general public may not be particularly interested in information about SES providers, but the purpose of § 200.39(c) is to ensure that information on SES providers is broadly disseminated, publicly available, and easily accessible to those who are interested. The Secretary believes it is important to provide these additional sources of information for parents seeking to obtain SES for their eligible children.

Changes: None.

Comment: One commenter expressed concern that posting the names of SES providers on LEA Web sites could be viewed as endorsing the providers, yet LEAs have no way of holding these providers accountable.

Discussion: LEAs are free to provide the information about SES providers in a manner that clearly conveys that no endorsement of individual providers is implied. We disagree that LEAs do not have a way to hold SES providers accountable. Under section 1116(e)(3)(C) of the ESEA, LEAs are responsible for terminating an agreement with an SES provider if the provider fails to meet the goals and timetables in that agreement.

Changes: None.

Comment: A number of commenters recommended requiring LEAs to disaggregate the public school choice and SES data posted on their Web sites by student subgroups, grade level, school, and provider. One commenter recommended requiring LEAs to post the total amount of funding they make available for public school choice and SES, as well as their per-child allocation for SES. Two commenters suggested requiring SEAs to publish the per-child allocations for each LEA, as well as the minimum each LEA must spend on public school choice and SES.

Discussion: The Secretary agrees that such additional information could be useful in identifying specific problems or challenges related to implementing public school choice and SES. However, we believe that requiring LEAs to disaggregate their public school choice and SES data by student subgroup, grade level, school, and provider would require nearly all LEAs and SEAs to change their data collection processes to support disaggregated reporting and, therefore, would be overly burdensome and costly. Therefore, we decline to require LEAs to disaggregate their public school choice and SES data.

In contrast, the amount an LEA must spend on choice-related transportation and SES (an amount equal to at least 20 percent of the LEA's Title I, Part A allocation (the LEA's 20 percent obligation)) and the maximum per-child allocation for SES for each LEA receiving Title I, Part A funds (the LEA's Title I, Part A allocation divided by the number of children in low-income families as determined by the Bureau of the Census) are easily calculated from data the SEA already collects. Posting this information on the SEA's Web site would require adding two columns to the tables that SEAs already prepare showing their final Title I, Part A allocations to LEAs (one column showing 20 percent of each LEA's final allocation and one column dividing the final allocation by the number of students from low-income families in the LEA as determined by the Bureau of the Census). Therefore, because of the minimal burden involved, and because the Secretary believes such information would help give all stakeholders a better understanding of the resources available to support Title I public school choice and SES, we have added a requirement in § 200.47 for each SEA to post on its Web site these amounts for each LEA. However, we believe that making such information available on SEA Web sites is sufficient, and decline to add a similar new requirement for LEAs because it would be unnecessarily duplicative. We also decline to require either SEAs or LEAs to post the statutory minimum allocations for choice-related transportation and SES. The Secretary does not believe that this additional information would be as useful.

Changes: We have added new § 200.47(a)(1)(ii)(B)(*1*) and (*2*) to require each SEA to post on its Web site, for each LEA, the amount that equals 20 percent of the LEA's Title I, Part A allocation that is available for choice-related transportation and SES, as required in § 200.48(a)(2), and the maximum per-child amount available for SES calculated under § 200.48(c)(1).

Comment: One commenter stated that, due to the small number of students participating in public school choice and SES, posting the participation data required in § 200.39(c) on LEA Web sites could disclose personally identifiable information about individual students.

Discussion: When publicly reporting any data, care must be taken not to reveal personally identifiable information about individual students, in accordance with the requirements in FERPA. In the vast majority of LEAs required to comply with § 200.39(c), posting public school choice and SES participation data on their Web sites will likely not reveal such information. In the limited number of cases in which such a violation could occur, LEAs should follow FERPA's requirements to ensure that personally identifiable information is not disclosed.

Changes: None.

Section 200.43 Restructuring

Comment: Several commenters expressed support for the proposed changes in § 200.43, stating that the changes would help schools make AYP and exit restructuring as soon as possible. The commenters agreed with the Department that restructuring is not always being implemented effectively. Many commenters expressed concerns about the general statutory requirements for restructuring. Some stated that the statutory options for alternative governance are not supported by research; some stated that the options are too ''extreme,'' while others stated that the statute takes a ''cookie-cutter'' approach to improvement that is not

appropriate. Other commenters stated that staffing changes should not be made as part of restructuring and school improvement in general.

Some commenters requested that the statutory restructuring requirements not be enforced until the ESEA is reauthorized. One commenter suggested that a school should not enter restructuring unless the percentage of students scoring below proficient in a subgroup exceeds 35 percent of a school's enrollment. Another commenter stated that the restructuring requirements, in particular, and NCLB, in general, are designed to address the problems of schools in urban areas and not rural schools in high-poverty areas because in rural areas access to SES providers is limited, public school choice is not realistic, and private management companies are not interested in managing rural schools.

Discussion: The purpose of the proposed regulations is to clarify the intent of the statute, which is that restructuring must be a significant change in the governance of a school that has not made AYP for five years. General concerns about the school improvement timeline in section 1116 of the ESEA and the specific requirements of restructuring should be addressed through the reauthorization process, not these regulations. We disagree that the statute should not be enforced until the ESEA is reauthorized.

Changes: None.

Comment: Several commenters asked the Department to improve its monitoring of States' implementation of the restructuring requirements. One commenter specifically suggested that the Department monitor and enforce the provisions of the ESEA requiring parent involvement in the restructuring process.

Discussion: The Secretary agrees with the commenters that monitoring is critical to ensuring that the restructuring requirements are implemented effectively and that parents should be involved in the restructuring process. The Department's monitoring protocol requires States to provide evidence of how they ensure that LEAs carry out their responsibilities for schools in improvement, corrective action, and restructuring. In preparation for the current monitoring cycle, the Department strengthened its monitoring of restructuring implementation by placing greater emphasis on how statewide systems of support and LEAs work with schools to determine the restructuring option that will be implemented by each LEA. The Department also added LEAs to its on-site monitoring to specifically examine the implementation of parental involvement requirements, including how parents are involved in corrective action and restructuring efforts.

Changes: None.

Comment: Two commenters stated that the proposed changes to § 200.43 exceed the Department's legal authority and should instead be left to Congress to address during the reauthorization of the ESEA. One commenter further stated that the regulations violate section 553(b)(2) of the Administrative Procedure Act.

Discussion: The Secretary believes that the proposed changes to § 200.43 merely clarify the intent of the statute and do not exceed the boundaries of the ESEA. Therefore, they are consistent with the Secretary's rulemaking authority, and do not violate the Administrative Procedure Act.

Changes: None.

Comment: Several commenters recommended that LEAs be required to involve educators, administrators, and parents, at a minimum, in the restructuring planning process.

Discussion: The statute and regulations already require, in section 1116(b)(8)(C) of the ESEA and § 200.43(b)(4), that LEAs provide parents and teachers with an opportunity to comment before the development of a proposed restructuring plan and an opportunity to participate in the development of that plan.

Changes: None.

Comment: Several commenters expressed concerns about the proposed changes in § 200.43(a)(1) and (a)(5) regarding the definition of restructuring. The commenters stated that the proposed regulations in paragraph (a)(1) exceed the statute by requiring ''fundamental reforms'' in instructional programs in addition to alternative governance arrangements. One commenter asserted that the Department misinterpreted the provisions of the ESEA by applying the language in section 1116(b)(8)(v) to the definition of restructuring, noting that it is not appropriate to require instructional reform in addition to alternative governance and staffing changes. Other commenters stated that our proposal in paragraph (a)(5) to require a restructuring plan to ''address the reason for the school's being in restructuring'' was not appropriate because the options for schools under restructuring are alternative governance arrangements, not educational interventions. Other commenters stated that the limited options available under restructuring make it difficult or impossible to address the specific reasons a school has been identified for restructuring.

Discussion: The Secretary disagrees that it is not appropriate to use the term ''fundamental reforms'' in the definition of restructuring. Contrary to the commenter's assumption, the term ''fundamental reforms'' does not imply required changes in instructional programs in addition to changes in governance. Rather, § 200.43(a)(1) provides that restructuring must include a major reorganization of the school's governance arrangement that, among other things, must include fundamental reforms to improve academic achievement in a school that has not made AYP for five years. Clearly, the options in § 200.43(b)(3)(i) through (iv), by definition, meet that standard. An LEA must ensure that, if it restructures a school under § 200.43(b)(3)(v), the restructuring makes fundamental reforms in the governance of the school.

Similarly, we disagree with the commenters who suggested that defining restructuring as needing to ''address the reason for the school's being in restructuring'' is not appropriate because the options for schools under restructuring are alternative governance arrangements, not educational interventions. First, it is unlikely that an LEA would deliberately select a restructuring option that did not best address the reasons the school is in restructuring. Second, and more importantly, it would be imprudent for an LEA to ignore a restructured school's instructional programs. As the Department notes in its 2006 non-regulatory guidance on LEA and school improvement (available at *http://www.ed.gov/policy/elsec/guid/schoolimprovementguid.doc*), ''the restructuring intervention will likely not address all of the identified needs of a school and cannot substitute for a coherent plan for systemic change. The intervention an LEA chooses should be viewed as one strategy in a school's comprehensive plan for improvement.'' The overriding requirement of the statute is that a school in restructuring has the tools to improve achievement, make AYP, and exit restructuring status. Ignoring instruction and curricular issues during restructuring is setting the stage for failure and will not enable the school to improve student achievement and exit restructuring as quickly as possible. The intent of restructuring, in particular, is to make fundamental reforms in the governance of a school—along with improving instructional changes—to provide children in the school with a quality education that enables them to meet State standards; schools and LEAs that merely focus on

doing just enough to comply with the letter of the law will not likely implement strategies that are effective in helping that school.

Changes: None.

Comment: Many commenters expressed concerns regarding proposed § 200.43(a)(4), which would require restructuring interventions to be ''significantly more rigorous and comprehensive'' than those taken as part of corrective action. Many commenters stated that this requirement would weaken the corrective action phase of the school improvement timeline. They argued that, because there is a fair amount of overlap between what is permitted for corrective action and for restructuring, the proposed requirement would discourage LEAs from being proactive and instituting rigorous interventions during corrective action, given that they would have to implement significantly more rigorous interventions if they entered the restructuring phase of school improvement. For example, schools might delay making significant staffing changes until they entered restructuring. Several commenters asked whether a school that made significant staffing changes during the corrective action phase would be required to implement significant staffing changes again in restructuring. The commenters also stated that, under proposed § 200.43(a)(4), schools would have to abandon interventions begun during corrective action before they were able to have any effect and noted that, according to research, significant improvements in academic achievement are unlikely to be observed after one year of implementing a new intervention. Other commenters stated that schools could see improvement after implementing effective interventions during corrective action, but not enough to make AYP. Some commenters stated that the current options available under restructuring would not be permissible under § 200.43(a)(4), which would further limit options for schools and LEAs. Several of these commenters stated that the proposed regulatory language in § 200.43(a)(4) was too vague to be helpful and questioned how the phrase ''significantly more rigorous and comprehensive'' would be defined. One commenter stated that the use of the term ''rigorous'' might lead to a focus on consequences and punishments rather than data-driven and research-based interventions.

Discussion: The Secretary appreciates the concerns of commenters who do not want the Department to create incentives for LEAs to weaken corrective actions or delay significant staffing changes or other restructuring options. The purpose of proposed § 200.43(a)(4) was not to add a new requirement, but to clarify the intent of the statute. By the time a school has not made AYP for six years, section 1116(b)(8) of the ESEA requires schools to implement alternative governance arrangements or significant staffing changes. States and LEAs are free to implement these changes on an earlier timeline. Furthermore, it was not our intent, in proposing § 200.43(a)(4), that schools abandon actions undertaken during corrective action before they have had a chance to take effect. If a school implements significant staffing changes, or takes other actions that meet the requirements for restructuring during corrective action, the Secretary agrees that the school should not be required to take further action when it enters restructuring. Further, when an LEA implements corrective actions that appear to be promising in improving student achievement, those actions or interventions should be continued as part of the restructuring plan. Restructuring should build on the previous efforts implemented to turn around a school during any phase of the school improvement process. If previous efforts do not appear to hold promise of improving student achievement, however, the LEA may need to take an altogether different approach during restructuring.

We have revised § 200.43(a)(4) to clarify that, if an LEA implements a restructuring action that meets the requirements in § 200.43(b) during corrective action, the LEA does not need to implement a significantly more rigorous and comprehensive reform once the school is in restructuring status. In such cases, the LEA should closely examine the school's achievement data to ensure that the interventions implemented during corrective action are having a positive effect on student achievement, and make adjustments as necessary.

We also recognize that there are many reasons that schools may be identified for restructuring and that some schools will need more significant changes than others. Restructuring should not be a ''one-size-fits-all'' response; rather, schools and LEAs should consider new approaches to professional development of teachers, instruction, and effective organization and management of instruction. We expect that the progression in interventions will look different depending on the reasons for a school entering restructuring.

Changes: We have revised § 200.43(a)(4) to provide that the restructuring must be significantly more rigorous and comprehensive than the corrective action implemented by the LEA unless the school has begun to implement one of the other restructuring options in § 200.43(b) as a corrective action.

Comment: One commenter recommended that the regulations require schools in restructuring to develop plans that include multiple components and not to rely on one approach alone to turn around a school.

Discussion: The Secretary agrees that it is important that there be multiple strategies in a restructuring plan. We believe that the language in § 200.43(a)(5), as well as the provisions in § 200.43(b)(3)(v), will help ensure that an LEA takes a comprehensive approach when developing a school's restructuring plan.

Changes: None.

Comment: One commenter stated that the proposed regulations are not based on scientific evidence. Several commenters recommended that the only restructuring options that should be available to schools and LEAs are those based on scientific evidence. Another commenter recommended that an LEA be required to provide evidence that the selected interventions are effective at addressing the reasons a school has been identified for improvement. Other commenters stated that the Department should provide more technical assistance and disseminate information on research-based practices for restructuring.

Discussion: There is a tremendous need for technical assistance on research-based practices for restructuring, as well as more research on effective methods of turning around low-performing schools. To assist States and LEAs in their efforts, IES' What Works Clearinghouse released a practice guide in May 2008 entitled *Turning Around Chronically Low Performing Schools*. This guide is available online at *http://ies.ed.gov/ncee/wwc/pdf/practiceguides/20072003.pdf*.

In addition, the National Center for Education Research (NCER) is currently designing a study to identify promising models for turning around chronically low-performing schools and to provide multiple design options for rigorously evaluating the identified schools' restructuring programs. The results of this study will help inform the field, as well as policy makers, as to what strategies are most effective in turning around low-performing schools.

The Department's Comprehensive Centers are also available to provide assistance to low-performing schools and LEAs. The centers provide technical

assistance and research findings to States on approaches to turning around school performance. The Center on Innovation and Improvement in particular focuses its work on school improvement and restructuring (*see http://www.centerii.org/*).

We disagree with commenters that the absence of research should obviate the responsibility of States and LEAs to implement any restructuring requirements. Although we recognize the importance of such research and are investing in an evaluation of restructuring approaches, we believe that students in persistently low-performing schools cannot wait for research to be completed before significant actions are taken to turn around their schools.

Changes: None.

Comment: Many commenters objected to proposed § 200.43(b)(3)(ii) and (v), which state that significant staffing changes ''may include, but may not be limited to, replacing the principal.'' These commenters argued that, in many cases, replacing the principal might be the best option and that, with effective leadership, existing school staff may be able to turn around a low-performing school. Several commenters stated that there is more research supporting the efficacy of principal replacement than there is supporting the efficacy of other significant staffing changes. One commenter noted that IES' recent practice guide, *Turning Around Chronically Low Performing Schools*, highlights evidence on the effectiveness of principal replacement and leadership change as a means of turning around chronically low-performing schools. Some commenters argued that States and LEAs need the flexibility to tailor restructuring to the needs of the school in order to implement meaningful interventions and to differentiate consequences; they asserted that the Department has no basis for restricting restructuring in this manner. One commenter stated that proposed § 200.43(b)(3)(ii) and (v) are inconsistent with the principles of the Department's differentiated accountability pilot, which recognizes that there is a need to give States more flexibility in shaping school interventions.

Discussion: The Department agrees that, for some schools, the only staffing change that may be necessary is replacing the principal. Our intent in proposing § 200.43(b)(3)(v) was to ensure that a school does not simply replace the principal, without also implementing other reforms. For the restructuring option in § 200.43(b)(3)(ii), however, we do not believe that a school could simply replace the principal and meet the requirement to replace ''all or most of the school staff (which may include the principal),'' since that restructuring option is focused on staff replacement, including but clearly not limited to the principal, as the primary means of turning around a school.

Section 200.43(b)(3)(v) provides schools with the flexibility to develop different strategies for implementing alternative governance arrangements. Staffing changes may be a part of that approach, and only replacing the principal would be permissible, so long as that is *not* the *only* change that the school implements as part of its restructuring plan. We have, therefore, revised proposed § 200.43(b)(3)(v) to clarify that the major restructuring of a school's governance may include replacing the principal so long as this change is part of a broader reform effort.

Changes: We have removed the parenthetical ''(which may include but not be limited to, replacing the principal)'' in § 200.43(b)(3)(v) and revised the sentence to provide that major restructuring of a school's governance may include replacing the principal, so long as this change is part of a broader reform effort.

Comment: One commenter suggested that the Department establish a new restructuring option that would allow States to meet the restructuring requirements if they create community schools, which could include a variety of components such as an extended school day and year, health and social services, local government partnerships, and coordination with the juvenile justice system.

Discussion: LEAs might incorporate some elements of the concept of ''community schools'' in a restructuring plan, so long as the totality of the restructuring plan meets the regulatory definition and requirements for restructuring in § 200.43.

Changes: None.

Section 200.44 Public School Choice

Comment: Two commenters suggested that proposed § 200.44(a)(2)(i), which would allow an LEA to offer public school choice as late as the first day of the school year, conflicts with the 14-day notification requirement in § 200.37(b)(4)(iv), which was referenced in proposed § 200.44(a)(2)(ii).

Discussion: As we noted in our discussion of § 200.37, we have modified the language in § 200.44(a)(2) to clarify that an LEA must offer, through the notice required in § 200.37, all students eligible for public school choice the option to transfer to another public school. Consistent with § 200.37(b)(4)(iv), this notice must be made sufficiently in advance of, and not later than 14 calendar days before, the start of the school year so that parents have adequate time to exercise their public school choice option before the school year begins.

Changes: We have revised § 200.44(a)(2) to clarify that an LEA must offer public school choice, through the notice required in § 200.37, so that a student may transfer in the school year following the school year in which the LEA administered the assessments that resulted in the identification of the student's school for improvement, corrective action, or restructuring.

Section 200.47 SEA Responsibilities for Supplemental Educational Services

General

Comment: A number of commenters expressed support for one or more of the proposed amendments in § 200.47 regarding SEA monitoring of LEA implementation of SES requirements and State approval and monitoring of SES providers. Some commenters stated that the new requirements would hold SEAs and LEAs accountable for providing a more open process to approve qualified SES providers. One commenter stated that the requirements would provide the public with better information on the effectiveness of tutoring in increasing student achievement and on the compliance of LEAs and providers with SES implementation requirements. However, some commenters expressed concern about the potential costs of implementing the proposed regulations and argued that SEAs would need to divert resources from services to students (or from providing technical assistance to schools and LEAs in improvement status) in order to pay for monitoring the implementation of SES unless Congress appropriates more funds. These commenters expressed concern that SEAs with limited staff and resources will not be able to meet the requirements in § 200.47. A few commenters requested that Congress provide funds to implement the requirements in § 200.47 before the regulations become effective. One commenter suggested that the requirements in § 200.47 be structured as mandates for providers, rather than for SEAs, so as not to establish unfunded mandates on SEAs.

Discussion: The Secretary believes that any additional costs for implementing the requirements in § 200.47 for approving and monitoring providers will be minimal (as discussed in detail in the *Summary of Costs and*

Benefits section) because States are already required, under section 1116(e)(4)(D) of the ESEA, to develop and implement standards and techniques to monitor the quality and effectiveness of SES and to have a process in place to publicly report on those standards and techniques. The Secretary believes that the regulations in § 200.47 will give more meaning and clarity to this statutory requirement and address concerns, raised during the Department's monitoring, about the inconsistencies across States in their monitoring of SES providers. Likewise, the Secretary does not believe that monitoring LEAs' implementation of SES will add costs because SEAs must already monitor their LEAs' compliance with statutory and regulatory requirements under 34 CFR 80.40.

We do not believe that implementing these regulations will diminish the amount of funding available to serve students because SEAs will not support their monitoring efforts with funds that would otherwise be distributed to LEAs and used for services to students. Rather, SEAs will use their State administrative reservations under Title I, Part A to support the strengthened monitoring efforts required by § 200.47. For that same reason, we do not believe the requirements in § 200.47 represent an unfunded mandate. In addition, the Department notes that SES providers serve students; efforts to ensure the quality and effectiveness of approved providers should not be viewed as a diversion of resources from services to students.

Finally, we do not believe it would be appropriate to structure the new regulations as provider mandates rather than as criteria for SEAs' approval and monitoring of providers. As noted earlier, section 1116(e)(4) of the ESEA clearly assigns SEAs responsibility for approving entities to provide SES in a State and for developing, implementing, and publicly reporting on standards and techniques for monitoring the quality and effectiveness of the services offered by approved providers. The regulations merely clarify what it means for SEAs to implement those statutory requirements.

Changes: None.

Monitoring LEAs' Implementation of SES

Comment: One commenter questioned the intent of the requirements related to State monitoring of LEAs' implementation of SES. Another commenter recommended that there be a ''gatekeeper'' at the Federal level to monitor States' compliance with their responsibilities regarding the implementation, management, and enforcement of SES requirements at the local level. Another commenter asked what an SEA must do in order to meet the requirement to develop, implement, and publicly report on the States' standards and techniques for monitoring the quality and effectiveness of the services offered by each SES provider. The commenter asked whether a State could meet the requirements by providing, on its Web site, information on the standards and techniques it uses for monitoring LEAs' implementation of SES, or if the Department expects a State to include this information on report cards or disseminate the information in other ways. Another commenter supported using rigorous and clear criteria when monitoring LEAs' implementation of SES, but did not believe that these criteria should be publicly reported. One commenter stated that SES is well implemented in the commenter's State and that it is not necessary to require that SEAs monitor LEA implementation, as proposed in § 200.47(a)(4)(iii).

Discussion: The Secretary believes it is necessary for States to report publicly on the criteria they use to monitor LEAs in order to ensure that all parties involved in SES—including SEAs, LEAs, schools, parents, and providers—understand and are aware of these criteria. The Department already includes SES implementation in its regular monitoring of Title I programs and, therefore, there is no need for an additional ''gatekeeper'' at the Federal level to monitor SES implementation, as suggested by one commenter.

A State's criteria for monitoring LEAs' implementation of SES should ensure that LEAs meet the requirements in section 1116(e) of the ESEA and § 200.46. We believe that States should have the flexibility to determine how best to share this information with the public, which may include, among other methods, posting the information on a State's Web site.

While many LEAs may be implementing SES requirements effectively, we do not believe that this is uniformly the case in all States. As we stated in the preamble to the NPRM, we believe that requiring States to develop, implement, and publicly report on the criteria they use to monitor LEAs' implementation of SES will help ensure that all SEAs set rigorous and clear expectations for their LEAs, which, in turn, will lead to more effective implementation of SES.

Changes: None.

Comment: Some commenters suggested that the Department require States to take additional actions to monitor LEAs' implementation of SES. One commenter recommended requiring States to report to the public and the Department on whether LEAs: (1) Develop agreements with providers that include specific student achievement goals, progress measures, and timelines for achieving the goals; and (2) terminate agreements with providers that fail to meet achievement goals and timelines. Another commenter suggested requiring States to conduct focus groups with families eligible for SES in order to gather information on how SES policies are implemented at the local level.

Discussion: An LEA is required under the ESEA to develop student agreements that include a provider's goals and timelines for achieving those goals, and provisions for terminating the agreements if the goals or timelines are not met. Accordingly, an SEA should assess the LEA's compliance with these requirements during the SEA's periodic monitoring. Given these requirements, we believe that requiring States to collect data and report on the agreements that LEAs enter into with each provider would be time consuming and of limited value. Therefore, we decline to require States to report to the public the information recommended by the commenter.

Regarding the recommendation that States conduct focus groups with families to obtain information on SES implementation at the local level, the Secretary believes that parents can provide important information and insights on ways to improve the implementation of SES and encourages States to meet with parents to hear about their experiences with LEA implementation of SES. We believe that States are in the best position, however, to decide how best to obtain feedback from families on LEA implementation practices.

Changes: None.

Approval and Monitoring of SES Providers

Comment: Some commenters stated that the requirements for approving and monitoring SES providers extend beyond the Department's regulatory authority.

Discussion: We do not agree. Section 1116(e)(4)(D) of the ESEA requires SEAs to develop, implement, and publicly report on standards and techniques for monitoring the quality and effectiveness of supplemental educational services. This requirement clearly assigns to SEAs the responsibility to hold SES providers accountable for the quality of the services they provide and the results they achieve, and for withdrawing

approval of providers that are ineffective.

All the requirements in § 200.47(c) are based on the statutory requirements related to the provision of SES. The requirement in § 200.47(c)(1)(i), which requires an SEA to monitor whether a provider's instructional program is consistent with the instruction provided and the content used by the LEA and the SEA, reflects the nearly identical statutory requirement in section 1116(e)(5)(B) of the ESEA. Likewise, the requirement in § 200.47(c)(1)(ii) that SEAs monitor whether a provider's instructional program addresses students' individual academic needs reflects the requirement in section 1116(e)(3)(A) that an LEA develop, in consultation with parents and the provider, a statement of the specific achievement goals the student will achieve through SES. The requirement in § 200.47(c)(1)(iii) that SEAs monitor whether a provider's services are contributing to students' academic proficiency reflects the statutory requirements in sections 1116(e)(4)(D) (withdrawal of approval of providers that do not contribute to increasing the academic proficiency of students served) and 1116(e)(12)(C) (supplementary educational services must be specifically designed to increase the academic achievement of eligible children). Finally, the requirement in § 200.47(c)(1)(iv) that SEAs monitor the alignment of SES with the State's academic content and student academic achievement standards is consistent with the requirement in section 1116(e)(5)(B) of the ESEA. Given the direct statutory authority for each regulatory provision, the Secretary has clearly not exceeded her regulatory authority in section 1901 of the ESEA.

