AUTHENTICATED
U.S. GOVERNMENT
INFORMATION
GPO

Federal Register

11–17–08 Monday
Vol. 73 No. 222 Nov. 17, 2008

Pages 67711–68288

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. 222

Monday, November 17, 2008

Agriculture Department
See Forest Service

Air Force Department
NOTICES
Privacy Act; Systems of Records, 67843–67844

Army Department
See Engineers Corps
NOTICES
Performance Review Board Membership, 67844–67846
Surplus Properties, 67846–67847

Bonneville Power Administration
NOTICES
2008 Columbia Basin Fish Accords Memorandum of Agreement with the Shoshone Bannock Tribes, 67865

Centers for Disease Control and Prevention
NOTICES
Diseases Transmitted Through the Food Supply, 67871–67872

Children and Families Administration
NOTICES
Agency Information Collection Activities; Proposals, Submissions, and Approvals, 67872–67873

Commerce Department
See International Trade Administration
See National Oceanic and Atmospheric Administration
See Patent and Trademark Office

Commission of Fine Arts
NOTICES
Meetings:
U.S. Commission of Fine Arts, 67837

Committee for the Implementation of Textile Agreements
NOTICES
Amendment of Limitation of Duty- and Quota-Free Imports of Apparel Articles Assembled in Beneficiary ATPDEA Countries from Regional Country Fabric, 67837–67838

Consumer Product Safety Commission
RULES
Labeling Requirement for Toy and Game Advertisements, 67730–67739
NOTICES
Requirements for Accreditation of Third Party Conformity, etc.:
Third Party Testing for Certain Children's Products, 67838–67840

Defense Department
See Air Force Department
See Army Department
See Engineers Corps
NOTICES
Establishment of Department of Defense Federal Advisory Committees, 67840–67841
Meetings:
U.S. Nuclear Command and Control System Comprehensive Review Advisory Committee, 67841–67842
Renewal of Department of Defense Federal Advisory Committees, 67842–67843

Defense Nuclear Facilities Safety Board
NOTICES
Meetings; Sunshine Act; Postponed, 67848

Education Department
NOTICES
Rehabilitation Training:
Long-Term Training—Comprehensive System of Personnel Development; Applications for New Awards for Fiscal Year (FY) 2009, 67848–67852
Rehabilitation Long-Term Training; Applications for New Awards for Fiscal Year (FY) 2009, 67856–67860
Rehabilitation Long-Term Training—Rehabilitation Counseling; Applications for New Awards for Fiscal Year (FY) 2009, 67852–67856

Election Assistance Commission
NOTICES
State Plan Pursuant to the Help America Vote Act, 68136–68201

Employment and Training Administration
NOTICES
Availability of Funds and Solicitation for Grant Applications (SGA):
Local Young Offender Planning Grants, State/Local Juvenile Offender Implementation Grants, etc., 67884–67894

Employment Standards Administration
See Wage and Hour Division

Energy Department
See Bonneville Power Administration
See Federal Energy Regulatory Commission
NOTICES
Record of Decision:
Montana Alberta Tie Ltd., 67860–67865

Engineers Corps
NOTICES
Environmental Impact Statements; Availability, etc.:
Gray's Beach Restoration Project, Waikiki, O'ahu, Hawaii, 67847–67848

Environmental Protection Agency
RULES
Approval and Promulgation of Air Quality Implementation Plans:
Pennsylvania; 2002 Base Year Inventory for the Pittsburgh-Beaver Valley 8-Hour Ozone Nonattainment Area, 67776–67778

PROPOSED RULES
Approval and Promulgation of Air Quality Implementation Plans:
Pennsylvania; Redesignation of the Pittsburgh-Beaver Valley 8-Hour Ozone Nonattainment Area, etc.; Withdrawal, 67827–67828
Virginia; Amendments to Ambient Air Quality Standards for Particulate Matter, 67825–67827
NOTICES
Agency Information Collection Activities; Proposals, Submissions, and Approvals, 67867
Settlements:
Former Spellman Engineering Site; Orlando, Orange County, FL, 67867

Executive Office of the President
See Trade Representative, Office of United States

Federal Aviation Administration
RULES
Airworthiness Directives:
Boeing Model 747 100, 747 100B, 747 100B SUD, 747 200B, 747 200C, 747 200F, 747 300, 747 400, 747 400D, 747 400F, and 747SR Series Airplanes, 67722–67726
Diamond Aircraft Industries GmbH Model DA 42 Airplanes, 67720–67722
Empresa Brasileira de Aeronautica S. A. (EMBRAER) Models EMB-110P1 and EMB-110P2 Airplanes, 67718–67720
Hawker Beechcraft Corporation Model 390 Airplanes, 67714–67716
SAAB 2000 Airplanes, 67716–67718
Standard Instrument Approach Procedures, and Takeoff Minimums and Obstacle Departure Procedures; Miscellaneous Amendments, 67726–67730
PROPOSED RULES
Airworthiness Directives:
Airbus Model A318, A319, A320, and A321 Series Airplanes, 67813–67815
BAE Systems (Operations) Limited (Jetstream) Model 4101 Airplanes, 67817–67820
Boeing Model 737-100, -200, -200C, -300, -400, and -500 Series Airplanes, 67815–67817
Bombardier Model CL-600-1A11 (CL-600), CL-600-2A12 (CL-601), and CL-600-2B16 (CL-601-3A, CL-601-3R, and CL-604) Airplanes, 67820–67823
Proposed Amendment of Class E Airspace:
Houston, TX, 67823–67824
Proposed Establishment of Class E Airspace: Branson, MO, 67824–67825
NOTICES
Commercial Space Transportation Advisory Committee; Renewal, 67922–67923

Federal Communications Commission
RULES
Amendment of the Commission's rules to Improve Public Safety Communications in the 800 MHz Band:
Consolidate the 800 MHz and 900 MHz Business and Industrial/Land Transportation Pool Channels, 67794–67801
PROPOSED RULES
Radio Broadcasting Services; Kihei, HI, 67828–67829
NOTICES
Agency Information Collection Activities; Proposals, Submissions, and Approvals, 67867–67869

Federal Election Commission
NOTICES
Meetings; Sunshine Act, 67869

Federal Emergency Management Agency
NOTICES
Disaster Declarations:
Indiana, 67875
Major Disaster and Related Determinations:
Arkansas, 67875–67876

Federal Energy Regulatory Commission
NOTICES
Complaints:
Lavand & Lodge, LLC v. ISO New England, Inc., 67865
Filings:
Powerex Corp., 67865–67866
Initial Market-Based Rate Filing Includes Request for Blanket Section 204 Authorization:
Canandaigua Power Partners, LLC, 67866
Evergreen Wind Power V, LLC, 67866
Mt. Carmel Cogen, Inc., 67866–67867

Federal Maritime Commission
NOTICES
Meetings; Sunshine Act, 67869–67870

Federal Reserve System
RULES
Reserve Requirements of Depository Institutions, 67713–67714
NOTICES
Formations of, Acquisitions by, and Mergers of Bank Holding Companies, 67870

Federal Trade Commission
NOTICES
Granting of Request for Early Termination of the Waiting Period Under the Premerger Notification Rules, 67870–67871

Federal Transit Administration
NOTICES
Environmental Impact Statements; Availability, etc.:
Hatcher Pass Recreational Area Trails and Transit Facilities in the Matanuska-Susitna Borough, AK, 67923–67924

Fine Arts Commission
See Commission of Fine Arts

Fish and Wildlife Service
NOTICES
Policy on Wilderness Stewardship; Availability, 67876–67882

Food and Drug Administration
NOTICES
Agency Information Collection Activities; Proposals, Submissions, and Approvals, 67873–67874
Determination of Regulatory Review Period for Purposes of Patent Extension; Somatuline Depot, 67874–67875

Foreign Assets Control Office
PROPOSED RULES
Licensing Procedures for Exportation of Agricultural Commodities, Medicine, and Medical Devices to Sudan and Iran, 67825

Forest Service
NOTICES
Environmental Impact Statements; Intent:
Kemmerer Ranger District, Bridger-Teton National Forest, WY; Kemmerer Grazing and Rangeland Vegetation Management Project, 67835–67836
Meetings:
Opal Creek Scenic Recreation Area (SRA) Advisory Council, 67836

General Services Administration
NOTICES
Meetings:
Multiple Award Schedule Advisory Panel, 67871

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

Homeland Security Department
See Federal Emergency Management Agency
RULES
Additional Countries Designated for the Visa Waiver Program, 67711–67713

Housing and Urban Development Department
RULES
Real Estate Settlement Procedures Act (RESPA):
Simplify and Improve the Process of Obtaining Mortgages and Reduce Consumer Settlement Costs, 68204–68288

Interior Department
See Fish and Wildlife Service
See National Park Service
See Reclamation Bureau

International Trade Administration
NOTICES
Antidumping:
Certain Tow Behind Lawn Groomers and Certain Parts Thereof from the People's Republic of China, 67836–67837

Justice Department
NOTICES
Consent Decree:
Comprehensive Environmental Response, Compensation, and Liability Act, 67883
Lodging of Consent Decree:
Comprehensive Environmental Response, Compensation, and Liability Act, 67883
Modification under the Clean Water Act, 67882

Labor Department
See Employment and Training Administration
See Wage and Hour Division
NOTICES
Agency Information Collection Activities; Proposals, Submissions, and Approvals, 67883–67884

Legal Services Corporation
RULES
Procedures for Disclosure of Information under the Freedom of Information Act, 67791–67794

National Aeronautics and Space Administration
NOTICES
Government-owned Inventions Available for Licensing, 67894–67895

National Highway Traffic Safety Administration
NOTICES
Receipt of Petition for Decision of Inconsequential Noncompliance:
Medical Coaches, Inc., 67924–67926
Volvo Cars of North America, LLC, 67926–67927

National Oceanic and Atmospheric Administration
RULES
Fisheries of the Northeastern United States:
Atlantic Herring Fishery; Total Allowable Catch Harvested for Management Area 1A, 67811–67812
General Provisions for Domestic Fisheries; Specifications for Boarding Ladders, 67805–67809
General Provisions of the Magnuson-Stevens Fishery Conservation and Management Act; Minor Amendments to Regulations, 67809–67811
Taking of Marine Mammals Incidental to Commercial Fishing Operations:
Atlantic Large Whale Take Reduction Plan, 67801–67805
PROPOSED RULES
Fisheries of the Northeastern United States; Atlantic Mackerel, Squid, and Butterfish Fisheries:
Specifications and Management Measures, 67829–67834
NOTICES
Marine Mammals; File No. 532-1822-03, 67837

National Park Service
RULES
Special Regulation; Areas of the National Park System, National Capital Region, 67739–67750
NOTICES
Meetings:
Big Cypress National Preserve Off-road Vehicle (ORV) Advisory Committee, 67882

National Science Foundation
NOTICES
Meetings:
Proposal Review, 67895

Nuclear Regulatory Commission
NOTICES
Receipt and Availability of Application:
Combined License; Entergy Operations, Inc., 67895–67896
Renewal of Cooper Nuclear Station Facility Operating License No. DPR-46 for an Additional 20-Year Period; Nebraska Public Power District, 67896
Receipt and Availability of Application for Renewal:
Duane Arnold Energy Center Facility Operating License No. DPR-49 for an Additional 20-Year Period; FPL Energy Duane Arnold, LLC, 67895

Office of United States Trade Representative
See Trade Representative, Office of United States

Patent and Trademark Office
RULES
Changes to Representation of Others before the United States Patent and Trademark Office, 67750–67759
Miscellaneous Changes to Trademark Rules of Practice, 67759–67776

Postal Service
NOTICES
International Product Change - Canada Post - United States Postal Service Contractual Bilateral Agreement for Inbound Competitive Services, 67898

Presidio Trust
NOTICES
Meetings:
Presidio Trust Board of Directors; Rescheduled; Notice to Extend Comment Period, 67898–67899

Reclamation Bureau
RULES
Reclamation Rural Water Supply Program, 67778–67791

Securities and Exchange Commission
NOTICES
Agency Information Collection Activities; Proposals, Submissions, and Approvals, 67899–67901
Application:
Wortham Finance, L.P. et al., 67901–67905
Meetings; Sunshine Act, 67905
Self-Regulatory Organizations; Proposed Rule Changes:
Financial Industry Regulatory Authority, Inc., 67905–67909
International Securities Exchange, LLC, 67909–67916
NASDAQ OMX PHLX, Inc., 67916–67918
The Options Clearing Corporation, 67918–67920

State Department
NOTICES
Establishment of an Online English Language Program, 67920–67921

Surface Transportation Board
NOTICES
Grand Elk Railroad, L.L.C.—Lease and Operation Exemption—Norfolk Southern Railway Company, 67927
Watco Companies, Inc.—Continuance in Control Exemption—Grand Elk Railroad, L.L.C., 67927–67928

Textile Agreements Implementation Committee
See Committee for the Implementation of Textile Agreements

Trade Representative, Office of United States
NOTICES
North American Free Trade Agreement; Invitation for Applications for Inclusion on the Chapter 19 Roster, 67896–67898

Transportation Department
See Federal Aviation Administration
See Federal Transit Administration
See National Highway Traffic Safety Administration
See Surface Transportation Board
NOTICES
Agency Information Collection Activities; Proposals, Submissions, and Approvals, 67922

Treasury Department
See Foreign Assets Control Office
See United States Mint

United States Mint
NOTICES
Price Decreases for American Eagle Gold and Platinum Coins, American Buffalo Gold Coins, and First Spouse Gold Coins, 67928–67929
Resumption of Sales of Previously Available Products, 67929–67932

Wage and Hour Division
RULES
The Family and Medical Leave Act of 1993, 67934–68133

Separate Parts In This Issue

Part II
Labor Department, Wage and Hour Division, 67934–68133

Part III
Election Assistance Commission, 68136–68201

Part IV
Housing and Urban Development Department, 68204–68288

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.

8 CFR
217 67711

12 CFR
204 67713

14 CFR
39 (5 documents) 67714, 67716, 67718, 67720, 67722
97 (2 documents) 67726, 67728

Proposed Rules:
39 (4 documents) 67813, 67815, 67817, 67820
71 (2 documents) 67823, 67824

16 CFR
1500 67730

24 CFR
203 68204
3500 68204

29 CFR
825 67934

31 CFR

Proposed Rules:
538 67825
560 67825

36 CFR
7 67739

37 CFR
1 67750
2 67759
3 67759
6 67759
7 67759
11 67750

40 CFR
52 67776

Proposed Rules:
52 (2 documents) 67825, 67827
81 67821

43 CFR
404 67778

45 CFR
1602 67791

47 CFR
90 67794

Proposed Rules:
73 67828

50 CFR
229 (2 documents) 67801, 67803
300 67805
600 (2 documents) 67805, 67809
622 67809
648 67811
679 67809
697 67805

Proposed Rules:
648 67829

Rules and Regulations

Federal Register
Vol. 73, No. 222
Monday, November 17, 2008

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

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

DEPARTMENT OF HOMELAND SECURITY

8 CFR Part 217

RIN 1601–AA54

Additional Countries Designated for the Visa Waiver Program

AGENCY: Office of the Secretary; DHS.

ACTION: Final rule; technical amendment.

SUMMARY: Citizens and eligible nationals of participating Visa Waiver Program countries may apply for admission to the United States at a U.S. port of entry as nonimmigrant aliens for a period of ninety days or less for business or pleasure without first obtaining a nonimmigrant visa, provided that they are otherwise eligible for admission under applicable statutory and regulatory requirements. This rule adds the Czech Republic, Estonia, Hungary, Latvia, Lithuania, the Republic of Korea, and the Slovak Republic to the list of countries authorized to participate in the Visa Waiver Program.

DATES: This final rule is effective on November 17, 2008.

FOR FURTHER INFORMATION CONTACT: Marc Frey, Department of Homeland Security, Office of Policy, (202) 282–9555.

SUPPLEMENTARY INFORMATION:

I. Background

A. The Visa Waiver Program

Pursuant to section 217 of the Immigration and Nationality Act (INA), 8 U.S.C. 1187, the Secretary of Homeland Security (the Secretary), in consultation with the Secretary of State, may designate certain countries as Visa Waiver Program (VWP) countries if certain requirements are met. Those requirements include, without limitation, (i) meeting the statutory rate of nonimmigrant visa refusal for nationals of the country, (ii) a government certification that it has a program to issue machine readable, tamper-resistant passports that comply with International Civil Aviation Organization (ICAO) standards, (iii) a U.S. government determination that the country's designation would not negatively affect U.S. law enforcement and security interests, (iv) government agreement to report, or make available to the U.S. government information about the theft or loss of passports, (v) the government accepts for repatriation any citizen, former citizen, or national not later than three weeks after the issuance of a final order of removal, and (vi) the government enters into an agreement with the United States to share information regarding whether citizens or nationals of that country represent a threat to the security or welfare of the United States or its citizens.

Section 711 of the Implementing Recommendations of the 9/11 Commission Act of 2007, Public Law No. 110–53, 121 Stat. 266, 338 (Aug. 3, 2007) (the 9/11 Act), authorizes the Secretary to expand the VWP to additional countries by waiving the low nonimmigrant visa refusal rate requirement. *See* 8 U.S.C. 1187(c)(8). To waive the low nonimmigrant visa refusal rate requirement, the Secretary of Homeland Security must certify to Congress that: (i) The Electronic System for Travel Authorization (ESTA) is ''fully operational,'' and (ii) an air exit system is in place that can verify the departure of not less than ninety-seven percent of foreign nationals who exit through U.S. airports. Those certifications have been made. To qualify for a waiver under 8 U.S.C. 1187(c)(8), a country must: (i) Meet all of the security requirements of the statute; (ii) the Secretary of Homeland Security determines that the totality of the country's security risk mitigation measures provide assurance that the country's participation in the VWP would not compromise the law enforcement, security or immigration enforcement interests of the United States; (iii) there has been a sustained reduction in the rate of refusals for nonimmigrant visas for nationals of the country and conditions exist to continue such reduction; (iv) the country cooperated with the U.S. government on counterterrorism initiatives, information sharing and preventing terrorist travel before the date of its designation as a program country and the Secretaries of Homeland Security and State determine that such cooperation will continue; and (v) the rate of refusals for nonimmigrant visitor visas during the previous full fiscal year was not more than ten percent or the visa overstay rate for the previous full fiscal year does not exceed the maximum visa overstay rate, once such rate is established. *See* 8 U.S.C. 1187(c)(8)(B).

The INA also sets forth requirements for continued eligibility and, where appropriate, termination of program countries.

Citizens and eligible nationals of VWP countries may apply for admission to the United States at a U.S. port of entry as nonimmigrant aliens for a period of ninety days or less for business or pleasure without first obtaining a nonimmigrant visa, provided that they are otherwise eligible for admission under applicable statutory and regulatory requirements. The designated countries in the VWP include Andorra, Australia, Austria, Belgium,[1] Brunei, Denmark, Finland, France, Germany, Iceland, Ireland, Italy, Japan, Liechtenstein, Luxembourg, Monaco, the Netherlands, New Zealand, Norway, Portugal, San Marino, Singapore, Slovenia, Spain, Sweden, Switzerland, and the United Kingdom.[2] *See* 8 CFR 217.2(a).

To travel to the United States under the VWP, an alien must be from a participating country and must (1) be seeking entry as a tourist for 90 days or less, (2) be a national of a program country, (3) present an electronic passport or a machine readable passport issued by a designated VWP participant country to the air or vessel carrier before departure;[3] (4) execute the required

[1] After May 15, 2003, citizens of Belgium must present a machine-readable passport in order to be granted admission under the Visa Waiver Program.

[2] The United Kingdom refers only to British citizens who have the unrestricted right of permanent abode in the United Kingdom (England, Scotland, Wales, Northern Ireland, the Channel Islands and the Isle of Man); it does not refer to British overseas citizens, British dependent territories' citizens, or citizens of British Commonwealth countries.

[3] For countries designated as VWP member countries prior to November 17, 2008, passports issued before October 26, 2006, need not contain the electronic chip that includes the biographic and biometric information of the passport holder provided the passports comply with International

Continued

immigration forms, (5) if arriving by air or sea, arrive on an authorized carrier, (6) not represent a threat to the welfare, health, safety or security of the United States, (7) have not violated U.S. immigration law during a previous admission under the visa waiver program, (8) possess a round trip ticket; and (9) waive the right to review or appeal a decision regarding admissibility or to contest other than on the basis of an application for asylum, any action for removal. *See* Section 217(a) of the Immigration and Nationality Act (INA), 8 U.S.C. 1187(a). *See also* 8 CFR part 217.

DHS, in consultation with the Department of State (DOS), has evaluated the countries of the Czech Republic, Estonia, Hungary, Latvia, Lithuania, the Republic of Korea, and the Slovak Republic for VWP designation to ensure the country meets the requirements set forth in section 711 of the 9/11 Act and section 217 of the INA. The Secretary has determined that these countries have satisfied the statutory requirements to be VWP countries; therefore, the Secretary, in consultation with the Secretary of State, has designated these countries as eligible for the VWP.[4]

This final rule adds the Czech Republic, Estonia, Hungary, Latvia, Lithuania, the Republic of Korea, and the Slovak Republic to the list of countries authorized to participate in the VWP. Accordingly, beginning November 17, 2008, citizens and eligible nationals from these additional VWP countries may apply for admission to the United States at a U.S. port of entry as nonimmigrant aliens for a period of ninety days or less for business or pleasure without first obtaining a nonimmigrant visa, provided that they are otherwise eligible for admission under applicable statutory and regulatory requirements. Each new member country has agreed that its citizens must obtain an approved travel authorization from U.S. Customs and Border Protection (CBP) via the Electronic System for Travel Authorization and must possess a valid electronic passport. For more information about the Electronic System for Travel Authorization program, please see the interim final rule at 73 FR 32440.

Civil Aviation Organization machine readable standards.

[4] On November 14, 2008, the Secretary of State nominated these countries for membership in the VWP.

III. Statutory and Regulatory Requirements

A. Administrative Procedure Act

This final rule merely lists those countries that the Secretary of Homeland Security, in consultation with the Secretary of State, has designated as VWP eligible countries in accordance with 8 U.S.C. 1187(c). This final rule neither imposes additional burdens on, nor takes away any existing rights or privileges from, the public. Therefore, pursuant to 5 U.S.C. 553(b)(B), notice and comment procedures are unnecessary. For the same reasons, pursuant to 5 U.S.C. 553(d)(3), a delayed effective date is not required.

This final rule is also excluded from the rulemaking provisions of 5 U.S.C. 553 as a foreign affairs function of the United States because it advances the President's foreign policy goals, involves bilateral agreements that the United States has entered into with participating VWP countries, and directly involves relationships between the United States and its alien visitors. Accordingly, DHS is not required to provide public notice and an opportunity to comment before implementing the requirements under this final rule.

B. Regulatory Flexibility Act

The Regulatory Flexibility Act (RFA) (5 U.S.C. 603(b)), as amended by the Small Business Regulatory Enforcement and Fairness Act of 1996 (SBREFA), requires an agency to prepare and make available to the public a regulatory flexibility analysis that describes the effect of a proposed rule on small entities (i.e., small businesses, small organizations, and small governmental jurisdictions) when the agency is required ''to publish a general notice of proposed rulemaking for any proposed rule.'' Because this rule is being issued as a final rule, on the grounds set forth above, a regulatory flexibility analysis is not required under the RFA.

DHS has considered the impact of this rule on small entities and had determined that this rule will not have a significant economic impact on a substantial number of small entities. The individual aliens to whom this rule applies are not small entities as that term is defined in 5 U.S.C. 601(6). Accordingly, there is no change expected in any process as a result of this rule that would have a direct effect, either positive or negative, on a small entity.

C. Unfunded Mandates Reform Act of 1995

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

D. Executive Order 12866

This amendment does not meet the criteria for a ''significant regulatory action'' as specified in Executive Order 12866.

E. Executive Order 13132

The rule will not have substantial direct effects on the States, on the relationship between the National Government and the States, or on the distribution of power and responsibilities among the various levels of government. Therefore, in accordance with section 6 of Executive Order 13132, DHS has determined that this final rule does not have sufficient federalism implications to warrant the preparation of a federalism summary impact statement.

F. Executive Order 12988 Civil Justice Reform

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

List of Subjects in 8 CFR Part 217

Air carriers, Aliens, Maritime carriers, Passports and visas.

Amendments to the Regulations

■ For the reasons stated in the preamble, DHS amends part 217 of title 8 of the Code of Federal Regulations (8 CFR part 217), as set forth below.

PART 217—VISA WAIVER PROGRAM

■ 1. The general authority citation for part 217 continues to read as follows:

Authority: 8 U.S.C. 1103, 1187; 8 CFR part 2.

■ 2. In section 217.2 the definition of the term ''Designated country'' in paragraph (a) is revised to read as follows:

§ 217.2 Eligibility.

(a) * * *

Designated country refers to Andorra, Australia, Austria, Belgium, Brunei, Czech Republic, Denmark, Estonia, Finland, France, Germany, Hungary, Iceland, Ireland, Italy, Japan, Latvia, Liechtenstein, Lithuania, Luxembourg,

Monaco, the Netherlands, New Zealand, Norway, Portugal, Republic of Korea, San Marino, Singapore, Slovak Republic, Slovenia, Spain, Sweden, Switzerland, and the United Kingdom. The United Kingdom refers only to British citizens who have the unrestricted right of permanent abode in the United Kingdom (England, Scotland, Wales, Northern Ireland, the Channel Islands and the Isle of Man); it does not refer to British overseas citizens, British dependent territories' citizens, or citizens of British Commonwealth countries. After May 15, 2003, citizens of Belgium must present a machine-readable passport in order to be granted admission under the Visa Waiver Program.

Dated: November 7, 2008.

Michael Chertoff,

Secretary.

[FR Doc. E8–27062 Filed 11–14–08; 8:45 am]

BILLING CODE 4410–10–P

FEDERAL RESERVE SYSTEM

12 CFR Part 204

[Regulation D; Docket No. R–1334]

Reserve Requirements of Depository Institutions

AGENCY: Board of Governors of the Federal Reserve System.

ACTION: Interim final rule; request for public comment.

SUMMARY: The Board is revising its interim final rule amending Regulation D, Reserve Requirements of Depository Institutions, to alter the formula by which earnings on required reserve balances and on excess balances of eligible institutions are calculated. The remainder of the interim final rule, including the period during which comments may be submitted, is unchanged from the interim final rule as published on October 9, 2008.

DATES: The amendments to Regulation D are effective on November 17, 2008. The rate changes for earnings on required reserve balances and on excess balances are applicable beginning on November 6, 2008. As provided in the **Federal Register** notice published on October 9, 2008, comments must be received on or before November 21, 2008.

ADDRESSES: You may submit comments, identified by Docket No. R–1334, by any of the following methods:

Agency Web Site: http://www.federalreserve.gov. Follow the instructions for submitting comments at *http://www.federalreserve.gov/generalinfo/foia/ProposedRegs.cfm.*

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

E-mail: regs.comments@federalreserve.gov. Include the docket number in the subject line of the message.

Fax: (202) 452–3819 or (202) 452–3102.

Mail: Jennifer J. Johnson, Secretary, Board of Governors of the Federal Reserve System, 20th Street and Constitution Avenue, NW., Washington, DC 20551.

All public comments are available from the Board's Web site at *http://www.federalreserve.gov/generalinfo/foia/ProposedRegs.cfm* as submitted, unless modified for technical reasons. Accordingly, your comments will not be edited to remove any identifying or contact information.

Public comments may also be viewed electronically or in paper in Room MP–500 of the Board's Martin Building (20th and C Streets, NW.) between 9 a.m. and 5 p.m. on weekdays.

FOR FURTHER INFORMATION CONTACT: Sophia H. Allison, Senior Counsel (202/452–3565), Legal Division, or Margaret Gillis DeBoer, Senior Financial Analyst (202/452–3139), Division of Monetary Affairs; for users of Telecommunications Device for the Deaf (TDD) only, contact (202/263–4869); Board of Governors of the Federal Reserve System, 20th and C Streets, NW., Washington, DC 20551.

SUPPLEMENTARY INFORMATION:

I. Background

On October 9, 2008, the Board published in the **Federal Register** an interim final rule amending Regulation D (Reserve Requirements of Depository Institutions) to direct the Federal Reserve Banks to pay interest on balances held at Reserve Banks to satisfy reserve requirements (''required reserve balances'') and balances held in excess of required reserve balances and clearing balances (''excess balances'') (73 FR 59482) (Oct. 9, 2008). At that time, the Board announced two formulas by which the amount of earnings payable on required reserve balances and excess balances will be calculated. For required reserve balances, the Board set the initial rate of interest to be the average federal funds rate target established by the Federal Open Market Committee (FOMC) over the reserve maintenance period less 10 basis points. For excess balances, the Board set the initial rate of interest to be the lowest federal funds rate target established by the FOMC in effect during the reserve maintenance period minus 75 basis points. The Board stated that it may adjust the formula for the interest rate on excess balances in light of experience and evolving market conditions. The Board adjusted the rate of interest for excess balances from the lowest federal funds rate target in effect during the reserve maintenance period minus 75 basis points to the lowest federal funds rate target minus 35 basis points on October 21, 2008. The change to the rate for excess balances was effective for the reserve maintenance periods beginning on Thursday, October 23, 2008.

The Board has judged that trading in the federal funds market at rates closer to the target federal funds rate will be fostered by setting the rate on excess balances at the lowest targeted federal funds rate during the reserve maintenance period. For the same reason, the Board has judged that the rate on required reserve balances should be set equal to the average target rate over the maintenance period. Accordingly, the Board is amending Regulation D to make the foregoing changes. These rate changes will be effective with the reserve maintenance periods beginning Thursday, November 6, 2008. The Board will continue to evaluate the appropriate setting of the rate on excess balances in light of evolving market conditions and make further adjustments as needed.

Administrative Procedure Act

In accordance with the Administrative Procedure Act (''APA'') section 553(b) (5 U.S.C. 553(b)), the Board finds, for good cause, that providing notice and an opportunity for public comment before the effective date of this rule would be contrary to the public interest. In addition, pursuant to APA section 553(d) (5 U.S.C. 553(d)), the Board finds good cause for making this amendment effective without 30 days advance publication. The Board has adopted this rule in light of, and to help address, the continuing unusual and exigent circumstances in the financial markets. This rule provides tools for carrying out monetary policy more effectively. Thus, the Board believes that any delay in implementing the rule would prove contrary to the public interest.

Regulatory Flexibility Act

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

publish a regulatory flexibility analysis if the agency certifies that the final rule will not have a significant economic impact on a substantial number of small entities. 5 U.S.C. 605(b).

Pursuant to section 605(b), the Board certifies that this interim final rule will not have a significant economic impact on a substantial number of small entities. The rule increases the interest paid on certain balances held by eligible institutions at the Federal Reserve Banks and will benefit all institutions, small and large, that receive such interest. There are no new reporting, record-keeping, or other compliance requirements associated with this rule.

Paperwork Reduction Act

In accordance with the Paperwork Reduction Act (44 U.S.C. 3506; 5 CFR 1320 Appendix A.1), the Board has reviewed the interim final rule under authority delegated to the Board by the Office of Management and Budget. The rule contains no collections of information pursuant to the Paperwork Reduction Act.

List of Subjects in 12 CFR Part 204

Banks, Banking, Reporting and recordkeeping requirements.

Authority and Issuance

■ For the reasons set forth in the preamble, the Board is amending 12 CFR part 204 as follows:

PART 204—RESERVE REQUIREMENTS OF DEPOSITORY INSTITUTIONS (REGULATION D)

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

Authority: 12 U.S.C. 248(a), 248(c), 371a, 461, 601, 611, and 3105.

■ 2. In § 204.10, paragraphs (b)(1) and (b)(2) are revised to read as follows:

§ 204.10 Payment of interest on balances.

* * * * *

(b) * * *

(1) For required reserve balances, at the average targeted federal funds rate over the reserve maintenance period; and

(2) For excess balances, at the lowest targeted federal funds rate during the reserve maintenance period.

* * * * *

By order of the Board of Governors of the Federal Reserve System, November 5, 2008.

Robert deV. Frierson,

Deputy Secretary of the Board.

[FR Doc. E8–26727 Filed 11–14–08; 8:45 am]

BILLING CODE 6210–01–P

DEPARTMENT OF TRANSPORTATION

Federal Aviation Administration

14 CFR Part 39

[Docket No. FAA–2008–0492; Directorate Identifier 2008–CE–023–AD; Amendment 39–15734; AD 2008–23–13]

RIN 2120–AA64

Airworthiness Directives; Hawker Beechcraft Corporation Model 390 Airplanes

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

ACTION: Final rule.

SUMMARY: We are adopting a new airworthiness directive (AD) for certain Hawker Beechcraft Corporation (HBC) Model 390 airplanes. This AD requires you to remove the current preformed packing, elbow fitting, and jam nut from the left and right hydraulic pump pressure output port and replace with new parts. This AD also requires you to install a hydraulic pump case drain check valve. This AD results from nine occurrences of hydraulic fluid leaking from the engine hydraulic pump output fitting as a result of an improperly installed elbow connecting the output port to the pulse dampener hose. We are issuing this AD to prevent hydraulic fluid leaks from the left and right hydraulic fluid pump and to prevent the flow of hydraulic fluid into the engine compartment. The loss of hydraulic fluid can result in loss of airplane hydraulic system pressure and the consequent loss of hydraulic system functions including gear extension/retraction, spoiler functions, and anti-skid braking system actuation. The inability of the hydraulic installation to isolate flow of hydraulic fluid could result in a hazardous amount of flammable fluid in the corresponding engine compartment. These conditions, if not corrected, could result in loss of system functions and/or fire in the engine compartment.

DATES: This AD becomes effective on December 22, 2008.

On December 22, 2008, the Director of the Federal Register approved the incorporation by reference of certain publications listed in this AD.

ADDRESSES: For service information identified in this AD, contact Hawker Beechcraft Corporation, 9709 East Central, Wichita, Kansas 67201; telephone: (316) 676–5034; fax: (316) 676–6614; Internet: *https://www.hawkerbeechcraft.com/service_support/pubs/*.

To view the AD docket, go to U.S. Department of Transportation, Docket Operations, M–30, West Building Ground Floor, Room W12–140, 1200 New Jersey Avenue, SE., Washington, DC 20590, or on the Internet at *http://www.regulations.gov*. The docket number is FAA–2008–0492; Directorate Identifier 2008–CE–023–AD.

FOR FURTHER INFORMATION CONTACT: Aaron Waters, Aerospace Engineer, 1801 Airport Road, Room 100, Wichita, Kansas 67209; telephone: (316) 946–4174; fax: (316) 946–4107.

SUPPLEMENTARY INFORMATION:

Discussion

On April 24, 2008, we issued a proposal to amend part 39 of the Federal Aviation Regulations (14 CFR part 39) to include an AD that would apply to certain Model 390 airplanes. This proposal was published in the **Federal Register** as a notice of proposed rulemaking (NPRM) on May 1, 2008 (73 FR 23988). The NPRM proposed to require you to remove the current preformed packing, elbow fitting, and jam nut from the left and right hydraulic pump pressure output port and replace with new parts. The NPRM also proposed to require you to install a hydraulic pump case drain check valve.

Comments

We provided the public the opportunity to participate in developing this AD. We received no comments on the proposal or on the determination of the cost to the public.

Conclusion

We have carefully reviewed the available data and determined that air safety and the public interest require adopting the AD as proposed except for minor editorial corrections. We have determined that these minor corrections:

- Are consistent with the intent that was proposed in the NPRM for correcting the unsafe condition; and
- Do not add any additional burden upon the public than was already proposed in the NPRM.

Costs of Compliance

We estimate that this AD affects 182 airplanes in the U.S. registry.

We estimate the following costs to do the modifications:

Labor cost	Parts cost	Total cost per airplane	Total cost on U.S. operators
Hydraulic pressure output fitting assembly: 8 work-hours × $80 per hour = $640	$100	$740	$134,680
Hydraulic pump case drain check valve: 16 work-hours × $80 per hour = $1,280	4,353	5,633	1,025,206

HBC will provide warranty credit as specified in Hawker Beechcraft Mandatory Service Bulletin SB 29–3869, dated January 2008; and Hawker Beechcraft Mandatory Service Bulletin SB 29–3851, dated January 2008.

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 AD.

Regulatory Findings

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

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

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

We prepared a summary of the costs to comply with this AD (and other information as included in the Regulatory Evaluation) and placed it in the AD Docket. You may get a copy of this summary by sending a request to us at the address listed under **ADDRESSES**. Include ''Docket No. FAA–2008–0492; Directorate Identifier 2008–CE–023–AD'' in your request.

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 Federal Aviation Administration amends part 39 of the Federal Aviation Regulations (14 CFR part 39) as follows:

PART 39—AIRWORTHINESS DIRECTIVES

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

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

§ 39.13 [Amended]

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

2008–23–13 Hawker Beechcraft Corporation: Amendment 39–15734; Docket No. FAA–2008–0492; Directorate Identifier 2008–CE–023–AD.

Effective Date

(a) This AD becomes effective on December 22, 2008.

Affected ADs

(b) None.

Applicability

(c) This AD applies to Model 390 airplanes, serial numbers RB–4 through RB–224, that are certificated in any category.

Unsafe Condition

(d) This AD results from nine occurrences of hydraulic fluid leaking from the engine hydraulic pump output fitting as a result of an improperly installed elbow connecting the output port to the pulse dampener hose. We are issuing this AD to prevent hydraulic fluid leaking from the left and right hydraulic fluid pump and to prevent the flow of hydraulic fluid into the engine compartment. The loss of hydraulic fluid can result in loss of airplane hydraulic system pressure and the consequent loss of hydraulic system functions including gear extension/retraction, spoiler functions, and anti-skid braking system actuation. The inability of the hydraulic installation to isolate flow of hydraulic fluid could result in a hazardous amount of flammable fluid in the corresponding engine compartment. These conditions, if not corrected, could result in loss of system functions and/or fire in the engine compartment.

Compliance

(e) To address this problem, you must do the following, unless already done:

Actions	Compliance	Procedures
(1) Remove current preformed packing (part number (P/N) MS28778–6), elbow fitting (P/N MS21908J6), and jam nut (P/N AN924–6J) from the left and right hydraulic pump pressure output port and install new preformed packing (P/N MS28778–6), union (P/N MS21902J6), and swivel fitting (P/N NAS1762J0606) in the left and right hydraulic pressure pump output port.	Within the next 200 hours time-in-service (TIS) after December 22, 2008 (the effective date of this AD) or within the next 6 months after December 22, 2008 (the effective date of this AD), whichever occurs first.	Follow Hawker Beechcraft Mandatory Service Bulletin SB 29–3869, dated January 2008.
(2) Install hydraulic pump case drain check valve Kit No. 390–5803–0001.	Within the next 200 hours TIS after December 22, 2008 (the effective date of this AD) or within the next 6 months after December 22, 2008 (the effective date of this AD), whichever occurs first.	Hawker Beechcraft Mandatory Service Bulletin SB 29–3851, dated January 2008.

Alternative Methods of Compliance (AMOCs)

(f) The Manager, Wichita Aircraft Certification Office (ACO), 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: Aaron Waters, Aerospace Engineer, Wichita ACO, 1801 Airport Road, Room 100, Wichita, Kansas 67209; telephone: (316) 946–4174; fax: (316) 946–4107. 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.

Material Incorporated by Reference

(g) You must use Hawker Beechcraft Mandatory Service Bulletin SB 29–3869, dated January 2008; and Hawker Beechcraft Mandatory Service Bulletin SB 29–3851, dated January 2008, to do the actions required by this AD, unless the AD specifies otherwise.

(1) The Director of the Federal Register approved the incorporation by reference of this service information under 5 U.S.C. 552(a) and 1 CFR part 51.

(2) For service information identified in this AD, contact Hawker Beechcraft Corporation, 9709 East Central, Wichita, Kansas 67201; telephone: (316) 676–5034; fax: (316) 676–6614; Internet: *https://www.hawkerbeechcraft.com/service_support/pubs/*.

(3) You may review copies at the FAA, Central Region, Office of the Regional Counsel, 901 Locust, Kansas City, Missouri 64106; or at the National Archives and Records Administration (NARA). For information on the availability of this material at NARA, call 202–741–6030, or go to: *http://www.archives.gov/federal_register/code_of_federal_regulations/ibr_locations.html*.

Issued in Kansas City, Missouri, on November 5, 2008.

Patrick R. Mullen,

Acting Manager, Small Airplane Directorate, Aircraft Certification Service.

[FR Doc. E8–26879 Filed 11–14–08; 8:45 am]

BILLING CODE 4910–13–P

DEPARTMENT OF TRANSPORTATION

Federal Aviation Administration

14 CFR Part 39

[Docket No. FAA–2008–0115; Directorate Identifier 2007–NM–240–AD; Amendment 39–15723; AD 2008–23–02]

RIN 2120–AA64

Airworthiness Directives; Saab Model SAAB 2000 Airplanes

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

ACTION: Final rule.

SUMMARY: We are adopting a new airworthiness directive (AD) for the products listed above. This 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:

One Part Number (P/N) LM–219–92 Centre Bracket from a P/N LM–219–SA28 Aft Engine Mounting assembly was found to be cracked while installed on the aircraft.

This reduces the effectiveness of the mounting assembly and could eventually cause it to fail.

* * * * *

A failed mounting assembly, if not corrected, could result in loss of the engine. We are issuing this AD to require actions to correct the unsafe condition on these products.

DATES: This AD becomes effective December 22, 2008.

The Director of the Federal Register approved the incorporation by reference of a certain publication listed in this AD as of December 22, 2008.

ADDRESSES: You may examine the AD docket on the Internet at *http://www.regulations.gov* or in person at the U.S. Department of Transportation, Docket Operations, M–30, West Building Ground Floor, Room W12–140, 1200 New Jersey Avenue, SE., Washington, DC.

FOR FURTHER INFORMATION CONTACT: Shahram Daneshmandi, Aerospace Engineer, International Branch, ANM–116, Transport Airplane Directorate, FAA, 1601 Lind Avenue, SW., Renton, Washington 98057–3356; telephone (425) 227–1112; fax (425) 227–1149.

SUPPLEMENTARY INFORMATION:

Discussion

We issued a supplemental notice of proposed rulemaking (NPRM) to amend 14 CFR part 39 to include an AD that would apply to the specified products. That supplemental NPRM was published in the **Federal Register** on August 29, 2008 (73 FR 50903). That supplemental NPRM proposed to correct an unsafe condition for the specified products. The MCAI states:

One Part Number (P/N) LM–219–92 Centre Bracket from a P/N LM–219–SA28 Aft Engine Mounting assembly was found to be cracked while installed on the aircraft.

This reduces the effectiveness of the mounting assembly and could eventually cause it to fail.

EASA Airworthiness Directive (AD) was issued to require inspection and rework in order to make the centre bracket less sensitive to external damage that may result in a crack.

This AD, superseding AD 2007–0204, has been issued to introduce an alternative repeatable inspection procedure.

A failed mounting assembly, if not corrected, could result in loss of the engine. The corrective actions include an inspection to determine if there are any sharp edges on the aft engine mounting assembly; repetitive visual inspections, or a combination of visual and fluorescent penetrant inspection, for cracking of the center bracket of the aft engine mounting assembly for both engines; rework of sharp edges; replacement of the aft engine mounting assemblies; and re-identification of engine mounting assemblies and reworked center bracket. You may obtain further information by examining the MCAI in the AD docket.

Comments

We gave the public the opportunity to participate in developing this AD. We received no comments on the supplemental NPRM or on the determination of the cost to the public.

Conclusion

We reviewed the available data and determined that air safety and the public interest require adopting the AD as proposed in the supplemental NPRM.

Differences Between This 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 required different actions in this AD from those in the MCAI in order to follow our FAA policies. Any such differences are highlighted in a NOTE within the AD.

Costs of Compliance

We estimate that this AD will affect about 6 products of U.S. registry. We also estimate that it will take about 8 work-hours per product to comply with the basic requirements of this AD. The average labor rate is $80 per work-hour. Based on these figures, we estimate the cost of this AD to the U.S. operators to be $3,840, or $640 per product.

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 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 this AD:

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

We prepared a regulatory evaluation of the estimated costs to comply with this AD and placed it in the AD docket.

Examining the AD Docket

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

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 FAA amends § 39.13 by adding the following new AD:

2008–23–02 Saab Aircraft AB: Amendment 39–15723. Docket No. FAA–2008–0115; Directorate Identifier 2007–NM–240–AD.

Effective Date

(a) This airworthiness directive (AD) becomes effective December 22, 2008.

Affected ADs

(b) None.

Applicability

(c) This AD applies to Saab Model SAAB 2000 airplanes, certificated in any category, serial number 004 through 063.

Subject

(d) Air Transport Association (ATA) of America Code 71: Powerplant.

Reason

(e) The mandatory continuing airworthiness information (MCAI) states:

One Part Number (P/N) LM–219–92 Centre Bracket from a P/N LM–219–SA28 Aft Engine Mounting assembly was found to be cracked while installed on the aircraft.

This reduces the effectiveness of the mounting assembly and could eventually cause it to fail.

EASA Airworthiness Directive (AD) was issued to require inspection and rework in order to make the centre bracket less sensitive to external damage that may result in a crack.

This AD, superseding AD 2007–0204, has been issued to introduce an alternative repeatable inspection procedure.

A failed mounting assembly, if not corrected, could result in loss of the engine. The corrective actions include an inspection to determine if there are any sharp edges on the aft engine mounting assembly; repetitive visual inspections, or a combination of visual and fluorescent penetrant inspection, for cracking of the center bracket of the aft engine mounting assembly for both engines; rework of sharp edges; replacement of the aft engine mounting assemblies; and re-identification of engine mounting assemblies and reworked center bracket.

Actions and Compliance

(f) Unless already done, do the following actions.

(1) Within 1,000 flight hours after the effective date of this AD, do visual inspections of both the aft engine mounting assemblies to find if the center bracket is correct (no sharp edges) from the manufacturer.

(2) If no sharp edge is found during the inspection required by paragraph (f)(1) of this AD, before further flight, inspect to determine if the aft engine mounting assembly and center bracket are identified with a ''–1,'' and before further flight re-identify the parts that are not identified with a ''–1,'' in accordance with the Accomplishment Instructions of Saab Service Bulletin 2000–71–025, dated June 13, 2007. Following the re-identification, no further action is required by this AD for airplanes on which no sharp edge is found during the inspection required by paragraph (f)(1) of this AD.

(3) If any sharp edge is found during the inspection required by paragraph (f)(1) of this AD, before further flight, do the action in paragraph (f)(3)(i) or (f)(3)(ii) of this AD in accordance with the Accomplishment Instructions of Saab Service Bulletin 2000–71–025, dated June 13, 2007.

(i) Do a general visual inspection for cracking of the center bracket of both of the aft engine mounting assemblies, with the bracket on the wing, and repeat the inspection thereafter at intervals not to exceed 250 flight hours until the action required by paragraph (f)(4) of this AD is accomplished.

(ii) Do general visual and penetrant inspections for cracking of the center bracket of both of the aft engine mounting assemblies, with the bracket off the wing.

Note 1: For the purposes of this AD, a general visual inspection is: ''A visual examination of an interior or exterior area, installation, or assembly to detect obvious damage, failure, or irregularity. This level of inspection is made from within touching distance unless otherwise specified. A mirror may be necessary to ensure visual access to all surfaces in the inspection area. This level of inspection is made under normally available lighting conditions such as daylight, hangar lighting, flashlight, or droplight and may require removal or opening of access panels or doors. Stands, ladders, or platforms may be required to gain proximity to the area being checked.''

(4) At the applicable time in paragraph (f)(4)(i) or (f)(4)(ii) of this AD, do the applicable actions in those paragraphs in accordance with the Accomplishment Instructions of Saab Service Bulletin 2000–71–025, dated June 13, 2007. Doing the applicable action terminates the repetitive inspection requirements of paragraph (f)(3)(i) of this AD.

(i) If no cracking is found during any inspection required by paragraph (f)(3) of this AD: Within 4,000 flight hours after the effective date of this AD, rework the center bracket, and re-identify the aft engine mounting assembly and center bracket.

(ii) If any cracking is found during any inspection required by paragraph (f)(3) of this AD, before further flight, replace the aft engine mounting assembly with an assembly and bracket identified with a ''–1'' part number.

(5) Actions done before the effective date of this AD in accordance with Saab Service Bulletin 2000–71–023, Revision 01, dated June 13, 2007, are acceptable for compliance with the corresponding requirements of paragraph (f)(3) of this AD.

FAA AD Differences

Note 2: This AD differs from the MCAI and/or service information as follows: Although the MCAI or service information allows further flight after cracks are found during compliance with the required action, paragraph (f)(4) of this AD requires that you replace a cracked aft engine mounting assembly before further flight.

Other FAA AD Provisions

(g) The following provisions also apply to this AD:

(1) Alternative Methods of Compliance (AMOCs): The Manager, International Branch, ANM–116, Transport Airplane Directorate, 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: Shahram Daneshmandi, Aerospace Engineer, International Branch, ANM–116, Transport Airplane Directorate, FAA, 1601 Lind Avenue, SW., Renton, Washington 98057–3356; telephone (425) 227–1112; fax (425) 227–1149. 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.

(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, 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 Airworthiness Directive 2008–0068, dated April 11, 2008; and Saab Service Bulletin 2000–71–025, dated June 13, 2007; for related information.

Material Incorporated by Reference

(i) You must use Saab Service Bulletin 2000–71–025, dated June 13, 2007, to do the actions required by this AD, unless the AD specifies otherwise.

(1) The Director of the Federal Register approved the incorporation by reference of this service information under 5 U.S.C. 552(a) and 1 CFR part 51.

(2) For service information identified in this AD, contact Saab Aircraft AB, SAAB Aircraft Product Support, S–581.88, Linköping, Sweden; telephone 011 46 13 18 5591; fax 011 46 13 18 4874; e-mail *http://www.saab2000.techsupport@saabgroup.com*; Internet *http://www.saabgroup.com*.

(3) 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/code_of_federal_regulations/ibr_locations.html*.

Issued in Renton, Washington, on October 24, 2008.

Ali Bahrami,

Manager, Transport Airplane Directorate, Aircraft Certification Service.

[FR Doc. E8–26364 Filed 11–14–08; 8:45 am]

BILLING CODE 4910–13–P

DEPARTMENT OF TRANSPORTATION

Federal Aviation Administration

14 CFR Part 39

[Docket No. FAA–2006–26598, Directorate Identifier 2006–CE–087–AD; Amendment 39–15733; AD 2008–23–12]

RIN 2120–AA64

Airworthiness Directives; Empresa Brasileira de Aeronautica S. A. (EMBRAER) Models EMB–110P1 and EMB–110P2 Airplanes

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

ACTION: Final rule.

SUMMARY: We are adopting a new airworthiness directive (AD) for the products listed above. This AD results from mandatory continuing airworthiness information (MCAI) issued 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:

It has been found cases of corrosion at the regions of Wings-to-Fuselage attachments, Vertical Stabilizer to Fuselage attachments, Rib 1 Half wing and Passenger Seat Tracks. Such corrosion may lead to subsequent cracking of the affected parts, compromising the aircraft structural integrity, which may in turn lead to structural failure and/or loss of some control surface.

We are issuing this AD to require actions to correct the unsafe condition on these products.

DATES: This AD becomes effective December 22, 2008.

On December 22, 2008, the Director of the Federal Register approved the incorporation by reference of certain publications listed in this AD.

ADDRESSES: You may examine the AD docket on the Internet at *http://www.regulations.gov* or in person at 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: Karl Schletzbaum, Aerospace Engineer, FAA, Small Airplane Directorate, 901 Locust, Room 301, Kansas City, Missouri 64106; telephone: (816) 329–4146; fax: (816) 329–4090.

SUPPLEMENTARY INFORMATION:

Discussion

We issued a notice of proposed rulemaking (NPRM) to amend 14 CFR part 39 to include an AD that would apply to the specified products. That NPRM was published in the **Federal Register** on July 8, 2008 (73 FR 38937). That NPRM proposed to correct an unsafe condition for the specified products. The MCAI states:

It has been found cases of corrosion at the regions of Wings-to-Fuselage attachments, Vertical Stabilizer to Fuselage attachments, Rib 1 Half-wing and Passenger Seat Tracks. Such corrosion may lead to subsequent cracking of the affected parts, compromising the aircraft structural integrity, which may in turn lead to structural failure and/or loss of some control surface.

Since this condition may occur in other aircraft of the same type design and affects flight safety, a corrective action is required. Thus, sufficient reason exists to request compliance with this AD in the indicated time limit.

Inspection for corrosion at regions of Wings-to-Fuselage attachments, Vertical Stabilizer to Fuselage attachments, Rib 1 Half-wing and Passenger Seat Tracks; and if applicable, removal of the detected corrosion.

Comments

We gave the public the opportunity to participate in developing this AD. We have considered the comment received.

Embraer requests the FAA follow the required actions of the MCAI and work together with the operators to issue AMOCs to relieve them when the required actions are positively identified as unnecessary. Embraer does not agree with the technical modifications proposed in the supplemental NPRM. Embraer's position is that the service instructions developed by Embraer present the necessary actions to adequately address the reported unsafe condition.

Embraer also states that instructions presented in EMBRAER Service Bulletin S.B. No.: 110–00–0007, REVISION No.: 01, dated January 12, 2007, and EMBRAER Service Bulletin S.B. No.: 110–57–0026, REVISION No.: 03, dated April 2, 2007, were developed based on findings of severe corrosion in the worldwide EMB–110 fleet. Embraer does recognize that since corrosion growth depends on several variables,

such as operational profile, climatic conditions, and the implementation of recommended preventive maintenance actions, these reports of severe corrosion may not represent the average situation of the fleet. However, Embraer can not assume the reports of severe corrosion are isolated findings.

The FAA does not agree. We previously reviewed comments from U.S. operators and have again reviewed service difficulty reports (SDRs) from the U.S. registered fleet. While there are some reports of corrosion relevant to the areas and topics of the MCAI, the magnitude and scope of the service difficulties in the U.S. fleet does not warrant the imposition of the entire requirements as described in the MCAI. We will continue to evaluate the other MCAI actions and monitor the corrosion issue. We may take future AD action.

We are not changing the AD as a result of this comment.

Conclusion

We reviewed the available data, including the comment received, and determined that air safety and the public interest require adopting the AD as proposed.

Differences Between This 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 required 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 AD.

Costs of Compliance

Based on the service information, we estimate that this AD will affect 38 products of U.S. registry. We also estimate that it will take about 95 work-hours per product to comply with basic requirements of this AD. The average labor rate is $80 per work-hour.

Based on these figures, we estimate the cost of this AD to the U.S. operators to be $288,800 or $7,600 per product.

We have no way of determining the number of products that may need any necessary follow-on actions or the cost associated with those 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 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 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.

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 the NPRM, 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.

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 FAA amends § 39.13 by adding the following new AD:

2008–23–12 Empresa Brasileira de Aeronautica S. A. (EMBRAER): Amendment 39–15733; Docket No. FAA–2006–26598; Directorate Identifier 2006–CE–087–AD.

Effective Date

(a) This airworthiness directive (AD) becomes effective December 22, 2008.

Affected ADs

(b) None.

Applicability

(c) This AD applies to Models EMB–110P1 and EMB–P2 airplanes, all serial numbers, certificated in any category.

Subject

(d) Air Transport Association of America (ATA) Code 57: Wings.

Reason

(e) The mandatory continuing airworthiness information (MCAI) states:

It has been found cases of corrosion at the regions of Wings-to-Fuselage attachments, Vertical Stabilizer to Fuselage attachments, Rib 1 Half-wing and Passenger Seat Tracks. Such corrosion may lead to subsequent cracking of the affected parts, compromising the aircraft structural integrity, which may in turn lead to structural failure and/or loss of some control surface.

Since this condition may occur in other aircraft of the same type design and affects flight safety, a corrective action is required. Thus, sufficient reason exists to request compliance with this AD in the indicated time limit.

Inspection for corrosion at regions of Wings-to-Fuselage attachments, Vertical Stabilizer to Fuselage attachments, Rib 1 Half-wing and Passenger Seat Tracks; and if applicable, removal of the detected corrosion.

Actions and Compliance

(f) Unless already done, do the following actions:

(1) Within the next 30 days after December 22, 2008 (the effective date of this AD) or within the next 100 hours time-in-service after December 22, 2008 (the effective date of

this AD), whichever occurs first, carry out a general visual inspection for corrosion at the regions of the wings-to-fuselage attachments, vertical stabilizer-to-fuselage attachments, rib 1 half-wing, and passenger seat tracks, following Parts I, II, and III of the Embraer—Empresa Brasileira de Aerońautica S.A. (EMBRAER) Service Bulletin S.B. No.: 110–00–0007, REVISION No.: 01, dated January 12, 2007.

(i) Before further flight, all structures found corroded or cracked as a result of the inspections done above must be addressed following the detailed instructions and procedures described in EMBRAER Service Bulletin S.B. No.: 110–00–0007, REVISION No.: 01, dated January 12, 2007.

(ii) Previous accomplishment of EMBRAER Alert Service Bulletin S.B. No.: 110–00–A007, dated March 6, 2006, or the implementation of the tasks required by section VI of the Maintenance Planning Guides TP 110P2/145, PM 110/652, or PM 110/165, released by EMBRAER, are considered alternative methods of compliance (AMOC) with the requirements of (f)(1) and (f)(1)(i) of this AD.

(2) Within the next 36 months after December 22, 2008 (the effective date of this AD), do a visual and, as applicable, a dye-penetrant inspection in rib 1 external and internal regions, in the auxiliary fittings of the main box half-wings, and in the spar webs of half-wings. Do the inspections following paragraph 3. ACCOMPLISHMENT INSTRUCTIONS of EMBRAER Service Bulletin S.B. No.: 110–57–0026, REVISION No.: 03, dated April 2, 2007. Before further flight, all structures found corroded or cracked as a result of the inspections done above must be corrected following the detailed instructions and procedures described in EMBRAER Service Bulletin S.B. No.: 110–57–0026, REVISION No.: 03, dated April 2, 2007.

Note 1: The FAA is aware that most of the affected airplanes are maintained under operators' approved aircraft inspection and maintenance programs. The AD actions may be integrated into these existing inspection and maintenance programs. We will consider changes in the compliance time or alternative actions following the provisions of paragraph (g)(1) of this AD.

FAA AD Differences

Note 2: This AD differs from the MCAI and/or service information as follows: We determined the requirement to do Part IV and Part V of EMBRAER Service Bulletin S.B. No.: 110–00–0007, REVISION No.: 01, dated January 12, 2007, may go beyond addressing the unsafe condition listed in the MCAI. We have removed those actions from this AD. We will continue to evaluate the additional MCAI actions and monitor the corrosion issue. We may take future AD action if we determine an additional unsafe condition exists or is likely to develop.

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: Karl Schletzbaum, Aerospace Engineer, FAA, Small Airplane Directorate, 901 Locust, Room 301, Kansas City, Missouri 64106; telephone: (816) 329–4146; fax: (816) 329–4090. 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.

(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 Agência Nacional de Aviação Civil (ANAC) AD No.: 2006–10–01R1, dated August 30, 2007; EMBRAER Service Bulletin S.B. No.: 110–00–0007, REVISION No.: 01, dated January 12, 2007; and EMBRAER Service Bulletin S.B. No.: 110–57–0026, REVISION No.: 03, dated April 2, 2007; for related information.

Material Incorporated by Reference

(i) You must use EMBRAER Service Bulletin S.B. No.: 110–00–0007, REVISION No.: 01, dated January 12, 2007, and EMBRAER Service Bulletin S.B. No.: 110–57–0026, REVISION No.: 03, dated April 2, 2007, to do the actions required by this AD, unless the AD specifies otherwise.

(1) The Director of the Federal Register approved the incorporation by reference of this service information under 5 U.S.C. 552(a) and 1 CFR part 51.

(2) For service information identified in this AD, contact Empresa Brasileira de Aeronautica S. A., Av. Brig. Faria Lima 2170, 12227–901, São José dos Campos—SP, Brazil; phone: (+55 12) 3927 1000; e-mail: *certif.@embraer.com.br*; Internet: *http://www.embraer.com/english/content/home.*

(3) You may review copies at the FAA, Central Region, Office of the Regional Counsel, 901 Locust, Room 506, Kansas City, Missouri 64106; 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 Kansas City, Missouri, on November 4, 2008.

Patrick R. Mullen,

Acting Manager, Small Airplane Directorate, Aircraft Certification Service.

[FR Doc. E8–26713 Filed 11–14–08; 8:45 am]

BILLING CODE 4910–13–P

DEPARTMENT OF TRANSPORTATION

Federal Aviation Administration

14 CFR Part 39

[Docket No. FAA–2008–0991 Directorate Identifier 2008–CE–054–AD; Amendment 39–15729; AD 2008–23–08]

RIN 2120–AA64

Airworthiness Directives; Diamond Aircraft Industries GmbH Model DA 42 Airplanes

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

ACTION: Final rule.

SUMMARY: We are adopting a new airworthiness directive (AD) for the products listed above. This AD results from mandatory continuing airworthiness information (MCAI) issued 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:

In-service experience indicates that the powder coating of the rear right hand (RH) engine support bracket degrades over time, leading to a reduced torque of the engine mountings bolts. In some cases, bolts had fully unscrewed and fell into the engine cowling. One case was reported where the pilot had to shut down an engine in flight because of a failed V-belt, the cause of failure assumed to be one of these bolts. This condition, if not corrected, may lead to further cases of loose bolts and subsequent damage to the engine or accessories in the engine compartment, possibly resulting in in-flight engine shut-down and reduced control of the aircraft.

We are issuing this AD to require actions to correct the unsafe condition on these products.

DATES: This AD becomes effective December 22, 2008.

On December 22, 2008, the Director of the Federal Register approved the incorporation by reference of certain publications listed in this AD.

ADDRESSES: You may examine the AD docket on the Internet at *http://www.regulations.gov* or in person at 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: Sarjapur Nagarajan, Aerospace Engineer, FAA, Small Airplane Directorate, 901 Locust, Room 301, Kansas City, Missouri 64106; telephone: (816) 329–4145; fax: (816) 329–4090.

SUPPLEMENTARY INFORMATION:

Discussion

We issued a notice of proposed rulemaking (NPRM) to amend 14 CFR part 39 to include an AD that would apply to the specified products. That NPRM was published in the **Federal Register** on September 17, 2008 (73 FR 53766). That NPRM proposed to correct an unsafe condition for the specified products. The MCAI states:

In-service experience indicates that the powder coating of the rear right hand (RH) engine support bracket degrades over time, leading to a reduced torque of the engine mountings bolts. In some cases, bolts had fully unscrewed and fell into the engine cowling. One case was reported where the pilot had to shut down an engine in flight because of a failed V-belt, the cause of failure assumed to be one of these bolts. This condition, if not corrected, may lead to further cases of loose bolts and subsequent damage to the engine or accessories in the engine compartment, possibly resulting in in-flight engine shut-down and reduced control of the aircraft.

To address and correct this situation, DAI has published MSB–42–058, providing instructions to accomplish repetitive inspections and correction of the fastening torque of the affected engine mounting bolts and replacement of the bolts with wire-secured bolts Part Number (P/N) D60–9071–26–01, after which the repetitive torque checks are no longer required.

Comments

We gave the public the opportunity to participate in developing this AD. We received no comments on the NPRM or on the determination of the cost to the public.

Conclusion

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

Differences Between This 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 required 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 AD.

Costs of Compliance

Based on the service information, we estimate that this AD will affect 157 products of U.S. registry. We also estimate that it will take about 1.5 work-hours per product to comply with basic requirements of this AD. The average labor rate is $80 per work-hour. Required parts will cost about $0 per product. Where the service information lists required parts costs that are covered under warranty, we have assumed that there will be no charge for these parts. As we do not control warranty coverage for affected parties, some parties may incur costs higher than estimated here.

Based on these figures, we estimate the cost of this AD to the U.S. operators to be $18,840 or $120 per product.

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 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 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.

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 the NPRM, 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.

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 FAA amends § 39.13 by adding the following new AD:

2008–23–08 Diamond Aircraft Industries GmbH: Amendment 39–15729; Docket No. FAA–2008–0991; Directorate Identifier 2008–CE–054–AD.

Effective Date

(a) This airworthiness directive (AD) becomes effective December 22, 2008.

Affected ADs

(b) None.

Applicability

(c) This AD applies to Model DA 42 airplanes, all serial numbers, certificated in any category, that have Thielert TAE125–01 engines installed, except those airplanes with engines identified by serial number in Diamond Aircraft Industries GmbH Mandatory Service Bulletin No. MSB–42–058, dated May 21, 2008, that have been installed on the aircraft with wedge locking washers and bonded-in bolts and are therefore not affected by this AD.

Subject

(d) Air Transport Association of America (ATA) Code 71: Power Plant.

Reason

(e) The mandatory continuing airworthiness information (MCAI) states:

In-service experience indicates that the powder coating of the rear right hand (RH) engine support bracket degrades over time, leading to a reduced torque of the engine mountings bolts. In some cases, bolts had fully unscrewed and fell into the engine cowling. One case was reported where the pilot had to shut down an engine in flight because of a failed V-belt, the cause of failure assumed to be one of these bolts. This condition, if not corrected, may lead to further cases of loose bolts and subsequent damage to the engine or accessories in the engine compartment, possibly resulting in in-flight engine shut-down and reduced control of the aircraft.

To address and correct this situation, DAI has published MSB–42–058, providing instructions to accomplish repetitive inspections and correction of the fastening torque of the affected engine mounting bolts and replacement of the bolts with wire-secured bolts Part Number (P/N) D60–9071–26–01, after which the repetitive torque checks are no longer required.

For the reasons described above, this EASA AD requires the accomplishment of repetitive torque checks of the affected engine mounting bolts and replacement of the bolts with wire-secured bolts.

Actions and Compliance

(f) Unless already done, do the following actions:

(1) Within the next 100 hours time-in-service (TIS) after December 22, 2008 (the effective date of this AD) and repetitively thereafter at intervals not to exceed 100 hours TIS, do the inspection and correction of the fastening torque of the RH rear engine support bracket mounting bolts following Diamond Aircraft Industries GmbH Mandatory Service Bulletin No. MSB–42–058, dated May 21, 2008; and Action 1 of Diamond Aircraft Industries GmbH Work Instruction WI–MSB–42–058, dated March 12, 2008.

(2) Within 6 months after December 22, 2008 (the effective date of this AD), replace all RH rear engine support bracket mounting bolts with wire-secured bolts, P/N D60–9071–26–01, following Diamond Aircraft Industries GmbH Mandatory Service Bulletin No. MSB–42–058, dated May 21, 2008; and Action 2 of Diamond Aircraft Industries GmbH Work Instruction WI–MSB–42–058, dated March 12, 2008.

(3) Installation of the wire-secured bolts, P/N D60–9071–26–01, as required by paragraph (f)(2) of this AD, terminates the repetitive torque inspections required by paragraph (f)(1) of this AD.

(4) As of 6 months after December 22, 2008 (the effective date of this AD), no person shall install spare RH rear engine support bracket mounting bolts as replacement parts on any aircraft to which this AD applies, except P/N D60–9071–26–01 wire-secured bolts.

FAA AD Differences

Note: This AD differs from the MCAI and/or service information as follows: No differences.

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: Sarjapur Nagarajan, Aerospace Engineer, FAA, Small Airplane Directorate, 901 Locust, Room 301, Kansas City, Missouri 64106; telephone: (816) 329–4145; fax: (816) 329–4090. 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.

(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. 2008–0139, dated July 24, 2008; Diamond Aircraft Industries GmbH Mandatory Service Bulletin No. MSB–42–058, dated May 21, 2008; and Diamond Aircraft Industries GmbH Work Instruction WI–MSB–42–058, dated March 12, 2008, for related information.

Material Incorporated by Reference

(i) You must use Diamond Aircraft Industries GmbH Mandatory Service Bulletin No. MSB–42–058, dated May 21, 2008; and Diamond Aircraft Industries GmbH Work Instruction WI–MSB–42–058, dated March 12, 2008, to do the actions required by this AD, unless the AD specifies otherwise.

(1) The Director of the Federal Register approved the incorporation by reference of this service information under 5 U.S.C. 552(a) and 1 CFR part 51.

(2) For service information identified in this AD, contact Diamond Aircraft Industries GmbH, N.A. Otto-Straβe 5, A–2700 Wiener Neustadt; telephone: +43 2622 26700; fax: +43 2622 26780; e-mail: *office@diamond-air.at*.

(3) You may review copies at the FAA, Central Region, Office of the Regional Counsel, 901 Locust, Room 506, Kansas City, Missouri 64106; 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 Kansas City, Missouri, on October 29, 2008.

James E. Jackson,

Acting Manager, Small Airplane Directorate, Aircraft Certification Service.

[FR Doc. E8–26430 Filed 11–14–08; 8:45 am]

BILLING CODE 4910–13–P

DEPARTMENT OF TRANSPORTATION

Federal Aviation Administration

14 CFR Part 39

[Docket No. FAA–2007–0308; Directorate Identifier 2007–NM–160–AD; Amendment 39–15731; AD 2008–23–10]

RIN 2120–AA64

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

AGENCY: Federal Aviation Administration (FAA), DOT.

ACTION: Final rule.

SUMMARY: We are adopting a new airworthiness directive (AD) for certain Boeing Model 747 airplanes identified above. This AD requires modifying the outboard flap track and transmission attachments. This AD results from a joint Boeing and FAA multi-model study (following in-service trailing edge flap structure and drive system events) on the hazards posed by skewing and failed flaps. This study identified the safety concerns regarding the transmission attachment design and the potential loss of an outboard trailing edge flap. We are issuing this AD to prevent certain discrepancies associated with this design (for example, a flap skew or lateral control asymmetry that can cause collateral damage to adjacent hydraulic tubing and subsequent loss of a hydraulic system), which could result in the asymmetric flight control limits being exceeded, and could adversely affect the airplane's continued safe flight and landing.

DATES: This AD is effective December 22, 2008.

The Director of the Federal Register approved the incorporation by reference of certain publications listed in this AD as of December 22, 2008.

ADDRESSES: 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 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:

Doug Tsuji, Aerospace Engineer, Systems and Equipment Branch, ANM–130S, FAA, Seattle Aircraft Certification Office, 1601 Lind Avenue, SW., Renton, Washington 98057–3356; telephone (425) 917–6487; fax (425) 917–6590.

SUPPLEMENTARY INFORMATION:

Discussion

We issued a notice of proposed rulemaking (NPRM) to amend 14 CFR part 39 to include an airworthiness directive (AD) that would apply to certain Boeing Model 747–100, 747–100B, 747–100B SUD, 747–200B, 747–200C, 747–200F, 747–300, 747–400, 747–400D, 747–400F, and 747SR series airplanes. That NPRM was published in the **Federal Register** on December 11, 2007 (72 FR 70247). That NPRM proposed to require modifying the outboard flap track and transmission attachments.

Actions Since NPRM Was Issued

Since we issued the NPRM, Boeing has issued Service Bulletins 747–27A2398, Revision 1, dated July 31, 2008; and 747–27A2421, Revision 1, dated July 10, 2008; to add longer grip length bolts necessary to install the new support housing and optional part numbers for the new support housing. In the NPRM, we referred to the original issue of the service bulletins, both dated April 19, 2007, as the sources of service information for modifying the outboard trailing edge flaps. The procedures in the original issue of the service bulletins are essentially the same as those in Revision 1. Therefore, we have revised paragraph (f) of this AD to refer to Revision 1 of the service bulletins as the appropriate sources of service information for modifying the outboard trailing edge flaps. We have also revised paragraphs (c) and (g) of this AD to refer to Revision 1 of the service bulletins. In addition, we have added a new paragraph (h) to the AD to give credit for using the original issue of the service bulletins for accomplishing the required actions before the effective date of the AD.

Comments

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

Request To Extend Compliance Period

All Nippon Airways Co. Ltd. (ANA) and KLM Royal Dutch Airlines—Fleet Services request that the compliance period be extended from a tiered 3 years and 6 years to 5 years and 8 years. The commenters cite difficulties in accomplishing the proposed actions (difficulties related to manpower and facility requirements) and claim that the proposed actions are better suited to correspond to scheduled ''D'' check maintenance.

We disagree with the request to extend the compliance times. We have determined that the tiered compliance times of 3 years and 6 years, as proposed, are commensurate with the unsafe condition associated with the loss of the transmission. We have not changed the final rule regarding this issue.

Request To Revise Cost Estimate

British Airways (BA) and Boeing state that the work-hour estimate specified in the NPRM (150 work hours) is too low. Boeing reports that its original work-hour estimate has been updated based on further evaluation and the results of the service bulletin validation. (The work hours specified in the NPRM are based on information provided in the service bulletin.) Boeing's recalculation now estimates that the actions will take 310 total hours (258 hours on the airplane and 52 hours for component work).

We agree, based on Boeing's explanation. We have revised the cost estimates in this final rule.

Request to Allow Repetitive Maintenance Instead of Modification

Singapore Airlines Limited states that the intent of the proposed AD can be achieved through regular replacement of the flap transmission bolts (with non H–11 bolts) and regular nondestructive testing (NDT) inspections on the Nos. 1, 2, 7, and 8 transmission housings. The commenter notes that AD 2001–03–10 (amendment 39–12114, 66 FR 10951, February 21, 2001) mandates replacing H–11 bolts (which failed prematurely) with Inconel bolts. Service history has shown no bolt failures after the bolts were replaced.

We infer that the commenter is requesting that we revise the NPRM to allow repetitive inspections and replacements instead of the modification. We do not agree. The intent of this AD is to remove an identified single failure condition that can result in a catastrophic event. Although AD 2001–03–10 requires replacing a known source of failures on the same airplanes affected by this new AD, and service history has shown no failures of the existing transmission attachment fitting, the potential single failure condition would still exist if no further action were taken. We have not changed the final rule regarding this issue.

Request for Alternative Method

According to Lufthansa, the existing transmission attachment (solid Inconel bolts) is a damage-tolerant design, and the new attachment with a double load path bolt is a fail-safe design. A cracked hollow bolt could go undetected, which Lufthansa claims is a disadvantage compared to the existing design.

We partially agree with the commenter's assertions. We agree that a cracked hollow bolt could go undetected. A planned inspection program must be developed to detect a fractured hollow bolt before the nested inner solid bolt fractures. For this reason, the FAA is considering additional rulemaking to address this broader issue. We disagree, however, that the solid Inconel bolt is a damage-tolerant design. Neither the existing single bolt design nor the new double load path bolt design would be classified as damage tolerant without planned inspections to detect a fractured bolt. The single bolt design was identified as a potential safety issue because a single bolt failure could lead to overload failure of the two remaining transmission mounting bolts, which is a static strength issue. A planned inspection program of the double load path bolt design will provide a transmission mount attachment design that is damage tolerant. While we might issue additional rulemaking related to the broader issue of inspecting to detect a fractured hollow bolt, we have not changed this final rule regarding this issue.

Request To Clarify Relationship of NPRM to Existing ADs

We cited Boeing Alert Service Bulletin 747–27A2398, dated April 19, 2007, in the NPRM as an appropriate source of service information for the modification. Japan Airlines (JAL) and ANA request that the actions specified in that service bulletin be considered an alternative method of compliance (AMOC) to paragraphs (a) and (b) of AD 2001–03–10 and paragraph (a) of AD

2001–23–13 (amendment 39–12512, 66 FR 58918, November 26, 2001) (a correction of that rule was published in the **Federal Register** on February 14, 2002 (67 FR 6864)).

The commenters also request that we describe the relationship among AD 2001–03–10, AD 2001–23–13, and the NPRM. We provide this summary information in the table titled ''Breakdown of Actions.''

BREAKDOWN OF ACTIONS

AD action	Boeing Service Bulletin	Actions
AD 2001–03–10	747–27A2376, dated July 1, 1999	Replacing H–11 bolts with Inconel bolts at the trailing edge (TE) flap transmission attachment fitting.
AD 2001–23–13	747–27–2374, dated November 18, 1999.	Replacing the TE flap transmission torque brake and changing the flap transmission P/N, after a torque brake is replaced.
The NPRM	747–27A2398, dated April 19, 2007.	Replacing the bolts with non-Inconel, dual load path bolts; installing new flap tracks; and installing the new transmission attachment fitting.

The commenters state that the NPRM and Boeing Service Bulletin 747–27A2398 show part numbers for the No. 2 and No. 7 transmission assemblies that are different from the part numbers specified in Boeing Service Bulletin 747–27–2374.

We agree that the requirements of this AD may terminate certain other requirements. This AD requires replacing the Inconel attach bolts installed by AD 2001–03–10 used for the transmission attachment fitting. Installation of the new bolts in accordance with Boeing Service Bulletin 747–27A2398, dated April 19, 2007, was previously approved as an AMOC to the requirements of paragraphs (a) and (b) of AD 2001–03–10 by FAA Letter 130S–08–47a, dated February 21, 2008. We have revised the AD in newly added paragraph (i) to clarify the relationship between the two ADs.

AD 2001–23–13 requires re-identifying the transmission assembly after replacing a discrepant torque brake with a new, improved torque brake. Before doing the requirements of this AD, operators should have already done the requirements of AD 2001–23–13, so the ''new'' part numbers created by AD 2001–23–13 are the ''existing'' part numbers in this AD. The modification required by this AD creates ''new'' part numbers. The ''new'' part numbers created by this AD were previously approved as an AMOC to paragraph (a)(2)(ii) of AD 2001–23–13 by FAA Letter 130S–08–48a, dated February 5, 2008. This final rule does not terminate any requirement of AD 2001–23–13.

Request to Revise Compliance Time for Paragraph (h)

Paragraph (h) of the NPRM (paragraph (j) in this final rule) would prohibit installing unmodified flap transmissions as of the effective date of the AD. BA, ANA, KLM, and Boeing request that we revise this provision to allow the continued use of unmodified hinge braces and support assemblies during the proposed compliance period for the modification. As written, paragraph (h) of the NPRM would require modifying a flap transmission and associated flap track whenever a flap transmission or hinge brace is replaced in service, regardless of the reason. The modification requires removing the outboard flaps and corresponding flap track, and is intended to be performed during planned maintenance. The modification would require significant manpower and use of proper facilities, equipment, tooling, etc. The commenters state that, if a transmission or hinge brace would need to be replaced outside of the planned schedule, such as for miscellaneous damage or an oil leak, the airplane would have to be taken out of service for modification, resulting in significant economic and operational impact.

We agree with the request and the commenters' rationale. The intent of this AD is to phase out a potential catastrophic failure mode that currently exists on Model 747 airplanes; service history indicates that immediate modification is not required. We have revised paragraph (j) of this AD to correspond with the modification specified in paragraph (f) of this AD.

Request to Clarify Compliance Times

Boeing requests that we revise the Relevant Service Information section of the NPRM, which indicates that the compliance time is based on flight cycles on the ''airplane,'' which, Boeing asserts, should instead be on the flap ''transmission.'' Paragraph 1.E. of Boeing Service Bulletins 747–27A2398 and 747–27A2421 explains that the compliance time is 6 years for flap transmissions known to have fewer than 20,000 total flight cycles, and 3 years for all other transmissions.

We agree with the commenter's explanation. We intended that the compliance times in this AD match the compliance times in the service bulletins. Although the Relevant Service Information section is not repeated in a final rule, the compliance time clarification provided by the commenter applies to paragraphs (f) and (g) in this final rule.

Request To Allow Flowchart for Deriving Compliance Time

Boeing requests that we revise the NPRM to include matrices (flowcharts) to help operators determine whether the 6-year or 3-year compliance time applies to a specific transmission. Alternatively, the commenter requests that flowcharts be considered for a future AMOC. Boeing states that the FAA agreed that operators may use transmission age and/or configuration to select the proper compliance time when the number of flight cycles on the flap transmission is unknown. Boeing reports that its flowcharts mirror the compliance time recommendations agreed on by Boeing and the FAA.

We disagree with the request to include flowcharts in the AD, although we generally agree that using transmission age and/or configuration is acceptable for selecting the proper compliance time. If the number of cycles is unknown, operators can estimate from the flap transmission configuration the date it was put into service, and can thus estimate the number of cycles on the transmission. But flowcharts can be variously interpreted and are often subject to misinterpretation, so they are generally not enforceable and therefore cannot be included in ADs. However, according to the provisions of paragraph (k) of the final rule, a request may be made to use a specific flowchart if the derived compliance times would accurately reflect the requirements of the AD.

Clarification of NPRM Discussion

In the Discussion section of the NPRM, we stated that we received a report about a joint Boeing and FAA

multi-model study. Although the Discussion section is not repeated in a final rule, we provide the following to clarify events leading up to this AD. In the late 1990s/early 2000s, the FAA participated with Boeing in a multi-model investigation on the effects of trailing edge wing flap skew and flap loss. As a result of this investigation, a simulation study revealed potential failures that could cause a flap skew and subsequent flap loss, with potentially catastrophic results.

Conclusion

We reviewed the relevant data, considered the comments received, and determined that air safety and the public interest require adopting the AD with the changes described previously. We also determined that these changes will not significantly increase the economic burden on any operator or increase the scope of the AD.

Costs of Compliance

There are about 990 airplanes of the affected design in the worldwide fleet. The following table provides the estimated costs for U.S. operators to comply with this AD.

ESTIMATED COSTS

Work hours	Average labor rate per hour	Parts	Cost per airplane	Number of U.S.-registered airplanes	Fleet cost
310	$80	$80,023	$104,823	141	$14,780,043

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

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.

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.

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 FAA amends § 39.13 by adding the following new AD:

2008–23–10 Boeing: Amendment 39–15731. Docket No. FAA–2007–0308; Directorate Identifier 2007–NM–160–AD.

Effective Date

(a) This airworthiness directive (AD) is effective December 22, 2008.

Affected ADs

(b) None.

Applicability

(c) This AD applies to Boeing Model 747–100, 747–100B, 747–100B SUD, 747–200B, 747–200C, 747–200F, 747–300, 747–400, 747–400D, 747–400F, and 747SR series airplanes, certificated in any category; as identified in Boeing Service Bulletins 747–27A2398, Revision 1, dated July 31, 2008; and 747–27A2421, Revision 1, dated July 10, 2008.

Unsafe Condition

(d) This AD results from a joint Boeing and FAA multi-model study (following in-service trailing edge flap structure and drive system events) on the hazards posed by skewing and failed flaps. This study identified the safety concerns regarding the transmission attachment design and the potential loss of an outboard trailing edge flap. We are issuing this AD to prevent certain discrepancies associated with this design (for example, a flap skew or lateral control asymmetry that can cause collateral damage to adjacent hydraulic tubing and subsequent loss of a hydraulic system), which could result in the asymmetric flight control limits being exceeded, and could adversely affect the airplane's continued safe flight and landing.

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.

Modification

(f) Do the following, as applicable: At the time specified in paragraph 1.E. of Boeing Service Bulletins 747–27A2398, Revision 1, dated July 31, 2008; and 747–27A2421, Revision 1, dated July 10, 2008; except as provided by paragraph (g) of this AD, modify the outboard flap track and transmission attachments by doing all actions specified in the Accomplishment Instructions of the service bulletin.

(g) Where Boeing Service Bulletins 747–27A2398, Revision 1, dated July 31, 2008; and 747–27A2421, Revision 1, dated July 10, 2008; specify compliance times relative to the date on the service bulletin, this AD requires compliance within the specified compliance time after the effective date of this AD.

Credit for Actions Done According to Previous Issue of Service Bulletins

(h) Actions done before the effective date of this AD in accordance with Boeing Alert Service Bulletins 747–27A2421 and 747–27A2398, both dated April 19, 2007, are acceptable for compliance with the requirements of paragraph (f) of this AD.

Terminating Action for Certain Requirements of AD 2001–03–10

(i) Accomplishment of the modification specified in paragraph (f) of this AD terminates the requirements of paragraphs (a)

and (b) of AD 2001–03–10, amendment 39–12114.

Parts Installation

(j) After completing the modifications required by paragraph (f) of this AD, no person may install a part identified in Table 1 of this AD on the modified airplane.

TABLE 1—PARTS PROHIBITED FROM INSTALLATION

Part	Part No.
Hinge brace assembly for Tracks 1 and 8	65B15515–1 65B15515–2 65B15515–9 65B15515–10
Hinge brace assembly for Tracks 2 and 7	65B15525–1 65B15525–2 65B15525–7 65B15525–8 65B17092–1 65B17092–2
Support housing assembly for Tracks 1 and 8	65B81982–( )
Support housing assembly for Tracks 2 and 7	65B81950–( )

Alternative Methods of Compliance (AMOCs)

(k)(1) The Manager, Seattle Aircraft Certification Office (ACO), FAA, ATTN: Doug Tsuji, Aerospace Engineer, Systems and Equipment Branch, ANM–130S; telephone (425) 917–6487; 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.

Material Incorporated by Reference

(l) You must use Boeing Service Bulletin 747–27A2398, Revision 1, dated July 31, 2008; or Boeing Service Bulletin 747–27A2421, Revision 1, dated July 10, 2008; as applicable; to do the actions required by this AD, unless the AD specifies otherwise.

(1) The Director of the Federal Register approved the incorporation by reference of this service information under 5 U.S.C. 552(a) and 1 CFR part 51.

(2) For service information identified in this AD, contact Boeing Commercial Airplanes, P.O. Box 3707, Seattle, Washington 98124–2207; telephone 206–544–9990; fax 206–766–5682; e-mail *DDCS@boeing.com;* Internet *https://www.myboeingfleet.com.*

(3) You may review copies of the service information incorporated by reference 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/code_of_federal_regulations/ibr_locations.html.*

Issued in Renton, Washington, on October 23, 2008.

Ali Bahrami,

Manager, Transport Airplane Directorate, Aircraft Certification Service.

[FR Doc. E8–26480 Filed 11–14–08; 8:45 am]

BILLING CODE 4910–13–P

DEPARTMENT OF TRANSPORTATION

Federal Aviation Administration

14 CFR Part 97

[Docket No. 30636; Amdt. No 3294]

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

AGENCY: Federal Aviation Administration (FAA), DOT.

ACTION: Final rule.

SUMMARY: This 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 November 17, 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 November 17, 2008.

ADDRESSES: Availability of matters 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 and Takeoff Minimums and ODPs are available online free of charge. Visit *http://www.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 Divisions, 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 of the Code of Federal Regulations, Part 97 (14 CFR part 97), by establishing, amending, suspending, or revoking SIAPS, Takeoff Minimums and/or ODPS. The complete regulators description of each SIAP and its associated Takeoff Minimums or ODP for an identified airport is listed on FAA form documents which are incorporated by reference in this amendment under 5 U.S.C. 552(a), 1 CFR part 51, and 14 CFR part 97.20. The applicable FAA Forms are FAA Forms 8260–3, 8260–4, 8260–5, 8260–15A, and 8260–15B when required by an entry on 8260–15A.

The large number of SIAPs, Takeoff Minimums and ODPs, in addition to their complex nature and the need for a special format make publication in the **Federal Register** expensive and impractical. Furthermore, airmen do not use the regulatory text of the SIAPs, Takeoff Minimums or ODPs, but instead refer to their depiction on charts printed by publishers of aeronautical materials. The advantages of incorporation by reference are realized and publication of the complete description of each SIAP,

Takeoff Minimums and ODP listed on FAA forms is unnecessary. This amendment provides the affected CFR sections and specifies the types of SIAPs and the effective dates of the associated Takeoff Minimums and ODPs. 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, Takeoff Minimums and ODP as contained in the transmittal. Some SIAP and Takeoff Minimums and textual ODP amendments may have been issued previously by the FAA in a Flight Data Center (FDC) Notice to Airmen (NOTAM) as an emergency action of immediate flight safety relating directly to published aeronautical charts. The circumstances which created the need for some SIAP and Takeoff Minimums and ODP amendments may require making them effective in less than 30 days. For the remaining SIAPS and Takeoff Minimums and ODPS, an effective date at least 30 days after publication is provided.

Further, the SIAPs and Takeoff Minimums and ODPS contained in this amendment are based on the criteria contained in the U.S. Standard for Terminal Instrument Procedures (TERPS). In developing these SIAPS and Takeoff Minimums and ODPs, the TERPS criteria were applied to the conditions existing or anticipated at the affected airports. Because of the close and immediate relationship between these SIAPs, Takeoff Minimums and ODPs, and safety in air commerce, I find that notice and public procedures before adopting these SIAPS, Takeoff Minimums and ODPs are impracticable and contrary to the public interest and, where applicable, that good cause exists for making some SIAPs effective in less than 30 days.

Conclusion

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

List of Subjects in 14 CFR Part 97

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

Issued in Washington, DC, on October 31, 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 establishing, amending, suspending, or revoking Standard Instrument Approach Procedures and/or Takeoff Minimums and/or Obstacle Departure Procedures effective at 0902 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:

** * * Effective 20 NOV 2008*

Los Angeles, CA, Los Angeles Intl, Takeoff Minimums and Obstacle DP, Amdt 12

** * * Effective 18 DEC 2008*

Miami, FL, Miami Intl, ILS OR LOC RWY 12, Amdt 5A
Miami, FL, Miami Intl, RNAV (GPS) Z RWY 12, Amdt 1A
Miami, FL, Miami Intl, RNAV (RNP) Y RWY 12, Orig-A
Orlando, FL, Orlando Sanford Intl, RNAV (GPS) RWY 9L, Amdt 2A
Orlando, FL, Orlando Sanford Intl, RNAV (GPS) RWY 9R, Orig-A
Orlando, FL, Orlando Sanford Intl, RNAV (GPS) RWY 27R, Amdt 1A
Marshfield, MA, Marshfield Muni-George Harlow Field, GPS RWY 6, Orig-A, CANCELLED
Marshfield, MA, Marshfield Muni-George Harlow Field, RNAV (GPS) RWY 6, Orig
Lebanon, NH, Lebanon Muni, GPS RWY 7, Orig-A, CANCELLED
Lebanon, NH, Lebanon Muni, NDB–B, Amdt 4, CANCELLED
Lebanon, NH, Lebanon Muni, RNAV (GPS) RWY 7, Orig
Lebanon, NH, Lebanon Muni, RNAV (GPS) RWY 18, Orig
Lebanon, NH, Lebanon Muni, RNAV (GPS) RWY 36, Orig
Somerville, NJ, Somerset, Takeoff Minimums and Obstacle DP, Amdt 3
Christiansted, St Croix, VI, Henry E Rohlsen, RNAV (GPS) RWY 28, Amdt 1

** * * Effective 15 JAN 2009*

Dillingham, AK, Dillingham, LOC/DME RWY 19, Amdt 6
Dillingham, AK, Dillingham, NDB RWY 1, Amdt 1A, CANCELLED
Dillingham, AK, Dillingham, RNAV (GPS) RWY 1, Amdt 1
Dillingham, AK, Dillingham, RNAV (GPS) RWY 19, Amdt 1
Dillingham, AK, Dillingham, Takeoff Minimums and Obstacle DP, Amdt 3
Dillingham, AK, Dillingham, VOR RWY 1, Amdt 9
Dillingham, AK, Dillingham, VOR/DME RWY 19, Amdt 7
Igiugig, AK, Igiugig, Takeoff Minimums and Obstacle DP, Orig
Pago Pago, American Samoa, AQ, Pago Pago Intl, VOR/DME OR TACAN–A, Amdt 4
Stockton, CA, Stockton Metropolitan, GPS RWY 29R, Orig-C, CANCELLED
Stockton, CA, Stockton Metropolitan, RNAV (GPS) RWY 11L, Orig
Stockton, CA, Stockton Metropolitan, RNAV (GPS) RWY 29R, Orig
Stockton, CA, Stockton Metropolitan, Takeoff Minimums and Obstacle DP, Orig
Durango, CO, Durango-La Plata County, GPS RWY 2, Orig-A, CANCELLED
Durango, CO, Durango-La Plata County, ILS OR LOC/DME RWY 3, Amdt 4
Durango, CO, Durango-La Plata County, RNAV (GPS) RWY 3, Orig
Durango, CO, Durango-La Plata County, Takeoff Minimums and Obstacle DP, Amdt 6A
Durango, CO, Durango-La Plata County, VOR OR GPS–A, Amdt 6A, CANCELLED
Avon Park, FL, Avon Park Executive, Takeoff Minimums and Obstacle DP, Orig
Coeur D'Alene, ID, Pappy Boyington Field, ILS OR LOC/DME RWY 5, Amdt 5
Coeur D'Alene, ID, Pappy Boyington Field, NDB RWY 5, Amdt 2
Coeur D'Alene, ID, Pappy Boyington Field, RNAV (GPS) RWY 5, Orig
Coeur D'Alene, ID, Pappy Boyington Field, VOR RWY 5, Orig
Coeur D'Alene, ID, Pappy Boyington Field, VOR/DME RWY 1, Amdt 1
Coeur D'Alene, ID, Pappy Boyington Field, VOR OR GPS–A, Orig-B, CANCELLED
Champaign/Urbana, IL, University of Illinois-Willard, Takeoff Minimums and Obstacle DP, Orig
Mount Carmel, IL, Mount Carmel Muni, RNAV (GPS) RWY 31, Orig
Peoria, IL, Greater Peoria Regional, RNAV (GPS) RWY 4, Amdt 1A
Peoria, IL, Greater Peoria Regional, RNAV (GPS) RWY 22, Amdt 1A
Duluth, MN, Duluth Intl, ILS OR LOC RWY 27, Amdt 8D
Shelby, NC, Shelby-Cleveland County Rgnl, Takeoff Minimums and Obstacle DP, Orig
Columbus, OH, Darby Dan, RNAV (GPS) RWY 9, Orig, CANCELLED
Columbus, OH, Darby Dan, RNAV (GPS) RWY 27, Orig, CANCELLED
Medford, OR, Rogue Valley Intl-Medford, Takeoff Minimums and Obstacle DP, Amdt 9

Correction: On October 14, 2008 (73 FR 60623), The FAA published an Amendment in Docket No. 30629, Amdt No. 3288 to Part

97 of the Federal Aviation Regulations under section 97.29. The last entry for *Ketchikan, AK, Ketchikan Intl*, effective September 25, 2008, is hereby corrected to read as follows:

Ketchikan, AK, Ketchikan Intl, ILS OR LOC/DME Z RWY 11, Amdt 7, RESCINDED

[FR Doc. E8–26844 Filed 11–14–08; 8:45 am]

BILLING CODE 4910–13–P

DEPARTMENT OF TRANSPORTATION

14 CFR Part 97

[Docket No. 30637; Amdt. No. 3295]

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 November 17, 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 November 17, 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 *http://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 31, 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.

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

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

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
10/15/08	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.
10/22/08	CO	GUNNISON	GUNNISON–CRESTED BUTTE REGIONAL.	8/4212	GPS B, ORIG.
10/22/08	CO	GUNNISON	GUNNISON–CRESTED BUTTE REGIONAL.	8/4213	VOR OR GPS A, AMDT 3B.
10/17/08	SC	HARTSVILLE	HARTSVILLE REGIONAL	8/4646	NDB RWY 3, ORIG.
10/17/08	SC	HARTSVILLE	HARTSVILLE REGIONAL	8/4647	NDB RWY 21, ORIG.
10/17/08	SC	HARTSVILLE	HARTSVILLE REGIONAL	8/4649	GPS RWY 3, ORIG.
10/17/08	SC	HARTSVILLE	HARTSVILLE REGIONAL	8/4654	GPS RWY 21, ORIG.
08/25/08	AK	BARTER ISLAND	BARTER ISLAND LRRS	8/4744	RNAV (GPS) RWY 25, ORIG.
08/25/08	AK	BARTER ISLAND	BARTER ISLAND LRRS	8/4745	RNAV (GPS) RWY 7, ORIG.
10/20/08	IL	CHICAGO/ROCKFORD	CHICAGO/ROCKFORD INTL	8/4913	LOC BC RWY 19, AMDT 15A.
10/20/08	IL	CHICAGO/ROCKFORD	CHICAGO/ROCKFORD INTL	8/4924	ILS OR LOC RWY 1, AMDT 28B.
10/20/08	CQ	TINIAN ISLAND/N MARIANA ISLAND.	TINIAN INTL	8/4983	NDB–A, AMDT 1B.
10/21/08	CO	GUNNISON	GUNNISON-CRESTED BUTTE REGIONAL.	8/5219	GPS B, ORIG.
10/21/08	CO	GUNNISON	GUNNISON-CRESTED BUTTE REGIONAL.	8/5220	VOR OR GPS A, AMDT 7B.
10/21/08	MN	MINNEAPOLIS	MINNEAPOLIS-ST PAUL INTL/WOLD–CHAMBERLAIN.	8/5234	CONVERGING ILS RWY 35, AMDT 1.
10/21/08	MN	MINNEAPOLIS	MINNEAPOLIS-ST PAUL INTL/WOLD–CHAMBERLAIN.	8/5240	RNAV (GPS) RWY 30R, AMDT 1.
10/22/08	NC	STATESVILLE	STATESVILLE REGIONAL	8/5501	ILS OR LOC/DME RWY 28, ORIG–A.
10/22/08	CO	COLORADO SPRINGS	CITY OF COLORADO SPRINGS MUNI.	8/5547	NDB RWY 35L, AMDT 25B.
10/22/08	CO	COLORADO SPRINGS	CITY OF COLORADO SPRINGS MUNI.	8/5548	ILS OR LOC RWY 35R, ORIG.
10/22/08	CO	COLORADO SPRINGS	CITY OF COLORADO SPRINGS MUNI.	8/5549	ILS OR LOC RWY 17L, ORIG–A.
10/22/08	CO	COLORADO SPRINGS	CITY OF COLORADO SPRINGS MUNI.	8/5550	ILS RWY 35L, AMDT 36A.
10/23/08	OH	CINCINNATI	CINCINNATI MUNI AIRPORT–LUNKEN FIELD.	8/5849	RNAV (GPS) RWY 25, ORIG.
10/23/08	AR	MENA	MENA INTERMOUNTAIN MUNI	8/5860	ILS OR LOC RWY 27, AMDT 1.
10/23/08	MI	KALAMAZOO	KALAMAZOO/BATTLE CREEK INTL	8/5861	VOR RWY 17, AMDT 18.
10/23/08	NM	SILVER CITY	GRANT COUNTY	8/5914	LOC/DME RWY 26, AMDT 5.
10/23/08	LA.	PATTERSON	HARRY P WILLIAMS MEMORIAL	8/5947	VOR/DME A, AMDT 10A.
10/23/08	SC	HARTSVILLE	HARTSVILLE REGIONAL	8/5987	GPS RWY 3, ORIG.
10/24/08	PA	HARRISBURG	HARRISBURG INTL	8/6092	ILS RWY 31, AMDT 1.
10/24/08	MN	GRAND MARAIS	GRAND MARAIS/COOK COUNTY	8/6116	NDB RWY 27, ORIG–A.
10/24/08	IA	PERRY	PERRY MUNI	8/6135	NDB RWY 14, AMDT 2A.
10/24/08	IA	PERRY	PERRY MUNI	8/6136	GPS RWY 14, ORIG–A.
10/24/08	IA	PERRY	PERRY MUNI	8/6137	NDB RWY 32, AMDT 5A.
10/24/08	TN	TULLAHOMA	TULLAHOMA REGIONAL/WM NORTHERN FLD.	8/6165	RNAV (GPS) RWY 24, ORIG–A.
10/24/08	OR	PORTLAND	PORTLAND INTL	8/6260	VOR/DME RWY 21, ORIG–C.
10/24/08	MI	KALAMAZOO	KALAMAZOO/BATTLE CREEK INTL	8/6281	GPS RWY 5, ORIG.
10/29/08	CA	LONG BEACH	LONG BEACH/DAUGHERTY FIELD	8/6395	ILS OR LOC RWY 30, AMDT 32C.
10/28/08	FL	LAKELAND	LAKELAND LINDER REGIONAL	8/6567	NDB RWY 5, AMDT 4.
09/18/08	TX	DALLAS	DALLAS LOVE FIELD	8/7951	ILS OR LOC RWY 31L, AMDT 21.
09/30/08	MA	BOSTON	GEN EDWARD LAWRENCE LOGAN INTL.	8/9727	RNAV (GPS) RWY 33L, ORIG–A.

[FR Doc. E8–26843 Filed 11–14–08; 8:45 am]
BILLING CODE 4910–13–P

CONSUMER PRODUCT SAFETY COMMISSION

16 CFR Part 1500

Labeling Requirement for Toy and Game Advertisements; Final Rule

AGENCY: Consumer Product Safety Commission.

ACTION: Final rule.

SUMMARY: The Consumer Product Safety Commission (''Commission'' or ''CPSC'') is issuing a final rule for advertisements of certain toys and games. Section 105 of the Consumer Product Safety Improvement Act of 2008, Public Law 110–314, 122 Stat. 3016 (August 14, 2008), (''CPSIA''), directs the Commission to promulgate regulations to effectuate this section with respect to advertising for certain toys and games in catalogues and other printed materials not later than 90 days after enactment. The final rule details requirements regarding the size and placement of the cautionary labeling and the use of abbreviated warnings. The rule exempts catalogues circulated solely between businesses from the rule's requirements, except where the recipient business is one that could be expected to be purchasing the product for the use of children rather than for resale. There is a grace period of 180 days for distribution of catalogues and other printed materials printed prior to the effective date of February 10, 2009.

DATE: The effective date of this rule with respect to catalogues and other printed materials is February 10, 2009. The Commission is providing a grace period of 180 days, or until August 9, 2009, during which catalogues and other printed materials printed prior to February 10, 2009 may be distributed without the required cautionary statements. Catalogues and other printed materials that are printed on or after February 10, 2009 must have the required cautionary statements. All catalogues and other printed materials distributed on or after August 9, 2009 must comply with this rule, regardless of when they were printed. This rule addresses only catalogues and other printed materials; however, the CPSIA extends the requirements to Internet advertisements as well. Internet advertisements must comply with Section 24 of the Federal Hazardous Substances Act as amended by the CPSIA no later than December 12, 2008.

FOR FURTHER INFORMATION CONTACT: Barbara E. Parisi, Project Manager, Office of General Counsel, Consumer Product Safety Commission, 4330 East-West Highway, Bethesda, Maryland; telephone (301) 504–7879 or e-mail: *bparisi@cpsc.gov.*

SUPPLEMENTARY INFORMATION:

A. Background

Section 24(a) of the Federal Hazardous Substances Act (FHSA) prescribes cautionary labeling requirements for toys or games that are intended for use by children from 3 to 6 years old and contain small parts. The cautionary statement warns potential purchasers that these products are not for children under 3 years old due to choking hazards. Section 24(b) of the FHSA prescribes similar requirements for balloons, small balls, and marbles intended for children 3 years and older, or any toy or game which contains such a balloon, small ball, or marble.

Section 105 of the CPSIA amends section 24 of the FHSA to require that, when a product's packaging requires a cautionary statement, advertising for the product that provides a direct means for purchase or order of the product (including catalogues, other printed materials, and Internet Web sites) must bear the same cautionary statement. Section 105 provides some guidelines on the format of the cautionary statement. Specifically, it must be prominently displayed in the primary language used in the advertisement, in conspicuous and legible type in contrast by typography, layout, or color with other material printed or displayed in the advertisement, and in a manner consistent with 16 CFR part 1500.

Section 105 of the CPSIA also allows the Commission to provide a grace period of no more than 180 days for catalogues and other printed material printed prior to the effective date. In addition, the Commission is directed to determine the applicability of the requirements to catalogues and other printed material distributed solely between businesses and not to individual consumers.

Section 105(2) of the CPSIA exempts the Commission from conducting Regulatory Flexibility Act and Paperwork Reduction Act analyses for this rulemaking. On September 29, 2008, the Commission voted unanimously (2–0) to approve the publication in the **Federal Register** of a notice of proposed rulemaking (NPR) for advertising requirements. The notice was published Monday, October 6, 2008. 73 FR 58063.

B. Response to Comments

In response to the **Federal Register** notice proposing advertising labeling requirements, the Commission received approximately 52 comments.

1. Hazards Required To Be Labeled in Advertisements

Comments: Several commenters asked that the Commission clarify the scope of the advertising requirements. A couple of commenters questioned whether, now that the Standard Safety Specification for Toy Safety (ASTM F973) is becoming mandatory, the labeling requirements therein become part of the advertising labeling requirements.

Response: Section 24 of the Federal Hazardous Substances Act requires that packaging for toys and games intended for use by children between the ages of 3 to 6 that contain small balls, marbles, or small parts require a precautionary labeling warning that such items present choking hazards and are not appropriate for children under 3. Section 24 of the Federal Hazardous Substances Act also requires that packages for balloons have warnings related to the choking and suffocation hazards that balloons present to children less than 8 years of age. The rule requires that, when a product's packaging is required to have any of the cautionary statements regarding choking hazards required by section 24 of the Federal Hazardous Substances Act, advertising for the product that provides a direct means for the purchase or order by a consumer must have the appropriate cautionary statements. Thus, the rule only applies to warnings regarding choking hazards presented by small parts, small balls, marbles and balloons.

The labeling requirements of ASTM F963 are not required to be included in product advertisements under this rule. Again, the cautionary statements required in advertisements by this rule are those found in section 24 of the Federal Hazardous Substances Act—specifically, cautionary statements regarding choking hazards presented by small parts, small balls, marbles, and balloons.

2. Permissibility of Additional Safety Warnings

Comments: Several commenters asked whether businesses could include other safety warnings, statements or information in Internet, catalogue or other advertising in a form and format in the sole discretion of the advertiser.

Response: This rule does not preclude advertisers from including other safety warnings, statements or information in

their advertisements. Further, additional safety warnings not required by the rule need not be in the format prescribed by this rule.

3. Direct Means for the Purchase or Order

Comments: Some commenters asked whether the rule applies to advertising leaflets sent directly to consumers where consumers would be required to make the purchase at a store.

Response: Such an advertisement would not be providing a direct means for the purchase or order of the product, since the consumer would be required to make a trip to the store to purchase the product. Thus, the advertisement would not require the cautionary statements.

Comments: Others questioned whether a Web site address alone on a flyer or free-standing insert would constitute a ''direct means of purchase.''

Response: This would not constitute a direct means of purchase, since a purchaser would still need to take the additional step of going to the website to purchase the product, wherein the cautionary warnings would be present. However, if the flyer or free-standing insert directed the purchaser to a specific phone number for order, this would constitute a ''direct means for the purchase or order,'' so that the flyer or free-standing insert would need to comply with the requirements of the rule.

Comments: A couple of commenters questioned the applicability of the rule to coupons and cards that consumers can mail in (e.g., with proof of purchase, payment for shipping and handling, sometimes for a fee).

Response: A mail in coupon for a toy or game subject to the cautionary statements of section 24 of the FHSA would require the cautionary statements adjacent to the description of the toy or game, since the coupon would be providing a direct means to purchase or order the product in question. If the coupon was one which needed to be taken to the store or used for an online Internet purchase, and did not include a mail-in option, then it would not need to comply with the advertising requirements in the final rule.

4. Type-Size Requirements

Comments: Several commenters expressed concern about the proposed minimum type-size requirements of 0.08 inches, stating that it seemed unnecessary. Some commenters suggested that the size of the required cautionary statements only be ''reasonably related'' to the size of other text in the advertisement, except for the heading, which would be consistent with the provisions for literature and descriptive material that accompany a product subject to Child Safety Protection Act labeling, as specified in 16 CFR 1500.121 and 16 CFR 1500.19.

Response: The Commission agrees that specifying the type size in absolute terms is not necessary if the warning text meets requirements that specify the type size relative to the other text in the advertisement. The Commission finds that a modified version of the type-size requirements for cautionary labeling of accompanying literature containing directions for use, specified in 16 CFR 1500.121(c)(6), is sufficient to satisfy the conspicuousness requirement for the advertising warnings. Specifically, the requirement reads, ''The type size of abbreviated cautionary statements shall be reasonably related to the type size of any other printed matter in the product advertisement, and must be in conspicuous and legible type by typography, layout, or color with other printed matter in the advertisement and separated from other graphic matter.''

5. Placement Requirements

Comments: Several commenters requested more flexibility in the placement of the full cautionary statements so that they are not required to appear at the bottom or top of the same page as the abbreviated warning or across two facing pages. For example, some commenters suggested that the statements be allowed to be located elsewhere in the catalogue, such as on the inside cover. One commenter suggested the use of a single general warning on the front cover of the catalogue stating that some of the products within might contain small parts. Another suggested placing the warnings in the catalogue Table of Contents to identify entire sections subject to the cautionary statements. One commenter suggested that, at the very least, the full cautionary statements be permitted anywhere on the same or facing page that contains the abbreviated warning.

Response: The Commission recognizes the concerns expressed by some commenters about the large amount of space in print catalogues that could be occupied by the full text of the required cautionary statements. The Commission's original proposal, which involved permitting the use of abbreviated warnings as long as a full cautionary statement was included at the bottom or top of the same or facing page for each abbreviated warning, was an attempt to address this situation. Members of the catalogue industry, however, have provided the CPSC with mock-up catalogue pages that approximate how some of their catalogue pages would appear if they met the requirements proposed in the NPR, and these samples reveal that the required cautionary statements would still take up a substantial amount of space, even with the use of abbreviated warnings. Thus, the Commission has concluded that, if abbreviated warnings are employed, then a single set of full cautionary statements must be included either (1) near the beginning of the print catalogue, before any pages containing advertisements of products available for purchase, or (2) adjacent to the ordering information. The bottom of every catalogue page that includes abbreviated warnings must provide a reference to the precise location of the full cautionary statements. Each full cautionary statement should clearly identify its corresponding number code to be referenced in the abbreviated warnings (as detailed in the ''Abbreviated Warnings'' section).

The Commission believes that a single general cautionary statement located on the cover of, or elsewhere in, a catalogue would provide little to no benefit to consumers if it merely warned that some of the products advertised might contain small parts or other choking hazards. Under such circumstances, consumers would have no way of identifying those products that present the warned-about hazard. The Commission, however, does believe that it is appropriate to permit a cautionary statement on the front cover, or an equally conspicuous location, of a catalogue to replace the corresponding abbreviated warnings within the catalogue if that cautionary statement applies to all products available for purchase in that catalogue and if this fact is clear to consumers. For example, if a catalogue only contained balloons subject to FHSA labeling, a single full cautionary statement—specifically, the cautionary statement identified in 16 CFR 1500.19(b)(2)—may appear on the cover of the catalogue rather than individually labeling each product advertisement within the catalogue.

Similarly, because full cautionary statements will no longer appear on each page or two-page spread of the catalogue and because some catalogue pages may include products that require identical cautionary labeling, the final rule permits the use of a single full cautionary statement at the top of a page to replace individual warnings on that page, provided that the page contains products that would require the same cautionary statement and that this fact is clear to consumers. If, for example, a page contains products that would all

require the cautionary statement related to small parts, the abbreviated warnings associated with small parts that would otherwise appear in each product advertisement on that page could be replaced with the cautionary statement identified in 16 CFR 1500.19(b)(1) positioned at the top of the page. This, again, presumes that consumers are notified that this cautionary statement applies to all products on that page. For example, a full cautionary statement related to small parts could be preceded by the statement, ''All products on this page contain small parts.'' Because a ''section'' of a catalogue might extend over multiple pages, the Commission finds that a single cautionary statement at the beginning of a section could be missed by consumers and is not appropriate.

6. Abbreviated Warnings

Comment: Some commenters suggested that the abbreviated warnings proposed in the Notice of Proposed Rulemaking, though better than the full cautionary statements, were still too lengthy. The commenters suggested several alternative approaches, including the use of abbreviated warnings without the prohibited age range, the use of a safety alert symbol and numbered codes to identify the applicable cautionary statements, and the use of icons alone to represent the applicable cautionary statements. One commenter also suggested that the abbreviated warnings be allowed to be combined in some manner. No commenter objected to the use of abbreviated warnings of some kind.

Response: The Commission recognizes that certain products will require multiple cautionary statements and that this could lead to substantial redundancy even with the use of abbreviated warnings. For example, each abbreviated warning begins with a safety alert symbol; thus, an advertisement that requires multiple abbreviated warnings would require multiple safety alert symbols. Additionally, three of the abbreviated warnings include the phrase ''Not for under 3 yrs.'' Advertising for a toy or game that requires more than one of these warnings, therefore, would repeat this phrase multiple times. This is further complicated by the possibility of the advertisement also requiring an abbreviated warning that warns ''Not for under 8 yrs.'' Simultaneous warnings that a toy is not for children ''under 3 yrs'' and not for children ''under 8 yrs'' could create confusion among consumers, and seems unnecessary given that one age range encompasses the other. For these reasons, the final rule permits a product advertisement that would require multiple abbreviated warnings to combine those warnings into a single abbreviated warning.

Comments: Some commenters suggested the use of a European symbol that is intended to communicate that a toy is not suitable for children under age three.

Response: It is unclear whether consumers would correctly interpret such a symbol as a warning about a choking hazard rather than simply an age recommendation. Moreover, this symbol may not be suitable to warn about balloon-related choking hazards to children under eight.

7. Grace Period

Comments: Most of the comments confirmed that the costs to catalogue publishers could be significant if a grace period is not granted. One retailer, for example, estimated that if the Commission does not provide for a grace period, the cost to reprint, ship, and mail new catalogues could be as high as $3.7 million.[1] Another commenter estimated that it could cost his company $1 million to republish its catalogues before their normal life cycles ended.[2] Another commenter stated that it is taking some time to obtain the information from manufacturers concerning which products require the cautionary statements.[3] Some retailers cannot begin to change the layout of their catalogue pages to reflect the cautionary statements until they receive this information from the manufacturers.

No commenter objected to the allowance of a grace period.

Response: Although the specific estimates cannot be confirmed, based on published estimates that the cost per copy of printing catalogues exceeds $1 for most firms (excluding layout and postage),[4] the Commission agrees it is reasonable to expect that some firms could face very significant costs if they had to reprint a large number of catalogues because a grace period was not provided.

The Commission recognizes that before the passage of the CPSIA, many manufacturers did not have this information assembled in a format that could be easily provided to retailers. Thus, manufacturers have had to assemble this information and develop procedures for providing this information to their retailers.

Comment: Some catalogue publishers stated that a 180 day grace period would not be sufficient and requested a grace period exceeding 180 days in length be provided by the Commission.

Response: The CPSIA only authorizes the Commission to provide a grace period of ''no more than 180 days'' for catalogues and other printed material printed prior to February 10, 2009.

Comment: One commenter requested a grace period for Internet advertisements.

Response: The CPSIA provides that the effective date for Internet Web site advertisements is December 12, 2008, and does not provide the Commission with any authority to provide a grace period with respect to Internet Website advertisements.

8. Applicability of Rule to Television Advertisements

Comments: Several commenters asked the Commission to confirm that this rule does not apply to television advertisements.

Response: While the CPSIA prescribes an effective date for advertisements on Internet Web sites and an effective date with respect to catalogues and other printed materials, there is no effective date prescribed for television advertisements. This rule addresses only catalogues and other printed materials; thus, the requirements of the rule are not applicable to television advertisements.

9. Business to Business Catalogues

Comment: The Commission received two comments opposing the requirement that catalogues distributed to schools and similar entities contain the cautionary statements. These comments stated that the cost to some businesses that supply educational products could be significant and that some businesses might have trouble separating their ''school or nursery'' customers from other institutional consumers.

Response: The Commission acknowledges that there will be some costs to businesses to comply with this requirement, but finds that institutional consumers purchasing products for the use of children could benefit from knowing which products contain choking hazards and are not appropriate

[1] Comment from Stephanie Lester, Vice President, International Trade, Retail Industry Leaders Association (20 October 2008).

[2] Terry Clayton, General Manager and COO, Triarco Arts and Crafts (14 October 2008).

[3] Comment from James H. Rice, CEO and Mary Ann Everett, Vice President, Creative Catalog Concepts (15 October 2008).

[4] Telephone conversation with Rick Woldenberg and Lisa Guili of Learning Resources, Inc. and Sandy Schusteff of ETA/Cuisenaire (8 September 2008) and Jim Tierney, ''Print, Production and Paper,'' *Multichannel Merchant* (1 November 2007), available at *http://multichannelmerchant.com/printchannel/printchannel/print_production_paper* (last accessed on 10 September 2008).

for some age groups. The flexibility provided in the placement of warnings and in the option of using abbreviated warnings should alleviate somewhat the costs to businesses.

Comment: Three comments from the general public opposed exempting catalogues distributed solely between businesses. These comments stated that the warnings would benefit retailers as well as consumers.

Response: The information in the cautionary statements may be of some benefit to retailers. However, the need that retailers have for the information is different from that of consumers. The intent of this requirement is to caution parents that a product has small parts, small balls, marbles, or latex balloons, and therefore, is not appropriate for young children, before the consumer purchases an item through a catalogue or the Internet. Retailers need this information to know in which section of the store to stock and which items will require cautionary statements in their catalogues. The CPSIA requires manufacturers to provide this information to retailers. However, there may be more effective or less expensive means of providing this information to retailers than through the use of warnings designed for consumers.

Comment: One of the comments opposing any exemption for business to business catalogues noted that sometimes bulk purchases are made for dentists' or physicians' offices, carnivals, and fairs, among other places.[5]

Response: Under the final rule, any catalogue that is distributed to these types of entities is required to include the appropriate cautionary statements since the businesses could be expected to be purchasing products for the use of children.

C. Explanation and Description of the Rule

Following is a brief explanation and description of the principal provisions of the Commission's regulation.

1. Type-Size Requirements

As discussed in the Response to Comments section (Section B), several commenters expressed concern about the proposed minimum type-size requirement of 0.08 inches, stating that it seemed unnecessary. The Commission agrees that specifying the type size in absolute terms is not necessary if the warning text also must meet requirements that specify the type size relative to the other text in the advertisement. The final rule revises the type-size requirement to read, ''The type size of abbreviated cautionary statements shall be reasonably related to the type size of any other printed matter in the product advertisement, and must be in conspicuous and legible type by typography, layout, or color with other printed matter in the advertisement and separated from other graphic matter.''

2. Placement Requirements

As noted and more fully discussed in the Response to Comments section (Section B), several commenters requested more flexibility in the placement of the full cautionary statements so that they are not required to appear at the bottom or top of the same page as the abbreviated warning or across two facing pages. The Commission generally agrees with the concerns expressed by some commenters about the large amount of space in print catalogues that could be occupied by the full required cautionary statements. Mock-up catalogue pages that approximated how some of the catalogue pages would appear if they met the requirements proposed in the NPR revealed that the required cautionary statements would still take up a substantial amount of space, even with the use of abbreviated warnings. The Commission has concluded that, if abbreviated warnings are employed, the use of a single set of full cautionary statements either (1) near the beginning of the print catalogue, before any pages containing advertisements of products available for purchase, or (2) adjacent to the ordering information, is permissible. The bottom of every catalogue page that includes abbreviated warnings, however, must provide a reference to the precise location of the full cautionary statements. Also, each full cautionary statement must clearly identify its corresponding number code to be referenced in the abbreviated warnings (as discussed below).

The Commission believes that a single general cautionary statement located on the cover of, or elsewhere in, a catalogue would provide little or no benefit to consumers if it merely warned that some of the products advertised might contain small parts or other choking hazards. Under such circumstances, consumers would have no way of identifying those products that present the warned-about hazard. The final rule, however, does permit a cautionary statement on the front cover, or equally conspicuous location, of a catalogue to replace the corresponding abbreviated warnings within the catalogue if that cautionary statement applies to all products available for purchase in that catalogue and if this fact is clear to consumers. For example, if a catalogue only contained balloons subject to the FHSA choking hazard labeling, a single full cautionary statement is permitted—specifically, the cautionary statement identified in 16 CFR 1500.19(b)(2)—to appear on the cover of the catalogue rather than individually labeling each product advertisement within the catalogue.

Similarly, because full cautionary statements will no longer appear on each page or two-page spread of the catalogue and because some catalogue pages may include products that require identical cautionary labeling, the final rule permits the use of a single full cautionary statement at the top of a page to replace individual warnings on that page, provided that the page contains products that would require the same cautionary statement and that this fact would be clear to consumers. If, for example, a page contains products that would all require the cautionary statement related to small parts, the abbreviated warnings associated with small parts that would otherwise appear in each product advertisement on that page could be replaced with the cautionary statement identified in 16 CFR 1500.19(b)(1) positioned at the top of the page. This, again, presumes that consumers are notified that this cautionary statement applies to all products on that page—for example, a full cautionary statement related to small parts could be preceded by the statement, ''All products on this page contain small parts.'' Because a ''section'' of a catalogue might extend over multiple pages, the Commission finds that a single cautionary statement at the beginning of a section could be missed by consumers and would not be appropriate.

3. Abbreviated Warnings for Catalogues and Other Printed Materials

Some commenters suggested that the abbreviated warnings included in the proposed rule, though better than the full cautionary statements, were still too lengthy. The Commission recognizes that certain products will require multiple cautionary statements and that this could lead to substantial redundancy even with the use of abbreviated warnings. The final rule permits a product advertisement that would require multiple warnings to combine those warnings into a single abbreviated warning, as more fully detailed below.

In the abbreviated warnings proposed in the notice of proposed rulemaking, emphasis was placed on the source of the choking hazard—for example,

[5] Comments of Consumers Union of U.S. Inc., *et al.* (20 October 2008).

''SMALL PARTS''—rather than on the choking hazard itself because the full cautionary statements would already display the phrase ''CHOKING HAZARD'' prominently and would be visible on the same or facing page; the source of the choking hazard was one of the easiest ways to distinguish among the full cautionary statements on the page. The use of the less-than symbol (<) in the original abbreviated warnings also was dependent on the full cautionary statements being located on the same or facing page.

The abbreviated warnings in the final rule now consist of three parts, in the following sequence:

(1) The safety alert symbol and the phrase ''CHOKING HAZARD.''

(2) Number codes, separated by commas, enclosed within a single set of parentheses, and ending in a period that identifies the required cautionary statements for the product being advertised (see 16 CFR 1500.20(e)(2)).

(3) The prohibited age range written in the form ''Not for under X yrs,'' where X is either 3 or 8, based on the most restrictive age range for all required cautionary statements for that product.

For example, a product that requires the cautionary statements specified in 16 CFR 1500.19(b)(1) and 16 CFR 1500.19(b)(2) could use the following abbreviated warning in its advertising:

FIGURE 8

⚠ CHOKING HAZARD (1,2). Not for under 8 yrs.

This approach allows consumers to focus on two key pieces of information: The nature of the hazard (choking) and the prohibited age range for that product (under 3 years or under 8 years). This is reasonably consistent with warnings literature, which generally recommends that consumer products with limited available space for warning labels select certain information for emphasis, exclude less important information, and refer the reader to more complete cautionary information elsewhere.[6] Information about the source of the choking hazard, though important, is likely to be less important during the purchasing stage than knowing that a choking hazard exists and for whom the toy is not appropriate. The Commission also believes that the prohibited age range is necessary for those cases in which consumers do not seek out the full cautionary statement elsewhere.

Those consumers who would like additional details about the choking hazards, however, can use the displayed codes to identify which of the cautionary statements shown at the beginning of the catalogue or adjacent to the ordering information apply. While on first glance, the abbreviated warnings appear longer than the abbreviated warnings originally proposed in the proposed rule, this is true only for products that require a single cautionary statement since the abbreviated warnings can now be combined. Furthermore, space on any given catalogue page will be regained by permitting the full cautionary statements to be moved from the same page as the abbreviated warnings to the beginning of the catalogue or adjacent to the ordering information.

The Commission had considered the use of icons rather than abbreviated warnings to further reduce the amount of space required for warnings in a catalogue, but several issues suggest that abbreviated warnings would be superior for consumers at this time. The primary criterion for evaluating an icon or symbol is the extent to which consumers are likely to understand its intended meaning.[7] Some commenters suggested the use of a European symbol that is intended to communicate that a toy is not suitable for children under age three, but it is unclear whether consumers would correctly interpret such a symbol as a warning about a choking hazard rather than simply an age recommendation.

Moreover, this symbol may not be suitable to warn about balloon-related choking hazards to children under eight. The commenters have proposed no other specific icon designs to distinguish among the various choking hazards that must be addressed through cautionary labeling, making it impossible to judge whether small unique icons would be sufficiently legible to allow consumers to distinguish among them. Additionally, developing icons or symbols that would be reasonably understandable without consumers first having to learn the intended meaning of the icon is highly unlikely; abstract or arbitrary icons probably would have to be relied upon. Such icons are likely to communicate little to no information about the hazard and, therefore, would require consumers to seek out the full cautionary statements to obtain this information and to eventually learn the icon's meaning. In general, consumers are less likely to use information that is provided at the point-of-sale as the effort required to process that information increases,[8] a finding that is consistent with the scientific consensus that consumers are less motivated and less likely to perform appropriate behaviors, such as complying with a warning, as the effort required to do so increases even by a small amount.[9] Some consumers will not put forth the effort to seek out and learn the meanings of icons, especially if their safety implications are not obvious. As a consequence, these consumers would be unlikely to receive the relevant safety information. In contrast, abbreviated warnings would provide consumers with basic information about the hazard and prohibited ages immediately.

4. Internet Warnings

Section 105 of the CPSIA stipulates that the Commission shall promulgate a final rule ''with respect to catalogues and other printed material'' by November 12, 2008. The CPSIA does not mandate that the Commission promulgate a final rule with regard to requirements for Internet advertising. The final rule contains no requirements

[6] Laughery, K.R., & Hammond, A. (1999). Overview. In M.S. Wolgalter, D.M. DeJoy, & K.R. Laughery (Eds.), *Warnings and risk communication* (pp. 3–13). Philadelphia: Taylor & Francis. Wogalter, M.S., & Leonard, S.D. (1999). Attention capture and maintenance. In M.S. Wogalter, D.M. DeJoy, & K.R. Laughery (Eds.), *Warnings and risk communication* (pp. 123–148). Philadelphia: Taylor & Francis. Wogalter, M.S., & Vigilante, Jr., W.J. (2006). Attention switch and maintenance. In M.S. Wogalter (Ed.), *Handbook of warnings* (pp. 245–265). Mahwah, NJ: Lawrence Erlbaum Associates.

[7] *American national standard criteria for safety symbols* (ANSI Z535.3, Rev. Ed.). (2002). Rosslyn, VA: National Electrical Manufacturers Association.

[8] Mazis, M.B., & Morris, L.A. (1999). Channel. In M.S. Wogalter, D.M. DeJoy, & K.R. Laughery (Eds.), *Warnings and risk communication* (pp. 99–121). Philadelphia: Taylor & Francis.

[9] Kalsher, M.J. & Williams, K.J. (2006). Behavioral compliance: Theory, methodology, and results. In M.S. Wogalter (Ed.), *Handbook of warnings* (pp. 313–331). Mahwah, NJ: Lawrence Erlbaum Associates.

specific to Internet Web site advertising. However, the requirements for Internet advertisements in Section 24 of the Federal Hazardous Substances Act, as amended by Section 105 of the CPSIA, will go into effect on December 12, 2008.

5. Business to Business Catalogues

The CPSIA directs the Commission to determine the applicability of the advertising requirements to catalogues and other printed materials that are distributed solely among businesses. In the notice of proposed rulemaking, it was noted that although the cautionary statements could be of some value to retailers, the value would be lower than the value of the cautionary statements in catalogues distributed to households and other end users. However, the costs of incorporating the cautionary statements into the catalogues distributed solely to businesses would be the same as the costs of including the cautionary statements in catalogues distributed to retail consumers.

Several of the comments that endorsed exempting catalogues that are distributed solely between businesses confirmed some of the assumptions that were included in the analysis contained in the notice of proposed rulemaking. These commenters stated that if the goal was to caution the ultimate consumer that the products contained small parts, balls, marbles or balloons before they purchased the product, then that goal would not be served by requiring the warnings in catalogues that are never seen by the end consumers.

They stated the benefit of the cautionary statements to resellers is low, but that significant costs could be incurred in including the cautionary statements in the catalogues.

Moreover, several commenters noted that manufacturers are required to provide retailers with the information concerning the required cautionary statements applicable to any of their products and that requiring the cautionary statements in catalogues that are distributed solely among businesses would limit the ability of manufacturers to convey this information in ways that could be more effective and less costly.

The Commission also expressed concern in the notice of proposed rulemaking that exempting catalogues that were distributed to entities that could be expected to provide children with direct access to the product, such as schools and day care centers, could thwart the intent of the law. These organizations share some of the characteristics of businesses and many are in fact businesses. However, because the people ordering products at these organizations would be ordering products for the use of children, they could benefit from knowing which products contain choking hazards and are not appropriate for some age groups.

Several commenters responded to a question posed by the Commission in the NPR as to how catalogues distributed solely between businesses could be distinguished from those intended for distribution to final consumers. Several stated that in many cases there is no clear way to distinguish between catalogues distributed solely between businesses from those intended for distribution to final consumers, including those distributed to entities such as schools, churches, day care centers, and recreational facilities. One commenter suggested that this is a factual distinction that could best be made through ''inquiry or observation of the use of the catalog.'' [10] In other words, if the catalogue is being distributed to households or to entities that purchase products for the use of children, it is not a catalogue that is distributed solely among businesses.

Other commenters stated that some catalogues that are intended only for other businesses do have characteristics that can be used to distinguish them from catalogues intended for the general public and some manufacturers and distributors have procedures in place that serve to limit sales and distribution to resellers. For example, some have minimum order quantities that are greater than a typical consumer would order. Some manufacturers or distributors require a sales tax identification number before taking an order from an entity or providing them with a catalogue. This serves to limit their sales to resellers. Some manufacturers will only provide catalogues to existing customers or those businesses that have registered with it.

The final rule provides that catalogues that are distributed solely between businesses are exempted from the requirements unless the recipient business is one that could be expected to be purchasing the product for the use of children instead of for resale. Examples of businesses that could be expected to purchase products for the use of children include schools, day care centers, churches, and recreational facilities.

C. Effective Date and Grace Period

Section 105 of the CPSIA provides that the requirements for Internet advertising shall take effect December 12, 2008. It provides that the requirements will apply to catalogues and other printed materials published or distributed on or after February 10, 2009. This includes catalogues that were printed prior to February 10, 2009, but not distributed until after February 10, 2009. The CPSIA authorizes the Commission to provide a grace period of not more than 180 days for catalogues and other printed material printed prior to February 10, 2009, during which time distribution of such catalogues and other printed materials shall not be considered a violation of the standard.

Based on research and on comments received in response to the notice of proposed rulemaking, the Commission has determined that there can be relatively long lead times for developing and printing catalogues. Some publishers expect to distribute catalogues for as long as two years after printing. Thus, it is likely that there are catalogues in circulation now, or that have been printed, or will be printed over the next several weeks, that do not contain the cautionary statements, but that are intended for distribution after February 10, 2009. Absent a grace period, the retailers, manufacturers, and importers who published the catalogues would have to stop distributing them on February 10, 2009.

The catalogues still in stock would have to be discarded and replacement catalogues would have to be printed, a cost to the publishers both in terms of discarding of the catalogues and in the possible loss in sales if the business experienced delays in obtaining reprinted catalogues.

The cost of providing a grace period— that some consumers may purchase games or toys from catalogues that they would not have purchased had they seen the cautionary labeling— though difficult to quantify, is likely to be small. The same cautionary statements are required on the products' packaging, and a parent could return or keep the product out of reach until the children are older if need be.

Even with a grace period of 180 days, all catalogues distributed after August 9, 2009, which includes all catalogues distributed in anticipation of the 2009 holiday shopping season, will have to contain the required cautionary statements.

Because of the significant lead time involved in printing catalogues and the relatively small cost of providing a grace period of 180 days, the Commission is providing a grace period of 180 days for catalogues and other printed materials.

[10] Comment from Richard Woldenberg, Chairman, Learning Resources, Inc. (16 October 2008).

D. Environmental Considerations

The National Environmental Policy Act and the Council on Environmental Quality Act regulations and CPSC procedures for environmental review require the Commission to assess the possible environmental effects associated with the advertising labeling rule. As a labeling rule, this rule falls within the provisions of 16 CFR 1021.5(c) which designates categories of actions conducted by the Consumer Product Safety Commission that normally have little or no potential for affecting the human environment. In the NPR, the Commission made a preliminary finding that neither an environmental assessment nor an environmental impact statement was required for this rule. The only comments received on this issue emphasized the importance of providing for a grace period to avoid having to discard large stocks of catalogues and print replacement catalogues. The final rule does include a grace period for catalogues and other printed materials. Because this rule will at most cause a very slight increase in the amount of material entering the waste stream annually, the Commission finds that neither an environmental assessment nor an environmental impact statement is required.

List of Subjects in 16 CFR Part 1500

Consumer protection, Labeling.

Conclusion

■ Under authority of section 3 and section 105 of the Consumer Product Safety Improvement Act, Public Law 110–314, 122 Stat. 3016 (August 14, 2008), the Commission amends Title 16, Chapter II, Subchapter C, Part 1500 as set forth below.

PART 1500—HAZARDOUS SUBSTANCES AND ARTICLES; ADMINISTRATION AND ENFORCEMENT REGULATIONS

■ 1. The authority citation for part 1500 continues to read as follows:

Authority: 15 U.S.C. 1261–1278.

■ 2. Add § 1500.20 to read as follows:

§ 1500.20 Labeling requirement for advertising toys and games.

(a) *Scope.* This section applies to catalogue and other printed material advertisements which provide a direct means of purchase or order of products requiring cautionary labeling under sections 24(a) and (b) of the FHSA.

(b) *Effective Date.* Under the Consumer Product Safety Improvement Act of 2008, Public Law 110–314, 122 Stat. 3016 (August 14, 2008), (''CPSIA''), the effective date of the CPSIA's amendment to Section 24 of the FHSA to require cautionary statements in catalogues and other printed materials is February 10, 2009. By this rule, the Commission is providing a grace period of 180 days, or until August 9, 2009, during which catalogues and other printed materials printed prior to February 10, 2009, may be distributed without such cautionary statements. Catalogues and other printed materials that are printed on or after February 10, 2009, must have the required cautionary statements. All catalogues and other printed materials distributed on or after August 9, 2009, must comply with this rule. This rule addresses only catalogues and other printed materials; however, the CPSIA extends the requirements for cautionary statements to Internet advertisements as well. Internet advertisements must comply with Section 24 of the FHSA as amended by the CPSIA no later than December 12, 2008.

(c) *Definitions.* For the purposes of this section, the following definitions shall apply.

(1) *Ball* means a spherical, ovoid, or ellipsoidal object that is designed or intended to be thrown, hit, kicked, rolled, dropped, or bounced. The term ''ball'' includes any spherical, ovoid, or ellipsoidal object that is attached to a toy or article by means of a string, elastic cord, or similar tether. The term ''ball'' also includes a multi-sided object formed by connecting planes into a generally spherical, ovoid, or ellipsoidal shape that is designated or intended to be used as a ball, and any novelty item of a generally spherical, ovoid, or ellipsoidal shape that is designated or intended to be used as a ball. The term ''ball'' does not include dice, or balls permanently enclosed inside pinball machines, mazes, or similar other containers. A ball is permanently enclosed if, when tested in accordance with 16 CFR 1500.53, it is not removed from the outer container.

(2) *Small ball* means a ball that, under the influence of its own weight, passes in any orientation, entirely through a circular hole with a diameter of 1.75 inches (44.4 mm) in a rigid template ¼ inches (6 mm) thick. In testing to evaluate compliance with this regulation, the diameter of opening in the Commission's test template shall be no greater than 1.75 inches (44.4 mm).

(3) *Latex balloon* means a toy or decorative item consisting of a latex bag that is designed to be inflated by air or gas. The term does not include inflatable children's toys that are used in aquatic activities such as rafts, water wings, swim rings, or other similar items.

(4) *Marble* means a ball made of hard material, such as glass, agate, marble, or plastic, that is used in various children's games, generally as a playing piece or marker. The term ''marble'' does not include a marble permanently enclosed in a toy or game. A marble is permanently enclosed if, when tested in accordance with 16 CFR 1500.53, it is not removed from the toy or game.

(5) *Small part* means any object which, when tested in accordance with the procedures contained in 16 CFR 1501.4(a) and 1501.4(b)(1), fits entirely within the cylinder shown in Figure 1 appended to 16 CFR part 1501. The use and abuse testing provisions of 16 CFR 1500.51 through 1500.53 and 1501.4(b)(2) do not apply to this definition.

(6) *Direct means of purchase or order* means any method of purchase that allows the purchaser to order the product without being in the physical presence of the product. Advertising that provides a direct means of purchase or order of a product would include catalogues or other printed advertising material that contain order blanks, telephone numbers or fax numbers for placing orders, and Internet Web sites that enable consumers to purchase a product online or through the use of a telephone number or fax number provided on the Internet Web site.

(d) *Advertising requirements.* Any toy or game that requires a cautionary statement about the choking hazard associated with small parts, balloons, small balls, or marbles must bear that cautionary statement in the product's advertising if the advertising provides a direct means to purchase or order the product.

(1) The advertising for any article that is a toy or game intended for use by children who are at least three years old but less than six years of age shall bear or contain the following cautionary statement if the toy or game includes a small part:

FIGURE 1

WARNING:

CHOKING HAZARD--Small parts
Not for children under 3 yrs.

(2) The advertising for any latex balloon, or toy or game that contains a latex balloon, shall bear the following cautionary statement:

FIGURE 2

WARNING:

CHOKING HAZARD--Children under 8 yrs. can choke or suffocate on uninflated or broken balloons. Adult supervision required.

Keep uninflated balloons from children.
Discard broken balloons at once.

(3)(i) The advertising for any small ball intended for children three years of age or older shall bear the following cautionary statement:

FIGURE 3

WARNING:

CHOKING HAZARD--This toy is a small ball.
Not for children under 3 yrs.

(ii) The advertising for any toy or game intended for children who are at least three years old but less than eight years of age that contains a small ball shall bear the following cautionary statement:

FIGURE 4

WARNING:

CHOKING HAZARD--Toy contains a small ball.
Not for children under 3 yrs.

(4)(i) The advertising for any marble intended for children three years of age or older shall bear the following cautionary statement:

FIGURE 5

WARNING:

CHOKING HAZARD--This toy is a marble.
Not for children under 3 yrs.

(ii) The advertising for any toy or game intended for children who are at least three years old but less than eight years of age that contains a marble shall bear the following cautionary statement:

FIGURE 6

WARNING:

CHOKING HAZARD--Toy contains a marble.
Not for children under 3 yrs.

(e) *Abbreviated warnings for catalogues and other printed materials.* Abbreviated versions of the required cautionary statements are permitted in each individual product advertisement, provided that the corresponding full cautionary statements appear in the catalogue and a statement referring to the precise location of the full cautionary statements—such as the page number on which the cautionary statements can be found—is located at the bottom of each catalogue page that contains one or more abbreviated cautionary statements. If abbreviated cautionary statements are used:

(1) The full cautionary statements associated with the abbreviated cautionary statements shall appear:

(i) Near the beginning of the catalogue, before any catalogue pages that contain advertisements of products available for purchase, or

(ii) Adjacent to the ordering information or order form in the catalogue.

(2) The full cautionary statements shall be in conspicuous and legible type in contrast by typography, layout or color.

(3) The full cautionary statements shall be clearly numbered according to the following scheme:

Required cautionary statement	Number
16 CFR 1500.19(b)(1) [1]	1
16 CFR 1500.19(b)(2) [2]	2
16 CFR 1500.19(b)(3)(i) [3]	3
16 CFR 1500.19(b)(3)(ii) [4]	4
16 CFR 1500.19(b)(4)(i) [5]	5
16 CFR 1500.19(b)(4)(ii) [6]	6

(4) The abbreviated cautionary statements shall consist of items 1500.20(e)(3)(i) through 1500.20(e)(3)(iv):

(i) A safety alert symbol substantially similar to that shown in figure 7.

FIGURE 7

(ii) The phrase, ''CHOKING HAZARD,'' written in capital letters.

(iii) Numbers, separated by commas and enclosed within a single set of parentheses, that identify the applicable cautionary statements for the product being advertised, followed by a period. These numbers shall match the numbers used to identify each full cautionary statement, as specified in 1500.20(e)(2).

(iv) A single prohibited age range written as either ''Not for under 3 yrs'' or ''Not for under 8 yrs,'' based on the most restrictive age range for all required cautionary statements for that product. Thus, if an advertised product requires the cautionary statement specified in 16 CFR 1500.19(b)(2), the prohibited age range in the abbreviated cautionary statement shall be ''Not for under 8 yrs.''

(v) For example, see Figure 8 for the abbreviated cautionary statement for an advertisement of a product that requires the cautionary statements specified in 16 CFR 1500.19(b)(1) and 16 CFR 1500.19(b)(2).

FIGURE 8

⚠ CHOKING HAZARD (1,2). Not for under 8 yrs.

(f) *Alternatives to cautionary statements for individual product advertisements in catalogues and other printed materials.* Multiple identical full or abbreviated cautionary statements may be replaced with a single full cautionary statement under the following circumstances:

(1) If all products available for purchase within a catalogue require the same cautionary statement, that cautionary statement, in full, may appear on the front cover, or equally conspicuous location, of the catalogue in lieu of repeating the cautionary statement within the catalogue, provided that it is communicated to consumers that the cautionary statement applies to all products in the catalogue.

(2) If all products on one catalogue page or on two facing catalogue pages require the same cautionary statement, that cautionary statement, in full, may appear at the top of the page or pages in lieu of repeating the cautionary statement in each product advertisement, provided that it is communicated to consumers that the cautionary statement applies to all products on the catalogue page or pages.

(g) *Prominence and conspicuousness of labeling statements.* The type size of abbreviated cautionary statements shall be reasonably related to the type size of any other printed matter in the product advertisement, and must be in conspicuous and legible type by typography, layout, or color with other printed matter in the advertisement and separated from other graphic matter.

(h) *Business to Business Catalogue Exception.* The requirements of section 24(c)of the Federal Hazardous Substances Act, as amended by section 105 of the CPSIA, do not apply to catalogues and other printed materials distributed solely between businesses unless the recipient business is one that could be expected to be purchasing the product for the use of children (instead of for resale, e.g.). Examples of businesses that can be expected to be purchasing products for the use of children include day care centers, schools, and churches.

Note: This Appendix will not appear in the Code of Federal Regulations.

List of Relevant Documents

1. Memorandum from Robert Franklin, Directorate for Economic Analysis, to Barbara E. Parisi, Attorney, Office of General Counsel, ''Response to Comments Raising Economic Issues Associated with Section 105 of the Consumer Product Safety Improvement Act of 2008 (Concerning the Inclusion of Cautionary Labeling for Toys and Games in Catalogues and Other Printed Materials),'' October 2008.

2. Memorandum from Timothy P. Smith, Engineering Psychologist, Division of Human Factors, Directorate for Engineering Sciences, to Barbara Parisi, Regulatory Affairs Attorney, Office of the General Counsel, ''Response to NPR Comments and Revised Requirements for the Size and Placement of Cautionary Statements Specified in Section 105, Labeling Requirement for Advertising Toys and Games, of the CPSIA,'' October 21, 2008.

3. Memorandum from Barbara E. Parisi, Attorney, Office of the General Counsel, to the Commission, ''Response to Comments Raising Questions Regarding the Scope of the Labeling Requirements for Advertising Toys and Games,'' October 24, 2008.

Dated: November 7, 2008.

Todd A. Stevenson,

Secretary, Consumer Product Safety Commission.

[FR Doc. E8–26964 Filed 11–14–08; 8:45 am]

BILLING CODE 6355–01–P

DEPARTMENT OF THE INTERIOR

National Park Service

36 CFR Part 7

RIN 1024–AD71

Special Regulation: Areas of the National Park System, National Capital Region

AGENCY: National Park Service, Interior.

ACTION: Final rule.

SUMMARY: The National Park Service (NPS) is finalizing regulations governing viewing of the Inaugural Parade by the Presidential Inaugural Committee. The rule also extends the permissible duration and extent of demonstrations and special events in Washington, DC, including the Inaugural, the Lighting of the National Christmas Tree and Christmas Pathway of Peace, the Cherry Blossom Festival, the Fourth of July Celebration, and the Smithsonian Folklife Festival.

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

FOR FURTHER INFORMATION CONTACT: Robbin Owen, National Park Service, National Capital Region, National Mall and Memorial Parks, Division of Park Programs, 202–619–7225.

SUPPLEMENTARY INFORMATION:

Background

On August 8, 2008, the NPS proposed a rule that applies to activities of the Presidential Inaugural Committee (PIC) for the Inaugural. The rule also proposed to clarify the application process and extend the permissible duration of demonstrations and special events in Washington, D.C., including the Inaugural, the Lighting of the National Christmas Tree and Christmas Pathway of Peace, the Cherry Blossom Festival, the Fourth of July Celebration, and the Festival of American Folklife (73 FR 46215). Persons and organizations interested in submitting comments were asked to submit them through the Federal Rulemaking Portal at *http://www.regulations.gov.* or to the National Park Service's Division of Park Programs at 1100 Ohio Drive, SW., Room 128, Washington, DC 20242. NPS also issued a news release that alerted the media to the proposed rule, and copies were available at the National Capital Region's Division of Park Programs, where permit applications are submitted. Copies were also mailed to past applicants who had requested a permit to demonstrate on Federal parkland at Inaugural Parades.

As noted in the preamble to the proposed rule, Pennsylvania Avenue, is among the world's most famous streets and is located in the heart of the Nation's Capital. Americans throughout history have marched, paraded, promenaded, and protested their way up and down Pennsylvania Avenue. NPS recognizes that the Inaugural is a national celebration event for the benefit of all citizens, and that it is not a private event. Furthermore, park areas along Pennsylvania Avenue, must be available to the public as well as demonstrators for viewing the Inaugural Parade.

In recent litigation, the U.S. District Court for the District of Columbia determined that the NPS's practice and procedure of submitting a permit application on behalf of the PIC violated its regulations with respect to the duration of special events and the timing of the submission of the application (*ANSWER Coalition* v. *Kempthorne,* 537 F.Supp.2d 183 (D.D.C. March 20, 2008)). The Court stated,

however, that ''[i]f the government thinks it appropriate to lengthen the amount of time for which permits may be granted under the regulations—perhaps even only for the Inauguration period and no other—the government may explicitly amend the regulations that apply to all permit applicants.'' 537 F.Supp.2d at 203–204.

The NPS issued a proposed rule to lengthen the permissible duration of any permit associated with Inaugural Day activities from 21 days to the period of time between October 24 through April 1. It would also ensure that the majority of Pennsylvania Avenue, National Historic Site (also known and referred to in this regulation as Pennsylvania Avenue, National Historic Park) is open to the public and demonstrators for the Inaugural Parade, regardless of viewpoint or the content of any message. In addition, the proposed rule would extend from three weeks to four months the duration of time that any permit may be issued for demonstrations or special events on the Ellipse and other designated park areas.

With respect to the Inaugural, the NPS's proposed rule would create a regulatory priority use for limited, designated park areas for the PIC, the Armed Forces Inaugural Committee, and the Architect of the Capitol or the Joint Congressional Committee on Inaugural Ceremonies, entities whose role in the Inaugural has traditionally necessitated such use. The DC Circuit's opinion in *A Quaker Action Group* v. *Morton,* 516 F.2d 717 (DC Cir. 1975), provided the legal basis for NPS's priority use regulations. There, the Court said that ''* * * if the Park Service wishes to enforce the regulations regarding a permit for public gatherings in the regulated areas, it must require a permit for *every* public gathering in those areas. * * * or, if the Park Service wishes, it could retain a system of NPS events, reserve time in, say, Lafayette Park, and even publish advance schedules.'' 516 F.2d at 729 (emphasis in original).

Among the limited number of park areas impacted by the proposed rule would be portions of the National Mall and the Inaugural parade route on Pennsylvania Avenue, from 3rd to 15th Streets, as designated on the proposed rule's maps. The designated priority-use areas along the parade route would be relatively small, leaving the majority of park areas available to the public and demonstrators regardless of viewpoint or the content of any message. The proposed rule would also extend the duration and extent of demonstrations and special events in Washington, DC, including the Inaugural, the Lighting of the National Christmas Tree and Christmas Pathway of Peace, the Cherry Blossom Festival, the Fourth of July Celebration, and the Festival of American Folklife. Finally, the proposed rule would make explicit the long-standing NPS policy of not accepting permit applications for demonstrations and special events earlier than one year in advance of the proposed event or the beginning of the proposed event's set-up.

The time period for the receipt of comments on the NPS's proposed rule closed on September 22, 2008. More than 2,900 comments were received by the NPS, almost all of them directly submitted to the Federal Rulemaking Portal at *http://www.regulations.gov.* The length of the submitted comments generally ranged from several sentences to a half a page. Almost all of the comments were from individuals who resided in the United States. No comment was received from ANSWER Coalition (or their attorneys), plaintiff in the pending lawsuit *ANSWER Coalition* v. *Kempthorne,* Civil No. 05–0071 PLF (D.D.C.), although they were provided a copy of the proposed rule.

The NPS appreciates the time and effort expended by those who submitted comments. The NPS has reviewed the comments, and provides responses to the issues raised in the following section. The NPS also explains the basis for the final rule, which contains three clarifications as well as minor adjustments of the regulatory maps' legends to make them more readable in the Code of Federal Regulations.

Response to Comments and Explanation of the Final Regulations

The vast majority of comments received focused on the Inaugural Parade and took issue with the NPS's designation of specific park areas for PIC bleachers along Pennsylvania Avenue, between 7th Street and 15th Streets. Almost 1,700 comments said that the proposed regulations would improperly ''privatize'' the parade route; interfere with, distance, or limit the public's ability to view the Inaugural Parade; or prevent demonstrators from exercising their First Amendment rights. Some complained that these parade route sidewalks should not be reserved for ''the elite few,'' or ''the exclusive use of privileged elite and Wall Street donors,'' while others stated that the rule established a ''discriminatory reservation of spectator space.''

A few comments stated that the PIC should not receive any special assistance from the NPS in securing permits. More than 200 comments said that the NPS should not allow the PIC to have any designated bleacher areas. Approximately 570 comments said that the PIC should only have the existing areas around the White House and Lafayette Park, or the area around the Capitol for the Inaugural swearing-in ceremony, and one comment said that the number of PIC bleachers around the White House was excessive. Twenty comments said Freedom Plaza should be available for public viewing of the Inaugural Parade. Some comments said the proposed rule contradicts NPS policy. Others said that the public should have total and unrestricted access to Federal Parkland.

After careful review of the issues raised, the NPS believes that the rule's allocation of space and time for set-up and take-down of necessary structures is a fair and equitable distribution of park areas, and is consistent with the First Amendment, the Presidential Inaugural Ceremonies Act, and NPS policy expressed in its existing regulations and Management Policies ¶ 8.6 (2006).

The Supreme Court has long recognized that government may constitutionally require reasonable time, place and manner restrictions on expressive activity, and that the NPS is responsible for the management, maintenance, and regulation of the National Parks under 16 U.S.C. 1, 1a–1, and 3. *Clark* v. *Community for Creative Non-Violence,* 468 U.S. 288, 289–90, 293 (1983). Furthermore, ''[r]egulations of the use of a public forum are not 'inconsistent with civil liberties' but * * * [are] one of the means of safeguarding the good order upon which [civil liberties] ultimately depend.' '' *Thomas* v. *Chicago Park District,* 534 U.S. 316, 323 (2002), *quoting Cox* v. *New Hampshire,* 312 U.S. 569, 574 (1941).

The allocations in the final rule comport with the Court of Appeal's opinion in A *Quaker Action Group* v. *Morton.* The final rule also fulfills the Department of the Interior's obligations under the Presidential Inaugural Ceremonies Act to provide areas on Federal Parkland for use by the Inaugural Committee for Inaugural activities and still provide access for the conduct of demonstrations. Section 501(1) of the Act expressly designates the Inaugural Committee as ''the committee appointed by the President-elect to be in charge of the Presidential inaugural ceremony and functions and activities associated with the ceremony'' (36 U.S.C. 501(1)). Section 503(a) of the Act provides that the ''Secretary of the Interior may grant to the Inaugural Committee a permit to use the reservations or grounds during the Inaugural period, including a reasonable

time before and after the Inaugural period'' (*Id.* § 503(a)).

The final rule does not ''privatize'' the parade route, is not discriminatory, and does not interfere with, distance, or limit the public's ability to view the Inaugural Parade. Nor does it prevent the exercise of First Amendment rights. Rather, as the attached maps of the parade viewing area detail, the final rule ensures that the majority of Pennsylvania Avenue, National Historic Park is open to the public. Consistent with the First Amendment and other long-standing NPS regulations, the majority of Pennsylvania Avenue, National Historic Park is open to demonstrators regardless of viewpoint or the content of message. The allocations in the final rule respond to the question on this subject posed by the District Court in *A.N.S.W.E.R. Coalition* v. *Kempthorne,* 537 F.Supp.2d at 205–206.

Neither the proposed nor final rule alters the existing, twenty-eight year old regulatory preference for the PIC for the White House sidewalk and all but the northeast quadrant of Lafayette Park for Inaugural Day, which NPS believes is still reasonable and necessary. Adopted in 1980 in accordance with the Presidential Inaugural Ceremonies Act (45 FR 84997), this regulatory preference continues to provide these areas for use by the Inaugural Committee for Inaugural activities, while also providing access for demonstration conduct in the vicinity of the White House. As the NPS explained in adopting this provision, access to the PIC area is controlled by the Inaugural Committee through a reserved ticket system, and the northeast quadrant of Lafayette Park and other park areas in the White House area and elsewhere are available for demonstration activity under the NPS's regular demonstration permit system (45 FR at 84998).

Besides the northeast quadrant of Lafayette Park, other park areas in the White House area and elsewhere remain available for demonstration activity under today's final rule. These open park areas include areas just north of the White House such as Farragut and McPherson Squares, Franklin Park, and most of Pennsylvania Avenue, National Historic Park. Pennsylvania Avenue, National Historic Park, which became Federal Parkland in 1995, begins near the Capitol and runs between 3rd and 15th Streets. While Americans have historically marched, paraded, promenaded, and protested up and down Pennsylvania Avenue, it has also been the site where PIC has traditionally located bleachers for the Inaugural Parade.

For example, on Federal Parkland adjacent to Pennsylvania Avenue, between 3rd and 15th Streets, there were 49 PIC bleachers for the 2005 Inaugural; 45 PIC bleachers for the 2001 Inaugural; and 36 PIC bleachers for the 1997 Inaugural. Under this final rule, most of Pennsylvania Avenue, National Historic Park is allocated to the public and demonstrators. Specifically, 7,024 linear feet or 70 percent of Pennsylvania Avenue, National Historic Park that abuts the parade route, which also comprises 625,882 square feet or 84 percent of Pennsylvania Avenue, National Historic Park, is open to the public and demonstrators regardless of viewpoint or the content of any message. These are expansive areas that fully allow the public and demonstrators to observe the Inaugural Parade, and the parade participants to see them.

One comment complained that the proposed rule was an attempt by the current ''Administration to co-opt the inaugural parade route for use by its own constituents.'' This comment is obviously inaccurate because the current administration is leaving office. A few comments inaccurately complained that the regulations ''set aside prime swaths of the Inaugural route'' for PIC. As depicted in the rule's block-by-block maps of Pennsylvania Avenue, National Historic Park, there are many open and expansive areas along the Inaugural route which are not designated for PIC bleachers and which provide prime venues to observe the Parade. These open areas include the north and south sides between 3rd and 4th Streets, John Marshall Park (located on the north side and between the Canadian Embassy and the United States Courthouse, and, at 446 feet by 210 feet, one of the largest park areas that make up Pennsylvania Avenue, National Historic Park), most of the north side between 4th and 6th Streets, most of the north and south sides between 6th and 7th Streets, most of the north and south sides between 7th and 9th Streets, all of the north and south sides between 9th and 10th Streets, most of the north and south sides between 10th and 12th Streets, all of the north side between 12th and 13th Streets, most of the south side between 13th and 14th Streets, the western edge of Freedom Plaza, and most of the north and south sides between 14th and 15th Streets. The final rule's maps also designate five areas that are open to members of the public who have disabilities: Portions of the north and south sides between 4th and 6th Streets, a portion of the north side between 7th and 9th Streets, and portions of the Freedom Plaza and Pershing Park sidewalks between 13th and 15th Streets.

The rule also substantially reduces the area that in the past has been designated for the PIC's bleachers. Under the rule, PIC bleacher areas along the parade route have now been reduced to 1,284 linear feet or 13 percent of Pennsylvania Avenue, National Historic Park that abuts the street, which also comprises 63,936 square feet or 9 percent of Pennsylvania Avenue, National Historic Park. These designated areas for PIC could accommodate 24 bleachers and 8,790 ticket holders, based on the PIC's 2005 set-up.

Because the final rule does not allocate to the PIC certain park areas that have been allocated to PIC in past Inaugural Parades, the final rule substantially increases the park areas available to the public and demonstrators. In 2005, these no-longer-allocated areas contained 25 PIC bleachers that could accommodate 11,344 PIC ticket-holders.

At least one comment noted that many PIC bleacher seats on Pennsylvania Avenue, National Historic Park during the last Inaugural Parade were empty because ticket-holders elected not to use their seats. The final rule includes a ''10-minute parade rule'' to address-such concerns: If a PIC bleacher seat in Pennsylvania Avenue, National Historic Park or Sherman Park has not been claimed by the ticket-holder ten minutes before the Inaugural Parade is scheduled to pass the bleacher's block, then any member of the public, without regard to viewpoint or content of the message, may at that time occupy the unclaimed seat. The NPS will require PIC to notify ticket-holders (and include a statement on each ticket) when they need to be in the bleacher to avoid losing their seats. The NPS will also require that PIC place marshals at PIC bleachers to assist ticket-holders and inform the NPS or the United States Park Police (Park Police) of any unclaimed seats under the 10-minute parade rule. Should the NPS or Park Police determine that PIC is not in compliance, appropriate action will be taken.

Some comments raised concerns about improving movement through any future Inaugural access points, so that people can reach park areas along the parade route more easily. Past Inaugural access points for Pennsylvania Avenue, National Historic Park have not been located on Federal Parkland nor operated by Park Police personnel. They have been based upon a security

determination by the United States Secret Service. As in the past, however, once the NPS obtains information about access points, it will immediately inform the media and all permit-holders, so that ticket-holders, the public, and demonstrators might better understand where access points are located and how people can get to the various park areas along the parade route.

Traditionally, each PIC decides how, and to whom, to distribute PIC bleacher seat tickets. In any event, 36 U.S.C. 510 of the Presidential Inaugural Ceremonies Act requires that the Inaugural Committee report to the Federal Elections Commission any donation of aggregate value greater than $200, including the donation's amount, date received, and the name and address of the donor.

The final rule is both fair and reasonable. At any Inaugural Parade, there will be people lawfully standing or sitting next to one another who may have and express different viewpoints and messages. In this country, expression of views and messages is what the First Amendment protects. ''It is firmly settled that under our Constitution the public expression of ideas may not be prohibited merely because the ideas are themselves offensive to some of their hearers.'' *Street* v. *New York,* 394 U.S. 576, 592 (1969). And courts have properly identified the Federal Parkland in Washington D.C.'s monumental core as a ''location in the heart of our nation's capital [which] makes it a prime location for demonstrations. It is here where Martin Luther King, Jr. delivered his famous 'I Have a Dream' speech, where both sides of the abortion debate have staged their passionate demonstrations, and where on any given day one may witness people gathering to voice their public concerns.'' *Friends of the Vietnam Memorial* v. *Kennedy,* 116 F.3d 495, 496 (DC Cir. 1997). NPS encourages all Inaugural parade viewers to understand and respect the exercise of First Amendment rights by others, and the Park Police will take enforcement action only when there is a violation of the law.