The requirements in § 200.47(c)(2) are conditional, in that they require the information to be considered by an SEA in monitoring approved providers only if such information is available. For example, while results from parent surveys can provide important information about the quality of a provider's services, § 200.47(c)(2)(i) does not require an SEA to conduct a parent survey. Rather, § 200.47(c)(2)(i) requires that an SEA take this information into consideration if such information exists. As a result, these regulatory provisions also do not exceed the Secretary's regulatory authority.

Changes: None.

Comment: One commenter recommended that, instead of monitoring providers for effectiveness, States should monitor for program quality.

Discussion: Section 1116(e)(4)(D) requires an SEA to monitor the ''quality and effectiveness of the services offered by approved providers.'' Thus, the statute requires that an SEA monitor both for effectiveness and program quality. The ultimate measure of a provider's program quality and effectiveness is improved student achievement.

Changes: None.

Comment: One commenter asked whether formal alignment studies must be completed in order for SEAs to comply with § 200.47(b)(2)(ii)(B) and (c)(1)(iv), which require the SEA to ensure that a provider's instructional program is aligned with State academic content and student academic achievement standards. Another commenter recommended amending § 200.47(b)(2)(ii)(B) and (c)(1)(iv) to prohibit States from approving providers that do not make available rigorous evidence of how their instruction and content are aligned with State content and achievement standards.

Discussion: Formal alignment studies are one way for a provider to demonstrate that its instructional program is aligned with State academic content and student academic achievement standards. However, the Secretary believes that States should have discretion in determining the evidence that must be provided to demonstrate that the instruction the provider gives and the content the provider uses are aligned with State academic content and student academic achievement standards. Therefore, we decline to amend § 200.47(b)(2)(ii)(B) and (c)(1)(iv) in the manner recommended by the commenter.

Changes: None.

Comment: One commenter requested clarification of the term ''research-based'' in § 200.47(b)(2)(ii)(C), which provides that, in order for an SEA to include a provider on the State's list of approved SES providers, the provider must agree to ensure that the instruction the provider gives and the content the provider uses are research-based.

Discussion: Section 1116(e)(12)(C)(ii) of the ESEA requires that supplemental educational services be of high quality, research-based, and specifically designed to increase the academic achievement of eligible children on the academic assessments required under section 1111 of the ESEA and enable those children to attain proficiency in meeting the State's academic achievement standards. We believe, after further consideration, that the regulatory language should adhere more closely to the statutory requirement and have made this change in § 200.47(b)(2)(ii)(C). We decline to promulgate a specific regulatory definition of ''research-based,'' as we do not believe there is a single definition that would be appropriate in all circumstances. Rather, we believe that States should have flexibility in implementing the statutory requirement in a manner that reflects their individual circumstances and the variety of studies conducted on the effectiveness of SES programs.

Changes: We have amended § 200.47(b)(2)(ii)(C) to require that a provider agree to ensure that the instruction it provides and the content it uses ''are of high quality, research-based, and specifically designed to increase the academic achievement of eligible children'' in place of the proposed language requiring a provider to agree to ensure that its instruction and content ''are research-based.''

Comment: One commenter supported the changes in § 200.47 and agreed that the effectiveness of SES providers should be monitored more closely, but stated that supplemental educational services should be aligned with students' areas of academic need. The commenter argued that, at times, parents choose providers that offer tutoring in reading, for example, when their child's academic need is in mathematics.

Discussion: The requirements in section 1116(e) and current § 200.46(b)(2) help ensure that supplemental educational services are aligned with students' areas of academic need. Section 200.46(b)(2) requires LEAs to enter into an agreement with each provider selected by a parent and develop, in consultation with the parent and the provider, a statement that includes specific achievement goals for the student, a description of how the student's progress will be measured, and a timetable for improving achievement. LEAs also are required to describe the procedures for regularly informing the student, parents, and teachers of the student's progress and to terminate the agreement if the provider is unable to meet the goals and timetables specified in the agreement (§ 200.46(b)(2)(ii) and (iii)). Ideally, through this agreement, parents and LEAs will develop goals in the areas that best address the student's needs. Ultimately, however, it is the parents' prerogative to select the provider of their choice, even if the provider does not provide services in the area of the student's greatest need.

Changes: None.

Comment: Several commenters opposed, as burdensome and

impractical, proposed § 200.47(c)(1)(i), which would require an SEA to examine evidence that a providers' instructional program is consistent with the instruction provided and the content used by the LEA and SEA. One commenter proposed that a provider's instructional programs address a student's individual needs as described in the student's SES plan.

Discussion: Section 1116(e)(12)(B)(ii) of the ESEA requires a provider to provide SES that is consistent with the instructional program of the LEA and the academic standards of the State. Similarly, section 1116(e)(5)(B) of the ESEA requires a provider to ensure that the instruction it provides and the content it uses are consistent with the instruction provided and content used by the LEA and the State and are aligned with the State's academic achievement standards. Section 200.47(c)(1)(i) merely requires an SEA, during its approval of providers, to ensure that each provider meets these important instructional requirements. Although an SEA cannot guarantee, through its State-level approval process, that a provider's instructional programs address each student's individual needs, an LEA, through its agreement with the provider, can and must do so.

Changes: None.

Comment: One commenter applauded the Department's proposal to require SEAs to consider the results of parent surveys in approving providers and recommended that the regulations provide incentives to ensure that parent recommendations are considered. However, one commenter stated that requiring States to use information from parent recommendations and surveys in approving providers would be inconsistent with the statutory requirement to use objective approval criteria to determine whether a provider has a demonstrated record of effectiveness in increasing the academic proficiency of students. The commenter stated that results from parent surveys are not a valid measure of whether the provider's instructional program increases student achievement and, instead, may reflect parent approval of non-academic benefits of SES. Another commenter questioned the usefulness of parent surveys for making decisions about approving providers and expressed concern that parent surveys are not reliable. One commenter stated that the use of parent surveys is not consistent with other aspects of NCLB in which accountability is defined by students' academic performance. Another commenter stated that parent surveys rely on accurate reporting by providers and asked what the Department would consider to be suitable evidence for satisfying this requirement.

Discussion: The Secretary believes that parents can be objective and reliable sources of information for States to consider in approving providers. Parents have an interest in ensuring that reputable, effective providers are approved by a State and retained on the State's list of approved providers and, thus, it seems unlikely that parents would want a State to approve or retain a provider that did not have a demonstrated record of effectiveness. However, we agree that information from parent surveys would not, by itself, offer complete information on whether a provider's program is successful in raising student achievement. We included this requirement in the regulations because we believe that parent feedback, in addition to evaluation results, is an important source of information, if available, that SEAs should consider in approving and monitoring providers. The requirement that States consider the results from parent surveys, if any, does not mean that this information has to be supplied by a provider. This information could come from other sources. The regulations simply provide that a State must consider parent recommendations or the results of a parent survey regarding the success of a provider's instructional program in increasing student achievement if such recommendations or surveys exist.

Regarding concerns that parent surveys may reflect parent approval of non-academic benefits of SES or be inconsistent with NCLB's focus on student academic performance, § 200.47(b)(3)(ii) and (c)(2)(i) specifically requires that a State consider parent surveys and recommendations (if any) regarding the success of the provider's instructional program in increasing student achievement. We do not believe that the regulations should include incentives to ensure that parent surveys are considered in approving providers. Section 200.47(b)(3)(ii) and (c)(2)(i) clearly states that SEAs must consider parent recommendations or results from parent surveys, if any are available.

With regard to the question of what the Department would consider suitable evidence for satisfying the requirement to consider parent surveys or recommendations, if any, we believe that a State should have the discretion to determine the evidence that is most appropriate and suitable given the manner in which SES is implemented in its LEAs. For example, a State that has providers from small, local community-based organizations might obtain parent recommendations in a manner that differs from a State that has a few large, for-profit providers.

Changes: None.

Comment: One commenter requested clarification regarding § 200.47(b)(3)(iii) and (c)(2)(ii), which would require States, in approving or renewing the approval of a provider, to consider evaluation results, if any, demonstrating that the provider's instructional program has improved student achievement. The commenter suggested defining acceptable evaluations as ones that are conducted by independent researchers using scientifically valid methods. Two commenters asked what it means for a provider to improve student achievement. These commenters recommended that the Department, in order to assist States in meeting their responsibility to monitor providers' effectiveness, establish a definition of improved student achievement and the methods that a State may use to demonstrate such improvement. Another commenter recommended that States consider only objective evaluations of SES providers.

One commenter expressed concern that the monitoring and evaluation of providers could be based on evidence from the provider's own evaluations and feedback from parents, with minimal regard for rigorous, high-quality, and valid evaluations. Several commenters expressed concern that providers would be permitted to use self-reported data to demonstrate effectiveness, rather than results on State assessments. However, one commenter recommended that SEAs be prohibited from taking into consideration student performance on State assessments when they consider whether to continue or withdraw approval of a provider. The commenter stated that the number of hours of service provided through SES is not sufficient to affect student achievement on a State assessment. Another commenter suggested that SEAs establish the minimum number of hours of SES that a student must receive before the student's test scores are included in an evaluation of a provider's effectiveness.

Discussion: It is important to note that, in approving and monitoring SES providers, SEAs must consider evaluation results only if they are available. Moreover, SEAs have considerable latitude in determining the type of evaluation results they will consider. While SEAs should consider only evaluations that they believe have used objective methodologies and should give preference to those that have used scientifically valid methods,

we believe it would be inappropriate for the Department to regulate on the types of evaluation results SEAs may use in determining whether SES providers are successful in raising student achievement.

The requirement to consider evaluation results, if any are available, should not be confused with the requirement to evaluate the quality and effectiveness of each provider. Using evaluation results is one, but by no means the only, way to judge a provider's effectiveness. We agree that the results of student performance on State assessments may not, by themselves, be a complete and satisfactory indicator of the effectiveness of SES. However, nothing in the statute or regulations would prevent a State from considering student performance on a State assessment to evaluate provider effectiveness, or establishing a minimum number of hours of SES to be completed before the student's test scores are included in an evaluation of providers. We believe these decisions are best left to the discretion of each SEA and, therefore, decline to define the specific evaluation methods States may use in evaluating the success of a provider's instructional program in improving student achievement.

Changes: None.

Comment: One commenter expressed concern that requiring providers to ensure that their instruction is research-based and requiring SEAs to consider parent recommendations or results from parent surveys in approving providers would discriminate against new or smaller providers that may not have the experience or resources to provide lengthy analyses to meet these requirements. Another commenter stated that meeting these requirements would be overly burdensome on new SES providers or non-corporate providers.

Discussion: Section 1116(e)(12)(B)(i) of the ESEA requires providers to have a demonstrated record of effectiveness in increasing student academic achievement. In addition, section 1116(e)(12)(C)(ii) requires supplemental educational services to be of high quality and research-based. Therefore, all providers, including new or smaller providers, must ensure that their instruction is of high quality and research-based. However, the Secretary recognizes that new or smaller providers may not have the same data or evaluation results as larger and longstanding providers to demonstrate the success of their instructional programs in improving student achievement. That is why § 200.47(b)(3)(ii) and (iii) and (c)(2)(i) require an SEA to consider parent recommendations or results from parent surveys and evaluation results, *if any are available*.

Changes: None.

Comment: One commenter recommended that the regulations specify that States may not use providers' financial or staffing information in evaluating whether providers have contributed to improving student achievement. Another commenter recommended requiring States to consider the opinions of educators and administrators in making decisions to approve providers.

Discussion: Section 1116(e)(12)(B)(iii) of the ESEA requires providers to be financially sound. Therefore, the Secretary believes it is reasonable for a State to request a provider's financial information in deciding whether to approve the provider, although not when evaluating the effectiveness of a provider's program. However, the Secretary does not believe that additional regulation in this area is needed. With regard to using staffing information to evaluate a provider's program, we believe that information about the qualifications of the individuals hired to provide SES is a reasonable factor that an SEA may want to consider in approving an SES provider although, again, we note that the issue of whether the instructors employed by a provider have adequate qualifications is separate from the issue of whether the provider's program is bringing about higher student achievement. We note that a State may not require a provider, as a condition of approval, to hire only staff who meet the ''highly qualified teacher'' requirements in §§ 200.55 and 200.56, consistent with § 200.47(b)(3).

We agree that input from teachers and administrators, particularly those who have direct experience with providers and who are in a position to assess the effectiveness of their instructional programs, could contribute valuable information to the provider approval process. However, the Secretary believes that SEAs are in the best position to decide on the additional criteria they will use to evaluate a provider's instructional program and, therefore, declines to require all States to consider staffing information or recommendations from teachers and administrators in evaluating a provider's program.

Changes: None.

Comment: One commenter recommended that the Department require SES providers to submit to the SEA records of complaints received by the SES provider, so that the SEA can use those records in considering a provider's approval or renewal. The commenter also recommended that completion rates and other performance indicators be considered when a State is renewing a provider's approval.

Discussion: The Secretary proposed § 200.47(c) in order to specify and clarify the evidence that SEAs must consider, *at a minimum*, in monitoring the effectiveness of a provider's instructional program. States are free to include other criteria that they believe would be useful in evaluating the effectiveness of a provider's program.

Changes: None.

Comment: Two commenters recommended that the regulations require SEAs, in determining whether to approve or renew the approval of a provider, to consider evidence that the provider does not discriminate in its employment practices and agrees to be subject to the same anti-discrimination laws and regulations that apply to recipients of Federal funds.

Discussion: Current § 200.47(b)(2)(iii) already requires an SEA to determine, before it can approve a provider, that the provider meets all applicable Federal, State, and local health, safety, and civil rights laws. The Department has clarified, in its *Supplemental Educational Services Non-Regulatory Guidance* (June 13, 2005), how Federal civil rights laws apply to SES providers (*see* question C–3 in the guidance, which is available at *http://www.ed.gov/policy/elsec/guid/suppsvcsguid.doc*).

Changes: None.

Comment: Some commenters stated that LEAs should have the authority to monitor or ensure the quality of SES providers. Another commenter stated that LEAs should be permitted to terminate contracts with SES providers that fail to adhere to contract provisions or fail to raise student achievement. One commenter recommended that a procedure be established to allow LEAs to file complaints against SES providers.

Discussion: Section 1116(e)(4)(D) of the ESEA clearly gives SEAs the responsibility to monitor the quality and effectiveness of the services offered by approved SES providers and to withdraw approval from providers that fail, for two consecutive years, to contribute to increasing the academic proficiency of the students they serve. We do not have the authority to alter this basic requirement through these regulations. Additionally, the Secretary does not believe it would be advisable to create, through regulations, a separate role for LEAs in monitoring and enforcing SES quality because doing so could result in overlapping monitoring

actions that would unnecessarily complicate accountability for SES. The Secretary does, however, support SEA efforts to involve LEAs in their monitoring efforts, for instance by having LEAs collect and report participation and assessment data to the SEA.

Regarding an LEA's ability to terminate a provider, section 1116(e)(3)(C) of the ESEA permits LEAs to terminate an individual student's agreement with a provider if the provider is unable to meet the goals and timetables in the agreement established with the provider. LEAs may also terminate a contract if the provider violates other provisions in the contract, such as provisions regarding student progress reports, invoicing payment for services, preserving student privacy, and complying with applicable health, safety, and civil rights laws. Further, LEAs may terminate a contract if a provider fails to meet additional administrative or operational terms that may be included in the contract, such as conducting background checks on the provider's employees, provided those terms are reasonable, do not subject the provider to more stringent requirements than apply to other contractors of the LEA, and do not have the effect of inappropriately limiting educational options for students and their parents. However, it is not within an LEA's authority to remove a provider from the approved provider list or to terminate an agreement with a provider for failing to raise student achievement unless the provider has failed to meet the goals and timetables specified in the individual agreement. Only an SEA may withdraw approval of a provider if, for two consecutive years, the provider does not contribute to increasing the academic proficiency of the students it serves (see section 1116(e)(4)(D) of the ESEA).

We decline to adopt the suggestion of one commenter that we establish procedures to allow LEAs to file complaints against SES providers with the SEA. Although it is essential that States facilitate open communication between their LEAs and providers so that disagreements can be resolved quickly and appropriately, we believe that States must have the discretion to establish procedures to receive feedback from their LEAs regarding a provider's actions in delivering SES.

Changes: None.

Comment: One commenter recommended that a national clearinghouse be established to collect and disseminate information on whether a provider has been removed from a State's list of approved providers. Another commenter suggested that the Department maintain a database with this information, as well as information on States' evaluations of the effectiveness of instructional programs provided by SES providers. One commenter stated that it would be difficult for an SEA to know if a provider was removed from another State's list of approved providers and argued that it would be inappropriate for a State to base its decision on another State's data.

Discussion: We decline to adopt the commenter's suggestion that the Federal government establish and maintain a national clearinghouse or database identifying providers that have been removed from States' approved provider lists and the results of any State evaluations of provider instructional programs. Rather, we believe it is sufficient that a provider that seeks approval from a State inform the State whether it has been removed from another State's list of approved providers and include any relevant information regarding such removal. If a State needs additional information or clarification, it may contact the State that removed the provider directly. We note that whether a provider has been removed from another State's list of approved providers is only one of the standards that a State must use in approving or renewing approval of providers under § 200.47(b) and (c).

Changes: None.

Comment: One commenter suggested that a provider be removed from a State's approved provider list if the provider gives false information on whether it has been removed from another State's list of approved providers.

Discussion: The Secretary agrees that there could be cause for removal from a State's approved provider list if a provider makes false claims about its removal from another State's list of approved providers. Ultimately, however, the decision to remove a provider from a State's list of approved providers remains with the State.

Changes: None.

Comment: One commenter recommended that the Secretary require SEAs, in approving SES providers, to: (1) Identify a pool of providers that demonstrate effectiveness in engaging with ''disconnected youth'' and reinforce State standards in developing workforce skills; (2) identify and remove barriers that hinder the approval and participation of local community-based organizations as SES providers; and (3) include specific selection criteria for providers to address workforce and youth development needs.

Discussion: The primary purpose of SES is to increase the academic achievement of eligible students on State assessments and help students attain proficiency in meeting the State's academic achievement standards. A State with a particular need for SES providers to serve eligible disconnected youth could develop and use criteria in addition to the approval criteria in § 200.47(b)(2) and (b)(3) in order to identify a pool of providers that can effectively engage with disconnected youth to help them meet the State's academic achievement standards. However, the Secretary does not believe that all providers should be required to have that particular expertise and declines to establish specific selection criteria related to serving disconnected youth.

The Secretary agrees that it is important to engage community-based organizations in providing SES. Section 1116(e)(4)(A) of the ESEA and § 200.47(a)(1)(i) already require a State to consult with LEAs, parents, teachers, and other interested members of the public in order to promote maximum participation by providers so that parents have as many choices of SES providers as possible. We believe it is extremely important for parents, teachers, and members of the public to encourage and recruit community-based organizations to apply to their State to become approved SES providers. In addition, States should ensure that they create ways to tap this potential pool of SES providers.

Changes: None.

Comment: A number of commenters recommended that the Department require States to approve an adequate number of SES providers who are trained to provide services to students with disabilities, including students with the most significant cognitive disabilities and students with low-incidence disabilities (e.g., students with mental retardation, deaf students, students who are blind). Other commenters recommended that all approved providers be required to serve students with disabilities and LEP students. Similarly, some commenters recommended that a provider's instruction and content be appropriate for and accessible to all students, including students with disabilities and LEP students. One commenter recommended adding a requirement that States consider, as part of their approval process, the ability of SES providers to provide quality services to LEP students. Some commenters recommended that States be required to indicate, on their lists of approved

providers, the providers that are trained to serve students with disabilities.

Discussion: Current § 200.47(a)(5) and (a)(6), respectively, requires SEAs to ensure that eligible students with disabilities under the IDEA and students covered under section 504 of the Rehabilitation Act of 1973, as amended (Section 504), receive appropriate supplemental educational services and accommodations in the provision of those services, and that eligible LEP students receive appropriate supplemental educational services and language assistance in the provision of those services. These regulations clearly require SEAs to ensure that an adequate number of providers in the State have the capability to provide services to students with disabilities and LEP students. Moreover, as indicated in the Department's *Supplemental Educational Services Non-Regulatory Guidance* (June 13, 2005), if no provider is able to provide SES to eligible students with disabilities, students covered under Section 504, or LEP students, an LEA would need to provide these services, with necessary accommodations and language assistance, either directly or through a contract (*see* questions C–4 and C–5 in the guidance available at *http://www.ed.gov/policy/elsec/guid/suppsvcsguid.doc*).

SES providers include a wide variety of agencies and organizations, including LEAs, large national operators, and small local organizations that focus on providing SES to particular groups of students. For example, a small community-based organization might have particular expertise in serving LEP students in one specific language group; another might focus on students with a specific disability. Requiring all prospective providers to serve students with the full range of disabilities or students with the full range of second-language needs would undoubtedly result in disqualifying many potentially effective providers from the program. Therefore, we decline to require that all providers be able to serve students with disabilities and LEP students.

As we noted in the discussion of the comments on § 200.37, the Secretary agrees that State and LEA lists of approved providers should include information on providers who serve students with disabilities and providers who serve LEP students. We, therefore, have added language to § 200.37(b)(5)(ii)(B) and § 200.47(a)(3)(ii) to make this clear.

Changes: As noted previously, we have revised § 200.37(b)(5)(ii)(B) and § 200.47(a)(3)(ii) to require LEAs and States, respectively, to indicate on the list of approved SES providers those providers that are able to serve students with disabilities or LEP students.

Comment: One commenter recommended that States be required to monitor providers' data and performance with students with disabilities and LEP students. Another commenter suggested that, as part of a State's monitoring of providers, the State should be required to consider the effectiveness of SES providers in serving LEP students.

Discussion: Section 1116(e)(4)(D) of the ESEA is clear that the SEA is responsible for monitoring the quality and effectiveness of the services offered by approved providers. A provider that serves students with disabilities or LEP students should be monitored by the SEA in the same manner as the SEA monitors other providers.

Changes: None.

Section 200.48 Funding for Choice-Related Transportation and Supplemental Educational Services

Section 200.48(a) Costs for Outreach and Assistance to Parents

Comment: Several commenters supported proposed § 200.48(a)(2)(iii)(C), which would allow an LEA to count its costs for parent outreach and assistance toward the requirement to spend an amount equal to at least 20 percent of the LEA's Title I, Part A allocation on choice-related transportation and SES (the ''20 percent obligation''). This change would permit an LEA to allocate up to 0.2 percent of its Title I, Part A allocation, (i.e., 1.0 percent of the 20 percent obligation), in that manner (the 0.2 percent cap). However, other commenters objected to this proposal. One commenter stated that this provision would increase the procedural ''hoops'' through which LEAs must jump and dilute needed classroom services. Similarly, another commenter stated that the provision would ''tie the hands'' of LEAs in their expenditure of local dollars.

Discussion: The commenters objecting to the new flexibility to count parent outreach and assistance funds toward meeting the 20 percent obligation appear to have misunderstood the proposal. The new regulation would not create any new procedural requirements for LEAs or tie their hands in spending funds; rather, § 200.48(a)(2)(iii)(C) provides additional flexibility that should make it easier for LEAs to finance the provision of outreach and other assistance to parents to help them take advantage of their Title I public school choice and SES options. Although LEAs should already be undertaking parent outreach activities and providing parent assistance related to public school choice and SES, LEAs' inability to count the cost of those activities toward meeting the 20 percent obligation may have limited the extent of that outreach. Section 200.48(a)(2)(iii)(C) should encourage LEAs to provide needed outreach and assistance to parents and may also make it easier for LEAs to meet their 20 percent obligation.

Changes: None.

Comment: A number of commenters expressed concern that the 0.2 percent cap on parent outreach and assistance would be insufficient for LEAs to engage in significant outreach activities. Other commenters stated that the 0.2 percent cap should not be limited to outreach expenses and recommended that the final regulations allow other administrative expenses to count toward meeting the 20 percent obligation. The commenters also suggested that such expenses be subject to a larger cap or not be capped at all.

Discussion: In order to increase participation in public school choice and SES, the Secretary believes that LEAs need to devote sufficient effort to notifying parents of available public school choice and SES options. The Secretary proposed to permit LEAs to count a portion of their public school choice and SES outreach expenses toward meeting the 20 percent obligation in order to ensure that LEAs provide parents the information they need to make the best, most informed decisions for their children. This amount is capped at 0.2 percent of an LEA's Title I, Part A allocation. The Secretary believes that this amount is sufficient to support meaningful outreach activities in many LEAs. We believe that expanding the size of the cap or extending it to cover other administrative expenses related to public school choice and SES might lead to a reduction in the number of students who could take advantage of these options. Therefore, we decline to allow other administrative expenses to count toward meeting the 20 percent obligation or to permit no cap or a higher cap. Moreover, LEAs already have great flexibility in the use of their Title I, Part A allocations to administer all aspects of their local Title I programs.

Changes: None.

Comment: Two commenters recommended that transportation be provided to children who enroll in SES and that LEAs be allowed to count the costs of that transportation toward meeting the 20 percent obligation.

Discussion: Although section 1116(b)(9) of the ESEA requires LEAs to provide transportation or pay for the cost of transportation for students taking advantage of the public school choice option under Part A of Title I, it does not include a similar requirement with respect to SES. In addition, current § 200.48(a)(2)(iii)(B) does not allow an LEA to include transportation costs for SES to count toward meeting the 20 percent obligation. The Secretary believes that funds made available for SES should be used to pay for actual services and not transportation costs. We, therefore, decline to make the changes requested by the commenter.

Changes: None.

Comment: One commenter supported the proposal allowing LEAs to count funds used for parent outreach toward meeting the 20 percent obligation but suggested that the Department publish a list of allowable uses of those funds. The commenter also expressed opposition to any provision requiring States to track and report LEAs' use of outreach funds. Another commenter recommended that the final regulations require LEAs to prepare a plan detailing and justifying the use of the funds for parent outreach and assistance.