The final rule allows the PIC to place portable public bathrooms at designated areas along the parade route. In addition, the final rule designates the traditional areas necessary for the television, radio and other media for broadcasting and reporting on the parade and related activities, as well as the traditional areas necessary for the Armed Forces Inaugural Committee for parade support structures for monitoring and managing the parade itself. And the final rule designates an area in front of the John A. Wilson Building for the District of Columbia's reviewing stand, and other areas for individuals with disabilities to view the parade.

None of the comments took issue with the necessity for, or size of, these areas. The modest allocations include 23,764 square feet, or 3 percent of the Pennsylvania Avenue, National Historic Park, for the Armed Forces Inaugural Committee parade control area; 1,346 square feet, or less than 1 percent of the park, for the District of Columbia's reviewing stand; 7,907 square feet, or 1 percent of the park, for the media area; and 456 square feet, or less than 1 percent of the park, for the parade announcer stands.

While a few comments said that designations on the National Mall infringe on the public's right of access and free speech, the final rule designates appropriate areas on the National Mall not only for ticketed guests for the Inaugural swearing-in ceremony, but also for members of the general public, the placement of media stands, and the assembly and staging of parade units. These designated areas support traditionally necessary Inaugural activities. The Armed Forces Inaugural Committee needs to assemble, stage, secure, and weather-protect the pre-Inaugural Parade components and floats on the National Mall between 14th and 1st Streets. And the Architect of the Capitol or the Joint Congressional Committee on Inaugural Ceremonies needs to site jumbotrons and sound towers so that the Joint Congressional Committee's standing room ticket-holders can observe the Inaugural ceremony between 4th and 1st Streets, and members of the general public can observe it between 7th and 4th Streets. In response to one comment, the NPS will work with the PIC and others on the supply and placement of jumbotrons on the National Mall for better viewing by members of the general public. In response to another comment, the final rule corrects a typographical error in the text of the proposed rule at (g)(4)(iii)(C)(2), in order to place the 150-foot by 200-foot media area in its traditional location east of 7th Street on the National Mall.

One comment suggested that the text identifying the Inaugural set-up and take-down locations in the proposed rule was broader than shown on the maps that are part of the proposed rule. The maps were intended to focus only on Pennsylvania Avenue, National Historic Park and Sherman Park, because of their depiction of the placement of assorted structures. Some comments indicated that the lengthened set-up and take-down timeframe was excessive, and would therefore limit free speech and assembly.

The NPS respectfully disagrees, especially because NPS is unaware of instances in the past where set-up and take-down activity has interfered with First Amendment rights. Inaugural-related construction is complex and extensive, and requires a reasonably adequate time period. Traditionally, set-ups and take-downs are done in stages, and an entire designated area may not be needed throughout the designated period. Accordingly, consistent with public safety, the portions of designated areas that are not immediately needed for set-up and take-down will remain open to the public and for demonstration and special event activity.

The final rule sets specific set-up and take-down times that the NPS has determined are reasonably necessary for the erection and removal of the stands, bleachers, media and parade support structures in the various designated park areas. The set-up and take-down times determined necessary under the rule are from November 1 through March 1 for the White House sidewalk and Lafayette Park, December 7 through February 10 for Pennsylvania Avenue, National Historic Park and Sherman Park, and January 6 through January 30 for the National Mall between 14th and 1st Streets.

Some comments stated that Pennsylvania Avenue, should stay open to the driving and walking public at all times. One comment requested that the rule not restrict ''reasonable signage'' on the parade route. Some comments objected to any restrictions on public access to the Inaugural Parade, recommending instead cancellation of the parade in the face of a security threat. Some comments assumed that the proposed rule would limit public access to the parade in order to provide an appropriate level of security for the President, and then suggested alternative approaches to protecting the President (e.g., improving motorcade vehicles, adding additional escorts, letting Secret Service manage security.) One comment said that the rule needs to weigh safety against the ''needs for freedom in a democracy,'' while another comment said that officials should not employ additional security measures. One comment suggested that logjams at public access security access points could be reduced by establishing more access points to the entire parade route.

The issues raised by these comments are outside the jurisdiction of the NPS and beyond this regulatory effort.

Pennsylvania Avenue, itself is under the jurisdiction of the District of Columbia, and issues related to Inaugural Parade security and access points are a matter for the United States Secret Service, who makes the security-based determinations such as what may be allowed on the Inaugural Parade sidewalks and the number and locations of access points.

The Smithsonian Institution requests that the final rule use the name ''Smithsonian Folklife Festival'' instead of ''Festival of American Folklife,'' and clarify the chart at 36 CFR 7.96(g)(4)(ii)(D) to indicate a 10-week time period for this event as intended by the proposed rule. NPS has included these changes in the final rule. One comment expressed confusion regarding whether the Cherry Blossom Festival's two-week set-up and take-down time period is in addition to the two weeks designated for the event itself. It is, and the final rule contains clarifying changes.

There were no comments regarding the proposed rule's incorporation of the long-standing NPS written policy not to accept permit applications for demonstrations and special events earlier than one year in advance of the proposed event, or the beginning of the event set-up if it is earlier. Thus, the final rule requires applications to be submitted no more than one-year before the date of the event including its set-up and take-down time. For example, the NPS would accept on January 1, 2009 an application for January 1, 2010, but would not accept on January 1, 2009 an application for January 1 for the next three years, or for January 1 and February 1, 2010.

Effective Date

Pursuant to 5 U.S.C. 553(d)(3) and 318 DM 4.7 B(1)(ii), the rule is effective immediately so that the NPS may effectively perform its duties under the Presidential Inaugural Ceremonies Act, manage activities on Federal Parkland associated with the upcoming 2009 Inaugural, and allow for any judicial challenge to occur in a timely manner. In addition, the rule is not a ''major rule'' for purposes of the Congressional Review Act, 5 U.S.C. Chapter 8, because it does not meet the Act's definition of a ''major rule'' at 5 U.S.C. 804(2).

Compliance With Other Laws

Regulatory Planning and Review (Executive Order 12866)

This document is a significant rule and is subject to review by the Office of Management and Budget (OMB) under Executive Order 12866.

1. This rule will not have an effect of $100 million or more on the economy. It will not adversely affect in a material way the economy, productivity, competition, jobs, the environment, public health or safety, or State, local, or tribal governments or communities.

2. This rule will not create a serious inconsistency or otherwise interfere with an action taken or planned by another agency.

3. This rule does not alter the budgetary effects of entitlements, grants, user fees, or loan programs or the rights or obligations of their recipients.

4. OMB has determined that this rule raises novel legal or policy issues.

Regulatory Flexibility Act

The Department of the Interior certifies that this document will not have a significant economic effect on a substantial number of small entities under the Regulatory Flexibility Act (5 U.S.C. 601 *et seq.*).

Small Business Regulatory Enforcement Fairness Act (SBREFA)

This rule is not a major rule under 5 U.S.C. 804(2), the Small Business Regulatory Enforcement Fairness Act. This rule:

a. Does not have an annual effect on the economy of $100 million or more.

b. Will not cause a major increase in costs or prices for consumers, individual industries, Federal, State, or local government agencies, or geographic regions.

c. Does not have significant adverse effects on competition, employment, investment, productivity, innovation, or the ability of U.S.-based enterprises to compete with foreign-based enterprises.

Unfunded Mandates Reform Act

This rule does not impose an unfunded mandate on State, local, or tribal governments or the private sector of more than $100 million per year. The rule does not have a significant or unique effect on State, local, or tribal governments or the private sector.

Takings (Executive Order 12630)

In accordance with Executive Order 12630, the rule does not have significant takings implications.

Federalism (Executive Order 13132)

In accordance with Executive Order 13132, the rule does not require the preparation of a federalism assessment.

Civil Justice Reform (Executive Order 12988)

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

Paperwork Reduction Act

This regulation requires information collection from 10 or more parties, which must be submitted for OMB approval under the Paperwork Reduction Act. However, these are not new collection requirements and, therefore, no additional request to OMB has been prepared. The information collection activities are necessary for the public to obtain benefits in the form of special park uses permits.

National Environmental Policy Act

We have analyzed this rule in accordance with the criteria of the National Environmental Policy Act (NEPA) according to Departmental guidelines in 516 DM 6 (49 FR 21438), to assess the impact of any Federal action significantly affecting the quality of the human environment, health, and safety. We have determined that the proposed rule is categorically excluded under 516 DM 6, Appendix 7.4(10), insofar as it is a modification of existing NPS regulations that does not increase public use to the extent of compromising the nature and character of the area or causing physical damage to it, or introduce incompatible uses which might compromise the nature and characteristics of the area or cause physical damage to it, or cause conflict with adjacent ownerships or land uses, or cause a nuisance to adjacent owners or occupants.

Government-to-Government Relationship With Tribes

In accordance with Executive Order 13175 ''Consultation and Coordination with Indian Tribal Governments'' (65 FR 67249), the President's memorandum of April 29, 1994, ''Government-to-Government Relations with Native American Tribal Governments'' (59 FR 22961), and 512 DM 2, the Department will consult with federally recognized tribal governments throughout the development of the regulation to jointly evaluate and address the potential effects, if any, of the proposed regulatory action.

List of Subjects in 36 CFR Part 7

National Parks, Special events.

■ In consideration of the foregoing, the National Park Service amends 36 CFR part 7 as set forth below:

PART 7—SPECIAL REGULATIONS, AREAS OF THE NATIONAL PARK SYSTEM

■ 1. The authority citation for part 7 is revised to read as follows:

Authority: 16 U.S.C. 1, 3, 9a, 460(q), 462(k); Sec. 7.96 also issued under 36 U.S.C.

501–511, D.C. Code 10–137 (2001) and D.C. Code 50–2201.07 (2001)

■ 2. Revise § 7.96 (g)(4) to read as follows:

§ 7.96 National Capital Region.

* * * * *

(g) * * *

(4) *Permit processing.* (i) NPS processes permit applications for demonstrations and special events in order of receipt. NPS will not accept applications more than one year in advance of a proposed continuous event (including set-up time, if any). Use of a particular area is allocated in order of receipt of fully executed applications, subject to the limitations in this section.

(ii) Specific national celebration events have priority use of particular park areas as shown in the following table:

The following event . . .	Has priority use of the following area . . .	At the following time . . .
(A) Lighting of the National Christmas Tree and Christmas Pathway of Peace.	Northern half of the oval portion of the Ellipse	The last four weeks in December as well as necessary set-up and take-down between October 1 through February 1.
(B) Cherry Blossom Festival	Park areas adjacent to the Tidal Basin and the sidewalk areas adjacent to Constitution Avenue, between 15th & 17th Streets NW.	Two weeks usually in late March or early April as well as the an additional two weeks for the necessary set-up and take-down.
(C) Fourth of July Celebration	Washington Monument Grounds and the Lincoln Memorial Reflecting Pool area.	Time required for necessary staging and fireworks set-up and take-down, totaling three weeks in late June and early July.
(D) Smithsonian Folklife Festival	The area bounded on the south by Jefferson Drive NW; on the north by Madison Drive, NW; on the east by 7th Street, NW; on the west by 14th Street, NW.	For a two-week period in approximately late June and early July and an additional eight weeks for the necessary set-up and take-down.
(E) Columbus Day Commemorative Wreath-Laying.	At the Columbus statue on the Union Plaza	On Columbus Day.
(F) Presidential Inaugural Ceremonies	See paragraph (g)(4)(iii) of this section	See paragraph (g)(4)(iii) of this section.

(iii) In connection with Presidential Inaugural Ceremonies the following areas are reserved for priority use as set forth in this paragraph.

(A) The White House sidewalk and Lafayette Park, exclusive of the northeast quadrant for the exclusive use of the Presidential Inaugural Committee on Inaugural Day.

(B) Portions of Pennsylvania Avenue, National Historic Park and Sherman Park, as designated in the maps included in paragraph (g)(4)(iii)(E) of this section, for the exclusive use of the Presidential Inaugural Committee on Inaugural Day for:

(*1*) Ticketed bleachers viewing and access areas, except that members of the public may use a ticketed bleacher seat that has not been claimed by the ticket holder 10 minutes before the Inaugural Parade is scheduled to pass the bleacher's block;

(*2*) Portable toilets, except that they will be available to the public;

(*3*) Television and radio media and Armed Forces Inaugural Committee parade support structures;

(*4*) The area in front of the John A. Wilson Building for the District of Columbia reviewing stand;

(*5*) Viewing areas designated for individuals with disabilities, except that they will be available to any disabled persons.

(C) The area of the National Mall between 14th and 1st Streets, for the exclusive use of the Armed Forces Inaugural Committee on Inaugural Day for the assembly, staging, security and weather protection of the pre-Inaugural parade components and floats on Inaugural Day, except for:

(*1*) The placement of jumbotrons and sound towers by the Architect of the Capitol or the Joint Congressional Committee on Inaugural Ceremonies so that the Inaugural ceremony may be observed by the Joint Congressional Committee's ticketed standing room ticket holders between 4th and 1st Streets and the general public between 7th and 4th Streets; and

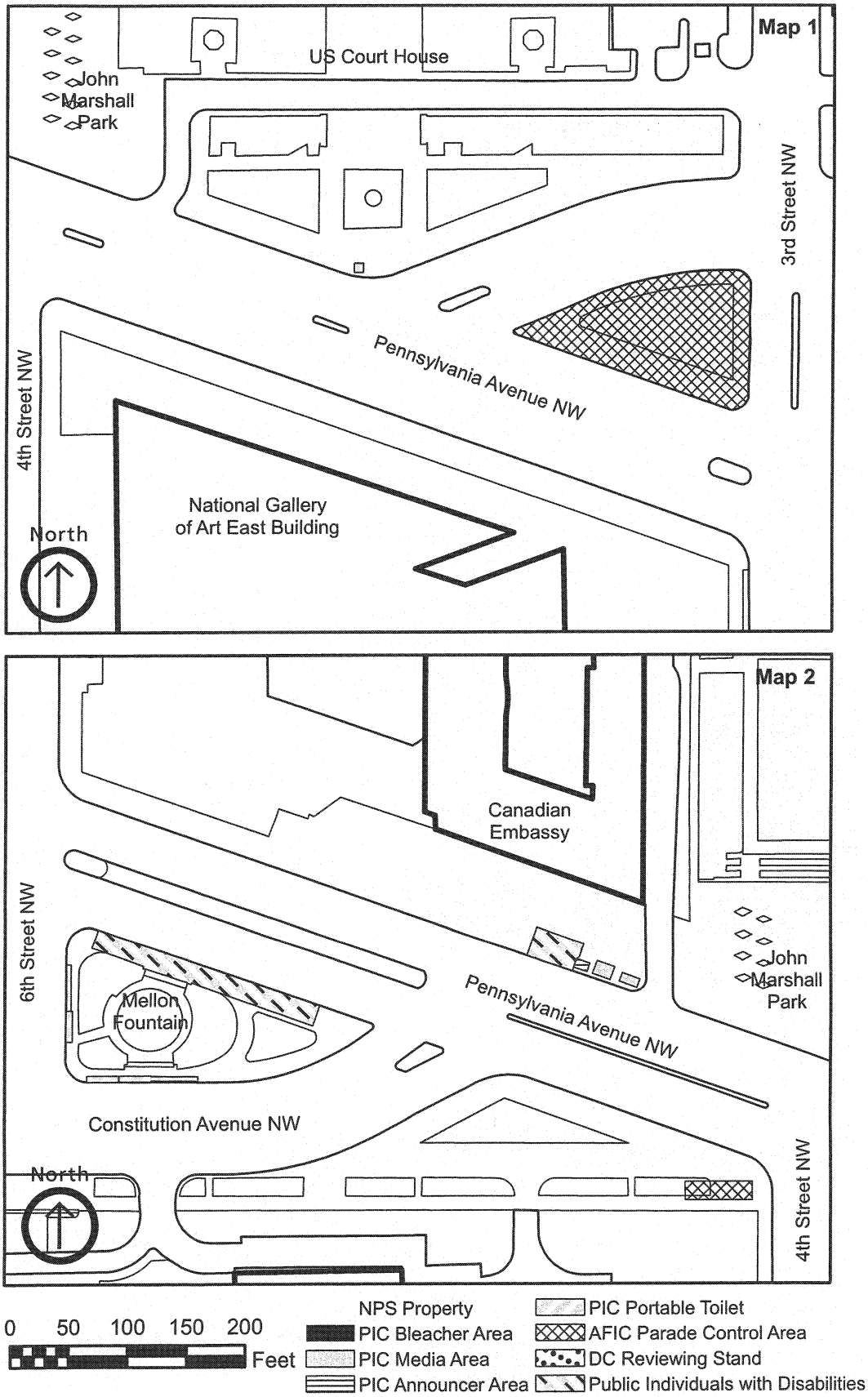
(*2*) A 150-foot-by-200-foot area on the National Mall just east of 7th Street, for the exclusive use of the Presidential Inaugural Committee for television and radio media broadcasts on Inaugural Day.

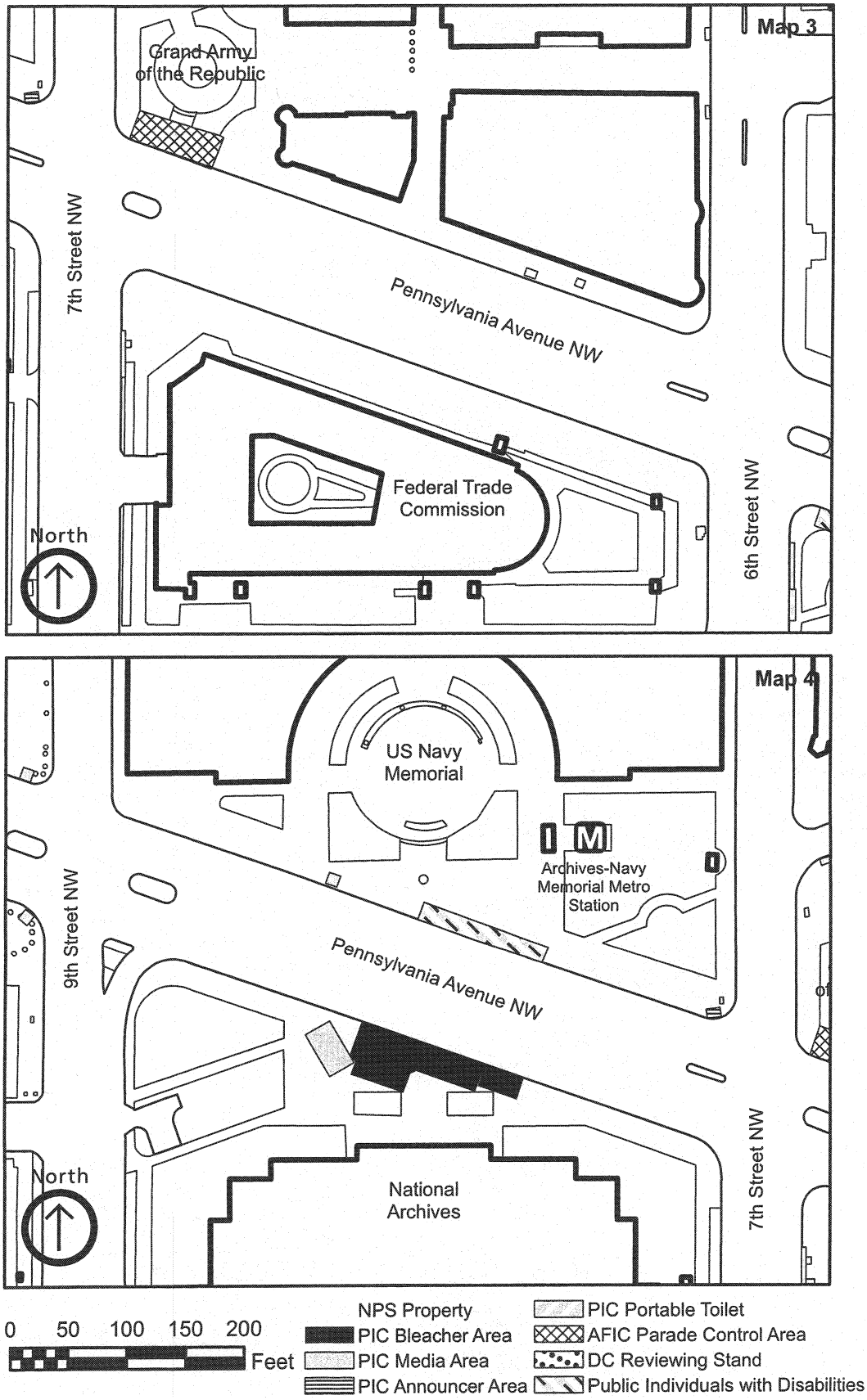
(D) The Presidential Inaugural Committee may also use portions of its designated areas reasonably necessary for setting up and taking down stands, bleachers, media and parade support structures as shown in the following table:

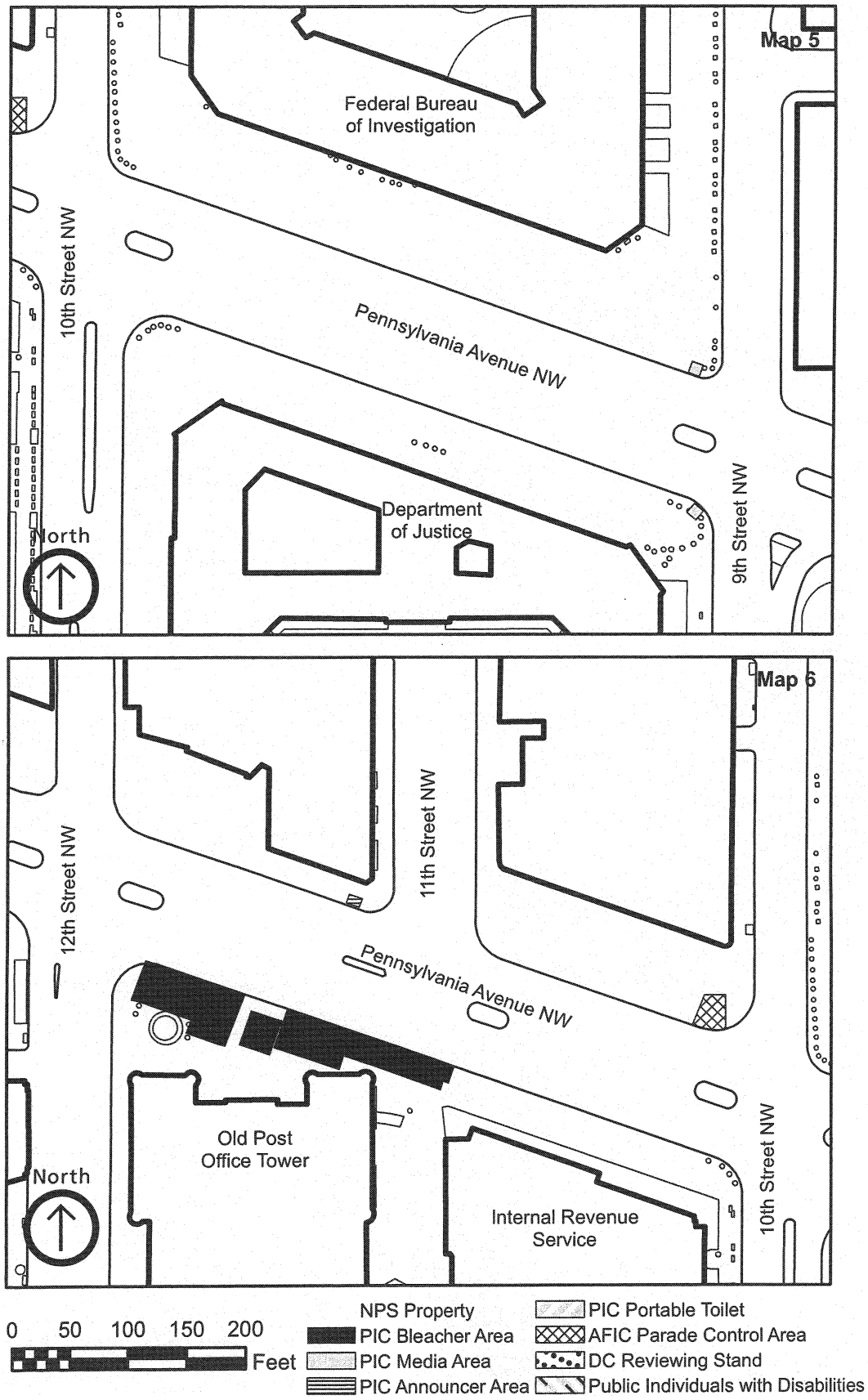
The Presidential Inaugural Committee may use the following area . . .	During the following period . . .
(1) The White House sidewalk and Lafayette Park	November 1 through March 1.
(2) Pennsylvania Avenue, National Historic Park and Sherman Park	December 7 through February 10.
(3) The National Mall between 14th and 1st Streets	January 6 through January 30.

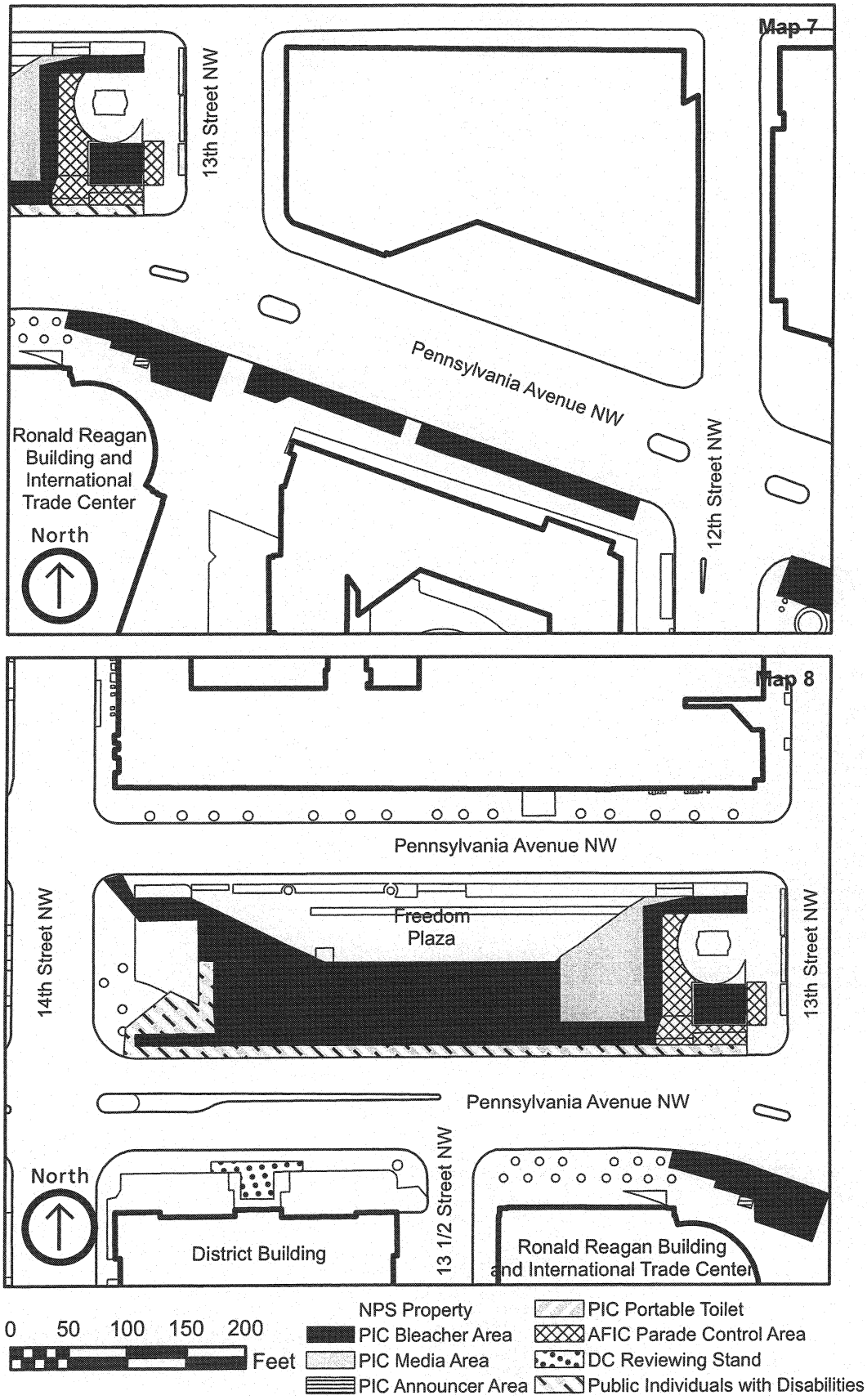
(E) Maps of designated portions of Pennsylvania Avenue, National Historic Park and Sherman Park referred to in paragraph (g)(4)(iii)(B) of this section are as follows:

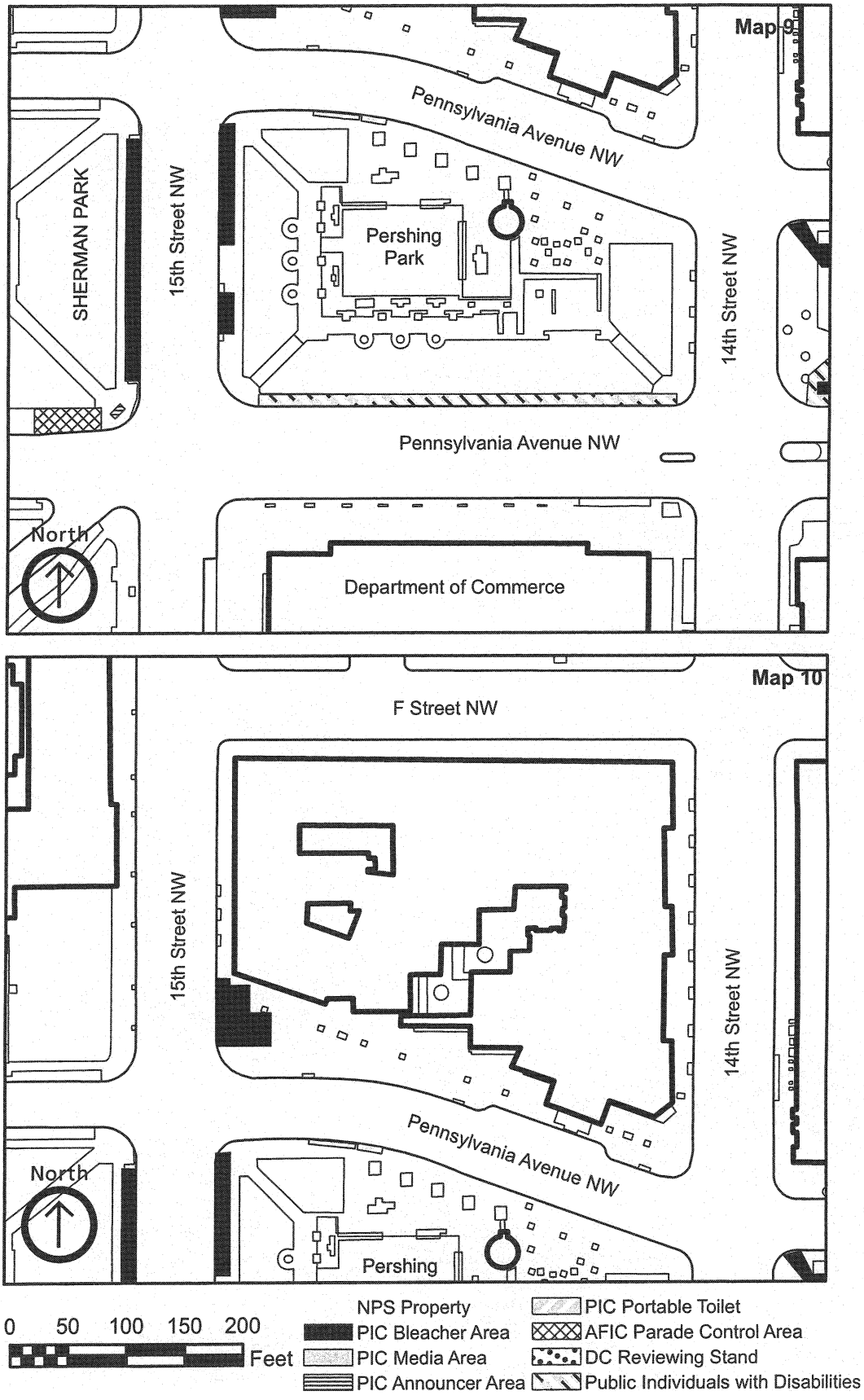
BILLING CODE 4312–JK–P


Map 1
US Court House
John Marshall Park
3rd Street NW
Pennsylvania Avenue NW
4th Street NW
National Gallery of Art East Building
North
Map 2
Canadian Embassy
6th Street NW
Mellon Fountain
Pennsylvania Avenue NW
John Marshall Park
Constitution Avenue NW
North
4th Street NW
0 50 100 150 200
Feet
NPS Property
PIC Bleacher Area
PIC Media Area
PIC Announcer Area
PIC Portable Toilet
AFIC Parade Control Area
DC Reviewing Stand
Public Individuals with Disabilities


Map 3
Grand Army of the Republic
7th Street NW
Pennsylvania Avenue NW
Federal Trade Commission
6th Street NW
North
Map 4
US Navy Memorial
Archives-Navy Memorial Metro Station
9th Street NW
Pennsylvania Avenue NW
7th Street NW
National Archives
North
0 50 100 150 200
Feet
NPS Property
PIC Bleacher Area
PIC Media Area
PIC Announcer Area
PIC Portable Toilet
AFIC Parade Control Area
DC Reviewing Stand
Public Individuals with Disabilities


Map 5
Federal Bureau of Investigation
10th Street NW
Pennsylvania Avenue NW
Department of Justice
9th Street NW
North
Map 6
12th Street NW
11th Street NW
Pennsylvania Avenue NW
Old Post Office Tower
Internal Revenue Service
10th Street NW
North
0 50 100 150 200
Feet
NPS Property
PIC Bleacher Area
PIC Media Area
PIC Announcer Area
PIC Portable Toilet
AFIC Parade Control Area
DC Reviewing Stand
Public Individuals with Disabilities


Map 7
13th Street NW
Pennsylvania Avenue NW
12th Street NW
Ronald Reagan Building and International Trade Center
North
Map 8
Pennsylvania Avenue NW
14th Street NW
Freedom Plaza
13th Street NW
Pennsylvania Avenue NW
North
District Building
13 1/2 Street NW
Ronald Reagan Building and International Trade Center
0 50 100 150 200
Feet
NPS Property
PIC Bleacher Area
PIC Media Area
PIC Announcer Area
PIC Portable Toilet
AFIC Parade Control Area
DC Reviewing Stand
Public Individuals with Disabilities


Map 9
Pennsylvania Avenue NW
SHERMAN PARK
15th Street NW
Pershing Park
14th Street NW
Pennsylvania Avenue NW
North
Department of Commerce
Map 10
F Street NW
15th Street NW
14th Street NW
Pennsylvania Avenue NW
North
Pershing
0 50 100 150 200
Feet
NPS Property
PIC Bleacher Area
PIC Media Area
PIC Announcer Area
PIC Portable Toilet
AFIC Parade Control Area
DC Reviewing Stand
Public Individuals with Disabilities

(iv) Other demonstrations or special events are permitted in park areas under permit for the National Celebration Events listed in paragraph (g)(4)(ii) of this section to the extent that they do not significantly interfere with the National Celebration Events. Except for Inaugural ceremony activities, no activity containing structures is permitted closer than 50 feet to another activity containing structures without the mutual consent of the sponsors of those activities.

(v) NPS will issue a permit for a demonstration on the White House sidewalk and in Lafayette Park at the same time only if the requirements of this paragraph are met. The organization, group, or other sponsor of the demonstration must undertake in good faith all reasonable action, including the provision of sufficient marshals, to ensure that the sponsor:

(A) Maintains good order and self-discipline in conducting the demonstration and any necessary movement of persons; and

(B) Observes the numerical limitations and waiver provisions described in paragraphs (g)(5)(i) and (ii) of this section.

(vi) NPS will issue permits authorizing demonstrations or special events for the periods shown in the following table. NPS may extend these periods for demonstrations only, unless another application requests use of the particular area and that application precludes double occupancy.

Park area	Permit validity period	Permit validity period for inaugural activities
(A) White House area, except the Ellipse.	7 days	Between October 24 through April 1 for reasonable and necessary set-up and take-down activities for the White House Sidewalk and Lafayette Park.
(B) The Ellipse and all other park areas.	4 months	Between December 7 through February 10 for reasonable and necessary set-up and take-down activities for Pennsylvania Avenue, National Historic Park and Sherman Park.

* * * * *

Dated: October 31, 2008.

Lyle Laverty,

Assistant Secretary of the Interior for Fish and Wildlife and Parks.

[FR Doc. E8–27047 Filed 11–14–08; 8:45 am]

BILLING CODE 4312–JK–C

DEPARTMENT OF COMMERCE

Patent and Trademark Office

37 CFR Parts 1 and 11

[Docket No.: PTO–C–2005–0013]

RIN 0651–AB55

Changes to Representation of Others Before the United States Patent and Trademark Office

AGENCY: United States Patent and Trademark Office, Commerce.

ACTION: Final rule.

SUMMARY: The United States Patent and Trademark Office (Office) is adopting new rules governing the conduct of individuals registered to practice before the Office. The Office is adopting a new rule that provides for an annual practitioner maintenance fee for those recognized to practice before the Office in patent cases. These changes will enable the Office to maintain a roster of registered practitioners and, consequently, better protect the public from unqualified practitioners. The Office is also making conforming amendments to 37 CFR 1.21.

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

FOR FURTHER INFORMATION CONTACT: Harry I. Moatz , Director of Enrollment and Discipline (OED Director), directly by phone at (571) 272–6069; by facsimile to (571) 273–6069 marked to the attention of Mr. Moatz; or by mail addressed to: Mail Stop OED-Ethics Rules, U.S. Patent and Trademark Office, P.O. Box 1450, Alexandria, Virginia 22313–1450.

SUPPLEMENTARY INFORMATION: Congress granted express authority to the Office to ''establish regulations, not inconsistent with law, which * * * may govern the recognition and conduct of agents, attorneys, or other persons representing applicants or other parties before the Office.'' 35 U.S.C. 2(b)(2)(D). Congress also provided that the ''Director may, after notice and opportunity for a hearing, suspend or exclude, either generally or in any particular case, from further practice before the Patent and Trademark Office, * * * any person, agent, or attorney * * * who does not comply with the regulations established under section 2(b)(2)(D) of this title. * * * The reasons for any such suspension or exclusion shall be duly recorded.'' 35 U.S.C. 32. In so doing, Congress vested express and implied authority with the Office to prescribe rules of procedure that are applicable to practitioners recognized to practice before the Office. Section 41(d) of Title 35, United States Code, authorizes the establishment of fees for services related to patents and not otherwise specified.

On December 12, 2003, the Office published *Changes to Representation of Others Before the United States Patent and Trademark Office*, a Notice of Proposed Rule Making in the **Federal Register** (68 FR 69441), 1278 *Off. Gaz. Pat. Office* 22 (Jan. 6, 2004), proposing to amend parts 1 and 2 of the rules and procedures governing patent and trademark prosecution (Title 37 of the Code of Federal Regulations), reserving part 10 and introducing part 11. Included in the proposed rules for part 11 were rules governing, *inter alia*, an annual fee for practitioners and procedures for both collecting the fee and informing practitioners who do not pay the fee of their situation—principally rules 1.21, 11.8 and 11.11. One hundred sixty-three written comments were received. Ninety of these written comments addressed the proposed annual practitioner fee requirement.

Following receipt and consideration of the comments to the proposed rules in the December 12, 2003 Notice regarding an annual fee and procedures for both collecting the fee and informing practitioners who do not pay the fee of their situation, the Office is prepared to proceed to final rule making. The fee in the final rules is referenced as the annual practitioner maintenance fee. The primary purposes for adopting a fee and procedures for both collecting the fee and informing practitioners who do not pay the fee of their situation is to maintain a roster of registered practitioners, including affording practitioners due process, protecting the public, preserving the integrity of the Office, and maintaining high professional standards.

A registered practitioner in active status is one who is able to represent clients and conduct business before the USPTO in patent cases. To maintain active status, the practitioner would pay the annual practitioner maintenance fee required under §§ 1.21(a)(7)(i) and 11.8(d).

An individual granted limited recognition under § 11.9(b) is one who is able to represent clients and conduct business before the USPTO in patent cases under specified conditions. To maintain limited recognition, the individual would pay the annual practitioner maintenance fee required under §§ 1.21(a)(8) and 11.8(d).

A registered practitioner in administrative inactive status or in voluntary inactive status would be prohibited from representing applicants or other parties and continuing to practice before the Office in patent cases. Administrative inactive status is applied only to a practitioner who is an employee of the USPTO, such as a patent examiner, and to judges. Voluntary inactive status is available to practitioners who have retired or are unable to continue their practice, but still desire to maintain a recognized professional association with the USPTO. Neither administrative inactive status nor voluntary inactive status is available to persons having limited recognition.

A registered practitioner under administrative inactive status is not responsible for payment of the annual practitioner maintenance fee while in this status. A registered practitioner under voluntary inactive status is responsible for paying a reduced annual practitioner maintenance fee during the period of inactivation. For the purposes of this section, the fee for a registered practitioner in voluntary inactive status is $25. If a condition occurs that automatically terminates a practitioner's administrative inactive status, e.g., separation from the USPTO, it would be permissible for that practitioner to seek a voluntary inactive status where the practitioner does not intend to represent clients and practice before the Office but still desires to maintain a professionally recognized association with the Office.

A registered practitioner who failed to pay the annual practitioner maintenance fee required under § 11.8(d) would be administratively suspended. A registered practitioner under active status can be administratively suspended for failure to comply with payment of the annual practitioner maintenance fee. A registered practitioner under voluntary inactive status can be administratively suspended for failure to comply with payment of the reduced annual practitioner maintenance fee. An individual granted limited recognition who failed to pay the annual practitioner maintenance fee required under § 11.8(d) would be administratively suspended.

The final rules will be applied as of the effective date of the final rules, without retroactive effect. For example, a person registered in the fiscal year in which the final rules become effective would not be required to pay the annual practitioner maintenance fee in that fiscal year. A further example is that unless a registered practitioner is in administrative inactive status or voluntary inactive status in the fiscal year in which the final rules become effective, a registered practitioner must pay the annual practitioner maintenance fee for active status. Still, a further example is that if the final rules become effective in fiscal year 2009, no fees under the final rules are due for fiscal year 2008. For purposes of these rules, the fiscal year begins on October 1 and ends on September 30.

Discussion of Specific Rules

Title 37 of the Code of Federal Regulations, Part 11, is amended as follows: Paragraph (d) of § 11.8 introduces an annual practitioner maintenance fee to be paid by registered practitioners in active status and persons granted limited recognition under § 11.9(b) to practice in patent cases before the Office. The amount of the fee is set forth in §§ 1.21(a)(7)(i) and 1.21(a)(8), respectively. Adequate notice of the due date for the annual practitioner maintenance fee will be published and sent to practitioners in advance. Failure to comply with these rules would subject a registered practitioner or person granted limited recognition to administrative suspension set forth in § 11.11(b). In the past, the fees paid by applicants and patentees have supported the costs of the activities that maintain the patent practitioner's community reputation for integrity. The annual practitioner maintenance fee is introduced pursuant to 35 U.S.C. 2(b)(2)(D) and 41(d). The annual practitioner maintenance fee will recover the estimated average cost to the Office for the roster maintenance process, including the costs of operating the disciplinary system. Maintaining the roster of registered practitioners up-to-date includes, for example, (i) processing additions to and deletions from the roster, (ii) maintaining current practitioner address/telephone/e-mail information, (iii) daily updating the roster with new changes of address, (iv) conducting investigations of alleged practitioner misconduct, and (v) conducting disciplinary proceedings against practitioners. With an annual practitioner maintenance fee, the Office will fund the disciplinary system as State disciplinary jurisdictions do, by fees from the bar members. Bar disciplinary activities are generally regarded as being in the interest of maintaining the Bar's reputation for integrity and supporting the willingness of potential clients to engage the services of practitioners. The continual updating of the USPTO roster is also in the interest of assuring that registered practitioners are identified to the public they seek and are authorized to serve. It is problematic to charge patent applicants for this activity since few patent applicants file grievances against practitioners. Many of the filed grievances concern patent applications that were not filed; applications that were filed or prosecuted improperly; applications that should not have been filed in the first place; or patent applicants who have not received the benefit of competent counsel. The anomaly is magnified by the need for disciplinary action concerning practitioners who have been convicted of felonies or have been disciplined by state bars for matters other than practice before the Office. By adopting an annual practitioner maintenance fee to be paid by registered practitioners, the cost of these activities is focused on those served by the roster maintenance and disciplinary system—registered practitioners, not applicants. Thus, USPTO will recover the costs associated with these activities from the practitioners instead of the public in general. The funds received from the annual practitioner maintenance fee would be directed to this process. The annual practitioner maintenance fee would not be imposed on persons during the fiscal year in which they are first registered or recognized to practice before the Office.

Paragraph (a) of § 11.11 provides for requiring practitioners to notify the OED Director of their postal address and telephone number for his or her business, as well as every change thereto. Additionally, it requires practitioners to notify the OED Director of up to three e-mail addresses for their business and every change to their e-mail addresses. Notice of the change of address or telephone number must be given within thirty days of the date of the change. Practitioners are encouraged to provide their business e-mail address to facilitate the Office's ability to communicate with the practitioners. A practitioner who is an attorney in good standing with the bar of the highest court of one or more states is also required to provide the OED Director with the state bar identification number associated with each membership. This will enable the OED Director to distinguish between individual

attorneys having the same or similar names. Further, the section identifies the information that the OED Director will routinely publish on the roster about each registered practitioner recognized to practice before the Office in patent cases.

Paragraph (b) of § 11.11 provides for administrative suspension for failure to comply with the payment of the annual practitioner maintenance fee required by § 11.8(d).

Paragraph (b)(1) of § 11.11 provides that the OED Director will mail a notice to the practitioner advising of noncompliance, stating the consequences of administrative suspension under paragraph (b)(5) of this section if noncompliance is not timely remedied, and the requirements for reinstatement under paragraph (f) of this section. The notice also will demand compliance within sixty days and payment of a delinquency fee. The notice also will be published. Paragraph (b)(1) of § 11.11 introduces payment of the delinquency fee. The amount of the fee is set forth in § 1.21(a)(9)(i). The amount of the fee is set to recover the estimated average cost to the Office for processes associated with a practitioner who is delinquent in payment of the annual practitioner maintenance fee.

Paragraph (b)(2) of § 11.11 provides that upon failure to comply with the notice and demand within the allowed time, the OED Director will send to the attorney, agent or person granted limited recognition a Rule to Show Cause as to why he or she should not be administratively suspended and no longer permitted to practice before the Office in patent matters, or hold himself or herself out as being registered or recognized to practice before the Office in patent matters. The OED Director shall file a copy of the Rule to Show Cause with the USPTO Director.

Paragraph (b)(3) of § 11.11 provides that, within 30 days of the OED Director sending the Rule to Show Cause, the attorney, agent or person granted limited recognition may file a response to the Rule to Show Cause with the USPTO Director and, if so, that the OED Director may file a reply thereto. Under this section the USPTO Director hears the matter on the documentary record and imposes the administrative suspension unless the USPTO Director determines that there is a genuine issue of material fact regarding notice or the failure to pay the requisite fees.

Paragraph (b)(4) of § 11.11 provides that an administratively suspended attorney, agent or person granted limited recognition continues to be responsible for paying his or her annual practitioner maintenance fee required by § 11.8(d).

Paragraph (b)(5) of § 11.11 provides that an administratively suspended attorney, agent or person granted limited recognition remains subject to investigation and discipline for his or her conduct prior to, during, or after the period he or she was administratively suspended.

Paragraph (b)(6) of § 11.11 provides that an administratively suspended attorney, agent or person granted limited recognition cannot practice before the Office in patent cases while under administrative suspension. An administratively suspended attorney, agent or person granted limited recognition who does not promptly obtain reinstatement must comply with applicable ethics rules concerning withdrawal from representation. An administratively suspended attorney, agent or person granted limited recognition who knows he or she has been administratively suspended will be subject to discipline for failing to comply with the provisions of this paragraph.

Paragraph (c)(1) of § 11.11 provides for administrative inactivation of a registered practitioner who becomes employed by the Office. The practitioner is not responsible for payments of the annual practitioner maintenance fee each complete fiscal year while the practitioner is in administratively inactive status.

Paragraph (c)(2) of § 11.11 provides for administrative inactivation of a registered practitioner who is a judge of a court of record, full-time court commissioner, U.S. bankruptcy judge, U.S. magistrate judge, or a retired judge who is eligible for temporary judicial assignment and is not engaged in the practice of law. The practitioner is not responsible for payments of the annual practitioner maintenance fee each complete fiscal year while the practitioner is in administratively inactive status.

Paragraph (d) of § 11.11 provides for voluntary inactivation of a registered practitioner. This section accommodates a registered practitioner who, at the time of the request, does not represent clients before the USPTO but still desires to maintain a recognized professional association with the USPTO. The USPTO will not inquire into reasons for seeking voluntary inactivation except that voluntary inactivation will be denied if the practitioner is delinquent in paying an annual practitioner maintenance fee or a delinquency fee. Voluntary inactivation will not preclude the USPTO from inquiring or continuing to inquire into possible ethical violations by the practitioner or imposing discipline therefor. Reasons for seeking voluntary inactivation may include retirement, health condition of the practitioner (long-term illnesses), or a practitioner's decision to practice in another substantive area.

Paragraph (d)(1) of § 11.11 provides that a registered practitioner may seek voluntary inactivation by filing a written request to be endorsed as inactive.

Paragraph (d)(2) of § 11.11 provides that a registered practitioner whose status has been changed to a voluntary inactive status continues to be responsible for paying his or her annual practitioner maintenance fee required by § 11.8(d) for such status. Paragraph (d)(2) of § 11.11 introduces payment of the annual practitioner maintenance fee for inactive status. The amount of the fee, $25, is set forth in § 1.21(a)(7)(ii). The amount of the fee is set to recover the estimated average cost to the Office for processes associated with a practitioner who is in inactive status.

Paragraph (d)(3) of § 11.11 provides that a registered practitioner in voluntary inactive status is still subject to investigation and discipline for ethical violations during the period of inactivation.

Paragraph (d)(4) of § 11.11 provides that a registered practitioner in arrears in annual practitioner maintenance fees or under administrative suspension for fee delinquency is ineligible to seek or enter into voluntary inactive status.

Paragraph (d)(5) of § 11.11 provides that a registered practitioner may not practice before the Office in patent cases while under voluntary inactive status. A practitioner in voluntary inactive status will be subject to discipline for failing to comply with the provisions of this paragraph. A voluntary inactive practitioner must comply with applicable ethics rules concerning withdrawal from representation.

Paragraph (d)(6) of § 11.11 provides for restoration to active status of a registered practitioner who is in voluntary inactive status in accordance with § 11.11(d). Paragraph (d)(6) of § 11.11 introduces payment of the fee for requesting restoration to active status from voluntary inactive status. The amount of the fee is set forth in § 1.21(a)(7)(iii). The amount of the fee is set to recover the estimated average cost to the Office for processing the request. The Office provides options for practitioners who are no longer attorneys in good standing at their state bars but seek active status before the USPTO. Since practitioners before the USPTO need not be attorneys, a practitioner who has ceased to be a

member in good standing of the bar of the highest court of a state for reasons other than ethical grounds may still seek to represent clients in patent matters before the USPTO as a patent agent. It becomes necessary to ensure that attorneys who are no longer members in good standing in a state bar explain the basis of such status when seeking restoration to active status before the USPTO. This section seeks to avoid the possibility that an attorney under a disciplinary proceeding or investigation in another disciplinary jurisdiction circumvents the obligation of informing the USPTO of any matter that detrimentally impacts the determination of the practitioner's moral character.

Any registered practitioner who is voluntarily inactivated pursuant to paragraph (d) of this section and who is a licensed attorney may comply with the submission of information and material pertaining to the practitioner's moral character on proof of being a member in good standing with the highest court of each state in which the practitioner is licensed to practice. If the registered practitioner is no longer a member in good standing of the highest court of another jurisdiction, the practitioner must submit a signed declaration or affidavit explaining the circumstances surrounding the practitioner's status in the other jurisdiction to the satisfaction of the OED Director that the reason for not being a member in good standing is not predicated on moral character. If the statement submitted is not to the satisfaction of the OED Director, the OED Director may decline restoration to active status on grounds of present lack of good moral character and reputation as set forth in § 11.7. An adverse decision by the OED Director is reviewable under § 11.2. This does not preclude the practitioner from submitting additional evidence to establish the requisite moral character.

Paragraph (d)(6) of § 11.11 also introduces payment of balance due upon restoration to active status from voluntary inactive status. The amount of the fee is set forth in § 1.21(a)(7)(iv). The amount of the fee is set to recover the balance of the estimated average cost to the Office for maintaining the roster. It is the difference between the annual practitioner maintenance fee for registered attorney or agent in active status, $118, and the annual practitioner maintenance fee for registered attorney or agent in voluntary inactive status, $25. The annual practitioner maintenance fee has increased from $100 proposed in December 2003, to $118 adopted in the final rules. In the nearly five years since the fee was proposed, the number of registered practitioners has increased from 28,835 in December 2003 to more than 36,400 in July 2008, and the staff of the Office of Enrollment and Discipline has been increased to maintain the enlarging roster of registered practitioners. The increase in the fee is a reflection of changes in the consumer price index and staffing adjustments from the time the rule was proposed.

Paragraph (e) of § 11.11 allows for resignation from practice before the Office of a registered practitioner who is neither under investigation under § 11.22 for a possible violation of the Mandatory Disciplinary Rules identified in § 10.20(b) of Part 10, subject to discipline under § 11.24 or § 11.25, nor subject to an adverse probable cause determination by a panel of the Committee on Discipline under § 11.23(b).

Paragraph (f) of § 11.11 establishes a procedure for administrative reinstatement of a registered practitioner who has been administratively suspended pursuant to § 11.11(b) or who has resigned pursuant to § 11.11(d). Paragraph (f) provides for payment of the annual practitioner maintenance fee set forth § 1.21(a)(7) for registered patent attorneys or agents, or the annual practitioner maintenance fee set forth in § 1.21(a)(8) for persons granted limited recognition. Paragraph (f) of § 11.11 also introduces payment of both the delinquency fee and the administrative reinstatement fee by the practitioner. The amount of the delinquency fee is set forth in § 1.21(a)(9)(i). The amount of the administrative reinstatement fee is set forth in § 1.21(a)(9)(ii). The amount of the delinquency fee is set to recover the estimated average cost to the Office for processes associated with a practitioner who is delinquent in payment of annual practitioner maintenance fee. The amount of the administrative reinstatement fee is set to recover the estimated average cost to the Office for processes associated with an application for reinstatement. A practitioner who resigned or was administratively suspended for two or more years before the date the Office receives a completed application from the person must also pass the registration examination under § 11.7(b)(1)(ii).

Response to comments: The Office published a notice proposing changes to the Office's rules governing disciplinary proceedings for attorneys, registered patent agents and persons granted limited recognition to practice before the Office. See *Changes to Representation of Others Before the United States Patent and Trademark Office*; Notice of proposed rulemaking, 68 FR 69442 (Dec. 12, 2003), 1278 *Off. Gaz. Pat. Office* 22 (Jan. 6, 2004) (proposed rule). The Office received one hundred sixty-three comments (from intellectual property organizations and patent practitioners) in response to this notice. The Office's responses to the ninety comments regarding an annual practitioner maintenance fee follow:

Comment 1: A number of comments noted that the staggered quarterly schedule of annual fee due dates set forth in the proposed rule would create an undue administrative burden on practitioners, particularly those who practice in large law firms, and would increase the possibility of confusion and inadvertent nonpayment of the fee. The comments indicated a single due date for all practitioners would reduce the administrative burden on practitioners and the Office, and would reduce the risk of inadvertent nonpayment.

Response: The suggestion in the comments has been adopted. The staggered quarterly schedule has been eliminated in favor of a single annual due date for all practitioners.

Comment 2: A large number of comments, citing past history, raised concern that annual practitioner maintenance fee payments would be diverted, and therefore opposed the annual practitioner maintenance fee on the basis that the fees would not be used to operate the roster maintenance process, including the disciplinary system.

Response: The USPTO has operated with full access to fee collections for the past four years. Annual practitioner maintenance fees collected under section 11.8(d) will be used to support maintenance of the roster of registered attorneys and agents, including the disciplinary system.

Comment 3: Several comments raised concern that proposed section 11.8(d) did not require separate notice to practitioners of the payment due date and, therefore, that practitioners would be more likely to inadvertently overlook payment of the fee.

Response: The suggestion to add a specific notice provision in section 11.8(d) has been adopted. Adequate notice of the due date will be sent to each practitioner at the last address provided pursuant to § 11.11(a) and will be published in the Official Gazette as well. It is expected that notice will also be published on the USPTO internet Web site. Pursuant to section 11.11(a), to ensure proper delivery of notices potentially affecting a practitioner's status, practitioners are required to update contact information within 30 days of a change. The USPTO has

implemented an on-line customer interface that will allow a practitioner to access his or her records with a username and password and to directly update address and contact information. Additionally, under 11.11(b)(1), whenever it appears that a registered patent attorney, a registered patent agent or a person granted limited recognition has failed to comply with § 11.8(d), the OED Director shall publish and send a notice to the attorney, agent or person granted limited recognition advising of the noncompliance, the consequence of being administratively suspended under paragraph (b)(5) of this section if noncompliance is not timely remedied, and the requirements for reinstatement under paragraph (f) of this section. The notice shall be published and sent to the attorney, agent or person granted limited recognition by mail to the last postal address furnished under paragraph (a) of this section or by e-mail addressed to the last e-mail addresses furnished under paragraph (a) of this section.

Comment 4: Several comments raised concern as to potential prejudice to clients in cases where an attorney handling a matter continues to make submissions to the USPTO after the attorney has been administratively suspended for failure to pay the annual fee and inquired as to how the USPTO would treat such submissions.

Response: Individuals representing others before the Office are expected at all times to meet the requirements for practice before the Office. Maintaining good standing and accurate contact information is the responsibility of the practitioner. Practitioners who properly update contact information on file with the Office of Enrollment and Discipline should receive ample notice of deadlines for payment of the annual practitioner maintenance fee and missed payment before the practitioner would be administratively suspended. A practitioner who has been administratively suspended may request an active member in his or her firm to timely file papers requiring a practitioner's signature. Nonetheless, a paper submitted in good faith by a practitioner who does not know that he or she has been administratively suspended for failure to pay the annual practitioner maintenance fee will be treated as unsigned. In the case of a new complete application, the applicant will receive a filing date because the signature of an attorney or agent on transmittal papers is not required. In the case of an unsigned *bona fide* response to an Office action, the submission will be treated in accordance with 37 CFR 1.135(c), and applicant may be given a new period of time to supply the omission. Practitioners should be aware, however, that submission of a response having an omission may affect patent term adjustment pursuant to 37 CFR 1.704(c)(7). In the case of an issue fee payment, an unsigned issue fee transmittal form may lead to abandonment of the application, in which case a petition to revive would be required.

Comment 5: Several comments asserted government patent attorneys and agents earn considerably less than the average annual income of patent attorneys and agents in the United States, and indicated a proposed $100 annual fee therefore would be excessively burdensome on government patent attorneys and agents. The comment suggested a reduced annual fee for attorneys and agents employed by the government. Similar comments were received with respect to part-time practitioners, solo practitioners and small law firms.

Response: The suggestion of a reduced annual practitioner maintenance fee for specific groups of active practitioners has not been adopted. The assertion in the comment that the average annual income for government patent attorneys and agents of approximately $80,000 is not supported in the comment. In any event, a $118 annual practitioner maintenance fee for an individual with an annual income of $80,000 represents about one seventh of one percent of the annual income, which will not have a significant economic impact on a substantial number of practitioners. The costs of maintaining the roster, including conducting disciplinary investigations regarding practitioners in such groups, is independent of the practitioner's income. Accordingly, having a single fee for all active practitioners is appropriate and fair.

Comment 6: Several comments suggested the annual practitioner maintenance fee should not be instituted because collection of an annual practitioner maintenance fee would increase the administrative burden on the Office of Enrollment and Discipline, thereby offsetting the collected fees with increased administrative costs.

Response: The suggestion has not been adopted. The Office of Enrollment and Discipline has developed a system for payment of annual fees through an on-line customer interface that will allow a practitioner to submit payments directly. Additionally, law firm or corporate administrators will be able to submit payments on behalf of multiple practitioners. The system will minimize the administrative burden on the Office of Enrollment and Discipline. Moreover, the on-line customer interface will allow a practitioner to directly update address and other contact information, further reducing the administrative burden of the Office by obviating the need for periodic surveys pursuant to § 10.11 and the reinstatement fee previously set forth in § 1.21(a)(3). Annual fee payment also may be submitted by mail or by hand delivery. It is also noted the $118 annual practitioner maintenance fee is not calculated to pay for the cost of administering a continuing education program for practitioners.

Comment 7: Several comments asserted Congress has not provided statutory authorization for the collection of an annual fee assessed against practitioners.

Response: The annual practitioner maintenance fee is authorized pursuant to the provisions of 35 U.S.C. 2(b)(2)(D) and 41(d).

Comment 8: Several comments suggested State bar associations carry out a broader range of services than does the Office of Enrollment and Discipline, and therefore asserted that an annual practitioner maintenance fee is unwarranted.

Response: The $118 annual practitioner maintenance fee is calculated on the basis of the cost of maintaining the roster, including the disciplinary system. The $118 figure is not based on services that are not provided by the Office of Enrollment and Discipline.

Comment 9: Several comments indicated the annual practitioner maintenance fee discriminates against patent practitioners over trademark attorneys.

Response: The Office does not maintain a roster of U.S. attorneys authorized to represent others before the Office in trademark and other non-patent matters, and therefore these individuals impose a lesser administrative burden. The vast majority of disciplinary investigations and actions involve registered practitioners. To the extent an unregistered practitioner is involved in a disciplinary proceeding, the Office has the authority to seek to recover the cost of the proceeding directly from the unregistered practitioner.

Comment 10: One comment asserted that many practitioners never practice before the Office, but nonetheless find value in maintaining registration because clients often prefer to have registered patent practitioners handling their matters. The comment suggested such individuals would rarely be the

basis of disciplinary proceedings at the Office and therefore should not have to pay an annual practitioner maintenance fee.

Response: The Office incurs the same administrative cost of maintaining the roster for practitioners who never practice as well as active practitioners. Moreover, disciplinary proceedings are not limited to conduct arising out of practice directly before the Office, and a practitioner who does not practice may have an increased possibility of client complaints stemming from unfamiliarity with Office practice. It is noted that a practitioner has the option of requesting voluntary inactive status under section 11.11(d) if the practitioner is not actively representing others in patent matters before the Office.

Comment 11: Several comments suggested there should be no annual practitioner maintenance fee for individuals in voluntary inactive status, and indicated the reduced annual practitioner maintenance fee for voluntary inactive practitioners should be eliminated.

Response: The suggestion has not been adopted. The Office continues to incur administrative costs in maintaining voluntary inactive practitioners on the roster, and voluntary inactive practitioners may be the subject of disciplinary investigation.

Comment 12: A number of comments asserted the cost of administering the roster and operating the disciplinary system should continue to be funded from application fees because practitioners will simply pass the cost of the annual practitioner maintenance fee on to clients as an overhead expense.

Response: The suggestion has not been adopted. Like state bars, the cost of administering the roster, including operating the Office disciplinary system, is properly borne primarily by practitioners rather than *pro se* applicants and other applicants.

Comment 13: Several comments asserted registration is a one-time event and suggested the costs of maintaining the roster and operating the disciplinary system should be recovered solely from fees collected at the time a practitioner applies for registration and initial registration fees.

Response: The suggestion has not been adopted. Fees collected at the time a practitioner applies for registration (*i.e.*, application fee and examination fee) recover the cost of processing applications for registration and administering the registration examination; the initial registration fee recovers the administrative costs of initial registration. Maintaining the roster, including the disciplinary system, are not one-time events; they are ongoing processes incurring ongoing costs.

Comment 14: One comment indicated the annual practitioner maintenance fee should not be implemented because it would create an economic disincentive discouraging students and unemployed scientists from taking and passing the registration examination.

Response: The suggestion has not been adopted. Persons newly registered are not liable for annual practitioner maintenance during the fiscal year in which they are first registered. Individuals may choose to go on voluntary inactive status if they are not practicing.

Comment 15: One comment asserted a practitioner may not be administratively suspended for failure to pay an annual practitioner maintenance fee without first being afforded notice and the opportunity for a hearing.

Response: Under Sec. 11.11(b), practitioners will be given advance notice of an impending administrative suspension as well as the opportunity for a hearing.

Comment 16: One comment suggested administrative suspension for failure to pay an annual practitioner maintenance fee would infringe on the right to free speech by preventing the administratively suspended practitioner from talking to another person about a patent application.

Response: An administratively suspended practitioner would be prohibited from practicing before the Office. The administratively suspended practitioner would not be prohibited from talking to another person about a patent application so long as the discussion does not constitute the practice of law before the Office.

Rule Making Considerations

Regulatory Flexibility Act: The Deputy General Counsel for General Law, United States Patent and Trademark Office, certified to the Chief Counsel for Advocacy, Small Business Administration, that the changes in this final rule will not have a significant impact on a substantial number of small entities (Regulatory Flexibility Act, 5 U.S.C. 605(b)). The provisions of the Regulatory Flexibility Act relating to the preparation of a regulatory flexibility analysis are not applicable to this final rule because the rule will not have a significant economic impact on a substantial number of small entities.

The final rule assesses a $118 annual practitioner maintenance fee upon registered attorneys and agents in active status and individuals granted limited recognition under 37 CFR 11.9(b). The Office estimates that approximately 37,000 practitioners will be subject to this fee under the final rule. The Office estimates that, in 2006, the average annual income in the United States of solo practitioners was $231,777; of patent attorneys who are partners in private firms, $434,464; of patent attorneys who are associates in private firms, $152,677; and of corporate IP attorneys, $198,109; and the average annual salary of patent agents in a firm in the United States was $92,761. AIPLA Report of the Economic Survey 2007, pp. 10, I–21, I–35, I–58 and F–25 (2007). Because the annual practitioner maintenance fee is less than one seventh of one percent of practitioners having an average annual income of $92,761 or more, this fee will not have a significant economic impact on practitioners.

It is estimated that annually about 150 practitioners will be in voluntary inactive status. Practitioners who choose voluntary inactive status are not required to pay the $118 annual practitioner maintenance fee. Rather, these practitioners must pay a $25 annual practitioner maintenance fee that will be assessed annually to registered attorneys and agents in voluntary inactive status. The Office estimates that the average income of an inactive practitioner in 2006 would have been comparable to the average income of a household the same year, $66,570. Income, Poverty, and Health Insurance Coverage in the United States: 2006, Current Population Reports, Consumer Income, U.S. Department of Commerce, pp. 27–29 (2007). The $25 annual practitioner maintenance fee assessed annually to registered attorneys and agents in voluntary inactive status is less than four one-hundredth of one percent of a household's annual income. Thus, this fee does not have a significant economic impact on a substantial number of small entities.

It is estimated that annually about ten practitioners in voluntary inactive status will request restoration to active status. The final rule imposes a $50 fee for requesting restoration to active status from voluntary inactive status. As previously noted, the Office estimates that, in 2008, the average annual income of patent attorneys in the United States is over $100,000, and the average annual income of patent agents in the United States is over $90,000. Thus, the $50 fee for requesting restoration to active status from involuntary status does not have a significant economic impact on a substantial number of small entities.

It is also estimated that the requests of all practitioners in voluntary inactive status for restoration to active status will

be granted. Thus, these practitioners (the Office estimates that there will be ten) must then pay the balance of the annual practitioner maintenance fee. These practitioners must pay an additional $93 fee for the balance due upon restoration to active status from voluntary inactive status ($118 minus the $25 inactive status fee already paid). As previously noted, the total fee of $118 will not have a significant economic impact on practitioners because it represents less than one seventh of one percent of practitioners having an average annual income of $92,761 or more. In addition, since only approximately ten practitioners out of approximately 37,000 practitioners are expected to be affected by this fee, this fee in the final rule will not impact a substantial number of small entities.

It is estimated that about 175 practitioners will be delinquent in paying their annual practitioner maintenance fee. The final rule imposes a $50 delinquency fee. This fee can be avoided in its entirety by simply paying the annual fee in a timely manner.

It is estimated that about 100 practitioners delinquent in paying their annual practitioner maintenance fee will be administratively suspended and will seek administrative reinstatement. The final rule imposes a $100 administrative reinstatement fee. Again, this fee can be avoided in its entirety by simply paying the annual fee prior to administrative suspension.

Even assuming that a practitioner chooses to switch from inactive to active status, and chooses to pay the fees late (by incurring a delinquency fee, administrative reinstatement fee and annual practitioner maintenance fee), the highest dollar amount assessed to any practitioner in this situation would be $268. It is estimated that only about 100 practitioners would be required to pay all of these fees. Given that the Office estimates the average annual income of patent attorneys in the United States is over $100,000, and the average annual income of patent agents in the United States is over $90,000, the total impact of all fees in this final rule does not have a significant economic impact on a substantial number of small entities.

Executive Order 13132: This notice of final rule making does not contain policies with federalism implications sufficient to warrant preparation of a Federalism Assessment under Executive Order 13132 (August 4, 1999).

Executive Order 12866: This notice of final rule making has been determined to be significant for purposes of Executive Order 12866 (September 30, 1993).

Paperwork Reduction Act: This notice of final rule making involves information collection requirements which are subject to review by the Office of Management and Budget (OMB) under the Paperwork Reduction Act of 1995 (44 U.S.C. 3501 *et seq.*). This notice of final rule making contains revisions governing the payment of an annual practitioner maintenance fee by patent practitioners to recover the costs of maintaining a roster of persons authorized to practice in patent cases before the USPTO and the costs of operating the USPTO disciplinary system. The principal impact of the changes in this notice of final rule making is on registered practitioners and individuals otherwise recognized to practice in patent cases before the USPTO. The information collections involved in this proposed rule have been previously reviewed and approved by OMB under OMB control number 0651–0012. The proposed revisions do not affect the information collection requirements for 0651–0012, so the USPTO is not resubmitting the collection to OMB for review and approval.

The title, description, and respondent description of the currently approved information collections for 0651–0012 are shown below with estimates of the annual reporting burdens. Included in the estimates is the time for reviewing instructions, gathering and maintaining the data needed, and completing and reviewing the collection of information.

OMB Number: 0651–0012.

Title: Admittance to Practice and Roster of Registered Patent Attorneys and Agents Admitted to Practice Before the Patent and Trademark Office (USPTO).

Form Numbers: PTO–158, PTO–158A, PTO–275, PTO–107A, PTO–1209, PTO–2126, PTO–2149, and PTO–2150.

Type of Review: Approved through December of 2010.

Affected Public: Individuals or households, businesses or other for-profit, Federal Government, and state, local, or tribal governments.

Estimated Number of Respondents: 72,122.

Estimated Time per Response: 5 minutes to 40 hours.

Estimated Total Annual Burden Hours: 89,475 hours.

Needs and Uses: The public uses the forms in this collection to ensure that all of the necessary information is provided to the USPTO and to request inclusion on the Register of Patent Attorneys and Agents.

Comments are Invited on: (1) Whether the collection of information is necessary for proper performance of the functions of the agency; (2) the accuracy of the agency's estimate of the burden; (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 to respondents.

Interested persons are requested to send comments regarding these information collections, including suggestions for reducing this burden, to Harry I. Moatz, Director of Enrollment and Discipline, Mail Stop OED-Ethics Rules, U.S. Patent and Trademark Office, P.O. Box 1450, Alexandria, Virginia 22313–1450, or to the Office of Information and Regulatory Affairs, Office of Management and Budget, New Executive Office Building, Room 10202, 725 17th Street, NW., Washington, DC 20503, Attention: Desk Officer for the United States Patent and Trademark Office.

Notwithstanding any other provision of law, no person is required to respond to nor shall a person be subject to a penalty for failure to comply with a collection of information subject to the requirements of the Paperwork Reduction Act unless that collection of information displays a currently valid OMB control number.

List of Subjects

37 CFR Part 1

Administrative practice and procedure, Patents.

37 CFR Part 11

Administrative practice and procedure, Inventions and patents, Lawyers, Reporting and recordkeeping requirements.

■ For the reasons set forth in the preamble, the United States Patent and Trademark Office is amending 37 CFR Parts 1 and 11 as follows:

PART 1—RULES OF PRACTICE IN PATENT CASES

■ 1. The authority citation for 37 CFR part 1 continues to read as follows:

Authority: 35 U.S.C. 2(b)(2), unless otherwise noted.

■ 2. In § 1.21, remove and reserve paragraph (a)(3), and add paragraphs (a)(7), (a)(8) and (a)(9) to read as follows:

§ 1.21 Miscellaneous fees and charges.

(a) * * *

(3) [Reserved]

* * * * *

(7) Annual practitioner maintenance fee for registered attorney or agent.

(i) Active Status—$118.00.

(ii) Voluntary Inactive Status—$25.00.

(iii) Fee for requesting restoration to active status from voluntary inactive status—$50.00.

(iv) Balance due upon restoration to active status from voluntary inactive status—$93.00.

(8) Annual practitioner maintenance fee for individual granted limited recognition—$118.00.

(9)(i) Delinquency fee—$50.00.

(ii) Administrative reinstatement fee—$100.00.

* * * * *

PART 11—REPRESENTATION OF OTHERS BEFORE THE UNITED STATES PATENT AND TRADEMARK OFFICE

■ 3. Revise the authority citation for 37 CFR part 11 to read as follows:

Authority: 5 U.S.C. 500, 15 U.S.C. 1123, 35 U.S.C. 2(b)(2), 32, 41.

■ 4. Amend § 11.8 by adding paragraph (d) to read as follows:

§ 11.8 Oath, registration fee, and annual practitioner maintenance fee.

* * * * *

(d) *Annual practitioner maintenance fee.* A registered patent attorney or agent shall annually pay to the USPTO Director a practitioner maintenance fee in the amount set forth in § 1.21(a)(7) of this subchapter. Individuals granted limited recognition under paragraph (b) of § 11.9 shall annually pay to the USPTO Director a practitioner maintenance fee in the amount set forth in § 1.21(a)(8) of this subchapter. Adequate notice shall be published and sent to practitioners in advance of the due date for payment of the annual practitioner maintenance fee. Payment shall be for the fiscal year in which the annual practitioner maintenance fee is assessed. Payment shall be due by the last day of the payment period. Persons newly registered or granted limited recognition shall not be liable for the annual practitioner maintenance fee during the fiscal year in which they are first registered or granted limited recognition. Failure to comply with the provisions of this paragraph (d) shall require the OED Director to subject a practitioner to a delinquency fee penalty set forth in § 11.11(b)(1), and further financial penalties and administrative suspension as set forth in § 11.11(b)(2) and (b)(3).

■ 5. Revise § 11.11 to read as follows:

§ 11.11 Administrative suspension, inactivation, resignation, and readmission.

(a) A registered attorney or agent must notify the OED Director of his or her postal address for his or her office, up to three e-mail addresses where he or she receives e-mail, and business telephone number, as well as every change to any of said addresses or telephone numbers within thirty days of the date of the change. A registered attorney or agent shall, in addition to any notice of change of address and telephone number filed in individual patent applications, separately file written notice of the change of address or telephone number to the OED Director. A registered practitioner who is an attorney in good standing with the bar of the highest court of one or more States shall provide the OED Director with the State bar identification number associated with each membership. The OED Director shall publish from the roster a list containing the name, postal business addresses, business telephone number, registration number, and registration status as an attorney or agent of each registered practitioner recognized to practice before the Office in patent cases.

(b) *Administrative suspension.* (1) Whenever it appears that a registered patent attorney, a registered patent agent or a person granted limited recognition under § 11.9(b) has failed to comply with § 11.8(d), the OED Director shall publish and send a notice to the attorney, agent or person granted limited recognition advising of the noncompliance, the consequence of being administratively suspended under paragraph (b)(5) of this section if noncompliance is not timely remedied, and the requirements for reinstatement under paragraph (f) of this section. The notice shall be published and sent to the attorney, agent or person granted limited recognition by mail to the last postal address furnished under paragraph (a) of this section or by e-mail addressed to the last e-mail addresses furnished under paragraph (a) of this section. The notice shall demand compliance and payment of a delinquency fee set forth in § 1.21(a)(9)(i) of this subchapter within sixty days after the date of such notice.

(2) In the event a registered patent attorney, registered patent agent or person granted limited recognition fails to comply with the notice of paragraph (b)(1) of this section within the time allowed, the OED Director shall publish and send in the manner provided for in paragraph (b)(1) of this section to the attorney, agent, or person granted limited recognition a Rule to Show Cause why his or her registration or recognition should not be administratively suspended, and he or she no longer be permitted to practice before the Office in patent matters or in any way hold himself or herself out as being registered or authorized to practice before the Office in patent matters. The OED Director shall file a copy of the Rule to Show Cause with the USPTO Director.

(3) Within 30 days of the OED Director's sending the Rule to Show Cause identified in § 11.11(b)(2), the registered patent attorney, registered patent agent or person granted limited recognition may file a response to the Rule to Show Cause with the USPTO Director. The response must set forth the factual and legal bases why the person should not be administratively suspended. The registered patent attorney, registered patent agent or person granted limited recognition shall serve the OED Director with a copy of the response at the time it is filed with the USPTO Director. Within ten days of receiving a copy of the response, the OED Director may file a reply with the USPTO Director that includes documents demonstrating that the notice identified in § 11.11(b)(1) was published and sent to the practitioner in accordance with § 11.11(b)(1). A copy of the reply by the OED Director shall be served on the registered patent attorney, registered patent agent or person granted limited recognition. When acting on the Rule to Show Cause, if the USPTO Director determines that there are no genuine issues of material fact regarding the Office's compliance with the notice requirements under this section or the failure of the person to pay the requisite fees, the USPTO Director shall enter an order administratively suspending the registered patent attorney, registered patent agent or person granted limited recognition. Otherwise, the USPTO Director shall enter an appropriate order dismissing the Rule to Show Cause. Nothing herein shall permit an administratively suspended registered patent attorney, registered patent agent or person granted limited recognition to seek a stay of the administrative suspension during the pendency of any review of the USPTO Director's final decision.

(4) An administratively suspended attorney, agent or person granted limited recognition remains responsible for paying his or her annual practitioner maintenance fee required by § 11.8(d).

(5) An administratively suspended attorney, agent or person granted limited recognition is subject to investigation and discipline for his or her conduct prior to, during, or after the period he or she was administratively suspended.

(6) An administratively suspended attorney, agent or person granted limited recognition is prohibited from

practicing before the Office in patent cases while administratively suspended. An attorney, agent or person granted limited recognition who knows he or she has been administratively suspended under this section will be subject to discipline for failing to comply with the provisions of this paragraph.

(c) *Administrative Inactivation.* (1) Any registered practitioner who shall become employed by the Office shall comply with § 10.40 of this subchapter for withdrawal from the applications, patents, and trademark matters wherein he or she represents an applicant or other person, and notify the OED Director in writing of said employment on the first day of said employment. The name of any registered practitioner employed by the Office shall be endorsed on the roster as administratively inactive. The practitioner shall not be responsible for payments of the annual practitioner maintenance fee each complete fiscal year while the practitioner is in administratively inactive status. Upon separation from the Office, the practitioner may request reactivation by completing and filing an application, Data Sheet, signing a written undertaking required by § 11.10, and paying the fee set forth in § 1.21(a)(1)(i) of this subchapter. Upon restoration to active status, the practitioner shall be responsible for paying the annual practitioner maintenance fee for the fiscal year in which the practitioner is restored to active status. An administratively inactive practitioner remains subject to the provisions of the Mandatory Disciplinary Rules identified in § 10.20(b) of this subchapter, and to proceedings and sanctions under §§ 11.19 through 11.58 for conduct that violates a provision of the Mandatory Disciplinary Rules identified in § 10.20(b) of this subchapter prior to or during employment at the Office. If, within 30 days after separation from the Office, the practitioner does not request active status or another status, the practitioner will be endorsed on the roster as voluntarily inactive and be subject to the provisions of paragraph (d) of this section.

(2) Any registered practitioner who is a judge of a court of record, full-time court commissioner, U.S. bankruptcy judge, U.S. magistrate judge, or a retired judge who is eligible for temporary judicial assignment and is not engaged in the practice of law may request, in writing, that his or her name be endorsed on the roster as administratively inactive. Upon acceptance of the request, the OED Director shall endorse the name of the practitioner as administratively inactive. The practitioner shall not be responsible for payment of the annual practitioner maintenance fee for each complete fiscal year the practitioner is in administratively inactive status. Following separation from the bench, the practitioner may request restoration to active status by completing and filing an application, Data Sheet, signing a written undertaking required by § 11.10, and paying the fee set forth in § 1.21(a)(1)(i) of this subchapter. Upon restoration to active status, the practitioner shall be responsible for paying the annual practitioner maintenance fee for the fiscal year in which the practitioner is restored to active status.

(d) *Voluntary Inactivation.* (1) Except as provided in paragraph (d)(4) of this section, any registered practitioner may voluntarily enter inactive status by filing a request, in writing, that his or her name be endorsed on the roster as voluntarily inactive. Upon acceptance of the request, the OED Director shall endorse the name as voluntarily inactive.

(2) A registered practitioner in voluntary inactive status shall be responsible for payment of the annual practitioner maintenance fee for voluntary inactive status set forth in § 1.21(a)(7)(ii) of this subchapter for each complete fiscal year the practitioner continues to be in voluntary inactive status.

(3) A registered practitioner who seeks or enters into voluntary inactive status is subject to investigation and discipline for his or her conduct prior to, during, or after the period of his or her inactivation.

(4) A registered practitioner who is in arrears in paying annual practitioner maintenance fees or under administrative suspension for annual practitioner maintenance fee delinquency is ineligible to seek or enter into voluntary inactive status.

(5) A registered practitioner in voluntary inactive status is prohibited from practicing before the Office in patent cases while in voluntary inactive status. A practitioner in voluntary inactive status will be subject to discipline for failing to comply with the provisions of this paragraph. Upon acceptance of the request for voluntary inactive status, the practitioner must comply with the provisions of § 10.40 of this subchapter.

(6) Any registered practitioner whose name has been endorsed as voluntarily inactive pursuant to paragraph (d)(1) of this section and is not under investigation, not subject to a disciplinary proceeding, and not in arrears for the annual practitioner maintenance fee for voluntary inactive status may be restored to active status on the register as may be appropriate provided that the practitioner files a written request for restoration, a completed application for registration on a form supplied by the OED Director furnishing all requested information and material, including information and material pertaining to the practitioner's moral character and reputation under § 11.7(a)(2)(i) during the period of inactivation, a declaration or affidavit attesting to the fact that the practitioner has read the most recent revisions of the patent laws and the rules of practice before the Office, and pays the fees set forth in §§ 1.21(a)(7)(iii) and (iv) of this subchapter.

(e) *Resignation.* A registered practitioner or a practitioner recognized under § 11.14(c), who is neither under investigation under § 11.22 for a possible violation of the Mandatory Disciplinary Rules identified in § 10.20(b) of Part 10 of this subchapter, subject to discipline under §§ 11.24 or 11.25, nor a practitioner against whom no probable cause has been found by a panel of the Committee on Discipline under § 11.23(b), may resign by notifying the OED Director in writing that he or she desires to resign. Upon acceptance in writing by the OED Director of such notice, that registered practitioner or practitioner under § 11.14 shall no longer be eligible to practice before the Office but shall continue to file a change of address for five years thereafter in order that he or she may be located in the event information regarding the practitioner's conduct comes to the attention of the OED Director or any grievance is made about his or her conduct while he or she engaged in practice before the Office. The name of any registered practitioner whose resignation is accepted shall be removed from the register, endorsed as resigned, and notice thereof published in the Official Gazette. Upon acceptance of the resignation by the OED Director, the practitioner must comply with the provisions of § 10.40 of this subchapter.

(f) *Administrative reinstatement.* (1) Any registered practitioner who has been administratively suspended pursuant to paragraph (b) of this section, or who has resigned pursuant to paragraph (e) of this section, may be reinstated on the register provided the practitioner has applied for reinstatement on an application form supplied by the OED Director, demonstrated compliance with the provisions of §§ 11.7(a)(2)(i) and (iii), and paid the fees set forth in §§ 1.21(a)(7)(i), (a)(9)(i) and (a)(9)(ii) of

this subchapter. Any person granted limited recognition who has been administratively suspended pursuant to paragraph (b) of this section may have their recognition reactivated provided the practitioner has applied for reinstatement on an application form supplied by the OED Director, demonstrated compliance with the provisions of §§ 11.7(a)(2)(i) and (iii), and paid the fees set forth in §§ 1.21(a)(8)(i), (a)(9)(i) and (a)(9)(ii) of this subchapter. A practitioner who has resigned or was administratively suspended for two or more years before the date the Office receives a completed application from the person who resigned or was administratively suspended must also pass the registration examination under § 11.7(b)(1)(ii). Any reinstated practitioner is subject to investigation and discipline for his or her conduct that occurred prior to, during, or after the period of his or her administrative suspension or resignation.

(2) Any registered practitioner whose registration has been administratively inactivated pursuant to paragraph (c) of this section may be reinstated to the register as may be appropriate provided within two years after his or her employment with the Office ceases or within two years after his or her employment in a judicial capacity ceases the following is filed with the OED Director: a request for reinstatement, a completed application for registration on a form supplied by the OED Director furnishing all requested information and material, and the fee set forth in § 1.21(a)(9)(ii) of this subchapter. Any registered practitioner inactivated or reinstated is subject to investigation and discipline for his or her conduct before, during, or after the period of his or her inactivation.

Dated: November 10, 2008.

Jon W. Dudas,

Under Secretary of Commerce for Intellectual Property and Director of the United States Patent and Trademark Office.

[FR Doc. E8–27208 Filed 11–14–08; 8:45 am]

BILLING CODE 3510–16–P

DEPARTMENT OF COMMERCE

Patent and Trademark Office

37 CFR Parts 2, 3, 6 and 7

[Docket No. PTO–T–2005–0018]

RIN 0651–AB89

Miscellaneous Changes to Trademark Rules of Practice

AGENCY: United States Patent and Trademark Office, Commerce.

ACTION: Final rule.

SUMMARY: The United States Patent and Trademark Office (''Office'') is amending the Trademark Rules of Practice to clarify certain requirements for applications, intent to use documents, amendments to classification, requests to divide, and Post Registration practice; to modernize the language of the rules; and to make other miscellaneous changes. For the most part, the rule changes are intended to codify existing practice, as set forth in the *Trademark Manual of Examining Procedure* (''TMEP'').

DATES: This rule is effective January 16, 2009.

FOR FURTHER INFORMATION: Contact Mary Hannon, Office of the Commissioner for Trademarks, by telephone at (571) 272–9569.

SUPPLEMENTARY INFORMATION: A proposed rule was published in the **Federal Register** on June 12, 2008 at *73 FR 33356*, and in the Official Gazette on July 8, 2008. The Office received comments from one law firm and one organization. These comments are posted on the Office's Web site at *http://www.uspto.gov/web/offices/pac/dapp/opla/comments/tm_comments2008aug20/index.htm*, and are addressed below.

References below to ''the Act,'' ''the Trademark Act,'' or ''the statute'' refer to the Trademark Act of 1946, 15 U.S.C. 1051 *et seq.*, as amended. References to ''TMEP'' or ''*Trademark Manual of Examining Procedure*'' refer to the 5th edition, September 2007. References to the ''TBMP'' or ''*Trademark Trial and Appeal Board Manual of Procedure*'' refer to the 2nd edition, Rev. 1, March 12, 2004.

Where appropriate, the Office has reworded or reorganized the rules for clarity, and added headings to facilitate navigation through the rules.

On August 14, 2008, the Office published a final rule that, *inter alia,* removed §§ 10.14 and 10.18 of this chapter and replaced them with new §§ 11.14 and 11.18; added a definition of ''attorney'' to § 11.1 of this chapter; and changed cross-references in several of the rules in parts 2 and 7 of this chapter. The rule change was effective September 15, 2008. *See* notice at *73 FR 47650* (Aug. 14, 2008). The cross-references in this notice have been changed accordingly.

Applications for Registration

The Office is amending § 2.21(a) to require that an application under section 1 or section 44 of the Trademark Act must be in the English language to receive a filing date.

Comment: One comment requested clarification as to whether the rule applies to applications under section 66(a) of the Trademark Act.

Response: The preamble of § 2.21 explicitly states that the rule applies only to ''an application under section 1 or section 44 of the Act.'' In a section 66(a) application (*i.e.*, a request for extension of protection of an international registration to the United States pursuant to the Madrid Protocol), the minimum filing requirements are set forth in section 66(b) of the Act, and compliance with these requirements is determined by the International Bureau of the World Intellectual Property Organization (''IB'') prior to sending to the Office the request for extension of protection to the United States. *See* TMEP section 1904.01(b) for further information about the filing date of a section 66(a) application.

The Office is removing § 2.21(c) because it is unnecessary. While it remains true that applicants who file on paper may resubmit the application documents and receive a new filing date as of the date of resubmission, it is unnecessary to say so in a rule.

The Office is amending § 2.23(a)(2), which requires that a TEAS Plus applicant continue to receive communications from the Office by electronic mail during the pendency of the application, to add a requirement that a TEAS Plus applicant maintain a valid e-mail correspondence address in order to maintain TEAS Plus status. If the e-mail address changes, the applicant must notify the Office of the new e-mail address. If an applicant chooses to receive correspondence on paper, the applicant will have to pay the processing fee required by §§ 2.6(a)(1)(iv) and 2.23(b).

The Office is amending § 2.32(a)(3)(iii) to indicate that the requirement for inclusion of the names and citizenship of the general partners in an application by a partnership applies only to domestic partnerships. Similarly, the Office is adding § 2.32(a)(3)(iv) to provide that if the applicant is a domestic joint venture,

the application must include the names and citizenship of all active members of the joint venture. These requirements are consistent with TMEP section 803.03(b). Because the Office does not track the varying legal effects of partnership and joint venturer status in foreign countries, and the relevance of this additional information has not been established, this requirement does not apply to foreign partnerships or foreign joint ventures.

Comment: Though noting that these requirements are consistent with the long-standing past practice of the Office, one commenter asserted that the requirements to set forth the names and citizenship of general partners and joint venturers impose an unfair burden of disclosure on domestic applicants because it does not apply to foreign partnerships.

Response: The Office is considering whether current practice regarding the requirement for the names and citizenship of general partners and active members of joint venturers should be changed, and will issue a new proposed rule if necessary. However, the Office believes it appropriate to incorporate its long-standing practice into the rules at this time.

The Office is amending § 2.32(a)(6) to delete the word ''and.'' The Office is amending § 2.32(a)(8) to change a period to a semicolon.

New § 2.32(a)(9) provides that if a mark includes non-English wording, the applicant must submit an English translation of that wording. New § 2.32(a)(10) provides that if the mark includes non-Latin characters, the applicant must submit a transliteration of those characters and either a translation of the corresponding non-English word(s) or a statement that the transliterated term has no meaning in English. This is consistent with the long-standing practice of the Office. TMEP section 809 *et seq*.

Comment: One commenter noted ''inconsistent treatment requiring translations between non-English wording and non-Latin characters,'' and asked the Office to ''consider whether the rules should also require an applicant to state whether non-English wording has no direct English meaning (*e.g.*, idiomatic expressions).''

Response: Section 2.32(a)(9) as written requires applicants to set forth both the direct literal translation of foreign wording and the meaning of foreign idiomatic expressions, and thus there is no inconsistency on this point. The requirement for translation of ''non-English wording'' encompasses only terms that have meaning in a foreign language, and does not apply to coined terms. In cases where a term has no meaning in a foreign language, it is often unnecessary to submit any statement regarding the significance of the term. However, in marks that include non-Latin characters, a transliteration is always necessary. Where a transliteration must be provided, the Office requires that the applicant also indicate whether the transliterated term has meaning in a foreign language.

The Office is amending § 2.33(b)(1) to remove the requirement that an application include a verified statement that the applicant ''has adopted and is using the mark shown in the accompanying drawing.'' This language is not required by statute and is deemed unnecessary. The rule as amended requires an allegation that ''the mark is in use in commerce.''

The Office is amending §§ 2.34(a)(1)(i), (a)(2), (a)(3)(i), and (a)(4)(ii) to change ''must allege'' to ''must also allege.'' This clarifies that the requirement for an allegation of current use or bona fide intention to use the mark in commerce applies to verifications filed after the application filing date.

The Office is adding § 2.34(a)(1)(v) to provide that if more than one item of goods or services is specified in a section 1(a) application, the dates of use need be for only one of the items specified in each class, provided that the particular item to which the dates apply is designated. This requirement for section 1(a) applications previously appeared in § 2.33(a)(2), but was inadvertently removed effective October 30, 1999, by the final rule published at 64 FR 48900 (Sept. 8, 1999). This requirement is consistent with the current requirements for allegations of use under §§ 2.76(c) and 2.88(c).

Comment: The Trademark Electronic Application System (''TEAS'') forms for filing applications and allegations of use do not provide for disclosure of the goods/services to which the date of first use applies, and should be updated accordingly.

Response: It is possible to designate the goods or services to which the dates of use apply in the current TEAS forms. In a TEAS Plus application, or a regular TEAS application in which the applicant enters the goods/services using the Office's on-line *Acceptable Identification of Goods and Services Manual* (''USPTO ID Manual''), different dates of use can be provided for any particular item (after assigning a section 1(a) filing basis to the item and clicking on the ''1(a)'' link for that item and entering the relevant information). If the applicant uses the free-text entry approach to identify the goods/services in a regular TEAS application, the on-line instructions advise the applicant to parenthetically indicate the item to which the dates apply (*e.g.*, ''pants, shirts (02/02/2000), shoes''). Alternatively, the applicant can use the Miscellaneous Statement field of the Additional Statement section of the application form to enter the information. In the Allegation of Use form, the applicant may enter the information in the existing free-text field for describing the submitted specimen (*e.g.*, ''The specimen consists of a label. The stated dates of first use apply specifically to shirts.'').

The Office is amending §§ 2.44(b) and 2.45(b), which pertain to collective and certification marks, to add a reference to section 66(a) applications. This corrects an oversight.

The Office is amending § 2.47(a) to remove the requirement for a specific allegation that a mark has been in ''lawful'' use in commerce in an application for registration on the Supplemental Register. Because the definition of ''commerce'' in section 45 of the Trademark Act is ''all commerce which may lawfully be regulated by Congress,'' the Office presumes that an applicant who alleges that ''the mark is in use in commerce'' is claiming lawful use. The Office generally questions the lawfulness of the alleged use in commerce only where the record shows a clear violation of law, such as the sale or transportation of a controlled substance. TMEP section 907.

The Office is also removing the requirement in § 2.47(a) that the applicant specify the type of commerce in which the mark is used. Because the definition of ''commerce'' in section 45 of the Act is ''all commerce which may lawfully be regulated by Congress,'' the Office presumes that a registrant who alleges that the mark is in use in commerce is alleging that the mark is in use in a type of commerce that Congress may regulate. The Office amended the Trademark Rules of Practice to remove the requirement for a specification of the type of commerce in applications for registration under section 1(a) of the Act, allegations of use in applications under section 1(b) of the Act, and affidavits under sections 8 and 15 of the Act, effective October 30, 1999 (*see* notice at *64 FR 48900* (Sept. 8, 1999)), but inadvertently overlooked §§ 2.47(a) and 2.153.

The Office is adding § 2.48, providing that the Office does not issue duplicate registrations. If two applications on the same register would result in registrations that are exact duplicates, the Office will permit only one application to mature into registration,

and will refuse registration in the other application. This codifies the long-standing practice of the Office. TMEP section 703. The Office will normally refuse registration in the later-filed application. The applicant may overcome the refusal by abandoning one of the applications or surrendering the registration.

The Office is amending § 2.52(b) to provide that special form drawings of marks that do not include color ''should'' show the mark in black on a white background, rather than that the drawing ''must'' show the mark in black on a white background. This gives examining attorneys discretion to accept a drawing that shows the mark in white on a black background, if this will more accurately depict the mark.

The Office is amending § 2.52(b)(1) to change the heading ''Color marks'' to ''Marks that include color.'' This corrects an error. ''Color marks'' are marks that consist *solely* of one or more colors used on particular objects, and § 2.52(b)(1) applies to all marks that include color.

The Office is amending § 2.53(a) to remove the reference to submission of a digitized image of a standard character mark as a drawing in a TEAS application. This option no longer exists. An applicant who wants to apply for a standard character mark through TEAS must use the default setting within the form, namely, the selected button for ''Standard Characters,'' and type the characters comprising the mark in the appropriate field on the TEAS form. TEAS generates the drawing. The Office is combining §§ 2.53(a)(1) and (2), because the requirements for standard character drawings in TEAS and TEAS Plus applications are now identical.

The Office is amending § 2.56(b)(1) to add a reference to ''displays associated with the goods.'' This conforms the rule with the definition of ''use in commerce'' in section 45 of the Act.

The Office is amending § 2.56(d)(2) to add a provision that where an applicant files a paper specimen that exceeds the size requirements of paragraph (d)(1), and the Office creates a digital facsimile copy of the specimen, the Office may destroy the original bulky specimen. This is consistent with current practice. TMEP section 904.02(b).

The Office is amending § 2.56(d)(4) to provide that specimens filed through TEAS may be in .pdf format. This provides TEAS filers with an additional option for filing specimens, and is consistent with current practice.

The Office is amending § 2.62 and its heading to add a requirement that a response to an Office action be signed by the applicant, someone with legal authority to bind the applicant (*e.g.*, a corporate officer or general partner of a partnership), or a practitioner who meets the requirements of § 11.14 (''qualified practitioner''). This is consistent with TMEP section 712.01.

The Office is amending § 2.64(c)(1) to state that the filing of an amendment to allege use does not extend the deadline for filing a response to an outstanding Office action, an appeal to the Trademark Trial and Appeal Board (''TTAB''), or a petition to the Director. This is consistent with current practice. TMEP section 1104.

The Office is amending § 2.65(a) to add a reference to a notice of appeal as a response that avoids abandonment of an application. This is consistent with section 12(b) of the Act.

The Office is revising § 2.73 to provide that only an application that includes section 1(a) of the Trademark Act as a filing basis, or for which an acceptable allegation of use under § 2.76 or § 2.88 has been filed, may be amended to seek concurrent use registration. The rule currently provides that applications under section 44 or section 66(a) of the Act may be amended to recite concurrent use. However, because section 2(d) of the Act requires concurrent lawful use in commerce by the parties to a concurrent use proceeding, the Office deems it inappropriate to allow amendment to seek concurrent use absent allegations and evidence of use in commerce. The Office is also adding a statement to § 2.99(g) that applications based solely on section 44 or section 66(a) are not subject to concurrent use registration proceedings.

The Office is revising § 2.74 to modernize the language and to add a provision that an amendment to an application must be signed by the applicant, someone with legal authority to bind the applicant (*e.g.*, a corporate officer or general partner of a partnership), or a qualified practitioner. This is consistent with TMEP section 605.02.

Intent To Use

The Office is amending § 2.76(d) to provide that an amendment to allege use (''AAU'') should be captioned ''Allegation of Use'' rather than ''amendment to allege use.'' This is consistent with the language on the Office's TEAS form. The term ''allegation of use'' encompasses both AAUs under § 2.76 and statements of use (''SOUs'') under § 2.88. The principal difference between AAUs and SOUs is the time of filing, and the same TEAS form is used for both filings. The rule merely sets forth the preferred title; the Office will still accept documents titled ''amendment to allege use'' or ''statement of use.''

The Office is amending § 2.77 to add a provision that amendments deleting a basis in a multiple-basis application, notices of change of attorney, and notices of change of address may be entered in a section 1(b) application during the period between the issuance of the notice of allowance and the submission of a statement of use. This is consistent with current practice. TMEP section 1107.

The Office is amending § 2.88(b)(1)(ii) to clarify that the dates of use specified in a statement of use must pertain to the goods or services identified in the notice of allowance, and that where an applicant claims section 1(a) for some goods/services in a class and section 1(b) for other goods/services in the same class, the statement of use must include dates for the section 1(b) goods/services.

The Office is amending § 2.88(b)(3) to provide that the applicant must pay a filing fee sufficient to cover at least one class within the statutory time for filing the statement of use, or the application will be abandoned. If the applicant submits a fee insufficient to cover all the classes in a multiple-class application, the applicant must specify the class(es) to be abandoned. If the applicant submits a fee sufficient to pay for at least one class, but insufficient to cover all the classes, and the applicant has not specified the class(es) to which the fee applies, the Office will issue a notice granting the applicant additional time to submit the fee(s) for the remaining class(es), or specify the class(es) to be abandoned. If the applicant does not submit the required fee(s) or specify the class(es) to be abandoned within the set time period, the Office will apply the fees paid, beginning with the lowest numbered class(es), in ascending order. The Office will delete the goods/services in the remaining class(es) not covered by the fees submitted. This is consistent with current practice.

The Office is amending § 2.88(d) to provide that an SOU should be captioned ''Allegation of Use'' rather than ''statement of use.'' This is consistent with the amendment to § 2.76(d), discussed above.

The Office is amending § 2.88(i)(2) to remove the provision that if any goods or services specified in the notice of allowance are omitted from the identification of goods or services in the SOU, the examining attorney will question the discrepancy and permit the applicant to reinsert the omitted goods/services, and substitute a provision that the Office will delete the omitted goods/services from the application and will

not permit the applicant to reinsert them. Currently, if the applicant omits goods/services identified in the notice of allowance from a paper SOU, but the applicant has not indicated an intention to delete those goods/services from the application or filed a request to divide the application, the examining attorney will contact the applicant to confirm that the applicant intends to delete the omitted goods/services, and will permit the applicant to amend the SOU to claim use on or in connection with the omitted goods/services. However, when an SOU is filed electronically, the TEAS form requires the applicant to expressly indicate an intention to delete any omitted goods/services/class(es), or include them within a separately filed request to divide. Therefore, if any of the goods/services identified in the notice of allowance do not appear in the identification of goods/services in a TEAS SOU, the examining attorney does not question the discrepancy and the applicant may not reinsert the omitted goods/services. TMEP section 1109.13. These inquiries concerning paper SOUs have sometimes caused unnecessary delay in applications after the applicant intentionally omitted goods/services. Therefore, the Office is changing its practice and will discontinue questioning goods/services that are omitted from paper SOUs. Under the new rule, the practice with paper SOUs would conform with the current practice for electronically filed SOUs. Applicants must set forth (or incorporate by reference) the goods/services on or in connection with which the mark is in use. This is consistent with the Office's long-standing practice with respect to requests for extensions of time to file a statement of use, set forth in § 2.89(f).

The Office is revising §§ 2.89(a)(2) and (b)(2) to add a provision that if an applicant timely submits a fee sufficient to pay for at least one class, but insufficient to cover all the classes, and the applicant has not specified the class(es) to which the fee applies, the Office will issue a notice granting the applicant additional time to submit the fee(s) for the remaining class(es), or specify the class(es) to be abandoned. If the applicant does not submit the required fee(s) or specify the class(es) to be abandoned within the set time period, the Office will apply the fees paid, beginning with the lowest numbered class(es), in ascending order. The Office will delete the remaining goods/services not covered by the fees submitted. This is consistent with current practice. TMEP section 1108.02(c).

Comment: Additional time is ''undefined.'' No time period is set forth in the rule or TMEP.

Response: The Office will amend TMEP section 1108.02(c) to indicate that the applicant will be given thirty days in which to cure the fee deficiency in an extension request that includes a fee sufficient to pay for at least one class, but insufficient to cover all the classes.

Amendments to Classification

The Office is amending § 2.85(a) to add a reference to amendments to adopt international classification.

The Office is combining §§ 2.85(b) and (c), pertaining to the old United States classification system, and adding a reference to amendments to adopt international classification.

The Office is redesignating § 2.85(f), pertaining to certification marks and collective membership marks, as § 2.85(c), and adding a statement that the classes set forth in §§ 6.3 and 6.4 do not apply to applications based on section 66(a) of the Trademark Act and registered extensions of protection. This is consistent with current practice. TMEP section 1904.02(b). Classes A, B, and 200 are from the old United States classification system that the United States still uses to classify certification and collective membership marks, but are not included in the international classes under the Nice Agreement Concerning the International Classification of Goods and Services for the Purposes of the Registration of Marks (''Nice Agreement''). Therefore, these classes do not apply to section 66(a) applications and registered extensions of protection, in which the IB determines classification. The Office is similarly amending §§ 6.3 and 6.4, indicating that these sections apply only to applications based on sections 1 and 44 of the Trademark Act and registrations resulting from such applications.

Current § 2.85(d), which now provides that renewals filed on registrations issued under a prior classification system are processed on the basis of that system, is redesignated as § 2.183(f), and amended to add an exception for registrations that have been amended to adopt international classification pursuant to § 2.85(e)(3).

New § 2.85(d) provides that in an application under section 66(a) of the Act or registered extension of protection, the classification cannot be changed from the classification that the IB has assigned, classes cannot be added, and goods or services cannot be transferred from one class to another in a multiple-class application. This is consistent with current practice. TMEP sections 1401.03(d) and 1904.02(b).

Comment: One comment requests that the Office clarify and/or reconsider this change. The commenter notes that in some instances ''the applicant is seeking to identify a good/service that was not the subject of classification by the IB.'' For example, if the international registration covered ''nutritional aids'' in Class 30, the applicant could not amend to ''nutritional supplements,'' because the United States classifies nutritional supplements in Class 5. This ''works a complete forfeiture of rights'' as to the goods or services that must be deleted from Class 30 in the section 66(a) application.

Response: Under Article 3(2) of the Madrid Protocol, the IB controls classification in an international registration. Under section 70(a) of the Trademark Act and Articles 6(3) and 6(4) of the Protocol, a section 66(a) application and any resulting registration remains part of and dependent upon the international registration. Since the international registration is limited to those classes that the IB has assigned, no legal basis exists for registration of the mark as to goods/services that fall outside these classes under U.S. standards. Upon notification of the final grant of protection, the IB would ultimately refuse any change in classification made during examination of a section 66(a) application. Therefore, the international classification of goods/services in a section 66(a) application cannot be changed from the classification that the IB has assigned.

While the IB controls *classification,* the same standards of specificity used in examining applications under sections 1 and 44 of the Act govern the propriety of the *identification* of goods/services in a section 66 (a) application. Section 68(a) of the Act; Madrid Protocol Article 5(1). Accordingly, if the initial identification of goods/services in a section 66(a) application is definite but misclassified under U.S. standards, the Office will accept the identification in the IB-assigned class. However, if the initial identification of goods/services is not definite, the classification cannot be changed and the scope of the identification for purposes of permissible amendment is limited by the classification that the IB has assigned. *See* TMEP section 1904.02(b) and Examination Guide 3–08, *Examination Procedures for Identifications of Goods and Services in Applications under Trademark Act Section 66(a) pursuant to the Madrid Protocol* (July 2, 2008), available on the Office's Web site at *http://*

www.uspto.gov/web/offices/tac/notices/examguide3-08.htm.

Thus, in the commenter's example above, if the international registration covered ''nutritional aids'' in Class 30, the applicant could not amend to ''nutritional supplements,'' because ''nutritional aids'' is an indefinite identification that can only be amended within the scope of the IB-designated Class 30. However, if the international registration covered ''nutritional supplements'' in Class 30, the Office would permit registration in Class 30, even though the Office classifies these goods in Class 5. No rights would be forfeited. Thus, international applicants who plan to seek an extension of protection to the United States can avoid forfeiting rights in a particular item by reviewing the USPTO ID Manual before filing the request for extension of protection of an international registration to the United States. The applicant can then include language in the international application, or by entry of a limitation of the goods or services extended to the United States, that will be acceptable in the United States. Alternatively, the applicant can seek registration in the United States under a different basis, such as section 1(b) or section 44. Regarding limitations, *see* TMEP sections 1904.03(g) and 1904.15, and *Examination Guide 3–08,* sections IV *et seq.*

Comment: The Office should consider implementing a pseudo-classification system so that the Office's automated search system would show the classes that the Office considers to be ''correct'' in cases where the classification designated by the IB differs from that of the Office. This would permit all Madrid applicants to amend the classification of goods/services in the same way non-Madrid filers presently do, and retain the full scope of protection afforded by registration. This would also ensure that a product or service that is ''misclassified'' by the IB is discovered in a search of Office records.

Response: The Office is developing such a system, to ensure that relevant marks in section 66(a) applications will be found in a search of Office records, even if the IB and USPTO classifications differ. However, that does not change the fact that no legal basis exists for registration of the mark in the United States as to goods/services that do not fall within the class(es) that the IB has assigned. Thus, even if a pseudo-classification system is implemented for search purposes, amendment of the classification in a section 66(a) application will still be prohibited.

Comment: Since there are already situations where the classification in section 66(a) applications and registered extensions of protection is ''wrong,'' due to the Office's practice of accepting definite identifications that are misclassified under U.S. standards, the Office should also permit amendment of indefinite identifications within the class assigned by the IB, even if that class is incorrect under U.S. standards.

Response: When a particular product or service identified in an international application could be classified in more than one class, but only one of the applicable classes has been indicated, the IB assumes ''that the reference is only to the product or service falling in the identified class.'' *Guide to the International Registration of Marks under the Madrid Agreement and Protocol,* Para. B.II.23.02 (Jan. 2008), available on the IB Web site at *http://www.wipo.int/madrid/en/guide/index.html.* Therefore, the Office believes that the scope of permissible amendment of an indefinite identification must be limited by the IB-assigned class. Furthermore, the practice of accepting identifications that are misclassified under U.S. standards must be limited to the extent possible.

The Office is removing § 2.85(e), which now pertains to appeal and renewal fee deficiencies in multiple-class applications and registrations, and moving the provisions on appeal fees to § 2.141(b). Section 2.183(e) already covers procedures for processing renewal fee deficiencies in multiple-class registrations.

Section 2.85(e) provides for changes in classification pursuant to the Nice Agreement. The international classification changes periodically, and the *International Classification of Goods and Services for the Purposes of the Registration of Marks,* which is published by the World Intellectual Property Organization, lists these changes. The current edition of the Nice Agreement is the 9th edition, 2006, which became effective January 1, 2007.

Section 2.85(e)(1) provides that when international classification changes, the new requirements apply only to applications filed on or after the effective date of the change.

Section 2.85(e)(2) and (3) provide that in section 1 and 44 applications filed before the effective date of a change in classification, and registrations resulting from such applications, the applicant or registrant may reclassify the goods or services in accordance with the current edition, upon payment of the required fees. This is consistent with current practice, set forth in TMEP sections 1401.11 and 1609.04.

The Office is redesignating § 2.85(g), which provides that classification schedules shall not limit or extend the applicant's rights, as § 2.85(f), and amending it to note an exception that in section 66(a) applications, the scope of the identification of goods or services for purposes of permissible amendments is limited by the class, because the classification that the IB has assigned may not be changed. This is consistent with TMEP section 1402.07(a). *See* discussion, *above,* of the scope of permissible amendment of an indefinite identification in a section 66(a) application, in the responses to comments on § 2.85(d).

Requests To Divide

The Office is separating the current § 2.87(c) into subsections 2.87(c)(1) and (c)(2).

The Office is adding § 2.87(c)(3) to provide that in a multiple basis application, a request to divide out goods or services having a particular basis may be filed during the period between the issuance of the notice of allowance under section 13(b)(2) of the Act and the filing of a statement of use under § 2.88. This is consistent with current practice. TMEP section 1107.

The Office is adding § 2.87(e) to provide that any outstanding time period for action by the applicant in the original application at the time of the division will apply to each new separate application that the division creates. This provision appeared in § 2.87(a) when the rule was first enacted in 1989, but was inadvertently removed when the rules were amended to adjust application filing fees on January 19, 2005. *See* notices at 54 FR 37562 (Sept. 11, 1989) and 70 FR 2952 (Jan. 19, 2005). Subsections (e)(1) through (e)(3) set forth certain specified exceptions, consistent with current practice, as set forth in TMEP sections 1110.04 and 1110.05.

The Office is adding § 2.87(f), requiring that a request to divide be signed by the applicant, someone with legal authority to bind the applicant (*e.g.*, a corporate officer or general partner of a partnership), or a qualified practitioner. This is consistent with TMEP section 1110.

The Office is adding § 2.87(g), setting forth the procedures for division of a section 66(a) application after a change in ownership with respect to some, but not all, of the goods or services. This incorporates existing practice, set forth in TMEP section 1110.08.

The Office is adding § 2.171(b)(2), to provide for division of registered extensions of protection upon notification by the IB that ownership of

an international registration has changed with respect to some, but not all, of the goods or services. This reflects current practice. TMEP section 1615.02.

Post Registration

The Office is amending § 2.153 to change ''registrant'' to ''owner,'' to make it clear that an affidavit or declaration under section 12(c) of the Act must be filed by the owner of the registration, and to add a requirement that the affidavit or declaration be signed by a person properly authorized to sign on behalf of the owner. This is consistent with current practice, set forth in TMEP section 1603, and with the requirements of § 2.161 for affidavits or declarations under section 8 of the Act.

The Office is further amending § 2.153 to remove the requirement for specification of the type of commerce in an affidavit claiming the benefits of section 12(c) of the Trademark Act of 1946 for a registration issued under the Trademark Acts of 1881 or 1905. This is consistent with the amendment of § 2.47(a), discussed above.

The Office is amending the center heading immediately after § 2.158 to delete the wording ''DURING SIXTH YEAR,'' to correct an oversight. The heading covers rules pertaining to affidavits or declarations under section 8 of the Act (''section 8 affidavits''). Effective October 30, 1999, such affidavits must be filed every tenth year after registration as well as during the sixth year.

The Office is amending § 2.161(g)(3) to provide that specimens filed through TEAS may be in .pdf format. This offers TEAS filers an additional option for filing specimens, and is consistent with current practice.

The Office is separating the current § 2.163(b) into new §§ (b) and (c). Section 2.163(b) is amended to require that a response to an Office action issued in connection with a section 8 affidavit be signed by the owner, someone with legal authority to bind the owner, or a qualified practitioner. This is consistent with TMEP section 1604.16.

The last sentence of the current § 2.163(b) is moved to new § (c), and revised to indicate that a registration will be cancelled for failure to respond to an Office action issued in connection with a section 8 affidavit only if no time remains in the grace period under section 8(c)(1) of the Act. This corrects an oversight in the current rule. Cancelling a registration under section 8 before expiration of the grace period would be inappropriate. If time remains in the grace period, the owner may file a complete new affidavit.

The Office is amending § 2.167(a) to provide that an affidavit or declaration of incontestability under section 15 of the Trademark Act must be filed in the name of the owner of the registration, and verified by the owner or a person properly authorized to sign on behalf of the owner (§ 2.161(b)). The Office is amending § 2.167(d) to substitute ''owner'' for ''registrant,'' to make it clear that the affidavit or declaration must be filed by the owner of the registration. These changes are consistent with TMEP section 1605.04.

The Office is amending § 2.167(f) for clarity.

The Office is amending § 2.171(a) to remove the requirement that a request for a new certificate of registration upon change of ownership include the original certificate of registration. This is consistent with current practice, and with Office practice in connection with requests to amend or correct registrations under section 7 of the Trademark Act. *See* notice at *69 FR 51362* (Aug. 19, 2004), removing the requirement that a section 7 request include the original certificate.

The Office is amending § 2.171(a) to add a statement that in a registered extension of protection, the assignment must be recorded with the IB before recordation in the Office. This is consistent with current § 7.22.

The Office is redesignating § 2.171(b) as (b)(1), and amending the section to indicate applicability only to registrations resulting from applications based on section 1 or 44 of the Act.

The Office is adding § 2.171(b)(2), providing for division of registered extensions of protection upon notification by the IB that ownership of an international registration has changed with respect to some, but not all, of the goods or services. This reflects current practice. TMEP section 1615.02.

The Office is reorganizing § 2.173, pertaining to amendment of registrations. The current paragraph (a) is separated into new paragraphs (a) through (d).

Section 2.173(a) provides that the owner of a registration may file a written request to amend a registration or to disclaim part of the mark in the registration; and that if the registration is involved in an inter partes proceeding before the TTAB, the request must be filed by appropriate motion to the TTAB. This is consistent with current § 2.173(a) and TMEP section 1609.01(b).

The current paragraph (b) is separated into new paragraphs (e) and (g).

New § 2.173(b) sets forth the requirements for the request for amendment.

Section 2.173(b)(2) requires that the request be filed in the name of the owner and signed by the owner, someone with legal authority to bind the owner (*e.g.*, a corporate officer or general partner of a partnership), or a qualified practitioner. The requirement for filing in the name of the owner is consistent with current practice. However, the requirement for signature by someone with legal authority to bind the owner or by a qualified practitioner changes current practice slightly. TMEP section 1609.01(b) now permits signature by a person with firsthand knowledge of the facts and actual or implied authority to act on behalf of the owner, which could include someone without legal authority to bind the owner. The Office believes that the better practice is to require that a request to amend a registration be signed by someone with legal authority to bind the owner or by a qualified practitioner.

Section 2.173(b)(3) requires that an amendment to change the mark include a specimen showing the mark as used on or in connection with the goods or services, an affidavit or a declaration under § 2.20 stating that the specimen was in use in commerce at least as early as the filing date of the amendment, and a new drawing of the amended mark. This is consistent with current § 2.173(a) and TMEP section 1609.02(c).

Section 2.173(c) provides that the registration must still contain registrable matter, and § 2.173(d) provides that the amendment may not materially alter the mark. This is consistent with current § 2.173(a).

Section 2.173(e) provides that no amendment to the identification of goods or services in a registration will be permitted, except to restrict the identification or change it in ways that would not require republication of the mark. This is consistent with current § 2.173(b).

The Office is adding § 2.173(f) to provide that if the registration includes a disclaimer, description of the mark, or miscellaneous statement, any amendment must include a request to make any necessary conforming amendments to the disclaimer, description, or other miscellaneous statements. For example, if the mark is XYZ INC., with a disclaimer of the entity designator ''INC.,'' and the owner of the registration proposes to amend the mark to remove ''INC.,'' the proposed amendment should also request that the disclaimer be deleted. If a proposed amendment does not include all necessary conforming amendment(s), the examiner will issue

an Office action requiring the amendment(s).

New § 2.173(g) provides that an amendment seeking the elimination of a disclaimer will be permitted only if deletion of the disclaimed portion of the mark is also sought. This provides an exception to the general prohibition against amendments to delete disclaimers, currently set forth in § 2.173(b), in the limited situation where the mark is amended to delete the disclaimer.

The Office is amending § 2.175(b)(2) to require that a request to correct the owner's error in a registration be filed in the name of the owner and signed by the owner, someone with legal authority to bind the owner (*e.g.*, a corporate officer or general partner of a partnership), or a qualified practitioner. This is consistent with the amendment of § 2.173(b)(2), discussed above. The Office is also amending the heading and paragraph (a) of § 2.175 to substitute ''owner'' for ''registrant,'' for consistency.

The Office is adding § 2.183(f) to provide that applications for renewal of registrations issued under a prior classification system will be processed on the basis of that system, except where the registration has been amended to adopt international classification. The provision that applications for renewal of registrations issued under a prior classification system are processed on the basis of that system is currently set forth in § 2.85(d). The reference to amendment of classification is consistent with § 2.85(e)(3), discussed above.

Section 2.184(b) is redesignated as § 2.184(b)(1), and amended to provide that a registration will expire for failure to respond to an Office action issued in connection with a renewal application only if no time remains in the grace period under section 9(a) of the Act. This corrects an oversight in the current rule. It would be inappropriate to cancel a registration for failure to renew before the renewal grace period has expired. If time remains in the grace period, the registrant may file a complete new renewal application.

The Office is adding § 2.184(b)(2) to require that a response to an Office action issued in connection with a renewal application be signed by the registrant, someone with legal authority to bind the registrant (*e.g.*, a corporate officer or general partner of a partnership), or a qualified practitioner. This is consistent with TMEP section 1606.12.

Madrid Protocol

The Office is amending § 7.11(a)(2) to provide that the applicant's entity in an application for international registration must be identical to the entity listed as owner of the basic application or registration. This is consistent with current practice. TMEP section 1902.02(c). Under section 61(a) of the Trademark Act, only the owner of the basic application or registration may file an international application.

The Office is amending the last sentence of § 7.14(e) to change ''submitted to'' to ''received in,'' for clarity.

The Office is amending § 7.25(a) to remove §§ 2.175 and 2.197 from the list of rules in part 2 that do not apply to an extension of protection of an international registration to the United States. Section 2.175 pertains to correction of mistakes by a registrant. Generally, all requests to record changes to an international registration must be filed at the IB, because an extension of protection of an international registration remains part of the international registration even after registration in the United States. However, in the limited circumstance where the holder of an international registration makes a mistake in a document filed during prosecution in the Office that affects only the extension of protection to the United States, the registrant may request correction of the error pursuant to § 2.175. For example, if there was a minor typographical error in an amendment to the identification of goods in a section 66(a) application, and the mark registered, the owner of the registration could request correction under § 2.175. If the Office grants the request, the Office will notify the IB of the change to the extension of protection to the United States.

Section § 2.197 provides a ''certificate of mailing or transmission'' procedure to avoid lateness due to mail delay. Section 66(a) applicants may currently use this procedure during prosecution of applications. Owners of registered extensions of protection who file affidavits of use or excusable nonuse under section 71 of the Trademark Act may also use this procedure. Therefore, its inclusion in § 7.25(a) was an error. Under §§ 2.197(a)(2)(ii) and 7.4(e), the certificate of mailing or transmission procedure remains inapplicable to international applications under § 7.11, responses to notices of irregularity under § 7.14, subsequent designations under § 7.21, requests to record changes of ownership under § 7.23, requests to record restrictions of the holder's right of disposal (or the release of such restrictions) under § 7.24, and requests for transformation under § 7.31.

Note: On February 29, 2008, the Office published a proposed rule that would prohibit the use of certificates of mailing or transmission for certain specified documents for which an electronic form is available in TEAS. See notice at 73 FR 11079. The Office is still reviewing the comments received in response to this proposal.

See the discussion of amendments to classification in section 66(a) applications in connection with new § 2.85(d), *above.*

Assignment Cover Sheet

The Office is amending § 3.31 to add a new paragraph (a)(8) requiring that a cover sheet submitted with a request to record a change of ownership of a trademark application or registration must include the citizenship or state or country of organization of the party receiving the interest; and that if the party receiving the interest is a domestic partnership or domestic joint venture, the cover sheet must include the names, legal entities, and national citizenship (or state or country of organization) of all general partners or active members that compose the partnership or joint venture. Currently, § 3.31(f) provides that the cover sheet ''should'' include this information, but the new rule makes it mandatory, to allow for more efficient processing of trademark applications and registrations.

The applicant's entity and citizenship or state or country of organization are required in an application for registration under § 2.32(a)(3)(iii) and must be submitted before the Office can issue a registration certificate in the name of the new owner. This information is also required when the new owner of a registration wants to change ownership in the trademark database and/or obtain a new certificate of registration in the name of the new owner. Requiring the information whenever a change of ownership is recorded will eliminate the need for the examining attorney or Post Registration examiner to issue an Office action requiring submission, which can cause substantial delay. Furthermore, in many cases, having complete information about the receiving party will ensure that the trademark database is automatically updated at the time of recordation or shortly thereafter. *See* TMEP sections 504 *et seq.* regarding automatic updating of the trademark database upon recordation of a change of ownership (automatic updating should ensure that the original certificate of registration issues in the name of the new owner).

References to ''Paper''

The Office is amending §§ 2.6(b)(6), 2.21(b), 2.21(c), 2.27(d), 2.87(d), 2.146(e)(1), 2.146(e)(2), and 2.146(i) to delete references to ''papers'' and substitute ''documents'' where appropriate, in order to encompass documents filed or issued electronically.

The Office is amending §§ 2.6(a)(19), 2.6(b)(3), and 2.56(d)(2) to delete references to ''file wrapper'' and substitute ''record'' or ''official record.'' The Office now maintains electronic records of applications and registrations.

The Office is amending §§ 2.62, 2.65(a), 2.66(a)(1), 2.66(d), 2.66(f)(1), 2.81(b), 2.89(a), 2.89(a)(3), 2.89(g), 2.93, 2.99(d)(2), 2.146(d), 2.146(e)(1), 2.146(e)(2), 2.146(j)(1), 2.163(b), 2.165(b), 2.176, 2.184(b), 2.186(b), 7.39(b), and 7.40(b) to change references to ''mailing'' to ''issuance,'' to encompass Office actions and communications issued electronically.

Comment: One commenter asserts that ''issuance'' is ambiguous because it ''could refer to either the date an Office Action is written or is mailed.'' The commenter notes that the Trademark Applications and Registrations Retrieval (''TARR'') database currently lists either ''Non-Final Action Mailed'' or ''Non-Final Action E-Mailed.'' The commenter suggests that the rules be amended to change ''mailing'' to ''mailing and e-mailing,'' or, alternatively, that TARR be changed to list an ''issuance'' date where it formerly listed ''Mailed'' or ''E-Mailed.''

Response: The Office has reviewed the context in which the term ''issuance'' is used in these rules, and believes the term clearly does not refer to the date on which an Office action is written, as opposed to the date on which it is mailed or e-mailed. ''Issuance'' is defined as ''[t]he provision of something by issuing it.'' The verb ''issue'' can be defined as ''[t]o send out officially, as in to issue an order'' (Law); ''[p]repare and issue for public distribution or sale;'' ''[c]irculate or distribute;'' or ''[b]ring out [as] an official document. * * *'' Webster's Online Dictionary, search of ''issuance'' and ''issue,'' *http://www.websters-online-dictionary.org/definition/issue* (Aug. 14, 2008). Therefore, the Office deems it unnecessary to change the rule or the information in TARR. The information in TARR indicates specifically whether the notice was mailed or e-mailed, which could be useful information.

The Office is amending § 2.81(b) to remove the sentence stating that ''The mailing date that appears on the notice of allowance will be the issue date of the notice of allowance,'' because it is unnecessary. The rule already states that the notice of allowance will include the issue date.

The Office is amending §§ 2.84(b), 2.173, 2.174, and 2.175 to delete references to ''printed,'' and substitute ''issued'' where appropriate, to encompass documents issued electronically.

The Office is amending §§ 2.87(d), 2.146(e)(i), and 2.146(i) to delete references to ''paper'' and to substitute ''document,'' to encompass documents filed through TEAS.

Sections 2.173(c), 2.174, and 2.175(c) are amended to remove the statements that printed copies of amendments and corrections under section 7 of the Act are attached to printed copies of the registration.

Comment: One commenter asked for clarification of how amendments and corrections would be communicated when certified copies of the registration are printed.

Response: The Office previously attached an updated registration certificate showing an amendment or correction to the original certificate and returned it to the owner of the registration, but this practice was changed in 2004. *See* notice at *69 FR 51362* (Aug. 19, 2004) (removing the requirement that the owner of a registration send the original certificate of registration or a certified copy thereof with a request for amendment or correction under section 7 of the Act). Currently, when a request for amendment or correction is granted, the Office sends an updated registration certificate showing the amendment or correction to the owner of record, and updates Office records accordingly. TMEP sections 1609.01(b) and 1609.10. A certified copy of the updated registration certificate may be obtained from the Document Services Branch of the Public Records Division for a fee.

Appeal Fees

The Office is reorganizing § 2.141 to move the provisions pertaining to appeal fees, some of which were previously set forth in § 2.85(e), to § 2.141(b). This is consistent with current practice, set forth in TBMP section 1202.04.

Other Changes

The Office is amending § 2.6(a)(13) to replace a section symbol with the word ''section.'' This is consistent with references to the statute in other rules, and with the format recommended in the *Federal Register Document Drafting Handbook,* National Archives and Records Administration, Office of the Federal Register (Oct. 1998). Section symbols are used in rules and **Federal Register** notices only to refer to other sections of the CFR.

The Office is amending § 2.6(a)(8) to delete ''assignee'' and substitute ''registrant.'' This clarifies that any registrant may request a new certificate of registration, upon payment of the required fee.

The Office is revising § 2.25 to provide that documents filed by an applicant or registrant become part of the official record and will not be returned or removed. The rule currently provides only for applications, but the new rule encompasses all documents filed in connection with an application or registration. This is consistent with current practice. *See* TMEP section 404. There is an exception for documents ordered to be filed under seal pursuant to a protective order issued by a court or by the TTAB.

The Office is removing § 2.26, which provides that a drawing from an abandoned application may be transferred to and used in a new application, if the file has not been destroyed. This rule is no longer in use and is deemed unnecessary.

The Office is amending § 2.32(a)(6) to delete the word ''and'' after the semicolon, and is amending § 2.32(a)(7) to change a period to a semicolon.

The Office is amending § 2.41 to add a reference to ''services'' at the end of the last sentence. This corrects an oversight.

The Office is amending § 2.86(a)(2) to delete the period and substitute a semicolon, followed by the word ''and'' (''; and'').

The Office is amending § 2.146(c) to add a provision that a petition to the Director be signed by the petitioner, someone with legal authority to bind the petitioner (*e.g.*, a corporate officer or general partner of a partnership), or a qualified practitioner. The rule further provides that when facts are to be proved on petition, the petitioner must submit proof in the form of affidavits or declarations in accordance with § 2.20, signed by someone with firsthand knowledge of the facts to be proved. This is consistent with TMEP sections 1705.03 and 1705.07.

The Office is amending § 2.195(b) to delete the phrase ''In addition to being mailed,'' because it is unnecessary.

The Office is amending § 2.195(e) to clarify the procedures for filing a petition to the Director to consider correspondence filed on the date of attempted filing by Express Mail during a postal service interruption or

emergency within the meaning of 35 U.S.C. 21(a). New § 2.195(e)(1) provides that a person who attempted to file correspondence by Express Mail, but was unable to deposit the correspondence with the United States Postal Service due to the interruption or emergency, may petition the Director to consider the correspondence to have been filed on the date of attempted filing. New § 2.195(e)(2) sets forth the requirements for the petition. New § 2.195(e)(3) notes that this procedure does not apply to correspondence that is excluded from the Express Mail procedure pursuant to § 2.198(a)(1). This is consistent with current practice.

The Office is amending § 2.208(c)(3) and removing § 2.208(c)(4), to update the mailing address for payments to replenish deposit accounts. This is consistent with § 1.25(c)(4) of this chapter.

Rule Making Requirements

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

Administrative Procedure Act: This rule merely involves rules of agency practice and procedure within the meaning of 5 U.S.C. 553(b)(A). Therefore, this rule may be adopted without prior notice and opportunity for public comment under 5 U.S.C. 553(b) and (c), or thirty-day advance publication under 5 U.S.C. 553(d). However, the Office has chosen to seek public comment before implementing the rule.

Regulatory Flexibility Act: The Deputy General Counsel for General Law of the United States Patent and Trademark Office hereby certifies to the Chief Counsel for Advocacy of the Small Business Administration that this final rule, Miscellaneous Changes to Trademark Rules of Practice (RIN 0651–AB89), will not have a significant impact on a substantial number of small entities (Regulatory Flexibility Act, 5 U.S.C. 605(b)).

As prior notice and an opportunity for public comment are not required pursuant to 5 U.S.C. 553 (or any other law), neither a regulatory flexibility analysis nor a certification under the Regulatory Flexibility Act (5 U.S.C. 601 *et seq.*) is required. *See* 5 U.S.C. 603.

The new rules clarify certain requirements for trademark applications and other trademark-related documents, modernize the language of the rules, and make some other miscellaneous procedural changes. In large part, the rule changes are intended to codify existing practice. Although the rules may affect any trademark applicant or registrant, because they codify the existing practice of the Office or concern relatively minor procedural matters, the changes will not have a significant economic impact on a substantial number of small entities.

Unfunded Mandates: The Unfunded Mandates Reform Act 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 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 given year. This rule will have no such effect on State, local, and tribal governments or the private sector.

Executive Order 13132: This rule does not contain policies with federalism implications sufficient to warrant preparation of a Federalism Assessment under Executive Order 13132 (Aug. 4, 1999).

Paperwork Reduction Act: This rule involves information collection requirements which are subject to review by the Office of Management and Budget (''OMB'') under the Paperwork Reduction Act of 1995 (44 U.S.C. 3501 *et seq.*). The collection of information in this rule has been reviewed and previously approved by OMB under control numbers 0651–0009, 0651–0050, 0651–0051, 0651–0054, 0651–0055, and 0651–0056.

The United States Patent and Trademark Office is not resubmitting any information collection package to OMB for its review and approval because the changes in this rule will not affect the information collection requirements associated with the information collections under the OMB control numbers listed above. The changes in this notice are limited to amending the rules of practice to simplify and clarify the requirements for amendments to applications and registrations, reword and reorganize the rules for clarity, and codify current practices and procedures.

Interested persons are requested to send comments regarding these information collections, including suggestions for reduction of this burden to: (1) The Office of Information and Regulatory Affairs, Office of Management and Budget, New Executive Office Building, Room 10202, 725 17th Street, NW., Washington, DC 20503, Attention: Desk Officer for the Patent and Trademark Office; and (2) Commissioner for Trademarks, P.O. Box 1451, Alexandria, VA 22313–1451 (Attn: Mary Hannon).

Notwithstanding any other provision of law, no person is required to respond to nor shall a person be subject to a penalty for failure to comply with a collection of information subject to the requirements of the Paperwork Reduction Act unless that collection of information displays a currently valid OMB control number.

List of Subjects

37 CFR Part 2

Administrative practice and procedure, Trademarks.

37 CFR Part 3

Administrative practice and procedure, Trademarks.

37 CFR Part 6

Administrative practice and procedure, Trademarks, Classification.

37 CFR Part 7

Administrative practice and procedure, Trademarks, International Registration.

■ For the reasons given in the preamble and under the authority contained in 15 U.S.C. 1123 and 35 U.S.C. 2, as amended, the Office is amending parts 2, 3, 6, and 7 of title 37 as follows:

PART 2—RULES OF PRACTICE IN TRADEMARK CASES

■ 1. The authority citation for 37 CFR part 2 continues to read as follows:

Authority: 15 U.S.C. 1123, 35 U.S.C. 2, unless otherwise noted.

■ 2. Revise § 2.6(a)(8), (13), and (19), and § 2.6(b)(3) and (6) to read as follows:

§ 2.6 Trademark fees.

* * * * *

(a) * * *

(8) For issuing a new certificate of registration upon request of registrant—$100.00

* * * * *

(13) For filing an affidavit under section 15 of the Act, per class—$200.00

* * * * *

(19) Dividing an application, per new application created—$100.00

* * * * *

(b) * * *

(3) Certified or uncertified copy of a trademark-related official record—$50.00

* * * * *

(6) For recording each trademark assignment, agreement or other document relating to the property in a registration or application

* * * * *

■ 3. Amend § 2.21 by revising paragraphs (a) introductory text and (b) to read as follows, and by removing paragraph (c):

§ 2.21 Requirements for receiving a filing date.

(a) The Office will grant a filing date to an application under section 1 or section 44 of the Act that is in the English language and contains all of the following:

* * * * *

(b) If the applicant does not submit all the elements required in paragraph (a) of this section, the Office will deny a filing date and issue a notice explaining why the filing date was denied.

■ 4. Revise § 2.23(a)(2) to read as follows:

§ 2.23 Additional requirements for TEAS Plus application.

(a) * * *

(2) Maintain a valid e-mail correspondence address, and continue to receive communications from the Office by electronic mail.

* * * * *

■ 5. Revise § 2.25 to read as follows:

§ 2.25 Documents not returnable.

Except as provided in § 2.27(e), documents filed in the Office by the applicant or registrant become part of the official record and will not be returned or removed.

■ 6. Remove § 2.26.

■ 7. Revise § 2.27(d) to read as follows:

§ 2.27 Pending trademark application index; access to applications.

* * * * *

(d) Except as provided in paragraph (e) of this section, the official records of applications and all proceedings relating thereto are available for public inspection and copies of the documents may be furnished upon payment of the fee required by § 2.6.

* * * * *

■ 8. Revise § 2.32(a)(3)(iii), (a)(6), and (a)(8), and add new § 2.32(a)(3)(iv), (a)(9), and (a)(10) to read as follows:

§ 2.32 Requirements for a complete application.

(a) * * *

(3) * * *

(iii) If the applicant is a domestic partnership, the names and citizenship of the general partners;

(iv) If the applicant is a domestic joint venture, the names and citizenship of the active members of the joint venture;

* * * * *

(6) A list of the particular goods or services on or in connection with which the applicant uses or intends to use the mark. In a United States application filed under section 44 of the Act, the scope of the goods and/or services covered by the section 44 basis may not exceed the scope of the goods and/or services in the foreign application or registration;

(7) * * *

(8) If the mark is not in standard characters, a description of the mark;

(9) If the mark includes non-English wording, an English translation of that wording; and

(10) If the mark includes non-Latin characters, a transliteration of those characters, and either a translation of the transliterated term in English, or a statement that the transliterated term has no meaning in English.

* * * * *

■ 9. Revise § 2.33(b)(1) to read as follows:

§ 2.33 Verified statement.

* * * * *

(b)(1) In an application under section 1(a) of the Act, the verified statement must allege:

That the applicant believes it is the owner of the mark; that the mark is in use in commerce; that to the best of the declarant's knowledge and belief, no other person has the right to use the mark in commerce, either in the identical form or in such near resemblance as to be likely, when applied to the goods or services of the other person, to cause confusion or mistake, or to deceive; that the specimen shows the mark as used on or in connection with the goods or services; and that the facts set forth in the application are true.

* * * * *

■ 10. Revise § 2.34(a)(1)(i), (a)(2), (a)(3)(i) and (a)(4)(ii), and add new paragraph (a)(1)(v) to read as follows:

§ 2.34 Bases for filing.

(a) * * *

(1) * * *

(i) The trademark owner's verified statement that the mark is in use in commerce on or in connection with the goods or services listed in the application. If the verification is not filed with the initial application, the verified statement must also allege that the mark was in use in commerce on or in connection with the goods or services listed in the application as of the application filing date;

* * * * *

(v) If more than one item of goods or services is specified in the application, the dates of use required in paragraphs (ii) and (iii) of this section need be for only one of the items specified in each class, provided that the particular item to which the dates apply is designated.

(2) *Intent-to-use under section 1(b) of the Act.* In an application under section 1(b) of the Act, the applicant must verify that it has a bona fide intention to use the mark in commerce on or in connection with the goods or services listed in the application. If the verification is not filed with the initial application, the verified statement must also allege that the applicant had a bona fide intention to use the mark in commerce on or in connection with the goods or services listed in the application as of the filing date of the application.

(3) * * *

(i) The applicant's verified statement that it has a bona fide intention to use the mark in commerce on or in connection with the goods or services listed in the application. If the verification is not filed with the initial application, the verified statement must also allege that the applicant had a bona fide intention to use the mark in commerce on or in connection with the goods or services listed in the application as of the filing date of the application.

* * * * *

(4) * * *

(i) * * *

(ii) Include the applicant's verified statement that it has a bona fide intention to use the mark in commerce on or in connection with the goods or services listed in the application. If the verification is not filed with the initial application, the verified statement must also allege that the applicant had a bona fide intention to use the mark in commerce on or in connection with the goods or services listed in the application as of the filing date of the application.

* * * * *

■ 11. Amend § 2.41 by revising paragraph (a) to read as follows:

§ 2.41 Proof of distinctiveness under section 2(f).

(a) When registration is sought of a mark which would be unregistrable by reason of section 2(e) of the Act but which is said by applicant to have become distinctive in commerce of the goods or services set forth in the application, applicant may, in support of registrability, submit with the application, or in response to a request for evidence or to a refusal to register, affidavits, or declarations in accordance with § 2.20, depositions, or other appropriate evidence showing duration, extent and nature of use in commerce and advertising expenditures in connection therewith (identifying types of media and attaching typical advertisements), and affidavits, or declarations in accordance with § 2.20,

letters or statements from the trade or public, or both, or other appropriate evidence tending to show that the mark distinguishes such goods or services.

* * * * *

■ 12. Revise § 2.44(b) to read as follows:

§ 2.44 Collective mark.

(a) * * *

(b) In an application to register a collective mark under section 1(b), section 44 or section 66(a) of the Act, the application shall specify and contain all applicable elements required by the preceding sections for trademarks, but shall also specify the class of persons intended to be entitled to use the mark, indicating what their relationship to the applicant will be, and the nature of the control applicant intends to exercise over the use of the mark.

■ 13. Revise § 2.45(b) to read as follows:

§ 2.45 Certification mark.

(a) * * *

(b) In an application to register a certification mark under section 1(b), section 44 or section 66(a) of the Act, the application shall include all applicable elements required by the preceding sections for trademarks. In addition, the application must: specify the conditions under which the certification mark is intended to be used; allege that the applicant intends to exercise legitimate control over the use of the mark; and allege that the applicant will not engage in the production or marketing of the goods or services to which the mark is applied. When the applicant files an allegation of use under § 2.76 or § 2.88, the applicant must submit a copy of the standards that determine whether others may use the certification mark on their goods and/or in connection with their services.

■ 14. Revise § 2.47(a) to read as follows:

§ 2.47 Supplemental Register.

(a) In an application to register on the Supplemental Register under section 23 of the Act, the application shall so indicate and shall specify that the mark has been in use in commerce.

* * * * *

■ 15. Add new § 2.48, to read as follows:

§ 2.48 Office does not issue duplicate registrations.

If two applications on the same register would result in registrations that are exact duplicates, the Office will permit only one application to mature into registration, and will refuse registration in the other application.

■ 16. Revise § 2.52(b) introductory text and (b)(1) to read as follows:

§ 2.52 Types of drawings and format for drawings.

* * * * *

(b) *Special form drawing.* Applicants who seek to register a mark that includes a two or three-dimensional design; color; and/or words, letters, or numbers or the combination thereof in a particular font style or size must submit a special form drawing. The drawing should show the mark in black on a white background, unless the mark includes color.

(1) *Marks that include color.* If the mark includes color, the drawing must show the mark in color, and the applicant must name the color(s), describe where the color(s) appear on the mark, and submit a claim that the color(s) is a feature of the mark.

* * * * *

■ 17. Revise § 2.53(a) to read as follows:

§ 2.53 Requirements for drawings filed through the TEAS.

* * * * *

(a) *Standard character drawings.* If an applicant seeks registration of a standard character mark, the applicant must enter the mark in the appropriate field on the TEAS form, and check the box to claim that the mark consists of standard characters.

* * * * *

■ 18. Revise § 2.56(b)(1), (d)(2), and (d)(4) to read as follows:

§ 2.56 Specimens.

* * * * *

(b)(1) A trademark specimen is a label, tag, or container for the goods, or a display associated with the goods. The Office may accept another document related to the goods or the sale of the goods when it is impracticable to place the mark on the goods, packaging for the goods, or displays associated with the goods.

* * * * *

(d)(1) * * *

(2) If the applicant files a specimen exceeding these size requirements (a ''bulky specimen''), the Office will create a digital facsimile of the specimen that meets the requirements of the rule (*i.e.*, is flat and no larger than 8½ inches (21.6 cm.) wide by 11.69 inches (29.7 cm.) long) and put it in the record. The Office may destroy the original bulky specimen.

* * * * *

(4) For a TEAS submission, the specimen must be a digitized image in .jpg or .pdf format.

■ 19. Revise § 2.62 to read as follows:

§ 2.62 Procedure for filing response.

(a) *Deadline.* The applicant's response to an Office action must be received within six months from the date of issuance.

(b) *Signature.* The applicant, someone with legal authority to bind the applicant (*e.g.*, a corporate officer or general partner of a partnership), or a practitioner who meets the requirements of § 11.14 of this chapter must sign the response.

■ 20. Revise § 2.64(c)(1) to read as follows:

§ 2.64 Final action.

* * * * *

(c)(1) If an applicant in an application under section 1(b) of the Act files an amendment to allege use under § 2.76 during the six-month response period after issuance of a final action, the examiner shall examine the amendment. The filing of an amendment to allege use does not extend the deadline for filing a response to an outstanding Office action, appeal to the Trademark Trial and Appeal Board, or petition to the Director.

* * * * *

■ 21. Revise § 2.65(a) to read as follows:

§ 2.65 Abandonment.

(a) If an applicant fails to respond, or to respond completely, within six months after the date an action is issued, the application shall be deemed abandoned unless the refusal or requirement is expressly limited to only certain goods and/or services. If the refusal or requirement is expressly limited to only certain goods and/or services, the application will be abandoned only as to those particular goods and/or services. A timely petition to the Director pursuant to §§ 2.63(b) and 2.146 or notice of appeal to the Trademark Trial and Appeal Board pursuant to § 2.142, if appropriate, is a response that avoids abandonment of an application.

* * * * *

■ 22. Revise § 2.66(a)(1), (d), and (f)(1) to read as follows:

§ 2.66 Revival of abandoned applications.

(a) * * *

(1) Within two months of the date of issuance of the notice of abandonment; or

* * * * *

(d) In an application under section 1(b) of the Act, the Director will not grant the petition if this would permit the filing of a statement of use more than 36 months after the date of issuance of the notice of allowance under section 13(b)(2) of the Act.

* * * * *

(f) * * *

(1) Files the request within two months of the date of issuance of the decision denying the petition; and

* * * * *

■ 23. Revise § 2.73 to read as follows:

§ 2.73 Amendment to recite concurrent use.

An application that includes section 1(a) of the Trademark Act as a filing basis, or for which an acceptable allegation of use under § 2.76 or § 2.88 has been filed, may be amended to an application for concurrent use registration, provided that the application as amended meets the requirements of § 2.42. The trademark examining attorney will determine whether the application, as amended, is acceptable.

■ 24. Revise § 2.74 to read as follows:

§ 2.74 Form and signature of amendment.

(a) *Form of Amendment.* Amendments should be set forth clearly and completely. Applicant should either set forth the entire wording, including the proposed changes, or, if it would be more efficient, indicate which words should be added and which words should be deleted. The examining attorney may require the applicant to rewrite the entire amendment, if necessary for clarification of the record.

(b) *Signature.* The applicant, someone with legal authority to bind the applicant (*e.g.*, a corporate officer or general partner of a partnership), or a practitioner who meets the requirements of § 11.14 must sign the request for amendment. If the amendment requires verification, the verification must be sworn to or supported by a declaration under § 2.20 by a person properly authorized to sign on behalf of the applicant (§ 2.33(a)).

■ 25. Revise § 2.76(d) to read as follows:

§ 2.76 Amendment to allege use.

* * * * *

(d) The title ''Allegation of Use'' should appear at the top of the document.

* * * * *

■ 26. Revise § 2.77 to read as follows:

§ 2.77 Amendments between notice of allowance and statement of use.

(a) The only amendments that can be entered in an application between the issuance of the notice of allowance and the submission of a statement of use are:

(1) The deletion of specified goods or services from the identification of goods/services;

(2) The deletion of a basis in a multiple-basis application; and

(3) A change of attorney or change of address.

(b) Other amendments filed during this period will be placed in the application file and considered when the statement of use is examined.

■ 27. Revise § 2.81(b) to read as follows:

§ 2.81 Post publication.

(a) * * *

(b) In an application under section 1(b) of the Act for which no amendment to allege use under § 2.76 has been submitted and accepted, if no opposition is filed within the time permitted or all oppositions filed are dismissed, and if no interference is declared, a notice of allowance will issue. The notice of allowance will state the serial number of the application, the name of the applicant, the correspondence address, the mark, the identification of goods and/or services, and the issue date of the notice of allowance. Thereafter, the applicant must submit a statement of use as provided in § 2.88.

■ 28. Revise § 2.84(b) to read as follows:

§ 2.84 Jurisdiction over published applications.

* * * * *

(b) After publication, but before the certificate of registration is issued in an application under section 1(a), 44, or 66(a) of the Act, or before the notice of allowance is issued in an application under section 1(b) of the Act, an application that is not the subject of an inter partes proceeding before the Trademark Trial and Appeal Board may be amended if the amendment does not necessitate republication of the mark or issuance of an Office action. Otherwise, an amendment to such an application may be submitted only upon petition to the Director to restore jurisdiction over the application to the trademark examining attorney for consideration of the amendment and further examination. The amendment of an application that is the subject of an inter partes proceeding before the Trademark Trial and Appeal Board is governed by § 2.133.

■ 29. Revise § 2.85 to read as follows:

§ 2.85 Classification schedules.

(a) *International classification system.* Section 6.1 of this chapter sets forth the international system of classification for goods and services, which applies for all statutory purposes to:

(1) Applications filed in the Office on or after September 1, 1973, and resulting registrations; and

(2) Registrations resulting from applications filed on or before August 31, 1973, that have been amended to adopt international classification pursuant to § 2.85(e)(3).

(b) *Prior United States classification system.* Section 6.2 of this chapter sets forth the prior United States system of classification for goods and services, which applies for all statutory purposes to registrations resulting from applications filed on or before August 31, 1973, unless:

(1) The registration has been amended to adopt international classification pursuant to § 2.85(e)(3); or

(2) The registration was issued under a classification system prior to that set forth in § 6.2.

(c) *Certification marks and collective membership marks.* Sections 6.3 and 6.4 specify the system of classification which applies to certification marks and collective membership marks in applications based on sections 1 and 44 of the Act, and to registrations resulting from applications based on sections 1 and 44. These sections do not apply to applications under section 66(a) or to registered extensions of protection.

(d) *Section 66(a) applications and registered extensions of protection.* In an application under section 66(a) of the Act or registered extension of protection, the classification cannot be changed from the classification assigned by the International Bureau of the World Intellectual Property Organization, unless the International Bureau corrects the classification. Classes cannot be added, and goods or services cannot be transferred from one class to another in a multiple-class application.

(e) *Changes to Nice Agreement.* The international classification system changes periodically, pursuant to the Nice Agreement Concerning the International Classification of Goods and Services for the Purposes of the Registration of Marks. These changes are listed in the *International Classification of Goods and Services for the Purposes of the Registration of Marks*, which is published by the World Intellectual Property Organization.

(1) If international classification changes pursuant to the Nice Agreement, the new classification applies only to applications filed on or after the effective date of the change.

(2) In a section 1 or section 44 application filed before the effective date of a change to the Nice Agreement, the applicant may amend the application to comply with the requirements of the current edition. The applicant must comply with the current edition for all goods or services identified in the application. The applicant must pay the fees for any added class(es).

(3) In a registration resulting from a section 1 or section 44 application that was filed before the effective date of a

change to the Nice Agreement, the owner may amend the registration to comply with the requirements of the current edition. The owner must reclassify all goods or services identified in the registration to the current edition. The owner must pay the fee required by § 2.6 for amendments under section 7 of the Act. The owner may reclassify registrations from multiple United States classes (§ 2.85(b)) into a single international classification, where appropriate.

(f) Classification schedules shall not limit or extend the applicant's rights, except that in a section 66(a) application, the scope of the identification of goods or services for purposes of permissible amendments (*see* § 2.71(a)) is limited by the class, pursuant to § 2.85(d).

■ 30. Revise § 2.86(a)(2) to read as follows:

§ 2.86 Application may include multiple classes.

(a) * * *

(2) Submit an application filing fee for each class, as set forth in § 2.6(a)(1); and

* * * * *

■ 31. Revise § 2.87 to read as follows:

§ 2.87 Dividing an application.

(a) *Application may be divided.* An application may be divided into two or more separate applications upon the payment of a fee for each new application created and submission by the applicant of a request in accordance with paragraph (d) of this section.

(b) *Fee.* In the case of a request to divide out one or more entire classes from an application, only the fee for dividing an application as set forth in § 2.6(a)(19) will be required. However, in the case of a request to divide out some, but not all, of the goods or services in a class, the applicant must submit the application filing fee as set forth in § 2.6(a)(1) for each new separate application to be created by the division, in addition to the fee for dividing an application.

(c) *Time for filing.* (1) A request to divide an application may be filed at any time between the application filing date and the date on which the trademark examining attorney approves the mark for publication; or during an opposition, concurrent use, or interference proceeding, upon motion granted by the Trademark Trial and Appeal Board.

(2) In an application under section 1(b) of the Act, a request to divide may also be filed with a statement of use under § 2.88 or at any time between the filing of a statement of use and the date on which the trademark examining attorney approves the mark for registration.

(3) In a multiple-basis application, a request to divide out goods or services having a particular basis may also be filed during the period between the issuance of the notice of allowance under section 13(b)(2) of the Act and the filing of a statement of use under § 2.88.

(d) *Form.* A request to divide an application should be made in a separate document from any other amendment or response in the application. The title ''Request to Divide Application'' should appear at the top of the first page of the document.

(e) *Outstanding time periods apply to newly created applications.* Any time period for action by the applicant which is outstanding in the original application at the time of the division will apply to each separate new application created by the division, except as follows:

(1) If an Office action pertaining to less than all the classes in a multiple-class application is outstanding, and the applicant files a request to divide out the goods, services, and/or class(es) to which the Office action does not pertain before the response deadline, a response to the Office action is not due in the new (child) application(s) created by the division of the application;

(2) If an Office action pertaining to less than all the bases in a multiple-basis application is outstanding, and the applicant files a request to divide out the goods/services having the basis or bases to which the Office action does not pertain before the response deadline, a response to the Office action is not due in the new (child) application(s) created by the division of the application; or

(3) In a multiple-basis application in which a notice of allowance has issued, if the applicant files a request to divide out the goods/services having the basis or bases to which the notice of allowance does not pertain before the deadline for filing the statement of use, the new (child) applications created by the division are not affected by the notice of allowance.

(f) *Signature.* The request to divide must be signed by the applicant, someone with legal authority to bind the applicant (*e.g.*, a corporate officer or general partner of a partnership), or a practitioner who meets the requirements of § 11.14.

(g) *Section 66(a) applications—change of ownership with respect to some but not all of the goods or services.* (1) When the International Bureau of the World Intellectual Property Organization notifies the Office that an international registration has been divided as the result of a change of ownership with respect to some but not all of the goods or services, the Office will construe the International Bureau's notice as a request to divide. The Office will record the partial change of ownership in the Assignment Services Branch, and divide out the assigned goods/services from the original (parent) application. The Office will create a new (child) application serial number, and enter the information about the new application in its automated records.

(2) To obtain a certificate of registration in the name of the new owner for the goods/services that have been divided out, the new owner must pay the fee(s) for the request to divide, as required by § 2.6 and paragraph (b) of this section. The examining attorney will issue an Office action in the child application requiring the new owner to pay the required fee(s). If the owner of the child application fails to respond, the child application will be abandoned. It is not necessary for the new owner to file a separate request to divide.

(3) The Office will not divide a section 66(a) application based upon a change of ownership unless the International Bureau notifies the Office that the international registration has been divided.

■ 32. Revise § 2.88(b)(1)(ii), (b)(3), (d), and (i)(2) to read as follows:

§ 2.88 Filing statement of use after notice of allowance.

(a) * * *

(b) * * *

(1) * * *

(ii) The mark is in use in commerce, specifying the date of the applicant's first use of the mark and first use of the mark in commerce on or in connection with the goods or services identified in the notice of allowance, and setting forth or incorporating by reference those goods/services identified in the notice of allowance on or in connection with which the mark is in use in commerce. Where an applicant claims section 1(a) of the Act for some goods/services in a class and section 1(b) of the Act for other goods/services in the same class, the statement of use must include dates for the section 1(b) of the Act goods/services;

* * * * *

(3) The fee per class required by § 2.6. The applicant must pay a filing fee sufficient to cover at least one class within the statutory time for filing the statement of use, or the application will be abandoned. If the applicant submits a fee insufficient to cover all the classes in a multiple-class application, the applicant must specify the classes to be abandoned. If the applicant submits a

fee sufficient to pay for at least one class, but insufficient to cover all the classes, and the applicant has not specified the class(es) to be abandoned, the Office will issue a notice granting the applicant additional time to submit the fee(s) for the remaining class(es), or specify the class(es) to be abandoned. If the applicant does not submit the required fee(s) or specify the class(es) to be abandoned within the set time period, the Office will apply the fees paid, beginning with the lowest numbered class(es), in ascending order. The Office will delete the goods/services in the remaining class(es) not covered by the fees submitted.

* * * * *

(d) The title ''Allegation of Use'' should appear at the top of the first page of the document.

* * * * *

(i) * * *

(2) If any goods or services specified in the notice of allowance are omitted from the identification of goods or services in the statement of use, the Office will delete the omitted goods/services from the application. The applicant may not thereafter reinsert these goods/services.

* * * * *

■ 33. Revise § 2.89(a) introductory text, (a)(2), (a)(3), (b)(2), and (g) to read as follows:

§ 2.89 Extensions of time for filing a statement of use.

(a) The applicant may request a six-month extension of time to file the statement of use required by § 2.88. The extension request must be filed within six months of the date of issuance of the notice of allowance under section 13(b)(2) of the Act and must include the following:

(1) * * *

(2) The fee per class required by § 2.6. The applicant must pay a filing fee sufficient to cover at least one class within the statutory time for filing the extension request, or the request will be denied. If the applicant timely submits a fee sufficient to pay for at least one class, but insufficient to cover all the classes, and the applicant has not specified the class(es) to which the fee applies, the Office will issue a notice granting the applicant additional time to submit the fee(s) for the remaining classes, or specify the class(es) to be abandoned. If the applicant does not submit the required fee(s) or specify the class(es) to be abandoned within the set time period, the Office will apply the fees paid, beginning with the lowest numbered class(es), in ascending order. The Office will delete the goods/services in the remaining classes not covered by the fees submitted; and

(3) A statement that is signed and verified (sworn to) or supported by a declaration under § 2.20 by a person properly authorized to sign on behalf of the applicant (see § 2.33(a)) that the applicant still has a bona fide intention to use the mark in commerce, specifying the relevant goods or services. If the verification is unsigned or signed by the wrong party, the applicant must submit a substitute verification within six months of the date of issuance of the notice of allowance.

(b) * * *

(2) The fee per class required by § 2.6. The applicant must pay a filing fee sufficient to cover at least one class within the statutory time for filing the extension request, or the request will be denied. If the applicant submits a fee insufficient to cover all the classes in a multiple-class application, the applicant must specify the classes to be abandoned. If the applicant submits a fee sufficient to pay for at least one class, but insufficient to cover all the classes, and the applicant has not specified the class(es) to which the fee applies, the Office will issue a notice granting the applicant additional time to submit the fee(s) for the remaining classes, or specify the class(es) to be abandoned. If the applicant does not submit the required fee(s) or specify the class(es) to be abandoned within the set time period, the Office will apply the fees, beginning with the lowest numbered class(es), in ascending order. The Office will delete the remaining goods/services not covered by the fees submitted;

* * * * *

(g) The applicant will be notified of the grant or denial of a request for an extension of time, and of the reasons for a denial. Failure to notify the applicant of the grant or denial of the request prior to the expiration of the existing period or requested extension does not relieve the applicant of the responsibility of timely filing a statement of use under § 2.88. If, after denial of an extension request, there is time remaining in the existing six-month period for filing a statement of use, applicant may submit a substitute request for extension of time. Otherwise, the only recourse available after denial of a request for an extension of time is a petition to the Director in accordance with § 2.66 or § 2.146. A petition from the denial of an extension request must be filed within two months of the date of issuance of the denial of the request. If the petition is granted, the term of the requested six-month extension that was the subject of the petition will run from the date of expiration of the previously existing six-month period for filing a statement of use.

* * * * *

■ 34. Revise § 2.93 to read as follows:

§ 2.93 Institution of interference.

An interference is instituted by the issuance of a notice of interference to the parties. The notice shall be sent to each applicant, in care of the applicant's attorney or other representative of record, if any, and if one of the parties is a registrant, the notice shall be sent to the registrant or the registrant's assignee of record. The notice shall give the name and address of every adverse party and of the adverse party's attorney or other authorized representative, if any, together with the serial number and date of filing and publication of each of the applications, or the registration number and date of issuance of each of the registrations, involved.

■ 35. Revise § 2.99(d)(2) and (g) to read as follows:

§ 2.99 Application to register as concurrent user.

* * * * *

(d)(1) * * *

(2) An answer to the notice is not required in the case of an applicant or registrant whose application or registration is specified as a concurrent user in the application, but a statement, if desired, may be filed within forty days after the issuance of the notice; in the case of any other party specified as a concurrent user in the application, an answer must be filed within forty days after the issuance of the notice.

* * * * *

(g) Registrations and applications to register on the Supplemental Register and registrations under the Act of 1920 are not subject to concurrent use registration proceedings. Applications under section 1(b) of the Act of 1946 are subject to concurrent use registration proceedings only after the applicant files an acceptable allegation of use under § 2.76 or § 2.88. Applications based solely on section 44 or section 66(a) of the Act are not subject to concurrent use registration proceedings.

* * * * *

■ 36. Revise § 2.141 to read as follows:

§ 2.141 Ex parte appeals from action of trademark examining attorney.

(a) An applicant may, upon final refusal by the trademark examining attorney, appeal to the Trademark Trial and Appeal Board upon payment of the prescribed fee for each class in the application for which an appeal is

taken, within six months of the date of issuance of the final action. A second refusal on the same grounds may be considered as final by the applicant for purpose of appeal.

(b) The applicant must pay an appeal fee for each class from which the appeal is taken. If the applicant does not pay an appeal fee for at least one class of goods or services before expiration of the six-month statutory filing period, the application will be abandoned. In a multiple-class application, if an appeal fee is submitted for fewer than all classes, the applicant must specify the class(es) in which the appeal is taken. If the applicant timely submits a fee sufficient to pay for an appeal in at least one class, but insufficient to cover all the classes, and the applicant has not specified the class(es) to which the fee applies, the Board will issue a written notice setting a time limit in which the applicant may either pay the additional fees or specify the class(es) being appealed. If the applicant does not submit the required fee or specify the class(es) being appealed within the set time period, the Board will apply the fee(s) to the class(es) in ascending order, beginning with the lowest numbered class.

■ 37. Revise § 2.146(c), (d), (e), (i) introductory text, and (j)(1) to read as follows:

§ 2.146 Petitions to the Director.

* * * * *

(c) Every petition to the Director must include a statement of the facts relevant to the petition, the points to be reviewed, the action or relief requested, and the fee required by § 2.6. Any brief in support of the petition should be embodied in or accompany the petition. The petitioner, someone with legal authority to bind the petitioner (e.g., a corporate officer or general partner of a partnership), or a practitioner who meets the requirements of § 11.14 of this chapter must sign the petition. When facts are to be proved on petition, the petitioner must submit proof in the form of affidavits or declarations in accordance with § 2.20, signed by someone with firsthand knowledge of the facts to be proved, and any exhibits.

(d) A petition must be filed within two months of the date of issuance of the action from which relief is requested, unless a different deadline is specified elsewhere in this chapter.

(e)(1) A petition from the grant or denial of a request for an extension of time to file a notice of opposition must be filed within fifteen days from the date of issuance of the grant or denial of the request. A petition from the grant of a request must be served on the attorney or other authorized representative of the potential opposer, if any, or on the potential opposer. A petition from the denial of a request must be served on the attorney or other authorized representative of the applicant, if any, or on the applicant. Proof of service of the petition must be made as provided by § 2.119. The potential opposer or the applicant, as the case may be, may file a response within fifteen days from the date of service of the petition and must serve a copy of the response on the petitioner, with proof of service as provided by § 2.119. No further document relating to the petition may be filed.

(2) A petition from an interlocutory order of the Trademark Trial and Appeal Board must be filed within thirty days after the date of issuance of the order from which relief is requested. Any brief in response to the petition must be filed, with any supporting exhibits, within fifteen days from the date of service of the petition. Petitions and responses to petitions, and any documents accompanying a petition or response under this subsection must be served on every adverse party pursuant to § 2.119.

* * * * *

(i) Where a petitioner seeks to reactivate an application or registration that was abandoned, cancelled or expired because documents were lost or mishandled, the Director may deny the petition if the petitioner was not diligent in checking the status of the application or registration. To be considered diligent, a petitioner must:

(1) * * *

* * * * *

(j) * * *

(1) Files the request within two months of the date of issuance of the decision denying the petition; and

* * * * *

■ 38. Revise § 2.153 to read as follows:

§ 2.153 Publication requirements.

The owner of a mark registered under the provisions of the Acts of 1881 or 1905 may at any time prior to the expiration of the period for which the registration was issued or renewed, upon the payment of the prescribed fee, file an affidavit or declaration in accordance with § 2.20 setting forth those goods or services in the registration on or in connection with which said mark is in use in commerce, and stating that the owner claims the benefits of the Trademark Act of 1946. The affidavit or declaration must be signed by a person properly authorized to sign on behalf of the owner (§ 2.161(b)).

■ 39. Revise the undesignated center heading immediately preceding § 2.160 to read as follows:

Cancellation for Failure To File Affidavit or Declaration

■ 40. Revise § 2.161(g)(3) to read as follows:

§ 2.161 Requirements for a complete affidavit or declaration of continued use or excusable nonuse.

* * * * *

(g) * * *

(3) Be a digitized image in .jpg or .pdf format, if transmitted through TEAS.

■ 41. Revise § 2.163(b) and add a new paragraph (c) to read as follows:

§ 2.163 Acknowledgment of receipt of affidavit or declaration.

* * * * *

(b) A response to the refusal must be filed within six months of the date of issuance of the Office action, or before the end of the filing period set forth in section 8(a) or section 8(b) of the Act, whichever is later. The response must be signed by the owner, someone with legal authority to bind the owner (*e.g.*, a corporate officer or general partner of a partnership), or a practitioner qualified to practice under § 11.14 of this chapter.

(c) If no response is filed within this time period, the registration will be cancelled, unless time remains in the grace period under section 8(c)(1) of the Act. If time remains in the grace period, the owner may file a complete new affidavit.

■ 42. Revise § 2.165(b) to read as follows:

§ 2.165 Petition to Director to review refusal.

* * * * *

(b) If the examiner maintains the refusal of the affidavit or declaration, the owner may file a petition to the Director to review the action. The petition must be filed within six months of the date of issuance of the action maintaining the refusal, or the Office will cancel the registration and issue a notice of the cancellation.

* * * * *

■ 43. Revise § 2.167(a), (d) and (f) to read as follows:

§ 2.167 Affidavit or declaration under section 15.

* * * * *

(a) Be verified (sworn to) or supported by a declaration under § 2.20, signed by the owner of the registration or a person properly authorized to sign on behalf of the owner (§ 2.161(b));

* * * * *

(d) Specify that there has been no final decision adverse to the owner's claim of ownership of such mark for such goods or services, or to the owner's right to register the same or to keep the same on the register;

* * * * *

(f) Be filed within one year after the expiration of any five-year period of continuous use following registration or publication under section 12(c). The Office will issue a notice acknowledging receipt of the affidavit or declaration.

* * * * *

■ 44. Revise § 2.171 to read as follows:

§ 2.171 New certificate on change of ownership.

(a) *Full change of ownership.* If the ownership of a registered mark changes, the new owner may request that a new certificate of registration be issued in the name of the new owner. The assignment or other document changing title must be recorded in the Office. The request for the new certificate must include the fee required by § 2.6(a)(8) and be signed by the owner of the registration, someone with legal authority to bind the owner (*e.g.*, a corporate officer or general partner of a partnership), or a practitioner qualified to practice under § 11.14 of this chapter. In a registered extension of protection, the assignment must be recorded with the International Bureau of the World Intellectual Property Organization before it can be recorded in the Office (see § 7.22).

(b) *Partial change of ownership.* (1) In a registration resulting from an application based on section 1 or 44 of the Act, if ownership of a registration has changed with respect to some but not all of the goods and/or services, the owner(s) may file a request that the registration be divided into two or more separate registrations. The assignment or other document changing title must be recorded in the Office. The request to divide must include the fee required by § 2.6(a)(8) for each new registration created by the division, and be signed by the owner of the registration, someone with legal authority to bind the owner (*e.g.*, a corporate officer or general partner of a partnership), or a practitioner qualified to practice under § 11.14 of this chapter.

(2)(i) When the International Bureau of the World Intellectual Property Organization notifies the Office that an international registration has been divided as the result of a change of ownership with respect to some but not all of the goods or services, the Office will construe the International Bureau's notice as a request to divide. The Office will record the partial change of ownership in the Assignment Services Branch, and divide out the assigned goods/services from the registered extension of protection (parent registration), issue an updated certificate for the parent registration, and publish notice of the parent registration in the *Official Gazette.*

(ii) The Office will create a new registration number for the child registration, and enter the information about the new registration in its automated records. The Office will notify the new owner that the new owner must pay the fee required by § 2.6 to obtain a new registration certificate for the child registration. It is not necessary for the new owner to file a separate request to divide.

(iii) The Office will not divide a registered extension of protection unless the International Bureau notifies the Office that the international registration has been divided.

■ 45. Revise § 2.173 to read as follows:

§ 2.173 Amendment of registration.

(a) *Form of amendment.* The owner of a registration may apply to amend a registration or to disclaim part of the mark in the registration. The owner must submit a written request specifying the amendment or disclaimer. If the registration is involved in an inter partes proceeding before the Trademark Trial and Appeal Board, the request must be filed by appropriate motion to the Board.

(b) *Requirements for request.* A request for amendment or disclaimer must:

(1) Include the fee required by § 2.6;

(2) Be signed by the owner of the registration, someone with legal authority to bind the owner (*e.g.*, a corporate officer or general partner of a partnership), or a practitioner who meets the requirements of § 11.14, and verified or supported by a declaration under § 2.20; and

(3) If the amendment involves a change in the mark: a new specimen showing the mark as used on or in connection with the goods or services; an affidavit or declaration under § 2.20 stating that the specimen was in use in commerce at least as early as the filing date of the amendment; and a new drawing of the amended mark.

(c) *Registration must still contain registrable matter.* The registration as amended must still contain registrable matter, and the mark as amended must be registrable as a whole.

(d) *Amendment may not materially alter the mark.* An amendment or disclaimer must not materially alter the character of the mark.

(e) *Amendment of identification of goods.* No amendment in the identification of goods or services in a registration will be permitted except to restrict the identification or to change it in ways that would not require republication of the mark.

(f) *Conforming amendments may be required.* If the registration includes a disclaimer, description of the mark, or other miscellaneous statement, any request to amend the registration must include a request to make any necessary conforming amendments to the disclaimer, description, or other statement.

(g) *Elimination of disclaimer.* No amendment seeking the elimination of a disclaimer will be permitted, unless deletion of the disclaimed portion of the mark is also sought.

■ 46. Revise § 2.174 to read as follows:

§ 2.174 Correction of Office mistake.

Whenever Office records clearly disclose a material mistake in a registration, incurred through the fault of the Office, the Office will issue a certificate of correction stating the fact and nature of the mistake, signed by the Director or by an employee designated by the Director, without charge. Thereafter, the corrected certificate shall have the same effect as if it had been originally issued in the corrected form. In the discretion of the Director, the Office may issue a new certificate of registration without charge.

■ 47. In § 2.175 revise the section heading and paragraphs (a) and (b)(2) to read as follows, and remove paragraph (c):

§ 2.175 Correction of mistake by owner.

(a) Whenever a mistake has been made in a registration and a showing has been made that the mistake occurred in good faith through the fault of the owner, the Director may issue a certificate of correction. In the discretion of the Director, the Office may issue a new certificate upon payment of the required fee, provided that the correction does not involve such changes in the registration as to require republication of the mark.

(b) * * *

(2) Be signed by the owner of the registration, someone with legal authority to bind the owner (*e.g.*, a corporate officer or general partner of a partnership), or a practitioner who meets the requirements of § 11.14 of this chapter, and verified or include a declaration in accordance with § 2.20; and

* * * * *

■ 48. Revise § 2.176 to read as follows:

§ 2.176 Consideration of above matters.

The matters in §§ 2.171 to 2.175 will be considered in the first instance by the Post Registration examiners, except for requests to amend registrations involved in inter partes proceedings before the Trademark Trial and Appeal Board, as specified in § 2.173(a), which shall be considered by the Board. If an action of the examiner is adverse, the owner of the registration may petition the Director to review the action under § 2.146. If the owner does not respond to an adverse action of the examiner within six months of the date of issuance, the matter will be considered abandoned.

■ 49. Amend § 2.183 by adding a new paragraph (f), to read as follows:

§ 2.183 Requirements for a complete renewal application.

* * * * *

(f) Renewals of registrations issued under a prior classification system will be processed on the basis of that system, unless the registration has been amended to adopt international classification pursuant to § 2.85(e)(3).

■ 50. Revise § 2.184(b) to read as follows:

§ 2.184 Refusal of renewal.

* * * * *

(b)(1) The registrant must file a response to the refusal of renewal within six months of the date of issuance of the Office action, or before the expiration date of the registration, whichever is later. If no response is filed within this time period, the registration will expire, unless time remains in the grace period under section 9(a) of the Act. If time remains in the grace period, the registrant may file a complete new renewal application.

(2) The registrant, someone with legal authority to bind the registrant (*e.g.*, a corporate officer or general partner of a partnership), or a practitioner who meets the requirements of § 11.14 must sign the response.

* * * * *

■ 51. Revise § 2.186(b) to read as follows:

§ 2.186 Petition to Director to review refusal of renewal.

* * * * *

(b) If the examiner maintains the refusal of the renewal application, a petition to the Director to review the refusal may be filed. The petition must be filed within six months of the date of issuance of the Office action maintaining the refusal, or the renewal application will be abandoned and the registration will expire.

* * * * *

■ 52. Revise § 2.195(b) and (e) to read as follows:

§ 2.195 Receipt of trademark correspondence.

* * * * *

(b) *Correspondence delivered by hand.* Correspondence may be delivered by hand during hours the Office is open to receive correspondence.

* * * * *

(e) *Interruptions in U.S. Postal Service.* (1) If the Director designates a postal service interruption or emergency within the meaning of 35 U.S.C. 21(a), any person attempting to file correspondence by ''Express Mail Post Office to Addressee'' service who was unable to deposit the correspondence with the United States Postal Service due to the interruption or emergency may petition the Director to consider such correspondence as filed on a particular date in the Office.

(2) The petition must:

(i) Be filed promptly after the ending of the designated interruption or emergency;

(ii) Include the original correspondence or a copy of the original correspondence; and

(iii) Include a statement that the correspondence would have been deposited with the United States Postal Service on the requested filing date but for the designated interruption or emergency in ''Express Mail'' service; and that the correspondence attached to the petition is the original correspondence or a true copy of the correspondence originally attempted to be deposited as Express Mail on the requested filing date.

(3) Paragraphs (e)(1) and (e)(2) of this section do not apply to correspondence that is excluded from the Express Mail procedure pursuant to § 2.198(a)(1).

■ 53. Revise § 2.208(c)(3) to read as follows, and remove paragraph (c)(4):

§ 2.208 Deposit accounts.

* * * * *

(c) * * *

(3) A payment to replenish a deposit account may be addressed to: Director of the United States Patent and Trademark Office, Attn: Deposit Accounts, 2051 Jamieson Avenue, Suite 300, Alexandria, Virginia 22314.

PART 3—ASSIGNMENT, RECORDING AND RIGHTS OF ASSIGNEE

■ 54. The authority citation for part 3 continues to read as follows:

Authority: 15 U.S.C. 1112, 1123; 35 U.S.C. 2, unless otherwise noted.

■ 55. In § 3.31, add paragraph (a)(8) and revise (f) to read as follows:

§ 3.31 Cover sheet content.

(a) * * *

(8) For trademark assignments, the entity and citizenship of the party receiving the interest. In addition, if the party receiving the interest is a domestic partnership or domestic joint venture, the cover sheet must set forth the names, legal entities, and national citizenship (or the state or country of organization) of all general partners or active members that compose the partnership or joint venture.

* * * * *

(f) Each trademark cover sheet should include the citizenship of the party conveying the interest.

* * * * *

PART 6—CLASSIFICATION OF GOODS AND SERVICES UNDER THE TRADEMARK ACT

■ 56. The authority citation for part 6 continues to read as follows:

Authority: 15 U.S.C. 1112, 1123; 35 U.S.C. 2, unless otherwise noted.

■ 57. Revise § 6.3 to read as follows:

§ 6.3 Schedule for certification marks.

In applications for registration of certification marks based on sections 1 and 44 of the Trademark Act and registrations resulting from such applications, goods and services are classified in two classes as follows:

A. Goods.

B. Services.

■ 58. Revise § 6.4 to read as follows:

§ 6.4 Schedule for collective membership marks.

All collective membership marks in applications based on sections 1 and 44 of the Trademark Act and registrations resulting from such applications are classified as follows:

Class	Title
200	Collective Membership.

PART 7—RULES OF PRACTICE IN FILINGS PURSUANT TO THE PROTOCOL RELATING TO THE MADRID AGREEMENT CONCERNING THE INTERNATIONAL REGISTRATION OF MARKS

■ 59. The authority citation for 37 CFR part 7 continues to read as follows:

Authority: 15 U.S.C. 1123, 35 U.S.C. 2, unless otherwise noted.

■ 60. Revise § 7.11(a)(2) to read as follows:

§ 7.11 Requirements for international application originating from the United States.

(a) * * *

(2) The name and entity of the international applicant that is identical to the name and entity of the applicant or registrant in the basic application or basic registration, and the applicant's current address;

* * * * *

■ 61. Revise § 7.14(e) to read as follows:

§ 7.14 Correcting irregularities in international application.

* * * * *

(e) *Procedure for response.* To be considered timely, a response must be received by the International Bureau before the end of the response period set forth in the International Bureau's notice. Receipt in the Office does not fulfill this requirement. Any response submitted through the Office for forwarding to the International Bureau should be submitted as soon as possible, but at least one month before the end of the response period in the International Bureau's notice. The Office will not process any response received in the Office after the International Bureau's response deadline.

■ 62. Revise § 7.25(a) to read as follows:

§ 7.25 Sections of part 2 applicable to extension of protection.

(a) Except for §§ 2.22–2.23, 2.130–2.131, 2,160–2.166, 2.168, 2.173, and 2.181–2.186, all sections in parts 2, 10, and 11 of this chapter shall apply to an extension of protection of an international registration to the United States, including sections related to proceedings before the Trademark Trial and Appeal Board, unless otherwise stated.

* * * * *

■ 63. Revise § 7.39(b) to read as follows:

§ 7.39 Acknowledgment of receipt of affidavit or declaration of use in commerce or excusable nonuse.

* * * * *

(b) A response to a refusal under paragraph (a) of this section must be filed within six months of the date of issuance of the Office action, or before the end of the filing period set forth in section 71(a) of the Act, whichever is later. The Office will cancel the extension of protection if no response is filed within this time period.

■ 64. Revise § 7.40(b) to read as follows:

§ 7.40 Petition to Director to review refusal.

* * * * *

(b) If the examiner maintains the refusal of the affidavit or declaration, the holder may file a petition to the Director to review the examiner's action. The petition must be filed within six months of the date of issuance of the action maintaining the refusal, or the Office will cancel the registration.

* * * * *

Dated: November 10, 2008.

Jon W. Dudas,

Under Secretary of Commerce for Intellectual Property and Director of the United States Patent and Trademark Office.

[FR Doc. E8–27222 Filed 11–14–08; 8:45 am]

BILLING CODE 3510–16–P

ENVIRONMENTAL PROTECTION AGENCY

40 CFR Part 52

[EPA–R03–OAR–2007–0453; FRL–8741–5]

Approval and Promulgation of Air Quality Implementation Plans; Pennsylvania; 2002 Base Year Inventory for the Pittsburgh-Beaver Valley 8-Hour Ozone Nonattainment Area

AGENCY: Environmental Protection Agency (EPA).

ACTION: Final rule.

SUMMARY: EPA is approving a State Implementation Plan (SIP) revision submitted by the Commonwealth of Pennsylvania. This revision establishes a 2002 base year inventory for the Pittsburgh-Beaver Valley, Pennsylvania, ozone nonattainment area (the Pittsburgh Area). The intended effect of this action is to approve a 2002 base year inventory for the Pittsburgh Area. This action is being taken under the Clean Air Act.

DATES: *Effective Date:* This final rule is effective on December 17, 2008.

ADDRESSES: EPA has established a docket for this action under Docket ID Number EPA–R03–OAR–2007–0453. All documents in the docket are listed in the *www.regulations.gov* Web site. Although listed in the electronic docket, some information is not publicly available, i.e., 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 either electronically through *www.regulations.gov* or in hard copy for public inspection 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 Pennsylvania Department of Environmental Protection, Bureau of Air Quality Control, P.O. Box 8468, 400 Market Street, Harrisburg, Pennsylvania 17105.

FOR FURTHER INFORMATION CONTACT: Christopher Cripps, (215) 814–2179, or by e-mail at *cripps.christopher@epa.gov.*

SUPPLEMENTARY INFORMATION: Throughout this document whenever ''we'', ''us'', or ''our'' is used, we mean EPA.

I. Background

On July 11, 2007 (72 FR 37683), EPA published a notice of proposed rulemaking (NPR) for the Commonwealth of Pennsylvania (the July 11, 2007 NPR). The July 11, 2007 NPR proposed approval of a request submitted by the Pennsylvania Department of Environmental Protection (PADEP) that the Pittsburgh Area be redesignated as attainment for the 0.08 parts per million (ppm) 8-hour ozone national ambient air quality standard (NAAQS) that was promulgated on July 18, 1997 (62 FR 38856) (the ''1997 8-hour ozone NAAQS'').[1] The July 11, 2007 NPR proposed approval of a SIP revision comprising a maintenance plan for the Pittsburgh Area that provides for continued attainment of the 1997 8-hour ozone NAAQS for at least 10 years after redesignation and the motor vehicle emission budgets (MVEBs) that were identified in this maintenance plan for purposes of transportation conformity. The July 11, 2007 NPR also proposed approval of a 2002 base year inventory for the Pittsburgh Area as a SIP revision.

The PADEP submitted the formal SIP revisions and the request that the Pittsburgh Area be redesignated to attainment of the 1997 8-hour ozone NAAQS (the ''redesignation request'') on April 26, 2007.

On May 29, 2008, the PADEP submitted a letter to formally withdraw the redesignation request and the maintenance plan SIP revision. On August 1, 2008, PADEP affirmed that the Commonwealth was not withdrawing the 2002 base year emissions inventory SIP revision submitted on April 26, 2007, and submitted an amended SIP revision document which struck-out the maintenance plan elements, leaving only the 2002 base year emissions inventory. The Commonwealth of

[1] On March 27, 2008 (73 FR 16436), EPA revised the level of the primary and secondary 8-hour ozone NAAQS to 0.075 ppm, but the Pittsburgh area has not been designated under this revision to the NAAQS.

Pennsylvania has withdrawn the redesignation request and the maintenance plan SIP revision from our consideration. In a separate action, we are withdrawing our proposed actions on the redesignation request and on the maintenance plan and the MVEBs identified therein.

As discussed in the July 11, 2007 NPR, we proposed to approve the 2002 base year emissions inventory for the Pittsburgh Area to fulfill the inventory requirements, as necessary, of both section 172(c)(3) and section 182(a)(1) of the Clean Air Act. *See*, 72 FR 37863 at 37688, July 11, 2007.

II. Summary of SIP Revision

The 2002 base year inventory establishes a comprehensive inventory for both volatile organic compounds (VOC), nitrogen oxides (NO_X) and carbon monoxide (CO) emissions in the Pittsburgh Area, including point, area, mobile on-road, and mobile non-road sources for a base year of 2002. A summary of the VOC and NO_X emissions in tons per year (tpy) and in tons per day (tpd) by sector are presented in Table 1.

TABLE 1—PITTSBURGH AREA 2002 BASE YEAR INVENTORY

Source sector	VOC emissions		NO_X emissions		CO emissions	
	tpy	tpd	tpy	tpd	tpy	tpd
Point Sources	6134.0	16.5	92842.2	250.4	50966.0	134.5
Nonpoint Sources	40162.6	100.3	33052.2	11.5	33052.2	61.6
Onroad Mobile Sources	29285.5	86.4	493445.8	173.9	493445.8	630.1
Nonroad Mobile Sources	15193.1	51.5	174583.3	86.1	174583.3	1105.6
Total Emissions	90775.2	254.7	793923.5	521.9	752047.3	1931.8

Other specific requirements for the 2002 base year inventory and the rationale for EPA's proposed action are explained in the July 11, 2007 NPR and will not be restated here. No public comments were received on the July 11, 2007 NPR.

III. Final Action

EPA is approving the 2002 base year inventory for the Pittsburgh Area as a revision to the Pennsylvania SIP.

IV. 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

- 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 January 16, 2009. 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 a 2002 base year inventory for the Pittsburgh Area 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, Volatile organic compounds.

Dated: November 7, 2008.

Donald S. Welsh,

Regional Administrator, Region III.

■ 40 CFR part 52 is amended as follows:

PART 52—[AMENDED]

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

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

Subpart NN—Pennsylvania

■ 2. In § 52.2020, the table in paragraph (e)(1) is amended by adding an entry for the 2002 Base Year Emissions Inventory for the Pittsburgh-Beaver Valley Nonattainment Area at the end of the table to read as follows:

§ 52.2020 Identification of plan.

* * * * *

(e) * * *

(1) * * *

Name of non-regulatory SIP revision	Applicable geographic area	State submittal date	EPA approval date	Additional explanation
*	*	*	*	*
2002 Base Year Emissions Inventory.	Pittsburgh-Beaver Valley Nonattainment Area: Allegheny, Armstrong, Beaver, Butler, Fayette, Washington, and Westmoreland counties.	4/26/07	11/17/08 [Insert page number where the document begins].	

* * * * *

[FR Doc. E8–27210 Filed 11–14–08; 8:45 am]

BILLING CODE 6560–50–P

DEPARTMENT OF THE INTERIOR

Bureau of Reclamation

43 CFR Part 404

RIN 1006–AA54

Reclamation Rural Water Supply Program

AGENCY: Bureau of Reclamation, Interior.

ACTION: Interim final rule.

SUMMARY: Reclamation is issuing this interim final rule to establish programmatic criteria for the Reclamation Rural Water Supply Program (Rural Water Supply Program), including criteria governing prioritization, eligibility, and the evaluation of appraisal investigations and feasibility studies. Title I of the Reclamation Rural Water Supply Act of 2006, Public Law 109–451 (Act), authorized Reclamation to establish the Rural Water Supply Program and requires publication of programmatic criteria in the **Federal Register**. This rule is intended to define for potential participants how the Rural Water Supply Program authorized by the Act will be administered.

DATES: This rule is effective December 17, 2008. Submit comments on the rule by January 16, 2009. The incorporation by reference of certain publications listed in the rule is approved by the Director of the Federal Register as of December 17, 2008. This interim final rule serves as a 60-day **Federal Register** notice to the public allowing them to comment on our information collection. Comments on the information collection must be received by January 16, 2009.

ADDRESSES: You may submit comments on this rule, identified by the number 1006–AA54, by one of the following methods:

—*Use of the Federal rulemaking Web site: http://www.regulations.gov.* Follow the instructions for submitting comments. This rule has been assigned Docket Identification number BOR–2008–0002.

—*By mail to:* Bureau of Reclamation, Denver Federal Center, P.O. Box 25007, Building 67, Denver, CO 80225, Attention: Avra Morgan, Mail Code 84–52000. Please include the number 1006–AA54 in your correspondence.

The Office of Management and Budget (OMB) has approved the information collection requirements contained in this rule under an emergency submission. The assigned OMB control number is 1006–0029. Please submit comments on the information collection to the Bureau of Reclamation, Attention: Avra Morgan, P.O. Box 25007, Denver, CO 80225 or by e-mail to *RuralWaterProgram@do.usbr.gov.*

FOR FURTHER INFORMATION CONTACT: Avra Morgan at 303–445–2906 or James Hess at 202–513–0543.

SUPPLEMENTARY INFORMATION:

I. Background

The Rural Water Supply Program

Title I of the Act authorizes the Secretary of the Interior (Secretary) to create the Rural Water Supply Program to address rural water needs in the Reclamation States. Authority and responsibility for implementing the provisions of the Act are delegated to Reclamation. Reclamation's rulemaking will establish comprehensive criteria and program requirements governing the implementation of the Rural Water Supply Program.

Reclamation has significant experience in the development of rural water projects. Since 1980, Congress has directed Reclamation to undertake 10 specific rural water projects, and Reclamation has a century of experience developing and managing water delivery systems in the West. However, prior to the passage of the Act in 2006, Reclamation did not have a formal rural water program. The program to be implemented by this rule will allow Reclamation to be involved in planning and prioritizing rural water projects to ensure that the projects selected are cost-effective and that they are in the Federal interest.

The Act specifically authorizes the Secretary to undertake the following activities in implementing the Rural Water Supply Program: (a) Investigate opportunities to ensure safe and adequate rural water supply projects for domestic, municipal, and industrial use in small communities and rural areas of the Reclamation States; (b) plan the design and construction of rural water supply projects through the conduct of appraisal investigations and feasibility studies; and (c) oversee, as appropriate, the construction of rural water supply projects that are recommended for construction by Reclamation in a feasibility report developed under the Rural Water Supply Program, and subsequently authorized by Congress.

Reclamation's Rural Water Supply Program is focused on planning rural water supply projects that incorporate a regional or watershed approach to water management. This means focusing on projects that will provide water to geographically dispersed localities distributed across a region or a watershed, in order to take advantage of economies of scale and to foster opportunities for partnerships. In carrying out this program, Reclamation will take into account the interconnectedness of water and land resources, encourage the active participation of all interested groups, and use the full spectrum of technical disciplines in activities and decision-making.

Reclamation has demonstrated expertise and experience in planning and constructing larger water supply projects that address the needs of more than one community. Reclamation's focus on regional water systems will complement, rather than duplicate, the existing Federal programs that support the delivery of potable water for rural areas in the United States. This will not only meet a clearly identified need in the western United States, but will also leverage Federal, state, and local funding to maximize the support provided to rural areas and ensure the most effective use of Federal dollars.

Overview of the Rule

This rule has the following five subparts: (1) Subpart A provides an overview of the Rural Water Supply program; (2) Subpart B covers cost-sharing requirements; (3) Subpart C describes how an appraisal investigation will be evaluated under the program; (4) Subpart D describes how a feasibility study will be evaluated under the program; and (5) Subpart E describes miscellaneous requirements.

Subpart A of the rule contains eligibility criteria, criteria for prioritizing requests for assistance under the program, definitions, and the process for requesting assistance under the program. Section 404.6 of the rule describes who is eligible to participate in the program, and § 404.7 describes the types of projects that are eligible for consideration. These eligibility requirements closely track the requirements in Title I of the Act.

Section 404.11 of the rule describes the types of assistance available under the program, including: (1) Technical assistance from Reclamation to conduct an appraisal investigation or feasibility study; (2) financial assistance to enable a non-Federal entity to conduct an appraisal or feasibility study themselves with Reclamation oversight; and (3) Reclamation review and approval of a completed appraisal or feasibility study.

Subpart A of the rule describes in detail the process by which Reclamation will announce opportunities for assistance under the program (§ 404.14), how to request assistance (§ 404.15), and how such requests will be prioritized and reviewed by Reclamation (§§ 404.17, 404.22 and 404.27). Section 404.13 of the rule contains the criteria that Reclamation will use to prioritize all requests for assistance under the program. This section further emphasizes the focus of Reclamation's Rural Water Supply Program on projects that will apply a regional or watershed perspective to water resources management.

Subpart B of the rule describes all cost-sharing requirements related to the Rural Supply Water Program. This includes the non-Federal cost-share requirements for completing appraisal investigations and feasibility studies (§§ 404.30 and 404.33, respectively), and the non-Federal cost-share requirements for the construction of rural water projects once construction authorization is provided by Congress (§ 404.37). An important part of Reclamation's role in evaluating a feasibility study under the program is to consider the non-Federal entity's capability to pay at least 25 percent of the cost of constructing a rural water project (§ 404.39).

Subparts C and D of the rule describe the criteria that Reclamation will use to evaluate appraisal investigations and feasibility studies completed under the program (§§ 404.44 and 404.49, respectively). These criteria closely track the provisions in Title I of the Act. The requirements in Subparts C and D of the rule will enable Reclamation to ensure that all appraisal and feasibility studies completed under the program meet Reclamation's standards, whether the studies are completed by Reclamation or by the non-Federal entity.

Subpart E of the rule contains several miscellaneous requirements. Among these is the requirement that title to projects constructed subsequent to participation in the Rural Water Supply Program shall be held by the non-Federal entity (§ 404.54). Another important requirement in Subpart E, among others, is the provision that rural water projects authorized before passage of the Act (§ 404.58) do not have to comply with the requirements in this rule.

Waiver of Notice of Proposed Rulemaking

Ordinarily, a notice of proposed rulemaking is published in the **Federal Register** and the public is invited to comment on the proposed rule in accordance with the Administrative Procedure Act (APA), as codified in 5 U.S.C. 553(b). The notice of proposed rulemaking includes a reference to the legal authority under which the rule is proposed, and the terms and substances of the proposed rule or a description of the subjects and issues involved. This procedure can be waived, however, if an agency finds good cause that a notice and comment procedure is impracticable, unnecessary, or contrary to the public interest and incorporates a statement of the finding and its reasons in the rule issued.

This rule is required as a result of the enactment of Title I of the Act, which provides that the Secretary will develop three sets of criteria for the Rural Water Supply Program within specified timeframes. Section 103 of the Act requires the promulgation of programmatic eligibility and prioritization criteria within 1 year of the date of enactment; § 105 requires criteria for the evaluation of appraisal investigations to be developed within 1 year of the date of enactment; and § 106 requires the promulgation of criteria for the evaluation of feasibility studies within 18 months of the date of enactment.

Current data indicate that millions of Americans still live without safe drinking water, a basic necessity of life. The Bureau of Reclamation has significant experience and technical capabilities in the planning, design and construction of rural water supply projects. Until now, however, Reclamation has never had a structured program for developing or funding rural water projects. Delaying the enactment of this rule in order to provide notice and comment would delay the implementation of a program to address water supply needs of rural communities. Furthermore, this rule closely tracks the detailed requirements of the Act.

Procedural Requirements

1. Regulatory Planning and Review (Executive Order (E.O.) 12866)

This document is a significant rule and OMB has reviewed this rule under Executive Order 12866. We have made the assessments required by E.O. 12866 and the results are given below.

(a) This rule will not have an annual effect of $100 million or more on the economy. It will not adversely affect in

any material way the economy, productivity, competition, jobs, environment, public health or safety, or state, local, and tribal governments or communities. On the contrary, the Rural Water Supply Program addressed by this rule will facilitate the planning of rural water systems that are urgently needed in order to maintain the economies and the public health and safety of the communities that they will serve. Moreover, the criteria established in this rule will ensure that the rural water projects planned under this program address a documented need, are economically feasible, and are affordable to the intended beneficiaries. The evaluation of rural water projects planned under this program will also take into account changes in regional economic activity associated with each project, as measured by regional income and employment.

As explained in the rule, Reclamation will only recommend a rural water project to Congress for construction if the project is determined to be economically feasible, among other requirements. Economic feasibility means that the estimated national economic benefits of a project exceed the costs. Analysis of rural water projects that have been authorized in the past indicates that they have not met the economic feasibility criteria. Therefore, the planning process set forth in the rule will result in rural water projects with potentially greater economic benefits. Implementation of this program will allow for the development of projects with a greater economic return to the Nation.

The Act requires an analysis documenting the ability of the project sponsor to pay 100 percent of operation, maintenance, and replacement costs as well as a portion of construction costs (minimum of 25 percent). This provision will reduce the risk of financial failure of a project due to the inability of water users to pay their portion of project costs in the future.

The Act authorizes appropriations of $15 million annually. Therefore, we expect our expenditures on the program over the next 4 fiscal years, including administrative costs, to be $15 million or less, annually. Authority to make appropriations under the program expires on September 30, 2016. Subsequent to that expiration, limited administrative costs would continue as previously authorized appraisal and feasibility studies are completed.

(b) This rule would not create a serious inconsistency or otherwise interfere with an action taken or planned by another agency. The rule requires all potential applicants to demonstrate that they have investigated other opportunities for funding and places a higher priority on funding projects that are not eligible for full assistance under any other rural water program. Rural water supply projects that incorporate a regional or watershed approach to water management planning are also prioritized higher under the program. In contrast, other rural water programs are focused on smaller rural water systems and do not provide assistance for these larger, more complex, types of rural water projects. This rule further requires Reclamation to consult and cooperate with other Federal agencies, tribes, states, and local governments whenever an appraisal investigation or feasibility study is conducted under the program. Reclamation has consulted with the United States Department of Agriculture (USDA) regarding the details of USDA's related programs, and will continue to do so.

(c) This rule does not alter the budgetary effects of entitlements, grants, user fees, concessions, loan programs, water contracts, management agreements, or the rights and obligations of their recipients; all of these will continue unaffected by the approval of any assistance under these rules.

(d) OMB has determined that this rule raises novel legal or policy issues. The rule, which implements the Act, establishes criteria for a new rural water program to be administered by Reclamation. While Reclamation has been involved in the construction of rural water projects for over 20 years, it has never had a formal rural water program. The program will allow Reclamation to be involved early on in the planning stages of creating a rural water project, and to prioritize the projects that it recommends for construction.

2. Regulatory Flexibility Act

The Department of the Interior certifies that this document will not have a significant economic effect on a substantial number of small entities under the Regulatory Flexibility Act (5 U.S.C. 601, *et seq.*). This rule does not impose any new requirements for small businesses to report or keep records on any of the requirements contained in this rule. Entities seeking financial assistance under the rule will be subject to those reporting and recordkeeping requirements (government-wide uniform administrative requirements) that normally apply to financial assistance agreements pursuant to 43 CFR 12. The entities eligible for assistance under this program may include small entities defined in the Regulatory Flexibility Act. However, application for assistance is strictly voluntary, and these entities may continue to rely on their own financing capabilities as they currently do. One of the purposes of this rule is to provide these entities with the requirements they must follow if they choose to apply for assistance from Reclamation. An Initial Regulatory Flexibility Analysis is not required and, accordingly, a Small Entity Compliance Guide is not required.

3. Small Business Regulatory Enforcement Fairness Act (SBREFA)

This rule is not a major rule under the Small Business Regulatory Enforcement Fairness Act (5 U.S.C. 804(2)). This rule:

(a) Does not have an annual effect on the economy of $100 million or more. The Act authorizes appropriations of $15 million annually. Therefore, we expect our expenditures on the program over the next 4 fiscal years, including administrative costs, to be $15 million or less, annually. Authority to make appropriations under the program expires on September 30, 2016. Subsequent to that expiration, limited administrative costs would continue as previously authorized appraisal and feasibility studies are completed.

(b) Will not cause a major increase in costs or prices for consumers, individual industries, Federal, state, local, or tribal government agencies, or geographic regions. Entities planning to construct a rural water supply project, including state, local or tribal government entities, would most likely conduct appraisal investigations and feasibility studies regardless of whether they participate in the program implemented under this rule. Because the rule provides that Reclamation will pay 100 percent of the cost of an appraisal investigation up to $200,000, and 50 percent of the cost of a feasibility study, the rule actually decreases the cost to state, tribal and local governments that want to plan a rural water supply project.

The Federal cost-share requirement for studies conducted under the Rural Water Supply Program will increase the cost to Reclamation because Reclamation has not previously been involved in preparing these types of planning studies for rural water supply projects. However, pursuant to the limitation on appropriations under the Act, Reclamation's cost may not exceed $15 million per year.

(c) This rule is not likely to have any effect on competition, employment, investment, productivity, innovation, or the ability of United States-based enterprises to compete with foreign-

based enterprises. As mentioned in (b), the effect of the Federal cost-share requirement included under the rule will likely be to reduce the cost of appraisal investigations and feasibility studies to entities participating in the program. The rule encourages competition by allowing interested entities to either request financial assistance (a grant or cooperative agreement) to perform an appraisal investigation or feasibility study themselves, or request Reclamation to perform the investigation or study for them. The rule requires an entity requesting financial assistance to demonstrate the cost-effectiveness of its proposal, compared to the cost of Reclamation performing the investigation or study.

4. Unfunded Mandates Reform Act

This rule does not impose an unfunded mandate or a requirement to expend monies on the part of state, local, or tribal governments or communities, or the private sector of $100 million or more annually. This rule does not have a significant or unique effect on state, local, or tribal governments or communities, or the private sector. Requests from any of these entities for assistance under this rule are strictly voluntary. Reclamation is not imposing a duty, requirement, or mandate on state, local, or tribal governments or communities, or the private sector to request such assistance. Therefore, a statement containing information required by the Unfunded Mandates Reform Act (2 U.S.C. 1541, *et seq.*) is not required.

5. Takings (E.O. 12630)

Under the criteria in E.O. 12630, this rule does not have any significant takings implications. This rule sets forth the requirements for requesting assistance from Reclamation for planning eligible rural water supply projects that are urgently needed by the project beneficiaries. While there are cost-share requirements for receiving assistance under the program, participation in the program is strictly voluntary, and the beneficiaries may choose instead to conduct an appraisal investigation or feasibility study on their own, financing the complete cost themselves. A Takings Implication Assessment is therefore not required.

6. Federalism (E.O. 13132)

Under the criteria in E.O. 13132, this rule does not have any federalism implications to warrant the preparation of a Federalism Assessment. The rule is not associated with, nor will it 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. A Federalism Assessment is therefore not required.

7. Civil Justice Reform (E.O. 12988)

This rule complies with the requirements of E.O. 12988. Specifically, this rule:

(a) Does not unduly burden the judicial system;

(b) Meets the criteria of section 3(a) requiring that all regulations be reviewed to eliminate errors and ambiguity and be written to minimize litigation; and

(c) Meets the criteria of section 3(b)(2) requiring that all regulations be written in clear language and contain clear legal standards.

8. Consultation With Indian Tribes (E.O. 13175)

Under the criteria of E.O. 13175, Reclamation has evaluated this rule and determined that it would have no substantial effects on federally recognized Indian tribes. While many tribal entities may be eligible for assistance with planning a rural water supply project under this rule, such application is strictly voluntary.

9. Paperwork Reduction Act

This rule contains information collection requirements, and a submission under the Paperwork Reduction Act (PRA) is required. Participation in the application process and the submission of information through that process is voluntary. This rule will not require the use of any forms other than those forms required for Reclamation to provide financial assistance under the program, including SF–424A and SF–424B, titles already approved by OMB. Following are further details regarding the information collection:

Title: Reclamation Rural Water Supply Program 43 CFR Part 404.

OMB Control No.: 1006–0029.

Frequency: One-time voluntary application.

Respondents for Program Assistance Applications: Eligible entities (described in § 404.6 of the rule) that desire to obtain assistance from Reclamation under the program.

Estimated Total Number of Respondents: 56.

Estimated Number of Responses per Respondent: 1.

Estimated Total Annual Burden on Respondents: 2,100 hours.

OMB has approved the information collection requirements contained in this rule under an emergency submission. The assigned OMB Control Number is 1006–0029, which expires on *May 31, 2009*. Under OMB Guidelines at 5 CFR 1320.13, we requested emergency processing of the information collection request. The Rural Water Supply Program will address rural water needs in the western United States by assisting rural communities to plan the design and construction of rural water projects. Eligible entities interested in participating in the program will be requested to submit information to allow Reclamation to evaluate and prioritize requests for financial or technical assistance. According to the emergency processing procedures, we have determined that:

(1) This information collection will be published in the **Federal Register** concurrent with the rulemaking.

(2) Delaying the enactment of this rule would delay the implementation of a program to address water supply needs of rural communities. Additionally, the information collected is general information about the water supply needs of the applicants and therefore, will be readily available to the applicants.

We have not formally consulted with potential respondents on the impact of this burden due to time constraints. Our estimate of the annual burden hours is based on Reclamation's experience with similar application processes for other programs. As part of our continuing effort to reduce paperwork and respondent burdens, Reclamation invites the public and other Federal agencies to comment on any aspect of the reporting and recordkeeping burden. In particular, comments are invited on:

(a) Whether the proposed collection of information is necessary for the proper performance of our functions, including whether the information will have practical use;

(b) The accuracy of our burden estimate for the proposed collection of information, including the validity of the methodology and assumptions used;

(c) Ways to enhance the quality, usefulness, and clarity of the information collected; and

(d) Ways to minimize the burden of the collection of information on respondents.

Please refer to the **DATES** and **ADDRESSES** sections for deadlines and instructions on submitting comments. You may obtain a copy of the supporting statement for this new collection of information by contacting the Bureau of Reclamation at 303–445–2906.

10. National Environmental Policy Act of 1969 (NEPA)

This rule does not constitute a major Federal action and would not have a significant effect on the quality of the human environment. While the individual feasibility studies for which assistance may be sought under this interim final rule require NEPA compliance, the requirement for such compliance would not be dependent on whether financial assistance is granted under this rule. Therefore, this rule does not require the preparation of an environmental assessment or environmental impact statement under the requirements of NEPA.

11. Information Quality Act

In developing this rule, there was no need to conduct or use a study, experiment, or survey requiring peer review under the Information Quality Act (Pub. L. 106–554).

12. Effects on the Energy Supply (E.O. 13211)

This rule is not a significant energy action under the definition in E.O. 13211. A Statement of Energy Effects is not required.

13. Clarity of This Regulation

We are required by E.O. 12866 and 12988, and by the Presidential Memorandum of June 1, 1998, to write all rules in plain language. This means each rule we publish must:

(a) Be logically organized;

(b) Use the active voice to address readers directly;

(c) Use clear language rather than jargon;

(d) Be divided into short sections and sentences; and

(e) Use lists and tables wherever possible.

If you believe we have not met these requirements, please send comments to Reclamation as instructed in the **ADDRESSES** section. Please make your comments as specific as possible, referring to specific sections and how they could be improved. For example, you should tell us the numbers of the sections or paragraphs that are unclearly written, which sections or sentences are too long, the sections where you believe lists or tables would be useful, etc.

14. Public Availability of Comments

Before including your name, 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.

List of Subjects in 43 CFR Part 404

Drinking water, Federal aid programs, Incorporation by reference, Natural resources, Public utilities, Rural areas, Water supply, and Watersheds.

Dated: November 3, 2008.

Kameran L. Onley,

Acting Assistant Secretary for Water and Science.

■ For the reasons stated in the preamble, the Bureau of Reclamation proposes to add a new part 404 to Title 43 of the Code of Federal Regulations as follows:

PART 404—RECLAMATION RURAL WATER SUPPLY PROGRAM

Subpart A—Overview

Sec.
404.1 What is the purpose of this part?
404.2 What terms are used in this part?
404.3 What is the Reclamation Rural Water Supply Program?
404.4 What are the goals of the program?
404.5 Who is responsible for implementing this rule?
404.6 Who is eligible to participate in the program?
404.7 What types of projects are eligible for consideration under the program?
404.8 Are there any exceptions that would allow a community with greater than 50,000 inhabitants to be part of an eligible rural water supply project?
404.9 What types of infrastructure and facilities may be included in an eligible rural water supply project?
404.10 Are there certain types of infrastructure and facilities that may not be included in a rural water supply project?
404.11 What type of assistance is available under the program?
404.12 Can Reclamation provide assistance with the construction of a rural water supply project under this program?
404.13 What criteria will Reclamation use to prioritize requests for assistance under the program?
404.14 How will Reclamation provide notice of opportunities for assistance under the program?
404.15 How can I request assistance under the program?
404.16 What information must I include in my statement of interest?
404.17 How will Reclamation evaluate my statement of interest?
404.18 How can I request assistance to conduct a feasibility study?
404.19 What requirements must be met before I can request assistance to conduct a feasibility study?
404.20 What information must I include in my full proposal to conduct an appraisal or a feasibility study?
404.21 What is Reclamation's role in preparing the full proposal?
404.22 How will Reclamation evaluate my full proposal?
404.23 How will Reclamation determine whether you or your contractor is qualified to conduct an appraisal investigation or a feasibility study?
404.24 How will Reclamation determine whether it is cost-effective for me or my contractor to conduct the appraisal investigation or feasibility study?
404.25 How can I request Reclamation to review an appraisal investigation or feasibility study that was not completed under this program?
404.26 Must an appraisal investigation be completed before I can request Reclamation to review a feasibility study that was not completed under this program?
404.27 How will Reclamation evaluate my request to review an appraisal investigation or feasibility study completed without the support of Reclamation?
404.28 Is it possible to expedite the completion of an appraisal investigation or feasibility study?
404.29 Can the level of effort needed to complete an appraisal investigation or feasibility study be scaled to be proportional to the size and cost of the proposed project?

Subpart B—Cost-Sharing

404.30 How much Federal funding can Reclamation provide for the completion of an appraisal investigation?
404.31 What forms of non-Federal cost-share payment are acceptable?
404.32 Can Reclamation reduce the non-Federal cost-share required for an appraisal investigation?
404.33 How much Federal funding can Reclamation provide for the completion of a feasibility study?
404.34 Can Reclamation reduce the amount of non-Federal cost-share required for a feasibility study?
404.35 Is there a different non-Federal cost-share requirement for feasibility studies that involve a community greater than 50,000 inhabitants?
404.36 Will Reclamation reimburse me for the cost of an appraisal investigation or a feasibility study that was not completed under § 404.11(a) or (b)?
404.37 How will Reclamation determine the appropriate non-Federal share of construction costs?
404.38 Are there different requirements for determining the appropriate non-federal share of construction costs to be paid by Indian tribes?
404.39 What factors will Reclamation consider in evaluating my capability to pay 25 percent or more of the construction costs?
404.40 What is the non-Federal share of operation, maintenance, and replacement costs?

Subpart C—Appraisal Investigations

404.41 How will an appraisal investigation be conducted under this program?
404.42 How much time is provided to complete an appraisal investigation?

404.43 What process will Reclamation follow to determine if an appraisal investigation is ready for review?
404.44 What criteria will Reclamation apply to determine whether it is appropriate to recommend that a feasibility study be conducted?
404.45 What will be included in the appraisal report prepared by Reclamation?
404.46 Who will the appraisal report be provided to?

Subpart D—Feasibility Studies

404.47 How will a feasibility study be conducted under this program?
404.48 What process will Reclamation follow to determine if a feasibility study is ready for review?
404.49 What criteria will Reclamation use to determine whether to recommend that a proposed rural water supply project be authorized for construction?
404.50 What information will be included in the feasibility report prepared by Reclamation?
404.51 Are proposed projects under the Rural Water Supply Program reviewed by the Administration?
404.52 Who will the feasibility report be provided to?

Subpart E—Miscellaneous

404.53 Does this rule provide authority for the transfer of pre-existing facilities from Federal to private ownership, or from private to Federal ownership?
404.54 Who will hold title to a rural water project that is constructed following the completion of an appraisal investigation or feasibility study under this program?
404.55 Who is responsible for the operation, maintenance, and replacement costs?
404.56 If a financial assistance agreement is entered into for a rural water supply project that benefits more than one Indian tribe, is the approval of each Indian tribe required?
404.57 Does this rule have any effect on state water law?
404.58 Do rural water projects authorized before the enactment of the Rural Water Supply Act of 2006 have to comply with the requirements in this rule?
404.59 If the Secretary recommends a project for construction, is that a promise of Federal funding?
404.60 Does this rule contain an information collection that requires approval by the Office of Management and Budget (OMB)?

Authority: Public Law 109–451 (43 U.S.C. 2401 *et seq.*)

Subpart A—Overview

§ 404.1 What is the purpose of this part?

The purpose of this part is to explain how the Reclamation Rural Water Supply Program is implemented. This part describes:

(a) The purpose and priorities of the program;

(b) How to apply for assistance under the program;

(c) How Reclamation will evaluate requests for assistance;

(d) How Reclamation will evaluate an appraisal investigation; and

(e) How Reclamation will evaluate a feasibility study.

§ 404.2 What terms are used in this part?

The following terms are used in this part:

Appraisal Investigation means an analysis of domestic, municipal, and industrial water supply problems, needs, and opportunities in the planning area, primarily using existing data. An appraisal investigation includes a preliminary assessment of alternatives to address the identified water supply problems and needs. The purpose of an appraisal investigation is to determine if there is at least one viable alternative that warrants a more detailed investigation through a feasibility study.

Appraisal Report means the document, prepared by Reclamation, setting forth the findings and conclusions reached by Reclamation in its evaluation of a completed appraisal investigation. The purpose of the appraisal report is for Reclamation to provide a recommendation on whether a feasibility study should be initiated.

Assistance means the transfer of a thing of value to a non-Federal project sponsor to carry out a public purpose of support or stimulation authorized by law. For purposes of this rule, assistance consists of funds provided by Reclamation through an assistance agreement (grant or cooperative agreement) and technical assistance performed by Reclamation, for the purpose of conducting an appraisal investigation or a feasibility study.

Commissioner means the Commissioner of the Bureau of Reclamation.

Feasibility Report means the document, prepared by Reclamation, setting forth the findings and conclusions of a completed feasibility study. The purpose of the feasibility report is to provide an Administration recommendation to Congress regarding whether the proposed rural water supply project should be authorized for construction.

Feasibility Study means a detailed investigation requiring the acquisition of primary data, and an analysis of a reasonable range of alternatives, including a preferred alternative, to meet identified water supply problems, needs, and opportunities in the planning area. A feasibility study also includes an analysis of the technical and economic feasibility of the proposed project, the impact of the proposed project on the environment in compliance with the National Environmental Policy Act and other applicable environmental laws, and the financial capability of the non-Federal project sponsor to pay the non-Federal costs associated with constructing, operating, and maintaining the rural water supply project. The completed feasibility study will form the basis for the recommendation to Congress in the feasibility report regarding whether the proposed rural water supply project should be authorized for construction.

Incidental Noncommercial Livestock Watering means the supply of water to pasture taps for the purpose of watering livestock, and other livestock watering uses that are incidental to the purpose of the project.

Indian means a person who is a member of an Indian tribe.

Indian Tribe means any Indian tribe, band, nation, or other organized group, or community, including pueblos, rancherias, colonies and any Alaska Native Village, or regional or village corporation as defined in or established pursuant to the Alaska Native Claims Settlement Act, which is recognized as eligible for the special programs and services provided by the United States to Indians because of their status as Indians.

Noncommercial Irrigation of Vegetation means the supply of water to irrigate lawns, trees, small gardens, and similar vegetation of less than 1 acre.

Non-Federal Project Sponsor means a non-Federal project entity or entities meeting the eligibility criteria in § 404.6. A non-Federal project sponsor is also referred to as project sponsor, project sponsors, I, me, my, you, or your in this part.

Program means the Reclamation Rural Water Supply Program that is described in § 404.3.

Reclamation means the Bureau of Reclamation, U.S. Department of the Interior.

Reclamation States means the states and areas referred to in 43 U.S.C. 391, as amended.

Regional or Watershed Perspective means an approach to rural water supply planning directed at meeting the needs of geographically dispersed localities across a region or a watershed that will take advantage of economies of scale and foster opportunities for partnerships. This approach also takes into account the interconnectedness of water and land resources, encourages the active participation of all interested groups, and uses the full spectrum of technical disciplines in activities and decision-making.

Rural Water Supply Project, or project, means:

(a) A project that is designed to serve a community or groups of communities, each of which has a current population of not more than 50,000 inhabitants, which may include Indian tribes and tribal organizations, dispersed home sites, or rural areas with domestic, municipal, and industrial water, including incidental noncommercial livestock watering and noncommercial irrigation of vegetation.

(b) A rural water supply project may include the following, or any combination of the following:

(1) The construction or installation of new rural water supply infrastructure and facilities;

(2) The improvement or upgrade of existing rural water supply infrastructure and facilities;

(3) The extension of existing rural water supply infrastructure and facilities to reach an increased service area; and

(4) The inter-connection of existing rural water supply infrastructure and facilities currently serving individual communities, dispersed homesites, rural areas, or tribes.

Secretary means the Secretary of the Interior, acting through the Commissioner of the Bureau of Reclamation.

Tribal Organization means:

(a) The recognized governing body of an Indian tribe; and

(b) Any legally established organization of Indians that is controlled, sanctioned, or chartered by the governing body, or democratically elected by the adult members of the Indian community to be served by the organization.

§ 404.3 What is the Reclamation Rural Water Supply Program?

This program addresses domestic, municipal, and industrial water supply needs in rural areas of the Reclamation States. Reclamation's experience, technical expertise, and financial resources assist rural communities to identify their water supply problems and needs, and evaluate options for addressing those needs. Using a regional or watershed perspective, Reclamation assists in planning projects that maximize regional and national benefits.

Through this program, Reclamation works in cooperation with non-Federal project sponsors in Reclamation States on a cost-share basis to:

(a) Investigate and identify opportunities to ensure safe and adequate rural water supplies for domestic, municipal, and industrial use in rural areas and small communities, including Indian tribes;

(b) Plan the design and construction of rural water supply projects through the conduct of appraisal investigations and feasibility studies; and

(c) Oversee, as appropriate, the construction of rural water supply projects that the Secretary recommends to Congress, which are subsequently authorized and funded for construction by Congress.

§ 404.4 What are the goals of the program?

The goals of the program are to:

(a) Assess and address urgent and compelling rural water supply needs that are not currently met by other programs;

(b) Promote and apply a regional or watershed perspective to water resources management in planning rural water supply projects;

(c) Develop solutions to address rural water supply needs that are cost-effective, and that generate national net economic benefits as required under the ''Economic Principles and Guidelines for Water and Related Land Resources'' (Principles and Guidelines). The Principles and Guidelines, published in 1983 by the Water Resources Council pursuant to the Water Resources Planning Act of 1965 (Pub. L. 89–80) as amended, is incorporated by reference into this section with the approval of the Director of the Federal Register under 5 U.S.C. 552(a) and 1 CFR part 51. The Principles and Guidelines are intended to ensure proper and consistent planning by Federal agencies in the formulation and evaluation of water and related land resources implementation studies. To enforce any edition other than that specified in this section, the material must be available to the public and approved by the Director of the Federal Register. All approved material is available for inspection at the National Archives and Records Administration (NARA). For information on the availability of this material at NARA, call 202–741–6030 or go to *http://www.archives.gov/federal_register/code_of_federal_regulations/ibr_locations.html.* Also, a copy of this publication may be obtained and inspected at: Bureau of Reclamation, Denver Federal Center, Building 67, Denver, CO 80225, Policy and Program Services, 303–445–2906 where copies are on file, or at the following website: *http://intra.gp.usbr.gov/resource_services/planning_process/principles_guidelines.pdf.*

(d) Encourage partnerships among rural communities, Indian tribes or tribal organizations, states or political subdivisions of a state, water districts and associations, and other eligible entities, to address rural water supply issues; and

(e) Complement other existing programs and authorities that address rural water supply issues, and encourage collaboration between programs where appropriate.

§ 404.5 Who is responsible for implementing this rule?

Authority to implement and make determinations under this rule has been delegated from the Secretary to the Commissioner. The Commissioner is authorized to implement this program and may re-delegate that authority as needed. Questions regarding the program should be directed to your local Reclamation office.

§ 404.6 Who is eligible to participate in the program?

Those eligible to participate in the program include:

(a) A state or political subdivision of a state, including a department, agency, municipality, county, or other regional or local authority;

(b) An Indian tribe or tribal organization; or

(c) An entity created under state law that has water management or water delivery authority, including for example, an irrigation or water district, canal company, water users association, rural water association or district, a joint powers authority, or other qualifying entity; and

(d) Any combination of the entities listed above, which collectively are referred to as the non-Federal project sponsor, as defined in § 404.2.

§ 404.7 What types of projects are eligible for consideration under the program?

To be eligible for consideration under the program, a rural water supply project must:

(a) Meet the definition of a rural water supply project in § 404.2; and

(b) Be located in a Reclamation State, as defined in § 404.2.

§ 404.8 Are there any exceptions that would allow a community with greater than 50,000 inhabitants to be part of an eligible rural water supply project?

Yes. A town or community with a population in excess of 50,000 inhabitants may participate in or be served by an eligible rural water supply project under this program if Reclamation determines that the town or community is a critical partner whose involvement substantially contributes to the financial viability of the proposed project. Such a community could be

expected to bear a greater proportionate share of the planning, design, and construction costs than other project sponsors, consistent with their capability to pay and the benefits they derive from the project.

§ 404.9 What types of infrastructure and facilities may be included in an eligible rural water supply project?

A rural water supply project may include, but is not limited to, the following types of infrastructure and facilities:

(a) Pumps, pipes, wells, surface water intakes and other diversion, transmission, or distribution systems;

(b) Storage tanks and small impoundments;

(c) Water treatment facilities for potable water supplies, including desalination facilities;

(d) Buildings necessary to house equipment and serve as a center for operations;

(e) Power transmission and related facilities required for the rural water supply project;

(f) Equipment and management tools for water conservation, groundwater recovery, and water reuse and recycling;

(g) Associated features to mitigate adverse environmental consequences of a project; and

(h) Appurtenances.

§ 404.10 Are there certain types of infrastructure and facilities that may not be included in a rural water supply project?

Yes. A rural water supply project may not include:

(a) Any infrastructure or facilities that would deliver water for commercial irrigation; and

(b) The construction of major impoundment structures.

§ 404.11 What type of assistance is available under the program?

Under the Reclamation Rural Water Supply Program, you may:

(a) Request Reclamation to conduct an appraisal investigation or feasibility study for a rural water supply project for you, with your cooperation;

(b) Request funding through a grant or cooperative agreement to enable you to conduct an appraisal investigation or feasibility study for a rural water supply project yourself, or through a contractor; or

(c) Request Reclamation to review and approve an appraisal investigation or feasibility study completed without assistance from Reclamation.

§ 404.12 Can Reclamation provide assistance with the construction of a rural water supply project under this program?

Reclamation may provide assistance with the construction of a rural water supply project developed under this program if Congress specifically authorizes the project and appropriates funds for construction.

§ 404.13 What criteria will Reclamation use to prioritize requests for assistance under the program?

All requests for assistance that meet the eligibility requirements in §§ 404.6 and 404.7 will be evaluated by applying the following prioritization criteria:

(a) Whether there is an urgent and compelling need for a rural water supply project that would:

(1) Address present or future water supply needs; or

(2) Promote public health and safety by addressing present and preventing future violations of drinking water standards;

(b) The extent to which a rural water supply project promotes and applies a regional or watershed perspective to water resources management as defined in § 404.2;

(c) The financial need of the project sponsors for assistance with the planning, design, and construction of a rural water supply project, as demonstrated by readily available local and regional economic indicators;

(d) The extent to which Reclamation is uniquely qualified to plan, design, and build the project;

(e) Whether a rural water supply project helps meet applicable requirements established by law;

(f) The extent to which a rural water supply project serves Indian tribes that have nonexistent or inadequate water systems;

(g) The extent to which a rural water supply project is ineligible for comprehensive funding (sufficient to fully fund planning and construction of the entire project) through other assistance programs;

(h) The extent to which a rural water supply project is identified as a priority by state, tribal or local governments;

(i) Whether a rural water supply project incorporates an innovative approach that effectively addresses water supply problems and needs, either by applying new technology or by employing a creative administrative or cooperative solution; and

(j) Other criteria that Reclamation deems appropriate.

§ 404.14 How will Reclamation provide notice of opportunities for assistance under the program?

Notice of opportunities for assistance to conduct an appraisal investigation or a feasibility study under § 404.11(a) or (b) will be posted as a program announcement on the required government-wide Web site for announcement of Federal assistance opportunities. Opportunities for assistance will also be advertised locally by Reclamation regional and area offices. You are encouraged to contact your local Reclamation office to find out about upcoming program announcements and to discuss your interest in the program.

§ 404.15 How can I request assistance under the program?

This table summarizes the requirements for requesting assistance under the program. The requirements are described in more detail in the sections that follow.

Type of assistance requested	How to request assistance
1. Request Reclamation to conduct an appraisal investigation	Submit a statement of interest as described in § 404.16. Reclamation will then advise you whether you are eligible to submit a full proposal.
2. Request funding to conduct an appraisal investigation yourself or through a contractor.	Submit a statement of interest as described in § 404.16. Reclamation will then advise you whether you are eligible to submit a full proposal.
3. Request Reclamation to conduct a feasibility study	Submit a full proposal as described in § 404.20.
4. Request funding to conduct a feasibility study yourself or through a contractor.	Submit a full proposal as described in § 404.20.
5. Request Reclamation to review and approve an appraisal investigation or a feasibility study completed without Reclamation assistance.	Submit the investigation or study and a cover letter to your local Reclamation office, as described in § 404.25.

§ 404.16 What information must I include in my statement of interest?

A statement of interest is a preliminary scope of work that must include sufficient information to address all of the eligibility criteria described in §§ 404.6 and 404.7 and the prioritization criteria in § 404.13, as well as any information required by the program announcement. In general, this may include, but is not limited to:

(a) Name, organization, and contact information, including the identification of any partners that may be involved in the appraisal investigation;

(b) Location map and description of the areas to be served by the proposed rural water supply project, including:

(1) Geographical scope;

(2) Demographics; and

(3) Existing rural water supply infrastructure, if any;

(c) Type of assistance being requested through this program as described in § 404.11;

(d) A general description of the problems, needs, and opportunities that the appraisal investigation is being formulated to address, supported by data or documentation where appropriate. The information provided must also address each of the prioritization criteria in § 404.13;

(e) A general description of project alternatives that may be considered in the investigation, including:

(1) Water supply management alternatives (e.g., types of infrastructure or facilities to deliver new water supplies), if known;

(2) Water demand management alternatives (e.g., water conservation and other approaches to reduce water consumption), if known; and

(3) Potential sources of water supply.

(f) A general description of any prior studies on the problems, needs, and water management alternatives at issue; and,

(g) A general description of existing sources of water supply.

§ 404.17 How will Reclamation evaluate my statement of interest?

(a) Reclamation will apply the eligibility requirements in §§ 404.6 and 404.7 and the prioritization criteria in § 404.13, to determine whether the proposed rural water supply project is eligible for further consideration through a full proposal;

(b) If the proposed project is not eligible for further consideration, Reclamation will notify you in writing of that outcome; and,

(c) If the proposed project is eligible for further consideration, Reclamation will notify you in writing that you are eligible to develop a full proposal to conduct an appraisal investigation, as described in § 404.20.

§ 404.18 How can I request assistance to conduct a feasibility study?

To request assistance to conduct a feasibility study under § 404.11(a) or (b), consistent with Reclamation's recommendation in an appraisal report, you must submit a full proposal to conduct a feasibility study in response to the program announcement, pursuant to § 404.20. You are not required to submit a statement of interest.

§ 404.19 What requirements must be met before I can request assistance to conduct a feasibility study?

All of the following requirements must be met before you can request assistance to conduct a feasibility study:

(a) An appraisal investigation must be completed, with or without assistance from Reclamation;

(b) Reclamation must have reviewed any appraisal investigation prepared without its assistance;

(c) Reclamation must have prepared an appraisal report evaluating the appraisal investigation; and,

(d) The appraisal report must include a recommendation by Reclamation, if appropriate, that a feasibility study should be conducted, as described in § 404.45.

§ 404.20 What information must I include in my full proposal to conduct an appraisal or a feasibility study?

A full proposal to conduct an appraisal investigation or a feasibility study is a detailed scope of work that must include sufficient information to address the eligibility criteria described in §§ 404.6 and 404.7, and the prioritization criteria in § 404.13. In general this may include, but is not limited to:

(a) The issues to be addressed in the appraisal investigation or feasibility study and a plan for addressing those issues. The information provided must also address each of the prioritization criteria in § 404.13;

(b) A description of who will conduct the appraisal investigation or feasibility study, which could include you, your contractor, or Reclamation;

(c) If you propose that either you or your contractor will conduct the appraisal investigation or feasibility study, you must include the information necessary for Reclamation to determine whether you or your contractor are qualified to conduct the investigation or study, and whether having you or your contractor conduct it is a cost-effective alternative, in accordance with the criteria in §§ 404.23 and 404.24;

(d) A schedule for conducting the work, identifying specific tasks and the duration of each task, and major milestones with dates for each milestone;

(e) A complete budget for conducting the appraisal investigation or feasibility study, including an itemized tabular summary of known or expected costs and a narrative description of those costs;

(f) A funding plan that details how the appraisal investigation or feasibility study will be paid for, taking into consideration applicable assistance and non-Federal cost-share requirements; and

(g) Any other information requested by Reclamation in the program announcement.

§ 404.21 What is Reclamation's role in preparing the full proposal?

(a) If you are requesting Reclamation to prepare an appraisal investigation or feasibility study on your behalf under § 404.11(a), Reclamation will work with you on a collaborative basis to provide the information requested in § 404.20(a), (b), (d), (e) and (f).

(b) If you are requesting funding through a grant or cooperative agreement under § 404.11(b), Reclamation will be available to provide you with guidance and assistance in preparing your full proposal, upon request.

§ 404.22 How will Reclamation evaluate my full proposal?

(a) Reclamation will evaluate the full proposal to conduct an appraisal or a feasibility study in order to ensure that it meets the requirements in § 404.20 and is, therefore, complete. Reclamation will notify you in writing of the outcome of this determination.

(b) If it is complete, Reclamation will evaluate your proposal against all other proposals received, using a competitive review process based on an application of the prioritization criteria in § 404.13.

(c) Full proposals will be selected for award of assistance based on:

(1) The evaluation process, as described in § 404.22(b); and

(2) The availability of appropriations; and

(3) Other criteria that Reclamation deems appropriate.

(d) Once the proposal evaluation and selection process is complete, you will be notified in writing of the outcome of your request for assistance.

§ 404.23 How will Reclamation determine whether you or your contractor is qualified to conduct an appraisal investigation or a feasibility study?

If you are requesting funding under § 404.11(b) to conduct an appraisal investigation or a feasibility study yourself or though a contractor, Reclamation will evaluate whether you, your technical staff, or contractor are qualified to perform the appraisal investigation or feasibility study based on their demonstrated qualifications and experience in performing or managing similar activities. Areas of expertise needed may include, but are not limited to, water management planning, engineering, hydrology, biology, demography, finance, and economics.

§ 404.24 How will Reclamation determine whether it is cost-effective for me or my contractor to conduct the appraisal investigation or feasibility study?

Reclamation will take the following steps to determine whether it is cost-effective for you or your contractor to conduct the appraisal investigation or feasibility study:

(a) Reclamation will review and evaluate the reasonableness of your full proposal, including the scope of work, the estimated costs, anticipated work schedule, and products to be delivered;

(b) At its discretion, Reclamation may also choose to prepare an independent government cost estimate to analyze whether it would be more cost-effective for Reclamation to complete the appraisal investigation or feasibility study;

(c) Reclamation will notify you in writing of its determination regarding the cost-effectiveness of your proposal and the basis for its decision.

§ 404.25 How can I request Reclamation to review an appraisal investigation or feasibility study that was not completed under this program?

(a) To request Reclamation to review an appraisal investigation or feasibility study that was not completed under this program as provided under § 404.11(c), you must submit the appraisal investigation or feasibility study to your local Reclamation office with a cover letter requesting Reclamation to review it.

(b) Your cover letter must address the eligibility criteria set forth in §§ 404.6 and 404.7 and the prioritization criteria in § 404.13.

(c) You may make your submittal at any time and are not required to submit a statement of interest in response to the program announcement, as required for requests to conduct an appraisal investigation or feasibility study under § 404.11(a) or (b).

§ 404.26 Must an appraisal investigation be completed before I can request Reclamation to review a feasibility study that was not completed under this program?

In general, Reclamation must review an appraisal investigation and prepare an appraisal report recommending that a feasibility study be conducted before Reclamation can review a feasibility study completed without Reclamation assistance under § 404.11(c). However, Reclamation may review a feasibility study without first reviewing and approving an appraisal investigation, if Reclamation determines that:

(a) No appraisal investigation was prepared for the project;

(b) The feasibility study satisfies the appraisal criteria set forth in § 404.44; and

(c) Reclamation documents these findings in the feasibility report.

§ 404.27 How will Reclamation evaluate my request to review an appraisal investigation or feasibility study completed without the support of Reclamation?

(a) Upon receipt of your submittal, Reclamation will apply the eligibility criteria in §§ 404.6 and 404.7 and the prioritization criteria in § 404.13, to determine whether the appraisal investigation or feasibility study is eligible to be reviewed under the program. Reclamation will notify you in writing of the outcome of this determination.

(b) If the proposed appraisal investigation or feasibility study is eligible for review, Reclamation will evaluate the investigation or study in accordance with the process set forth in § 404.43, for an appraisal investigation, or § 404.48, for a feasibility study.

§ 404.28 Is it possible to expedite the completion of an appraisal investigation or feasibility study?

Yes. If Reclamation determines that a community or groups of communities to be served by a proposed rural water supply project has urgent and compelling water needs, Reclamation will, to the maximum extent practicable, expedite appraisal investigations and reports and feasibility studies and reports conducted under this program.

§ 404.29 Can the level of effort needed to complete an appraisal investigation or feasibility study be scaled to be proportional to the size and cost of the proposed project?

Yes. In general, the level of effort for an appraisal investigation or feasibility study should be scaled to take into consideration the total size, cost, and complexity of the proposed rural water supply project in order to reduce the total cost of the investigation or study. However, the effort to scale the appraisal investigation or feasibility study must not diminish the quality of the data, the analysis, or the overall completeness of the investigation or study.

Subpart B—Cost-Sharing

§ 404.30 How much Federal funding can Reclamation provide for the completion of an appraisal investigation?

In general, Reclamation will be responsible for 100 percent of the cost of an appraisal investigation conducted under § 404.11(a) or (b), up to $200,000. If the cost of the appraisal investigation exceeds $200,000, your cost-share will be 50 percent of the amount exceeding $200,000.

§ 404.31 What forms of non-Federal cost-share payment are acceptable?

The non-Federal cost-share for an appraisal investigation or a feasibility study may be provided in the form of money or in-kind services that Reclamation determines are necessary and reasonable for the conduct and completion of the investigation or study. The determination of allowability, allocability, and reasonableness is governed by the Cost Principles of the Office of Management and Budget, codified at 2 CFR 220, 225, and 230, and in the Federal Acquisitions Regulations, Part 312.

§ 404.32 Can Reclamation reduce the non-Federal cost-share required for an appraisal investigation?

Yes. Reclamation may reduce the non-Federal cost-share for appraisal investigations below 50 percent of the costs exceeding $200,000, if:

(a) Reclamation determines that there is an overwhelming Federal interest in conducting the appraisal investigation, and you demonstrate financial hardship. Financial hardship will be determined in accordance with Reclamation's official policies, guidance and standards, which are available at your local Reclamation office; and

(b) Reclamation consults with other Federal agencies that are partners in the project and determines that a reduction in the non-Federal cost-share is appropriate.

§ 404.33 How much Federal funding can Reclamation provide for the completion of a feasibility study?

In general, Reclamation will be responsible for 50 percent of the cost of a feasibility study conducted under § 404.11(a) or (b). You will be

responsible to pay for the remaining 50 percent of the cost of the study using non-Federal funding.

§ 404.34 Can Reclamation reduce the amount of non-Federal cost-share required for a feasibility study?

Yes. Reclamation may reduce the non-Federal cost-share required for a feasibility study to an amount less than 50 percent of the study costs if:

(a) Reclamation determines that there is an overwhelming Federal interest in conducting the feasibility study, and you demonstrate financial hardship. Financial hardship will be determined in accordance with Reclamation's standards, which are available at your local Reclamation office; and

(b) Reclamation consults with other Federal agencies that are partners in the project and determines that a reduction in the non-Federal cost-share is appropriate.

§ 404.35 Is there a different non-Federal cost-share requirement for feasibility studies that involve a community greater than 50,000 inhabitants?

Yes. If the feasibility study involves a rural water supply system that will serve a community with a population in excess of 50,000 inhabitants, pursuant to the exception provided in § 404.8, you may be required to pay more than 50 percent of the costs of the study. Determination of the appropriate amount of the non-Federal cost-share will be based on the same criteria used to evaluate your capability to pay the non-Federal share of construction costs, set forth in § 404.39.

§ 404.36 Will Reclamation reimburse me for the cost of an appraisal investigation or a feasibility study that was not completed under § 404.11(a) or (b)?

No. The cost-share provisions described in this rule only apply to appraisal investigations and feasibility studies that are completed under the program pursuant to § 404.11(a) or (b). Reclamation will not reimburse you or provide program funding for any expenses related to an appraisal investigation or a feasibility study that is completed without assistance from Reclamation.

§ 404.37 How will Reclamation determine the appropriate non-Federal share of construction costs?

Reclamation will determine the appropriate non-Federal share of construction costs in the process of developing the feasibility report. The non-Federal cost-share will be:

(a) At least 25 percent of the total construction costs; and

(b) An additional amount based on your capability to pay, as appropriate, to be determined by Reclamation based on the factors in § 404.39.

§ 404.38 Are there different requirements for determining the appropriate non-Federal share of construction costs to be paid by Indian tribes?

Yes. The appropriate non-Federal share of construction costs to be paid by Indian tribes will be based on:

(a) Consideration of an Indian tribe's capability to pay at least 25 percent of the construction costs, to be determined in accordance with the factors in § 404.39; and

(b) If Reclamation determines, based on the analysis in § 404.38(a), that an Indian tribe is not capable of paying at least 25 percent of the construction costs, Reclamation may recommend in its feasibility report that the collection of all or part of the non-Federal construction costs apportioned to an Indian tribe be deferred, unless or until Reclamation determines that the Indian tribe should pay all or a portion of those costs.

§ 404.39 What factors will Reclamation consider in evaluating my capability to pay 25 percent or more of the construction costs?

Reclamation will consider the following factors:

(a) Economic factors for the project area, relative to the state average, including:

(1) Per capita income;

(2) Median household income; and

(3) The poverty rate;

(b) The ability of the project sponsor to raise tax revenues or assess fees such as user fees and ad valorum taxes or issue bonds;

(c) The strength of the project sponsor financial statements in comparison to other similar entities over the previous 4 years, including a review of:

(1) Current (includes cash and inventory) and non-current assets (property, plants etc.);

(2) Net Assets (total assets minus total liabilities);

(3) Changes to net assets;

(4) Operating revenues (water and power sales);

(5) Operating expenses (variable costs and depreciation, maintenance and repair);

(6) Cash flow from operating activities (positive value from water sales minus payments to supplies and employees);

(7) Current (current bonds payable and accounts payable) and non-current liabilities (long term debt payable);

(8) Outstanding debts and all other financial obligations;

(9) Collateral/equity as appropriate;

(10) Cash flows from capital and related financing activities (negative value from principle paid on bonds and interest payments);

(11) Net cash flow; and

(12) Any non-operating revenues and expenses;

(d) Funding commitments from non-Federal sources, other than the non-Federal project sponsor, including resources committed by state, county, or local governments;

(e) The existing cost of water and the cost to develop new water supplies in the region; and

(f) The impact of the proposed project on water rates;

(g) The projected impact of the proposed project on the non-Federal project sponsor's ability to raise or generate revenues;

(h) The non-Federal project sponsor's financial history including their past performance on repaying loans and other debts; and

(i) Any other financial means of the non-Federal project sponsor that is not captured in this subsection.

§ 404.40 What is the non-Federal share of operation, maintenance, and replacement costs?

You are required to pay 100 percent of the operation, maintenance, and replacement costs of any rural water supply project planned under this program.

Subpart C—Appraisal Investigations

§ 404.41 How will an appraisal investigation be conducted under this program?

Appraisal investigations will be conducted in accordance with Reclamation-approved standards governing the approach, process and content of the appraisal investigation. You can obtain information about Reclamation's standards and requirements for conducting an appraisal investigation by contacting your local Reclamation office.

§ 404.42 How much time is provided to complete an appraisal investigation?

An appraisal investigation must be scheduled for completion not later than 2 years after the date on which the appraisal investigation is initiated, unless otherwise agreed to in writing by Reclamation.

§ 404.43 What process will Reclamation follow to determine if an appraisal investigation is ready for review?

(a) Reclamation will evaluate whether the appraisal investigation adequately addresses all of the items required in Reclamation's standards for conducting appraisal investigations, and is, therefore ready for review. Reclamation

standards and requirements for the content of an appraisal investigation are available at your local Reclamation office. Reclamation will notify you in writing of the outcome of this determination within 90 business days from the date of Reclamation's receipt of the appraisal investigation;

(b) If the appraisal investigation does not include the required information, you will be notified in writing of the reasons why, and you will have an opportunity to make changes and re-submit the corrected appraisal investigation to Reclamation for additional review. As appropriate, Reclamation will work with you to suggest approaches to correct the appraisal investigation;

(c) Once Reclamation determines that the appraisal investigation includes all of the required information, Reclamation will review the investigation to determine, based on an application of the criteria set forth in § 404.44, whether or not it is appropriate to proceed to a feasibility study. Reclamation will document its findings in an appraisal report, as described in § 404.45;

(d) Reclamation's review of an appraisal investigation will take no longer than 180 business days from its receipt of the appraisal investigation to its completion of the appraisal report, excluding time when Reclamation is waiting for additional information from the project sponsor.

§ 404.44 What criteria will Reclamation apply to determine whether it is appropriate to recommend that a feasibility study be conducted?

In reviewing an appraisal investigation, Reclamation will apply the following criteria to determine whether at least one of the alternatives identified is appropriate for further analysis through a feasibility study, or whether the investigation should be terminated without conducting a feasibility study, including:

(a) Whether a reasonable range of alternatives (structural or non-structural) have been formulated and evaluated;

(b) Whether the recommendation for further study of one or more alternatives is clearly supported by the analysis in the appraisal investigation; and

(c) For each alternative considered in the investigation, whether the alternative:

(1) Identifies viable water supplies and water rights sufficient to supply the proposed service area, including all practicable water sources such as lower quality waters, non-potable waters, and water-reuse-based water supplies;

(2) Has a positive effect on public and health and safety;

(3) Will meet water demand, including projected future needs;

(4) Provides environmental benefits, including source water protection;

(5) Applies a regional or watershed perspective and promotes benefits in the region in which the project is carried out;

(6) Implements an integrated water resources management approach;

(7) Enhances water management flexibility, including providing for local control of water supplies and, where applicable, encouraging participation in water banking and markets;

(8) Promotes long-term protection of water supplies;

(9) Includes preliminary cost estimates that are reasonable and supported;

(10) Is cost-effective and generates national net economic benefits as required under the Principles and Guidelines (incorporated by reference at § 404.4);

(11) For each alternative proposed for further evaluation in a feasibility study, whether the project sponsor has the capability to pay 100 percent of the costs associated with the operation, maintenance, and replacement of the facilities constructed or developed; and

(12) Other factors that Reclamation deems appropriate.

§ 404.45 What will be included in the appraisal report prepared by Reclamation?

The appraisal report prepared by Reclamation will include Reclamation's finding as to whether or not it is appropriate to proceed to a feasibility study, based on Reclamation's review of the appraisal investigation and application of the criteria set forth in § 404.44, and the reasons supporting that finding.

§ 404.46 Who will the appraisal report be provided to?

A copy of the appraisal report will be provided to you. Reclamation will also publish a notice of availability of the appraisal report in the **Federal Register** and will make a copy of the report available to the public upon request.

Subpart D—Feasibility Studies

§ 404.47 How will a feasibility study be conducted under this program?

Feasibility studies will be conducted in accordance with Reclamation's standards governing the approach, process and content of the feasibility study, including the Principles and Guidelines (incorporated by reference at § 404.4). You can obtain information about Reclamation's standards and requirements for conducting feasibility studies by contacting your local Reclamation office.

§ 404.48 What process will Reclamation follow to determine if a feasibility study is ready for review?

(a) Reclamation will evaluate whether the feasibility study adequately addresses all of the items required in Reclamation's standards for conducting a feasibility study, and is, therefore, ready for review. Reclamation standards and requirements for the content of a feasibility study are available at your local Reclamation office. Reclamation will notify you in writing of the outcome of this determination within 90 business days from the date of Reclamation's receipt of the feasibility study;

(b) If the feasibility study does not include the required information, you will be notified in writing of the reasons why, and you will have an opportunity to make changes and re-submit the corrected feasibility study to Reclamation for additional review. Where appropriate, Reclamation will work with you to suggest approaches to correct the feasibility study;

(c) Once Reclamation determines that the feasibility study includes all of the required information, Reclamation will review the study to determine, based on application of the criteria set forth in § 404.49, whether or not it is appropriate to recommend to Congress that it authorize construction of the project;

(d) Reclamation's review of the feasibility study will take no longer than 180 business days from the date that Reclamation determines that the study includes all of the required information and is ready for review; and

(e) Reclamation will document its findings in a feasibility report, as more fully described in section § 404.50.

§ 404.49 What criteria will Reclamation use to recommend that a proposed rural water supply project be authorized for construction?

In reviewing a feasibility study, Reclamation will assure that the proposed project is consistent with the policies and programs of the President and will apply the following criteria to evaluate and determine whether it is appropriate to recommend authorization for construction:

(a) The degree to which the project meets the prioritization criteria in § 404.13;

(b) The outcome of the environmental analysis;

(c) Whether there is a Federal interest in the project, including;

(1) A clearly defined Federal nexus to a proposed project;

(2) The Federal cost of the project in relation to the amount of Federal resources likely to be available; and

(d) Whether the recommended project alternative is clearly supported by the feasibility study, based on application of the following factors, including the extent to which the alternative:

(1) Addresses near and long-term water demand;

(2) Advances public health and safety and consideration of other benefits of the proposed rural water supply project;

(3) Addresses environmental quality and source water protection issues;

(4) Addresses opportunities to treat and use low-quality or non-potable water, water-reuse based supplies, and brackish and saline waters, through innovative and economically viable treatment technologies;

(5) Addresses opportunities for water conservation through structural or non-structural approaches and demonstration technologies to reduce water use and water system costs;

(6) Addresses opportunities to take advantage of economic incentives and the use of market-based mechanisms;

(7) Includes a reasonable and supported estimate of construction costs and operation, maintenance, and replacement costs;

(8) Is consistent with the Principles and Guidelines (incorporated by reference at § 404.4).

(9) Includes a reasonable and supported operation, maintenance, and replacement plan to assist the project sponsor in establishing rates and fees and a schedule identifying how those costs should be allocated to each non-Federal project sponsor;

(10) Demonstrates your financial capability to pay at least 25 percent of the design and construction costs and 100 percent of the operation, maintenance, and replacement costs;

(11) Is eligible for guaranteed loans;

(12) Includes adequate administrative and financial controls to manage construction and operation, maintenance, and replacement of the project;

(13) Is eligible for assistance under other Federal authorities to pay for discrete features or portions of the project;

(14) Is technically feasible and can be constructed within industry standards;

(15) Involves partnerships with other state, local, or tribal governments or Federal entities; and

(16) In the case of Indian tribes and tribal organizations, the extent to which the alternative addresses the goal of economic self-sufficiency;

(17) The degree to which the proposed project demonstrates that it has clear deliverables, will be accomplished within a reasonable schedule, within budget, and is well managed; and

(18) Other factors and criteria that Reclamation deems appropriate.

§ 404.50 What information will be included in the feasibility report prepared by Reclamation.

The feasibility report prepared by Reclamation will include:

(a) Reclamation's finding as to whether the proposed rural water supply project is feasible and the reasons supporting that determination;

(b) A recommendation to Congress regarding whether or not the proposed rural water supply project should be authorized for construction, and the reasons supporting the recommendation. This recommendation will be based on Reclamation's review of the feasibility study and its application of the criteria set forth in § 404.49; and

(c) If the rural water supply project is recommended for construction, the feasibility report will also include:

(1) The appropriate Federal and non-Federal share of the capital construction costs for the project and for projects involving multiple project sponsors, the portion of those costs allocated to each project sponsor;

(2) What amount of grants, loan guarantees, or combination of grants and loan guarantees should constitute the Federal share of the project;

(3) The annual operation, maintenance, and replacement costs, and the portion of those costs allocated to each project sponsor participating in the rural water supply project; and

(4) An assessment of the financial capability of each project sponsor participating in the rural water supply project to pay the portion of the construction and operation, maintenance, and replacement costs allocated to it.

§ 404.51 Are proposed projects under the Rural Water Supply program reviewed by the Administration?

Yes. The Administration will review all projects proposed for funding under the Reclamation's Rural Water Supply program. This includes review under Executive Order 12322 to determine whether the project is consistent with the policies and programs of the President. This review will occur before the feasibility report is finalized.

§ 404.52 Who will the feasibility report be provided to?

Upon its completion, Reclamation will:

(a) Provide the feasibility report to you;

(b) Submit the feasibility report to the Committee on Energy and Natural Resources of the Senate and the Committee on Natural Resources of the House of Representatives;

(c) Make the report publicly available, along with associated study documents; and

(d) Publish in the **Federal Register** a notice of the availability of the results.

Subpart E—Miscellaneous

§ 404.53 Does this rule provide authority for the transfer of pre-existing facilities from Federal to private ownership, or from private to Federal ownership?

No. This rule does not authorize the transfer of pre-existing facilities or pre-existing components of any water system from Federal to private ownership, or from private to Federal ownership.

§ 404.54 Who will hold title to a rural water project that is constructed following the completion of an appraisal investigation or feasibility study under this program?

Title to any rural water project planned, designed and recommended for construction under this program will be held by the non-Federal project sponsor.

§ 404.55 Who is responsible for the operation, maintenance, and replacement costs?

You will be responsible for 100 percent of the operation, maintenance, and replacement costs for any rural water facility that is planned, designed, and recommended for construction under this program.

§ 404.56 If a financial assistance agreement is entered into for a rural water supply project that benefits more than one Indian tribe, is the approval of each Indian tribe required?

Yes. When a financial assistance agreement is entered into with an organization to perform services benefiting more than one Indian tribe, the approval of each such Indian tribe is a prerequisite to entering into the financial assistance agreement.

§ 404.57 Does this rule have any affect on state water law?

No. Neither the Act nor this rule preempts or affects state water law or any interstate compact governing water. Reclamation will comply with state water laws in carrying out this rule.

§ 404.58 Do rural water projects authorized before the enactment of the Rural Water Supply Act of 2006 have to comply with the requirements in this rule?

No. Neither the Act nor this rule imposes any additional requirements on rural water supply projects that were authorized for construction before the date of enactment of the Act.

§ 404.59 If the Secretary recommends a project for construction, is that a promise of Federal funding?

No. Congress must first authorize the project for construction and Federal funding is subject to the availability of appropriations.

§ 404.60 Does this rule contain an information collection that requires approval by OMB?

Yes. This rule does contain an information collection that is approved by OMB, under Control Number 1006–0029. The Paperwork Reduction Act provides that 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 OMB control number.

[FR Doc. E8–26584 Filed 11–14–08; 8:45 am]

BILLING CODE 4310–MN–P

LEGAL SERVICES CORPORATION

45 CFR Part 1602

Procedures for Disclosure of Information Under the Freedom of Information Act

AGENCY: Legal Services Corporation.

ACTION: Final rule.

SUMMARY: LSC is revising its regulation on procedures for disclosure of information under the Freedom of Information Act to implement changes in that law made by the OPEN Government Act of 2007. LSC is also designating the Office of Inspector General as a separate component for receiving requests for its records and making two technical amendments.

DATES: This Final Rule is effective as of December 31, 2008.

FOR FURTHER INFORMATION CONTACT: Mattie Cohan, Senior Assistant General Counsel, Office of Legal Affairs, Legal Services Corporation, 3333 K St., NW., Washington, DC 20007; 202–295–1624 (phone); 202–337–6519 (fax); *mcohan@lsc.gov* (e-mail).

SUPPLEMENTARY INFORMATION: LSC is subject to the Freedom of Information Act (FOIA) by the terms of the Legal Services Corporation Act. 42 U.S.C. 2996d(g).[1] LSC has implemented FOIA procedures through the adoption of regulations found at 45 CFR Part 1602.

On December 31, 2007, President Bush signed the Openness Promotes Effectiveness in our National Government Act of 2007 (''OPEN Government Act'' or ''Act'') into law. The OPEN Government Act amends FOIA in an effort to improve media and public access to government records. In order to bring LSC's FOIA regulations into conformance with the changes to FOIA made by the OPEN Government Act provisions, the LSC Board of Directors initiated a rulemaking on August 2, 2008 and LSC issued a Notice of Proposed Rulemaking (NPRM) on August 14, 2008 (73 Fed. Reg. 45764) proposing revisions to the regulation and seeking public comment. LSC received no comments on the NPRM and LSC adopts the revisions to the regulation as proposed. The changes to Part 1602 are discussed in greater detail below.

Section-by-Section Analysis

Definitions—45 CFR 1602.2

Section 1602.2(g)—Records

Under LSC's regulations, ''records'' are various materials ''made or received by the Corporation in connection with the transaction of the Corporation's business and preserved by the Corporation.'' 45 CFR 1602.2(g). Section 9 of the OPEN Government Act expands the statutory definition of ''record'' to include any information that is maintained for an agency by an entity under Government contract, for the purposes of records management. LSC proposed to amend § 1602.2(g) to conform the regulation with the expanded statutory definition by specifically referencing information maintained by LSC under contract for the purposes of records management. LSC adopts the revisions as proposed.[2]

Section 1602.2(h)—Representatives of News Media

FOIA provides that ''representatives of the news media'' may not be charged fees for search and review time associated with responding to their FOIA requests. 5 U.S.C. 552(a)(4)(A)(ii)(II). The term ''representative of the news media'' is not defined in FOIA, but LSC's FOIA regulation at Part 1602 currently contains a definition based on a definition of that term appearing in guidance published by the Office of Management and Budget. *See* 53 FR 6151 (March 1, 1988); 52 FR 10012 (March 27, 1987).

The OPEN Government Act of 2007 clarifies that ''freelance'' journalists and ''alternative media'' news sources (such as online news sources) are ''representatives of the news media'' for the purposes of the fee structure. Specifically, § 3 of the OPEN Government Act defines ''representative of the news media'' as ''any person or entity that gathers information of potential interest to a segment of the public, uses its editorial skills to turn the raw materials into a distinct work, and distributes that work to an audience.'' That section goes on to provide:

> In this clause, the term 'news' means information that is about current events or that would be of current interest to the public. Examples of news-media entities are television or radio stations broadcasting to the public at large and publishers of periodicals (but only if such entities qualify as disseminators of 'news') who make their products available for purchase by or subscription by or free distribution to the general public. These examples are not all-inclusive. Moreover, as methods of news delivery evolve (for example, the adoption of the electronic dissemination of newspapers through telecommunications services), such alternative media shall be considered to be news-media entities. A freelance journalist shall be regarded as working for a news-media entity if the journalist can demonstrate a solid basis for expecting publication through that entity, whether or not the journalist is actually employed by the entity. A publication contract would present a solid basis for such an expectation; the Government may also consider the past publication record of the requester in making such a determination.

Although LSC's existing definition of ''representative of the news media'' is not substantively inconsistent with or contrary to the newly clarified definition in the OPEN Government Act, LSC believes that it is prudent to amend its regulatory definition to reflect the revised statutory language. LSC believes that substituting the clarified definition for the existing one will ensure that LSC's regulation reflects the full intent of Congress. Accordingly, LSC proposed to amend § 1602.2(h) to reflect the statutory language. LSC adopts the definition as proposed.

Requests for Records—45 CFR 1602.8

Agencies are required to make determinations on whether to comply with FOIA requests within twenty (20) business days of receipt of a request.

[1] Absent this authority, LSC would not otherwise be subject to FOIA since LSC is not an agency, department or instrumentality of the Federal government. 42 U.S.C. 2996d(e)(1).

[2] In accordance with **Federal Register** requirements, LSC is not including any specific regulatory text language in this preamble. Readers are referred to the regulatory text section *supra*.

5 U.S.C. 552(a)(6)(A)(i). LSC has incorporated this requirement into its regulations at 45 CFR 1602.8(i). The OPEN Government Act provides additional instruction to clarify when the time limit begins to run. Specifically, section 6 of the OPEN Government Act provides that:

> The 20-day period under clause [5 U.S.C 552(a)(6)(A)(i)] shall commence on the date on which the request is first received by the appropriate component of the agency, but in any event not later than ten days after the request is received by any component of the agency that is designated in the agency's regulations under this section to receive requests under this section. [sic] The 20-day period shall not be tolled by the agency except:
>
> (I) That the agency may make one request to the requester for information and toll the 20-day period while it is awaiting such information that it has reasonably requested from the requester under this section; or
>
> (II) If necessary to clarify with the requester issues regarding fee assessment. In either case, the agency's receipt of the requester's response to the agency's request for information or clarification ends the tolling period.

Unlike some agencies subject to FOIA, LSC has had only one component designated to receive requests, the Office of Legal Affairs. The Office of Inspector General (OIG) is not a separate component designated to receive FOIA requests under LSC's regulations, although the General Counsel or designee forwards requests for records maintained by the OIG for processing and response. Under the current regulation, when FOIA requests are for OIG records and they are referred over to the OIG, the 20-day time limit for response only starts for the OIG when the OIG receives the request upon referral from the Office of Legal Affairs. However, under the new statutory requirements, the OIG's 20-day time limit will commence when the OIG receives the request from the Office of Legal Affairs, but in no event later than 10 working days from when the Office of Legal Affairs receives the request. Thus, if for some reason the referral is not made on a timely basis, the OIG could lose some or all of its response time before its response would be deemed late through no action on inaction on the part of the OIG.

Designating the OIG as a separate component authorized to receive requests directly would ameliorate, although not entirely eliminate, this potential problem. In addition, LSC notes that it is typical practice in other agencies with Inspectors General for those Offices of Inspector General to be separately designated components authorized to receive and process FOIA request directly. Accordingly, LSC proposed to revise 45 CFR 1602.8(i) to incorporate the provisions of the OPEN Government Act discussed above and to designate the Office of Inspector General as a component authorized to receive FOIA requests for its records. LSC adopts the revisions as proposed.

In addition, LSC proposed to redesignate paragraph (i)(2) as (i)(2)(i), and amend that paragraph to provide for the mutual referral by the respective Offices of FOIA requests received for the others' documents. LSC also proposed add a new paragraph (i)(2)(ii) to clarify when the 20-day period under paragraph (i)(1) begins to run for each respective Office. LSC adopts the revisions as proposed.

Exemptions for Withholding Records—45 CFR 1602.9

Under FOIA, entire documents or portions thereof may be withheld from disclosure if one or more specified exemptions apply. 5 U.S.C. 552(b). If a particular document contains information that can be withheld from disclosure which may reasonably be segregated from the material which must be released, the agency must (with limited exception) release the segregable portion of the record and indicate the amount of information which has been deleted. *Id.* Section 12 of the OPEN Government Act imposes a further requirement that the agency inform requesters of the exemption under which redacted information is being withheld. LSC proposes incorporating this new requirement into its regulations by amending § 1602.9(b) to insert the words ''and the exemption under which the deletion is made'' after the words ''amount of information deleted'' where they appear in the second and third sentences of that paragraph. LSC adopts the revision as proposed.

Officials Authorized to Grant or Deny Requests for Records—45 CFR 1602.10

Under the current regulation, because the OIG is not separately designated to receive its own FOIA requests, the Counsel to the Inspector General or designee is required to consult with the Office of the General Counsel prior to granting or denying requests for records which have been referred to the OIG. 45 CFR 1602.10(b). With the change, discussed elsewhere herein, to designate the OIG as a unit authorized to receive FOIA requests directly, this requirement is obsolete. Accordingly, LSC is deleting this requirement from the regulation by deleting the last sentence of § 1602.10(b).

In addition, under the current regulation, the Office of the General Counsel is required to consult with the OIG when a requested record originated with the OIG but is now maintained elsewhere within the Corporation. 45 CFR 1602.10(b). This ensures that the OIG has notice of the request and an opportunity to participate in the potential release of OIG records by the Office of General Counsel. With the change, discussed elsewhere herein, to designate the OIG as a component authorized to receive FOIA requests directly, it is appropriate to adopt a parallel provision requiring the OIG to consult with the Office of the General Counsel prior to granting or denying a request for a record which originated in a component of the Corporation other than the OIG but which is being maintained by the OIG. Accordingly, LSC proposed to add a new last sentence of § 1602.10(b) requiring such consultation. LSC adopts the revision as proposed.

Fees—45 CFR 1602.13

FOIA provides for the assessment of fees on requesters associated with the processing of their FOIA requests. 5 U.S.C. 552(a)(4). Prior to the adoption of the OPEN Government Act, applicable fees could be assessed when authorized under FOIA, regardless of the timeliness of the response to the requester. Section 6 of the OPEN Government Act has changed that, providing now that, for FOIA requests received on or after December 31, 2008, an agency which fails to provide a timely response may not assess search fees, except in cases involving unusual or exceptional circumstances. In the case of requesters who are representatives of the news media, since they are already not subject to search charges, the OPEN Government Act provides that, for FOIA requests received on or after December 31, 2008, applicable duplication fees will not be charged when the agency provides an untimely response. LSC proposed to implement this statutory change by amending § 1602.13, Fees, by redesignating paragraph (b) as a paragraph (b)(1) and adding a new paragraph (b)(2) to incorporate the statutory requirement. LSC adopts the revision with minor modifications to the text for clarity and to explicitly reference that the limitation on the charging of fees applies only the requests received on or after the effective date of the revision.

Technical Changes—References to LSC's Address

Although not required by the OPEN Government Act, LSC is taking this

opportunity to make two technical changes to the regulation, both referencing addresses for the submission of FOIA requests.

Section 1602.5—Public Reading Room

When the Corporation last amended Part 1602 in 2003, it was in the process of moving its offices from 750 First St. NE., Washington, DC to its current location at 3333 K St., NW., Washington, DC. Section 1602.5, which sets forth the address of LSC's public reading room and is also the address referenced in the instructions for the submission of FOIA requests in § 1602.8(b), was amended at that time to include both addresses. The reference to the First St. NE. address is now obsolete. Accordingly, LSC proposed to delete the reference to that obsolete address and amend the first sentence of § 1602.5(a) to reference LSC's current address. LSC adopts the revision as proposed.

Section 1602.8—Requests for Records

LSC proposed a technical change to § 1602.8(b) to update the email address requesters are required to use to submit FOIA requests. The current regulation lists an email address of *info@smtp.lsc.gov*, which is a general information email address. In order to improve handling and processing of FOIA requests, LSC has since established a dedicated FOIA email address to ensure that FOIA requests are identified and processed separately from other general information requests submitted to the Corporation. Accordingly, LSC proposed to amend paragraph (b) to delete the old email address, and substitute the correct dedicated FOIA e-mail address: *FOIA@lsc.gov* in the third sentence of paragraph (b). LSC adopts the revision as proposed.

List of Subjects in 45 CFR Part 1602

Freedom of Information, Reporting and recordkeeping requirements.

■ For the reasons set forth above, LSC amends 45 CFR part 1602 as follows:

PART 1602—PROCEDURES FOR DISCLOSURE OF INFORMATION UNDER THE FREEDOM OF INFORMATION ACT

■ 1. The authority citation for part 1602 continues to read as follows:

Authority: 42 U.S.C. 2996d(g); 5 U.S.C. 552.

■ 2. Paragraphs (g) and (h) of § 1602.2 are revised to read as follows:

§ 1602.2 Definitions.

(g) *Records* means books, papers, maps, photographs, or other documentary materials, regardless of whether the format is physical or electronic, made or received by the Corporation in connection with the transaction of the Corporation's business and preserved by the Corporation (either directly or maintained by a third party under contract to the Corporation for records management purposes), as evidence of the organization, functions, policies, decisions procedures, operations, or other activities of the Corporation, or because of the informational value of data in them. The term does not include, inter alia, books, magazines, or other materials acquired solely for library purposes.

(h) *Representative of the news media* means any person or entity that gathers information of potential interest to a segment of the public, uses its editorial skills to turn the raw materials into a distinct work, and distributes that work to an audience. In this clause, the term ''news'' means information that is about current events or that would be of current interest to the public. Examples of news media entities are television or radio stations broadcasting to the public at large and publishers of periodicals (but only if such entities qualify as disseminators of ''news'') who make their products available for purchase by or subscription by or free distribution to the general public. These examples are not all-inclusive. Moreover, as methods of news delivery evolve (for example, the adoption of the electronic dissemination of newspapers through telecommunications services), such alternative media shall be considered to be news media entities. A freelance journalist shall be regarded as working for a news media entity if the journalist can demonstrate a solid basis for expecting publication through that entity, whether or not the journalist is actually employed by the entity. A publication contract would present a solid basis for such an expectation; the Corporation may also consider the past publication record of the requester in making such a determination.

* * * * *

■ 3. Paragraph (a) of § 1602.5 is revised to read as follows:

§ 1602.5 Public reading room.

(a) The Corporation will maintain a public reading room its office at 3333 K St. NW., Washington, DC, 20007. This room will be supervised and will be open to the public during the regular business hours of the Corporation for inspecting and copying records described in paragraph (b) of this section.

* * * * *

■ 4. Paragraphs (b) and (i)(1)and (2) of § 1602.8 are revised to read as follows:

§ 1602.8 Requests for records.

* * * * *

(b) Requests. Requests for records under this section shall be made in writing, with the envelope and the letter or e-mail request clearly marked Freedom of Information Act Request. All such requests shall be addressed to the Corporation's Office of Legal Affairs or, in the case of requests for records maintained by the Office of Inspector General, to the Office of Inspector General. Requests by letter shall use the address given in § 1602.5(a). E-mail requests shall be addressed to *FOIA@lsc.gov* or, in the case of requests for records maintained by the Office of Inspector General, *FOIA@oig.lsc.gov*. Any request not marked and addressed as specified in this paragraph will be so marked by Corporation personnel as soon as it is properly identified, and will be forwarded immediately to the Office of Legal Affairs, or as appropriate, the Office of Inspector General. A request improperly addressed will only be deemed to have been received as in accordance with paragraph (i) of this section. Upon receipt of an improperly addressed request, the General Counsel or designee (or Counsel to the Inspector General or designee) shall notify the requester of the date on which the time period began.

* * * * *

(i)(1)(i) The General Counsel or designee, upon request for any records made in accordance with this section, except in the case of a request for Office of Inspector General records, shall make an initial determination of whether to comply with or deny such request and dispatch such determination to the requester within 20 days (excepting Saturdays, Sundays and legal public holidays) after receipt of such request, except for unusual circumstances, in which case the time limit may be extended for up to 10 working days by written notice to the requester setting forth the reasons for such extension and the date on which a determination is expected to be dispatched.

(ii) In the case of a request for any Office of Inspector General records made in accordance with this section, the Counsel to the Inspector General or designee shall make an initial determination of whether to comply with or deny such request and dispatch such determination to the requester

within 20 days (excepting Saturdays, Sundays and legal public holidays) after receipt of such request, except for unusual circumstances, in which case the time limit may be extended for up to 10 working days by written notice to the requester setting forth the reasons for such extension and the date on which a determination is expected to be dispatched.

(i)(2)(i) If the General Counsel or designee determines that a request or portion thereof is for the Office of Inspector General records, the General Counsel or designee shall promptly refer the request or portion thereof to the Office of Inspector General and send notice of such referral to the requester. If the Counsel to the Inspector General or designee determines that a request or portion thereof is for Corporation records not maintained by the Office of Inspector General, the Counsel to the Inspector General or designee shall promptly refer the request or portion thereof to the Office of Legal Affairs and send notice of such referral to the requester.

(ii) The 20-day period under paragraph (i)(1) of this section shall commence on the date on which the request is first received by the appropriate Office (the Office of Legal Affairs or the Office of Inspector General), but in no event later than 10 working days after the request has been received by either the Office of Legal Affairs or the Office of Inspector General. The 20-day period shall not be tolled by the Office processing the request except that the processing Office may make one request to the requester for information pursuant to paragraph (c) of this section and toll the 20-day period while it is awaiting such information that it has reasonably requested from the requester under this section; or, if necessary to clarify with the requester issues regarding fee assessment. In either case, the processing Office's receipt of the requester's response to such a request for information or clarification ends the tolling period.

* * * * *

■ 5. Paragraph (b) introductory text of § 1602.9 is revised to read as follows:

§ 1602.9 Exemptions for withholding records.

* * * * *

(b) In the event that one or more of the exemptions in paragraph (a) of this section apply, any reasonably segregable portion of a record shall be provided to the requester after deletion of the portions that are exempt. The amount of information deleted and the exemption under which the deletion is being made shall be indicated on the released portion of the record, unless doing so would harm the interest protected by the exemption under which the deletion is made. If technically feasible, the amount of information deleted and the exemption under which the deletion is being made shall be indicated at the place in the record where the deletion occurs.

* * * * *

■ 6. Paragraph (b) of § 1602.10 is revised to read as follows:

§ 1602.10 Officials authorized to grant or deny requests for records.

* * * * *

(b) The General Counsel or designee and the Counsel to the Inspector General or designee are authorized to grant or deny requests under this part. In the absence of a Counsel to the Inspector General, the Inspector General shall name a designee who will be authorized to grant or deny requests under this part and who will perform all other functions of the Counsel to the Inspector General under this part. The General Counsel or designee shall consult with the Office of the Counsel to the Inspector General or designee prior to granting or denying any request for records or portions of records which originated with the Office of Inspector General, or which contain information which originated with the Office of Inspector General, but which are maintained by other components of the Corporation. The Counsel to the Inspector General or designee shall consult with the Office of the General Counsel prior to granting or denying any request for records or portions of records which originated with any component of the Corporation other than the Office of Inspector General, or which contain information which originated with a component of the Corporation other than the Office of Inspector General, but which are maintained by the Office of Inspector General.

■ 7. Paragraph (b) of § 1602.13 is amended by redesignating paragraph (b) as (b)(1) and adding paragraph (b)(2) to read as follows:

§ 1602.13 Fees.

* * * * *

(b) * * *

(2) If no unusual circumstances, as set forth in § 1602.8 apply, for requests received on or after December 31, 2008, if LSC has failed to comply with the time limits set forth in that section, otherwise applicable search fees will not be charged to a requester. In such cases, if the requester is a representative of the news media, otherwise applicable duplication fees will not be charged.

Victor M. Fortuno,

Vice President and General Counsel.

[FR Doc. E8–26961 Filed 11–14–08; 8:45 am]

BILLING CODE 7050–01–P

FEDERAL COMMUNICATIONS COMMISSION

47 CFR Part 90

[WT Docket No. 05–62; WT Docket No. 02–55; FCC 08–244]

Amendment of the Commission's Rules To Improve Public Safety Communications in the 800 MHz Band, and to Consolidate the 800 MHz and 900 MHz Business and Industrial/Land Transportation Pool Channels

AGENCY: Federal Communications Commission.

ACTION: Final rule.

SUMMARY: In this document, the Federal Communications Commission (Commission) retains the current site-based licensing paradigm for the 900 MHz B/ILT spectrum, and declines to adopt competitive bidding rules or geographic service areas for the licensing of 900 MHz B/ILT ''white space;'' adopts interference protection rules applicable to all licensees operating in the 900 MHz B/ILT spectrum; and lifts, on a rolling basis, the freeze placed on applications for new 900 MHz B/ILT licenses in September 2004, the lift being tied to the completion of rebanding in each 800 MHz National Public Safety Planning Advisory Committee (NPSPAC) region. The Commission takes these actions to balance the needs of incumbent 900 MHz B/ILT licensees and commercial providers that operate in the spectrum.

DATES: Effective December 17, 2008.

FOR FURTHER INFORMATION CONTACT: Michael Connelly, *Michael.Connelly@FCC.gov,* Mobility Division, Wireless Telecommunications Bureau, (202) 418–0620, or TTY (202) 418–7233. For additional information concerning the Paperwork Reduction Act information collection requirements contained in this document, contact Judith Boley at 202–418–0214, or via the Internet at *PRA@fcc.gov.*

SUPPLEMENTARY INFORMATION: This is a summary of the Federal Communications Commission's *Report and Order (R&O),* FCC 08–244, adopted October 9, 2008, and released October 22, 2008. The full text of the *R&O* is available for public inspection and

copying during regular business hours at the FCC Reference Information Center, 445 12th St., SW., Room CY–A257, Washington, DC 20554. The complete text may be purchased from the Commission's duplicating contractor, Best Copying and Printing, Inc. (BCPI), 445 12th Street, SW., Room CY–B402, Washington, DC 20554, telephone 202–488–5300, facsimile 202–488–5563, or you may contact BCPI at its Web site: *http://www.BCPIWEB.com.* When ordering documents from BCPI, please provide the appropriate FCC document number, FCC 08–244, for the *R&O.* The *R&O* is also available on the Internet at the Commission's Web site through its Electronic Document Management System (EDOCS): *http://hraunfoss.fcc.gov/edocs_public/SilverStream/Pages/edocs.html.*

Paperwork Reduction Act of 1995 Analysis

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

Synopsis of Report and Order

I. Background

1. In 1986, the Commission established a pool structure for the 900 MHz PLMR spectrum and allocated 2.5 MHz for the Industrial/Land Transportation Pool (99 channels) and 2.5 MHz for the Business Pool (100 channels) (collectively, the B/ILT Pools) at 51 FR 37398, Oct. 22, 1986. The B/ILT Pools were established for use by site-by-site licensees engaged in commercial activities, the operation of educational, philanthropic, or ecclesiastical institutions, clergy activities, or the operation of hospitals, clinics, or medical associations. In addition, eligibility was also provided for any corporations furnishing nonprofit radio communication service to its parent corporation or subsidiary. Currently, applications for use of the B/ILT frequencies are limited to private, internal use systems.

2. In its *800 MHz Report and Order (800 MHz R&O)* at 69 FR 67823, Nov. 22, 2004, the Commission adopted significant technical and procedural measures designed to address the problem of interference to public safety communications in the 800 MHz band. As part of its reconfiguration plan at 800 MHz, the Commission consolidated the B/ILT Pools in the 800 MHz and 900 MHz bands, allowing any eligible B/ILT licensee to be licensed on the consolidated channels. The Commission also provided for additional flexibility in the 900 MHz band by allowing 900 MHz PLMR licensees to initiate CMRS operations on their currently authorized spectrum or to assign their authorizations to others for CMRS use. The Commission reasoned that since it permitted CMRS use of PLMR frequencies in the 800 MHz land mobile band, similar rules should apply in the 900 MHz land mobile spectrum, in the interest of regulatory symmetry. The Commission also noted that in order to provide the ''green space'' necessary to effect reconfiguration of the 800 MHz band, some operations may need to shift from the 800 MHz to 900 MHz band.

3. In September 2004, the Bureau issued a *Public Notice* freezing acceptance of applications for new 900 MHz B/ILT licenses until further notice. The Wireless Telecommunications Bureau (the Bureau) indicated that an exceptionally large number of applications for 900 MHz authorizations had been filed subsequent to the release of the *800 MHz R&O,* which allowed 900 MHz B/ILT licensees to initiate commercial operations on their licensed spectrum or to assign their authorizations to others for commercial use. The Bureau noted its concern that additional such filings might compromise the ability to accommodate displaced systems while the 800 MHz band is reconfigured to abate unacceptable interference to public safety, critical infrastructure, and other ''high site'' 800 MHz systems. The Bureau determined that applications for modification of existing facilities, assignment of license, or transfer of control of a licensee would continue to be accepted, subject to applicable rules regarding eligibility, loading, and other requirements. In addition, applicants were advised that they might have recourse via the Commission's waiver provisions to request an exception to the freeze.

4. The Commission adopted a *Notice of Proposed Rulemaking (NPRM)* at 70 FR 13,143, March 18, 2005, in WT Docket 05–62 proposing to amend it's rules to facilitate more flexible use of the 900 MHz B/ILT band and to license any remaining spectrum in the band using a geographic area licensing scheme. The *NPRM* also sought comment on defining the rights of B/ILT licensees already operating on the 900 MHz B/ILT frequencies, and on using competitive bidding rules, in the event mutually exclusive applications were filed for the proposed 900 MHz geographic licenses. The Commission also reaffirmed the Bureau's freeze on new applications for 900 MHz B/ILT licenses, concluding that allowing the continued filing of applications for new 900 MHz B/ILT licenses during the rulemaking period might limit the effectiveness of the decisions ultimately made in WT Docket No. 05–62. In response to the *NPRM,* the Commission received 20 comments, ten reply comments, and numerous *ex parte* filings.

II. Discussion

A. Retention of Site-Based Licensing for 900 MHz B/ILT Channels

5. In the *R&O,* the Commission retained the current site-based licensing paradigm for new applications for 900 MHz B/ILT licenses, declining to adopt at this time the geographic area and competitive bidding licensing rules and policies proposed in the *NPRM.* There, the Commission proposed service rules for 900 MHz B/ILT channels to provide licensees with the flexibility to employ the spectrum for any use permitted by the United States Table of Frequency Allocations contained in part 2 of our rules (*i.e.*, fixed or mobile services). The Commission tentatively concluded to adopt a geographic area licensing scheme for the 900 MHz B/ILT spectrum because such an approach would be consistent with flexible use management principles, and requested comment on that tentative conclusion.

6. Some commenters supported competitive bidding and flexible use rules (including geographic area licensing) for all unlicensed 900 MHz B/ILT spectrum. For example, Nextel asserted that the existing 900 MHz B/ILT access rules are limiting, inefficient, and a gross underutilization of spectrum that, if unchanged, would impede the ability of the marketplace to respond to consumer demand. While conceding that there may be circumstances under which the Commission may need to ''set aside'' spectrum for particular uses in order to achieve important public interest goals, Nextel notes the Commission has in the past decade adopted flexible and competitive licensing policies to promote an innovative marketplace, and that auctioning all unused 900 MHz B/ILT spectrum will facilitate successful 800 MHz reconfiguration.

7. The majority of commenters opposed using competitive bidding to license the remaining 900 MHz B/ILT spectrum using geographic service

areas, many of whom urge the Commission, if it were to conduct an auction, to set aside some portion of currently unlicensed 900 MHz B/ILT white space for traditional B/ILT use. For example, the Joint Commenters contended that auctioning all 900 MHz B/ILT white space was tantamount to a ''complete loss'' of the 900 MHz band for incumbent B/ILT licensees, and would ''strand'' incumbents at their existing capacity levels and service areas. The Joint Commenters questioned whether the public interest truly is best served by allocating all unencumbered spectrum for cell phones and utilizing spectrum auctions in light of the growth needs of traditional B/ILT licensees. In the event the Commission were to decide to auction and license all available 900 MHz B/ILT white space, the Joint Commenters urge the Commission to reserve some spectrum for continued site-based licensing under current eligibility requirements.

8. The Commission found that the record, as developed in the docket, supports retention of the current site-based licensing formula for the 900 MHz B/ILT spectrum, and therefore declined to adopt competitive bidding rules or geographic service areas to license 900 MHz B/ILT ''white space.'' It was persuaded by the record that the dedicated spectrum allotted to B/ILT licensees at 900 MHz represents one of the few remaining opportunities for such licensees to obtain much-needed spectrum, noting geographic-based service area licensing in lieu of site-based licensing would do little in terms of meeting the needs of current and future 900 MHz B/ILT licensees, many of whom would be forced to acquire at auction more spectrum than what they actually need, or can afford, to ensure that they have adequate spectrum necessary for wireless telecommunications systems to support their operations. Even if a traditional 900 MHz B/ILT licensee determined that it was fiscally responsible to acquire a geographic-based license, the Commission remained concerned that portions of the acquired spectrum would remain unused and undervalued, precisely the result the Commission sought to avoid when it opened this proceeding.

9. A significant underlying rationale for proposing geographic service areas and competitive bidding rules to license 900 MHz B/ILT spectrum white space was the need to facilitate 800 MHz rebanding, on the theory that 800 MHz commercial licensees would need to relocate to a band with similar spectral characteristics. Sprint Nextel, an 800 MHz commercial licensee, has indicated that it has acquired hundreds of 900 MHz B/ILT site-based licenses, and will continue to acquire such licenses, in order to support 800 MHz rebanding. In addition, Sprint Nextel has obtained special temporary authority (STA) from the Commission to operate on a temporary basis on 900 MHz B/ILT spectrum in order to support its 800 MHz rebanding efforts. Finally, Sprint Nextel is using spectrum leasing arrangements as a means for obtaining 900 MHz B/ILT spectrum to be used on a time-limited basis to facilitate 800 MHz rebanding. Those options remain open to Sprint Nextel under the action the Commission took in the *R&O.* In light of the opportunities Nextel has for obtaining 900 MHz B/ILT spectrum to support its 800 MHz rebanding activities, adoption of geographic area licensing and competitive bidding rules for 900 MHz B/ILT spectrum is no longer essential to the success of the 800 MHz rebanding process, and may in fact impede the effective use of this spectrum by many other incumbents and potential licensees in the 900 MHz B/ILT band.

B. Interference Protection in the 900 MHz B/ILT Band

10. In the *NPRM,* the Commission proposed requiring geographic area licensees to afford the same protection to incumbent 900 MHz B/ILT systems that 900 MHz SMR MTA licensees must currently provide to incumbents. The Commission also asked if additional interference protection requirements were necessary and, if so, what additional rules should apply and why. The Commission specifically asked whether the overall approach to interference protection should be modified to include the interference abatement requirements mandated in the *800 MHz R&O,* or an enhanced or voluntary Best Practices approach to address potential interference in this band.

11. A number of commenters urged adoption of the same or similar interference abatement requirements for the 900 MHz B/ILT spectrum as those previously established for a post-rebanded 800 MHz environment in the *800 MHz R&O.* In initial comments in this proceeding, for example, the Joint Commenters asserted that it is imperative that incumbents be adequately protected from interference caused by new (commercial) entrants. They also asserted there is reason to believe the introduction of commercial cellular networks into the 900 MHz bands would cause harmful interference to incumbents in the bands. AAR also urges adoption of the 800 MHz interference abatement rules. In a subsequent *ex parte* presentation, the Joint Commenters, joined by Enterprise Wireless Alliance and United Parcel Service, urged that § 90.672(a) of the Commission's rules regarding unacceptable interference to non-cellular 800 MHz licensees from 800 MHz cellular systems or part 22 cellular systems be amended to include 900 MHz B/ILT spectrum. Section 90.672(a) defines ''unacceptable interference'' as occurring when a fully operational transceiver receives minimum median desired signal strengths of $-104/-101$ dBm, as measured at the radio frequency (RF) input of the receiver of a mobile/portable unit, and when a voice transceiver receives an undesired signal or signals that cause the measured Carrier to Noise plus Interference (C/(I+N)) ratio of a receiver to be less than 20 dB.

12. Sprint Nextel opposed implementing the same standards in 900 MHz B/ILT spectrum as the Commission adopted for post-rebanded 800 MHz spectrum. Initially, in responding to the proposals set out in the *NPRM,* Nextel asserted that new 900 MHz B/ILT geographic area licensees should provide the same level of protection to co-channel 900 MHz B/ILT incumbents that 900 MHz SMR licensees must provide, and that incumbents are entitled to protection within their originally-licensed 40 dBμ V/m field strength contours. Further, it urges voluntary ''Best Practices'' and a commitment by 900 MHz CMRS licensees to cooperate on a case-by-case basis with incumbent 900 MHz B/ILT licensees. Nextel cautioned strongly against adopting the interference abatement requirements adopted in the *800 MHz R&O,* on the grounds that there are no public safety channels allocated at 900 MHz; that incumbents can finance robust, interference-resistant systems; that there have been no complaints regarding Sprint Nextel's dual band 800 MHz/900 MHz Enhanced Specialized Mobile Radio (ESMR) system (operating since 2002); and that to adopt the 800 MHz interference measures for the 900 MHz white space would impose substantial operational burdens on geographic licensees, and would be contrary to the FCC's flexible use policies. In a subsequent *ex parte* presentation, Sprint Nextel suggested that, to the extent the Commission looks to the 800 MHz rebanding proceeding for guidance regarding interference protection standards and practices for the 900 MHz B/ILT spectrum, the interference protection standards that apply to the 800 MHz band's interleaved

spectrum during the transition to spectral segregation would be more appropriate than the standards to be applied when the rebanding is completed. Sprint Nextel avers that the interference abatement protection it has to extend in an interleaved environment, during the rebanding transition, while lower than the protection afforded post-rebanding, is a more comparable standard in light of the nature of operations in the 900 MHz B/ILT band.

13. The Commission noted that in the *800 MHz Supplemental Report and Order,* 70 FR 6757, Feb. 8, 2005, in the 800 MHz rebanding proceeding, it had acknowledged that the rules adopted for a post-rebanded environment could impose substantial operational restrictions on ESMR carriers operating in the interleaved channels prior to completion of band reconfiguration, and that field experience had shown that a lesser standard, while less ''complete,'' could nevertheless provide meaningful interference protection during transition. The Commission therefore waived §§ 22.970(a) and 90.672(a) of its rules until band reconfiguration was complete in a particular NPSPAC region. In waiving the rules, the Commission determined that, during the interim transition period, non-cellular systems would enjoy interference protection for signal strengths of −85 dBm for portables and −88 dBm for mobiles. While noting that these levels were not universally applauded, the Commission observed that they were supported by Nextel and several commercial, private, and public safety members of the 800 MHz community. The Commission found a direct relationship between these interim interference protection levels and the ability of ESMR and cellular carriers to serve their subscribers adequately, a factor affecting both the public's access to wireless services and the viability of a carrier's business.

14. Noting that a spectrally interleaved environment, where technically different systems operate on a co-channel and/or adjacent channel basis, is developing within the 900 MHz band, the Commission adopted standards in the *R&O* based on the standards it had implemented for the rebanding transition period in the 800 MHz band. Specifically, all licensees operating in the 900 MHz B/ILT frequencies are entitled to interference protection for portable/hand-held units with a minimum median desired signal strength of −85 dBm and for mobile/vehicular units with a minimum median desired signal strength of −88 dBm. Similar to the Commission's observation in the context of 800 MHz rebanding, it concluded that these values likewise are ''within the range of reason'' for providing meaningful interference protection for all licensees operating on 900 MHz B/ILT frequencies. The Commission adopted a revision to § 90.672 of it's rules that provides that unacceptable interference will be deemed to occur to operations in the 900 MHz B/ILT band where, assuming all other conditions as provided in the amended rule section are met, a voice transceiver is receiving an undesired signal or signals that cause the measured Carrier to Noise plus Interference (C/(I+N)) ratio of the transceiver's received to be less than 17 dB. As with the median desired signal, the value the Commission adopted for this ratio is consistent with the value that is applicable to the 800 MHz band during the rebanding transition. Finally, the Commission adopted the proposal put forth by the Joint Commenters for establishing minimum receiver standards for mobile and portable units used in the 900 MHz B/ILT band: 60 dB intermodulation rejection ratio; 60 dB adjacent channel rejection; and −116 dBm reference sensitivity. These minimum receiver standards are part of the package of rule provisions designed to guard against unacceptable interference in the 900 MHz B/ILT band.

C. Lifting the Freeze Place on Applications for New 900 MHz B/ILT Licenses

15. The Bureau imposed a freeze on the acceptance of applications for new 900 MHz B/ILT licenses in September 2004 at 19 FCC Rcd 18277 (WTB 2004), and the Commission affirmed that freeze in the *NPRM.* Because the Commission is concluding WT Docket 05–62, and in light of the actions it took in the *R&O,* the Commission lifted the freeze placed on the filing of applications for new 900 MHz B/ILT authorizations. Specifically, the freeze will be lifted in a NPSPAC region six months after rebanding is complete in that particular NPSPAC region. The Commission believes this approach best balances the demands for 900 MHz B/ILT spectrum, including the ongoing needs of Nextel for access to this spectrum to support its rebanding efforts. As of October 9, 2008, the Commission has granted special temporary authorizations to Sprint Nextel to operate temporarily on 900 MHz B/ILT spectrum in 101 markets in order to provide ''green space'' necessary to enable the relocation of 800 MHz incumbents during the reconfiguration of this band. The Commission is concerned that lifting the 900 MHz B/ILT application freeze in its entirety at this time could jeopardize Nextel's 800 MHz rebanding efforts. Accordingly, we will not lift the freeze in a particular NPSPAC region until six months after the date that rebanding is completed in that particular region. We believe that this timeframe will provide Nextel a reasonable opportunity to relocate its facilities off the 900 MHz B/ILT frequencies it is now using under special temporary authority. In order to avoid any confusion regarding the date when the 900 MHz B/ILT application freeze is lifted in any particular NPSPAC region, the Commission directed the Bureau, in coordination with the Public Safety and Homeland Security Bureau, to provide public notice as to when the freeze will end within 60 days of rebanding being completed within a specific NPSPAC region.

16. In addition, the Commission noted there may be situations in which an applicant seeks a 900 MHz B/ILT authorization for spectrum in a NPSPAC region where the freeze has been lifted that could extend the applicant's service contour into an adjacent NPSPAC region where the freeze has not been lifted. In such a case, the applicant may file a waiver request to allow its coverage to extend into the NPSPAC region in which the freeze remains in effect, provided the overlapping coverage area is limited and would not disrupt Nextel's rebanding efforts in the region. Further, the Commission reminded potential 900 MHz B/ILT applicants that, under the applicable rules, co-channel frequency usage in a NPSPAC region where the freeze has not yet been lifted may limit the geographic area in which applications can be permissibly filed in a NPSPAC region where the freeze is no longer in effect.

III. Conclusion

17. In the *R&O,* the Commission decided to retain site-based licensing for the 900 MHz B/ILT band, believing this action will help ensure the continued viability of 900 MHz B/ILT communications operations, which play an essential role in emergencies, critical infrastructure operations, homeland security, and the U.S. economy. At the same time, Nextel will retain a number of mechanisms to access 900 MHz B/ILT spectrum to be used as ''green space'' during the course of the 800 MHz rebanding process. The Commission also adopted interference standards that will help to facilitate interference-free operation in this band and accommodate the range of licensees operating in this band. Finally, the Commission lifted the freeze on the filing of applications for new 900 MHz

B/ILT licenses in each 800 MHz NPSPAC region six months after 800 MHz rebanding is completed in that region. The Commission believes that its actions in this proceeding achieve a balance of competing interests that will best serve the needs of the public.

IV. Procedural Matters

A. Regulatory Flexibility Act

18. As required by the Regulatory Flexibility Act of 1980 (RFA), the Commission has prepared a Final Regulatory Flexibility Analysis (FRFA) of the possible significant economic impact on small entities of the policies and rules adopted in this *R&O.* The analysis is found in an appendix to the *R&O.*

B. Congressional Review Act

19. The Commission will send a copy of the *R&O* to Congress and the Government Accountability Office pursuant to the Congressional Review Act, *see* 5 U.S.C. 801(a)(1)(A).

C. Accessible Formats

20. Accessible formats of the *R&O* (Braille, large print, electronic files, audio format), are available to persons with disabilities by sending an e-mail to *fcc504@fcc.gov* or by calling the Consumer & Governmental Affairs Bureau at 202–418–0530 (voice), 202–418–0432 (TTY). The R&O can also be downloaded at *http://www.fcc.gov.*

V. Final Regulatory Flexibility Act Analysis

21. As required by the Regulatory Flexibility Act of 1980, as amended (RFA), an Initial Regulatory Flexibility Analysis (IRFA) was incorporated in the Notice of Proposed Rulemaking (*NPRM*). The Commission sought written public comment on the proposals in the *NPRM,* including comment on the IRFA. This present Final Regulatory Flexibility Analysis (FRFA) conforms to the RFA.

A. Need for, and Objectives of, the Rules

22. In the *R&O,* the Commission takes three actions: First, it retains the current site-based licensing paradigm for the 199 channels allocated to the Business and Industrial Land Transportation (B/ILT Pool) in the 896–901/935–940 MHz (900 MHz) band (900 MHz B/ILT Pool) and declines to adopt competitive bidding rules or geographic service areas for the 900 MHz B/ILT ''white space;'' second, it amends part 90 of the Commission's rules to establish interference protection rules for licensees operating in the 900 MHz B/ILT Pool; and third, it lifts, on a rolling basis, the freeze on applications for new licenses in the 900 MHz B/ILT Pool.

23. Regarding retention of the current site-based licensing paradigm, the spectrum allotted to 900 MHz B/ILT licensees is one of the few remaining area where such licensees can obtain spectrum essential to their safe and efficient operation; transitioning to geographic area licensing could in many cases frustrate normal B/ILT system growth. Traditional B/ILT licensees have a vital communications role in safeguarding critical infrastructure (CI) industries, including such varied and critical industries as utilities, land transportation, manufacturers/industry, and petro-chemical. Finally, an important rationale for originally proposing to adopt geographic service areas and competitive bidding processes was to facilitate rebanding at 800 MHz by allowing Sprint Nextel to relocate to spectrally-similar 900 MHz B/ILT spectrum. Through a combination of acquisition of site-based licenses, special temporary authorizations, and spectrum leasing at 900 MHz, Sprint Nextel appears to have acquired sufficient spectrum at 900 MHz to allow it to proceed with the 800 MHz rebanding, and the Commission concludes that geographic licensing and competitive bidding rules are not now essential to the success of 800 MHz rebanding.

24. Regarding amending part 90 of the Commission's rules to establish interference protection standards, the environment at 900 MHz is similar to the spectrally interleaved environment that exists today at 800 MHz during the current rebanding transition period. In the *800 MHz Supplemental Report and Order,* the Commission adopted an ''interim'' interference protection standard that cellular licensees need to afford non-cellularized systems prior to the completion of rebanding. Because the 900 MHz band has and will continue to include systems employing different technologies and with different operational characteristics that are spectrally interleaved, the 800 MHz ''interim'' environment is sufficiently similar to the 900 MHz spectrum environment that the rules the Commission adopted for use during the 800 MHz rebanding transition are appropriate for the 900 MHz B/ILT spectrum.

25. Regarding lifting the freeze on applications for new licenses in the 900 MHz B/ILT Pool, the freeze placed on applications for new 900 MHz B/ILT licenses in September 2004 will be lifted on a rolling basis, tied to the completion of rebanding in each 800 MHz National Public Safety Planning Advisory Committee (NPSPAC) region. Specifically, the freeze will be lifted in a NPSPAC region six months after rebanding is complete in that particular NPSPAC region. The Commission will provide notice to the public regarding the date on which the freeze will be lifted in each NPSPAC region after rebanding concludes in that region. Accepting applications for new authorizations on a rolling basis best balance the demands for 900 MHz B/ILT spectrum, including the ongoing needs of Sprint Nextel for access to this spectrum to support its rebanding efforts. Lifting the freeze on a rolling basis, with a six-month ''grace period,'' will provide Sprint Nextel a reasonable opportunity to relocate its facilities off the 900 MHz B/ILT frequencies it is now using under special temporary authority.

B. Summary of Significant Issues Raised by Public Comments in Response to the IRFA

26. No comments or reply comments were filed in direct response to the IRFA.

C. Description and Estimate of the Number of Small Entities To Which the Rules Will Apply

27. The RFA directs agencies to provide a description of, and where feasible, an estimate of the number of small entities that may be affected by the proposed rules and policies, if adopted. The RFA generally defines the term ''small entity'' as having the same meaning as the terms ''small business,'' ''small organization,'' and ''small governmental jurisdiction.'' In addition, the term ''small business'' has the same meaning as the term ''small business concern'' under the Small Business Act. A ''small business concern'' is one which: (1) Is independently owned and operated; (2) is not dominant in its field of operation; and (3) satisfies any additional criteria established by the SBA.

28. *Small Businesses.* Nationwide, there are a total of approximately 22.4 million small businesses, according to SBA data.

29. *Small Organizations.* Nationwide, there are approximately 1.6 million small organizations.

30. *Small Governmental Jurisdictions.* The term ''small governmental jurisdiction'' is defined as ''governments of cities, towns, townships, villages, school districts, or special districts, with a population of less than fifty thousand.'' As of 2002, there were approximately 87,525 governmental jurisdictions in the United States. This number includes 38,967 county governments, municipalities, and townships, of which 37,373

(approximately 95.9%) have populations of fewer than 50,000, and of which 1,594 have populations of 50,000 or more. Thus, we estimate the number of small governmental jurisdictions overall to be 85,931 or fewer. In completing this FRFA, we recognize that small governmental jurisdictions are, in fact, likely to be 900 MHz B/ILT licensees.

31. *Wireless Telecommunications Carriers.* The SBA has developed a small business size standard for wireless firms within the broad economic census category of ''Wireless Telecommunications Carriers (except Satellite).'' Under this category, the SBA deems a wireless business to be small if it has 1,500 or fewer employees. For the census category of wireless telecommunications carrier, Census Bureau data for 2002 show that there were 11,156 firms in this category that operated for the entire year. Of this, 9,770 had fewer than 100 (one hundred) employees. Thus, under this category and size standard, the great majority of firms can be considered small.

32. Licensees in the 900 MHz B/ILT band generally fall into one of two categories: wireless telecommunications carrier (except satellite) that provide service to other parties, and entities that use the spectrum solely for internal purposes, not to provide telecommunications services to other, but rather to support their primary operations. The first category of licensees, those that provide telecommunications service to others, are typically incumbent B/ILT licensees that have either converted their operations to commercial use, as is allowed under Commission rules, or assigned their licenses to a commercial operator for commercial use. Others in this category include commercial entities operating in this band under special temporary authority, or through a leasing arrangement with an incumbent B/ILT licensee. In the second category are more traditional B/ILT licensees, ''traditional'' in that provision of telecommunications services is not their primary operation. Rather, these licensees hold authorizations to operate in the 900 MHz B/ILT only to the extent that holding such authorizations, and providing communication, further their primary operations. Examples include public utilities, small, mid-size, and large manufacturers, parcel delivery companies, etc.

33. *Estimates for Private Land Mobile Radio (PLMR) Licensees, including 900 MHz B/ILT Licensees.* As a preliminary matter, we note that 900 MHz B/ILT licensees fall under the SBA designation of wireless telecommunications carriers (except satellite). Private land mobile radio systems serve an essential role in a vast range of industrial, business, land transportation, and public safety activities. These radios are used by companies of all sizes operating in all U.S. business categories. Because of the vast array of PLMR users, the Commission has not developed a definition of small entities specifically applicable to PLMR users, nor has the SBA developed so specific a definition. As noted above, under this category and size standard, the great majority of firms can be considered small. For the purpose of determining whether a licensee is a small business as defined by the SBA, each licensee would need to be evaluated within its own business area. The Commission's fiscal year 1994 annual report indicates that, at the end of fiscal year 1994, there were 1,101,711 licensees operating 12,882,623 transmitters in the PLMR bands below 512 MHz. For purposes of FRFA analysis, we assume the vast majority of all PLMR licensees are small.

34. The Commission has determined that there are approximately 1,000 licensees in the 896–901 MHz and 935–940 MHz B/ILT MHz bands, as of October 9, 2008; the Commission does not know how many licensees in these bands are small entities, as the Commission does not collect that information for these types of entities. The Commission notes that, under the action it takes in this Order, entities, including small businesses, may resume filing for authorizations in this service. The Commission does not know how many entities that will file for authorization will be small entities. Thus, the Commission assumes, for purposes of the FRFA, that all prospective licensees are small entities as that term is defined by the SBA or by our proposed small business definitions for these bands.

D. Description of Projected Reporting, Recordkeeping, and other Compliance Requirements

35. There are no new reporting or recordkeeping requirements adopted in the *R&O* that impose new compliance requirements on affected entities.

E. Steps Taken To Minimize Significant Economic Impact on Small Entities, and Significant Alternatives Considered

36. The RFA requires an agency to describe any significant alternatives that it has considered in reaching its proposed approach, which may include the following four alternatives (among others): (1) The establishment of differing compliance or reporting requirements or timetables that take into account the resources available to small entities; (2) the clarification, consolidation, or simplification of compliance or reporting requirements under the rule for small entities; (3) the use of performance rather than design standards; and (4) an exemption from coverage of the rule, or any part thereof for small entities.

37. Regarding retention of the current site-based licensing formula, the Commission considered adopting competitive bidding rules and geographic-area licensing, but found that the adverse effects of changing the licensing system on all current and future licensees in this service, and particularly including small businesses, were too great. The Commission is in particular concerned that traditional 900 MHz B/ILT licensees, whose primary business is something other than provision of communications services, would have to acquire far more spectrum at auction than they would need, causing the type of spectrum hoarding and warehousing the Commission has worked against. The Commission therefore decided to retain the current licensing system.

38. Regarding amending part 90 of the Commission's rules to account for, and limit harmful interference within, the interleaved environment of the 900 MHz B/ILT spectrum, the Commission considered three options: To adopt the same rules as will be applied in the post-rebanded 800 MHz environment; to retain the current 900 MHz B/ILT interference protection rules; and to adopt the rules currently in effect at 800 MHz during the rebanding transition period. The first option could have been too burdensome for Sprint Nextel and possibly other 900 MHz B/ILT licensees; complying with 800 MHz-type interference protection would have been so costly as to prevent Sprint Nextel from even considering use of the 900 MHz B/ILT band. The second option, based as it is on the assumption of little interference, may not provide sufficient protection for a number of 900 MHz B/ILT licensees from powerful commercial carrier such as Sprint Nextel, which in turn would impede their (*i.e.*, incumbent and ''traditional'' 900 MHz B/ILT licensees) ability to operate effectively. Adversely affected entities under either option could include small businesses. The Commission adopted the third option as an appropriate balancing of burdens and achievement of suitable interference protection. The Commission has acknowledged that the interference protection standard adopted here is the most appropriate for all parties for an interleaved spectral

environment such as the 900 MHz B/ILT band.

39. In the Commission's view, establishing a generally-applicable interference protection standard for the 900 MHz B/ILT Pool will effectively eliminate costs that all licensees, including small entities, would incur to resolve an interference complaint. The Commission believes that any up-front costs associated with initial compliance with the amended rule outweigh the costs associated with addressing and resolving an interference issue. Finally, the Commission believes that among the alternative rules proposed in the *NPRM,* the one it adopts in the *R&O* (*i.e.*, holding all 900 MHz B/ILT Pool licensees to the same interference protection rights and obligations, as opposed to adopting two or more interference protection standards) is the least onerous to, and most effective for, all parties, including small entities, in that adopting a generally-applicable standard puts all licensees in an equal position.

40. Regarding lifting the freeze placed on applications for new authorizations for 900 MHz B/ILT licenses, with adoption of the *R&O,* there is no compelling reason to maintain the freeze; the Commission's action will only benefit small businesses, as it will allow them to apply for new or additional 900 MHz B/ILT spectrum.

F. Report to Congress

41. The Commission will send a copy of the *R&O,* including the FRFA, in a report to be sent to Congress pursuant to the Congressional Review Act. In addition, the Commission will send a copy of the *R&O,* including the FRFA, to the Chief Counsel for Advocacy of the SBA. A copy of the *R&O* and FRFA (or summaries thereof) will also be published in the **Federal Register**.

IV. Ordering Clauses

42. Pursuant to sections 1, 4(i), 303, 309, 316, and 332 of the Communications Act of 1934, as amended, 47 U.S.C. 151, 154(i), 303, 309, 316, and 332, the *R&O* is hereby adopted.

43. Part 90 of the Commission's rules is amended as set forth in Appendix B of the *R&O* and that these rules shall be effective December 17, 2008.

44. The Petitions for Reconsideration filed by the Association of American Railroads on December 17, 2004, by the National Association of Manufacturers and MRFAC, Inc. on December 22, 2004, and by Exelon Corporation on December 22, 2004, in WT Docket No. 02–55 *et. al.* are granted to the extent described herein.

45. The freeze placed on applications for new 900 MHz Business/Industrial Land Transportation licenses by Public Notice, September 17, 2004, is hereby lifted, at such time and under the conditions set forth in the *R&O.*

46. The Commission's Consumer and Governmental Affairs Bureau, Reference Information Center, *shall send* a copy of the *R&O,* including the Final Regulatory Flexibility Analysis, to the Chief Counsel for Advocacy of the Small Business Administration.

List of Subjects in 47 CFR Part 90

Communications common carriers.

Federal Communications Commission.

Marlene H. Dortch,

Secretary.

Final Rules

■ For the reasons discussed in the preamble, the Federal Communications Commission amends 47 CFR part 90 as follows:

PART 90—PRIVATE LAND MOBILE RADIO SERVICES

■ 1. The authority citation for part 90 continues to read as follows:

Authority: Sections 4(i), 11, 303(g), 303(r), and 332(c)(7) of the Communications Act of 1934, as amended, 47 U.S.C. 154(i), 161, 303(g), 303(r), 332(c)(7).

■ 2. Section 90.672 is revised to read as follows:

§ 90.672 Unacceptable interference to non-cellular 800 MHz licensees from 800 MHz cellular systems or Part 22 Cellular Radiotelephone systems, and within the 900 MHz Business/Industrial Land Transportation Pool.

(a) *Definition.* Except as provided in 47 CFR 90.617(k), unacceptable interference to non-cellular licensees in the 800 MHz band from 800 MHz cellular systems or part 22 of this chapter, Cellular Radiotelephone systems and within the 900 MHz Business/Industrial Land Transportation (B/ILT) Pool will be deemed to occur when the below conditions are met:

(1) A transceiver at a site at which interference is encountered:

(i) Is in good repair and operating condition, and is receiving:

(A) A median desired signal strength of −104 dBm or higher if operating in the 800 MHz band, or a median desired signal strength of –88 dBm if operating in the 900 MHz B/ILT Pool, as measured at the R.F. input of the receiver of a mobile unit; or

(B) A median desired signal strength of −101 dBm or higher if operating in the 800 MHz band, or a median desired signal strength of –85 dBm if operating in the 900 MHz B/ILT Pool, as measured at the R.F. input of the receiver of a portable *i.e.*, hand-held unit; and either

(ii) Is a voice transceiver:

(A) With manufacturer published performance specifications for the receiver section of the transceiver equal to, or exceeding, the minimum standards set out in paragraph (b) of this section, and;

(B) Receiving an undesired signal or signals which cause the measured Carrier to Noise plus Interference (C/(I+N)) ratio of the receiver section of said transceiver to be less than 20 dB if operating in the 800 MHz band, or less than 17 dB if operating in the 900 MHz B/ILT Pool, or;

(iii) Is a non-voice transceiver receiving an undesired signal or signals which cause the measured bit error rate (BER) (or some comparable specification) of the receiver section of said transceiver to be more than the value reasonably designated by the manufacturer.

(2) Provided, however, that if the receiver section of the mobile or portable voice transceiver does not conform to the standards set out in paragraph (b) of this section, then that transceiver shall be deemed subject to unacceptable interference only at sites where the median desired signal satisfies the applicable threshold measured signal power in paragraphs (a)(1)(i) of this section after an upward adjustment to account for the difference in receiver section performance. The upward adjustment shall be equal to the increase in the desired signal required to restore the receiver section of the subject transceiver to the 20 dB C/(I+N) ratio of paragraph (a)(1)(ii)(B) of this section. The adjusted threshold levels shall then define the minimum measured signal power(s) in lieu of paragraphs (a)(1)(i) of this section at which the licensee using such non-compliant transceiver is entitled to interference protection.

(b) *Minimum Receiver Requirements.* Voice transceivers capable of operating in the 806–824 MHz portion of the 800 MHz band, or in the 900 MHz Business/Industrial Land Transportation Pool, shall have the following minimum performance specifications in order for the system in which such transceivers are used to claim entitlement to full protection against unacceptable interference. (See paragraph (a)(2) of this section.)

(1) Voice units intended for mobile use: 75 dB intermodulation rejection ratio; 75 dB adjacent channel rejection ratio; –116 dBm reference sensitivity.

(2) Voice units intended for portable use: 70 dB intermodulation rejection

ratio; 70 dB adjacent channel rejection ratio; –116 dBm reference sensitivity.

(3) Voice units intended for mobile or portable use in the 900 MHz Business/Industrial Land Transportation Pool: 60 dB intermodulation rejection ratio; 60 dB adjacent channel rejection ratio; –116 dBm reference sensitivity.

[FR Doc. E8–27246 Filed 11–14–08; 8:45 am]

BILLING CODE 6712–01–P

DEPARTMENT OF COMMERCE

National Oceanic and Atmospheric Administration

50 CFR Part 229

[Docket No. 0811101438–81439–01]

RIN 0648–XL74

Taking of Marine Mammals Incidental to Commercial Fishing Operations; Atlantic Large Whale Take Reduction Plan

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

ACTION: Temporary rule.

SUMMARY: The Assistant Administrator for Fisheries (AA), NOAA, announces temporary restrictions consistent with the requirements of the Atlantic Large Whale Take Reduction Plan's (ALWTRP) implementing regulations. These regulations apply to lobster trap/pot and anchored gillnet fishermen in an area totaling approximately 1,650 nm² (5,659.5 km²), east of Gloucester, Massachusetts and Portsmouth, New Hampshire, for 15 days. The purpose of this action is to provide protection to an aggregation of northern right whales (right whales).

DATES: Effective beginning at 0001 hours November 19, 2008, through 2400 hours December 3, 2008.

ADDRESSES: Copies of the proposed and final Dynamic Area Management (DAM) rules, Environmental Assessments (EAs), Atlantic Large Whale Take Reduction Team (ALWTRT) meeting summaries, and progress reports on implementation of the ALWTRP may also be obtained by writing Diane Borggaard, NMFS/Northeast Region, 55 Great Republic Drive, Gloucester, MA 01930.

FOR FURTHER INFORMATION CONTACT: Diane Borggaard, NMFS/Northeast Region, 978–281–9300 x6503; or Kristy Long, NMFS, Office of Protected Resources, 301–713–2322.

SUPPLEMENTARY INFORMATION:

Electronic Access

Several of the background documents for the ALWTRP and the take reduction planning process can be downloaded from the ALWTRP web site at *http://www.nero.noaa.gov/whaletrp/*.

Background

The ALWTRP was developed pursuant to section 118 of the Marine Mammal Protection Act (MMPA) to reduce the incidental mortality and serious injury of three endangered species of whales (right, fin, and humpback) due to incidental interaction with commercial fishing activities. In addition, the measures identified in the ALWTRP would provide conservation benefits to a fourth species (minke), which are neither listed as endangered nor threatened under the Endangered Species Act (ESA). The ALWTRP, implemented through regulations codified at 50 CFR 229.32, relies on a combination of fishing gear modifications and time/area closures to reduce the risk of whales becoming entangled in commercial fishing gear (and potentially suffering serious injury or mortality as a result).

On January 9, 2002, NMFS published the final rule to implement the ALWTRP's DAM program (67 FR 1133). On August 26, 2003, NMFS amended the regulations by publishing a final rule, which specifically identified gear modifications that may be allowed in a DAM zone (68 FR 51195). The DAM program provides specific authority for NMFS to restrict temporarily on an expedited basis the use of lobster trap/pot and anchored gillnet fishing gear in areas north of 40° N. lat. to protect right whales. Under the DAM program, NMFS may: (1) require the removal of all lobster trap/pot and anchored gillnet fishing gear for a 5-day period; (2) allow lobster trap/pot and anchored gillnet fishing within a DAM zone with gear modifications determined by NMFS to sufficiently reduce the risk of entanglement; and/or (3) issue an alert to fishermen requesting the voluntary removal of all lobster trap/pot and anchored gillnet gear for a 15-day period and asking fishermen not to set any additional gear in the DAM zone during the 15-day period.

A DAM zone is triggered when NMFS receives a reliable report from a qualified individual of three or more right whales sighted within an area (75 nm² (139 km²)) such that right whale density is equal to or greater than 0.04 right whales per nm² (1.85 km²). A qualified individual is an individual ascertained by NMFS to be reasonably able, through training or experience, to identify a right whale. Such individuals include, but are not limited to, NMFS staff, U.S. Coast Guard and Navy personnel trained in whale identification, scientific research survey personnel, whale watch operators and naturalists, and mariners trained in whale species identification through disentanglement training or some other training program deemed adequate by NMFS. A reliable report would be a credible right whale sighting.

On November 4, 2008, an aerial survey reported an aggregation of 4 right whales in the proximity of 42° 54' N. lat. and 70° 19' W. long. The position lies approximately 20nm east of Portsmouth, New Hampshire. After conducting an investigation, NMFS ascertained that the report came from a qualified individual and determined that the report was reliable. Thus, NMFS has received a reliable report from a qualified individual of the requisite right whale density to trigger the DAM provisions of the ALWTRP.

Once a DAM zone is triggered, NMFS determines whether to impose restrictions on fishing and/or fishing gear in the zone. This determination is based on the following factors, including but not limited to: the location of the DAM zone with respect to other fishery closure areas, weather conditions as they relate to the safety of human life at sea, the type and amount of gear already present in the area, and a review of recent right whale entanglement and mortality data.

NMFS has reviewed the factors and management options noted above relative to the DAM under consideration. As a result of this review, NMFS prohibits lobster trap/pot and anchored gillnet gear in this area during the 15-day restricted period unless it is modified in the manner described in this temporary rule.

The DAM Zone is bound by the following coordinates:

43°15′ N., 70°35′ W. (NW Corner)
43°15′ N., 69°48′ W.
42°32′ N., 69°48′ W.
42°32′ N., 70°44′ W.
43°34′ N., 70°44′ W. Following the shoreline northward to
42°40′ N., 70°44′ W.
43°02′ N., 70°44′ W. Following the shoreline northward to
43°15′ N., 70°35′ W. (NW Corner)

In addition to those gear modifications currently implemented under the ALWTRP at 50 CFR 229.32, the following gear modifications are required in the DAM zone. If the requirements and exceptions for gear modification in the DAM zone, as described below, differ from other ALWTRP requirements for any

overlapping areas and times, then the more restrictive requirements will apply in the DAM zone. Special note for gillnet fishermen: a portion of this DAM zone overlaps the year–round Western Gulf of Maine Closure Area for Northeast Multispecies found at 50 CFR 648.81(e).Due to this closure, sink gillnet is prohibited from this portion of the DAM zone.

Lobster trap/pot gear

Fishermen utilizing lobster trap/pot gear within portions of Northern Nearshore Lobster Waters that overlap with the DAM zone are required to utilize all of the following gear modifications while the DAM zone is in effect:

1. Groundlines must be made of either sinking or neutrally buoyant line. Floating groundlines are prohibited;
2. All buoy lines must be made of either sinking or neutrally buoyant line, except the bottom portion of the line, which may be a section of floating line not to exceed one–third the overall length of the buoy line;
3. Fishermen are allowed to use two buoy lines per trawl; and
4. A weak link with a maximum breaking strength of 600 lb (272.4 kg) must be placed at all buoys.

Fishermen utilizing lobster trap/pot gear within the portion of the Offshore Lobster Waters Area that overlap with the DAM zone are required to utilize all of the following gear modifications while the DAM zone is in effect:

1. Groundlines must be made of either sinking or neutrally buoyant line. Floating groundlines are prohibited;
2. All buoy lines must be made of either sinking or neutrally buoyant line, except the bottom portion of the line, which may be a section of floating line not to exceed one–third the overall length of the buoy line;
3. Fishermen are allowed to use two buoy lines per trawl; and
4. A weak link with a maximum breaking strength of 1,500 lb (680.4 kg) must be placed at all buoys.

Anchored Gillnet Gear

Fishermen utilizing anchored gillnet gear within the portions of the Other Northeast Gillnet Waters Area that overlap with the DAM zone are required to utilize all the following gear modifications while the DAM zone is in effect:

1. Groundlines must be made of either sinking or neutrally buoyant line. Floating groundlines are prohibited;
2. All buoy lines must be made of either sinking or neutrally buoyant line, except the bottom portion of the line, which may be a section of floating line not to exceed one–third the overall length of the buoy line;
3. Fishermen are allowed to use two buoy lines per string;
4. The breaking strength of each net panel weak link must not exceed 1,100 lb (498.8 kg). The weak link requirements apply to all variations in net panel size. One weak link must be placed in the center of the floatline and one weak link must be placed in the center of each of the up and down lines at both ends of the net panel. Additionally, one weak link must be placed as close as possible to each end of the net panels on the floatline; or, one weak link must be placed between floatline tie–loops between net panels and one weak link must be placed where the floatline tie–loops attach to the bridle, buoy line, or groundline at each end of a net string;
5. A weak link with a maximum breaking strength of 1,100 lb (498.8 kg) must be placed at all buoys; and
6. All anchored gillnets, regardless of the number of net panels, must be securely anchored with the holding power of at least a 22 lb (10.0 kg) Danforth–style anchor at each end of the net string.

The restrictions will be in effect beginning at 0001 hours November 19, 2008, through 2400 hours December 3, 2008, unless terminated sooner or extended by NMFS through another notification in the **Federal Register**.

The restrictions will be announced to state officials, fishermen, ALWTRT members, and other interested parties through e–mail, phone contact, NOAA website, and other appropriate media immediately upon issuance of the rule by the AA.

Classification

In accordance with section 118(f)(9) of the MMPA, the Assistant Administrator (AA) for Fisheries has determined that this action is necessary to implement a take reduction plan to protect North Atlantic right whales.

Environmental Assessments for the DAM program were prepared on December 28, 2001, and August 6, 2003. This action falls within the scope of the analyses of these EAs, which are available from the agency upon request.

NMFS provided prior notice and an opportunity for public comment on the regulations establishing the criteria and procedures for implementing a DAM zone. Providing prior notice and opportunity for comment on this action, pursuant to those regulations, would be impracticable because it would prevent NMFS from executing its functions to protect and reduce serious injury and mortality of endangered right whales. The regulations establishing the DAM program are designed to enable the agency to help protect unexpected concentrations of right whales. In order to meet the goals of the DAM program, the agency needs to be able to create a DAM zone and implement restrictions on fishing gear as soon as possible once the criteria are triggered and NMFS determines that a DAM restricted zone is appropriate. If NMFS were to provide prior notice and an opportunity for public comment upon the creation of a DAM restricted zone, the aggregated right whales would be vulnerable to entanglement which could result in serious injury and mortality. Additionally, the right whales would most likely move on to another location before NMFS could implement the restrictions designed to protect them, thereby rendering the action obsolete. Therefore, pursuant to 5 U.S.C. 553(b)(B), the AA finds that good cause exists to waive prior notice and an opportunity to comment on this action to implement a DAM restricted zone to reduce the risk of entanglement of endangered right whales in commercial lobster trap/pot and anchored gillnet gear as such procedures would be impracticable.