Discussion: The Secretary believes that LEAs are in the best position to determine the most effective means of providing parent outreach and assistance related to public school choice and SES. Therefore, we do not believe that it is necessary to specify in the regulations the types of parent outreach and assistance activities that LEAs may implement with funds counted toward meeting the 20 percent obligation under § 200.48(a)(2)(iii)(C). We believe it is best left to LEAs to determine the methods of outreach and assistance that meet the needs of the parents and students they serve. We also believe that a requirement for LEAs to prepare a detailed plan for the use of the outreach funds would create unnecessary burden without sufficient corresponding benefit.

The Department notes that Title I, Part A funds expended to meet the 20 percent obligation, like other Title I, Part A funds, would be auditable expenses and that LEAs should account for them as they would other Federal funds. The Department is not, at this time, intending to collect data on the use of these funds.

Changes: None.

Section 200.48(d) 20 Percent Obligation

Comment: A number of commenters supported proposed § 200.48(d)(1), which would have required an LEA, before using unspent funds from its 20 percent obligation for other purposes, to demonstrate to the SEA success in meeting the following criteria:

(a) Partnering with community-based organizations or other groups to help inform eligible students and their families of the opportunities to transfer or to receive supplemental educational services;

(b) Ensuring that eligible students and their parents had a genuine opportunity to sign up to transfer or to obtain SES, including by—

(i) Providing timely, accurate notice as required in §§ 200.36 and 200.37;

(ii) Ensuring that sign-up forms for SES are distributed directly to all eligible students and their parents and are made widely available and accessible through broad means of dissemination, such as the Internet, other media, and communications through public agencies serving eligible students and their families; and

(iii) Allowing eligible students to sign up to receive SES throughout the school year; and

(c) Ensuring that eligible SES providers are given access to school facilities, using a fair, open, and objective process, on the same basis and terms as are available to other groups that seek access to school facilities.

Other commenters opposed the proposed regulations. Some commenters asserted that the changes in proposed § 200.48(d) were inconsistent with the statute and that the Secretary does not have the authority to require LEAs to carry over unexpended public school choice and SES funds.

Discussion: The Secretary believes that the regulations are fully consistent with section 1116(b)(10) of the ESEA, which requires an LEA to spend, each year, an amount equal to at least 20 percent of its Title I, Part A allocation for choice-related transportation and SES unless a lesser amount is needed to satisfy all demand. Thus, unless an LEA has met all demand, this statutory obligation continues to exist, and the LEA must fulfill its obligation in the subsequent fiscal year. This is true with respect to any statutory set-aside requirement. For example, section 1118(a)(3) of the ESEA requires an LEA to reserve not less than one percent of its Title I, Part A allocation each year for parent involvement activities. If an LEA does not spend the full one percent for parent involvement activities in the year for which its Part A allocation was appropriated, the LEA must spend the unspent portion in the subsequent year for parent involvement activities, in addition to meeting its statutory obligation for that subsequent year. There are two differences, however, between most set-aside requirements and the 20 percent obligation: (1) The 20 percent obligation need not be met with Title I, Part A funds; and (2) the 20 percent obligation is dependent on demand, which may, in fact, result in an LEA spending less than the full statutory amount if it has met all demand for choice-related transportation and SES. We proposed the criteria in § 200.48(d)(1) (new § 200.48(d)(2)(i)) to encourage LEAs to devote sufficient effort to ensuring they have met the demand for public school choice and SES by notifying parents of their available public school choice and SES options and to making SES conveniently available in order to afford parents a genuine opportunity to participate. We believe the Secretary has the authority to make these changes under section 1901(a) of the ESEA, which authorizes the Secretary to ''issue such regulations as are necessary to reasonably ensure that there is compliance with [Title I].''

Changes: None.

Comment: One commenter objected to the criteria in proposed § 200.48(d)(1) because, according to the commenter, they would decrease LEA flexibility to spend Title I funds on plans that LEAs know will work best for the students in their schools. Other commenters stated that the proposed regulations would result in ''micromanaging'' LEAs and inappropriately blame LEAs for parental decisions not to transfer their child to a new school or obtain SES for their child. One commenter asserted that proposed § 200.48(d) would result in ''favorable treatment'' of Title I public school choice and SES options relative to the ''regular'' Title I program.

Discussion: The Secretary understands the need to balance the demand for SES and public school choice with the desire of LEAs to use all available funds to implement effective Title I programs. However, evidence from a wide range of sources, including participation data reported by States in their Consolidated State Performance Reports, data on participation rates and notification practices from the NATI report, and the Department's monitoring of public school choice and SES notification and enrollment practices, suggests that, in many LEAs across the country, low demand for public school choice and SES is related to poor-quality implementation. The regulations are not intended to prevent LEAs from appropriately using unspent choice-related transportation and SES funds on other allowable activities or to favor one part of Title I over another, but to ensure that, before using these funds for other

purposes, parents of all eligible students are given a genuine opportunity to request a school transfer or sign up to receive SES.

Changes: None.

Comment: One commenter recommended that LEAs that spend an amount equal to at least 10 percent of their Title I, Part A allocations on choice-related transportation and SES should not have to meet the criteria in proposed § 200.48(d)(1).

Discussion: The Department believes it would be inconsistent with the statute to exempt from compliance with the requirements in § 200.48(d) an LEA that spends less than its 20 percent obligation on choice-related transportation and SES. Section 1116(b)(10) of the ESEA clearly requires that an LEA spend an amount equal to at least 20 percent of its Title I, Part A allocation on choice-related transportation and SES unless it has met all demand for public school choice and SES with a lesser amount. Moreover, the purpose of the requirements in § 200.48(d) is not to ensure that an LEA spends any particular proportion of its 20 percent obligation on choice-related transportation and SES, but to promote effective implementation of Title I public school choice and SES options. For example, one LEA meeting all of the criteria in new § 200.48(d)(2)(i) (proposed § 200.48(d)(1)) may experience demand requiring only one-quarter of its 20 percent obligation, while another LEA spending half of its 20 percent obligation, the proportion recommended by the commenter, may well be ignoring significant additional demand for public school choice and SES if it is not meeting the criteria in new § 200.48(d)(2)(i) (proposed § 200.48(d)(1)).

Changes: None.

Comment: Several commenters objected to proposed § 200.48(d) because, according to the commenters, this provision does not take into account situations in which an LEA may have a legitimate reason for either not spending the full 20 percent obligation or not being able to meet one or more of the criteria in proposed § 200.48(d)(1). Some commenters noted, for example, that many rural LEAs are not able to provide public school choice because they have only one school at each grade level and are not able to provide SES because there are so few SES providers in the area. Another commenter provided an example of an LEA that has one school in corrective action and that, even assuming all eligible students took advantage of their public school choice and SES options, would need to spend only one-third of its 20 percent obligation to meet the needs of those students. Yet another commenter offered an example of an LEA that for the past two years has set aside the full 20 percent obligation, over-enrolled students in SES, and then not spent all of its 20 percent obligation due to the failure of particular providers to serve students or to complete services according to the contracted schedule. This commenter objected to being forced to carry over dollars that were not spent because providers did not provide the contracted services. One commenter claimed that States are better positioned than the Department to understand these local circumstances and determine whether LEAs are appropriately implementing the public school choice and SES requirements.

Discussion: The Department believes these commenters are misinterpreting the requirements in § 200.48(d), which would not apply to LEAs that, for legitimate reasons, cannot spend their full 20 percent obligation. In general, the Department agrees that States would have the authority, under existing law and regulation, to determine that the provisions in § 200.48(d) do not apply in the circumstances cited by the commenters. For example, the provisions in § 200.48(d) would not apply to LEAs that are not able to provide public school choice because they have only one school at each grade level or to LEAs that are not served by SES providers and, thus, are not able to make SES available to students who otherwise would be eligible for such services.

Similarly, the requirements in § 200.48(d) do not apply if an LEA enrolls sufficient numbers of eligible students to spend all funds reserved for choice-related transportation and SES, but has funds left over at the end of the year because one or more providers did not fulfill their contractual obligations or because enrolled students did not begin or complete services. However, if an LEA experiences significant student attrition in its SES program early in the school year, leading to lower than anticipated expenditures, it would be expected to hold a second enrollment period and sign up sufficient students to use the full 20 percent obligation.

In the case of an LEA that is able to provide public school choice and SES to all eligible students without spending its full 20 percent obligation, the requirements in § 200.48(d) apply only to the funds that are reserved to serve eligible students. For example, if an LEA can serve all eligible students with an amount equal to 10 percent of its Title I, Part A allocation, it would be required to reserve only that amount for choice-related transportation and SES and would be able to use the other half of its 20 percent obligation immediately for other allowable activities. Note, however, that an LEA seeking to exempt a portion of its 20 percent obligation from the requirements in § 200.48(d) must base the amount that it reserves for choice-related transportation and SES on the assumption that *all* eligible students will choose to transfer schools or obtain SES. If the amount reserved in this manner is less than the full 20 percent obligation, then the requirements in § 200.48(d) apply only to this lesser amount. Finally, any LEA that is already providing public school choice and SES to all eligible students would not be subject to § 200.48(d).

Changes: None.

Comment: A large number of commenters expressed concern about the effect of the provisions in § 200.48(d) on LEAs' Title I, Part A allocations. These concerns appeared to be based primarily on the potential interaction of the requirements in § 200.48(d) with the statutory limitation in section 1127(a) of the ESEA that prohibits LEAs from carrying over more than 15 percent of their Title I, Part A allocations from one fiscal year to the next fiscal year. Some commenters stated that the proposed regulations could lead to the loss of millions of dollars appropriated for Title I and, as a result, prevent LEAs from operating quality programs. Two commenters requested clarification of what happens when funds are carried over, including the possibility that unspent choice-related transportation and SES funds are carried over repeatedly for a number of years. Finally, other commenters recommended various measures to avoid such losses, such as allowing States to waive the criteria in proposed § 200.48(d)(1) for LEAs that otherwise would lose access to Title I funds due to the 15 percent carryover limitation. Another commenter recommended excluding funds from the 20 percent obligation from the 15 percent carryover limitation and not restricting any funds that are carried over as a result of this exclusion for choice-related transportation or SES.

Discussion: LEAs, like other recipients of Federal education funds, are subject to a variety of requirements governing the availability and use of those funds. If LEAs do not meet these requirements, for whatever reason, it is possible to lose access to the funds. However, LEAs have considerable flexibility in managing their Federal allocations, including those received under Title I, Part A of the ESEA, and the Department does not believe that the

application of § 200.48(d) is likely to lead to a loss of Title I funding. The Department also believes that the commenters have exaggerated the number of LEAs, even under the proposed regulation, that would be required to carry over unspent choice-related transportation and SES funds and thus potentially be subject (assuming they are carrying over Title I funds) to the 15 percent Title I carryover limitation. The vast majority of LEAs seeking to use unspent choice-related transportation and SES funds for other allowable activities are likely to take whatever measures are required to meet the criteria in new § 200.48(d)(2)(i) (proposed § 200.48(d)(1)), use unspent funds as needed, and thus avoid any potential problems that could be created by carrying over a significant amount of Title I funds from one year to the next. Those that do carry over Title I funds are likely to employ ''first in-first out'' accounting practices under which affected LEAs would spend any carried over ''prior-year'' funds first, before using current year funds, in order to avoid lapsing any prior-year funds due to the end of the period of availability.

Under the final regulation, the LEAs that are likely to carry over unused choice-related transportation and SES funds are those that have not met the criteria in new § 200.48(d)(2)(i) (proposed § 200.48(d)(1)). However, even these LEAs would be unlikely to lose Title I funds due to the 15 percent Title I carryover limitation or other Federal accounting requirements, for several reasons. First, under section 1127(b) of the ESEA, an LEA may apply to the State for a one-year exemption (available once every three years) from the 15 percent Title I carryover limitation. This exemption is one reason that the Department believes that other measures proposed by commenters to ensure that an LEA does not lose unspent choice-related transportation and SES funds due to the 15 percent Title I carryover limitation, such as a waiver of the criteria in new § 200.48(d)(2)(i) (proposed § 200.48(d)(1)) or excluding funds from the 20 percent obligation from the 15 percent Title I carryover limitation, are unnecessary.

The second reason the 15 percent Title I carryover limitation should not lead to the loss of an LEA's Title I funds is that § 200.48(d) focuses on the amount that must be spent on choice-related transportation and SES, not the specific funds or source of funds that an LEA uses to satisfy that amount. In other words, what is actually ''carried over'' is a funding commitment, not actual funds. LEAs not meeting the criteria must add the amount of any unused portion of the 20 percent obligation to the amount that must be spent on choice-related transportation and SES in the subsequent year. Thus, an LEA that does not meet the criteria in new § 200.48(d)(2)(i) (proposed § 200.48(d)(1)), and that has, for example, $100,000 in unused fiscal year 2009 Title I, Part A funds that were reserved as part of the LEA's 20 percent obligation in the 2009–2010 school year, does not have to carry over those specific Title I funds to the next school year. The LEA could use that $100,000 in fiscal year 2009 Title I funds for other Title I activities in the 2009–2010 school year, so long as it adds the same $100,000 amount—from any Federal, State, or local source—to its 20 percent obligation for the 2010–2011 school year. The third reason that LEAs in this situation would be unlikely to allow carried-over Title I funds to lapse is that they are likely to use ''first in-first out'' accounting rules, as described earlier in this discussion.

For all of these reasons, the Department believes that the concerns expressed by commenters about the potential loss of Title I funds due to the interaction of the requirements in § 200.48(d) and the 15 percent Title I carryover limitation are unwarranted. Moreover, it is not the intention, or the expectation, of the Secretary that any LEA will lose access to any portion of its Title I, Part A allocation due to the requirements in § 200.48(d). Rather, these requirements are intended to promote, consistent with the authorizing statute, maximum participation by eligible students in Title I public school choice and SES.

Changes: None.

Comment: One commenter asserted that the criteria in proposed § 200.48(d)(1) that an LEA must meet in order to carry over unused funds from its 20 percent obligation are inconsistent with the current 15 percent Title I carryover limitation because the primary purpose of that limitation is to ensure that most Title I funds are spent in the program year for which the funds were appropriated.

Discussion: Assuming proper implementation of public school choice and SES, the Secretary expects that, consistent with the intent of the carryover limitation in section 1127 of the ESEA, all funds from an LEA's 20 percent obligation should be spent in the school year for which these funds are appropriated. However, if proper implementation does not happen, we believe it is appropriate to require LEAs to redouble their efforts in the following year, even if that requires carrying over some portion of their 20 percent obligation. Also, as described in detail in the previous comment and discussion, § 200.48(d) does not require LEAs to carry over any specific funds. Rather, any LEA not meeting the criteria in new § 200.48(d)(2)(i) (proposed § 200.48(d)(1)) for a given school year must, in the following school year, spend on choice-related transportation and SES an amount equal to its 20 percent obligation for that school year *plus* the amount of any unspent choice-related transportation and SES funds from the previous school year. Meeting the requirements in § 200.48(d) does not require carrying over funds from one year to the next.

Changes: None.

Comment: One commenter warned that the 15 percent Title I carryover limitation could allow LEAs to evade the requirements in § 200.48(d). More specifically, the commenter stated that, if an LEA was already carrying over other Title I funds close to or exceeding the 15 percent Title I carryover limitation, it would not be able to carry over any unused funds from its 20 percent obligation and, thus, would not be able to add these unused funds to the amount required to be spent on choice-related transportation and SES in the subsequent year. To avoid this possible outcome, the commenter recommended that the final regulations exclude unused funds from the 20 percent obligation from the 15 percent Title I carryover limitation and require affected LEAs to disclose publicly the amount of any funds carried over due to failing to meet the criteria in proposed § 200.48(d)(1).

Discussion: While the Department understands the commenter's concern that some LEAs may attempt to use the 15 percent Title I carryover limitation to evade the requirements in § 200.48(d), we believe the commenter's analysis is incorrect in several ways. First, the Department believes that there are few, if any, LEAs that would prefer simply to lose access to a significant portion of their Title I allocation rather than comply with the criteria in new § 200.48(d)(2)(i) (proposed § 200.48(d)(1)) that can help raise student achievement and help schools and LEAs make AYP. Second, if an LEA already is carrying over 15 percent of its Title I, Part A allocation (before the addition of any unspent portion of its 20 percent obligation to the carryover total), it would first need to use those funds to meet unmet requirements, such as the 20 percent obligation. Finally, as with section 1116(b)(10) of the ESEA, which refers not to specific funds but to ''an amount equal to'' 20 percent of an

LEA's Title I, Part A allocation, new § 200.48(d)(1)(i) (proposed § 200.48(d)(1)) requires an LEA that does not meet the criteria ''to spend the unexpended *amount* in the subsequent school year'' (emphasis added) on choice-related transportation, SES, or parent outreach and assistance. This means that, regardless of the loss of access to specific Title I or non-Title I funds due to carryover limitations or other requirements governing the use of such funds, the LEA remains obligated to add the ''unexpended amount'' to the 20 percent obligation for public school choice and SES in the following year, and would have to identify another source of funding to replace any funds lost due to the 15 percent Title I carryover limitation. Because it is the requirement to spend this ''unexpended amount,'' and not the specific funds originally reserved to meet the 20 percent obligation, that is carried over to the following year, there is no need to exempt unused funds from an LEA's 20 percent obligation from the statutory 15 percent Title I carryover limitation, a change that in any case would not be possible through regulatory action alone. As for the recommendation that LEAs publicly disclose any unexpended amount that is carried over to the subsequent year, the Department believes that such disclosure would be subject to misinterpretation and would not necessarily provide useful information to parents.

Changes: None.

Comment: Two commenters expressed concern about the potential impact that the criteria in proposed § 200.48(d)(1) would have on private school students receiving equitable services under Title I. One commenter stated, for example, that § 200.48(d) would require an LEA to carry over all unspent funds to the following year for the exclusive use of public schools, thereby eliminating the opportunity for private school students to benefit from their equitable share of the unspent funds. The second commenter recommended that any unspent funds be made available as soon as possible during the school year so that nonpublic school students can receive their fair share under the equitable participation requirements of the ESEA.

Discussion: Section 1120 of the ESEA requires an LEA to provide equitable Title I services to eligible students enrolled in private elementary and secondary schools, their teachers, and their families. Funds to provide these services are generated by students from low-income families who reside in a participating public school attendance area and attend a private school. Equitable services for private school students generally apply to Title I funds spent for instruction for elementary and secondary school students, professional development, and parent involvement. They do not apply, however, to all uses of Title I funds. For example, they do not apply to preschool services, because preschool is generally not considered to be elementary education under State law, and they do not apply to Title I funds reserved for choice-related transportation and SES, because private schools are not subject to school improvement and private school students do not receive SES. Thus, if an LEA carries over unspent Title I funds to the subsequent year for particular purposes such as SES, the application of the equitable services requirements depends on the purpose for which those carryover funds are used.

For this reason, the Department does not believe that the provisions in § 200.48(d), which potentially require an LEA with unused funds from its 20 percent obligation to carry over those funds for expenditure on choice-related transportation and SES in the subsequent school year, unlawfully or otherwise inappropriately affect the amount of carryover funds available for equitable services for private school students. It is important to note that the requirement to spend an amount equal to at least 20 percent of an LEA's Title I, Part A allocation for choice-related transportation and SES applies even if an LEA does not use Title I, Part A funds to meet its 20 percent obligation. However, assuming an LEA does use Title I, Part A funds, those funds are not subject to the equitable services requirement, as noted previously, because they are specifically used to provide choice-related transportation, SES, and parent outreach to eligible students in schools in need of improvement, corrective action, and restructuring—requirements that do not apply to private schools or services that private school students receive under Title I, Part A, just as they do not apply to services for students in public schools that are not identified for improvement. The regulations in § 200.48(d) merely require an LEA that did not spend the requisite amount in a given year on choice-related transportation, SES, and parent outreach to spend the unexpended amount on those same activities in the following year (unless the LEA meets the criteria in new § 200.48(d)(2)(i) (proposed § 200.48(d)(1)). If an LEA reserved Title I, Part A funds for those activities and can demonstrate that spending an amount less than the 20 percent obligation is warranted, the Title I, Part A funds that the LEA then may use for other allowable activities would be subject to the equitable services requirements, as applicable. The revised criteria in new § 200.48(d)(2)(i), particularly in new paragraph (d)(2)(i)(B)(*3*) relating to two enrollment ''windows,'' should enable an LEA to determine by mid-year whether it has met all demand for choice-related transportation and SES and, thus, can spend any unspent funds on other allowable activities. After it makes this determination, the LEA must consult with appropriate private school officials pursuant to section 1120(b) of the ESEA as to what equitable services the LEA will provide to eligible private school students with funds remaining from its 20 percent obligation.

Changes: None.

Comment: One commenter claimed that forcing LEAs to carry over unused State or local funds that were part of an LEA's 20 percent obligation would violate the unfunded mandates provision in section 9527(a) of the ESEA. Another commenter requested clarification on the potential impact of § 200.48(d) on any non-Title I funds reserved to meet an LEA's 20 percent obligation.

Discussion: The claim that the criteria in new § 200.48(d)(2)(i) (proposed § 200.48(d)(1)) violate the so-called ''unfunded mandates'' provision in section 9527(a) of the ESEA is incorrect. Section 9527(a) prohibits the Secretary from mandating that a State or LEA ''spend any funds or incur any costs not paid for under [the ESEA].'' As noted previously, the 20 percent obligation for choice-related transportation and SES created by section 1116(b)(10) of the ESEA does not require the use of any particular Federal, State, or local funds; instead, it requires an LEA with schools identified for improvement, corrective action, or restructuring to spend an amount equal to at least 20 percent of its Title I, Part A allocation on choice-related transportation and SES unless a lesser amount is needed. An LEA has complete discretion as to the source of funds, and the Secretary is not mandating through § 200.48(d) that an LEA use State or local funds to meet this requirement. Likewise, an LEA that does not meet the criteria in new § 200.48(d)(2)(i) (proposed § 200.48(d)(1)) would not be required to carry over any specific unused State or local funds it has set aside to meet its 20 percent obligation, but would add the *amount* of those unused funds to its 20 percent obligation for the subsequent year.

Changes: None.

Comment: One commenter requested that the Department clarify in the final regulations that the standard used to determine the amount that an LEA must spend on SES before using unspent funds for other purposes is based on an amount equal to 15 percent of the LEA's Title I, Part A allocation, rather than the current five percent minimum. Other commenters recommended that we clarify in the final regulations that this 5 percent minimum is all that an LEA must spend on SES under the statute.

Discussion: These comments appear to have been based on a misunderstanding of current law and regulations. Under section 1116(b)(10) of the ESEA, an LEA is required to spend a minimum of an amount equal to five percent of its Title I, Part A allocation on SES only in situations where the LEA faces such strong demand for choice-related transportation that it otherwise might spend the full 20 percent obligation only on choice-related transportation and not offer SES to any eligible students. Current law and regulations already require LEAs to spend the equivalent of 20 percent of their Title I, Part A allocation on choice-related transportation, SES, or a combination of the two, assuming there is sufficient demand for these options. Within that 20 percent, the statutory requirement in section 1116(b)(1) to spend at least 15 percent on SES would continue to apply if an LEA spends no more than five percent on choice-related transportation.

Changes: None.

Comment: One commenter opposed the requirements in § 200.48(d), recommending instead that any unused funds from the 20 percent obligation be redirected to Title I schools that have been identified for improvement.

Discussion: The purpose of the requirements in § 200.48(d) is to help ensure that LEAs improve their implementation of Title I public school choice and SES and thereby increase participation in these options. Redirecting unused portions of an LEA's 20 percent obligation to school improvement purposes, rather than requiring those portions to be carried over and used to support public school choice and SES in the subsequent year, would be inconsistent with this purpose.

Changes: None.

Comment: One commenter recommended that the Department require an LEA to spend any unused funds from its 20 percent obligation to provide additional SES.

Discussion: We interpret this comment to mean that an LEA should not be permitted to spend unused funds from its 20 percent obligation for other allowable activities. However, section 1116(b)(10)(A) of the ESEA clearly anticipates situations in which an LEA may legitimately spend less than the full 20 percent obligation on choice-related transportation and SES and may then redirect such funds to other allowable activities.

Changes: None.

State Review Process

Comment: Several commenters claimed that ensuring compliance with the requirements in § 200.48(d) would impose a significant and unnecessary burden on States, with some commenters recommending that compliance be enforced through State monitoring rather than through an advance approval process. One commenter argued that the provisions in proposed § 200.48(d) appear to penalize all LEAs for the failures of a few, and that a better approach would be to investigate allegations of poor implementation of public school choice and SES. Another commenter observed that not meeting the full 20 percent obligation is not necessarily a sign of ''bad faith'' and recommended that the criteria apply only in cases where Federal or State monitoring efforts identify substantial problems in an LEA's implementation of the public school choice and SES requirements.

Discussion: Proposed § 200.48(d) was not intended to punish any LEA, but to help ensure that LEAs devote sufficient effort to notifying parents of available public school choice and SES options. The Secretary believes that many LEAs already make good-faith efforts to implement the public school choice and SES requirements and will have little difficulty meeting the new criteria if they want to use unspent funds from their 20 percent obligation for other purposes.

As for the recommendation that proposed § 200.48(d) apply only where Federal or State monitoring has found problems with LEA implementation of public school choice and SES requirements, the Department believes that the appropriate response to findings from State performance reports, evaluations, and Federal monitoring reports documenting continuing low participation rates in the face of a potentially increasing number of eligible students is not to continue to rely solely on routine monitoring. Although the Secretary does not agree that the requirements in proposed § 200.48(d) would have created significant and unnecessary new administrative burden for States, she does agree that the goal of the proposed regulation—improved implementation of Title I public school choice and SES provisions—can be met through a more targeted approach to enforcement. For this reason, and to reduce administrative burden on States and LEAs, we have restructured and made several changes to proposed § 200.48(d). First, LEAs are not required to submit evidence of compliance with the criteria in new § 200.48(d)(2)(i) (proposed § 200.48(d)(1)) to their SEA, or to receive SEA approval before using unspent choice-related transportation and SES funds for other allowable activities. Instead, the final regulations only require an LEA seeking to use unspent choice-related transportation and SES funds for other allowable activities to (1) maintain records showing that it has met the criteria in new § 200.48(d)(2)(i), (2) notify the SEA that it has met those criteria, and (3) notify the SEA that it intends to spend the remainder of its 20 percent obligation on other allowable activities and indicate the amount of that remainder. An SEA will not be required to review and approve each LEA's use of unspent funds from its 20 percent obligation but generally will ensure LEA compliance through its regular monitoring process. However, in addition to its regular monitoring, an SEA must review any LEA that (1) the SEA determines has spent a significant portion of its 20 percent obligation for other activities, and (2) has been the subject of multiple complaints, supported by credible evidence, regarding the LEA's implementation of the public school choice and SES requirements. The SEA must complete the required review of such LEAs before the beginning of the next school year. We also note that an SEA may target for review any LEA that it believes is not implementing public school choice and SES in accordance with the law and regulations.

If an SEA finds during its monitoring and review that an LEA failed to meet any of the criteria in new § 200.48(d)(2)(i) (proposed § 200.48(d)(1)), the LEA must (1) add the amount of any unspent choice-related transportation and SES funds (i.e., the ''remainder'' specified in new § 200.48(d)(2)(iii)(B)) to its 20 percent obligation for the next school year or (2) meet the criteria in new § 200.48(d)(2)(i) and obtain permission from the SEA before spending any portion of this total amount on activities other than choice-related transportation, SES, or parent outreach and assistance. In addition, the SEA must confirm the LEA's compliance with the criteria in new

§ 200.48(d)(2)(i) (proposed § 200.48(d)(1)) for the subsequent year before it grants this permission.

The final regulations also clarify that the criteria in new § 200.48(d)(2)(i) (proposed § 200.48(d)(1)) are the minimum criteria that LEAs must meet before spending any portion of their 20 percent obligation on other allowable activities. An SEA may establish additional criteria for the effective implementation of Title I public school choice and SES options. We note, however, that any other criteria used by an SEA to review LEA compliance with the requirements in new § 200.48(d)(2)(i) (proposed § 200.48(d)(1)) must be in addition to, and may not serve as a substitute for, the criteria in new § 200.48(d)(2)(i) (proposed § 200.48(d)(1)).

Changes: For purposes of clarification, we have revised § 200.48(a)(2)(iii)(C) to define ''20 percent obligation'' as an amount equal to 20 percent of an LEA's Title I, Part A allocation. We have restructured § 200.48(d) and included the minimum criteria that an LEA must meet before using unspent funds from its 20 percent obligation for other allowable activities in new paragraph (d)(2)(i)(A) through (C) (proposed paragraph (d)(1)(i) through (iii)). A new § 200.48(d)(2)(ii) has been added to require an LEA seeking to spend less than its 20 percent obligation on choice-related transportation, SES, and parent outreach and assistance to maintain records demonstrating compliance that it has met the criteria in new § 200.48(d)(2)(i). A new § 200.48(d)(2)(iii) has been added to also require the LEA to notify the SEA that it has met these criteria, and that it intends to spend the remainder of its 20 percent obligation on other allowable activities and indicate the amount of that remainder. A new paragraph (d)(3) has been added to require each SEA, in addition to enforcing § 200.48(d) through its regular monitoring of LEA Title I programs, to review for compliance with new § 200.48(d)(2)(i) any LEA that (1) the SEA determines has spent a significant portion of its 20 percent obligation for other activities, and (2) has been the subject of multiple complaints, supported by credible evidence, regarding its implementation of public school choice or SES requirements. A new paragraph (d)(3)(ii)(B) has been added to require the SEAs to complete the review of such LEAs before the beginning of the next school year.

Proposed § 200.48(d)(2) has been redesignated as new § 200.48(d)(1)(ii) and a new paragraph (d)(4) has been added to provide that if an SEA determines, either through its regular monitoring or through the review required by new paragraph (d)(3)(ii), that an LEA has failed to meet any of the criteria in new paragraph (d)(2)(i), the LEA must (1) spend an amount equal to the remainder specified in its notice to the SEA under new § 200.48(d)(2)(iii)(B) in the subsequent school year, in addition to its 20 percent obligation for that year on choice-related transportation costs, SES, or parent outreach and assistance or (2) meet the criteria in new § 200.48(d)(2)(i) and obtain permission from the SEA before spending less than this total amount (the remainder plus the new 20 percent obligation) on choice-related transportation, SES, or parent outreach and assistance. The SEA must confirm that the LEA has complied with the criteria in new paragraph (d)(2)(i) for that subsequent school year before granting such permission.

Comment: One commenter recommended that we revise the regulations to provide authority for SEAs to waive LEA compliance with any of the criteria in proposed § 200.48(d)(1).

Discussion: As noted earlier in this section, § 200.48(d) is intended to improve implementation of Title I public school choice and SES requirements by LEAs with large numbers of eligible students and low participation rates. After more than six years of NCLB implementation, a considerable body of evidence on existing implementation practices argues strongly for less, rather than more, flexibility in this area. This is why new § 200.48(d)(2)(i) (proposed § 200.48(d)(1)) identifies several ''best practices'' associated with effective implementation of and greater participation in public school choice and SES and generally requires that an LEA follow these practices before using unspent funds from its 20 percent obligation for other allowable activities. The Department also believes, as noted earlier in this preamble, that States already have the authority, under existing law and regulations, to determine that the provisions in § 200.48(d) do not apply under certain circumstances, such as in LEAs that are not able to make available public school choice or SES options to their students due to a lack of such options in their geographic area. However, States do not have the authority to waive compliance with a specific criterion for an LEA to which § 200.48(d) does apply.

Changes: None.

Comment: One commenter recommended that the evidence submitted to an SEA by an LEA to demonstrate success in meeting the criteria in proposed § 200.48(d)(1) be publicly available, and that such evidence include a separate breakout of the funds spent on choice-related transportation and SES, the amount of the unspent funds, and a justification for how the funds would subsequently be used.

Discussion: The final regulations do not require LEAs to submit evidence that they have met the criteria in new § 200.48(d)(2)(i) (proposed § 200.(d)(1)) before using unspent choice-related transportation and SES funds for other allowable activities. The Secretary made this change, in part, to alleviate SEA and LEA concerns about administrative burden, and declines the commenter's recommendation to increase that burden by adding new data collection and disclosure requirements to the final regulations.

Changes: None.

New § 200.48(d)(2)(i)(A) (Proposed § 200.48(d)(1)(i)) Partnering With Outside Organizations

Comment: We received a number of comments on the proposal that an LEA, before using unspent choice-related transportation and SES funds for other purposes, demonstrate success in partnering with community-based organizations (CBOs) or other groups to help inform eligible students and their families of the opportunities to transfer to another public school or to receive SES. One of these commenters recommended that this requirement be optional because some communities have few CBOs that are available or interested in partnering with LEAs.

Discussion: The Department proposed this requirement based on findings from the NATI report and other evaluation data that participation in public school choice and SES is higher when parents learn of these options from multiple sources within their communities.[17] However, the Department recognizes that in some communities, particularly in rural or geographically isolated areas, it may be difficult to identify a willing partner for educational outreach activities. We, therefore, have revised § 200.48(d)(2)(i)(A) (proposed § 200.48(d)(1)(i)) to require LEAs to partner with a CBO or other groups for the purpose of promoting participation in Title I public school choice and SES ''to the extent practicable.'' We have also expanded the examples of such groups to include faith-based organizations (FBOs), other CBOs, and business groups.

[17] *Id.*

Changes: We have added ''to the extent practicable'' to the criterion in new § 200.48(d)(2)(i)(A) (proposed § 200.48(d)(1)(i)) regarding partnering with outside groups and have also added examples of such outside groups to include faith-based organizations, other community-based organizations, and business groups.

Comment: Two commenters stated that an LEA should not be required to demonstrate success in partnering with CBOs as a criterion for reallocating unspent funds from its 20 percent obligation because, according to the commenters, this requirement would increase administrative costs. One of these commenters added that the requirement to partner with CBOs would be an excessive burden on public schools already mandated to provide information on Web sites, in newsletters, and in letters to parents.

Discussion: The Department recognizes that meeting the criterion in new § 200.48(d)(2)(i)(A) (proposed § 200.48(d)(1)(i)) could entail additional administrative costs, but believes that such costs, as described in the *Summary of Costs and Benefits* section, would be minimal and would be far outweighed by the potential benefits of more effective implementation of and participation in Title I public school choice and SES. These requirements also reflect evidence from the NATI report and other sources that pursuing multiple avenues of communicating with parents about public school choice and SES is one of the most effective strategies for increasing participation in these options. In addition, the Department believes that partnering with outside groups is one of the most cost-effective ways to promote SES, as FBOs, CBOs, and business groups already have a presence in the community and thus, gives LEAs a way to tap existing resources in their effort to reach out to parents about Title I public school choice and SES options. However, as discussed previously, the Department acknowledges that partnering with outside groups may be challenging for some LEAs, and we have revised the regulations to provide that an LEA establish such partnerships ''to the extent practicable.''

Changes: None.

Comment: One commenter recommended that the Department prescribe in the final regulations specific requirements for an LEA to meet in establishing a partnership with CBOs for the purpose of this section, such as responsibility for choosing the CBO partners, the elements of an adequate partnership, and the appropriate division of authority between the LEA and its partners.

Discussion: The Secretary believes that LEAs are in the best position to decide how to develop and structure partnerships with outside groups in their communities. Establishing requirements for such partnerships through these regulations would create a ''one-size-fits-all'' approach that would likely stifle the development of cooperative and innovative partnerships.

Changes: None.

Comment: One commenter objected to requiring LEAs to partner with CBOs because, according to the commenter, it should be sufficient for LEAs to make parents aware of their public school choice and SES options through written notifications sent by mail.

Discussion: The Secretary does not dispute that sending written information through the U.S. mail is a standard and widely accepted practice, used by a variety of Federal, State, and local government agencies, including LEAs, for communicating with the public. However, as discussed in the preamble to the NPRM, there is evidence that, regardless of the method of transmission, mailings and other written materials alone are often insufficient to make eligible parents aware of their Title I public school choice and SES options. For example, the NATI report found that, in the 2004–2005 school year, while nearly 70 percent of LEAs provided written notification of public school choice options and 94 percent of LEAs used written materials to inform parents of SES options, surveys of parents in eight large urban LEAs showed that just over a quarter (27 percent) of eligible parents reported receiving notification about public school choice and about half of parents (53 percent) reported receiving notice of SES options.[18]

One problem with using written materials alone to communicate with parents is that such materials can vary widely in content and clarity. The NATI report also found that, although some notification letters were easy to read and presented public school choice and SES options as a positive benefit for eligible students, others were confusing, discouraged parents from changing schools, or appeared to be biased in favor of certain SES providers.[19] Finally, the families of many students attending the high-poverty schools served by Title I, particularly in urban areas, often are highly mobile and, thus, hard to reach at a fixed address via U.S. mail.

For all of these reasons, the Secretary believes that it is important for LEAs to use multiple methods for informing eligible parents of their public school choice and SES options. The Secretary believes that partnering with CBOs is an effective, low-cost strategy for LEAs to help ensure that eligible parents learn about and take advantage of public school choice and SES options for their children.

Changes: None.

Comment: One commenter recommended adding language ensuring that the criteria in proposed § 200.48(d)(1), and more specifically the criteria to partner with CBOs and to permit enrollment in SES throughout the school year, take into account the needs of homeless, migrant, foster, and other highly mobile students.

Discussion: The Secretary agrees that it is important for LEAs to reach out to all eligible students in order to provide a genuine opportunity for all eligible students to obtain SES. This is one reason the final regulations include multiple criteria that LEAs must meet before spending any unused funds from their 20 percent obligation for other allowable activities. These criteria require an LEA that wishes to use unspent funds from its 20 percent obligation for other allowable activities to engage in broader outreach efforts that must include, to the extent practicable, partnering with outside groups (such as CBOs serving homeless, migrant, foster, and other mobile students), hold a minimum of two SES enrollment periods so that a student who starts school after the beginning of the school year has at least one opportunity to sign up for SES, and afford greater opportunities to obtain SES in school facilities—a convenient, safe location for students who otherwise might not be able to access SES. We believe that implementation of these ''best practices'' will greatly benefit homeless, migrant, foster, and other mobile students and increase their participation in public school choice and SES. However, we believe that LEAs should have flexibility to meet the criteria in new § 200.48(d)(2)(i) (proposed § 200.48(d)(1)) in ways that best meet the needs, and accommodate the circumstances, of their students, and we decline to add references to any particular student group in this section.

Changes: None.

[18] *Id.*

[19] *Id.*

New § 200.48(d)(2)(i)(B)(2) (Proposed § 200.48(d)(1)(ii)(B)) SES Enrollment Forms

Comment: One commenter suggested that the Secretary modify proposed § 200.48(d)(1)(ii)(B) to require that sign-up forms for SES be distributed through the Department-funded Parent Training and Information Centers and Parent Information and Resource Centers.

Discussion: New. § 200.48(d)(*2*)(i)(B)(*2*) (proposed § 200.48(d)(1)(ii)(B)) provides that, to ensure that eligible students and their parents have a genuine opportunity to sign up to transfer or to obtain SES, an LEA must, among other things, ensure that SES sign-up forms are distributed directly to all eligible students and their parents and are made widely available through broad means of dissemination, such as through public agencies serving eligible students and their families. The Secretary prefers to give LEAs flexibility in selecting those public agencies that are in the community and able to assist the LEA, rather than mandating that each LEA work with a specific agency or center. In many LEAs, there will be no Parent Training and Information Center or Parent Information and Resource Center present and available to work with the LEA on the distribution of sign-up forms.

Changes: None.

New § 200.48(d)(2)(i)(B)(3) (Proposed § 200.48(d)(1)(ii)(C)) SES Enrollment Period

Comment: Many commenters opposed the criterion in proposed § 200.48(d)(1)(ii)(C) that LEAs provide opportunities for enrollment in SES throughout the school year. For example, one commenter asserted that meeting this criterion would effectively prevent an LEA from ever using unspent funds from its 20 percent obligation for other instructional purposes because funds would have to be reserved through the end of the school year. Another commenter claimed that offering year-round services would be a resource and staffing burden for LEAs. An SES provider expressed similar concerns, stating that continuous or open enrollment throughout the school year would be administratively burdensome because it is difficult to schedule services on short notice and because services may begin too late in the year for students to finish an SES program. This commenter recommended that LEAs instead be required to offer three enrollment windows during which parents and students could sign up to receive SES. Another commenter recommended that States be permitted to set their own dates for releasing unused funds from an LEA's 20 percent obligation.

Discussion: The Secretary recognizes that the proposed full-year SES enrollment criterion, although desirable as a way of maximizing opportunities for parents to obtain SES for their eligible children, could be difficult for LEAs to implement and could hamper the provision of effective SES programs. In addition, as the commenters noted, to meet this criterion an LEA would have to reserve funding for SES until very late in the school year, making it difficult to spend unused funds for other purposes. Setting a requirement that could severely restrict an LEA's use of unspent funds from its 20 percent obligation could have the unintended effect of serving as a disincentive to undertake good-faith efforts to promote public school choice and SES. On the other hand, simply setting a fixed date in the school year for release and use of unspent choice-related transportation and SES funds could encourage half-hearted enrollment practices by LEAs seeking to maximize the amount of funds that could be used for other allowable Title I activities.

To address these concerns, while continuing to pursue the goal of expanding SES enrollment opportunities for eligible students and their parents, the final regulations require LEAs to provide a minimum of two enrollment windows at separate points in the school year. In addition, we have added language requiring that these enrollment windows be of sufficient length to enable parents to make informed decisions about requesting SES and selecting a provider. We note that to help ensure that parents have a genuine opportunity to sign up for SES, enrollment windows should be at times and places that are convenient for the parents of eligible students, including working parents and single parents. One approach, for example, would be to link enrollment windows to the end of grading periods and the associated parent-teacher conferences that typically create a natural opportunity to encourage and promote SES enrollment. Multiple enrollment windows will also help ensure that students who enroll after the beginning of the school year have an opportunity to sign up for SES.

Changes: We have revised the criterion in new § 200.48(d)(2)(i)(B)(*3*) (proposed § 200.48(d)(1)(ii)(C)) to require an LEA to provide a minimum of two enrollment windows, at separate points in the school year, that are of sufficient length to enable parents of eligible students to make informed decisions about requesting SES and selecting a provider.

Comment: Two commenters suggested that the Department modify proposed § 200.48(d)(1)(ii)(C) to require an LEA to allow eligible students to sign up to receive SES not only throughout the school year but also through summer learning programs before being permitted to use unspent funds from its 20 percent obligation for other allowable activities.

Discussion: The Department encourages LEAs to begin SES at the beginning of the school year because, as stated in section 1116(e)(12)(C) of the ESEA, the primary purpose of SES is to increase the academic achievement of eligible children on the State's academic assessments. The Department's guidance permits summer SES programs, but in most cases it will be preferable to provide services that take place over the course of the school year. In addition, the Department recognizes that waiting until late in the school year, or even until the summer, before beginning the process of spending unused choice-related transportation and SES funds could result in less effective use of those funds. For these reasons, the Department believes that the decision to offer SES late in the school year or in the summer is best left to the discretion of individual LEAs.

Changes: None.

Comment: One commenter recommended that the Department require an LEA to maintain a student waiting list for SES in order to ensure that the LEA meets all demand for SES before using unspent funds from its 20 percent obligation for other allowable activities.

Discussion: Maintaining a waiting list for SES essentially requires continuous or open enrollment in SES throughout the school year (and perhaps into the summer months). As we have discussed in our responses to other comments, we no longer believe we should require an LEA to provide continuous or open enrollment throughout the school year.

Changes: None.

New § 200.48(d)(2)(i)(C) (Proposed § 200.48(d)(l)(iii)) SES Provider Access to School Facilities

Comment: Several commenters expressed concern that proposed § 200.48(d)(1)(iii), which requires LEAs to offer SES providers fair access to school facilities on the same basis and terms as are available to other groups, may conflict with State and local prerogatives and authority governing access to public facilities. Another commenter recommended that LEAs be permitted to differentiate among for-

profit and non-profit groups and organizations, including SES providers, in granting access to school facilities.

Discussion: The intention of the fair provider access criterion in new § 200.48(d)(2)(i)(C) (proposed § 200.48(d)(1)(iii)) is not to override State and local policies with respect to determining the terms of access to school facilities, but to ensure that all SES providers are treated fairly under those policies. The Secretary recognizes that many municipalities and LEAs may have access policies that differentiate among public and private and non-profit and for-profit organizations seeking to use school facilities. However, the Department believes that those policies must take into account both the educational purpose of SES and the requirement to implement SES fairly as part of an LEA's overall Title I program. In this context, the Department believes it is reasonable to require that State and local municipalities ensure that their policies do not unfairly exclude SES providers, regardless of their profit-making status, from school facilities.

Changes: None.

Comment: One commenter stated that meeting the criterion in proposed § 200.48(d)(1)(ii)(C) to offer the opportunity to enroll in SES throughout the school year, and the criterion under which an LEA would have to provide SES providers with access to school facilities in proposed § 200.48(d)(1)(iii) could create capacity concerns for LEAs. Another commenter asserted that many LEAs simply do not have the capacity to offer access to school facilities for SES because of the extensive after-school programs already offered on school sites.

Discussion: The Secretary recognizes that LEAs have limited space and times available for organizations seeking use of school facilities. In particular, we recognize that access to school facilities in any particular LEA may depend on such factors as the size of those facilities, the number of organizations seeking access, and the cost of keeping facilities open outside of the regular school day. The final regulations, however, simply provide that, when making facilities available, LEAs use a fair, open, and objective process that offers access to SES providers on the same basis and terms that are available to other groups seeking access to school facilities. In addition, the final regulations in new § 200.48(d)(2)(i)(B)(*3*) reduce facilities planning burdens on LEAs by modifying the proposed SES ''full-year enrollment'' criterion to require, instead, a minimum of two enrollment ''windows'' at separate points in the school year.

Changes: None.

Comment: One commenter expressed concern that the fair provider access criterion in proposed § 200.48(d)(1)(iii) could lead some LEAs to implement or raise fees charged to other (non-SES provider) organizations for access to school facilities.

Discussion: We understand that many LEAs currently make school facilities available to community groups and other organizations at little or no cost, and that increased demand for facility space from SES providers and regulatory pressure to equalize access may lead some LEAs to adopt more restrictive space-use policies, including the possible imposition of new or higher fees for using school space. The Secretary believes that such changes would be detrimental both to SES and to non-SES-related organizations. However, the Secretary believes that in most cases LEAs will endeavor to make fair arrangements for all entities seeking access to school facilities and that any additional cost or other limitations on such access for non-SES-related organizations must be balanced against the benefits potentially gained through greater student access to SES at school sites.

Changes: None.

Comment: Two commenters expressed concern that the proposed criterion that an LEA provide fair and open access to school facilities for SES providers could force LEAs to grant access to organizations that present a danger to students or other school personnel and that LEAs should not have to provide space for ''unproven services.''

Discussion: The criterion in new § 200.48(d)(2)(i)(C) (proposed § 200.48(d)(1)(iii)) would not require an LEA to grant access to school facilities to any organization that presents a danger to students, teachers, or other school personnel. It merely provides that an LEA choosing to take advantage of the flexibility offered in the regulations implement a policy, if it does not already have one, that provides fair and open access to school facilities by SES providers on the same basis and terms as are available to other groups. Moreover, the assertion that SES providers, in general, represent a threat to school safety has no basis in either fact or experience. SES providers are approved by the SEAs of the States in which they operate and typically are required as part of that approval process to conduct criminal background checks on their employees. Providers operate openly in the communities they serve, often recruit by word of mouth, hire public school teachers as tutors, and even serve students in their own homes in many locations. SEAs monitor SES providers, typically with assistance from LEAs, and the Department is not aware of any significant safety issues arising with the SES program since it began nearly six years ago.

With respect to the claim that SES services are ''unproven,'' under § 200.47(b), an SEA may only grant approval to providers with a ''demonstrated record of effectiveness,'' and final regulations in § 200.47 would strengthen the process for approving and renewing and withdrawing approval of SES providers.

Changes: None.

Section 200.56(d) Definition of ''Highly Qualified Teacher''

Comment: Two commenters expressed concern about proposed § 200.56(d), which would include a cross-reference to the definition of ''highly qualified special education teacher'' in 34 CFR 300.18(d) of the IDEA regulations. The commenters stated that the Department should not incorporate by reference a regulation from one law (IDEA) into a regulation for another law (ESEA) that contains no reference to special education teachers. The commenters stated that, as a matter of law, the requirements for highly qualified special education teachers may be applied and enforced only under the IDEA, not under the ESEA. Other commenters supported including the cross-reference in § 200.56. One commenter, however, said that it did not make sense to add more regulations for special education teachers seven years after NCLB was enacted. Other commenters stated that the proposed regulation would weaken the requirements for highly qualified teachers and should not be adopted.

Discussion: Section 1119(a) of the ESEA requires that *all* teachers, which includes special education teachers, teaching core academic subjects be ''highly qualified'' by the 2005–2006 school year. In 2004, Congress amended the IDEA and established, in section 602(10), requirements governing the qualifications of special education teachers that differ from those in the ESEA. The ''highly qualified special education teacher'' definition in section 602(10) of the IDEA requires all special education teachers, including those who teach core academic subjects, to meet a State's special education certification or licensure requirements. In addition, if special education teachers are teaching core academic subjects, they must demonstrate subject-matter competency.

Under the IDEA, the ways in which some special education teachers can demonstrate subject-matter competency also differ from the regulations under the ESEA. For example, with respect to new special education teachers who are teaching multiple core academic subjects and who are highly qualified in mathematics, language arts, or science, section 602(10)(D) of the IDEA allows those teachers up to two years from the date of employment to demonstrate competence in the other core academic subjects that they teach. Section 602(10)(F) of the IDEA also provides that a teacher who is highly qualified under the IDEA will be considered highly qualified for purposes of the ESEA.

Our intent in the NPRM was to reference the definition of ''highly qualified special education teacher'' in 34 CFR 300.18 of the IDEA regulations so as to clarify, consistent with section 602(10)(F) of the IDEA, that the flexibility in meeting the highly qualified requirements afforded some special education teachers under the IDEA applies to determinations of whether they are highly qualified under the ESEA. The language in the preamble to the NPRM, however, might have implied that special education teachers who do not teach core academic subjects would be covered by the ESEA regulations. Such an implication would be inaccurate because the term ''highly qualified'' in the ESEA is only used with regard to teachers who are teaching core academic subjects. The preamble to the NPRM might also have implied that special education teachers would have to meet the highly qualified requirements in the IDEA in order to be highly qualified under the ESEA, even if they met the requirements in § 200.56. We did not intend to change the requirements for highly qualified teachers under the IDEA or the ESEA or imply that the requirements for all highly qualified special education teachers would be enforced under the ESEA. We merely wanted to clarify that, if a special education teacher is highly qualified under 34 CFR 300.18, that teacher is considered highly qualified under § 200.56, recognizing that the term ''highly qualified'' in the ESEA is used only with regard to teachers who are teaching core academic subjects. Therefore, we are revising § 200.56(d) to make clear that a special education teacher is a highly qualified teacher for purposes of the ESEA if the teacher is a ''highly qualified special education teacher'' under 34 CFR 300.18. Special education teachers who meet the requirements in § 200.56(a) and (b) or (c) are also highly qualified under the ESEA even if they do not meet the requirements under the IDEA.

Changes: We have revised § 200.56(d) and the introductory language in § 200.56 to make clear that a special education teacher is highly qualified under § 200.56 if the teacher is a ''highly qualified special education teacher'' under 34 CFR 300.18.

Implementation Timeline

Comment: Some commenters stated that the effective date of the proposed regulations could inhibit meaningful implementation because the regulations take effect in the middle of school year 2008–2009.

Discussion: The NPRM was not clear on when States and LEAs would need to begin implementing the various sections of the regulations. Therefore, we are including a table (Table 1) that provides a detailed timeline for implementing the final regulatory requirements. The timeline includes provisions for which States or LEAs must take action and does not include voluntary provisions (e.g., § 200.20 incorporating growth in calculating AYP) or provisions that do not require actions by States and LEAs (e.g., § 200.22 National TAC).

We are also including another table (Table 2) that provides a detailed timeline for implementing the graduation rate requirements.