For the same reasons, the AA finds that, under 5 U.S.C. 553(d)(3), good cause exists to waive the 30-day delay in effective date. If NMFS were to delay for 30 days the effective date of this action, the aggregated right whales would be vulnerable to entanglement, which could cause serious injury and mortality. Additionally, right whales would likely move to another location between the time NMFS approved the action creating the DAM restricted zone and the time it went into effect, thereby rendering the action obsolete and ineffective. Nevertheless, NMFS recognizes the need for fishermen to have time to either modify or remove (if not in compliance with the required restrictions) their gear from a DAM zone once one is approved. Thus, NMFS makes this action effective 2 days after the date of publication of this document in the **Federal Register**. NMFS will also endeavor to provide notice of this action to fishermen through other means upon issuance of the rule by the AA, thereby providing approximately 3 additional days of notice while the Office of the **Federal Register** processes the document for publication.

NMFS determined that the regulations establishing the DAM program and actions such as this one taken pursuant to those regulations are consistent to the maximum extent practicable with the enforceable policies of the approved coastal management program of the U.S.

Atlantic coastal states. This determination was submitted for review by the responsible state agencies under section 307 of the Coastal Zone Management Act. Following state review of the regulations creating the DAM program, no state disagreed with NMFS' conclusion that the DAM program is consistent to the maximum extent practicable with the enforceable policies of the approved coastal management program for that state.

The DAM program under which NMFS is taking this action contains policies with federalism implications warranting preparation of a federalism assessment under Executive Order 13132. Accordingly, in October 2001 and March 2003, the Assistant Secretary for Intergovernmental and Legislative Affairs, Department of Commerce, provided notice of the DAM program and its amendments to the appropriate elected officials in states to be affected by actions taken pursuant to the DAM program. Federalism issues raised by state officials were addressed in the final rules implementing the DAM program. A copy of the federalism Summary Impact Statement for the final rules is available upon request (**ADDRESSES**).

The rule implementing the DAM program has been determined to be not significant under Executive Order 12866.

Authority: 16 U.S.C. 1361 *et seq.* and 50 CFR 229.32(g)(3).

Dated: November 10, 2008.

Samuel D. Rauch III,

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

[FR Doc. E8–27219 Filed 11–12–08; 4:15 pm]

BILLING CODE 3510–22–S

DEPARTMENT OF COMMERCE

National Oceanic and Atmospheric Administration

50 CFR Part 229

[Docket No. 0811101436–81441–01]

RIN 0648–XL75

Taking of Marine Mammals Incidental to Commercial Fishing Operations; Atlantic Large Whale Take Reduction Plan

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

ACTION: Temporary rule.

SUMMARY: The Assistant Administrator for Fisheries (AA), NOAA, announces temporary restrictions consistent with the requirements of the Atlantic Large Whale Take Reduction Plan's (ALWTRP) implementing regulations. These regulations apply to lobster trap/pot and anchored gillnet fishermen in an area totaling approximately 1,575 nm² (5,402.3 km²), east of Portland, Maine, for 15 days. The purpose of this action is to provide protection to an aggregation of northern right whales (right whales).

DATES: Effective beginning at 0001 hours November 19, 2008, through 2400 hours December 3, 2008.

ADDRESSES: Copies of the proposed and final Dynamic Area Management (DAM) rules, Environmental Assessments (EAs), Atlantic Large Whale Take Reduction Team (ALWTRT) meeting summaries, and progress reports on implementation of the ALWTRP may also be obtained by writing Diane Borggaard, NMFS/Northeast Region, 55 Great Republic Drive, Gloucester, MA 01930.

FOR FURTHER INFORMATION CONTACT: Diane Borggaard, NMFS/Northeast Region, 978–281–9300 x6503; or Kristy Long, NMFS, Office of Protected Resources, 301–713–2322.

SUPPLEMENTARY INFORMATION:

Electronic Access

Several of the background documents for the ALWTRP and the take reduction planning process can be downloaded from the ALWTRP web site at *http://www.nero.noaa.gov/whaletrp/*.

Background

The ALWTRP was developed pursuant to section 118 of the Marine Mammal Protection Act (MMPA) to reduce the incidental mortality and serious injury of three endangered species of whales (right, fin, and humpback) due to incidental interaction with commercial fishing activities. In addition, the measures identified in the ALWTRP would provide conservation benefits to a fourth species (minke), which are neither listed as endangered nor threatened under the Endangered Species Act (ESA). The ALWTRP, implemented through regulations codified at 50 CFR 229.32, relies on a combination of fishing gear modifications and time/area closures to reduce the risk of whales becoming entangled in commercial fishing gear (and potentially suffering serious injury or mortality as a result).

On January 9, 2002, NMFS published the final rule to implement the ALWTRP's DAM program (67 FR 1133). On August 26, 2003, NMFS amended the regulations by publishing a final rule, which specifically identified gear modifications that may be allowed in a DAM zone (68 FR 51195). The DAM program provides specific authority for NMFS to restrict temporarily on an expedited basis the use of lobster trap/pot and anchored gillnet fishing gear in areas north of 40° N. lat. to protect right whales. Under the DAM program, NMFS may: (1) require the removal of all lobster trap/pot and anchored gillnet fishing gear for a 15-day period; (2) allow lobster trap/pot and anchored gillnet fishing within a DAM zone with gear modifications determined by NMFS to sufficiently reduce the risk of entanglement; and/or (3) issue an alert to fishermen requesting the voluntary removal of all lobster trap/pot and anchored gillnet gear for a 15-day period and asking fishermen not to set any additional gear in the DAM zone during the 15-day period.

A DAM zone is triggered when NMFS receives a reliable report from a qualified individual of three or more right whales sighted within an area (75 nm² (139 km²)) such that right whale density is equal to or greater than 0.04 right whales per nm² (1.85 km²). A qualified individual is an individual ascertained by NMFS to be reasonably able, through training or experience, to identify a right whale. Such individuals include, but are not limited to, NMFS staff, U.S. Coast Guard and Navy personnel trained in whale identification, scientific research survey personnel, whale watch operators and naturalists, and mariners trained in whale species identification through disentanglement training or some other training program deemed adequate by NMFS. A reliable report would be a credible right whale sighting.

On November 4, 2008, an aerial survey reported an aggregation of 7 right whales in the proximity of 43° 37′ N. lat. and 68° 54′ W. long. The position lies approximately 95nm east of Portland, Maine. After conducting an investigation, NMFS ascertained that the report came from a qualified individual and determined that the report was reliable. Thus, NMFS has received a reliable report from a qualified individual of the requisite right whale density to trigger the DAM provisions of the ALWTRP.

Once a DAM zone is triggered, NMFS determines whether to impose restrictions on fishing and/or fishing gear in the zone. This determination is based on the following factors, including but not limited to: the location of the DAM zone with respect to other fishery closure areas, weather

conditions as they relate to the safety of human life at sea, the type and amount of gear already present in the area, and a review of recent right whale entanglement and mortality data.

NMFS has reviewed the factors and management options noted above relative to the DAM under consideration. As a result of this review, NMFS prohibits lobster trap/pot and anchored gillnet gear in this area during the 15-day restricted period unless it is modified in the manner described in this temporary rule.

The DAM Zone is bound by the following coordinates:

43°42′ N., 68°57′ W. (NW Corner)
43°42′ N., 68°00′ W.
43°04′ N., 68°00′ W.
43°04′ N., 68°57′ W.
43°42′ N., 68°57′ W. (NW Corner)

In addition to those gear modifications currently implemented under the ALWTRP at 50 CFR 229.32, the following gear modifications are required in the DAM zone. If the requirements and exceptions for gear modification in the DAM zone, as described below, differ from other ALWTRP requirements for any overlapping areas and times, then the more restrictive requirements will apply in the DAM zone.

Lobster trap/pot gear

Fishermen utilizing lobster trap/pot gear within portions of Northern Nearshore Lobster Waters that overlap with the DAM zone are required to utilize all of the following gear modifications while the DAM zone is in effect:

1. Groundlines must be made of either sinking or neutrally buoyant line. Floating groundlines are prohibited;
2. All buoy lines must be made of either sinking or neutrally buoyant line, except the bottom portion of the line, which may be a section of floating line not to exceed one–third the overall length of the buoy line;
3. Fishermen are allowed to use two buoy lines per trawl; and
4. A weak link with a maximum breaking strength of 600 lb (272.4 kg) must be placed at all buoys.

Fishermen utilizing lobster trap/pot gear within the portion of the Offshore Lobster Waters Area that overlap with the DAM zone are required to utilize all of the following gear modifications while the DAM zone is in effect:

1. Groundlines must be made of either sinking or neutrally buoyant line. Floating groundlines are prohibited;
2. All buoy lines must be made of either sinking or neutrally buoyant line, except the bottom portion of the line, which may be a section of floating line not to exceed one–third the overall length of the buoy line;
3. Fishermen are allowed to use two buoy lines per trawl; and
4. A weak link with a maximum breaking strength of 1,500 lb (680.4 kg) must be placed at all buoys.

Anchored Gillnet Gear

Fishermen utilizing anchored gillnet gear within the portions of the Other Northeast Gillnet Waters Area that overlap with the DAM zone are required to utilize all the following gear modifications while the DAM zone is in effect:

1. Groundlines must be made of either sinking or neutrally buoyant line. Floating groundlines are prohibited;
2. All buoy lines must be made of either sinking or neutrally buoyant line, except the bottom portion of the line, which may be a section of floating line not to exceed one–third the overall length of the buoy line;
3. Fishermen are allowed to use two buoy lines per string;
4. The breaking strength of each net panel weak link must not exceed 1,100 lb (498.8 kg). The weak link requirements apply to all variations in net panel size. One weak link must be placed in the center of the floatline and one weak link must be placed in the center of each of the up and down lines at both ends of the net panel. Additionally, one weak link must be placed as close as possible to each end of the net panels on the floatline; or, one weak link must be placed between floatline tie–loops between net panels and one weak link must be placed where the floatline tie–loops attach to the bridle, buoy line, or groundline at each end of a net string;
5. A weak link with a maximum breaking strength of 1,100 lb (498.8 kg) must be placed at all buoys; and
6. All anchored gillnets, regardless of the number of net panels, must be securely anchored with the holding power of at least a 22 lb (10.0 kg) Danforth–style anchor at each end of the net string.

The restrictions will be in effect beginning at 0001 hours November 19, 2008, through 2400 hours December 3, 2008, unless terminated sooner or extended by NMFS through another notification in the **Federal Register**.

The restrictions will be announced to state officials, fishermen, ALWTRT members, and other interested parties through e–mail, phone contact, NOAA website, and other appropriate media immediately upon issuance of the rule by the AA.

Classification

In accordance with section 118(f)(9) of the MMPA, the Assistant Administrator (AA) for Fisheries has determined that this action is necessary to implement a take reduction plan to protect North Atlantic right whales.

Environmental Assessments for the DAM program were prepared on December 28, 2001, and August 6, 2003. This action falls within the scope of the analyses of these EAs, which are available from the agency upon request.

NMFS provided prior notice and an opportunity for public comment on the regulations establishing the criteria and procedures for implementing a DAM zone. Providing prior notice and opportunity for comment on this action, pursuant to those regulations, would be impracticable because it would prevent NMFS from executing its functions to protect and reduce serious injury and mortality of endangered right whales. The regulations establishing the DAM program are designed to enable the agency to help protect unexpected concentrations of right whales. In order to meet the goals of the DAM program, the agency needs to be able to create a DAM zone and implement restrictions on fishing gear as soon as possible once the criteria are triggered and NMFS determines that a DAM restricted zone is appropriate. If NMFS were to provide prior notice and an opportunity for public comment upon the creation of a DAM restricted zone, the aggregated right whales would be vulnerable to entanglement which could result in serious injury and mortality. Additionally, the right whales would most likely move on to another location before NMFS could implement the restrictions designed to protect them, thereby rendering the action obsolete. Therefore, pursuant to 5 U.S.C. 553(b)(B), the AA finds that good cause exists to waive prior notice and an opportunity to comment on this action to implement a DAM restricted zone to reduce the risk of entanglement of endangered right whales in commercial lobster trap/pot and anchored gillnet gear as such procedures would be impracticable.

For the same reasons, the AA finds that, under 5 U.S.C. 553(d)(3), good cause exists to waive the 30-day delay in effective date. If NMFS were to delay for 30 days the effective date of this action, the aggregated right whales would be vulnerable to entanglement, which could cause serious injury and mortality. Additionally, right whales would likely move to another location between the time NMFS approved the action creating the DAM restricted zone

and the time it went into effect, thereby rendering the action obsolete and ineffective. Nevertheless, NMFS recognizes the need for fishermen to have time to either modify or remove (if not in compliance with the required restrictions) their gear from a DAM zone once one is approved. Thus, NMFS makes this action effective 2 days after the date of publication of this document in the **Federal Register**. NMFS will also endeavor to provide notice of this action to fishermen through other means upon issuance of the rule by the AA, thereby providing approximately 3 additional days of notice while the Office of the **Federal Register** processes the document for publication.

NMFS determined that the regulations establishing the DAM program and actions such as this one taken pursuant to those regulations are consistent to the maximum extent practicable with the enforceable policies of the approved coastal management program of the U.S. Atlantic coastal states. This determination was submitted for review by the responsible state agencies under section 307 of the Coastal Zone Management Act. Following state review of the regulations creating the DAM program, no state disagreed with NMFS' conclusion that the DAM program is consistent to the maximum extent practicable with the enforceable policies of the approved coastal management program for that state.

The DAM program under which NMFS is taking this action contains policies with federalism implications warranting preparation of a federalism assessment under Executive Order 13132. Accordingly, in October 2001 and March 2003, the Assistant Secretary for Intergovernmental and Legislative Affairs, Department of Commerce, provided notice of the DAM program and its amendments to the appropriate elected officials in states to be affected by actions taken pursuant to the DAM program. Federalism issues raised by state officials were addressed in the final rules implementing the DAM program. A copy of the federalism Summary Impact Statement for the final rules is available upon request (**ADDRESSES**).

The rule implementing the DAM program has been determined to be not significant under Executive Order 12866.

Authority: 16 U.S.C. 1361 *et seq.* and 50 CFR 229.32(g)(3).

Dated: November 10, 2008.

Samuel D. Rauch III,

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

[FR Doc. E8–27218 Filed 11–12–08; 4:15 pm]

BILLING CODE 3510–22–S

DEPARTMENT OF COMMERCE

National Oceanic and Atmospheric Administration

50 CFR Parts 300, 600 and 697

[Docket No. 070717337–81411–03]

RIN 0648–AV78

General Provisions for Domestic Fisheries; Specifications for Boarding Ladders

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

ACTION: Final rule.

SUMMARY: NMFS publishes regulations to require operators of domestic fishing vessel with a freeboard of four feet or over to provide a U.S. Coast Guard-approved pilot ladder as a safe and enforceable means for authorized personnel to board fishing vessels in carrying out their duties under the Magnuson-Stevens Fishery Conservation and Management Act (Magnuson-Stevens Act), the Atlantic Tunas Convention Act, and other applicable fisheries laws and treaties. This action is necessary to provide for the safety of personnel boarding domestic fishing vessels, as current standards have proven to be inadequate. These final regulations establish a safer and more enforceable national standard for ladders used by authorized officers for boarding domestic fishing vessels subject to Federal regulation.

DATES: Effective January 1, 2009.

ADDRESSES: NMFS prepared a Final Regulatory Flexibility Analysis (FRFA), , which incorporates the IRFA and this final rule, and is contained in the Classification section of this final rule. Copies of the Initial Regulatory Flexibility Analysis/Regulatory Impact Review (IRFA/RIR) may be obtained from: Alan Risenhoover, Director, Office of Sustainable Fisheries, National Marine Fisheries Service, 1315 East-West Highway, Silver Spring, MD 20910.

FOR FURTHER INFORMATION CONTACT: William D. Chappell, 301–713–2337.

SUPPLEMENTARY INFORMATION: A proposed rule for this action was published on December 11, 2007 (72 FR 70286), with public comment accepted though January 10, 2008. Several requests were made to extend the comment period, and NMFS responded by re-opening the proposed rule for public comment from January 25, 2008 to February 25, 2008 (73 FR 4514). A detailed description of the statutory and regulatory authority for, and need for this rule is contained in the preamble of the proposed rule and is not repeated here.

Current regulations at § 600.730(c)(3) require the operator of a fishing vessel to ''provide a safe ladder'' to be used for boarding purposes. This requirement has been in existence at least since general provisions for domestic fisheries were consolidated (53 FR 24644, June 29, 1988). While some commenters expressed surprise at the existence of this requirement, they generally agreed that some sort of ladder is needed for boarding larger vessels. Comments focused on the definition of a safe ladder, when the ladder is needed, and who provides (and pays for) the ladder.

Twenty years of experience have shown that the current generic definition is inadequate for both safety and enforcement purposes. Because standards to define a ''safe ladder'' did not exist, some fishing vessel operators provided inadequate ladders, which put boarding personnel at risk. Where the ladder is clearly inadequate, the boarding party must either provide a boarding ladder or abort the boarding. This lack of a quick and safe means of boarding slows down boardings and creates additional interruptions of fishing operations. These final regulations provide a common definition for a ladder proven to be safer than other types.

The final rule requires the use of a pilot ladder on all fishing vessels with a freeboard of 4 ft (1.25 m) and defines the term ''freeboard'' for this rule. Because the definition of freeboard is now defined as the distance between the top rail of the gunwale and the water's surface, some vessels that did not need to provide a ladder before will have to provide a ladder under this rule.

Comments on the Proposed Rule

NMFS received one letter of comment from Washington Department of Fish and Wildlife (WDFW) and three letters of comment from the United States Coast Guard (USCG), plus 56 comments from members of the public with thirty-two unique comments.

Comment 1: NMFS received twenty-six comments that the USCG or NMFS provide a boarding ladder when

required to safely conduct an at-sea boarding.

Response: The fishing vessels affected by this rule are already required by 50 CFR 600.730(c)(3) to provide a safe boarding ladder; this rule defines ''safe boarding ladder'' more clearly. Additionally, since all sizes and classes of fishing vessels are subject to at-sea boardings, the USCG would need to maintain and store multiple ladders of various sizes to enable boarding of the range of fishing vessel sizes, which is not feasible due to space limitations aboard USCG vessels. The small boats the USCG uses for boarding also have insufficient room to carry both a ladder and a boarding team. Finally, transferring the ladder from a Coast Guard small boat to a fishing vessel with the crew securing an unfamiliar ladder represents a higher risk activity than the fishing vessel providing its own custom-sized ladder, undermining the purpose of this rule to provide for safer boardings.

Comment 2: NMFS received twenty two comments that the boarding ladder required by this rule was too costly.

Response: While NMFS understands that the ladder is a costly investment, it is less than the cost involved with the potential serious injury or death that can result from a fall during a boarding. NMFS research found that USCG-approved ladders can be custom made for $64 per foot for wood and $148 per foot for synthetic ladders. Further, use of the ladder is not limited to boardings or observer transfers. It can be used for vessel maintenance, retrieving gear from the water, and boarding a life raft, as well as in a man overboard situation.

Comment 3: NMFS received seventeen comments that the fishing vessels required by this rule to carry a ladder had insufficient storage space aboard.

Response: Many fishing vessels affected by this rule are already required to carry a safe boarding ladder. The ladder specified in this rule was designed to be stored aboard vessels. Additionally, the rule only applies to larger fishing vessels which typically have sufficient storage space.

Comment 4: NMFS received twelve comments that small fishing vessels should be exempted from this requirement.

Response: Fishing vessels with less than four feet of freeboard, which tend to be small fishing vessels, are exempt from this rule.

Comment 5: NMFS received seven comments that vessels that have been boarded in the past without incident or inconvenience should not be required to carry unnecessary equipment.

Response: Every boarding at sea is unique, with variance in environmental conditions, boarding team composition, and boarding platforms. The fact that no accident occured in previous boardings is not an indicator that there will be no accident during the next boarding if a safety hazard exists. Even though boarding accidents are relatively rare, the risk to boarding party personnel dictates that boarding ladder safety must be improved.

Comment 6: NMFS received six comments that the definition of ''freeboard'' is unclear.

Response: NMFS has changed the definition in the final rule. The term freeboard, as it applies to this rule, is measured at the time the vessel is boarded, and is a physical measurement of the vessel at the lowest point of sufficient width to accommodate a boarding. The measurement cannot be pre-determined at the dock or the marine architects' office, because loading conditions (i.e., fuel state and catch onboard) and weather are constantly changing. It remains the fishing vessel operator's responsibility to provide a pilot ladder when conditions exist that require one.

Comment 7: NMFS received five comments that this rule has a potential for decreasing safety at sea.

Response: The USCG-approved ladders required by this rule are designed to safely transfer people at sea and meet international safety standards. Numerous USCG boarding officers were consulted in the development of this rule, all of whom agreed that the use of USCG approved pilot ladders will increase the safety of at-sea boardings.

Comment 8: NMFS received four comments concurring with the rule.

Response: NMFS acknowledges these comments.

Comment 9: NMFS received four comments that the number of vessels affected by this rule is not accurate.

Response: While the number of vessels affected by this rule is an estimate, NMFS considers the data used to be reasonable and the best available. Since the US government does not track the freeboard of fishing vessels, a length of 65 feet was a proxy used to determine an estimated number of affected vessels, based on best professional judgment by NMFS and the USCG. Data provided by the USCG indicated that there are 5,520 federally-documented fishing vessels over 65 feet and an estimated 530 state numbered fishing vessels over 65 feet, yielding an estimated 6050 fishing vessels that will be affected by this rule.

Comment 10: NMFS received four comments that homemade ladders should be acceptable.

Response: This rule requires a ladder that is designed for at-sea operations and can be considered safe without a detailed inspection. The USCG equipment approval process is available to anyone wishing to construct their own ladder.

Comment 11: NMFS received four comments that a ''one size fits all'' approach to boarding ladders is inappropriate.

Response: NMFS believes that this rule employs a sufficiently flexible approach while improving the safety of boarding for authorized officers and other persons. Vessels with less than 4 feet of freeboard do not need a ladder and ladders can be customized to fit a particular vessel's freeboard.

Comment 12: NMFS received two comments that built-in steps should be accepted.

Response: Built in steps can be a hazard to the small boat used to transfer boarding teams onto the fishing vessels. As both vessels rise and fall with the waves, the small boat rubs against the steps which can tear a rubber sponson, gouge a fiberglass boat, and in rough seas even cause the small boat to capsize. Additionally, the standard adopted eliminates any question by the fishermen or enforcement as to what constitutes a safe boarding ladder.

Comment 13: NMFS received two comments that the minimum freeboard height to require a boarding ladder should be greater than four feet.

Response: NMFS concluded that four feet was appropriate because a five foot tall boarding officer (USCG minimum height requirement) of average upper body strength wearing a dry suit, uniform and over 35 pounds of weapons, tools and gear may find a higher freeboard height difficult to climb without the assistance of a ladder.

Comment 14: NMFS received two comments requesting an extension of the public comment period.

Response: NMFS accommodated this request by reopening the comment period for an additional 30 days.

Comment 15: NMFS received two comments that the rule should not apply to charter or recreational vessels.

Response: Federal fisheries regulations apply to charter and recreational vessels as well as commercial vessels, and at-sea boardings are conducted on all three categories of vessel.

Comment 16: NMFS received two comments questioning whether sufficient ladders were available.

Response: NMFS research revealed numerous ship supply stores that can provide custom built ladders.

Comment 17: NMFS received two comments requesting phase in provisions.

Response: NMFS will provide lead time for vessel owners and operators to obtain pilot ladders prior to the effective date of these regulations.

Comment 18: NMFS received two comments that the rule is not necessary.

Response: The safety of boarding teams is a priority for NMFS and the USCG. This rule provides a clear definition for a ''safe ladder''. Previously allowed unsafe ladders caused boarding personnel to fall in the water, a life-threatening situation.

Comment 19: NMFS received one comment that most boardings of small trollers occur over the stern where a ladder physically can't be rigged due to space considerations.

Response: The term freeboard, as it applies to this rule, is a physical measurement of the vessel at the lowest point of sufficient width to accommodate a boarding. Provided that the stern of a troller is a safe boarding location, is of sufficient width to accommodate a boarding, and the freeboard is four feet (1.25 m) or less, a boarding ladder would not be required.

Comment 20: NMFS received one comment that boarding teams should wait for safer conditions.

Response: NMFS and the USCG conduct risk assessments prior to boarding a vessel; weather conditions are an integral part of this assessment. In some areas, waiting for calm conditions would preclude most at-sea boardings and result in decreased effectiveness of fishery regulations.

Comment 21: NMFS received one comment that the ladder should be called a boarding ladder not a pilot ladder.

Response: The name ''pilot ladder'' is retained as it refers to a specifically constructed ladder. The ladder required by this rule is a USCG approved pilot ladder that will be used for at-sea boardings. The USCG approval regulations, 46 CFR subpart 163.003, contain standards for a pilot ladder.

Comment 22: NMFS received one comment asking if a thirty foot vessel would require the same ladder as a ninety foot vessel.

Response: This requirement is not based on vessel length, but rather on freeboard. Therefore, vessels with similar freeboard will need a ladder of a similar length. Pilot ladders are available in custom sizes built to fit various freeboard heights.

Comment 23: NMFS received one comment asking how this rule rebuilds fisheries.

Response: This rule facilitates at-sea enforcement, which is one component of effective fishery management.

Comment 24: NMFS received one comment that this requirement may be subject to safety inspections under the USCG Commercial Fishing Vessel Safety program.

Response: Federal fisheries regulations and fishing vessel safety regulations are two distinct federal programs. The ladders required by this final rule will be subject to inspection under NMFS federal fisheries regulations, not USCG Commercial Fishing Vessel Safety regulations.

Comment 25: NMFS received one comment requesting to limit the requirement to vessels over sixty-five feet (20 m) in length.

Response: The ladder requirement is based on freeboard height, not vessel length. Some vessels less than sixty-five feet in length have a freeboard greater than four feet (1.25 m) and would be required to provide a boarding ladder. Conversely, some vessels longer than 65 feet (20 m) have a freeboard of less than four feet (1.25 m).

Comment 26: NMFS received two comments that the rule should be voluntary.

Response: This rule is mandatory. As noted in the proposed rule and elsewhere in this final rule, the flexible requirement that fishing vessel operators provide boarding parties a ''safe boarding ladder'' did not result in a satisfactory level of compliance and safety.

Comment 27: NMFS received one comment that the rule should apply in all areas of the U.S. Exclusive Economic Zone (EEZ).

Response: The rule applies to domestic fishing vessels in all areas of the U.S. EEZ and anywhere U.S. fishing vessels are boarded for the purposes of enforcing applicable fisheries laws. Similar regulations apply to foreign fishing vessels in the EEZ. See 50 CFR 600.504(d), Boarding.

Comment 28: NMFS received one comment that the rule should apply in the Pacific Northwest and one comment that it should not.

Response: As stated in the response to Comment 27, the rule applies in the entire U.S. EEZ and anywhere domestic fishing vessels are boarded for the purposes of enforcing applicable fisheries laws. Hazardous boarding conditions exist in the Pacific Northwest as they do in other areas of the EEZ.

Comment 29: NMFS received one comment that all fish should be retained with no discards.

Response: This comment is outside the scope of this rule.

Comment 30: NMFS received one comment that the use of Billy Pugh Personnel Transfer Devices should be authorized.

Response: While the Billy Pugh Personnel Transfer Device is a safe means of transporting personnel between vessels, the cost, training, and inapplicability to small vessels make this a less preferred option. Additionally, a major difference between a transfer device and a ladder is that when climbing on a ladder a boarding team is in control of whether or not they go up or down the ladder, dependent on the situation. If a personnel transfer device was authorized, the boarding team would then be putting themselves within the control of the individual raising or lowering the transfer device. NMFS concluded that it is more appropriate for a ladder to be used so that USCG personnel maintain control over their boarding of the vessel.

Comment 31: NMFS received one comment asking if the rule applied to USCG inspected vessels.

Response: This rule will apply to both inspected and uninspected domestic fishing vessels with a freeboard of greater than four feet (1.25 m) and fishing in federal waters or with a federal permit.

Comment 32: NMFS received one comment that there are safer options available beyond requiring a boarding ladder.

Response: Other methods of management and enforcement may require fewer at-sea boardings, but no method of management has completely removed the need for at-sea boardings. NMFS and the U.S. Coast Guard consider the use of boarding ladders an integral part of at-sea boardings. As discussed in the preamble to the proposed rule and set forth below, NMFS considered five options in developing new boarding ladder requirements with this final rule as the preferred option.

Changes from the Proposed Rule

In order to clarify what is meant by freeboard in a bulwarks cut-out, the definition of freeboard has been revised to explain that freeboard means the distance between the threshold of the bulwark cut-out and the water's surface. Because the definitions of pilot ladder are only applicable to the regulations regarding boarding, they have been moved to that section in the international and the Magnuson-Stevens Act regulations. This also makes them more accessible to the user.

Classification

Pursuant to section 305(d) of the Magnuson-Stevens Act, the NMFS Assistant Administrator has determined that this final rule is consistent with the Magnuson-Stevens Act and other applicable law.

NMFS prepared a final regulatory flexibility analysis (FRFA), which incorporates the IRFA and this final rule, and describes the economic impact that this action may have on small entities. A copy of IRFA is available from NMFS (see **ADDRESSES**).

Statement of Objective and Need

A description of the objective of and need for this rule is contained in the preamble of this final rule.

Summary of Significant Issues Raised in Public Comments

NMFS received twenty-two comments that the boarding ladder required by this rule was too costly. NMFS understands that the ladder is a costly investment and conducted market research to determine current costs of such a ladder. This research found that USCG-approved ladders can be custom made for $64 per foot for wood and $148 per foot for synthetic ladders (from $640-$1,480 for a 10–foot ladder). By requiring a specifically constructed ladder, the vessel owner and operator can reduce the liability caused by their requirement to provide a safe boarding ladder. This makes the purchase cost of a pilot ladder less than the potential cost involved if serious injury or death results from a fall during a boarding. Further, use of the ladder is not limited to boardings or observer transfers. It can be used for vessel maintenance, retrieving gear from the water, and boarding a life raft, as well as in a man overboard situation.

Small Entities Affected

In determining the number of vessels that might be affected by this rule, NMFS and the Coast Guard first determined that vessels 65 ft (20.0 m) or greater in length usually have a freeboard (defined as the working distance between the top rail of the gunwale to the water's surface) of greater than 4 ft (1.25 m). While some vessels 65 ft (20.0 m) or greater in length may have a freeboard of 4 ft (1.25 m) or less, NMFS assumed for purposes of this analysis that all of these vessels, as well as an unknown number of smaller vessels, would be required to carry a pilot ladder if this proposed rule were implemented. According to U.S. Coast Guard vessel documentation records, 6,050 documented fishing vessels are 65 ft (20 m) long or longer and could be affected by this requirement. Because some vessels already have ladders that would meet the new requirements, it is unlikely that all of the identified fishing vessels would need to purchase a ladder. Except for approximately 11 large catcher-processor vessels, mostly engaged in the Alaska fisheries, these vessels are all considered small entities for the purpose of this rule.

Reporting and Recordkeeping Requirements

This rule has no reporting or recordkeeping requirements.

Steps Taken to Minimize the Significant Economic Impacts on Small Entities

This action considered 5 alternatives including the preferred alternative and the status quo. The preferred alternative (proposed action) is to require the operators of all fishing vessels with a freeboard of over 4 feet (1.25 m) to provide a U.S. Coast Guard-approved pilot ladder for boarding parties, observers and other officials required to board the vessel. This alternative was chosen because it clarified the height at which a boarding party member could safely board a fishing vessel, it provided for owners/operators of fishing vessels with an easily obtainable and affordable ladder recognized internationally as being of safe construction.

The second alternative is the status quo, or no change to the regulations. This alternative would not increase costs to fishermen; however, neither would it increase safety to persons attempting to board fishing vessels at sea. The regulations would continue to be ambiguous and vessel operators may continue to provide unsafe ladders, resulting in delayed boardings and accidents, some of which could be serious or fatal.

A third alternative considered would limit this requirement to Alaskan and Northwestern Atlantic waters where cold water and rough seas are common. The limitation would reduce the cost to fishermen, but would not reduce the hazard to boarding parties in the areas that are not subject to the requirements, since boardings are conducted in rough seas off all coasts and during all periods of the year. Therefore, limiting the extent of this requirement would compromise the safety of boarding parties in any areas of the EEZ that are not subject to the requirements.

A fourth alternative would require vessels with a freeboard of 3 feet (0.9 m) or more to provide a ladder. Some reports from U.S. Coast Guard boarding parties indicate that ladders would facilitate boarding operations in those cases. NMFS rejected this alternative because of increased costs to the fishermen and the marginal benefit in safety.

A fifth alternative would allow fishing vessel owners or operators to make their own ladders according to specifications found at 46 CFR subpart 163.003, without going through the procedures for CG approval. While fishermen could potentially make such ladders more cheaply than buying them, the ladders would not be approved and there would be no assurance that they would actually perform as required. Therefore, this alternative was not adopted.

Section 212 of the Small Business Regulatory Enforcement Fairness Act of 1996 states that, for each rule or group of related rules for which an agency is required to prepare a FRFA, the agency shall publish one or more guides to assist small entities in complying with the rule, and shall designate such publications as ''small entity compliance guides.'' The agency shall explain the actions a small entity is required to take to comply with a rule or group of rules. The small entity compliance guide for this rule follows:

Small Entity Compliance Guide

Applicability: Owners and operators of United States fishing vessels fishing under U.S. laws in U.S. waters and on the high seas.

Requirements: If your vessel has a freeboard of greater than four feet (1.25 m), described as the working distance between the top rail of the gunwale of a vessel and the water's surface, your vessel must provide a Coast Guard- approved pilot ladder for the use of enforcement personnel boarding your vessel. If your vessel has cut-outs in the bulwarks for the purpose of personnel boarding, the freeboard is the distance between the threshold of the bulwark cut-out and the water's surface.

Description of a pilot ladder: A pilot ladder, sometimes called a Jacob's ladder, is a flexible ladder constructed and approved to meet the U.S. Coast Guard standards for pilot ladders at 46 CFR subpart 163.003 entitled Pilot Ladder. Pilot ladders may be purchased through many marine equipment suppliers in a variety of lengths and materials. NMFS research has determined that the cost of a pilot ladder made of natural materials is about $64.00 per foot, and a ladder made of synthetic materials is about $148 per foot. The total cost of a ladder would therefore likely range from $640 to $1,480 for a 10–foot ladder.

Deployment: Specific boarding regulations for the Magnuson-Stevens Act are found at 50 CFR 600.730(c). Boarding regulations published under other Federal fisheries laws are identical. These regulations require that when necessary to facilitate a boarding or at the request of an authorized officer or observer, you must provide your pilot ladder for their use. You must also provide a manrope or safety line, illuminate the ladder, and take any other actions necessary to facilitate the boarding and ensure the safety of the authorized officer and boarding party.

This small entity compliance guide is authorized by the Assistant Administrator of Fisheries, National Marine Fisheries Service and complies with section 212 of the Small Business Regulatory Enforcement Fairness Act of 1996.

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

List of Subjects

50 CFR Part 300

Administrative practice and procedure, Antarctica, Canada, Exports, Fish, Fisheries, Fishing, Imports, Indians, Labeling, Marine resources, Reporting and recordkeeping requirements, Russian Federation, Transportation, Treaties, Wildlife.

50 CFR Part 600

Administrative practice and procedure, Confidential business information, Fisheries, Fishing, Fishing vessels, Foreign relations, Intergovernmental relations, Penalties, Reporting and recordkeeping requirements, Statistics.

50 CFR Part 697

Administrative practice and procedure, Fisheries, Fishing, Intergovernmental relations, Reporting and recordkeepingrequirements.

Dated: November 10, 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 300, 600, and 697 are amended as follows.

CHAPTER III

PART 300—INTERNATIONAL FISHERIES REGULATIONS

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

Authority: 16 U.S.C. 773 *et seq.*, 16 U.S.C. 951–961 and 971 *et seq.*, 16 U.S.C. 973–973r, 16 U.S.C. 2431 *et seq.*, 16 U.S.C. 3371–3378, 16 U.S.C. 3636(b), 16 U.S.C. 5501 *et seq.*, and 16 U.S.C. 1801 *et seq.*

■ 2. In § 300.5, paragraphs (a)(1) and (2) are added and paragraphs (c)(3) and (4) are revised to read as follows:

§ 300.5 Facilitation of enforcement.

(a) * * *

(1) For the purposes of this section ''freeboard'' means the working distance between the top rail of the gunwale of a vessel and the water's surface. Where cut-outs are provided in the bulwarks for the purpose of boarding personnel, freeboard means the distance between the threshold of the bulwark cut-out and the water's surface.

(2) For the purposes of this section, ''pilot ladder'' means a flexible ladder constructed and approved to meet the U.S. Coast Guard standards for pilot ladders at 46 CFR subpart 163.003 entitled Pilot Ladder.

(c) * * *

(3) Except for fishing vessels with a freeboard of 4 feet (1.25 m) or less, provide, when requested by an authorized officer or CCAMLR inspector, a pilot ladder capable of being used for the purpose of enabling the authorized officer or CCAMLR inspector to embark and disembark the vessel safely. The pilot ladder must be maintained in good condition and kept clean.

(4) When necessary to facilitate the boarding or when requested by an authorized officer or CCAMLR inspector, provide a manrope or safety line, and illumination for the pilot ladder.

CHAPTER VI

PART 600—MAGNUSON-STEVENS ACT PROVISIONS

■ 3. The authority citation for part 600 continues to read as follows:

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

■ 4. In § 600.730, paragraphs (a)(1) and (2) are added after the introductory text and paragraphs (c)(3) and (4) are revised to read as follows:

§ 600.730 Facilitation of enforcement.

(a) * * *

(1) For the purposes of this section ''freeboard'' means the working distance between the top rail of the gunwale of a vessel and the water's surface. Where cut-outs are provided in the bulwarks for the purpose of boarding personnel, freeboard means the distance between the threshold of the bulwark cut-out and the water's surface.

(2) For the purposes of this section, ''pilot ladder'' means a flexible ladder constructed and approved to meet the U.S. Coast Guard standards for pilot ladders at 46 CFR subpart 163.003 entitled Pilot Ladder.

(c) * * *

(3) Except for fishing vessels with a freeboard of 4 feet (1.25 m) or less, provide, when requested by an authorized officer or observer personnel, a pilot ladder capable of being used for the purpose of enabling personnel to embark and disembark the vessel safely. The pilot ladder must be maintained in good condition and kept clean.

(4) When necessary to facilitate the boarding or when requested by an authorized officer or observer, provide a manrope or safety line, and illumination for the pilot ladder.

CHAPTER VI

PART 697–ATLANTIC COASTAL FISHERIES COOPERATIVE MANAGEMENT

■ 5. The authority citation for part 697 continues to read as follows:

Authority: 16 U.S.C. 1501 *et seq.*

■ 6. In § 697.9, paragraph (a) is revised to read as follows:

§ 697.9 Facilitation of enforcement.

(a) *General.* See § 600.730 of this chapter.

[FR Doc. E8–27221 Filed 11–14–08; 8:45 am]

BILLING CODE 3510–22–S

DEPARTMENT OF COMMERCE

National Oceanic and Atmospheric Administration

50 CFR Parts 600, 622, and 679

[Docket No. 0809101190–81192–01]

RIN 0648–AX26

General Provisions of the Magnuson-Stevens Fishery Conservation and Management Act; Minor Amendments to Regulations

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

ACTION: Final rule.

SUMMARY: NMFS issues minor amendments to update regulations pertaining to the Magnuson-Stevens Fishery Conservation and Management Act (Magnuson-Stevens Act). The updated regulations reflect amendments to the Magnuson-Stevens Act by the Magnuson-Stevens Fishery Conservation and Management Reauthorization Act of 2006 (MSRA) so that regulations are consistent with the revised statutory text. The effect of this action is to update Magnuson-Stevens Act regulations where only minor changes to revise language or insert new provisions of the amended Magnuson-Stevens Act are needed. Additional actions interpreting and implementing the requirements of the MSRA are being addressed as separate rulemakings.

DATES: Effective November 17, 2008.

FOR FURTHER INFORMATION CONTACT: William D. Chappell at 301–713–2337.

SUPPLEMENTARY INFORMATION: In title 50, parts 600, 622, and 679 contain regulations issued under authority of the Magnuson-Stevens Act. On January 12, 2007, the President signed into law the MSRA (Public Law 109–479), which

amended the Magnuson-Stevens Act and set forth, among other things, general and more specialized provisions pertaining to parts 600, 622, and 679. NMFS makes minor changes to these parts to resolve inconsistencies between the specified regulations and the governing changes presented in the MSRA that have a direct bearing on the regulations. This final rule makes changes following the provisions of the Magnuson-Stevens Act as amended by the MSRA in the order of their presentation in the regulations. The applicable Magnuson-Stevens Act citation is in parentheses.

In § 600.10 the definition of term ''limited access system'' is added, as this term is used very often in current fishery management plans and regulations (Magnuson-Stevens Act sec. 3(27)).

Section 600.345 is modified to add the MSRA requirement to National Standard 8 — Communities, that fishery conservation and management measures take into account the importance of fishery resources to fishing communities by using economic and social data that is based on the best scientific information available (Magnuson-Stevens Act sec. 301(a)(8)).

Section 600.350 revises National Standard 9 — Bycatch, by reformatting paragraph (c), the definition, and adding an exclusion of ''bycatch'' scientifically tagged and released highly migratory species fish harvested in a commercial fishery managed by a Council or the Western and Central Pacific Fisheries Convention Implementation Act (Magnuson-Stevens Act sec. 304(g)(2)).

Section 600.516 updates the language and specifies that allocations of the total allowable level of foreign fishing are discretionary and such allocations shall be zero for fisheries that have adequate or excess domestic harvest capacity (Magnuson-Stevens Act sec. 201(d)).

Section 622.2, revises the definition of ''Caribbean'' to reflect the extended jurisdiction of the Caribbean Fishery Management Council to the U.S. waters surrounding all U.S. territories in the Caribbean Sea (Magnuson-Stevens Act sec. 302(a)(1)(D)). Previously, Council jurisdiction was only over fisheries seaward of the U.S. Virgin Islands and Puerto Rico.

Section 218 of the MSRA amended section 802 of the Consolidated Appropriations Act of 2004 (Public Law 108—199; section 802) to extend the duration of the Central Gulf of Alaska (GOA) Rockfish Program from two to five years. In section 802, Congress required the Secretary in consultation with the North Pacific Fishery Management Council to establish a management program for Central GOA rockfish and other groundfish fisheries with specific provisions. Section 802 states in part, ''...The pilot program will sunset when a GOA groundfish comprehensive rationalization plan is authorized by the Council and implemented by the Secretary, or 2 years from date of implementation, whichever is earlier.''

The North Pacific Fishery Management Council adopted the Central GOA Rockfish Program on June 6, 2005. NMFS approved the amendment to the Gulf of Alaska Groundfish Fishery Management Plan and adopted regulations establishing the Program beginning in 2007 and expiring December 31, 2008. Section 218 of the MSRA has now extended the expiration date to five years after implementation. The GOA groundfish comprehensive rationalization plan is not yet complete.

This rule amends regulations at 50 CFR 679.80(a)(2) to be consistent with the statutory requirements of section 218 of the MSRA that the Central GOA Rockfish Program be extended from December 31, 2008 (i.e., two years after implementation by the Secretary), to December 31, 2011 (i.e., five years after implementation by the Secretary).

Classification

The Office of Management and Budget has determined that this final rule is not significant for purposes of Executive Order 12866.

Through this action, NMFS seeks to ensure that the regulations implementing the Magnuson-Stevens Act conform to the statutory requirements. Pursuant to 5 U.S.C. 553(b)(B), the NOAA Assistant Administrator for Fisheries finds good cause to waive prior notice and an opportunity for public comment on this action, as notice and comment are unnecessary for the following reasons. First, the actions taken in this final rule are non-discretionary. As noted previously in the preamble, these actions either change current regulations to conform to the statute or add definitions that exist in the statute to the regulations. Since these changes are non-discretionary, notice and comment on them would not allow the agency to make any changes to them, making notice and comment unnecessary. Second, the regulations as they exist present out-of-date information, due to the MSRA amendments. This situation causes confusion to the public as they try to reconcile the requirements of the Magnuson-Stevens Act with those of the regulations. Bringing the regulations in line with the overriding requirements of the statute is consistent with the public interest. Further, because the rule is only administrative in nature, is non-discretionary, and imposes no new substantive requirements or restrictions on the public, the Assistant Administrator for Fisheries, NOAA, under 5 U.S.C. 553(d)(3), finds inapplicable the requirement to delay its effective date for 30 days.

List of Subjects

50 CFR Part 600

Administrative practice and procedure, Confidential business information, Fisheries, Fishing, Fishing vessels, Foreign relations, Intergovernmental relations, Penalties, Reporting and recordkeeping requirements, Statistics.

50 CFR Part 622

Fisheries, Fishing, Puerto Rico, Reporting and recordkeeping requirements, Virgin Islands.

50 CFR Part 679

Alaska, Fisheries.

Dated: November 10, 2008.

Samuel D. Rauch III

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

■ For the reasons discussed in the preamble, NMFS amends 50 CFR parts 600, 622, and 679 as follows:

Chapter VI

PART 600—MAGNUSON-STEVENS ACT PROVISIONS

■ 1. The authority citation for part 600 continues to read as follows:

Authority: 5 U.S.C. 561 and 16 U.S.C. 1801 *et seq.*

■ 2. In § 600.10, the definition of ''Limited access system'' is added in alphabetical order to read as follows:

§ 600.10 Definitions.

Limited access system means a system that limits participation in a fishery to those satisfying certain eligibility criteria or requirements contained in a fishery management plan or associated regulation.

■ 3. In § 600.345, paragraph (a) introductory text is revised to read as follows:

§ 600.345 National Standard 8—Communities.

(a) *Standard 8.* Conservation and management measures shall, consistent with the conservation requirements of the Magnuson-Stevens Act (including the prevention of overfishing and rebuilding of overfished stocks), take

into account the importance of fishery resources to fishing communities by utilizing economic and social data that are based upon the best scientific information available in order to:

■ 4. In § 600.350, paragraph (c) is revised to read as follows:

§ 600.350 National Standard 9—Bycatch.

(c) *Definition—Bycatch.* The term ''bycatch'' means fish that are harvested in a fishery, but that are not sold or kept for personal use.

(1) *Inclusions.* Bycatch includes the discard of whole fish at sea or elsewhere, including economic discards and regulatory discards, and fishing mortality due to an encounter with fishing gear that does not result in capture of fish (i.e., unobserved fishing mortality).

(2) *Exclusions.* Bycatch excludes the following:

(i) Fish that legally are retained in a fishery and kept for personal, tribal, or cultural use, or that enter commerce through sale, barter, or trade.

(ii) Fish released alive under a recreational catch-and-release fishery management program. A catch-and-release fishery management program is one in which the retention of a particular species is prohibited. In such a program, those fish released alive would not be considered bycatch.

(iii) Fish harvested in a commercial fishery managed by the Secretary under Magnuson-Stevens Act sec. 304(g) or the Atlantic Tunas Convention Act of 1975 (16 U.S.C. 971d) or highly migratory species harvested in a commercial fishery managed by a Council under the Magnuson-Stevens Act or the Western and Central Pacific Fisheries Convention Implementation Act, that are not regulatory discards and that are tagged and released alive under a scientific tagging and release program established by the Secretary.

■ 5. In § 600.516, paragraph (a) is revised to read as follows:

§ 600.516 Total allowable level of foreign fishing (TALFF).

(a) The TALFF, if any, with respect to any fishery subject to the exclusive fishery management authority of the United States, is that portion of the OY of such fishery, which cannot or will not be harvested by vessels of the United States. Allocations of TALFF are discretionary, except that the total allowable level shall be zero for fisheries determined by the Secretary to have adequate or excess domestic harvest capacity.

PART 622—FISHERIES OF THE CARIBBEAN, GULF, AND SOUTH ATLANTIC

■ 6. The authority citation for part 622 continues to read as follows:

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

■ 7. In § 622.2, the definition of ''Caribbean'' is revised to read as follows:

§ 622.2 Definitions and acronyms.

Caribbean means the Caribbean Sea and Atlantic Ocean seaward of Puerto Rico, the U.S. Virgin Islands, and possessions of the United States in the Caribbean Sea.

PART 679—FISHERIES OF THE EXCLUSIVE ECONOMIC ZONE OFF ALASKA

■ 8. The authority citation for 50 CFR part 679 is revised to read as follows:

Authority: 16 U.S.C. 773 *et seq.*; 16 U.S.C. 1540(f); 16 U.S.C. 1801 *et seq.*; 16 U.S.C. 3631 *et seq.*; Pub. L. 105–277; Pub. L. 106–31; Pub. L. 106–554; Pub. L. 108–199; Pub. L. 108–447; Pub. L. 109–241; Pub. L. 109–479.

■ 9. In § 679.80, paragraph (a)(2) is revised to read as follows:

§ 679.80 Initial allocation of rockfish QS.

(a) * * *

(2) *Duration.* The Rockfish Program authorized under this part expires on December 31, 2011.

[FR Doc. E8–27227 Filed 11–14–08; 8:45 am]

BILLING CODE 3510–22–S

DEPARTMENT OF COMMERCE

National Oceanic and Atmospheric Administration

50 CFR Part 648

[Docket No. 061228342–7068–02]

RIN 0648–XL69

Fisheries of the Northeastern United States; Atlantic Herring Fishery; Total Allowable Catch Harvested for Management Area 1A

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

ACTION: Closure of Atlantic herring fishery for Management Area 1A.

SUMMARY: NMFS announces that, effective 0001 hours, November 14, 2008, federally permitted vessels may not fish for, catch, possess, transfer, or land more than 2,000 lb (907.2 kg) of Atlantic herring in or from Management Area 1A (Area 1A) per trip or calendar day until January 1, 2009, when the 2009 TAC becomes available, except for transiting purposes as described in this notice. This action is based on the determination that 95 percent of the Atlantic herring total allowable catch (TAC) allocated to Area 1A for 2008 is projected to be harvested. Regulations governing the Atlantic herring fishery require publication of this notification to advise vessel and dealer permit holders that no TAC is available for the directed fishery for Atlantic herring harvested from Area 1A.

DATES: Effective 0001 hrs local time, November 14, 2008, for the remainder of the fishing year.

FOR FURTHER INFORMATION CONTACT: Christopher Biegel, Fishery Management Specialist, at (978) 281–9112.

SUPPLEMENTARY INFORMATION: Regulations governing the Atlantic herring fishery are found at 50 CFR part 648. The regulations require annual specification of optimum yield, domestic and foreign fishing, domestic and joint venture processing, and management area TACs. The 2008 TAC allocated to Area 1A (72 FR 17807, April 10, 2007) is 45,000 mt (99,908,017 lb).

The regulations at § 648.202 require the Administrator, Northeast Region, NMFS (Regional Administrator) to monitor the Atlantic herring fishery in each of the four management areas designated in the Fishery Management Plan for the Atlantic Herring Fishery and, based upon dealer reports, state data, and other available information, to determine when the harvest of Atlantic herring is projected to reach 95 percent of the TAC allocated. When such a determination is made, NMFS is required to publish notification in the **Federal Register** of this determination. Effective upon a specific date, NMFS must notify vessel and dealer permit holders that vessels are prohibited from fishing for, catching, possessing, transferring, or landing more than 2,000 lb (907.2 kg) of herring per trip or calendar day in or from the specified management area for the remainder of the closure period. Transiting of Area 1A with more than 2,000 lb of herring on board is allowed under the conditions specified below.

The Regional Administrator has determined, based upon dealer reports and other available information, that 95 percent of the total Atlantic herring TAC allocated to Area 1A for the 2008 fishing year is projected to be harvested. Therefore, effective 0001 hrs local time, November 14, 2008, federally permitted

vessels may not fish for, catch, possess, transfer, or land more than 2,000 lb (907.2 kg) of Atlantic herring in or from Area 1A per trip or calendar day through December 31, 2008; except a vessel may transit Area 1A with more than 2,000 lb (907.2 kg) of herring on board, or land more than 2,000 lb (907.2 kg) provided such herring were not caught in Area 1A, and provided all fishing gear is stowed and not available for immediate use as required by § 648.23(b). Effective November 14, 2008, federally permitted dealers are also advised that they may not purchase Atlantic herring from federally permitted Atlantic herring vessels that harvest more than 2,000 lb (907.2 kg) of Atlantic herring from Area 1A through 2400 hrs local time, December 31, 2008,.

Classification

This action is required by 50 CFR part 648 and is exempt from review under Executive Order 12866.

This action closes the Atlantic herring fishery for Management Area 1A until January 1, 2009, under current regulations. The regulations at § 648.201(a) require such action to ensure that Atlantic herring vessels do not exceed the 2008 TAC. The Atlantic herring fishery opened for the 2008 fishing year at 0001 hours on January 1, 2008. Data indicating the Atlantic herring fleet will have landed at least 95% of the 2008 TAC have only recently become available. The Assistant Administrator for Fisheries, NOAA (AA), finds good cause pursuant to 5 U.S.C. 553(b)(B) to waive prior notice and the opportunity for public comment because it would be contrary to the public interest. If implementation of this closure is delayed to solicit prior public comment, the quota for this fishing year will be exceeded, thereby undermining the conservation objectives of the FMP. The AA further finds, pursuant to 5 U.S.C 553(d)(3), good cause to waive the thirty (30) day delayed effectiveness period for the reasons stated above.

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

Dated: November 12, 2008.

Emily H. Menashes

Acting Director, Office of Sustainable Fisheries, National Marine Fisheries Service.

[FR Doc. E8–27217 Filed 11–12–08; 4:15 pm]

BILLING CODE 3510–22–S

Proposed Rules

Federal Register
Vol. 73, No. 222
Monday, November 17, 2008

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

DEPARTMENT OF TRANSPORTATION

Federal Aviation Administration

14 CFR Part 39

[Docket No. FAA–2008–1215; Directorate Identifier 2008–NM–072–AD]

RIN 2120–AA64

Airworthiness Directives; Airbus Model A318, A319, A320, and A321 Series Airplanes

AGENCY: Federal Aviation Administration (FAA), DOT.

ACTION: Notice of proposed rulemaking (NPRM).

SUMMARY: We propose to adopt a new airworthiness directive (AD) for 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:

> Two incidents have occurred due to the lack of visibility on the Primary Flight Display (PFD) of the Traffic Alert and Collision Avoidance System (TCAS) indications.

* * * * *

We are issuing this AD to prevent possible mid-air collisions due to lack of visibility of TCAS indications on the PFD. 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 December 17, 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 W12–40, 1200 New Jersey Avenue, SE., Washington, DC, 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 Operations office 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 Operations 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: Tim Dulin, Aerospace Engineer, International Branch, ANM–116, Transport Airplane Directorate, FAA, 1601 Lind Avenue, SW., Renton, Washington 98057–3356; telephone (425) 227–2141; fax (425) 227–1149.

SUPPLEMENTARY INFORMATION:

Comments Invited

We invite you to send any written relevant data, views, or arguments about this proposed AD. Send your comments to an address listed under the **ADDRESSES** section. Include ''Docket No. FAA–2008–1215; Directorate Identifier 2008–NM–072–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 based on 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 Airworthiness Directive 2008–0032, dated February 21, 2008 (referred to after this as ''the MCAI''), to correct an unsafe condition for the specified products. The MCAI states:

> Two incidents have occurred due to the lack of visibility on the Primary Flight Display (PFD) of the Traffic Alert and Collision Avoidance System (TCAS) indications.
>
> EIS2 [electronic instrument system 2] standard S7 introduces modifications to the vertical speed indication to improve the legibility in case of TCAS Resolution Advisory.
>
> The modifications consist in changing the colour of the needle and increasing the width of the TCAS green band.
>
> This AD supersedes [EASA] AD 2006–0108 [dated May 3, 2006]. Also, as all aircraft in this AD applicability have been retrofitted to at least S4.2 standard, the operational limitations contained in the Compliance paragraph 2. of AD 2006–0108 have already been addressed.
>
> This AD therefore mandates the installation of the improved EIS2 standard S7.

We are issuing this AD to prevent possible mid-air collisions due to lack of visibility of TCAS indications on the PFD. You may obtain further information by examining the MCAI in the AD docket.

Relevant Service Information

Airbus has issued Service Bulletin A320–31–1276, Revision 01, dated March 5, 2008. The actions described in this service information are intended to correct the unsafe condition identified in the MCAI.

FAA's Determination and Requirements of This 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 the State of Design Authority, we have been notified of the unsafe condition described in the MCAI and service information referenced above. We are proposing this AD because we evaluated all pertinent information and determined an unsafe condition exists and is likely to exist or develop on other products of the same type design.

Differences Between This 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

Based on the service information, we estimate that this proposed AD would affect about 113 products of U.S. registry. We also estimate that it would take about 4 work-hours per product to comply with the basic requirements of this proposed AD. The average labor rate is $80 per work-hour. Required parts would cost about $0 per product. Where the service information lists required parts costs that are covered under warranty, we have assumed that there will be no charge for these costs. As we do not control warranty coverage for affected parties, some parties may incur costs higher than estimated here. Based on these figures, we estimate the cost of the proposed AD on U.S. operators to be $36,160, or $320 per product.

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:

Airbus: Docket No. FAA–2008–1215; Directorate Identifier 2008–NM–072–AD.

Comments Due Date

(a) We must receive comments by December 17, 2008.

Affected ADs

(b) None.

Applicability

(c) This AD applies to Airbus Model A318–111, A318–112, A319–111, A319–112, A319–113, A319–114, A319–115, A319–131, A319–132, A319–133, A320–111, A320–211, A320–212, A320–214, A320–231, A320–232, A320–233, A321–111, A321–112, A321–131, A321–211, A321–212, A321–213, A321–231, and A321–232, certificated in any category; equipped with EIS2 (electronic instrument system 2) standard S4.2 (DMC disk part number F1419418) installed by Airbus Modification 34571, or Airbus Service Bulletin A320–31A1220, or Airbus Service Bulletin A320–31–1234; except those airplanes on which Airbus Modification 36725 has been embodied in production.

Subject

(d) Air Transport Association (ATA) of America Code 31: Instruments.

Reason

(e) The mandatory continuing airworthiness information (MCAI) states:

Two incidents have occurred due to the lack of visibility on the Primary Flight Display (PFD) of the Traffic Alert and Collision Avoidance System (TCAS) indications.

EIS2 standard S7 introduces modifications to the vertical speed indication to improve the legibility in case of TCAS Resolution Advisory.

The modifications consist in changing the colour of the needle and increasing the width of the TCAS green band.

This AD supersedes AD 2006–0108 [dated May 3, 2006]. Also, as all aircraft in this AD applicability have been retrofitted to at least S4.2 standard, the operational limitations contained in the Compliance paragraph 2. of AD 2006–0108 have already been addressed.

This AD therefore mandates the installation of the improved EIS2 standard S7.

We are issuing this AD to prevent possible mid-air collisions due to lack of visibility of TCAS indications on the PFD.

Actions and Compliance

(f) Unless already done, do the following actions:

(1) Within 12 months after the effective date of this AD, install EIS2 standard S7 (DMC disk part number F1461768), in accordance with the Accomplishment Instructions of Airbus Service Bulletin A320–31–1276, Revision 01, dated March 5, 2008.

(2) Installations done before the effective date of this AD in accordance with Airbus Service Bulletin A320–31–1263, Revision 01, dated July 20, 2007; Airbus Service Bulletin A320–31–1263, Revision 02, dated August 10, 2007; Airbus Service Bulletin A320–31–1263, Revision 03, dated November 23, 2007; or Airbus Service Bulletin A320–31–1276, dated April 18, 2007; are acceptable for compliance with the requirements of paragraph (f)(1) of this AD.

FAA AD Differences

Note: This AD differs from the MCAI and/or service information as follows:

(1) This AD does not include the operational limitations specified in paragraph 1 of the MCAI. The MCAI carried these limitations forward from European Aviation Safety Agency (EASA) Airworthiness Directive 2006–0108, dated May 3, 2006. The FAA-approved Master Minimum Equipment List (MMEL) already contains these and more restrictive operational limitations, and we previously determined that no action was required on our part regarding this provision of EASA AD 2006–0108.

Other FAA AD Provisions

(g) The following provisions also apply to this AD:

(1) Alternative Methods of Compliance (AMOCs): The Manager, ANM–116, International Branch, Transport Airplane Directorate, 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: Tim Dulin, Aerospace Engineer, 1601 Lind Avenue, SW., Renton, Washington 98057–3356; telephone (425) 227–2141; fax (425) 227–1149. 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.

(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, 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 EASA Airworthiness Directive 2008–0032, dated February 21, 2008, and Airbus Service Bulletin A320–31–1276, Revision 01, dated March 5, 2008, for related information.

Issued in Renton, Washington, on November 6, 2008.

Stephen P. Boyd,

Assistant Manager, Transport Airplane Directorate, Aircraft Certification Service.

[FR Doc. E8–27167 Filed 11–14–08; 8:45 am]

BILLING CODE 4910–13–P

DEPARTMENT OF TRANSPORTATION

Federal Aviation Administration

14 CFR Part 39

[Docket No. FAA–2008–1213; Directorate Identifier 2007–NM–092–AD]

RIN 2120–AA64

Airworthiness Directives; Boeing Model 737–100, –200, –200C, –300, –400, and –500 Series Airplanes

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

ACTION: Notice of proposed rulemaking (NPRM).

SUMMARY: The FAA proposes to supersede an existing airworthiness directive (AD) that applies to certain Boeing Model 737–100, –200, –200C, –300, –400, and –500 series airplanes. The existing AD currently requires repetitive inspections of the intercostal webs, attachment clips, and stringer splice channels for cracks; and corrective action if necessary. This proposed AD would reduce the repetitive inspection intervals from 25,000 flight cycles to 6,000 flight cycles, and expand the inspection area for Model 737–200C series airplanes to include the area aft of the forward entry door. This proposed AD results from additional reports of fatigue cracks. We are proposing this AD to detect and correct fatigue cracking of the intercostals on the forward and aft sides of the forward entry door, which could result in loss of the forward entry door and rapid decompression of the airplane.

DATES: We must receive comments on this proposed AD by January 2, 2009.

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: Howard Hall, Aerospace Engineer, Airframe Branch, ANM–120S, FAA, Seattle Aircraft Certification Office, 1601 Lind Avenue, SW., Renton, Washington 98057–3356; telephone (425) 917–6430; 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–2008–1213; Directorate Identifier 2007–NM–092–AD'' at the beginning of your comments. We specifically invite comments on the overall regulatory, economic, environmental, and energy aspects of this proposed AD. We will consider all comments received by the closing date and may amend this proposed AD because of those comments.

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

Discussion

On September 16, 2005, we issued AD 2005–20–03, amendment 39–14296 (70 FR 56361, September 27, 2005) for certain Boeing Model 737–100, –200, –200C, –300, –400, and –500 series airplanes. That AD requires repetitive inspections of the intercostal webs, attachment clips, and stringer splice channels for cracks; and corrective action if necessary. That AD resulted from reports of fatigue cracks on several Boeing Model 737–200 series airplanes. We issued that AD to detect and correct fatigue cracking of the intercostals on the forward and aft sides of the forward entry door, which could result in loss of the forward entry door and rapid decompression of the airplane.

Actions Since Existing AD Was Issued

Since we issued AD 2005–20–03, many operators have reported to Boeing over one hundred fatigue cracks at all doorstop and hinge support intercostals on both the forward and aft sides of the forward entry door. Operators have also reported cracks on several airplanes at multiple intercostal locations.

Relevant Service Information

We have reviewed Boeing Alert Service Bulletin 737–53A1204, Revision 1, dated March 26, 2007. We referred to Boeing Special Attention Service Bulletin 737–53–1204, dated June 19, 2003, as the appropriate source of service information for accomplishing the actions required by AD 2005–20–03. Revision 1 reduces the repetitive inspection intervals from 25,000 flight cycles to 6,000 flight cycles for all areas.

Revision 1 also adds a new inspection for cracking in the intercostal area aft of the forward entry door for Boeing Model 737–200C series airplanes on which the intercostals on the aft side of the forward entry door were not inspected previously. (The original issue of the

service bulletin specified inspections only of the forward area.)

The compliance thresholds aft of the door vary depending on whether actions have been previously accomplished in accordance with Part 1, Part 2, and Part 3 of Paragraph 3.B. of Boeing Special Attention Service Bulletin 737–53–1204, dated June 19, 2003.

- For airplanes on which the actions have been accomplished previously, the threshold specified in the service bulletin for the next corresponding action is 6,000 flight cycles after the date of the previous inspection, or 3,000 flight cycles after March 26, 2007 (the date of Revision 1 of the service bulletin), whichever occurs later.
- For airplanes on which the actions have not been accomplished previously, the threshold specified in the service bulletin for the initial inspection is 15,000 total flight cycles, or within 4,500 flight cycles from June 19, 2003 (the date of the initial release of the service bulletin), whichever occurs later.
- For all airplanes, the threshold for the initial inspection specified in Part 4 of Paragraph 3.B. of Revision 1 of the service bulletin is 15,000 total flight cycles, or within 4,500 flight cycles from March 26, 2007.

FAA's Determination and Requirements of the Proposed AD

We have evaluated all pertinent information and identified an unsafe condition that is likely to develop on other airplanes of the same type design. For this reason, we are proposing this AD, which would supersede AD 2005–20–03 and would retain the requirements of the existing AD. This proposed AD would also reduce the repetitive inspection intervals from 25,000 flight cycles to 6,000 flight cycles, and expand the inspection area for Boeing Model 737–200C series airplanes. This proposed AD would require accomplishing the actions specified in the service bulletin described previously, except as discussed under ''Difference Between the Proposed AD and the Service Bulletin.''

Difference Between the Proposed AD and the Service Bulletin

The service bulletin 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.

Costs of Compliance

There are about 3,132 airplanes of the affected design in the worldwide fleet. 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	Cost per airplane	Number of U.S.-registered airplanes	Fleet cost
Inspection of areas forward of the aft entry door (required by AD 2005–20–03).	2	$80	$160 per inspection cycle.	876	$140,160 per inspection cycle.
Inspection of areas aft of the forward entry door for Model 737–200C series airplanes (new proposed action).	1	80	$80 per inspection cycle.	19	$1,520 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 have determined that this proposed AD would not have federalism implications under Executive Order 13132. This proposed AD would not have a substantial direct effect on the States, on the relationship between the national Government and the States, or on the distribution of power and responsibilities among the various levels of government.

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

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

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

List of Subjects in 14 CFR Part 39

Air transportation, Aircraft, Aviation safety, 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 Federal Aviation Administration (FAA) amends § 39.13 by removing amendment 39–14296 (70 FR 56361, September 27, 2005) and adding the following new airworthiness directive (AD):

Boeing: Docket No. FAA–2008–1213; Directorate Identifier 2007–NM–092–AD.

Comments Due Date

(a) The FAA must receive comments on this AD action by January 2, 2009.

Affected ADs

(b) This AD supersedes AD 2005–20–03.

Applicability

(c) This AD applies to Model 737–100, –200, –200C, –300, –400, and –500 series airplanes, certificated in any category, as identified in Boeing Alert Service Bulletin 737–53A1204, Revision 1, dated March 26, 2007.

Unsafe Condition

(d) This AD results from reports of fatigue cracks. We are issuing this AD to detect and correct fatigue cracking of the intercostals on the forward and aft sides of the forward entry door, which could result in loss of the forward entry door and rapid decompression of the airplane.

Compliance

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

Initial Compliance Time

(f) For all Model 737–100, –200, –200C, –300, –400, and –500 series airplanes: Before the accumulation of 15,000 total flight cycles, or within 4,500 flight cycles after November 1, 2005 (the effective date of AD 2005–20–03), whichever occurs later: Do the inspections required by paragraphs (h) and (i) of this AD.

(g) For all Model 737–200C series airplanes: Before the accumulation of 15,000 total flight cycles, or within 4,500 flight cycles after the effective date of this AD, whichever occurs later: Do the inspection required by paragraph (j) of this AD.

Initial Inspection for Passenger Configuration Airplanes

(h) For Group 1 passenger airplanes identified in Boeing Alert Service Bulletin 737–53A1204, Revision 1, dated March 26, 2007: Perform a detailed inspection for cracking of the intercostal web, attachment clips, and stringer splice channels; and a high frequency eddy current inspection for cracking of the stringer splice channels located forward and aft of the forward entry door; and do all applicable corrective actions before further flight; in accordance with Parts 1 and 2 of the Work Instructions of Boeing Special Attention Service Bulletin 737–53–1204, dated June 19, 2003; or Boeing Alert Service Bulletin 737–53A1204, Revision 1, dated March 26, 2007. After the effective date of this AD, only Revision 1 may be used.

Initial Inspection for Cargo Configuration Airplanes (Forward of the Forward Entry Door)

(i) For Group 2 cargo airplanes identified in Boeing Alert Service Bulletin 737–53A1204, Revision 1, dated March 26, 2007: Perform a detailed inspection for cracking of the intercostal webs and attachment clips located forward of the forward entry door; and do all applicable corrective actions before further flight; in accordance with Part 3 of the Work Instructions of Boeing Special Attention Service Bulletin 737–53–1204, dated June 19, 2003, or Boeing Alert Service Bulletin 737–53A1204, Revision 1, dated March 26, 2007. After the effective date of this AD, only Revision 1 may be used.

Initial Inspection for Cargo Configuration Airplanes (Aft of the Forward Entry Door)

(j) For Group 2 cargo airplanes identified in Boeing Alert Service Bulletin 737–53A1204, Revision 1, dated March 26, 2007: Perform a detailed inspection for cracking of the intercostal webs and attachment clips located aft of the forward entry door; and do all applicable corrective actions before further flight; in accordance with Part 4 of the Work Instructions of Boeing Special Attention Service Bulletin 737–53–1204, dated June 19, 2003; or Boeing Alert Service Bulletin 737–53A1204, Revision 1, dated March 26, 2007. After the effective date of this AD, only Revision 1 may be used.

Repeat Inspections

(k) Repeat the inspections required by paragraphs (h), (i), and (j) of this AD thereafter at intervals not to exceed 6,000 flight cycles after the previous inspection, or within 3,000 flight cycles after the effective date of this AD, whichever occurs later.

Exceptions

(l) Do the actions required by this AD by accomplishing all the applicable actions specified in the Accomplishment Instructions of the Boeing Special Attention Service Bulletin 737–53–1204, dated June 19, 2003; or Boeing Alert Service Bulletin 737–53A1204, Revision 1, dated March 26, 2007; (''the service bulletins'') except as provided by paragraphs (l)(1) and (l)(2) of this AD. After the effective date of this AD, only Revision 1 may be used

(1) Where the service bulletins specify to contact Boeing for repair instructions: Before further flight, repair using a method approved in accordance with the procedures specified in paragraph (m) of this AD.

(2) Where the service bulletins specify a compliance time relative to the date of a service bulletin, this AD requires compliance relative to the effective date of this AD. Where the service bulletins specify a compliance time relative to the date of the initial release of the service bulletin, this AD requires compliance relative to the effective date of AD 2005–20–03 (November 1, 2005).

Alternative Methods of Compliance (AMOCs)

(m)(1) The Manager, Seattle Aircraft Certification Office (ACO), FAA, ATTN: Howard Hall, Aerospace Engineer, Airframe Branch, ANM–120S, FAA, Seattle ACO, 1601 Lind Avenue, SW., Renton, Washington 98057–3356; telephone (425) 917–6430; 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.

(4) AMOCs approved previously in accordance with AD 2005–20–03 are approved as AMOCs for the corresponding provisions of this AD, provided the repetitive inspection intervals (if any) do not exceed 6,000 flight cycles.

(5) AMOCs approved previously in accordance with AD 2005–20–03 are not approved as AMOCs for the provisions of paragraph (j) or (k) of this AD.

Issued in Renton, Washington, on November 6, 2008.

Stephen P. Boyd,

Assistant Manager, Transport Airplane Directorate, Aircraft Certification Service.

[FR Doc. E8–27163 Filed 11–14–08; 8:45 am]

BILLING CODE 4910–13–P

DEPARTMENT OF TRANSPORTATION

Federal Aviation Administration

14 CFR Part 39

[Docket No. FAA–2008–1214; Directorate Identifier 2007–NM–259–AD]

RIN 2120–AA64

Airworthiness Directives; BAE Systems (Operations) Limited (Jetstream) Model 4101 Airplanes

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

ACTION: Notice of proposed rulemaking (NPRM).

SUMMARY: The FAA proposes to supersede an existing airworthiness directive (AD) that applies to all BAE Systems (Operations) Limited (Jetstream) Model 4101 airplanes. The existing AD currently requires operators to determine the number of flight cycles accumulated on each component of the main landing gear (MLG) and the nose landing gear (NLG), and to replace each component that reaches its life limit with a serviceable component. The existing AD also requires operators to revise the Airworthiness Limitations (AWL) section of the Instructions for Continued Airworthiness (ICA) in the aircraft maintenance manual to reflect

the new life limits for structurally significant items. This proposed AD would require a new revision of the AWL section of the ICA to incorporate revised life limits for structurally significant items, operational and functional tests of certain systems, and instructions to retain critical ignition source prevention features during configuration changes. This proposed AD results from mandatory continuing airworthiness information (MCAI) originated by an aviation authority of another country. We are proposing this AD to prevent failure of certain structurally significant items, including the MLG and the NLG, which could result in reduced structural integrity of the airplane; and to prevent fuel vapor ignition sources, which could result in fuel tank explosion and consequent loss of the airplane.

DATES: We must receive comments on this proposed AD by December 17, 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 BAE Systems Regional Aircraft, 13850 McLearen Road, Herndon, Virginia 20171; telephone 703–736–1080; e-mail *raebusiness@baesystems.com;* Internet *http://www.baesystems.com/Businesses/RegionalAircraft/index.htm.*

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: Todd Thompson, Aerospace Engineer, International Branch, ANM–116, Transport Airplane Directorate, FAA, 1601 Lind Avenue, SW., Renton, Washington 98057–3356; telephone (425) 227–1175; fax (425) 227–1149.

SUPPLEMENTARY INFORMATION:

Comments Invited

We invite you to send any written relevant data, views, or arguments about this proposed AD. Send your comments to an address listed under the **ADDRESSES** section. Include ''Docket No. FAA–2008–1214; Directorate Identifier 2007–NM–259–AD'' at the beginning of your comments. We specifically invite comments on the overall regulatory, economic, environmental, and energy aspects of this proposed AD. We will consider all comments received by the closing date and may amend this proposed AD because of those comments.

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

Discussion

On September 9, 2005, we issued AD 2005–19–15, amendment 39–14280 (70 FR 55230, September 21, 2005), for all BAE Systems (Operations) Limited (Jetstream) Model 4101 airplanes. That AD requires operators to determine the number of flight cycles accumulated on each component of the main landing gear (MLG) and the nose landing gear (NLG), and to replace each component that reaches its life limit with a serviceable component. The existing AD also requires operators to revise the Airworthiness Limitations (AWL) section of the Instructions for Continued Airworthiness in the aircraft maintenance manual to reflect the new life limits for structurally significant items. That AD resulted from engineering analysis of fleet operations which resulted in more restrictive life limits. We issued that AD to prevent failure of certain structurally significant items, including the MLG and the NLG, which could result in reduced structural integrity of the airplane.

Actions Since Existing AD Was Issued

Since we issued AD 2005–19–15, the European Aviation Safety Agency (EASA), which is the airworthiness authority for the European Union, advises that BAE System (Operations) Limited has issued revised Airworthiness Limitations, Certification Maintenance Requirements, and Critical Design Configuration Control Limitations (CDCCL). The revisions were based on assessments of fuel tank wiring installations. These assessments revealed that fuel vapor ignition sources may remain undetected. Fuel vapor ignition sources, if not corrected, could result in fuel tank explosion and consequent loss of the airplane.

Relevant Service Information

BAE Systems (Operations) Limited has issued Chapters 05–10–10, ''Airworthiness Limitations,'' 05–10–20, ''Certification Maintenance Requirements,'' and 05–10–30, ''Critical Design Configuration Control Limitations (CDCCL)—Fuel System'' of BAE Systems (Operations) Limited Jetstream Series 4100 AMM, Revision 29, dated February 15, 2008. Chapter 05–10–10 revises life limits for structurally significant items. Chapter 05–10–20 includes operational and functional tests of certain systems (e.g., air conditioning, electrical power, fire protection, and flight controls) and the maximum permitted time between those tests to maintain the certificated airworthiness standard of the airplanes. Chapter 05–10–30 includes CDCCLs that provide instructions to retain critical ignition source prevention features during configuration changes that may be caused by modification, repair, or maintenance actions.

Accomplishing the actions specified in the service information is intended to adequately address the unsafe condition. The EASA mandated the service information and issued airworthiness directive 2008–0094, dated May 16, 2008 (referred to after this as ''the MCAI''), to ensure the continued airworthiness of these airplanes in the European Union.

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 the State of Design Authority, we have been notified of the unsafe condition described in the MCAI and service information referenced above. We are proposing this AD because we evaluated all pertinent information and determined an unsafe condition exists and is likely to exist or develop on other products of the same type design.

This proposed AD would supersede AD 2005–19–15 and would continue to require revising the AWL section of the Instructions for Continued Airworthiness in the AMM to reflect the

new life limits structurally significant items. This proposed AD would also require revising the AWL section of the Instructions for Continued Airworthiness by incorporating the instructions specified in certain chapters of the service information described previously.

Change to Existing AD

This proposed AD would retain only certain requirements of AD 2005–19–15. As a result, the corresponding paragraph identifiers have changed in this proposed AD, as listed in the following table:

REVISED PARAGRAPH IDENTIFIER

Requirement in AD 2005–19–15	Corresponding requirement in this proposed AD
paragraph (l)	paragraph (f).

Costs of Compliance

The following table provides the estimated costs for U.S. operators to comply with this proposed AD.

ESTIMATED COSTS

Action	Work hour	Average labor rate per hour	Cost per airplane	Number of U.S.-registered airplanes	Fleet cost
AWL revision (required by AD 2005–19–15)	1	$80	$80	3	$240
AWL revision (new proposed action)	1	80	80	3	240

Authority for This Rulemaking

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

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

Regulatory Findings

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

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

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

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

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

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

List of Subjects in 14 CFR Part 39

Air transportation, Aircraft, Aviation safety, 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 Federal Aviation Administration (FAA) amends § 39.13 by removing amendment 39–14280 (70 FR 55230, September 21, 2005) and adding the following new airworthiness directive (AD):

BAE Systems (Operations) Limited (Formerly British Aerospace Regional Aircraft): Docket No. FAA–2008–1214; Directorate Identifier 2007–NM–259–AD.

Comments Due Date

(a) The FAA must receive comments on this AD action by December 17, 2008.

Affected ADs

(b) This AD supersedes AD 2005–19–15.

Applicability

(c) This AD applies to all BAE Systems (Operations) Limited Model Jetstream 4101 airplanes, certificated in any category.

Unsafe Condition

(d) This AD results from mandatory continuing airworthiness information (MCAI) originated by an aviation authority of another country. We are issuing this AD to prevent failure of certain structurally significant items, including the main landing gear (MLG) and the nose landing gear (NLG), which could result in reduced structural integrity of the airplane; and to prevent fuel vapor ignition sources, which could result in fuel tank explosion and consequent loss of the airplane.

Compliance

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

Certain Requirement of AD 2005–19–15

Revise Aircraft Maintenance Manual (AMM)

(f) Within 30 days after October 26, 2005 (the effective date of AD 2005–19–15): Revise the Airworthiness Limitations (AWL) section of the Instructions for Continued Airworthiness of the BAE Systems (Operations) Limited J41 AMM to include the life limits of the components listed in Chapter 05–10–10, Airworthiness Limitations—Description and Operation Section, Revision 23, dated February 15, 2005, of the AMM. This may be accomplished by inserting a copy into the AWL section of the Instructions for Continued Airworthiness. Thereafter, except as provided in paragraph (i) of this AD, no alternative replacement times may be approved for any affected component.

New Requirements of This AD

Revise AWL Section of Instructions for Continued Airworthiness

(g) Within 90 days after the effective date of this AD: Revise the AWL section of the

Instructions for Continued Airworthiness by incorporating the instructions of Chapters 05–10–10, ''Airworthiness Limitations,'' 05–10–20, ''Certification Maintenance Requirements,'' and 05–10–30, ''Critical Design Configuration Control Limitations (CDCCL)—Fuel System'' of BAE Systems (Operations) Limited Jetstream Series 4100 AMM, Revision 29, dated February 15, 2008 (hereafter ''the service information''). Thereafter, except as provided in paragraph (i) of this AD, no alternative replacement times or inspection intervals may be approved for any affected component. The revised Chapter 05–10–10 replaces the corresponding chapter specified in paragraph (f) of this AD.

(h) Where paragraph 2.A.(2) of the service information specifies that certain landing gear units ''must be removed 31st March 2008,'' this AD requires compliance within 60 days after the effective date of this AD.

Alternative Methods of Compliance (AMOCs)

(i) The Manager, International Branch, ANM–116, 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: Todd Thompson, Aerospace Engineer, International Branch, ANM–116, Transport Airplane Directorate, FAA, 1601 Lind Avenue, SW., Renton, Washington 98057–3356; telephone (425) 227–1175; fax (425) 227–1149. 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) European Aviation Safety Agency (EASA) airworthiness directive 2008–0094, dated May 16, 2008, also addresses the subject of this AD.

Issued in Renton, Washington, on November 6, 2008.

Stephen P. Boyd,

Assistant Manager, Transport Airplane Directorate, Aircraft Certification Service.

[FR Doc. E8–27161 Filed 11–14–08; 8:45 am]

BILLING CODE 4910–13–P

DEPARTMENT OF TRANSPORTATION

Federal Aviation Administration

14 CFR Part 39

[Docket No. FAA–2008–1216; Directorate Identifier 2008–NM–111–AD]

RIN 2120–AA64

Airworthiness Directives; Bombardier Model CL–600–1A11 (CL–600), CL–600–2A12 (CL–601), and CL–600–2B16 (CL–601–3A, CL–601–3R, and CL–604) Airplanes

AGENCY: Federal Aviation Administration (FAA), 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:

* * * [S]everal cases of wing anti-ice piccolo duct failure reported on CL–600–2B19 (CRJ) aircraft. Although there have been no failures reported on Challenger aircraft, similar ducts are installed on the above Challenger models.

* * * * *

Cracking of the wing anti-ice piccolo ducts could result in air leakage, with an adverse effect on the anti-ice air distribution pattern and a possible unannunciated insufficient heat condition. * * *

The unsafe condition is anti-ice system air leakage with a possible adverse effect on the anti-ice air distribution pattern and anti-ice capability without annunciation to the flightcrew, and consequent reduced controllability of the airplane. 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 December 17, 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 W12–40, 1200 New Jersey Avenue, SE., Washington, DC, 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 Operations office 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 Operations 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: Dan Parrillo, 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) 228–7305; fax (516) 794–5531.

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–2008–1216; Directorate Identifier 2008–NM–111–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 based on 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

Transport Canada Civil Aviation (TCCA), which is the aviation authority for Canada, has issued Canadian Airworthiness Directive CF–2008–18, dated May 9, 2008 (referred to after this as ''the MCAI''), to correct an unsafe condition for the specified products. The MCAI states:

There have been several cases of wing anti-ice piccolo duct failure reported on CL–600–2B19 (CRJ) aircraft. Although there have been no failures reported on Challenger aircraft, similar ducts are installed on the above Challenger models [CL–600–1A11, CL–600–2A12, and CL–600–2B16].

Upon investigation, it has been determined that ducts manufactured since June 2000, and installed since 1 August 2000, are susceptible to cracking due to the process used to drill the holes in the ducts. These ducts were installed on CL–600–2B16 aircraft, serial numbers 5469 through 5635 in production, but may also have been installed as replacements on CL–600–1A11, CL–600–2A12 and other CL–600–2B16 aircraft.

Cracking of the wing anti-ice piccolo ducts could result in air leakage, with an adverse effect on the anti-ice air distribution pattern and a possible unannunciated insufficient heat condition. As a result, the airplane flight manual (AFM) instructions have been revised to provide proper annunciation of an insufficient heat condition, utilizing existing messages and indications, with instructions, to the pilot, to leave icing conditions if

sufficient heat cannot be achieved or maintained.

This directive mandates the amendment of the AFM procedures, in addition to checking the part numbers and serial numbers of the installed wing anti-ice piccolo ducts and replacing them as necessary.

The unsafe condition is anti-ice system air leakage with a possible adverse effect on the anti-ice air distribution pattern and anti-ice capability without annunciation to the flightcrew, and consequent reduced controllability of the airplane. You may obtain further information by examining the MCAI in the AD docket.

Relevant Service Information

Bombardier has issued the service information listed in the ''Temporary Revisions (TRs)'' and ''Service Bulletins'' tables. The actions described in this service information are intended to correct the unsafe condition identified in the MCAI.

TEMPORARY REVISIONS (TRS)

Canadair TR—	To the—	Date—
600/23	Canadair Challenger Model CL–600–1A11 Airplane Flight Manual (AFM)	August 16, 2006.
600–1/19	Canadair Challenger Model CL–600–1A11 (Winglets) AFM	August 16, 2006.
601/14	Canadair Challenger Model CL–600–2A12 AFM, Product Support Publication (PSP) 601–1B–1	August 16, 2006.
601/15	Canadair Challenger Model CL–600–2A12 AFM, PSP 601–1A–1	August 16, 2006.
601/19	Canadair Challenger Model CL–600–2A12 AFM, PSP 601–1B	August 16, 2006.
601/26	Canadair Challenger Model CL–600–2B16 AFM, PSP 601A–1	August 16, 2006.
601/27	Canadair Challenger Model CL–600–2A12 AFM	August 16, 2006.
601/27	Canadair Challenger Model CL–600–2B16 AFM, PSP 601A–1–1	August 16, 2006.
604/20	Canadair Challenger Model CL–604 AFM, PSP 604–1	April 17, 2006.

SERVICE BULLETINS

Bombardier Service Bulletin—	Revision level—	Date—
600–0734	Original	November 30, 2006.
601–0585	Original	November 30, 2006.
604–30–003	01	January 21, 2008.

FAA's Determination and Requirements of This 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 the State of Design Authority, we have been notified of the unsafe condition described in the MCAI and service information referenced above. We are proposing this AD because we evaluated all pertinent information and determined an unsafe condition exists and is likely to exist or develop on other products of the same type design.

Differences Between This 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

Based on the service information, we estimate that this proposed AD would affect about 108 products of U.S. registry. We also estimate that it would take about 37 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 $319,680, or $2,960 per product.

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:

Bombardier, Inc. (Formerly Canadair): Docket No. FAA–2008–1216; Directorate Identifier 2008–NM–111–AD.

Comments Due Date

(a) We must receive comments by December 17, 2008.

Affected ADs

(b) None.

Applicability

(c) This AD applies to the airplanes identified in Table 1, paragraphs (c)(1), (c)(2), (c)(3), and (c)(4) of this AD, certificated in any category.

TABLE 1—AIRPLANES AFFECTED BY THIS AD

Bombardier model	Serial Nos.
(1) CL–600–1A11 (CL–600) airplanes	1004 through 1085 inclusive.
(2) CL–600–2A12 (CL–601) airplanes	3001 through 3066 inclusive.
(3) CL–600–2B16 (CL–601–3A, CL–601–3R, & CL–604) airplanes	5001 through 5194 inclusive.
(4) CL–600–2B16 (CL–601–3A, CL–601–3R, & CL–604) airplanes	5301 through 5635 inclusive.

Subject

(d) Air Transport Association (ATA) of America Code 30: Ice and Rain Protection.

Reason

(e) The mandatory continuing airworthiness information (MCAI) states:

There have been several cases of wing anti-ice piccolo duct failure reported on CL–600–2B19 (CRJ) aircraft. Although there have been no failures reported on Challenger aircraft, similar ducts are installed on the above Challenger models.

Upon investigation, it has been determined that ducts manufactured since June 2000, and installed since 1 August 2000, are susceptible to cracking due to the process used to drill the holes in the ducts. These ducts were installed on CL–600–2B16 aircraft, serial numbers 5469 through 5635 in production, but may also have been installed as replacements on CL–600–1A11, CL–600–2A12 and other CL–600–2B16 aircraft.

Cracking of the wing anti-ice piccolo ducts could result in air leakage, with an adverse effect on the anti-ice air distribution pattern and a possible unannunciated insufficient heat condition. As a result, the airplane flight manual (AFM) instructions have been revised to provide proper annunciation of an insufficient heat condition, utilizing existing messages and indications, with instructions, to the pilot, to leave icing conditions if sufficient heat cannot be achieved or maintained.

This directive mandates the amendment of the AFM procedures, in addition to checking the part numbers and serial numbers of the installed wing anti-ice piccolo ducts and replacing them as necessary.

The unsafe condition is anti-ice system air leakage with a possible adverse effect on the anti-ice air distribution pattern and anti-ice capability without annunciation to the flightcrew, and consequent reduced controllability of the airplane.

Actions and Compliance

(f) Unless already done, do the following actions.

(1) For airplanes identified in paragraphs (c)(1), (c)(2), (c)(3), and (c)(4) of this AD: Within 30 days after the effective date of this AD, revise the Normal and Abnormal Procedures sections of the Airplane Flight Manual (AFM) by inserting a copy of the applicable Temporary Revision (TR) listed in Table 2 of this AD. When the information in the applicable TR is included in the general revisions of the AFM, the general revisions may be inserted in the AFM and the TR may be removed.

TABLE 2—TEMPORARY REVISIONS

Canadair TR—	To the—	Date—
(i) 600/23	Canadair Challenger Model CL–600–1A11 Airplane Flight Manual (AFM)	August 16, 2006.
(ii) 600–1/19	Canadair Challenger Model CL–600–1A11 (Winglets) AFM	August 16, 2006.
(iii) 601/14	Canadair Challenger Model CL–600–2A12 AFM, Product Support Publication (PSP) 601–1B–1	August 16, 2006.
(iv) 601/15	Canadair Challenger Model CL–600–2A12 AFM, PSP 601–1A–1	August 16, 2006.
(v) 601/19	Canadair Challenger Model CL–600–2A12 AFM, PSP 601–1B	August 16, 2006.
(vi) 601/26	Canadair Challenger Model CL–600–2B16 AFM, PSP 601A–1	August 16, 2006.
(vii) 601/27	Canadair Challenger Model CL–600–2A12 AFM	August 16, 2006.
(viii) 601/27	Canadair Challenger Model CL–600–2B16 AFM, PSP 601A–1–1	August 16, 2006.
(ix) 604/20	Canadair Challenger Model CL–604 AFM, PSP 604–1	April 17, 2006.

(2) For airplanes identified in paragraphs (c)(1), (c)(2), and (c)(3) of this AD, and for Model CL–600–2B16 (CL–601–3A, CL–601–3R, & CL–604) airplanes, serial numbers 5301 through 5468 inclusive: Prior to the accumulation of 2,000 total flight hours, or within 60 months after the effective date of this AD, whichever occurs first, review the airplane maintenance records to determine if any anti-ice piccolo ducts or complete leading edge sections were replaced since August 1, 2000.

(3) For airplanes identified in paragraphs (c)(1), (c)(2), and (c)(3) of this AD, and for Model CL–600–2B16 (CL–601–3A, CL–601–3R, & CL–604) airplanes, serial numbers 5301 through 5468 inclusive: If, during the action required by paragraph (f)(2) of this AD, it is determined that any anti-ice piccolo duct has been replaced since August 1, 2000, before further flight do a visual inspection to determine if any affected serial number is installed as identified in paragraph 2.C. of the applicable service bulletin identified in Table 3 of this AD. A review of airplane maintenance records is acceptable in lieu of this inspection if the serial number of the duct can be conclusively determined from that review. If any affected serial number is installed, before further flight replace the piccolo duct with a serviceable piccolo duct that does not have a serial number identified in paragraph 2.C. of the applicable service bulletin identified in Table 3 of this AD. Do all actions in accordance with the Accomplishment Instructions of the applicable service bulletin listed in Table 3 of this AD.

TABLE 3—SERVICE BULLETINS

Model—	Bombardier service bulletin—	Revision level—	Date—
(i) CL–600–1A11 (CL–600) airplanes	600–0734	Original	November 30, 2006.
(ii) CL–600–2A12 (CL–601) airplanes	601–0585	Original	November 30, 2006.
(iii) CL–600–2B16 (CL–601–3A, CL–601–3R) airplanes	601–0585	Original	November 30, 2006.
(iv) CL–600–2B16 (CL–604) airplanes	604–30–003	01	January 21, 2008.

(4) For Model CL–600–2B16 (CL–601–3A, CL–601–3R, & CL–604) airplanes, serial numbers 5469 through 5635 inclusive: Prior to the accumulation of 2,000 total flight hours, or within 60 months after the effective date of this AD, whichever occurs first, do a visual inspection of the anti-ice piccolo ducts to determine if any affected serial number identified in paragraph 2.C. of the Bombardier Service Bulletin 604–30–003, Revision 01, dated January 21, 2008 (''the service bulletin''), is installed. If any affected serial number is installed, before further flight replace the piccolo duct with a serviceable piccolo duct that does not have a serial number identified in paragraph 2.C. of the service bulletin. Do all actions in accordance with the Accomplishment Instructions of the service bulletin.

(5) As of the effective date of this AD, no person may install on any airplane an anti-ice piccolo duct with a serial number identified in paragraph 2.C. of the applicable service bulletin identified in Table 3 of this AD.

(6) Actions done before the effective date of this AD in accordance with Bombardier Service Bulletin 604–30–003, dated November 30, 2006, are acceptable for compliance with the corresponding actions in this AD.

FAA AD Differences

Note 1: This AD differs from the MCAI and/or service information as follows: No differences.

Other FAA AD Provisions

(g) The following provisions also apply to this AD:

(1) Alternative Methods of Compliance (AMOCs): The Manager, New York Aircraft Certification 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: Dan Parrillo, 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) 228–7305; fax (516) 794–5531. 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.

(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, 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 Canadian Airworthiness Directive CF–2008–18, dated May 9, 2008, and the service information identified in Table 2 and Table 3 of this AD, for related information.

Issued in Renton, Washington, on November 6, 2008.

Stephen P. Boyd,

Assistant Manager, Transport Airplane Directorate, Aircraft Certification Service.

[FR Doc. E8–27162 Filed 11–14–08; 8:45 am]

BILLING CODE 4910–13–P

DEPARTMENT OF TRANSPORTATION

Federal Aviation Administration

14 CFR Part 71

[Docket No. FAA–2008–1046; Airspace Docket No. 08–ASW–21]

Proposed Amendment of Class E Airspace; Houston, TX

AGENCY: Federal Aviation Administration (FAA), DOT.

ACTION: Notice of proposed rulemaking.

SUMMARY: This action proposes to amend Class E airspace at Houston, TX. Additional controlled airspace is necessary to accommodate Area Navigation (RNAV) Standard Instrument Approach Procedures (SIAP) at Lone Star Executive Airport, Conroe, TX. The FAA is taking this action to enhance the safety and management of Instrument Flight Rules (IFR) aircraft operations at Lone Star Executive Airport. This action also updates the coordinates of Chambers County Airport, and reflects a name change for Scholes Field.

DATES: 0901 UTC. Comments must be received on or before January 2, 2009.

ADDRESSES: Send comments on this proposal to the U.S. Department of Transportation, Docket Operations, 1200 New Jersey Avenue, SE., West Building Ground Floor, Room W12–140, Washington, DC 20590–0001. You must identify the docket number FAA–2008–1046/Airspace Docket No. 08–ASW–21, at the beginning of your comments. You may also submit comments on the Internet at *http://www.regulations.gov.* You may review the public docket containing the proposal, any comments received, and any final disposition in person in the Dockets Office between 9 a.m. and 5 p.m., Monday through Friday, except Federal holidays. The Docket Office (telephone 1–800–647–5527) is on the ground floor of the building at the above address.

FOR FURTHER INFORMATION CONTACT: Scott Enander, Central Service Area, Operations Support Group, Federal Aviation Administration, Southwest Region, 2601 Meacham Blvd., Fort Worth, TX 76193–0530; telephone: (817) 222–5582.

SUPPLEMENTARY INFORMATION:

Comments Invited

Interested parties are invited to participate in this proposed rulemaking by submitting such written data, views, or arguments, as they may desire. Comments that provide the factual basis supporting the views and suggestions presented are particularly helpful in developing reasoned regulatory decisions on the proposal. Comments are specifically invited on the overall regulatory, aeronautical, economic, environmental, and energy-related aspects of the proposal. Communications should identify both docket numbers and be submitted in triplicate to the address listed above. Commenters wishing the FAA to acknowledge receipt of their comments on this notice must submit with those comments a self-addressed, stamped postcard on which the following statement is made: ''Comments to Docket No. FAA–2008–1046/Airspace Docket No. 08–ASW–21.'' The postcard will be date/time stamped and returned to the commenter.

Availability of NPRMs

An electronic copy of this document may be downloaded through the Internet at *http://www.regulations.gov.* Recently published rulemaking documents can also be accessed through the FAA's Web page at *http://www.faa.gov/airports_airtraffic/air_traffic/publications/airspace_amendments/*.

Additionally, any person may obtain a copy of this notice by submitting a request to the Federal Aviation Administration (FAA), Office of Air Traffic Airspace Management, ATA–400, 800 Independence Avenue, SW., Washington, DC 20591, or by calling (202) 267–8783. Communications must identify both docket numbers for this notice. Persons interested in being placed on a mailing list for future NPRMs should contact the FAA's Office of Rulemaking (202) 267–9677, to request a copy of Advisory Circular No. 11–2A, Notice of Proposed Rulemaking Distribution System, which describes the application procedure.

The Proposal

This action proposes to amend Title 14, Code of Federal Regulations (14 CFR), Part 71 by amending the Class E airspace area for IFR operations at Houston, TX. The RNAV SIAPs at Lone Star Executive Airport, Conroe, TX, have made this action necessary. The area would be depicted on appropriate aeronautical charts. Additionally, this action reflects the name change for Scholes Field, and the coordinates for Chambers County Airport would be updated.

Class E airspace areas are published in Paragraph 6005 of FAA Order 7400.9S, dated October 3, 2008, and effective October 31, 2008, which is incorporated by reference in 14 CFR 71.1. The Class E airspace designation listed in this document would be published subsequently in the Order.

The FAA has determined that this proposed regulation only involves an established body of technical regulations for which frequent and routine amendments are necessary to keep them operationally current. It, therefore, (1) Is not a ''significant regulatory action'' under Executive Order 12866; (2) is not a ''significant rule'' under DOT Regulatory Policies and Procedures (44 FR 11034; February 26, 1979); and (3) does not warrant preparation of a Regulatory Evaluation as the anticipated impact is so minimal. Since this is a routine matter that will only affect air traffic procedures and air navigation, it is certified that this rule, when promulgated, will not have a significant economic impact on a substantial number of small entities under the criteria of the Regulatory Flexibility Act. The FAA's authority to issue rules regarding aviation safety is found in Title 49 of the U.S. Code. Subtitle 1, Section 106 describes the authority of the FAA Administrator. Subtitle VII, Aviation Programs, describes in more detail the scope of the agency's authority. This rulemaking is promulgated under the authority described in Subtitle VII, Part A, Subpart I, Section 40103. Under that section, the FAA is charged with prescribing regulations to assign the use of airspace necessary to ensure the safety of aircraft and the efficient use of airspace. This regulation is within the scope of that authority as it amends controlled airspace in the Houston, TX, area.

List of Subjects in 14 CFR Part 71

Airspace, Incorporation by reference, Navigation (Air).

The Proposed Amendment

In consideration of the foregoing, the Federal Aviation Administration proposes to amend 14 CFR Part 71 as follows:

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

1. The authority citation for Part 71 continues to read as follows:

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

§ 71.1 [Amended]

2. The incorporation by reference in 14 CFR 71.1 of Federal Aviation Administration Order 7400.9S, Airspace Designations and Reporting Points, dated October 3, 2008, and effective October 31, 2008, is amended as follows:

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

* * * * *

ASW TX E5 Houston, TX [Amended]

Point of Origin
(Lat. 30°35′01″ N., long. 95°28′01″ W.)
Anahuac, Chambers County Airport, TX
(Lat. 29°46′11″ N., long. 94°39′49″ W.)
Galveston, Scholes International at Galveston, TX
(Lat. 29°15′55″ N., long. 94°51′38″ W.)
Brookshire, Woods No. 2 Airport, TX
(Lat. 29°47′37″ N., long. 95°55′31″ W.)
Fulshear, Covey Trails Airport, TX
(Lat. 29°41′24″ N., long. 95°50′23″ W.)
Conroe, Lone Star Executive Airport, TX
(Lat. 30°21′09″ N., long. 95°24′52″ W.)

That airspace extending upward from 700 feet above the surface within an area bounded by a line beginning at the Point of Origin to lat. 29°45′00″ N., long. 94°44′01″ W.; thence from lat. 29°45′00″ N., long. 94°44′01″ W. to a point of tangency with the east arc of a 7.6-mile radius of Scholes International at Galveston, and within a 7.6-mile radius of Scholes International at Galveston; thence from lat. 29°17′04″ N., long. 95°00′13″ W.; to lat. 29°30′01″ N., long. 95°54′01″ W.; to lat. 30°26′01″ N., long. 95°42′01″ W.; to the point of origin, and within a 6.6-mile radius of Lone Star Executive Airport, and within a 6.5-mile radius of Woods No. 2 Airport, and within a 6.4-mile radius of Covey Trails Airport excluding that airspace within the Anahuac, TX, Class E airspace area.

* * * * *

Issued in Fort Worth, TX, on November 6, 2008.

Robert Beeman,

Acting Manager, Operations Support Group, ATO Central Service Area.

[FR Doc. E8–27150 Filed 11–14–08; 8:45 am]

BILLING CODE 4910–13–P

DEPARTMENT OF TRANSPORTATION

Federal Aviation Administration

14 CFR Part 71

[Docket No. FAA–2008–0873; Airspace Docket No. 08–AGL–7]

Proposed Establishment of Class E Airspace; Branson, MO

AGENCY: Federal Aviation Administration (FAA), DOT.

ACTION: Notice of proposed rulemaking; correction.

SUMMARY: This action makes a correction to the airport's name and geographic coordinates in the Notice of Proposed Rulemaking (NPRM) published in the **Federal Register** October 22, 2008 (73 FR 62940) Docket No. FAA–2008–0873.

DATES: *Effective Dates:* 0901 UTC. November 17, 2008.

SUPPLEMENTARY INFORMATION:

History

The FAA published an NPRM in the **Federal Register** October 22, 2008, (73 FR 62940), Docket No. FAA–2008–0873, establishing Class E Airspace at Branson, MO. Subsequent to publication, an error was discovered in the airport's name and geographic coordinates for Branson Airport. This action corrects those errors.

Correction to NPRM

Accordingly, pursuant to the authority delegated to me, the airport

name and geographic coordinates for Class E2 and E5 airspace, as published in the **Federal Register** October 22, 2008, (73 FR 62940), Docket No. FAA–2008–0873, are amended as follows:

§ 71.1 [Amended]

* * * * *

ACE MO E2 Branson, MO [Corrected]

Branson Airport, MO (Lat. 36°31′55″ N., long. 93°12′02″ W.)

Within a 4.1-mile radius of Branson Airport. This Class E airspace area is effective during the specific dates and times established in advance by a Notice to Airmen. The effective date and time will thereafter be continuously published in the Airport/Facility Directory.

* * * * *

ACE MO E5 Branson, MO [Corrected]

Branson Airport , MO (Lat. 36°31′55″ N., long. 93°12′02″ W.)

That airspace extending upward from 700 feet above the surface within a 6.6-mile radius of Branson Airport.

* * * * *

Issued in Fort Worth, TX, on November 6, 2008.

Robert Beeman,

Acting Manager, Operations Support Group, ATO Central Service Area.

[FR Doc. E8–27155 Filed 11–14–08; 8:45 am]

BILLING CODE 4910–13–P

DEPARTMENT OF THE TREASURY

Office of Foreign Assets Control

31 CFR Parts 538 and 560

Comment Request Regarding the Effectiveness of Licensing Procedures for Exportation of Agricultural Commodities, Medicine, and Medical Devices to Sudan and Iran

AGENCY: Office of Foreign Assets Control, Treasury.

ACTION: Request for comments.

SUMMARY: The Office of Foreign Assets Control (''OFAC'') of the U.S. Department of the Treasury is soliciting comments on the effectiveness of OFAC's licensing procedures for the exportation of agricultural commodities, medicine, and medical devices to Sudan and Iran. Pursuant to section 906(c) of the Trade Sanctions Reform and Export Enhancement Act of 2000 (Title IX of Pub. L. 106–387, 22 U.S.C. 7201 *et seq.*) (the ''Act''), OFAC is required to submit a biennial report to the Congress on the operation of licensing procedures for such exports.

DATES: Written comments should be received on or before December 17, 2008 to be assured of consideration.

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

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

Fax: Attn: Request for Comments (TSRA) (202) 622–0091.

Mail: Attn: Request for Comments (TSRA), Office of Foreign Assets Control, Department of the Treasury, 1500 Pennsylvania Avenue, NW., Washington, DC 20220.

FOR FURTHER INFORMATION CONTACT: Requests for additional information about these licensing procedures should be directed to the Licensing Division, Office of Foreign Assets Control, Department of the Treasury, 1500 Pennsylvania Avenue, NW., Washington, DC 20220, telephone: (202) 622–2480. Additional information about these licensing procedures is also available under the heading ''Other OFAC Sanctions Programs'' at *http://www.treas.gov/ofac.*

SUPPLEMENTARY INFORMATION: The current procedures used by OFAC for authorizing the export of agricultural commodities, medicine, and medical devices to Sudan and Iran are set forth in 31 CFR 538.523–526 and 31 CFR 560.530–533. Under the provisions of section 906(c) of the Act, OFAC must submit a biennial report to the Congress on the operation, during the preceding two-year period, of the licensing procedures required by section 906 of the Act for the export of agricultural commodities, medicine, and medical devices to Sudan and Iran. This report is to include:

(1) The number and types of licenses applied for;

(2) The number and types of licenses approved;

(3) The average amount of time elapsed from the date of filing of a license application until the date of its approval;

(4) The extent to which the licensing procedures were effectively implemented; and

(5) A description of comments received from interested parties about the extent to which the licensing procedures were effective, after holding a public 30-day comment period.

This notice solicits comments from interested parties regarding the effectiveness of OFAC's licensing procedures for the export of agricultural commodities, medicine, and medical devices to Sudan and Iran. Interested parties submitting comments are asked to be as specific as possible. All comments received on or before December 17, 2008 will be considered by OFAC in developing the report to the Congress. In the interest of accuracy and completeness, OFAC requires written comments. Comments received after the end of the comment period will be considered, if possible, but their consideration cannot be assured. OFAC will not accept comments accompanied by a request that part or all of the comments be treated confidentially because of their business proprietary nature or for any other reason. OFAC will return such comments when submitted by regular mail to the person submitting the comments and will not consider them. All comments made will be a matter of public record. Copies of the public record concerning these regulations may be obtained from OFAC's Web site (*http://www.treas.gov/ofac*). If that service is unavailable, written requests may be sent to: Office of Foreign Assets Control, U.S. Department of the Treasury, 1500 Pennsylvania Ave., NW., Washington, DC 20220, Attn: Aydin M. Akgün.

Approved: November 10, 2008.

Adam J. Szubin,

Director, Office of Foreign Assets Control.

[FR Doc. E8–27242 Filed 11–14–08; 8:45 am]

BILLING CODE 4810–25–P

ENVIRONMENTAL PROTECTION AGENCY

40 CFR Part 52

[EPA–R03–OAR–2008–0073; FRL8741–3]

Approval and Promulgation of Air Quality Implementation Plans; Virginia; Amendments to Ambient Air Quality Standards for Particulate Matter

AGENCY: Environmental Protection Agency (EPA).

ACTION: Proposed rule.

SUMMARY: EPA is proposing to approve a State Implementation Plan (SIP) revision submitted by the Commonwealth of Virginia. This revision consists of amendments to the Commonwealth of Virginia's ambient air quality standards for particulate matter. This action is being taken under the Clean Air Act (CAA).

DATES: Written comments must be received on or before December 17, 2008.

ADDRESSES: Submit your comments, identified by Docket ID Number EPA–R03–OAR–2008–0073 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–2008–0073, Cristina Fernandez, Chief, Air Quality Planning, 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–2008–0073. EPA's policy is that all comments received will be included in the public docket without change, and may be made available online at *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: Gobeail McKinley, (215) 814–2033, or by e-mail at *mckinley.gobeail@epa.gov.*

SUPPLEMENTARY INFORMATION: On January 7, 2008, the Commonwealth of Virginia submitted a formal revision to its State Implementation Plan. The SIP revision consists of amendments to the Commonwealth's existing ambient air quality standards in 9 VAC 5 Chapter 30.

I. Background

Effective on September 16, 1997, EPA established two new standards for fine particulate matter ($PM_{2.5}$) that applies to particles 2.5 micrometers in diameter or less (62 FR 38652). The two new $PM_{2.5}$ standards were set at 15 micrograms per cubic meter (μg/m^3), based on the 3-year average of annual arithmetic mean $PM_{2.5}$ concentrations from single or multiple community-oriented monitors, and 65 μg/m^3, based on the 3-year average of the 98th percentile of 24-hour $PM_{2.5}$ concentrations at each population-oriented monitor within an area. Effective on December 18, 2006, EPA revised the level of the 24-hour $PM_{2.5}$ standard to 35 μg/m^3, retained the level of the annual $PM_{2.5}$ standard at 15 μg/m^3, retained the 24-hour PM_{10} standard at 150 μg/m^3, and revoked the annual PM_{10} standard (71 FR 61144).

II. Summary of SIP Revision

The Commonwealth's SIP revision to the Virginia Regulations for the Control and Abatement of Air Pollution: 9 VAC 5 Chapter 30—Ambient Air Quality Standards incorporates the annual and 24-hour $PM_{2.5}$ national ambient air quality standards (NAAQS) that were established by the EPA on July 18, 1997 (62 FR 38652) and on October 17, 2006 (71 FR 61144). The revision is consistent with the national ambient air quality standards set out in 40 CFR part 50. The SIP revision amends the Commonwealth's $PM_{2.5}$ standard to add the new 24-hour standard of 35 μg/m^3, retains the current 24-hour standard of 65 μg/m^3 during the transition to the new standard, adds transitional language to clarify implementation of these standards, and removes obsolete language referencing the annual PM_{10} standard. The SIP revision also adds new reference conditions to make the state regulation consistent with 40 CFR part 50.

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.

III. Proposed Action

EPA is proposing to approve the Virginia SIP revision for amendments to the existing air quality standards, 9 VAC 5 Chapter 30. The Commonwealth's SIP revision (9 VAC 5–30–65) includes an incorrect reference of the **Federal Register** document for the annual and 24-hour $PM_{2.5}$ NAAQS that were established by the EPA on July 18, 1997 (62 FR 38652). EPA will not promulgate a final approval rule until the Commonwealth of Virginia submits a correction to 9 VAC 5 Chapter 30. EPA is soliciting public comments on the issues discussed in this document. These comments will be considered before taking final action.

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 proposes to approve state law as meeting Federal requirements and does not impose additional requirements beyond those imposed by state law. For that reason, this proposed action:

- Is not a ''significant regulatory action'' subject to review by the Office of Management and Budget under Executive Order 12866 (58 FR 51735, October 4, 1993);
- Does not impose an information collection burden under the provisions of the Paperwork Reduction Act (44 U.S.C. 3501 *et seq.*);
- Is certified as not having a significant economic impact on a substantial number of small entities under the Regulatory Flexibility Act (5 U.S.C. 601 *et seq.*);
- Does not contain any unfunded mandate or significantly or uniquely affect small governments, as described in the Unfunded Mandates Reform Act of 1995 (Pub. L. 104–4);
- Does not have Federalism implications as specified in Executive Order 13132 (64 FR 43255, August 10, 1999);
- Is not an economically significant regulatory action based on health or safety risks subject to Executive Order 13045 (62 FR 19885, April 23, 1997);
- Is not a significant regulatory action subject to Executive Order 13211 (66 FR 28355, May 22, 2001);
- Is not subject to requirements of Section 12(d) of the National Technology Transfer and Advancement Act of 1995 (15 U.S.C. 272 note) because application of those requirements would be inconsistent with the 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 proposed rule, amending ambient air quality standards for particulate matter in the Commonwealth of Virginia, does not have tribal implications as specified by Executive Order 13175 (65 FR 67249, November 9, 2000), because the SIP is not approved to apply in Indian country located in the state, and EPA notes that it will not impose substantial direct costs on tribal governments or preempt tribal law.

List of Subjects in 40 CFR Part 52

Environmental protection, Air pollution control, Nitrogen dioxide, Particulate matter, Reporting and recordkeeping requirements, Sulfur oxides.

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

Dated: November 6, 2008.

Donald S. Welsh,

Regional Administrator, Region III.

[FR Doc. E8–27192 Filed 11–14–08; 8:45 am]

BILLING CODE 6560–50–P

ENVIRONMENTAL PROTECTION AGENCY

40 CFR Parts 52 and 81

[EPA–R03–OAR–2007–0453; FRL–8741–4]

Approval and Promulgation of Air Quality Implementation Plans; Pennsylvania; Redesignation of the Pittsburgh-Beaver Valley 8-Hour Ozone Nonattainment Area to Attainment and Approval of the Area's Maintenance Plan; Withdrawal of Proposed Rule

AGENCY: Environmental Protection Agency (EPA).

ACTION: Proposed rule; withdrawal.

SUMMARY: EPA is withdrawing the proposed rule to approve a redesignation request and a maintenance plan State Implementation Plan (SIP) revision submitted by the Commonwealth of Pennsylvania. In a proposed rule published on July 11, 2007, EPA proposed to approve a request that the Pittsburgh-Beaver Valley, Pennsylvania, ozone nonattainment area (the Pittsburgh Area) be redesignated as attainment for the 8-hour ozone national ambient air quality standard (NAAQS) that was promulgated on July 18, 1997. In conjunction with the proposed action on the redesignation request, we also proposed to approve a maintenance plan for the Pittsburgh Area that provides for continued attainment of the 8-hour ozone NAAQS for at least 10 years after redesignation, and, to approve a 2002 base year inventory for the Pittsburgh Area. On May 29, 2008, the Pennsylvania Department of Environmental Protection (PADEP) submitted a letter to formally withdraw the redesignation request and the maintenance plan SIP revision.

FOR FURTHER INFORMATION CONTACT: Christopher Cripps, (215) 814–2179, or by e-mail at *cripps.christopher@epa.gov.*

SUPPLEMENTARY INFORMATION: Throughout this document whenever ''we'', ''us'', or ''our'' is used, we mean EPA.

I. Background

On April 26, 2007, the PADEP formally submitted a request to

redesignate the Pittsburgh Area from nonattainment to attainment of the 8-hour NAAQS promulgated on July 18, 1997 (62 FR 38856) (the ''1997 8-hour ozone NAAQS''). [1] Concurrently, on April 26, 2007, the PADEP submitted a maintenance plan for the Pittsburgh Area as a SIP revision to ensure continued attainment of the 8-hour NAAQS for at least 10 years after redesignation. The PADEP also submitted a 2002 base year inventory as a SIP revision on April 26, 2007.

In a proposed rule published on July 11, 2007 (72 FR 37683) in the **Federal Register**, EPA proposed to determine that the Pittsburgh Area had attained the 1997 8-hour ozone NAAQS. In addition, we proposed to approve the April 26, 2007, request that the Pittsburgh Area be redesignated as attainment for the 1997 8-hour NAAQS. *See,* 72 FR 37683 at 38864, 38686, July 11, 2008.

In the proposed rule published on July 11, 2007, we also proposed to approve two SIP revisions: (1) A maintenance plan for the Pittsburgh Area that provides for continued attainment of the 1997 8-hour ozone NAAQS for at least 10 years after redesignation including the motor vehicle emissions budgets (MVEBs) that were identified in this maintenance plan; and (2) a 2002 base year inventory for the Pittsburgh Area.

On May 29, 2008, the PADEP submitted a letter to formally withdraw the redesignation request and the maintenance plan SIP revision. On August 1, 2008, PADEP affirmed that the Commonwealth was not withdrawing the 2002 base year emissions inventory SIP revision submitted on April 26, 2007, and submitted a redacted SIP revision which contained only the 2002 base year emissions inventory.

Now that the Commonwealth of Pennsylvania has withdrawn the redesignation request and the maintenance plan SIP revision from our consideration, we must withdraw our proposed actions on the redesignation request and on the maintenance plan and its associated MVEBs. In addition, we are withdrawing our proposed determination that the Pittsburgh Area has attained the 1997 8-hour ozone NAAQS.

The other proposed action published on July 11, 2007, on the SIP revision consisting of the 2002 base year inventory for the Pittsburgh Area is neither affected by this notice nor withdrawn. In this notice to withdraw the proposed rulemaking actions on the maintenance plan SIP revision and the redesignation request, EPA is not instituting a second comment period on the proposed action to approve the 2002 base year inventory for the Pittsburgh Area. EPA will make its final decision on the 2002 base year inventory for the Pittsburgh Area in a separate rulemaking action.

[1] On March 27, 2008 (73 FR 16436), EPA revised the level of the primary and secondary 8-hour ozone NAAQS from 0.08 parts per million (ppm) to 0.075 ppm, but the Pittsburgh Area has not yet been designated under this revision to the NAAQS.

II. Withdrawal of Proposed Actions

Therefore, EPA is withdrawing the following proposed approval actions published on July 11, 2007 (72 FR 37683 at 37694): (1) The determination that the Pittsburgh Area has attained the 1997 8-hour ozone NAAQS; (2) the Commonwealth's April 26, 2007, request that the Pittsburgh Area to be designated to attainment of the 1997 8-hour NAAQS for ozone; and (3) the maintenance plan and its MVEBs for the Pittsburgh Area, which was submitted on April 26, 2007, as revision to the Pennsylvania SIP.

List of Subjects

40 CFR Part 52

Environmental protection, Air pollution control, Nitrogen oxides, Ozone, Reporting and recordkeeping requirements, Volatile organic compounds.

40 CFR Part 81

Air pollution control, National parks, Wilderness areas.

Dated: November 7, 2008.

Donald S. Welsh,

Regional Administrator, Region III.

[FR Doc. E8–27211 Filed 11–14–08; 8:45 am]

BILLING CODE 6560–50–P

FEDERAL COMMUNICATIONS COMMISSION

47 CFR Part 73

[DA 08–2439; MB Docket No. 08–217; RM–11434]

Radio Broadcasting Services; Kihei, HI

AGENCY: Federal Communications Commission.

ACTION: Proposed rule.

SUMMARY: The Audio Division requests comment on a petition filed by Shirk-Mays, LLC, requesting the allotment of FM Channel 264C2 at Kihei, Hawaii, as a third local aural service. The reference coordinates for Channel 264C2 at Kihei are 20–39–36 NL and 156–21–50 WL.

DATES: Comments must be filed on or before December 22, 2008, and reply comments on or before January 6, 2009.

ADDRESSES: Federal Communications Commission, 445 Twelfth Street, SW., Washington, DC 20554. In addition to filing comments with the FCC, interested parties should serve the petitioner, his counsel, or consultant, as follows: Richard J. Hayes, Jr., Esq., Post Office Box 200, Lincolnville, ME 04849 (Counsel for Shirk-Mays, LLC).

FOR FURTHER INFORMATION CONTACT: Andrew J. Rhodes, Media Bureau, (202) 418–2180.

SUPPLEMENTARY INFORMATION: This is a synopsis of the Commission's Notice of Proposed Rule Making, MB Docket No. 08–217, adopted October 29, 2008, and released October 31, 2008. The full text of this Commission decision is available for inspection and copying during regular business hours at the FCC's Reference Information Center, Portals II, 445 Twelfth Street, SW., Room CY–A257, Washington, DC 20554. The complete text of this decision may also be purchased from the Commission's duplicating contractor, Best Copy and Printing, Inc., 445 12th Street, SW., Room CY–B402, Washington, DC 20554, telephone 1–800–378–3160 or *http://www.BCPIWEB.com.* This document does not contain proposed information collection requirements subject to the Paperwork Reduction Act of 1995, Public Law 104–13. In addition, therefore, it does not contain any proposed information collection burden ''for small business concerns with fewer than 25 employees,'' pursuant to the Small Business Paperwork Relief Act of 2002, Public Law 107–198, *see* 44 U.S.C. 3506(c)(4).

Provisions of the Regulatory Flexibility Act of l980 do not apply to this proceeding.

Members of the public should note that from the time a Notice of Proposed Rule Making is issued until the matter is no longer subject to Commission consideration or court review, all *ex parte* contacts are prohibited in Commission proceedings, such as this one, which involve channel allotments. See 47 CFR 1.1204(b) for rules governing permissible *ex parte* contact.

For information regarding proper filing procedures for comments, see 47 CFR 1.415 and 1.420.

List of Subjects in 47 CFR Part 73

Radio, Radio broadcasting.

For the reasons discussed in the preamble, the Federal Communications Commission proposes to amend 47 CFR part 73 as follows:

PART 73—RADIO BROADCAST SERVICES

1. The authority citation for part 73 continues to read as follows:

Authority: 47 U.S.C. 154, 303, 334, 336.

§ 73.202 [Amended]

2. Section 73.202(b), the Table of FM Allotments under Hawaii, is amended by adding Channel 264C2 at Kihei.

Federal Communications Commission.

John A. Karousos,

Assistant Chief, Audio Division, Media Bureau.

[FR Doc. E8–27244 Filed 11–14–08; 8:45 am]

BILLING CODE 6712–01–P

DEPARTMENT OF COMMERCE

National Oceanic and Atmospheric Administration

50 CFR Part 648

[Docket No. 0808041043–81412–01]

RIN 0648–AX16

Fisheries of the Northeastern United States; Atlantic Mackerel, Squid, and Butterfish Fisheries; Specifications and Management Measures

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

ACTION: Proposed rule, request for comments.

SUMMARY: NMFS proposes 2009 specifications and management measures for Atlantic mackerel, squid, and butterfish (MSB). This action proposes to maintain quotas for Atlantic mackerel (mackerel), *Illex* squid (*Illex*), and butterfish at the same levels as 2008, while increasing the quota for *Loligo* squid (*Loligo*). Additionally, this action proposes to increase the incidental possession limit for mackerel and requests public comment concerning the possibility of an inseason adjustment to increase the mackerel quota, if landings approach proposed harvest limits. These proposed specifications and management measures promote the utilization and conservation of the MSB resource.

DATES: Public comments must be received no later than 5 p.m., eastern standard time, on December 17, 2008.

ADDRESSES: Copies of supporting documents used by the Mid-Atlantic Fishery Management Council (Council), including the Environmental Assessment (EA) and Regulatory Impact Review (RIR)/Initial Regulatory Flexibility Analysis (IRFA), are available from: Daniel Furlong, Executive Director, Mid-Atlantic Fishery Management Council, Room 2115, Federal Building, 300 South New Street, Dover, DE 19904–6790. The EA/RIR/IRFA is accessible via the Internet at *http://www.nero.nmfs.gov*.

You may submit comments, identified by 0648–AX16, by any one of the following methods:

- Electronic Submissions: Submit all electronic public comments via the Federal e-Rulemaking portal *http://www.regulations.gov;*
- Fax: (978) 281–9135, Attn: Carrie Nordeen;
- Mail to NMFS, Northeast Regional Office, One Blackburn Drive, Gloucester, MA 01930. Mark the outside of the envelope ''Comments on 2009 MSB Specifications.''

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 (e.g., name, address) 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. Attachments to electronic comments will be accepted in Microsoft Word, Excel, WordPerfect, or Adobe PDF formats only.

FOR FURTHER INFORMATION CONTACT: Carrie Nordeen, Fishery Policy Analyst, 978–281–9272, fax 978–281–9135.

SUPPLEMENTARY INFORMATION:

Background

Regulations implementing the Fishery Management Plan for the Atlantic Mackerel, Squid, and Butterfish Fisheries (FMP) appear at 50 CFR part 648, subpart B. Regulations governing foreign fishing appear at 50 CFR part 600, subpart F. These regulations at § 648.21 and 600.516(c), require that NMFS, based on the maximum optimum yield (Max OY) of each fishery as established by the regulations, annually publish a proposed rule specifying the amounts of the initial optimum yield (IOY), allowable biological catch (ABC), domestic annual harvest (DAH), and domestic annual processing (DAP), as well as, where applicable, the amounts for total allowable level of foreign fishing (TALFF) and joint venture processing (JVP) for the affected species managed under the FMP. In addition, these regulations allow specifications to be specified for up to 3 years, subject to annual review. The regulations found in § 648.21 also specify that IOY for squid is equal to the combination of research quota (RQ) and DAH, with no TALFF specified for squid. For butterfish, the regulations specify that a butterfish bycatch TALFF will be specified only if TALFF is specified for mackerel.

At its June 10–12, 2008, meeting in Atlantic City, NJ, the Mid-Atlantic Fishery Management Council (Council) recommended 2009 MSB specifications. The recommended specifications for mackerel, *Illex*, and butterfish are the same as those implemented in 2008. For *Loligo*, the Council recommended increasing the Max OY, ABC, IOY, DAH, and DAP based on updated biological reference points implemented in Amendment 9 to the FMP and based on the most recent stock assessment. The Council also recommended increasing the incidental possession limit for mackerel during summer months to reduce the potential for the regulatory discarding of mackerel by the Atlantic herring fleet. With the exception of the incidental possession limit for mackerel, all other management measures (e.g., fishery closure thresholds, possession limits, gear requirements) are the same as those implemented in 2008.

Research Quota

Framework Adjustment 1 to the FMP established the Mid-Atlantic Research Set-Aside (RSA) Program, which allows research projects to be funded through the sale of fish that has been set-aside from the total annual quota. The RQ may vary between 0 and 3 percent of the overall quota for each species. The Council has recommended that 3 percent of the 2009 *Loligo, Illex*, butterfish, and mackerel quotas be set aside to fund projects selected under the 2009 Mid-Atlantic RSA Program.

NMFS solicited research proposals under the 2009 Mid-Atlantic RSA Program through the **Federal Register** (73 FR 7528, February 8, 2008). The deadline for submission was March 24, 2008. On July 5, 2008, NMFS convened a Review Panel to review the comments submitted by technical reviewers. At this time, the project selection and award process for the 2009 Mid-Atlantic RSA Program has not concluded. Based on discussions between NMFS staff, technical review comments, and Review Panel comments, projects requesting *Loligo* RQ will be forwarded to the NOAA Grants Office for award. If any portion of the RQ is not awarded, NMFS will return any un-awarded RQ to the commercial fishery either through the final 2009 MSB specification rulemaking process or through the publication of a separate notice in the

Federal Register notifying the public of a quota adjustment.

Vessels harvesting RQ in support of approved research projects would be issued exempted fishing permits (EFP) authorizing them to exceed Federal possession limits and to fish during Federal quota closures. The Magnuson-Stevens Fishery Conservation and Management Act (Magnuson-Stevens Act) requires that interested parties be provided an opportunity to comment on all proposed EFPs. These exemptions are necessary to allow project investigators to recover research expenses, as well as adequately compensate fishing industry participants harvesting RQ. Vessels harvesting RQ would operate within all other regulations that govern the commercial fishery, unless otherwise exempted through a separate EFP.

2009 Proposed Specifications and Management Measures

TABLE 1. PROPOSED SPECIFICATIONS, IN METRIC TONS (MT), FOR ATLANTIC MACKEREL, SQUID, AND BUTTERFISH FOR 2009 FISHING YEAR.

Specifications	Loligo	Illex	Mackerel	Butterfish
Max OY	32,000	24,000	N/A	12,175
ABC	19,000	24,000	156,000	1,500
IOY	13,300[1]	24,000	115,000[2]	500
DAH	13,300	24,000	115,000[3]	500
DAP	13,300	24,000	100,000	500
JVP	0	0	0	0
TALFF	0	0	0	0

[1] Excludes 5,700 mt (3 percent of the IOY) for RQ.
[2] IOY may be increased during the year, but the total ABC will not exceed 156,000 mt.
[3] Includes a 15,000 mt catch of Atlantic mackerel by the recreational fishery.

Atlantic Mackerel

The status of the Atlantic mackerel stock was most recently assessed at the 42nd Stock Assessment Review Committee (SARC) in late 2005. SARC 42 concluded that the mackerel stock is not overfished and overfishing is not occurring. According to the FMP, mackerel ABC must be calculated using the formula ABC = T — C, where C is the estimated catch of mackerel in Canadian waters for the upcoming fishing year and T is the yield associated with a fishing mortality rate that is equal to the target fishing mortality rate (F). Based on projections from SARC 42, the yield associated with the target F of 0.12 in 2008 is 211,000 mt. SARC 42 did not project yields for 2009, but the yield projections from 2008 will be used as a proxy until new projections are calculated in the next mackerel stock assessment, currently scheduled for 2009. Canadian catch of mackerel has been increasing in recent years; therefore, the estimate of Canadian catch for 2009 has been increased from the 2007 estimate of 52,000 mt to 55,000 mt. Thus, 211,000 mt minus 55,000 mt results in a proposed 2009 mackerel ABC of 156,000 mt.

This action proposes a mackerel IOY of 115,000 mt. The Council believes that this level of harvest would provide the greatest overall benefit to the Nation with respect to food production and recreational opportunities, and would allow for an increase in domestic landings. In recent years, domestic mackerel landings have been increasing due to major investments in the domestic mackerel processing sector. Mackerel landings in 2003 totaled 35,071 mt, while landings for 2006 totaled 58,279 mt. The Council concluded, based on industry testimony, that U.S. vessels will continue to increase their landings and that shoreside processing capacity has increased to the point that it can process all of the DAH. Industry has indicated that the relatively low landings in 2007 (26,429 mt) as compared to 2006 were because mackerel were farther offshore than in recent years and thus less available to the fishery. If mackerel are available to the fishery in 2009, industry expects to land the entire IOY. The proposed 115,000–mt IOY is consistent with mackerel regulations at § 648.21(b)(2)(ii), which state that IOY is a modification of ABC, based on social and economic factors, and must be less than or equal to ABC.

The Magnuson-Stevens Act provides that the specification of TALFF, if any, shall be that portion of the optimum yield (OY) of a fishery that will not be harvested by vessels of the United States. TALFF would allow foreign vessels to harvest U.S. fish and sell their product on the world market, in direct competition with the U.S. industry efforts to expand exports. The Council expressed its concern, supported by industry testimony, that an allocation of TALFF would threaten the expansion of the domestic industry. The Council noted that this would prevent the U.S. industry from taking advantage of declines in the European production of Atlantic mackerel that have resulted in an increase in world demand for U.S. fish. The only economic benefit associated with a TALFF is the foreign fishing fees it generates. On the other hand, there are economic benefits associated with the development of the domestic mackerel fishery. Increased mackerel production generates jobs both for plant workers and other support industries. More jobs generate additional sources of income for residents of coastal communities and generally enhance the social fabric of these communities.

For these reasons, and consistent with the Council's recommendation, NMFS proposes to specify IOY at a level that can be fully harvested by the domestic fleet, thereby precluding the specification of a TALFF, in order to assist the expansion of the U.S. mackerel industry. This would yield positive social and economic benefits to both U.S. harvesters and processors. Given the trends in landings, and the industry's testimony that it has experienced significant growth, NMFS concurs that it is reasonable to assume that, in 2009, the commercial fishery has the ability to harvest 100,000 mt of mackerel. Thus DAH would be 115,000 mt, which is the commercial harvest plus the 15,000 mt allocated for the recreational fishery. Because IOY = DAH, this specification is consistent with the Council's recommendation that the level of IOY should not provide for a TALFF.

NMFS proposes to maintain JVP at zero (the most recent allocation was 5,000 mt of JVP in 2004), consistent with the Council's recommendation. In previous years, the Council recommended a JVP greater than zero because it believed U.S. processors lacked the ability to process the total

amount of mackerel that U.S. harvesters could land. However, for the past 5 years, the Council has recommended zero JVP because the surplus between DAH and DAP has been declining as U.S. shoreside processing capacity for mackerel has expanded. The Council received testimony from processors and harvesters that the shoreside processing sector of this industry has continued to expand since 2002–2003. Subsequent industry testimony estimated current processing capacity at 2,500 mt per day. The Council also heard from the industry that the availability (i.e., size, distribution, and abundance) of mackerel to the fishery, rather than processing capacity, has curtailed catch in recent years. Based on this information, the Council concluded that processing capacity is no longer a limiting factor relative to domestic production of mackerel. Furthermore, the Council concluded that the U.S. mackerel processing sector has the potential to process the DAH, so JVP would be specified at zero.

Mackerel Incidental Possession Limit

Regulations at § 648.25(a) specify that, during closures of the directed mackerel fishery, the incidental possession limit for mackerel is 20,000 lb (9.08 mt). At the Council's June 2008 meeting, the industry requested increasing the incidental mackerel possession limit to minimize the potential for regulatory discard of mackerel by the Atlantic herring fleet. Mackerel and Atlantic herring are known to co-occur in the Gulf of Maine during summer months. To minimize the potential for the regulatory discarding of mackerel by the Atlantic herring fleet during a closure of the directed mackerel fishery, the industry requested that the mackerel incidental possession limit be increased during summer months. Industry identified a 50,000–lb (22.7–mt) incidental mackerel possession limit, to be effective after June 1, as an appropriate limit to minimize the potential for regulatory discarding by the Atlantic herring fleet in the Gulf of Maine, without creating directed fishing for mackerel during a closure of the mackerel fishery. When considering this incidental possession limit increase, the Council discussed that, relative to the quota, few mackerel are landed after June 1, because they move offshore and are largely unavailable to U.S. pelagic fishing fleets. The Council also recognized that this measure was not anticipated to result in a quota overage because it was unlikely that the buffer between the threshold at which the directed mackerel fishery closes (103,500 mt) and the IOY (115,000 mt) would be landed between June 1 and December 31.

After considering these factors, NMFS proposes that the mackerel incidental possession limit be increased from a 20,000–lb (9.08–mt) incidental possession limit to a 20,000–lb (9.08–mt) limit if the directed mackerel fishery closes prior to June 1, and a 50,000–lb (22.7–mt) limit if the directed mackerel fishery closes on or after June 1. This proposed incidental possession limit is consistent with the Council's recommendation.

Inseason Adjustment of the Mackerel IOY

Regulations at § 648.21(e) provide that specifications may be adjusted inseason during the fishing year by the NMFS Northeast Regional Administrator (Regional Administrator), in consultation with the Council, by publishing a notice in the **Federal Register** and providing a 30-day public comment period. At the June 2008 Council meeting, in response to recent growth in the domestic harvesting and processing sectors of the mackerel fishery, both the mackerel industry and the Council voiced interest in increasing the 2009 mackerel IOY if landings approach 115,000 mt during the most active part of the fishing year (January-April). However, the mackerel fishing season is short, and it would be difficult to implement a separate inseason action during the fishing season. To facilitate a timely inseason adjustment to the mackerel IOY, if necessary, this action proposes and seeks comment on such an inseason adjustment. In 2009, as in 2008, NMFS's Northeast Fishery Statistic Office will summarize mackerel landings from dealer reports on a weekly basis and post this information on the Northeast Regional Office website (*http://www.nero.noaa.gov/*). NMFS staff will closely monitor these landings and industry trends to determine if an inseason adjustment is necessary. If, using landings projections and all other available information, the Regional Administrator determines that 70 percent of the Atlantic mackerel IOY will be landed during the 2009 fishing year, the Regional Administrator will make available additional quota for a total IOY of 156,000 mt of Atlantic mackerel for harvest during 2009. Additionally, if an inseason adjustment of the IOY is warranted, the Regional Administrator will notify the Council and the inseason adjustment will be published in the **Federal Register**.

Atlantic Squids

Loligo

Amendment 9 to the FMP (Amendment 9) (73 FR 37382, July 1, 2008) revised the proxies for *Loligo* target and threshold fishing mortality rates, F_{Target} and $F_{Threshold}$, respectively, to reflect the analytical advice provided by the most recent *Loligo* stock assessment review committee (SARC 34). While Amendment 9 revised the formulas and values for these reference points, the function of the reference points remains unchanged. FTarget is the basis for determining OY and $F_{Threshold}$ determines whether overfishing is occurring.

Because *Loligo* is a sub-annual species (i.e., has a lifespan of less than 1 year), the stock is solely dependent on sufficient recruitment year to year to prevent stock collapse. The revised proxies for FTarget and FThreshold implemented in Amendment 9 are fixed values based on average fishing mortality rates achieved during a time period when the stock biomass was fairly resilient (1987—2000). The revised proxies are calculated as follows: F_{Target} is the 75th percentile of fishing mortality rates during 1987—2000 and $F_{Threshold}$ is the average fishing mortality rates during the same period. The revised proxy for F_{Target} (0.32) is used as the basis for establishing *Loligo* OY. The use of a proxy is necessary because it is currently not possible to accurately predict *Loligo* stock biomass because recruitment, which occurs throughout the year, is highly variable inter-annually and influenced by changing environmental conditions.

Based on the revised biological reference points for *Loligo*, the Council recommended an increase to the 2009 *Loligo* Max OY, ABC, IOY, DAH, and DAP. In 2008, the *Loligo* Max OY was 26,000 mt and the ABC, IOY, DAH, and DAP was 17,000 mt. For 2009, the proposed *Loligo* Max OY is 32,000 mt and the proposed ABC, IOY, DAH, DAP is 19,000 mt. Using the revised *Loligo* biological reference points, the Monitoring Committee initially calculated the proposed 2009 *Loligo* ABC, IOY, DAH, and DAP to be 23,000 mt. The Monitoring Committee subsequently reduced the proposed 2009 *Loligo* ABC, IOY, DAH, and DAP to 19,000 mt, to be consistent with SARC 34 management recommendation that harvest not exceed 20,000 mt, and due to uncertainty associated with the *Loligo* stock assessment model.

NMFS concurs with the Council's recommendation, therefore, this action proposes a 2009 *Loligo* Max OY of 32,000 mt and an ABC, IOY DAH, and

DAP of 19,000 mt. The FMP does not authorize the specification of JVP and TALFF for the *Loligo* fishery because of the domestic industry's capacity to harvest and process the OY for this fishery; therefore, there would be no *Loligo* JVP or TALFF in 2009.

As described previously, the Council recommended that the *Loligo* RQ for 2009 be up to 3 percent (5,700 mt) of the ABC. Scientific research project proposals requesting *Loligo* RQ were recommended for approval and will be forwarded to the NOAA Grants Office for award. The proposed *Loligo* IOY, DAH, and DAP were adjusted to reflect the RQ and equal 13,300 mt. Any of the *Loligo* RQ that is not awarded to a scientific research project will be made available to the commercial fishery after the publication of a notice in the **Federal Register**.

Distribution of the *Loligo* DAH

As was done in 2007 and 2008, NMFS is proposing that the 2009 *Loligo* DAH be allocated into trimesters, consistent with the Council's recommendation. The proposed 2009 trimester allocations would be as follows:

TABLE 2. PROPOSED TRIMESTER ALLOCATION OF *Loligo* QUOTA IN 2009

Trimester	Percent	Metric Tons[1]
I (Jan-Apr)	43	8,116
II (May-Aug)	17	3,208
III (Sep-Dec)	40	7,550
Total	100	13,300

[1] Trimester allocations after 5,700 mt RQ deduction.

Illex Squid

The *Illex* stock was most recently assessed at SARC 42 in late 2005. While it was not possible to evaluate current stock status because there are no reliable current estimates of stock biomass or fishing mortality rate, qualitative analyses determined that overfishing had not likely been occurring.

NMFS proposes to maintain the *Illex* specifications in 2009 at the same levels as they were for the 2008 fishing year, consistent with the Council's recommendation. This action proposes that the specification of Max OY, IOY, ABC, and DAH would be 24,000 mt. This level of DAH corresponds to a target fishing mortality rate of 75 percent F_{MSY}. The FMP does not authorize the specification of JVP and TALFF for the *Illex* fishery because of the domestic fishing industry's capacity to harvest and to process the OY from this fishery.

Butterfish

The status of the butterfish stock was most recently assessed at SARC 38 in late 2004. The assessment concluded that, while overfishing of the stock is not occurring, the stock is overfished because estimates of stock biomass are below the minimum biomass threshold (½ B_{MSY}). SARC 38 estimated the butterfish stock at 8,700 mt, ½ B_{MSY} at 11,400 mt, and B_{MSY} at 22,798 mt. Based on this information, the Council was notified by NMFS on February 11, 2005, that the butterfish stock was designated as overfished, pursuant to the requirements of section 304(e) of the Magnuson-Stevens Act. The Council is developing a rebuilding plan for the butterfish stock in Amendment 10 to the FMP. Therefore, as in 2008, the Council recommended that the quota be restricted to recent landings levels to prevent an expansion of the fishery and to protect the rebuilding stocks. Without a current market for butterfish, a directed butterfish fishery has not existed for several years, with landings since 2003 ranging from 437 mt to 554 mt.

The MSB FMP specifies that maximum sustainable yield equals Max OY. SARC 38 re-estimated butterfish maximum sustainable yield as 12,175 mt, and the butterfish overfishing threshold at F of 0.38. Assuming that butterfish discards equal twice the level of landings, the amount of butterfish discards associated with approximately 500 mt of landings is approximately 1,000 mt.

Therefore, in 2009, as implemented in 2008, the proposed specifications would set the Max OY at 12,175 mt; the ABC at 1,500 mt; and the IOY, DAH, and DAP at 500 mt. Harvest at these proposed levels should prevent overfishing on the butterfish stock in 2009. Additionally, consistent with MSB regulations, the Council recommended, and NMFS is proposing, zero TALFF for butterfish in 2009 because zero TALFF is proposed for mackerel.

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 the Atlantic Mackerel, Squid, and Butterfish FMP, other provisions of the Magnuson-Stevens Act, and other applicable law, subject to further consideration after pubic comment.

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

The Council prepared an IRFA, as required by section 603 of the Regulatory Flexibility Act (RFA). The IRFA describes the economic impact this proposed rule, if adopted, would have on small entities. A summary of the analysis follows. A copy of this analysis is available from the Council or NMFS (see **ADDRESSES**) or via the Internet at *http://www.nero.noaa.gov*.

Statement of Objective and Need

This action proposes 2009 specifications and management measures for mackerel, squid, and butterfish, and proposes to modify an incidental possession limit for mackerel. A complete description of the reasons why this action is being considered, and the objectives of and legal basis for this action, are contained in the preamble to this proposed rule and are not repeated here.

Description and Estimate of Number of Small Entities to Which the Rule Will Apply

Based on permit data for 2007, the numbers of potential fishing vessels in the 2009 fisheries are as follows: 383 for *Loligo*/butterfish, 78 for *Illex*, 2,462 for mackerel, and 2,108 vessels with incidental catch permits for squid/butterfish. There are no large entities participating in this fishery, as defined in section 601 of the RFA. Therefore, there are no disproportionate economic impacts on small entities. Many vessels participate in more than one of these fisheries; therefore, permit numbers are not additive.

Description of Projected Reporting, Recordkeeping, and Other Compliance Requirements

This action does not contain any new collection-of-information, reporting, recordkeeping, or other compliance requirements. It does not duplicate, overlap, or conflict with any other Federal rules.

Minimizing Significant Economic Impacts on Small Entities

Proposed Actions

The mackerel IOY proposed in this action (115,000 mt, with 15,000 mt allocated to recreational catch) represents status quo, as compared to 2008, and is no constraint to vessels relative to the landings in recent years. Mackerel landings for 2001–2003 averaged 24,294 mt. Landings in 2004 were 55,528 mt, landings in 2005 were 43,246 mt, landings in 2006 were 58,279 mt, and landings in 2007 were 24,446 mt. This action also proposes an inseason adjustment, if landings approach the IOY early in the fishing

year, to increase the IOY up to the ABC (156,000 mt). Therefore, no reductions in revenues for the mackerel fishery are expected as a result of this proposed action; in fact, an increase in revenues as a result of the proposed action is possible. Based on 2007 data, the mackerel fishery could increase its landings by 90,554 mt in 2009, if it takes the entire IOY. In 2007, the last year for which complete financial data are available, the average value for mackerel was $258 per mt. Using this value, the mackerel fishery could see an increase in revenues of $23,362,932 as a result of the proposed 2009 IOY (115,000 mt), and an additional increase in revenues of $10,578,000 as a result of the proposed adjustment to increase the IOY up to the ABC (156,000 mt).

The *Loligo* IOY (19,000 mt) proposed in this action represents a potential for increased landings when compared to the 2008 IOY (17,000 mt). *Loligo* landings for 2001–2003 averaged 14,092 mt. Landings in 2004 were 15,447, landings in 2005 were 16,984 mt, landings in 2006 were 15,880 mt, and landings in 2007 were 12,342 mt. In 2007, the last year for which complete financial data are available, the average value for *Loligo* was $1,883 per mt. No reductions in revenues for the *Loligo* fishery are expected as a result of this proposed action; in fact, an increase in revenues as a result of the proposed action is possible. Based on 2007 data, the *Loligo* fishery could increase its landings by 6,658 mt in 2009, if it takes the entire IOY. Using the average value for *Loligo* from 2007 ($1,883 mt), the *Loligo* fishery could see an increase in revenues of $12,537,014 as a result of the proposed 2009 IOY (19,000 mt),

The *Illex* IOY (24,000 mt) proposed in this action represents status quo as compared to 2008. *Illex* landings for 2001–2003 averaged 4,350 mt. Landings in 2004 were 26,098 mt, landings in 2005 were 12,032 mt, landings in 2006 were 13,944 mt, and landings in 2007 were 9,022 mt. In 2007, the last year for which complete financial data are available, the average value for *Illex* was $428 per mt. Implementation of this proposed action would not result in a reduction in revenue or a constraint on the fishery in 2009. Based on 2007 data, the *Illex* fishery could increase its landings by 14,978 mt in 2009, if it takes the entire IOY. Using the average value for *Illex* from 2007 ($428 mt), the *Illex* fishery could see an increase in revenues of $6,410,584 as a result of the proposed 2009 IOY (24,000 mt).

The butterfish IOY proposed in this action (500 mt) represents status quo, as compared to 2008, and represents only a minimal constraint to vessels relative to the landings in recent years. Due to market conditions, there has been not been a directed butterfish fishery in recent years; therefore, recent landings have been low. Landings in 2004 were 537 mt, landings in 2005 were 437 mt, landings in 2006 were 554 mt, and landings in 2007 were 673 mt. Given the lack of a directed butterfish fishery and low butterfish landings, the proposed action is not expected to reduce revenues in this fishery more than minimally. Based on 2007 data, the value of butterfish was $1,602 per mt.

Alternatives to the Proposed Rule

The Council analysis evaluated three alternatives for mackerel, and all of them would have set the ABC at 156,000 mt, IOY at 115,000 mt, and maintained the status quo trigger for closing the directed fishery. This ABC and IOY do not represent a constraint on vessels in this fishery, so no negative impacts on revenues in this fishery are expected as a result of these alternatives. These alternatives only differed from the proposed action with respect to incidental possession limits. The proposed action specifies the incidental mackerel possession limit at 20,000 lb (9.08 mt) if the directed mackerel fishery closes prior to June 1, and at 50,000 lb (22.7 mt) if the directed mackerel fishery closes on or after June 1. The alternatives to the proposed action specify incidental mackerel possession limits at 20,000 lb (9.08 mt)(status quo) and at 50,000 lb (22.7 mt)(least restrictive). These alternatives were not adopted by the Council because the status quo incidental possession limit may have resulted in the regulatory discarding of mackerel by the Atlantic herring fishery in the Gulf of Maine and, if mackerel are available to the fishery in 2009, the least restrictive incidental possession limit may have encouraged targeting on mackerel during a fishery closure early in the year (January-April). Differences in incidental possession limits may affect behavior and effort during closures of the directed fishery; however, all alternatives are expected to result in the same total landings for 2009.

For *Loligo*, alternatives to the proposed action would have set the Max OY at 26,000 mt and ABC, IOY, DAH, and DAP at 17,000 mt (status quo) or Max OY at 32,000 mt and ABC, IOY, DAH, and DAP at 23,000 mt (least restrictive). These alternatives were not adopted by the Council because they were either not consistent with the revised reference points from SARC 34 (status quo) or not consistent with the management recommendations from SARC 34 and did not consider the uncertainty associated with the *Loligo* stock assessment model (least restrictive).

For *Illex*, one alternative considered would have set Max OY, ABC, IOY, DAH, and DAP at 30,000 mt. This alternative would allow harvest far in excess of recent landings in this fishery. Therefore, there would be no constraints and, thus, no revenue reductions, associated with this alternative. However, the Council considered this alternative unacceptable because an ABC specification of 30,000 mt may not prevent overfishing in years of moderate to low abundance of *Illex*. Another alternative considered would have set MAX OY at 24,000 mt and ABC, IOY, DAH, and DAP at 19,000 mt. The Council considered this alternative unacceptable because it was unnecessarily restrictive.

For butterfish, one alternative considered would have set the ABC at 4,525 mt, and IOY, DAH, and DAP at 1,861 mt; while another would have set ABC at 12,175 mt, and IOY, DAH, and DAP 9,131 mt. These amounts exceed the landings of this species in recent years. Therefore, neither alternative represents a constraint on vessels in this fishery or would reduce revenues in the fishery. However, neither of these alternatives were adopted by the Council because they would likely result in overfishing and the additional depletion of the spawning stock biomass of an overfished species.

List of Subjects in 50 CFR Part 648

Fisheries, Fishing, Recordkeeping and reporting requirements.

Dated: November 12, 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 648 is proposed to be amended as follows:

PART 648—FISHERIES OF THE NORTHEASTERN UNITED STATES

1. The authority citation for part 648 continues to read as follows:

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

2. In § 648.25, paragraph (a) is revised to read as follows:

§ 648.25 Possession restrictions.

(a) *Atlantic mackerel*. During a closure of the directed Atlantic mackerel fishery that occurs prior to June 1, vessels may not fish for, possess, or land more than 20,000 lb (9.08 mt) of Atlantic mackerel per trip at any time,

and may only land Atlantic mackerel once on any calendar day, which is defined as the 24–hr period beginning at 0001 hours and ending at 2400 hours. During a closure of the directed fishery for butterfish that occurs on or after June 1, vessels may not fish for, possess, or land more than 50,000 lb (22.7 mt) of Atlantic mackerel per trip at any time, and may only land Atlantic mackerel once on any calendar day.

[FR Doc. E8–27225 Filed 11–14–08; 8:45 am]

BILLING CODE 3510–22–S

Notices

Federal Register

Vol. 73, No. 222

Monday, November 17, 2008

This section of the FEDERAL REGISTER contains documents other than rules or proposed rules that are applicable to the public. Notices of hearings and investigations, committee meetings, agency decisions and rulings, delegations of authority, filing of petitions and applications and agency statements of organization and functions are examples of documents appearing in this section.

DEPARTMENT OF AGRICULTURE

Forest Service

Kemmerer Ranger District, Bridger-Teton National Forest, WY; Kemmerer Grazing and Rangeland Vegetation Management Project

AGENCY: Forest Service, USDA.

ACTION: Notice of intent to prepare an environmental impact statement.

SUMMARY: The Bridger-Teton National Forest will prepare an Environmental Impact Statement to analyze the effects of continued authorization of grazing on 15 sheep allotments on the Kemmerer Ranger District in southwest Wyoming. The project area encompasses 165,575 acres of National Forest System lands within Lincoln County of western Wyoming. Most of the project area's east boundary is west of Commissary Ridge; the west boundary is Salt Creek. The center of the project area lies roughly 17 air miles northeast of Cokeville, Wyoming. The allotments included in the analysis are: Lower Salt Creek, Buckskin Knoll, Lake Alice, Smiths Fork, Aspen Springs, Basin Creek, Devil's Hole, Elk Creek, Green Knoll, Indian Creek, Lake Mountain, Pole Creek, Sams Allen Creek, South Fontenelle and Spruce Creek Allotments.

The analysis contained in the EIS will be used by the Responsible Official to decide whether or not, and if so, how to authorize livestock grazing and manage rangeland vegetation within the project area.

DATES: Comments concerning the scope of the analysis must be received by January 2, 2009. The draft environmental impact statement is expected in May of 2009 and the final environmental impact statement is expected in September of 2009.

ADDRESSES: Send written comments to Tracy Hollingshead, District Ranger, Kemmerer Ranger District, Bridger-Teton National Forest, 308 U.S. Highway 189 North, Kemmerer, WY 83101. Send electronic mail to: *comments-intermtn-bridger-teton_kemmerer@fs.fed.us* and on the subject line put only ''Kemmerer Grazing Allotments.'' Comments received in response to this solicitation, including names and addresses of those who comment, will be part of the public record for this proposed action. Comments submitted anonymously will be accepted and considered; however, anonymous comments will not provide the respondent with standing to appeal the subsequent decision.

FOR FURTHER INFORMATION CONTACT: Gary Dean, Rangeland Management Specialist, Kemmerer Ranger District, 308 U.S. Highway 189 North, Kemmerer, WY 83101 (307–877–4415), *gdean@fs.fed.us*. Individuals who use telecommunication devices for the deaf (TDD) may call the Federal Information Relay Service (FIRS) at 1–800–877–8339 between 8 a.m. and 8 p.m., Eastern Time, Monday through Friday.

SUPPLEMENTARY INFORMATION:

Purpose and Need for Action

The purpose of this analysis is to determine if continued livestock grazing is appropriate within the project area. If livestock grazing is re-authorized then the adaptive management strategies under which grazing would be managed to maintain or achieve desired conditions and meet Forest Plan objectives. Desired conditions are defined by the Bridger Teton Land and Resource Management Plan, Forest Service Manual, and applicable laws. This effort is undertaken to comply with the 1995 Rescissions Act (Pub. L. 104–19).

Proposed Action

The proposed action is to continue to authorize livestock grazing on 15 allotments within the project area with updated livestock grazing and rangeland vegetation management direction. Resource desired conditions are identified. Grazing practices addressing frequency of grazing and of rest from grazing will be guided by the amount and diversity of vegetation given the capability of soils, as well as indicators of soil quality such as amount of ground cover, sign of active erosion and healing of headcuts. Other Best Management Practices addressing the timing, duration, and in specific settings the intensity, of use are identified. Adaptive management is part of the proposed action. Identified are: Criteria to guide management, predetermined optional courses of action used to make adaptive changes in management over time, and the focused monitoring which provides the basis for adjusting management to attain desired resource conditions. One last element of rangeland vegetation management, non-structural improvements, is included. Allotment Management Plans will become part of a re-issued term grazing permit and contain the livestock grazing and rangeland vegetation management direction identified by the Responsible Official's decision.

Possible Alternatives

To date the Bridger Teton National Forest has identified two alternatives to the proposed action: (A) No Domestic Livestock Grazing, and (B) Continuation Of Current Livestock Management. Alternative A would eliminate livestock grazing on the project area over the next five years. This alternative will demonstrate the effects of eliminating livestock grazing on the environment and more clearly illustrate the potential effects of implementing any grazing and rangeland vegetation management alternative. Alternative B would continue current grazing management practices including annual adjustments in authorized livestock numbers and season.

Responsible Official

The official responsible for this proposed action is the Kemmerer District Ranger, Kemmerer Ranger District, Bridger-Teton National Forest, 308 U.S. Highway 189 North, Kemmerer, WY 83101.

Nature of Decision To Be Made

The decision to be made, based on this analysis, is if livestock will be allowed to continue to graze on 15 allotments within the project area, and if so, under what management direction. The management direction would be either through implementation of the proposed action or a grazing alternative to the proposed action.

Preliminary Issues

Preliminary issues associated with the proposed action include:

(1) The amount and diversity of vegetation in some locations are less than the current capability of soils.

(2) Sediment delivery to drainages supporting fisheries, and retention of precipitation on uplands, as evidenced by headcutting/gullies and sign of active erosion.

(3) Wildlife values within some aspen stands are minimized by a lack of diverse aspen age classes; in some locations the diversity of herbaceous and shrub species in the understory is also diminished.

Scoping Process

The first formal opportunity to respond to the proposed action listed above is during the public scoping process (40 CFR 1501.7) which begins with the issuance of this Notice of Intent. Scoping letters will be sent to the forest mailing list of known interested parties and news releases will be made encouraging public to provide comments and input into the project. The scoping process will assist the forest in identifying specific issues to be addressed related to the purpose and need and the scope of the decision. Mail comments to the addresses given above. Ongoing information related to the proposed action and related analysis will be posted on the Bridger-Teton National Forest Web site *http://www.fs.fed.us/r4/btnf*.

Early Notice of Importance of Public Participation in Subsequent Environmental Review: A draft environmental impact statement (DEIS) will be prepared for comment. The comment period on the DEIS will be for a period of 45 days from the date the Environmental Protection Agency publishes the notice of availability in the **Federal Register**. The Forest Service believes, at this early stage, it is important to give reviewers notice of several court rulings related to public participation in the environmental review process. First, reviewers of a DEIS must structure their participation in the environmental review of the proposal so that it is meaningful and alerts an agency to the reviewers' position and contentions. *Vermont Yankee Nuclear Power Corp.* v. *NRDC*, 435 U.S. 519, 553 (1978). Also, environmental objections that could be raised at the DEIS stage but that are not raised until after completion of the final environmental impact statement may be waived or dismissed by the courts. *City of Angoon* v. *Hodel*, 803 F.2d 1016, 1022 (9th Cir. 1986) and *Wisconsin Heritages, Inc.* v. *Harris*, 490 F. Supp. 1334, 1338 (ED. Wis. 1980). Because of these court rulings, it is very important that those interested in this proposed action participate by the close of the 45 day comment period so that substantive comments and objections are made available to the Forest Service at a time when it can meaningfully consider them and respond to them in the final environmental impact statement.

To assist the Forest Service in identifying and considering issues and concerns on the proposed action, comments on the DEIS should be as specific as possible. It is also helpful if comments refer to specific pages or chapters of the draft statement. Comments may also address the adequacy of the DEIS or the merits of the alternatives formulated and discussed in the statement. Reviewers may wish to refer to the Council on Environmental Quality Regulations for implementing the procedural provisions of the National Environmental Policy Act at 40 CFR 1503.3 in addressing these points. Comments received, including the names and addresses of those who comment, will be considered part of the public record on this proposal and will be available for public inspection.

Authority: 40 CFR 1501.7 and 1508.22; Forest Service Handbook 1909.15, Section 21.

Dated: November 6, 2008.

Tracy Hollingshead,

District Ranger, Kemmerer Ranger District, Bridger-Teton National Forest.

[FR Doc. E8–27072 Filed 11–14–08; 8:45 am]

BILLING CODE 3410–11–M

DEPARTMENT OF AGRICULTURE

Forest Service

Opal Creek Scenic Recreation Area (SRA) Advisory Council

AGENCY: Forest Service, USDA.

ACTION: Notice of meeting.