TABLE 1—IMPLEMENTATION TIMELINE

Regulatory requirement	Implementation date
§ 200.7—Review of minimum group size, confidence intervals, etc. Each State must submit revisions to its Accountability Workbook.	In time for changes to be effective for AYP determinations based on 2009–2010 assessment results.
§ 200.11—Reporting NAEP data on report cards	Report cards issued in 2009–2010 for 2008–2009 school year data (with NAEP data from the most recent year available).
§ 200.19—Other Academic Indicators	
Implementing transitional graduation rate	AYP determinations based on 2008–2009 assessment results.
Establishing a goal and targets/continuous and substantial improvement for AYP.	AYP determinations based on 2009–2010 assessment results.
Reporting of four-year adjusted cohort graduation rate	Report cards providing assessment results for the 2010–2011 school year.
Reporting of extended-year adjusted cohort graduation rate	The first year for which a State separately calculates such a rate.
Implementing four-year adjusted cohort graduation rate for AYP purposes, in the aggregate and disaggregated.	AYP determinations based on 2011–2012 assessment results.
Accountability Workbook revisions	In time for changes to be effective for AYP determinations based on 2009–2010 assessment results.
Request for extension of the deadline for reporting four-year adjusted cohort graduation rate.	March 2, 2009.
§ 200.37—Notice of identification	
14-day notice for choice	Before start of 2009–2010 school year.
New provisions for SES notice	Beginning with 2009–2010 notice.
§ 200.39—Responsibilities regarding improvement (publication of data on LEA Web site).	In a timely manner to ensure that parents have current information on their public school choice and SES options.
§ 200.47—SEA responsibility re: SES	
SEA posting of data on Web site for LEAs	Before the start of the 2009–2010 school year.
Develop, implement, and publish standards for monitoring LEAs	Before the start of the 2009–2010 school year.
Approving providers using new criteria	Beginning with next approval cycle.
Monitoring providers using new criteria	Beginning with next monitoring cycle of SES.
§ 200.48(d) 20 percent obligation	Beginning with funds expended during 2009–2010 school year.

TABLE 2—IMPLEMENTATION TIMELINE FOR GRADUATION RATES

	School year and regulatory requirements			
	2008–2009	2009–2010	2010–2011	2011–2012
	AYP based on 2008–2009 assessment results	AYP based on 2009–2010 assessment results	AYP based on 2010–2011 assessment results	AYP based on 2011–2012 assessment results
AYP	States must calculate high school graduation rate for AYP determinations in the aggregate using an approved transitional rate or the four-year adjusted cohort graduation rate and any extended-year adjusted cohort graduation rate			States must calculate high school graduation rate for AYP, in the aggregate and disaggregated by subgroup, using the four-year rate and any extended-year rate.
Reporting	States must report disaggregated graduation rate data using an approved transitional rate or the four-year rate (any extended-year rate must be reported separately)		Beginning with report cards providing assessment results for the 2010–2011 school year, States must report disaggregated graduation rate data using the four-year rate (any extended-year rate must be reported separately).	
Goal and Targets	States may use current goals and targets.	States must have a single goal and targets that meet the criteria in the regulations. States may need to change their goal and targets when they begin using the four-year rate for AYP.		

To read this chart: For example, for the 2008–2009 school year, a State must (a) calculate high school graduation rate for AYP determinations using an approved transitional rate or the four-year adjusted cohort graduation rate (that meets the requirements in the regulation); (b) report its graduation rate disaggregated by subgroup; and (c) may use its current goal and targets.

Executive Order 12866

Under Executive Order 12866, the Secretary must determine whether this regulatory action is ''significant'' and therefore subject to the requirements of the Executive Order and subject to review by OMB. Section 3(f) of Executive Order 12866 defines a ''significant regulatory action'' as an action likely to result in a rule that may (1) have an annual effect on the economy of $100 million or more, or adversely affect a sector of the economy, productivity, competition, jobs, the environment, public health or safety, or State, local or tribal governments, or communities in a material way (also referred to as an ''economically significant'' rule); (2) create serious inconsistency or otherwise interfere with an action taken or planned by another agency; (3) materially alter the budgetary impacts of entitlement 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 Secretary has determined that this regulatory action is significant under section 3(f)(4) of the Executive order.

Summary of Costs and Benefits

The Department believes many of the regulatory changes included in these final regulations will not impose significant costs on States, LEAs, or other entities that participate in programs funded under Part A of Title I. Other changes will impose costs, but the Department believes that the benefits resulting from the regulations will greatly exceed those costs. Although many commenters claimed that the proposed regulations would increase State or local burden (and one commenter stated specifically that the cost-benefit analysis included in the NPRM underestimated the costs of implementing the proposed regulations), commenters did not provide alternative estimates of the costs of implementing the various proposals. Therefore, this final cost-benefit analysis generally continues the Department's original estimates, making revisions only to reflect changes in the regulations or in other places where the Department determined that revisions were needed.

The major benefit of these regulations, taken in their totality, is a Title I, Part A program in which clearer accountability and implementation requirements (particularly in the areas of high school graduation rate, public school choice, and SES) will be coupled with greater flexibility in implementation (particularly in the use of measures of individual student academic growth in calculating AYP). These regulations will, thus, add to the contributions that NCLB has made to the creation of a system in which schools, LEAs, and States expect to educate all children to high standards and are held accountable for doing so. The regulations will support the attainment of increases in student achievement that build on the improvements that the Nation has seen in the last several years. The benefits to the United States of having a more educated citizenry have been plentiful and will continue to be so as the reforms implemented as a result of NCLB (and as supported through these regulations) continue to take hold.

The Department's analysis of the costs and benefits of implementing specific provisions of the regulations follows. The costs to implement specific provisions of the regulations are included in the tables at the end of the *Paperwork Reduction Act of 1995 section of this notice*.

Accountability Workbook (Minimum Group Size and Graduation Rate)

The regulations in § 200.7 clarify that State definitions of AYP must include a minimum group size that is based on sound statistical methodology, that yields statistically reliable information for each purpose for which disaggregated data are used, and that ensures that, to the maximum extent practicable, all student groups are included, particularly at the school level, in accountability determinations. The Department has previously reviewed each State's minimum group size and believes that some States already meet the requirements of § 200.7. Some States, however, may need to revise their minimum group size and other components of the State's AYP definition based on the final

regulations and on feedback from the new peer review.

All States are required to revise their Accountability Workbook and explain how their minimum group size meets the requirements in § 200.7 and to provide certain other information on their minimum group size and AYP definition (information on how other components of the State's AYP definition, in addition to its minimum group size, interact to affect statistical reliability and ensure the maximum inclusion of all students and student subgroups in AYP determinations as well as information on the exclusion of students and subgroups from those determinations). States are required to submit to the Department, for technical assistance and peer review, a revised Accountability Workbook that reflects these new requirements in time for AYP determinations based on 2009–2010 assessment results.

Under the regulations in § 200.19(b)(6), States will also need to revise their Accountability Workbook in order to include: (a) The State's current graduation rate definition, (b) the State's progress toward meeting the deadline for calculating and reporting the four-year adjusted cohort graduation rate, (c) the State's graduation rate goal and targets, (d) an explanation of how the State's graduation rate goal represents the rate the State expects all high schools in the State to meet and of how the State's targets demonstrate continuous and substantial improvement toward meeting or exceeding the goal, and (e) the graduation rate for the most recent school year of the high school at the 10th percentile, the 50th percentile, and the 90th percentile in the State (ranked in terms of graduation rate). If a State decides to use an extended-year adjusted cohort graduation rate as part of its AYP definition, the State must also describe, in its Accountability Workbook, how it will use that rate with its four-year adjusted cohort graduation rate to determine whether its schools and LEAs have made AYP. These requirements are somewhat different from what the Department proposed in the NPRM.

We have revised our earlier estimates (included in the NPRM) of the cost to States of submitting a revised Accountability Workbook in order to include the time necessary to prepare and submit the information related to graduation rates. The Department estimates that each State would, on average, require 276 hours of staff time to complete this effort, including 80 hours for development and analysis of a proposed minimum group size policy (within an overall definition of AYP), 132 hours for the development of new graduation rate definitions and policies, and an additional 64 hours for actual preparation of the Accountability Workbook. We further estimate that SEAs' cost for that activity will be $30 an hour. For the 50 States, the District of Columbia, and Puerto Rico, the estimated cost of revising and submitting their Accountability Workbook would thus be $430,560. These estimates incorporate an assumption that some States will need to do additional work on their Accountability Workbook as a result of feedback from the peer review.

In response to the NPRM, one commenter stated that our cost estimates severely underestimated the time and resources States would expend to revise their Accountability Workbook. However, the commenter did not provide alternative estimates for the Department to consider. Moreover, this cost-benefit analysis includes a ''sensitivity analysis'' (discussed later in this section) that subjects the cost calculations to alternative (and higher) assumptions about the amount of time that will be required for compliance.

The Department believes that the benefits of the change in minimum group size policy, in terms of greater accountability that would result from a State's use of a minimum group size that meets the regulatory criteria, would greatly outweigh the minimal costs of compliance.

Participation in NAEP

In the NPRM, the Department projected that States and LEAs would be able to implement at minimal cost the requirement to include NAEP data on State and LEA report cards. The Department made this projection because State NAEP results are available on the NCES Web site and through other sources, and obtaining those data should not pose a significant burden. Neither should including the data on report cards, as the NAEP results would be a minor addition to the data already so included.

Several individuals who commented on the NPRM stated that it would be burdensome for SEAs and LEAs to ensure the accurate and appropriate use of NAEP results and some said, more specifically, that the incorporation of NAEP results on State report cards would require significant staff time and resources because States must seek input from stakeholders, obtain State Board of Education approval, and pay the costs for reproduction. Other commenters stressed that LEAs would need to clarify, on their report cards, that only limited comparisons can be made between NAEP and State assessments because of the differences between the two assessments.

In consideration of these comments, the Department reiterates that NAEP data are readily available and that it should not be a significant burden for States and LEAs to obtain and include those data on their report cards. However, the Department also acknowledges that there will be some cost, particularly in the first year, of making the transition to including NAEP data on State and local report cards. The Department's final estimate is that, in the first year, each SEA will require 24 hours to incorporate NAEP data on State report cards and, thereafter, each SEA will require the 5 hours annually that the Department estimated in the Paperwork Reduction Act analysis included in the NPRM. At $30 per hour, the estimated cost of implementation for 52 States is, thus, $37,440 in the first year and $7,800 in each succeeding year.

Similarly, at the local level, the Department also estimates 24 hours of burden in the first year and 5 hours thereafter. For approximately 14,000 LEAs, at $25 per hour, the total cost will be $8,400,000 in year one and $1,750,000 annually thereafter.

These estimates take into consideration the changes made in the final regulations, which provide greater specificity on the NAEP data that must be reported and no longer require LEAs to publish disaggregated NAEP results. The Department does not believe that those changes will add measurably to the cost of compliance.

We note that the NAEP reading and mathematics assessments are administered only once every two years. In the second year of a cycle, the costs to SEAs and LEAs of including NAEP data on their report cards should be particularly low. Further, the Department assumes that, in many States, the SEA will prepare summaries of the NAEP data (largely from the ''snapshots'' provided by NCES and accessible on the NCES Web site) and provide them to LEAs, which in turn will be able to include those summaries on their report cards with little investment of time or effort. The Department, thus, does not believe that the cost of including NAEP data on the report cards will be any greater than what is estimated above.

The Department believes that these minimal costs of implementing the requirements to include NAEP data on report cards will be greatly outweighed by the benefits of providing the public with important additional information

on student achievement with which to compare State assessment results.

High School Graduation Rate

The final regulations restructure the regulations in § 200.19 on ''Other Academic Indicators'' and, in particular, require States to adopt a ''four-year adjusted cohort graduation rate'' and, at a State's option, an ''extended-year adjusted cohort graduation rate,'' for the purpose of reporting no later than school year 2010–2011 and for the purpose of making AYP determinations no later than school year 2011–2012. Prior to those deadlines, States will use either the four-year adjusted cohort graduation rate or a transitional graduation rate, which for most States will be the rate they currently use, for those two purposes. (Unlike the NPRM, the final regulations do not require States to implement an ''Averaged Freshman Graduation Rate'' during the interim period.) The regulations also require the use of disaggregated graduation rate data for AYP determinations beginning with the determinations based on school year 2011–2012 assessment results (with the exception that ''safe-harbor'' determinations, which are already required to include disaggregated data, would continue to include them). In addition, the final regulations require a State to include in its AYP definition (a) a single graduation rate goal that the State expects all high schools in the State to meet, and (b) annual graduation rate targets that reflect continuous and substantial improvement from the prior year toward meeting or exceeding the goal. To make AYP beginning with determinations based on 2009–2010 assessment results, any school or LEA that serves grade 12, and the State, must meet or exceed the graduation rate goal or annual target.

In order to meet the deadlines for implementation of the four-year adjusted cohort graduation rate, States will need to have in place a data system that can track students who emigrate to another country, transfer to another school, or die. States also will need to collect four years of student data through those systems in order to implement the new rate by the deadline established in the final regulations.

In 2005, all 50 States agreed to the NGA's *Graduation Counts: A Compact on State High School Graduation Data,* which calls for each State to develop a longitudinal graduation rate. A recent publication by the NGA [20] reports that 36 States already have the information systems needed to collect student longitudinal data and are tracking cohorts of students as they progress through school. Within four years, according to this report, 49 States should have the high school cohort data needed to implement an adjusted cohort graduation rate, although States will still need to provide guidance to local officials who collect and report the data and to take other actions to ensure data quality and accuracy. This activity reflects policies the States have adopted, and actions they have taken, in the absence of Federal regulations. Based on this information, we believe that the regulations on development and implementation of a four-year adjusted cohort graduation rate will not impose significant costs on the great majority of States that they were not likely to assume in the absence of the regulations. That is, in light of the progress by almost all States in developing the systems needed to calculate a four-year adjusted cohort graduation rate, it would not be appropriate to attribute to the regulations the costs that States are assuming in this area.[21] Moreover, the Federal government supports States' development of longitudinal student data systems through the Department's Statewide Longitudinal Data Systems program. For the fiscal years 2005 (when the program began) through 2008, the Congress appropriated more than $122 million for this program and, through fiscal year 2007, 27 States have received these grants.

At the local level, the major cost of implementing the new regulations on graduation rate will be in determining whether students who have left the schools of an LEA have transferred to another LEA or school or have dropped out. We estimate that each LEA will require 50 hours annually to meet this responsibility. For approximately 14,000 LEAs nationally, at $25 per hour, the cost of implementation will be approximately $17.5 million.

We believe the benefits of the changes regarding graduation rate definitions and the use of disaggregated graduation rate data in AYP calculations will be significant. A uniform and accurate method of calculating graduation rate is needed to raise expectations and to hold schools, LEAs, and States accountable for increasing the number of students who graduate on time with a regular high school diploma, as well as to provide parents and the public with more accurate information. By requiring all States to use a more rigorous and accurate graduation rate calculation, the Department can ensure greater accountability and transparency on this important indicator. In addition, we need to have a uniform and accurate method of calculating high school graduation rate to improve our understanding of the scope and characteristics of those students dropping out of school or taking longer to graduate. Finally, the use of disaggregated graduation rate data in AYP calculations will help ensure that schools and LEAs do not allow overall success in graduating students in four years (or less) to mask low graduation rates for individual student groups.

Growth Models

The final regulations allow States to use measures of individual student academic growth in school and LEA AYP determinations and, thus, provide States with greater flexibility without burdening them with significant additional costs. To receive permission to incorporate individual student academic growth into its AYP definition, a State will have to have implemented a longitudinal data system that tracks student progress from grade to grade. However, as discussed earlier under the heading *High School Graduation Rate,* almost all States are developing student longitudinal data systems in the absence of Federal regulations; this is the case because the benefits of having a longitudinal student data system are much greater than just having the ability to support the use of individual student academic growth in calculating AYP. States have found such systems to be valuable in numerous ways,[22] including in tracking the educational progress of students as they progress through grades and across schools and school systems; more accurately determining whether students graduate from high school; calculating accurate student dropout

[20] National Governors Association. (2008). *Implementing Graduation Counts: State Progress to Date, 2008.* Washington, DC: Author.

[21] More specifically, we estimate that 36 States will require an average of 240 hours to complete the development or refinements of their data systems for the purpose of computing the four-year adjusted cohort graduation rate consistent with the regulations, for a total of 8,640 hours nationally. Based on information from the NGA reports, we believe the additional 16 States will not need to assume those costs because they have already completed that work. Further, we assume that the 52 States will require an average of 120 hours to compute the extended-year adjusted cohort graduation rate, should all decide to adopt such a rate, for a total of 6,240 hours. At $30 per hour, the total cost of implementing these requirements would be $446,400, or approximately $8,585 per State.

[22] Ewell, P., & Boeke, M. (2007). Tracking student progression: The State of the States; Retrieved October 10, 2008 from *http://www.nchems.org/c2sp/sur/SURSurveyReport.pdf.*

rates; holding schools and LEAs accountable for results; targeting assistance to those schools and LEAs most in need; determining whether the content their secondary schools offer is well aligned with college-preparedness requirements; identifying strengths and weaknesses in teacher preparedness; and measuring the educational performance of the State as a whole. Therefore, the Department believes it would be inappropriate to assign the costs States incur in designing and implementing longitudinal data systems as a cost of complying with this section of the final regulations.

In order to implement an AYP definition that includes measures of student academic growth, an SEA will need to submit a request to the Department that describes that definition and meets certain other requirements. We estimate that a State would need 240 hours to prepare such a request. If all 52 States prepare such requests, the total cost would be $374,720 (again assuming $30 per hour).

Public School Choice and Supplemental Educational Services

The final regulations make a number of changes to the current regulations on public school choice and supplemental educational services.

First, in § 200.37, the regulations require LEAs to notify parents of eligible students of the option to transfer their child to another school, sufficiently in advance of, but no later than 14 calendar days before, the start of the school year in order to give those parents adequate time to exercise their public school choice option. As stated in the NPRM, the Department believes that this regulation would not increase LEA costs because it would affect merely the timing of the parental notification. Two commenters on the NPRM disagreed, stating that this change in the regulations would result in increased local administrative costs. However, the commenters did not offer any facts or estimates to support that comment, so we decline to amend our analysis.

Under § 200.37, the regulations also require that an LEA's notice to parents of students eligible for SES: (a) Explain the benefits of SES, (b) be clear and concise, and (c) be clearly distinguishable from the other school improvement information sent to parents under § 200.37. The final regulation, unlike the NPRM, also requires that this notice include an indication of those providers that are able to serve students with disabilities or LEP students. The Department does not believe this change will add significantly to LEAs' compliance burden because information on providers that are able to serve students with disabilities and LEP students will be available from the SEAs; LEAs will not need to collect that information themselves.

We note that LEAs may assign costs related to meeting this requirement to the amount equal to 0.2 percent of their Title I, Part A allocation that the regulations permit LEAs to use for outreach and assistance to parents on public school choice and SES.

Data from the ESEA Consolidated State Performance Report indicate that approximately 2,000 LEAs nationally have at least one Title I school in year two of school improvement (or in a later stage of the Title I accountability timeline). These are the schools with students eligible for SES that would technically be covered by this new requirement. However, some of these LEAs are not able to offer SES and, thus, are not affected by the proposed notice requirement. For example, rural and other small or isolated LEAs often do not have any approved SES providers serving their area. For this reason, our analysis assumes that 80 percent of the estimated 2,000 LEAs with at least one Title I school in year two of improvement or later, or 1,600 LEAs, will be subject to the notice requirement annually. We estimate that these 1,600 LEAs will each require an average of 12 hours of staff time to prepare the notice to parents and that the cost for this time will average $25 per hour. Under this assumption, the cost for the preparation of this notice will be $480,000 annually.

Further, in the 2006–2007 school year, in the States for which the Department has data, approximately 3.7 million students were eligible for SES.[23] Assuming that approximately 3.7 million students continue to be eligible each year, we project that: (1) The parents of one half of these students would receive the SES information by mail, in a separate mailing, and (2) the remaining parents would receive that information through notices that students bring home from school, in a mailing that includes other information already required to be provided to parents (in § 200.37), or by other means that impose very small costs on LEAs. For the parents who would receive the separate notices by mail, the cost of providing the notice (assuming continuation of current postage rates) would be $756,000, bringing the total cost for the implementation of the proposed SES notice requirement to $1,236,000.

These estimates are the same as those the Department included in the NPRM (with the exception of an adjustment to reflect a subsequent change in the first-class postage rate). Although one commenter stated that implementation of these requirements in the regulations would be burdensome, no commenters challenged these cost estimates.

The regulations in § 200.39 require LEAs to post on their Web sites information on their implementation of the public school choice and SES requirements, including information on the number of students who were eligible for and who participated in the public school choice and SES options, information on approved SES providers operating in the LEA and on the locations where services are provided, and a list of schools available to students who wish to take advantage of the public school choice option. If an LEA does not have its own Web site, the SEA is required to include on its Web site the information otherwise required of LEAs.

Based on data from the ESEA Consolidated State Performance Report, approximately 3,000 LEAs have a Title I school in year one of improvement or later and, thus, are technically required to offer either public school choice, or both public school choice and SES, to their eligible students. However, as with the SES notice requirement, some of those LEAs would not be affected because they are unable to offer public school choice and SES due to a lack of choice options (for instance, rural and other small LEAs frequently have only one school at a particular grade span) or the absence of an approved SES provider serving their area. We estimate that 80 percent of the 3,000 LEAs with a Title I school in year one of improvement or later, or 2,400 LEAs, would need to post the new information on their Web site. We further estimate that these LEAs would require an average of 25 hours of staff time to prepare the data for the Web site, at a cost of $25 per hour, for an estimated national cost of $1,500,000 to meet the new requirement to post public school choice and SES information on LEA Web sites. Therefore, the total estimated cost for implementation of the new SES and Web site notice requirements is $2,736,000. These estimates are unchanged from those the Department included in the NPRM (again, with the exception of a minor adjustment because of a change in the postage rate). Although some commenters opposed the proposed requirements as burdensome, none challenged the

[23] U.S. Department of Education. (2007). *Consolidated State Performance Report, 2006–07.* Unpublished raw data.

Department's cost estimates. In addition, the Department does not believe that the changes made since the NPRM (exempting LEAs that do not have a Web site from the requirement to post the information on public school choice and SES, but requiring that their SEA post that information) will make a significant difference in the cost of compliance.

We have also estimated the cost to SEAs of posting the public school choice and SES information for LEAs that do not have their own Web sites. The Department projects that 47 States will need to post this information and that this effort will require five hours annually. At $30 per hour, the estimated total national cost is $7,050.

The benefits of these provisions are that parents and others will have more and better information about public school choice and SES and, thus, parents might be more likely to take advantage of those options (with attendant benefits for their children) and that LEA implementation of the public school choice and SES requirements will be more transparent. We also note that LEAs may assign costs related to meeting this requirement to the amount equal to 0.2 percent of their Title I, Part A allocations under § 200.48(a)(2)(iii)(C).

The final regulations in § 200.47 require SEAs to post information on their Web sites on the amount that each LEA must spend for public school choice and SES (that is, an amount equal to 20 percent of the LEA's Title I allocation) and, for each LEA, the per-child amount for SES. SEA Web sites must also indicate which SES providers are able to serve students with disabilities or LEP students. The Department added these provisions to the final regulations in response to comments on the NPRM. The Department believes that the information called for will be readily available to most SEAs and, thus, should be inexpensive to post. (A few SEAs may have to revise their application instructions in order to gather some of this information, but the cost of making such revisions should be minimal.) The Department estimates that it will require four hours annually for an SEA to post this information. For 52 SEAs at $30 an hour, the total annual cost will be an estimated $6,240.

The regulations in § 200.47 also clarify the SEA's responsibilities for SES, by stating that those responsibilities include developing, implementing, and publicly reporting on the SEA's standards and techniques for monitoring LEAs' implementation of SES. States should already have such standards and techniques in place because they are required under 34 CFR 80.40 to monitor LEA activities. The burden of publicly reporting on them, such as by posting information about them on the SEA's Web site, should be minimal. Specifically, we estimate that the total cost of implementation will be $62,400, based on an assumption that each of the 52 SEAs will require 40 hours to fulfill these responsibilities, at a cost of $30 an hour. The benefit of these regulations will be greater transparency of how SEAs monitor LEAs' implementation of SES.

The regulations in § 200.47 also clarify that, in order to be approved as an SES provider, an entity must provide the State with evidence that the instruction it would provide and the content it would use are aligned with the State's academic content and student academic achievement standards and are of high quality, research-based, and specifically designed to increase the academic achievement of eligible children. In addition, a State must consider, at a minimum, (1) whether the entity has been removed from any State's approved provider list; (2) parent recommendations or results from parent surveys, if any, regarding the success of the entity's instructional program in increasing student achievement; and (3) evaluation results, if any, demonstrating that the instructional program has improved student achievement. The Department believes that these requirements will result in improvements in States' SES provider approval procedures leading to high-quality SES and improved student achievement, and that the cost of compliance will be very minimal.

The regulations in § 200.47 also further specify the evidence that States must consider when monitoring the quality and effectiveness of the services offered by an approved provider in order to inform decisions on renewal or withdrawal of approval of the provider. The statute and current regulations already require States to approve SES providers with a demonstrated record of effectiveness, and to develop and apply objective criteria for monitoring and withdrawing approval of providers. The regulations may add minimal costs to States if they need to revise their applications or monitoring protocol in order to comply with the requirements, or if a revised application or protocol results in more labor-intensive application review or monitoring. The regulations will only add costs to SES providers if they are not already providing this information to States in their applications for approval and renewal. The Department believes that the minimal costs to States and SES providers will be outweighed by the benefits of having a clear outline of the evidence that States must consider both before providers begin serving students in the State and as their programs are monitored and being considered for renewal or termination.

A number of commenters expressed concern about the costs of implementing the changes proposed for § 200.47, but did not offer specific estimates of the cost of implementation. For example, some commenters stated that the cost of SEA monitoring of SES providers would diminish direct services to students. The Department responded, in the *Analysis of Comments and Changes* section of this preamble, that State monitoring is required under the ESEA and that the regulations merely clarify the elements of effective monitoring. Moreover, SEA monitoring is financed with Title I funds that SEAs reserve for State administration, not with funds that would otherwise be used for services to students. Other commenters expressed concern about the new requirement for SEAs to consider, in their monitoring and in their review of SES provider applications, evaluation results and parent surveys; these commenters were concerned that the regulations would require SEAs to conduct costly surveys and evaluations. The Department pointed out that the regulations require consideration of parent surveys and evaluations only when they are available. After consideration of these comments, the Department's assessment of the cost of compliance for the § 200.47 revisions is largely unchanged.

The regulations on funding for public school choice and SES in § 200.48 allow LEAs to count costs for parent outreach and assistance toward the requirement to spend the equivalent of 20 percent of the LEA's Title I, Part A allocation (the ''20 percent obligation'') on choice-related transportation and SES. This provision permits an LEA to allocate up to 0.2 percent of its Title I, Part A allocation (1.0 percent of the 20 percent obligation) in that manner. Allowing LEAs to count toward meeting the 20 percent obligation a limited amount of funds for parent outreach and assistance will help ensure that LEAs provide parents the information they need to make the best decisions for their children. The new provision will not impose costs on LEAs, as they would, at their discretion, support the parental outreach and assistance activities by using funds from other activities.

The amendments to § 200.48 also require an LEA that uses unspent funds

from its 20 percent obligation for other allowable activities to meet the following criteria:

(1) Partner, to the extent practicable, with outside groups, such as faith-based organizations, other community-based organizations, and business groups, in order to inform eligible students and their families about their opportunities for public school choice and SES.

(2) Ensure that eligible students and their families have a genuine opportunity to transfer to schools or to receive SES. The language clarifies that providing such an opportunity includes (a) providing timely and accurate notice to those students and their families, as required under §§ 200.36 and 200.37; (b) ensuring that sign-up forms for SES are distributed directly to all eligible students and are made widely available and accessible; and (c) providing a minimum of two SES enrollment ''windows'' at separate points in the school year that are of sufficient length to enable parents of eligible students to make informed decisions about requesting SES and selecting a provider.

(3) Ensure that approved SES providers are given access to school facilities through a fair, open, and objective process.

In response to comments on the NPRM, the Department revised the proposed language to require an LEA that is using funds from its 20 percent obligation for other purposes: (1) To maintain records that it has met the criteria listed above, and (2) to notify the SEA that it has met those criteria and of the amount remaining from its 20 percent obligation that it intends to spend on other allowable activities. These requirements replace language in the NPRM that would have required LEAs to obtain permission from the SEA before using unspent funds for other purposes. The final regulations also: (1) Revise the proposed language on partnering to provide examples of outside groups with which an LEA may partner and to clarify that this activity must take place only to the extent practicable; and (2) replace a requirement that LEAs permit eligible students to sign up for SES throughout the school year with a requirement for two enrollment ''windows'' at separate points in the school year. All of these changes should result in reduced compliance costs.

The Department believes that most of the costs that LEAs will incur in meeting these requirements will be minimal. The most tangible costs will be for developing a clearly distinguishable notification (on eligibility and the benefits of SES) to parents of eligible students (which has been accounted for in the cost estimate for § 200.37) and in maintaining records and informing the SEA that an LEA has met the various outreach and access criteria in § 200.48(d) if it wishes to use unspent funds from its 20 percent obligation for other allowable activities. We estimate these additional LEA documentation costs related to § 200.48(d) as follows.

As noted earlier, we project that 2,400 LEAs annually will be required to offer public school choice, or both public school choice and SES, to their eligible students. Further, based on data for 378 LEAs reported to the Department's ED*Facts* data system, we estimate that 10 percent of those LEAs (240) will use the full 20 percent obligation for choice-related transportation and SES and, thus, will not be affected by the regulations.[24] Further, based on the ED*Facts* data, we estimate that an additional 15 percent of the LEAs (360) will not meet the 20 percent obligation but will choose to spend the remaining funds for choice-related transportation and SES in the following year, rather than meeting the criteria in new § 200.48(d)(2)(i), compiling and maintaining the required records, and informing the SEA of their actions.[25]

The remaining 1,800 LEAs, under our assumptions, will decide to use unspent funds from their 20 percent obligation for other allowable activities and, thus, will need to maintain records demonstrating that they have met the criteria in § 200.48(d)(2)(i) and inform the SEA that they have met those criteria and of the amount they intend to spend on other allowable activities. We estimate that the annual cost of this effort will be $540,000, based on an assumption that each LEA will require 12 hours to meet these requirements and that LEAs' costs for this effort will be $25 per hour.

The final regulations also revise the language in the NPRM on SEA responsibilities related to an LEA's use of any unspent portion of its 20 percent obligation. In place of the proposed requirement for SEAs to approve LEA requests to spend less than the 20 percent obligation, the final regulations require that SEAs ensure, through their regular monitoring process, LEAs' compliance with the criteria in new § 200.48(d)(2)(i). The regulations also require SEAs to review certain LEAs (those that have spent a significant portion of their 20 percent obligation on other allowable activities and have been the subject of multiple complaints, supported by credible evidence, related to public school choice or SES) and to complete each such review by the beginning of the next school year. The Department estimates that most of the costs of meeting these requirements will be minimal, as SEAs are already monitoring LEAs' implementation of the public school choice and SES requirements and should be able, at minimal cost, to incorporate the new requirements into their monitoring procedures. However, the requirement to complete a review of certain LEAs before the beginning of the next school year will likely result in SEAs having to undertake additional monitoring and review activities. The Department estimates that, of the projected 1,800 LEAs that will elect to spend less than their 20 percent obligation on choice-related transportation and SES, five percent (90) will be covered by § 200.48(d)(3)(ii)(A) and, thus, will be required to be reviewed by the SEA prior to the beginning of the next school year. The Department further estimates that 80 percent of these reviews (72) will be reviews that the State would not have carried out in the absence of this new requirement. Finally, the Department estimates that the cost of carrying out each review (including staff time, travel, and other expenses) will average $1,220 (based on 24 hours of staff time per review, at $30 an hour, plus $500 per review for travel and additional expenses). Thus, the estimated total cost of implementation will be $87,840 annually.

Finally, the regulations require that, if an SEA determines that an LEA has failed to meet the three criteria related to implementation of public school choice and SES, the LEA must spend, in the next year, the ''unexpended'' amount needed to meet the 20 percent obligation, in addition to the 20 percent required in that subsequent year. Such an LEA must also request SEA permission before spending less than the unexpended amount and the 20 percent obligation in the subsequent

[24] The ED*Facts* data from 2005–2006 indicate that 8.2 percent of LEAs used the equivalent of at least 20 percent of their Title I allocation to fund SES. Unfortunately, the data do not include expenditures for choice-related transportation. We assume that the inclusion of expenditures for choice-related transportation would bring the total to approximately 10 percent.

[25] This estimate is based on the assumption that LEAs that spend close to the 20 percent will find it more efficient to spend the remaining funds the following year than to compile and maintain the records and inform the SEA of their use of those funds for other purposes. The ED*Facts* data from 2005–2006 indicate that 11.6 percent of LEAs used the equivalent of at least 16 percent (but less than 20 percent) of their Title I allocations for SES. Again, the data do not include expenditures for choice-related transportation; we assume that if those expenditures were included, approximately 15 percent of LEAs will elect to spend the remaining funds of their obligation in the succeeding year.

year, and the SEA may not grant such permission unless it has confirmed the LEA's compliance with the criteria in § 200.48(d)(2)(i). The Department believes that few LEAs will be covered by these provisions and, thus, that the cost of compliance will be low. Our estimate is that 10 percent (240) of the 2,400 LEAs required to implement public school choice and SES will be covered and that one half of those LEAs will apply to the SEA for permission to spend the unused funds. (The other half will add the unexpended amount to the 20 percent obligation in the succeeding year). We further estimate that each such LEA will require 12 hours (at $25 per hour) to prepare a request to the SEA to spend the unused funds. The total estimated annual cost of implementing these requirements at the LEA level is, thus, $36,000. We further estimate that SEAs will require 12 hours to review each request. At $30 per hour, the total estimated annual cost for SEAs is $43,200.

Overall, the total estimated cost of implementing the regulations on public school choice and SES is $3,519,060.

Although our cost estimates for the public school choice and SES regulations are necessarily speculative (because of the limited availability of relevant data), the estimated costs are low even if some of the assumptions are changed significantly. For example, if the number of hours required at each stage of implementing the new public school choice and SES regulations were doubled, the total annual cost would increase only to $6,245,460. These costs, even when combined with the estimated $27,188,800 attributable to implementation (in the first year) of the regulations on minimum group size, high school graduation rates, submission of revised Accountability Workbooks, the inclusion of NAEP data on report cards, and implementation of AYP definitions that include measures of student growth are an extremely small amount within the context of the $13.9 billion Title I program.

The Department believes that the regulations on public school choice and SES will result in significant benefits, in terms of providing more students with access to public school choice and SES under Title I and students and their families receiving better information about their options. A recent study by the RAND Corporation, supported by the Department, found that, in five out of the seven large urban LEAs in which there were sufficient numbers of students to analyze the effects, the students participating in SES showed statistically significant positive effects in both reading and mathematics achievement.[26] Moreover, for those students using SES for multiple years, the analysis suggests that the positive effects might accumulate over time. If SES can continue to improve student achievement and close the achievement gap, students, schools, and LEAs will benefit. In sum, the Department believes that the benefits students will receive, if more LEAs provide eligible students with a genuine opportunity to take advantage of the public school choice and SES options, will well exceed the small costs LEAs and SEAs would assume in implementing these regulations. Moreover, LEAs and SEAs will be able to use Federal funds provided through Title I, Part A to meet the aforementioned administrative expenses.

Other Provisions

The Department believes that the additional provisions in the final regulations will not result in significant costs for LEAs, SEAs, or other entities. These provisions include, in § 200.2, clarification of the requirement that State assessments involve multiple measures of student achievement and, in § 200.43, clarification of the actions LEAs must take when schools are in ''restructuring'' status. Similarly, § 200.22 authorizes the creation of a National Technical Advisory Council; all costs of operating the National TAC will be paid for with Department salaries and expenses funds.

Paperwork Reduction Act of 1995

The final regulations contain information collection provisions that are subject to review by OMB under the Paperwork Reduction Act of 1995 (44 U.S.C. 3501–3520). A description of the specific information collection requirements is provided in the following tables along with an estimate of the annual recordkeeping burden for these requirements. (Two of the requirements do not add additional burden to what has already been approved.) Included in the estimate is the time for collecting and tracking data, maintaining records, calculations, and reporting. We display the valid OMB control numbers assigned to the collections of information in these final regulations at the end of the affected sections of the regulations.

The final regulations include information collection requirements associated with the following provisions that will add additional burden to already approved collections (1810–0576 and 1810–0581): § 200.7(a)(2)(ii); § 200.11(c); § 200.19(b)(1); § 200.19(b)(1)(ii)(B)(1); § 200.19(b)(6); § 200.19(b)(7); § 200.20(h); § 200.37(b)(5)(ii)(C); § 200.39(c)(1); § 200.39(c)(2); § 200.47(a)(1)(ii)(B); § 200.47(a)(3)(ii); § 200.47(a)(4)(iii); § 200.48(d)(3); and 200.48(d)(4). These information collection requirements were listed in the NPRM or represent new or modified requirements in response to public comment.

Collections of information: State Educational Agency, Local Educational Agency, and School Data Collection and Reporting under ESEA, Title I, Part A (OMB Number 1810–0581) and Consolidated State Application (OMB Number 1810–0576).

Burden hours and cost estimates for the final regulations pertaining to ''State Educational Agency, Local Educational Agency, and School Data Collection and Reporting under ESEA, Title I, Part A (OMB Number 1810–0581)'' are presented in the following tables. The first table presents the estimated burden for SEAs and the second table presents the estimated burden for LEAs.

TITLE I REGULATIONS (COLLECTION 1810–0581) FINAL REGULATIONS BURDEN HOURS/COST FOR SEAS

Citation	Description	Number of respondents	Average number of hours per respondent *	Total hours	Total cost (total hours × $30.00)
§ 200.11(c)	Adding NAEP data to SEA report cards and developing tool for parents to compare NAEP and State assessment data.	52	24	1,248	$37,440

[26] U.S. Department of Education. (2007). *State and Local Implementation of the No Child Left Behind Act, Volume I—Title I School Choice, Supplemental Educational Services, and Student Achievement*, Washington, DC: Author.

TITLE I REGULATIONS (COLLECTION 1810–0581) FINAL REGULATIONS BURDEN HOURS/COST FOR SEAS—Continued

Citation	Description	Number of respondents	Average number of hours per respondent *	Total hours	Total cost (total hours × $30.00)
§ 200.19 (b)(1)	Beginning with report cards providing assessment results for SY 2010–11, calculate the four-year adjusted cohort graduation rate, and, if option is selected by the State, the extended-year adjusted cohort graduation rate.	52	286	14,880	446,400
§ 200.39(c)(2)	Post the information listed in § 200.39(c)(1) for LEAs that do not operate their own Web site.	47	5	235	7,050
§ 200.47(a)(1)(ii)(B)	Post on the SEA's Web site an amount equal to 20 percent of each LEA's Part A allocation and the per-pupil amount available for SES.	52	2	104	3,120
§ 200.47(a)(3)(ii)	Indicate on the list those providers able to serve students with disabilities or limited English proficient students.	52	2	104	3,120
§ 200.47(a)(4)(iii)	Develop, implement and publicly report on standards and techniques for monitoring LEAs' implementation of the SES requirements.	52	40	2,080	62,400
§ 200.48(d)(3)	Review of LEAs	52	33	1,728	51,840
§ 200.48(d)(4)	Review LEA request to use unexpended funds	52	28	1,440	43,200
Totals	N/A	52	N/A	21,819	654,570

* Figures in this column reflect rounding.

Information collection activities are also associated with other final revisions to § 200.47(a)(4) at the SEA level. These particular revisions, however, do not pose an additional burden to SEAs because they simply specify how SEAs are to carry out this part of the regulation and related regulations but should not require additional time beyond the hours already estimated for § 200.47(a) in the currently approved 1810–0581 collection.

TITLE I REGULATIONS (COLLECTION 1810–0581) FINAL REGULATIONS BURDEN HOURS/COST FOR LEAS

Citation	Description	Number of respondents	Average number of hours per respondent	Total hours	Total cost (total hours × $25.00)
§ 200.11(c)	Adding NAEP data to LEA report cards	13,987	24	335,688	$8,392,200
§ 200.19(b)(1)(ii)(B)(*1*)	Documentation that a student has transferred out—that the student has enrolled in another school or in an educational program that culminates in the award of a regular high school diploma.	13,987	50	699,350	17,483,750
§ 200.37(b)(5)(ii)(C)	Providing notice to parents that their children are eligible for SES and describing the benefits of SES.	1,600	12	19,200	480,000
§ 200.39(c)(1)	Provide information on public school choice and SES.	2,400	25	60,000	1,500,000
§ 200.48(d)(3)	Maintain records that the criteria are met and meet requirements for informing SEA.	1,800	12	21,600	540,000
§ 200.48(d)(4)	Apply to SEA to use unexpended funds	120	12	1,440	36,000
Totals		13,987	N/A	1,137,278	28,431,950

Information collection activities are also associated with §§ 200.37(b)(4)(iv) and 200.37(b)(5)(ii)(B). The information collection activities associated with this change do not pose an additional burden to LEAs, however. Sufficient hours for this activity are already accounted for in the currently approved 1810–0581 collection.

Consolidated State Application (Collection 1810–0576)

SEA burden hours and cost estimates for the final regulations pertaining to ''Consolidated State Application (OMB Number 1810–0576)'' are presented in the following table.

Citation	Description	Number of respondents	Average number of hours per respondent	Total hours	Total cost (total hours × $30.00)
§ 200.7(a)(2)(ii)	Revise Accountability Workbook relating to minimum group size.	52	112	5,824	$174,720
§ 200.19(b)(6) and (b)(7)	Revise Accountability Workbook for Graduation: 1. Graduation rate definition to determine AYP based on SY 2009–2010 assessment results; 2. Progress towards deadline in § 200.19(b)(4)(ii)(A) for calculating and reporting graduation rate defined in § 200.19(b)(1)(i) through (iv); 3. Graduation rate goal and targets; 4. Explanation of graduation rate goal and how the targets demonstrate continuous and substantial improvement; 5. Graduation rate of the high school at the 10th percentile, 50th percentile, and 90th percentile ranked by graduation rate; 6. If using extended-year adjusted cohort, how it will use this rate with the four-year rate to determine AYP; 7. Request extension of deadline, if appropriate.	52	164	8,528	255,840
§ 200.20(h)	Request waiver under section 9401 of ESEA to incorporate academic growth into State's AYP definition.	52	240	12,480	374,400
Total		52	N/A	26,832	804,960

Regulatory Flexibility Act Certification

The Secretary certifies that these final regulations will not have a significant economic impact on a substantial number of small entities. The small entities that the final regulations will affect are small LEAs receiving funds under Title I. These final regulations will not have a significant economic impact because the regulations impose minimal requirements beyond those that would otherwise be required under the ESEA, with most of those requirements falling on SEAs. Further, the small LEAs should be able to meet the costs of compliance with these regulations using Federal funds provided through Title I.

Intergovernmental Review

This program is not subject to Executive Order 12372 and the regulations in 34 CFR part 79.

Electronic Access to This Document

You may view this document, as well as all other Department of Education documents published in the **Federal Register**, in text or Adobe Portable Document Format (PDF) on the Internet at the following site: *http://www.ed.gov/news/fedregister.*

To use PDF you must have Adobe Acrobat Reader, which is available free at this site. If you have questions about using PDF, call the U.S. Government Printing Office (GPO), toll free, at 1–888–293–6498; or in the Washington, DC, area at (202) 512–1530.

Note: The official version of this document is the document published in the **Federal Register**. Free Internet access to the official edition of the **Federal Register** and the Code of Federal Regulations is available on GPO Access at: *http://www.gpoaccess.gov/nara/index.html.*

(Catalog of Federal Domestic Assistance Number: 84.010 Improving Programs Operated by Local Educational Agencies)

List of Subjects in 34 CFR Part 200

Administrative practice and procedure, Adult education, Children, Education of children with disabilities, Education of disadvantaged children, Elementary and secondary education, Eligibility, Family-centered education, Grant programs—education, Indians—education, Infants and children, Institutions of higher education, Juvenile delinquency, Local educational agencies, Migrant labor, Nonprofit private agencies, Private schools, Public agencies, Reporting and recordkeeping requirements, State-administered programs, State educational agencies.

Dated: October 20, 2008.

Margaret Spellings,

Secretary of Education.

■ For the reasons discussed in the preamble, the Secretary amends part 200 of title 34 of the Code of Federal Regulations as follows:

PART 200—TITLE I—IMPROVING THE ACADEMIC ACHIEVEMENT OF THE DISADVANTAGED

■ 1. The authority citation for part 200 continues to read as follows:

Authority: 20 U.S.C. 6301 through 6578, unless otherwise noted.

■ 2. Section 200.2 is amended by revising paragraph (b)(7) to read as follows:

§ 200.2 State responsibilities for assessment.

* * * * *

(b) * * *

(7) Involve multiple up-to-date measures of student academic achievement, including measures that assess higher-order thinking skills and understanding of challenging content, as defined by the State. These measures may include—

(i) Single or multiple question formats that range in cognitive complexity within a single assessment; and

(ii) Multiple assessments within a subject area.

* * * * *

■ 3. Section 200.7 is amended by:

■ A. Revising paragraph (a)(2)(i).

■ B. Redesignating paragraph (a)(2)(ii) as (a)(2)(iv).

■ C. Adding new paragraphs (a)(2)(ii) and (a)(2)(iii).

■ D. Adding the OMB control number before the authority citation.

The revision and additions read as follows:

§ 200.7 Disaggregation of data.

(a) * * *

(2)(i) Based on sound statistical methodology, each State must determine the minimum number of students sufficient to—

(A) Yield statistically reliable information for each purpose for which disaggregated data are used; and

(B) Ensure that, to the maximum extent practicable, all student subgroups in § 200.13(b)(7)(ii) (economically disadvantaged students; students from major racial and ethnic groups; students with disabilities as defined in section 9101(5) of the Act; and students with limited English proficiency as defined in section 9101(25) of the Act) are included, particularly at the school level, for purposes of making accountability determinations.

(ii) Each State must revise its Consolidated State Application Accountability Workbook under section 1111 of the Act to include—

(A) An explanation of how the State's minimum group size meets the requirements of paragraph (a)(2)(i) of this section;

(B) An explanation of how other components of the State's definition of adequate yearly progress (AYP), in addition to the State's minimum group size, interact to affect the statistical reliability of the data and to ensure the maximum inclusion of all students and student subgroups in § 200.13(b)(7)(ii); and

(C) Information regarding the number and percentage of students and student subgroups in § 200.13(b)(7)(ii) excluded from school-level accountability determinations.

(iii) Each State must submit a revised Consolidated State Application Accountability Workbook in accordance with paragraph (a)(2)(ii) of this section to the Department for technical assistance and peer review under the process established by the Secretary under section 1111(e)(2) of the Act in time for any changes to be in effect for AYP determinations based on school year 2009–2010 assessment results.

* * * * *

■ 4. Section 200.11 is amended by:

■ A. Adding a new paragraph (c).

■ B. Adding the OMB control number before the authority citation.

The additions read as follows:

§ 200.11 Participation in NAEP.

* * * * *

(c) *Report cards.* Each State and LEA must report on its annual State and LEA report card, respectively, the most recent available academic achievement results in grades four and eight on the State's NAEP reading and mathematics assessments under paragraph (a) of this section. The report cards must include—

(1) The percentage of students at each achievement level reported on the NAEP in the aggregate and, for State report cards, disaggregated for each subgroup described in § 200.13(b)(7)(ii); and

(2) The participation rates for students with disabilities and for limited English proficient students.

(Approved by the Office of Management and Budget under control number 1810–0581)

* * * * *

■ 5. Section 200.19 is amended by:

■ A. Revising paragraph (a).

■ B. Redesignating paragraphs (b) and (c) as paragraphs (c) and (d), respectively.

■ C. Adding a new paragraph (b).

■ D. In paragraph (e)(1), removing the words ''in paragraphs (a) and (b)'', and adding in their place, the words ''in paragraphs (a) through (c)''.

■ E. Adding the OMB control number before the authority citation.

The revision and additions read as follows:

§ 200.19 Other academic indicators.

(a) *Elementary and middle schools*—(1) *Choice of indicator.* To determine AYP, consistent with § 200.14(e), each State must use at least one other academic indicator for public elementary schools and at least one other academic indicator for public middle schools, such as those in paragraph (c) of this section.

(2) *Goals.* A State may, but is not required to, increase the goals of its other academic indicators over the course of the timeline under § 200.15.

(3) *Reporting.* A State and its LEAs must report under section 1111(h) of the Act (annual report cards) performance on the academic indicators for elementary and middle schools at the school, LEA, and State levels in the aggregate and disaggregated by each subgroup described in § 200.13(b)(7)(ii).

(4) *Determining AYP.* A State—

(i) Must disaggregate its other academic indicators for elementary and middle schools by each subgroup described in § 200.13(b)(7)(ii) for purposes of determining AYP under § 200.20(b)(2) (''safe harbor'') and as required under section 1111(b)(2)(C)(vii) of the Act (additional academic indicators under paragraph (c) of this section); but (ii) Need not disaggregate those indicators for determining AYP under § 200.20(a)(1)(ii) (meeting the State's annual measurable objectives).

(b) *High schools*—(1) *Graduation rate.* Consistent with paragraphs (b)(4) and (b)(5) of this section regarding reporting and determining AYP, respectively, each State must calculate a graduation rate, defined as follows, for all public high schools in the State:

(i)(A) A State must calculate a ''four-year adjusted cohort graduation rate,'' defined as the number of students who graduate in four years with a regular high school diploma divided by the number of students who form the adjusted cohort for that graduating class.

(B) For those high schools that start after grade nine, the cohort must be calculated based on the earliest high school grade.

(ii) The term ''adjusted cohort'' means the students who enter grade 9 (or the earliest high school grade) and any students who transfer into the cohort in grades 9 through 12 minus any students removed from the cohort.

(A) The term ''students who transfer into the cohort'' means the students who enroll after the beginning of the entering cohort's first year in high school, up to and including in grade 12.

(B) To remove a student from the cohort, a school or LEA must confirm in writing that the student transferred out, emigrated to another country, or is deceased.

(*1*) To confirm that a student transferred out, the school or LEA must have official written documentation that the student enrolled in another school or in an educational program that culminates in the award of a regular high school diploma.

(*2*) A student who is retained in grade, enrolls in a General Educational Development (GED) program, or leaves school for any other reason may not be counted as having transferred out for the purpose of calculating graduation rate and must remain in the adjusted cohort.

(iii) The term ''students who graduate in four years'' means students who earn a regular high school diploma at the conclusion of their fourth year, before the conclusion of their fourth year, or during a summer session immediately following their fourth year.

(iv) The term ''regular high school diploma'' means the standard high school diploma that is awarded to students in the State and that is fully aligned with the State's academic content standards or a higher diploma and does not include a GED credential,

certificate of attendance, or any alternative award.

(v) In addition to calculating a four-year adjusted cohort graduation rate, a State may propose to the Secretary for approval an ''extended-year adjusted cohort graduation rate.''

(A) An extended-year adjusted cohort graduation rate is defined as the number of students who graduate in four years or more with a regular high school diploma divided by the number of students who form the adjusted cohort for the four-year adjusted cohort graduation rate, provided that the adjustments account for any students who transfer into the cohort by the end of the year of graduation being considered minus the number of students who transfer out, emigrate to another country, or are deceased by the end of that year.

(B) A State may calculate one or more extended-year adjusted cohort graduation rates.

(2) *Transitional graduation rate.* (i) Prior to the deadline in paragraph (b)(4)(ii)(A) of this section, a State must calculate graduation rate as defined in paragraph (b)(1) of this section or use, on a transitional basis—

(A) A graduation rate that measures the percentage of students from the beginning of high school who graduate with a regular high school diploma in the standard number of years; or

(B) Another definition, developed by the State and approved by the Secretary, that more accurately measures the rate of student graduation from high school with a regular high school diploma.