SUMMARY: Opal Creek Scenic Recreation Area Advisory Council meetings will convene in Stayton, Oregon on Wednesday, December 3, 2008. These meetings are scheduled to begin at 6:30 p.m., and will conclude at approximately 8:30 p.m. Meetings will be held in the South Room of the Stayton Community Center located on 400 West Virginia Street in Stayton, Oregon.

The Opal Creek Wilderness and Opal Creek Scenic Recreation Area Act of 1996 (Opal Creek Act) (Pub. L. 104–208) directed the Secretary of Agriculture to establish the Opal Creek Scenic Recreation Area Advisory Council. The Advisory Council is comprised of thirteen members representing state, county and city governments, and representatives of various organizations, which include mining industry, environmental organizations, inholders in Opal Creek Scenic Recreation Area, economic development, Indian tribes, adjacent landowners and recreation interests. The council provides advice to the Secretary of Agriculture on preparation of a comprehensive Opal Creek Management Plan for the SRA, and consults on a periodic and regular basis on the management of the area. Tentative agenda items include: Abandoned mine closure progress report, Forest Service updates, and Advisory Council solicitation status.

A direct public comment period is tentatively scheduled to begin at 8 p.m. Time allotted for individual presentations will be limited to 3 minutes. Written comments are encouraged, particularly if the material cannot be presented within the time limits of the comment period. Written comments may be submitted prior to scheduled meetings by sending them to Designated Federal Official Paul Matter at the address given below.

FOR FURTHER INFORMATION CONTACT: For more information regarding this meeting, contact Designated Federal Official Paul Matter; Willamette National Forest, Detroit Ranger District, HC 73 Box 320, Mill City, OR 97360; (503) 854–3366.

Dated: November 7, 2008.

Katherine K. Harbick,

Acting Forest Supervisor.

[FR Doc. E8–27075 Filed 11–14–08; 8:45 am]

BILLING CODE 3410–11–M

DEPARTMENT OF COMMERCE

International Trade Administration

(A–570–939)

Certain Tow Behind Lawn Groomers and Certain Parts Thereof From the People's Republic of China: Postponement of Preliminary Determination of Antidumping Duty Investigation

AGENCY: Import Administration, International Trade Administration, Department of Commerce.

EFFECTIVE DATE: November 17, 2008.

FOR FURTHER INFORMATION CONTACT: Thomas Martin or Zev Primor, AD/CVD Operations, Office 4, Import Administration, International Trade Administration, U.S. Department of Commerce, 14th Street and Constitution Avenue, NW, Washington, DC 20230; telephone: (202) 482–3936 or (202) 482–4114, respectively.

SUPPLEMENTARY INFORMATION:

Postponement of Preliminary Determinations

On July 14, 2008, the Department of Commerce (the Department) initiated the antidumping duty investigation on Certain Tow Behind Lawn Groomers and Certain Parts Thereof from the People's Republic of China. *See Certain Tow Behind Lawn Groomers and Certain Parts Thereof From the People's Republic of China: Initiation of Antidumping Duty Investigation*, 73 FR 42315 (July 21, 2008). The notice of initiation stated that the Department would issue the preliminary determination for this investigation no later than 140 days after the date of issuance of the initiation, in accordance with section 773(b)(1)(A) of the Tariff Act of 1930, as amended (the Act).

On November 5, 2008 the petitioner, Agri–Fab Inc., made a timely request pursuant to 19 CFR 351.205(b)(2) and (e) for a 50–day postponement of the preliminary determination. The petitioner requested postponement of the preliminary determination due to the complexity of the investigation.

For the reasons identified by the petitioner and because there are no compelling reasons to deny the request, the Department is postponing the deadline for the preliminary determination under section 773(c)(1)(A) of the Act by 50 days. Because the extended deadline, January 20, 2009, falls on a federal holiday, the deadline for the preliminary determination will be the next business day, Wednesday, January 21, 2009. *See* 19 CFR 351.303(b). The deadline for the final determination will continue to be 75 days after the date of the preliminary determination, unless extended.

This notice is issued and published pursuant to section 733(c)(2) of the Act and 19 CFR 351.205(f)(1).

Dated: November 10, 2008.

David M. Spooner,

Assistant Secretary for Import Administration.

[FR Doc. E8–27230 Filed 11–14–08; 8:45 am]

BILLING CODE 3510–DS–S

DEPARTMENT OF COMMERCE

National Oceanic and Atmospheric Administration

RIN 0648–XD09

Marine Mammals; File No. 532–1822–03

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

ACTION: Notice; issuance of permit amendment.

SUMMARY: Notice is hereby given that Kenneth Balcomb, Center for Whale Studies, P.O. Box 1577, Friday Harbor, WA 98250 has been issued an amendment to scientific research Permit No. 532–1822–02.

ADDRESSES: The amendment and related documents are available for review upon written request or by appointment in the following office(s):

Permits, Conservation and Education Division, Office of Protected Resources, NMFS, 1315 East-West Highway, Room 13705, Silver Spring, MD 20910; phone (301)713–2289; fax (301)427–2521; and

Northwest Region, NMFS, 7600 Sand Point Way NE, BIN C15700, Bldg. 1, Seattle, WA 98115–0700; phone (206)526–6150; fax (206)526–6426.

FOR FURTHER INFORMATION CONTACT: Jaclyn Daly or Jennifer Skidmore, (301)713–2289.

SUPPLEMENTARY INFORMATION: On October 10, 2007, notice was published in the **Federal Register** (72 FR 57523) that an amendment of Permit No. 532–1882–02, issued July 17, 2006, had been requested by the above-named individual. The requested amendment has been granted under the authority of the Marine Mammal Protection Act of 1972, as amended (16 U.S.C. 1361 *et seq.*), the regulations governing the taking and importing of marine mammals (50 CFR part 216), the Endangered Species Act of 1973, as amended (ESA; 16 U.S.C. 1531 *et seq.*), the regulations governing the taking, importing, and exporting of endangered and threatened species (50 CFR parts 222–226).

The purpose of the amendment is to obtain distribution and movement data of southern resident killer whales during the spring, fall, and winter months via satellite tagging. The permit amendment authorizes the tagging of up to 6 individual adult or sub-adult male southern resident killer whales per year, three of which may be re-tagged per year, throughout the inland waters of Washington and the coastal waters of Washington, Oregon, and California. No more than 12 individuals are authorized to be tagged for the duration of the permit. The permit will expire on April 14, 2011.

In compliance with the National Environmental Policy Act of 1969 (42 U.S.C. 4321 *et seq.*), an environmental assessment was prepared analyzing the effects of the permitted activities. After a Finding of No Significant Impact, the determination was made that it was not necessary to prepare an environmental impact statement.

Issuance of this permit, as required by the ESA, was based on a finding that such permit: (1) was applied for in good faith; (2) will not operate to the disadvantage of such endangered species; and (3) is consistent with the purposes and policies set forth in section 2 of the ESA.

Dated: November 10, 2008.

P. Michael Payne,

Chief, Permits, Conservation and Education Division, Office of Protected Resources, National Marine Fisheries Service.

[FR Doc. E8–27223 Filed 11–14–08; 8:45 am]

BILLING CODE 3510–22–S

COMMISSION OF FINE ARTS

Notice of Meeting

The next meeting of the U.S. Commission of Fine Arts is scheduled for 20 November 2008, at 10 a.m. in the Commission's offices at the National Building Museum, Suite 312, Judiciary Square, 401 F Street, NW., Washington, DC 20001–2728. Items of discussion may include buildings, parks and memorials.

Draft agendas and additional information regarding the Commission are available on our Web site: *http://www.cfa.gov.* Inquiries regarding the agenda and requests to submit written or oral statements should be addressed to Thomas Luebke, Secretary, U.S. Commission of Fine Arts, at the above address, or call 202–504–2200. Individuals requiring sign language interpretation for the hearing impaired should contact the Secretary at least 10 days before the meeting date.

Dated in Washington DC, 3 November, 2008.

Thomas Luebke,

Secretary.

[FR Doc. E8–27076 Filed 11–14–08; 8:45 am]

BILLING CODE 6330–01–M

COMMITTEE FOR THE IMPLEMENTATION OF TEXTILE AGREEMENTS

Amendment of Limitation of Duty- and Quota-Free Imports of Apparel Articles Assembled in Beneficiary ATPDEA Countries from Regional Country Fabric

November 10, 2008.

AGENCY: Committee for the Implementation of Textile Agreements (CITA).

ACTION: Amending the 12-Month Cap on Duty and Quota Free Benefits.

EFFECTIVE DATE: November 17, 2008.

FOR FURTHER INFORMATION CONTACT: Richard Stetson, International Trade Specialist, Office of Textiles and Apparel, U.S. Department of Commerce, (202) 482–3400.

SUPPLEMENTARY INFORMATION:

Authority: Section 3103 of the Trade Act of 2002, Pub. L. No. 107–210; Title VII of the Tax Relief and Health Care Act of 2006 (TRHCA 2006), Pub. L. No. 109–432; H.R. 1830 110th Cong. (2007); Presidential Proclamation 7616 of October 31, 2002 (67 FR 67283, November 5, 2002).

Section 3103 of the Trade Act of 2002 amended the Andean Trade Preference Act (ATPA) to provide for duty and quota-free treatment for certain textile and apparel articles imported from designated Andean Trade Promotion and Drug Eradication Act (ATPDEA) beneficiary countries. Section 204(b)(3)(B)(iii) of the amended ATPA provides duty- and quota-free treatment for certain apparel articles assembled in ATPDEA beneficiary countries from regional fabric and components, subject to quantitative limitation. More specifically, this provision applies to apparel articles sewn or otherwise assembled in one or more ATPDEA beneficiary countries from fabrics or from fabric components formed or from components knit-to-shape, in one or more ATPDEA beneficiary countries, from yarns wholly formed in the United States or one or more ATPDEA beneficiary countries (including fabrics not formed from yarns, if such fabrics are classifiable under heading 5602 and 5603 of the Harmonized Tariff Schedule (HTS) and are formed in one or more ATPDEA beneficiary countries). Such apparel articles may also contain certain other eligible fabrics, fabric components, or components knit-to-shape.

The TRHCA of 2006 extended the expiration of the ATPA to June 30, 2007. See Section 7002(a) of the TRHCA 2006. H.R. 1830 further extended the expiration of the ATPA to February 29, 2008. H.R. 5264 further extended the expiration of the ATPA to December 31, 2008. **See Limitation of Duty- and Quota-Free Imports of Apparel Articles Assembled in Beneficiary ATPDEA Countries from Regional Country Fabric** (73 FR 55502, September 25, 2008).

H.R. 7222, 110th Cong. (2008), further extended the expiration of the ATPA to December 31, 2009. See Pub. L. No. 110–436. The purpose of this notice is to extend the period of the quantitative limitation for preferential tariff treatment under the regional fabric provision for imports of qualifying apparel articles for a full 12-month period, through September 30, 2009.

For the period beginning on October 1, 2008 and extending through September 30, 2009, the aggregate quantity of imports eligible for preferential treatment under the regional fabric provision is 1,222,785,719 square meters equivalent. Apparel articles entered in excess of this quantity will be subject to otherwise applicable tariffs.

This quantity is calculated using the aggregate square meter equivalents of all apparel articles imported into the United States, derived from the set of Harmonized System lines listed in the Annex to the World Trade Organization Agreement on Textiles and Clothing (ATC), and the conversion factors for units of measure into square meter equivalents used by the United States in implementing the ATC.

Janet E. Heinzen,

Acting Chairman, Committee for the Implementation of Textile Agreements.

[FR Doc. E8–27229 Filed 11–14–08; 8:45 am]

BILLING CODE 3510–DS

CONSUMER PRODUCT SAFETY COMMISSION

Third Party Testing for Certain Children's Products; Notice of Requirements for Accreditation of Third Party Conformity Assessment Bodies to Assess Conformity With Part 1501 of Title 16, Code of Federal Regulations

AGENCY: Consumer Product Safety Commission.

ACTION: Notice of Requirements for Accreditation of Third Party Conformity Assessment Bodies to Assess Conformity with part 1501 of Title 16, Code of Federal Regulations.

Introduction: The Consumer Product Safety Act (''CPSA''), at § 14(a)(3)(B)(iii) as added by § 102(a)(2) of the Consumer Product Safety Improvement Act of 2008 (''CPSIA''), Public Law 110–314, directs the U.S. Consumer Product Safety Commission (''CPSC'' or ''Commission'') to publish this notice of requirements for accreditation of third party conformity assessment bodies (''third party laboratories'') to test children's products for conformity with the Commission's regulations at 16 CFR part 1501 for identifying toys and other articles intended for use by children under three years of age which present choking, aspiration, or ingestion hazards because of small parts (the ''small parts rule'') [1] Each manufacturer (including the importer) or private labeler of products subject to those regulations must have products manufactured more than 90 days after the **Federal Register** publication date of this notice tested by a laboratory accredited to do so and must issue a certificate of compliance with the applicable regulations based on that testing.[2, 3]

The Commission is also recognizing limited circumstances in which testing performed by a laboratory on or after May 16, 2008, 90 days prior to the date of enactment of CPSIA (August 14, 2008), but prior to Commission acceptance of the laboratory's preexisting accreditation, provided that accreditation is accepted not later than January 20, 2009, may form the basis for the certificate of compliance with the small parts regulation required of the manufacturer or private labeler.

This notice provides the criteria and process for Commission acceptance of accreditation of ''third party'' laboratories for testing to the small parts regulations (laboratories that are not owned, managed, or controlled by a manufacturer or private labeler of a children's product to be tested by the laboratory for certification purposes), ''firewalled'' laboratories (those that are owned, managed, or controlled by a manufacturer or private labeler of a children's product to be tested by the laboratory for certification purposes and that seek accreditation under the additional statutory criteria for ''firewalled'' laboratories), and laboratories owned or controlled in whole or in part by a government.

The requirements of this notice are effective upon its publication in the **Federal Register** and are exempted by CPSIA from the notice and comment rulemaking requirements of the

[1] Section 102 of CPSIA also required the Commission to publish requirements for accreditation of laboratories for testing to the lead paint ban at 16 CFR part 1303 and for testing to the Commission's regulations for full-size baby cribs at 16 CFR part 1508, for non-full-size baby cribs at 16 CFR part 1509, and for pacifiers at 16 CFR part 1511. The requirements for accreditation for testing to the lead paint ban were published in the **Federal Register** on September 22, 2008. 73 FR 54,564–6. The requirements for accreditation for testing to the crib and pacifier regulations were published in the **Federal Register** on October 22, 2008. 73 FR 62,965–7.

[2] Section 14(a)(2) of the CPSA as added by § 102(a)(2) of CPSIA requires that certification be based on testing of sufficient samples of the product, or samples that are identical in all material respects to the product.

[3] Of course, irrespective of certification, the product in question must comply with applicable CPSC requirements. See, *e.g.*, CPSA § 14(h) as added by CPSIA § 102(b).

Administrative Procedure Act, 5 U.S.C. 553.[4]

Baseline accreditation of each category of laboratory to the International Organization for Standardization (''ISO'') Standard ISO/IEC 17025:2005—General Requirements for the Competence of Testing and Calibration Laboratories—is required. The accreditation must be by an accreditation body that is a signatory to the International Laboratory Accreditation Cooperation—Mutual Recognition Arrangement (''ILAC–MRA'') and the scope of the accreditation must include testing for compliance with the small parts regulation at 16 CFR part 1501.[5] A laboratory owned or controlled by a manufacturer or private labeler of products to be tested by the laboratory is subject to additional requirements intended to assure that the Commission is immediately and confidentially notified of any attempt by the manufacturer, private labeler or other interested party to hide or exert undue influence over the laboratory's test results. A governmental laboratory may be accredited subject to additional requirements concerning independence of its relationship with the host government and freedom of manufacturers in the host country to elect to use accredited non-government laboratories for certification testing without suffering disadvantage.

The Commission has established an electronic accreditation registration and listing system that can be accessed via its web site.

Although the accreditation requirements in this notice for testing to the small parts regulations are effective upon their publication in the **Federal Register**, the Commission solicits comments on the accreditation procedures as they apply to that testing and on the accreditation approach in general, since the Commission must publish additional testing laboratory accreditation procedures over the coming months.

DATES: *Effective Date:* The requirements for accreditation of laboratories for testing to the small parts regulations are effective upon publication of this notice in the **Federal Register**, that is November 17, 2008.

Request for Comments: Please provide comments in response to this notice by December 17, 2008. Comments on this notice should be captioned ''Laboratory Accreditation Process for Small Parts Testing.'' Comments should be submitted to the Office of the Secretary by e-mail at *smallpartsreqts@cpsc.gov*, or mailed or delivered, preferably in five copies, to the Office of the Secretary, Consumer Product Safety Commission, 4330 East West Highway, Bethesda, Maryland 20814. Comments may also be filed by facsimile to (301) 504–0127.

FOR FURTHER INFORMATION CONTACT: Robert ''Jay'' Howell, Acting Assistant Executive Director for Hazard Identification and Reduction, U.S. Consumer Product Safety Commission, 4330 East West Highway, Bethesda, Maryland 20814; e-mail *rhowell@cpsc.gov.*

I. Accreditation Requirements

A. Baseline Third Party Laboratory Accreditation Requirements

For a third party laboratory to be accredited to test children's products for conformity with the Commission's small parts regulations, it must be accredited by an ILAC–MRA signatory accrediting body and the accreditation must be registered with, and accepted by, the Commission. A listing of ILAC–MRA signatory accrediting bodies is available on the Internet at *http://ilac.org/membersbycategory.html.* The accreditation must be to ISO Standard ISO/IEC 17025:2005—General Requirements for the Competence of Testing and Calibration Laboratories and the scope of the accreditation must expressly include testing to the regulations of 16 CFR part 1501. A true copy in English of the accreditation and scope documents demonstrating compliance with these requirements must be registered with the Commission electronically. The additional requirements for accreditation of firewalled and governmental laboratories are described below in sections I.B and I.C.

The Commission will maintain on its web site an up-to-date listing of laboratories whose accreditations it has accepted and the scope of each accreditation. Subject to the limited provisions for acceptance of ''retrospective'' testing performed by other than firewalled laboratories noted in section III below, once the Commission adds a laboratory to that list, the laboratory may commence testing of children's products to support certification by the manufacturer or private labeler of compliance with the small parts regulations.

B. Additional Accreditation Requirements for Firewalled Laboratories

In addition to the baseline accreditation requirements in section I.A, firewalled laboratories seeking accredited status must submit to the Commission for review copies in English of their training documents showing how employees are trained to notify the Commission immediately and confidentially of any attempt by the manufacturer, private labeler or other interested party to hide or exert undue influence over the laboratory's test results. This additional requirement applies to any laboratory in which a manufacturer or private labeler of a children's product to be tested by the laboratory owns a ten percent or more interest. While the Commission is not addressing common parentage of a lab and a children's product manufacturer at this time, it will be vigilant to see if this issue needs to be dealt with in the future.

The Commission must formally accept, by order, the accreditation application of a laboratory before the laboratory can become an accredited firewalled laboratory.

C. Additional Accreditation Requirements for Governmental Laboratories

In addition to the baseline accreditation requirements of section I.A, CPSIA permits accreditation of a laboratory owned or controlled in whole or in part by a government if:

- To the extent practicable, manufacturers or private labelers located in any nation are permitted to choose laboratories that are not owned or controlled by the government of that nation;
- The laboratory's testing results are not subject to undue influence by any other person, including another governmental entity;
- The laboratory is not accorded more favorable treatment than other laboratories in the same nation who have been accredited;
- The laboratory's testing results are accorded no greater weight by other governmental authorities than those of other accredited laboratories; and
- The laboratory does not exercise undue influence over other governmental authorities on matters affecting its operations or on decisions by other governmental authorities controlling distribution of products

[4] CPSA § 14(a)(3)(G) as added by § 102(a)(2) of CPSIA exempts publication of this notice from the rulemaking requirements of the Administrative Procedure Act, 5 U.S.C. 553, and from the Regulatory Flexibility Act, 5 U.S.C. 601–612.

[5] A description of the history and content of the ILAC–MRA approach and of the requirements of the ISO 17025:2005 laboratory accreditation standard is provided in the CPSC staff briefing memorandum *Third Party Conformity Assessment Body Accreditation Requirements for Testing Compliance with 16 CFR Part 1501 (Small Parts Regulation), November 2008,* available on the CPSC Web site at *http://www.cpsc.gov/library/foia/foia09/brief/smallparts.pdf.*

based on outcomes of the laboratory's conformity assessments.

The Commission will accept the accreditation of a governmental laboratory if it meets the baseline accreditation requirements of section I.A and meets the conditions stated here. To obtain this assurance, CPSC staff will engage the governmental entities relevant to the accreditation request.

II. How Does a Laboratory Apply for Acceptance of Its Accreditation?

The Commission has established an electronic accreditation acceptance and registration system accessed via the Commission's Internet site at *http://www.cpsc.gov/businfo/labaccred.html.* The applicant provides, in English, basic identifying information concerning its location, the type of accreditation it is seeking, and electronic copies of its ILAC–MRA accreditation certificate and scope statement and firewalled laboratory training document(s), if relevant. Commission staff reviews that submission for accuracy and completeness. In the case of baseline third party laboratory accreditation and accreditation of governmental laboratories, when that review and any necessary discussions with the applicant are satisfactorily completed, the laboratory in question is added to the CPSC listing of accredited laboratories at *http://www.cpsc.gov/businfo/labaccred.html.* In the case of a firewalled laboratory seeking accredited status, when the review is complete, the staff transmits its recommendation on accreditation to the Commission for consideration.[6] If the Commission accepts a staff recommendation to accredit a firewalled laboratory, that laboratory will then be added to the CPSC list of accredited laboratories. In each case, the Commission will electronically notify the laboratory of acceptance of its accreditation. All information to support an accreditation acceptance request must be provided in the English language.

Subject to the limited provisions for acceptance of ''retrospective'' testing performed by other than accredited firewalled laboratories noted in section III. below, once the Commission adds a laboratory to the list, the laboratory may then commence testing of children's products to support certification of compliance with the small parts regulations by the manufacturer or private labeler.

III. Limited Acceptance of Children's Product Certifications Based on Third Party Laboratory Testing Prior to Commission Acceptance of Accreditation

The Commission will accept a certificate of compliance with the small parts requirements based on testing performed by an accredited third party or governmental laboratory on or after May 16, 2008 (90 days prior to August 14, 2008, the date on which CPSIA was enacted) and thus prior to the Commission's acceptance of the laboratory's accreditation if:

- The laboratory was ISO/IEC 17025 accredited by an C–MRA member at the time of the test;
- The accreditation scope in effect for the laboratory at that time expressly included testing to 16 CFR part 1501;
- The laboratory's accreditation application is accepted by the Commission under the procedures of this notice not later than January 20, 2009; and
- The laboratory's accreditation and inclusion of the small parts requirements in its scope remains in effect through the effective date for mandatory third party testing and manufacturer/private labeler certification for small parts.

Testing performed by a firewalled laboratory prior to Commission acceptance of its accreditation cannot be used as the basis for certification by a manufacturer or private labeler with a 10 percent or greater ownership interest in the laboratory pursuant to CPSA § 14(a)(3)(B)(ii) of compliance with the small parts regulations.

Dated: November 12, 2008.

Todd A. Stevenson,

Secretary, Consumer Product Safety Commission.

[FR Doc. E8–27236 Filed 11–14–08; 8:45 am]

BILLING CODE 6355–01–P

[6] A laboratory that may ultimately seek acceptance as a firewalled laboratory could initially request acceptance as a third party laboratory accredited for testing of children's products other than those of its owners.

DEPARTMENT OF DEFENSE

Office of the Secretary of Defense

Establishment of Department of Defense Federal Advisory Committees

AGENCY: Department of Defense.

ACTION: Notice; Establishment of Federal Advisory Committee.

SUMMARY: Under the provisions of section 1082 of Public Law 110–181, the Federal Advisory Committee Act of 1972, (5 U.S.C. Appendix, as amended), the Sunshine in the Government Act of 1976 (5 U.S.C. 552b, as amended), and 41 CFR 102–3.65, the Department of Defense gives notice that it is establishing the Advisory Panel on Department of Defense Capabilities for Support of Civil Authorities After Certain Incidents (hereafter referred to as the Panel).

The Panel is a non-discretionary federal advisory committee established under the authority of section 1082 of Public Law 110–181 and 41 CFR 102–3.50(a) to carry out an assessment of the capabilities of the Department of Defense to provide support to U.S. civil authorities in the event of a chemical, biological, radiological, nuclear, or high-yield explosive incident.

The Advisory Panel on Department of Defense Capabilities for Support of Civil Authorities After Certain Incidents is required by statute to submit a report within 12 months of its findings and recommendations. The report will be submitted to the Secretary of Defense and the Committees on Armed Services on the Senate and the House of Representatives.

The Advisory Panel on Department of Defense Capabilities for Support of Civil Authorities After Certain Incidents shall be composed of a chairperson and no more than nineteen additional members who have expertise in the legal, operational, and organizational aspects of the management of the consequences of a chemical, biological, radiological, nuclear, or high-yield explosive incident.

Panel members appointed by the Secretary of Defense, who are not full-time or permanent part-time employees of the federal government, shall be appointed as experts and consultants under the authority of 5 U.S.C. 3109 and, with the exception of travel and per diem for official travel, they shall serve without compensation. These experts and consultants shall serve as special government employees.

The Department of Defense intends to authorize the Advisory Panel on Department of Defense Capabilities for Support of Civil Authorities After Certain Incidents to establish and use subcommittees, and the Panel, to include any subcommittees, will operate under the provisions of the Federal Advisory Committee Act of 1972, the Sunshine in the Government Act of 1976 (5 U.S.C. 552b, as amended), and 41 CFR, Parts 102–3 through 102–3.185.

Such subcommittees or workgroups shall not work independently of the chartered Panel, and shall report all their recommendations and advice to the Panel for full deliberation and discussion. Subcommittees or workgroups have no authority to make

decisions on behalf of the chartered Panel nor can they report directly to the Department of Defense or any federal officers or employees who are not Panel Members.

FOR FURTHER INFORMATION CONTACT: Jim Freeman, Deputy Committee Management Officer for the Department of Defense, 703–601–6128.

SUPPLEMENTARY INFORMATION: The Panel shall meet at the call of the Panel's Designated Federal Officer, in consultation with the Panel's chairperson. The Designated Federal Officer, pursuant to DoD policy, shall be a full-time or permanent part-time DoD employee, and shall be appointed in accordance with established DoD policies and procedures. The Designated Federal Officer or duly appointed Alternate Designated Federal Officer shall attend all committee meetings and subcommittee meetings.

Pursuant to 41 CFR 102–3.105(j) and 102–3.140, the public or interested organizations may submit written statements to the Advisory Panel on Department of Defense Capabilities for Support of Civil Authorities After Certain Incidents membership about the Panel's mission and functions. Written statements may be submitted at any time or in response to the stated agenda of planned meeting of the Advisory Panel on Department of Defense Capabilities for Support of Civil Authorities After Certain Incidents.

All written statements shall be submitted to the Designated Federal Officer for the Advisory Panel on Department of Defense Capabilities for Support of Civil Authorities After Certain Incidents, and this individual will ensure that the written statements are provided to the membership for their consideration. Contact information for the Advisory Panel on Department of Defense Capabilities for Support of Civil Authorities After Certain Incidents' Designated Federal Officer, once appointed, may be obtained from the GSA's FACA Database—*https://www.fido.gov/facadatabase/public.asp.*

The Designated Federal Officer, pursuant to 41 CFR 102–3.150, will announce planned meetings of the Advisory Panel on Department of Defense Capabilities for Support of Civil Authorities After Certain Incidents. The Designated Federal Officer, at that time, may provide additional guidance on the submission of written statements that are in response to the stated agenda for the planned meeting in question.

Dated: November 7, 2008.

Patricia L. Toppings,

OSD Federal Register Liaison Officer, Department of Defense.

[FR Doc. E8–27193 Filed 11–14–08; 8:45 am]

BILLING CODE 5001–06–P

DEPARTMENT OF DEFENSE

Office of the Secretary

U.S. Nuclear Command and Control System Comprehensive Review Advisory Committee

AGENCY: Department of Defense.

ACTION: Notice of meeting.

SUMMARY: Under the provisions of the Federal Advisory Committee Act of 1972 (5 U.S.C., Appendix, as amended), the Government in the Sunshine Act of 1976 (5 U.S.C. paragraph 552b, as amended), and 41 CFR paragraph 102–3.150, the Department of Defense announces the following Federal Advisory Committee meetings of the U.S. Nuclear Command and Control System Comprehensive Review Advisory Committee will take place.

DATES: December 3, 2008 (0830–1630), and December 4, 2008 (0830–1700).

ADDRESSES: Pentagon Conference Center.

FOR FURTHER INFORMATION CONTACT: Mr. William L. Jones, (703) 681–8681, U.S. Nuclear Command and Control System Support Staff (NSS), Skyline 3, 5201 Leesburg Pike, Suite 500, Falls Church, Virginia 22041.

SUPPLEMENTARY INFORMATION:

Purposes of the Meetings: For the Federal Advisory Committee to be provided reports of the findings and recommendations of each of its twelve Research Groups.

AGENDA

Time	Topic	Presenter
December 3, 2008—Pentagon Conference Center		
8:30 a.m.	Administrative Remarks	CAPT Budney, USN (NSS).
8:45 a.m.	Physical and Personnel Security.	
9:45 a.m.	Recapture/Recovery.	
10:45 a.m.	Break.	
11 a.m.	Accident/Incident Response.	
12 p.m.	Lunch.	
1 p.m.	Warhead and Stockpile Management.	
2 p.m.	Information Assurance.	
3:15 p.m.	Break.	
3:30 p.m.	Weapons Delivery.	
4:30 p.m.	Adjourn.	
December 4, 2008—Pentagon Conference Center		
8:30 a.m.	Administrative Remarks	CAPT Budney, USN (NSS).
8:45 a.m.	Force Planning.	
9:45 a.m.	Force Management and Direction.	
10:45 a.m.	Break.	
11 a.m.	Situational Awareness/ITW/AA.	
12 p.m.	Lunch.	
1 p.m.	Communications.	
2 p.m.	Threat/Intelligence.	
3:15 p.m.	Break.	
3:30 p.m.	Crisis Support (closed session).	
4:30 p.m.	Executive Session—Final Report Outline	Dr. Weinstein.

AGENDA—Continued

Time	Topic	Presenter
5 p.m.	Adjourn.	

Pursuant to 5 U.S.C. paragraph 552b, as amended, and 41 CFR paragraph 102–3.155, the Department of Defense has determined that the meeting shall be closed to the public. The Director, U.S. Nuclear Command and Control System Support Staff, in consultation with his General Counsel, has determined in writing that the public interest requires that all sessions of the committee's meeting will be closed to the public because they will be concerned with classified information and matters covered by section 5 U.S.C. paragraph 552b(c)(1).

Committee's Designated Federal Officer: Mr. William L. Jones, (703) 681–8681, U.S. Nuclear Command and Control System Support Staff (NSS), Skyline 3, 5201 Leesburg Pike, Suite 500, Falls Church, Virginia 22041. *William.jones@nss.pentagon.mil.*

Pursuant to 41 CFR paragraphs 102–3.105(j) and 102–3.140, and section 10(a)(3) of the Federal Advisory Committee Act of 1972, the public or interested organizations may submit written statements at any time to the Nuclear Command and Control System Federal Advisory Committee about its mission and functions. All written statements shall be submitted to the Designated Federal Officer for the Nuclear Command and Control System Federal Advisory Committee. He will ensure that written statements are provided to the membership for their consideration. Written statements may also be submitted in response to the stated agenda of planned committee meetings. Statements submitted in response to this notice must be received by the Designated Federal Officer at least five calendar days prior to the meeting which is the subject of this notice. Written statements received after that date may not be provided or considered by the Committee until its next meeting. All submissions provided before that date will be presented to the committee members before the meeting that is subject of this notice. Contact information for the Designated Federal Officer is listed above.

Dated: November 7, 2008.

Patricia L. Toppings,

OSD Federal Register Liaison Officer, Department of Defense.

[FR Doc. E8–27198 Filed 11–14–08; 8:45 am]

BILLING CODE 5001–06–P

DEPARTMENT OF DEFENSE

Office of the Secretary of Defense

Renewal of Department of Defense Federal Advisory Committees

AGENCY: Department of Defense.

ACTION: Notice; Renewal of Federal Advisory Committee.

SUMMARY: Under the provisions of the Federal Advisory Committee Act of 1972, (5 U.S.C. Appendix, as amended), the Government in the Sunshine Act of 1976 (5 U.S.C. 552b, as amended), and 41 CFR 102–3.65, the Department of Defense gives notice that it is renewing the charter for the Defense Health Board (hereafter referred to as the Board).

The Board is a discretionary federal advisory committee established by the Secretary of Defense to provide the Department of Defense provide the Secretary of Defense, through the Assistant Secretary of Defense for Health Affairs and the Under Secretary of Defense for Personnel and Readiness, independent advice and recommendations on matters pertaining to operational programs, policy development, and research programs and requirements for the treatment and prevention of disease and injury, the promotion of health and the delivery of efficient, effective, and high quality health care services to Department of Defense beneficiaries.

The Board shall be composed of not more than thirty members, who are eminent authorities within their respective disciplines related to clinical health care, disease and injury prevention, and health care delivery and administration. The Secretary of Defense, unless otherwise directed by statute, shall approve the appointment of all Board Members and Subcommittee Members, to include regular government employees.

Board Members and Subcommittee Members, who are not full-time or permanent part-time federal officers or employees, shall be appointed as experts and consultants under the authority of 5 U.S.C. 3109, and serve as special government employees.

The appointment of Board Members and Subcommittee Members, unless otherwise directed by statute, shall be reviewed on an annual basis by the Secretary of Defense, and no Board Member or Subcommittee Member shall serve more than four years on the Board. Board Members and Subcommittee Members, unless otherwise directed by statute or as determined by the Secretary of Defense, shall, with the exception of travel and per diem for official travel, serve without compensation.

The Secretary of Defense may appoint regular government officers or employees as Board Members or Subcommittee Members depending upon the individual's qualification or position within the Department of Defense. Regular government employees, who serve on the Board due to their position within the Department of Defense, shall be exempt from annual renewal as long as the Secretary of Defense continues the ex officio status of that position on the Board.

The Secretary of Defense, based upon the recommendations of the Under Secretary of Defense for Personnel and Readiness or designated representatives, shall appoint the President of the Board from the Board membership. The Under Secretary of Defense for Personnel and Readiness, prior to his recommendation, may consult the Board membership. No Board Member shall serve more than two consecutive 2-year terms of service as Board President.

Regular government officers or employees who participate in the Department of Defense's decision making process for this Board are prohibited from serving as Board Members or Subcommittee Members.

The Board shall be authorized to establish subcommittees, as necessary and consistent with its mission, and these subcommittees or working groups shall operate under the provisions of the Federal Advisory Committee Act of 1972, the Government in the Sunshine Act of 1976, and other appropriate federal regulations.

Such subcommittees or workgroups shall not work independently of the chartered Defense Health Board, and shall report all their recommendations and advice to the Board for full deliberation and discussion. Subcommittees or workgroups have no authority to make decisions on behalf of the chartered Board nor can they report directly to the Department of Defense or any federal officers or employees who are not Board members.

FOR FURTHER INFORMATION CONTACT: Jim Freeman, Deputy Committee Management Officer for the Department of Defense, 703–601–6128.

SUPPLEMENTARY INFORMATION: The Board shall meet at the call of the Board's Designated Federal Officer, in consultation with the Board's chairperson. The Designated Federal Officer, pursuant to DoD policy, shall be a full-time or permanent part-time DoD employee, and shall be appointed in accordance with established DoD policies and procedures. The Designated Federal Officer or duly appointed Alternate Designated Federal Officer shall attend all committee meetings and subcommittee meetings.

Pursuant to 41 CFR 102–3.105(j) and 102–3.140, the public or interested organizations may submit written statements to the Defense Health Board membership about the Board's mission and functions. Written statements may be submitted at any time or in response to the stated agenda of planned meeting of the Defense Health Board.

All written statements shall be submitted to the Designated Federal Officer for the Defense Health Board, and this individual will ensure that the written statements are provided to the membership for their consideration. Contact information for the Defense Health Board's Designated Federal Officer can be obtained from the GSA's FACA Database—*https://www.fido.gov/facadatabase/public.asp.*

The Designated Federal Officer, pursuant to 41 CFR 102–3.150, will announce planned meetings of the Defense Health Board. The Designated Federal Officer, at that time, may provide additional guidance on the submission of written statements that are in response to the stated agenda for the planned meeting in question.

Dated: November 7, 2008.

Patricia L. Toppings,

OSD Federal Register Liaison Officer, Department of Defense.

[FR Doc. E8–27197 Filed 11–14–08; 8:45 am]

BILLING CODE 5001–06–P

DEPARTMENT OF DEFENSE

Department of the Air Force

[Docket ID USAF–2008–0035]

Privacy Act of 1974; System of Records

AGENCY: Department of the Air Force, DoD.

ACTION: Notice to Alter a System of Records Notice.

SUMMARY: The Department of the Air Force proposes to alter a system of records notice to its inventory of records systems subject to the Privacy Act of 1974 (5 U.S.C. 552a), as amended.

DATES: The actions will be effective on December 17, 2008 unless comments are received that would result in a contrary determination.

ADDRESSES: Send comments to the Air Force Privacy Act Officer, Office of Warfighting Integration and Chief Information Officer, SAF/XCPPI, 1800 Air Force Pentagon, Washington, DC 20330–1800.

FOR FURTHER INFORMATION CONTACT: Mr. Kenneth Brodie at (703) 696–7557.

SUPPLEMENTARY INFORMATION: The Department of the Air Force's record system notices for records systems subject to the Privacy Act of 1974 (5 U.S.C. 552a), as amended, have been published in the **Federal Register** and are available from the address above.

The proposed system report, as required by 5 U.S.C. 522a(r) of the Privacy Act of 1974, as amended, was submitted on November 7, 2008, to the House Committee on Oversight and Government Reform, the Senate Committee on Homeland Security and Governmental Affairs, and the Office of Management and Budget (OMB) pursuant to paragraph 4c of Appendix I to OMB Circular No. A–130, ''Federal Agency Responsibilities for Maintaining Records About Individuals,'' dated February 8, 1996 (February 20, 1996, 61 FR 6427).

Dated: November 7, 2008.

Patricia L. Toppings,

OSD Federal Register Liaison Officer, Department of Defense.

F051 AF JA C

SYSTEM NAME:

Legal Assistance Administration (June 11, 1997, 62 FR 31793).

* * * * *

CHANGES:

* * * * *

SYSTEM LOCATION:

Delete entry and replace with ''The Judge Advocate General, Headquarters United States Air Force, 1420 Air Force Pentagon, Washington, DC 20330–1420. At Headquarters of major commands and at all levels down to and including Air Force installations.

Official mailing addresses are published as an appendix to the Air Force's compilation of record systems notices.''

* * * * *

CATEGORIES OF RECORDS IN THE SYSTEM:

Delete entry and replace with ''Individual's name, Social Security Number (SSN), financial records, personnel files, leases, tax documents, personal letters and documents, and all other information necessary to provide advice and assistance to personnel seeking legal assistance.''

AUTHORITY FOR MAINTENANCE OF THE SYSTEM:

Delete entry and replace with ''10 U.S.C. 8013, Secretary of the Air Force; 10 U.S.C. 8037, Judge Advocate General, Deputy Judge Advocate General: Appointment and duties; Air Force Instruction 51–504, Legal Assistance, Notary, and Preventive Law Programs; and E.O. 9397(SSN).''

PURPOSE(S):

Delete entry and replace with ''Records are used and maintained to provide continuing legal assistance to clients; by Department of Defense employees to complete their official duties; to manage the legal assistance program; and used to assist the client with personal legal issues.''

* * * * *

STORAGE:

Delete entry and replace with ''Paper records in file folders and electronic storage media.''

* * * * *

SAFEGUARDS:

Delete entry and replace with ''Records are accessed by person(s) responsible for servicing the record system in performance of their official duties and by authorized personnel who are properly screened and cleared for need-to-know. Records are stored in locked rooms and cabinets. Those in computer storage devices are protected by computer system software. Computers must be accessed with a password.''

* * * * *

SYSTEM MANAGER(S) AND ADDRESS:

Delete entry and replace with ''The Judge Advocate General, Headquarters, United States Air Force, 1420 Air Force Pentagon, Washington, DC 20330–1420.''

NOTIFICATION PROCEDURE:

Delete entry and replace with ''Individuals seeking to determine whether this system of records contains information on themselves should address written inquiries to The Judge Advocate General, Headquarters United States Air Force, 1420 Air Force Pentagon, Washington, DC 20330–1420.

Requests should include name and Social Security Number (SSN).''

RECORD ACCESS PROCEDURES:

Delete entry and replace with ''Individuals seeking to access records about themselves contained in this system should address written requests to The Judge Advocate General, Headquarters United States Air Force, 1420 Air Force Pentagon, Washington, DC 20330–1420.

Requests should include name and Social Security Number (SSN).''

* * * * *

RECORD SOURCE CATEGORIES:

Delete entry and replace with ''From the individual.''

* * * * *

F051 AF JA C

SYSTEM NAME:

Legal Assistance Administration Records.

SYSTEM LOCATION:

The Judge Advocate General, Headquarters United States Air Force, 1420 Air Force Pentagon, Washington, DC 20330–1420–1420. At Headquarters of major commands and at all levels down to and including Air Force installations.

Official mailing addresses are published as an appendix to the Air Force's compilation of record systems notices.

CATEGORIES OF INDIVIDUALS COVERED BY THE SYSTEM:

Active duty and retired military personnel, and their dependents and Air Force civilian personnel stationed overseas.

CATEGORIES OF RECORDS IN THE SYSTEM:

Individual's name, Social Security Number (SSN), financial records, personnel files, leases, tax documents, personal letters and documents, and all other information necessary to provide advice and assistance to personnel seeking legal assistance.

AUTHORITY FOR MAINTENANCE OF THE SYSTEM:

10 U.S.C. 8013, Secretary of the Air Force; 10 U.S.C. 8037, Judge Advocate General, Deputy Judge Advocate General: Appointment and duties; Air Force Instruction 51–504, Legal Assistance, Notary, and Preventive law Programs; and E.O. 9397(SSN).

PURPOSE(S):

Records are used and maintained to provide continuing legal assistance to clients; by Department of Defense employees to complete their official duties; to manage the legal assistance program; and used to assist the client with personal legal issues.

ROUTINE USES OF RECORDS MAINTAINED IN THE SYSTEM, INCLUDING CATEGORIES OF USERS AND THE PURPOSES OF SUCH USES:

In addition to those disclosures generally permitted under 5 U.S.C. 552a(b) of the Privacy Act, these records or information contained therein may specifically be disclosed outside the DoD as a routine use pursuant to 5 U.S.C. 552a(b)(3) as follows:

The ''Blanket Routine Uses'' published at the beginning of the Air Force's compilation of systems of records notices apply to this system.

POLICIES AND PRACTICES FOR STORING, RETRIEVING, ACCESSING, RETAINING, AND DISPOSING OF RECORDS IN THE SYSTEM:

STORAGE:

Paper records in file folders and electronic storage media.

RETRIEVABILITY:

Retrieved by name or Social Security Number (SSN).

SAFEGUARDS:

Records are accessed by person(s) responsible for servicing the record system in performance of their official duties and by authorized personnel who are properly screened and cleared for need-to-know. Records are stored in locked rooms and cabinets. Those in computer storage devices are protected by computer system software. Computers must be accessed with a password.

RETENTION AND DISPOSAL:

Retained in office files until superseded, obsolete, no longer needed for reference, or on inactivation, then destroyed by tearing into pieces, shredding, pulping, macerating, or burning. Computer records are destroyed by erasing, deleting or overwriting.

SYSTEM MANAGER(S) AND ADDRESS:

The Judge Advocate General, Headquarters, United States Air Force, 1420 Air Force Pentagon, Washington, DC 20330–1420.

NOTIFICATION PROCEDURE:

Individuals seeking to determine whether this system of records contains information on themselves should address written inquiries to The Judge Advocate General, Headquarters United States Air Force, 1420 Air Force Pentagon, Washington, DC 20330–1420.

Requests should include name and Social Security Number (SSN).

RECORD ACCESS PROCEDURES:

Individuals seeking to access records about themselves contained in this system should address written requests to The Judge Advocate General, Headquarters United States Air Force, 1420 Air Force Pentagon, Washington, DC 20330–1420.

Requests should include name and Social Security Number (SSN).

CONTESTING RECORD PROCEDURES:

The Air Force rules for accessing records, and for contesting contents and appealing initial agency determinations are published in Air Force Instruction 37–132; 32 CFR 806b; or may be obtained from the system manager.

RECORD SOURCE CATEGORIES:

From the individual.

EXEMPTIONS CLAIMED FOR THE SYSTEM:

None.

[FR Doc. E8–27199 Filed 11–14–08; 8:45 am]

BILLING CODE 5001–06–P

DEPARTMENT OF DEFENSE

Department of the Army

Performance Review Board Membership

AGENCY: Department of the Army, DoD.

ACTION: Notice.

SUMMARY: Notice is given of the names of members of a Performance Review Board for the Department of the Army.

DATES: *Effective Date:* November 10, 2008.

FOR FURTHER INFORMATION CONTACT: Constance Ray, Civilian Senior Leader Management Office, 140 Army Pentagon, Washington, DC 20310–0140.

SUPPLEMENTARY INFORMATION: Section 4314(c)(1) through (5) of Title 5, U.S.C., requires each agency to establish, in accordance with regulations, one or more Senior Executive Service performance review boards. The boards shall review and evaluate the initial appraisal of senior executives' performance by supervisors and make recommendations to the appointing authority or rating official relative to the performance of these executives.

The members of the Department of the Army Performance Review Boards are:

1. Mr. Stephen Bagby, Deputy Assistant Secretary of the Army (Cost and Economics), Office of the Assistant Secretary of the Army (Financial Management and Comptroller).

2. Ms. Anita Bales, Deputy Auditor General for Forces and Financial Audits, Army Audit Agency.

3. Ms. Stephanie Barna, Deputy General Counsel (Operations and Personnel), Office of the General Counsel.

4. Ms. Grace Bochenek, Director, U.S. Army Tank-Automotive RDE Center, U.S. Army Materiel Command.
5. Major General Thomas Bostick, Commanding General, United States Army Recruiting Command.
6. Dr. Todd S. Bridges, Senior Research Scientist (Environmental), U.S. Army Engineering Research and Development Center.
7. Mr. Kirby Brown, Deputy to the Commanding General, Fires Center of Excellence/Director, Capabilities, Development and Integration, U.S. Army Training and Doctrine Command.
8. Dr. Kwong Kit Choi, Senior Research Scientist for Physical Sciences, U. S. Army Research Laboratory.
9. Mr. Ronald Chronister, Deputy to the Commander, U.S. Army Materiel Command.
10. Dr. Craig College, Deputy, Deputy Assistant Chief of Staff for Installation Management, Office of the Assistant Chief of Staff for Installation Management.
11. Mr. Ronald Davis, Deputy Chief for Business Transformation, U.S. Army Materiel Command.
12. Brigadier General Genero Dellarocco, Program Executive Officer for Missiles and Space, Office of the Assistant Secretary of the Army (Acquisition, Logistics, Technology).
13. Dr. Michael Drillings, Director for MANPRINT, Office of the Deputy Chief of Staff, G–1.
14. Mr. George Dunlop, Principal Deputy Assistant Secretary of the Army (Civil Works)/Deputy Assistant Secretary of the Army (Legislation), Office of the Assistant Secretary of the Army (Civil Works).
15. Mr. John Dugan, Deputy to the Commander, U.S. Army Tank Automotive & Armaments Command, U.S. Army Materiel Command.
16. Mr. James Engle, Managing Director, Defense Armaments, Communications-Electronics, and Investments Division, U.S. North Atlantic Treaty Organization.
17. Dr. Henry O. Everitt, III, Senior Research Scientist (Optical Sciences), U.S. Army Research, Development and Engineering Command.
18. Mr. Michael Etzinger, Director of Test Management, U.S. Army Developmental Test Command.
19. Mr. James Faust, Assistant Deputy Chief of Staff, G–2, Office of the Deputy Chief of Staff, G–2.
20. Ms. Sarah Finnicum, Director for Supply Policy, Program and Processes, Office of the Deputy Chief of Staff, G–4.
21. Mr. Peter Fisher, Technical Advisor Foreign Intelligence Production, Office of the Deputy Chief of Staff, G–2.
22. Mr. Patrick Fitzgerald, The Auditor General, Army Audit Agency.
23. Mr. Kevin Flamm, Program Manager, Assembled Chemical Weapons Alternatives, U.S. Army Materiel Command.
24. Brigadier General Jeffrey Foley, Commanding General, U.S. Army Signal Center and Fort Gordon.
25. Dr. Richard Fong, Senior Research Scientist (Warheads Technology), U. S. Army Armament Research Development and Engineering Center.
26. Ms. Patricia Fraser, Director, Resource Integration, Office of the Deputy Chief of Staff, G–2.
27. Ms. Janet Garber, Director, Test and Evaluation Management Agency, Office of the Deputy Under Secretary of the Army.
28. Dr. Grant R. Gerhart, Senior Research Scientist (Computer Modeling & Simulation), U. S. Army Tank Automotive Research Command.
29. Ms. Teresa Gerton, Deputy Chief of Staff for Resource Management, U.S. Army Materiel Command.
30. Mr. Troy Gilleland, Jr., Assistant Deputy Chief of Staff, G–1, U.S. Army Forces Command.
31. Mr. John Glen, Principal Assistant for Research and Technology, U.S. Army Medical Command.
32. Dr. Claire C. Gordon, Senior Research Scientist (Biological Anthropology), Research, Development & Engineering Command.
33. Mr. Brent Green, Deputy General Counsel (Ethics and Fiscal), Office of the General Counsel.
34. Ms. Judith Guenther, Director of Investment, Office of the Assistant Secretary of the Army (Financial Management and Comptroller).
35. Mr. Ernie Gurany, Senior General Military Intelligence Analyst, National Ground Intelligence Center.
36. Mr. Jerry Hansen, Deputy Assistant Secretary of the Army (Strategic Infrastructure), Office of the Assistant Secretary of the Army (Installations and Environment).
37. Ms. Barbara Heffernan, Director of Resource Integration, Office of the Assistant Chief of Staff for Installation Management.
38. Mr. Randy Hoag, Director, Defense Plans Division, U.S. North Atlantic Treaty Organization.
39. Mr. Edward Horton, Director of Logistics and Stationing Management, U.S. Army Installation Management Command.
40. Mr. James Johnson, Executive Director, U.S. Army Developmental Test Command.
41. Dr. Nola Johnson, Deputy to the Commanding General, Maneuver Support/Director, Capabilities Development and Integration, U.S. Army Training and Doctrine Command.
42. Dr. Shashi P. Karna, Senior Research Scientist (NanoFunctional Materials), U.S. Army Research Laboratory.
43. Mr. Thomas E. Kelly III, Deputy Under Secretary of the Army, Office of the Under Secretary of the Army, Office of the Secretary of the Army.
44. Mr. Thomas Killion, Deputy Assistant Secretary for Research and Technology/Chief Scientist, Office of the Assistant Secretary of the Army (Acquisition, Logistics, and Technology).
45. Mr. Darell Lance, Chief of Staff, Headquarters, U.S. Army Intelligence and Security Command.
46. Dr. Tomasz R. Letowski, Senior Research Scientist (Soldier Performance), U. S. Army Research Laboratory.
47. Mr. Mark R. Lewis, Assistant Deputy Chief of Staff for Operations, Office of the Deputy Chief of Staff, G–3/5/7.
48. LTG James Lovelace, Commanding General, Third Army/United States Army Central.
49. Dr. James W. McCauley, Senior Research Engineer (Ceramic Materials), U.S. Army Research Laboratory.
50. Dr. Robert W. McMillan, Senior Research Scientist (Research Applications), U.S. Army Space and Missiles Defense Command.
51. Mr. Gary P. Martin, Director, U.S. Army Communication-Electronics Research, Development and Engineering Center, U.S. Army Research, Development and Engineering Command.
52. Mr. Joseph Mizzoni, Deputy Auditor General for Acquisition and Logistics Audits, Army Audit Agency.
53. Mr. William Moore, Deputy to the Commanding General, U.S. Army Combined Arms Support, U.S. Army Training and Doctrine Command.
54. Mr. Daniel Morris, Special Assistant to the Commander, National Ground Intelligence Center.
55. Ms. Joyce Morrow, Administrative Assistant to the Secretary of the Army, Office of the Administrative Assistant to the Secretary of the Army, Office of the Secretary of the Army.
56. Major General James R. Myles, Commanding General, U.S. Army Aviation and Missile Command, U.S. Army Materiel Command.
57. Major General Roger Nadeau, Commanding General, Army Test and Evaluation Command.
58. Mr. John Nerger, Executive Director, Installation Management Command, Assistant Chief of Staff for Installation Management.

59. Mr. Robert Parise, Command Counsel, U.S. Army Materiel Command.
60. Dr. John Parmentola, Director for Research and Laboratory Management, Office of the Assistant Secretary of the Army (Acquisition, Logistics, and Technology).
61. Mr. Dean Pfoltzer, Deputy Director Program Analysis and Evaluation, Office of the Deputy Chief of Staff, G–8.
62. Mr. Benjamin Piccolo, Principal Deputy Auditor General, Army Audit Agency.
63. Ms. Tracey Pinson, Director of Small and Disadvantaged Business Utilization, Office of the Secretary of the Army.
64. Mr. Dean G. Popps, Principal Deputy Assistant Secretary of the Army (Acquisition, Logistics and Technology)/Director for Iraq Reconstruction and Program Management), Office of the Assistant Secretary of the Army (Acquisition, Logistics and Technology).
65. Mr. Geoffrey G. Prosch, Principal Deputy Assistant Secretary of the Army (Installations, Logistics & Environment), Office of the Assistant Secretary of the Army (Installations and Environment).
66. Major General Fred D. Robinson, Commanding General, U.S. Army Research Development and Engineering Command, U.S. Army Materiel Command.
67. Mr. Mark Rocke, Deputy Assistant Secretary (Strategic Communications and Business Transformation), Office of the Assistant Secretary of the Army (Acquisition, Logistics, and Technology).
68. Mr. Michael Ryan, Director, European Security and Defense Policy Advisor/Defense Advisor, U.S. North Atlantic Treaty Organization.
69. Ms. Connie Schmaljohn, Senior Research Scientist (Medical Defenses Against Infectious Disease Threats, U.S. Army Materiel Command.
70. Mr. Craig Schmauder, Deputy General Counsel (Civil Works and Environment), Office of the General Counsel.
71. Ms. Lynn Schnurr, Director, Army Intelligence Community Information Management, Deputy Chief of Staff, G–2.
72. Mr. Thomas Schoenbeck, Director, Enterprise Support, U.S. Southern Command.
73. Dr. Paul H. Shen, Senior Research Scientist (Nuclear/Electronics Survivability, U. S. Army Research Laboratory.
74. Mr. Gordon Spencer, Chief Scientist, U.S. Army National Ground Intelligence Center, U.S. Army Intelligence and Security Command.
75. Mr. Lewis Steenrod, Director of Modernization, Office of the Deputy Chief of Staff, G–8.
76. Mr. Steven Stockton, Deputy Director, Civil Works, U.S. Army Corps of Engineers.
77. Dr. Brian R. Strickland, Chief Scientist (Directed Energy Applications), U. S. Army Space and Missile Defense Command.
78. Mr. Larry Stubblefield, Deputy Administrative Assistant to the Secretary of the Army/Director, Shared Services, Office of the Administrative Assistant to the Secretary of the Army.
79. Dr. Mark Swinson, Chief Scientist, U.S. Army Space and Missile Defense Command.
80. Major General Merdith W. B. Temple, Deputy Commanding General for Civil and Emergency Operation, U.S. Army Corps of Engineers.
81. Mr. Edward Thomas, Deputy to the Commanding General/Director of Logistics and Readiness Center, U.S. Army Communications-Electronics Life Cycle Management Command, U.S. Army Materiel Command.
82. Mr. Lee Thompson, Executive Director for Logistics Civil Augmentation Program, U.S. Army Materiel Command.
83. Lieutenant General N. Ross Thompson, Military Deputy, Assistant Secretary of the Army (Acquisition, Logistics and Technology), Office of the Assistant Secretary of the Army (Acquisition, Logistics and Technology).
84. Ms. Belinda Tiner, Deputy Auditor General, Policy and Operations Management, Army Audit Agency.
85. Dr. Mark B. Tischler, Senior Research Scientist (Rotorcraft Flight Dynamics and Control), U. S. Army Research, Development and Engineering Command.
86. Mr. J. Joseph Tyler, Director of Military Programs, U.S. Army Corps of Engineers.
87. Mr. Edgar Vandiver, III, Director, U.S. Army Center for Army Analysis.
88. Mr. Roy Wallace, Director, Plans and Resources, Office of the Deputy Chief of Staff, G–1.
89. Mr. Steven Wetzel, Deputy Director, Strategy and Policy, U.S. Southern Command.
90. Mr. Jeffrey White, Director, Human Capital Strategy/Deputy to the Deputy Under Secretary of the Army.
91. Mr. Conrad Whyne, Director, U.S. Army Chemical Materials Agency, U.S. Army Materiel Command.
92. Mr. Gary Winkler, Director for Enterprise Management, Office of the Chief Information Officer/G–6,
93. Dr. Thomas W. Wright, Senior Research Scientist (Terminal Ballistics), U. S. Army Research Laboratory.
94. Ms. Debra Wymer, Director, Technical Integration and Interoperability for Space and Missile Defense, U.S. Army Space and Missile Defense Command.

Brenda S. Bowen,

Army Federal Register Liaison Officer.

[FR Doc. E8–27175 Filed 11–14–08; 8:45 am]

BILLING CODE 3710–08–P

DEPARTMENT OF DEFENSE

Department of the Army

Surplus Properties; Notice

AGENCY: Department of the Army, DoD.

ACTION: Notice.

SUMMARY: This amended notice provides information regarding the properties that have been determined surplus to the United States needs in accordance with the Defense Base Closure and Realignment Act of 1990, Public Law No. 101–510, as amended, and the 2005 Base Closure and Realignment Commission Report, as approved, and following screening with Federal agencies and Department of Defense components. This Notice amends the Notice published in the **Federal Register** on May 9, 2006 (71 FR 26930).

DATES: Effective November 14, 2008, by adding the following surplus properties.

FOR FURTHER INFORMATION CONTACT: Headquarters, Department of the Army, Assistant Chief of Staff for Installation Management, Base Realignment and Closure (BRAC) Division, Attn: DAIM-BD, 600 Army Pentagon, Washington DC 20310–0600, (703) 601–2418. For information regarding a specific property listed below, by state, contact the Army BRAC Division at the mailing address above or at *ArmyBRAC2005@hqda.army.mil.*

SUPPLEMENTARY INFORMATION: Under the provisions of the Federal Property and Administrative Services Act of 1949, as amended, the Defense Base Closure and Realignment Act of 1990, as amended, and other public benefit conveyance authorities, this surplus property may be available for conveyance to State and local governments and other eligible entities for public benefit purposes. Notices of interest from representatives of the homeless, and other interested parties located in the vicinity of any listed surplus property should be submitted to the recognized Local Redevelopment Authority (LRA). The properties are listed by state. Additional information for these or any Army BRAC 2005 surplus property may be

found at *http://www.hqda.army.mil/acsimweb/brac/braco.htm.*

Surplus Property List

1. Addition

Indiana

Newport Chemical Depot: Highway 63, Newport, IN. 47966–0160. The Army's Base Transition Coordinator is Mr. Tom Kutz whose e-mail address is *Thomas.kutz@us.army.mil* and his telephone number is (765) 245 4505. His mailing address is Newport Chemical Depot, P.O. Box 160, Newport, IN 47966–0160. The Vermillion County Economic Council has been recognized as the Local Redevelopment Authority (LRA). The LRA is located at 292 North Ninth Street, Clinton, IN 47842. Mr. Ed Cole can be reached for information by calling (765) 832–3870.

Oregon

Umatilla Chemical Depot: 78798 Ordinance Road, Hermiston, OR 97838. The Army's Base Transition Coordinator is Mr. Phillip M. Ferguson whose telephone number is (541) 564–5390 and his e-mail address is *phillip.m.ferguson@us.army.mil.* The Umatilla County Commissioners have been recognized as the Local Redevelopment Authority (LRA). Correspondence to the LRA should be directed to Mr. William Hansell, Executive Director, Umatilla County Commissioners, Umatilla County Courthouse, 216 SE 4th, Pendleton, OR 97801.

Authority: This action is authorized by the Defense Base Closure and Realignment Act of 1990, Title XXIX of the National Defense Authorization Act for Fiscal Year 1991, Pub. L. No. 101–510; the Base Closure Community Redevelopment and Homeless Assistance Act of 1994, Pub. L. No. 103–421; and 10 U.S.C. 113.

Brenda S. Bowen,

Army Federal Register Liaison Officer.

[FR Doc. E8–27174 Filed 11–14–08; 8:45 am]

BILLING CODE 3710–08–P

DEPARTMENT OF DEFENSE

Department of the Army, Corps of Engineers

Intent To Prepare a Draft Environmental Impact Statement for the Proposed Gray's Beach Restoration Project, Waikiki, O'ahu, HI, Department of the Army Regulatory File Number POH–2007–192

AGENCY: Department of the Army, U.S. Army Corps of Engineers, DOD.

ACTION: Notice of Intent.

SUMMARY: In order to establish a stable, sandy beach seaward of the Sheraton Waikiki Hotel, its owners propose to construct three T-head groins extending seaward from the existing seawall which defines the hotel property boundary. They propose to pump sand from nearby marine deposits and place it between the groins to form a protected beach. The proposed project site, which is within the State of Hawai'i Conservation District, would remain state-owned. The project site is located within the navigable waters of the United States and the proposed activity is subject to the regulatory jurisdiction of the U.S. Army Corps of Engineers.

DATES: In order to be considered in preparation of the DEIS, comments and suggestions should be received no later than 30 days after publication of this notice in the **Federal Register**.

ADDRESSES: Send written comments to U.S. Army Corps of Engineers, Honolulu District; ATTN: Regulatory Branch (CEPOH–EC–R/P. Galloway), Building 230; Fort Shafter, HI 96858–5440. Facsimile comments can be sent to 808–438–4060. Comments may also be submitted via e-mail to: *peter.c.galloway@usace.army.mil.*

FOR FURTHER INFORMATION CONTACT: Questions about the proposed action and the Draft Environmental Impact Statement (DEIS) should be addressed to: Mr. Peter Galloway (see **ADDRESSES**), Telephone 808–438–8416.

SUPPLEMENTARY INFORMATION: Kyo-ya Hotels & Resorts LP, which owns the Sheraton Waikiki Hotel (Sheraton) and the adjacent Royal Hawaiian Hotel, proposes to develop a stable sandy beach on the abutting inshore reef flat fronting the Sheraton in order to enhance recreational and aesthetic enjoyment of the area, provide protection for the backshore area, and facilitate lateral access along the shoreline. The Sheraton is presently protected by a vertical seawall, constructed at the hotel's seaward property line, which has been in place since the 1920s. There is presently very little beach area fronting the Sheraton, which was constructed close to the seaward property line, making the area one of the most constrained in Waikiki with respect to public alongshore (lateral) access. The narrow band of sand fronting the Sheraton seawall comes and goes, and is typically under water at high tide. The site of the proposed project is owned by the State of Hawai'i and is designated State of Hawai'i Conservation District land.

To create the desired beach, the applicant proposes to construct three un-grouted, basalt-rock T-head groins that would span 500 feet of shoreline. The stems of the T-head groins would extend 160 feet seaward into the inshore area from the existing seawall, and the T-heads would extend 53 feet to either side of each stem, at angles ranging from 90 to 120 degrees. The angle of each T-head will be established so as to best orient the gaps between the heads parallel to the average wave approach. Approximately 15,000 cubic yards of sand would be pumped from nearby offshore deposits and placed between and adjacent to the T-head groins to create sections of protected beach. The total area of the permanent rock and sand fill in waters of the U.S. would be approximately 2.7 acres. The total area of dry beach (sand area above the high tide line) created would be approximately 1 acre. In order to provide access for construction of the groins, the applicant proposes to construct temporary sections of rock platform, approximately 20 feet in width, along the seaward side of the existing vertical concrete seawall.

The proposed project would involve work or structures in or affecting the course, condition, location or capacity of navigable waters of the United States. In addition, it would involve the discharge of dredged or fill material into navigable waters of the United States. Federal authorization of the project will therefore require issuance of a Department of the Army (DA) permit pursuant to both Section 10 of the Rivers and Harbors Act of 1899 (33 U.S.C. 403) and Section 404 of the Clean Water Act (33 U.S.C. 1344).

In addition to the no-action alternative, other alternatives to be considered in the DEIS may include: (1) Project with different size and/or number of T-head groins, or other structural designs; (2) project with groin structures but no sand fill; and (3) sand placement and replenishment with no stabilizing structures.

Potentially significant impacts identified to date and to be addressed in the DEIS include: (1) Conversion of an inshore reef area to a structurally protected sandy beach; (2) loss of foraging habitat (algae beds) utilized by federally protected sea turtles; (3) changes in adjacent algal community; (4) changes in inshore water circulation pattern including water residence time; (5) other, unforeseen changes in adjacent reef habitat; (6) effects of sand removal from seaward marine deposits; (7) effects on surfing and wave reflection; (8) changes in availability of recreation and recreational facilities; (9) changes in beach and shoreline access and use; (10) setting of precedent for use of T-head groins in Hawai'i; (11) setting

of precedent for privately funded beach restoration or creation on adjacent public conservation lands.

The decision whether to issue a DA permit will be based on an evaluation of the probable impacts, including cumulative impacts, of the proposed activity on the public interest. That decision will reflect the national concern for both protection and utilization of important resources. The benefit, which reasonably may be expected to accrue from the proposal, must be balanced against its reasonably foreseeable detriments. All factors which may be relevant to the proposal will be considered, including the cumulative effects thereof: among these are conservation, economics, aesthetics, general environmental concerns, wetlands, historic values, fish and wildlife values, flood hazards, floodplain values, land use, navigation, shoreline erosion and accretion, recreation, water supply and conservation, water quality, energy needs, safety, food and fiber production, mineral needs, considerations of property ownership and, in general, the needs and welfare of the people. Evaluation of the impact of the activity on the public interest will include application of the guidelines promulgated by the Administrator, Environmental Protection Agency (40 CFR part 230).

The Corps will invite the National Marine Fisheries Service and U.S. Fish and Wildlife Service to be cooperating agencies in preparation of the DEIS. The Corps anticipates that consultations will be required pursuant to provisions of the Magnuson-Stevens Fishery Conservation and Management Act, Section 7 of the Endangered Species Act, and Section 106 of the National Historic Preservation Act. Before a final DA permit can be issued, the applicant must first obtain a Hawai'i Coastal Zone Management (CZM) Program federal consistency certification issued by the State of Hawai'i Department of Business, Economic Development and Tourism, and a Clean Water Act Section 401 Water Quality Certification, or waiver thereof, issued by the State of Hawai'i Department of Health.

The Corps invites participation in the EIS process of affected federal, state and local agencies; affected Hawaiian organizations, individuals and practitioners; and other interested private organizations and parties. The applicant has issued a state-level EIS Preparation Notice (EISPN) pursuant to requirements of the Hawai'i Revised Statutes (HRS Chapter 343) stating that the applicant anticipates preparation of a joint state and federal EIS document. All comments received in response to this NOI and the state EISPN will be considered when determining the scope of the combined DEIS. To the extent practicable, federal and state requirements will be coordinated in the preparation of the joint document.

A public scoping meeting will be held on Wednesday, December 17, 2008, at the Waikiki Community Center, 310 Paoakalani Avenue, Honolulu, Hawaii, from 6:30 p.m. until 8:30 p.m., to help determine the scope of analysis of the proposed action. The scoping meeting will also be announced in local media. Interested parties are encouraged to express their views during the scoping process and throughout the development of alternatives and the joint DEIS. To be most helpful, comments should clearly describe specific environmental topics or issues which the commenter believes the document should address. Further information concerning the proposed or the scoping meeting may be obtained from Peter C. Galloway (see **ADDRESSES**). The DEIS is expected to be published and circulated for review in mid-2009, and the final EIS is expected to be completed 4 to 6 months later.

Dated: November 7, 2008.

John W. Henderson,

Major, U.S. Army, Acting Commander.

[FR Doc. E8–27176 Filed 11–14–08; 8:45 am]

BILLING CODE 3720–58–P

DEFENSE NUCLEAR FACILITIES SAFETY BOARD

Sunshine Act Meeting Postponed

AGENCY: Defense Nuclear Facilities Safety Board.

ACTION: Notice of Public Meeting Postponement.

SUMMARY: The Defense Nuclear Facilities Safety Board (Board) published a document in the **Federal Register** of November 5, 2008, (73 FR 65838), as corrected, concerning notice of a public hearing and meeting on December 5, 2008, with regard to the Department of Energy's (DOE) and National Nuclear Security Administration's incorporation of safety into the design and construction of new DOE defense nuclear facilities and into major modification of existing facilities. That public hearing and meeting has been postponed. The Board intends to reschedule the hearing and meeting and will publish a notice of the rescheduled date in the **Federal Register** when that date has been determined.

FOR FURTHER INFORMATION CONTACT: Brian Grosner, General Manager, Defense Nuclear Facilities Safety Board, 625 Indiana Avenue, NW., Suite 700, Washington, DC 20004–2901, (800) 788–4016. This is a toll-free number.

Dated: November 12, 2008.

A. J. Eggenberger,

Chairman.

[FR Doc. E8–27300 Filed 11–13–08; 11:15 am]

BILLING CODE 3670–01–P

DEPARTMENT OF EDUCATION

Office of Special Education and Rehabilitative Services; Overview Information: Rehabilitation Training: Rehabilitation Long-Term Training—Comprehensive System of Personnel Development Notice Inviting Applications for New Awards for Fiscal Year (FY) 2009

Catalog of Federal Domestic Assistance (CFDA) Number: 84.129W.

DATES: *Applications Available:* November 17, 2008.

Deadline for Transmittal of Applications: January 15, 2009.

Deadline for Intergovernmental Review: March 2, 2009.

Full Text of Announcement

I. Funding Opportunity Description

Purpose of Program: The Rehabilitation Long-Term Training program provides financial assistance for—

(1) Projects that provide basic or advanced training leading to an academic degree in areas of personnel shortages in rehabilitation as identified by the Secretary;

(2) Projects that provide a specified series of courses or program of study leading to the award of a certificate in areas of personnel shortages in rehabilitation as identified by the Secretary; and

(3) Projects that provide support for medical residents enrolled in residency training programs in the specialty of physical medicine and rehabilitation.

Priority: This priority is from the notice of final priority for this program, published in the **Federal Register** on October 16, 1998 (63 FR 55764).

Absolute Priority: For FY 2009, this priority is an absolute priority. Under 34 CFR 75.105(c)(3) we consider only applications that meet this priority.

This priority is:

Comprehensive System of Personnel Development.

Projects must—

(1) Provide training to currently employed vocational rehabilitation (VR)

counselors, including VR counselors with disabilities and VR counselors representing ethnic minorities, that leads to an academic degree or academic certificate, and can be used to meet the designated State unit (DSU) personnel standards required under section 101(a)(7) of the Rehabilitation Act of 1973, as amended, commonly referred to as the Comprehensive System of Personnel Development (CSPD);

(2) Provide the training that is required to meet the qualifications for the academic degrees and academic certificates specified in the CSPD plans of the States with which the project will be working; and

(3) Develop innovative approaches (*e.g.*, distance learning, competency-based programs) to maximize participation in, and improve the effectiveness of, project training.

The regulations in 34 CFR 386.31(b) require that a minimum of 75 percent of project funds be used to support student scholarships and stipends. The regulations also provide that the Secretary may waive this requirement under certain circumstances, *e.g.*, when a new training program is established.

Program Authority: 29 U.S.C. 772.

Applicable Regulations: (a) The Education Department General Administrative Regulations (EDGAR) in 34 CFR parts 74, 75, 77, 79, 80, 81, 82, 84, 85, 86, and 99. (b) The regulations for this program in 34 CFR parts 385 and 386. (c) The notice of final priority published in the **Federal Register** on October 16, 1998 (63 FR 55764).

Note: The regulations in 34 CFR part 79 apply to all applicants except Federally recognized Indian tribes.

Note: The regulations in 34 CFR part 86 apply to institutions of higher education only.

II. Award Information

Type of Award: Discretionary grants.

Estimated Available Funds: The Administration has requested $37,766,000 for the Rehabilitation Training program for FY 2009, of which we intend to use an estimated $1,153,571 for this competition. The actual level of funding, if any, depends on final congressional action. However, we are inviting applications to allow enough time to complete the grant process if Congress appropriates funds for this program.

Estimated Range of Awards: $175,000–$200,000.

Estimated Average Size of Awards: $190,000

Maximum Award: We will reject any application that proposes a budget exceeding $200,000 for a single budget period of 12 months. The Assistant Secretary for Special Education and Rehabilitative Services may change the maximum amount through a notice published in the **Federal Register**.

Estimated Number of Awards: 6.

Note: The Department is not bound by any estimates in this notice.

Project Period: Up to 60 months.

III. Eligibility Information

1. *Eligible Applicants:* States and public or nonprofit agencies and organizations, including Indian tribes and institutions of higher education.

2. *Cost Sharing or Matching:* Cost sharing of at least 10 percent of the total cost of the project is required of grantees under the Rehabilitation Training: Rehabilitation Long-Term Training program (34 CFR 386.30).

Note: Under 34 CFR 75.562(c), an indirect cost reimbursement on a training grant is limited to the recipient's actual indirect costs, as determined by its negotiated indirect cost rate agreement, or eight percent of a modified total direct cost base, whichever amount is less. The eight percent limit does not apply to agencies of State or local governments, including Federally recognized Indian tribal governments, as defined in 34 CFR 80.3. Indirect costs in excess of the eight percent limit may not be charged directly, used to satisfy matching or cost-sharing requirements, or charged to another Federal award.

IV. Application and Submission Information

1. *Address to Request Application Package:* You can obtain an application package via the Internet or from the Education Publications Center (ED Pubs). To obtain a copy via the Internet, use the following address: *http://www.ed.gov/fund/grant/apply/grantaps/index.html.* To obtain a copy from ED Pubs, write, fax, or call the following: Education Publications Center, P.O. Box 1398, Jessup, MD 20794–1398. Telephone, toll free: 1–877–433–7827. FAX: (301) 470–1244. If you use a telecommunications device for the deaf (TDD), call, toll free: 1–877–576–7734.

You can contact ED Pubs at its Web site, also: *http://www.ed.gov/pubs/edpubs.html* or at its e-mail address: *edpubs@inet.ed.gov.*

If you request an application from ED Pubs, be sure to identify this competition as follows: CFDA number 84.129W.

Individuals with disabilities can obtain a copy of the application package in an accessible format (*e.g.*, braille, large print, audiotape, or computer diskette) by contacting the person or team listed under Accessible *Format* in section VIII of this notice.

2. *Content and Form of Application Submission:* Requirements concerning the content of an application, together with the forms you must submit, are in the application package for this competition.

Page Limit: The application narrative (Part III of the application) is where you, the applicant, address the selection criteria that reviewers use to evaluate your application. You must limit the application narrative (Part III) to the equivalent of no more than 45 pages, using the following standards:

- A ''page'' is 8.5″ x 11″, on one side only, with 1″ margins at the top, bottom, and both sides.
- Double space (no more than three lines per vertical inch) all text in the application narrative, including titles, headings, footnotes, quotations, references, and captions, as well as all text in charts, tables, figures, and graphs.
- Use a font that is either 12 point or larger or no smaller than 10 pitch (character per inch).
- Use one of the following fonts: Times New Roman, Courier, Courier New, or Arial. An application submitted in any other font (including Times Roman or Arial Narrow) will not be accepted.

The page limit does not apply to Part I, the cover sheet; Part II, the budget section, including the narrative budget justification; Part IV, the assurances and certifications; or the one-page abstract, the resumes, the bibliography, or the letters of support. However, the page limit does apply to all of the application narrative section (Part III).

We will reject your application if you exceed the page limit or if you apply other standards and exceed the equivalent of the page limit.

3. *Submission Dates and Times: Applications Available:* November 17, 2008. *Deadline for Transmittal of Applications:* January 15, 2009.

Applications for grants under this competition must be submitted electronically using the Grant.gov Apply site (Grants.gov). For information (including dates and times) about how to submit your application electronically, or in paper format by mail or hand delivery if you qualify for an exception to the electronic submission requirement, please refer to section IV. 6. *Other Submission Requirements* in this notice.

We do not consider an application that does not comply with the deadline requirements.

Individuals with disabilities who need an accommodation or auxiliary aid in connection with the application process should contact the person listed

under **FOR FURTHER INFORMATION CONTACT** in section VII in this notice. If the Department provides an accommodation or auxiliary aid to an individual with a disability in connection with the application process, the individual's application remains subject to all other requirements and limitations in this notice.

Deadline for Intergovernmental Review: March 2, 2009.

4. *Intergovernmental Review:* This competition is subject to Executive Order 12372 and the regulations in 34 CFR part 79. Information about Intergovernmental Review of Federal Programs under Executive Order 12372 is in the application package for this competition.

5. *Funding Restrictions:* We reference regulations outlining funding restrictions in the Applicable Regulations section in this notice.

6. *Other Submission Requirements:* Applications for grants under this competition must be submitted electronically unless you qualify for an exception to this requirement in accordance with the instructions in this section.

a. *Electronic Submission of Applications.*

Applications for grants under the Rehabilitation Training: Rehabilitation Long-Term Training—Comprehensive System of Personnel Development competition, CFDA Number 84.129W, must be submitted electronically using the Governmentwide Grants.gov Apply site at *http://www.Grants.gov.* Through this site, you will be able to download a copy of the application package, complete it offline, and then upload and submit your application. You may not e-mail an electronic copy of a grant application to us.

We will reject your application if you submit it in paper format unless, as described elsewhere in this section, you qualify for one of the exceptions to the electronic submission requirement *and* submit, no later than two weeks before the application deadline date, a written statement to the Department that you qualify for one of these exceptions. Further information regarding calculation of the date that is two weeks before the application deadline date is provided later in this section under *Exception to Electronic Submission Requirement.*

You may access the electronic grant application for the Rehabilitation Training: Rehabilitation Long-Term Training—Comprehensive System of Personnel Development program at *http://www.Grants.gov.* You must search for the downloadable application package for this competition by the CFDA number. Do not include the CFDA number's alpha suffix in your search (*e.g.*, search for 84.129, not 84.129W).

Please note the following:

- When you enter the Grants.gov site, you will find information about submitting an application electronically through the site, as well as the hours of operation.
- Applications received by Grants.gov are date and time stamped. Your application must be fully uploaded and submitted and must be date and time stamped by the Grants.gov system no later than 4:30:00 p.m., Washington, DC time, on the application deadline date. Except as otherwise noted in this section, we will not accept your application if it is received—that is, date and time stamped by the Grants.gov system—after 4:30:00 p.m., Washington, DC time, on the application deadline date. We do not consider an application that does not comply with the deadline requirements. When we retrieve your application from Grants.gov, we will notify you if we are rejecting your application because it was date and time stamped by the Grants.gov system after 4:30:00 p.m., Washington, DC time, on the application deadline date.
- The amount of time it can take to upload an application will vary depending on a variety of factors, including the size of the application and the speed of your Internet connection. Therefore, we strongly recommend that you do not wait until the application deadline date to begin the submission process through Grants.gov.
- You should review and follow the Education Submission Procedures for submitting an application through Grants.gov that are included in the application package for this competition to ensure that you submit your application in a timely manner to the Grants.gov system. You can also find the Education Submission Procedures pertaining to Grants.gov at *http://e-Grants.ed.gov/help/GrantsgovSubmissionProcedures.pdf.*
- To submit your application via Grants.gov, you must complete all steps in the Grants.gov registration process (see *http://www.grants.gov/applicants/get_registered.jsp*). These steps include (1) registering your organization, a multi-part process that includes registration with the Central Contractor Registry (CCR); (2) registering yourself as an Authorized Organization Representative (AOR); and (3) getting authorized as an AOR by your organization. Details on these steps are outlined in the Grants.gov 3-Step Registration Guide (see *http://www.grants.gov/section910/Grants.govRegistrationBrochure.pdf*). You also must provide on your application the same D–U–N–S Number used with this registration. Please note that the registration process may take five or more business days to complete, and you must have completed all registration steps to allow you to submit successfully an application via Grants.gov. In addition you will need to update your CCR registration on an annual basis. This may take three or more business days to complete.
- You will not receive additional point value because you submit your application in electronic format, nor will we penalize you if you qualify for an exception to the electronic submission requirement, as described elsewhere in this section, and submit your application in paper format.
- You must submit all documents electronically, including all information you typically provide on the following forms: Application for Federal Assistance (SF 424), the Department of Education Supplemental Information for SF 424, Budget Information—Non-Construction Programs (ED 524), and all necessary assurances and certifications. Please note that two of these forms—the SF 424 and the Department of Education Supplemental Information for SF 424—have replaced the ED 424 (Application for Federal Education Assistance).
- You must attach any narrative sections of your application as files in a .DOC (document), .RTF (rich text), or .PDF (Portable Document) format. If you upload a file type other than the three file types specified in this paragraph or submit a password-protected file, we will not review that material.
- Your electronic application must comply with any page-limit requirements described in this notice.
- After you electronically submit your application, you will receive from Grants.gov an automatic notification of receipt that contains a Grants.gov tracking number. (This notification indicates receipt by Grants.gov only, not receipt by the Department.) The Department then will retrieve your application from Grants.gov and send a second notification to you by e-mail. This second notification indicates that the Department has received your application and has assigned your application a PR/Award number (an ED-specified identifying number unique to your application).
- We may request that you provide us original signatures on forms at a later date.

Application Deadline Date Extension in Case of Technical Issues with the Grants.gov System: If you are

experiencing problems submitting your application through Grants.gov, please contact the Grants.gov Support Desk, toll free, at 1–800–518–4726. You must obtain a Grants.gov Support Desk Case Number and must keep a record of it.

If you are prevented from electronically submitting your application on the application deadline date because of technical problems with the Grants.gov system, we will grant you an extension until 4:30:00 p.m., Washington, DC time, the following business day to enable you to transmit your application electronically or by hand delivery. You also may mail your application by following the mailing instructions described elsewhere in this notice.

If you submit an application after 4:30:00 p.m., Washington, DC time, on the application deadline date, please contact the person listed under **FOR FURTHER INFORMATION CONTACT** in section VII in this notice and provide an explanation of the technical problem you experienced with Grants.gov, along with the Grants.gov Support Desk Case Number. We will accept your application if we can confirm that a technical problem occurred with the Grants.gov system and that that problem affected your ability to submit your application by 4:30:00 p.m., Washington, DC time, on the application deadline date. The Department will contact you after a determination is made on whether your application will be accepted.

Note: The extensions to which we refer in this section apply only to the unavailability of, or technical problems with, the Grants.gov system. We will not grant you an extension if you failed to fully register to submit your application to Grants.gov before the application deadline date and time or if the technical problem you experienced is unrelated to the Grants.gov system.

Exception to Electronic Submission Requirement: You qualify for an exception to the electronic submission requirement, and may submit your application in paper format, if you are unable to submit an application through the Grants.gov system because—

- You do not have access to the Internet; or
- You do not have the capacity to upload large documents to the Grants.gov system; *and*
- No later than two weeks before the application deadline date (14 calendar days or, if the fourteenth calendar day before the application deadline date falls on a Federal holiday, the next business day following the Federal holiday), you mail or fax a written statement to the Department, explaining which of the two grounds for an exception prevent you from using the Internet to submit your application.

If you mail your written statement to the Department, it must be postmarked no later than two weeks before the application deadline date. If you fax your written statement to the Department, we must receive the faxed statement no later than two weeks before the application deadline date.

Address and mail or fax your statement to: Beverly Steburg, U.S. Department of Education, 400 Maryland Avenue, SW., room 5049, Potomac Center Plaza (PCP), Washington, DC 20202–2800. FAX: (202) 245–7591.

Your paper application must be submitted in accordance with the mail or hand delivery instructions described in this notice.

b. *Submission of Paper Applications by Mail.*

If you qualify for an exception to the electronic submission requirement, you may mail (through the U.S. Postal Service or a commercial carrier) your application to the Department. You must mail the original and two copies of your application, on or before the application deadline date, to the Department at the applicable following address: U.S. Department of Education, Application Control Center, Attention: (CFDA Number 84.129W) LBJ Basement Level 1, 400 Maryland Avenue, SW., Washington, DC 20202–4260.

You must show proof of mailing consisting of one of the following:

(1) A legibly dated U.S. Postal Service postmark.

(2) A legible mail receipt with the date of mailing stamped by the U.S. Postal Service.

(3) A dated shipping label, invoice, or receipt from a commercial carrier.

(4) Any other proof of mailing acceptable to the Secretary of the U.S. Department of Education.

If you mail your application through the U.S. Postal Service, we do not accept either of the following as proof of mailing:

(1) A private metered postmark.

(2) A mail receipt that is not dated by the U.S. Postal Service.

If your application is postmarked after the application deadline date, we will not consider your application.

Note: The U.S. Postal Service does not uniformly provide a dated postmark. Before relying on this method, you should check with your local post office.

c. *Submission of Paper Applications by Hand Delivery.*

If you qualify for an exception to the electronic submission requirement, you (or a courier service) may deliver your paper application to the Department by hand. You must deliver the original and two copies of your application by hand, on or before the application deadline date, to the Department at the following address: U.S. Department of Education, Application Control Center, Attention: (CFDA Number 84.129W) 550 12th Street, SW., Room 7041, Potomac Center Plaza, Washington, DC 20202–4260.

The Application Control Center accepts hand deliveries daily between 8:00 a.m. and 4:30:00 p.m., Washington, DC time, except Saturdays, Sundays, and Federal holidays. *Note for Mail or Hand Delivery of Paper Applications:* If you mail or hand deliver your application to the Department—

(1) You must indicate on the envelope and—if not provided by the Department—in Item 11 of the SF 424 the CFDA number, including suffix letter, if any, of the competition under which you are submitting your application; and

(2) The Application Control Center will mail to you a notification of receipt of your grant application. If you do not receive this notification within 15 business days from the application deadline date, you should call the U.S. Department of Education Application Control Center at (202) 245–6288.

V. Application Review Information

Selection Criteria: The selection criteria for this competition are from 34 CFR 75.210 and 34 CFR 386.20 and are listed in the application package.

VI. Award Administration Information

1. *Award Notices:* If your application is successful, we notify your U.S. Representative and U.S. Senators and send you a Grant Award Notification (GAN). We may notify you informally, also.

If your application is not evaluated or not selected for funding, we notify you.

2. *Administrative and National Policy Requirements:* We identify administrative and national policy requirements in the application package and reference these and other requirements in the *Applicable Regulations* section of this notice.

We reference the regulations outlining the terms and conditions of an award in the *Applicable Regulations* section of this notice and include these and other specific conditions in the GAN. The GAN also incorporates your approved application as part of your binding commitments under the grant.

3. *Reporting:* At the end of your project period, you must submit a final performance report, including financial information, as directed by the Secretary. If you receive a multi-year award, you must submit an annual

performance report that provides the most current performance and financial expenditure information as directed by the Secretary under 34 CFR 75.118. The Secretary may also require more frequent performance reports under 34 CFR 75.720(c). For specific requirements on reporting, please go to *http://www.ed.gov/fund/grant/apply/appforms/appforms.html.*

4. *Performance Measures:* The Government Performance and Results Act (GPRA) of 1993 directs Federal departments and agencies to improve the effectiveness of programs by engaging in strategic planning, setting outcome-related goals for programs, and measuring program results against those goals.

The goal of the Rehabilitation Services Administration's (RSA) Rehabilitation Training: Rehabilitation Long-Term Training program is to increase the number of qualified VR personnel working in State VR agencies or related agencies. At least 75 percent of all grant funds must be used for direct payment of student scholarships. Each grantee is required to track students receiving scholarships and must maintain information on the cumulative support granted to RSA scholars, scholar-debt in years, program completion data for each scholar, dates each scholar's work begins and is completed to meet his or her payback agreement, current home address, and the place of employment of individual scholars.

Grantees are required to report annually to RSA on these data using the RSA Grantee Reporting Form, OMB# 1820–0617, an electronic reporting system. The RSA Grantee Reporting Form collects specific data including the number of RSA scholars entering the rehabilitation workforce, the rehabilitation field each scholar enters, and the type of employment setting each scholar chooses (*e.g.*, State agency, nonprofit service provider, or practice group). This form allows RSA to measure results against the goal of increasing the number of qualified VR personnel working in State VR agencies or related agencies.

VII. Agency Contact

For Further Information Contact: Beverly Steburg, U.S. Department of Education, Rehabilitation Services Administration, 400 Maryland Avenue, SW., room 5049, PCP, Washington, DC 20202–2800. Telephone: (202) 245–7607 or by e-mail: *Beverly.steburg@ed.gov.*

If you use TDD, call the Federal Relay Service (FRS), toll free, at 1–800–877–8339.

VIII. Other Information

Accessible Format: Individuals with disabilities can obtain this document and a copy of the application package in an accessible format (*e.g.*, braille, large print, audiotape, or computer diskette) by contacting the Grants and Contracts Service Team, U.S. Department of Education, 400 Maryland Avenue, SW., room 5075, PCP, Washington, DC 20202–2550. Telephone: (202) 245–7363. If you use a TDD, call the FRS, toll free, at 1–800–877–8339.

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.

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: November 10, 2008.

Tracy R. Justesen,

Assistant Secretary for Special Education and Rehabilitative Services.

[FR Doc. E8–27188 Filed 11–14–08; 8:45 am]

BILLING CODE 4000–01–P

DEPARTMENT OF EDUCATION

Office of Special Education and Rehabilitative Services Overview Information; Rehabilitation Training: Rehabilitation Long-Term Training—Rehabilitation Counseling; Notice Inviting Applications for New Awards for Fiscal Year (FY) 2009

Catalog of Federal Domestic Assistance (CFDA) Number: 84.129B.

DATES: *Applications Available:* November 17, 2008.

Deadline for Transmittal of Applications: January 15, 2009.

Deadline for Intergovernmental Review: March 2, 2009.

Full Text of Announcement

I. Funding Opportunity Description

Purpose of Program: The Rehabilitation Long-Term Training program provides financial assistance for—

(1) Projects that provide basic or advanced training leading to an academic degree in areas of personnel shortages in rehabilitation as identified by the Secretary;

(2) Projects that provide a specified series of courses or program of study leading to the award of a certificate in areas of personnel shortages in rehabilitation as identified by the Secretary; and

(3) Projects that provide support for medical residents enrolled in residency training programs in the specialty of physical medicine and rehabilitation.

Priorities: This priority contains one absolute priority and one invitational priority.

Absolute Priority: This priority is from the notice of final priority for this program, published in the **Federal Register** on January 15, 2003 (68 FR 2166).

For FY 2009, this priority is an absolute priority. Under 34 CFR 75.105(c)(3) we consider only applications that meet this priority.

This priority is:

Partnership with the State Vocational Rehabilitation Agency.

This priority supports projects that will increase the knowledge of students of the role and responsibilities of the vocational rehabilitation (VR) counselor and of the benefits of counseling in State VR agencies. This priority focuses attention on and intends to strengthen the unique role of rehabilitation educators and State VR agencies in the preparation of qualified VR counselors by increasing or creating ongoing collaboration between institutions of higher education and State VR agencies.

Projects funded under this priority must include within the degree program information about and experience in the State VR system. Projects must include partnering activities for students with the State VR agency including experimental activities such as formal internships or practicum agreements. In addition, experimental activities for students with community-based rehabilitation service providers are encouraged.

Projects must include an evaluation of the impact of project activities.

Within this absolute priority, we are particularly interested in applications that address the following invitational priority.

Invitational Priority: Under 34 CFR 75.105(c)(1) we do not give an application that meets this invitational priority a competitive or absolute preference over other applications.

This priority is:

Distance Learning.

We are especially interested in projects that include a distance learning component to enable non-traditional students and students from a broad geographic area to enroll in the training program. We establish this invitational priority in order to prepare more students for careers in State VR agencies.

Program Authority: 29 U.S.C. 772.

Applicable Regulations: (a) The Education Department General Administrative Regulations (EDGAR) in 34 CFR parts 74, 75, 77, 79, 80, 81, 82, 84, 85, 86, and 99.

(b) The regulations for this program in 34 CFR parts 385 and 386.

Note: The regulations in 34 CFR part 79 apply to all applicants except federally recognized Indian tribes.

Note: The regulations in 34 CFR part 86 apply to institutions of higher education only.

II. Award Information

Type of Award: Discretionary grants.

Estimated Available Funds: The Administration has requested $37,766,000 for the Rehabilitation Training program for FY 2009, of which we intend to use an estimated $3,450,000 for this Rehabilitation Counseling competition. The actual level of funding, if any, depends on final congressional action. However, we are inviting applications to allow enough time to complete the grant process if Congress appropriates funds for this program.

Estimated Range of Awards: $100,000–$150,000.

Estimated Average Size of Awards: $137,500.

Maximum Award: We will reject any application that proposes a budget exceeding $150,000 for a single budget period of 12 months. The Assistant Secretary for Special Education and Rehabilitative Services may change the maximum amount through a notice published in the **Federal Register**.

Estimated Number of Awards: 23.

Note: The Department is not bound by any estimates in this notice.

Project Period: Up to 60 months.

III. Eligibility Information

1. *Eligible Applicants:* States and public or nonprofit agencies and organizations, including Indian tribes and institutions of higher education.

2. *Cost Sharing or Matching:* Cost sharing of at least 10 percent of the total cost of the project is required of grantees under the Rehabilitation Training program (34 CFR 386.30).

Note: Under 34 CFR 75.562(c), an indirect cost reimbursement on a training grant is limited to the recipient's actual indirect costs, as determined by its negotiated indirect cost rate agreement, or eight percent of a modified total direct cost base, whichever amount is less. Indirect costs in excess of the eight percent limit may not be charged directly, used to satisfy matching or cost-sharing requirements, or charged to another Federal award.

IV. Application and Submission Information

1. *Address to Request Application Package:* You can obtain an application package via the Internet or from the Education Publications Center (ED Pubs). To obtain a copy via the Internet, use the following address: *http://www.ed.gov/fund/grant/apply/grantaps/index.html*. To obtain a copy from ED Pubs, write, fax, or call the following: Education Publications Center, P.O. Box 1398, Jessup, MD 20794–1398. Telephone (toll free): 1–877–433–7827. FAX: (301) 470–1244. If you use a telecommunications device for the deaf (TDD), call, toll free: 1–877–576–7734.

You can contact ED Pubs at its Web site, also: *http://www.ed.gov/pubs/edpubs.html* or at its e-mail address: *edpubs@inet.ed.gov*.

If you request an application from ED Pubs, be sure to identify this competition as follows: CFDA number 84.129 B.

Individuals with disabilities can obtain a copy of the application package in an alternative format (e.g., Braille, large print, audiotape, or computer diskette) by contacting the person or team listed under *Alternative Format* in section VIII of this notice.

2. *Content and Form of Application Submission:* Requirements concerning the content of an application, together with the forms you must submit, are in the application package for this competition.

Page Limit: The application narrative (Part III of the application) is where you, the applicant, address the selection criteria that reviewers use to evaluate your application. You must limit the application narrative (Part III) to the equivalent of no more than 45 pages, using the following standards:

- A ''page'' is 8.5″ x 11″, on one side only, with 1″ margins at the top, bottom, and both sides.
- Double space (no more than three lines per vertical inch) all text in the application narrative, including titles, headings, footnotes, quotations, references, and captions, as well as all text in charts, tables, figures, and graphs.
- Use a font that is either 12 point or larger or no smaller than 10 pitch (characters per inch).
- Use one of the following fonts: Times New Roman, Courier, Courier New, or Arial. An application submitted in any other font (including Times Roman or Arial Narrow) will not be accepted.

The page limit does not apply to Part I, the cover sheet; Part II, the budget section, including the narrative budget justification; Part IV, the assurances and certifications; or the one-page abstract, the resumes, the bibliography, or the letters of support. However, the page limit does apply to all of the application narrative section (Part III).

We will reject your application if you exceed the page limit; or if you apply other standards and exceed the equivalent of the page limit.

3. *Submission Dates and Times:*

Applications Available: November 17, 2008. Deadline for Transmittal of Applications: January 15, 2009.

Applications for grants under this competition must be submitted electronically using the Grants.gov Apply site (Grants.gov). For information (including dates and times) about how to submit your application electronically, or in paper format by mail or hand delivery if you qualify for an exception to the electronic submission requirement, please refer to section IV. 6. *Other Submission Requirements* in this notice.

We do not consider an application that does not comply with the deadline requirements.

Individuals with disabilities who need an accommodation or auxiliary aid in connection with the application process should contact the person listed under **FOR FURTHER INFORMATION CONTACT** in section VII in this notice. If the Department provides an accommodation or auxiliary aid to an individual with a disability in connection with the application process, the individual's application remains subject to all other requirements and limitations in this notice.

Deadline for Intergovernmental Review: March 2, 2009.

4. *Intergovernmental Review:* This competition is subject to Executive Order 12372 and the regulations in 34 CFR part 79. Information about Intergovernmental Review of Federal Programs under Executive Order 12372 is in the application package for this competition.

5. *Funding Restrictions:* We reference regulations outlining funding restrictions in the *Applicable Regulations* section of this notice.

6. *Other Submission Requirements:* Applications for grants under this

competition must be submitted electronically unless you qualify for an exception to this requirement in accordance with the instructions in this section.

a. *Electronic Submission of Applications.*

Applications for grants under the Rehabilitation Training: Rehabilitation Long-Term Training, CFDA number 84.129B must be submitted electronically using the Governmentwide Grants.gov Apply site at *http://www.Grants.gov*. Through this site, you will be able to download a copy of the application package, complete it offline, and then upload and submit your application. You may not e-mail an electronic copy of a grant application to us.

We will reject your application if you submit it in paper format unless, as described elsewhere in this section, you qualify for one of the exceptions to the electronic submission requirement and submit, no later than two weeks before the application deadline date, a written statement to the Department that you qualify for one of these exceptions. Further information regarding calculation of the date that is two weeks before the application deadline date is provided later in this section under *Exception to Electronic Submission Requirement*.

You may access the electronic grant application for the Rehabilitation Training: Rehabilitation Long-Term Training—Rehabilitation Counseling program at *http://www.Grants.gov*. You must search for the downloadable application package for this competition by the CFDA number. Do not include the CFDA number's alpha suffix in your search (e.g., search for 84.129, not 84.129B).

Please note the following:

- When you enter the Grants.gov site, you will find information about submitting an application electronically through the site, as well as the hours of operation.
- Applications received by Grants.gov are date and time stamped. Your application must be fullyploaded and submitted and must be date and time stamped by the Grants.gov system no later than 4:30:00 p.m., Washington, DC time, on the application deadline date. Except as otherwise noted in this section, we will not accept your application if it is received—that is, date and time stamped by the Grants.gov system—after 4:30:00 p.m., Washington, DC time, on the application deadline date. We do not consider an application that does not comply with the deadline requirements. When we retrieve your application from Grants.gov, we will notify you if we are rejecting your application because it was date and time stamped by the Grants.gov system after 4:30:00 p.m., Washington, DC time, on the application deadline date.
- The amount of time it can take to upload an application will vary depending on a variety of factors, including the size of the application and the speed of your Internet connection. Therefore, we strongly recommend that you do not wait until the application deadline date to begin the submission process through Grants.gov.
- You should review and follow the Education Submission Procedures for submitting an application through Grants.gov that are included in the application package for this competition to ensure that you submit your application in a timely manner to the Grants.gov system. You can also find the Education Submission Procedures pertaining to Grants.gov at *http://e-Grants.ed.gov/help/GrantsgovSubmissionProcedures.pdf*.
- To submit your application via Grants.gov, you must complete all steps in the Grants.gov registration process (see *http://www.grants.gov/applicants/get_registered.jsp*). These steps include (1) Registering your organization, a multi-part process that includes registration with the Central Contractor Registry (CCR); (2) registering yourself as an Authorized Organization Representative (AOR); and (3) getting authorized as an AOR by your organization. Details on these steps are outlined in the Grants.gov 3-Step Registration Guide (see *http://www.grants.gov/section910/Grants.govRegistrationBrochure.pdf*). You also must provide on your application the same D-U-N-S Number used with this registration. Please note that the registration process may take five or more business days to complete, and you must have completed all registration steps to allow you to submit successfully an application via Grants.gov. In addition you will need to update your CCR registration on an annual basis. This may take three or more business days to complete.
- You will not receive additional point value because you submit your application in electronic format, nor will we penalize you if you qualify for an exception to the electronic submission requirement, as described elsewhere in this section, and submit your application in paper format.
- You must submit all documents electronically, including all information you typically provide on the following forms: Application for Federal Assistance (SF 424), the Department of Education Supplemental Information for SF 424, Budget Information—Non-Construction Programs (ED 524), and all necessary assurances and certifications. Please note that two of these forms—the SF 424 and the Department of Education Supplemental Information for SF 424—have replaced the ED 424 (Application for Federal Education Assistance).
- You must attach any narrative sections of your application as files in a .DOC (document), .RTF (rich text), or .PDF (Portable Document) format. If you upload a file type other than the three file types specified in this paragraph or submit a password-protected file, we will not review that material.
- Your electronic application must comply with any page-limit requirements described in this notice.
- After you electronically submit your application, you will receive from Grants.gov an automatic notification of receipt that contains a Grants.gov tracking number. (This notification indicates receipt by Grants.gov only, not receipt by the Department.) The Department then will retrieve your application from Grants.gov and send a second notification to you by e-mail. This second notification indicates that the Department has received your application and has assigned your application a PR/Award number (an ED-specified identifying number unique to your application).
- We may request that you provide us original signatures on forms at a later date.

Application Deadline Date Extension in Case of Technical Issues with the Grants.gov System: If you are experiencing problems submitting your application through Grants.gov, please contact the Grants.gov Support Desk, toll free, at 1–800–518–4726. You must obtain a Grants.gov Support Desk Case Number and must keep a record of it.

If you are prevented from electronically submitting your application on the application deadline date because of technical problems with the Grants.gov system, we will grant you an extension until 4:30:00 p.m., Washington, DC time, the following business day to enable you to transmit your application electronically or by hand delivery. You also may mail your application by following the mailing instructions described elsewhere in this notice.

If you submit an application after 4:30:00 p.m., Washington, DC time, on the application deadline date, please contact the person listed under **FOR FURTHER INFORMATION CONTACT** in section VII in this notice and provide an explanation of the technical problem you experienced with Grants.gov, along with the Grants.gov Support Desk Case

Number. We will accept your application if we can confirm that a technical problem occurred with the Grants.gov system and that that problem affected your ability to submit your application by 4:30:00 p.m., Washington, DC time, on the application deadline date. The Department will contact you after a determination is made on whether your application will be accepted.

Note: The extensions to which we refer in this section apply only to the unavailability of, or technical problems with, the Grants.gov system. We will not grant you an extension if you failed to fully register to submit your application to Grants.gov before the application deadline date and time or if the technical problem you experienced is unrelated to the Grants.gov system.

Exception to Electronic Submission Requirement: You qualify for an exception to the electronic submission requirement, and may submit your application in paper format, if you are unable to submit an application through the Grants.gov system because—

- You do not have access to the Internet; or
- You do not have the capacity to upload large documents to the Grants.gov system;

and

- No later than two weeks before the application deadline date (14 calendar days or, if the fourteenth calendar day before the application deadline date falls on a Federal holiday, the next business day following the Federal holiday), you mail or fax a written statement to the Department, explaining which of the two grounds for an exception prevent you from using the Internet to submit your application.

If you mail your written statement to the Department, it must be postmarked no later than two weeks before the application deadline date. If you fax your written statement to the Department, we must receive the faxed statement no later than two weeks before the application deadline date.

Address and mail or fax your statement to: Edwin Powell, U.S. Department of Education, 400 Maryland Avenue, SW., room 5038, Potomac Center Plaza (PCP), Washington, DC 20202–2800. FAX: (202) 245–7591.

Your paper application must be submitted in accordance with the mail or hand delivery instructions described in this notice.

b. *Submission of Paper Applications by Mail.*

If you qualify for an exception to the electronic submission requirement, you may mail (through the U.S. Postal Service or a commercial carrier) your application to the Department. You must mail the original and two copies of your application, on or before the application deadline date, to the Department at the following address: U.S. Department of Education, Application Control Center, Attention: (CFDA Number 84.129B), LBJ Basement Level 1, 400 Maryland Avenue, SW., Washington, DC 20202–4260.

You must show proof of mailing consisting of one of the following:

(1) A legibly dated U.S. Postal Service postmark.

(2) A legible mail receipt with the date of mailing stamped by the U.S. Postal Service.

(3) A dated shipping label, invoice, or receipt from a commercial carrier.

(4) Any other proof of mailing acceptable to the Secretary of the U.S. Department of Education.

If you mail your application through the U.S. Postal Service, we do not accept either of the following as proof of mailing:

(1) A private metered postmark.

(2) A mail receipt that is not dated by the U.S. Postal Service.

If your application is postmarked after the application deadline date, we will not consider your application.

Note: The U.S. Postal Service does not uniformly provide a dated postmark. Before relying on this method, you should check with your local post office.

c. *Submission of Paper Applications by Hand Delivery.*

If you qualify for an exception to the electronic submission requirement, you (or a courier service) may deliver your paper application to the Department by hand. You must deliver the original and two copies of your application by hand, on or before the application deadline date, to the Department at the following address: U.S. Department of Education, Application Control Center, Attention: (CFDA Number 84.129B), 550 12th Street, SW., Room 7041, Potomac Center Plaza, Washington, DC 20202–4260.

The Application Control Center accepts hand deliveries daily between 8:00 a.m. and 4:30:00 p.m., Washington, DC time, except Saturdays, Sundays, and Federal holidays.

Note for Mail or Hand Delivery of Paper Applications: If you mail or hand deliver your application to the Department—

(1) You must indicate on the envelope and—if not provided by the Department—in Item 11 of the SF 424 the CFDA number, including suffix letter, if any, of the competition under which you are submitting your application; and

(2) The Application Control Center will mail to you a notification of receipt of your grant application. If you do not receive this notification within 15 business days from the application deadline date, you should call the U.S. Department of Education Application Control Center at (202) 245–6288.

V. Application Review Information

Selection Criteria: The selection criteria for this competition are from 34 CFR 75.210 and 34 CFR 386.20 and are listed in the application package.

VI. Award Administration Information

1. *Award Notices:* If your application is successful, we notify your U.S. Representative and U.S. Senators and send you a Grant Award Notification (GAN). We may notify you informally, also.

If your application is not evaluated or not selected for funding, we notify you.

2. *Administrative and National Policy Requirements:* We identify administrative and national policy requirements in the application package and reference these and other requirements in the *Applicable Regulations* section of this notice.

We reference the regulations outlining the terms and conditions of an award in the *Applicable Regulations* section of this notice and include these and other specific conditions in the GAN. The GAN also incorporates your approved application as part of your binding commitments under the grant.

3. *Reporting:* At the end of your project period, you must submit a final performance report, including financial information, as directed by the Secretary. If you receive a multi-year award, you must submit an annual performance report that provides the most current performance and financial expenditure information as directed by the Secretary under 34 CFR 75.118. The Secretary may also require more frequent performance reports under 34 CFR 75.720(c). For specific requirements on reporting, please go to *http://www.ed.gov/fund/grant/apply/appforms/appforms.html.*

4. *Performance Measures:* The Government Performance and Results Act (GPRA) of 1993 directs Federal departments and agencies to improve the effectiveness of programs by engaging in strategic planning, setting outcome-related goals for programs, and measuring program results against those goals.

The goal of the Rehabilitation Services Administration's (RSA) Rehabilitation Training: Rehabilitation Long-Term Training program is to increase the number of qualified VR personnel working in State VR agencies or related agencies. At least 75 percent of all grant funds must be used for direct payment of student scholarships. Each grantee is required to track students

receiving scholarships and must maintain information on the cumulative support granted to RSA scholars, scholar-debt in years, program completion data for each scholar, dates each scholar's work begins and is completed to meet his or her payback agreement, current home address, and the place of employment of individual scholars.

Grantees are required to report annually to RSA on these data using the RSA Grantee Reporting Form, OMB# 1820–0617, an electronic reporting system. The RSA Grantee Reporting Form collects specific data including the number of RSA scholars entering the rehabilitation workforce, the rehabilitation field each scholar enters, and the type of employment setting each scholar chooses (e.g., State agency, nonprofit service provider, or practice group). This form allows RSA to measure results against the goal of increasing the number of qualified VR personnel working in State VR agencies or related agencies.

VII. Agency Contact

FOR FURTHER INFORMATION CONTACT: Edwin Powell, U.S. Department of Education, Rehabilitation Services Administration, 400 Maryland Avenue, SW., room 5038, PCP, Washington, DC 20202–2800. Telephone: (202) 245–7505 or by e-mail: *Edwin.Powell@ed.gov*.

If you use a TDD, call the Federal Relay Service (FRS), toll free, at 1–800–877–8339.

VIII. Other Information

Alternative Format: Individuals with disabilities can obtain this document and a copy of the application package in an alternate format (e.g, Braille, large print, audiotape, or computer diskette) by contacting the Grants and Contracts Service Team, U.S. Department of Education, 400 Maryland Avenue, SW., room 5075, PCP, Washington, DC 20202–2550. Telephone: (202) 245–7363. If you use a TDD, call the FRS, toll free, at 1–800–877–8339.

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.

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: November 10, 2008.

Tracy R. Justesen,

Assistant Secretary for Special Education and Rehabilitative Services.

[FR Doc. E8–27185 Filed 11–14–08; 8:45 am]

BILLING CODE 4000–01–P

DEPARTMENT OF EDUCATION

Office of Special Education and Rehabilitative Services Overview Information; Rehabilitation Training: Rehabilitation Long-Term Training Notice Inviting Applications for New Awards for Fiscal Year (FY) 2009

Catalog of Federal Domestic Assistance (CFDA) Numbers: 84.129F, H, P, and R.

DATES: *Applications Available:* November 17, 2008. *Deadline for Transmittal of Applications:* January 15, 2009. *Deadline for Intergovernmental Review:* March 2, 2009.

Full Text of Announcement

I. Funding Opportunity Description

Purpose of Program: The Rehabilitation Long-Term Training program provides financial assistance for—

(1) Projects that provide basic or advanced training leading to an academic degree in areas of personnel shortages in rehabilitation as identified by the Secretary;

(2) Projects that provide a specified series of courses or program of study leading to the award of a certificate in areas of personnel shortages in rehabilitation as identified by the Secretary; and

(3) Projects that provide support for medical residents enrolled in residency training programs in the specialty of physical medicine and rehabilitation.

Priorities: In accordance with 34 CFR 75.105(b)(2)(ii), these priorities are from the regulations for this program (34 CFR 386.1).

Absolute Priorities: For FY 2009 these priorities are absolute priorities. Under 34 CFR 75.105(c)(3) we consider only applications that propose to provide training in the priority areas of personnel shortages listed in the following chart.

CFDA numbers	Priority area (maximum number of awards in parentheses)	Maximum award (see below)
84.129F	Vocational Evaluation And Work Adjustment (3)	$100,000
84.129H	Rehabilitation of Individuals Who Are Mentally Ill (2)	$100,000
84.129P	Rehabilitation of Individuals Who Are Blind or Have Vision Impairments (4)	$100,000
84.129R	Job Development And Job Placement Services to Individuals With Disabilities (3)	$100,000

Program Authority: 29 U.S.C. 772.

Applicable Regulations: (a) The Education Department General Administrative Regulations (EDGAR) in 34 CFR parts 74, 75, 77, 79, 80, 81, 82, 84, 85, 86, and 99. (b) The regulations for this program in 34 CFR parts 385 and 386.

Note: The regulations in 34 CFR part 79 apply to all applicants except federally recognized Indian tribes.

Note: The regulations in 34 CFR part 86 apply to institutions of higher education only.

II. Award Information

Type of Award: Discretionary grants.

Estimated Available Funds: The Administration has requested $37,766,000 for the Rehabilitation Training program for FY 2009, of which we intend to use an estimated $1,200,000 for these competitions. The actual level of funding, if any, depends on final congressional action. However, we are inviting applications to allow enough time to complete the grant

process if Congress appropriates funds for this program.

Estimated Range of Awards: $70,000–$100,000.

Estimated Average Size of Awards: $95,000.

Maximum Award: We will reject any application that proposes a budget exceeding $100,000 for a single budget period of 12 months. The Assistant Secretary for Special Education and Rehabilitative Services may change the maximum amount through a notice published in the **Federal Register**.

Estimated Number of Awards: 12.

Note: The Department is not bound by any estimates in this notice.

Project Period: Up to 60 months.

III. Eligibility Information

1. *Eligible Applicants:* States and public or nonprofit agencies and organizations, including Indian tribes and institutions of higher education.

2. *Cost Sharing or Matching:* Cost sharing of at least 10 percent of the total cost of the project is required of grantees under the Rehabilitation Training program (34 CFR 386.30).

Note: Under 34 CFR 75.562(c), an indirect cost reimbursement on a training grant is limited to the recipient's actual indirect costs, as determined by its negotiated indirect cost rate agreement, or eight percent of a modified total direct cost base, whichever amount is less. Indirect costs in excess of the eight percent limit may not be charged directly, used to satisfy matching or cost-sharing requirements, or charged to another Federal award.

IV. Application and Submission Information

1. *Address to Request Application Package:* You can obtain an application package via the Internet or from the Education Publications Center (ED Pubs). To obtain a copy via the Internet, use the following address: *http://www.ed.gov/fund/grant/apply/grantaps/index.html.* To obtain a copy from ED Pubs, write, fax, or call the following: Education Publications Center, P.O. Box 1398, Jessup, MD 20794–1398. Telephone (toll free): 1–877–433–7827. FAX: (301) 470–1244. If you use a telecommunications device for the deaf (TDD), call, toll free: 1–877–576–7734.

You can contact ED Pubs at its Web site, also: *http://www.ed.gov/pubs/edpubs.html* or at its e-mail address: *edpubs@inet.ed.gov*.

If you request an application from ED Pubs, be sure to identify this competition as follows: CFDA number 84.129 F, H, P, and R.

Individuals with disabilities can obtain a copy of the application package in an accessible format (e.g., braille, large print, audiotape, or computer diskette) by contacting the person or team listed under *Accessible Format* in section VIII of this notice.

2. *Content and Form of Application Submission:* Requirements concerning the content of an application, together with the forms you must submit, are in the application package for this competition. Page Limit: The application narrative (Part III of the application) is where you, the applicant, address the selection criteria that reviewers use to evaluate your application. You must limit the application narrative (Part III) to the equivalent of no more than 45 pages, using the following standards:

- A ''page'' is 8.5″ x 11″, on one side only, with 1″ margins at the top, bottom, and both sides.
- Double space (no more than three lines per vertical inch) all text in the application narrative, including titles, headings, footnotes, quotations, references, and captions, as well as all text in charts, tables, figures, and graphs.
- Use a font that is either 12 point or larger or no smaller than 10 pitch (characters per inch).
- Use one of the following fonts: Times New Roman, Courier, Courier New, or Arial. An application submitted in any other font (including Times Roman or Arial Narrow) will not be accepted.

The page limit does not apply to Part I, the cover sheet; Part II, the budget section, including the narrative budget justification; Part IV, the assurances and certifications; or the one-page abstract, the resumes, the bibliography, or the letters of support. However, the page limit does apply to all of the application narrative section (Part III).

We will reject your application if you exceed the page limit or if you apply other standards and exceed the equivalent of the page limit.

3. *Submission Dates and Times:* Applications Available: November 17, 2008. Deadline for Transmittal of Applications: January 15, 2009.

Applications for grants under this competition must be submitted electronically using the Grants.gov Apply site (Grants.gov). For information (including dates and times) about how to submit your application electronically, or in paper format by mail or hand delivery if you qualify for an exception to the electronic submission requirement, please refer to section IV. 6. *Other Submission Requirements* in this notice.

We do not consider an application that does not comply with the deadline requirements.

Individuals with disabilities who need an accommodation or auxiliary aid in connection with the application process should contact the person listed under **FOR FURTHER INFORMATION CONTACT** in section VII in this notice. If the Department provides an accommodation or auxiliary aid to an individual with a disability in connection with the application process, the individual's application remains subject to all other requirements and limitations in this notice. Deadline for Intergovernmental Review: March 2, 2009.

4. *Intergovernmental Review:* This competition is subject to Executive Order 12372 and the regulations in 34 CFR part 79. Information about Intergovernmental Review of Federal Programs under Executive Order 12372 is in the application package for this competition.

5. *Funding Restrictions:* We reference regulations outlining funding restrictions in the *Applicable Regulations* section of this notice.

6. *Other Submission Requirements:* Applications for grants under this competition must be submitted electronically unless you qualify for an exception to this requirement in accordance with the instructions in this section.

a. *Electronic Submission of Applications.*

Applications for grants under the Rehabilitation Training: Rehabilitation Long-Term Training, CFDA number 84.129F, H, P, or R must be submitted electronically using the Governmentwide Grants.gov Apply site at *http://www.Grants.gov.* Through this site, you will be able to download a copy of the application package, complete it offline, and then upload and submit your application. You may not e-mail an electronic copy of a grant application to us.

We will reject your application if you submit it in paper format unless, as described elsewhere in this section, you qualify for one of the exceptions to the electronic submission requirement and submit, no later than two weeks before the application deadline date, a written statement to the Department that you qualify for one of these exceptions. Further information regarding calculation of the date that is two weeks before the application deadline date is provided later in this section under *Exception to Electronic Submission Requirement.*

You may access the electronic grant application for the Rehabilitation Training: Rehabilitation Long-Term Training program at *http://www.Grants.gov.* You must search for

the downloadable application package for this program or competition by the CFDA number. Do not include the CFDA number's alpha suffix in your search (e.g., search for 84.129, not 84.129F, H, P, or R).

Please note the following:

• When you enter the Grants.gov site, you will find information about submitting an application electronically through the site, as well as the hours of operation.

• Applications received by Grants.gov are date and time stamped. Your application must be fully uploaded and submitted, and must be date and time stamped by the Grants.gov system no later than 4:30:00 p.m., Washington, DC time, on the application deadline date. Except as otherwise noted in this section, we will not accept your application if it is received—that is, date and time stamped by the Grants.gov system later than 4:30:00 p.m., Washington, DC time, on the application deadline date. We do not consider an application that does not comply with the deadline requirements. When we retrieve your application from Grants.gov, we will notify you if we are rejecting your application because it was date and time stamped by the Grants.gov system after 4:30:00 p.m., Washington, DC time, on the application deadline date.

• The amount of time it can take to upload an application will vary depending on a variety of factors, including the size of the application and the speed of your Internet connection. Therefore, we strongly recommend that you do not wait until the application deadline date to begin the submission process through Grants.gov.

• You should review and follow the Education Submission Procedures for submitting an application through Grants.gov that are included in the application package for this competition to ensure that you submit your application in a timely manner to the Grants.gov system. You can also find the Education Submission Procedures pertaining to Grants.gov at *http://e-Grants.ed.gov/help/GrantsgovSubmissionProcedures.pdf.*

• To submit your application via Grants.gov, you must complete all steps in the Grants.gov registration process (see *http://www.grants.gov/applicants/get_registered.jsp*). These steps include (1) Registering your organization, a multi-part process that includes registration with the Central Contractor Registry (CCR); (2) registering yourself as an Authorized Organization Representative (AOR); and (3) getting authorized as an AOR by your organization. Details on these steps are outlined in the Grants.gov 3–Step Registration Guide (see *http://www.grants.gov/section910/Grants.govRegistrationBrochure.pdf*). You also must provide on your application the same D-U-N-S Number used with this registration. Please note that the registration process may take five or more business days to complete, and you must have completed all registration steps to allow you to submit successfully an application via Grants.gov. In addition you will need to update your CCR registration on an annual basis. This may take three or more business days to complete.

• You will not receive additional point value because you submit your application in electronic format, nor will we penalize you if you qualify for an exception to the electronic submission requirement, as described elsewhere in this section, and submit your application in paper format.

• You must submit all documents electronically, including all information you typically provide on the following forms: Application for Federal Assistance (SF 424), the Department of Education Supplemental Information for SF 424, Budget Information—Non-Construction Programs (ED 524), and all necessary assurances and certifications. Please note that two of these forms—the SF 424 and the Department of Education Supplemental Information for SF 424—have replaced the ED 424 (Application for Federal Education Assistance).

• You must attach any narrative sections of your application as files in a .DOC (document), .RTF (rich text), or .PDF (Portable Document) format. If you upload a file type other than the three file types specified in this paragraph or submit a password-protected file, we will not review that material.

• Your electronic application must comply with any page-limit requirements described in this notice.

• After you electronically submit your application, you will receive from Grants.gov an automatic notification of receipt that contains a Grants.gov tracking number. (This notification indicates receipt by Grants.gov only, not receipt by the Department.) The Department then will retrieve your application from Grants.gov and send a second notification to you by e-mail. This second notification indicates that the Department has received your application and has assigned your application a PR/Award number (an ED-specified identifying number unique to your application).

• We may request that you provide us original signatures on forms at a later date.

Application Deadline Date Extension in Case of Technical Issues with the Grants.gov System: If you are experiencing problems submitting your application through Grants.gov, please contact the Grants.gov Support Desk at 1–800–518–4726. You must obtain a Grants.gov Support Desk Case Number and must keep a record of it.

If you are prevented from electronically submitting your application on the application deadline date because of technical problems with the Grants.gov system, we will grant you an extension until 4:30:00 p.m., Washington, DC time, the following business day to enable you to transmit your application electronically or by hand delivery. You also may mail your application by following the mailing instructions described elsewhere in this notice.

If you submit an application after 4:30:00 p.m., Washington, DC time, on the application deadline date, please contact the person listed under **FOR FURTHER INFORMATION CONTACT** in section VII in this notice and provide an explanation of the technical problem you experienced with Grants.gov, along with the Grants.gov Support Desk Case Number. We will accept your application if we can confirm that a technical problem occurred with the Grants.gov system and that that problem affected your ability to submit your application by 4:30:00 p.m., Washington, DC time, on the application deadline date. The Department will contact you after a determination is made on whether your application will be accepted.

Note: The extensions to which we refer in this section apply only to the unavailability of, or technical problems with, the Grants.gov system. We will not grant you an extension if you failed to fully register to submit your application to Grants.gov before the application deadline date and time or if the technical problem you experienced is unrelated to the Grants.gov system.

Exception to Electronic Submission Requirement: You qualify for an exception to the electronic submission requirement, and may submit your application in paper format, if you are unable to submit an application through the Grants.gov system because—

• You do not have access to the Internet; or

• You do not have the capacity to upload large documents to the Grants.gov system;

and

• No later than two weeks before the application deadline date (14 calendar days or, if the fourteenth calendar day before the application deadline date falls on a Federal holiday, the next

business day following the Federal holiday), you mail or fax a written statement to the Department, explaining which of the two grounds for an exception prevent you from using the Internet to submit your application.

If you mail your written statement to the Department, it must be postmarked no later than two weeks before the application deadline date. If you fax your written statement to the Department, we must receive the faxed statement no later than two weeks before the application deadline date.

Address and mail or fax your statement to: Theresa DeVaughn, U.S. Department of Education, 400 Maryland Avenue, SW., room 5045, Potomac Center Plaza (PCP), Washington, DC 20202–2800. FAX: (202) 245–7591.

Your paper application must be submitted in accordance with the mail or hand delivery instructions described in this notice.

b. *Submission of Paper Applications by Mail.*

If you qualify for an exception to the electronic submission requirement, you may mail (through the U.S. Postal Service or a commercial carrier) your application to the Department. You must mail the original and two copies of your application, on or before the application deadline date, to the Department at the following address: U.S. Department of Education, Application Control Center, Attention: (CFDA Number 84.129F, H, P, or R), LBJ Basement Level 1, 400 Maryland Avenue, SW., Washington, DC 20202–4260.

You must show proof of mailing consisting of one of the following:

(1) A legibly dated U.S. Postal Service postmark.

(2) A legible mail receipt with the date of mailing stamped by the U.S. Postal Service.

(3) A dated shipping label, invoice, or receipt from a commercial carrier.

(4) Any other proof of mailing acceptable to the Secretary of the U.S. Department of Education.

If you mail your application through the U.S. Postal Service, we do not accept either of the following as proof of mailing:

(1) A private metered postmark.

(2) A mail receipt that is not dated by the U.S. Postal Service.

If your application is postmarked after the application deadline date, we will not consider your application.

Note: The U.S. Postal Service does not uniformly provide a dated postmark. Before relying on this method, you should check with your local post office.

c. *Submission of Paper Applications by Hand Delivery.*

If you qualify for an exception to the electronic submission requirement, you (or a courier service) may deliver your paper application to the Department by hand. You must deliver the original and two copies of your application by hand, on or before the application deadline date, to the Department at the following address: U.S. Department of Education, Application Control Center, Attention: (CFDA Number 84.129F, H, P, or R), 550 12th Street, SW., Room 7041, Potomac Center Plaza, Washington, DC 20202–4260.

The Application Control Center accepts hand deliveries daily between 8:00 a.m. and 4:30:00 p.m., Washington, DC time, except Saturdays, Sundays, and Federal holidays.

Note for Mail or Hand Delivery of Paper Applications: If you mail or hand deliver your application to the Department—

(1) You must indicate on the envelope and—if not provided by the Department—in Item 11 of the SF 424 the CFDA number, including suffix letter, if any, of the competition under which you are submitting your application; and

(2) The Application Control Center will mail to you a notification of receipt of your grant application. If you do not receive this notification within 15 business days from the application deadline date, you should call the U.S. Department of Education Application Control Center at (202) 245–6288.

V. Application Review Information

Selection Criteria: The selection criteria for this competition are from 34 CFR 75.210 and 34 CFR 386.20 and are listed in the application package.

VI. Award Administration Information

1. *Award Notices:* If your application is successful, we notify your U.S. Representative and U.S. Senators and send you a Grant Award Notification (GAN). We may notify you informally, also.

If your application is not evaluated or not selected for funding, we notify you.

2. *Administrative and National Policy Requirements:* We identify administrative and national policy requirements in the application package and reference these and other requirements in the *Applicable Regulations* section of this notice.

We reference the regulations outlining the terms and conditions of an award in the *Applicable Regulations* section of this notice and include these and other specific conditions in the GAN. The GAN also incorporates your approved application as part of your binding commitments under the grant.

3. *Reporting:* At the end of your project period, you must submit a final performance report, including financial information, as directed by the Secretary. If you receive a multi-year award, you must submit an annual performance report that provides the most current performance and financial expenditure information as directed by the Secretary under 34 CFR 75.118. The Secretary may also require more frequent performance reports under 34 CFR 75.720(c). For specific requirements on reporting, please go to *http://www.ed.gov/fund/grant/apply/appforms/appforms.html.*

4. *Performance Measures:* The Government Performance and Results Act (GPRA) of 1993 directs Federal departments and agencies to improve the effectiveness of programs by engaging in strategic planning, setting outcome-related goals for programs, and measuring program results against those goals.

The goal of the Rehabilitation Services Administration's (RSA) Rehabilitation Training: Rehabilitation Long-Term Training program is to increase the number of qualified VR personnel working in State VR agencies or related agencies. At least 75 percent of all grant funds must be used for direct payment of student scholarships. Each grantee is required to track students receiving scholarships and must maintain information on the cumulative support granted to RSA scholars, scholar-debt in years, program completion data for each scholar, dates each scholar's work begins and is completed to meet his or her payback agreement, current home address, and the place of employment of individual scholars.

Grantees are required to report annually to RSA on these data using the RSA Grantee Reporting Form, OMB# 1820–0617, an electronic reporting system. The RSA Grantee Reporting Form collects specific data including the number of RSA scholars entering the rehabilitation workforce, the rehabilitation field each scholar enters, and the type of employment setting each scholar chooses (e.g., State agency, nonprofit service provider, or practice group). This form allows RSA to measure results against the goal of increasing the number of qualified VR personnel working in State VR agencies or related agencies.

VII. Agency Contact

FOR FURTHER INFORMATION CONTACT: Theresa DeVaughn, U.S. Department of Education, Rehabilitation Services Administration, 400 Maryland Avenue, SW., Room 5045, PCP, Washington, DC 20202–2800. Telephone: (202) 245–7321 or by e-mail: *Theresa.Devaughn@ed.gov.*

If you use TDD, call the Federal Relay Service (FRS), toll free, at 1–800–877–8339.

VIII. Other Information

Accessible Format: Individuals with disabilities can obtain this document and a copy of the application package in an accessible format (e.g., braille, large print, audiotape, or computer diskette) by contacting the Grants and Contracts Service Team, U.S. Department of Education, 400 Maryland Avenue, SW., room 5075, PCP, Washington, DC 20202–2550. Telephone: (202) 245–7363. If you use a TDD, call the FRS, toll free, at 1–800–877–8339.

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.

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: November 10, 2008.

Tracy R. Justesen,

Assistant Secretary for Special Education and Rehabilitative Services.

[FR Doc. E8–27191 Filed 11–14–08; 8:45 am]

BILLING CODE 4000–01–P

DEPARTMENT OF ENERGY

[Docket No. PP–305]

Record of Decision; Montana Alberta Tie Ltd.

AGENCY: Office of Electricity Delivery and Energy Reliability (OE), Department of Energy (DOE).

ACTION: Record of Decision (ROD).

SUMMARY: DOE announces its decision to issue a Presidential permit to Montana Alberta Tie Ltd. to construct, operate, maintain, and connect a new single-circuit 230,000-volt (230-kV) electric transmission line across the U.S.-Canada border near Cut Bank, Montana, along the preferred alternative identified in the EIS, with the environmental mitigation measures and electric reliability conditions noted below. The environmental impacts that would be associated with the line were analyzed in the *Environmental Impact Statement for the Montana Alberta Tie Ltd. (MATL) 230-kV Transmission Line* (DOE/EIS–0399, MATL EIS). The transmission line, known as the MATL Project, would originate at an existing NorthWestern Energy (NWE) 230-kV Switchyard at Great Falls, Montana, and extend north to a new substation to be constructed northeast of Lethbridge, Alberta, Canada. Approximately 130 miles of the 203-mile long transmission line would be constructed in the United States.

In reaching this decision, DOE considered the low environmental impacts in the United States from constructing, operating, maintaining, and connecting the proposed international transmission line, the absence of adverse impacts to the reliability of the U.S. electric power supply system, the absence of major issues of concern to the public, and the favorable recommendations of the Departments of State and Defense.

DOE has prepared this ROD in accordance with the regulations of the Council on Environmental Quality (40 CFR Parts 1500–1508) for implementing the National Environmental Policy Act (NEPA), and DOE's NEPA Implementing Procedures (10 CFR Part 1021).

ADDRESSES: The Final EIS is available on the DOE NEPA Web site at *http://www.gc.energy.gov/NEPA/.* This ROD also will be available on the same DOE NEPA Web site and on the OE Web site at *http://www.oe.energy.gov/permits_pending.htm.* In addition, this ROD may be requested by contacting Mrs. Ellen Russell, Senior Project Manager, Office of Electricity Delivery and Energy Reliability, U.S. Department of Energy, OE–20, 1000 Independence Avenue, SW., Washington, DC 20585, by telephone at 202–586–9624, by facsimile at 202–586–8008, or at *Ellen.Russell@hq.doe.gov.*

FOR FURTHER INFORMATION CONTACT: For further information about the MATL EIS, contact Ellen Russell as indicated in the **ADDRESSES** section above. For general information on the DOE NEPA process, contact Ms. Carol Borgstrom, Director, Office of NEPA Policy and Compliance, GC–20, 1000 Independence Avenue, SW., Washington, DC 20585, by telephone at 202–586–4600, or leave a message at 800–472–2756.

SUPPLEMENTARY INFORMATION: DOE and the State of Montana Department of Environmental Quality (DEQ) are the lead agencies in the preparation of the State of Montana Final EIS and DOE Federal Final EIS, entitled *Environmental Impact Statement for the Montana Alberta Tie Ltd. (MATL) 230-kV Transmission Line* (DOE/EIS–0399, MATL EIS). The Bureau of Land Management (BLM), U.S. Department of the Interior, is a cooperating agency.

Background

Executive Order (E.O.) 10485 (September 9, 1953), as amended by E.O. 12038 (February 7, 1978), requires that a Presidential permit be issued by DOE before electric transmission facilities may be constructed, operated, maintained, or connected at the U.S. international border.[1] DOE may issue or amend a permit if it determines that the permit is in the public interest and after obtaining favorable recommendations from the U.S. Departments of State and Defense. In determining whether issuance of a permit for a proposed action is in the public interest, DOE considers the environmental impacts of the proposed project pursuant to NEPA, determines the project's impact on electric reliability by ascertaining whether the proposed project would adversely affect the operation of the U.S. electric power supply system under normal and contingency conditions, and considers any other factors that DOE believes are relevant to the public interest.

MATL, a private Canadian corporation owned by Tonbridge Power, is proposing to construct and operate an international 230-kV, alternating current merchant (*i.e.*, private) transmission line that would originate at the existing NWE 230-kV Switchyard at Great Falls, Montana, and extend north to a new substation to be constructed northeast of Lethbridge, Alberta, Canada. The line would cross the U.S.-Canada international border north of Cut Bank, Montana. Approximately 130 miles of the 203-mile long transmission line are proposed to be constructed in the United States. The proposed line would be constructed and owned by MATL. It would be part of the Western Interconnection (western grid)[2]. A

[1] The authority to administer the International Electricity Regulatory Program through the regulation of electricity exports and the issuance of Presidential permits has been delegated to the Assistant Secretary for Electricity Delivery and Energy Reliability in Redelegation Order No. 00–002.10C issued on May 29, 2008.

[2] There are three distinct power grids or ''interconnections'' within the United States: the Eastern Interconnection, the Western Interconnection, and the Electric Reliability Council of Texas. The three interconnections are electrically independent from each other except for a few low capacity direct current transmission lines that loosely link them. Within each interconnection, electricity is produced the instant it is used, and

phase shifting transformer would be installed at the substation near Lethbridge to control the direction of power flows on the line.

Before constructing and operating the proposed transmission line, MATL must obtain a Presidential permit from DOE (10 CFR 205.320, et seq.) and a Certificate of Compliance (certificate) from DEQ under the Montana Major Facility Siting Act (MFSA)(75–20–101, et seq., Montana Code Annotated). In October 2005, MATL applied to DOE for a Presidential permit and to DEQ for a certificate.

NEPA Review

Because of the similarities in NEPA and the Montana Environmental Policy Act (MEPA) requirements, DOE and DEQ (the ''agencies'') cooperated in the preparation of a single environmental review document that would satisfy both Federal and State requirements. Initially, DOE considered an environmental assessment (EA) to be the appropriate level of review under NEPA while DEQ considered the appropriate level of review under MEPA to be an EIS. DOE issued a Notice of Intent to Prepare an Environmental Assessment and to Conduct Public Scoping Meetings and Notice of Floodplain and Wetlands Involvement in the **Federal Register** on November 18, 2005 (70 FR 69962). Three scoping meetings were held in December 2005, and in March 2007 the agencies published a document titled *Draft Environmental Impact Statement for the Montana Alberta Tie Ltd. (MATL) 230-kV Transmission Line* that served as a Draft EIS for DEQ and an EA for DOE. Comments received on that document during the 55-day public comment period indicated that additional analysis was required to address land use and potential effects on farming caused by the MATL line and also to account for changes to State tax law that took place in Montana's April 2007 special legislative session. Based on this new information, DOE determined that an EIS was now required to properly assess the environmental impacts.

On June 7, 2007, DOE published a Notice of Intent to Prepare an EIS and to Conduct Scoping in the **Federal Register** (72 FR 31569) and invited additional comments for a 30-day period. On July 27, 2007, MATL submitted to BLM an Application for Transportation and Utility Systems and Facilities on Federal Land. On September 6, 2007, DOE invited BLM to participate as a cooperating agency in the preparation of the EIS in order to address BLM's authority to consider whether to approve MATL's request for a right-of-way grant to cross Federal lands managed by BLM and the proposed project's relationship to relevant BLM land use plans. On October 12, 2007, BLM agreed to be a cooperating agency.

On February 15, 2008, the U.S. Environmental Protection Agency (EPA) published a Notice of Availability of the Draft EIS in the **Federal Register** (73 FR 8869), which began a 45-day public comment period that ended on March 31, 2008. During the comment period, the agencies hosted three public hearings during which the public was invited to submit both oral and written comments. The agencies also accepted written comments from the public throughout the comment period.

All comments received on the Draft EIS were considered in the preparation of the Final EIS. The agencies issued the Final EIS for the MATL 230-kV transmission line in September 2008. A notice of availability of the Final EIS was published by EPA in the **Federal Register** on October 3, 2008 (73 FR 57619).

Alternatives Considered

The EIS evaluated the international transmission line as proposed by MATL, the No Action alternative, and two additional action alternatives, plus several Local Routing Options and minor variations to the Local Routing Options.

The No Action alternative was designated Alternative 1. Under this alternative DOE would not grant a Presidential permit and DEQ would not grant a certificate and, therefore, the proposed MATL international transmission line would not be constructed. This alternative reflects the status quo and serves as a benchmark against which MATL's proposal and other action alternatives are evaluated. Since under the No Action alternative MATL's proposed transmission line would not be built, implementation of the No Action alternative would not cause impacts to the environment that the construction and operation of the proposed transmission line would. Therefore, the No Action alternative is the environmentally preferable alternative.

The transmission line project as proposed by the applicant was designated Alternative 2. Under this alternative MATL would construct and operate a 230-kV transmission line in a 129.9-mile-long corridor between Great Falls, Montana, and the U.S.-Canada border, connecting across that border to the portion of the line to be constructed in Alberta, Canada. The interconnection of the line north of Great Falls would require NWE to enlarge its existing 230-kV Great Falls Switchyard to accommodate the new line and other potential future lines. The MATL line would extend from the expanded Great Falls Switchyard to a new substation that MATL would construct on agricultural land approximately 10 miles south of Cut Bank, Montana. From that point the line would continue north to the U.S.-Canada border at the western edge of the Red Creek Oil Field. The proposed line would occupy a 105-foot-wide right-of-way within a 500-foot-wide area that was analyzed in the EIS. The typical span between support structures would be about 800 feet, but could range from 500 feet to 1,600 feet depending upon the topography. Metal monopole support structures would be used on about 56 miles of the line where it would cross cropland and Conservation Reserve Program (CRP) land diagonally. On the remaining 74 miles wooden H-frame structures would be used.

Alternative 3 was developed by MATL in response to a siting criterion under MFSA that gives consideration to paralleling existing utility corridors. Under this alternative a 121.6-mile-long transmission line would be built in a corridor that would generally parallel an existing 115-kV transmission line along the entire route from the 230-kV Great Falls Switchyard to a new substation near Cut Bank. From this substation Alternative 3 would continue north, crossing the border approximately 4 miles west of the border crossing for Alternative 2. Alternative 3 would be similar in most other respects to Alternative 2, but it would use only H-frame structures for the entire length of the line.

Alternative 4 was developed by the agencies to address public concerns raised during the EIS process. It was designed to reduce transmission line interference with farming activities and reduce the proximity to residences. This alternative would be the longest of the three action alternatives at 139.6 miles. The alignment would use portions of the Alternative 2 alignment from north of Conrad to the Montana-Alberta border, but in other areas it would maximize the use of range and pasture land in order to avoid cultivated land. Where cultivated land would be crossed, the line would generally be located along field or strip boundaries. Alternative 4 would be similar in most other respects to Alternative 2, except that monopole structures would be used on all 88.9 miles where the line would

flows over virtually all transmission lines from generators to customer loads.

cross cropland and CRP land, not just where such lands would be crossed on the diagonal as in Alternative 2.

Several Local Routing Options and minor variations, which could be applied to Alternative 2 and in some instances to Alternative 4, were developed by the agencies to address landowner concerns related to costs, impacts to farming, impacts to other land uses, and proximity to residences. The Local Routing Options and minor variations were also analyzed in the EIS.

The preferred alternative identified by the agencies in the Final EIS consists of portions of Alternatives 2 and 4 and some Local Routing Options as described in detail in Section 2.7 of the EIS. It begins at the Great Falls Switchyard and follows Alternative 4 for 27.3 miles. From that point to Milepost 103.1, the preferred alternative primarily follows Alternative 2, but includes the Diamond Valley South, Teton River, Southeast of Conrad, Northwest of Conrad, Belgian Hill, Bullhead Coulee South, Bullhead Coulee North, and South of Cut Bank Local Routing Options. The preferred alternative crosses Federal land managed by BLM between Milepost 93.4 and Milepost 94.0. North of Milepost 103.1 the preferred alternative coincides with Alternatives 2 and 4 to join with the border crossing approved by Canada. The total length of the preferred alternative is 133.5 miles and would contain about 83.6 miles of monopoles and 49.9 miles of H-frame structures.

Analysis of Environmental Impacts

The EIS analysis found that no natural resources would experience a significant impact from implementation of any action alternative. Potential impacts in the 500-foot wide analysis area and cumulative impacts would be similar for all three action alternatives.

The No Action alternative would not change any of the resource conditions in the region, but it would forgo the expected socioeconomic benefits of the proposed transmission line, as there would be no additional employment from construction and operation of the transmission line, and no increase in county or State tax revenue. There would be no additional impacts or compensation to farmers for use of their land. There would be no additional transmission capacity available for integrating new or existing power generators.

All of the action alternatives would result in some loss of and interference with crop production. Alternative 3 would have the most impacts to crop production because it would include the most diagonal crossing of crop lands and because H-frame structures would be used on all cropland crossings. Alternative 3 would add to impacts associated with farming around transmission support structures because this alternative would closely parallel an existing 115-kV transmission line between Great Falls and Cut Bank. Alternative 4 would have less impact on crop production than the other action alternatives because it would include the least diagonal crossing of cropland and CRP land and would use monopoles wherever it would cross such land.

Under all action alternatives, the proposed line would comply with the requirements of the National Electric Safety Code. On cultivated and CRP lands expected heights of the tallest farming equipment (*i.e.*, 20 feet), including antenna heights, would be used to determine the minimum ground clearance of 27.2 feet for the safe operation of such equipment under the line.

Construction activities under all of the action alternatives could result in increased soil erosion and release of sediment to streams, lakes, and wetlands, although best management practices would reduce or avoid potential impacts. Alternative 4 was found to have the highest potential for soil erosion and sediment discharge to surface waters because the 500-foot-wide analysis corridor associated with this alternative would intersect the largest area of potentially unstable soils and the most streams. The analysis corridor associated with Alternative 2 would intersect the smallest area of unstable soils and the fewest wetlands, while the analysis area for Alternative 3 would intersect the fewest streams but the largest area of wetlands and the largest number of lakes. Other than the placement of one structure in Black Horse Lake under Alternative 2, transmission line structures would not be placed in wetlands. However, the agencies' preferred alternative avoids this impact by routing the transmission line away from Black Horse Lake.

All action alternatives would produce some localized short-term emissions of particulate matter during construction. In addition, all action alternatives would emit very small amounts of greenhouse gases, principally from vehicle and equipment operations during construction. These construction-related greenhouse gas emissions were estimated and found to be negligible.

Under all action alternatives, some bird mortality could result from collisions with transmission lines even after mitigating measures are applied; potential impacts would be somewhat less under Alternative 4 than the other alternatives because Alternative 4 would not be located as close to the Benton Lake National Wildlife Refuge. Under all action alternatives portions of the transmission line would cross some potential habitat for special status species. Although no adverse effects to special status species are expected from any of the action alternatives, Alternative 2 would cross more potential habitat for special status species than Alternatives 3 and 4. No designated critical habitat would be crossed by any of the alternatives. In compliance with section 7 of the Endangered Species Act (ESA), DOE conducted a Biological Assessment and consulted with the U.S. Fish and Wildlife Service (FWS). On September 16, 2006, the FWS concurred with DOE's determination that the proposed line may affect, but will not adversely affect, any species listed as threatened or endangered under the ESA.

Under any of the action alternatives, transmission line construction could disturb archaeological or historical resources. To avoid or reduce impacts to such resources, MATL would be required to implement project-specific cultural resource protection measures (*e.g.*, using monitors when working in the vicinity of archeological sites, placing poles so as to avoid impacts to cultural resource sites, prohibiting development of access roads through cultural resource sites). Impacts to Traditional Cultural Properties (TCPs) would be minimized by avoiding disturbance to TCPs and potential locations identified by knowledgeable Tribal members.

Short-term, localized construction noise would occur under any of the action alternatives. In general, operation of the transmission line would not add substantially to existing background noise levels, but noise from rain or wind on the transmission line could cause noise levels to exceed a State of Montana standard in one subdivided area near a short segment (0.16 mile) of the Alternative 4 alignment. However, the agencies' preferred alternative does not include this portion of Alternative 4.

All action alternatives would provide socioeconomic benefits in the short term due to construction-related employment. In the long term there would be increased opportunities to import or export electric power, and the presence of the transmission line could help make it possible to build new generation facilities. State and local governments would receive additional tax revenue from the line. Under all action alternatives, farmers would incur additional costs due to the need to farm

around transmission line structures placed on their properties. MATL would compensate landowners with one-time easement payments for the right-of-way, annual per-pole payments, and annual flat fees for the additional costs of farming caused by the transmission line. Some agricultural landowners would also receive a State property tax exemption for property affected by the transmission line.

Under all action alternatives, nearby residents and motorists using travel corridors would be exposed to views of a transmission line. Alternative 3 would expose the largest number of nearby residences and the longest length of travel corridors to near-field views within ½ mile of the proposed line. Alternative 4 would have the lowest overall visibility to nearby residences and travel corridors, but Alternatives 2 and 4 would be similar with respect to the number of residences within ¼ mile.

The Notice of Intent that initiated the DOE NEPA review process (70 FR 69962; November 18, 2005) also initiated a floodplain and wetlands assessment in accordance with DOE regulations in 10 CFR Part 1022. The notice stated that DOE would issue a floodplain statement of findings at the conclusion of that assessment. The EIS considered potential impacts to floodplains and found that there would be no floodplain involvement under any of the action alternatives. Under all action alternatives, the line would cross floodplains of the Teton, Dry Fork Marias, and Marias river crossings, but there would be no placement of transmission line structures or other construction in any 100-year floodplain. Because no part of the action would be located in a floodplain, a floodplain statement of findings is not required.

Cumulative Impacts

Past and present facilities and activities that are potential sources of cumulative environmental impacts in the project vicinity include at least 17 pipelines and 8 transmission lines that transect the area; farming (irrigated and non-irrigated), grazing, weed management, hunting, and general recreation; growth of cities and towns, residential areas, and industrial and commercial areas; and development of Federal and State highways and county roads, railroads and railroad rights-of-way, communication facilities, military installations, conservation easements, airports, and national trails.

Reasonably foreseeable future actions that could occur in the Project study area (*i.e.*, an area that includes alternatives and areas where roads may be built or improved) include the development of wind farms, reconstruction and relocation of an existing electricity transmission line, two fossil-fueled power plants (250-megawatt (MW) coal-fired and 275-MW gas-fired) proposed to be built near Great Falls, additional irrigation systems on area farmland, and the potential for MATL to upgrade the capacity of the proposed line from 300 MW to 400 MW in each direction. Transmission rights on the proposed line have been sold to companies that are prospective developers of wind farms, but the transmission capacity could be sold and used for electricity generated by other means. For the purpose of assessing potential cumulative impacts in the EIS, it was conservatively estimated that the proposed transmission line would provide sufficient transmission capacity for 400 to 533 new wind turbines.

Construction activities associated with reasonably foreseeable future actions, including new or expanded wind farms, would depend on the type, location, and design of development. Potential effects of this construction on soils, surface waters, air quality, wetlands, vegetation, wildlife, and cultural resources would be similar in kind to the potential impacts of building the proposed transmission line, but could differ in magnitude depending on the action. Operation of proposed coal- and gas-fired power plants would increase the emission of air pollutants, but ambient air pollutant concentrations resulting from these and other ongoing and reasonably foreseeable activities would continue to be well below applicable State and Federal ambient air quality standards. Generation of electricity by potential wind farms could contribute to reducing emissions of greenhouse gases by avoiding the need to generate equal amounts of electricity from fossil fuels, while the proposed coal- and gas-fired power plants near Great Falls could contribute greenhouse gases with global warming potential equivalent to more than 4 million tons/year of carbon dioxide, equal to about 10 percent of Montana's total emissions of greenhouse gases in 2005. Wind turbines, meteorological towers and associated guy wires, and overhead distribution lines would be a potential collision hazard to birds and bats. Operation of wind turbines potentially built by developers with contracted capacity on the proposed MATL transmission line is estimated to result in approximately 720 to 960 bird fatalities and 30 to 7,100 bat fatalities per year. Operation of wind turbines would result in noise; noise levels would depend on the observer's location. Wind farms would be highly visible in the landscape because turbines would be introduced into rural landscapes with few other comparable structures.

Comments Received on the Final EIS

After publication of the Final EIS, DOE received a telephone comment from a member of the public and a written comment from the U.S. EPA. The telephone commenter expressed the belief that his prior comments had been censored and offered three assertions in support of his claim: (1) An attachment to a written comment he submitted on the Draft EIS had been excluded from the Final EIS; (2) a written document submitted by the commenter during a hearing on the Draft EIS had also been excluded from the Final EIS; and (3) he had been prevented from speaking at a hearing held in March 2007 to receive comments on the State Draft EIS and the Federal EA.

With respect to the first claim, the attachment to the commenter's written comment was a letter sent to the commenter from a law firm representing MATL and discussed the acquisition of an easement across the commenter's property. DOE included the attachment in the administrative record but not in the comment response section of the Final EIS because the attachment contained no information or comments related to the Draft EIS. With regard to the second assertion, the document submitted by the commenter during the hearing on the Draft EIS in March 2008 contained a list of talking points circulated by a group that encouraged its members to present oral comments in support of the MATL project. Each of the talking points contained in the document submitted by the telephone commenter was in fact discussed by numerous individuals during the hearings on the Draft EIS. These talking points and comments were contained in the transcripts of the hearings and included in the comment response section of the Final EIS along with the agencies' responses.

Concerning the third assertion, DOE generally does not conduct public hearings on an EA before it is approved, although DOE provides it to the State, and often to the public, before approval. Therefore, DOE did not participate in the hearings held by DEQ in March 2007 on the State Draft EIS and the Federal EA. Nonetheless, in light of the commenter's claim, DOE reviewed the audio transcripts of those hearings and determined that the commenter presented uncensored oral comments at the hearing held in Conrad on March 27,

2007, and attended the hearing in Cut Bank on March 28, 2007. Based on the review of the record, DOE has found no evidence of censorship on the part of the presiding officer and no attempt to prevent the commenter or anyone else from making a statement or presenting a comment at any of the public hearings held in this proceeding.

The EPA Region 8 submitted written comments dated October 21, 2008, on the Final EIS acknowledging the agencies' responses to EPA's comments on the Draft EIS. In addition EPA stated its appreciation for information added to the Final EIS, including bird migration corridor maps and evaluation of potential avian impacts from the proposed transmission line. EPA did not oppose implementation of the MATL project and noted that the EIS "* * * shows that complex considerations were involved in evaluation of alternative routing options, and significant effort was put into evaluating and comparing the many project trade-offs, and that many mitigation measures for environmental protection are included."

Decision

DOE has decided to issue Presidential Permit PP–305 authorizing MATL to construct, operate, maintain, and connect a 230-kV electric transmission line across the U.S.-Canada border along the preferred alternative identified and analyzed in the EIS, with the environmental mitigation measures and electric reliability conditions noted below.

Mitigation

Avoidance of potential environmental impacts was a consideration in identification and selection of the preferred alternative. The routing of this alternative avoids some wildlife habitat areas potentially affected by Alternative 2, and the routing and design of the alternative are intended to minimize adverse impacts to cultivated agricultural land uses. DOE's Presidential permit will contain a condition that requires MATL to implement all project-specific environmental protection measures it proposed in its MFSA application, as described in the EIS, and also the environmental specifications incorporated by reference in the Certificate of Compliance issued by DEQ on October 22, 2008. The permit condition will specify that, where there is a conflict between the MATL-proposed measures and the environmental specifications developed by DEQ, the more environmentally protective provision will apply. With the implementation of the preferred alternative and the inclusion of the mitigation measures that will be made a condition of the Presidential permit, DOE has employed all practicable means to avoid or minimize environmental harm. The DEQ Certificate of Compliance, the MATL-proposed protection measures, and the DEQ-developed environmental specifications can be found on the DEQ Web site at *http://deq.mt.gov/MFS/MATL.asp.*

Basis for Decision

In reaching this decision, DOE considered the low environmental impacts in the United States from constructing, operating, maintaining, and connecting the proposed international transmission line, the absence of adverse impacts to the reliability of the U.S. electric power supply system, the absence of major issues of concern to the public, and the favorable recommendations of the Departments of State and Defense.

DOE has determined that the potential environmental impacts from the DOE preferred alternative, with implementation of the stipulated mitigation measures, are expected to be small, as discussed above, and overall less than the expected impacts from any of the other action alternatives. DOE's decision is also consistent with the Certificate of Compliance issued by DEQ on October 22, 2008, which authorized construction of the MATL project along the route identified as the preferred alternative and analyzed in the EIS, and represents a balance between avoidance of impacts to farmland, cost to farmers, avoidance of residences, public acceptance, and the use of public lands.

DOE did not select the No Action alternative because it would forgo the expected benefits of the proposed transmission line to the economy of Montana and because it would not be consistent with the finding of the Montana DEQ that there is a need for the transmission capacity that would be provided by the MATL project.

DOE has determined that granting a Presidential permit to MATL for construction of an international transmission line along the route identified as the preferred alternative in the EIS is consistent with the public interest based on the consideration of environmental impacts, the lack of adverse impacts on the reliability of the U.S. electric power supply system, the absence of major issues of concern to the public, and the favorable recommendations of the Departments of State and Defense. In reaching the finding on electric system reliability, DOE considered the information contained in the *System Impact Study* commissioned by NWE, dated September 26, 2006, and the *Phase 2 Study Report* accepted by the Project Review Group of the Western Electricity Coordinating Council (WECC) [3], dated July 24, 2007, both of which were submitted to DOE by MATL in support of its application for a Presidential permit.

The results of the *System Impact Study* indicate that the proposed international transmission line can be interconnected to the NWE system at the Great Falls substation and operated without violating industry-established reliability criteria provided that MATL mitigates potential overloads on two autotransformers identified in the contingency analysis and operates its shunt capacitor facilities in such a way as to avoid high voltages during all electric system operating conditions. The Presidential permit to be issued to MATL will contain a condition requiring it to comply with these interconnection requirements.

The results of the WECC *Phase 2 Study Report* indicate that the proposed MATL line can be installed and operated without having an adverse impact on the reliability of the U.S. electric power system provided that MATL implements the mitigation plan described in that report. MATL has committed to implementing this mitigation plan which includes development and implementation of a remedial action scheme and related operating procedures and nomograms.[4] The Presidential permit to be issued to MATL will contain a condition requiring MATL to develop and implement the mitigation and adhere to all other operating requirements that may be prescribed by WECC and/or NWE.

For the foregoing reasons, DOE has decided to issue Presidential Permit PP–305 to MATL authorizing the construction, operation, maintenance, and connection of a 230-kV transmission line across the U.S.-

[3] The Western Electricity Coordinating Council is one of 8 regional electric reliability councils within the United States. It is responsible for coordinating and promoting electric reliability in all or part of the 14 western states, the Canadian Provinces of British Columbia and Alberta, and the northern portion of Baja California, Mexico.

[4] Remedial action schemes and nomograms are operating procedures that establish limits on the amount of electric power that may be transmitted over a particular transmission line or produced by a generating station under varying electric system conditions of load and equipment availability. These operating procedures establish a means of avoiding or mitigating any reliability problems that are expected to exist under various system contingencies.

Canada border along the preferred alternative identified and analyzed in the EIS, with the environmental mitigation measures and electric reliability conditions noted above.

Dated: November 12, 2008.

Kevin M. Kolevar,

Assistant Secretary, Office of Electricity Delivery and Energy Reliability.

[FR Doc. E8–27187 Filed 11–14–08; 8:45 am]

BILLING CODE 6450–01–P

DEPARTMENT OF ENERGY

Bonneville Power Administration

2008 Columbia Basin Fish Accords Memorandum of Agreement with the Shoshone-Bannock Tribes

AGENCY: Bonneville Power Administration (BPA), Department of Energy (DOE).

ACTION: Notice of availability of Record of Decision (ROD).

SUMMARY: This notice announces the availability of the ROD for the 2008 Columbia Basin Fish Accords Memorandum of Agreement (MOA) with the Shoshone-Bannock Tribes consistent with and tiered to the Fish and Wildlife Implementation Plan Environmental Impact Statement (DOE/EIS–0312, April 2003) and ROD (October 31, 2003). BPA has decided to enter into a MOA with the Shoshone-Bannock Tribes of the Fort Hall Indian Reservation in Idaho and two Federal agencies (the U.S. Army Corps of Engineers and the U.S. Bureau of Reclamation) to provide for 10-year mutual commitments to implement projects for the benefit of fish and wildlife within the Columbia River Basin. BPA believes the agreement will benefit fish and wildlife in the region by providing additional actions, greater clarity regarding biological benefits, and secure funding. The agreement also provides substantial benefits for wildlife and fish populations, both anadromous and resident fish, within the Basin and within Idaho. The agreement will also help BPA meet its treaty and trust responsibilities to the tribes.

ADDRESSES: Copies of the ROD may be obtained by calling BPA's toll-free document request line, 1–800–622–4520. The ROD is also available on the BPA Web site, *http://www.bpa.gov/corporate/pubs/rods/2008/.*

FOR FURTHER INFORMATION CONTACT: Sandra Ackley, Bonneville Power Administration—KEC–4, P.O. Box 3621, Portland, Oregon, 97208–3621; toll-free telephone number 1–800–282–3713; fax number 503–230–5699; or e-mail *sjackley@bpa.gov.*

Issued in Portland, Oregon, on November 6, 2008.

Stephen J. Wright,

Administrator and Chief Executive Officer.

[FR Doc. E8–27186 Filed 11–14–08; 8:45 am]

BILLING CODE 6450–01–P

DEPARTMENT OF ENERGY

Federal Energy Regulatory Commission

[Docket No. EL09–8–000]

Lavand & Lodge, LLC Complainant v. ISO New England, Inc. Respondent; Notice of Complaint

November 10, 2008.

Take notice that on November 3, 2008, Lavand & Lodge, LLC (Complainant) filed, pursuant to sections 206 and 212 of the Rules and Practice and Procedure, 18 CFR 385.206 and 385.212, a formal complaint against ISO New England, Inc. (Respondent) alleging that the Respondent breached its obligation relative to certain settlement constructs.