(ii) For a transitional graduation rate calculated under paragraph (b)(2)(i) of this section—

(A) ''Regular high school diploma'' has the same meaning as in paragraph (b)(1)(iv) of this section;

(B) ''Standard number of years'' means four years unless a high school begins after ninth grade, in which case the standard number of years is the number of grades in the school; and

(C) A dropout may not be counted as a transfer.

(3) *Goal and targets.* (i) A State must set—

(A) A single graduation rate goal that represents the rate the State expects all high schools in the State to meet; and

(B) Annual graduation rate targets that reflect continuous and substantial improvement from the prior year toward meeting or exceeding the graduation rate goal.

(ii) Beginning with AYP determinations under § 200.20 based on school year 2009–2010 assessment results, in order to make AYP, any high school or LEA that serves grade 12 and the State must meet or exceed—

(A) The graduation rate goal set by the State under paragraph (b)(3)(i)(A) of this section; or

(B) The State's targets for continuous and substantial improvement from the prior year, as set by the State under paragraph (b)(3)(i)(B) of this section.

(4) *Reporting.* (i) In accordance with the deadlines in paragraph (b)(4)(ii) of this section, a State and its LEAs must report under section 1111(h) of the Act (annual report cards) graduation rate at the school, LEA, and State levels in the aggregate and disaggregated by each subgroup described in § 200.13(b)(7)(ii).

(ii)(A) Beginning with report cards providing results of assessments administered in the 2010–2011 school year, a State and its LEAs must report the four-year adjusted cohort graduation rate calculated in accordance with paragraph (b)(1)(i) through (iv) of this section.

(B) If a State adopts an extended-year adjusted cohort graduation rate calculated in accordance with paragraph (b)(1)(v) of this section, the State and its LEAs must report, beginning with the first year for which the State calculates such a rate, the extended-year adjusted cohort graduation rate separately from the four-year adjusted cohort graduation rate.

(C) Prior to the deadline in paragraph (b)(4)(ii)(A) of this section, a State and its LEAs must report a graduation rate calculated in accordance with paragraph (b)(1) or (b)(2) of this section in the aggregate and disaggregated by the subgroups in § 200.13(b)(7)(ii).

(5) *Determining AYP.* (i) Beginning with AYP determinations under § 200.20 based on school year 2011–2012 assessment results, a State must calculate graduation rate under paragraph (b)(1) of this section at the school, LEA, and State levels in the aggregate and disaggregated by each subgroup described in § 200.13(b)(7)(ii).

(ii) Prior to the AYP determinations described in paragraph (b)(5)(i) of this section, a State must calculate graduation rate in accordance with either paragraph (b)(1) or (b)(2) of this section—

(A) In the aggregate at the school, LEA, and State levels for determining AYP under § 200.20(a)(1)(ii) (meeting the State's annual measurable objectives), except as provided in paragraph (b)(7)(iii) of this section; but

(B) In the aggregate and disaggregated by each subgroup described in § 200.13(b)(7)(ii) for purposes of determining AYP under § 200.20(b)(2) (''safe harbor'') and as required under section 1111(b)(2)(C)(vii) of the Act (additional academic indicators under paragraph (c) of this section).

(6) *Accountability workbook.* (i) A State must revise its Consolidated State Application Accountability Workbook submitted under section 1111 of the Act to include the following:

(A) The State's graduation rate definition that the State will use to determine AYP based on school year 2009–2010 assessment results.

(B) The State's progress toward meeting the deadline in paragraph (b)(4)(ii)(A) of this section for calculating and reporting the four-year adjusted cohort graduation rate defined in paragraph (b)(1)(i) through (iv) of this section.

(C) The State's graduation rate goal and targets.

(D) An explanation of how the State's graduation rate goal represents the rate the State expects all high schools in the State to meet and how the State's targets demonstrate continuous and substantial improvement from the prior year toward meeting or exceeding the goal.

(E) The graduation rate for the most recent school year of the high school at the 10th percentile, the 50th percentile, and the 90th percentile in the State (ranked in terms of graduation rate).

(F) If a State uses an extended-year adjusted cohort graduation rate, a description of how it will use that rate with its four-year adjusted cohort graduation rate to determine whether its schools and LEAs have made AYP.

(ii) Each State must submit, consistent with the timeline in § 200.7(a)(2)(iii), its revised Consolidated State Application Accountability Workbook in accordance with paragraph (b)(6)(i) of this section to the Department for technical assistance and peer review under the process established by the Secretary under section 1111(e)(2) of the Act.

(7) *Extension.* (i) If a State cannot meet the deadline in paragraph (b)(4)(ii)(A) of this section, the State may request an extension of the deadline from the Secretary.

(ii) To receive an extension, a State must submit to the Secretary, by March 2, 2009—

(A) Evidence satisfactory to the Secretary demonstrating that the State cannot meet the deadline in paragraph (b)(4)(ii)(A) of this section; and

(B) A detailed plan and timeline addressing the steps the State will take to implement, as expeditiously as possible, a graduation rate consistent with paragraph (b)(1)(i) through (iv) of this section.

(iii) A State that receives an extension under this paragraph must, beginning with AYP determinations under § 200.20 based on school year 2011–

2012 assessment results, calculate graduation rate under paragraph (b)(2) of this section at the school, LEA, and State levels in the aggregate and disaggregated by each subgroup described in § 200.13(b)(7)(ii).

* * * * *

(Approved by the Office of Management and Budget under control numbers 1810–0581 and 1810–0576)

* * * * *

■ 6. Section 200.20 is amended by:
■ A. Adding a new paragraph (h).
■ B. Adding the OMB control number before the authority citation.
■ C. Revising the authority citation.

The additions and revision read as follows:

§ 200.20 Making adequate yearly progress.

* * * * *

(h) *Student academic growth.* (1) A State may request authority under section 9401 of the Act to incorporate student academic growth in the State's definition of AYP under this section.

(2) A State's policy for incorporating student academic growth in the State's definition of AYP must—

(i) Set annual growth targets that—

(A) Will lead to all students, by school year 2013–2014, meeting or exceeding the State's proficient level of academic achievement on the State assessments under § 200.2;

(B) Are based on meeting the State's proficient level of academic achievement on the State assessments under § 200.2 and are not based on individual student background characteristics; and

(C) Measure student achievement separately in mathematics and reading/language arts;

(ii) Ensure that all students enrolled in the grades tested under § 200.2 are included in the State's assessment and accountability systems;

(iii) Hold all schools and LEAs accountable for the performance of all students and the student subgroups described in § 200.13(b)(7)(ii);

(iv) Be based on State assessments that—

(A) Produce comparable results from grade to grade and from year to year in mathematics and reading/language arts;

(B) Have been in use by the State for more than one year; and

(C) Have received full approval from the Secretary before the State determines AYP based on student academic growth;

(v) Track student progress through the State data system;

(vi) Include, as separate factors in determining whether schools are making AYP for a particular year—

(A) The rate of student participation in assessments under § 200.2; and

(B) Other academic indicators as described in § 200.19; and

(vii) Describe how the State's annual growth targets fit into the State's accountability system in a manner that ensures that the system is coherent and that incorporating student academic growth into the State's definition of AYP does not dilute accountability.

(3) A State's proposal to incorporate student academic growth in the State's definition of AYP will be peer reviewed under the process established by the Secretary under section 1111(e)(2) of the Act.

(Approved by the Office of Management and Budget under control number 1810–0576)

(Authority: 20 U.S.C. 6311(b)(2), (b)(3)(C)(xi); 7861)

■ 7. Section 200.22 is added to read as follows:

§ 200.22 National Technical Advisory Council.

(a) To provide advice to the Department on technical issues related to the design and implementation of standards, assessments, and accountability systems, the Secretary shall establish a National Technical Advisory Council (hereafter referred to as the ''National TAC''), which shall be governed by the provisions of the Federal Advisory Committee Act (FACA) (Pub. L. 92–463, as amended; 5 U.S.C. App.).

(b)(1) The members of the National TAC must include persons who have knowledge of and expertise in the design and implementation of educational standards, assessments, and accountability systems for all students, including students with disabilities and limited English proficient students, and experts with technical knowledge related to statistics and psychometrics.

(2) The National TAC shall be composed of 10 to 20 members who may meet as a whole or in committees, as the Secretary may determine.

(3) The Secretary shall, through a notice published in the **Federal Register**—

(i) Solicit nominations from the public for members of the National TAC; and

(ii) Publish the list of members, once selected.

(4) The Secretary shall screen nominees for membership on the National TAC for potential conflicts of interest to prevent, to the extent possible, such conflicts, or the appearance thereof, in the National TAC's performance of its responsibilities under this section.

(c) The Secretary shall use the National TAC to provide its expert opinions on matters that arise during the State Plan review process.

(d) The Secretary shall prescribe and publish the rules of procedure for the National TAC.

(Authority: 20 U.S.C. 6311(e))

■ 8. Section 200.32 is amended by:
■ A. Redesignating paragraph (a)(1) as paragraph (a)(1)(i).
■ B. Adding a new paragraph (a)(1)(ii).

The addition reads as follows:

§ 200.32 Identification for school improvement.

(a)(1)(i) * * *

(ii) In identifying schools for improvement, an LEA—

(A) May base identification on whether a school did not make AYP because it did not meet the annual measurable objectives for the same subject or meet the same other academic indicator for two consecutive years; but

(B) May not limit identification to those schools that did not make AYP only because they did not meet the annual measurable objectives for the same subject or meet the same other academic indicator for the same subgroup under § 200.13(b)(7)(ii) for two consecutive years.

* * * * *

■ 9. Section 200.37 is amended by:
■ A. Adding new paragraph (b)(4)(iv).
■ B. Revising paragraph (b)(5)(ii)(B).
■ C. Adding new paragraph (b)(5)(ii)(C).
■ D. Adding new paragraph (b)(5)(iii).

The revision and additions read as follows:

§ 200.37 Notice of identification for improvement, corrective action, or restructuring.

* * * * *

(b) * * *

(4) * * *

(iv) The explanation of the available school choices must be made sufficiently in advance of, but no later than 14 calendar days before, the start of the school year so that parents have adequate time to exercise their choice option before the school year begins.

(5) * * *

(ii) * * *

(B) A brief description of the services, qualifications, and demonstrated effectiveness of the providers referred to in paragraph (b)(5)(ii)(A) of this section, including an indication of those providers who are able to serve students with disabilities or limited English proficient students.

(C) An explanation of the benefits of receiving supplemental educational services.

(iii) The annual notice of the availability of supplemental educational services must be—

(A) Clear and concise; and

(B) Clearly distinguishable from the other information sent to parents under this section.

* * * * *

■ 10. Section 200.39 is amended by adding a new paragraph (c) to read as follows:

§ 200.39 Responsibilities resulting from identification for school improvement.

* * * * *

(c)(1) Except as provided in paragraph (c)(2) of this section, the LEA must prominently display on its Web site, in a timely manner to ensure that parents have current information, the following information regarding the LEA's implementation of the public school choice and supplemental educational services requirements of the Act and this part:

(i) Beginning with data from the 2007–2008 school year and for each subsequent school year, the number of students who were eligible for and the number of students who participated in public school choice.

(ii) Beginning with data from the 2007–2008 school year and for each subsequent school year, the number of students who were eligible for and the number of students who participated in supplemental educational services.

(iii) For the current school year, a list of supplemental educational services providers approved by the State to serve the LEA and the locations where services are provided.

(iv) For the current school year, a list of available schools to which students eligible to participate in public school choice may transfer.

(2) If the LEA does not have its own Web site, the SEA must include on the SEA's Web site the information required in paragraph (c)(1) of this section for the LEA.

* * * * *

■ 11. Section 200.43 is amended by:

■ A. Revising paragraph (a)(1).

■ B. In paragraph (a)(2), removing the word ''and'' at the end of the paragraph.

■ C. In paragraph (a)(3), removing the punctuation ''.'' and adding in its place the punctuation '';'' at the end of the paragraph.

■ D. Adding new paragraphs (a)(4) and (a)(5).

■ E. Revising paragraph (b)(3)(ii).

■ F. Revising paragraph (b)(3)(v).

The additions and revisions read as follows:

§ 200.43 Restructuring.

(a) * * *

(1) Makes fundamental reforms to improve student academic achievement in the school;

* * * * *

(4) Is significantly more rigorous and comprehensive than the corrective action that the LEA implemented in the school under § 200.42, unless the school has begun to implement one of the options in paragraph (b)(3) of this section as a corrective action; and

(5) Addresses the reasons why the school was identified for restructuring in order to enable the school to exit restructuring as soon as possible.

(b) * * *

(3) * * *

(ii) Replace all or most of the school staff (which may include, but may not be limited to, replacing the principal) who are relevant to the school's failure to make AYP.

* * * * *

(v) Any other major restructuring of a school's governance arrangement that makes fundamental reforms, such as significant changes in the school's staffing and governance, in order to improve student academic achievement in the school and that has substantial promise of enabling the school to make AYP. The major restructuring of a school's governance may include replacing the principal so long as this change is part of a broader reform effort.

* * * * *

■ 12. Section 200.44 is amended by revising paragraph (a)(2) to read as follows:

§ 200.44 Public school choice.

(a) * * *

(2) The LEA must offer this option, through the notice required in § 200.37, so that students may transfer in the school year following the school year in which the LEA administered the assessments that resulted in its identification of the school for improvement, corrective action, or restructuring.

* * * * *

■ 13. Section 200.47 is amended by:

■ A. Revising paragraph (a)(1)(ii).

■ B. Redesignating paragraph (a)(3) as paragraph (a)(3)(i).

■ C. In newly redesignated paragraph (a)(3)(i), removing the punctuation ''.'' and adding in its place the words ''; and'' at the end of the paragraph.

■ D. Adding a new paragraph (a)(3)(ii).

■ E. Revising the introductory text in paragraph (a)(4).

■ F. In paragraph (a)(4)(i), removing the word ''and'' at the end of the paragraph.

■ G. In paragraph (a)(4)(ii), removing the punctuation ''.'' and adding in its place the words ''; and'' at the end of the paragraph.

■ H. Adding a new paragraph (a)(4)(iii).

■ I. Revising paragraph (b)(2)(ii)(B).

■ J. Redesignating paragraph (b)(2)(ii)(C) as paragraph (b)(2)(ii)(D).

■ K. Adding a new paragraph (b)(2)(ii)(C).

■ L. Redesignating paragraph (b)(3) as paragraph (b)(4).

■ M. Adding a new paragraph (b)(3).

■ N. Adding a new paragraph (c).

The revisions and additions read as follows:

§ 200.47 SEA responsibilities for supplemental educational services.

(a) * * *

(1)(i) * * *

(ii) This promotion must include—

(A) Annual notice to potential providers of—

(*1*) The opportunity to provide supplemental educational services; and

(*2*) Procedures for obtaining the SEA's approval to be a provider of those services; and

(B) Posting on the SEA's Web site, for each LEA—

(*1*) The amount equal to 20 percent of the LEA's Title I, Part A allocation available for choice-related transportation and supplemental educational services, as required in § 200.48(a)(2); and

(*2*) The per-child amount for supplemental educational services calculated under § 200.48(c)(1).

* * * * *

(3)(i) * * *

(ii) Indicate on the list those providers that are able to serve students with disabilities or limited English proficient students.

(4) Consistent with paragraph (c) of this section, develop, implement, and publicly report on standards and techniques for—

* * * * *

(iii) Monitoring LEAs' implementation of the supplemental educational services requirements of the Act and this part.

* * * * *

(b) * * *

(2) * * *

(ii) * * *

(B) Are aligned with State academic content and student academic achievement standards;

(C) Are of high quality, research-based, and specifically designed to increase the academic achievement of eligible children; and

* * * * *

(3) In approving a provider, the SEA must consider, at a minimum—

(i) Information from the provider on whether the provider has been removed from any State's approved provider list;

(ii) Parent recommendations or results from parent surveys, if any, regarding the success of the provider's instructional program in increasing student achievement; and

(iii) Evaluation results, if any, demonstrating that the instructional program has improved student achievement.

* * * * *

(c) *Standards for monitoring approved providers.* To monitor the quality and effectiveness of services offered by an approved provider in order to inform the renewal or the withdrawal of approval of the provider—

(1) An SEA must examine, at a minimum, evidence that the provider's instructional program—

(i) Is consistent with the instruction provided and the content used by the LEA and the SEA;

(ii) Addresses students' individual needs as described in students' supplemental educational services plans under § 200.46(b)(2)(i);

(iii) Has contributed to increasing students' academic proficiency; and

(iv) Is aligned with the State's academic content and student academic achievement standards; and

(2) The SEA must also consider information, if any, regarding—

(i) Parent recommendations or results from parent surveys regarding the success of the provider's instructional program in increasing student achievement; and

(ii) Evaluation results demonstrating that the instructional program has improved student achievement.

* * * * *

■ 14. Section 200.48 is amended by:

■ A. In paragraph (a)(2), introductory text, adding the words ''(''20 percent obligation'')'' after the word ''part''.

■ B. In paragraph (a)(2)(iii)(A), removing the word ''and'' at the end of the paragraph.

■ C. In paragraph (a)(2)(iii)(B), removing the punctuation ''.'' and adding, in its place, the words ''; and''.

■ D. Adding a new paragraph (a)(2)(iii)(C).

■ E. Adding a new paragraph (d).

■ F. Adding the OMB control number before the authority citation.

The additions read as follows:

§ 200.48 Funding for choice-related transportation and supplemental educational services.

(a) * * *

(2) * * *

(iii) * * *

(C) The LEA may count in the amount the LEA is required to spend under paragraph (a) of this section its costs for outreach and assistance to parents concerning their choice to transfer their child or to request supplemental educational services, up to an amount equal to 0.2 percent of its allocation under subpart 2 of part A of Title I of the Act.

* * * * *

(d) *Unexpended funds for choice-related transportation and supplemental educational services.* (1)(i) Except as provided in paragraph (d)(2) of this section, if an LEA does not meet its 20 percent obligation in a given school year, the LEA must spend the unexpended amount in the subsequent school year on choice-related transportation costs, supplemental educational services, or parent outreach and assistance (consistent with paragraph (a)(2)(iii)(C) of this section).

(ii) The LEA must spend the unexpended amount under paragraph (d)(1)(i) of this section in addition to the amount it is required to spend to meet its 20 percent obligation in the subsequent school year.

(2) To spend less than the amount needed to meet its 20 percent obligation, an LEA must—

(i) Meet, at a minimum, the following criteria:

(A) Partner, to the extent practicable, with outside groups, such as faith-based organizations, other community-based organizations, and business groups, to help inform eligible students and their families of the opportunities to transfer or to receive supplemental educational services.

(B) Ensure that eligible students and their parents have a genuine opportunity to sign up to transfer or to obtain supplemental educational services, including by—

(*1*) Providing timely, accurate notice as required in §§ 200.36 and 200.37;

(*2*) Ensuring that sign-up forms for supplemental educational services are distributed directly to all eligible students and their parents and are made widely available and accessible through broad means of dissemination, such as the Internet, other media, and communications through public agencies serving eligible students and their families; and

(*3*) Providing a minimum of two enrollment ''windows,'' at separate points in the school year, that are of sufficient length to enable parents of eligible students to make informed decisions about requesting supplemental educational services and selecting a provider.

(C) Ensure that eligible supplemental educational services providers are given access to school facilities, using a fair, open, and objective process, on the same basis and terms as are available to other groups that seek access to school facilities;

(ii) Maintain records that demonstrate the LEA has met the criteria in paragraph (d)(2)(i) of this section; and

(iii) Notify the SEA that the LEA—

(A) Has met the criteria in paragraph (d)(2)(i) of this section; and

(B) Intends to spend the remainder of its 20 percent obligation on other allowable activities, specifying the amount of that remainder.

(3)(i) Except as provided in paragraph (d)(3)(ii) of this section, an SEA must ensure an LEA's compliance with paragraph (d)(2)(i) of this section through its regular monitoring process.

(ii)(A) In addition to its regular monitoring process, an SEA must review any LEA that—

(*1*) The SEA determines has spent a significant portion of its 20 percent obligation for other activities under paragraph (d)(2)(iii)(B) of this section; and

(*2*) Has been the subject of multiple complaints, supported by credible evidence, regarding implementation of the public school choice or supplemental educational services requirements; and

(B) The SEA must complete its review by the beginning of the next school year.

(4)(i) If an SEA determines under paragraph (d)(3) of this section that an LEA has failed to meet any of the criteria in paragraph (d)(2)(i) of this section, the LEA must—

(A) Spend an amount equal to the remainder specified in paragraph (d)(2)(iii)(B) of this section in the subsequent school year, in addition to its 20 percent obligation for that year, on choice-related transportation costs, supplemental educational services, or parent outreach and assistance; or

(B) Meet the criteria in paragraph (d)(2)(i) of this section and obtain permission from the SEA before spending less in that subsequent school year than the amount required by paragraph (d)(4)(i)(A) of this section.

(ii) The SEA may not grant permission to the LEA under paragraph (d)(4)(i)(B) of this section unless the SEA has confirmed the LEA's compliance with paragraph (d)(2)(i) of this section for that subsequent school year.

(Approved by the Office of Management and Budget under control number 1810–0581)

* * * * *

■ 15. Section 200.50 is amended by:

■ A. Redesignating paragraph (d)(1) as paragraph (d)(1)(i).

■ B. Adding a new paragraph (d)(1)(ii).

The addition reads as follows:

§ 200.50 SEA review of LEA progress.

* * * * *

(d) * * *

(1)(i) * * *

(ii) In identifying LEAs for improvement, an SEA—

(A) May base identification on whether an LEA did not make AYP because it did not meet the annual measurable objectives for the same subject or meet the same other academic indicator for two consecutive years; but

(B) May not limit identification to those LEAs that did not make AYP only because they did not meet the annual measurable objectives for the same subject or meet the same other academic indicator for the same subgroup under § 200.13(b)(7)(ii) for two consecutive years.

* * * * *

■ 16. Section 200.56 is amended by:

■ A. Revising the introductory text.

■ B. Adding a new paragraph (d).

■ C. Revising the authority citation.

The revisions and addition read as follows:

§ 200.56 Definition of ''highly qualified teacher.''

A teacher described in § 200.55(a) and (b)(1) is a ''highly qualified teacher'' if the teacher meets the requirements in paragraph (a) and paragraph (b), (c), or (d) of this section.

* * * * *

(d) A special education teacher is a ''highly qualified teacher'' under the Act if the teacher meets the requirements for a ''highly qualified special education teacher'' in 34 CFR 300.18.

(Authority: 20 U.S.C. 1401(10); 7801(23))

Note: The following appendix will not appear in the Code of Federal Regulations.

Appendix A

Four-year adjusted cohort graduation rate and extended-year adjusted cohort graduation rate for the first time 9th grade cohort of 2002-03 by school year and outcome

School Year 2002-03

First-time 9th grade students in 2002-03 =		100
Dropouts =		10
Transfers out =		10
Transfers in =		20
Diplomas earned 02/03=		0
Cohort end of 02-03 =	100 - 10 + 20 = 110	
4-year adjusted cohort graduation rate =	NA	
5-year adjusted cohort graduation rate =	NA	

School Year 2003-04

Adjusted 02-03 9th grade cohort =		110
Dropouts =		5
Transfers out =		10
Transfers in =		5
Diplomas earned 03/04=		0
Cohort end of 03-04 =	110 - 10 + 5 = 105	
4-year adjusted cohort graduation rate =	NA	
5-year adjusted cohort graduation rate =	NA	

School Year 2004-05

Adjusted 02-03 9th grade cohort =		105
Dropouts =		5
Transfers out =		10
Transfers in =		5
Diplomas earned 04/05=		2
Cohort end of 04-05 =	105 - 10 + 5 = 100	
4-year adjusted cohort graduation rate =	NA	
5-year adjusted cohort graduation rate =	NA	

School Year 2005-06

Adjusted 02-03 9th grade cohort =		100
Dropouts =		1
Transfers out =		5
Transfers in =		5
Diplomas earned 05/06=		63
Cohort end of 05-06 =	100 - 5 + 5 = 100	
4-year adjusted cohort graduation rate =	(2+63)/100 = 65%	
5-year adjusted cohort graduation rate =	NA	

School Year 2006-07

Adjusted 02-03 9th grade cohort =		100
Dropouts =		5
Transfers out =		2
Transfers in =		3
Diplomas earned 06/07=		5
Cohort end of 06-07 =	100 - 2 + 3 = 101	
4-year adjusted cohort graduation rate =	(2+63)/100 = 65%	
5-year adjusted cohort graduation rate =	(2+63+5)/101 = 69%	

Summary of cohort as of 2006-07

Of 101 students in the cohort at the end of 2006-07:

- 26 had dropped out;
- 65 had graduated on time or early (within 4 years) in 2005-06;
- 70 had graduated within 5 years, (by the end of 2006-07);
- and 5 were still in school.

The cohort is the class of first time 9th graders of 2002-03.

The arrows show how to follow the cohort across sequential years.

The cohort size is adjusted at the end of each school year for out transfers and in transfers.

The 4-year graduation rate is the number of students in the 2002-03 adjusted cohort (denominator) who earned a regular diploma in 4 years or less.

The 5-year graduation rate is the number of students in the 2002-03 adjusted cohort (denominator) who earned a regular diploma in 5 years or less.

[FR Doc. E8–25270 Filed 10–28–08; 8:45 am]

BILLING CODE 4000–01–P

Reader Aids

Federal Register

Vol. 73, No. 210

Wednesday, October 29, 2008

CUSTOMER SERVICE AND INFORMATION

Federal Register/Code of Federal Regulations	
General Information, indexes and other finding aids	**202–741–6000**
Laws	**741–6000**
Presidential Documents	
Executive orders and proclamations	**741–6000**
The United States Government Manual	**741–6000**
Other Services	
Electronic and on-line services (voice)	**741–6020**
Privacy Act Compilation	**741–6064**
Public Laws Update Service (numbers, dates, etc.)	**741–6043**
TTY for the deaf-and-hard-of-hearing	**741–6086**

ELECTRONIC RESEARCH

World Wide Web

Full text of the daily Federal Register, CFR and other publications is located at: **http://www.gpoaccess.gov/nara/index.html**

Federal Register information and research tools, including Public Inspection List, indexes, and links to GPO Access are located at: **http://www.archives.gov/federal__register**

E-mail

FEDREGTOC-L (Federal Register Table of Contents LISTSERV) is an open e-mail service that provides subscribers with a digital form of the Federal Register Table of Contents. The digital form of the Federal Register Table of Contents includes HTML and PDF links to the full text of each document.