Any person desiring to intervene or to protest this filing must file in accordance with Rules 211 and 214 of the Commission's Rules of Practice and Procedure (18 CFR 385.211, 385.214). Protests will be considered by the Commission in determining the appropriate action to be taken, but will not serve to make protestants parties to the proceeding. Any person wishing to become a party must file a notice of intervention or motion to intervene, as appropriate. The Respondent's answer and all interventions, or protests must be filed on or before the comment date. The Respondent's answer, motions to intervene, and protests must be served on the Complainants.

The Commission encourages electronic submission of protests and interventions in lieu of paper using the ''eFiling'' link at *http://www.ferc.gov.* Persons unable to file electronically should submit an original and 14 copies of the protest or intervention to the Federal Energy Regulatory Commission, 888 First Street, NE., Washington, DC 20426.

This filing is accessible on-line at *http://www.ferc.gov,* using the ''eLibrary'' link and is available for review in the Commission's Public Reference Room in Washington, DC. There is an ''eSubscription'' link on the Web site that enables subscribers to receive e-mail notification when a document is added to a subscribed docket(s). For assistance with any FERC Online service, please e-mail *FERCOnlineSupport@ferc.gov,* or call (866) 208–3676 (toll free). For TTY, call (202) 502–8659.

Comment Date: 5 p.m. Eastern Time on November 28, 2008.

Kimberly D. Bose,

Secretary.

[FR Doc. E8–27173 Filed 11–14–08; 8:45 am]

BILLING CODE 6717–01–P

DEPARTMENT OF ENERGY

Federal Energy Regulatory Commission

[Docket No. TX09–1–000]

Powerex Corp.; Notice of Filing

November 10, 2008.

Take notice that on November 5, 2008, Powerex Corp. (Powerex) filed an application for an Order, requesting that the Commission require Nevada Power Company (Nevada Power) to provide transmission serve to Powerex, pursuant to section 211 of the Federal Power Act and section 5.2 of Nevada Power's Open Access Transmission Tariff.

Any person desiring to intervene or to protest this filing must file in accordance with Rules 211 and 214 of the Commission's Rules of Practice and Procedure (18 CFR 385.211, 385.214). Protests will be considered by the Commission in determining the appropriate action to be taken, but will not serve to make protestants parties to the proceeding. Any person wishing to become a party must file a notice of intervention or motion to intervene, as appropriate. Such notices, motions, or protests must be filed on or before the comment date. On or before the comment date, it is not necessary to serve motions to intervene or protests on persons other than the Applicant.

The Commission encourages electronic submission of protests and interventions in lieu of paper using the ''eFiling'' link at *http://www.ferc.gov.* Persons unable to file electronically should submit an original and 14 copies of the protest or intervention to the Federal Energy Regulatory Commission, 888 First Street, NE., Washington, DC 20426.

This filing is accessible on-line at *http://www.ferc.gov,* using the ''eLibrary'' link and is available for review in the Commission's Public Reference Room in Washington, DC. There is an ''eSubscription'' link on the Web site that enables subscribers to receive e-mail notification when a document is added to a subscribed

docket(s). For assistance with any FERC Online service, please e-mail *FERCOnlineSupport@ferc.gov,* or call (866) 208–3676 (toll free). For TTY, call (202) 502–8659.

Comment Date: 5 p.m. Eastern Time on December 5, 2008.

Kimberly D. Bose,

Secretary.

[FR Doc. E8–27172 Filed 11–14–08; 8:45 am]

BILLING CODE 6717–01–P

DEPARTMENT OF ENERGY

Federal Energy Regulatory Commission

[Docket No. ER09–172–000]

Canandaigua Power Partners, LLC; Supplemental Notice That Initial Market-Based Rate Filing Includes Request for Blanket Section 204 Authorization

November 10, 2008.

This is a supplemental notice in the above-referenced proceeding of Canandaigua Power Partners, LLC's application for market-based rate authority, with an accompanying rate tariff, noting that such application includes a request for blanket authorization, under 18 CFR part 34, of future issuances of securities and assumptions of liability.

Any person desiring to intervene or to protest should file with the Federal Energy Regulatory Commission, 888 First Street, NE., Washington, DC 20426, in accordance with Rules 211 and 214 of the Commission's Rules of Practice and Procedure (18 CFR 385.211 and 385.214). Anyone filing a motion to intervene or protest must serve a copy of that document on the Applicant.

Notice is hereby given that the deadline for filing protests with regard to the applicant's request for blanket authorization, under 18 CFR part 34, of future issuances of securities and assumptions of liability, is December 1, 2008.

The Commission encourages electronic submission of protests and interventions in lieu of paper, using the FERC Online links at *http://www.ferc.gov.* To facilitate electronic service, persons with Internet access who will eFile a document and/or be listed as a contact for an intervenor must create and validate an eRegistration account using the eRegistration link. Select the eFiling link to log on and submit the intervention or protests.

Persons unable to file electronically should submit an original and 14 copies of the intervention or protest to the Federal Energy Regulatory Commission, 888 First St., NE., Washington, DC 20426.

The filings in the above-referenced proceeding are accessible in the Commission's eLibrary system by clicking on the appropriate link in the above list.

They are also available for review in the Commission's Public Reference Room in Washington, DC. There is an eSubscription link on the Web site that enables subscribers to receive e-mail notification when a document is added to a subscribed docket(s). For assistance with any FERC Online service, please e-mail *FERCOnlineSupport@ferc.gov.* or call (866) 208–3676 (toll free). For TTY, call (202) 502–8659.

Nathaniel J. Davis, Sr.,

Deputy Secretary.

[FR Doc. E8–27194 Filed 11–14–08; 8:45 am]

BILLING CODE 6717–01–P

DEPARTMENT OF ENERGY

Federal Energy Regulatory Commission

[Docket No. ER09–174–000]

Evergreen Wind Power V, LLC; Supplemental Notice That Initial Market-Based Rate Filing Includes Request for Blanket Section 204 Authorization

November 10, 2008.

This is a supplemental notice in the above-referenced proceeding of Evergreen Wind Power, LLC's application for market-based rate authority, with an accompanying rate tariff, noting that such application includes a request for blanket authorization, under 18 CFR part 34, of future issuances of securities and assumptions of liability.

Any person desiring to intervene or to protest should file with the Federal Energy Regulatory Commission, 888 First Street, NE., Washington, DC 20426, in accordance with Rules 211 and 214 of the Commission's Rules of Practice and Procedure (18 CFR 385.211 and 385.214). Anyone filing a motion to intervene or protest must serve a copy of that document on the Applicant.

Notice is hereby given that the deadline for filing protests with regard to the applicant's request for blanket authorization, under 18 CFR part 34, of future issuances of securities and assumptions of liability, is December 1, 2008.

The Commission encourages electronic submission of protests and interventions in lieu of paper, using the FERC Online links at *http://www.ferc.gov.* To facilitate electronic service, persons with Internet access who will eFile a document and/or be listed as a contact for an intervenor must create and validate an eRegistration account using the eRegistration link. Select the eFiling link to log on and submit the intervention or protests.

Persons unable to file electronically should submit an original and 14 copies of the intervention or protest to the Federal Energy Regulatory Commission, 888 First St., NE., Washington, DC 20426.

The filings in the above-referenced proceeding are accessible in the Commission's eLibrary system by clicking on the appropriate link in the above list. They are also available for review in the Commission's Public Reference Room in Washington, DC. There is an eSubscription link on the Web site that enables subscribers to receive e-mail notification when a document is added to a subscribed docket(s). For assistance with any FERC Online service, please e-mail *FERCOnlineSupport@ferc.gov* or call (866) 208–3676 (toll free). For TTY, call (202) 502–8659.

Nathaniel J. Davis, Sr.,

Deputy Secretary.

[FR Doc. E8–27196 Filed 11–14–08; 8:45 am]

BILLING CODE 6717–01–P

DEPARTMENT OF ENERGY

Federal Energy Regulatory Commission

[Docket No. ER09–214–000]

Mt. Carmel Cogen, Inc.; Supplemental Notice That Initial Market-Based Rate Filing Includes Request for Blanket Section 204 Authorization

November 10, 2008.

This is a supplemental notice in the above-referenced proceeding of Mt. Carmel Cogen, Inc.'s application for market-based rate authority, with an accompanying rate tariff, noting that such application includes a request for blanket authorization, under 18 CFR part 34, of future issuances of securities and assumptions of liability.

Any person desiring to intervene or to protest should file with the Federal Energy Regulatory Commission, 888 First Street, NE., Washington, DC, 20426, in accordance with Rules 211 and 214 of the Commission's Rules of Practice and Procedure (18 CFR 385.211 and 385.214). Anyone filing a motion to

intervene or protest must serve a copy of that document on the Applicant.

Notice is hereby given that the deadline for filing protests with regard to the applicant's request for blanket authorization, under 18 CFR Part 34, of future issuances of securities and assumptions of liability, is December 1, 2008.

The Commission encourages electronic submission of protests and interventions in lieu of paper, using the FERC Online links at *http://www.ferc.gov*. To facilitate electronic service, persons with Internet access who will eFile a document and/or be listed as a contact for an intervenor must create and validate an eRegistration account using the eRegistration link. Select the eFiling link to log on and submit the intervention or protests.

Persons unable to file electronically should submit an original and 14 copies of the intervention or protest to the Federal Energy Regulatory Commission, 888 First St., NE., Washington, DC 20426.

The filings in the above-referenced proceeding are accessible in the Commission's eLibrary system by clicking on the appropriate link in the above list. They are also available for review in the Commission's Public Reference Room in Washington, DC. There is an eSubscription link on the Web site that enables subscribers to receive e-mail notification when a document is added to a subscribed docket(s). For assistance with any FERC Online service, please e-mail *FERCOnlineSupport@ferc.gov.* or call (866) 208–3676 (toll free). For TTY, call (202) 502–8659.

Nathaniel J. Davis, Sr.,

Deputy Secretary.

[FR Doc. E8–27195 Filed 11–14–08; 8:45 am]

BILLING CODE 6717–01–P

ENVIRONMENTAL PROTECTION AGENCY

[FRL–8741–1]

Agency Information Collection Activities OMB Responses

AGENCY: Environmental Protection Agency (EPA).

ACTION: Notice.

SUMMARY: This document announces the Office of Management and Budget's (OMB) responses to Agency Clearance requests, in compliance with the Paperwork Reduction Act (44 U.S.C. 3501 *et seq.*). An agency may not conduct or sponsor, and a person is not required to respond to, a collection of information unless it displays a currently valid OMB control number. The OMB control numbers for EPA's regulations are listed in 40 CFR part 9 and 48 CFR chapter 15.

FOR FURTHER INFORMATION CONTACT: Rick Westlund (202) 566–1682, or e-mail at *westlund.rick@epa.gov* and please refer to the appropriate EPA Information Collection Request (ICR) Number.

SUPPLEMENTARY INFORMATION:

OMB Responses to Agency Clearance Requests

OMB Approvals

EPA ICR Number 1591.24; Regulation of Fuel and Fuel Additives (Renewal); in 40 CFR 80.40–80.130; was approved 10/22/2008; OMB Number 2060–0277; expires 10/31/2011.

EPA ICR Number 1230.23; Prevention of Significant Deterioration and Non-Attainment New Source Review (Renewal); in 40 CFR part 51, appendix S, 40 CFR 51.160–51.166, 40 CFR 52.21–52.24; was approved 10/22/2008; OMB Number 2060–0003; expires 10/31/2011.

EPA ICR Number 1446.09; PCBs: Consolidated Reporting and Recordkeeping Requirements; in 40 CFR part 761; was approved 10/29/2008; OMB Number 2070–0112; expires 10/31/2011.

EPA ICR Number 1715.10; TSCA Section 402 and Section 404 Training and Certification, Accreditation and Standards for Lead-Based Paint Activities (Final Rule Addendum); in 40 CFR part 745; was approved 11/03/2008; OMB Number 2070–0155; expires 10/31/2011.

Disapproval

EPA ICR Number 2097.03; The National Primary Drinking Water Regulations; Long Term 2 Enhanced Surface Water Treatment Rule; a request for a short term extension of the 10/31/2008 expiration date was disapproved 11/04/2008.

Dated: November 10, 2008.

John Moses,

Acting Director, Collection Strategies Division.

[FR Doc. E8–27202 Filed 11–14–08; 8:45 am]

BILLING CODE 6560–50–P

ENVIRONMENTAL PROTECTION AGENCY

[Docket# EPA–RO4–SFUND–2008–0778, FRL–8741–2]

Former Spellman Engineering Site; Orlando, Orange County, FL; Notice of Settlements

AGENCY: Environmental Protection Agency.

ACTION: Notice of Settlements.

SUMMARY: Under Section 122(h)(1) of the Comprehensive Environmental Response, Compensation and Liability Act (CERCLA), the United States Environmental Protection Agency has entered into two settlements concerning the Former Spellman Engineering Site located in Orlando, Orange County, Florida for publication.

DATES: The Agency will consider public comments on the settlements until December 17, 2008. The Agency will consider all comments received and may modify or withdraw its consent to the settlements if comments received disclose facts or considerations which indicate that the settlements are inappropriate, improper, or inadequate.

ADDRESSES: Copies of the settlements are available from Ms. Paula V. Painter. Submit your comments, identified by Docket ID No. EPA–RO4–SFUND–2008–0778 or Site name Former Spellman Engineering Superfund Site by one of the following methods:

- *http://www.regulations.gov:* Follow the on-line instructions for submitting comments.
- *E-mail: Painter.Paula@epa.gov.*
- *Fax:* 404/562–8842/Attn Paula V. Painter.

FOR FURTHER INFORMATION CONTACT: Paula V. Painter at 404/562–8887.

Dated: October 15, 2008.

Anita L. Davis,

Chief, Superfund Enforcement & Information Management Branch, Superfund Division.

[FR Doc. E8–27200 Filed 11–14–08; 8:45 am]

BILLING CODE 6560–50–P

FEDERAL COMMUNICATIONS COMMISSION

Public Information Collection Requirement Submitted to OMB for Review and Approval, Comments Requested

November 12, 2008.

SUMMARY: The Federal Communications Commission, as part of its continuing effort to reduce paperwork burden, invites the general public and other

Federal agencies to take this opportunity to comment on the following information collection, as required by the Paperwork Reduction Act of 1995, Public Law 104–13. An agency may not conduct or sponsor a collection of information unless it displays a currently valid control number. No person shall be subject to any penalty for failing to comply with a collection of information subject to the Paperwork Reduction Act (PRA) that does not display a valid control number. Comments are requested concerning (a) whether the proposed collection of information is necessary for the proper performance of the functions of the Commission, including whether the information shall have practical utility; (b) the accuracy of the Commission's burden estimate; (c) ways to enhance the quality, utility, and clarity of the information collected; and (d) ways to minimize the burden of the collection of information on the respondents, including the use of automated collection techniques or other forms of information technology.

DATES: Written Paperwork Reduction Act (PRA) comments should be submitted on or before December 17, 2008. If you anticipate that you will be submitting comments, but find it difficult to do so within the period of time allowed by this notice, you should advise the contacts listed below as soon as possible.

ADDRESSES: Direct all PRA comments to Nicholas A. Fraser, Office of Management and Budget, via Internet at *Nicholas_A._Fraser@omb.eop.gov* or via fax at (202) 395–5167 and to Cathy Williams, Federal Communications Commission, Room 1–C823, 445 12th Street, SW., Washington, DC or via Internet at *Cathy.Williams@fcc.gov* or *PRA@fcc.gov*. To view a copy of this information collection request (ICR) submitted to OMB: (1) Go to the web page *http://www.reginfo.gov/public/do/PRAMain*, (2) look for the section of the Web page called ''Currently Under Review,'' (3) click on the downward-pointing arrow in the ''Select Agency'' box below the ''Currently Under Review'' heading, (4) select ''Federal Communications Commission'' from the list of agencies presented in the ''Select Agency'' box, (5) click the ''Submit'' button to the right of the ''Select Agency'' box, (6) when the list of FCC ICRs currently under review appears, look for the title of this ICR (or its OMB control number, if there is one) and then click on the ICR Reference Number to view detailed information about this ICR.''

FOR FURTHER INFORMATION CONTACT: For additional information or copies of the information collection(s), contact Cathy Williams at (202) 418–2918.

SUPPLEMENTARY INFORMATION:

OMB Control Number: 3060–0174.

Title: Sections 73.1212, 76.1615 and 76.1715, Sponsorship Identification.

Form Number: Not applicable.

Type of Review: Extension of a currently approved collection.

Respondents: Business or other for-profit entities; Individuals or households.

Number of Respondents/Responses: 23,215 respondents; 1,711,990 responses.

Estimated Time per Response: 0.0011 hours to 0.2011 hours.

Frequency of Response: Recordkeeping requirement; Third party disclosure requirement; On occasion reporting requirement.

Total Annual Burden: 224,971 hours.

Total Annual Cost: $31,818.88.

Nature of Response: Required to obtain or retain benefits. The statutory authority for this information collection is contained in 4(i), 317 and 507 of the Communications Act of 1934, as amended.

Confidentiality: No need for confidentiality required.

Privacy Impact Assessment(s): No impact(s).

Needs and Uses: 47 CFR 73.1212 requires a broadcast station to identify the sponsor of any matter transmitted for consideration. 47 CFR 76.1615 states that, when a cable operator engaged in origination cablecasting presents any matter for which consideration is provided to such cable television system operator, the cable television system operator, at the time of the telecast, shall identify the sponsor. For both sections, for advertising commercial products or services, the mention of the sponsor's name or product, when it is clear that the mention of the product constitutes sponsorship identification, is all that is required. In the case of television political advertisements concerning candidates for public office, the sponsor shall be identified with letters equal to or greater than four (4) percent of the vertical height of the television screen that airs for no less than four (4) seconds.

47 CFR 73.1212 and 76.1715 state that, with respect to sponsorship announcements that are waived when the broadcast/origination cablecast of ''want ads'' sponsored by an individual, the licensee/operator shall maintain a list showing the name, address and telephone number of each such advertiser. These lists shall be made available for public inspection.

47 CFR 73.1212 states that, when an entity rather than an individual sponsors the broadcast of matter that is of a political or controversial nature, the licensee is required to retain a list of the executive officers, or board of directors, or executive committee, etc., of the organization paying for such matter in its public file.

Federal Communications Commission.

Marlene H. Dortch,

Secretary.

[FR Doc. E8–27245 Filed 11–14–08; 8:45 am]

BILLING CODE 6712–01–P

FEDERAL COMMUNICATIONS COMMISSION

Notice of Public Information Collection(s) Being Reviewed by the Federal Communications Commission, Comments Requested

November 12, 2008.

SUMMARY: The Federal Communications Commission, as part of its continuing effort to reduce paperwork burdens, invites the general public and other Federal agencies to take this opportunity to comment on the following information collection(s), as required by the Paperwork Reduction Act of 1995 (PRA), Public Law No. 104–13. An agency may not conduct or sponsor a collection of information unless it displays a currently valid control number. Subject to the PRA, no person shall be subject to any penalty for failing to comply with a collection of information that does not display a valid control number. Comments are requested concerning (a) whether the proposed collection of information is necessary for the proper performance of the functions of the Commission, including whether the information shall have practical utility; (b) the accuracy of the Commission's burden estimate; (c) ways to enhance the quality, utility, and clarity of the information collected; and (d) ways to minimize the burden of the collection of information on the respondents, including the use of automated collection techniques or other forms of information technology.

DATES: Written PRA comments should be submitted on or before January 16, 2009. If you anticipate that you will be submitting comments, but find it difficult to do so within the period of time allowed by this notice, you should advise the contact listed below as soon as possible.

ADDRESSES: Interested parties may submit all PRA comments by e-mail or U.S. post mail. To submit your comments by e-mail, send them to

PRA@fcc.gov and/or to *Cathy.Williams@fcc.gov.* To submit your comments by U.S. mail, mark them to the attention of Cathy Williams, Federal Communications Commission, Room 1–C823, 445 12th Street, SW., Washington, DC 20554.

FOR FURTHER INFORMATION CONTACT: For additional information about the information collection(s), contact Cathy Williams at (202) 418–2918 or send an e-mail to *PRA@fcc.gov* and/or *Cathy.Williams@fcc.gov.*

SUPPLEMENTARY INFORMATION:

OMB Control No.: 3060–0678.

Title: Part 25 of the Commission's Rules Governing the Licensing of, and Spectrum Usage by, Satellite Network Stations and Space Stations.

Form No.: FCC Form 312 and Schedule S.

Type of Review: Revision of a currently approved collection.

Respondents: Business or other for-profit entities.

Number of Respondents: 4,112 respondents; 4,112 responses.

Estimated Time per Response: 1 Hour.

Frequency of Response: On occasion and annual reporting requirements; Third party disclosure requirement.

Obligation to Respond: Required to obtain or retain benefits. The Commission has statutory approval for the information collection requirements under Sections 4(i), 7(a), 303(c), 303(f), 303(g) and 303(r) of the Communications Act of 1934, as amended, 47 U.S.C. Sections 154(i), 157(a), 303(c), 303(f), 303(g) and 303(r).

Total Annual Burden: 42,579 hours.

Total Annual Cost: $613,719,126.

Privacy Act Impact Assessment: No impact(s).

Nature and Extent of Confidentiality: There is no need for confidentiality pertaining to the information collection requirements in this collection.

Needs and Uses: On October 17, 2008, the Federal Communications Commission (''Commission'') released an Eighth Report and Order and Order on Reconsideration titled, ''In the Matter of 2000 Biennial Regulatory Review—Streamlining and Other Revisions of Part 25 of the Commission's Rules Governing the Licensing of, and Spectrum Usage by, Satellite Network Earth Stations and Space Stations; Streamlining the Commission's Rules and Regulations for Satellite Applications and Licensing Procedures'' (FCC 08–246), IB Docket Nos. 00–248 and 95–117. In the Eighth Report and Order, the Commission further streamlined the Commission's non-routine earth station processing rules by adopting a new earth station procedure that will enable the Commission to treat more applications routinely than is possible under the current earth station procedures. This rulemaking facilitates the provision of broadband Internet access services.

The PRA information collection requirements contained in the Eighth Report and Order are as follows:

1. The Commission plans to modify the ''Application for Satellite Space and Earth Station Authorizations'' (FCC Form 312), including Schedule B, in the International Bureau Filing System (''MyIBFS'') to reflect the off-axis equivalent isotropically radiated power (EIRP) envelope compliance requirement. In the interim, earth station applicants must submit a table as an attachment to the FCC Form 312 to show their compliance with the off-axis EIRP requirement.

2. Earth station licensees who plan to use a contention protocol must certify that their contention protocol usage will be reasonable. In the future, the Commission will revise the FCC Form 312 in MyIBFS to provide a streamlined method for earth station applicants planning to use a contention protocol to make this certification.

The information collection requirements accounted for in this collection are necessary to determine the technical and legal qualifications of applicants or licensees to operate a station, transfer or assign a license, and to determine whether the authorization is in the public interest, convenience and necessity. Without such information, the Commission could not determine whether to permit respondents to provide telecommunication services in the U.S. Therefore, the Commission would be unable to fulfill its statutory responsibilities in accordance with the Communications Act of 1934, as amended, and the obligations imposed on parties to the World Trade Organization (WTO) Basic Telecom Agreement.

Federal Communications Commission.

Marlene H. Dortch,

Secretary.

[FR Doc. E8–27247 Filed 11–14–08; 8:45 am]

BILLING CODE 6712–01–P

FEDERAL ELECTION COMMISSION

Sunshine Act Notices

AGENCY: Federal Election Commission.

DATE AND TIME: Tuesday, November 18, 2008 at 10 a.m.

PLACE: 999 E Street, NW., Washington, DC.

STATUS: This meeting will be closed to the public.

ITEMS TO BE DISCUSSED: Compliance matters pursuant to 2 U.S.C. 437g.

Audits conducted pursuant to 2 U.S.C. 437g, 438(b), and Title 26, U.S.C.

Matters concerning participation in civil actions or proceedings or arbitration.

Internal personnel rules and procedures or matters affecting a particular employee.

PERSON TO CONTACT FOR INFORMATION: Mr. Robert Biersack, Press Officer, Telephone: (202) 694–1220.

Mary W. Dove,

Secretary of the Commission.

[FR Doc. E8–27138 Filed 11–14–08; 8:45 am]

BILLING CODE 6715–01–M

FEDERAL MARITIME COMMISSION

Sunshine Act; Notice of Meeting

AGENCY HOLDING THE MEETING: Federal Maritime Commission.

TIME AND DATE: November 20, 2008—10 a.m.

PLACE: 800 North Capitol Street, NW., First Floor Hearing Room, Washington, DC.

STATUS: A portion of the meeting will be in Open Session and the remainder of the meeting will be in Closed Session.

MATTERS TO BE CONSIDERED:

Open Session

(1) Semiannual IG Report to the Congress.

(2) FY 2008 Competitive Sourcing Efforts.

(3) FMC Agreement No. 201197, SSA Terminals (Oakland) Cooperative Working Agreement

(4) Docket No. 06–01—Worldwide Relocations, Inc., All-in-One Shipping, Inc., Boston Logistics, Corp., Around the World Shipping, Inc., *et al.*

Closed Session

(1) Internal Administrative Practices and Personnel Matters.

(2) Docket No. 06–06—EuroUSA Shipping Inc., Tober Group, Inc., and Container Innovations, Inc.,—Possible Violations of Section 10 of the Shipping Act of 1984 and the Commission's Regulations at 46 CFR 515.27.

(3) *Federal Maritime Commission* v. *City of Los Angeles, California*; Harbor Department of the City of Los Angeles; Board of Harbor Commissioners of the City of Los Angeles; City of Long Beach, California; Harbor Department of the City of Long Beach; Board of Harbor Commissioners of the City of Long

Beach—Complaint for an Injunction Pursuant to section 6(h) of the Shipping Act of 1984, 46 U.S.C. 41307—Update on Status of the Proceeding.

FOR FURTHER INFORMATION CONTACT: Karen V. Gregory, Secretary, (202) 523–5725.

Karen V. Gregory,

Secretary.

[FR Doc. E8–27384 Filed 11–13–08; 4:15 pm]

BILLING CODE 6730–01–P

FEDERAL RESERVE SYSTEM

Formations of, Acquisitions by, and Mergers of Bank Holding Companies

The companies listed in this notice have applied to the Board for approval, pursuant to the Bank Holding Company Act of 1956 (12 U.S.C. 1841 *et seq.*) (BHC Act), Regulation Y (12 CFR Part 225), and all other applicable statutes and regulations to become a bank holding company and/or to acquire the assets or the ownership of, control of, or the power to vote shares of a bank or bank holding company and all of the banks and nonbanking companies owned by the bank holding company, including the companies listed below.

The applications listed below, as well as other related filings required by the Board, are available for immediate inspection at the Federal Reserve Bank indicated. The applications also will be available for inspection at the offices of the Board of Governors. Interested persons may express their views in writing on the standards enumerated in the BHC Act (12 U.S.C. 1842(c)). If the proposal also involves the acquisition of a nonbanking company, the review also includes whether the acquisition of the nonbanking company complies with the standards in section 4 of the BHC Act (12 U.S.C. 1843). Unless otherwise noted, nonbanking activities will be conducted throughout the United States. Additional information on all bank holding companies may be obtained from the National Information Center website at *www.ffiec.gov/nic/*.

Unless otherwise noted, comments regarding each of these applications must be received at the Reserve Bank indicated or the offices of the Board of Governors not later than December 12, 2008.

A. Federal Reserve Bank of Philadelphia (Michael E. Collins, Senior Vice President) 100 North 6th Street, Philadelphia, Pennsylvania 19105–1521:

1. Cornerstone Financial Corporation, to become a bank holding company by acquiring 100 percent of the voting shares of Cornerstone Bank, both of Mount Laurel, New Jersey.

B. Federal Reserve Bank of Richmond (A. Linwood Gill, III, Vice President) 701 East Byrd Street, Richmond, Virginia 23261–4528:

1. Hampton Roads Bankshares, Inc., Norfolk, Virginia, to acquire 100 percent of the voting shares of Gateway Financial Holdings, Inc., Virginia Beach, Virginia, and thereby indirectly acquire Gateway Bank and Trust Co., Elizabeth City, North Carolina.

C. Federal Reserve Bank of Atlanta (Steve Foley, Vice President) 1000 Peachtree Street, N.E., Atlanta, Georgia 30309:

1. BancTenn Corp., Kingsport Tennessee, to acquire up to 20 percent of the voting shares of Paragon Commercial Corporation, and thereby indirectly acquire voting shares of Paragon Commercial Bank, both of Raleigh, North Carolina.

D. Federal Reserve Bank of Kansas City (Todd Offenbacker, Assistant Vice President) 1 Memorial Drive, Kansas City, Missouri 64198–0001:

1. FSB Investments, LLC, Oklahoma City, Oklahoma, to become a bank holding company by acquiring up to 100 percent of the voting shares of MidWest Community Financial Corporation, Midwest City, Oklahoma, and thereby indirectly acquire The First State Bank, Canute, Oklahoma.

Board of Governors of the Federal Reserve System, November 12, 2008.

Robert deV. Frierson,

Deputy Secretary of the Board.

[FR Doc. E8–27183 Filed 11–14–08; 8:45 am]

BILLING CODE 6210–01–S

FEDERAL TRADE COMMISSION

Granting of Request for Early Termination of the Waiting Period Under the Premerger Notification Rules

Section 7A of the Clayton Act, 15 U.S.C. 18a, as added by Title II of the Hart-Scott-Rodino Antitrust Improvements Act of 1976, requires persons contemplating certain mergers or acquisitions to give the Federal Trade Commission and the Assistant Attorney General advance notice and to wait designated periods before consummation of such plans. Section 7A(b)(2) of the Act permits the agencies, in individual cases, to terminate this waiting period prior to its expiration and requires that notice of this action be published in the **Federal Register**.

The following transactions were granted early termination of the waiting period provided by law and the premerger notification rules. The grants were made by the Federal Trade Commission and the Assistant Attorney General for the Antitrust Division of the Department of Justice. Neither agency intends to take any action with respect to these proposed acquisitions during the applicable waiting period.

Trans No.	Acquiring	Acquired	Entities
Transactions Granted Early Termination—10/20/2008			
20090007	GlaxoSmithKline plc	Michael Pellico	Laclede, Inc.
20090008	GlaxoSmithKline plc	Stephen Pellico	Laclede, Inc.
20090009	Sageview Capital Master, L.P	Hologic, Inc	Hologic, Inc.
20090023	Vista Equity Partners Fund III, L.P	Francisco Partners, L.P	Aderant Holdings, Inc.
20090034	Vista Equity Partners Fund III, L.P	William R. Haack	Zywave, Inc.
20090039	ESL Partners, L.P	AutoZone, Inc	AutoZone, Inc.
20090044	ZAM Equities, L.P	AutoZone, Inc	AutoZone, Inc.
Transactions Granted Early Termination—10/21/2008			
20090022	Health Care Service Corporation	TMG Health, Inc	TMG Health, Inc.
20090031	Oracle Corporation	Primavera Software, Inc	Primavera Software, Inc.
Transactions Granted Early Termination—10/22/2008			
20090003	Puget Energy, Inc	Wayzata Opportunities Fund, LLC	Mint Farm Energy Center LLC.

Trans No.	Acquiring	Acquired	Entities
Transactions Granted Early Termination—10/23/2008			
20081693	Wollers Kluwer N.V	Platform Partners, LLC	Intellitax Software Solutions, Inc., Orrtax Intangibles, LLC, Refunds Today, LLC, Tax Refund Express, Inc., TRE Financial Services, LLC.
Transactions Granted Early Termination—10/24/2008			
20090027	Carl C. Icahn	The Williams Companies, Inc	The Williams Companies, Inc.
20090028	Icahn Partners Master Fund II L.P	The Williams Companies, Inc	The Williams Companies, Inc.
20090042	Toyota Boshoku Corporation	Toyota Boshoku Corporation	Trim Masters, Inc.
20090043	Toyota Boshoku Corporation	Johnson Controls, Inc	Trim Masters, Inc.
20090054	Maine Health	Waldo County Healthcare, Inc	Waldo County Healthcare, Inc.
20090055	Johnson & Johnson	Chrysalis Ventures II, L.P	HealthMedia, Inc.
20090055	Baljit S. Nanda	Sam Hirbod	PCF SaleCo, LLC.
Transactions Granted Early Termination—10/27/2008			
20081820	Reyes Holdings, LLC	Tillman J. Keller III	American Diversified Supply Company, Institutional Jobbers Corporation.
20090035	Merck & Co., Inc	Japan Tobacco Inc	Japan Tobacco Inc.
20090058	Continental Aktiengesellschaft	Carlisle Companies Incorporated	Carlisle Power Transmission Products, Inc.
20090063	Shindaiwa Corporation	Kioritz Corporation	Kioritz Corporation.
Transactions Granted Early Termination—10/28/2008			
20090045	Parker Hannifin Corporation	Robert E. Kershaw	Aqua Pro, Inc., Aqua Pro Properties Ltd. I.
20090057	HCL Technologies Limited	Axon Group plc	Axon Group plc.
Transactions Granted Early Termination—10/29/2008			
20090032	Ligand Pharmaceuticals Incorporated	Pharmacopeia, Inc	Pharmacopeia, Inc.
20090046	Precision Castparts Corp	Frederick Properties, Inc	Fatigue Technology, Inc., Fatigue Technology International Corporation, FTI Manufacturing, Inc.
20090056	Elliott Associates, L.P	Epicor Software Corporation	Epicor Software Corporation.
20090059	IMD Parent LLC	Lehman Brothers Holdings Inc	Lehman Brothers Holdings Inc.
Transactions Granted Early Termination—10/31/2008			
20090002	Berkshire Hathaway Inc	Constellation Energy Group, Inc	Constellation Energy Group, Inc.
20090064	Fairfax Financial Holdings Limited	Ridley Corporation Limited	Ridley Inc.
20090066	Hess Corporation	Crosstex Energy, L.P	Seminole Gas Processing Plant.
20090072	OME Acquisition S.C.A	HCP Capital Group GmbH	Starkstrom-Geratebau GmbH.

FOR FURTHER INFORMATION CONTACT: Sandra M. Peay, Contact Representative, or Renee Hallman, Contact Representative, Federal Trade Commission, Premerger Notification Office, Bureau of Competition, Room H–303, Washington, DC 20580, (202) 326–3100.

By Direction of the Commission.

Donald S. Clark,

Secretary.

[FR Doc. E8–27019 Filed 11–14–08; 8:45 am]

BILLING CODE 6750–01–M

GENERAL SERVICES ADMINISTRATION

Multiple Award Schedule Advisory Panel; Notification of Public Advisory Panel Meeting

AGENCY: U.S. General Services Administration (GSA).

ACTION: Notice.

SUMMARY: The U.S. General Services Administration's (GSA) Multiple Award Schedule Advisory Panel (MAS Panel), a Federal Advisory Committee, meeting scheduled for November 12, 2008, is cancelled.

Dated: November 12, 2008.

David A. Drabkin,

Deputy Chief Acquisition Officer, Office of the Chief Acquisition Officer, General Services Administration.

[FR Doc. E8–27228 Filed 11–14–08; 8:45 am]

BILLING CODE 6820–EP–M

DEPARTMENT OF HEALTH AND HUMAN SERVICES

Centers for Disease Control and Prevention

Diseases Transmitted Through the Food Supply

AGENCY: Centers for Disease Control and Prevention (CDC), Department of Health and Human Services (HHS).

ACTION: Notice of annual update of list of infectious and communicable diseases that are transmitted through handling the food supply and the methods by which such diseases are transmitted.

SUMMARY: Section 103(d) of the Americans with Disabilities Act of 1990, Public Law 101–336, requires the Secretary to publish a list of infectious and communicable diseases that are transmitted through handling the food supply and to review and update the list annually. The Centers for Disease Control and Prevention (CDC) published a final list on August 16, 1991 (56 FR 40897) and updates on September 8, 1992 (57 FR 40917); January 13, 1994 (59 FR 1949); August 15, 1996 (61 FR 42426); September 22, 1997 (62 FR 49518–9); September 15, 1998 (63 FR 49359), September 21, 1999 (64 FR 51127); September 27, 2000 (65 FR 58088), September 10, 2001 (66 FR 47030), and September 27, 2002 (67 FR 61109). The final list has been reviewed in light of new information and has been revised as set forth below.

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

FOR FURTHER INFORMATION CONTACT: Dr. Donald Sharp, National Center for Infectious Diseases, Centers for Disease Control and Prevention (CDC), 1600 Clifton Road, NE., Mailstop G–24, Atlanta, Georgia 30333; Telephone: (404) 639–2213.

SUPPLEMENTARY INFORMATION: Section 103(d) of the Americans with Disabilities Act of 1990, 42 U.S.C. 12113 (d), requires the Secretary of Health and Human Services to:

1. Review all infectious and communicable diseases which may be transmitted through handling the food supply;
2. Publish a list of infectious and communicable diseases which are transmitted through handling the food supply;
3. Publish the methods by which such diseases are transmitted; and,
4. Widely disseminate such information regarding the list of diseases and their modes of transmissibility to the general public.

Additionally, the list is to be updated annually.

Since the last publication of the list on September 26, 2006 (67 FR 61109), no information has been added.

I. Pathogens Often Transmitted by Food Contaminated by Infected Persons Who Handle Food, and Modes of Transmission of Such Pathogens

The contamination of raw ingredients from infected food-producing animals and cross-contamination during processing are more prevalent causes of foodborne disease than is contamination of foods by persons with infectious or contagious diseases. However, some pathogens are frequently transmitted by food contaminated by infected persons. The presence of any one of the following signs or symptoms in persons who handle food may indicate infection by a pathogen that could be transmitted to others through handling the food supply: Diarrhea, vomiting, open skin sores, boils, fever, dark urine, or jaundice. The failure of food-handlers to wash hands (in situations such as after using the toilet, handling raw meat, cleaning spills, or carrying garbage, for example), wear clean gloves, or use clean utensils is responsible for the foodborne transmission of these pathogens. Non-foodborne routes of transmission, such as from one person to another, are also major contributors in the spread of these pathogens. Pathogens that can cause diseases after an infected person handles food are the following:

Noroviruses;
Hepatitis A virus;
Salmonella Typhi *;
Shigella species;
Staphylococcus aureus;
Streptococcus pyogenes.

II. Pathogens Occasionally Transmitted by Food Contaminated by Infected Persons Who Handle Food, But Usually Transmitted by Contamination at the Source or in Food Processing or by Non-Foodborne Routes

Other pathogens are occasionally transmitted by infected persons who handle food, but usually cause disease when food is intrinsically contaminated or cross-contaminated during processing or preparation. Bacterial pathogens in this category often require a period of temperature abuse to permit their multiplication to an infectious dose before they will cause disease in consumers. Preventing food contact by persons who have an acute diarrheal illness will decrease the risk of transmitting the following pathogens:

Campylobacter jejuni;
Cryptosporidium parvum;
Entamoeba histolytica;
Enterohemorrhagic *Escherichia coli;*
Enterotoxigenic *Escherichia coli;*
Giardia lamblia;
Nontyphoidal *Salmonella;*
Sapoviruses;
Taenia solium;
Vibrio cholerae;
Yersinia enterocolitica.

* Kauffmann-White scheme for designation of *Salmonella* serotypes.

References

1. World Health Organization. Health surveillance and management procedures for food-handling personnel: report of a WHO consultation. World Health Organization technical report series; 785. Geneva: World Health Organization, 1989.
2. Frank JF, Barnhart HM. Food and dairy sanitation. In: Last JM, ed. Maxcy-Rosenau public health and preventive medicine, 12th edition. New York Appleton-Century-Crofts, 1986: 765–806.
3. Bennett JV, Holmberg SD, Rogers MF, Solomon SL. Infectious and parasitic diseases. In: Amler RW, Dull HB, eds. Closing the gap: the burden of unnecessary illness. New York: Oxford University Press, 1987: 102–114.
4. Centers for Disease Control and Prevention. Locally acquired neurocysticercosis—North Carolina, Massachusetts, and South Carolina, 1989–1991. MMWR 1992; 41:1–4.
5. Centers for Disease Control and Prevention. Foodborne Outbreak of Cryptosporidiosis-Spokane, Washington, 1997. MMWR 1998; 47:27.
6. Noel JS, Humphrey CD, Rodriguez EM, *et al.*, Parkville virus: A novel genetic variant of human calicivirus in the sapporo virus clade, associated with an outbreak of gastroenteritis in adults. J. Med. Virol. 52:173–178, 1997.

Dated: November 6, 2008.

James D. Seligman,

Chief Information Officer, Centers for Disease Control and Prevention (CDC).

[FR Doc. E8–27165 Filed 11–14–08; 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: Court Improvement Program.

OMB No.: 0970–0245.

Description: The Court Improvement Program provides grants to State court systems to conduct assessments of their foster care and adoption laws and judicial processes and to develop and implement a plan for system improvement. ACF proposes to collect information from the States about this program (applications, program reports) by way of a Program Instruction, which (1) describes the requirements for States under the reauthorization of the Court Improvement Program; (2) outlines the programmatic and fiscal provisions and reporting requirements of the program; (3) specifies the application submittal and approval procedures for the program for Fiscal Years 2007 through

2011; and (4) identifies technical resources for use by State courts during the course of the program. This Program Instruction contains information collection requirements pursuant to receiving a grant award that are found in Public Law 103–66, as amended by Public Law 105–89, Public Law 107–133, Public Law 109–239, and Public Law 109–288. The agency will use the information received to ensure compliance with the statute and provide training and technical assistance to the grantees.

Respondents: State Courts.

Annual Burden Estimates.

Instrument	Number of respondents	Number of responses per respondent	Average burden hours per response	Total burden hours
Application	52	1	40	2,080
Annual program report	52	1	36	1,872

Estimated Total Annual Burden Hours: 3,952.

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: November 12, 2008.

Janean Chambers,

Reports Clearance Officer.

[FR Doc. E8–27234 Filed 11–14–08; 8:45 am]

BILLING CODE 4184–01–P

DEPARTMENT OF HEALTH AND HUMAN SERVICES

Food and Drug Administration

[Docket No. FDA–2008–N–0571]

Agency Information Collection Activities; Proposed Collection; Comment Request; Guidance for Industry and Food and Drug Administration Staff; Compliance With the Medical Device User Fee and Modernization Act of 2002, as Amended: Prominent and Conspicuous Mark of Manufacturers on Single-Use Devices (formerly ''Reprocessed Single-Use Device Labeling'')

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 reprocessed single-use device labeling.

DATES: Submit written or electronic comments on the collection of information by January 16, 2009.

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.

Compliance With Section 301 of the Medical Device User Fee and Modernization Act of 2002, as Amended: Prominent and Conspicuous Mark of Manufacturers on Single-Use Devices (formerly "Reprocessed Single-Use Device Labeling") (Federal Food, Drug, and Cosmetic Act, Section 502(u)) (OMB Control Number 0910–0577)—Extension

Section 502 of the Federal Food, Drug, and Cosmetic Act (the act) (21 U.S.C. 352), among other things, establishes requirements that the label or labeling of a medical device must meet so that it is not misbranded and subject to regulatory action. Section 301 of the Medical Device User Fee and Modernization Act of 2002 (Public Law 107–250) amended section 502 of the act to add section 502(u) to require devices (both new and reprocessed) to bear prominently and conspicuously the name of the manufacturer, a generally recognized abbreviation of such name, or a unique and generally recognized symbol identifying the manufacturer. Thus, the name for this information collection activity has been changed to more accurately describe the information collection content.

Section 2(c) of The Medical Device User Fee Stabilization Act of 2005 (Public Law 109–43) amends section 502(u) of the act by limiting the provision to reprocessed single-use devices (SUDs) and the manufacturers who reprocess them. Under the amended provision, if the original SUD or an attachment to it prominently and conspicuously bears the name of the manufacturer, then the reprocessor of the SUD is required to identify itself by name, abbreviation, or symbol, in a prominent and conspicuous manner on the device or attachment to the device. If the original SUD does not prominently and conspicuously bear the name of the manufacturer, the manufacturer who reprocesses the SUD for reuse may identify itself using a detachable label that is intended to be affixed to the patient record.

The requirements of section 502(u) of the act impose a minimal burden on industry. This section of the act only requires the manufacturer, packer, or distributor of a device to include their name and address on the labeling of a device. This information is readily available to the establishment and easily supplied. From its registration and premarket submission database, FDA estimates that there are 10 establishments that distribute approximately 1,000 reprocessed SUDs. Each response is anticipated to take 0.1 hours resulting in a total burden to industry of 100 hours.

FDA estimates the burden of this collection of information as follows:

TABLE 1.—ESTIMATED ANNUAL REPORTING BURDEN[1]

Section of the Act	No. of Respondents	No. of Responses per Respondent	Total Annual Responses	Hours Per Response	Total Hours
502(u)	10	100	1,000	.1	100

[1] There are no capital costs or operating and maintenance costs associated with this collection of information.

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: November 5, 2008.

Jeffrey Shuren,

Associate Commissioner for Policy and Planning.

[FR Doc. E8–27178 Filed 11–14–08; 8:45 am]

BILLING CODE 4160–01–S

DEPARTMENT OF HEALTH AND HUMAN SERVICES

Food and Drug Administration

[Docket No. FDA–2008–E–0111]

Determination of Regulatory Review Period for Purposes of Patent Extension; SOMATULINE DEPOT

AGENCY: Food and Drug Administration, HHS.

ACTION: Notice.

SUMMARY: The Food and Drug Administration (FDA) has determined the regulatory review period for SOMATULINE DEPOT and is publishing this notice of that determination as required by law. FDA has made the determination because of the submission of an application to the Director of Patents and Trademarks, Department of Commerce, for the extension of a patent which claims that human drug product.

ADDRESSES: Submit written comments and petitions to the Division of Dockets Management (HFA–305), Food and Drug Administration, 5630 Fishers Lane, rm. 1061, Rockville, MD 20852. Submit electronic comments to *http://www.regulations.gov*.

FOR FURTHER INFORMATION CONTACT: Beverly Friedman, Office of Regulatory Policy, Food and Drug Administration, 10903 New Hampshire Ave., Bldg. 51, rm. 6222, Silver Spring, MD 20993–0002, 301–796–3602.

SUPPLEMENTARY INFORMATION: The Drug Price Competition and Patent Term Restoration Act of 1984 (Public Law 98–417) and the Generic Animal Drug and Patent Term Restoration Act (Public Law 100–670) generally provide that a patent may be extended for a period of up to 5 years so long as the patented item (human drug product, animal drug product, medical device, food additive, or color additive) was subject to regulatory review by FDA before the item was marketed. Under these acts, a product's regulatory review period forms the basis for determining the amount of extension an applicant may receive.

A regulatory review period consists of two periods of time: A testing phase and an approval phase. For human drug products, the testing phase begins when the exemption to permit the clinical investigations of the drug becomes effective and runs until the approval phase begins. The approval phase starts with the initial submission of an application to market the human drug product and continues until FDA grants permission to market the drug product. Although only a portion of a regulatory review period may count toward the actual amount of extension that the Director of Patents and Trademarks may award (for example, half the testing phase must be subtracted as well as any time that may have occurred before the patent was issued), FDA's determination of the length of a regulatory review period for a human drug product will include all of the testing phase and approval phase as specified in 35 U.S.C. 156(g)(1)(B).

FDA recently approved for marketing the human drug product SOMATULINE DEPOT (lanreotide). SOMATULINE DEPOT is indicated for the long-term treatment of acromegalic patients who

have had an inadequate response to or cannot be treated with surgery and/or radiotherapy. Subsequent to this approval, the Patent and Trademark Office received a patent term restoration application for SOMATULINE DEPOT (U.S. Patent No. 5,595,760) from Society De Conseils De Recherches Et D'Applications Scientifiques, and the Patent and Trademark Office requested FDA's assistance in determining this patent's eligibility for patent term restoration. In a letter dated April 22, 2008, FDA advised the Patent and Trademark Office that this human drug product had undergone a regulatory review period and that the approval of SOMATULINE DEPOT represented the first permitted commercial marketing or use of the product. Shortly thereafter, the Patent and Trademark Office requested that FDA determine the product's regulatory review period.

FDA has determined that the applicable regulatory review period for SOMATULINE DEPOT is 3,629 days. Of this time, 3,324 days occurred during the testing phase of the regulatory review period, while 305 days occurred during the approval phase. These periods of time were derived from the following dates:

1. *The date an exemption under section 505(i) of the Federal Food, Drug, and Cosmetic Act (the act) (21 U.S.C. 355) became effective*: September 24, 1997. FDA has verified the applicant's claim that the date the investigational new drug application became effective was on September 24, 1997.

2. *The date the application was initially submitted with respect to the human drug product under section 505(b) of the act*: October 30, 2006. FDA has verified the applicant's claim that the new drug application (NDA) for SOMATULINE DEPOT (NDA 22–074) was initially submitted on October 30, 2006.

3. *The date the application was approved:* August 30, 2007. FDA has verified the applicant's claim that NDA 22–074 was approved on August 30, 2007.

This determination of the regulatory review period establishes the maximum potential length of a patent extension. However, the U.S. Patent and Trademark Office applies several statutory limitations in its calculations of the actual period for patent extension. In its application for patent extension, this applicant seeks 5 years of patent term extension.

Anyone with knowledge that any of the dates as published are incorrect may submit to the Division of Dockets Management (see **ADDRESSES**) written or electronic comments and ask for a redetermination by January 16, 2009. Furthermore, any interested person may petition FDA for a determination regarding whether the applicant for extension acted with due diligence during the regulatory review period by May 18, 2009. To meet its burden, the petition must contain sufficient facts to merit an FDA investigation. (See H. Rept. 857, part 1, 98th Cong., 2d sess., pp. 41–42, 1984.) Petitions should be in the format specified in 21 CFR 10.30.

Comments and petitions should be submitted to the Division of Dockets Management. Three copies of any mailed information are to be submitted, except that individuals may submit one copy. Comments are to be identified with the docket number found in brackets in the heading of this document. Comments and petitions may be seen in the Division of Dockets Management between 9 a.m. and 4 p.m., Monday through Friday.

Please note that on January 15, 2008, the FDA Division of Dockets Management Web site transitioned to the Federal Dockets Management System (FDMS). FDMS is a Government-wide, electronic docket management system. Electronic comments or submissions will be accepted by FDA only through FDMS at *http://www.regulations.gov*.

Dated: October 20, 2008.

Jane A. Axelrad,

Associate Director for Policy, Center for Drug Evaluation and Research.

[FR Doc. E8–27179 Filed 11–14–08; 8:45 am]

BILLING CODE 4160–01–S

DEPARTMENT OF HOMELAND SECURITY

Federal Emergency Management Agency

[FEMA–1795–DR]

Indiana; Amendment No. 7 to Notice of a Major Disaster Declaration

AGENCY: Federal Emergency Management Agency, DHS.

ACTION: Notice.

SUMMARY: This notice amends the notice of a major disaster declaration for the State of Indiana (FEMA–1795–DR), dated September 23, 2008, and related determinations.

DATES: *Effective Date:* November 7, 2008.

FOR FURTHER INFORMATION CONTACT: Peggy Miller, Disaster Assistance Directorate, Federal Emergency Management Agency, 500 C Street, SW., Washington, DC 20472, (202) 646–3886.

SUPPLEMENTARY INFORMATION: The notice of a major disaster declaration for the State of Indiana is hereby amended to include the following areas among those areas determined to have been adversely affected by the event declared a major disaster by the President in his declaration of September 23, 2008.

LaPorte County for Public Assistance (already designated for Individual Assistance).

Daviess County for Public Assistance.

(The following Catalog of Federal Domestic Assistance Numbers (CFDA) are to be used for reporting and drawing funds: 97.030, Community Disaster Loans; 97.031, Cora Brown Fund; 97.032, Crisis Counseling; 97.033, Disaster Legal Services; 97.034, Disaster Unemployment Assistance (DUA); 97.046, Fire Management Assistance Grant; 97.048, Disaster Housing Assistance to Individuals and Households In Presidentially Declared Disaster Areas; 97.049, Presidentially Declared Disaster Assistance—Disaster Housing Operations for Individuals and Households; 97.050 Presidentially Declared Disaster Assistance to Individuals and Households—Other Needs; 97.036, Disaster Grants—Public Assistance (Presidentially Declared Disasters); 97.039, Hazard Mitigation Grant.)

R. David Paulison,

Administrator, Federal Emergency Management Agency.

[FR Doc. E8–27164 Filed 11–14–08; 8:45 am]

BILLING CODE 9111–23–P

DEPARTMENT OF HOMELAND SECURITY

Federal Emergency Management Agency

[FEMA–1804–DR]

Arkansas; Major Disaster and Related Determinations

AGENCY: Federal Emergency Management Agency, DHS.

ACTION: Notice.

SUMMARY: This is a notice of the Presidential declaration of a major disaster for the State of Arkansas (FEMA–1804–DR), dated October 22, 2008, and related determinations.

DATES: *Effective Date:* October 22, 2008.

FOR FURTHER INFORMATION CONTACT: Peggy Miller, Disaster Assistance Directorate, Federal Emergency Management Agency, 500 C Street, SW., Washington, DC 20472, (202) 646–3886.

SUPPLEMENTARY INFORMATION: Notice is hereby given that, in a letter dated October 22, 2008, the President declared a major disaster under the authority of the Robert T. Stafford Disaster Relief and Emergency Assistance Act, 42

U.S.C. 5121–5207 (the Stafford Act), as follows:

I have determined that the damage in certain areas of the State of Arkansas resulting from Tropical Storm Ike during the period of September 13–23, 2008, is of sufficient severity and magnitude to warrant a major disaster declaration under the Robert T. Stafford Disaster Relief and Emergency Assistance Act, 42 U.S.C. 5121–5207 (the Stafford Act). Therefore, I declare that such a major disaster exists in the State of Arkansas.

In order to provide Federal assistance, you are hereby authorized to allocate from funds available for these purposes such amounts as you find necessary for Federal disaster assistance and administrative expenses.

You are authorized to provide Public Assistance in the designated areas, Hazard Mitigation throughout the State, and any other forms of assistance under the Stafford Act that you deem appropriate. Consistent with the requirement that Federal assistance be supplemental, any Federal funds provided under the Stafford Act for Hazard Mitigation will be limited to 75 percent of the total eligible costs. Federal funds provided under the Stafford Act for Public Assistance also will be limited to 75 percent of the total eligible costs, except for any particular projects that are eligible for a higher Federal cost-sharing percentage under the FEMA Public Assistance Pilot Program instituted pursuant to 6 U.S.C. 777. If Other Needs Assistance under Section 408 of the Stafford Act is later requested and warranted, Federal funding under that program also will be limited to 75 percent of the total eligible costs.

Further, you are authorized to make changes to this declaration to the extent allowable under the Stafford Act.

The Federal Emergency Management Agency (FEMA) hereby gives notice that pursuant to the authority vested in the Administrator, under Executive Order 12148, as amended, Kenneth M. Riley, of FEMA is appointed to act as the Federal Coordinating Officer for this declared disaster.

The following areas of the State of Arkansas have been designated as adversely affected by this declared major disaster:

Carroll, Clay, Craighead, Greene, Hempstead, Howard, Izard, Lafayette, Lawrence, Little River, Madison, Miller, Newton, Randolph, Sharp, and Van Buren Counties for Public Assistance.

All counties within the State of Arkansas are eligible to apply for assistance under the Hazard Mitigation Grant Program.

(The following Catalog of Federal Domestic Assistance Numbers (CFDA) are to be used for reporting and drawing funds: 97.030, Community Disaster Loans; 97.031, Cora Brown Fund; 97.032, Crisis Counseling; 97.033, Disaster Legal Services; 97.034, Disaster Unemployment Assistance (DUA); 97.046, Fire Management Assistance Grant; 97.048, Disaster Housing Assistance to Individuals and Households In Presidentially Declared Disaster Areas; 97.049, Presidentially Declared Disaster Assistance—Disaster Housing Operations for Individuals and Households; 97.050, Presidentially Declared Disaster Assistance to Individuals and Households—Other Needs; 97.036, Disaster Grants—Public Assistance (Presidentially Declared Disasters); 97.039, Hazard Mitigation Grant.)

R. David Paulison,

Administrator, Federal Emergency Management Agency.

[FR Doc. E8–27142 Filed 11–14–08; 8:45 am]

BILLING CODE 9111–23–P

DEPARTMENT OF THE INTERIOR

Fish and Wildlife Service

RIN 1018–AU27

Policy on Wilderness Stewardship

AGENCY: Fish and Wildlife Service, Interior.

ACTION: Notice of availability.

SUMMARY: We establish policy for implementing the National Wildlife Refuge System Administration Act of 1966, as amended, and the Wilderness Act of 1964 as Part 610 Chapters 1–5 of the Fish and Wildlife Service Manual. In the Wilderness Act, Congress called for the establishment of a National Wilderness Preservation System to secure an ''enduring resource of wilderness'' for the American public. This policy updates guidance on administrative and public activities on wilderness within the National Wildlife Refuge System (Refuge System).

ADDRESSES: You may download a copy of this policy at: *http://www.fws.gov/refuges/policyMakers/NWRpolicies.html* or request a copy from: National Wildlife Refuge System, U.S. Fish and Wildlife Service, *Attn:* Nancy Roeper, National Wilderness Coordinator, 4401 North Fairfax Drive, Room 657, Arlington, VA 22203; fax (703) 358–1929.

FOR FURTHER INFORMATION CONTACT: Nancy Roeper, National Wilderness Coordinator, National Wildlife Refuge System, U.S. Fish and Wildlife Service, 4401 North Fairfax Drive, Room 657, Arlington, Virginia 22203 (*telephone:* 703–358–2389, *fax:* 703–358–1929).

SUPPLEMENTARY INFORMATION: We published a draft Wilderness Stewardship policy in the **Federal Register** on January 16, 2001 (66 FR 3708) and invited the public to provide comments on the draft policy by March 19, 2001. During this comment period, we received several requests to extend the comment period. In response to these requests and in order to ensure that the public had an adequate opportunity to review and comment on the draft policy, we extended the comment period until April 19, 2001 (66 FR 15136). We reopened the comment period from May 15 to June 14, 2001 (66 FR 26879). On June 21, 2001, we again reopened the comment period until June 30, 2001 (66 FR 33268), and corrected the May 15, 2001, notice to reflect that comments received between April 19 and May 15, 2001, would be considered, and need not be resubmitted.

During the 8 years since publication, we made numerous revisions to the draft Wilderness Stewardship policy based on public comments and on internal reviews and discussions by Service managers and staff. We also developed Intergovernmental Personnel Agreements (IPAs) with representatives from five States to facilitate an effective means of involving the State fish and wildlife agencies in the development and implementation of Refuge System policies and guidance, including the Wilderness Stewardship policy. The National Wildlife Refuge System Administration Act of 1966, as amended in 1997 by the Improvement Act (16 U.S.C. 668dd–668ee, as amended) (Administration Act), requires that, in administering the Refuge System, the Fish and Wildlife Service ensure effective coordination, interaction, and cooperation with State fish and wildlife agencies. (State employees under these agreements are on assignment to the Service, serve as Service staff, and are subject to the provisions of law governing the ethical and other conduct of Federal employees.)

This policy is intended to improve the internal management of the Service, and it is not intended to, and does not, create any right or benefit, substantive or procedural, enforceable at law or equity by a party against the United States, its Departments, agencies, instrumentalities or entities, its officers or employees, or any other person.

Purpose of This Policy and Authorities

The purpose of this policy is to implement the Administration Act and the Wilderness Act of 1964, within the Refuge System. This policy replaces existing policy found in the Refuge Manual at 6 RM 8.

The Administration Act provides a mission and goals for the Refuge System. As specially designated areas encompassed within the Refuge System, wilderness directly contributes to the fulfillment of the mission and goals by, for example, protecting a diversity of fish, wildlife, plants, and their habitats and providing opportunities for

compatible wildlife-dependent recreation.

The Wilderness Act of 1964 (16 U.S.C. 1131–1136) provides the basis for wilderness protection of the Refuge System. It clearly establishes that, as we carry out the Service mission, the Refuge System mission and goals, and the individual refuge establishing purposes in areas designated as wilderness, we do so in a way that preserves wilderness character. This policy gives refuge managers uniform direction and procedures for making decisions regarding conservation and uses of the Refuge System wilderness areas and incorporates provisions of the Administration Act. The policy prescribes how the refuge manager preserves the character and qualities of designated wilderness while managing for refuge establishing purpose(s), maintaining outstanding opportunities for solitude or a primitive and unconfined type of recreation, and conducting minimum requirements analyses before taking any action in wilderness.

United States Border Security

The Department of Homeland Security (DHS) has waived all of the requirements of a number of Federal statutes, including the Administration Act and the Wilderness Act, with respect to the construction of roads and fixed and mobile barriers in areas of high illegal entry in the vicinity of the southwestern U.S. border. See 73 FR 19078 (April 8, 2008). None of the provisions of the Wilderness Act or the Service's policy on wilderness Stewardship apply to the activities determined by DHS to fall within the waiver. However, there may be other activities related to border security that are geographically removed from the areas of high illegal entry which are not covered by the DHS waiver. Where such an activity is proposed to be located within designated wilderness in the Refuge System and is a generally prohibited use under the Wilderness Act, the Service will conduct minimum requirement analyses. This will determine whether the proposed activities are necessary to administer the area as wilderness and to accomplish the purposes of the refuge, including Wilderness Act purposes.

Policy Summary

For clarity, we reorganized the content of the policy from seven chapters, as first published in 2001, into five chapters as explained in more detail in ''Summary of Comments and Changes to the Final Policy.'' It is now organized as follows:

Chapter 1 identifies our priorities in implementing the policy, establishes the responsibility for wilderness stewardship, defines terms, describes the broad framework within which we manage wilderness, discusses the philosophical underpinnings of wilderness, and requires compliance with the requirements of the Wilderness Act. It also establishes a process for conducting minimum requirement analyses and establishes training requirements for specific Service employees.

Chapter 2 addresses general administration, natural and cultural resource management, and public use management in wilderness. It clarifies the circumstances under which generally prohibited uses (temporary roads, motor vehicles, motorized equipment, motorboats, mechanical transport, landing of aircraft, structures, and installations) may be necessary for wilderness preservation. It addresses commercial uses, research, and public access. It affirms that we will generally not modify ecosystems, species population levels, or natural processes in refuge wilderness unless doing so maintains or restores biological integrity, diversity, or environmental health that has been degraded or is necessary to protect or recover threatened or endangered species. It describes how we respond to wildland fires and how we may use prescribed fire. It also explains that in wilderness areas, we will emphasize providing opportunities for solitude or a primitive and unconfined type of recreation. Appropriate recreational uses in wilderness include the six wildlife-dependent recreational uses (hunting, fishing, wildlife observation and photography, and environmental education and interpretation) identified in the Improvement Act if they are compatible and do not involve generally prohibited uses. The chapter also addresses special needs for persons with disabilities.

Chapter 3 provides guidance on developing wilderness stewardship plans (WSP). The WSP is a step-down management plan that provides detailed strategies and implementation schedules for meeting the broader wilderness goals and objectives identified in the refuge comprehensive conservation plan. The WSP also includes minimum requirement analyses for all refuge management activities and compatibility determinations for refuge uses in the wilderness area.

Chapter 4 describes the three-part process we follow in conducting wilderness reviews in accordance with the refuge planning process outlined in the planning policy (602 FW 1, 3, and 4). We conduct an inventory to identify areas that meet the basic definition of wilderness and carry out a study to evaluate all the values, resources, and uses within the area. The findings of the study determine whether we will recommend an area for designation as wilderness.

Chapter 5 addresses special provisions of the Alaska National Interest Lands Conservation Act (ANILCA) (16 U.S.C. 4lOhh-3233, 43 U.S.C. 1602–1784) for wilderness stewardship in Alaska. The chapter consolidates and adds to the provisions that were scattered throughout the policy in the previous draft.

Summary of Comments and Changes to the Final Policy

We received approximately 4,130 comment letters in response to the 2001 publication in the **Federal Register**. The comments were from Federal, State, and local government agencies; nongovernmental organizations; and individuals. Some comments addressed specific elements in the draft policy, while many comments expressed general support without addressing specific elements. We considered all of the information and recommendations for improvement included in the comments and made appropriate changes to the draft policy.

In general, we combined chapters 1 and 2 of the proposed policy into chapter 1 (General Overview); combined chapters 3, 4, and 5 of the proposed policy into chapter 2 (Wilderness Administration and Resource Stewardship); renumbered chapter 6 as chapter 3 (Wilderness Stewardship Planning); and renumbered chapter 7 as chapter 4 (Wilderness Review and Evaluation). We added a new chapter 5 to cover special provisions for wilderness in Alaska, which were scattered throughout the draft policy.

Key to Changes From the 2001 Draft Policy to the Final Policy

The following table compares the format of the 2001 draft and final policies. The table lists each section in chapters 1–5 of the final policy and indicates whether the section is new or where the information was located in the 2001 draft policy.

Final policy	2001 Draft policy
Chapter 1 General Overview of Wilderness Stewardship Policy	
1.1 What is the purpose of Part 610 and this chapter?	1.1.
1.2 What does this chapter cover?	1.2.
1.3 What are the authorities for this policy?	1.3.
1.4 What are the priorities in implementing this policy?	New.
1.5 What do these terms mean?	1.6.
1.6 Who is responsible for wilderness stewardship in the Service?	1.4.
1.7 What is wilderness?	New.
1.8 What are the purposes of the Wilderness Act?	2.7.
1.9 What is the National Wilderness Preservation System (NWPS)?	New.
1.10 How does the Service coordinate stewardship of the NWPS with other Federal agencies?	2.19.
1.11 How does the Service coordinate wilderness stewardship with State fish arid wildlife agencies?	1.5.
1.12 What is the broad framework the Service uses to administer wilderness?	2.4.
1.13 What is wilderness character?	2.5.
1.14 What are the principles for administering wilderness?	2.6.
1.15 What is the relationship between wilderness stewardship and compatibility?	New.
1.16 What activities does the Service prohibit in wilderness?	2.9, 2.11.
1.17 How do refuge managers accomplish both the establishing purpose(s) of a refuge and the purposes of the Wilderness Act?	2.8.
1.18 How does the Service determine if a proposed refuge management activity is the minimum requirement for administering the area as wilderness and necessary to accomplish the purposes the refuge, including Wilderness Act purposes?	2.10, 2.15.
1.19 When must the Refuge System conduct a minimum requirement analysis?	2.14.
1.20 Who makes minimum requirement decisions?	2.16.
1.21 What is the relationship of the Minimum Requirement Analysis to the requirements of the National Environmental Policy Act?	New.
1.22 What effects do emergencies have on the uses generally prohibited by the Wilderness Act?	2.13.
1.23 What effect does the Department of Homeland Security waiver of the Administration Act and the Wilderness Act have on the uses generally prohibited by the Wilderness Act?	New.
1.24 What are the training requirements for Refuge System staff?	1.7.
1.25 What are the training requirements for Endangered Species and fisheries and Habitat Conservation staff?	1.8.
1.26 When should State employees attend wilderness training?	1.9.
Chapter 2 Wilderness Administration and Resource Stewardship	
2.1 What is the purpose of this chapter?	3.1.
2.2 What does this chapter cover?	3.2.
2.3 What are the authorities that directly affect wilderness stewardship on Service lands?	3.3.
2.4 What is the Service's general policy for wilderness administration and the stewardship of natural and cultural resources in wilderness?	3.4.
2.5 Can the Service allow structures and installations in wilderness?	3.5A., 4.13.
2.6 Can the Service allow roads and trails in wilderness?	3.5B. and C., 4.13H.
2.7 Can the Service allow use of motorized vehicles, motorized equipment, and mechanical transport in wilderness?	3.5D.
2.8 Can the Service manage aircraft use in and over wilderness?	3.6A., 4.6E.
2.9 How does wilderness designation affect existing private rights?	New.
2.10 Can the Service authorize access through wilderness to non-Federal land where rights to access do not exist?	3.5E.
2.11 Can the Service authorize rights-of-way in wilderness?	3.5G.
2.12 Can the Service authorize commercial enterprises and services in wilderness?	3.5F.
2.13 How does the Service manage permits for commercial services?	3.5F.
2.14 Can the Service authorize mineral exploration and development activities in wilderness areas?	3.5H.
2.15 Will the Service propose names for geographic features in wilderness?	3.51.
2.16 How does the Service conserve wildlife and habitat in 2.12, wilderness?	3.6C.
2.17 Can the Service introduce, transplant, or stock fish, wildlife, and plants in wilderness?	3.6C.(3).
2.18 Can the Service use livestock grazing as a refuge management economic activity?	3.6C.(2).
2.19 Can the Service control invasive species, pests, and diseases in wilderness?	3.6C.(4).
2.20 Can the Service control predation in wilderness?	3.6C.(6).
2.21 What is the Service's general policy for managing wilderness fires?	5.4.
2.22 Can the Service manage wildland fire in wilderness?	5.5.
2.23 Can the Service use prescribed fire in wilderness?	5.6.
2.24 How does the Service accomplish emergency stabilization and rehabilitation in wilderness following a wildfire?	New.
2.25 How does the Service protect air resources in wilderness?	3.6.D
2.26 How does the Service protect natural night skies and natural soundscapes in wilderness?	New.
2.27 How does the Service conduct research in wilderness?	3.6.A.
2.28 How does the Service conduct inventory and monitoring 3.6.B, activities in wilderness?	4.12.
2.29 How does the Service protect cultural resources in wilderness?	3.7.
2.30 What are the Service's general public use guidelines 4.4, for wilderness?	4.5.
2.31 What types of public uses does the Service prohibit in wilderness?	4.6.
2.32 Can the Service allow use and grazing of recreational pack and saddle stock in wilderness?	4.6.C.
2.33 How does the Service address visitor safety in wilderness?	4.9.
2.34 How does the Service enhance solitude or opportunities for primitive and unconfined recreation in wilderness?	4.8.
2.35 How can the Service best preserve a quality wilderness experience as well as the wilderness itself?	4.7.
2.36 How does the Service inform and educate the public about wilderness?	4.10.
2.37 What is the Leave No Trace (LNT) program?	2.17, 4.11.

Final policy	2001 Draft policy
2.38 How does the Service address special needs for people with disabilities in wilderness?	4.14.
Chapter 3 Wilderness Stewardship Planning	
3.1 What is the purpose of this chapter?	6.1.
3.2 What does this chapter cover?	6.2.
3.3 What are the authorities that directly affect wilderness stewardship on Service lands?	6.3.
3.4 What is a wilderness stewardship plan (WSP)?	6.4, 6.5.
3.5 Does every wilderness area need a WSP?	6.6.
3.6 Can refuge managers prepare a WSP for wilderness study areas (WSA) recommended for wilderness designation in a finalCCP, recommended wilderness areas, or proposed wilderness areas?	New.
3.7 Can refuge managers combine other step-down management plans with the WSP?	New.
3.8 What should a WSP contain?	6.7.
3.9 How does the Service coordinate with States, other Federal agencies, and tribes in wilderness stewardship planning?	New.
3.10 How does the Service involve the public in wilderness stewardship planning?	6.8.
3.11 How does the Service administer wilderness areas that do not have an approved WSP?	6.9.
3.12 May the Service decide to implement a WSP that was completed before development of the refuge CCP?	6.10.
3.13 How frequently should the Service revise WSPs?	6.11.
3.14 How does wilderness stewardship planning work whenService wilderness adjoins wilderness of another Federal agency?	6.12.
Chapter 4 Wilderness Review and Evaluation	
4.1 What is the purpose of this chapter?	7.1.
4.2 What does this chapter cover?	7.2.
4.3 What are the authorities that directly affect wilderness reviews and management of WSAs, recommended wilderness, and proposed wilderness on Service lands?	7.3.
4.4 What is a wilderness review?	7.4.
4.5 When should the Service conduct a wilderness review?	7.5, 7.7.
4.6 How do wilderness reviews relate to acquisition planning?	7.6.
4.7 How does the Service identify WSAs in the wilderness inventory?	7.8.
4.8 How does the Service evaluate the size criteria to identify a WSA during inventory?	7.9.
4.9 How does the Service evaluate the naturalness criteria to identify a WSA during inventory?	7.10.
4.10 How does the Service evaluate outstanding opportunities for solitude or a primitive and unconfined type of recreation during inventory?	7.11.
4.11 Must an area contain ecological, geological, or other features of scientific, educational, scenic, or historic value to qualify as a WSA?	7.12.
4.12 What factors does the Service consider when conducting a wilderness study?	7.13.
4.13 In the wilderness study, how does the Service evaluate whether a WSA can be effectively managed as wilderness?	New.
4.14 What is the relationship between the wilderness study conclusions and the final CCP decisions?	New.
4.15 What level of NEPA documentation does the Service require for wilderness proposals?	New.
4.16 How does the Service involve stakeholders in wilderness reviews?	New.
4.17 What is the process for the Director's review and approval of wilderness recommendations in CCPs?	7.14.
4.18 What is included in the wilderness study report?	7.15.
4.19 What additional documents does the Service need to prepare for Secretarial approval of the wilderness recommendation?	7.16.
4.20 What are the steps for forwarding or reporting the Service's wilderness recommendations?	7.14.
4.21 What is the Service's general policy for managing WSAs?	7.17.
4.22 What is the Service's general policy for managing recommended wilderness?	New.
4.23 What is the Service's general policy for managing proposed wilderness?	7.18.
Chapter 5 Special Provisions for Alaska Wilderness	
5.1 What is the purpose of this chapter?	New.
5.2 What does this chapter cover?	New.
5.3 How do the other chapters in the Service's wilderness policy (610 FW 1–4) apply to Alaska wilderness?	1.2, 2.2, 3.2, 4.2, 5.2, 6.2, 7.2.
5.4 How do the special provisions of ANILCA affect the need for a minimum requirement analysis (MRA) for proposed refuge management activities and facilities in Alaska wilderness?	2.IIA., 3.5A.(3), 3.5D.
5.5 What special provisions apply to public access for traditional activities and travel to and from villages and homesites?	3.5E.(2).
5.6 What special provisions apply to access to inholdings in Alaska wilderness areas?	3.5E.(1).
5.7 What special provisions apply to public access to subsistence resources?	2.18.
5.8 What special provisions apply to authorization of temporary access to non-Federal lands?	New.
5.9 What special provisions apply to helicopter access in Alaska wilderness areas?	New.
5.10 What special provisions apply to rights-of-way for transportation and utility systems in and across Alaska wilderness areas?	3.5G.
5.11 What special provisions apply to assessment, exploration, and development of mineral resources on Alaska wilderness areas?	3.5H.(1).
5.12 Does the Service allow the use of motorized equipment in Alaska wilderness areas?	3.5D.
5.13 What provisions apply to commercial enterprises and services in Alaska wilderness areas?	3.5F.
5.14 What special provisions apply to management of structures and installations in Alaska wilderness areas?	3.5A.

Final policy	2001 Draft policy
5.15 What temporary facilities and equipment related to the taking of fish and wildlife does the Service authorize in Alaska wilderness areas?	1.6W., 3.5F.(l).
5.16 What special provisions apply to management of fish populations on Alaska wilderness areas?	New.
5.17 Does the Service conduct wilderness reviews of refuge lands in Alaska?	New.
5.18 What is the Service's general policy for managing wilderness study areas (WSAs), recommended wilderness, and proposed wilderness in Alaska?	New.

Required Determinations.

Regulatory Planning and Review. The Office of Management and Budget (OMB) has determined that this policy is significant and has reviewed this policy under Executive Order 12866 (E.O. 12866). OMB bases its determination upon the following four criteria:

(a) Whether the policy will have an annual effect of $100 million or more on the economy or adversely affect an economic sector, productivity, jobs, the environment, or other units of the government.

(b) Whether the policy will create inconsistencies with other Federal agencies' actions.

(c) Whether the policy will materially affect entitlements, grants, user fees, loan programs, or the rights and obligations of their recipients.

(d) Whether the policy raises novel legal or policy issues.

Regulatory Flexibility Act. Under the Regulatory Flexibility Act (as amended by the Small Business Regulatory Enforcement Fairness Act {SBREFA} of 1996) (5 U.S.C. 601, *et seq.*), whenever a Federal agency is required to publish a notice of rulemaking for any proposed or final policy, it must prepare and make available for public comment a regulatory flexibility analysis that describes the effect of the policy on small entities (*i.e.*, small businesses, small organizations, and small government jurisdictions). However, no regulatory flexibility analysis is required if the head of an agency certifies that the policy would not have a significant economic impact on a substantial number of small entities. Thus, for a regulatory flexibility analysis to be required, impacts must exceed a threshold for ''significant impact'' and a threshold for a ''substantial number of small entities.'' See 5 U.S.C. 605(b). SBREFA amended the Regulatory Flexibility Act to require Federal agencies to provide a statement of the factual basis for certifying that a policy would not have a significant economic impact on a substantial number of small entities.

This policy is administrative, legal, technical, and procedural in nature and provides updated instructions for the maintenance of wilderness areas on the National Wildlife Refuge System. This policy does not increase the types of recreation allowed on the System but establishes an emphasis on the characteristics desired for a wilderness experience. As a result, there may be opportunities for an increase in wilderness experiences on national wildlife refuges with designated wilderness areas. The changes in the wilderness areas are likely to increase visitor activity on these national wildlife refuges.

From 1999 to 2003, the number of wilderness visitors averaged 501,147 visitors annually, comprising about 1.3 percent of all refuge visitors. There are insufficient data to provide more than broad estimates about the effects of this updated policy on public use of wilderness areas on national wildlife refuges. The Service expects that refuges that improve the quality of their wilderness areas, and thereby increase the opportunities for high-quality wilderness experiences, will see an increase in public use. With this policy, the Service estimates that on balance there will be up to a 10 percent increase in the public's use of wilderness areas on refuges. Thus, we expect an increase of approximately 50,115 wilderness visitors annually.

New recreational user days generate expenditures associated with recreational activities on refuges' wilderness areas. Due to the unavailability of site-specific expenditure data, we use the national estimates from the 2006 National Survey of Fishing, Hunting, and Wildlife Associated Recreation to identify expenditures for food and lodging, transportation, and other incidental expenses. Using the average trip-related expenditures for fishing, hunting, and wildlife watching activities with the maximum expected additional participation on the Refuge System yields approximately $1.8 million in wilderness-related expenditures (50,115 days × $35.35 per day).

By having ripple effects throughout the economy, these direct expenditures are only part of the economic impact of wilderness recreation. Using an average national impact multiplier for hunting and fishing activities (2.72) derived from the reports ''Economic Importance of Hunting in America'' and ''Sportfishing in America'' for the estimated increase in direct expenditures yields a total economic impact of approximately $4.8 million (2007 dollars) (Southwick Associates, Inc., 2007). (Using a local impact multiplier would yield more accurate and smaller results. However, we employed the national impact multiplier due to the difficulty in developing local multipliers for each specific region.)

Since we know that most of the fishing and hunting occurs within 100 miles of a participant's residence, then it is unlikely that most of this spending would be ''new'' money coming into a local economy; therefore, this spending would be offset with a decrease in some other sector of the local economy. The net gain to the local economies would be no more than $4.8 million, and most likely considerably less. Since 80 percent of the participants travel less than 100 miles to engage in hunting and fishing activities, their spending patterns would not add new money into the local economy. Furthermore, the probability of all refuges with wilderness programs being upgraded to true wilderness characteristics, as defined by Congress, is very low. Resource constraints have kept these refuges from upgrading wilderness experiences and it is unlikely that this updated policy will cause all refuges with wilderness designation to upgrade their programs immediately. As a result, the real impact would be on the order of $964,000 annually.

Many small businesses within the retail trade industry (such as hotels, gas stations, taxidermy shops, bait and tackle shops, etc.) may benefit from increased refuge visitation. A large percentage of these retail trade establishments near the refuges most likely qualify as small businesses. We expect that the incremental recreational opportunities will be scattered across the refuges that offer wilderness recreational opportunities, and so we do not expect that the policy will have a significant economic effect (benefit) on a substantial number of small entities in any region or nationally.

With the small increase in overall spending anticipated from this policy, it

is unlikely that a substantial number of small entities will have more than a small benefit from the increased spending near the affected refuges. Therefore, we certify that this policy will not have a significant economic effect on a substantial number of small entities as defined under the Regulatory Flexibility Act (5 U.S.C. 601 *et seq.*). An initial/final Regulatory Flexibility Analysis is not required. Accordingly, a Small Entity Compliance Guide is not required.

Small Business Regulatory Enforcement Fairness Act. The policy is not a major policy under 5 U.S.C. 804(2), the Small Business Regulatory Enforcement Fairness Act. This policy:

a. Does not have an annual effect on the economy of $100 million or more. The addition of some wilderness experience opportunities at refuges would generate expenditures by wilderness participants with an economic impact estimated at $964,000 million per year. Consequently, the maximum benefit of this policy for businesses both small and large would not be sufficient to make this a major policy. The impact would be scattered across the country and would most likely not be significant in any local area.

b. Will not cause a major increase in costs or prices for consumers, individual industries, Federal, State, or local government agencies, or geographic regions. This policy will have a small effect on the expenditures of new participants for wilderness opportunities of Americans. Under the assumption that all wilderness opportunities would be of high quality, participants would be attracted to the refuge system. If the refuge were closer to the participant's residence than alternative sources of wilderness experiences then a reduction in travel costs would occur and benefit the participants. The Service does not have information to quantify this reduction in travel cost but has to assume that since most people travel less than 100 miles to hunt and fish, that the reduced travel cost would be small for the additional days of wilderness activities generated by this policy. This policy is not expected to significantly affect the supply or demand for wilderness opportunities in the U.S. and therefore should not affect prices for equipment and supplies, or the retailers that sell equipment. Refuge system wilderness opportunities account for a small portion of the wilderness opportunities available in the contiguous United States.

c. Does not have significant adverse effects on competition, employment, investment, productivity, innovation, or the ability of U.S. based enterprises to compete with foreign-based enterprises. Because this policy represents such a small proportion of wildlife related recreational spending, there will be no measurable economic effect on the wildlife-dependent industry which has annual sales of equipment and travel expenditures of $72 billion nationwide. Refuge visitors averaged 501,147 visits to refuges for wilderness activities from 1999 to 2003 compared to 37.1 million visitors for all activities on refuge system lands. This policy seeks to preserve wilderness characteristics for those participants who want this experience and is aimed at providing guidance to Federal managers in establishing quality programs where the opportunity exists for wilderness programs. Refuges that have or establish wilderness programs may hire additional staff from the local community to assist with the programs but this would not be a significant increase with a total of 66 refuges participating. Consequently, there is no significant employment or small business effects.

Unfunded Mandates Reform Act. In accordance with the Unfunded Mandates Reform Act (2 U.S.C. 1501, *et seq.*):

a. This policy will not ''significantly or uniquely'' affect small governments. A Small Government Agency Plan is not required. See B(1)(a).

b. This policy will not produce a Federal mandate of $100 million or greater in any year, *i.e.*, it is not a ''significant regulatory action'' under the Unfunded Mandates Reform Act. V Takings. In accordance with Executive Order 12630, the policy does not have significant takings implications. A takings implication assessment is not required. This policy will not change the ability of inholders to access their property, although it may affect the way in which they may access it. Depending on the specifics of the easements of record, outstanding rights-of-way, enabling legislation, or other rights granted by law, inholders may be required to modify their modify their: routes of entry so that access will be through a non-wilderness area; method of access, and use non-motorized means; or time of entry, to disturb the fewest wilderness users.

Federalism. As discussed in B(1)a, this policy does not have significant Federalism effects to warrant the preparation of a Federalism Assessment under Executive Order 12612. This policy will not have substantial direct effects on the States, in their relationship between the Federal Government and the States, or on the distribution of power and responsibilities among the various levels of government.

Civil Justice Reform. In accordance with Executive Order 12988, it has been determined that the policy does not unduly burden the judicial system and meets the requirements of sections 3(a) and 3(b)(2) of the Order. The policy will clarify established policy and result in better understanding of the policies by refuge wilderness visitors.

Paperwork Reduction Act. This policy does not require any information collection from 10 or more parties and a submission under the Paperwork Reduction Act of 1995 is not required.

National Environmental Policy Act. We have analyzed this policy in accordance with the criteria of the National Environmental Policy Act and 40 CFR 1508. This policy does not constitute a major Federal action significantly affecting the quality of the human environment. This policy is administrative, legal, technical, and procedural in nature and provides updated instructions for the stewardship of wilderness areas on the National Wildlife Refuge System. The environmental effects are too speculative or conjectural to lend themselves to meaningful analysis and will later be subjected to the NEPA process on a case-by-case basis. Extraordinary circumstances may exist for individual actions that may occur in implementing this policy that would constitute an exception to the categorical exclusion of the policy as a whole. Again, those individual actions will be subject to future NEPA analysis. An environmental assessment is not required at this time. (See B(1)d.)

Wilderness stewardship plans will need to be developed for all refuges with wilderness. These plans will either be incorporated directly into refuge comprehensive conservation plans or as step-down management plans, pursuant to our refuge planning guidance in 602 FW 1–3. We prepare these plans in compliance with section 102(2)(C) of NEPA, and the Council on Environmental Quality's regulations for implementing NEPA in 40 CFR parts 1500–1508. We invite the affected public to participate in the review, development, and implementation of these plans.

Government-to-Government Relationship with Tribes. In accordance with the President's memorandum of April 29, 1994, ''Government-to-Government Relations with Native American Tribal Governments'' (59 FR 22951) and 512 DM 2 we have evaluated possible effects on Federally-recognized

Indian tribes and have determined that there are no effects. We coordinate wilderness use on national wildlife refuges with Tribal governments having adjoining or overlapping jurisdiction.

Dated: November 7, 2008.

Rowan W. Gould,

Acting Director, U.S. Fish and Wildlife Service.

[FR Doc. E8–27014 Filed 11–14–08; 8:45 am]

BILLING CODE 4310–55–M

DEPARTMENT OF THE INTERIOR

National Park Service

2009 Meetings of the Big Cypress National Preserve Off-Road Vehicle (ORV) Advisory Committee

AGENCY: Department of the Interior, National Park Service, ORV Advisory Committee.

ACTION: Notice of meetings.

SUMMARY: In accordance with the Federal Advisory Committee Act (Pub. L. 92–463, 86 Stat. 770, 5 U.S.C. App 1, 10), notice is hereby given of the meetings of the Big Cypress National Preserve ORV Advisory Committee for 2009.

DATES: The Committee will meet on the following dates:

Tuesday, January 20, 2009, 3:30–8 p.m.

Tuesday, March 24, 2009, 3:30–8 p.m.

Tuesday, May 19, 2009, 3:30–8 p.m.

Tuesday, July 21, 2009, 3:30–8 p.m.

Tuesday, September 15, 2009, 3:30–8 p.m.

Tuesday, December 1, 2009, 3:30–8 p.m.

ADDRESSES: The January, March, and December meetings will be held at Big Cypress National Preserve Headquarters, 33100 Tamiami Trail East, Ochopee, Florida. The May, July, and September meetings will be held at the Everglades City Community Center, 205 Buckner Avenue, Everglades City, Florida. Written comments may be sent to: Superintendent, Big Cypress National Preserve, 33100 Tamiami Trail East, Ochopee, FL 34141–1000, Attn: ORV Advisory Committee.

FOR FURTHER INFORMATION CONTACT: Pedro Ramos, Acting Superintendent, Big Cypress National Preserve, 33100 Tamiami Trail East, Ochopee, Florida 34141–1000; 239–695–1103, or go to the Web site *http://parkplanning.nps.gov/projectHome.cfm?parkId=352&projectId=20437.*

SUPPLEMENTARY INFORMATION: The Committee was established (**Federal Register**, August 1, 2007, pp. 42108–42109) pursuant to the Preserve's 2000 *Recreational Off-road Vehicle Management Plan* and the Federal Advisory Committee Act of 1972 (5 U.S.C. Appendix) to examine issues and make recommendations regarding the management of off-road vehicles (ORVs) in the Preserve. The agendas for these meetings will be published by press release and on the *http://parkplanning.nps.gov/projectHome.cfm?parkId=352&projectId=20437* Web site. The meetings will be open to the public, and time will be reserved for public comment.

Oral comments will be summarized for the record. If individuals wish to have their comments recorded verbatim, they must submit them in writing.

Pedro Ramos,

Acting Superintendent, Big Cypress National Preserve.

[FR Doc. E8–27166 Filed 11–14–08; 8:45 am]

BILLING CODE 4310–70–P

DEPARTMENT OF JUSTICE

Notice of Lodging of Agreement and Order Regarding Modification of the Consent Decree Under the Clean Water Act

Notice is hereby given that on November 10, 2008, a proposed Agreement and Order Regarding Modification of the Consent Decree (''Agreement and Order'') in *United States of America and State of Louisiana* v. *City of Baton Rouge and Parish of East Baton Rouge*, Civil Action No 01–978–B–M3 was lodged with the United States District Court for the Middle District of Louisiana.

This action was originally filed in 2001 by the United States and the State of Louisiana under Clean Water Act (''CWA'') Section 301, 33 U.S.C. 1311, seeking civil penalties and injunctive relief for violations related to the publically owned treatment works owned and operated by the City of Baton Rouge and the Parish of East Baton Rouge (collectively ''the City/Parish''). On March 14, 2001, the Court entered a Consent Decree resolving all claims in the Complaint (''the 2002 Consent Decree''). Among other requirements, the 2002 Consent Decree required the City/Parish to implement a 13–15 year project to improve its sewage collection system. Pursuant to these requirements, the City/Parish proposed a Second Remedial Measures Action Plan (''Second RMAP'') in which it selected a remedial measure for the collection system. Pursuant to Paragraph 40(a) of the 2002 Consent Decree, the Second RMAP was approved on July 10, 2007. If entered by the Court, the proposed Agreement and Order would modify the 2002 Consent Decree by amending the approved Second RMAP to allow the City/Parish to decommission the Central Wastewater Treatment plant located at 2443 River Road in East Baton Rouge Parish, Louisiana (''the Central Plant'') and the redirect the flows to the South Wastewater Treatment Plant located at 2850 Gardere Lane in East Baton Rouge Parish, Louisiana (the South Plant'').

The Department of Justice will receive for a period of thirty (30) days from the date of this publication comments relating to the Agreement and Order. Comments should be addressed to the Assistant Attorney General, Environment and Natural Resources Division, and either e-mailed to *pubcomment-ees.enrd@usdoj.gov* or mailed to P.O. Box 7611, U.S. Department of Justice, Washington, DC 20044–7611, and should refer to *U.S. and La.* v. *City of Baton Rouge*, D.J. Ref. 90–5–1–1–2769/1.

The Agreement and Order may be examined at the Office of the United States Attorney for the Middle District of Louisiana, 777 Florida St., Suite 208, Baton Rouge, Louisiana 70801, and at U.S. Environmental Protection Agency-Region 6, 1445 Ross Avenue, Dallas, Texas 75202. During the public comment period, the Agreement and Order, may also be examined on the following Department of Justice Web site: *http://www.usdoj.gov/enrd/Consent_Decrees.html.* A copy of the Agreement and Order may also be obtained by mail from the Consent Decree Library, P.O. Box 7611, U.S. Department of Justice, Washington, DC 20044–7611 or by faxing or e-mailing a request to Tonia Fleetwood (*tonia.fleetwood@usdoj.gov*), fax no. (202) 514–0097, phone confirmation number (202) 514–1547. In requesting a copy from the Consent Decree Library, please enclose a check in the amount of $9.00 (25 cents per page reproduction cost) payable to the U.S. Treasury or, if by email or fax, forward a check in that amount to the Consent Decree Library at the stated address.

Thomas A. Mariani, Jr.,

Assistant Chief, Environmental Enforcement Section, Environment and Natural Resources Division.

[FR Doc. E8–27216 Filed 11–14–08; 8:45 am]

BILLING CODE 4410–15–P

DEPARTMENT OF JUSTICE

Notice of Lodging of Consent Decree Under the Comprehensive Environmental Response, Compensation, and Liability Act

Notice is hereby given that on October 31, 2008, a proposed Settlement Agreement in *United States* v. *Vertac Chemical Corp., et al.*, Civil Action No. LR–C–80–109, was lodged with the United States District Court for the Western District of Arkansas.

Plaintiff the United States of America (''United States''), on behalf of the Administrator of the United States Environmental Protection Agency (''EPA'') and defendant Hercules Incorporated (''Hercules'') and defendant Uniroyal Chemical Ltd. (''Uniroyal'' n/k/a Chemtura Canada Co./Cie.) (collectively referred to as the ''Defendants'') have entered into a Settlement Agreement, Stipulated Order and Judgment (''Settlement Agreement'') to settle the United States' claims against Defendants for the recovery of response costs from June 1, 1998 through September 1, 2008, in connection with the Vertac Inc. Superfund Site (''Vertac Site'') in Jacksonville, Arkansas, and the Jacksonville Municipal Landfill Superfund Site (''Jacksonville Site'') also in Jacksonville, Arkansas (collectively, the ''Sites''), under the Comprehensive, Environmental, Response, Compensation and Liability Act (''CERCLA''), 42 U.S.C. 9601, *et seq.* The proposed Settlement Agreement provides for the payment of $14,494,921.86 by defendant Hercules, and the payment of $380,11.92 by defendant Uniroyal.

The Department of Justice will receive for a period of thirty (30) days from the date of this publication comments relating to the Settlement Agreement. Comments should be addressed to the Assistant Attorney General for the Environment and Natural Resources Division, U.S. Department of Justice, and either e-mailed to *pubcomment-ees.enrd@usdoj.gov* or mailed to P.O. Box 7611, NW., Washington, DC 20044–7611, and should refer to *United States* v. *Vertac Chemical Corp., et al.*, DOJ. Ref. 90–7–1–18B.

The Settlement Agreement may be examined at the Office of the United States Attorney, Western District of Arkansas, 425 West Capitol Avenue, Suite 500, Little Rock, AR 72201–3452, and at the offices of EPA, Region 6, 1445 Ross Ave., Dallas, TX 75202–2733. During the public comment period, the Settlement Agreement, may also be examined on the following Department of Justice Web site, to *http://www.usdoj.gov/enrd/Consent_Decrees.html*. A copy of the Settlement Agreement may also be obtained by mail from the Consent Decree Library, P.O. Box 7611, U.S. Department of Justice, Washington, DC 20044–7611 or by faxing or e-mailing a request to Tonia Fleetwood (*tonia.fleetwood@usdoj.gov*), fax no. (202) 514–0097, phone confirmation number (202) 514–1547. In requesting a copy from the Consent Decree Library, please enclose a check in the amount of $2.25 (25 cents per page reproduction cost) payable to the U.S. Treasury or, if by e-mail or fax, forward a check in that amount to the Consent Decree Library at the stated address.

Thomas A. Mariani, Jr.,

Assistant Section Chief, Environmental Enforcement Section, Environment and Natural Resources Division.

[FR Doc. E8–27215 Filed 11–14–08; 8:45 am]

BILLING CODE 4410–15–P

DEPARTMENT OF JUSTICE

Notice of Lodging of Consent Decree Under the Comprehensive Environmental Response, Compensation and Liability Act, 42 U.S.C. 9606 et seq.

Notice is hereby given that on November 10, 2008, two proposed consent decrees in *United States of America and the State of Missouri* v. *Blue Tee Corp. et al.*, Civil Action No. 08–5114, were lodged with the United States District Court for the Western District of Missouri.

The Complaint, filed by the Plaintiffs alleges that the Defendants are liable under Sections 106 and 107 of the Comprehensive Environmental Response, Compensation, and Liability Act (''CERCLA''), 42 U.S.C. 9606 *et seq.*, for the performance of response actions and payment of response costs incurred by the United States and the State of Missouri at the Oronogo/Duenweg Mining Belt Superfund Site in Jasper County, Missouri (hereinafter ''the Site'').

The proposed Consent Decrees settle the Plaintiffs' claims against all the Defendants. In the Consent Decrees, the Defendants have agreed to perform the response actions at the Site which were selected by the Record of Decision for the Site issued by the United States Environmental Protection Agency on September 30, 2004. These response actions are estimated to cost over $37.5 million.

Pursuant to 42 U.S.C. 9622(d)(2) and 28 CFR 50.7, for thirty (30) days after the date of this publication, the Department of Justice will receive comments relating to the Consent Decrees. Comments should be addressed to the Assistant Attorney General, Environment and Natural Resources Division, and either e-mailed to *pubcomment-ees.enrd@usdoj.gov* or mailed to P.O. Box 7611, U.S. Department of Justice, Washington, DC 20044–7611. In either case, the comments should refer to *United States of America and The State of Missouri* v. *Blue Tee Corp. et al.*, Civil Action No. 08–5114 (W.D. Mo.), Ref. No. 90–11–2–06280/3.

During the comment period, the Consent Decrees may be examined on the following Department of Justice Web site: *http://www.usdoj.gov/enrd/Consent_Decrees.html*. A copy of the Consent Decrees may also be examined at the Office of the United States Attorney, Western District of Missouri, Charles Evans Whittaker Courthouse, 400 East Ninth Street, Kansas City, Missouri 64106. Copies of the Consent Decrees may also be obtained by mail from the Consent Decree Library, P.O. Box 7611, U.S. Department of Justice, Washington, DC 20044–7611, or by faxing or e-mailing a request to Tonia Fleetwood (*tonia.fleetwood@usdoj.gov*), fax no. (202) 514–0097, phone confirmation number (202) 514–1547. In requesting a copy from the Consent Decree Library, please enclose a check in the amount of $94 (25 cents per page reproduction cost) payable to the United States Treasury or, if by e-mail or fax, forward a check in that amount to the Consent Decree Library at the stated address.

Maureen Katz,

Assistant Section Chief, Environmental Enforcement Section, Environment and Natural Resources.

[FR Doc. E8–27152 Filed 11–14–08; 8:45 am]

BILLING CODE 4410–15–P

DEPARTMENT OF LABOR

Office of the Secretary

Submission for OMB Review: Comment Request

November 7, 2008.

The Department of Labor (DOL) hereby announces the submission of the following public information collection request (ICR) to the Office of Management and Budget (OMB) for review and approval in accordance with the Paperwork Reduction Act of 1995 (Pub. L. 104–13, 44 U.S.C. chapter 35). A copy of this ICR, with applicable supporting documentation, including

among other things a description of the likely respondents, proposed frequency of response, and estimated total burden may be obtained from the *RegInfo.gov* Web site at *http://www.reginfo.gov/public/do/PRAMain* or by contacting Amy Hobby on 202–693–4553 (this is not a toll-free number)/e-mail: *DOL_PRA_PUBLIC@dol.gov*.

Interested parties are encouraged to send comments to the Office of Information and Regulatory Affairs, Attn: OMB Desk Officer for the Employee Benefits Security Administration (EBSA), Office of Management and Budget, Room 10235, Washington, DC 20503, Telephone: 202–395–7316/Fax: 202–395–6974 (these are not toll-free numbers), e-mail: *OIRA_submission@omb.eop.gov* within 30 days from the date of this publication in the **Federal Register**. In order to ensure the appropriate consideration, comments should reference the OMB Control Number (see below).

The OMB is particularly interested in comments which:

- Evaluate whether the proposed collection of information is necessary for the proper performance of the functions of the agency, including whether the information will have practical utility;
- Evaluate the accuracy of the agency's estimate of the burden of the proposed collection of information, including the validity of the methodology and assumptions used;
- Enhance the quality, utility, and clarity of the information to be collected; and
- Minimize the burden of the collection of information on those who are to respond, including through the use of appropriate automated, electronic, mechanical, or other technological collection techniques or other forms of information technology, e.g., permitting electronic submission of responses.

Agency: Employee Benefits Security Administration.

Type of Review: Extension without change of an existing OMB Control Number.

Title of Collection: Furnishing Documents to the Secretary of Labor on Request Under ERISA Section 104(a)(6).

OMB Control Number: 1210–0112.

Affected Public: Businesses or other for-profits, Not-for-profit institutions.

Total Estimated Number of Respondents: 500.

Total Estimated Annual Burden Hours: 44.

Total Estimated Annual Costs Burden: $1,665.

Description: Section 104(a)(6) of the Employee Retirement Income Security Act of 1974 (ERISA) and related regulations at 29 CFR 2520.104a–8 require the administrator of an employee benefit plan covered by Title I of ERISA to furnish certain documents relating to the plan on request to the Secretary of Labor. For additional information, see related notice published at 73 FR 47243 on August 13, 2008.

Darrin A. King,

Departmental Clearance Officer.

[FR Doc. E8–27212 Filed 11–14–08; 8:45 am]

BILLING CODE 4510–29–P

DEPARTMENT OF LABOR

Employment and Training Administration

Notice of Availability of Funds and Solicitation for Grant Applications (SGA) for Local Young Offender Planning Grants, State/Local Juvenile Offender Implementation Grants, and an Intermediary Juvenile Reentry Grant

AGENCY: Employment and Training Administration, U.S. Department of Labor.

Announcement Type: Notice of Solicitation for Grant Applications.

Funding Opportunity Number: SGA/DFA PY 08–09.

Catalog Federal Assistance Number: 17.261.

SUMMARY: The Employment and Training Administration announces the availability of $17.3 million for Young Offender Grants. The grants will be awarded through a competitive process for three categories of projects—(1) Young Offender Planning Grants to be awarded to local governments; (2) Juvenile Offender Implementation Grants to be awarded to state/local government partnerships; and (3) a Juvenile Offender Reentry Grant to be awarded to an organization with experience conducting demonstrations in multiple cities. The goal of the planning grants is to allow selected localities to develop comprehensive blueprints for serving both juvenile and young adult offenders returning from correctional facilities. To qualify for these planning awards, applicants will need to provide one-to-one leveraged resources from a local or national foundation, local or state government, other federal funds, or other source. The goal of the implementation grants is to allow state juvenile justice departments and local juvenile justice agencies to join together to put into place a comprehensive strategy for serving all youth in the local area returning home from juvenile correctional or detention facilities. The goal of the intermediary reentry grant is to allow an organization to design and implement a model program for serving returning juvenile offenders in four cities that may be selected competitively after grant award.

This solicitation provides background information and describes the application submission requirements, outlines the process that eligible entities must use to apply for funds covered by this solicitation, and outlines the evaluation criteria used as a basis for selecting the grantees.

DATES: *Key Dates:* The closing date for receipt of applications under this announcement is December 18, 2008. Application and submission information is explained in detail in Part IV of this SGA.

ADDRESSES: Applications that do not meet the conditions set forth in this notice will not be considered. No exceptions to the submission requirements set forth in this notice will be granted. For detailed guidance, please refer to Section IV.C.

SUPPLEMENTARY INFORMATION: This solicitation consists of eight parts:

Part I provides a description of this funding opportunity.

Part II describes the size and nature of the anticipated awards.

Part III describes eligibility information.

Part IV provides information on the application and submission process.

Part V describes the criteria against which applications will be reviewed and explains the Proposal review process.

Part VI provides award administration information.

Part VII contains DOL agency contact information.

Part VIII lists additional resources of interest to applicants and other information.

I. Overall Funding Opportunity Description

The Employment and Training Administration announces the availability of $17.3 million for Young Offender Grants. The grants will be awarded through a competitive process for three categories of projects—(1) approximately 10 Young Offender Planning Grants of approximately $300,000 each to be awarded to local governments; (2) approximately three Juvenile Offender Implementation Grants of approximately $3,115,260 each to be awarded to state/local government partnerships; and (3) one Intermediary Reentry Grant of approximately $5 million to be awarded to an organization with experience

conducting demonstrations in multiple cities.

Each year, Juvenile Courts in the United States handle roughly 1.6 million delinquency cases and an estimated 144,000 youth are placed in juvenile correctional facilities. Youth in the juvenile justice system have high probabilities of returning to crime. For example, the State of Virginia reports that 79 percent of youth released from state correctional facilities and 60 percent of youth placed on probation in the state are arrested for a new crime within three years.

Juvenile offenders do not return evenly to communities across the United States, but rather return disproportionately to high-crime, high-poverty areas. The social support system in such communities is typically overwhelmed by the volume of returning offenders. The purpose of all three categories of grants being awarded under this solicitation is to provide selected state and local governments and an intermediary organization the opportunity to develop comprehensive strategies for serving *all* young offenders returning to a city or county. The Department recognizes that the funds available under the state/local implementation grants and the intermediary reentry grant may not be sufficient to serve all youth returning to the local area from juvenile correctional facilities, but the funds will be enough to serve a significant number of returning youth and for the state and local area to put into place strategies that could eventually serve all returning youth.

The goal of the planning grants is to allow selected localities to develop comprehensive blueprints for serving all juvenile and young adult offenders returning from correctional facilities. The Department's intent in funding these planning grants is that communities will then use resources outside of these grants to fully fund the plans that they develop. Applicants will need to show in their proposals and grantees will need to provide in the plans that they eventually develop how they intend to use state government, local government, and foundation resources to implement their plans.

The goal of the implementation grants is to allow state juvenile justice departments and local juvenile justice agencies to join together to put into place a comprehensive strategy for serving all youth in the local area returning home from juvenile correctional or detention facilities. These grants are designed to be administered by a partnership of state juvenile justice departments and local juvenile justice agencies. Either of the state juvenile justice department or local juvenile justice agency partners is eligible to apply for a grant and be part of the partnership under this Notice. Each state is limited to submitting only one application, and this application is limited to having juvenile offenders from only one county in the state as its focus. We are requiring a partnership between state and local juvenile justice agencies in these grants because reentry programs for juvenile offenders need both pre-release and post-release components. Further, in many states, the majority of youth in juvenile correctional facilities come from one city, and improved reentry outcomes for youth from that city benefit both the state and the locality.

The goal of the intermediary reentry grant is to allow an organization to design and implement a model program for serving returning juvenile offenders in four cities across the country. These cities may be selected after award through a competition open to faith and community-based organizations. The Department is allowing State/Local Implementation Grantees and Intermediary Reentry Grantees to use both time and part of their grant resources to go through a planning process prior to the implementation of their projects.

The Department's overarching reentry strategy, developed through the Ready-4-Work, Prisoner Reentry Initiative, and various Youthful Offender demonstrations, includes three main features: (1) The use of faith-based and community organizations in partnership with the juvenile or adult criminal justice system; (2) an emphasis on providing volunteer mentors for returning offenders; and (3) a focus on education for younger juvenile offenders and employment for older juvenile offenders and adult offenders. The Department expects that all three categories of grants being funded under this solicitation will develop programs based on this overarching strategy.

The Department also expects that all three categories will form Community Reentry Teams to design these components. These Community Reentry Teams will include at a minimum representatives from state and local juvenile justice agencies, the local workforce system, the local public school system, the local foster youth system, faith-based and community organizations, local corporations and businesses, and local foundations. Since Planning Grantees will also be developing plans for serving young adult offenders, their Community Reentry Teams should also include representatives for state and local criminal justice agencies.

The Ready-4-Work demonstration placed faith-based and community organization at the center of social service delivery to returning offenders. The Department of Labor funded 11 sites serving returning adult offenders, while the Department of Justice funded seven sites serving returning juvenile offenders. For more information on the Ready-4-Work demonstration, see the Public/Private Ventures report *When the Gates Open: Ready4Work-A National Response to the Prisoner Reentry Crisis* at *http://www.ppv.org/ppv/publications/assets/189_publication.pdf.* Also see the Department of Labor publication *Ready4Reentry: A Prisoner Reentry Toolkit for Faith-Based and Community Organizations* available at *http://www.dol.gov/cfbci/PRItoolkit.pdf.*

The Prisoner Reentry Initiative includes both a pre-release component funded by the Department of Justice and a post-release component funded by the Department of Labor. The initial set of 30 Prisoner Reentry Initiative grants are now in their third-year of operation, while a second set of 23 grants are now in their first year of operation. For more information on this project, see the Coffey Communications interim report *Evaluation of the Prisoner Reentry Initiative* at *http://wdr.doleta.gov/research/FullText_Documents/PRI%2DEval%20Interim%20Report%20%2D%206%2D11%2D08%2Epdf.*

The Department sees faith-based and community organizations as important partners because they possess the compassion, commitment and expertise needed to help young offenders get back on track in their lives. These organizations also posses an intimate knowledge of the community, its resources, and potential program participants. Faith-based and community organizations can provide assistance to young offenders in a variety of ways, including mentoring, case management, family support services, and supportive services necessary to help younger juvenile offenders return to and succeed in school and to help older juvenile offenders and young adult offenders find and retain employment.

The Department also expects that projects in all three categories of grants will emphasize a Shared Youth Vision approach in which multiple state and local agencies work collaboratively across funding streams to best serve young people in their jurisdictions. Please go to the Employment and Training Administration's Web site for more information on the Shared Youth

Vision at *http://www.doleta.gov/ryf/WhiteHouseReport/VMO.cfm.*

The Department believes that a wide variety of programming is necessary to meet the diverse needs of young offenders, and that the projects carried out with the state/local implementation grants and the intermediary reentry grant and the strategies developed with the planning grants will include all the components listed below. The state/local implementation grantees and the intermediary reentry grantee will actually put into place these components, while the planning grantees will develop strategies for implementing these components.

#1. Employment Strategies. For the state/local implementation grants and the intermediary reentry grant, the employment component should be aimed at juvenile offenders ages 18 and above. For the planning grants, the employment component will be the main strategy for the young adult portion of the plan and also a key component for youth ages 18 and above in the juvenile portion of the plan. The employment component can include strategies such as on-the-job training; vocational training; subsidized jobs in both the public and private sectors; participation in conservation and service corps programs; participation in YouthBuild programs; job readiness training; job placement; internships for juvenile offenders who return to school; efforts to expose students to careers and to coordinate with industry-based youth organizations; and efforts to expand the career awareness of juvenile offenders and to make them aware of the educational requirements of various careers. See the Web sites of Skills USA at *http://www.skillsusa.org* and Health Occupations Students of America at *http://www.hosa.org/natorg.html* for examples of programs that coordinate with industries in teaching youth about careers.

Designing this component will require coordinating with the local workforce system to provide access both to the corporations represented on the Workforce Investment Board and the service providers funded by the local workforce system. As part of the planning process after grant award, local areas also will need to do a scan of existing DOL-funded initiatives in the community, including the WIA formula youth program, WIRED, Beneficiary Choice projects, community-based job training projects, youth offender projects, and high-growth job training grants, to determine potential linkages, if present.

#2. Case Management. This component will provide a team of full-time advocates to serve young offenders returning to the city or county. The Department sees these case managers or advocates as assisting parole officers in serving returning young offenders and in linking these offenders to available social services. The Department also sees these case managers or advocates getting to know the parents of juvenile offenders and making home visits to the youth. The Department expects that case management will start at some point prior to release to allow young offenders to become familiar with their case managers prior to release. This component may also include having a separate team of case managers to work with youth at correctional facilities to prepare the youth for their release. See the Ready-4-Work and Prisoner Reentry Initiative publications referenced above for discussions of implementing case management components for returning offenders.

#3. Educational Strategies. This component will be primarily aimed at juvenile offenders under the age of 18, but will also include strategies aimed at serving juvenile offenders ages 18 and above. Juvenile offenders returning from out-of-home placements face great difficulties when they re-enroll in school, and the Department expects that grantees in all three categories will coordinate with local school districts in developing this component. One study of a large urban school district found that within a year of re-enrolling in high school, nearly two-thirds of first-time ninth graders and over three-fourths of ninth grade repeaters who were incarcerated and then returned to school withdraw or drop out. The study found that only 12 percent of first-time ninth graders and 15 percent of ninth grade repeaters completed their high school education within four years. Educational activities can be operated under this grant both during pre-release and post-release. The Department sees this educational component as offering a variety of educational pathways to serve the diverse needs of youth. The Department expects that this educational component will include the following elements:

- Reading and math remediation;
- Assisting young offenders compile the credits they have received in various schools and correctional facilities they have attended;
- Credit retrieval opportunities to allow young juvenile offenders to catch up with their age cohort in high school credits;
- Transition programs such that juvenile offenders returning from out-of-home placements do not re-enter classrooms in the middle of a semester;
- Tutoring in high school classes for returning offenders; and
- Having case managers coordinate with teachers and parole officers to help ensure the success of juvenile offenders when they return to school.

#4. Mentoring. This component will be aimed at providing adult mentors for returning young offenders. For the State/Local Implementation Grants and the Intermediary Reentry Grant, the Department requires that a faith-based or community organization experienced in providing social services to youth or in operating mentoring programs have the lead in this component of the program. This organization may be selected competitively by the grantee after award. Mentoring can be provided through volunteers recruited through a variety of ways, and may include one-on-one mentoring, group mentoring, and service-based mentoring. The Department recognizes that it may not be possible to provide a mentor for every youth returning from a juvenile correctional facility, but grantees should develop strategies to provide a high proportion of returning youth offenders with mentors, with the goal of eventually serving all such youth.

#5. Restorative Justice Projects. The Department expects that each grantee will develop restorative justice projects that allow youth offenders to participate in community service projects to give something positive back to their neighborhood to make up for their delinquent offenses. Plans should provide for different types of projects appropriate for the different age groups of offenders. As examples, age-appropriate work for participants ages 18 and above could include construction projects such as helping build housing for poor families or helping build community centers, while age-appropriate work for younger participants youth could include conservation projects such as tree planting and clearing trails in parks. The Department expects that this component will be developed in conjunction with local conservation and service corps programs, volunteer organizations, and state and local parks.

#6. Community-Wide Efforts to Reduce Crime and Violence. The Department expects that grantees will include in each of the components listed above connections with neighborhood leaders and institutions which serve youth as part of their missions, such as faith-based and community groups with youth programs, Settlement Houses, Boys and Girls Clubs, Girls Inc, YMCAs, and YWCAs. The Department expects that the overall strategy developed by all

three categories of grantees will include faith-based and community organizations and social service organizations in neighborhoods with large numbers of juvenile offenders joining together to form a community-wide net to serve juvenile offenders and to prevent youth violence, as was done in Boston's 10 Point Coalition (*http://www.jsonline.com/story/index.aspx?id=212652*).

II. Award Information

A. Award Amount

Planning Grants: The Department expects to award 10 planning grants of approximately $300,000 each.

State/Local Implementation Grants: The Department expects to award three state/local implementation grants of approximately $3,115,260 each. These grants may receive additional years of funding depending on the availability of such funds and demonstrated performance.

Intermediary Reentry Grant: The Department expects to award one Intermediary Reentry Grant of approximately $5 million. This grant may receive additional years of funding depending on the availability of such funds and demonstrated performance.

B. Period of Performance

Planning Grants: Planning Grants will be awarded for a 12-month period of performance.

State/Local Implementation Grants and Intermediary Reentry Grant: These grants will be funded for an 18-month period of performance that includes up to six months of planning and 12 full months of operation. In the Budget Narrative, applicants must provide separate budgets for planning and operations. Regardless of the length of the planning period, applicants must budget for a full 12 months of operation. Grantees should be judicious in their use of funds during the planning period and careful to use them specifically for planning components associated with this grant.

III. Eligibility Information and Other Grant Specifications

A. Eligible Applicants

Planning Grants: City and county governments are eligible to apply for planning grants, with the mayor being the signatory for the city or county executive being the signatory for the county.

State/Local Implementation Grants: As described above, these grants are designed to be administered by a partnership of state juvenile justice departments and local juvenile justice agencies. Either of the state juvenile justice department or local juvenile justice agency partners is eligible to apply for a grant under this Notice. Each state is limited to submitting only one application, and this application is limited to having juvenile offenders from only one county in the state as its focus.

Intermediary Reentry Grant: An organization that has experience in conducting multi-site demonstrations in several localities may apply for this grant.

Note for all three categories of grants: DOL/ETA's acceptance of a proposal and award of Federal funds to sponsor any program do not provide a waiver of any grant requirements and/or procedures. OMB Circulars require that an entity's procurement procedures must ensure that all procurement transactions are conducted, as much as practical, to provide open and free competition. If a proposal identifies a specific entity to provide services, the DOL/ETA's award does not provide the justification or basis to sole source the procurement, *i.e.*, avoid competition, unless the activity is regarded as the primary work of an official partner to the application.

B. Cost Sharing or Matching

Planning Grants: Planning grants must provide one-to-one leveraged resources from a local or national foundation, local or state government, other federal funds, or other source.

State/Local Implementation Grants and Intermediary Reentry Grant: There are no cost-sharing or matching requirements for state/local implementation grants or the intermediary reentry grant, but the development of leveraged resources is strongly encouraged in these grants and will be one of the factors considered in the review of proposals.

C. Other Eligibility Requirements

Participant Eligibility. Youth ages 14 and above who have been involved in the juvenile justice system within the past year, but never involved in the adult criminal justice system, may be served by the state/local implementation grants and intermediary reentry grant. The first priority of service for these grants is youth currently in or recently released from juvenile correctional facilities. If grant funds are still available after all such youth from the local area are served, the second priority for service is youth currently in or recently released from local juvenile detention centers. If grant funds are still available after all such youth from the local area are served, the third priority is youth who have been placed on probation through the local juvenile justice system. A minimum of 80 percent of youth enrolled must be those currently in or released within the last 30 days from either juvenile correctional facilities or juvenile detention centers.

IV. Application and Submission Information

A. Address to Request Application Package

This SGA contains all of the information and links to forms needed to apply for grant funding.

B. Content and Form of Application Submission

The proposal will consist of two separate and distinct parts—a cost proposal and a technical proposal. Applications that fail to adhere to the instructions in this section will be considered non-responsive and will not be considered.

Part I. The Cost Proposal. The Cost Proposal must include the following three items:

- The Standard Form (SF) 424, ''Application for Federal Assistance'' (available at *http://www.whitehouse.gov/omb/grants/sf424.pdf*), *http://www07.grants.gov/agencies/forms_repository_information.jsp* and *http://www.doleta.gov/grants/find_grants.cfm*). The SF 424 must clearly identify the applicant and be signed by an individual with authority to enter into a grant agreement. Upon confirmation of an award, the individual signing the SF 424 on behalf of the applicant shall be considered the representative of the applicant. *Indicate on Line 12 of SF 424 the category for which you are applying under this Notice.*
- All applicants for Federal grant and funding opportunities are required to have a Dun and Bradstreet (DUNS) number. See Office of Management and Budget (OMB) Notice of Final Policy Issuance, 68 FR 38402 (June 27, 2003). Applicants must supply their DUNS number on the SF 424. The DUNS number is a nine-digit identification number that uniquely identifies business entities. Obtaining a DUNS number is easy and there is no charge. To obtain a DUNS number, access this Web site: *http://www.dunandbradstreet.com* or call 1–866–705–5711.
- The SF 424A Budget Information Form (available at *http://www.whitehouse.gov/omb/grants/sf424a.pdf), http://www07.grants.gov/*

agencies/forms_repository_information.jsp and *http://www.doleta.gov/grants/find_grants.cfm*. In preparing the Budget Information Form, the applicant must provide a detailed backup budget for both the planning and operations aspects of the project, with a narrative explanation in support of the request. The budget narrative should break down the budget and leveraged resources by project activity, should discuss cost-per-participant, and should discuss precisely how the administrative costs support the project goals. Administrative costs do not need to be identified separately from program costs on the SF 424A Budget Information Form. Please note that applicants who fail to provide a SF 424, SF 424A and/or a budget narrative will be removed from consideration prior to the technical review process. If the proposal calls for integrating WIA or other Federal funds or includes other leveraged resources, these funds should not be listed on the SF 424 or SF 424A Budget Information Form, but should be described in the budget narrative and in Part II of the proposal. The amount of Federal funding requested for the entire period of performance should be shown on the SF 424 and SF 424A Budget Information Form. Applicants are also encouraged, but not required, to submit OMB Survey N. 1890–0014: Survey on Ensuring Equal Opportunity for Applicants, which can be found at *http://www07.grants.gov/agencies/forms_repository_information.jsp* and *http://www.doleta.gov/grants/find_grants.cfm*.

Part II. The Technical Proposal. The Technical Proposal will demonstrate the applicant's capability to plan and implement a project in accordance with the provisions of this solicitation. The guidelines for the content of the Technical Proposal are provided in Part V Section A of this SGA. The Technical Proposal for planning grants is limited to ten (10) double-spaced single-sided pages with 12 point text font and one-inch margins. The Technical Proposal for state/local implementation grants and the intermediary reentry grant is limited to twenty (20) double-spaced single-sided pages with 12 point text font and one-inch margins. Any pages submitted in excess of these page limits will not be reviewed. In addition, applications for planning grants must include a memorandum of understanding signed by the State juvenile correctional agency, the State adult correctional agency, and the local juvenile justice agency committing that these agencies will work together in carrying out the grant. Applications for State/local implementation grants must include a memorandum of understanding signed by the State juvenile correctional agency and the local juvenile justice agency committing that these agencies will work together in carrying out the grant. Applications for intermediary reentry grants do not need to include such agreements because the cities to be served by this grant and the local sub-grantees may be selected competitively after grant award. The applications for all three categories must also include a 2-page Executive Summary. These additional materials do not count against the 20-page limit for the Technical Proposal.

Applicants submitting proposals in hard-copy must submit an original signed application (including the SF 424) and one (1) ''copy-ready'' version free of bindings, staples or protruding tabs to ease in the reproduction of the proposal by DOL.

C. Submission Date, Times, and Addresses

The closing date for receipt of applications under this announcement is December 18, 2008. Applications must be received at the address below no later than 5 p.m. (Eastern Time). Applications submitted electronically through Grants.gov must be successfully submitted at *http://www.grants.gov* no later than 5 p.m. (Eastern Time) on December 29, 2008, and then subsequently validated by Grants.gov. The submission and validation process is described in more detail below. The process can be complicated and time-consuming. Applicants are strongly advised to initiate the process as soon as possible and to plan for time to resolve technical problems if necessary.

Applications sent by e-mail, telegram, or facsimile (fax) will not be accepted.

Applications that do not meet the conditions set forth in this notice will not be honored. No exceptions to the mailing and delivery requirements set forth in this notice will be granted.

Mail/overnight mail/hand delivery—Mailed applications must be addressed to the U.S. Department of Labor, Employment and Training Administration, Division of Federal Assistance, Attention: Chari Magruder, Reference SGA/DFA PY 08–09, 200 Constitution Avenue, NW., Room N–4716, Washington, DC 20210. Applicants are advised that mail delivery in the Washington area may be delayed due to mail decontamination procedures. Hand-delivered proposals will be received at the above address. All overnight mail will be considered to be hand-delivered and must be received at the designated place by the specified closing date and time.

Electronic submission—Applicants may apply online through Grants.gov (*http://www.grants.gov*). It is strongly recommended that before the applicant begins to write the proposal, applicants should immediately initiate and complete the ''Get Registered'' registration steps at *http://www.grants.gov/applicants/get_registered.jsp*. These steps may take multiple days or weeks to complete, and this time should be factored into plans for electronic submission in order to avoid unexpected delays that could result in the rejection of an application. It is highly recommended that online submissions be completed at least two (2) working days prior to the date specified for the receipt of applications to ensure that the applicant still has the option to submit by overnight delivery service in the event of any electronic submission problems. It is also highly recommended that applicants use the ''Organization Registration Checklist'' at *http://www.grants.gov/assets/Organization_Steps_Complete_Registration.pdf* to ensure the registration process is complete.

Within two business days of application submission, Grants.gov will send the applicant two e-mail messages to provide the status of application progress through the system. The first e-mail, almost immediate, will confirm receipt of the application by Grants.gov. The second e-mail will indicate the application has either been successfully validated or has been rejected due to errors. *Only applications that have been successfully submitted and successfully validated will be considered.* It is the sole responsibility of the applicant to ensure a timely submission, therefore sufficient time should be allotted for submission (two business days), and if applicable, subsequent time to address errors and receive validation upon resubmission (an additional two business days for each ensuing submission). It is important to note that if sufficient time is not allotted and a rejection notice is received after the due date and time, the application will not be considered.

The components of the application *must* be saved as either .doc, .xls or .pdf files. Documents received in a format other than .doc, .xls or .pdf will not be read.

The Grants.gov helpdesk is available from 7 a.m. (Eastern Time) until 9 p.m. (Eastern Time). Applicants should factor the unavailability of the Grants.gov helpdesk after 9 p.m. (Eastern Time) into plans for submitting an application.

Applicants are strongly advised to utilize the plethora of tools and documents, including FAQs that are available on the ''Applicant Resources'' page at *http://www.grants.gov/applicants/app_help_reso.jsp#faqs*. To receive updated information about critical issues, new tips for users and other time sensitive updates as information is available, applicants may subscribe to ''Grants.gov Updates'' at *http://www.grants.gov/applicants/email_subscription_signup.jsp*.

If applicants encounter a problem with Grants.gov and do not find an answer in any of the other resources, call 1–800–518–4726 to speak to a Customer Support Representative or e-mail *support@grants.gov.*

Late Applications: For applications submitted on Grants.gov, only applications that have been successfully submitted no later 5 p.m. (Eastern Time) on the closing date and successfully validated will be considered. For applicants not submitting on Grants.gov, any application received after the exact date and time specified for receipt at the office designated in this notice will not be considered, unless it is received before awards are made, was properly addressed, and: (a) Was sent by U.S. Postal Service registered or certified mail not later than the fifth calendar day before the date specified for receipt of applications (e.g., an application required to be received by the 20th of the month must be post marked by the 15th of that month) or (b) Was sent by professional overnight delivery service to the addressee not later than one working day prior to the date specified for receipt of applications. ''Post marked'' means a printed, stamped or otherwise placed impression (exclusive of a postage meter machine impression) that is readily identifiable, without further action, as having been supplied or affixed on the date of mailing by an employee of the U.S. Postal Service. Therefore, applicants should request the postal clerk to place a legible hand cancellation ''bull's eye'' postmark on both the receipt and the package. Failure to adhere to the above instructions will be a basis for a determination of nonresponsiveness. Evidence of timely submission by a professional overnight delivery service must be demonstrated by equally reliable evidence created by the delivery service provider indicating the time and place of receipt.

D. Intergovernmental Review

This funding opportunity is not subject to Executive Order (EO) 12372, ''Intergovernmental Review of Federal Programs.''

E. Funding Restrictions

All proposal costs must be necessary and reasonable in accordance with Federal guidelines. Determinations of allowable costs will be made in accordance with the applicable Federal cost principles. Disallowed costs are those charges to a grant that the grantor agency or its representative determines not to be allowed in accordance with the applicable Federal Cost Principles or other conditions contained in the grant. Applicants will not be entitled to reimbursement of pre-award costs. Funds provided under these grants shall only be used for activities that are in addition to those that would otherwise be available in the local area in the absence of such funds. Paying for food is only allowable in circumstances in which it is integral to a training activity. Grant funds may be used to pay wages to participants for summer and after-school work experience and internships as long as participants are assigned real work for these wages, but grant funds cannot be used for paying stipends to participants. Grantees must submit an implementation plan and detailed budget for project officer review and approval prior to starting operations. If grantees are starting some components sooner than others, they can submit separate plans for the components as they are ready to start them.

Indirect Costs. As specified in OMB Circulars on Cost Principles, indirect costs are those that have been incurred for common or joint objectives and cannot be readily identified with a particular cost objective. In order to utilize grant funds for indirect costs incurred, the applicant must obtain an Indirect Cost Rate Agreement with its Federal Cognizant Agency either before or shortly after the grant award. The Federal Cognizant Agency is generally determined based on the preponderance of Federal dollars received by the recipient.

Administrative Costs. An entity that receives a grant to carry out a project or program may not use more than 10 percent of the amount of the grant to pay administrative costs associated with the program or project. Administrative costs could be both direct and indirect costs and are defined at 20 CFR 667.220. Administrative costs do not need to be identified separately from program costs on the SF 424A Budget Information Form. They should be discussed in the budget narrative and tracked through the grantee's accounting system. To claim any administrative costs that are also indirect costs, the applicant must obtain an Indirect Cost Rate Agreement from its Federal Cognizant Agency as specified above.

F. Legal Rules Pertaining to Inherently Religious Activities by Organizations That Receive Federal Financial Assistance

Direct Federal grants, sub-award funds, or contracts under this program shall not be used to support inherently religious activities such as religious instruction, worship, or proselytization. Therefore, organizations must take steps to separate, in time or location, their inherently religious activities from the services funded under this program. Neutral, secular criteria that neither favor nor disfavor religion must be employed in the selection of grant and sub-grant recipients. In addition, under the Workforce Investment Act of 1998 and DOL regulations implementing the Workforce Investment Act, a recipient may not use direct Federal assistance to train a participant in religious activities, or employ participants to construct, operate, or maintain any part of a facility that is used or to be used for religious instruction or worship. *See* 29 CFR 37.6(f). Under WIA, ''no individual shall be excluded from participation in, denied the benefits of, subjected to discrimination under, or denied employment in the administration of or in connection with, any such program or activity because of race, color, religion, sex (except as otherwise permitted under Title IX of the Education Amendments of 1972 and the Religious Freedom Restoration Act of 1993), national origin, age, disability, or political affiliation or belief.'' Regulations pertaining to the Equal Treatment for Faith-Based Organizations, which includes the prohibition against Federal funding of inherently religious activities, can be found at 29 CFR Part 2, Subpart D. Provision relating to the use of indirect support (such as vouchers) is at 29 CFR 2.33(c) and 20 CFR 667.266.

A faith-based organization receiving federal funds retains its independence from Federal, State, and local governments, and may continue to carry out its mission, including the definition, practice, and expression of its religious beliefs. For example, a faith-based organization may use space in its facilities to provide secular programs or services funded with Federal funds without removing religious art, icons, scriptures, or other religious symbols. In addition, a faith-based organization that receives Federal funds retains its authority over its internal governance, and it may retain religious terms in its organization's name, select its board members on a religious basis, and

include religious references in its organization's mission statements and other governing documents in accordance with all program requirements, statutes, and other applicable requirements governing the conduct of DOL funded activities.

The Department notes that the Religious Freedom Restoration Act (RFRA), 42 U.S.C. sec. 2000bb, applies to all Federal law and its implementation. If your organization is a faith-based organization that makes hiring decisions on the basis of religious belief, it may be entitled to receive Federal financial assistance under Title I of the Workforce Investment Act and maintain that hiring practice even though Section 188 of the Workforce Investment Act contains a general ban on religious discrimination in employment. If you are awarded a grant, you will be provided with information on how to request such an exemption.

V. Application Review Information

A. Evaluation Criteria

This section identifies and describes the criteria that will be used to evaluate proposals submitted for planning grants and implementation grants. Note that applications for planning grants do not need to include a Project Design section in their proposals, as their project design will be developed through the planning grants. Also note that that the allocation of points to need varies between the state/local and intermediary proposals because the intermediary applicants will not yet have identified the cities in which they will be operated.

Criterion	Points for planning grant applications	Points for state/local implementation grant applications	Points for intermediary eentry applications
1. Local Need	40	20	10
2. Project design	N/A	35	30
3. Collaboration	40	35	20
4. Organizational capacity	20	10	40
Total Possible Points	100	100	100

The rated components listed above make up the Technical Proposal (along with the additional requirements listed in section IV.B).

1. Local Need

Planning Grants and State/Local Implementation Grants:

The points for local need for both planning grants and State/local implementation grants will be assigned based on a combination of the number of delinquency cases in the county to be served by your proposed project and the justification that you make in your application for the need for the project. Half of the points under this criterion will be assigned based on the number of youth in delinquency cases as determined by the most recent data available provided voluntarily by juvenile courts across the country to the National Juvenile Court Data Archive (NJCDA), a project maintained by the National Center for Juvenile Justice (NCJJ) with funds provided by the Office of Juvenile Justice and Delinquency Prevention. These Juvenile Court statistics include State and county-level caseload data showing the annual delinquency, status offense, and dependency cases handled by juvenile courts. These county-level statistics are available on the OJJDP Web site under *Easy Access to State and County Juvenile Court Case Counts* at *http://ojjdp.ncjrs.org/ojstatbb/ezaco/asp/TableDisplay.asp.* We will be using the combined number of petitioned and non-petitioned delinquency cases.

If you are from Kentucky, Louisiana, or Mississippi, please provide the number of combined petitioned and non-petitioned delinquency cases in the county that you will be serving for the latest year available as the national base does not include these statistics for these three States. If you are applying from any other State, you do not need to provide in your application the statistics for the area that you will be serving as we can access that information from the national data base as long as you indicate in the Needs Section of your application the county that you will be serving. If you are from Connecticut, indicate the venue district that you will be serving.

The other half of the points under this criterion will be based on the justification that you provide in your application for the need for this project in the area that you will be serving. Make your best case for why your local area needs this grant. Present the number of youth from the county placed in a juvenile correctional facility this past year; the number of youth placed in local detention centers; and the number who returned home from juvenile correctional facilities. Provide the source of this data. Discuss the extent of youth gangs in the city or county. Discuss why the problems of juvenile crime and youth gangs exist to the extent that they do in the county, what resources are currently available for serving returning juvenile offenders; and what gaps currently exist in these services. Applicants for planning grants also should discuss the extent of the problem of young adult crime in the city or county to be served, as planning grants will be developing blueprints for serving young adult as well as juvenile offenders.

Intermediary Reentry Grant:

- Discuss what factors indicating local need you will include in your solicitation for selecting cities competitively after award, why you believe that these factors are a good indicator of local need for the project, whether data is available on these factors, and what weight you will place on need factors.
- Discuss why the problems of juvenile crime and gangs exist to the extent that they do in the country as a whole; what resources typically are currently available for serving returning juvenile offenders; and what gaps currently exist in these services.

Planning Grant and State/Local Implementation proposals will be evaluated under this criterion as follows:

- Half of the points under this criterion will be based on the number of delinquency cases in the county to be served by the project reported in the *Easy Access to State and County Juvenile Court Case Counts* data base. A scale will be used to rank the number of delinquency cases in a county as high, medium, or low, with the most points being provided to counties with high numbers of delinquency cases.
- The other half of the points under this criterion will be based on the case

you make in your proposal for the local need for your project. Based on evidence that you provide regarding the number of youth from the county placed in a juvenile correctional facility this past year; the number of youth placed in local detention centers; the number who returned home from juvenile correctional facilities; and current gaps in services to juvenile offenders, the review panel will rank the seriousness of the problems of juvenile crime and youth gangs in your county as severe, moderate, or low. Local areas with severe juvenile crime and youth gangs will receive the most points. Planning grant applications will also be ranked based on the evidence provided regarding the seriousness of their adult crime problem.

Intermediary Grant proposals will be evaluated under this criterion as follows:

- The review panel will evaluate how you will include local need as part of your competitive selection of cities. The review panel will consider how well you have thought through what factors of local need should be included in your solicitation for the cities that will be part of your project; whether data is available on the factors that you propose; and the extent to which these factors accurately reflect local need. Panelists will rate your response on a scale of fair, good, and excellent, with excellent receiving the most points (5 points).
- The review panel will evaluate your response regarding why juvenile crime and youth gangs exist to the extent that they do in the country as a whole; what resources typically are currently available for serving returning juvenile offenders; and what gaps currently exist in these services. The panel will consider how well you have thought through these issues and how insightful your analysis is of existing gaps in services. Panelists will rate your response on a scale of fair, good, and excellent, with excellent receiving the most points (5 points).

2. Project Design (Applications for Planning Grants Do Not Complete This Section)

State/Local Implementation Grants and Intermediary Reentry Grants: Discuss how you will implement each of the required project components in Part I of the grant announcement:

- *Community Reentry Team:* Discuss which agencies will serve on this team. Discuss the roles and responsibilities of the Community Reentry Team.
- *Employment Strategies:* Discuss how you plan to place older juvenile offenders in jobs. Discuss how you will link with the local Workforce Investment Board, One-Stop Centers, and corporations.
- *Case Management:* Discuss how you will carry out this component, including the number of case managers or advocates you expect to hire, how these case managers or advocates will interact with guidance counselors and staff, the expected number of students to be served each year in this component, and the anticipated case load size.
- *Educational Strategies:* Discuss the educational strategies that you will implement with grant funds. Provide details regarding how you will implement each strategy, including the number of full-time staff positions that will be dedicated to each new strategy and the expected number of students to be served each year by each strategy. Describe the level of staff development that will be provided in implementing these educational strategies.
- *Mentoring:* Describe how the mentoring component will be carried out, including how mentors will be recruited, screened, and trained, the anticipated number of youth who will receive mentors, and the number of full-time staff to be hired for this component. Also, discuss the extent to which you will use one-on-one mentoring, group mentoring, service-based mentoring, and work-based mentoring.
- *Restorative Justice:* Discuss how you will implement community service projects for juvenile offenders both ages 18 and above and ages 17 and below. Discuss possible links with local conservation and service corps programs, volunteer organizations, and state and local parks.
- *Community-Wide Violence Reduction Efforts:* Discuss plans for churches and social service organizations in neighborhoods served by the grant to join together to prevent youth violence and serve juvenile offenders.

State/Local Implementation Grant proposals and Intermediary Reentry Grant proposals will be evaluated under this criterion for each of the six required components plus the Community Reentry Team as follows:

For State/Local Implementation Grant proposals, up to 5 points will be awarded for each of the six required components plus the Community Reentry Team. For Intermediary Reentry Grant proposals, up to 5 points each will be awarded for the employment and education components and up to 4 points each will be awarded for the other four components and the Community Reentry Team. The points for each of the required components and the Community Reentry Team will be rated by the panel based on:

- The extent to which the applicant demonstrates that it has thought through how it will implement the component;
- The practicality and likelihood of success of the design that the applicant is proposing for the component; and
- The potential for the component as designed by the applicant to have large impact on the young offender population in the communities to be served.

3. Collaboration

This section should include for all three categories a discussion of how the project will be carried out in a shared youth vision framework in which multiple state and local agencies work collaboratively across funding streams to best serve young people in their jurisdictions.

Planning Grants: This section should include:

- A discussion of each of the key partners that will be involved in the project, including the state and local juvenile justice agencies, state and local agencies responsible for returning adult offenders, the school district, the workforce investment system, local foundations, and corporations.
- A discussion of the community's potential commitment to the project, including a description of organizations that serve neighborhoods with large numbers of returning young offenders, including churches with youth programs, Settlement Houses, Boys and Girls Clubs, Girls Inc, YMCAs, and YWCAs, and how these organizations could help serve as a community-wide net for at-risk youth.
- A description of the one-to-one leveraged resources and the extent to which the leveraged resources represent funding or staffing that would not otherwise be dedicated to improving services for juvenile and young adult offenders.

State/Local Implementation Grants: This section should include:

- A discussion of each of the key partners that will be involved in the project, including the state and local juvenile justice agencies, the school district, the workforce investment system, local foundations, and corporations.
- A discussion of the community's potential commitment to the project, including a description of organizations that serve neighborhoods with large numbers of returning young offenders, including churches with youth programs, Settlement Houses, Boys and Girls Clubs, Girls Inc, YMCAs, and YWCAs, and how these organizations

could help serve as a community-wide net for at-risk youth.

• A description of the leveraged resources that will provide and the extent to which these resources represent funding or staffing that would not otherwise be dedicated to improving services for juvenile and young adult offenders.

• A description of the requirements that will go into the grant announcement for selecting faith-based and community organizations as sub-grantees/contractors. The Department strongly encourages the competitive selection of sub-grantees and contractors either before or after grant award.

Intermediary Reentry Grants: Because cities in which the project will be operated will not be selected until after grant award, applicants will not be able to list specific local partners in this section. Rather, discuss the types of local organizations that you will seek out as partners. This section should include:

• A discussion of how you plan to involve key local partners, including the state and local juvenile justice agencies, the school district, the workforce investment system, local foundations, and corporations.

• A description of the types of local organizations that the applicant will seek to include in this project, including churches with youth programs, Settlement Houses, Boys and Girls Clubs, Girls Inc, YMCAs, and YWCAs, and how these organizations could help serve as a community-wide net for at-risk youth.

• A description of the types of leveraged funds that will be sought to carry out these grants.

• A description of the requirements for local state and local collaboration that will go into the grant announcement for selecting cities and local subgrantees. The Department strongly encourages the competitive selection of sub-grantees and contractors either before or after grant award.

Planning Grant proposals will be evaluated under this criterion based on:

• The extent of planned partnerships between the state and local juvenile justice agencies, the school district, the workforce investment system, state and local agencies responsible for adult offenders, local foundations, and corporations (15 points).

• The extent of the potential commitment to the project of faith-based and community organizations that are operating in neighborhoods with large numbers of returning young offenders likely to be served by the grant (15 points).

• The extent to which the one-to-one leveraged resources represent funding or staffing that would not otherwise be dedicated to improving services for juvenile and young adult offenders (10 points).

State/Local Implementation Grant proposals will be evaluated under this criterion based on:

• The extent of planned partnerships between the state and local juvenile justice agencies, the school district, the workforce investment system, state and local agencies responsible for adult offenders, local foundations, and corporations (9 points).

• The extent of the potential commitment to the project of faith-based and community organizations that are operating in neighborhoods with large numbers of returning young offenders likely to be served by the grant (9 points).

• The amount of leveraged resources and the extent to which these leveraged resources represent funding or staffing that would not otherwise be dedicated to improving services for juvenile offenders (9 points).

• The extent to which the requirements that will go into the solicitation for selecting faith-based and community sub-grantees and contractors are practical and able to differentiate between proposals of different levels of merit (8 points).

Intermediary Reentry Grant proposals will be evaluated under this criterion based on:

• The practicality and likelihood of success of the plan for involving key local partners in the project, including state and local juvenile justice agencies, the school district, the workforce investment system, state and local agencies responsible for adult offenders, local foundations, and corporations (5 points).

• The likelihood of success and the potential of having a large impact on the juvenile offender population of the plan for involving faith-based and community organizations in this project (5 points).

• The likelihood of success of the plan for leveraging additional funds for the project, the amount of expected leveraged resources, and the extent to which these leveraged resources will represent funding or staffing that would not otherwise be dedicated to improving services for juvenile offenders (5 points).

• The extent to which the requirements that will go into the solicitation for selecting faith-based and community sub-grantees and contractors are practical and able to differentiate between proposals of different levels of merit (5 points).

4. Organizational Capacity

• *Planning Grants:* Discuss the capacity of the organization to lead this planning process. Discuss experience of the organization in carrying out previous planning efforts. Discuss the capacity of the organization to have the lead in following through to implement the blueprints for reform developed through the 12-month planning period funded by these grants. Discuss the experience of key staff related to the juvenile and criminal justice systems. Discuss the organization's previous success in operating projects in a shared youth vision approach involving collaboration among agencies and the use of leveraged resources.

• *State/Local Implementation Grants:* Discuss the capacity and the commitment to this project of the State juvenile justice department. Discuss the capacity and commitment of the local juvenile justice agency. Discuss each organization's previous success in providing services in a shared youth vision approach involving collaboration among agencies and the use of leveraged resources. Discuss the experience of key staff related to the juvenile justice system.

• *Intermediary Reentry Grant:* This section should include discussions of the organization's direct experience in conducting multi-site demonstrations; the proposed staff's direct experience in conducting multi-site demonstrations; the organization's and the key staff's direct experience relating to each of the seven required program components discussed above—community reentry teams, case management, employment, education, mentoring, balanced and restorative justice, and community violence reduction efforts; and the organization's previous success in operating demonstrations in a shared youth vision approach involving collaboration among agencies and the use of leveraged resources.

Planning Grant proposals will be evaluated under this criterion based on:

• The experience of the organization in carrying out previous planning efforts (7 points).

• The experience of key staff related to the juvenile and criminal justice systems (7 points).

• The organization's previous success in operating projects in a shared youth vision approach involving collaboration among agencies and the use of leveraged resources (6 points).

State/Local Implementation Grant proposals will be evaluated under this criterion based on:

• The experience of the State juvenile justice department and key staff in collaborating with other agencies (5 points).

• The experience of the local juvenile justice agency and key staff in collaborating with other agencies (5 points).

Intermediary Reentry Grant proposals will be evaluated under this criterion based on:

• The organization's direct experience in conducting multi-site demonstrations (9 points).

• The proposed staff's direct experience in conducting multi-site demonstrations country (9 points).

• The organization's and the key staff's direct experience relating to each of the seven required program components discussed above—community reentry teams, case management, employment, education, mentoring, balanced and restorative justice, and community violence reduction efforts (9 points).

• The organization's previous success in operating demonstrations in a shared youth vision approach involving collaboration among agencies and the use of leveraged resources (8 points).

B. Review and Selection Process

Proposals that are timely and responsive to the requirements of this SGA will be rated against the criteria listed above by an independent panel that may be comprised of representatives from DOL and other reviewers. Proposals will be grouped by the category for which they apply, and the proposals within each category will be rated separately. The ranked scores will serve as the primary basis for selection of applications for funding, in conjunction with other factors such as geographic balance; the availability of funds; and which proposals are most advantageous to the Government. Any applications that receive a score of 80 and above will be considered for award. The panel results are advisory in nature and not binding on the Grant Officer, and the Grant Officer may consider any information that comes to his/her attention. If no fundable proposals are received for a given category or if fewer fundable proposals are received for a category than we intended to fund, additional awards may be made in the other categories. The Government may elect to award the grant(s) with or without discussions with the applicants. Should a grant be awarded without discussions, the award will be based on the applicant's signature on the SF 424, which constitutes a binding offer by the applicant (including electronic signature via E-Authentication on *http://www.grants.gov*).

VI. Award Administration Information

A. Award Notices

All award notifications will be posted on the ETA homepage (*http://www.doleta.gov*). The notice of award signed by the Grants Officer will serve as the authorizing document. Applicants not selected for award will be notified as soon as possible.

B. Administrative and National Policy Requirements

1. Administrative Program Requirements

All grantees, including faith-based organizations, will be subject to all applicable Federal laws, regulations, and the applicable OMB Circulars. The grant(s) awarded under this SGA will be subject to the following administrative standards and provisions:

a. Non-Profit Organizations—OMB Circulars A–122 (Cost Principles) and 29 CFR Part 95 (Administrative Requirements).

b. Educational Institutions—OMB Circulars A–21 (Cost Principles) and 29 CFR Part 95 (Administrative Requirements).

c. State and Local Governments—OMB Circulars A–87 (Cost Principles) and 29 CFR Part 97 (Administrative Requirements).

d. Profit Making Commercial Firms—Federal Acquisition Regulation (FAR)—48 CFR Part 31 (Cost Principles), and 29 CFR Part 95 (Administrative Requirements).

e. All entities must comply with 29 CFR Parts 93 and 98, and, where applicable, 29 CFR Parts 96 and 99.

f. 29 CFR Part 2, subpart D—Equal Treatment in Department of Labor Programs for Religious Organizations, Protection of Religious Liberty of Department of Labor Social Service Providers and Beneficiaries.

g. 29 CFR Part 31—Nondiscrimination in Federally Assisted Programs of the Department of Labor—Effectuation of Title VI of the Civil Rights Act of 1964.

h. 29 CFR Part 32—Nondiscrimination on the Basis of Handicap in Programs and Activities Receiving or Benefiting from Federal Financial Assistance.

i. 29 CFR Part 33—Enforcement of Nondiscrimination on the Basis of Handicap in Programs or Activities Conducted by the Department of Labor.

j. 29 CFR Part 35—Nondiscrimination on the Basis of Age in Programs or Activities Receiving Federal Financial Assistance from the Department of Labor.

k. 29 CFR Part 36—Nondiscrimination on the Basis of Sex in Education Programs or Activities Receiving Federal Financial Assistance.

The following administrative standards and provisions may be applicable:

a. Workforce Investment Act—20 Code of Federal Regulations (CFR) Part 667 (General Fiscal and Administrative Rules).

b. 29 CFR Part 30—Equal Employment Opportunity in Apprenticeship and Training; and

c. 29 CFR Part 37—Implementation of the Nondiscrimination and Equal Opportunity Provisions of the Workforce Investment Act of 1998.

In accordance with Section 18 of the Lobbying Disclosure Act of 1995 (Pub. L. 104–65) (2 U.S.C. 1611) non-profit entities incorporated under Internal Revenue Service Code section 501(c)(4) that engage in lobbying activities are not eligible to receive Federal funds and grants.

Note: Except as specifically provided in this Notice, DOL/ETA's acceptance of a proposal and an award of Federal funds to sponsor any program(s) does not provide a waiver of any grant requirements and/or procedures. For example, OMB Circulars require that an entity's procurement procedures must ensure that all procurement transactions are conducted, as much as practical, to provide open and free competition. If a proposal identifies a specific entity to provide services, the DOL/ETA's award does not provide the justification or basis to sole source the procurement, i.e., avoid competition, unless the activity is regarded as the primary work of an official partner to the application.

2. Special Program Requirements

Evaluation. DOL will require that State/Local Implementation Grantees and the Intermediary Reentry Grantee cooperate in an independent evaluation of their projects. This evaluation will make use of program MIS data, local administrative data on juvenile crime and recidivism, and program progress reports. DOL recognizes that there will be limitations on this cooperation due to state confidentiality requirements regarding data on individual juvenile offenders.

Intellectual Property Rights. The Federal Government reserves a paid-up, nonexclusive and irrevocable license to reproduce, publish or otherwise use, and to authorize others to use for federal purposes: (i) The copyright in all products developed under the grant, including a subgrant or contract under the grant or subgrant; and (ii) any rights of copyright to which the grantee, subgrantee or a contractor purchases ownership under an award (including

but not limited to curricula, training models, technical assistance products, and any related materials). Such uses include, but are not limited to, the right to modify and distribute such products worldwide by any means, electronically or otherwise. Federal funds may not be used to pay any royalty or licensing fee associated with such copyrighted material, although they may be used to pay costs for obtaining a copy which is limited to the developer/seller costs of copying and shipping. If revenues are generated through selling products developed with grant funds, including intellectual property, these revenues are program income. Program income is added to the grant and must be expended for allowable grant activities.

C. Reporting and Accountability

The state/local implementation grants and the intermediary reentry grant will be subject to performance standards measuring their progress in meeting the goals of the grants. National goals will be set after grant award in the following areas:

- Reducing the recidivism rate of youth returning from out-of-home placements;
- Increasing the employment rate of returning juvenile offenders ages 18 and above;
- Increasing the rate which returning juvenile offenders ages 18 and above enter post-secondary education or training;
- Increasing the school retention rate of returning juvenile offenders under the age of 18;
- Increasing the rate which returning juvenile offenders under the age of 18 achieve a high school diploma.

The planning grants will not be subject to performance standards, but DOL/ETA staff will review the completed plans submitted by grantees and will provide comments and suggestions to the grantees regarding their plans. The plans submitted by these grantees will also be shared with other localities in the country.

Quarterly financial reports, quarterly progress reports, and MIS data will be submitted by the grantee electronically. Grantees must agree to meet DOL reporting requirements. The grantee is required to provide the reports and documents listed below:

Quarterly Financial Reports. A Quarterly Financial Status Report is required until such time as all funds have been expended or the grant period has expired, whichever is sooner. Quarterly reports are due 45 days after the end of each calendar year quarter. Grantees must use ETA's On-Line Electronic Reporting System; information and instructions will be provided to grantees.

Quarterly Progress Reports. The grantee must submit a quarterly progress report based on a DOL template to its designated Federal Project Officer within 45 days after the end of each quarter. This report should provide a detailed account of activities undertaken during that quarter. The quarterly progress report should be in narrative form and should include:

1. In-depth information on accomplishments, including project success stories, upcoming grant activities, and promising approaches and processes.
2. Progress toward meeting performance outcomes.
3. Challenges being faced by the grantee in implementing the project.

MIS Reports. Organizations will be required to submit updated MIS data within 45 days after the end of each quarter based on a DOL template that reports on enrollment, services provided, placements, outcomes, and follow-up status.

VII. Agency Contacts

For further information regarding this SGA, please contact B. Jai Johnson, Grants Management Specialist, Division of Federal Assistance, at (202) 693–3296 (please note this is not a toll-free number). Applicants should fax all technical questions to (202) 693–2705, or e-mail: *johnson.bjai@dol.gov* and must specifically address the fax to the attention of B. Jai Johnson and should include SGA/DFA PY 08–09, a contact name, fax and phone number, and e-mail address. This announcement is being made available on the ETA Web site at *http://www.doleta.gov/grants/find_grants.cfm*, *http://www.grants.gov,* and in the **Federal Register**.

VIII. Additional Resources and Other Information

A. Resources for the Applicant

DOL maintains a number of web-based resources that may be of assistance to applicants:

- Questions and responses submitted to the Grant Officer regarding the SGA will be posted on the Employment and Training Web site at *http://www.doleta.gov.* Questions will be received for one month after publication.

B. Other Information

OMB Information Collection No. 1225–0086.

Expires September 30, 2009.

According to the Paperwork Reduction Act of 1995, no persons are required to respond to a collection of information unless such collection displays a valid OMB control number. Public reporting burden for this collection of information is estimated to average 20 hours per response, including time for reviewing instructions, searching existing data sources, gathering and maintaining the data needed, and completing and reviewing the collection of information. Send comments regarding the burden estimated or any other aspect of this collection of information, including suggestions for reducing this burden, to the OMB Desk Officer for ETA, Office of Management and Budget, Room 10235, Washington, DC 20503. PLEASE DO NOT RETURN YOUR COMPLETED APPLICATION TO THE OMB. SEND IT TO THE SPONSORING AGENCY AS SPECIFIED IN THIS SOLICITATION.

This information is being collected for the purpose of awarding a grant. The information collected through this ''Solicitation for Grant Applications'' will be used by the Department of Labor to ensure that grants are awarded to the applicant best suited to perform the functions of the grant. Submission of this information is required in order for the applicant to be considered for award of this grant. Unless otherwise specifically noted in this announcement, information submitted in the respondent's application is not considered to be confidential.

Signed at Washington, DC, this 10th day of November 2008.

Chari A. Magruder,

Employment and Training Administration, Grant Officer.

[FR Doc. E8–27151 Filed 11–14–08; 8:45 am]

BILLING CODE 4510–FT–P

NATIONAL AERONAUTICS AND SPACE ADMINISTRATION

[Notice (08–090)]

Government-Owned Inventions, Available for Licensing

AGENCY: National Aeronautics and Space Administration.

ACTION: Notice of Availability of Inventions for Licensing.

SUMMARY: Patent applications on the inventions listed below assigned to the National Aeronautics and Space Administration, have been filed in the United States Patent and Trademark Office, and are available for licensing.

DATES: November 17, 2008.

FOR FURTHER INFORMATION CONTACT: Edward K. Fein, Patent Counsel, Johnson Space Center, Mail Code AL,

Houston, TX 77058–8452; telephone (281) 483–4871; fax (281) 483–6936.

NASA Case No. MSC–24180–1: Filtering Apparatus and Method of Use;

NASA Case No. MSC–23349–2: Ad Hoc Selection of Voice Over Internet Streams;

NASA Case No. MSC–22859–5: Production of Functional Proteins: Balance of Shear Stress and Gravity;

NASA Case No. MSC–24508–1: Method for Making a Microporous Membrane;

NASA Case No. MSC–24441–1: Systems and Methods for Separating a Multiphase Fluid;

NASA Case No. MSC–24216–1: Connecting Node and Method for Constructing a Connecting Node.

Dated: November 4, 2008.

Michael C. Wholley,

General Counsel.

[FR Doc. E8–27309 Filed 11–14–08; 8:45 am]

BILLING CODE 7510–13–P

NATIONAL SCIENCE FOUNDATION

Proposal Review; Notice of Meetings

In accordance with the Federal Advisory Committee Act (Pub. L. 92–463, as amended), the National Science Foundation (NSF) announces its intent to hold proposal review meetings throughout the year. The purpose of these meetings is to provide advice and recommendations concerning proposals submitted to the NSF for financial support. The agenda for each of these meetings is to review and evaluate proposals as part of the selection process for awards. The review and evaluation may also include assessment of the progress of awarded proposals. The majority of these meetings will take place at NSF, 4201 Wilson, Blvd., Arlington, Virginia 22230.

These meetings will be closed to the public. The proposals being reviewed include information of a proprietary or confidential nature, including technical information; financial data, such as salaries; and personal information concerning individuals associated with the proposals. These matters are exempt under 5 U.S.C. 552b(c), (4) and (6) of the Government in the Sunshine Act. NSF will continue to review the agenda and merits of each meeting for overall compliance of the Federal Advisory Committee Act.

These closed proposal review meetings will not be announced on an individual basis in the **Federal Register**. NSF intends to publish a notice similar to this on a quarterly basis. For an advance listing of the closed proposal review meetings that include the names of the proposal review panel and the time, date, place, and any information on changes, corrections, or cancellations, please visit the NSF Web site: *http://www.nsf.gov/events/advisory.jsp.* This information may also be requested by telephoning 703/292–8182.

Dated: November 12, 2008.

Susanne Bolton,

Committee Management Officer.

[FR Doc. E8–27190 Filed 11–14–08; 8:45 am]

BILLING CODE 7555–01–P

NUCLEAR REGULATORY COMMISSION

[Docket No. 50–331]

FPL Energy Duane Arnold, LLC; Notice of Receipt and Availability of Application for Renewal of Duane Arnold Energy Center Facility Operating License No. DPR–49 for an Additional 20-Year Period

The U.S. Nuclear Regulatory Commission (NRC or Commission) has received an application, dated September 30, 2008, FPL Energy Duane Arnold, LLC, filed pursuant to Section 104b of the Atomic Energy Act of 1954, as amended, and Title 10 of the Code of Federal Regulations Part 54 (10 CFR Part 54), to renew the operating license for the Duane Arnold Energy Center (DAEC). Renewal of the license would authorize the applicant to operate the facility for an additional 20-year period beyond the period specified in the current operating license. The current operating license for DAEC expires on February 21, 2014. DAEC is a boiling-water reactor designed by General Electric that is located in Palo, Iowa. The acceptability of the tendered application for docketing, and other matters including an opportunity to request a hearing, will be the subject of subsequent **Federal Register** notices.

Copies of the application are available to the public at the Commission's Public Document Room (PDR), located at One White Flint North, 11555 Rockville Pike, Rockville, Maryland 20852 or through the Internet from the NRC's Agencywide Documents Access and Management System (ADAMS) Public Electronic Reading Room under Accession Number ML082980481. The ADAMS Public Electronic Reading Room is accessible from the NRC Web site at *http://www.nrc.gov/reading-rm/adams.html.* In addition, the application is available at *http://www.nrc.gov/reactors/operating/licensing/renewal/applications.html.* Persons who do not have access to the Internet or who encounter problems in accessing the documents located in ADAMS should contact the NRC's PDR Reference staff at 1–800–397–4209, extension 4737, or by e-mail to *pdr@nrc.gov.*

Dated at Rockville, Maryland, this 7th day of November 2008.

For the Nuclear Regulatory Commission.

Brian E. Holian,

Director, Division of License Renewal, Office of Nuclear Reactor Regulation.

[FR Doc. E8–27182 Filed 11–14–08; 8:45 am]

BILLING CODE 7590–01–P

NUCLEAR REGULATORY COMMISSION

Entergy Operations, Inc.; Notice of Receipt and Availability of Application for a Combined License

On September 25, 2008, Entergy Operations, Incorporated filed with the U.S. Nuclear Regulatory Commission (NRC, the Commission) pursuant to Section 103 of the Atomic Energy Act and Title 10 of the *Code of Federal Regulations* (10 CFR) Part 52, ''Licenses, Certifications, and Approvals for Nuclear Power Plants,'' an application for a combined license (COL) for an economic simplified boiling water reactor (ESBWR) nuclear power plant, to be located in West Feliciana Parish, Louisiana. The reactor is to be identified as River Bend Station, Unit 3.

An applicant may seek a COL in accordance with Subpart C of 10 CFR Part 52.The information submitted by the applicant includes certain administrative information such as financial qualifications submitted pursuant to 10 CFR 52.77, as well as technical information submitted pursuant to 10 CFR 52.79.

Subsequent **Federal Register** notices will address the acceptability of the tendered COL application for docketing and provisions for participation of the public in the COL review process.

A copy of the application is available for public inspection at the Commission's Public Document Room (PDR), located at One White Flint North, Public File Area O1 F21, 11555 Rockville Pike (first floor), Rockville, Maryland, and via the Agencywide Documents Access and Management System (ADAMS) Public Electronic Reading Room on the Internet at the NRC Web site, *http://www.nrc.gov/reading-rm/adams.html.* The cover letter ADAMS Accession number is ML082830022. Future publicly available documents related to the application will also be posted in ADAMS. Persons who do not have access to ADAMS, or

who encounter problems in accessing the documents located in ADAMS, should contact the NRC Public Document Room staff by telephone at 1–800–397–4209 or 301–415–4737, or by e-mail to *pdr@nrc.gov.* The application is also available at *http://www.nrc.gov/reactors/new-reactors/col.html.*

Dated at Rockville, Maryland, this 10th day of November 2008.

For the Nuclear Regulatory Commission.

Jeffrey Cruz,

Branch Chief, ESBWR/ABWR Projects Branch 1, Division of New Reactor Licensing, Office of New Reactors.

[FR Doc. E8–27180 Filed 11–14–08; 8:45 am]

BILLING CODE 7590–01–P

NUCLEAR REGULATORY COMMISSION

[Docket No. 50–298]

Nebraska Public Power District; Notice of Receipt and Availability of Application for Renewal of Cooper Nuclear Station Facility Operating License No. DPR–46 for an Additional 20-Year Period

The U.S. Nuclear Regulatory Commission (NRC or Commission) has received an application, dated September 24, 2008, from Nebraska Public Power District, filed pursuant to Section 104b of the Atomic Energy Act of 1954, as amended, and Title 10 of the Code of Federal Regulations Part 54 (10 CFR part 54), to renew the operating license for the Cooper Nuclear Station (CNS), Unit 1. Renewal of the license would authorize the applicant to operate the facility for an additional 20-year period beyond the period specified in the current operating license. The current operating license for CNS, Unit 1 expires on January 18, 2014. CNS, Unit 1 is a Boiling Water Reactor designed by General Electric that is located near Brownville, Nebraska. The acceptability of the tendered application for docketing, and other matters including an opportunity to request a hearing, will be the subject of subsequent **Federal Register** notices.

Copies of the application are available to the public at the Commission's Public Document Room (PDR), located at One White Flint North, 11555 Rockville Pike, Rockville, Maryland 20852 or through the internet from the NRC's Agencywide Documents Access and Management System (ADAMS) Public Electronic Reading Room under Accession Number ML083030227. The ADAMS Public Electronic Reading Room is accessible from the NRC Web site at *http://www.nrc.gov/reading-rm/adams.html.* In addition, the application is available at *http://www.nrc.gov/reactors/operating/licensing/renewal/applications.html.* Persons who do not have access to the internet or who encounter problems in accessing the documents located in ADAMS should contact the NRC's PDR Reference staff at 1–800–397–4209, extension 4737, or by e-mail to *pdr@nrc.gov.*

A copy of the license renewal application for the CNS, Unit 1, is also available to local residents near the site at the Auburn Memorial Library, 1810 Courthouse Avenue, Auburn, NE 68305.

Dated at Rockville, Maryland, this 10th day of November 2008.

For the Nuclear Regulatory Commission.

Brian E. Holian,

Director, Division of License Renewal, Office of Nuclear Reactor Regulation.

[FR Doc. E8–27184 Filed 11–14–08; 8:45 am]

BILLING CODE 7590–01–P

OFFICE OF THE UNITED STATES TRADE REPRESENTATIVE

North American Free Trade Agreement; Invitation for Applications for Inclusion on the Chapter 19 Roster

AGENCY: Office of the United States Trade Representative.

ACTION: Invitation for applications.

SUMMARY: Chapter 19 of the North American Free Trade Agreement (''NAFTA'') provides for the establishment of a roster of individuals to serve on binational panels convened to review final determinations in antidumping or countervailing duty (''AD/CVD'') proceedings and amendments to AD/CVD statutes of a NAFTA Party. The United States annually renews its selections for the Chapter 19 roster. Applications are invited from eligible individuals wishing to be included on the roster for the period April 1, 2009, through March 31, 2010.

DATES: Applications should be received no later than December 15, 2008.

ADDRESSES: Comments should be submitted (i) electronically to *www.regulations.gov*, docket number USTR–2008–0037, or (ii) by fax, to Sandy McKinzy at (202) 395–3640.

FOR FURTHER INFORMATION CONTACT: J. Daniel Stirk, Assistant General Counsel, Office of the United States Trade Representative, (202) 395–9617.

SUPPLEMENTARY INFORMATION:

Binational Panel Reviews Under NAFTA Chapter 19

Article 1904 of the NAFTA provides that a party involved in an AD/CVD proceeding may obtain review by a binational panel of a final AD/CVD determination of one NAFTA Party with respect to the products of another NAFTA Party. Binational panels decide whether such AD/CVD determinations are in accordance with the domestic laws of the importing NAFTA Party, and must use the standard of review that would have been applied by a domestic court of the importing NAFTA Party. A panel may uphold the AD/CVD determination, or may remand it to the national administering authority for action not inconsistent with the panel's decision. Panel decisions may be reviewed in specific circumstances by a three-member extraordinary challenge committee, selected from a separate roster composed of fifteen current or former judges.

Article 1903 of the NAFTA provides that a NAFTA Party may refer an amendment to the AD/CVD statutes of another NAFTA Party to a binational panel for a declaratory opinion as to whether the amendment is inconsistent with the General Agreement on Tariffs and Trade (''GATT''), the GATT Antidumping or Subsidies Codes, successor agreements, or the object and purpose of the NAFTA with regard to the establishment of fair and predictable conditions for the liberalization of trade. If the panel finds that the amendment is inconsistent, the two NAFTA Parties shall consult and seek to achieve a mutually satisfactory solution.

Chapter 19 Roster and Composition of Binational Panels

Annex 1901.2 of the NAFTA provides for the maintenance of a roster of at least 75 individuals for service on Chapter 19 binational panels, with each NAFTA Party selecting at least 25 individuals. A separate five-person panel is formed for each review of a final AD/CVD determination or statutory amendment. To form a panel, the two NAFTA Parties involved each appoint two panelists, normally by drawing upon individuals from the roster. If the Parties cannot agree upon the fifth panelist, one of the Parties, decided by lot, selects the fifth panelist from the roster. The majority of individuals on each panel must consist of lawyers in good standing, and the chair of the panel must be a lawyer.

Upon each request for establishment of a panel, roster members from the two involved NAFTA Parties will be requested to complete a disclosure form, which will be used to identify possible

conflicts of interest or appearances thereof. The disclosure form requests information regarding financial interests and affiliations, including information regarding the identity of clients of the roster member and, if applicable, clients of the roster member's firm.

Criteria for Eligibility for Inclusion on Chapter 19 Roster

Section 402 of the NAFTA Implementation Act (Pub. L. 103–182, as amended (19 U.S.C. 3432)) (''Section 402'') provides that selections by the United States of individuals for inclusion on the Chapter 19 roster are to be based on the eligibility criteria set out in Annex 1901.2 of the NAFTA, and without regard to political affiliation. Annex 1901.2 provides that Chapter 19 roster members must be citizens of a NAFTA Party, must be of good character and of high standing and repute, and are to be chosen strictly on the basis of their objectivity, reliability, sound judgment, and general familiarity with international trade law. Aside from judges, roster members may not be affiliated with any of the three NAFTA Parties. Section 402 also provides that, to the fullest extent practicable, judges and former judges who meet the eligibility requirements should be selected.

Adherence to the NAFTA Code of Conduct for Binational Panelists

The ''Code of Conduct for Dispute Settlement Procedures Under Chapters 19 and 20'' (see *http://www.nafta-sec-alena.org/DefaultSite/index_e.aspx?DetailID=246*), which was established pursuant to Article 1909 of the NAFTA, provides that current and former Chapter 19 roster members ''shall avoid impropriety and the appearance of impropriety and shall observe high standards of conduct so that the integrity and impartiality of the dispute settlement process is preserved.'' The Code also provides that candidates to serve on chapter 19 panels, as well as those who are ultimately selected to serve as panelists, have an obligation to ''disclose any interest, relationship or matter that is likely to affect [their] impartiality or independence, or that might reasonably create an appearance of impropriety or an apprehension of bias.'' Annex 1901.2 of the NAFTA provides that roster members may engage in other business while serving as panelists, subject to the Code of Conduct and provided that such business does not interfere with the performance of the panelist's duties. In particular, Annex 1901.2 states that ''[w]hile acting as a panelist, a panelist may not appear as counsel before another panel.''

Procedures for Selection of Chapter 19 Roster Members

Section 402 establishes procedures for the selection by the Office of the United States Trade Representative (''USTR'') of the individuals chosen by the United States for inclusion on the Chapter 19 roster. The roster is renewed annually, and applies during the one-year period beginning April 1 of each calendar year.

Under Section 402, an interagency committee chaired by USTR prepares a preliminary list of candidates eligible for inclusion on the Chapter 19 Roster. After consultation with the Senate Committee on Finance and the House Committee on Ways and Means, USTR selects the final list of individuals chosen by the United States for inclusion on the Chapter 19 roster.

Remuneration

Roster members selected for service on a Chapter 19 binational panel will be remunerated at the rate of 800 Canadian dollars per day.

Applications

Eligible individuals who wish to be included on the Chapter 19 roster for the period April 1, 2009, through March 31, 2010, are invited to submit applications. Persons submitting applications may either send one copy by fax to Sandy McKinzy at 202–395–3640, or should be submitted electronically to *www.regulations.gov,* docket number USTR–2008–0037.

Applications must be typewritten, and should be headed ''Application for Inclusion on NAFTA Chapter 19 Roster.'' Applications should include the following information, and each section of the application should be numbered as indicated:

1. Name of the applicant.
2. Business address, telephone number, fax number, and e-mail address.
3. Citizenship(s).
4. Current employment, including title, description of responsibility, and name and address of employer.
5. Relevant education and professional training.
6. Spanish language fluency, written and spoken.
7. Post-education employment history, including the dates and addresses of each prior position and a summary of responsibilities.
8. Relevant professional affiliations and certifications, including, if any, current bar memberships in good standing.
9. A list and copies of publications, testimony, and speeches, if any, concerning AD/CVD law. Judges or former judges should list relevant judicial decisions. Only one copy of publications, testimony, speeches, and decisions need be submitted.
10. Summary of any current and past employment by, or consulting or other work for, the Governments of the United States, Canada, or Mexico.
11. The names and nationalities of all foreign principals for whom the applicant is currently or has previously been registered pursuant to the Foreign Agents Registration Act, 22 U.S.C. 611 *et seq.*, and the dates of all registration periods.
12. List of proceedings brought under U.S., Canadian, or Mexican AD/CVD law regarding imports of U.S., Canadian, or Mexican products in which the applicant advised or represented (for example, as consultant or attorney) any U.S., Canadian, or Mexican party to such proceeding and, for each such proceeding listed, the name and country of incorporation of such party.
13. A short statement of qualifications and availability for service on Chapter 19 panels, including information relevant to the applicant's familiarity with international trade law and willingness and ability to make time commitments necessary for service on panels.
14. On a separate page, the names, addresses, telephone and fax numbers of three individuals willing to provide information concerning the applicant's qualifications for service, including the applicant's character, reputation, reliability, judgment, and familiarity with international trade law.

Current Roster Members and Prior Applicants

Current members of the Chapter 19 roster who remain interested in inclusion on the Chapter 19 roster must submit updated applications. Individuals who have previously applied but have not been selected may reapply. If an applicant, including a current or former roster member, has previously submitted materials referred to in item 9, such materials need not be resubmitted.

Public Disclosure

Applications normally will not be subject to public disclosure and will not be posted publicly on *www.regulations.gov.* They may be referred to other federal agencies in the course of determining eligibility for the roster, and shared with foreign governments and the NAFTA Secretariat in the course of panel selection.

False Statements

Pursuant to section 402(c)(5) of the NAFTA Implementation Act, false statements by applicants regarding their personal or professional qualifications, or financial or other relevant interests that bear on the applicants' suitability for placement on the Chapter 19 roster or for appointment to binational panels, are subject to criminal sanctions under 18 U.S.C. 1001.

Paperwork Reduction Act

This notice contains a collection of information provision subject to the Paperwork Reduction Act (''PRA'') that has been approved by the Office of Management and Budget (''OMB''). Notwithstanding any other provision of law, no person is required to respond to nor shall a person be subject to a penalty for failure to comply with a collection of information subject to the requirements of the PRA unless that collection of information displays a currently valid OMB number. This notice's collection of information burden is only for those persons who wish voluntarily to apply for nomination to the NAFTA Chapter 19 roster. It is expected that the collection of information burden will be under 3 hours. This collection of information contains no annual reporting or recordkeeping burden. This collection of information was approved by OMB under OMB Control Number 0350–0014. Please send comments regarding the collection of information burden or any other aspect of the information collection to USTR at the above e-mail address or fax number.

Privacy Act

The following statements are made in accordance with the Privacy Act of 1974, as amended (5 U.S.C. 552a). The authority for requesting information to be furnished is section 402 of the NAFTA Implementation Act. Provision of the information requested above is voluntary; however, failure to provide the information will preclude your consideration as a candidate for the NAFTA Chapter 19 roster. This information is maintained in a system of records entitled ''Dispute Settlement Panelists Roster.'' Notice regarding this system of records was published in the **Federal Register** on November 30, 2001. The information provided is needed, and will be used by USTR, other federal government trade policy officials concerned with NAFTA dispute settlement, and officials of the other NAFTA Parties to select well-qualified individuals for inclusion on the Chapter 19 roster and for service on Chapter 19 binational panels.

Daniel E. Brinza,

Assistant United States Trade Representative for Monitoring and Enforcement.

[FR Doc. E8–27231 Filed 11–14–08; 8:45 am]

BILLING CODE 3190–W9–P

POSTAL SERVICE

International Product Change—Canada Post—United States Postal Service Contractual Bilateral Agreement for Inbound Competitive Services

AGENCY: Postal Service™.

ACTION: Notice.

SUMMARY: The Postal Service gives notice of its intent to file a request with the Postal Regulatory Commission to add the Canada Post—United States Postal Service Contractual Bilateral Agreement for Inbound Competitive Services to the Competitive Products List pursuant to 39 U.S.C. 3642.

DATES: November 17, 2008.

FOR FURTHER INFORMATION CONTACT: Margaret M. Falwell, 703–292–3576.

SUPPLEMENTARY INFORMATION: The United States Postal Service® hereby gives notice that it intends to file with the Postal Regulatory Commission, on or about November 14, 2008, a Request of United States Postal Service to Add Canada Post—United States Postal Service Contractual Bilateral Agreement for Inbound Competitive Services to the Competitive Product List, and Notice of Filing (Under Seal) the Enabling Governors' Decision and Agreement. Documents are or will be available on the Postal Regulatory Commission's Web site, *http://www.prc.gov.*

Neva R. Watson,

Attorney, Legislative.

[FR Doc. E8–27156 Filed 11–14–08; 8:45 am]

BILLING CODE 7710–12–P

PRESIDIO TRUST

Notice To Extend Comment Period and Notice of Rescheduled Public Meeting

AGENCY: The Presidio Trust.

ACTION: Notice.

SUMMARY: By **Federal Register** notice of August 1, 2008 (73 FR 45092), the Presidio Trust (Trust) extended the Environmental Protection Agency-calculated 45-day time period for public review of the Draft Supplemental Environmental Impact Statement (SEIS) to September 19, 2008. The previous deadline for comments was July 31, 2008. By **Federal Register** notice of September 15, 2008 (73 FR 53295), the Trust (i) further extended the time period for public review of the SEIS to October 20, 2008, and (ii) announced a public meeting of the Trust Board of Directors scheduled for October 14, 2008. By **Federal Register** notice of October 10, 2008 (FR 60368), the Trust (i) further extended the time period of public review of the SEIS to November 17, 2008, and (ii) announced the postponement of the public meeting of the Trust Board of Directors to November 13, 2008. By this notice, the Trust is (i) further extending the public comment period to December 15, 2008, and (ii) in accordance with § 103(c)(6) of the Presidio Trust Act, 16 U.S.C. 460bb note, Title I of Public Law 104–333, 110 Stat. 4097, as amended, and in accordance with the Trust's bylaws, informing the public that the public meeting of the Trust Board of Directors is now rescheduled for December 9, 2008.

SUPPLEMENTARY INFORMATION: In accordance with the National Environmental Policy Act, the Trust is requesting public comment on the Presidio Trust Management Plan (PTMP) Main Post Update Draft SEIS. The Draft SEIS evaluates alternatives to the planning concept for the 120-acre Main Post district at the Presidio of San Francisco identified in the 2002 PTMP, the Trust's comprehensive land use plan and policy framework. The Draft SEIS considers planning proposals that were not anticipated in the PTMP, including a contemporary art museum and a lodge, and identifies Alternative 2 as the proposed action, which is further described in the Draft Main Post Update of the PTMP. By extending the comment period, the Trust anticipates more in-depth comments on the Draft SEIS that will promote a better-informed decision. The Draft PTMP Main Post Update and Draft SEIS can be reviewed at local libraries, at the Trust headquarters at 34 Graham Street, San Francisco, CA 94129, and on the Trust Web site at *http://www.Presidio.gov* in the Major Projects section. Although the time for comments has been extended, the Trust requests that interested parties provide comments as soon as possible.

The purposes of the public meeting are to provide an Executive Director's report, to receive public comment at a second public meeting of the Trust's Board of Directors on the Draft PTMP Main Post Update and Draft SEIS, and to receive public comment on other matters in accordance with the Trust's Public Outreach Policy. The meeting

will be held on Tuesday, December 9, 2008, at 6:30 p.m., at the Palace of Fine Arts Theatre, 3301 Lyon Street, San Francisco, California.

Individuals requiring special accommodation at the public meeting, such as needing a sign language interpreter, should contact Mollie Matull at 415.561.5300 prior to December 2, 2008.

The public meeting will begin at 6:30 p.m. on Tuesday, December 9, 2008. Written comments must be received by December 15, 2008.

The public meeting will be held at the Palace of Fine Arts Theatre, 3301 Lyon Street, San Francisco, California. Written comments should be submitted to Main Post, Attn: Compliance Coordinator, The Presidio Trust, 34 Graham Street, P.O. Box 29052, San Francisco, CA 94129–0052. Electronic comments can be sent to *Mainpost@Presidiotrust.gov*. Please be aware that all comments and information submitted will be made available to the public, including, without limitation, any postal address, e-mail address, phone number or other information contained in each submission.

FOR FURTHER INFORMATION CONTACT: John Pelka, 415.561.4183.

Dated: November 10, 2008.

Karen A. Cook,

General Counsel.

[FR Doc. E8–27158 Filed 11–14–08; 8:45 am]

BILLING CODE 4310–4R–P

SECURITIES AND EXCHANGE COMMISSION

Submission for OMB Review; Comment Request

Upon Written Request, Copies Available From: U.S. Securities and Exchange Commission, Office of Investor Education and Advocacy, Washington, DC 20549–0213.

Extension:

Rule 10b–17; OMB Control No. 3235–0476; SEC File No. 270–427.

Notice is hereby given that pursuant to the Paperwork Reduction Act of 1995 (44 U.S.C. 3501 *et seq.*), the Securities and Exchange Commission (''Commission'') has submitted to the Office of Management and Budget a request for approval of extension of the existing collection of information provided for in the following rule: Rule 10b–17 (17 CFR 240.10b–17).

Rule 10b–17 requires any issuer of a class of securities publicly traded by the use of any means or instrumentality of interstate commerce or of the mails or of any facility of any national securities exchange to give notice of the following specific distributions relating to such class of securities: (1) A dividend or other distribution in cash or in kind other than interest payments on debt securities; (2) a stock split or reverse stock split; or (3) a rights or other subscription offering. Notice shall be either given to the Financial Industry Regulatory Authority, Inc. as successor to the National Association of Securities Dealers, Inc. or in accordance with the procedures of the national securities exchange upon which the securities are registered. The Commission may exempt an issuer of over-the-counter (but not listed) securities from the notice requirement. The requirements of 10b–17 do not apply to redeemable securities of registered open-end investment companies or unit investment trusts.

The information required by Rule 10b–17 is necessary for the execution of the Commission's mandate under the Securities Exchange Act of 1934 to prevent fraudulent, manipulative, and deceptive acts and practices. The Commission has found that not requiring formal notices of the types of distributions covered by Rule 10b–17 has led to a number of abuses including purchasers not being aware of their rights to such distributions. It is only through formal notice of the distribution, including the date of the distribution, that current holders, potential buyers, or potential sellers of the securities at issue will know their rights to the distribution. Therefore, it is only through formal notice that investors can make an informed decision as to whether to buy or sell a security.

There are approximately 4,052 respondents per year. These respondents make approximately 17,262 responses per year. Each response takes approximately 10 minutes to complete. Thus, the total compliance burden per year is 2,877 burden hours.

An agency may not conduct or sponsor, and a person is not required to respond to, a collection of information unless it displays a currently valid control number.

Comments should be directed to (i) Desk Officer for the Securities and Exchange Commission, Office of Information and Regulatory Affairs, Office of Management and Budget, Room 10102, New Executive Office Building, Washington, DC 20503 or by sending an e-mail to: *nfraser@omb.eop.gov;* and (ii) Lewis W. Walker, Acting Director/Chief Information Officer, Securities and Exchange Commission, c/o Shirley Martinson, 6432 General Green Way, Alexandria, VA 22312 or send an e-mail to: *PRA_Mailbox@sec.gov*. Comments must be submitted within 30 days of this notice.

Dated: November 10, 2008.

Florence E. Harmon,

Acting Secretary.

[FR Doc. E8–27237 Filed 11–14–08; 8:45 am]

BILLING CODE 8011–01–P

SECURITIES AND EXCHANGE COMMISSION

Submission for OMB Review; Comment Request

Upon Written Request, Copies Available From: Securities and Exchange Commission, Office of Investor Education and Advocacy, Washington, DC 20549–0213.

Extension:

Rule 17a–5(c); OMB Control No. 3235–0199; SEC File No. 270–199.

Notice is hereby given that pursuant to the Paperwork Reduction Act of 1995 (44 U.S.C. 3501 *et seq.*), the Securities and Exchange Commission (''Commission'') has submitted to the Office of Management and Budget a request for approval of extension of the existing collection of information provided for in the following rule: Rule 17a–5(c) (17 CFR 240.17a–5(c)) under the Securities Exchange Act of 1934 (15 U.S.C. 78a *et seq.*) (''Exchange Act'').

Rule 17a–5(c) generally requires broker-dealers who carry customer accounts to provide statements of the broker-dealer's financial condition to their customers. Paragraph (5) of Rule 17a–5(c) provides a conditional exemption from this requirement. A broker-dealer that elects to take advantage of the exemption must publish its statements on its Web site in a prescribed manner, and must maintain a toll-free number that customers can call to request a copy of the statements.

The purpose of the Rule is to ensure that customers of broker-dealers are provided with information concerning the financial condition of the firm that may be holding the customers' cash and securities. The Commission, when adopting the Rule in 1972, stated that the goal was to ''directly'' send a customer essential information so that the customer could ''judge whether his broker or dealer is financially sound.'' The Commission adopted the Rule in response to the failure of several broker-dealers holding customer funds and securities in the period between 1968 and 1971.

The Commission estimates that approximately 275 broker-dealer respondents carrying approximately 110 million public customer accounts incur an average burden of 138,000 hours per year to comply with the Rule.

An agency may not conduct or sponsor, and a person is not required to respond to, a collection of information unless it displays a currently valid control number.

Comments should be directed to: (i) Desk Officer for the Securities and Exchange Commission, Office of Information and Regulatory Affairs, Office of Management and Budget, Room 10102, New Executive Office Building, Washington, DC 20503 or by sending an e-mail to: *nfraser@omb.eop.gov;* and (ii) Lewis W. Walker, Acting Director/Chief Information Officer, Securities and Exchange Commission, c/o Shirley Martinson, 6432 General Green Way, Alexandria, VA 22312, or send an e-mail to *PRA_Mailbox@sec.gov*. Comments must be submitted within 30 days of this notice.

Dated: November 10, 2008.

Florence E. Harmon,

Acting Secretary.

[FR Doc. E8–27238 Filed 11–14–08; 8:45 am]

BILLING CODE 8011–01–P

SECURITIES AND EXCHANGE COMMISSION

Submission for OMB Review; Comment Request

Upon Written Request, Copies Available From: Securities and Exchange Commission, Office of Investor Education and Advocacy, Washington, DC 20549–0213.

Extension:

Rule 22d–1; SEC File No. 270–275; OMB Control No. 3235–0310.

Notice is hereby given that pursuant to the Paperwork Reduction Act of 1995 (44 U.S.C. 3501–3520), the Securities and Exchange Commission (''Commission'') has submitted to the Office of Management and Budget a request for extension of the previously approved collection of information discussed below.

Rule 22d–1 (17 CFR 270.22d–1) under the Investment Company Act of 1940 (the ''Act'') (15 U.S.C. 80a *et seq.*) provides registered investment companies that issue redeemable securities (''funds'') an exemption from section 22(d) of the Investment Company Act (15 U.S.C. 80a–22(d)) to the extent necessary to permit scheduled variations in or elimination of the sales load on fund securities for particular classes of investors or transactions, provided certain conditions are met. The rule imposes an annual burden per series of a fund of approximately 15 minutes, so that the total annual burden for the approximately 4,735 series of funds that might rely on the rule is estimated to be 1,184 hours.

The estimate of average burden hours is made solely for the purposes of the Paperwork Reduction Act, and is not derived from a comprehensive or even a representative survey or study. Responses will not be kept confidential. An agency may not conduct or sponsor, and a person is not required to respond to, a collection of information unless it displays a currently valid control number.

Please direct general comments regarding the above information to the following persons: (i) Desk Officer for the Securities and Exchange Commission, Office of Management and Budget, Room 10102, New Executive Office Building, Washington, DC 20503 or email to: *nfraser@omb.eop.gov*; and (ii) Lewis W. Walker, Acting Director/CIO, Securities and Exchange Commission, c/o Shirley Martinson, 6432 General Green Way, Alexandria, VA 22312; or send an e-mail to: *PRA_Mailbox@sec.gov*. Comments must be submitted to OMB within 30 days of this notice.

Dated: November 10, 2008.

Florence E. Harmon,

Acting Secretary.

[FR Doc. E8–27240 Filed 11–14–08; 8:45 am]

BILLING CODE 8011–01–P

SECURITIES AND EXCHANGE COMMISSION

Submission for OMB Review; Comment Request

Upon Written Request, Copies Available From: Securities and Exchange Commission, Office of Investor Education and Advocacy, Washington, DC 20549–0213.

Extension:

Rule 32a–4; SEC File No. 270–473; OMB Control No. 3235–0530.

Notice is hereby given that, pursuant to the Paperwork Reduction Act of 1995 (44 U.S.C. 350l *et seq.*), the Securities and Exchange Commission (''Commission'') has submitted to the Office of Management and Budget a request for extension of the previously approved collection of information discussed below.

Section 32(a)(2) of the Investment Company Act (15 U.S.C. 80a–31(a)(2)) requires that shareholders of a registered investment management or face-amount certificate company (''fund'') ratify or reject the selection of a fund's independent public accountant. Rule 32a–4 (17 CFR 270.32a–4) exempts a fund from this requirement if (i) the fund's board of directors establishes an audit committee composed solely of independent directors with responsibility for overseeing the fund's accounting and auditing processes,[1] (ii) the fund's board of directors adopts an audit committee charter setting forth the committee's structure, duties, powers and methods of operation, or sets out similar provisions in the fund's charter or bylaws,[2] and (iii) the fund maintains a copy of such an audit committee charter permanently in an easily accessible place.[3]

Each fund that chooses to rely on rule 32a–4 incurs two collection of information burdens. The first, related to the board of directors' adoption of the audit committee charter, occurs once, when the committee is established. The second, related to the fund's maintenance and preservation of a copy of the charter in an easily accessible place, is an ongoing annual burden. The information collection requirement in rule 32a–4 enables the Commission to monitor the duties and responsibilities of an independent audit committee formed by a fund relying on the rule.

Commission staff estimates that, on average, the board of directors takes 15 minutes to adopt the audit committee charter. Commission staff has estimated that with an average of 8 directors on the board,[4] total director time to adopt the charter is 2 hours. Combined with an estimated 1 hour of paralegal time to prepare the charter for board review, the staff estimates a total one-time collection of information burden of 3 hours for each fund. Once a board adopts an audit committee charter, a fund generally maintains it in a file cabinet or as a computer file. Commission staff has estimated that there is no annual hourly burden associated with maintaining the charter in this form.[5]

[1] Rule 32a–4(a).

[2] Rule 32a–4(b).

[3] Rule 32a–4(c).

[4] This estimate is based on staff discussions with a staff representative of an entity that surveys funds and calculates fund board statistics based on responses to its surveys.

[5] No hour burden related to such maintenance of the charter was identified by the funds the Commission staff surveyed. Commission staff understands that many audit committee charters have been significantly revised after their adoption in response to the Sarbanes-Oxley Act (Pub. L. No.

Because virtually all funds extant have now adopted audit committee charters, the annual one-time collection of information burden associated with adopting audit committee charters is limited to the burden incurred by newly established funds. Commission staff estimates that fund sponsors establish approximately 153 new funds each year,[6] and that all of these funds will adopt an audit committee charter in order to rely on rule 32a–4. Thus, Commission staff estimates that the annual one-time hour burden associated with adopting an audit committee charter under rule 32a–4 going forward will be approximately 459 hours.[7]

As noted above, all funds that rely on rule 32a–4 are subject to the ongoing collection of information requirement to preserve a copy of the charter in an easily accessible place. This ongoing requirement, which Commission staff has estimated has no hourly burden, applies to all funds that have adopted an audit committee charter and continue to maintain it.

When funds adopt an audit committee charter in order to rely on rule 32a–4, they also may incur one-time costs related to hiring outside counsel to prepare the charter. Commission staff estimates that those costs average approximately $1000 per fund.[8] Commission staff understands that virtually all funds now rely on rule 32a–4 and have adopted audit committee charters, and thus estimates that the annual cost burden related to hiring outside legal counsel is limited to newly established funds.

As noted above, Commission staff estimates that approximately 153 new funds each year will adopt an audit committee charter in order to rely on rule 32a–4. Thus, Commission staff estimates that the ongoing annual cost burden associated with rule 32a–4 in the future will be approximately $153,000.[9]

The estimates of average burden hours and costs are made solely for the purposes of the Paperwork Reduction Act, and are not derived from a comprehensive or even a representative survey or study of the costs of Commission rules and forms.

The collections of information required by rule 32a–4 are necessary to obtain the benefits of the rule. The Commission is seeking OMB approval, because an agency may not conduct or sponsor, and a person is not required to respond to, a collection of information unless it displays a currently valid control number.

Please direct general comments regarding the above information to the following persons: (i) Desk Officer for the Securities and Exchange Commission, Office of Management and Budget, Room 10102, New Executive Office Building, Washington, DC 20503 or e-mail to: *nfraser@omb.eop.gov*; and (ii) Lewis W. Walker, Acting Director/CIO, Securities and Exchange Commission, c/o Shirley Martinson, 6432 General Green Way, Alexandria, VA 22312; or send an e-mail to: *PRA_Mailbox@sec.gov*. Comments must be submitted to OMB within 30 days of this notice.

Dated: November 10, 2008.

Florence E. Harmon,

Acting Secretary.

[FR Doc. E8–27241 Filed 11–14–08; 8:45 am]

BILLING CODE 8011–01–P

107–204, 116 Stat. 745) and other developments. However, the costs associated with these revisions are not attributable to the requirements of rule 32a–4.

[6] This estimate is based on the number of Form N–8As filed from January 2005 through December 2007.

[7] This estimate is based on the following calculation: (3.0 burden hours for establishing charter × 153 new funds = 459 burden hours).

[8] Costs may vary based on the individual needs of each fund. However, based on the staff's conversations with outside counsel that prepare these charters, legal fees related to the preparation and adoption of an audit committee charter usually average $1000 or less. The Commission also understands that the ICI has prepared a model audit committee charter, which most legal professionals use when establishing audit committees, thereby reducing the costs associated with drafting a charter.

[9] This estimate is based on the following calculations: ($1000 cost of adopting charter × 153 newly established funds = $153,000).

SECURITIES AND EXCHANGE COMMISSION

[Investment Company Act Release No. 28484; 813–365]

Wortham Finance, L.P. et al.; Notice of Application

November 10, 2008.

AGENCY: Securities and Exchange Commission (''Commission'').

ACTION: Notice of an application for an order under sections 6(b) and 6(e) of the Investment Company Act of 1940 (the ''Act'') granting an exemption from all provisions of the Act, except section 9 and sections 36 through 53, and the rules and regulations under the Act. With respect to sections 17 and 30 of the Act, and the rules and regulations thereunder, and rule 38a–1 under the Act, the exemption is limited as set forth in the application.

SUMMARY OF THE APPLICATION: Applicants request an order to exempt a vehicle formed for the benefit of certain eligible current employees of John L. Wortham & Son, L.P. (''Insurance LP'') from certain provisions of the Act. The vehicle will be an ''employees' securities company'' as defined in section 2(a)(13) of the Act.

APPLICANTS: Wortham Finance, L.P. (''Finance LP''), JLW Finance, LLC (''Finance GP''), J. Wortham, LLC (''Insurance GP'') and Insurance LP (together with any business organization that results solely from a reorganization of Insurance LP into a different organizational structure or into an entity organized under the laws of another jurisdiction, ''Insurance LP''). Insurance LP, Finance LP, Finance GP and Insurance GP are collectively referred to herein as the ''Firm''.

FILING DATES: The application was filed on April 10, 2007 and amended on December 5, 2007 and October 30, 2008.

HEARING OR NOTIFICATION OF HEARING: An order granting the application will be issued unless the Commission orders a hearing. Interested persons may request a hearing by writing to the Commission's Secretary and serving applicants with a copy of the request, personally or by mail. Hearing requests should be received by the Commission by 5:30 p.m. on December 8, 2008 and should be accompanied by proof of service on applicants, 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, Securities and Exchange Commission, 100 F St., NE., Washington, DC 20549–1090. Applicants, 2727 Allen Parkway, Suite 2400, Houston, Texas 77109–2115.

FOR FURTHER INFORMATION CONTACT: Shannon Conaty, Senior Counsel, at (202) 551–6827, or Janet M. Grossnickle, Assistant Director, at (202) 551–6821, (Division of Investment Management, Office of Investment Company Regulation).

SUPPLEMENTARY INFORMATION: The following is a summary of the application. The complete application may be obtained for a fee at the Commission's Public Reference Room, 100 F St., NE., Washington, DC 20549–1520 (tel. 202–551–5850).

Applicants' Representations

1. Founded in 1915, Insurance LP, a Texas limited partnership, is the largest

independent insurance broker in Texas with headquarters in Houston and offices in Addison, Austin, Dallas, Fort Worth and San Antonio. Insurance LP offers a comprehensive portfolio of services, including insurance brokerage, claims management, loss control, risk management consulting, personal life insurance and employee benefits to public and private companies, professional practices and individuals engaged in an extensive range of industries. Since its inception, Insurance LP has been an independent, privately-owned entity. In 1965, Insurance LP was purchased from its founders, Gus Wortham and other selling founders, by a new generation of partners, thus beginning a cyclical succession of ownership that continues today. Prior to December 1, 2003, when an Insurance LP partner sold all or a portion of his or her partnership interest in Insurance LP, the Insurance LP Executive Committee (as defined below) designated either a new or existing partner to buy such interest. On December 1, 2003, Insurance LP was restructured and two new limited partnerships were formed, Insurance LP and Finance LP.

2. Insurance LP conducts the traditional insurance business of the Firm while Finance LP buys and sells ownership interests in the Firm. The two new limited partnerships, and the corresponding limited liability companies created to be the general partners of such limited partnerships, Insurance GP and Finance GP, are owned directly or indirectly by each equity partner of the Firm in the same proportion as their pre-restructuring ownership in Insurance LP. Limited partnership interests in Insurance LP and membership interests in Insurance GP may only be transferred together (such interests, the ''Insurance Units''). Limited partnership interests in Finance LP and membership interests in Finance GP may only be transferred together (such interests, the ''Finance Units'', and together with the Insurance Units, ''Units'').

3. Finance LP is a Texas limited partnership. Finance LP operates as a non-diversified, closed-end management investment company. Finance LP has been established to facilitate the purchase or sale of Units. Finance GP, a Texas limited liability company, serves as the sole general partner of Finance LP. Finance GP has delegated all management functions for Finance LP to an executive committee (the ''Finance GP Executive Committee'') composed of managing members of Finance GP elected by a majority of the individuals and entities which currently own Units (''Unitholders''). Insurance GP, a Texas limited liability company, serves as the sole general partner of Insurance LP. Insurance GP has delegated all management functions for Insurance LP to an executive committee (the ''Insurance GP Executive Committee'') composed of managing members of Insurance GP elected by a majority of the Unitholders. All the members of the Finance GP Executive Committee and the Insurance GP Executive Committee are Unitholders. The Finance GP Executive Committee will be the sole manager of Finance LP and make all investment and other operational decisions for Finance LP. Finance GP or any person involved in the operation of Finance LP will register as an investment adviser if required under the Investment Advisers Act of 1940 (''Advisers Act''), or the rules under it.

4. Unitholders and Eligible Unitholders (as defined below) are required to buy and sell their Insurance Units and Finance Units simultaneously. Finance LP is responsible for (a) purchasing Units from Unitholders, (b) issuing its own promissory notes for such purchases, (c) selling Units acquired by it to Eligible Unitholders, (d) accepting promissory notes from Eligible Unitholders purchasing Units, (e) holding and managing investments in certain marketable securities and other assets, and (f) handling the administration of such activities.

5. Units will be offered without registration in reliance on section 4(2) of the Securities Act of 1933 (the ''Securities Act'') or Regulation D under the Securities Act, and will be offered solely to Eligible Unitholders. Eligible Unitholders must be (a) persons who are, at the time of investment, current employees of Insurance LP (''Wortham Employees'') but who are not yet Unitholders, (b) persons who are, at the time of investment, current Wortham Employees and who are Unitholders, (c) persons who are highly-experienced individual insurance professionals who laterally join Insurance LP (''Lateral Partners''), or (d) a limited partnership, corporation or other business entity all of the voting power of which is controlled by such Lateral Partners (''Lateral Partner Investment Vehicle''). In order for a Lateral Partner Investment Vehicle to be an ''Eligible Unitholder'', it must qualify as either (a) an accredited investor as defined in rule 501(a) of Regulation D or (b) an entity for which a Lateral Partner is a settlor and principal investment decision-maker.[1] In order for a Wortham Employee or Lateral Partner to qualify as an ''Eligible Unitholder'', that person must be a person who is, at the time of investment, a current Wortham Employee or Lateral Partner who (a) meets the standards of an ''accredited investor'' set forth in rule 501(a)(5) or rule 501(a)(6) of Regulation D under the Securities Act, or (b) is one of 35 or fewer current Wortham Employees or Lateral Partners who meets certain requirements (''Category 2 investors'').

6. Each Category 2 investor will be a current Wortham Employee or Lateral Partner, who meets the sophistication requirements set forth in rule 506(b)(2)(ii) of Regulation D under the Securities Act and who (a) has a college education and/or has had a minimum of five years of business and/or professional experience in the insurance and risk management industries, and (b) has had compensation of at least $80,000 in the preceding 12 month period, and has a reasonable expectation of compensation of at least $140,000 in each of the two immediately succeeding 12 month periods.

7. Prior to offering Units to an individual, the Insurance GP Executive Committee and the Finance GP Executive Committee must reasonably believe that the individual is a sophisticated investor capable of understanding and evaluating the risks of investing in the Firm without the benefit of regulatory safeguards.

8. Finance LP is a financing vehicle intended to create an opportunity for Eligible Unitholders to become owners in the Firm when they might not have otherwise been able to make immediate full payment of the purchase price of the Units. Eligible Unitholders who are individuals acquire Units by executing a non-recourse 10-year promissory note bearing interest at prime rate (but not exceeding 10%) to Finance LP in a face amount equal to (i) a fixed formula price calculated monthly for the Insurance Units (as determined in accordance with the terms of the Insurance Units transfer agreement) multiplied by the total number of Insurance Units purchased and sold plus (ii) a fixed formula price calculated monthly for the Finance Units (as determined in accordance with the terms of the Finance Units transfer agreement) multiplied by the total number of Finance Units purchased and sold (together, the ''Formula Price''). Eligible Unitholders that are S corporations contribute their net

[1] If a Lateral Partner Investment Vehicle is an entity other than a trust, the reference to ''settlor'' shall be construed to mean a person who created the vehicle, alone or together with others, and who contributed funds or other assets to the vehicle.

insurance brokerage business assets as tax-free contributions to Insurance LP in exchange for newly issued Units and execute 10-year promissory notes for any shortfall in their pro-rata share of the combined equity in the Firm.

9. Each selling Unitholder currently receives a non-recourse 10-year prime rate (not to exceed 10%) bearing promissory note in an amount equal to the Formula Price for the number of Units sold. Through a credit facility with a local financial institution (the ''Credit Facility''), Finance LP provides letter of credit enhanced promissory notes to selling Unitholders in exchange for their Units. All promissory notes for Eligible Unitholders contain a pre-payment provision exercisable at the option of Finance LP. On rare occasions, cash is paid for the Units acquired from selling Unitholders.

10. To secure full and complete payment and performance of the obligations under the Credit Facility, Finance LP must grant the lender a first priority security interest in certain collateral held by Finance LP. Such collateral is comprised of a portfolio consisting of high quality fixed income securities, including municipal bonds (rated AA or better) and U.S. Treasury and Agency securities (rated AAA), and registered money market funds operating in compliance with rule 2a–7. The Finance GP Executive Committee selects one or more investment advisers registered under the Advisers Act to manage Finance LP's portfolio based on such adviser's overall level of professional experience and its conservative value preservation strategies. Neither the Credit Facility nor any other borrowing by Finance LP from a bank or other financial institution would cause any person not named in section 2(a)(13) of the Act to own outstanding securities of Finance LP (other than short-term paper). Any borrowings by Finance LP will be non-recourse other than to the Firm.

11. The terms of the Units will be fully disclosed in the private placement memorandum of the Firm, and each Eligible Unitholder will receive a private placement memorandum, Finance LP's limited partnership agreement and Insurance LP's limited partnership agreement (or other organizational documents) prior to his or her investment in the Units. Finance GP will send Unitholders annual reports of the Firm, which will contain audited financial statements, as soon as practicable after the end of each fiscal year, but no later than 180 days after the fiscal year end. In addition, as soon as practicable after the end of each fiscal year of the Firm, Finance GP shall send a report to each person who was a Unitholder at any time during the fiscal year then ended, setting forth such tax information as shall be necessary for the preparation by the Unitholder of his or her federal and state income tax returns and a report of the investment activities of Finance LP during such year.

12. Unitholders will be permitted to transfer Units only by operation of law, to a receiver or trustee in bankruptcy for that Unitholder, to the Unitholder's estate in the event of his or her death, or with the express consent of both the Insurance GP Executive Committee and the Finance GP Executive Committee. No person may become a transferee or substitute Unitholder unless that person is a member of one of the classes of persons listed in section 2(a)(13) of the Act, except that a legal representative or executor may hold Units in order to settle the estate of a decedent or bankrupt or for similar purposes. No fee of any kind will be charged in connection with the sale of Units.

13. No separate management fee will be charged to Finance LP by Finance GP, and no compensation will be paid by Finance LP or by Unitholders to Finance GP for its services.

14. Finance LP will not acquire any security issued by a registered investment company if immediately after the acquisition Finance LP would own more than 3% of the outstanding voting stock of the registered investment company.

Applicants' Legal Analysis

1. Section 6(b) of the Act provides, in part, that the Commission may exempt employees' securities companies from the provisions of the Act to the extent that the exemption is consistent with the protection of investors. Section 6(b) provides that the Commission will consider, in determining the provisions of the Act from which the company should be exempt, the company's form of organization and capital structure, the persons owning and controlling its securities, the price of the company's securities and the amount of any sales load, how the company's funds are invested, and the relationship between the company and the issuers of the securities in which it invests. Section 2(a)(13) defines an employees' securities company as any investment company all of whose securities (other than short-term paper) are beneficially owned (a) by current or former employees, or persons on retainer, of one or more affiliated employers, (b) by immediate family members of such persons, or (c) by such employer or employers together with any of the persons in (a) or (b).

2. Section 7 of the Act generally prohibits investment companies that are not registered under section 8 of the Act from selling or redeeming their securities. Section 6(e) provides that, in connection with any order exempting an investment company from any provision of section 7, certain provisions of the Act, as specified by the Commission, will be applicable to the company and other persons dealing with the company as though the company were registered under the Act. Applicants request an order under sections 6(b) and 6(e) of the Act exempting Finance LP from all provisions of the Act, except section 9 and sections 36 through 53, and the rules and regulations under the Act. With respect to sections 17 and 30 of the Act, and the rules and regulations thereunder, and rule 38a–1 under the Act, the exemption is limited as set forth in the application.

3. Section 17(a) generally prohibits any affiliated person of a registered investment company, or any affiliated person of an affiliated person, acting as principal, from knowingly selling or purchasing any security or other property to or from the company. Applicants request an exemption from section 17(a) to the extent necessary permit Finance LP to: (a) Purchase, from the Firm or any affiliated person thereof, Units for the account of the Firm or any affiliated person thereof; or (b) sell, to the Firm or any affiliated person thereof, Units previously acquired by Finance LP.

4. Applicants state that an exemption from section 17(a) is consistent with the protection of investors and the purposes of the Act. Applicants state that Unitholders will be informed in the Firm's private placement memorandum of the possible extent of Finance LP's dealings with the Firm or any affiliated person thereof. Applicants also state that, as financially sophisticated professionals, Unitholders will be able to evaluate the attendant risks. Applicants assert that the community of interest among Unitholders and the Firm will provide the best protection against any risk of abuse.

5. Section 17(f) of the Act designates the entities that may act as investment company custodians, and rule 17f–2 allows an investment company to act as self-custodian, subject to certain requirements. Applicants request an exemption from section 17(f) and rule 17f–2 to permit the following exceptions from the requirements of rule 17f–2: (a) The promissory notes and non-publicly traded securities held by Finance LP may be kept in the locked files of Finance LP; (b) for purposes of paragraph (d) of the rule, (i) employees

of the Firm will be deemed employees of Finance LP, (ii) officers of Finance GP (including the Finance GP Executive Committee) will be deemed to be officers of Finance LP, and (iii) the Finance GP Executive Committee will be deemed to be the board of directors of Finance LP; and (c) in place of the verification procedure under paragraph (f) of the rule, verification will be effected quarterly by two employees of the Firm. Applicants assert that the promissory notes and non-publicly traded securities held by Finance LP are most suitably kept in Finance LP's files, where they can be referred to as necessary. The publicly traded securities owned by Finance LP are held in one or more brokerage accounts.

6. Section 17(g) and rule 17g–1 generally require the bonding of officers and employees of a registered investment company who have access to its securities or funds. Rule 17g–1 requires that a majority of directors who are not interested persons (''independent directors'') take certain actions and give certain approvals relating to fidelity bonding. Paragraph (g) of rule 17g–1 sets forth certain materials relating to the fidelity bond that must be filed with the Commission and certain notices relating to the fidelity bond that must be given to each member of the investment company's board of directors. Paragraph (h) of rule 17g–1 provides that an investment company must designate one of its officers to make the filings and give the notices required by paragraph (g). Paragraph (j) of rule 17g–1 exempts a joint insured bond provided and maintained by an investment company and one or more other parties from section 17(d) of the Act. Rule 17g–1(j)(3) requires that the board of directors of an investment company satisfy the fund governance standards defined in rule 0–1(a)(7). Applicants request an exemption from section 17(g) and rule 17g–1 to the extent necessary to permit Finance LP to comply with rule 17g–1 without the necessity of having a majority of the independent directors take such action and make such approvals as are set forth in the rule. Specifically, Finance LP will comply with rule 17g–1 by having the GP Finance Executive Committee take such actions and make such approvals as are set forth in rule 17g–1. Applicants state that, because Finance GP will be an interested person of Finance LP, Finance LP could not comply with rule 17g–1 without the requested relief. Applicants also request an exemption from the requirements of rule 17g–1(g) and (h) relating to the filing of copies of fidelity bonds and related information with the Commission and the provision of notices to the board of directors and from the requirements of rule 17g–1(j)(3). Applicants believe the filing requirements are burdensome and unnecessary as applied to Finance LP. The Finance GP Executive Committee will maintain the materials otherwise required to be filed with the Commission by rule 17g–1(g) and agree that all such material will be subject to examination by the Commission and its staff. The Finance GP Executive Committee will designate a person to maintain the records otherwise required to be filed with the Commission under paragraph (g) of the rule. Applicants also state that the notices otherwise required to be given to the board of directors would be unnecessary as Finance LP will not have a board of directors. Finance LP will comply with all other requirements of rule 17g–1.

7. Section 17(j) and paragraph (b) of rule 17j–1 make it unlawful for certain enumerated persons to engage in fraudulent or deceptive practices in connection with the purchase or sale of a security held or to be acquired by a registered investment company. Rule 17j–1 also requires that every registered investment company adopt a written code of ethics and that every access person of a registered investment company report personal securities transactions. Applicants request an exemption from the requirements of rule 17j–1, except for the anti-fraud provisions of paragraph (b), because they are unnecessarily burdensome as applied to Finance LP.

8. Applicants request an exemption from the requirements in sections 30(a), 30(b) and 30(e), and the rules under those sections, that registered investment companies prepare and file with the Commission and mail to their shareholders certain periodic reports and financial statements. Applicants contend that the forms prescribed by the Commission for periodic reports have little relevance to Finance LP and would entail administrative and legal costs that outweigh any benefit to Unitholders. Applicants request exemptive relief to the extent necessary to permit Finance LP to report annually to Unitholders. Applicants also request an exemption from section 30(h) to the extent necessary to exempt the Finance GP Executive Committee and any other persons who may be deemed members of an advisory board of Finance LP from filing Forms 3, 4 and 5 under section 16 of the under the Securities Exchange Act of 1934 with respect to their ownership of Units. Applicants assert that, because there will be no trading market and the transfers of Units will be severely restricted, these filings are unnecessary for the protection of investors and burdensome to those required to make them.

9. Rule 38a–1 requires investment companies to adopt, implement and periodically review written policies and procedures reasonably designed to prevent violation of the federal securities laws and to appoint a chief compliance officer. Finance LP will comply with rule 38a–1(a), (c) and (d), except that (i) since Finance LP does not have a board of directors, the Finance GP Executive Committee will fulfill the responsibilities assigned to a board of directors under the rule, and (ii) since the Finance GP Executive Committee does not have any independent members, approval by a majority of the independent board members required by rule 38a–1 will not be obtained.

Applicants' Conditions

The applicants agree that any order granting the requested relief will be subject to the following conditions:

1. Each proposed transaction to which Finance LP is a party otherwise prohibited by Section 17(a) (each, a ''Section 17 Transaction'') will be effected only if the Finance GP Executive Committee determines that: (a) the terms of the Section 17 Transaction, including the consideration to be paid or received, are fair and reasonable to Unitholders and do not involve overreaching of Finance LP or Unitholders on the part of any person concerned; and (b) the Section 17 Transaction is consistent with the interests of the Unitholders, the Firm's organizational documents and the Firm's reports to its Unitholders.

In addition, the Finance GP Executive Committee will record and preserve a description of such Section 17 Transactions, its findings, the information or materials upon which its findings are based and the basis therefore. All such records will be maintained for the life of Finance LP and at least six years thereafter, and will be subject to examination by the Commission and its staff. All such records will be maintained in an easily accessible place for at least the first two years.

2. Finance GP will send to each person who was a Unitholder at any time during the fiscal year then ended audited financial statements with respect to the Firm. At the end of each fiscal year, the Firm will make a valuation or have a valuation made of all of the assets of Finance LP as of the fiscal year end in a manner consistent with customary practice with respect to

the valuation of assets of the kind held by Finance LP. Consistent with the Firm's customary practice, Units will be valued in accordance with the terms of the Transfer Agreements. In addition, as soon as practicable after the end of each fiscal year of the Firm, Finance GP shall send a report to each person who was a Unitholder at any time during the fiscal year then ended, setting forth such tax information as shall be necessary for the preparation by the Unitholder of his or her federal and state income tax returns and a report of the investment activities of Finance LP during such year.

3. Finance LP and the Finance GP Executive Committee will maintain and preserve, for the life of Finance LP and at least six years thereafter, such accounts, books, and other documents as constitute the record forming the basis for the audited financial statements and annual reports of the Firm to be provided to Unitholders, and agree that all such records will be subject to examination by the Commission and its staff. All such records will be maintained in an easily accessible place for at least the first two years.

For the Commission, by the Division of Investment Management, under delegated authority.

Florence E. Harmon,

Acting Secretary.

[FR Doc. E8–27213 Filed 11–14–08; 8:45 am]

BILLING CODE 8011–01–P

SECURITIES AND EXCHANGE COMMISSION

Sunshine Act Meeting

Notice is hereby given, pursuant to the provisions of the Government in the Sunshine Act, Public Law 94–409, that the Securities and Exchange Commission will hold an Open Meeting on Wednesday, November 19, 2008 at 10 a.m., in the Auditorium, Room L–002.

The subject matter of the Open Meeting will be:

Item 1: The Commission will consider whether to adopt rule amendments that would impose additional requirements on nationally recognized statistical rating organizations in order to address concerns about the integrity of their credit rating procedures and methodologies.

Item 2: The Commission will consider whether to adopt rule amendments to improve mutual fund disclosure by providing investors with a summary prospectus containing key information in plain English in a clear and concise format, and by enhancing the availability on the Internet of more detailed information to investors. The Commission also will consider whether to adopt related amendments to Form N–1A, including amendments that address exchange-traded funds.

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: November 12, 2008.

Florence E. Harmon,

Acting Secretary.

[FR Doc. E8–27295 Filed 11–14–08; 8:45 am]

BILLING CODE 8011–01–P

SECURITIES AND EXCHANGE COMMISSION

[Release No. 34–58903; File No. SR–FINRA–2008–011]

Self-Regulatory Organizations; Financial Industry Regulatory Authority, Inc.; Order Approving Proposed Rule Change To Amend the Trade Reporting Structure and Require Submission of Non-Tape Reports That Identify Other Members Who Participated in Agency and Riskless Principal Transactions as Modified by Amendments Nos. 1 and 2

November 5, 2008.

I. Introduction

On March 28, 2008, the Financial Industry Regulatory Authority, Inc., (''FINRA'') filed with the Securities and Exchange Commission (''SEC'') pursuant to Section 19(b)(1) of the Securities Exchange Act of 1934 (''Act'') [1] and Rule 19b–4 thereunder,[2] a proposed rule change to amend its trade reporting rules applicable to over-the-counter (''OTC'') equity transactions. The proposed rule change was published for comment in the **Federal Register** on April 24, 2008.[3] The Commission received four comment letters on the proposed rule change.[4]

On October 9, 2008, FINRA filed Amendment No. 1 to the proposed rule change.[5] November 3, 2008, FINRA filed Amendment No. 2.[6] This order approves the proposed rule change, as amended.

II. Description of Proposed Rule Change

A. Summary

FINRA has proposed to amend its trade reporting rules applicable to OTC equity transactions [7] to: (1) Replace the current market maker-based trade reporting framework with an ''executing party'' framework; and (2) require that any member with the trade reporting obligation under FINRA rules that is acting in a riskless principal or agency capacity on behalf of one or more other members submit non-tape reports to FINRA, as necessary, to identify such other member(s) as a party to the trade.

B. Description of Proposed Rule Change

1. Trade Reporting Structure

Currently, the following structure is in place for purposes of reporting most OTC equity transactions to FINRA: (1) In transactions between two market makers, the sell-side reports; (2) in transactions between a market maker and a non-market maker, the market maker reports; (3) in transactions between two non-market makers, the sell-side reports; and (4) in transactions between a member and either a non-member or customer, the member reports. FINRA has proposed to amend its rules to require that for transactions between members, the ''executing party'' reports the trade to FINRA and

[1] 15 U.S.C. 78s(b)(1).

[2] 17 CFR 240.19b–4.

[3] *See* Securities Exchange Act Release No. 57681 (April 17, 2008), 73 FR 22186 (''Notice'').

[4] *See* letters from Romeo Bermudez, Chief Compliance Officer, Direct Edge ECN LLC, to Florence E. Harmon, Acting Secretary, Commission, dated May 13, 2008 (''Direct Edge Letter''); Eric Swanson, General Counsel, BATS Trading, Inc, to Florence E. Harmon, Acting Secretary, Commission, dated May 14, 2008 (''BATS Letter''); Ann Vlcek, Managing Director and Associate General Counsel, Securities Industry and Financial Markets Association (''SIFMA'') to Florence E. Harmon, Acting Secretary, Commission, dated May 15, 2008 (''SIFMA Letter''); Philip M. Pinc, Vice President, Counsel, National Stock Exchange, Inc. (''NSX''), to Florence E. Harmon, Acting Secretary, Commission, dated May 29, 2008 (''NSX Letter'').

[5] In Amendment No. 1, FINRA made technical changes to the rule text to reflect changes approved by the Commission in SR–FINRA–2008–021, which renumbered certain rules and replaced references to ''NASD'' with ''FINRA.'' *See* Securities Exchange Act Release No. 58643 (September 25, 2008), 73 FR 57174 (October 1, 2008).

[6] In Amendment No. 2, FINRA clarified that the implementation date for this proposed rule change would be 180 days from the date of this approval order. The Commission is not publishing the amendment for comment.

[7] Specifically, OTC equity transactions are: (1) Transactions in NMS stocks, as defined in Rule 600(b) of Regulation NMS under the Act, effected otherwise than on an exchange, which are reported through the Alternative Display Facility (''ADF'') or a Trade Reporting Facility (''TRF''); and (2) transactions in ''OTC Equity Securities,'' as defined in NASD Rule 6610 (*e.g.*, OTC Bulletin Board and Pink Sheets securities), Direct Participation Program (''DPP'') securities and PORTAL equity securities, which are reported through the OTC Reporting Facility (''ORF''). The ADF, TRFs and ORF are collectively referred to herein as the ''FINRA Facilities.''

for transactions between a member and a non-member or customer, the member reports the trade.

FINRA has proposed to define ''executing party'' as the member that receives an order for handling or execution or is presented an order against its quote, does not subsequently re-route the order, and executes the transaction. In circumstances where both parties to the transaction are members, and both satisfy the definition of executing party, the member representing the sell-side would report the transaction to FINRA, unless the parties agree otherwise and the member representing the sell-side contemporaneously documents their agreement. In such instances, the sell-side would be presumed to be the member with the trade reporting obligation unless it can demonstrate that there was an agreement to the contrary.

Under the proposed rule change, an alternative trade system, (''ATS''), including an electronic communications network, (''ECN''), would be the executing party and would have the reporting obligation where the transaction is executed on the ATS. If an ATS routed an order to another member for handling and/or execution, then the other member would be the executing party and would have the reporting obligation under the proposed rule change. If an ATS routed an order to a non-member that was executed OTC, then the ATS would report the trade.

2. Submission of Non-Tape Reports to Identify Other Members for Agency and Riskless Principal Transactions

FINRA trade reporting rules require that trade reports submitted to FINRA identify the member that is a party to an OTC trade. Each trade report submitted for public dissemination purposes (''tape report'') generally only allows for the identification of two parties. This trade reporting structure is based on a two-party model where a broker-dealer acts as principal or as agent for a non-broker-dealer customer. The rules do not specifically speak to reporting obligations for riskless principal transactions in which one broker-dealer acts as agent or riskless principal for another broker-dealer or when order management systems and ATSs simultaneously match one or more broker-dealer orders on one or both sides of a trade. In these situations, where a FINRA member executes a trade in a riskless principal capacity [8] on behalf of another member, or matches, as agent, the orders of two or more members, the tape report does not identify all members involved in the trade.[9]

FINRA represented that industry business models have evolved to include more trades where one broker-dealer acts as agent or in a riskless principal capacity for another broker-dealer and order management systems and ATSs simultaneously match one or more broker-dealer orders on one or both sides of a trade. Therefore, FINRA has proposed to require that any member with the obligation to report the trade under FINRA rules that is acting in a riskless principal or agency capacity on behalf of one or more other members, submit to FINRA one or more non-tape reports identifying such other member(s) as a party to the transaction, if such other member(s) is not identified on the initial trade report or a report submitted to FINRA to reflect the offsetting leg of a riskless principal transaction. This proposed reporting requirement would also be applicable to PORTAL equity security transactions.

The proposed reporting requirement would only apply to the member that has the responsibility under FINRA rules to report the trade to FINRA (*i.e.*, the ''executing party'' in a trade between two members, as discussed above). It would not negate or modify the requirements for reporting riskless principal transactions under FINRA rules and would not change the reporting requirements applicable to riskless principal transactions with a customer.

The proposed reporting requirement would not apply to transactions that are executed on and reported through an exchange. Today, where the initial leg of a riskless principal or agency transaction is executed on an exchange, members are not required to report either leg of the transaction to FINRA. The initial leg of the transaction is reported through the exchange (and therefore must not be reported to FINRA), and members have the option of submitting a non-tape (typically, a clearing-only) report to FINRA for the offsetting leg of the transaction. Pursuant to the proposed rule change, members would continue to have the option of submitting a non-tape report for riskless principal and agency transactions where the initial leg is executed on an exchange; there would continue to be no obligation to submit a non-tape report for such trades.

Because members would be submitting non-tape reports, the 90-second reporting requirement under FINRA trade reporting rules would not apply. Members generally would have until the end of the day on trade date to submit the requisite non-tape reports.[10]

III. Summary of Comments

The Commission received four comment letters in response to the proposed rule change addressing different aspects of the proposal.[11] FINRA submitted a response to these comment letters.[12]

A. Executing Party Trade Reporting Structure Proposal

SIFMA expressed support for the proposed executing party trade reporting structure and stated that the proposal presents workable standards for clearly identifying the member with the responsibility for reporting a trade.[13]

SIFMA requested further clarification with respect to several issues, however. First, SIMFA questioned whether members that manually negotiate a trade and seek to modify the proposed sell-side reporting default may use a previously executed ''Attachment II'' or other agreement to satisfy the documentation requirement under the proposed rule change. In its response to comments, FINRA explained that in a situation where two members have entered into a ''give up agreement,'' [14] one member can ''give up'' or report on behalf of another member. However, where the contra party is giving up or reporting on behalf of the member with the trade reporting obligation under FINRA rules, the give up agreement does not shift the trade reporting obligation to the contra party. FINRA explained that the member with the trade reporting obligation remains responsible for compliance with FINRA trade reporting rules and, for example, could be charged with late reporting if the member reporting on its behalf fails to submit the tape report within 90 seconds of execution. The give up

[8] For purposes of FINRA trade reporting rules applicable to equity securities, a ''riskless principal'' transaction is a transaction in which a member, after having received an order to buy (sell) a security, purchases (sells) the security as principal and satisfies the original order by selling (buying) as principal at the same price.

[9] According to FINRA, some members submit non-tape reports identifying the other members involved in the trade.

[10] In certain circumstances, however, members must submit non-tape reports contemporaneously with trade execution, *e.g.*, to qualify for the exemption from the requirements of IM–2110–2 (Trading Ahead of Customer Limit Order) for riskless principal transactions.

[11] *See supra* note 5.

[12] *See* Letter from Lisa C. Horrigan, Associate General Counsel, FINRA, to Florence E. Harmon, Acting Secretary, Commission, dated September 9, 2008 (''FINRA Letter'').

[13] *See* SIFMA Letter, *supra* note 5.

[14] The ''Attachment II'' is a form of give up agreement.

agreement only permits one member to submit a trade report on behalf of another member. FINRA stated that, by contrast, the contemporaneous agreement in the context of manually negotiated trades under the proposed rule change can shift the trade reporting obligation under FINRA rules.[15]

Second, SIFMA requested that FINRA confirm that the member with the trade reporting obligation—whether the executing broker, sell-side broker, or as agreed upon by members negotiating manual trades pursuant to the proposed rule change—was responsible for timely and accurate trade reporting.[16] In particular, SIMFA requested confirmation that when two members in a manually negotiated trade have properly documented an agreement as to which member is responsible for reporting the trade, the other member is not responsible for reporting deficiencies with respect to the trade.[17]

FINRA confirmed that under the proposed rule change, the member with the trade reporting obligation would be that party responsible for timely and accurate trade reporting.[18] FINRA explained that where the trade reporting obligation is shifted to the member representing the buy-side by virtue of a contemporaneously documented agreement under the proposed rule change, the member representing the sell-side is not responsible for such trade reporting deficiencies as the buy-side member's failure to submit the tape report within 90 seconds of execution.[19]

At SIFMA's request, FINRA also clarified in its response to comments that the proposed executing party trade reporting structure would not affect the processing of regulatory transaction fees pursuant to Section 3 of Schedule A to the By-Laws (''Section 3''). FINRA represented that it always bills Section 3 fees to the clearing member identified as the sell-side on the tape report, and as such, it makes no difference for billing purposes which member appears on the tape report as the reporting party and which member appears as the contra party.[20]

B. Non-Tape Reporting Proposal

All four commenters addressed this aspect of the proposed rule change and raised the following issues.

First, Direct Edge, BATS, and NSX asserted that the proposed rule change does not meet the requirements of Section 15A(b)(5) of the Act[21] because it does not address the fees associated with the submission of non-tape reports.[22] The commenters explained that FINRA charges each TRF for regulation based on the volume of tape and non-tape reports submitted to the TRF and that the proposed rule change will increase the number of non-tape reports submitted to the TRFs, which will increase the regulatory charges paid to FINRA by the TRFs.[23] The commenters further explain that these increased regulatory charges will, in turn, be passed along to FINRA members because one of the TRFs, the FINRA/NSX TRF, imposes a fee on TRF participants for the submission of non-tape reports designed to generate revenues for the TRF to cover some of its regulatory costs.[24] Therefore, the commenters believe FINRA should be required to demonstrate the basis for its regulatory charges to the TRFs under Section 15A(b)(5) of the Act. Without such a showing, the commenters claim that the TRFs and FINRA members are unable to make a determination as to the reasonableness of such charges.[25]

NSX, a TRF Business Member, further argues that it is competitively disadvantaged by FINRA's proposal because it has difficulty passing on FINRA's regulatory charges to its TRF customers due to the lack of transparency and predictability of those charges.[26] NSX contends that FINRA should publish for notice and comment a complete schedule of its charges for TRF regulation and explain the regulatory work that it performs relating to non-tape reports.[27]

In its response to these comments, FINRA stated that it believes that these arguments are not germane to the proposed rule change.[28] FINRA explained that its charges for regulation of TRFs are assessed pursuant to a contract between FINRA and the respective TRF Business Members and are not subject to Section 15A(b)(5) of the Act.[29] FINRA argued that the fact that a TRF Business Member may determine that, for competitive reasons, the TRF should charge TRF participants a fee to generate revenues to cover some of the regulatory costs owed to FINRA under the contract does not bring these regulatory costs within the scope of the Act and that any issue that NSX or the other TRF Business Members may have pertaining to FINRA's regulatory charges or the regulatory work FINRA performs is a matter of contract.[30]

BATS argued that if the Commission fails to require FINRA to demonstrate the reasonableness of the regulatory charges it imposes on the TRFs, members ultimately will be charged a fee that has never been subject to regulatory scrutiny.[31] FINRA responded to this comment by explaining that the proposed rule change does not seek to modify FINRA's charges for regulation of the TRFs, and reiterating that those charges are a matter of private contract.[32] FINRA stated that any proposed rule change to impose a fee on TRF participants would be filed with the Commission.[33]

Second, DirectEdge and BATS argued that the proposed rule change would impose a requirement on members that would be duplicative of FINRA's Order Audit Trail System (''OATS'') requirements and that FINRA did not explain why it could not get this information from OATS.[34]

In response to these comments, FINRA explained that the OATS rules apply only to Nasdaq-listed securities and OTC Equity Securities and not to non-Nasdaq exchange-listed securities.[35] FINRA represented that it does not receive OATS information for a large segment of transactions taking place in the OTC market today. FINRA also stated that while there is some overlap, OATS captures the life-cycle of an order, while the trade reporting rules are designed to capture information relating to executed trades. FINRA believes that the more logical place to require and store information regarding the parties to an executed trade is in the context of trade reporting rules.[36]

BATS argued that it should be a ''fairly easy exercise'' to match the ultimate buyer and seller of a trade executed on an ATS or ECN using

[15] *See* FINRA Letter, *supra* note 10.

[16] *See* SIFMA Letter, *supra* note 5.

[17] *Id.*

[18] *See* FINRA Letter, *supra* note 10.

[19] *Id.*

[20] *See* FINRA Letter, *supra* note 10.

[21] 15 U.S.C. 78o–3(b)(5). This section provides that ''[a]n association of brokers and dealers shall not be registered as a national securities association unless the Commission determines that the rules of the association provide for the equitable allocation of reasonable dues, fees, and other charges among members and issuers and other persons using any facility or system which the association operates or controls.''

[22] *See* Direct Edge Letter, BATS Letter and NSX Letter, *supra* note 5.

[23] *Id.*

[24] *Id.*

[25] *Id.*

[26] *See* NSX Letter, *supra* note 5.

[27] *Id.*

[28] *See* FINRA Letter, *supra* note 10.

[29] *Id.*

[30] *Id.*

[31] *See* BATS Letter, *supra* note 5.

[32] *See* FINRA Letter, *supra* note 10.

[33] *See, e.g.,* Securities Exchange Act Release No. 57299 (February 8, 2008), 73 FR 8915 (February 15, 2008).

[34] *See* Direct Edge Letter and BATS Letter, *supra* note 5.

[35] *See* FINRA Letter, *supra* note 10.

[36] *Id.*

OATS execution reports.[37] However, FINRA explained that its rules do not mandate the submission of OATS data in the manner described by the commenter and not all ATSs and ECNs report this way, and therefore the process of matching OATS execution reports is not as easy as the commenter suggests.[38]

Third, BATS asserted that FINRA failed to justify its need for non-tape reports, when, according to BATS, FINRA can request information relating to the ultimate buyer and seller in a given transaction directly from the executing member.[39] BATS argued that FINRA should be required to explain what has changed, either in the quality of the information it is receiving about transactions or in the regulatory requirements under which it is operating, that now makes the non-tape reports necessary or appropriate.

In response, FINRA explained that its current trade reporting rules generally reflect the traditional two-party trade model where a broker-dealer acts as principal or as agent for a non-broker-dealer customer. The rules do not adequately deal with industry business models that have evolved to include more trades where one broker-dealer acts as agent or in a riskless principal capacity for another broker-dealer and where order management systems and ATSs simultaneously match one or more broker-dealer orders on one or both sides of a trade.[40] FINRA noted that because the current trade reporting rules generally only allow for the identification of two parties, the tape report does not identify all members involved in the trade and consequently FINRA's audit trail is incomplete.[41] FINRA argued that the proposed rule change would enhance FINRA staff's ability to create a complete, accurate audit trail and assist in the automated surveillance of various customer protection and market integrity rules (*e.g.*, to enable automated surveillance for wash sales, the audit trail must reflect the ultimate buyer and seller for any given transaction).[42]

Fourth, SIMFA requested that the Commission and FINRA defer consideration of this aspect of the proposed rule change to permit FINRA and the New York Stock Exchange LLC (''NYSE'') to collaborate with each other and the industry on a more uniform approach for regulatory reporting of riskless principal and agency trades.[43] FINRA responded that while it recognizes the benefits in harmonizing regulatory reporting requirements where possible, it is important to note that the proposed rule change and the new NYSE requirement cited by SIFMA are not identical.[44] FINRA explained that the NYSE requirement relates to the mechanics of reporting riskless principal transactions effected on the NYSE by mandating the electronic linking of executions of facilitated orders to all underlying orders to qualify for an exception to NYSE Rule 92 (Limitations on Members' Trading Because of Customers' Orders).[45]

Finally, SIFMA requested clarification on several points if consideration of this aspect of the proposed rule change is not deferred. First, SIFMA asked how the requirement to submit non-tape reports for ''Manning'' purposes will be reconciled with the proposed end-of-day submission of non-tape reports under the proposed rule change.[46] FINRA explained that although the 90-second reporting requirement would not apply to the submission of non-tape reports under the proposed rule change, in certain circumstances, members must submit non-tape reports contemporaneously with trade execution.[47] For example, FINRA explained, to qualify for the exemption from the requirements of NASD IM–21 10–2 (the ''Manning Rule'') for riskless principal transactions, a member must submit, contemporaneously with the execution of the facilitated order, a non-tape report reflecting the offsetting ''riskless'' leg of the transaction.[48] For purposes of the Manning Rule, ''contemporaneously'' has been interpreted to require execution as soon as possible, but absent reasonable and documented justification, within one minute.[49] FINRA represented that this is an existing requirement and it would not be affected by the proposed rule change, and therefore, under the proposed rule change, members would continue to report as they do today to qualify for the exemption under NASD IM–21l0–2(c)(3).[50]

Second, SIFMA asked whether the requirement to submit non-tape reports identifying all members involved in a trade would affect OATS matching requirements.[51] FINRA explained that under its current rules, where an OATS execution report is related to a trade report submitted to a FINRA facility, the OATS report must match the related trade report and FINRA stated that this requirement would apply to any non-tape report submitted under the proposed rule change.[52]

C. Proposed Implementation

FINRA proposed that the implementation date would be (1) at least 90 days following Commission approval for transactions executed on ATSs, including ECNs; and (2) at least 180 days following Commission approval with respect to all other transactions. The commenters raise the following issues with respect to this proposed implementation schedule.

BATS stated that it did not object to the shorter period for ATSs,[53] while Direct Edge opposed the shorter implementation period for ATSs and asserted that FINRA failed to justify this approach.[54] SIFMA argued that certain ATSs should be permitted to comply with the latter of the two dates in light of the systems changes they would be required to make (*e.g.*, an ATS that trade reports and identifies its subscriber as the reporting party or has its subscriber report the trade, or an ATS that does not submit non-tape reports today).[55] SIMFA also requested clarification that the shorter period would apply only to systems that qualify as an exchange under the Act and operate under Regulation ATS. In response to these comments, FINRA proposed to implement the proposed rule change on the same date for all members, including ATSs, at least 180 days from the date of approval by the Commission.[56]

SIFMA also requested that FINRA not implement the proposed rule change until it had published revised technical specifications.[57] In response, FINRA stated that it does not believe that the proposed rule change will result in any significant changes to applicable technical specifications, and that members would continue to populate and submit to FINRA tape and non-tape reports in the same manner as they do today.[58] Thus, FINRA does not believe that the implementation date needs to

[37] *See* BATS Letter, *supra* note 5.

[38] *See* FINRA Letter, *supra* note 10.

[39] *See* BATS Letter, *supra* note 5.

[40] *See* FINRA Letter, *supra* note 10.

[41] *Id.*

[42] *Id.*

[43] *See* SIFMA Letter, *supra* note 5.

[44] *See* FINRA Letter, *supra* note 10.

[45] *Id.*

[46] *See* SIFMA Letter, *supra* note 5.

[47] *See* FINRA Letter, *supra* note 10.

[48] *See* NASD IM–2110–2(c)(3)

[49] *See* NASD Notices to Members 95–67 (August 1995) and 98–78 (September 1998).

[50] *See* FINRA Letter, *supra* note 10.

[51] *See* SIFMA Letter, *supra* note 5.

[52] *See* FINRA Letter, *supra* note 10.

[53] *See* BATS Letter, *supra* note 5.

[54] *See* Direct Edge Letter, *supra* note 5.

[55] *See* SIFMA Letter, *supra,* note 5.

[56] *See* FINRA Letter, *supra* note 10.

[57] *See* SIFMA Letter, *supra,* note 5.

[58] *See* FINRA Letter, *supra* note 10.

be linked to the publication of specific technical specifications.

Finally, SIFMA suggested that the non-tape reporting proposal be implemented approximately six months following implementation of the executing party trade reporting structure.[59] FINRA responded that SIFMA did not provide any reason why the system changes necessary to comply with both aspects of the proposed rule change could not be made and tested simultaneously and reiterated its position that 180 days should provide sufficient time to make all necessary systems changes.[60]

IV. Discussion

After careful review, the Commission finds that the proposed rule change is consistent with the requirements of the Act and the rules and regulations thereunder applicable to a national securities association.[61] In particular, the Commission believes the proposal is consistent with Section 15A(b)(6) of the Act,[62] which requires, among other things, that the Association's rules be designed to prevent fraudulent and manipulative acts and practices, to promote just and equitable principles of trade, and, in general, to protect investors and the public interest. The Commission believes that FINRA adequately addressed the comments raised in response to the notice of this proposed rule change.

The primary purpose of this proposed rule change is to modify the rules governing trade reporting in OTC equity transactions by replacing the current market maker-based trade reporting framework with an ''executing party'' framework and by requiring that any member with the trade reporting obligation under FINRA rules that is acting in a riskless principal or agency capacity on behalf of one or more other members, submit non-tape reports to FINRA, as necessary, to identify such other member(s) as a party to the trade.

A. Trade Reporting Structure

The Commission believes that FINRA's proposal to require that for transactions between members, the ''executing party'' would report the trade to FINRA and for transactions between a member and a non-member or customer, the member would report the trade, establishes an objective standard for determining the reporting obligation in these circumstances, while still affording the parties flexibility to enter into agreements to shift the trade reporting obligation, when appropriate, at the parties' discretion. The proposed rule change should help to ensure that the member with the trade reporting obligation is the party that knows the material terms and details of the transaction. Therefore, the Commission believes that this will help increase overall compliance with trade reporting rules and increase the amount of accurate trade information available to FINRA.

B. Non-Tape Reporting Proposal

FINRA has also proposed to require that any member with the obligation to report a trade under FINRA rules that is acting in a riskless principal or agency capacity on behalf of one or more other members submit to FINRA one or more non-tape reports identifying such other member(s) as a party to the transaction, if such other member is not identified on the initial trade report or a report submitted to FINRA to reflect the offsetting leg of a riskless principal transactions. The Commission believes that this proposed requirement will help to modernize FINRA's rules to adapt to the increase in trades involving riskless principal transactions. The proposed changes should help to ensure that FINRA staff is able to create a complete, accurate audit trail through the execution of trades. The Commission believes that the information proposed to be collected by FINRA is an appropriate supplement to that already collected pursuant to FINRA's OATS requirements and will assist FINRA in automated surveillance to ensure compliance with various customer protection and market integrity rules.[63]

C. Implementation

In its response to comments, FINRA stated that it intended to implement the proposed rule change at least 180 days from the date of this approval order.[64] For purposes of clarity, in Amendment No. 2, FINRA requested that the proposed rule change be implemented 180 days from the date of this approval order. The Commission believes that this is an appropriate time frame for members to prepare to comply with the proposed rules.

V. Conclusion

It is therefore ordered, pursuant to Section 19(b)(2) of the Act,[65] that the proposed rule change (SR–FINRA–2008–011), as amended, is approved.

For the Commission, by the Division of Trading and Markets, pursuant to delegated authority.[66]

Florence E. Harmon,

Acting Secretary.

[FR Doc. E8–27141 Filed 11–14–08; 8:45 am]

BILLING CODE 8011–01–P

[59] *See* SIFMA Letter, *supra,* note 5.

[60] *See* FINRA Letter, *supra* note 10.

[61] In approving this rule proposal, the Commission has considered the proposed rule's impact on efficiency, competition, and capital formation. 15 U.S.C. 78c(f).

[62] 15 U.S.C. 78o–3(b)(6).

[63] With respect to the Commenters' concerns that this proposed rule change should be reviewed as a fee filing, the Commission agrees with FINRA that this is a matter of contract and is not the subject of this proposed rule change.

[64] *See* FINRA Letter, *supra* note 10.

[65] 15 U.S.C. 78s(b)(2).

[66] 17 CFR 200.30–3(a)(12).

SECURITIES AND EXCHANGE COMMISSION

[Release No. 34–58918; File No. SR–ISE–2008–85]

Self-Regulatory Organizations; International Securities Exchange, LLC; Notice of Filing of Proposed Rule Change Relating to Changes to the ISE Stock Exchange Governing Documents in Connection with ISE's Purchase of Equity Interests in Direct Edge Holdings, Inc.

November 7, 2008.

Pursuant to Section 19(b)(1) of the Securities Exchange Act of 1934 (the ''Exchange Act'')[1] and Rule 19b–4 thereunder,[2] notice is hereby given that on November 7, 2008, the International Securities Exchange, LLC (the ''Exchange'' or ''ISE'') 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 the Exchange. The Commission is publishing this notice to solicit comments on the proposed rule change from interested persons.

I. Self-Regulatory Organization's Statement of the Terms of Substance of the Proposed Rule Change

The Exchange proposes, among other things, to merge the ISE Stock Exchange, LLC (''ISE Stock''), a Delaware limited liability company, with and into Maple Merger Sub, LLC (''Maple Merger Sub''), a Delaware limited liability company and a wholly owned subsidiary of Direct Edge Holdings LLC (''Direct Edge''), with Maple Merger Sub being the surviving entity. As part of the same transaction, International Securities Exchange Holdings, Inc. (''ISE Holdings'') will purchase equity interests in Direct Edge such that after the transactions contemplated by the

[1] 15 U.S.C. 78s(b)(1).

[2] 17 CFR 240.19b–4.

merger and purchase, ISE Holdings will have a 31.54% equity interest in Direct Edge. Currently, ISE Stock operates a marketplace for the trading of U.S. cash equities by Equity Electronic Access Members (''Equity EAMs'') of ISE under the rules of ISE, as a facility, as that term is defined in Section 3(a)(2) of the Securities Exchange Act of 1934 (''Exchange Act'') [3] of ISE (the ''Facility''). ISE proposes that, following the closing of the transaction and the merger of ISE Stock into Maple Merger Sub, Maple Merger Sub will operate the Facility.[4] Maple Merger Sub will be wholly-owned by Direct Edge, a Delaware limited liability company.

ISE is a registered national securities exchange under Section 6 of the Exchange Act and a self-regulatory organization (''SRO''). As a facility of ISE, the Facility is subject to regulation by ISE and oversight by the Commission. ISE represents that following the transactions described above, it will continue to have adequate funds to discharge all regulatory functions related to the Facility.[5] ISE will also enter into a Regulatory Services Agreement with Maple Merger Sub. In this filing, the Exchange is submitting to the SEC: (i) The Certificate of Formation and the Limited Liability Company Agreement of Maple Merger Sub (''LLC Agreement'') which specifically relates to the control and governance of Maple Merger Sub and helps to ensure that ISE has the authority over Maple Merger Sub to maintain ISE's responsibility for all regulatory functions related to the Facility; (ii) the Third Amended and Restated Limited Liability Company Operating Agreement of Direct Edge Holdings LLC (''DE Operating Agreement''); (iii) amendments to the ISE Holdings Certificate of Incorporation and Bylaws; and (iv) amendments to ISE Rules 312 and 2108. As the primary purpose of this rule filing is to focus on those provisions that are directly related to ISE's ability to perform its regulatory responsibility with respect to the Facility following the transactions described above, the Exchange's discussion in this filing will be limited to those relevant provisions of the LLC Agreement and the DE Operating Agreement. The text of the proposed rule change is available on the Exchange's Web site *http://www.ise.com* at the principal office of the Exchange, and at the Commission's Public Reference Room.

II. Self-Regulatory Organization's Statement of the Purpose of, and Statutory Basis for, the Proposed Rule Change

In its filing with the Commission, the Exchange included statements concerning the purpose of, and basis for, the proposed rule change and discussed any comments it received on the proposed rule change. The text of these statements may be examined at the places specified in Item IV below. The self-regulatory organization 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, among other things, to merge ISE Stock with and into Maple Merger Sub, a wholly owned subsidiary of Direct Edge, with Maple Merger Sub being the surviving entity. As part of the same transaction, ISE Holdings will purchase equity interests in Direct Edge such that after the transactions contemplated by the merger and purchase, ISE Holdings will have a 31.54% equity interest in Direct Edge. Currently, ISE Stock operates the Facility, however, ISE proposes that, following the closing of the transaction and the merger of ISE Stock into Maple Merger Sub, Maple Merger Sub will operate the Facility.

ISE is an SRO, and as a facility of ISE, the Facility is subject to regulation by ISE and oversight by the SEC. ISE represents that following the transactions described above, it will continue to have adequate funds to discharge all regulatory functions related to the Facility.[6] ISE will also enter into a Regulatory Services Agreement with Maple Merger Sub. In this filing, the Exchange is submitting to the Commission: (i) The Certificate of Formation and LLC Agreement which specifically relates to the control and governance of Maple Merger Sub and helps to ensure that ISE has the authority over Maple Merger Sub to maintain ISE's responsibility for all regulatory functions related to the Facility; (ii) the DE Operating Agreement; (iii) amendments to the ISE Holdings Certificate of Incorporation and Bylaws; and (iv) amendments to ISE Rules 312 and 2108. As the primary purpose of this rule filing is to focus on those provisions that are directly related to ISE's ability to perform its regulatory responsibility with respect to the Facility following the transactions described above, the Exchange's discussion in this filing will be limited to those relevant provisions of the LLC Agreement and the DE Operating Agreement.

Maple Merger Sub

As a limited liability company, ownership of Maple Merger Sub is represented by limited liability membership interests in Maple Merger Sub. Maple Merger Sub has only one owner, Direct Edge (the ''Sole Member'').

Governance of Maple Merger Sub

Pursuant to Section 4.1 of the LLC Agreement, Maple Merger Sub will be managed by the Sole Member. As noted above, ISE will have regulatory responsibility over Maple Merger Sub and the Facility. Subject to the foregoing and the provisions of Section 1.6 as described below, as the Sole Member, Direct Edge will have the authority to make all decisions regarding the business of Maple Merger Sub. The Sole Member is responsible for the control and management of the business of Maple Merger Sub.

Under Section 4.1 of the LLC Agreement, subject to the limitations provided in the LLC Agreement and except as specifically provided therein, the Sole Member shall have exclusive and complete authority and discretion to manage the operations and affairs of Maple Merger Sub and to make all decisions regarding the business of Maple Merger Sub and shall have the power to act for or bind Maple Merger Sub. Any action taken by the Sole Member shall constitute the act of and serve to bind Maple Merger Sub.

The provisions contained in Section 1.6 of the LLC Agreement ensure that ISE has the information regarding Maple Merger Sub and the Facility necessary to carry out its regulatory responsibilities. Specifically, Section 1.6 provides that, so long as Maple Merger Sub operates the Facility, in the event that ISE, in its sole discretion, reasonably and in good

[3] 15 U.S.C. 78c(a)(2).

[4] Direct Edge is planning to file two Form 1 Applications to own and operate two national securities exchanges. If the Commission approves the Form 1 Applications, the Facility will cease operations.

[5] Maple Merger Sub will not be entitled to any revenue generated in connection with penalties, fines, and regulatory fees that may be assessed by ISE against Equity EAMs in connection with trading on ISE Stock. Rather, all regulatory fines, penalties and fees assessed against and paid by ISE members to ISE in connection with trading on ISE Stock shall remain with ISE.

[6] Maple Merger Sub will not be entitled to any revenue generated in connection with penalties, fines, and regulatory fees that may be assessed by ISE against Equity EAMs in connection with trading on ISE Stock. Rather, all regulatory fines, penalties and fees assessed against and paid by ISE members to ISE in connection with trading on ISE Stock shall remain with ISE.

faith, determines that any action, transaction, or aspect of an action or transaction, is necessary or appropriate for, or interferes with, the performance or fulfillment of ISE's regulatory functions or its responsibilities under the Exchange Act or such action, transaction, or aspect of an action or transaction is specifically required by the SEC, (i) no such action, transaction, or aspect of an action or transaction shall be authorized, undertaken or effective, without ISE's prior approval and (ii) ISE shall have the sole and exclusive right to direct that any such necessary or appropriate action, as it may reasonably and in good faith determine in its sole discretion be taken or transaction be undertaken by or on behalf of Maple Merger Sub without regard to any other party in any capacity.

Additionally, Section 1.6(b) provides that ISE shall receive notice of planned or proposed changes to Maple Merger Sub (but not to include changes relating solely to one or more of the following: marketing, administrative matters, personnel matters, social or team-building events, meetings of members, communications with members, finance, market research, real property, equipment, furnishings, personal property, intellectual property, insurance, contracts unrelated to the operation of the Facility and de minimis items) and the Facility. Any such changes must be affirmatively approved by ISE prior to implementation.

Section 4.1 of the LLC Agreement contains limitations on the authority of the Sole Member. Specifically, Section 4.1 provides that notwithstanding any contrary provision of the LLC Agreement, and subject always to ISE's rights to act under Section 1.6, all actions taken by the Sole Member shall be governed by and subject to Sections 7.3(a) [7] and 7.7 of the DE Operating Agreement, which are discussed in detail below.

Voting Limitations of Members

Under Section 4.4 of the LLC Agreement, no Person [8] (other than the Sole Member), either alone or together with its Related Persons,[9] as of any record date for the determination of members entitled to vote on any matter, shall be entitled to: (i) Vote or cause the voting of Common Interests, as defined in the LLC Agreement, beneficially owned by such Person or its Related Persons, in person or by proxy or through any voting agreement, plan, or arrangement, to the extent that such Common Interests represent in the aggregate more than twenty percent (20%) of voting power of the then-issued and outstanding Common Interests (such threshold being hereinafter referred to as the ''Voting Limitation''); or (ii) enter into any voting agreement, plan, or arrangement that would result in Common Interests beneficially owned by such Person or its Related Persons, subject to such voting agreement, plan, or arrangement not being voted on a matter, or any proxy relating thereto being withheld, where the effect of that voting agreement, plan, or arrangement would be to enable any Person, alone or together with its Related Persons, to exceed the Voting Limitation. Maple Merger Sub shall disregard any such votes purported to be cast in excess of the Voting Limitation.

The limitations imposed by Section 4.4 may be waived if both the Sole Member and ISE each consent to expressly permit such waiver of the Voting Limitation; and such waiver shall have been filed with, and approved by, the Commission under Section 19(b) of the Exchange Act and shall have become effective thereunder. In granting a waiver, both the Sole Member and ISE must have determined that: (i) The exercise of such voting rights or the entering of such agreement, plan or other arrangement, as applicable, by such Person, either alone or together with its Related Persons, will not impair the ability of Maple Merger Sub and ISE to carry out its functions and responsibilities, including, but not limited to, under the Exchange Act and is otherwise in the best interests of the Maple Merger Sub, its Members [10] and ISE; (ii) such voting rights by such Person, either alone or together with its Related Persons, will not impair the ability of the Commission to enforce the Exchange Act; (iii) neither such Person nor its Related Persons are subject to any applicable ''statutory disqualification'' (within the meaning of Section 3(a)(39) of the Exchange Act); and (iv) neither such Person nor its Related Persons is an ''Exchange Member'' (as such term is defined in the Constitution of ISE).

By specifically imposing a Voting Limitation on any Person that, either alone or together with its Related Persons, owns Common Interests that represent in the aggregate more than twenty percent (20%) of the voting power then entitled to be cast, ISE is ensuring that it is in all cases able to maintain proper control over the exercise of its regulatory function in relation to Maple Merger Sub, and is not subject to influence that may be adverse to its regulatory responsibilities from any Person that may control a substantial amount of the outstanding votes entitled to be cast on any matter. This provision and other related provisions relating to notice and rule filing requirements with respect to any Person that acquires certain Percentage Interest [11] levels in Maple Merger Sub will serve to protect the integrity of ISE's self-regulatory responsibilities and the SEC's oversight responsibilities.

Ownership Limitations of Members and Changes in Ownership

Under Section 7.2(a) of the LLC Agreement, no Person (other than the Sole Member), either alone or together with its Related Persons, at any time, may own, directly or indirectly, of

[7] Section 7.3(a) of the DE Operating Agreement provides, that subject to Section 7.3(b), the Board may constitute any officer of Direct Edge as the Direct Edge's proxy, with power of substitution, to vote the equity of any subsidiary of Direct Edge and to exercise, on behalf of Direct Edge, any and all rights and powers incident to the ownership of that equity, including the authority to execute and deliver proxies, waivers and consents. Subject to Sections 7.3(b) and 7.7, in the absence of specific action by the Direct Edge Board, the Chief Executive Officer shall have authority to represent Direct Edge and to vote, on behalf of Direct Edge, the equity of other Persons, both domestic and foreign, held by Direct Edge. Subject to Sections 7.3(b) and 7.7, the Chief Executive Officer shall also have the authority to exercise any and all rights incident to the ownership of that equity, including the authority to execute and deliver proxies, waivers and consents.

[8] ''Person'' means any individual, partnership, limited liability company, association, corporation, trust, or other entity. LLC Agreement Section 2.1 ''Definitions''.

[9] ''Related Person'' means (i) with respect to any Person, any executive officer (as defined under Rule 3b–7 under the Exchange Act), director, general partner, manager or managing member, as applicable, and all ''affiliates'' and ''associates'' of such Person (as such terms are defined in Rule 12b–2 under the Exchange Act); (ii) with respect to any Person constituting an ''Exchange Member'' (as such term is defined in the Constitution of the ISE LLC, a copy of which will be provided to any member of Maple Merger Sub upon written request therefore), any broker or dealer with which such Exchange Member is associated; (iii) with respect to any Person that is an executive officer (as defined under Rule 3b–7 under the Exchange Act), director, general partner, manager or managing member of a company, corporation or similar entity, such company, corporation or entity, as applicable; and (iv) any two or more Persons that have any agreement, arrangement or understanding (whether or not in writing) to act together for the purpose of acquiring, voting, holding or disposing of Common Interests; and the term ''beneficially owned'' and derivative or similar words shall have the meaning set forth in Regulation 13D–G under the Exchange Act. LLC Agreement Section 2.1 ''Definitions''.

[10] ''Member(s)'' means the Sole Member and all Additional Members admitted pursuant to Section 4.3(a). LLC Agreement Section 2.1 ''Definitions''.

[11] ''Percentage Interest'' shall mean, with respect to any Member, the ratio of the number of Common Interests held by such Member to the total of all of the issued and outstanding Common Interests, expressed as a percentage. LLC Agreement Section 2.1 ''Definitions''.

record or beneficially, an aggregate amount of Common Interests which would result in more than twenty percent (20%) Percentage Interest level in Maple Merger Sub (the ''Concentration Limitation'').

Section 7.2(b) states that the Concentration Limitation shall apply to each Person (other than the Sole Member) unless and until: (i) Such Person shall have delivered to the Sole Member and ISE a notice in writing, not less than 45 days (or such shorter period as the Sole Member and ISE shall expressly consent to) prior to the acquisition of any Common Interests that would cause such Person (either alone or together with its Related Persons) to exceed the Concentration Limitation, of such Person's intention to acquire such ownership; (ii) the Sole Member and ISE shall each have consented to expressly permit such ownership; and (iii) such waiver shall have been filed with, and approved by, the SEC under Section 19(b) of the Exchange Act and shall have become effective thereunder.

Section 7.2(c) states that in exercising their discretion under Section 7.2(b), the Sole Member and ISE shall have determined that (i) such beneficial ownership of Common Interests by such Person, either alone or together with its Related Persons, will not impair the ability of the Maple Merger Sub and ISE to carry out its functions and responsibilities, including but not limited to, under the Exchange Act and is otherwise in the best interests of the Maple Merger Sub, its Members and ISE; (ii) such beneficial ownership of Common Interests by such Person, either alone or together with its Related Persons, will not impair the ability of the SEC to enforce the Exchange Act; (iii) neither such Person nor its Related Persons are subject to any applicable ''statutory disqualification'' (within the meaning of Section 3(a)(39) of the Exchange Act); and (iv) neither such Person nor its Related Persons is an ''Exchange Member'' (as such term is defined in the Constitution of the ISE). In making the determinations referred to in the immediately preceding sentence, the Sole Member and ISE may impose such conditions and restrictions on such Person and its Related Persons owning any Common Interests entitled to vote on any matter as the Sole Member and ISE may each deem necessary, appropriate or desirable in furtherance of the objectives of the Exchange Act and the governance of Maple Merger Sub.

Beginning after Commission approval of this proposed rule change, Maple Merger Sub shall provide the Commission with written notice ten (10) days prior to the closing date of any transaction that results in a Person's Percentage Interest, alone or together with any Related Persons, meeting or crossing the threshold level of 5% or the successive 5% Percentage Interest levels of 10% and 15%.

ISE believes that these provisions provide the Commission with the authority to review and subject to public comment any substantial transfer of ownership that may have the potential to affect ISE's regulatory responsibilities regarding the Facility.

ISE believes that these transfer restrictions, together with the Voting Limitation and Concentration Limitation, are adequately designed to prohibit any Person, either alone or with its Related Persons, from having the power to control a substantial number of outstanding votes entitled to be cast on any matter, and more importantly, that may be adverse to ISE's regulatory oversight responsibilities. Moreover, ISE believes that these provisions serve to protect the integrity of ISE's and the Commission's regulatory oversight responsibilities and allows the Commission to review the acquisition of substantial ownership or voting power by any Person.

Regulatory Jurisdiction Over Sole Member

ISE will regulate Maple Merger Sub as an operator of a facility of the Exchange. ISE has responsibility under the Exchange Act for the Facility. The Sole Member of Maple Merger Sub, as owner and operator of the Facility, will also be subject to the SEC's jurisdiction. In this regard, Section 10.2 of the LLC Agreement provides that the Sole Member acknowledges that to the extent that they are related to the business of Maple Merger Sub or the Facility, the books, records, premises, officers, directors, agents and employees of the Sole Member shall be deemed to be the books, records, premises, officers, directors, agents and employees of ISE for purposes of and subject to oversight pursuant to the Exchange Act. Furthermore, the books, records, premises, officers, directors, agents and employees of Maple Merger Sub shall be deemed to be the books, records, premises, officers, directors, agents and employees of the ISE for purposes of and subject to oversight pursuant to the Exchange Act. In addition, the books and records of Maple Merger Sub will be kept within the U.S.[12]

Section 10.3(a) requires that confidential information pertaining to Maple Merger Sub, the Facility or the self-regulatory function of ISE (including but not limited to disciplinary matters, trading data, trading practices and audit information) contained in the books and records of Maple Merger Sub shall: (i) Not be made available to any Persons (other than as provided in the next sentence) other than to those officers, directors, employees and agents of the Maple Merger Sub that have a reasonable need to know the contents thereof; (ii) be retained in confidence by the Maple Merger Sub and the officers, directors, employees and agents of the Maple Merger Sub; and (iii) not be used for any commercial purposes. Nothing in the LLC Agreement shall be interpreted as to limit or impede the rights of the Commission to access and examine such confidential information pursuant to the federal securities laws and the rules and regulations thereunder, or to limit or impede the ability of officers, directors, employees or agents of Maple Merger Sub to disclose such confidential information to the Commission.[13]

ISE believes that these provisions would help to ensure the Sole Member and Maple Merger Sub's books and records by the Commission and, to the extent the Sole Member and Maple Merger Sub's books and records relate to the operation or administration of the Facility would help enable the Commission to carry out its regulatory responsibilities regarding Maple Merger Sub.

Under Section 10.2(c) of the LLC Agreement, Maple Merger Sub, its Members, the Facility and officers, directors, agents, and employees of Maple Merger Sub and its Members irrevocably submit to the jurisdiction of the U.S. federal courts, the Commission and ISE, for the purposes of any suit, action or proceeding pursuant to the U.S. federal securities laws, the rules or regulations thereunder, directly arising out of, or relating to, Maple Merger Sub or the Facility activities or Section 10.2 of the LLC Agreement (except that such jurisdictions shall also include Delaware for any such matter relating to the organizational or internal affairs of Maple Merger Sub), and waives, and agrees not to assert by way of motion, as a defense or otherwise in any such suit, action or proceeding, any claims that it is not personally subject to the jurisdiction of the Commission, that the suit, action or proceeding is an inconvenient forum or that the venue of the suit, action or proceeding is improper, or that the subject matter

[12] LLC Agreement, Section 10.2(a).

[13] LLC Agreement, Section 10.3.

hereof may not be enforced in or by such courts or agency.

Under Section 10.2(d) of the LLC Agreement, Maple Merger Sub, its Members, the Facility and officers, directors, agents, and employees of Maple Merger Sub and its Members agree to comply with the federal securities laws and the rules and regulations thereunder and shall cooperate with ISE pursuant to its regulatory authority and the provisions of the LLC Agreement and the Commission; and to engage in conduct that fosters and does not interfere with ISE's ability 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 mechanisms of a free and open market and a national market system; and, in general, to protect investors and the public interest.

Section 10.2(e) provides that Maple Merger Sub and each Member shall take such action as is necessary to ensure that Maple Merger Sub's and such Member's officers, directors and employees consent in writing to the application to them of the applicable provisions of Section 10.2(b), (c) and (d), as applicable, with respect to their Maple Merger Sub-related activities.

The Exchange believes that these provisions will serve as notice to the Sole Member and Maple Merger Sub that they will be subject to the jurisdiction of the U.S. federal courts, the Commission and the ISE. It is imperative that regulatory cooperation is assured from the Sole Member, Maple Merger Sub and the Facility, regardless of their business location, country of domicile or other circumstance which the Commission may deem to have the potential to be adverse to the regulatory responsibilities and interests of the ISE, the Commission, or the U.S. federal courts. Accordingly, these provisions ensure that, should an occasion arise that requires regulatory cooperation or jurisdictional submission from the Sole Member or Maple Merger Sub; such party's cooperation will be forthcoming and uncontested.

Fair Representation of Trading Participants, or EAMs

ISE believes that the Maple Merger Sub company structure assures the fair representation of ISE Members, its trading participants, in the selection of its directors and administration of its affairs, and satisfies Commission requirements in that one or more directors shall be representative of issuers and investors and not be associated with a member of the exchange, broker, or dealer.

In order to exercise trading privileges on ISE Stock, a broker-dealer must be an approved EAM of ISE. There is only one type of EAM membership for both options trading on ISE and equities trading on ISE Stock. When an applicant is approved under ISE rules as an EAM, the member is issued an EAM Exchange Right. Under the ISE Constitution, holders of EAM Exchange Rights, or EAMs, have the right to elect two members (the ''EAM Directors'') of the Board of Directors of ISE (the ''ISE Board''). Nominees for election to the ISE Board to serve as Industry Directors, including EAM Directors, are currently made by the Exchange's Nominating Committee, which is not a committee of the ISE Board, and is comprised of representatives of the holders of each EAM Exchange Right. ISE Members also may nominate Industry Director candidates for election to the ISE Board by petition. Accordingly, since trading participants on ISE Stock must be EAMs, and since EAMs have the right to elect EAM Directors of the ISE Board, the ISE believes that ISE Stock trading participants are fairly represented on the ISE Board.

DE Operating Agreement

As discussed above, Direct Edge will be the sole owner of Maple Merger Sub, and Maple Merger Sub will operate the Facility as a facility of ISE. Because the Facility will be a facility of ISE, ISE will have regulatory responsibility under the Exchange Act for the Facility. Because Direct Edge is the sole owner of the operator of the ISE's Facility, the DE Operating Agreement will include certain provisions that are designed to preserve the independence of the ISE's self-regulatory function with respect to the Facility, enable the Facility to operate in a manner that complies with the federal securities laws, including the objectives of Section 6(b) and 19(g) of the Exchange Act and facilitate the ability of the Exchange and the Commission to fulfill their regulatory and oversight obligations over the Facility under the Exchange Act.

For example, Section 7.7 of the DE Operating Agreement which contains provisions requiring supermajority and majority votes of the Board of Directors of Direct Edge in connection with certain activities that could apply to the ISE as the entity with regulatory responsibility for the Facility, provides that nothing in Section 7.7 will be applicable where the application of the provision would interfere with the effectuation of any decisions by the ISE Board relating to its regulatory functions (including disciplinary matters) or the structure of the market ISE regulates or would interfere with the ability of ISE to carry out its responsibilities under the Exchange Act as determined by the ISE Board, which functions or responsibilities include the ability of the ISE as a self-regulatory organization to prevent fraudulent and manipulative acts and practices; promote just and equitable principles of trade; foster cooperation and coordination with Persons engaged in regulating, clearing, settling, processing information with respect to, and facilitating transactions in securities; remove impediments to and perfect the mechanism of a free and open market and a national market system; and, in general, protect investors and the public interest. In addition, Section 7.7(i) provides that a member of Direct Edge may transfer its ownership interest without the approval of the Direct Edge Board or any members of Direct Edge if such transfer is required to comply with the requirements of a governmental entity or any self-regulatory organization.

The DE Operating Agreement also includes ownership and voting limitations. For example, Section 12.1 of the DE Operating Agreement relates to ownership and voting concentration limitations and provides that no Person, either alone or together with its Related Persons (as defined in the DE Operating Agreement): (i) May own, directly or indirectly, of record or beneficially, equity units of the Sole Member representing in the aggregate a percentage interest of more than 40%; (ii) may, if they are a holder of EAM Rights (as defined in the LLC Agreement), own, directly or indirectly, of record or beneficially, equity units of the Sole Member representing in the aggregate a percentage interest of more than 20%; and (iii) may, directly, indirectly or pursuant to any voting trust, agreement, plan or other arrangement, vote or cause the voting of equity units or give any consent or proxy with respect to equity units of the Sole Member representing a percentage interest of more than 20%, nor may they enter into any agreement, plan or other arrangement with any other Person, either alone or together with Related Persons, under circumstances that would result in the equity units that are subject to such agreement, plan or other arrangement not being voted on any matter or matters or any proxy relating thereto being withheld, where the effect of such agreement, plan or other

arrangement would be to enable any Person, either alone or together with their Related Persons, to vote, possess the right to vote or cause the voting of equity units of the Sole Member that would represent a percentage interest of more than 20%. The concentration limitations set forth in Section 12.1 of the DE Operating Agreement do not apply to ISE Holdings for so long as ISE is a wholly owned subsidiary of ISE Holdings. The limitations set forth in (i) and (iii) above may be waived by the board of managers of the Sole Member by amendment to the DE Operating Agreement adopted by the board of managers if, in connection with the adoption of such amendment, the board adopts a resolution stating that that the board has determined that the amendment: (i) Will not impair the ability of ISE to carry out its functions and responsibilities under the Exchange Act and the rules and regulations thereunder, (ii) is otherwise in the best interests of the Sole Member and its members and the Maple Merger Sub; and (iii) will not impair the ability of the SEC to enforce the Exchange Act and the rules and regulations thereunder. Such amendment shall not be effective unless it is filed with and approved by the SEC. In making the determinations referred to in Section 12.1(b), the board of managers of the Sole Member may impose on the Person in question and its Related Persons such conditions and restrictions as it may in its sole discretion deem necessary, appropriate or desirable in furtherance of the objectives of the Exchange Act, and the rules under the Exchange Act, and the governance of the Maple Merger Sub.

The DE Operating Agreement contains a number of provisions designed to ensure that ISE has sufficient access to the books and records of the Sole Member. For example, Section 11.2 of the DE Operating Agreement relates to access to and preservation of confidentiality of the books and records and other confidential information and provides that the books, records, premises, officers, managers, agents and employees of the Sole Member shall be deemed to be the books, records, premises, officers, managers, agents and employees of ISE to the extent that they are related to the operation or administration of Maple Merger Sub for purposes of and subject to oversight pursuant to the Exchange Act. Furthermore, for as long as the Sole Member controls, directly or indirectly, Maple Merger Sub, the books and records, as well as any confidential information of the Maple Merger Sub relating to the self regulatory function of the ISE, shall be subject at all times to inspection and copying by the SEC and ISE provided that such books and records are related to the operation or administration of Maple Merger Sub. Section 11.2 of the DE Operating Agreement also provides for the confidentiality of all books and records of the Maple Merger Sub that reflect confidential information pertaining to the self regulatory function of ISE and that such books and records shall not be used for any non-regulatory purposes.

The DE Operating Agreement contains a number of provisions specifically related to the SRO function. For example, Section 14.1 of the DE Operating Agreement provides that the managers, officers, employees and agents of the Sole Member shall not take any actions that would interfere with the effectuation of any decisions by ISE in its capacity as an SRO relating to its regulatory functions (including disciplinary matters) or which would interfere with the ability of ISE in its capacity as an SRO to carry out its responsibilities under the Exchange Act. Section 14.2 of the DE Operating Agreement provides that the Sole Member shall cooperate with the SEC and ISE, as applicable, pursuant to and to the extent of their respective regulatory authority. The officers, managers, employees and agents of the Sole Member additionally are deemed to agree to: (i) Comply with the U.S. federal securities laws and the rules and regulations thereunder and (ii) cooperate with the SEC and ISE in respect of the SEC's oversight responsibilities regarding Maple Merger Sub and ISE and the self-regulatory functions and responsibilities of ISE. Section 14.3 of the DE Operating Agreement provides that the Sole Member and its officers, managers, employees and agents, by virtue of their acceptance of such position, shall be deemed to irrevocably submit to the jurisdiction of the United States federal courts, the SEC and ISE, as applicable, for the purposes of any suit, action or proceeding pursuant to the U.S. federal securities laws and the rules and regulations thereunder arising out of, or relating to, the activities of Maple Merger Sub, and by virtue of their acceptance of any such position, shall be deemed to waive, and agree not to assert by way of motion, as a defense or otherwise in any such suit, action or proceeding, any claims that it or they are not personally subject to the jurisdiction of the United States federal courts, the SEC or ISE that the suit, action or proceeding is an inconvenient forum or that the venue of the suit, action or proceeding is improper, or that the subject matter of that suit, action or proceeding may not be enforced in or by such courts or agency. The Sole Member and its officers, managers, employees and agents also agree that they will maintain an agent, in the United States, for the service of process of a claim arising out of, or relating to, the activities of Maple Merger Sub, and agree to notify the other parties hereto of the name and address of such agent.

Finally, the DE Operating Agreement contains provisions designed to ensure that any changes to the DE Operating Agreement be first reviewed by ISE to determine whether such change must be filed with the SEC. For example, Section 15.2 of the DE Operating Agreement provides that before any amendment to any provision of the DE Operating Agreement shall be effective, such amendment shall be submitted to ISE and if ISE determines that such amendment must be filed with, or filed with and approved by, the SEC before the amendment may be effective under Section 19 of the Exchange Act and the rules promulgated under the Exchange Act or otherwise, then the proposed amendment to the DE Operating Agreement shall not be effective until filed with, or filed with and approved by, the SEC, as the case may be.

ISE Holding's Certificate of Incorporation and Bylaws

The Exchange proposes to amend certain provisions of the Certificate of Incorporation and Bylaws (together the ''Corporate Documents'') of ISE Holdings in connection with the contemplated ownership and operation of two (2) national securities exchanges by Direct Edge. As a result of ISE Holdings owning a 31.54% equity interest in Direct Edge and possessing certain contractual rights and obligations with respect to Direct Edge, ISE Holdings may, in the future, control, indirectly subsidiary exchanges of Direct Edge. Accordingly, the Exchange proposes to broaden certain references that are currently limited to ISE (the sole registered national securities exchange controlled by ISE Holdings) to cover these two contemplated Direct Edge subsidiary exchanges. Thus, the Exchange proposes to replace certain references to ISE with each ''Controlled National Securities Exchange.'' These references appear in the ownership and voting limitations sections of the Corporate Documents, as well as other miscellaneous sections, including, but not limited to, the confidentiality section, the books and records section,

the compliance with laws section and the amendments section.

ISE Rules

The Exchange proposes to amend the language in Rule 312 (Limitation on Affiliation between the Exchange and Members) to reflect that this provision now covers Maple Merger Sub, as an operator of the Facility.

Subsequent to the effectuation of the transactions discussed above, ISE Holdings will have a 31.54% equity interest in Direct Edge, which wholly owns and operates Direct Edge ECN LLC (''DE ECN'') which displays its quotes on ISE. DE ECN currently, and will continue to after the transactions are effected, routes orders into ISE Stock. Due to the combination of ISE Holdings owning a 31.54% equity interest in DE ECN's parent company, Direct Edge, and DE ECN routing orders into ISE Stock, DE ECN will be deemed to be a facility of ISE, as that term is defined in Section 3(a)(2) of the Exchange Act.

Further, upon closing of the transaction, ISE and Maple Merger Sub will be affiliated with DE ECN, which is a member of ISE and a wholly owned subsidiary of Direct Edge.

Recognizing that the Commission has previously expressed concern regarding (1) the potential for conflicts of interest in instances where an exchange is affiliated with one of its members, and (2) the potential for informational advantages that could place an affiliated member of an exchange at a competitive advantage vis-à-vis the other non-affiliated members, ISE proposes to amend Rule 312 to permit the proposed affiliation subject to several conditions and limitations.

Accordingly, the Exchange is proposing to adopt subsection (b) to Rule 312 to require that for so long as the Exchange is affiliated with DE ECN or DE ECN is a facility of the Exchange: [14] (1) Financial Industry Regulatory Authority (''FINRA''), a self-regulatory organization unaffiliated with the Exchange or any of its affiliates, will carry out oversight and enforcement responsibilities as the designated examining authority designated by the Commission pursuant to Rule 17d–1 of the Exchange Act with the responsibility for examining DE ECN for compliance with applicable financial responsibility rules; (2) the Exchange shall contract with a non-affiliated self-regulatory organization to regulate and oversee the activities of DE ECN, pursuant to Rule 17d–2 under the Exchange Act; (3) the Exchange shall provide said non-affiliated self-regulatory organization with information regarding all exception reports, alerts, complaints, trading errors, cancellations, investigations, and enforcement matters (collectively, ''Exceptions'') in which DE ECN is identified as a participant that has potentially violated Exchange or SEC rules, in an easily accessible manner, and said non-affiliated self-regulatory organization shall provide a report to the Exchange quantifying Exceptions on not less than a quarterly basis; (4) the Exchange, on behalf of Direct Edge, shall establish and maintain procedures and internal controls reasonably designed to ensure that DE ECN does not develop or implement changes to its systems on the basis of nonpublic information obtained as a result of its affiliation with the Exchange until such information is available generally to similarly situated members of the Exchange in connection with the provision of inbound order routing to the Exchange; (5) in the event that DE ECN acts as an introducing broker for subscribers of DE ECN who are not members of the Exchange, then DE ECN's role as introducing broker is limited to its role as introducing broker to DE ECN; (6) DE ECN will not engage in any business other than operating as an ECN and other than acting as an introducing broker as described above; (7) the affiliation of DE ECN is subject to the conditions set forth above and is granted on a temporary basis, for not longer than one year from the date of Commission approval of this filing.

The Exchange proposes to adopt subsection (c) of ISE Rule 2108 (Order Routing and Route Out Facility) to expand the scope of the rule to cover DE ECN. Specifically, proposed Rule 2108(c), requires that the books, records, premises, officers, directors, agents, and employees of the DE ECN, as a facility of the Exchange, shall be deemed to be the books, records, premises, officers, directors, agents, and employees of the Exchange for purposes of and subject to oversight pursuant to the Exchange Act. The books and records of the DE ECN, as a facility of the Exchange, shall be subject at all times to inspection and copying by the Exchange and the Commission.

2. Statutory Basis

The Exchange believes that the proposed rule change is consistent with the provisions of Section 6 of the Exchange Act,[15] in general, and with Sections 6(b)(1) and (b)(5) of the Exchange Act,[16] in particular, in that the proposal enables the Exchange and the Facility to be so organized as to have the capacity to be able to carry out the purposes of the Exchange Act and to comply with and enforce compliance by members and persons associated with members with provisions of the Exchange Act, the rules and regulations thereunder, and SRO rules, and 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.

B. Self-Regulatory Organization's Statement on Burden on Competition

The proposed rule change does not impose any burden on competition that is not necessary or appropriate in furtherance of the purposes of the Act.

C. Self-Regulatory Organization's Statement on Comments on the Proposed Rule Change Received from Members, Participants or Others

The Exchange has not solicited, and does not intend to solicit, comments on this proposed rule change. The Exchange has not received any unsolicited written comments from members or other interested parties.

III. Date of Effectiveness of the Proposed Rule Change and Timing for Commission Action

Within 35 days of the date of publication of this notice in the **Federal Register** or within such longer period (i) as the Commission may designate up to 90 days of such date if it finds such longer period to be appropriate and publishes its reasons for so finding or (ii) as to which the Exchange consents, the Commission will:

A. by order approve such proposed rule change, or

B. institute proceedings to determine whether the proposed rule change should be disapproved.

IV. Solicitation of Comments

Interested persons are invited to submit written data, views, and arguments concerning the foregoing, including whether the proposed rule change is consistent with the Act.

[14] E-mail from Joseph W. Ferrarro III, Associated General Counsel, Exchange, to Heidi Pilpel, Attorney, Division of Trading and Markets, Commission, dated November 7, 2008.

[15] 15 U.S.C. 78f.

[16] 15 U.S.C. 78f(b)(1), (5).

Comments may be submitted by any of the following methods:

Electronic Comments

- Use the Commission's Internet comment form *(www.sec.gov/rules/sro.shtml);* or
- Send an e-mail to *rule-comments@sec.gov.* Please include File Number SR–ISE–2008–85 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–ISE–2008–85. This file number should be included on the subject line if e-mail is used. To help the Commission process and review your comments more efficiently, please use only one method. The Commission will post all comments on the Commission's Internet Web site *(http://www.sec.gov/rules/sro.shtml).* Copies of the submission, all subsequent amendments, all written statements with respect to the proposed rule change that are filed with the Commission, and all written communications relating to the proposed rule change between the Commission and any person, other than those that may be withheld from the public in accordance with the provisions of 5 U.S.C. 552, will be available for inspection and copying in the Commission's Public Reference Room, 100 F Street, NE., Washington, DC 20549, on official business days between the hours of 10 a.m. and 3 p.m. Copies of the filing also will be available for inspection and copying at the principal office of the Exchange. All comments received will be posted without change; the Commission does not edit personal identifying information from submissions. You should submit only information that you wish to make available publicly. All submissions should refer to File Number SR–ISE–2008–85 and should be submitted on or before December 8, 2008.

For the Commission, by the Division of Trading and Markets, pursuant to delegated authority.[17]

Florence E. Harmon,

Acting Secretary.

[FR Doc. E8–27157 Filed 11–14–08; 8:45 am]

BILLING CODE 8011–01–P

[17] 17 CFR 200.30–3(a)(12).

SECURITIES AND EXCHANGE COMMISSION

[Release No. 34–58915; File No. SR–Phlx–2008–68]

Self-Regulatory Organizations; Notice of Filing and Immediate Effectiveness of Proposed Rule Change and Amendment No. 1 Thereto by NASDAQ OMX PHLX, Inc. Relating to Settlement Values and Spot Prices for Foreign Currency Options

November 6, 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 30, 2008, NASDAQ OMX PHLX, Inc. (''Phlx'' or ''Exchange'') filed with the Securities and Exchange Commission (''SEC'' or ''Commission'') the proposed rule change as described in Items I and II below, which Items have been prepared by the Exchange. On November 6, 2008, the Exchange filed Amendment No. 1 to the proposed rule change. The Commission is publishing this notice to solicit comments on the proposed rule change, as amended, from interested persons.

I. Self-Regulatory Organization's Statement of the Terms of Substance of the Proposed Rule Change

The Exchange, pursuant to Section 19(b)(1) of the Act[3] and Rule 19b–4 thereunder,[4] proposes to modify the definition of the closing settlement value for foreign currency options traded on the Exchange (''FCOs'').

The text of the proposed rule change is available on the Exchange's Web site at *http://www.phlx.com/regulatory/reg_rulefilings.aspx.*

II. Self-Regulatory Organization's Statement of the Purpose of, and Statutory Basis for, the Proposed Rule Change

In its filing with the Commission, the Exchange included statements concerning the purpose of and basis for the proposed rule change and discussed any comments it received on the proposed rule change. The text of these statements may be examined at the places specified in Item IV below. The Exchange has prepared summaries, set forth in sections A, B, and C below, of the most significant aspects of such statements.

[1] 15 U.S.C. 78s(b)(1).

[2] 17 CFR 240.19b–4.

[3] 15 U.S.C. 78s(b)(1).

[4] 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 purpose of the proposed rule change is to indicate that the spot price at 12:00:00 Eastern Time (noon) on the last trading day prior to expiration will be the closing settlement value for FCOs instead of the Noon Buying Rate.

The Exchange currently uses the Noon Buying Rate, which it receives from the Federal Reserve Bank of New York (the ''New York Fed''),[5] for the purposes of setting the closing settlement values of the Australian dollar, the Euro, the British pound, the Canadian dollar, the Swiss franc and the Japanese yen. Going forward, the closing settlement value for FCOs will be the spot price at 12:00:00 Eastern Time (noon) on the last trading day prior to expiration.

By way of background, for all currencies underlying FCOs trading on the Exchange, it disseminates closing (final) settlement values on its Web site, and disseminates modified spot prices over the facilities of the Consolidated Tape Association (''CTA'') at least once every fifteen seconds while the Exchange is open for trading.[6] Spot prices are FCO quotations obtained by the Exchange from a foreign currency price quotation dissemination system selected by the Exchange.[7] The Exchange calculates averages of bid and ask values provided by Tenfore Systems Limited (''Tenfore'') (the ''Tenfore Values'') to get spot prices for FCOs. The Exchange then calculates modified spot prices for each of the foreign currencies underlying its FCOs by applying multipliers to the spot prices (100 for the British pound, the Australian dollar, the Canadian dollar and the Swiss franc; and 10,000 for the Japanese yen). Because the Tenfore Values are expressed in foreign currency units per U.S. dollar for the Japanese yen, the Canadian dollar and the Swiss franc (rather than in U.S. dollars per unit of foreign currency as for other

[5] On October 2, 2007, the New York Fed announced its decision to discontinue the publication of foreign exchange rates such as the Noon Buying Rate on December 31, 2008, given the availability of alternate market-based sources for these rates. The Exchange believes that other markets that trade foreign currency options, such as for example the International Securities Exchange (''ISE''), also use foreign currency rates provided by the New York Fed. *See* ISE Rule 2212.

[6] *See* Securities Exchange Act Release Nos. 55513 (March 22, 2007), 72 FR 14636 (March 28, 2007) (SR–Phlx–2007–28) and 56034 (July 10, 2007), 72 FR 38853 (July 16, 2007) (SR–Phlx–2007–34).

[7] *See* Phlx Rule 1000(b)16.

currencies such as the Euro), in calculating spot market prices for these three currencies the Exchange uses the inverse of the average of the Tenfore Values (that is, one divided by the average of the Tenfore Values).[8]

Settlement Value

Currently, the Exchange uses the Noon Buying Rate for the closing settlement value of the Australian dollar, the Euro, the British pound, the Canadian dollar, the Swiss franc and the Japanese yen. The closing settlement value for options on the Japanese yen, the Canadian dollar and the Swiss franc is an amount equal to one divided by the day's announced Noon Buying Rate, as determined by the New York Fed on the expiration date, rounded to the nearest .0001 (except in the case of the Japanese yen where the amount is rounded to the nearest .000001). If the Noon Buying Rate is not announced by 5 p.m. eastern time on expiration day, the closing settlement value is based upon the most recently announced Noon Buying Rate, unless the Exchange determines to apply an alternative closing settlement value as a result of extraordinary circumstances.

Going forward, the closing settlement value for FCOs will be the spot price at 12:00:00 Eastern Time (noon) on the last trading day prior to expiration as calculated by the supplier of the data,[9] and the Exchange will no longer need to calculate an average of the Tenfore Values nor calculate inverse values for the Japanese yen, the Canadian dollar and the Swiss franc to get proper spot prices.[10]

[8] The Exchange now gets Tenfore Values from Thomson Financial LLC (''Thomson'') and uses them to calculate spot and modified spot prices. It is expected that in the future another entity, QuoteMedia Inc. (''QuoteMedia''), will use the Tenfore Values to calculate spot prices in the same way that the Exchange now does, and will provide the spot prices to NASDAQ OMX in the proper format (already inverted for the Japanese yen, the Canadian dollar, and the Swiss franc). NASDAQ OMX will then apply the relevant multipliers to the spot prices to calculate modified spot prices. As part of NASDAQ OMX, the Exchange will have access to the spot prices and the modified spot prices on or after November 3, 2008, and will no longer need to perform any calculations regarding them. The Exchange will continue to disseminate modified spot prices over the facilities of the CTA, or through one or more major market data vendors, at least once every fifteen seconds while the Exchange is open for trading.

[9] Similarly to modified spot prices, the Exchange will disseminate settlement values over the facilities of the CTA or through one or more major market data vendors, such that settlement values should be available to users at the same time.

[10] The Exchange is proposing conforming changes to its Rule 1079.

2. Statutory Basis

The Exchange believes that its proposal is consistent with Section 6(b) of the Act [11] in general, and furthers the objectives of Section 6(b)(5) of the Act [12] in particular, in that it is designed to promote just and equitable principles of trade, to remove impediments to and perfect the mechanism of a free and open market and a national market system, and, in general to protect investors and the public interest, by enabling the Exchange to continue providing closing settlement values for FCOs to its customers.

B. Self-Regulatory Organization's Statement on Burden on Competition

The Exchange does not believe that the proposed rule change will impose any burden on competition not necessary or appropriate in furtherance of the purposes of the Act.

C. Self-Regulatory Organization's Statement on Comments on the Proposed Rule Change Received From Members, Participants or Others

No written comments were either solicited or received.

III. Date of Effectiveness of the Proposed Rule Change and Timing for Commission Action

Because the foregoing proposed rule change does not: (i) Significantly affect the protection of investors or the public interest; (ii) impose any significant burden on competition; and (iii) become operative for 30 days from the date on which it was filed, or such shorter time as the Commission may designate, it has become effective pursuant to Section 19(b)(3)(A) of the Act [13] and Rule 19b–4(f)(6) thereunder.[14]

The Exchange has requested that the Commission waive the 30-day operative delay. The Commission believes that waiver of the 30-day operative delay is consistent with the protection of investors and the public interest. The Commission notes that this filing allows the Exchange to continue providing FCO data (with no substantive changes to the data or its calculation) to public customers. As the Exchange is consolidating certain systems with other NASDAQ OMX Group systems, the Exchange believes that waiving the 30-day operative delay will allow the Exchange to provide FCO data in the most efficient and cost-effective way, and in the timeliest manner, to the benefit of investors. The Exchange believes that on or after November 3, 2008, when the Exchange will no longer need to conduct data calculations, investors should find that they are able to access FCO data faster and at times when it previously would not be available. Accordingly, the Commission designates the proposal to be operative upon filing with the Commission.[15]

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.

[11] 15 U.S.C. 78f(b).

[12] 15 U.S.C. 78f(b)(5).

[13] 15 U.S.C. 78s(b)(3)(A).

[14] 17 CFR 240.19b–4(f)(6). Rule 19b–4(f)(6) also requires the self-regulatory organization to give the Commission 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 designated by the Commission. Phlx has satisfied the five-day pre-filing requirement.

IV. Solicitation of Comments

Interested persons are invited to submit written data, views, and arguments concerning the foregoing, including whether the proposed rule change is consistent with the Act. Comments may be submitted by any of the following methods:

Electronic Comments

- Use the Commission's Internet comment form (*http://www.sec.gov/rules/sro.shtml*); or
- Send an e-mail to *rule-comments@sec.gov.* Please include File Number SR–Phlx–2008–68 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–Phlx–2008–68. 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

[15] For purposes only of waiving the 30-day operative delay of this proposal, the Commission has considered the proposed rule's impact on efficiency, competition, and capital formation. 15 U.S.C. 78c(f).

proposed rule change between the Commission and any person, other than those that may be withheld from the public in accordance with the provisions of 5 U.S.C. 552, will be available for inspection and copying in the Commission's Public Reference Room, on official business days between the hours of 10 a.m. and 3 p.m. Copies of the filing also will be available for inspection and copying at the principal office of the Exchange. All comments received will be posted without change; the Commission does not edit personal identifying information from submissions. You should submit only information that you wish to make available publicly. All submissions should refer to File Number SR–Phlx–2008–68 and should be submitted on or before December 8, 2008.

For the Commission, by the Division of Trading and Markets, pursuant to delegated authority.[16]

Florence E. Harmon,

Acting Secretary.

[FR Doc. E8–27139 Filed 11–14–08; 8:45 am]

BILLING CODE 8011–01–P

SECURITIES AND EXCHANGE COMMISSION

[Release No. 34–58901; File No. SR–OCC–2008–06]

Self-Regulatory Organizations; The Options Clearing Corporation; Notice of Filing of a Proposed Rule Change Relating to the Stock Loan/Hedge Program

November 5, 2008.

Pursuant to section 19(b)(1) of the Securities Exchange Act of 1934 (''Act''),[1] notice is hereby given that on February 25, 2008, The Options Clearing Corporation (''OCC'') filed with the Securities and Exchange Commission (''Commission'') and on October 7, 2008, amended the proposed rule change described in Items I, II, and III below, which items have been prepared primarily by OCC. The Commission is publishing this notice to solicit comments from interested persons.

I. Self-Regulatory Organization's Statement of the Terms of Substance of the Proposed Rule Change

The proposed rule change would mitigate inconsistencies that may result under the Stock Loan/Hedge Program.

II. Self-Regulatory Organization's Statement of the Purpose of, and Statutory Basis for, the Proposed Rule Change

In its filing with the Commission, OCC 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. OCC has prepared summaries, set forth in sections (A), (B), and (C) below, of the most significant aspects of these statements.[2]

(A) Self-Regulatory Organization's Statement of the Purpose of, and Statutory Basis for, the Proposed Rule Change

OCC has decided to take certain steps to provide for the continued growth and development of its Stock Loan/Hedge Program (''Program''). These include (1) elimination of the ability of clearing members to carry stock loan and borrow positions without depositing risk margin and (2) adjusting the amount of required risk margin where stock loan collateral provided by the borrower to the lender exceeds the value of the borrowed stock.

Background and General Description of the Proposed Rule Change.

The Program is provided for in Article XXI of OCC's By-Laws and Chapter XXII of the Rules. It provides a means for OCC clearing members to submit certain stock loan/borrow transactions (''stock loan transactions'') to OCC for clearance. The stock and the stock loan collateral move through the facilities of The Depository Trust Company from the lending clearing member (''lender'') to the borrowing clearing member (''borrower''), and vice-versa when the stock is returned, in the same way that such transactions are ordinarily effected. Where the stock loan transaction is submitted to OCC for clearance, however, OCC is substituted as the lender to the borrower and the borrower to the lender. Thereafter, OCC guarantees performance of the stock loan transaction with respect to delivery and return of stock and collateral and the making of daily mark-to-market payments between the lender and borrower, which are effected through OCC's cash settlement system.

One advantage of submitting stock loan transactions to OCC is that the stock loan and borrow positions then reside in the clearing member's options accounts at OCC and to the extent that they offset the risk of options positions carried in the same account, may reduce the clearing member's margin requirement in the account. OCC's risk is, in turn, reduced by having the benefit of the hedge. Nevertheless, OCC currently permits qualified clearing members to elect to submit stock loan and borrow transactions to OCC on a ''margin ineligible basis,'' meaning that the positions are excluded from OCC's margin calculations for the account containing those positions. Margin-ineligible stock loan and borrow positions do not reduce the margin requirement for the account to reflect any offsetting value they might have, nor does OCC collect additional margin to reflect the risk of those positions. The election is made by each clearing member on an account-by-account basis so that all stock loan and borrow positions in a particular account are carried on a margin ineligible basis or none are. In order to carry stock loan and borrow positions on a margin ineligible basis, a clearing member must meet heightened standards of creditworthiness as set forth in Interpretation and Policy .06 under Section 1 of Article V of OCC's By-Laws.

While OCC believes that the current credit-based risk management approach has been adequate to date given historical Program activity levels, OCC also believes that a more conservative approach is warranted to provide for further growth of the Program and greater market volatility. OCC therefore seeks to better manage the market risk resulting from open stock loan and borrow positions by applying its standard margining approach to all such positions.

Another potential exposure that OCC seeks to address arises from the stock loan market practice of requiring the borrower to overcollateralize a position by giving the lender cash collateral equal to 102% of the position's current market value. OCC's rules provide that OCC's guarantee of Program transactions extends to the full value of the collateral exchanged as part of a stock loan transaction. Therefore, if a lender were to fail, even if the stock could be sold out at 100% of the marking price, the borrower would be left with a 2% deficiency, for which OCC would be liable. Managing this potential exposure will be accomplished by (a) an additional margin charge applied to lenders executing stock loans at 102% in an amount equal to the 2% excess collateral and (b) borrowers receiving a margin credit in an equal amount. These new margin charges/credits are independent of, and in addition to, the risk margin determined by the

[16] 17 CFR 200.30–3(a)(12).

[1] 15 U.S.C. 78s(b)(1).

[2] The Commission has modified the text of the summaries prepared by OCC.

''STANS'' margining system that will be collected and maintained from both lenders and borrowers.

In connection with the submission of this filing, OCC has confirmed with the Commission staff that the proposed rule change would not have adverse consequences to clearing members under Rule 15c3–1, the Commission's net capital rule.[3] Specifically, where stock loan/borrow transactions are submitted to OCC for clearance through the Program, any additional amount of margin required to be deposited with OCC as a result of such transactions shall be treated the same as any other portion of the OCC margin deposit and shall therefore not constitute an unsecured receivable and shall not be required to be deducted from net capital.

In order to minimize any potential disruptive impact associated with these changes in the margin treatment of stock loan and borrow positions, OCC would utilize two initial phase-in periods. There would be a one-month grace period (beginning from the date of Commission approval of this rule filing) before the changes are applied to any positions. For the next two months, all new positions must be submitted on a margin-eligible basis and will be subject to the overcollateralization provisions, but positions that were carried on a margin-ineligible basis as of the date of the approval order will not be required to be margined or subject to the overcollateralization provisions. After the end of that initial three-month period, all stock loan and borrow positions in all accounts would be carried on a margin-eligible basis and would be subject to the overcollateralization provisions, regardless of when the positions were established.

Rule Amendments Applicable to Changes in the Program.

OCC proposes the following amendments to its Rules to achieve the above-referenced initiative and accommodate and facilitate the continued growth and development of the Program.

1. Margin Requirements—Rule 601

OCC will amend Rule 601(e) to eliminate its current category of ''margin-ineligible'' accounts, and instead apply its standard margining approach to all Program positions using its ''STANS'' system. This change will become effective three months following the date of the Commission's order approving this rule filing. In addition, a new interpretation .06 would be added to Rule 601 setting forth the additional margin charges and credits, and the implementation schedule, applicable to stock loan and borrow positions that have collateral set at 102%.

2. Instructions to the Corporation—Rule 2201

Rule 2201(a) is proposed to be amended to provide that, with respect to standing instructions that clearing members provide to OCC, the requirement to notify OCC of the fact that the clearing member is approved to maintain stock loan positions and stock borrow positions in its accounts on a non-margined basis, and the account or accounts that are to be margin-ineligible, shall become inapplicable three months from the SEC's approval order. After that time, OCC will have eliminated the ability to carry any stock loan or borrow positions on a ''margin-ineligible'' basis.

3. Initiation of Stock Loans—Rule 2202

Rule 2202(f) is proposed to be amended to specify that, one month after the Commission's approval order, a member shall not be able to submit new stock loan transactions to OCC for clearance in a margin-ineligible account.

OCC believes that the proposed rule change is consistent with the purposes and requirements of the Act because it is designed to promote the prompt and accurate clearance and settlement of stock loan transactions, to foster cooperation and coordination with persons engaged in the clearance and settlement of such transactions, to remove impediments to and perfect the mechanism of a national system for the prompt and accurate clearance and settlement of such transactions, and, in general, to protect investors and the public interest. It accomplishes this purpose by applying margin requirements designed to enhance OCC's protection against the risk of carrying stock loan and borrow positions. The proposed rule change is not inconsistent with the existing rules of OCC, including any rules proposed to be amended.

(B) Self-Regulatory Organization's Statement on Burden on Competition

OCC does not believe that the proposed rule change would impose any material burden on competition.

(C) Self-Regulatory Organization's Statement on Comments on the Proposed Rule Change Received From Members, Participants, or Others

Written comments were not and are not intended to be solicited with respect to the proposed rule change, and none have been received.

III. Date of Effectiveness of the Proposed Rule Change and Timing for Commission Action

Within thirty-five 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 ninety 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–OCC–2008–06 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–OCC–2008–06. 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,

[3] 17 CFR 240.15c–3–1.

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 OCC and on OCC's Web site at *http://www.theocc.com/publications/rules/proposed_changes/sr_occ_08_06.pdf.* 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–OCC–2008–06 and should be submitted on or before December 8, 2008.

For the Commission by the Division of Trading and Markets, pursuant to delegated authority.[4]

Florence E. Harmon,

Acting Secretary.

[FR Doc. E8–27140 Filed 11–14–08; 8:45 am]

BILLING CODE 8011–01–P

[4] 17 CFR 200.30–3(a)(12).

DEPARTMENT OF STATE

[Public Notice 6426]

Establishment of an Online English Language Program

ACTION: Request for information.

SUMMARY: The United States Department of State's Bureau of Educational and Cultural Affairs (ECA) seeks to tap private sector ingenuity and capacity by partnering with the private sector to create an online English language learning and literacy series for economically disadvantaged youth outside the United States that will be made available without charge. Through English learning programs, traditionally underserved populations will gain access to diverse sources of information, the ability to participate in the global marketplace, and a better understanding of the values that shape responsible citizens of the world.

DATES: The Department will accept comments from the public up to December 17, 2008.

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

- Persons with access to the Internet may view this notice and provide comments by going to the regulations.gov Web site at: *http://www.regulations.gov/index.cfm.*
- *Mail (paper, disk, or CD-ROM submissions):* U.S. Department of State, Attn: Ms. Suzanne Matula, Office of English Language Programs, SA–44, 301 4th Street, SW., Room 304 Washington, DC 20547.
- *E-mail: ExchangesDirect@state.gov.* You must include the Title in the subject line of your message.

FOR FURTHER INFORMATION CONTACT: Ms. Suzanne Matula, Office of English Language Programs, (202) 453–8856; SA–44, 301 4th Street, SW., Room 304 Washington, DC 20547.

SUPPLEMENTARY INFORMATION: This Request for Information (RFI) is a general solicitation of public comments that seeks to gather input as to the best technical platforms and delivery mechanisms for this learning series (whose content will be provided by ECA) and to determine which private sector institutions are active in the development and integration of these platforms and mechanisms and which are able to provide these platforms free of charge

This RFI is issued solely for information and planning purposes and does not constitute a Request for Proposal (RFP). In accordance with FAR 15.209(c), responses to this RFI are not offers and will not be accepted by the Government to form a binding contract. The Government will not award a contract based on this RFI, nor will it pay for the information provided pursuant to this RFI. Responses to this RFI will be treated as general information only. Responses to this RFI will not be returned.

Background: The global demand for English language instruction is at an all time high. English is the ''entry point'' that allows people to participate in the increasingly globalized world economy, access diverse sources of information, broadens their understanding of democratic traditions and contributes more robustly to the socio-economic prosperity of their own families, communities and societies. In much of the world, demand for English language instruction far outpaces supply, and available instruction is often far beyond the financial means of the average language learner.

The United States Government (USG), academia and business leaders have a rare opportunity to work together to help the world's estimated 2 billion individuals desiring to learn English to master this universally-valued skill. Developing and providing a new means of gaining English language skills will be a powerful way for the USG and private sector to respond to what is both an unprecedented challenge and opportunity.

ECA wishes to collaborate with the best of U.S. business, NGO and academic communities to create an online English language literacy and communication series: *English Access Online.* This program will be sponsored by ECA's Office of English Language Programs, which creates and implements high quality, targeted English language programs overseas. More information on these programs can be found at *http://exchanges.state.gov/englishteaching/.*

Detail

Goals and Parameters

ECA seeks to develop a compelling, technologically innovative, multi-media online English language learning and literacy series that will be available free of charge to economically disadvantaged youth around the world. The typical user has been defined as a foreign secondary school student with little or no English language ability.

We seek proposals that have several or all of the following characteristics:

- Free and oriented to self-study so that all learners, from all economic backgrounds and geographic areas, have access and opportunity.
- Designed to encourage creative and critical thinking.
- Immersive, to allow interactive language learning, interpersonal connections and collaboration among language learners. We would like to consider virtual reality and 3–D environments.
- Multi-level, to allow progression from a novice-low level to an intermediate-high level of proficiency.
- Designed to use a variety of instructional technologies to support diverse learning styles.
- Designed to monitor and record user performance and select appropriate learning tasks based on the learner/user's demonstrated level of language proficiency.
- Designed to provide automated assessment and user performance tracking.
- Oriented around stories or themes that highlight American culture and values to provide a context for language learning, encourage critical thinking, and promote mutual understanding.
- Technologically scalable, so that individuals with varying levels of telecommunications infrastructure and capacity, and available hardware can access instruction.

To support learner autonomy and linkages across different national educational programs, the language learning framework for *English Access Online* will be based on the norms and guidelines of the National Council of State Supervisors for Languages

(NCSSFL), which in turn have equivalents in the Common European Framework of Reference (CEFR) for languages.

The NCSSFL approach uses Can-Do statements associated with different modes of language (i.e., listening, speaking, reading, writing) and a ten-level scale of language proficiency. There are 125 Can-Do statements associated with the five levels encompassed by this range of proficiency. For each Can-Do statement, there will be:

(a) An instructional component, which presents, explains, and models new linguistic and cultural content (one per Can-Do statement);

(b) A series of language-use tasks of varying levels of difficulty (called a ''lesson cycle''), which provides learners with multiple opportunities to practice and produce English in an immersive virtual reality environment (three lesson cycles per Can-Do statement × three difficulty levels × two tasks per difficulty level = 18 language-use tasks per Can-Do statement); and

(c) A series of feedback components, which provide learners with detailed feedback on their performance on specific language use tasks (three feedback components per lesson cycle × three lesson cycles per Can-Do statement = nine feedback components per Can-Do statement).

Request for Information: ECA has completed the first phase of the pedagogical development work for *English Access Online* and is in the process of identifying its potential content development partners. ECA, along with its content development partners, will be responsible for authoring the system's instructional content (creating scripts and storyboards, determining how instructional content will be presented, specifying the nature of language production tasks, specifying how feedback will be presented to the user, etc.).

ECA in this RFI is seeking private sector entities as partners to undertake software and application development, Web-enablement of the content, production (music, animation, video, etc.), and development and integration of a global and scaleable delivery mechanism and systems integration. ECA requests comment from any interested members of the public on the following questions, and is also seeking companies, universities, NGOs and other partners willing to contribute their resources, time and vision free of charge to develop these aspects of *English Access Online.*

1. Our vision is to provide *English Access Online* in a Web-based, virtual reality environment that would be of interest and engaging to young learners. Our preference is that learners be able to use *English Access Online* from any computer anywhere, and have opportunities for interactive learning. Is this the most appropriate delivery platform? If so, which virtual reality environments are most appropriate for this purpose? In not, would another platform be preferable? What interfaces would need to be purchased/developed to ''enable'' content on these platforms?

2. ECA would like *English Access Online* to be a long-term initiative that evolves as technology evolves. Of the available computing platforms, which are more or less suited to dynamic growth and incorporation of new technologies, including mobile technologies (e.g., cell phones)?

3. Are there off-the-shelf products that could be used as the application interfaces for *English Access Online,* or do new systems need to be developed? Which private sector entities are adept at modifying existing systems or developing new ones?

4. Should the development of *English Access Online* be separated from ongoing hosting and management? If so, which private sector entities can provide content hosting and management?

5. *English Access Online* will require a learning management system that will provide automated assessment and user performance tracking. The adaptive software will monitor learner success rates on activities, offer more detailed tutorials for areas of difficulty, and redirect the learners to lower/higher level learning activities. *English Access Online* will track an individual student's progress and allow the student to log on anytime anywhere and pick up where he/she last left off. Are there available learning management systems that could be used for *English Access Online* or will it be necessary to develop a new learning management system that can be integrated with the delivery platform? Which private sector entities have expertise in developing, integrating, and/or modifying learning management systems?

6. How could voice recognition be used as part of the learning and assessment process?

7. What role could Voice Over Internet Protocol (VOIP) play in facilitating collaboration and interaction with the learning series and among learners?

8. Some *English Access Online* learners may not have access to high bandwidth or up-to-date hardware platforms. Should the platform for this program use the lowest common denominator platform available or is there a way to span the high-tech/low-tech gap with a dual capability system? What technologies should be used?

9. Which entities or organizations can provide *English Access Online* with video, music and animation that would represent American culture, comply with copyright laws and regulations and would be free of charge?

10. All of the above requires coordination between all parties and systems integration, as well as the expertise of a company with global reach that can ensure delivery of *English Access Online* to intended audiences. Which private sector entities have the expertise and global reach to contribute to this endeavor?

11. What privacy and security considerations, including compliance with relevant USG regulations, need to be addressed in the development of this system?

12. What is the timeframe required to accomplish our goals?

13. ECA believes that the viability of this project depends on a strong partnership among the USG, academia, and the private sector. Is a public-private partnership a viable framework for achieving the goals of this program? ECA and its academic partners can ONLY provide the pedagogical framework and curriculum content for *English Access Online.* What type of financial model could be used to provide for the technical platform/delivery mechanism, integration, and operations and maintenance of the system? Do private sector entities view this initiative as compatible with their corporate social responsibility objectives and/or to grow future markets and create new customers?

Dated: November 7, 2008.

Goli Ameri,

Assistant Secretary for Educational and Cultural Affairs, Department of State.

[FR Doc. E8–27233 Filed 11–14–08; 8:45 am]

BILLING CODE 4710–05–P

DEPARTMENT OF TRANSPORTATION

Office of the Secretary

[OST—2008 –0259, Pricing and Multilateral Affairs Division]

Agency Information Collection Request; Activity Under OMB Review; (14 CFR Part 221–Exemption from Passenger Tariff-filing Requirements in Certain Instances and Mandatory Electronic Filing of Residual Passenger Tariffs)

AGENCY: Office of the Secretary (OST), DOT.

ACTION: Notice and request for comments; Extension of a currently approved information collection.

SUMMARY: In compliance with the Paperwork Reduction Act of 1995, Public Law 104–13, (44 U.S.C. 3501 *et seq.*) this notice announces that the Information Collection Request, abstracted below, is being forwarded to the Office of Management and Budget for notice and request for comments of currently approved (Exemption from Passenger Tariff-Filing Requirements in Certain Instances, and Mandatory Electronic Filing of Residual Passenger Tariffs). A **Federal Register** Notice with a 60-day comment period was published on September 9, 2008, Volume 73, Number 175, Pages 52445–52447. The agency did not receive any comments to its previous notice.

DATES: Written comments should be submitted by December 17, 2008.

FOR FURTHER INFORMATION CONTACT: Bernice Gray, 202–366–2418 or John Kiser, 202–366–2435, Pricing and Multilateral Affairs Division, Office of the Secretary, Department of Transportation, Washington, DC. Office hours are from 8 a.m. to 5 p.m., Monday through Friday, except Federal holidays.

Comments: Comments should be sent to OMB: Attention DOT/OST Desk Officer, Office of Information and Regulatory Affairs, Office of Management and Budget, Docket Library, Room 10102, 725 17th Street, NW., Washington, DC 20503, or *oira_submission@omb.eop.gov* (e-mail).

SUPPLEMENTARY INFORMATION:

OMB Control No.: 2106–0009.

Title: Exemption from Passenger Tariff-filing Requirements in Certain Instances and Mandatory Electronic Filing of Residual Passenger Tariffs.

Respondents: The vast majority of the air carriers filing international tariffs are large operators with revenues in excess of several million dollars each year. Small air carriers operating aircraft with 60 seats or less and 18,000 pounds payload or less that offer on-demand air-taxi service are not required to file such tariffs.

Number of Respondents: 148.

Number of Responses: 229,200.

Total Annual Burden: 45,840.

Abstract: Chapter 41504 of Title 49 of the United States Code requires that every air carrier and foreign air carrier file with the Department of Transportation (DOT), publish and keep open (*i.e.*, post) for public inspection tariffs showing all ''foreign'' or ''international'' fares, and related charges for air transportation between points served by it, and any other air carrier or foreign air carrier when through services, fares and related charges have been established; and showing, to the extent required by DOT regulations, all classifications, rules, regulations, practices, and services in connection with such air transportation. Once tariffs are filed and approved by DOT, they become a legally binding contract of carriage between carriers and users of foreign air transportation.

Part 221 of the Department's Economic Regulations (14 CFR part 221) set forth specific technical and substantive requirements governing the filing of tariff material with the DOT Office of International Aviation's Pricing and Multilateral Affairs Division. A carrier initiates an electronic tariff filing whenever it wants to amend an existing tariff for commercial and competitive reasons or when it desires to file a new one. Electronic tariffs filed pursuant to part 221 are used by carriers, computer reservation systems, travel agents, DOT, other government agencies and the general public to determine the prices, rules and related charges for international passenger air transportation. In addition, DOT needs U.S. and foreign air carrier passenger tariff information to monitor international air commerce, carry out carrier route selections and conduct international negotiations.

Part 293 exempts carriers from their statutory and regulatory duty to file international tariffs in many specific markets.

Comments are invited on: (a) Whether the proposed collection of information is necessary for the proper performance of the functions of the Department, including whether the information will have practical utility; (b) the accuracy of the Departments estimate of the burden of the proposed information collection; (c) ways to enhance the quality, utility and clarity of the information collection; and (d) ways to minimize the burden of the collection of information on respondents, by the use of electronic means, including the use of automated collection techniques or other forms of information technology.

All responses to this notice will be summarized and included in the request for OMB approval. All comments will also become a matter of public record.

Issued in Washington, DC, on November 11, 2008.

Tracey M. Jackson,

Office of the Chief Information Officer.

[FR Doc. E8–27207 Filed 11–14–08; 8:45 am]

BILLING CODE 4910–62–P

DEPARTMENT OF TRANSPORTATION

Federal Aviation Administration

Commercial Space Transportation Advisory Committee; Renewal

AGENCY: Federal Aviation Administration (FAA), DOT.

ACTION: Notice of renewal.

SUMMARY: Pursuant to section 14(a)(2)(A) of the Federal Advisory Committee Act (Pub. L. 92–463, 5 U.S.C. App. 2), and 5 U.S.C. 552b(c), and in accordance with section 102–3.65, title 41 of the Code of Federal Regulations, notice is hereby given that the Commercial Space Transportation Advisory Committee (COMSTAC) has been renewed for a 2-year period beginning November 15, 2008. The primary purpose of the Committee is to provide information, advice, and recommendations to the U.S. Department of Transportation (DOT) on matters concerning the U.S. commercial space transportation industry. The primary goals of the Committee are to evaluate economic, technological, and institutional developments relating to the industry; to provide a forum for the discussion of problems involving the relationship between industry activities and government requirements; and to make recommendations to DOT on issues and approaches for Federal policies and programs regarding the industry. The Committee will operate in accordance with the rules of the Federal Advisory Committee Act and the Department of Transportation, FAA Committee Management Order (1110.30C).

FOR FURTHER INFORMATION CONTACT: Brenda Parker (AST–100), COMSTAC Executive Director, Office of Commercial Space Transportation, 800 Independence Avenue, SW., Room 331, Washington, DC 20591, telephone: (202) 267–3674; e-mail: *brenda.parker@faa.dot.gov.*

Issued in Washington, DC, November 7, 2008.

George C. Nield,

Associate Administrator for Commercial Space Transportation.

[FR Doc. E8–27153 Filed 11–14–08; 8:45 am]

BILLING CODE 4910–13–P

DEPARTMENT OF TRANSPORTATION

Federal Transit Administration

Preparation of an Environmental Impact Statement on Hatcher Pass Recreational Area Trails and Transit Facilities in the Matanuska-Susitna Borough, AK

AGENCY: Federal Transit Administration (FTA), Department of Transportation.

ACTION: Notice of Intent To Prepare an Environmental Impact Statement.

SUMMARY: The FTA and Matanuska-Susitna Borough are issuing this notice to advise the public that an Environmental Impact Statement (EIS) will be prepared for the proposed Hatcher Pass Recreational Area Trails and Transit Facilities project in the Matanuska-Susitna Borough, Alaska. The project would construct access roads, parking areas, and pedestrian facilities for two day-use areas that would provide an opportunity for skiing and other recreational opportunities for local and regional residents. The EIS will be prepared in accordance with regulations implementing the National Environmental Policy Act (NEPA), as well as provisions of the recently enacted Safe, Accountable, Flexible, Efficient Transportation Equity Act: A Legacy for Users (SAFETEA–LU). The purpose of the Notice of Intent (NOI) is to alert interested parties regarding the plan to prepare the EIS, to provide information on the nature of the proposed project, to invite participation in the EIS process, including comments on the scope of the EIS proposed in this notice, and to announce that public scoping meetings will be conducted.

DATES: Written comments on the scope of the EIS should be sent to Ms. Kristi Stuller, DOWL HKM Public Involvement Coordinator, by December 24, 2008, at 2:30 p.m. at the location indicated under **ADDRESSES** below. An interagency scoping meeting has been scheduled for December 8, 2008, and the public scoping meeting will be held on December 11, 2008, from 5:30–8:30 p.m. at the location indicated under **ADDRESSES** below.

ADDRESSES: Written comments on the scope of the EIS should be sent to Ms. Kristi Stuller, DOWL HKM Public Involvement Coordinator, 4041 B Street, Anchorage, Alaska 99503. Comments may also be offered at the public and agency scoping meetings. The address for the public scoping meeting is as follows: Colony Middle School, 9250 Colony Schools Drive, Palmer, AK 99645.

The address for the agency scoping meeting is as follows: Matanuska-Susitna Borough Lower Level Conference Room, 350 East Dahlia Avenue, Palmer, AK 99645.

These locations are accessible to persons with disabilities. If translation signing services or other special accommodations are needed, please contact Public Involvement Coordinator Kristi Stuller at (907) 562–2000 at least 48 hours before the meeting. A scoping information packet is available on the project Web site at: *http://www.hatcherpass.com*, or by calling Public Involvement Coordinator Kristi Stuller at (907) 562–2000. Copies will also be available at the scoping meeting.

FOR FURTHER INFORMATION CONTACT: Ms. Linda Gehrke, Deputy Regional Administrator, Federal Transit Administration, Region 10 Office, at (206) 220–4463.

SUPPLEMENTARY INFORMATION:

The Proposed Project: The FTA and Matanuska-Susitna Borough (MSB) are proposing a project to construct access roads, parking lots, and trail connections for two day-use areas that would provide transportation access and transit facilities to serve recreational opportunities for local and regional residents in the Hatcher Pass area. The MSB intends to create a moderate sized development that would include Nordic and alpine skiing, snowboarding, biathlon, mountain biking, hiking, sledding, and equestrian access in Hatcher Pass, Alaska. The study area is located at approximately 61.734 north latitude and 149.299 west longitude (Sections 2–5, 8–11, 14–22, and 26–30 of T19N, R1E, Seward Meridian) (USGS Quadrangle Anchorage C6, C7, and D7 1:63,360 Scale).

Preliminary Purposes and Need for the Proposed Project

Purpose. The preliminary statement of purpose of this project is to provide transportation access and transit facilities to assist in the transportation needs of proposed new Nordic and alpine ski and recreational areas in Hatcher Pass, Alaska. Hatcher Pass is located approximately 55 miles north of Anchorage, Alaska, in the heart of the MSB, Alaska's fastest growing community.

Need. The preliminary statement of need for the project is the lack of existing transportation access, pedestrian amenities and trails, and transit facilities to accommodate the proposed development of new recreational areas at Hatcher Pass that otherwise has excellent road access by both the Glenn and Parks Highways and is paved to the Alpine base area as well as to nearly the top of the pass.

In the summer months, Hatcher Pass is a popular tourist destination with activity focused around the Independence Mine State Historical Park, which features the area's brief but intense hard rock mining history. The area is also a very popular family hiking area with many trail destinations. Hatcher Pass has been used as a winter sports venue since the 1940s and sees use by cross-country and downhill skiers, snowboarders and snowmobile riders. Their activities are currently supported by small-scale businesses, which provide limited food and lodging and some trail grooming services.

The Hatcher Pass Ski Area Project, as currently proposed by the MSB, is not the large-scale four-season resort as is currently described in the 1989 State of Alaska Department of Natural Resources Hatcher Pass Management Plan. Rather, it will be a day-use area that will provide an opportunity for skiing and other recreational opportunities for local and regional residents that is financially feasible and environmentally sensitive. The MSB's goal is a moderate sized development that would include Nordic and alpine skiing, snowboarding, biathlon (winter sport that combines cross-country skiing with rifle shooting), mountain biking, hiking, sledding, and equestrian access.

Preliminary estimates indicate that approximately 1,850 skiers will visit the Nordic area day during the 150 day ski season. In the Alpine area, the estimated visitation will be between 130,000–240,000 skiers during the 100 day ski season. These estimates are a result of applying economic trends and growth rates to the estimates in the Financial Feasibility Study conducted by Economic Research Associates in 1995. As of 2006, the average daily traffic (ADT) at the intersection of Palmer Fishhook Road and Edgerton Parks Road was 502.

Alternatives: The proposed project includes improvements at two areas in Hatcher Pass—the North Side Alpine Ski Area and the South Side Recreational Area. Proposed improvements include the following:

North Side (Alpine Ski Area)

- Reconstruction of an existing gravel access road, approximately 1,400-ft in length
- Reconstruction of an existing gravel parking area
- Construction of a covered 20–30 passenger transit shelter at the south end of the parking lot

South Side Recreational Area

- Construction of a new access road off of Edgerton Park Road, approximately 5,500-ft in length
- Nordic and other non-motorized multiple-use trails
- Parking areas and trailheads
- Construction of a covered 20–30 passenger transit shelter at the south end of the parking lot

The Hatcher Pass Ski Area project involves MSB's plans to construct two Alpine ski lifts, Alpine trails, and a small day lodge providing food and ski concessions as part of the overall Alpine ski area development, and a small chalet and conference facility as part of the overall South Side Recreational Area development. These components are not part of the FTA-funded project, but will be considered in the EIS as part of the secondary and cumulative impact analysis.

Three preliminary road alignments have been developed for the South Side Recreational Area access road. MSB plans to utilize the EIS scoping process to continue refining and exploring the various development options for this project. These refinements will be developed in consultation with state and local agencies and the surrounding community, and will be explored in the context of the EIS.