To join or leave, go to **http://listserv.access.gpo.gov** and select *Online mailing list archives, FEDREGTOC-L, Join or leave the list (or change settings);* then follow the instructions.

PENS (Public Law Electronic Notification Service) is an e-mail service that notifies subscribers of recently enacted laws.

To subscribe, go to **http://listserv.gsa.gov/archives/publaws-l.html** and select *Join or leave the list (or change settings);* then follow the instructions.

FEDREGTOC-L and **PENS** are mailing lists only. We cannot respond to specific inquiries.

Reference questions. Send questions and comments about the Federal Register system to: **fedreg.info@nara.gov**

The Federal Register staff cannot interpret specific documents or regulations.

FEDERAL REGISTER PAGES AND DATE, OCTOBER

56935–57234 1
57235–57474 2
57475–58018 3
58019–58434 6
58435–58866 7
58867–59478 8
59479–60094 9
60095–60602 10
60603–60934 14
60935–61324 15
61325–61648 16
61649–62186 17
62187–62434 20
62435–62846 21
62847–63056 22
63057–63328 23
63329–63620 24
63621–63838 27
63839–64178 28
64179–64514 29

CFR PARTS AFFECTED DURING OCTOBER

At the end of each month, the Office of the Federal Register publishes separately a List of CFR Sections Affected (LSA), which lists parts and sections affected by documents published since the revision date of each title.

3 CFR

Proclamations:
8294 57223
8295 57233
8296 .....57475, 60609
8297 58429
8298 58431
8299 58433
8300 58861
8301 58863
8302 58867
8303 60603
8304 61649
8305 61651
8306 61653
8307 61655
8308 62435
8309 62437
8310 64177

Executive Orders:
12962 (amended by 13474) 57229
13176 (Superseded by 13476) 60605
13474 57229
EO 12139 (amended by EO 13475) 60095
EO 12949 (amended by EO 13475) 60095
EO 13475 60095
13476 60605

Administrative Orders:
Memorandums:
Memorandum of April 17, 2006 (superseded by Memorandum of October 17, 2008) 62845
Memorandum of October 3, 2008 (supersedes Memorandum of December 20, 2005) 58869
Memorandum of October 17, 2008 62845
Notices:
Notice of October 16, 2008 62433
Notice of October 22, 2008 63619
Presidential Determinations:
PD 2008-29 of September 30, 2008 58865
2009-1 60935
2009-2 60937
Presidential Determination No. 2009-3 of October 9, 2008 62847
Presidential Determination No. 2009-4 of October 15, 2008 62849
Presidential Determination No. 2009-5 of October 17, 2008 63839
Presidential Determination No. 2009-6 of October 20, 2008 63841

4 CFR

22 60609

5 CFR

211 64179
295 58019
315 60611
316 60611
9701 58435
9901 58435

Proposed Rules:
532 58506

6 CFR

5 .....63057, 63058

Proposed Rules:
Ch. 1 64280
5 .....62214, 63084, 63908

7 CFR

205 59479
301 63060
331 .....61325, 63621
984 57485
1260 60097

Proposed Rules:
205 63584
340 60008
800 62446
810 62446
946 62215
966 62218
1496 63387
1499 63387
1599 63387
1703 61198
1780 61198
2902 63298
3570 61198
4280 61198
4284 61198
5002 61198

8 CFR

100 58023
212 58023
214 61332
248 61332
274a 63843

9 CFR

71 63867
77 60099
83 63867
93 63867
121 ....61325, 63621
149 60464
160 60464
161 60464
201 62439

Proposed Rules:

2 63085

10 CFR

2 63546
30 63546
40 63546
50 ....57235, 60612, 63546
52 63546
60 63546
63 63546
70 63546
71 63546
72 ....63546, 63621
73 63546
76 63546
150 63546
431 58772

Proposed Rules:

2 62931
35 58063
50 62220
51 ....59540, 59547, 59551
72 63655
430 ....62034, 62134
431 62034

11 CFR

Proposed Rules:

100 62224
101 62224
102 62224
104 62224
110 62224
113 62224
116 62224
400 62224
9001 62224
9003 62224
9031 62224
9033 62224
9035 62224

12 CFR

201 61657
203 63329
204 ....57488, 59482
225 ....62851, 63624
263 58031
303 63338
330 61658
370 64179
509 63625
721 62854
740 ....56935, 62856
745 ....60616, 62856
792 56936
951 61660
1291 61660

Proposed Rules:

3 63656
208 63656
222 63909
225 63656
226 63909
227 63909
230 63909
325 63656
327 61560
360 63406
567 63656
701 57013
740 62935
742 57013
1202 60192
1250 60198
1773 60198

13 CFR

101 61665
121 ....56940, 61336
124 57490
125 ....56940, 61336
127 ....56940, 61336
134 ....56940, 61336
140 63627
300 62858
301 62858
302 62858
303 62858
305 62858
307 62858
308 62858
310 62858
314 62858
315 62858

Proposed Rules:

121 ....57014, 61369
125 ....57014, 61369
127 ....57014, 61369
134 ....57014, 61369

14 CFR

23 63339
25 ....63339, 63867
33 ....57235, 63339
35 63339
36 62871
39 ....56956, 56958, 56960, 58032, 58436, 59486, 59488, 59491, 59493, 60102, 61336, 61342, 61343, 61346, 62872, 63349, 63352, 63354, 63357, 63629, 64191
71 ....58871, 60622, 60939, 60940, 62876, 62878, 62879
91 ....62871, 63880
93 ....60544, 60574
95 ....63881, 63885
97 ....59494, 60623, 60942, 61348, 64194
121 63867
417 63630

Proposed Rules:

39 ....58507, 58509, 58901, 58903, 58906, 59571, 59573, 60201, 60203, 60206, 60657, 61369, 61372, 61375, 61378, 61747, 62447, 62937, 63090, 63094, 63096, 64282, 64284
71 ....58512, 58513, 61749, 61750, 61752, 62940, 63407, 63910, 63912
91 ....57270, 63098
93 60996

15 CFR

303 62880
730 56964
732 ....56964, 57495
734 ....56964, 57495
736 56964
738 57495
740 ....57495, 60910
742 ....57495, 58033
744 ....57495, 58033
746 57495
748 57495
750 57495
762 ....56964, 57495
770 57495
772 ....57495, 60910
774 ....56964, 57495, 58033, 60910

Proposed Rules:

740 57554
772 57554

16 CFR

305 63066
1610 62187

Proposed Rules:

3 58832
4 58832
1500 58063

17 CFR

10 63359
12 63359
30 60625
143 57512
190 57235
229 57237
230 ....58300, 60050
231 60050
232 60050
239 ....58300, 60050
240 ....58300, 60050, 61666, 61678
241 ....60050, 61690
242 ....61690, 61690, 61706
249 ....58300, 60050, 61678

Proposed Rules:

230 61753
240 61753

18 CFR

35 ....57515, 63886, 64100
40 63770
41 58720
131 57515
141 58720
154 57515
157 57515
250 57515
281 57515
284 57515
300 57515
301 60105
341 57515
344 57515
346 57515
347 57515
348 57515
358 63796
375 57515
385 ....57515, 62881

Proposed Rules:

40 ....62229, 63105
806 57271

19 CFR

4 60943

20 CFR

404 64195
416 64195
501 62190
616 63068
1002 63631

21 CFR

201 63886
203 59496
205 59496
208 63886
209 63886
210 63361
211 63361
522 ....58871, 58872
558 58873
573 64197
589 63072
801 58874

Proposed Rules:

1 63663

22 CFR

7 62196
40 62197
50 62196
126 58041

23 CFR

505 63362

Proposed Rules:

620 58908
635 58908
636 58908
710 58908

24 CFR

5 63834
25 60538
100 63610
990 61350
4001 58418

Proposed Rules:

30 61754
570 61757

25 CFR

542 60492
543 60492
547 60508

Proposed Rules:

502 60490
546 60490

26 CFR

1 ....58438, 59501, 62199, 62203, 62204, 63073, 63372
54 62410
801 60627

Proposed Rules:

1 ....58514, 59575, 61770, 63913
54 ....60208, 63914

27 CFR

9 64199
447 57239
478 57239
479 57239
555 57239

Proposed Rules:

9 64286
19 64287

28 CFR

58 58438

570 62440

29 CFR

29 64402
403 57412
1910 64202
2509 ....58445, 61731, 61734
2550 ....58447, 58450, 58459
2578 58549
2590 62410
4022 61352
4044 61352
Proposed Rules:
3 62229
5 62229
1910 62942
1926 ....59714, 62942
2550 60657
2590 60208
2700 62449

30 CFR

203 ....58467, 64205
210 58875
260 ....58467, 64205
938 60944
950 57538
Proposed Rules:
56 63110
57 63110
66 63110

31 CFR

30 62205

32 CFR

112 59501
199 59504
212 59505
706 ....60947, 63375
726 64206
750 60948
751 60949
756 60949
757 60950
Proposed Rules:
288 59579
325 59582
553 57017
1702 61771
1703 61772

33 CFR

100 ....57242, 60629
105 ....60951, 63376, 63377, 64208
110 ....57244, 60629
117 ....58473, 60629, 60952, 60953, 60954, 63632, 63633
147 60629
165 ....59509, 59511, 60629, 63633, 63637
Proposed Rules:
117 ....58070, 62450
165 ....62235, 63663

34 CFR

5b 61354
200 64436
674 63232
682 63232
685 63232

36 CFR

211 62443
294 61456
1228 57245
Proposed Rules:
7 59585
223 64288

37 CFR

10 59513
Proposed Rules:
201 ....58073, 60658, 63111
385 57033

38 CFR

3 ....61736, 64208
17 ....58875, 58877
59 58877
Proposed Rules:
5 62004
17 63914

39 CFR

111 61355
3020 ....59514, 62184, 62886

40 CFR

3 61737
9 59034
49 61740
50 58042
52 ....56970, 57246, 58475, 59518, 60955, 60957, 61357, 62889, 62891, 62893, 62897, 62902, 63378, 63382, 63639, 64210, 64213
55 62907
59 58481
60 59034
62 56981
63 64068
80 ....57248, 59034, 61358
81 56983
85 59034
86 59034
89 59034
90 59034
91 59034
92 59034
94 59034
147 63639
152 64215
156 64215
165 64215
180 ....56995, 58880, 60151, 60963, 60969, 64229, 64246
197 61256
261 59523
271 ....63074, 64252
272 ....63897, 64252
1027 59034
1033 59034
1039 59034
1042 59034
1045 59034
1048 59034
1051 ....59034, 62444
1054 59034
1060 59034
1065 59034
1068 59034
1074 59034
Proposed Rules:
3 61773
50 58080
51 58080
52 ....57272, 58084, 58515, 58913, 59586, 60996, 61381, 62945, 63408, 63419, 63915, 64293
60 59956
61 59956
63 ....58352, 59956, 60432, 62384, 63420
80 57274
158 ....59382, 60211, 63112
161 ....59382, 60211, 63112
180 57040
228 60662
262 58388
264 58388
265 58388
266 58388
271 ....58388, 63917, 64294
272 ....63917, 64294

42 CFR

9 60410
34 ....58047, 62210
73 61363
100 59528
411 57541
412 57541
413 ....56998, 57541
422 57541
441 57854
447 58491
489 57541

43 CFR

11 57259
46 61292
Proposed Rules:
403 58085
2300 60212
8360 57564

44 CFR

64 60158
65 ....60159, 63076
67 ....60162, 63647
Proposed Rules:
67 ....60216, 63113, 63116

45 CFR

144 62410
146 62410
148 62410
Proposed Rules:
144 60208
146 60208
148 60208

46 CFR

393 59530

47 CFR

0 57543
12 59537
25 56999
52 60172
64 ....60172, 63078
73 ....56999, 57268, 57551, 57552, 60631, 60974, 60975, 60976, 63384, 63385, 63652, 63901
76 ....61742, 64260
90 60631
Proposed Rules:
Ch. 1 ....59586, 63127, 63128
1 60997
27 57750
43 60997
73 ....57280, 60670, 60671, 62237, 62238, 62239, 63129, 63130, 63131, 63918
90 57750
400 57567

48 CFR

215 62211
252 62211
Proposed Rules:
204 62239
207 63666
217 62239
235 63666
252 63666
470 63387
501 57580
504 59589
511 59590
514 60224
515 57580
532 58515
552 ....57580, 58515, 59589, 59590, 60224
553 60224
1633 58886
1852 63420
2133 58886

49 CFR

1 ....57268, 59538
40 62910
89 57268
171 57001
172 ....57001, 57008
173 57001
175 57001
176 57001
178 57001
179 57001
180 57001
192 62148
232 61512
541 60633
571 ....58887, 62744
1540 64018
1544 64018
1560 64018
Proposed Rules:
109 57281
571 57297
830 58520

50 CFR

17 ....61936, 62816
21 59448
22 59448
216 60976
222 ....57010, 60638
223 ....57010, 60638, 64264
224 ....60173, 62919, 63901
229 60640
300 62444
622 ....58058, 58059
648 ....58497, 58498, 58898, 60986, 62445, 63652
660 ....58499, 60191, 60642, 60987
679 ....57011, 57553, 58061, 58503, 58504, 58899, 59538, 60994, 61366, 61367, 62212, 63080, 63081, 63082, 63083
697 58059
Proposed Rules:
17 ....57314, 58922, 61007,

62450, 62592, 63421, 63919, 63926
216.....60754, 60836
226.....57583, 58527
224.....62459
226.....62459
402.....63667
622 .....61015, 63932, 64295
635.....63668
640.....64295
648.....63934
679.....57585, 62241
697.....58099

REMINDERS

The items in this list were editorially compiled as an aid to Federal Register users. Inclusion or exclusion from this list has no legal significance.

RULES GOING INTO EFFECT OCTOBER 29, 2008

DEFENSE DEPARTMENT

Navy Department

Payments of Amounts due Mentally Incompetent Members of the Naval Service; published 10-29-08

ENVIRONMENTAL PROTECTION AGENCY

Carbaryl; Order Denying NRDC's Petition to Revoke Tolerances; published 10-29-08

Pesticide Tolerances:

Pyrimethanil; published 10-29-08

FEDERAL COMMUNICATIONS COMMISSION

Carriage of Digital Television Broadcast Signals; published 10-29-08

Television Broadcasting Services:

Vanderbilt, MI

Vanderbilt, Michigan; published 10-15-08

HEALTH AND HUMAN SERVICES DEPARTMENT

Food and Drug Administration

Food Additives Permitted in Feed and Drinking Water of Animals:

Methyl Esters of Conjugated Linoleic Acid (Cis-9, Trans-11 and Trans-10, Cis-12-Octadecadienoic Acids); published 10-29-08

LABOR DEPARTMENT

Occupational Safety and Health Administration

Electrical Standard; Clarifications; Corrections; published 10-29-08

NUCLEAR REGULATORY COMMISSION

Inflation Adjustment To The Price-Anderson Act Financial Protection Regulations; published 9-29-08

PERSONNEL MANAGEMENT OFFICE

Veterans' Preference; published 10-29-08

SOCIAL SECURITY ADMINISTRATION

Technical Amendments to Definition of Persons Closely Approaching Retirement Age; published 10-29-08

VETERANS AFFAIRS DEPARTMENT

Posttraumatic Stress Disorder; published 10-29-08

COMMENTS DUE NEXT WEEK

AGRICULTURE DEPARTMENT

Agricultural Marketing Service

Irish Potatoes Grown in Washington; Modification of Late Payment and Interest Charge Regulation; comments due by 11-4-08; published 10-20-08 [FR E8-24918]

Specialty Crop Block Grant Program; Farm Bill; comments due by 11-3-08; published 9-4-08 [FR E8-20486]

AGRICULTURE DEPARTMENT

Animal and Plant Health Inspection Service

Brucellosis in Cattle; State and Area Classifications; Montana; comments due by 11-3-08; published 9-3-08 [FR E8-20374]

COMMERCE DEPARTMENT

Interagency Cooperation under the Endangered Species Act; comments due by 11-6-08; published 10-27-08 [FR E8-25678]

COMMERCE DEPARTMENT

National Oceanic and Atmospheric Administration

Endangered and Threatened Species:

Proposed Critical Habitat for the Gulf of Maine Distinct Population Segment of Atlantic Salmon; comments due by 11-4-08; published 9-5-08 [FR E8-20603]

Endangered and Threatened Wildlife and Plants:

Designation of Critical Habitat for Threatened Southern Distinct Population Segment of North American Green Sturgeon; comments due by 11-7-08; published 9-8-08 [FR E8-20632]

Fisheries of the Exclusive Economic Zone Off Alaska:

Atka Mackerel in the Bering Sea and Aleutian Islands Management Area; comments due by 11-4-08; published 10-23-08 [FR E8-25327]

Bering Sea and Aleutian Islands Crab Rationalization Program; comments due by 11-3-08; published 9-19-08 [FR E8-21989]

Groundfish of the Gulf of Alaska; comments due by 11-3-08; published 10-3-08 [FR E8-23456]

Fisheries Off West Coast States:

Fisheries Off West Coast States; Pacific Coast Groundfish Fishery; Biennial Specifications and Management Measures; Inseason Adjustments; Correction; comments due by 11-6-08; published 10-7-08 [FR E8-23722]

ENERGY DEPARTMENT

Coordination of Federal Authorizations for Electric Transmission Facilities; comments due by 11-3-08; published 9-19-08 [FR E8-21867]

ENVIRONMENTAL PROTECTION AGENCY

Approval and Promulgation of Air Quality Implementation Plans:

Texas; Reasonable Further Progress Plan, Motor Vehicle Emissions Budgets and Revised 2002 Emissions Inventory; Dallas/Fort Worth Ozone Nonattainment Area; comments due by 11-6-08; published 10-7-08 [FR E8-23674]

Texas; Reasonable Further Progress Plan, Motor Vehicle Emissions Budgets, and Revised 2002 Base Year Emissions Inventory; comments due by 11-6-08; published 10-7-08 [FR E8-23673]

Approval and Promulgation of Implementation Plans:

Georgia; Prevention of Significant Deterioration and Nonattainment New Source Review Rules; Extension of Comment Period; comments due by 11-5-08; published 10-6-08 [FR E8-23554]

Missouri; comments due by 11-7-08; published 10-8-08 [FR E8-23877]

New Jersey; Diesel Idling Rule Revisions; comments due by 11-3-08; published 10-2-08 [FR E8-23246]

Environmental Statements; Notice of Intent:

Coastal Nonpoint Pollution Control Programs; States and Territories—Florida and South Carolina; Open for comments until further notice; published 2-11-08 [FR 08-00596]

Extension of Cross-Media Electronic Reporting Rule Deadline for Authorized Programs; comments due by 11-3-08; published 10-17-08 [FR E8-24824]

National Emission Standards for Hazardous Air Pollutants:

Chemical Manufacturing Area Sources; comments due by 11-5-08; published 10-6-08 [FR E8-22518]

National Priorities List, Proposed Rule (No. 49); comments due by 11-3-08; published 9-3-08 [FR E8-20389]

Pesticide Tolerances for Emergency Exemptions:

Linuron; comments due by 11-4-08; published 9-5-08 [FR E8-20627]

Regulation of Fuels and Fuel Additives:

Modifications to Renewable Fuel Standard; comments due by 11-3-08; published 10-2-08 [FR E8-23131]

Time-Limited Pesticide Tolerances:

Pyraflufen-ethyl; comments due by 11-4-08; published 9-5-08 [FR E8-20515]

FEDERAL COMMUNICATIONS COMMISSION

Radio Broadcasting Services:

Oolitic, IN; comments due by 11-3-08; published 10-2-08 [FR E8-23158]

FEDERAL DEPOSIT INSURANCE CORPORATION

Agency Information Collection Activities; Proposals, Submissions, and Approvals; comments due by 11-5-08; published 10-6-08 [FR E8-23495]

FEDERAL TRADE COMMISSION

Rules of Practice; comments due by 11-6-08; published 10-7-08 [FR E8-23745]

GENERAL SERVICES ADMINISTRATION

General Services Acquisition Regulation:

GSAR Case 2006-G515; Rewrite of Part 532, Contract Financing; comments due by 11-6-08; published 10-7-08 [FR E8-23660]

HOUSING AND URBAN DEVELOPMENT DEPARTMENT

Prohibition on Use of Indian Community Development

Block Grant Assistance for Employment Relocation Activities; comments due by 11-7-08; published 9-8-08 [FR E8-20785]

Revision of Hearing Procedures; comments due by 11-7-08; published 9-8-08 [FR E8-20761]

Revisions to the Regulations Implementing the Program Fraud Civil Remedies Act (1986); comments due by 11-7-08; published 9-8-08 [FR E8-20760]

INTERIOR DEPARTMENT

Fish and Wildlife Service

Interagency Cooperation under the Endangered Species Act; comments due by 11-6-08; published 10-27-08 [FR E8-25678]

Proposed Willamette Valley Native Prairie Habitat Programmatic Safe Harbor Agreement:

Fenders Blue Butterfly in Benton, Lane, Linn, Marion, Polk, and Yamhill Counties, OR; comments due by 11-5-08; published 10-6-08 [FR E8-23556]

INTERIOR DEPARTMENT

Reclamation Bureau

Bureau of Reclamation Loan Guarantees; comments due by 11-5-08; published 10-6-08 [FR E8-23444]

MANAGEMENT AND BUDGET OFFICE

Federal Procurement Policy Office

Cost Accounting Standards:

Harmonization of Cost Accounting Standards 412 and 413 with the Pension Protection Act of 2006; comments due by 11-3-08; published 9-2-08 [FR E8-20255]

MINE SAFETY AND HEALTH FEDERAL REVIEW COMMISSION

Federal Mine Safety and Health Review Commission

Procedural Rules; comments due by 11-3-08; published 9-2-08 [FR E8-20235]

NUCLEAR REGULATORY COMMISSION

Medical Use of Byproduct Material:

Amendments/Medical Event Definitions; Extension of Comment Period; comments due by 11-7-08; published 10-6-08 [FR E8-23534]

PERSONNEL MANAGEMENT OFFICE

Prevailing Rate Systems:

Redefinition of the Buffalo, NY, and Pittsburgh, PA, Appropriated Fund Federal Wage System Wage Areas; comments due by 11-6-08; published 10-7-08 [FR E8-23725]

Recruitment and Selection through Competitive Examinations; comments due by 11-3-08; published 9-2-08 [FR E8-20272]

Recruitment, Selection, and Placement (General); comments due by 11-7-08; published 9-8-08 [FR E8-20657]

Training:

Supervisory, Management, and Executive Development; comments due by 11-3-08; published 9-2-08 [FR E8-20273]

SECURITIES AND EXCHANGE COMMISSION

Commission Guidance on the Use of Company Web Sites; comments due by 11-5-08; published 8-7-08 [FR E8-18148]

SOCIAL SECURITY ADMINISTRATION

Representation of Parties; Revisions to Rules; comments due by 11-7-08; published 9-8-08 [FR E8-20500]

TRANSPORTATION DEPARTMENT

Federal Aviation Administration

Airworthiness Directives:

Boeing Model 747-100, 747-100B, 747-200B, 747-200C, 747 200F, 747-300, 747SR, and 747SP Series Airplanes; comments due by 11-7-08; published 9-23-08 [FR E8-22211]

Boeing Model 747 Airplanes; comments due by 11-7-08; published 9-23-08 [FR E8-22215]

Empresa Brasileira de Aeronautica S.A. (EMBRAER) Model EMB 120, 120ER, 120FC, 120QC, and 120RT Airplanes; comments due by 11-6-08; published 10-7-08 [FR E8-23666]

General Electric Company (GE) CF6 80A Series Turbofan Engines; comments due by 11-3-08; published 9-4-08 [FR E8-20497]

Automatic Dependent Surveillance - Broadcast (ADS-B) Out Performance Requirements to Support Air Traffic Control (ATC) Service:

Reopening of Comment Period; comments due by 11-3-08; published 10-2-08 [FR E8-23199]

Proposed Establishment of Class E Airspace:

Napakiak, AK; comments due by 11-3-08; published 9-18-08 [FR E8-21782]

Shageluk, AK; comments due by 11-3-08; published 9-18-08 [FR E8-21780]

Proposed Revision of Class E Airspace:

Badami, AK; comments due by 11-3-08; published 9-18-08 [FR E8-21781]

Robinson R-22/R-44 Special Training and Experience Requirements; comments due by 11-5-08; published 8-7-08 [FR E8-18239]

TRANSPORTATION DEPARTMENT

Federal Highway Administration

Fair Market Value and Design-Build Amendments; comments due by 11-7-08; published 10-8-08 [FR E8-23729]

TREASURY DEPARTMENT

Foreign Assets Control Office

Economic Sanctions Enforcement Guidelines; comments due by 11-7-08; published 9-8-08 [FR E8-20704]

TREASURY DEPARTMENT

Internal Revenue Service

Rules for Home Construction Contracts; comments due by 11-3-08; published 8-4-08 [FR E8-17830]

Section 108 Reduction of Tax Attributes for S Corporations; comments due by 11-4-08; published 8-6-08 [FR E8-17952]

Substantiation and Reporting Requirements for Cash and Noncash Charitable Contribution Deductions; comments due by 11-5-08; published 8-7-08 [FR E8-17953]

TREASURY DEPARTMENT

Alcohol and Tobacco Tax and Trade Bureau

Agency Information Collection Activities; Proposals, Submissions, and Approvals; comments due by 11-3-08; published 9-4-08 [FR E8-20451]

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. 6197/P.L. 110–448

To designate the facility of the United States Postal Service located at 7095 Highway 57 in Counce, Tennessee, as the "Pickwick Post Office Building". (Oct. 22, 2008; 122 Stat. 5013)

Last List October 23, 2008

Public Laws Electronic Notification Service (PENS)

PENS is a free electronic mail notification service of newly enacted public laws. To subscribe, go to *http://listserv.gsa.gov/archives/publaws-l.html*

Note: This service is strictly for E-mail notification of new laws. The text of laws is not available through this service. **PENS** cannot respond to specific inquiries sent to this address.