The EIS Process and the Role of Participating Agencies and the Public: The purpose of the EIS process is to explore in a public setting potentially significant effects of implementing the proposed action and alternatives on the physical, human, and natural environment. Areas of investigation include but are not limited to: land use, development potential, land acquisition and displacements, historic resources, visual and aesthetic qualities, air quality, noise and vibration, energy use, safety and security, and ecosystems, including threatened and endangered species. Measures to avoid, minimize, or mitigate any significant adverse impacts will be identified. Regulations implementing NEPA, as well as provisions of the recently enacted Safe, Accountable, Flexible, Efficient Transportation Equity Act: A Legacy for Users (SAFETEA–LU), call for public involvement in the EIS process. Section 6002 of SAFETEA–LU requires that FTA and the MSB do the following: (1) Extend an invitation to other Federal and non-Federal agencies and Indian tribes that may have an interest in the proposed project to become ''participating agencies,'' (2) provide an opportunity for involvement by participating agencies and the public in helping to define the purpose and need for a proposed project as well as the range of alternatives for consideration in the impact statement, and (3) establish a plan for coordinating public and agency participation in and comment on the environmental review process. An invitation to become a participating agency, with the scoping information packet appended, will be extended to other Federal and non-Federal agencies and Indian tribes that may have an interest in the proposed project. It is possible that we may not be able to identify all Federal and non-Federal agencies and Indian tribes that may have such interest. Any Federal or non-Federal agency or Indian tribe interested in the proposed project that does not receive an invitation to become a participating agency should notify at the earliest opportunity the contacts identified above under **ADDRESSES**.

A comprehensive public involvement program has been developed and a public and agency involvement Coordination Plan will be created. The program includes a project Web site (*http://www.hatcherpass.com*); outreach to local and Borough officials and community and civic groups; a public scoping process to define the issues of concern among all parties interested in the project; establishment of a community advisory committee and organizing periodic meetings with that committee; a public hearing on release of the draft environmental impact statement (DEIS); establishment of a walk-in project office near the project area; and development and distribution of project newsletters.

The purposes of and need for the proposed project have been preliminarily identified in this notice. We invite the public and participating agencies to consider the preliminary statement of purposes of and need for the proposed project, and to provide input on the purpose and need statement and potential alternatives that should be considered. Suggestions for modifications to the statement of purposes of and need for the proposed project and any other alternatives that meet the purpose of and need for the proposed project are welcomed and will be given serious consideration. Comments on potentially significant environmental impacts that may be associated with the proposed project and alternatives are also welcomed. There will be additional opportunities to participate in the scoping process at the public meeting announced in this notice.

In accordance with 23 CFR 771.105(a) and 771.133, FTA will comply with all Federal environmental laws, regulations, and executive orders applicable to the proposed project during the environmental review process to the maximum extent practicable. These requirements include, but are not limited to, the regulations of the Council on Environmental Quality and FTA implementing NEPA (40 CFR parts 1500–1508, and 23 CFR Part 771), the project-level air quality conformity regulation of the U.S. Environmental Protection Agency (EPA) (40 CFR part 93), the Section 404(b)(1) guidelines of EPA (40 CFR part 230), the regulation implementing Section 106 of the National Historic Preservation Act (36 CFR part 800), the regulation implementing section 7 of the Endangered Species Act (50 CFR part 402), Section 4(f) of the Department of Transportation Act (23 CFR 771.135) and Executive Orders 12898 on environmental justice, 11988 on floodplain management, and 11990 on wetlands.

Issued on: November 6, 2008.

Linda Gehrke,

Deputy Regional Administrator, FTA Region 10.

[FR Doc. E8–27147 Filed 11–14–08; 8:45 am]

BILLING CODE 4910–57–P

DEPARTMENT OF TRANSPORTATION

National Highway Traffic Safety Administration

[Docket No. NHTSA–2008–0165; Notice 1]

Medical Coaches, Inc., Receipt of Petition for Decision of Inconsequential Noncompliance

Medical Coaches, Inc. (Medical Coaches), has determined that certain model year 1996–2008 trailers did not fully comply with paragraph S5.3 of 49 CFR 571.120, Federal Motor Vehicle Safety Standard (FMVSS) No. 120 *Tire Selection and Rims for Motor Vehicles With a GVWR of More Than 4,536 Kilograms (10,000 pounds).* Medical Coaches has filed an appropriate report pursuant to 49 CFR Part 573, *Defect and Noncompliance Responsibility and Reports.*

Pursuant to 49 U.S.C. 30118(d) and 30120(h) (see implementing rule at 49

CFR part 556), Medical Coaches has petitioned for an exemption from the notification and remedy requirements of 49 U.S.C. Chapter 301 on the basis that this noncompliance is inconsequential to motor vehicle safety.

This notice of receipt of Medical Coaches petition is published under 49 U.S.C. 30118 and 30120 and does not represent any agency decision or other exercise of judgment concerning the merits of the petition.

Affected are approximately 310 Trailers manufactured between March 14, 1996 and May 19, 2008.

Paragraphs S5.3 of FMVSS No. 120 requires in pertinent part:

S5.3 Each vehicle shall show the information specified in S5.3.1 and S5.3.2 and, in the case of a vehicle equipped with a non-pneumatic spare tire, the information specified in S5.3.3, in the English language, lettered in block capitals and numerals not less than 2.4 millimeters high and in the format set forth following this paragraph. This information shall appear either—

(a) After each GAWR listed on the certification label required by Sec. 567.4 or Sec. 567.5 of this chapter; or at the option of the manufacturer,

(b) On the tire information label affixed to the vehicle in the manner, location, and form described in Sec. 567.4 (b) through (f) of this chapter as appropriate of each GVWR-GAWR combination listed on the certification label * * *

Truck Example—Suitable Tire-Rim Choice

GVWR: 7,840 KG (17,289 LB)
GAWR: FRONT—2,850 KG (6,280 LB) WITH 7.50–20(D) TIRES, 20x6.00 RIMS AT 520 KPA (75 PSI) COLD SINGLE
GAWR: REAR—4,990 KG (11,000 LB) WITH 7.50–20(D) TIRES, 20x6.00 RIMS, AT 450 KPA (65 PSI) COLD DUAL
GVWR: 13,280 KG (29,279 LB)
GAWR: FRONT—4,826 KG (10,640 LB) WITH 10.00–20(F) TIRES, 20x7.50 RIMS, AT 620 KPA (90 PSI) COLD SINGLE
GAWR: REAR—8,454 KG (18,639 LB) WITH 10.00–20(F) TIRES, 20x2.70 RIMS, AT 550 KPA (80 PSI) COLD DUAL

In its petition, Medical Coaches explained that, as of March 14, 1996, its tire and rim label information was not in full compliance with FMVSS No. 120. The combined certification/tire information labels affixed to Medical Coaches' trailers pursuant to 49 CFR part 567 *Certification* failed to comply with S5.3 of FMVSS No. 120 because metric measurements were omitted. The labels contained the correct English unit information.

Medical Coaches also stated that since September of 2006 its trailer combined certification/tire information labels did not comply with the requirements of 49 CFR Part 567 due to the omission of metric units for gross vehicle weight rating (GVWR) and gross axle weight ratings (GAWR). The label contained the correct English unit information.

Medical Coaches learned of its noncompliance after submitting sample certification labels to the National Truck Equipment Association (NTEA) for review as part of their Member Verification Program (MVP).

Medical Coaches has determined that 310 trailers have noncompliant labels. All of those labels failed to fully comply with FMVSS 120, and 46 did not fully comply with 49 CFR part 567.

Medical Coaches supported its application for inconsequential noncompliance with the following statements:

The Medical Coaches' certification label did contain the correct information in English units and displayed this information in the correct format.

The omission of the metric units is highly unlikely to have any affect whatsoever on motor vehicle safety since the correct English units were included and because of the small number of trailers involved.

The metric requirements of 49 CFR 571.120 and 49 CFR 567 were not mandated for safety reasons.

Several inconsequential noncompliance requests have been granted by NHTSA in the past for the omission of metric units on certification labels. These petitions involved thousands of trailers, well over the 310 involved in this petition.

Medical Coaches has not received any complaints from customers on the omission of the metric data from the certification labels and is not aware of accidents or injuries caused by these omissions.

Medical Coaches has purchased a certification label printing program from the NTEA that assures certification label compliance from now and into the future.

Additionally, Medical Coaches states that it does not question the need and usefulness of detailing metric units on certification labels. Medical Coaches' error of omission, while regrettable, was corrected as soon as the nonconformance was realized and believes that it is now in full compliance with assurances for the future.

Medical Coaches believes the metric equivalents on certification labels, while mandated, have little affect on vehicle safety and respectfully requests that NHTSA grant a petition.

NHTSA notes that the statutory provisions (49 U.S.C. 30118(d) and 30120(h)) that permit manufacturers to file petitions for a determination of inconsequentiality allow NHTSA to exempt manufacturers only from the duties found in sections 30118 and 30120, respectively, to notify owners, purchasers, and dealers of a defect or noncompliance and to remedy the defect or noncompliance.

Interested persons are invited to submit written data, views, and arguments on this petition. Comments must refer to the docket and notice number cited at the beginning of this notice and be submitted by any of the following methods:

a. By mail addressed to: U.S. Department of Transportation, Docket Operations, M–30, West Building Ground Floor, Room W12–140, 1200 New Jersey Avenue, SE., Washington, DC 20590.

b. By hand delivery to U.S. Department of Transportation, Docket Operations, M–30, West Building Ground Floor, Room W12–140, 1200 New Jersey Avenue, SE., Washington, DC 20590. The Docket Section is open on weekdays from 10 a.m. to 5 p.m. except Federal Holidays.

c. Electronically: By logging onto the Federal Docket Management System (FDMS) Web site at *http://www.regulations.gov/.* Follow the online instructions for submitting comments. Comments may also be faxed to 1–202–493–2251.

Comments must be written in the English language, and be no greater than 15 pages in length, although there is no limit to the length of necessary attachments to the comments. If comments are submitted in hard copy form, please ensure that two copies are provided. If you wish to receive confirmation that your comments were received, please enclose a stamped, self-addressed postcard with the comments. Note that all comments received will be posted without change to *http://www.regulations.gov,* including any personal information provided.

Anyone is able to search the electronic form of all comments received into any of our dockets by the name of the individual submitting the comment (or signing the comment, if submitted on behalf of an association, business, labor union, etc.). DOT's complete Privacy Act Statement in the **Federal Register** published on April 11, 2000 (65 FR 19477–78).

You may view documents submitted to a docket at the address and times given above. You may also view the documents on the Internet at *http://www.regulations.gov* by following the online instructions for accessing the dockets available at that Web site.

The petition, supporting materials, and all comments received before the close of business on the closing date indicated below will be filed and will be considered. All comments and supporting materials received after the closing date will also be filed and will be considered to the extent possible. When the petition is granted or denied, notice of the decision will be published in the **Federal Register** pursuant to the authority indicated below.

Comment closing date: December 17, 2008.

Authority: 49 U.S.C. 30118, 30120: delegations of authority at CFR 1.50 and 501.8.

Issued on: November 10, 2008.

Claude H. Harris,

Director, Office of Vehicle Safety Compliance.

[FR Doc. E8–27235 Filed 11–14–08; 8:45 am]

BILLING CODE 4910–59–P

DEPARTMENT OF TRANSPORTATION

National Highway Traffic Safety Administration

[Docket No. NHTSA–2008–0167; Notice 1]

Volvo Cars of North America, LLC, Receipt of Petition for Decision of Inconsequential Noncompliance

Volvo Cars of North America, LLC (Volvo), has determined that certain model year 2003–2009 multipurpose passenger vehicles (MPV) did not fully comply with paragraphs S4.4.2(a) and 4.4.2(c) of 49 CFR 571.110, Federal Motor Vehicle Safety Standard (FMVSS) No. 110 *Tire Selection and Rims for Motor Vehicles With a GVWR of 4,536 Kilograms (10,000 pounds) or Less.* Volvo has filed an appropriate report pursuant to 49 CFR Part 573, *Defect and Noncompliance Responsibility and Reports.*

Pursuant to 49 U.S.C. 30118(d) and 30120(h) (see implementing rule at 49 CFR part 556), Volvo has petitioned for an exemption from the notification and remedy requirements of 49 U.S.C. Chapter 301 on the basis that this noncompliance is inconsequential to motor vehicle safety.

This notice of receipt of Volvo's petition is published under 49 U.S.C. 30118 and 30120 and does not represent any agency decision or other exercise of judgment concerning the merits of the petition.

Affected are approximately 201,914 model years 2003–2009 XC90 MPV manufactured from August 5, 2002 through March 28, 2008, and 14,147 model years 2008–2009 XC70 MPV manufactured from May 21, 2007 through March 28, 2008.

Paragraphs S4.4.2(a) and 4.4.2(c) of FMVSS No. 110 require in pertinent part:

S4.4.2. Rim markings for vehicles other than passenger cars. Each rim or, at the option of the manufacturer in the case of a single-piece wheel, each wheel disc shall be marked with the information listed in S4.4.2 (a) through (e), in lettering not less than 3 millimeters in height, impressed to a depth, or at the option of the manufacturer, embossed to a height of not less than 0.125 millimeters. The information listed in S4.4.2 (a) through (c) shall appear on the outward side. In the case of rims of multi piece construction, the information listed in S4.4.2 (a) through (e) shall appear on the rim base and the information listed in S4.4.2 (b) and (d) shall also appear on each other part of the rim.

(a) A designation that indicates the source of the rim's published nominal dimensions, as follows:

(1) ''T'' indicates The Tire and Rim Association.

(2) ''E'' indicates The European Tyre and Rim Technical Organization.

(3) ''J'' indicates Japan Automobile Tire Manufacturers Association, Inc.

(4) ''L'' indicates ABPA (Brazil), a.k.a. Associacao Latino Americana De Pneus E Aros.

(5) ''F'' indicates Tire and Rim Engineering Data Committee of South Africa (Tredco).

(6) ''S'' indicates Scandinavian Tire and Rim Organization (STRO).

(7) ''A'' indicates The Tyre and Rim Association of Australia.

(8) ''I'' indicates Indian Tyre Technical Advisory Committee (ITTAC).

(9) ''R'' indicates Argentine Institute of Rationalization of Materials, a.k.a. Instituto Argentino de Racionalizacion de Materiales, (ARAM).

(10) ''N'' indicates an independent listing pursuant to S4.1 of Sec. 571.139 or S5.1(a) of Sec. 571.119 * * *

(c) The symbol DOT, constituting a certification by the manufacturer of the rim that the rim complies with all applicable Federal motor vehicle safety standards.

In its petition, Volvo described the noncompliance as the omission of the certification symbol (''DOT'') and the designation symbol (in this case ''E'') which indicates the source of the rims' published nominal dimensions.

Volvo argues that this noncompliance is inconsequential to motor vehicle safety for the following reason: Apart from S4.4.2 (a) and S4.4.2(c), which require the designation of the source of the rims' dimensions, and use of the symbol DOT, respectively the subject rims contain all information required within FMVSS No. 110. The tire and rim of the affected vehicles are properly matched, and are appropriate for the load-carrying characteristics of these vehicles. The information on the wheel provides users with the information necessary to ensure that the wheel is mounted on the appropriate vehicle; the omission of the ''DOT-E'' stamping will not result in misapplication of the wheels. Also, the rim markings and vehicle placard, which are used to identify the correct replacement rim, both contain the correct and complete size of rims installed on the subject vehicles.

Volvo stated that it is unaware of any accidents or injuries or customer complaints related to the lack of these markings and that the missing markings do not affect the performance of the wheels or the tire and wheel assemblies.

In addition, Volvo states that it has corrected the problem that caused these errors so that they will not be repeated in future production and that it believes that because the noncompliance is inconsequential to motor vehicle safety that no corrective action is warranted.

NHTSA notes that the statutory provisions (49 U.S.C. 30118(d) and 30120(h)) that permit manufacturers to file petitions for a determination of inconsequentiality allow NHTSA to exempt manufacturers only from the duties found in sections 30118 and 30120, respectively, to notify owners, purchasers, and dealers of a defect or noncompliance and to remedy the defect or noncompliance.

Interested persons are invited to submit written data, views, and arguments on this petition. Comments must refer to the docket and notice number cited at the beginning of this notice and be submitted by any of the following methods:

a. By mail addressed to: U.S. Department of Transportation, Docket Operations, M–30, West Building Ground Floor, Room W12–140, 1200 New Jersey Avenue, SE., Washington, DC 20590.

b. By hand delivery to U.S. Department of Transportation, Docket Operations, M–30, West Building Ground Floor, Room W12–140, 1200 New Jersey Avenue, SE., Washington, DC 20590. The Docket Section is open on weekdays from 10 a.m. to 5 p.m. except Federal Holidays.

c. Electronically: By logging onto the Federal Docket Management System (FDMS) Web site at *http://www.regulations.gov/*. Follow the online instructions for submitting comments. Comments may also be faxed to 1–202–493–2251.

Comments must be written in the English language, and be no greater than 15 pages in length, although there is no limit to the length of necessary attachments to the comments. If comments are submitted in hard copy form, please ensure that two copies are provided. If you wish to receive confirmation that your comments were received, please enclose a stamped, self-addressed postcard with the comments. Note that all comments received will be posted without change to *http://www.regulations.gov*, including any personal information provided.

Anyone is able to search the electronic form of all comments received into any of our dockets by the name of the individual submitting the comment (or signing the comment, if

submitted on behalf of an association, business, labor union, etc.). DOT's complete Privacy Act Statement in the **Federal Register** published on April 11, 2000 (65 FR 19477–78).

You may view documents submitted to a docket at the address and times given above. You may also view the documents on the Internet at *http://www.regulations.gov* by following the online instructions for accessing the dockets available at that Web site.

The petition, supporting materials, and all comments received before the close of business on the closing date indicated below will be filed and will be considered. All comments and supporting materials received after the closing date will also be filed and will be considered to the extent possible. When the petition is granted or denied, notice of the decision will be published in the **Federal Register** pursuant to the authority indicated below.

Comment closing date: December 17, 2008.

Authority: 49 U.S.C. 30118, 30120: delegations of authority at CFR 1.50 and 501.8.

Issued on: November 10, 2008.

Claude H. Harris,

Director, Office of Vehicle Safety Compliance.

[FR Doc. E8–27239 Filed 11–14–08; 8:45 am]

BILLING CODE 4910–59–P

DEPARTMENT OF TRANSPORTATION

Surface Transportation Board

[STB Finance Docket No. 35187]

Grand Elk Railroad, L.L.C.—Lease and Operation Exemption—Norfolk Southern Railway Company

Grand Elk Railroad, L.L.C. (GER), a noncarrier,[1] has filed a verified notice of exemption under 49 CFR 1150.31 to acquire, by lease, and to operate approximately 122.9 miles of Norfolk Southern Railway Company (NS) rail lines in Michigan and Indiana.[2] The lines to be leased and operated are located between: (1) Milepost KH 1.4 at Elkhart, IN, and milepost KH 27.4 at Three Rivers, MI; (2) milepost FB 27.3 at Three Rivers, MI, and milepost FB 102.3 at Grand Rapids, MI; (3) milepost KZ 94.25 and milepost KZ 95.0 (Kalamazoo Industrial Track); (4) milepost OW 66.6 and milepost OW 70.24 (Plainwell Industrial Track); (5) milepost XH 88.10 and milepost XH 92.40 (Hastings Running Track); (6) milepost CQ 42.8 and milepost CQ 43.9 (CK&S Industrial Track); (7) milepost KY 0.0 and milepost 3.2 (B O Secondary); (8) milepost UP 0.0 and milepost UP 6.7 (Upjohn Secondary); (9) milepost QY 421.2 and milepost QY 421.3 (Quincy Secondary); (10) milepost VW 106.0 and milepost VW 106.9 (Comstock Industrial Track); (11) milepost AZ 69.6 and milepost AZ 70.4 (Airline Extension); and (12) milepost IJ 44.3 and milepost IJ 44.7 (CK&S Industrial Track), along with the yard tracks in Botsford Yard located between milepost MH 141.8 and milepost MH 142.7.

NS will also grant GER incidental trackage rights over approximately 0.43 miles of NS rail line located between milepost 143.03 and milepost 142.6 at Botsford Yard.

This transaction is related to STB Finance Docket No. 35188, W*atco Companies, Inc.—Continuance in Control Exemption—Grand Elk Railroad, L.L.C.* In that proceeding, Watco Companies, Inc. has concurrently filed a verified notice of exemption to continue in control of GER upon GER's becoming a Class III rail carrier.

GER certifies that its projected annual revenues as a result of the transaction will not result in GER's becoming a Class II or Class I rail carrier. Because its projected annual revenues may exceed $5 million, however, GER states that it is in the process of complying with the 60-day labor notice requirement at 49 CFR 1150.32(e).

GER states that it expects to consummate the transaction some time after the effective date of the exemption. However, the exemption cannot become effective and consummation of this transaction cannot occur until 60 days after GER certifies to the Board that it has satisfied the labor notice requirement.

Pursuant to the Consolidated Appropriations Act, 2008, Pub. L. No. 110–161, § 193, 121 Stat. 1844 (2007), nothing in this decision authorizes the following activities at any solid waste rail transfer facility: collecting, storing or transferring solid waste outside of its original shipping container; or separating or processing solid waste (including baling, crushing, compacting and shredding). The term ''solid waste'' is defined in section 1004 of the Solid Waste Disposal Act, 42 U.S.C. 6903.

If the verified notice contains false or misleading information, the exemption is void *ab initio.* Petitions to revoke the exemption under 49 U.S.C. 10502(d) may be filed at any time. The filing of a petition to revoke will not automatically stay the effectiveness of the exemption. Petitions for stay must be filed at least 7 days before the exemption becomes effective.

An original and 10 copies of all pleadings, referring to STB Finance Docket No. 35187, must be filed with the Surface Transportation Board, 395 E Street, SW., Washington, DC 20423–0001. In addition, a copy of each pleading must be served on Karl Morell, Of Counsel, Ball Janik LLP, Suite 225, 1455 F Street, NW., Washington, DC 20005.

Board decisions and notices are available on our Web site at *http://www.stb.dot.gov.*

Decided: November 10, 2008.

By the Board, David M. Konschnik, Director, Office of Proceedings.

Kulunie L. Cannon,

Clearance Clerk.

[FR Doc. E8–27133 Filed 11–14–08; 8:45 am]

BILLING CODE 4915–01–P

[1] GER is a wholly owned subsidiary of Watco Companies, Inc.

[2] GER and NS have entered into a lease agreement. According to GER, the lease agreement does not contain any provision that prohibits GER from interchanging traffic with a third party.

DEPARTMENT OF TRANSPORTATION

Surface Transportation Board

[STB Finance Docket No. 35188]

Watco Companies, Inc.—Continuance in Control Exemption—Grand Elk Railroad, L.L.C.

Watco Companies, Inc. (Watco), a noncarrier, has filed a verified notice of exemption to continue in control of Grand Elk Railroad, L.L.C. (GER), upon GER's becoming a Class III rail carrier.[1]

This transaction is related to a concurrently filed verified notice of exemption in STB Finance Docket No. 35187, *Grand Elk Railroad, L.L.C.—Lease and Operation Exemption-Norfolk Southern Railway Company.* In that proceeding, GER seeks an exemption under 49 CFR 1150.31 to lease from Norfolk Southern Railway Company (NS) and to operate approximately 122.9 miles of rail line between specified points in Michigan and Indiana. NS will also grant GER incidental trackage rights over approximately 0.43 miles of NS rail line located at Botsford Yard.

The parties intend to consummate the transaction after the effective date of the exemption sought in the related filing in STB Finance Docket No. 35187.[2]

Watco currently controls 19 Class III rail carriers: South Kansas and Oklahoma Railroad Company, Palouse River & Coulee City Railroad, Inc.,

[1] Watco owns 100% of the issued and outstanding stock of GER.

[2] That exemption cannot become effective until GER has complied with the 60-day labor notice requirement at 49 CFR 1150.32(e).

Timber Rock Railroad, Inc., Stillwater Central Railroad, Inc., Eastern Idaho Railroad, Inc., Kansas & Oklahoma Railroad, Inc., Pennsylvania Southwestern Railroad, Inc., Great Northwest Railroad, Inc., Kaw River Railroad, Inc., Mission Mountain Railroad, Inc., Mississippi Southern Railroad, Inc., Yellowstone Valley Railroad, Inc., Louisiana Southern Railroad, Inc., Arkansas Southern Railroad, Inc., Alabama Southern Railroad, Inc., Vicksburg Southern Railroad, Inc, Austin Western Railroad, Inc, Baton Rouge Southern Railroad, LLC, and Pacific Sun Railroad L.L.C.

Watco represents that: (1) The rail lines to be operated by GER do not connect with any other railroads in the Watco corporate family; (2) the continuance in control is not part of a series of anticipated transactions that would connect these rail lines with any other railroad in the Watco corporate family; and (3) the transaction does not involve a Class I rail carrier. Therefore, the transaction is exempt from the prior approval requirements of 49 U.S.C. 11323. *See* 49 CFR 1180.2(d)(2).

Under 49 U.S.C. 10502(g), the Board may not use its exemption authority to relieve a rail carrier of its statutory obligation to protect the interests of its employees. Section 11326(c), however, does not provide for labor protection for transactions under sections 11324 and 11325 that involve only Class III rail carriers. Accordingly, the Board may not impose labor protective conditions here, because all of the carriers involved are Class III carriers.

If the verified notice contains false or misleading information, the exemption is void *ab initio.* Petitions to revoke the exemption under 49 U.S.C. 10502(d) may be filed at any time. The filing of a petition to revoke will not automatically stay the effectiveness of the exemption. Stay petitions must be filed no later than November 26, 2008 (at least 7 days before the exemption becomes effective).

An original and 10 copies of all pleadings, referring to STB Finance Docket No. 35188, must be filed with the Surface Transportation Board, 395 E Street, SW., Washington, DC 20423–0001. In addition, one copy of each pleading must be served on Karl Morell, Of Counsel, Ball Janik, LLP, Suite 225, 1455 F Street, NW., Washington, DC 20005.

Board decisions and notices are available on our Web site at *http://www.stb.dot.gov.*

Decided: November 10, 2008.

By the Board, David M. Konschnik, Director, Office of Proceedings.

Kulunie L. Cannon,

Clearance Clerk.

[FR Doc. E8–27134 Filed 11–14–08; 8:45 am]

BILLING CODE 4915–01–P

DEPARTMENT OF THE TREASURY

United States Mint

Notification of Price Decreases for American Eagle Gold and Platinum Coins, American Buffalo Gold Coins, and First Spouse Gold Coins

ACTION: Notification of Price Decreases for American Eagle Gold and Platinum Coins, American Buffalo Gold Coins, and First Spouse Gold Coins.

SUMMARY: The United States Mint is adjusting prices for its American Eagle Gold and Platinum Coins, American Buffalo Gold Coins, and First Spouse Gold Coins.

Pursuant to the authority that 31 U.S.C. 5111(a) and 5112(k) grant the Secretary of the Treasury to mint and issue gold and platinum coins, and to prepare and distribute numismatic items, the United States Mint mints and issues 2008 American Eagle Gold and Platinum Coins, American Buffalo Gold Coins, and First Spouse Gold Coins. In accordance with 31 U.S.C. 9701(b)(2)(B), the United States Mint is changing the price of these coins to reflect decreases in the market price of gold and platinum.

Effective on or about November 14, 2008, the United States Mint will commence selling the following 2008 American Eagle Gold and Platinum Coins, American Buffalo Gold Coins and First Spouse Gold Coins according to the following price schedule:

Product	Price
American Eagle Gold Coins	
2008 AMERICAN EAGLE ONE OUNCE GOLD PROOF COIN	$1,024.95
2008 AMERICAN EAGLE ONE-HALF OUNCE GOLD PROOF COIN	534.95
2008 AMERICAN EAGLE ONE-QUARTER OUNCE GOLD PROOF COIN	302.45
2008 AMERICAN EAGLE ONE-TENTH OUNCE GOLD PROOF COIN	162.95
2008 AMERICAN EAGLE GOLD PROOF FOUR-COIN SET	1,952.45
2008 AMERICAN EAGLE ONE OUNCE GOLD UNCIRCULATED COIN	974.95
2008 AMERICAN EAGLE ONE-HALF OUNCE GOLD UNCIRCULATED COIN	509.95
2008 AMERICAN EAGLE ONE-QUARTER OUNCE GOLD UNCIRCULATED COIN	287.45
2008 AMERICAN EAGLE ONE-TENTH OUNCE GOLD UNCIRCULATED COIN	154.95
2008 AMERICAN EAGLE GOLD UNCIRCULATED FOUR-COIN SET	1,862.45
American Eagle Platinum Coins	
2008 AMERICAN EAGLE ONE OUNCE PLATINUM PROOF COIN	1,119.95
2008 AMERICAN EAGLE ONE-HALF OUNCE PLATINUM PROOF COIN	599.95
2008 AMERICAN EAGLE ONE-QUARTER OUNCE PLATINUM PROOF COIN	359.95
2008 AMERICAN EAGLE ONE-TENTH OUNCE PLATINUM PROOF COIN	199.95
2008 AMERICAN EAGLE PLATINUM PROOF FOUR-COIN SET	2,179.95
2008 AMERICAN EAGLE ONE OUNCE PLATINUM UNCIRCULATED COIN	1,069.95
2008 AMERICAN EAGLE ONE-HALF OUNCE PLATINUM UNCIRCULATED COIN	569.95
2008 AMERICAN EAGLE PLATINUM UNCIRCULATED FOUR-COIN SET	2,089.95
10th ANNIVERSARY PLATINUM SET	1,249.95
American Buffalo Gold Coins	
2008 AMERICAN BUFFALO ONE OUNCE GOLD PROOF COIN	1,049.95
2008 AMERICAN BUFFALO ONE-HALF OUNCE GOLD PROOF COIN	549.95

Product	Price
2008 AMERICAN BUFFALO ONE-QUARTER OUNCE GOLD PROOF COIN	312.45
2008 AMERICAN BUFFALO ONE-TENTH OUNCE GOLD PROOF COIN	164.95
2008 AMERICAN BUFFALO GOLD PROOF FOUR-COIN SET	2,005.45
2008 AMERICAN BUFFALO ONE OUNCE GOLD UNCIRCULATED COIN	999.95
2008 AMERICAN BUFFALO ONE-HALF OUNCE GOLD UNCIRCULATED COIN	524.95
2008 AMERICAN BUFFALO ONE-QUARTER OUNCE GOLD UNCIRCULATED COIN	297.45
2008 AMERICAN BUFFALO ONE-TENTH OUNCE GOLD UNCIRCULATED COIN	158.95
2008 AMERICAN BUFFALO GOLD UNCIRCULATED FOUR-COIN SET	1,902.45
AMERICAN BUFFALO 2008 CELEBRATION COIN	968.88
8–8–08 DOUBLE PROSPERITY SET	1,078.88
First Spouse Gold Coins	
2008 FIRST SPOUSE SERIES ONE-HALF OUNCE GOLD PROOF COIN JACKSON'S LIBERTY	549.95
2008 FIRST SPOUSE SERIES ONE-HALF OUNCE GOLD UNCIRCULATED COIN JACKSON'S LIBERTY	524.95
2008 FIRST SPOUSE SERIES ONE-HALF OUNCE GOLD PROOF COIN LOUISA ADAMS	549.95
2008 FIRST SPOUSE SERIES ONE-HALF OUNCE GOLD UNCIRCULATED COIN LOUISA ADAMS	524.95
2008 FIRST SPOUSE SERIES ONE-HALF OUNCE GOLD PROOF COIN ELIZABETH MONROE	549.95
2008 FIRST SPOUSE SERIES ONE-HALF OUNCE GOLD UNCIRCULATED COIN ELIZABETH MONROE	524.95

FOR FURTHER INFORMATION CONTACT: Andrew Brunhart, Deputy Director; United States Mint; 801 Ninth Street, NW.; Washington, DC 20220; or call 202–354–7500.

Authority: 31 U.S.C. 5111, 5112 & 9701.

Dated: November 10, 2008.

Edmund C. Moy,

Director for United States Mint.

[FR Doc. E8–27144 Filed 11–14–08; 8:45 am]

BILLING CODE 4810–02–P

DEPARTMENT OF THE TREASURY

United States Mint

Notification of Resumption of Sales of Previously Available Products

ACTION: Notification of Resumption of Sales of Previously Available Products.

SUMMARY: The United States Mint is setting prices and will resume selling previously available products.

Pursuant to the authority that 31 U.S.C. 5111(a), 5112 & 5132 grant the Secretary of the Treasury to prepare and distribute numismatic items, the United States Mint will resume selling previously available products.

The United States Mint is setting the price of these coins in accordance with 31 U.S.C. 9701(b)(2)(B).

Effective November 15, 2008, the United States Mint will commence selling the following previously available products according to the following price schedule:

Product	Last chance price
Annual Sets	
2007 UNITED STATES MINT PROOF SET®	$26.95
2007 UNITED STATES MINT 50 STATE QUARTERS PROOF SET™	13.95
2004 UNITED STATES MINT UNCIRCULATED COIN SET®	16.95
2006 UNITED STATES MINT UNCIRCULATED COIN SET®	16.95
2007 UNITED STATES MINT UNCIRCULATED COIN SET®	22.95
2007 UNITED STATES MINT SILVER PROOF SET™	44.95
2007 UNITED STATES MINT 50 STATE QUARTERS SILVER PROOF SET™	25.95
Special Sets	
50 STATE QUARTERS® AND EURO COIN COLLECTION	49.95
OFFICIAL COIN COLLECTING STARTER KIT	19.50
50 State Quarters® Bags & Rolls	
2004 WISCONSIN TWO-ROLL SET	32.95
2005 MINNESOTA TWO-ROLL SET	32.95
2005 MINNESOTA 1,000-COIN BAG, PHILADELPHIA	309.95
2005 MINNESOTA 1,000-COIN BAG, DENVER	309.95
2005 OREGON 1,000-COIN BAG, DENVER	309.95
2006 COLORADO 100-COIN BAG, PHILADELPHIA	32.95
2006 NEBRASKA 1,000-COIN BAG, PHILADELPHIA	309.95
2006 COLORADO 1,000-COIN BAG, PHILADELPHIA	309.95
2006 NEBRASKA 100-COIN BAG, DENVER	32.95
2006 NORTH DAKOTA 100-COIN BAG, DENVER	32.95
2006 SOUTH DAKOTA 100-COIN BAG, DENVER	32.95
2006 NEBRASKA 1,000-COIN BAG, DENVER	309.95
2006 COLORADO 1,000-COIN BAG, DENVER	309.95
2006 NORTH DAKOTA 1,000-COIN BAG, DENVER	309.95
2007 WYOMING 100-COIN BAG, PHILADELPHIA	32.95
2007 MONTANA 1,000-COIN BAG, PHILADELPHIA	309.95

Product	Last chance price
2007 WYOMING 1,000-COIN BAG, PHILADELPHIA	309.95
2007 UTAH 1,000-COIN BAG, PHILADELPHIA	309.95
2007 WYOMING 100-COIN BAG, DENVER	32.95
2007 WYOMING 1,000-COIN BAG, DENVER	309.95
2007 UTAH 1,000-COIN BAG, DENVER	309.95
2007 UTAH TWO-ROLL SET	32.95
2008 OKLAHOMA 100-COIN BAG, PHILADELPHIA	32.95
2008 NEW MEXICO 100-COIN BAG, PHILADELPHIA	32.95
2008 ARIZONA 100-COIN BAG, PHILADELPHIA	32.95
2008 OKLAHOMA 1,000-COIN BAG, PHILADELPHIA	309.95
2008 NEW MEXICO 1,000-COIN BAG, PHILADELPHIA	309.95
2008 ARIZONA 1,000-COIN BAG, PHILADELPHIA	309.95
2008 OKLAHOMA TWO-ROLL SET	32.95
2008 NEW MEXICO TWO-ROLL SET	32.95
2008 ARIZONA TWO-ROLL SET	32.95
2008 OKLAHOMA 100-COIN BAG, DENVER	32.95
2008 NEW MEXICO 100-COIN BAG, DENVER	32.95
2008 ARIZONA 100-COIN BAG, DENVER	32.95
2008 OKLAHOMA 1,000-COIN BAG, DENVER	309.95
2008 NEW MEXICO 1,000-COIN BAG, DENVER	309.95
2008 ARIZONA 1,000-COIN BAG, DENVER	309.95
Other Bags & Rolls	
2001 SACAGAWEA GOLDEN DOLLAR 25-COIN ROLL, PHILADELPHIA	35.95
2001 KENNEDY HALF DOLLAR 200-COIN BAG	130.95
2001 KENNEDY HALF-DOLLAR 2-ROLL SET	32.95
2002 GOLDEN DOLLAR 2000-COIN BAG, PHILADELPHIA	2,190.00
2002 GOLDEN DOLLAR 2000-COIN BAG, DENVER	2,190.00
2003 JEFFERSON NICKEL 2-ROLL SET	8.95
2004 SACAGAWEA GOLDEN DOLLAR 2000-COIN BAG, DENVER	2,490.00
2005 OCEAN IN VIEW NICKEL 1000-COIN BAG, PHILADELPHIA	79.95
2005 OCEAN IN VIEW NICKEL 1000-COIN BAG, DENVER	79.95
2005 SACAGAWEA GOLDEN DOLLAR 250-COIN BAG, PHILADELPHIA	319.95
50 State Quarters® Official First Day Coin Covers	
1999 NEW JERSEY OFFICIAL FIRST DAY COIN COVER	14.95
1999 GEORGIA OFFICIAL FIRST DAY COIN COVER	14.95
1999 CONNECTICUT OFFICIAL FIRST DAY COIN COVER	14.95
2000 SOUTH CAROLINA OFFICIAL FIRST DAY COIN COVER	14.95
2000 NEW HAMPSHIRE OFFICIAL FIRST DAY COIN COVER	14.95
2000 VIRGINIA OFFICIAL FIRST DAY COIN COVER	14.95
2001 NEW YORK OFFICIAL FIRST DAY COIN COVER	14.95
2001 NORTH CAROLINA OFFICIAL FIRST DAY COIN COVER	14.95
2001 RHODE ISLAND OFFICIAL FIRST DAY COIN COVER	14.95
2001 VERMONT OFFICIAL FIRST DAY COIN COVER	14.95
2001 KENTUCKY OFFICIAL FIRST DAY COIN COVER	14.95
2002 TENNESSEE OFFICIAL FIRST DAY COIN COVER	14.95
2002 OHIO OFFICIAL FIRST DAY COIN COVER	14.95
2002 LOUISIANA OFFICIAL FIRST DAY COIN COVER	14.95
2002 INDIANA OFFICIAL FIRST DAY COIN COVER	14.95
2002 MISSISSIPPI OFFICIAL FIRST DAY COIN COVER	14.95
2003 ILLINOIS OFFICIAL FIRST DAY COIN COVER	14.95
2003 ALABAMA OFFICIAL FIRST DAY COIN COVER	14.95
2003 MAINE OFFICIAL FIRST DAY COIN COVER	14.95
2003 MISSOURI OFFICIAL FIRST DAY COIN COVER	14.95
2003 ARKANSAS OFFICIAL FIRST DAY COIN COVER	14.95
2004 MICHIGAN OFFICIAL FIRST DAY COIN COVER	14.95
2004 FLORIDA OFFICIAL FIRST DAY COIN COVER	14.95
2004 TEXAS OFFICIAL FIRST DAY COIN COVER	14.95
2004 IOWA OFFICIAL FIRST DAY COIN COVER	14.95
2004 WISCONSIN OFFICIAL FIRST DAY COIN COVER	14.95
2005 CALIFORNIA OFFICIAL FIRST DAY COIN COVER	14.95
2005 MINNESOTA OFFICIAL FIRST DAY COIN COVER	14.95
2005 OREGON OFFICIAL FIRST DAY COIN COVER	14.95
2005 KANSAS OFFICIAL FIRST DAY COIN COVER	14.95
2005 WEST VIRGINIA OFFICIAL FIRST DAY COIN COVER	14.95
2006 NEVADA OFFICIAL FIRST DAY COIN COVER	14.95
2006 NEBRASKA OFFICIAL FIRST DAY COIN COVER	14.95
2006 COLORADO OFFICIAL FIRST DAY COIN COVER	14.95
2006 NORTH DAKOTA OFFICIAL FIRST DAY COIN COVER	14.95
2006 SOUTH DAKOTA OFFICIAL FIRST DAY COIN COVER	14.95

Product	Last chance price
2007 MONTANA OFFICIAL FIRST DAY COIN COVER	14.95
2007 WASHINGTON OFFICIAL FIRST DAY COIN COVER	14.95
2007 IDAHO OFFICIAL FIRST DAY COIN COVER	14.95
2007 WYOMING OFFICIAL FIRST DAY COIN COVER	14.95
2007 UTAH OFFICAL FIRST DAY COIN COVER	14.95
American Presidency 1 Coin Covers	
2007 GEORGE WASHINGTON 1 COIN COVER	14.95
2007 JOHN ADAMS 1 COIN COVER	14.95
2007 THOMAS JEFFERSON 1 COIN COVER	14.95
2007 JAMES MADISON PRES 1 COIN COVER	14.95
50 State Quarters® Coin & Die Sets	
2002 TENNESSEE COIN AND DIE SET—(D)	34.95
2007 WASHINGTON COIN & DIE SET—(P)	34.95
2007 MONTANA COIN & DIE SET—(D)	34.95
2007 WYOMING COIN & DIE SET—(D)	34.95
2007 MONTANA COIN & DIE SET—(P)	34.95
2007 IDAHO COIN & DIE SET—(D)	34.95
2007 WYOMING COIN & DIE SET—(P)	34.95
2007 IDAHO COIN & DIE SET—(P)	34.95
2007 UTAH COIN & DIE SET—(D)	34.95
2007 NEBRASKA COIN & DIE SET—(D)	34.95
2006 NEBRASKA COIN & DIE SET (P)	34.95
2006 COLORADO COIN & DIE SET—(P)	34.95
2006 NORTH DAKOTA COIN & DIE SET—(D)	34.95
2006 NORTH DAKOTA COIN & DIE SET—(P)	34.95
2006 SOUTH DAKOTA COIN & DIE SET—(D)	34.95
2006 SOUTH DAKOTA COIN & DIE SET—(P)	34.95
2005 OREGON COIN & DIE SET—(P)	34.95
2004 IOWA COIN & DIE SET—(P)	34.95
2003 MAINE COIN & DIE SET—(D)	34.95
2001 NORTH CAROLINA COIN & DIE SET—(P)	34.95
2001 RHODE ISLAND COIN & DIE SET—D	34.95
50 State Quarters® Collectible Spoons	
2004 IOWA COLLECTOR'S SPOON	7.95
2007 IDAHO COLLECTOR'S SPOON	7.95
2007 WYOMING COLLECTOR'S SPOON	7.95
2008 OKLAHOMA COLLECTOR'S SPOON	7.95
2008 NEW MEXICO COLLECTOR'S SPOON	7.95
2008 ARIZONA COLLECTOR'S SPOON	7.95
2005 WEST VIRGINIA COLLECTOR'S SPOON	7.95
2006 NEVADA COLLECTOR'S SPOON	7.95
2006 COLORADO COLLECTOR'S SPOON	7.95
2006 NEBRASKA COLLECTOR'S SPOON	7.95
2006 NORTH DAKOTA COLLECTOR'S SPOON	7.95
2006 SOUTH DAKOTA COLLECTOR'S SPOON	7.95
2007 WASHINGTON COLLECTOR'S SPOON	7.95
2007 MONTANA COLLECTOR'S SPOON	7.95
2007 UTAH COLLECTOR'S SPOON	7.95
50 State Quarters® Greetings from America Series	
1999 50 STATE QUARTERS® GREETINGS FROM AMERICA STATE CARD SET	27.99
1999 50 STATE QUARTERS® GREETINGS FROM AMERICA PORTFOLIO	29.99
2000 50 STATE QUARTERS® GREETINGS FROM AMERICA STATE CARD SET	27.99
2000 50 STATE QUARTERS® GREETINGS FROM AMERICA PORTFOLIO	29.99
2001 50 STATE QUARTERS® GREETINGS FROM AMERICA STATE CARD SET	27.99
2001 50 STATE QUARTERS® GREETINGS FROM AMERICA PORTFOLIO	29.99
2002 50 STATE QUARTERS® GREETINGS FROM AMERICA STATE CARD SET	27.99
2002 50 STATE QUARTERS® GREETINGS FROM AMERICA PORTFOLIO	29.99
2003 50 STATE QUARTERS® GREETINGS FROM AMERICA STATE CARD SET	27.99
2003 50 STATE QUARTERS® GREETINGS FROM AMERICA PORTFOLIO	29.99
2004 50 STATE QUARTERS® GREETINGS FROM AMERICA STATE CARD SET	27.99
2004 50 STATE QUARTERS® GREETINGS FROM AMERICA PORTFOLIO	29.99
2005 50 STATE QUARTERS® GREETINGS FROM AMERICA PORTFOLIO	29.99
2005 50 STATE QUARTERS® GREETINGS FROM AMERICA STATE CARD SET	27.99
2006 50 STATE QUARTERS® GREETINGS FROM AMERICA PORTFOLIO	29.99
2006 50 STATE QUARTERS® GREETINGS FROM AMERICA STATE CARD SET	27.99
2007 50 STATE QUARTERS® GREETINGS FROM AMERICA PORTFOLIO	29.99

Product	Last chance price
2007 50 STATE QUARTERS® GREETINGS FROM AMERICA STATE CARD SET	27.99
50 STATE QUARTERS® GREETINGS FROM AMERICA PORTFOLIO ALBUM	29.95
50 STATE QUARTERS® GREETINGS FROM AMERICA STATE CARD SET ALBUM	29.95
Westward Journey Nickel Series ™	
2004 WESTWARD JOURNEY NICKEL SERIES™ COIN SET	12.95
2006 WESTWARD JOURNEY NICKEL SERIES™ COIN SET	6.50

Sales of the products above will continue through December 19, 2008, or until inventories are depleted. Full terms and conditions for sales appear on the United States Mint catalog Web site at *http://www.usmint.gov/catalog.*

FOR FURTHER INFORMATION CONTACT: Andrew Brunhart, Deputy Director; United States Mint; 801 Ninth Street, NW.; Washington, DC 20220; or call 202–354–7500.

Dated: November 10, 2008.

Edmund C. Moy,

Director for United States Mint.

[FR Doc. E8–27145 Filed 11–14–08; 8:45 am]

BILLING CODE 4810–02–P

Federal Register

Monday,
November 17, 2008

Part II

Department of Labor

Wage and Hour Division

29 CFR Part 825
The Family and Medical Leave Act of 1993; Final Rule

DEPARTMENT OF LABOR

Wage and Hour Division

29 CFR Part 825

RIN 1215–AB35

The Family and Medical Leave Act of 1993

AGENCY: Employment Standards Administration, Wage and Hour Division, Department of Labor.

ACTION: Final rule.

SUMMARY: This document provides the text of final regulations implementing the Family and Medical Leave Act of 1993 (''FMLA''), the law that provides eligible employees who work for covered employers the right to take job-protected, unpaid leave for absences due to the birth of the employee's son or daughter and to care for the newborn child; because of the placement of a son or daughter with the employee for adoption or foster care; in order to care for a son, daughter, spouse, or parent with a serious health condition; or because of the employee's own serious health condition that makes the employee unable to perform the functions of his or her job. The final regulations also address new military family leave entitlements included in amendments to the FMLA enacted as part of the National Defense Authorization Act for FY 2008, which provide additional job-protected leave rights to eligible employees of covered employers who provide care for covered servicemembers with a serious injury or illness and because of qualifying exigencies arising out of the fact that a covered military member is on active duty or has been notified of an impending call or order to active duty in support of a contingency operation.

EFFECTIVE DATE: These rules are effective on January 16, 2009.

FOR FURTHER INFORMATION CONTACT: Richard M. Brennan, Senior Regulatory Officer, Wage and Hour Division, Employment Standards Administration, U.S. Department of Labor, Room S–3502, 200 Constitution Avenue, NW., Washington, DC 20210; *telephone:* (202) 693–0066 (this is not a toll free number). Copies of this rule may be obtained in alternative formats (Large Print, Braille, Audio Tape or Disc), upon request, by calling (202) 693–0675. TTY/TDD callers may dial toll-free 1–877–889–5627 to obtain information or request materials in alternative formats.

Questions of interpretation and/or enforcement of the agency's regulations may be directed to the nearest Wage and Hour Division (WHD) District Office. Locate the nearest office by calling the WHD's toll-free help line at (866) 4US–WAGE ((866) 487–9243) between 8 a.m. and 5 p.m. in your local time zone, or log onto the WHD's Web site for a nationwide listing of WHD District and Area Offices at: *http://www.dol.gov/esa/contacts/whd/america2.htm*.

SUPPLEMENTARY INFORMATION:

I. Background

A. What the FMLA Provides

The Family and Medical Leave Act of 1993, Public Law 103–3, 107 Stat. 6 (29 U.S.C. 2601 *et seq.*), was enacted on February 5, 1993, and became effective for most covered employers on August 5, 1993. As enacted in 1993, FMLA entitled eligible employees of covered employers to take job-protected, unpaid leave, or to substitute appropriate accrued paid leave, for up to a total of 12 workweeks in a 12-month period for the birth of the employee's son or daughter and to care for the newborn child; for the placement of a son or daughter with the employee for adoption or foster care; to care for the employee's spouse, parent, son, or daughter with a serious health condition; or when the employee is unable to work due to the employee's own serious health condition.

On January 28, 2008, President Bush signed into law H.R. 4986, the National Defense Authorization Act for FY 2008 (''NDAA''), Public Law 110–181. Section 585(a) of the NDAA expanded the FMLA to allow eligible employees of covered employers to take FMLA-qualifying leave ''[b]ecause of any qualifying exigency (as the Secretary [of Labor] shall, by regulation, determine) arising out of the fact that the spouse, or a son, daughter, or parent of the employee is on active duty (or has been notified of an impending call or order to active duty) in the Armed Forces in support of a contingency operation.'' *See* 29 U.S.C. 2612(a)(1)(E) (referred to herein as ''qualifying exigency leave''). The NDAA also provided that ''an eligible employee who is the spouse, son, daughter, parent, or next of kin of a covered servicemember shall be entitled to a total of 26 workweeks of leave during a [single] 12-month period to care for the servicemember.'' *See* 29 U.S.C. 2612(a)(3)–(4) (referred to herein as ''military caregiver leave''). In addition to establishing these two new leave entitlements (referred to together throughout this document as the ''military family leave provisions''), section 585(a) of the NDAA included conforming amendments to incorporate the new military family leave entitlements into the FMLA's current statutory provisions relating to the use of FMLA leave and to add certain new terms to the FMLA's statutory definitions. The NDAA amendments were enacted January 28, 2008. The amendments require the Secretary of Labor to define ''any qualifying exigency'' through regulation. *See* 29 U.S.C. 2612(a)(1)(E).

To be eligible for FMLA leave, an employee must have been employed for at least 12 months by the employer and for at least 1,250 hours of service with the employer during the 12 months preceding the leave, and be employed at a worksite at which the employer employs at least 50 employees within 75 miles of the worksite. *See* 29 U.S.C. 2611(2). Employers covered by the FMLA must maintain any preexisting group health coverage for an eligible employee during the FMLA leave period under the same conditions coverage would have been provided if the employee had not taken leave and, once the leave period has concluded, reinstate the employee to the same or an equivalent job with equivalent employment benefits, pay, and other terms and conditions of employment. *See* 29 U.S.C. 2614. If an employee believes that his or her FMLA rights have been violated, the employee may file a complaint with the Department of Labor or file a private lawsuit in federal or state court. If the employer has violated an employee's FMLA rights, the employee is entitled to reimbursement for any monetary loss incurred, equitable relief as appropriate, interest, attorneys' fees, expert witness fees, and court costs. Liquidated damages also may be awarded. *See* 29 U.S.C. 2617.

Title I of the FMLA is administered by the U.S. Department of Labor and applies to private sector employers of 50 or more employees, public agencies and certain federal employers and entities, such as the U.S. Postal Service and Postal Regulatory Commission. Title II is administered by the U.S. Office of Personnel Management and applies to civil service employees covered by the annual and sick leave system established under 5 U.S.C. Chapter 63, plus certain employees covered by other federal leave systems. Title III established a temporary Commission on Leave to conduct a study and report on existing and proposed policies on leave and the costs, benefits, and impact on productivity of such policies.[1] Title IV

[1] The Commission surveyed workers and employers in 1995 and issued a report published by the Department in 1996, ''A Workable Balance: Report to Congress on Family and Medical Leave Policies.'' *See http://www.dol.gov/esa/whd/fmla/fmla/1995Report/family.htm*. In 1999, the

(also administered by the Department of Labor) contains miscellaneous provisions, including rules governing the effect of the FMLA on more generous leave policies, other laws, and existing employment benefits. Title V originally extended leave provisions to certain employees of the U.S. Senate and House of Representatives, but such coverage was repealed and replaced by the Congressional Accountability Act of 1995, 2 U.S.C. 1301.

B. Regulatory History

The FMLA required the Department to issue initial regulations to implement Titles I and IV of the FMLA within 120 days of enactment, or by June 5, 1993, with an effective date of August 5, 1993. The Department issued a Notice of Proposed Rulemaking (''NPRM'') on March 10, 1993 (58 FR 13394), inviting comments until March 31, 1993, on a variety of questions and issues. After considering the comments received from a wide variety of stakeholders, including employers, trade and professional associations, advocacy organizations, labor unions, state and local governments, law firms, employee benefit firms, academic institutions, financial institutions, medical institutions, Members of Congress, and others, the Department issued an interim final rule on June 4, 1993 (58 FR 31794), which became effective on August 5, 1993, and which also invited further public comment on the interim regulations. Based on this second round of public comments, the Department published final regulations on January 6, 1995 (60 FR 2180), which were amended on February 3, 1995 (60 FR 6658) and on March 30, 1995 (60 FR 16382) to make minor technical corrections. The final regulations went into effect on April 6, 1995.

On December 1, 2006, the Department published a Request for Information (''RFI'') in the **Federal Register** (71 FR 69504) requesting the public to comment on its experiences with, and observations of, the Department's administration of the law and the effectiveness of the FMLA regulations. The RFI's questions and areas of focus were derived from stakeholder meetings, a number of rulings of the U.S. Supreme Court and other federal courts, the Department's experience administering the law, information from Congressional hearings, and public comments filed with the Office of Management and Budget (''OMB'') as described by OMB in three annual reports to the Congress on the FMLA's costs and benefits.[2] The Department received more than 15,000 comments in response to the RFI from workers, family members, employers, academics, and other interested parties.[3] This input ranged from personal accounts, legal reviews, industry and academic studies, and surveys to recommendations for regulatory and statutory changes to address particular areas of concern. The Department published its Report on the comments received in response to the Department's RFI in June 2007 (*see* 72 FR 35550 (June 28, 2007)).

On February 11, 2008, the Department published an NPRM in the **Federal Register** (73 FR 7876) inviting public comments for 60 days on proposed changes to the FMLA's implementing regulations. The proposed changes were based on the Department's experience of nearly 15 years administering the law, the two previous Department of Labor studies and reports on the FMLA issued in 1996 and 2001, several U.S. Supreme Court and lower court rulings, and a review of the public comments received in response to the RFI. The NPRM also sought public comment on issues to be addressed in final regulations to implement the 2008 amendments to the FMLA providing for military family leave pursuant to section 585(a) of the NDAA. The Department's NPRM included a description of the relevant military family leave statutory provisions, a discussion of issues the Department had identified under those provisions, and a series of questions seeking comment on subjects and issues for consideration in developing the final regulations.

In response to the NPRM, the Department received 4,689 comment submissions (the majority via the Federal eRulemaking Portal at *http://www.regulations.gov*) during the official comment period from a wide variety of individuals, employees, employers, trade and professional associations, labor unions, governmental entities, Members of Congress, law firms, and others. Two submissions attached the views of some of their individual members: The American Federation of Teachers (528 individual comments) and MomsRising.org (4,712 individual comments). Additional comments submitted via the Regulations.gov eRulemaking Portal after the comment period closed were not considered part of the official record and were not considered. (Comments may be viewed on the Regulations.gov Web site at *http://www.regulations.gov/fdmspublic/component/main?main=DocketDetail&d=ESA-2008-0001*.)

Nearly 90 percent of the comments received in response to the NPRM were either: (1) Very general statements; (2) personal anecdotes that do not address any particular aspect of the proposed regulatory changes; (3) comments addressing issues that are beyond the scope or authority of the proposed regulations, ranging from repeal of the Act to expanding its coverage and benefits; or (4) identical or nearly identical ''form letters'' sent in response to comment initiatives sponsored by various constituent groups, such as the American Postal Workers Union and several of its affiliated local unions, the Associated Builders and Contactors, MomsRising.org, the National Organization of Women, the Society for Human Resource Management, Teamsters for a Democratic Union, and Women Employed. The remaining comments reflect a wide variety of views on the merits of particular sections of the proposed regulations. Many include substantive analyses of the proposed revisions. The Department acknowledges that there are strongly held views on many of the issues presented in this rulemaking, and it has carefully considered all of the comments, analyses, and arguments made for and against the proposed changes.

The major comments received on the proposed regulatory changes are summarized below, together with a discussion of the changes that have been made in the final regulatory text in response to the comments received. In addition to the more substantive comments discussed below, the Department received some minor editorial suggestions (*e.g.*, suggested grammatical revisions and correction of misspelled words), some of which have been adopted and some of which have not. A number of other minor editorial changes have been made to improve the clarity of the regulatory text.

II. Summary of Comments on Changes to the FMLA Regulations

This summary begins with a general overview of how the new military

Department updated the employee and establishment surveys conducted in 1995 and published a report in January 2001, ''Balancing the Needs of Families and Employers: Family and Medical Leave Surveys, 2000 Update.'' *See http://www.dol.gov/esa/whd/fmla/fmla/toc.htm*.

[2] These OMB reports may be found at the following Web sites: *2001 report: http://www.whitehouse.gov/omb/inforeg/costbenefitreport.pdf; 2002 report: http://www.whitehouse.gov/omb/inforeg/2002_report_to_congress.pdf; 2004 report: http://www.whitehouse.gov/omb/inforeg/2004_cb_final.pdf*.

[3] Comments are available for viewing at the Wage and Hour Division of the Employment Standards Administration, U.S. Department of Labor, 200 Constitution Avenue, NW., Washington, DC 20210. Many comments are also available on *http://www.regulations.gov*.

family leave entitlements have been incorporated into the existing FMLA regulatory framework, followed by a section-by-section presentation of the major comments received on the Department's other proposed revisions. As proposed in the NPRM, the section headings in the final rule have been reworded from a question into the more common format of a descriptive title, and several sections have been restructured and reorganized to improve the accessibility of the information. In addition, proposed sections of the regulations have been renumbered in the final rule to allow for the addition of new regulatory sections addressing the military family leave entitlements as described below.

Incorporation of New Military Family Leave Entitlements Into the FMLA Regulations

In crafting these final regulations on military family leave, the Department was mindful of the special circumstances underlying the need for such leave. In recognition of the military families who may have the need to take FMLA leave under these new entitlements, the Department worked to finalize these regulations as expeditiously as possible. In addition, because many of the NDAA provisions providing for military family leave under the FMLA adopt existing provisions of law generally applicable to the military, the Department engaged in extensive discussions with the Departments of Defense and Veterans Affairs before finalizing these regulations. The Department also consulted with a number of military service organizations. These discussions focused on creating regulatory requirements under the FMLA that reflect an understanding of and appreciation for the unique circumstances facing military families when a servicemember is deployed in support of a contingency operation or injured in the line of duty on active duty, as well as providing appropriate deference to existing military protocol. The Departments of Defense and Veterans Affairs are fully cognizant of the central role each of them will play in ensuring that military families are able to avail themselves of the new entitlements when needed and to comply with the statutory and regulatory requirements for the taking of job-protected leave under the FMLA when a servicemember is deployed or seriously injured or ill. The Department also acknowledges the critical role employers play in helping the men and women serving in the military, especially those in the National Guard and Reserves. In workplaces around the country, employer support is vital to the implementation of the military family leave provisions in a manner that recognizes and contributes to the success of the members of the military and their families.

In the NPRM, the Department specifically requested comments on whether the new military family leave entitlements should be incorporated into the broader FMLA regulatory framework, or whether completely separate, stand-alone regulatory sections should be created for one or both of the new entitlements. The Department proposed to adopt many of the same or similar procedures for taking military family leave as are applied to other types of FMLA leave and suggested a number of sections to which conforming changes would need to be made in order to reflect these new leave entitlements. For example, the Department cited §§ 825.100 and 825.112(a) as sections that would need to be updated to reflect the military family leave entitlements. Among other items, the Department also suggested that the poster and general notice discussed in proposed § 825.300(a), the eligibility notice in proposed § 825.300(b), and the designation notice in proposed § 825.300(c) would need to incorporate appropriate references to the military family leave entitlements. The Department also requested comments on any other regulatory sections that should be revised in light of the military family leave entitlements.

After reviewing the public comments, the Department concurs with the majority of comments that stated that the procedures used when taking military family leave should be the same as those used for other types of FMLA leave whenever possible. The Department believes that this approach is beneficial to both employees and employers—each of whom should find it easier to apply the same or similar procedures for taking and administering FMLA leave regardless of the qualifying reason. Accordingly, the Department has, when feasible, incorporated a discussion of the new military family leave entitlements into the proposed regulatory provisions that concern the taking of FMLA leave for other qualifying reasons. The Department also has created four new regulatory sections—numbered as §§ 825.126, 825.127, 825.309 and 825.310—which address specific employee and employer responsibilities for purposes of military family leave.

The Department received a few comments regarding the incorporation of the military family leave entitlements into the proposed FMLA regulatory framework. The National Partnership for Women & Families and MomsRising.org both stated:

> Because the military leave provisions have different time requirements, different certification requirements, and different definitions than the rest of the FMLA, we strongly recommend that the regulations for these provisions not be incorporated in the rest of the FMLA regulations. Rather, these regulations should have their own sections within the FMLA regulations and can refer to the rest of the FMLA when necessary. This organization will reduce confusion and will allow DOL to issue the military leave regulations much more promptly.

The Pennsylvania Governor's Office of Administration also recommended ''that the regulations for [the military family leave entitlements] be separate from the FMLA regulations.''

On the other hand, a number of commenters urged that the Department, as much as possible, incorporate the new regulations regarding military servicemember leave into the existing FMLA regulations. For example, TOC Management Services argued:

> The DOL should take its cue from Congress, which chose to incorporate the provisions of H.R. 4986 into the existing FMLA statutes * * *. By organizing the statutes this way, Congress has clearly shown an intent to have the new FMLA provisions be an integrated part of the FMLA; not a stand-alone provision within the other FMLA provisions. Although carving out a section to address the new military servicemember leave provisions would be the most convenient option for the DOL, it would ultimately lead to confusion. Employees and employers reading through the regulations to determine their leave rights/obligations may not be aware that there is an entirely separate section dealing with military servicemember leave. For instance, an employee may read § 825.112 to determine whether they qualify for leave to care for their injured servicemember spouse and end their inquiry after reading through that section. It would be confusing to have an entirely different section regarding qualifying reasons for leave that relates only to military servicemembers. To the extent possible, the DOL should follow Congress's lead in incorporating the new provisions into the existing ones.

Similarly, the Illinois Credit Union League stated that, ''[because] the military and medical provisions are companion regulations, they should be incorporated into one statutory scheme to ensure consistency. To act otherwise would be to assure a regulatory legal patchwork * * *.'' WorldatWork also suggested that the Department ''should incorporate the notice provisions provided in this section with the notice provisions provided elsewhere in the FMLA regulations. Consistency will help in administration.''

The Department has decided to incorporate, wherever feasible, the new military family leave entitlements into the proposed FMLA regulations governing the taking of job-protected leave for other qualifying reasons. The Department believes that completely separating the military family leave provisions from the provisions governing the taking of other types of FMLA leave would create unnecessary confusion and complexity for employees and employers. By integrating the military family leave provisions into the proposed FMLA regulations where applicable and appropriate, employees and employers will be better able to understand their rights and obligations under the new entitlements. Because Congress chose to incorporate the new entitlements into the existing FMLA statutory framework rather than create a new entitlement separate from the rest of the FMLA, ensuring that the totality of the FMLA regulations reflects the new military family leave provisions is both necessary and consistent with congressional intent.

In most cases, these changes are modest technical changes that acknowledge the military leave entitlements in the context of the FMLA. For example, some references to certification in the regulations have been altered to clarify whether they refer only to ''medical certifications'' of a serious health condition or if they refer also to ''certifications'' under the military family leave provisions. In some places, certain references to an employee's entitlement to 12 workweeks of leave are changed to simply reference the employee's leave entitlement, including the entitlement of up to 26 workweeks for military caregiver leave. Minor changes such as this occur in §§ 825.101, 825.112, 825.122, 825.124, 825.200, 825.202–825.207, 825.213, 825.300, 825.301, 825.305–825.308, 825.400, and 825.500. In some instances, the changes are more substantial, such as in the notice provisions in §§ 825.302 and 825.303, and the general description of the FMLA in § 825.100. In addition, several new terms related to the military family leave provisions have been added to the definitions in § 825.800. Where significant, the specific changes required to incorporate the new military family leave entitlements into the proposed FMLA regulations are discussed in greater detail in the section-by-section analysis of the final regulations which follows.

The Department also recognizes that the NDAA amendments to the FMLA created certain new concepts that are applicable only to the taking of military family leave. Accordingly, the final rule includes four new regulatory sections, numbered §§ 825.126, 825.127, 825.309, and 825.310, which address those unique aspects of the military family leave entitlements. These four sections are discussed in greater detail below in the section-by-section analysis. Generally speaking, §§ 825.126 and 825.127 discuss an employee's entitlement to qualifying exigency and military caregiver leave respectively. Sections 825.309 and 825.310 of the final rule cover the certification requirements for taking qualifying exigency and military caregiver leave respectively. The proposed FMLA provisions beginning with § 825.309 and ending with § 825.311 have been renumbered in the final rule as §§ 825.311–825.313 to allow for the addition of these two new military family leave certification provisions.

Section-by-Section Analysis of Final Regulations

Section 825.100 (The Family and Medical Leave Act)

The Department proposed no substantive changes to this section. Section 825.100 in the final rule is amended to include a description of the military family leave provisions in the general discussion of the FMLA. Section 825.100(a) reflects that the FMLA has been amended, and also adds the new qualifying reasons for taking leave. Section 825.100(b) adds the serious injury or illness of a covered servicemember for whom the employee is eligible to provide care under the FMLA as another reason that precludes an employer from recovering health benefits from an employee who does not return to work. Section 825.100(d) now includes references to military caregiver leave and qualifying exigency leave in the overview of certification.

Section 825.101 (Purpose of the Act)

The Department proposed no substantive changes to this section. Section 825.101(a) in the final rule is amended to include a reference to the military family leave provisions in the general discussion of the purpose of the FMLA.

Sections 825.102–825.103 (Reserved)

The NPRM proposed to delete and reserve §§ 825.102 (Effective date of the Act) and 825.103 (How the Act affected leave in progress on, or taken before, the effective date of the Act), because they are no longer needed. The final rule reserves these sections.

Section 825.104 (Covered Employer)

The Department proposed no changes to this section, which discusses employer coverage under the FMLA, and received no comments on this section. The final rule adopts the section as proposed.

Section 825.105 (Counting Employees for Determining Coverage)

The Department proposed no substantive changes to this section, which addresses how to count employees for purposes of determining coverage. The only change proposed was to update the dates used in the example in paragraph (f). The final rule adopts the section as proposed.

TOC Management Services stated that it believes the rule is confusing because it states in paragraph (c) that there is no employer/employee relationship when an employee is laid off. It noted that there may be a continuing obligation to that employee, such as under a collective bargaining agreement, because the employee has an expectation of recall in the event that business picks up again. It also stated that many employers mistakenly use the word ''layoff'' when the action truly is an administrative termination or downsizing and the employee has no expectation of recall.

The Department has not heard from any other commenters that this rule is confusing. Moreover, the fact that an employer may have continuing contractual obligations to an individual on layoff does not mean that it has a current employer-employee relationship with that person within the meaning of the FMLA. Employees who are laid off typically are eligible for unemployment insurance benefits, which demonstrates the lack of an ongoing employer/employee relationship as it is commonly understood. Therefore, the Department is not making any changes to the section and is adopting the rule as proposed.

Section 825.106 (Joint Employer Coverage)

Section 825.106 addresses joint employment. The proposed rule added a new paragraph at § 825.106(b)(2) to address joint employment in the specific context of a Professional Employer Organization (''PEO''). PEOs are unlike traditional placement or staffing agencies that supply temporary employees to clients. PEOs operate in a variety of ways, but typically provide payroll and administrative benefits services for the existing employees of an employer/client. The proposed rule stated that PEOs that contract with clients merely to perform administrative

functions are not joint employers with their clients; however, where the PEO has the right to hire, fire, assign, or direct and control the employees, or benefits from the work they perform, such a PEO would be a joint employer.

The commenters generally applauded the Department's recognition of the differences between PEOs and traditional staffing agencies, but they had a number of suggestions for further improvements and clarifications. *See, e.g.*, Strategic Outsourcing, Inc.; TriNet Group; National Association of Professional Employer Organizations (''NAPEO''); American Federation of Labor and Congress of Industrial Organizations (''AFL–CIO''); and Fulbright & Jaworski. *But see* Harrill & Sutter (stating proposed change is completely unnecessary and probably harmful because companies will begin to call themselves PEOs regardless of facts). Based on the comments received, the Department has made a number of additional changes, as described below.

First, many of the commenters expressed concern regarding the proposed rule's focus on a PEO's ''right'' to make certain employment decisions rather than the ''actual'' role it exercises when evaluating whether the PEO is a joint employer. They were concerned particularly in light of the fact that several states' laws require PEOs to reserve such rights in their contracts with client employers. The commenters had different suggestions for further clarification on this point. For example, NAPEO noted that PEOs ''contractually assume or share certain employer obligations and responsibilities.'' Therefore, NAPEO conceded that the ''reality of PEO arrangements is that PEOs do co-employ client worksite employees.'' NAPEO recommended, however, that the regulation designate PEO clients as the primary employers for FMLA purposes. *See also* TriNet Group. Both NAPEO and TriNet Group stated that PEOs do not create the jobs for which they provide administrative services; rather, the client employer creates those jobs and the PEO has no authority to move an employee to another client. Therefore, they believed that the primary employer duty of job restoration should be the responsibility of the entity that creates the job opportunity. The AFL–CIO similarly stated that ''it makes no sense to consider PEOs as primary employers. In fact, designating the PEO as the primary employer for purposes of job restoration threatens to deprive employees of their key post-leave FMLA right.'' *See also* Greenberg Traurig (PEOs do not fit the model of a primary employer because they do not hire and place employees at a work location and thus should not be responsible for reinstatement).

On the other hand, Strategic Outsourcing, Inc. objected to NAPEO's per-se rule designating the clients of PEOs as the primary employers, stating that the PEO industry has changed throughout its history and will continue to evolve, and that there is great variety among PEOs as to the scope of services they deliver. ''[A]ny per-se rule that fails to take into account the unique facts of each case will inevitably result in improper application of the FMLA.'' Therefore, Strategic Outsourcing, Inc. asked the Department to focus on the economic realities of the situation, both to determine whether a joint employment relationship exists and, if so, to determine which employer is the primary employer. ''Such an approach would allow for the multifarious forms PEOs take, and would avoid making the application of the FMLA dependent on state law and nuances of contractual terms.'' Fulbright & Jaworski similarly noted that the FMLA borrows the definition of ''employ'' from the FLSA, which utilizes an economic realities analysis. Moreover, it disagreed with NAPEO's suggestion, stating that PEOs that do not exercise control over a client's employees and that do not hire and fire should not be considered joint employers. *See also* Duane Morris (disagreeing with NAPEO's assertion that PEOs are always joint employers); Greenberg Traurig (suggesting that the regulation follow the case law ''which emphasizes that it is the economic realities of the relationship and actual practices that determine the employer/employee relationship''); Kunkel Miller & Hament (referencing a number of court decisions holding that PEOs/employee leasing companies were not joint employers).

Jackson Lewis concluded that the joint employment concept ''is entirely inapposite to the relationship between a PEO and its client companies'' because, although a PEO assumes a number of employer responsibilities, it does not have the day-to-day control over the employees, cannot meaningfully affect the terms and conditions of their employment, and does not benefit from the work of those employees. Proskauer Rose similarly stated that, although each relationship must be evaluated in its totality, with no single factor controlling, ''the joint employer doctrine should rarely, if ever, be applied to PEOs,'' and that the right to hire and fire ''should be irrelevant to the joint employer analysis unless the PEO actually exercises that right.'' In contrast, the Equal Employment Advisory Council emphasized that the proposed language (stating that where the PEO ''has the right to hire, fire, assign, or direct and control the employees, or benefits from the work that the employees perform, such a PEO would be a joint employer with the client company'') makes a ''critical'' point that ''must be retained, since an organization maintaining one or more of these types of control indeed would be a 'joint employer' under the FMLA and other laws.''

Some of these commenters also addressed the issue of how employers must count their employees, if the PEO is a joint employer, to determine whether there are 50 employees within 75 miles. *See, e.g.*, Proskauer Rose, Greenberg Traurig, and NAPEO. They noted that the size of the average PEO client (17 employees) falls squarely within the statutory exception to coverage, and they stated that a small company that would otherwise be exempt from the FMLA should not be deprived of the exception just because it partners with a PEO.

Finally, a number of commenters stated that the Department used confusing terminology in the proposed rule that did not keep clear the distinction between a traditional temporary placement or staffing agency and an employee leasing agency or PEO. *See, e.g.*, American Staffing Association.

The Department agrees with the commenters that suggested that the economic realities analysis is the proper standard for assessing whether a PEO is a joint employer. *See* § 825.105(a). The FMLA incorporates the FLSA definition of ''employ,'' which is ''to suffer or permit to work.'' 29 U.S.C. 2611(3), incorporating 29 U.S.C. 203(g). As the Supreme Court has repeatedly recognized, that definition is strikingly broad. *See, e.g.*, *Rutherford Food Co.* v. *McComb*, 331 U.S. 722, 730 (1947). Whether an employment relationship exists must be determined in light of the economic realities of the situation. *Goldberg* v. *Whitaker House Cooperative, Inc.*, 366 U.S. 28, 33 (1961). An economic realities analysis does not depend on ''isolated factors but rather upon the circumstances of the whole activity.'' *Rutherford Food Co.*, 331 U.S. at 730. The Department also applied this economic realities principle when it promulgated regulations to clarify the definition of ''joint employment'' under the Migrant and Seasonal Agricultural Worker Protection Act, 29 U.S.C. 1802(5), which also incorporates the FLSA definition of ''employ.'' *See* 62 FR 11734 (Mar. 12, 1997); 29 CFR Part 500.

Therefore, the final rule modifies § 825.106(b)(2) of the proposed rule by

adding a sentence to clarify that the ''determination of whether a PEO is a joint employer also turns on the economic realities of the situation and must be made based upon all the facts and circumstances.'' The final rule retains the proposed sentence clarifying that a PEO is not a joint employer if it simply performs administrative functions, such as those related to payroll and benefits and updating employment policies. The final rule modifies the proposed sentence pertaining to the right to hire, fire, assign, or direct and control to clarify that ''such rights may lead to a determination that the PEO would be a joint employer with the client employer, depending upon all the facts and circumstances.'' The final rule also adds a sentence at the end of § 825.106(c) to clarify that, unlike the situation involving traditional placement agencies, the client employer most commonly would be the primary employer in a joint employment relationship with a PEO.

With regard to how to count employees in the joint employment context, some of the comments demonstrated confusion about which employees an employer must count. There appeared to be a misperception that if a PEO jointly employs its client employers' employees, each client employer therefore also must jointly employ (and count) both the office staff of the PEO and the employees of the PEO's other unrelated clients. That would only be true, however, if the economic realities showed that the PEO office staff or the employees of the other unrelated clients were economically dependent on the client employer, something which is unlikely. Therefore, the final rule adds a new sentence in § 825.106(d) to clarify employee counting in the PEO context.

Finally, the final rule makes minor editorial changes in response to the comments noting that the terminology used was confusing with regard to leasing agencies. The Department deleted that terminology, and the final rule refers only to temporary placement agencies and PEOs, the two main categories of employment agencies. Of course, the labeling or categorization of a particular employer does not control the outcome; all the facts and circumstances in each situation must be evaluated to assess whether joint employment exists and, if so, which employer is the primary employer.

Section 825.107 (Successor in Interest Coverage)

No changes were proposed in this section of the current rule, and no substantive comment was received. The final rule adopts this section as proposed.

Section 825.108 (Public Agency Coverage)

The Department proposed no changes to this section, which addresses what constitutes a ''public agency'' for purposes of coverage. The current regulation states that, where there is any question about whether a public entity is a public agency as distinguished from a part of another public agency, the U.S. Bureau of the Census's ''Census of Governments'' will be determinative. In contrast, the regulations implementing the Fair Labor Standards Act use this test as just one factor in determining what constitutes a separate public agency. *See* 29 CFR § 553.102. Because the FMLA incorporates the FLSA's definition of ''public agency'' (*see* 29 U.S.C. 2611(4)(A)(iii), incorporating 29 U.S.C. 203(x)), the proposal asked whether the FMLA regulation should be conformed to the test in the FLSA regulations. The final rule makes this regulation consistent with the FLSA regulation.

Very few commenters addressed this issue. The AFL–CIO stated that the ''FLSA test is more appropriate'' because the FLSA factors include employment-specific criteria rather than relying primarily on governance and taxation issues as the Census does. In contrast, Catholic Charities, Diocese of Metuchen stated that a change was not necessary because the Census test was ''sufficient for determining whether a public agency is a separate and distinct entity.'' It stated that, because the test focuses on whether the agency has independent fiscal powers and looks at the type of governing body that the agency has and the functions that this body performs, the factors are clear and concise and less subjective than the FLSA case-by-case determination. *See also* Harrill & Sutter (no need for an amendment because, although the FMLA definition of ''public agency'' incorporates the FLSA definition, the definition of ''employer'' is broader and refers simply to conduct affecting commerce); Robert Jusino (agencies should promulgate their rules by using standardized tests and definitions unless the FLSA multiple factors tests is significantly superior).

The final rule amends this section to be consistent with the FLSA regulation, pursuant to which the Census is just one factor. Because the FMLA incorporates the FLSA's definition of ''public agency,'' the Department believes that the regulatory tests should be consistent. Moreover, as the AFL–CIO noted, the FLSA test allows employment-related factors to play a greater role than they do in the Census analysis, which the Department believes is appropriate.

Section 825.109 (Federal Agency Coverage)

The NPRM proposed to update the existing regulations that identify the Federal agencies covered by Title I of the FMLA and the Department of Labor's regulations to reflect changes in the law resulting from the Congressional Accountability Act of 1995, 2 U.S.C. 1301, and a nomenclature change in the Postal Regulatory Commission required by section 604(f) of the Postal Accountability and Enhancement Act, Public Law 109–435, Dec. 20, 2006, 120 Stat. 3242. No substantive comments were received on this section and it is adopted in the final rule as proposed.

Section 825.110 (Eligible Employee)

Section 825.110 addresses the requirement that employees are eligible to take FMLA leave only if they have been employed by the employer for at least 12 months and have at least 1,250 hours of service in the 12-month period preceding the leave. The proposed rule added a new paragraph at § 825.110(b)(1) to provide that, although the 12 months of employment need not be consecutive, employment prior to a continuous break in service of five years or more need not be counted. The Department also proposed a new paragraph (b)(2) setting forth two exceptions to the five-year rule for: (1) A break in service resulting from an employee's fulfillment of National Guard or Reserve military service obligations; and (2) where a written agreement, including a collective bargaining agreement, exists concerning the employer's intention to rehire the employee after the break in service. In those situations, the proposed rule provided that prior employment must be counted regardless of the length of the break in service. The proposed rule also stated, in paragraph (b)(4), that an employer may consider employment prior to a break in service of more than five years, provided that it does so uniformly with respect to all employees with similar breaks. The proposed rule stated in paragraph (c)(2) that an employer must credit an employee returning from his or her National Guard or Reserve obligation with the hours of service that would have been performed but for the military service when evaluating the 1,250-hour requirement, and paragraph (b)(2)(i) stated that the period of the military service also must be counted toward the

12-month requirement. Proposed paragraph (d) clarified that an ineligible employee on non-FMLA leave may become eligible for FMLA leave while on leave (by meeting the 12-month requirement), and that any portion of the leave taken for a qualifying reason after the employee becomes eligible would be protected FMLA leave. The proposed rule also deleted portions of current paragraphs (c) and (d), based upon the Supreme Court's decision in *Ragsdale* v. *Wolverine World Wide, Inc.*, 535 U.S. 81 (2002), because they improperly ''deemed'' employees eligible for FMLA leave. Finally, the proposal moved the notice provisions in current paragraph (d) to § 825.300(b) and deleted current paragraph (e), which relates to counting periods of employment prior to the effective date of the FMLA. The final rule adopts the changes made in the proposed rule with one modification that extends the period for breaks in service from five years to seven years.

Many commenters addressed various aspects of the proposed rule. Numerous employee representatives opposed the proposed five-year cap on breaks in service in order for prior employment to count toward the 12-month requirement. They asserted that the proposal was contrary to the statutory text, which does not have any time limit for the 12-month requirement; that the legislative history is clear that the months of employment do not need to be consecutive; and that the current regulation is appropriate and therefore any change would be arbitrary and contrary to the remedial purpose of the law. *See, e.g.*, AFL–CIO; American Postal Workers Union; Maine Department of Labor; Legal Aid Society—Employment Law Center; Sargent Shriver National Center on Poverty Law; and Harrill & Sutter. The AFL–CIO stated that most employers retain records for seven years as a routine business practice, and that employees also might have records for longer than five years. It further stated that employer objections regarding the administrative burdens associated with combining previous periods of employment were not credible in light of the advances in electronic compilation and retrieval of data. Therefore, the AFL–CIO suggested that, if any limit is imposed, it should be lengthened to seven years to conform to standard recordkeeping practices. The American Postal Workers Union similarly commented that a five-year cap strikes the wrong balance between employees' need for FMLA leave and employers' ability to identify prior periods of service. It stated that in most cases there will be no question whether an employee had a period of prior service sufficient to qualify the employee for protection, and that the increasing use of electronic recordkeeping will minimize the burden on employers. The National Partnership for Women & Families, the Coalition of Labor Union Women, and Women Employed all emphasized that the proposed change would cause particular hardships for women, who more frequently take extended time off to raise children or to care for ill family members and then return to their jobs; the National Partnership suggested six or seven years might have a less harmful effect. The Cleveland-Marshall College of Law, Employment Law Clinic, commented that an employer is not required to rehire a separated employee; therefore, the issue arises only if the employer has made a conscious decision to rehire a former employee after determining that the burden of hiring an employee who qualifies for FMLA rights sooner is outweighed by the value that the former employee would have to the employer.

Numerous employers expressed the opposite view and stated that having some cap on the length of the gap was at least a step in the right direction. For example, the Equal Employment Advisory Council (''EEAC'') noted that with the passage of time, manufacturing methods, technology, equipment, customers, marketing methods and product lines may change dramatically, and an employee who has been gone for a number of years is functionally no different from a new employee. Therefore, EEAC commented that having an established cutoff beyond which a break in service will be ignored balances the interests of employers and employees and allows employers to focus benefits on employees who exhibit loyalty. However, EEAC and many other employers stated that allowing a five-year gap was too long. They suggested that the Department should allow a gap of three years, because that would be consistent with the length of the FMLA record keeping requirement and, thus, there would be appropriate documentation available. They commented that allowing a five-year gap would cause administrative problems by putting pressure on employers to retain records for that longer period, which would be burdensome and yet of little practical value to employees because so few would return to their employer after that long a gap. *See, e.g.*, EEAC; Chamber of Commerce of the United States of America (the ''Chamber''); HR Policy Association; Fisher & Phillips; Food Marketing Institute; and Catholic Charities, Diocese of Metuchen.

Other employers suggested that there should be an even shorter period. For example, the National Coalition to Protect Family Leave stated that the eligibility determination should be based simply upon continuous service for a 12-month period, and it opposed any aggregation of service other than pursuant to the two exceptions in paragraph (b)(2). *See also* College and University Professional Association for Human Resources; Spencer Fane Britt & Browne; Metropolitan Transportation Authority (NY); and National Business Group on Health. Jackson Lewis commented that the Department should reject an absolute time period, and instead look to each employer's normal ''break in service'' policies applicable to seniority, eligibility for benefits, and accrual of paid leave time; however, if an absolute limit is necessary, it suggested a cap of two years. Jackson Lewis regarded it as unfair that a returning employee who left employment five years ago would be entitled to FMLA leave before a colleague who had recently devoted 12 consecutive months of service to the company, and that the unfairness would be compounded unless the rules also accounted for FMLA leave taken in the last few months of that individual's previous employment.

Some employers stated that allowing a five-year gap brings clarity to the decision and strikes the right balance between allowing an employee to count previous periods of employment and protecting an employer from the burden of tracking former employees for potentially long periods of time. They viewed the proposal as consistent with the Act, which does not require the 12 months of employment to be consecutive, but which also recognizes that there must be balance and that the goals must be accomplished in a way that takes account of employers' legitimate interests. *See, e.g.*, Burr & Forman; TOC Management Services; Retail Industry Leaders Association; Association of Corporate Counsel's Employment and Labor Law Committee; Society of Professional Benefit Administrators; Cummins Inc.; Domtar Paper Company.

Finally, a number of employers suggested that the Department should clarify that employers are required to maintain employee records for only three years and provide further guidance on what it means that the employee is responsible for putting forth some proof of the prior

employment for the earlier years. *See, e.g.*, the Chamber; College and University Professional Association for Human Resources; Hewitt Associates; Retail Industry Leaders Association; Fisher & Phillips. Hewitt Associates asked: What would happen if the employer actually has the data from the earlier years; what if the data would be difficult to retrieve; and how can an employer challenge the employee's proof? Vercruysse Murray & Calzone asked whether it would be sufficient for an employee to merely assert, by affidavit or otherwise, that he or she was employed for a specific period of time five years ago, or to present a document evidencing previous employment, even though that document may not contain sufficient information to establish the actual duration of the previous employment. EEAC suggested that employees should be required to provide proof such as pay stubs, W–2 forms, or other documentary evidence beyond the employee's mere word that he or she is a former employee. In contrast, the AFL–CIO commented that an employee should only have to prove prior employment where the employer does not have records, because it stated that most employers keep employment and tax records for several years beyond the three years the FMLA requires.

Only a few commenters addressed the two exceptions to the five-year rule in proposed § 825.110(b)(2), which are applicable where the break in service is for National Guard or Reserve service or where there is a written agreement regarding the employer's intention to rehire the employee. Those commenters generally agreed with or did not oppose the exceptions. *See, e.g.*, HR Policy Association; National Coalition to Protect Family Leave; EEAC. Burr & Forman stated that the military exception is unnecessary because the same administrative burdens apply when an employee is gone for over five years for military reasons, and the proposed rules already provide sufficient protection by counting military service both toward the 12-month requirement and toward the 1,250 hour requirement in determining employee eligibility.

With regard to proposed § 825.110(c)(2), which counts the hours the employee would have worked for the employer but for the National Guard or Reserve service, EEAC stated that it should be deleted because it was beyond the Department's authority to legislate FMLA eligibility for employees who have been absent for military service and thus lack the minimum 1,250 hours of service within the previous year, as statutorily required. EEAC recognized that the Department's proposal codifies guidance previously issued concluding that, because the Uniformed Services Employment and Reemployment Rights Act (''USERRA'') entitles returning service members to the rights and benefits they would have had if they had been continuously employed, they are entitled to count the time. EEAC disagreed, however, with the Department's reconciliation of the two statutes.

Several commenters addressed the clarification in proposed § 825.110(d) providing that an employee who is on non-FMLA leave may become eligible for FMLA leave while on leave (by meeting the 12-month requirement), and that any portion of the leave taken for a qualifying reason after the employee becomes eligible would be protected FMLA leave, while any leave taken before the employee passed the 12-month mark would not be FMLA leave. The AFL–CIO approved of this clarification, which is consistent with the court's decision in *Babcock* v. *Bell South Advertising and Publishing Corporation*, 348 F.3d 73 (4th Cir. 2003), stating that this is the interpretation of the regulation that best effectuates the 12-month eligibility requirement of the FMLA. *See also* Society of Professional Benefit Administrators (agreeing that the proposal would clarify a very confusing issue for employers); Domtar Paper Company.

Other commenters opposed the proposal and suggested that eligibility for FMLA leave should attach only to leave that actually begins after the employee meets the 12-month and 1,250-hour requirements, regardless of whether and when the employee gives notice by requesting leave, and should not attach to a block of leave or intermittent leave that begins before the employee becomes eligible and continues after the employee becomes eligible. *See, e.g.*, National Coalition to Protect Family Leave; EEAC; National Business Group on Health; and Food Marketing Institute. EEAC stated that, in situations where employers provide more generous leave benefits than the FMLA requires by providing leave for those who lack the minimum 12 months of service, the employer then must provide future FMLA benefits that it would not otherwise be required to provide. It stated this ''creates a perverse incentive for employers (1) not to provide leave in excess of the FMLA requirements and (2) to act swiftly to terminate employees before they become eligible for FMLA protection.'' EEAC also noted that it results in an employee with only nine months of service who is allowed to take three months of approved leave becoming eligible for three more months of leave at the 12-month mark, while an employee with nine years of service is eligible for only three months total. *See also* Spencer Fane Britt & Browne; Vercruysse Murray & Calzone (also commenting that the proposal would create significant administrative burdens for employers because they would have to revisit employees' eligibility for FMLA leave during the middle of their non-FMLA leave, and when an employee reaches 12 months of service the employer will have to issue an Eligibility Notice a second time). This commenter also asked what happens if the employer's policies do not require group health benefits to be continued during the period of a non-FMLA absence. Hewitt Associates stated that employers might fear that replacing an employee during the first non-FMLA portion of the leave would run afoul of the FMLA's prohibition against interfering with an employee's right to take leave, thereby effectively extending the FMLA's protections through the first non-FMLA portion of the leave and providing an employee with greater than 12 weeks of leave. Therefore, Hewitt Associates suggested that the Department clarify that the employee would have no expectation of, or right to, these FMLA non-interference protections during the first non-FMLA phase of the leave. Finally, Jackson Lewis urged the Department to provide that any non-FMLA leave that would otherwise qualify counts towards an employee's annual entitlement of 12 weeks of FMLA leave.

A number of the commenters also asked the Department to create consistency between the language in § 825.110(d), which states that eligibility is determined when the leave commences, and § 825.110(e), which states that the determination of whether an employer has 50 employees within 75 miles is made when the employee gives notice of the need for leave. *See, e.g.*, National Coalition to Protect Family Leave; Associated Builders and Contractors; International Franchise Association. The National Coalition to Protect Family Leave stated that it applauded the Department's interest in promoting as much advance notice of an employee's need for leave as possible to allow both the employer and the employee to plan, but it believed that the statute requires the 50/75 eligibility determination to be made when the employee actually takes leave rather than when advance notice is given. On the other hand, EEAC stated that it ''understands the Department's

reasoning for selecting a different date,'' and it simply sought clarification that the employer could reevaluate the 50/75 determination at the beginning of each new FMLA leave year, consistent with other provisions.

Finally, a number of commenters applauded the Department for the deletions from existing § 825.110(c) and (d) in response to the Supreme Court's decision in *Ragsdale. See, e.g.*, EEAC; HR Policy Association; and Association of Corporate Counsel's Employment and Labor Law Committee. The National Association of Letter Carriers, however, objected to the deletion of the requirement that the employer must project when an employee will become eligible for leave or advise the employee when the employee becomes eligible, stating that the requirement minimizes disputes.

With regard to the cap in proposed § 825.110(b)(1) on gaps in service in order for the prior employment to count toward an employee's 12-month requirement, the final rule modifies the proposal by extending the permissible gap to seven years. The court in *Rucker* v. *Lee Holding Co.*, 471 F.3d 6 (1st Cir. 2006), in permitting the five year gap at issue in that case, recognized that the statutory language is ambiguous as to whether previous periods of employment count toward the 12-month requirement, and it stated that the appropriate way to resolve this important policy issue was through agency rulemaking. The Department believes that a seven-year cap draws an appropriate balance between the interests of employers and employees. It recognizes and gives effect to the legislative history's clear statement that the 12 months of employment need not be consecutive, while limiting the burden on employers of attempting to verify an employee's claims regarding prior employment in the distant past. In light of the legislative history, the Department rejects the comments suggesting that no gap should be permitted. By allowing a gap of up to seven years, the rule takes account of the comments noting that employees sometimes take extended leaves from the workforce to raise children or to care for ill family members and emphasizing that women are particularly likely to fill this role. The final rule also recognizes that many employers keep records for seven years for tax or other standard business reasons; thus, allowing a seven-year gap will not impose a burden on those employers. The FMLA, however, only requires employers to keep records for three years, and the burden of proving eligibility is always on the employee. Accordingly, if an employer retains records only for the required three years, it may base its initial determination of the employee's eligibility for leave on those records. If it therefore advises the employee in the eligibility notice that the employee is not eligible for FMLA leave, the employee will have to submit sufficient proof of his or her periods of employment in years four through seven to demonstrate eligibility. Such proof might include W–2 forms; pay stubs; a statement identifying the dates of prior employment, the position the employee held, the name of the employee's supervisor, and the names of co-workers; or any similar information that would allow the employer to verify the dates of the employee's prior service. Any application for employment the employee had completed also might provide additional relevant information.

The final rule also adopts the two exceptions to the cap set forth in paragraph (b)(2) for breaks in service resulting from an employee's fulfillment of National Guard or Reserve military service obligations and breaks where a written agreement exists concerning the employer's intention to rehire the employee after the break in service. The final rule also adopts the provision in paragraph (b)(4) stating that an employer may consider prior employment falling outside the cap, provided that it does so uniformly with respect to all employees with similar breaks. There were very few comments addressing these provisions and they generally were supportive. The Department believes these exceptions are quite limited and will not impose any burden on employers. The final rule does make conforming changes in paragraphs (b)(2) and (b)(4) to reflect the change from five years to seven years.

The final rule also includes the proposed provisions regarding counting the time an employee would have worked for the employer but for the employee's fulfillment of National Guard or Reserve military obligations toward the 12-month and 1,250-hour requirements. USERRA requires that service members who conclude their tours of duty and are reemployed by their employer must receive all benefits of employment that they would have obtained if they had remained continuously employed, except those benefits that are considered a form of short-term compensation, such as accrued paid vacation. Therefore, the Department believes that USERRA requires this outcome.

The final rule clarifies in § 825.110(d), as did the proposed rule, that an employee may attain FMLA eligibility while out on a block of leave when the employee satisfies the requirement for 12 months of employment. Some commenters indicated that this would result in newly-hired employees being treated more favorably than long-term employees. Any such peculiar situations that may occur, however, are not the result of the FMLA, but rather would result from the employer's own policies. An employer that voluntarily allows a new employee with no FMLA rights to go out on leave for a family or medical condition could similarly voluntarily allow a more senior employee with the same condition to extend a leave beyond the legally required 12 weeks. Nothing in the FMLA prohibits an employer from treating employees who have exhausted their FMLA rights more favorably than the law requires. Moreover, the Department believes that this clarification of the current rule is the best interpretation of the statutory language, which defines an ''eligible employee'' as one ''who has been employed for at least 12 months.'' 29 U.S.C. 2611(2)(A). Because an employee remains employed while out on employer-provided leave, the employee becomes eligible under the statutory definition upon reaching the 12-month threshold. Of course, as the proposed and final rules also clarify, any leave that employers voluntarily provide before an employee attains eligibility under the FMLA is not FMLA leave. Therefore, the FMLA protections do not apply to such leave, and employers may apply their normal policies to such leave. Employers may not, however, count any such non-FMLA leave toward the employee's 12-week FMLA entitlement. Finally, as the Department explained in Opinion Letter FMLA2006–4–A (Feb. 13, 2006), the FMLA only requires an employer to ''maintain'' group health insurance coverage at the same level and under the same conditions as prior to the FMLA leave; it does not require an employer to provide insurance if it did not do so at the commencement of the FMLA leave.

The final rule also adopts the proposed changes in paragraphs (c) and (d), deleting the ''deeming'' provisions. In light of the Supreme Court's decision in *Ragsdale*, the Department believes that it does not have regulatory authority to deem employees eligible for FMLA leave who do not meet the 12-month/1,250-hour requirements, even where the employer fails to provide the required eligibility notices to employees or provides incorrect information. As noted in § 825.300(e), however, such failures may have the effect of interfering with, restraining or denying the employee the exercise of FMLA

rights and result in harm, in which case the employee would have statutory remedies. Section 825.300(b) also requires employers to provide employees with an eligibility notice, and if the employee is not yet eligible for leave, the notice must inform the employee of the number of months the employee has been employed by the employer or other reason why the employee is ineligible.

Finally, the Department is making no changes in § 825.110(e), which states that the determination of whether an employer employs 50 employees within 75 miles is made when the employee gives notice of the need for leave. The Department continues to believe that retaining the standard in the current rule encourages as much advance notice of an employee's need for leave as possible and allows both the employer and the employee to plan for the absence. This is consistent with the statutory requirement that, when the need for leave is foreseeable, employees must provide at least 30 days' advance notice or such notice as is practicable if the leave must begin in less than 30 days. Therefore, consistent with the proposed rule, the Department is making no changes to this provision.

Section 825.111 (Determining Whether 50 Employees Are Employed Within 75 Miles)

The NPRM proposed one change to § 825.111(a)(3) of the current rule, relating to the location of an employee's worksite when the employee is jointly employed by two or more employers and is stationed at a fixed worksite for at least one year. The proposed rule stated that after one year at the fixed worksite, the employee's worksite for purposes of determining employee eligibility is the actual physical place where the employee works, rather than the primary employer's office from which the employee is assigned or reports. The proposed change responded to the court's decision in *Harbert* v. *Healthcare Services Group, Inc.*, 391 F.3d 1140 (10th Cir. 2004), in which the court held that the current regulation is arbitrary and capricious as applied to an employee with a long-term fixed worksite. The court held that the current regulation contravened the plain meaning of the term ''worksite''; contradicted Congressional intent that employers with fewer than 50 employees within 75 miles who could cover for an absent employee should not have to provide FMLA leave; and created an arbitrary distinction between sole and joint employers. Although the court acknowledged the legislative history stating that the term ''worksite'' should be construed in the same manner as the term ''single site of employment'' under the Worker Adjustment and Retraining Notification (''WARN'') Act and its implementing regulations, the court held that that definition ''governs only employees without a fixed place of work.''

The final rule adopts the proposed rule, stating in § 825.111(a)(3) that, for purposes of determining an employee's eligibility, the worksite of a jointly employed employee is the primary employer's office from which the employee is assigned or reports ''unless the employee has physically worked for at least one year at a facility of a secondary employer, in which case the employee's worksite is that location.''

The commenters expressed a variety of divergent views about the proposed change. The National Coalition to Protect Family Leave supported the proposed change to follow the court's decision in *Harbert*, stating that it concurred with the court's reasoning that there should be a distinction ''between a jointly employed employee who is assigned to a fixed worksite, versus a jointly employed employee who has no fixed worksite and changes worksites, be it regularly or irregularly.'' Vercruysse Murray & Calzone stated that the proposed 12-month rule establishes the same type of arbitrary standard struck down by the court, and that the standard ''should be whether or not the leased employee is assigned to a *fixed worksite*, not *how long* the leased employee has been assigned to a fixed worksite.'' Thus, only if the leased employee's worksite is variable should the worksite be the location from which the employee receives his or her assignments or reports. Burr & Forman stated that the 12-month period is too short and recommended that an employee's worksite change from the primary employer's office to the customer's premises only after the temporary employee has worked on the premises for two years, to reduce the burden on small, start-up employers that use a significant number of temporary employees and would have to count them when determining the eligibility of their own direct employees.

Jackson Lewis commented that the Department's proposal was ''ineffective and misguided'' and it urged the Department to define ''worksite'' as ''the physical location where the person works, both for single and jointly employed workers.'' Jackson Lewis noted that the purpose behind the requirement for 50 employees within 75 miles was to protect employers that cannot readily replace absent workers who are assigned to smaller, remote locations. It stated that the length of time that a jointly employed employee has been working at a small, remote location has nothing to do with whether his or her primary employer can find a replacement employee; it also found it anomalous that an employee assigned to such a location for a short period of time may remain entitled to FMLA leave (because that employee's worksite is the primary employer's office), while an employee assigned for more than a year is less likely to receive FMLA leave.

The AFL–CIO opposed the proposed modification for different reasons, stating that the current regulation is a permissible construction of the statute, as the dissent found in *Harbert.* It stated that defining the worksite in a joint employment situation as the primary employer's office appropriately maintains the focus on the entity most likely to have the ability to find a replacement worker. It added that shifting the worksite after 12 months to the physical location where the employee performs his or her work does not effectuate the statutory purpose behind the 50/75 rule, since that worksite belongs to an employer who bears no responsibility for hiring and transferring the employee. The AFL–CIO concluded that the proposal creates an arbitrary distinction between jointly employed employees who have a fixed worksite for at least a year and those who do not, resulting in an employee who is eligible for FMLA leave on one day becoming ineligible for leave the next day because the worksite has shifted to a new location where the employee cannot satisfy the 50/75 rule. The AFL–CIO agreed, however, that the current rule creates a reasonable distinction between sole and joint employers, which is in harmony with the purpose of the Act, because it alleviates the burden on small businesses to find replacement workers in situations where they would not normally bear that burden. The National Partnership for Women & Families similarly opposed this change, stating that the legislative history of the FMLA shows clearly that the term ''worksite'' was to be defined as it is under the WARN Act. It stated that while ''the WARN Act regulations do not specifically address situations where employees are placed in a temporary worksite long term, there is no sound reason to consider these employees differently than other temporary employees.'' It further stated that the Department has not explained why one year should be the cut off, and asserted that it is contradictory to count the

assigning employer as the primary employer with the majority of FMLA responsibilities but to count the worksite of the employee as that of the employer to which he or she is assigned.

Hewitt Associates requested further guidance regarding the worksite of ''virtual'' or telecommuting employees under the rule, particularly for employees who work out of their home and may receive assignments from various locations. Catholic Charities, Diocese of Metuchen wanted clarity regarding the example in § 825.111(a)(2), which states that construction workers sent from New Jersey to Ohio to work at a construction site opened in Ohio would continue to have the headquarters in New Jersey as their ''worksite.'' This commenter stated the regulations should clarify whether the ''worksite'' of these workers might eventually change from New Jersey to Ohio if these workers are employed in Ohio for a long period of time.

The commenters' divergent views reflect the difficulty of crafting a simple resolution that fits perfectly in all situations. The Department continues to believe that its proposed rule, which modifies the current rule only with regard to jointly employed employees who have been assigned to a fixed worksite for at least 12 months, is the best solution. The general definition of ''worksite'' remains the same and, in accordance with the legislative history, it is consistent with the WARN Act standards. The Department does not believe it would be appropriate to adopt the Jackson Lewis suggestion that the definition for all employees should be the actual physical location of their work, because the WARN Act's regulatory definition for employees with no fixed worksite refers to such employees' home base, from which their work is assigned, or to which they report. The Department also does not believe it is appropriate to adopt the suggestion of Vercruysse Murray & Calzone that how long the employee has been assigned to a fixed site is irrelevant, because a series of one-week or one-month assignments do not constitute fixed worksites.

Because the WARN Act regulation is silent, however, as to joint employment and long-term fixed worksites, the proposal created an exception for those few cases where an employee who is jointly employed is assigned to a fixed worksite for more than one year. As the *Harbert* court held, the plain meaning of the term ''worksite,'' the general FMLA principle that an employer with fewer than 50 employees within 75 miles should not have to find temporary replacements for employees on leave, and the interest in having consistency between sole and joint employers counsel in favor of a different rule in that situation. When a temporary employee has worked for a secondary employer for such an extended length of time, the employer depends upon the temporary employee to the same degree as it does its direct employees, and it faces the same difficulties in obtaining a fully adequate replacement employee. Therefore, the final rule adopts the proposed rule's change with regard to jointly employed employees who have physically worked for at least one year at a facility of a secondary employer, in which case the worksite is that location.

Finally, with regard to the commenters' requests for clarification, both the proposal and the final rule add the term ''telecommuting'' in § 825.111(a)(2) to the existing rule's use of the term ''flexiplace.'' This further clarifies that ''virtual'' employees who work out of their home do not have their personal residence as their worksite; rather, they are considered to work in the ''office to which they report and from which assignments are made.'' Because the current definition of ''worksite'' remains unchanged for employees who are not jointly employed, the worksite for construction employees who travel from their headquarters to a construction site remains their home base, *i.e.*, the company's headquarters.

Section 825.112 (Qualifying Reasons for Leave, General Rule)

The Department proposed no substantive changes to this section, which addresses the qualifying reasons that entitle an eligible employee to take FMLA leave. The proposal did, however, move several paragraphs of the current rule to other sections to improve the organization (for example, to place all provisions that address leave taken for the birth of a child in one section, and all provisions related to leave for adoption or foster care in another section). The final rule adopts the rule as proposed with additional modifications to reflect the military leave entitlements.

Very few commenters addressed this section. WorldatWork stated that it agreed with the proposed reorganization, both specifically with regard to this section as well as with regard to other sections that were similarly reorganized to put a particular topic in one spot. WorldatWork noted that it will make the regulations much easier to read and make it easier to find relevant topics. In contrast, Harrill & Sutter opposed the change, stating that people have been working with the FMLA regulations for 13 years, and a change is going to lead to more confusion. TOC Management Services again commented that the Department should eliminate the statement that the employer/employee relationship ends when an employee is placed on layoff status and clarify the statement made in § 825.112(c) that an employee must be recalled or otherwise be re-employed before being eligible for FMLA leave.

The Department believes that the reorganization of sections to put information related to particular topics in one spot is an improvement. Many commenters approved of the reorganization overall, without commenting on specific sections. *See, e.g.*, National Coalition to Protect Family Leave; the Chamber; Equal Employment Advisory Council. Thus, the Department does not believe that this reorganization will lead to confusion. Furthermore, as explained previously with regard to § 825.105, the Department believes that the employment relationship ends for purposes of the FMLA when an employee is laid off. Proposed § 825.112(c) is identical to paragraph (f) of the current regulation. The Department is not aware of any confusion regarding this section and other commenters did not identify problems with its implementation. Therefore, the Department is adopting the rule as proposed. In addition, in § 825.112(a), new paragraphs (a)(5) and (a)(6) have been added to reflect the two new qualifying reasons for taking leave under the military family leave provisions.

Introduction to Sections 825.113, 825.114, and 825.115 (Serious Health Condition, Inpatient Care, and Continuing Treatment)

The FMLA defines ''serious health condition'' as either ''an illness, injury, impairment, or physical or mental condition that involves—(A) inpatient care in a hospital, hospice, or residential medical care facility; or (B) continuing treatment by a health care provider.'' 29 U.S.C. 2611(11). ''Continuing treatment'' is not defined in the Act and Congress did not establish any ''bright-line'' rules of what conditions were covered.

The appropriate meaning of the term ''serious health condition'' has been the topic of debate for many years. The Department's Report on the RFI (*see* 72 FR at 35563–70 (June 28, 2007)) and the NPRM (*see* 73 FR 7885–89 (Feb. 11, 2008)) both contained a discussion of this debate and the positions taken by the courts and the Department in opinion letters in defining ''serious health condition.'' The proposed rule

reorganized the structure of the regulations defining ''serious health condition'' for clarity, but maintained the substance of the current regulation's definition with some modifications to clarify the time period in which continuing treatment following a period of incapacity must take place and the frequency of periodic treatment for chronic conditions. The Department concluded, after extensive consideration, that there was no alternative approach to the existing regulatory definition that would more effectively cover the types of conditions Congress intended to cover under the FMLA without also including some conditions that many believe should not be covered.

An overwhelming majority of comments from employers and employer groups voiced disappointment that the proposed rule failed to address their concerns that the rule is an overly broad definition of serious health condition. *See, e.g.*, U.S. Postal Service; Food Marketing Institute; National Association of Convenience Stores; National Association of Manufacturers. For example, the National Restaurant Association commented that it ''does not believe that the intent of Congress in enacting FMLA was to include such minor illnesses within its coverage. Unfortunately, however, the DOL proposals, while acknowledging this area of concern, fail to address the issue.'' Hoffinger Industries commented, ''a definitive, more precise definition of Serious Health Condition should be developed that will not allow an employee to transform a short-term acute condition into a qualifying serious health condition.'' The Equal Employment Advisory Council said it was ''disappointed that the Department is not proposing to * * * narrow * * * the definition of 'serious health condition' * * *. In our view, this provision grants FMLA coverage in many, many situations in which a health condition is not actually 'serious.' '' The Retail Industry Leaders Association commented, ''[t]he definition of a serious health condition has provided FMLA coverage for many non-serious conditions where Congress intended no such coverage * * *. RILA member companies are disappointed that the DOL has retained essentially the current definition of serious health condition.'' The Chamber commented, ''[t]hese minor changes fall well short of the revisions necessary to clarify the current definition of serious health condition, which employers believe is overbroad and inconsistent with the intent behind the Act.''

Comments from employee representatives generally favored the proposal's retention of the current definition of ''serious health condition,'' but did not support the few proposed changes to the definition. For example, the AFL–CIO commented, ''[w]e support the Department's substantive treatment of serious health condition because it does not—despite the urging of many employers—rewrite the definition against Congress's intent * * * [but the changes proposed interfere] with the legitimate decisions of health care providers * * * [and] will likely result in a financial hardship for a significant number of employees.'' The National Partnership for Women & Families supported the Department's decision not to make ''major changes'' to the definition of serious health condition, but expressed concern that the Department lacked data to show the effect of the changes it did propose. The National Postal Mail Handlers Union and the Coalition of Labor Union Women objected to the proposed changes because they believed the changes would result in employees being required to have additional medical appointments. Finally, the Communications Workers of America supported the retention in the proposed rule of an objective test to define ''serious health condition,'' but objected to the additional requirements the Department proposed for defining continuous treatment and chronic serious health conditions.

Section 825.113 (Serious Health Condition)

Proposed § 825.113, ''Serious health condition,'' provided the general rules and accompanying definitions governing what constitutes a serious health condition. Proposed § 825.113(a) provided the basic definition of what constitutes a serious health condition currently found in § 825.114(a). Proposed § 825.113(b) incorporated the definition of ''incapacity'' from current § 825.114(a)(2)(i). Proposed § 825.113(c) incorporated the definition of ''treatment'' found in current § 825.114(b) with minor editorial changes. The final rule makes no changes to the proposed text for these three paragraphs.

Proposed § 825.113(d) incorporated language from current § 825.114(c), which addresses the types of treatments and conditions not ordinarily expected to be covered by the definition of a serious health condition. The language states, in part: ''Ordinarily, unless complications arise, the common cold, the flu, ear aches, upset stomach, * * * *etc.*, are examples of conditions that do not meet the definition of a serious health condition.'' This provision has been the focus of longstanding debate as to whether the conditions enumerated can or cannot be serious health conditions. The NPRM contained a discussion of the history of both the Department's and the courts' interpretation of this language. 73 FR 7886–87 (Feb. 11, 2008). In the NPRM, the Department maintained that this provision merely illustrates the types of conditions that would not *ordinarily* qualify as serious health conditions. *Id.* at 7886. The Department also stated its belief that this language (1) does not categorically exclude the listed conditions; and (2) does not create its own definition separate and apart from the objective regulatory definition of serious health condition in current § 825.114(a) (and proposed §§ 825.113(a), 825.114, 825.115). *Id.* The Department received significant comments from both employer and employee groups regarding the retention of this provision in the regulations, which are discussed below. The final rule makes no substantive changes to proposed § 825.113(d).

In their comments, a number of employer groups agreed with the Department's view that the list should be preserved because it serves a baseline purpose as explanatory language similar to that in a preamble. For example, Southwest Airlines commented that ''[i]t is clear that the list is not a per se rule of exclusions, but rather provides helpful, useful examples of minor conditions that in the absence of complications do not qualify as serious health conditions under the FMLA. The list aids all who are involved in the medical certification process and with the administration of FMLA leaves.''

Many employer groups, however, differed as to when a non-serious health condition can become a serious health condition. The Society for Human Resource Management and the National Coalition to Protect Family Leave both argued that ''the situations where any condition on this list rises to the level of a serious health condition should be construed narrowly'' and suggested that the Department ''add language to the regulation specifying that some sort of serious complication must result in order for an otherwise 'non-serious' health condition to be considered a serious health condition.'' The U.S. Postal Service and the Chamber both expressed concern that the rule as proposed would result in continued confusion on the part of both employers and the courts as to when otherwise minor conditions rise to the level of serious health conditions. The Chamber

urged the Department to ''explicitly exclude minor ailments from the definition of serious health condition, even where such conditions may require a regimen of continuing, supervised treatment.''

Comments received from employees and employee groups overwhelmingly supported the Department's decision to retain the existing definition of serious health condition instead of creating a per se list of covered conditions. The AARP and the National Partnership for Women & Families both commented that the current definition of serious health condition allows employees the opportunity to be covered by the FMLA depending on how the specific illness affects that particular employee, rather than depending on how the illness affects individuals generally. *See also* American Association of University Women. The Communications Workers of America commented that ''an objective test provides the fairest way to define the statute's coverage of [serious health conditions], especially because every individual's experience with a medical condition or disease can vary widely.''

PathWaysPA addressed the Department's decision to retain the list of conditions that ordinarily are not serious health conditions in proposed § 825.113(d) and argued that the provision was surplusage. This commenter stated that ''no 'list' of conditions should be defined as unable to qualify for FMLA certification.'' The AFL–CIO agreed with the Department's interpretation in the NPRM of this provision, stating that ''employers have long complained that certain illnesses should never qualify as serious health conditions and have argued that Section 825.114(c) supports such a restrictive definition. Courts have rejected this argument * * *. The Department has taken an important step towards foreclosing argument on this point by explaining in the NPRM that the definition of serious health condition does not 'categorically exclude' the 'common ailments and conditions' enumerated * * *.''

The Department carefully considered the comments received on the definition of serious health condition and has concluded that there is no regulatory alternative that would address the concerns raised by the business community regarding coverage of what some perceive to be minor ailments without excluding absences that should be FMLA-protected. The final rule reflects the Department's conclusion that the objective test defining what constitutes a serious health condition under the FMLA (in both the proposed and final versions of §§ 825.113(a), 825.114, and 825.115) is the controlling regulatory standard, and the list of common ailments such as colds and flu (in proposed and final § 825.113(d)) is helpful as identifying ailments that ordinarily will not qualify for FMLA leave because they generally will not satisfy these regulatory criteria.

On a different matter, the Associated Builders and Contractors and the Navy Federal Credit Union commented that the phrase ''resulting from stress'' should be removed from the last sentence of proposed § 825.113(d). The Society for Human Resource Management and the National Coalition to Protect Family Leave agreed, commenting that ''[t]he cited phrase improperly suggests that stress alone can cause mental illness * * *. Also, by placing allergies in sequence, it suggests that mental illness can be developed from allergies.'' The Department has deleted the phrase ''resulting from stress'' in § 825.113(d) of the final rule to clarify that a mental illness, regardless of its cause, can be a serious health condition under the FMLA if all the regulatory requirements are met. No other changes to the text of § 825.113 have been made in the final rule.

Section 825.114 (Inpatient Care)

Section 825.114 of the proposed rule defined what constitutes inpatient care, adopting language from the current regulations. The definition of ''inpatient care'' in current § 825.114(a)(1) incorporates a definition of ''incapacity,'' which was removed from proposed § 825.114 and replaced by a cross-reference to the stand-alone definition of ''incapacity'' in proposed § 825.113(b).

The Equal Employment Advisory Council commented, ''[w]e hope that setting 'incapacity' apart will emphasize for both employees and health care providers that actual inability to work is a fundamental prerequisite for FMLA protection.'' There were no substantive comments on this section of the proposal, and the Department made no changes to the proposed text of this section in the final rule.

Section 825.115 (Continuing Treatment)

Proposed § 825.115 defined ''continuing treatment'' for purposes of establishing a serious health condition, incorporating the five different definitions contained in current § 825.114(a)(2)(i)–(v) with some changes. Proposed § 825.115(a) (''Incapacity and treatment'') incorporated language from current § 825.114(a)(2)(i), which provides that the continuing treatment requirement is satisfied if, in connection with a period of incapacity of more than three consecutive calendar days, the employee or family member has one visit to a health care provider and a regimen of continuing treatment, such as a course of a prescription medication, or two visits to a health care provider. The proposal made one change to the current definition, specifying in proposed § 825.115(a)(1) that the two visits to a health care provider must occur within 30 days, unless extenuating circumstances exist. The Department indicated in the NPRM that it did not believe the 30-day time limit should be applied to proposed § 825.115(a)(2) (treatment on one occasion resulting in regimen of continuing treatment), but invited comments on the issue. Proposed § 825.115(b), titled ''Pregnancy or prenatal care,'' incorporated language from current § 825.114(a)(2)(ii) without change except for a cross-reference to the new consolidated section in proposed § 825.120, addressing leave for pregnancy and childbirth. Proposed § 825.115(c), ''Chronic conditions,'' retained the definition in current § 825.114(a)(2)(iii) with one change, specifying that the term ''periodic treatment'' be defined as treatment two or more times a year. Proposed § 825.115(d), ''Permanent or long-term conditions,'' incorporated language from current § 825.114(a)(2)(iv) without change. Proposed § 825.115(e), ''Conditions requiring multiple treatments,'' incorporated language from current § 825.114(a)(2)(v), which provides coverage for any period of absence to receive multiple treatments by a health care provider for restorative surgery after an accident or other injury, or for a condition that would likely result in a period of incapacity of more than three consecutive calendar days in the absence of medical intervention or treatment for conditions such as cancer, severe arthritis, and kidney disease. The Department did not receive substantive comments regarding proposed § 825.115(b), (d), or (e) and the final rule adopts these sections as proposed. The Department has made additional changes to § 825.115(a) and (c), which are discussed below.

Although the Department did not propose to change the period of incapacity required to satisfy the ''incapacity and treatment'' definition of continuing treatment in proposed § 825.115(a), many employers and employer groups urged the Department to expand the period of incapacity from the current requirement of ''more than three consecutive calendar days.'' The

Society for Human Resource Management, the National Coalition to Protect Family Leave, and other employer groups commented that the current requirement for a period of incapacity of more than three consecutive calendar days has played a significant role in permitting otherwise minor medical conditions to satisfy the definition of serious health condition. These commenters suggested that extending the period of incapacity to five consecutive scheduled work days or seven consecutive calendar days would significantly reduce the instances in which these minor ailments receive FMLA protection. The Pennsylvania Governor's Office of Administration also suggested a five consecutive day period of incapacity, commenting specifically on the difficulty it has encountered in trying to protect three-day absences. The Chamber commented that ''[t]he brevity of the three-day period creates significant administrative burdens for employers'' and suggested that the period be extended to five business days or seven calendar days. The Society for Human Resource Management, the National Coalition to Protect Family Leave, and others suggested that a longer period of incapacity would be consistent with the waiting period employed in many short-term disability plans. Additionally, the Society for Human Resource Management and others stated that the final rule should clarify that ''more than three consecutive, calendar days'' refers to whole or complete calendar days.

Employee groups, on the other hand, strongly supported maintaining the ''more than three calendar days'' minimum requirement for incapacity. For example, 9to5, the National Association of Working Women commented, ''[t]he current definition reflects the practical reality that serious health conditions requiring family or medical leave can sometimes be of a fairly short duration * * * such as pneumonia, acute appendicitis, or kidney stones.'' The National Partnership for Women & Families supported the Department's decision to maintain the standard of more than three ''calendar days'' rather than ''workdays.''

After reviewing the comments, the Department continues to believe it is more appropriate to keep the basic regulatory requirement of a minimum period of incapacity of ''more than three consecutive calendar days'' than to adopt a ''work day'' or ''business day'' test or to increase the number of calendar days required. In the Department's view, a test based on calendar days of incapacity measures the severity of an illness better than a test based on days absent from work. This is particularly true for employees who do not work a traditional, fixed five-day week. The Department recognizes the legitimate employer concerns about the ability to verify employee incapacity over weekends, but to increase the minimum number of days of incapacity required would invariably exclude some employees the statute currently protects. The final rule does make one minor clarification, as suggested by the Society for Human Resource Management and others, that the test cannot be met by partial days. To eliminate any possible misunderstanding of the existing requirement, the word ''full'' is added to the test in the final rule (*i.e.*, a period of incapacity of more than three consecutive, ''full'' calendar days).

Many employer groups offered different views about the proposed change in § 825.115(a)(1) that the two treatments occur within 30 days. Those employer groups opposed to it urged that the regulations require that the minimum of two treatments occur during the ''more than three day'' period of incapacity. Several groups, including the Society for Human Resource Management and the National Coalition to Protect Family Leave, commented that the Department should reconsider its position and adopt the Tenth Circuit's ruling in *Jones* v. *Denver Public Schools*, 427 F.3d 1315 (10th Cir. 2005), that the two visits must occur within the period of incapacity. The Society for Human Resource Management and the National Coalition to Protect Family Leave stated, ''[u]nder the Department's proposal, the employer's hands would be tied for 30 days, which would create uncertainty for all parties * * *.'' They also stated, however, that if the 30-day requirement becomes part of the final regulations, the 30-day period should run from the first day the employee is incapacitated and the second visit should always be at the direction of the health care provider. The Portland (OR) Office of Management and Finance commented that the proposal would ''allow employees to obtain FMLA protection simply by scheduling a second doctor's appointment.'' The Pennsylvania Governor's Office of Administration commented that the 30-day period would force employers to retroactively designate leave as FMLA-protected. Other employers, however, supported the proposed 30-day period for the two treatments. The National Association of Manufacturers, the National Roofing Contractors Association, AT&T, and other employer groups commented that the proposal would clarify what is currently a vague area in the rules. *See also* National Business Group on Health.

A number of employee groups, for different reasons, opposed the proposed requirement in § 825.115(a)(1), that the two treatments occur within 30 days. The AFL–CIO commented that the 30-day period was arbitrary and would prove a significant obstacle to employees seeking FMLA leave. Commenters including the Association of Professional Flight Attendants, the National Postal Mail Handlers Union, and the National Treasury Employees Union offered the examples of conditions that would incapacitate employees for more than three days, but generally do not require follow-up appointments within 30 days. The National Employment Lawyers Association noted that it can often take more than 30 days to schedule an appointment with a specialist and suggested that a three to six months time period would be more appropriate. Finally, the American Postal Workers Union objected to any temporal limitation on treatment appointments, arguing that any limitation was inconsistent with the statute, which requires only continuing treatment by a health care provider.

A number of employee and employer groups asked for clarification of the ''extenuating circumstances'' exception to the 30-day rule and suggested that a definition of ''extenuating circumstances'' should be included in the regulatory text. The Society for Human Resource Management and the National Coalition to Protect Family Leave asserted that leaving ''extenuating circumstances'' undefined would result in ''extensive litigation.'' *See also* Hewitt Associates. The National Partnership for Women & Families commented that the preamble example of scheduling difficulties as extenuating circumstances was not reflected in the regulation. *See also* Association of Professional Flight Attendants; National Postal Mail Handlers Union. The National Retail Federation recommended deleting the ''extenuating circumstances'' exception altogether.

Employee and employer groups also generally agreed with the Department's decision not to apply a 30-day time limit to § 825.115(a)(2), which addresses treatment by a health care provider on at least one occasion that results in a regimen of continuing treatment (*e.g.*, a course of prescription medication). *See, e.g.*, Society for Human Resource Management. The American Postal Workers Union asserted that applying a 30-day time frame under § 825.115(a)(2)

would be unreasonable. The National Association of Manufacturers commented that in situations covered under § 825.115(a)(2), the treatment visit with the health care provider should take place during the initial period of incapacity. Vercruysse Murray & Calzone commented that employees should be required to receive the regimen of continuing treatment during the initial period of incapacity because to permit the regimen of treatment to commence after the employee returns to work would allow employees to retroactively qualify for FMLA leave.

Finally, some commenters asked whether a phone call or email contact with a health care provider could qualify as a visit or treatment under either prong of § 825.115(a). *See, e.g.*, Spencer Fane Britt & Browne; Society for Human Resource Management, Northern California Human Resources Association, Legislative Affairs Committee.

The Department continues to believe that the proposed ''30-day'' limit in § 825.115(a)(1) is useful because the current regulation, § 825.114(a)(2)(i)(A), provides no guidance as to the time frame during which the two treatments by a doctor must occur. The Department recognizes that many of the comments from employers and employer groups favor the adoption of the ruling by the United States Court of Appeals for the Tenth Circuit in *Jones* v. *Denver Public Schools*, 427 F.3d 1315 (10th Cir. 2005), that both treatments must occur during the period of the incapacity in order for the condition to qualify as a serious health condition. Nonetheless, the Department believes a 30-day test is a more appropriate guideline than a test limited to just the period of incapacity because it is consistent with usual treatment plans, and guards against employers making quick judgments that deny FMLA leave when employees otherwise should qualify for the law's protections. To clarify when the 30-day period begins, § 825.115(a)(1) of the final rule states that the 30-day period begins with the first day of incapacity. By starting the 30-day period on the first day of incapacity, the final rule provides a clearly defined period during which the continuing treatment must occur.

Some employer groups expressed the concern that under the proposed rule an employee retroactively would be able to transform a minor condition into a serious health condition by going to a health care provider for the first time as much as 30 days after the initial incapacity in an effort to foreclose any proposed disciplinary action. The Department notes that a single visit to a health care provider will not satisfy the requirements of § 825.115(a) unless the health care provider determines that additional treatment (either visits or a regimen of treatment) is medically necessary, and therefore employees will not be able to ''transform'' a condition into a FMLA-protected serious health condition as suggested by these commenters. Nonetheless, a new paragraph (3) of § 825.115(a) has been added to the final rule to provide that the first visit (in the case of § 825.115(a)(1)) and the only visit (in the case of § 825.115(a)(2)) must occur within seven days of the first day of incapacity. As with the requirement for two treatment visits within 30 days, the Department believes that the need to make an initial visit to a health care provider within seven days of the day on which the incapacity begins is an appropriate indicator of the seriousness of the medical condition. The Department considered whether the first visit should be required during the initial period of incapacity. As some employer commenters pointed out, the initial treatment visit will normally occur during the incapacity and the treatment regimen (such as prescription medication) will be prescribed at that time. *See, e.g.*, National Association of Manufacturers. The Department is cognizant, however, that it can often take several days to get an appointment with a health care provider, particularly in rural areas and communities with limited numbers of providers, and therefore believes that a seven-day outer limit for the first visit or only visit is more appropriate. Additionally, in response to comments about whether a phone call or email contact with the health care provider qualifies as treatment, § 825.115(a)(3) also clarifies that treatment means an in-person visit to a health care provider for examination, evaluation, or specific treatment, and does not include, for example, a phone call, letter, email, or text message.

The 30-day test is intended to gauge the health care provider's assessment of the severity of the illness. Accordingly, in response to comments from employers who suggested that employees may schedule follow-up appointments simply to meet the test of a second visit, a new paragraph (4) is added to § 825.115(a) of the final rule to clarify that the health care provider, and not the employee or the patient, must make the determination as to whether a second visit during the 30-day period is needed. The Department anticipates that in many cases the health care provider will determine at the initial treatment visit whether an additional visit is required and, if so, when it should occur. There will, however, be some situations in which the health care provider initially determines that such follow-up treatment is not necessary, but because the condition does not resolve or deteriorates, the health care provider later determines that an additional treatment visit is needed within the 30-day time period. Providing the other requirements of the definition are met, the Department intends the final rule to cover all situations in which the health care provider determines that additional treatment is necessary within the 30-day period.

Finally, in response to the comments from both employer and employee groups regarding the ''extenuating circumstances'' exception to the 30-day limit, the final rule includes a new paragraph (5) in § 825.115(a) that provides an explanation of ''extenuating circumstances.'' The new paragraph provides that the term ''extenuating circumstances'' means circumstances that prevent the follow-up visit from occurring as planned by the health care provider, and includes an example of such circumstances.

As discussed in the NPRM, the Department did not propose substantive changes to the construction of chronic serious health conditions under the regulations. *See* 73 FR 7888–89 (Feb. 11, 2008). The Department, however, did propose in § 825.115(c) to define the term ''periodic treatment,'' which is used in the definition of a chronic serious health condition, as treatment ''at least twice a year.''

Several employers and employer groups supported defining ''periodic visits'' as ''at least twice a year.'' *See, e.g.*, TOC Management Services; National Association of Manufacturers; Southwest Airlines. The U.S. Postal Service called the proposal ''reasonable'' and commented that ''the potential benefit of such monitored medical care strikes a comfortable balance with the minimal burden involved.''

Other employer commenters suggested requiring more frequent treatment than twice per year. The Portland (OR) Office of Management and Finance suggested that the Department consider requiring biannual visits for employees with no more than two days of absence per month and quarterly visits for employees absent more frequently. A labor attorney, Scott MacDonald, suggested that treatment ''at least once every four months'' would be more appropriate and that if the twice per year standard were maintained it should be clarified as ''at least once

every six months.'' The Southern Company and the Society for Human Resource Management suggested that the appropriate standard should be four treatment visits per year. Catholic Charities, Diocese of Metuchen and the National Association of Convenience Stores suggested that treatment only twice per year indicates that the condition is not serious. *See also* Illinois Credit Union League. Finally, Spencer Fane Britt & Browne argued that requiring only two treatment visits per year ''will render just about any condition to be a 'chronic' one and totally eliminates the need for the condition to be 'serious' in nature.'' They suggested that chronic conditions should not be separately included in the definition of serious health condition and that incapacity due to such conditions should only be covered when it exceeds three calendar days as required by § 825.115(a).

On the other hand, many employees and employee groups viewed the requirement of treatment visits of ''at least twice a year'' as excessive. The AFL–CIO commented that after an initial series of treatment visits at the onset of a chronic condition, many individuals may only visit their health care providers once per year. The National Postal Mail Handlers Union commented that requiring a second visit in a year, regardless of whether the employee's condition has changed, would impose an unnecessary burden on both the employee and the health care system. The National Partnership for Women & Families also expressed concern about the additional cost the proposed requirement would impose on employees. *See also* A Better Balance: The Work and Family Legal Center.

The Department recognizes employers' concerns regarding requiring only two treatment visits per year, and their desire for some clearer way to assess the seriousness of a chronic health condition, but is concerned that imposing some greater standard could effectively render ineligible many employees who are entitled to the protections of the law. On the other hand, the Department does not agree with comments from employee groups that because many chronic conditions are stable and require limited treatment, the twice per year standard is unreasonable since that effectively ignores the requirement for ''periodic'' visits in the current regulations. The need for two treatment visits per year is a reasonable indicator that the chronic condition is a serious health condition. The Department believes the requirement for two visits per year thus strikes a reasonable balance between no minimum frequency at all, as supported by many employee groups, or four or more times per year, as suggested by many employer groups, for employees who use FMLA leave for chronic serious health conditions. As with the requirement of two treatment visits within 30 days under § 825.115(a), the determination of whether two treatment visits per year are necessary is a medical determination to be made by the health care provider. Because the need for treatment visits is a function of the condition, the Department does not agree with comments suggesting the rule will increase the burden or cost to employees. The Department also notes that ''two visits to a health care provider'' every year is not the sole criterion in the regulations for determining a covered chronic serious health condition.

As discussed in the NPRM, the legislative history of the Act clearly indicates that Congress intended to cover chronic serious health conditions (73 FR 7888, Feb. 11, 2008); the Department therefore specifically rejects the suggestion that chronic serious health conditions should not be separately included in § 825.115.

Sections 825.116–825.118 (Reserved)

The proposed rule moved the provisions in current § 825.116 defining the phrase ''needed to care for'' a family member to § 825.124, which is discussed below. The proposal moved the provisions in current § 825.117 regarding the ''medical necessity'' for taking and scheduling intermittent or reduced schedule leave to §§ 825.202 and 825.203, which are discussed below. Current § 825.118 defining ''health care provider'' was renumbered as § 825.125 in the proposed rule. Sections 825.116–825.118 were designated as ''reserved'' in the proposal to reflect these organizational changes. The final rule adopts the proposed organizational changes.

Section 825.119 (Leave for Treatment of Substance Abuse)

The Department proposed no substantive changes in this new section, which consolidates in a single location the provisions in current §§ 825.112(g) and 825.114(d) related to substance abuse. It reaffirms that FMLA leave is available for the treatment of substance abuse when it qualifies as a serious health condition, but not for an absence because of the employee's use of the substance, and that the FMLA does not prevent an employer from taking action against an employee for violating the employer's uniformly-applied substance abuse policy. The final rule adopts the rule as proposed.

Very few commenters addressed this reorganization. TOC Management Services suggested that the rule should clarify that an absence because of a family member's use of the substance, rather than for treatment, also does not qualify for FMLA leave. The National Retail Federation stated that the clarification regarding permitted employment actions for violation of a substance abuse policy was helpful. Robert Jusino commented that an employer should be barred from taking adverse action against an employee for breaking company policy.

The Department continues to believe that the rule, which is simply a consolidation of existing sections, is clear and sets forth the appropriate distinction between an absence for treatment for a serious health condition and an absence because of an employee's use of the substance. The general lack of comments supports that view. Therefore, the final rule is adopted as proposed.

Section 825.120 (Leave for Pregnancy or Birth)

The current regulations contain guidance pertaining to pregnancy and birth throughout a number of different sections. Proposed § 825.120 collected the existing guidance from these various regulatory sections into one comprehensive section. Proposed § 825.120(a)(1), titled ''[g]eneral rules,'' restated language from current § 825.112(b) that both the mother and father are entitled to FMLA leave for the birth of their child. Proposed § 825.120(a)(2) restated language from current § 825.201 explaining that FMLA-protected leave following the birth of a healthy child (''bonding time'') must be completed within a year from the birth. Proposed § 825.120(a)(3) incorporated language from current § 825.202(a) that husbands and wives who work for the same employer may be limited to a combined 12 weeks of FMLA leave for the birth or placement for adoption or foster care of a healthy child, or to care for an employee's parent with a serious health condition. *See* 29 U.S.C. 2612(f). Proposed § 825.120(a)(4) combined language from current §§ 825.114(a)(2)(ii), 825.114(e), and 825.112(a) and (c) to make clear that a mother may be entitled to FMLA leave for both prenatal care and incapacity related to pregnancy, and the mother's serious health condition following the birth of a child. Proposed § 825.120(a)(5) summarized a husband's right to take leave when needed to care for his pregnant spouse because of her serious

health condition. Proposed § 825.120(a)(6) was added to make clear that both spouses may each take their full 12 weeks of leave to care for a child with a serious health condition, regardless of whether the spouses work for the same employer. Finally, proposed § 825.120(b) combined language from current §§ 825.203(b) and 825.204(a), which provides that intermittent or reduced schedule leave may only be taken to care for a healthy newborn child with the employer's agreement, and, in such cases, the employer may temporarily transfer the employee to an alternative position that better accommodates the leave schedule. *See* 29 U.S.C. 2612(b)(1). The final rule adopts § 825.120 as proposed with one minor clarification discussed below. Additionally, the final rule clarifies language in the regulatory text of § 825.120(a)(2).

The U.S. Postal Service commented that proposed § 825.120(a)(5), regarding a father's right to use FMLA leave to provide care for his spouse in connection with the pregnancy or birth, overstates these rights. The Department has modified the language of this provision to clarify that a husband is entitled to FMLA-protected leave if he is needed to care for his spouse who is incapacitated due to her pregnancy (*e.g.*, if the pregnant spouse is unable to transport herself to a doctor's appointment). As stated in the NPRM (73 FR 7888 (Feb. 11, 2008)), and as with all care for covered family members under the FMLA (*see* current § 825.116(a) and final § 825.124(a)), such care may include providing psychological comfort and reassurance. This provision merely codifies a husband's right to FMLA leave to care for his pregnant spouse under the current regulations—it neither expands nor contracts that right. As with any leave to care for a covered family member with a serious health condition, the employer has the right to request medical certification to verify the employee's need for leave. The wording of this provision has been changed in the final rule from ''father'' to ''husband'' to clarify that FMLA leave to care for a pregnant woman is available to a spouse and not, for example, to a boyfriend or fiancé who is the father of the unborn child.

On a related note, Southwest Airlines suggested that the 12-week combined limit on leave to care for a healthy newborn taken by spouses employed by the same employer in § 825.120(a)(3) should apply equally to unmarried parents who work for the same employer. The Department notes that this provision is based on section 102(f) of the statute, which was intended to eliminate employer incentives to refuse to hire married couples and applies only to ''a husband and wife.'' *See* 29 U.S.C. 2612(f); S. Rep. No. 103–3, at 28 (1993); H. Rep. No. 103–8, at 38 (1993).

No other changes have been made to § 825.120 in the final rule.

Section 825.121 (Leave for Adoption or Foster Care)

The Department also proposed a single consolidated section on FMLA rights and obligations with regard to adoption and foster care in proposed § 825.121. The current regulations contain guidance pertaining to adoption and foster care throughout a number of sections. Proposed § 825.121(a)(1) provided that leave for adoption or foster care may begin prior to the actual birth or adoption. Proposed § 825.121(a)(2) contained language from current § 825.201 explaining that FMLA-protected leave for adoption or foster care must be completed within a year from the placement. Proposed § 825.121(a)(3) incorporated language from current § 825.202(a) that husbands and wives working for the same employer are limited to a combined 12 weeks of leave for purposes of bonding with the healthy adopted or foster child, to care for the healthy child following the birth of the child, and to care for an employee's parent with a serious health condition. *See* 29 U.S.C. 2612(f). Proposed § 825.121(a)(4) was added to clarify that both spouses may each take their full 12 weeks of FMLA leave to care for an adopted or foster child with a serious health condition, regardless of whether the spouses work for the same employer. Proposed § 825.121(b), ''Use of intermittent and reduced schedule leave,'' combined language from current §§ 825.203(b) and 825.204(a), which provides that intermittent or reduced schedule leave after placement of a healthy child for adoption or foster care may only be taken with the employer's agreement and, in such cases, an employer may temporarily transfer the employee to an alternative position that better accommodates the leave. *See* 29 U.S.C. 2612(b)(2). Proposed § 825.121(b) also clarified that if intermittent or reduced schedule leave is needed for a serious health condition of the adopted or foster child, no employer agreement is necessary.

The Department received very few comments on this provision. The final rule clarifies language in the regulatory text at § 825.121(a)(2). Otherwise, the final rule adopts § 825.121 as proposed.

Section 825.122 (Definitions of Spouse, Parent, Son or Daughter, Next of Kin of a Covered Servicemember, Adoption, Foster Care, Son or Daughter on Active Duty or Call to Active Duty Status, Son or Daughter of a Covered Servicemember, and Parent of a Covered Servicemember)

The proposed rule, at § 825.122, made minor changes to the definition of ''parent'' in current § 825.113, clarifying that a parent can be a biological, adoptive, step or foster mother or father, as well as an individual who stood *in loco parentis* to the employee. The proposal also added a definition of ''adoption,'' incorporated the statement in current § 825.112(d) that the source of the adoption is not relevant to FMLA leave eligibility, and moved the current rule's definition of ''foster care'' from § 825.112(e) to this section. In the definition of ''son or daughter'' in § 825.122(c), the proposal also specified that an adult child must be incapable of self-care because of a disability ''at the time leave is to commence.'' This addition was intended to eliminate the confusion about coverage that is caused when eligibility decisions are based on facts and circumstances that occur after the leave commences. Finally, the proposed rule stated in § 825.122(f) that an employer could require an employee to provide documentation to confirm a family relationship, such as a sworn, notarized statement or a submitted and signed tax return.

The final rule makes the clarifying changes to the definition of ''parent,'' adds the definition of ''adoption,'' and moves the definition of ''foster care,'' as set forth in the proposal. The final rule clarifies in paragraph (c) that whether an adult child has a disability is based upon the facts as they exist when the leave commences, as proposed. Paragraph (c) also makes clear that the definition of ''son or daughter'' is for purposes of FMLA leave taken for birth or adoption, or to care for a family member with a serious health condition. The final rule does not adopt the changes proposed in paragraph (f) to the documentation necessary to confirm the necessary family relationship, but rather retains the current regulation and moves the text to new paragraph (j). Lastly, to address terms that are unique to the military family leave provisions, the final rule contains definitions of ''next of kin of a covered servicemember'' in paragraph (d), ''son or daughter on active duty or call to active duty status'' in paragraph (g), ''son or daughter of a covered servicemember'' in paragraph (h), and, ''parent of a covered

servicemember'' in paragraph (i), respectively.

A number of commenters addressed the change in proposed § 825.122(c) stating that an adult child must be incapable of self-care because of a disability ''at the time that FMLA leave is to commence.'' The preamble to the proposed rule explained that the clarifying change was made in response to the court's decision in *Bryant* v. *Delbar*, 18 F.Supp.2d 799 (M.D. Tenn. 1998), in which the court analyzed whether an adult child had a disability for FMLA coverage purposes based on facts and circumstances that occurred well after the leave commenced. The Department stated that a coverage decision should not take into account such after-the-fact developments.

A few commenters supported this clarification, including the Equal Employment Advisory Council; Retail Industry Leaders Association; and TOC Management Services. A few other commenters found the proposal unclear. For example, the National Treasury Employees Union (''NTEU'') described the Department's preamble as going farther than the proposed regulation, because the preamble stated that ''the new language is intended to specify that 'the determination' of whether an adult child has a disability is to be made at the time leave is to commence.'' NTEU opposed such a change, because the need for leave to care for a qualifying adult child might arise on relatively short notice, and it thought the ''proposal would make it too easy for an employer to deny FMLA rights by insisting on immediate pre-leave certification of three difficult facts: That the adult child needs care for a serious health condition, is incapable of self-care, AND has a disability within the meaning of the Americans with Disabilities Act.'' The AFL–CIO stated that it was concerned that the regulation could be read to mean that, where an employee takes non-FMLA leave to care for an adult child who ''does not have a disability when the leave commences, the employee does not have the right to convert the absence into FMLA leave if the adult child subsequently satisfies the definition.'' It wanted clarification that subsequent leave might qualify as FMLA leave, consistent with the Department's clarification that an employee who has not worked 12 months for the employer at the start of the leave has the right to treat the leave as FMLA-qualifying once the employee meets the 12-month eligibility requirement. *See* § 825.110(d).

Proposed § 825.122(f) added a notarized statement or submitted tax return as reasonable documentation to establish the family relationship. A number of commenters objected to the proposed change from the current regulation, which states that an employee may confirm the requisite family relationship with a simple statement. For example, the AFL–CIO stated that the regulations have allowed a simple statement for 15 years, and in the ''absence of any evidence that simple non-notarized statements have proven problematic, this change is nothing more than one more hurdle for employees to qualify for FMLA leave.'' NTEU described the additional requirement as ''needless'' and an ''obstacle'' and stated that it ''imposes a substantial new burden on an employee needing to care for a family member.'' The National Partnership for Women & Families similarly commented that ''DOL has not offered any data or rationale as to why this change is necessary, nor has it received widespread complaints regarding abuse of the definition of family member. This change could simply serve to make it more difficult for certain employees to take leave and should not be made.'' *See also* AARP; Family Caregiver Alliance; American Association of University Women.

Many of the same commenters objected on privacy grounds to submitting a tax return, and they questioned whether an employer could require a tax return even if the employee had provided other documentation. In addition, Hewitt Associates expressed concern about the use of an employee's tax return to establish the family relationship. In light of ''the heightened sensitivity around data privacy, the use of a tax return to prove a family relationship will likely require careful employer safeguards for such a limited purpose. Furthermore, such a provision may need to be reconciled with the tax code, particularly 26 U.S.C. 6103 which concerns the confidentiality of tax returns.'' Hewitt Associates also noted that, although the preamble to the proposed rule suggested that a tax return might be helpful with regard to establishing an *in loco parentis* relationship, such a document actually would be ineffective where the employee is requesting leave for an *in loco parentis* parent, because that relationship was established when the employee was a child. Given the availability of other forms of documentation, Hewitt Associates suggested eliminating this clause from the regulations. A number of individual employee commenters also opposed this provision, stating that it was an unnecessary invasion of personal privacy. *See, e.g.*, Tom Landis; Cindy Whitmore; Nathan Grant.

A few employers favored the proposed changes. *See, e.g.*, National Association of Manufacturers; AT&T; Pennsylvania Governor's Office of Administration. They did not indicate, however, that there had been any problem or abuse involving the current rule's simple statement requirement. The Equal Employment Advisory Council (''EEAC'') offered a rationale for the requirement for a notarized statement, commenting that it ''underscores the gravity of claiming federal protection for an absence from work and also confirms for employees that an actual family relationship must exist.'' EEAC acknowledged, however, that ''most employees would not even think of lying to their employer about a family relationship to obtain leave,'' but stated that the proposed change would help ''employers to combat the potential for abuse by the few who would.''

With regard to the proposed change clarifying that an adult child must be incapable of self-care because of a disability ''at the time FMLA leave is to commence,'' the Department did not intend to suggest that the employer's final determination as to whether the adult child was covered had to be made on the date the leave commenced, and that an employee could not subsequently communicate further information, such as in response to an employer request for a medical certification or if the child's condition changed. The intent of the proposal, as explained in the preamble, was to avoid a situation where the decision regarding whether there was coverage at one point in time was affected by events that did not occur until a much later date.

Thus, the focus is on the adult child's condition at the time of the parent's leave. The current rule states that a child who is 18 or older must be incapable of self-care ''because of a physical or mental disability,'' and it further defines the term ''disability'' as a ''physical or mental impairment that substantially limits one or more of the major life activities of an individual.'' The current rule cites the EEOC regulations implementing the ADA (at 29 CFR 1630.2) defining those terms, including the term ''substantially limits,'' which relates generally to the nature, severity, duration and long-term impact of the impairment. The proposal did not make any changes in this area from the current rule.

Therefore, for example, if a 25-year-old son breaks a leg in a car accident and is expected to recover in a short period of time, he would not normally be incapable of self-care because of a

physical or mental disability. The proposal clarifies that any leave the parent took to care for the adult child would not be FMLA-protected if the disability standard is not met. If the 25-year-old later suffered a stroke that left him with substantial and permanent mobility impairments, he likely would meet the regulatory standard. At that point, any subsequent leave the parent took to care for the adult child who is incapable of self-care due to a physical or mental disability would be protected by the FMLA. However, that protection would not extend retroactively to the parent's leave taken when the 25-year-old son had only a broken leg.

The Department believes that the proposed regulatory text, which refers to an adult child incapable of self-care due to a disability ''at the time FMLA leave is to commence,'' clarifies the requirements. That language mirrors the language in § 825.110(d), which addresses whether an employee has 12 months of service ''as of the date the FMLA leave is to start.'' Therefore, the Department is adopting the proposal as written, to clarify that circumstances that occur later affecting an adult child's disability status do not affect whether previous leave qualifies for FMLA protection.

Paragraph (c) in the final rule provides that if the FMLA leave is taken for birth or adoption, or to care for a family member with a serious health condition, then ''son or daughter'' means a biological, adopted, or foster child, a stepchild, a legal ward, or a child of a person standing *in loco parentis,* who is either under age 18, or age 18 or older and ''incapable of self-care because of a mental or physical disability'' at the time that FMLA leave is to commence.

The Department has decided not to adopt the proposal's requirement for a notarized statement regarding the family relationship. Given the absence of evidence of actual problems with the current rule's simple statement requirement, and the comments stating that it would cause needless expense and delay for employees to have to obtain a notarized statement and intrusion into personal privacy to provide a tax return, the Department has decided to retain the current rule. Of course, an employer can require an employee to assert in the statement that the requisite family relationship exists. In other words, the employer may require the employee to state that he or she wants leave to care for a spouse, a son or daughter, or a parent, as defined in the regulations. This assertion will ensure that the employee fully understands that one of the specific family relationships must exist in order to qualify for FMLA leave.

In addition, to reflect the military family leave provisions, § 825.122 now contains a definition of ''next of kin of a covered servicemember'' in paragraph (d), with a cross-reference to § 825.127(b)(3), which also contains this definition of ''next of kin of a covered service member'' and provides examples and further detail. Section 825.122 of the final rule also contains a definition of ''son or daughter on active duty or call to active duty status'' with a corresponding cross-reference to § 825.126(b)(1), which contains this definition, as well as a definition of ''son or daughter of a covered servicemember'' with a corresponding cross-reference to § 825.127(b)(1), which contains this definition. In addition, final § 825.122 includes a definition of ''parent of a covered servicemember'' in paragraph (i), with a corresponding cross-reference to § 825.127(b)(2) containing this definition. These definitions are discussed in more detail in the preamble accompanying §§ 825.126 and 825.127.

Section 825.123 (Unable To Perform the Functions of the Position)

The Department proposed no substantive changes to this section, which implements the statutory requirement that an individual must be unable to perform the functions of a job in order to qualify for FMLA leave. The proposal stated, as the current rule does, that an individual must be ''unable to work at all'' or be unable to perform ''one or more of the essential functions of the job'' in order to qualify, and that an employer may provide a statement of the employee's essential functions to the employee's health care provider. The proposal also clarified in paragraph (b) that a sufficient medical certification must specify what functions the employee is unable to perform. The final rule adopts the proposed rule, but clarifies that a certification will be sufficient if it specifies what functions of the position the employee is unable to perform such that an employer can determine whether the employee is unable to work at all or is unable to perform any one of the essential functions of the employee's position.

A few commenters addressed the unchanged definition in this section. The Chamber stated that the Department should change the rule so that an employee qualifies for FMLA leave only when the employee is unable to work at all or unable to perform the majority of his or her essential functions. This commenter described it as a ''loophole'' that employees can take leave when their condition prohibits them from performing only one aspect of the job and they are able to perform many other essential functions. The National Coalition to Protect Family Leave suggested that the Department change the definition to ''unable to perform the essential functions of the employee's position, unless modified by the employer to accommodate a temporary restriction.'' *See also* Associated Builders and Contractors; International Franchise Association; Jackson County (MO) Department of Corrections. The National Coalition to Protect Family Leave stated that employers should be allowed to require an employee to work in either the same job minus the restricted duties or in some other position, whether or not a part of a formal ''light duty'' program. This commenter approved of the clarification that the certification must specify what essential function the employee cannot perform. Southwest Airlines and the Equal Employment Advisory Council also supported this change. The Illinois Credit Union League stated that there should be consistency between the use of the term ''function'' and ''essential functions,'' but it emphasized that an employer should not be required to identify essential job functions, because employers are not required to draft job descriptions, and essential functions may change.

The National Association of Letter Carriers objected to the requirement that the health care provider specify the particular functions the employee cannot perform, stating that this is more onerous than section 103 of the Act, which requires only a statement that the employee is unable to perform the functions of the position. *See also* National Treasury Employees Union. Another commenter, Scott MacDonald, Esq., noted that unless the employer includes all of the essential functions on the form, it will be impossible for the medical care provider to indicate whether the employee is unable to perform any of them.

The Department believes that the proposed rule, which made only a minor change to the current rule, is the best interpretation of the statutory provision authorizing FMLA leave when an employee is ''unable to perform the functions of the position of such employee.'' 29 U.S.C. 2612(a)(1)(D). The Department continues to believe that if an employee cannot perform one or more essential functions of the job, the Act gives that employee the right to take leave, even if the employer is willing to provide a light duty job or modify the job in a way that would allow the employee to continue working. While

employers may not require employees to perform modified or light duty work in lieu of taking FMLA leave, employees may voluntarily agree to such arrangements. *See also* § 825.220(d). The Department believes that the additional clarification in this section that a sufficient medical certification must identify the function(s) that the employee cannot perform will not be burdensome, that it is consistent with medical certification requirements of current and proposed § 825.306, and that it is a reasonable interpretation of the statutory requirements that a certification provide both appropriate medical facts regarding the employee's condition and a statement that the employee is unable to perform the functions of the position. *See* 29 U.S.C. 2613(b)(3) and (4)(B). In response to the concern of some commenters, the Department notes that the rule gives employers the option of providing a list of essential functions when it requires a medical certification; an employer is not required to do so. Finally, in order to explain why the term ''functions'' and not ''essential functions'' is used in paragraph (b), the final rule clarifies that a certification will be sufficient if it provides information regarding the functions the employee is unable to perform so that an employer can then determine whether the employee is unable to perform one or more essential functions of the job. This revision reflects the fact that the determination of whether a particular job duty is an essential function is a legal, not a medical, conclusion, and is in accord with the medical certification requirements in § 825.306 and the Department's prototype medical certification form.

Section 825.124 (Needed To Care for a Family Member or a Covered Servicemember)

The FMLA provides leave ''[i]n order to care for the spouse, or a son, daughter, or parent, of the employee, if such spouse, son, daughter, or parent has a serious health condition.'' 29 U.S.C. 2612(a)(1)(C). The legislative history indicates that the ''phrase 'to care for' * * * [is to] be read broadly to include both physical and psychological care.'' S. Rep. No. 103–3, at 24 (1993); H.R. Rep. No. 103–8, at 36 (1993). The statute also provides leave to care for a covered servicemember. 29 U.S.C. 2612(a)(3). The current regulations define the phrase ''needed to care for'' a family member in § 825.116. The proposed rule moved this section to § 825.124 without making any substantive changes, other than to clarify that the employee need not be the only individual, or even the only family member, available to provide care to the family member with a serious health condition. The final rule adopts this provision as proposed, with minor revisions to reflect the new military caregiver leave entitlement.

A number of employers commented that employees should only be entitled to FMLA leave to care for a family member when they are actually providing care. For example, the Manufacturers Alliance/MAPI and the Metropolitan Transportation Authority (NY) commented that if an employee has arranged for others to care for the family member, the employee is not needed to provide care and should not be entitled to FMLA leave. Southwest Airlines commented, ''[l]eave to care for a family member should not include, for example, an employee who lives out of state from the family member and who does not travel to the family member needing the care during the employee's entire FMLA leave. The logical meaning of 'to care for' a family member, whether it be physical or psychological care, is active caregiver participation by the employee needing the leave.''

The Equal Employment Advisory Council recommended ''that the Department further revise this section by reiterating in § 825.124(c), with a cross reference to § 825.202 and § 825.203, that in order to qualify for intermittent leave to care for a family member, that leave must be *medically necessary*.'' (Emphasis in original.) Burr & Forman commented that the regulations should clarify that FMLA leave cannot be used to perform the job duties of either the ill family member (during the period in which the ill family member seeks treatment) or another family member (who then provides care to the ill family member).

On the other hand, AARP and many employee groups supported the Department's clarification that employees may take FMLA leave to care for a family member even if they are not the only caregiver available. The Family Caregiver Alliance commented that, in many cases, having more than one caregiver available for support and relief helps ensure the health and safety of the caregivers, as well as the care receiver. The National Partnership for Women & Families commented that the legislative history makes clear that Congress anticipated that both parents may take leave to care for a child, or that multiple siblings may take leave to care for a parent, and that such leave may be taken on either an overlapping or sequential basis.

Finally, Working America/Working America Education Fund included with its comments a number of short quotes from its members that help put a human face on the wide variety of situations in which employees need to care for a family member: ''As a Hospice social worker, I have found FMLA to be extremely important to allow family members to care for loved ones in their final days.'' ''I have a friend who first took care of one dying parent and then was the sole caretaker of her second, remaining terminally ill parent. She took FMLA to care for her remaining parent and did not lose her sanity or her job.'' ''I had to use the FMLA a few times after my mother developed Alzheimers. We live 200 miles apart. I needed to go see her occasionally so that she didn't forget me and that I didn't just let go of her as well.'' ''* * * I am a widowed mother of five children. If one of them were to become seriously ill, I would need to take care of them.'' These examples illustrate the difficulty in trying to include in the regulations prescriptive requirements for family leave when that leave may be needed in many different circumstances.

The Department acknowledges the difficulties employers face in meeting the FMLA's requirements to provide employees with the opportunity to use leave to care for family members. Nonetheless, the Department continues to believe that the FMLA does not permit adding requirements for family leave, such as a requirement that the employee furnish information about the availability of other caregivers. An employee is entitled to use FMLA leave to care for a spouse or covered family member, assuming the eligibility and procedural requirements are met, no matter how many other family members, friends, or caregivers may be available to provide this care. However, as a number of employer commenters stated, such FMLA leave may be taken only to care for the family member with a serious health condition or the covered servicemember with a serious illness or injury. An employee may not use FMLA leave to work in a family business, for example. No regulatory changes are necessary to address this, however, as both the statute and §§ 825.112(a)(3) and 825.124 make clear that FMLA leave is available only ''to care for'' a covered relative.

Finally, in order to qualify for intermittent leave to care for a family member or covered servicemember, the intermittent leave must be medically necessary as required by the statute. 29 U.S.C. 2612(b)(1). The cross-reference in § 825.124(c) to §§ 825.202–825.205 for the rules governing the use of intermittent or reduced schedule leave addresses this matter sufficiently.

Section 825.125 (Definition of Health Care Provider)

The proposed rule, at § 825.125, modified the definition of ''health care provider'' by clarifying the status of physician assistants (''PAs''). The proposal added PAs to the list of recognized health care providers and deleted the requirement that they operate ''without supervision by a doctor or other health care provider.'' The proposal made corresponding changes to proposed § 825.115 (Continuing treatment) and § 825.800 (Definitions). The current rule's definition of ''health care provider'' (at § 825.118) does not expressly mention PAs. However, as the preamble to the proposed rule noted, they generally fall within the current definition under § 825.118(b)(3), which includes any health care provider from whom an employer or the employer's group health plan's benefits manager will accept certification of the existence of a serious health condition to substantiate a claim for benefits. The final rule adopts the proposed rule's definition of ''health care provider.''

Most of the commenters that addressed this issue supported the proposed change. For example, the American Academy of Physician Assistants (''AAPA'') noted that the current regulations cause confusion because PAs are not named as health care providers, and yet they are usually covered as providers because the ''overwhelming majority of private and public insurance plans reimburse medical care by PAs.'' The AAPA stated that PAs are covered providers of physician services through Medicare, Medicaid, Tri-Care, Federal Employee Health Benefit plans and most private insurance plans; they may diagnose and treat injured workers through nearly all state workers' compensation programs; and the Department of Transportation regulations define PAs as ''medical examiners'' for purposes of performing the medical exam and signing the certificate of physical examination for truck drivers. The AAPA also stated that the current regulatory references to a PA working ''under direct supervision of a health care provider'' cause confusion because they suggest that the FMLA imposes supervisory requirements that are not required by state law. Finally, the AAPA stated that clarifying the status of PAs will avoid disruption in the continuity of care for workers who seek FMLA-related medical treatment or certification from a PA. Other commenters also expressed approval for the proposed change. *See* National Retail Federation; Retail Industry Leaders Association; HIV-Policy Collaborative; and Redfield Medical Clinic.

The Metropolitan Transportation Authority (NY) opposed the change, stating that it does not believe that a PA ''has sufficient training or expertise to make the medical determinations necessary under the Act.'' The Society of Professional Benefit Administrators commented that the change ''will have a significant impact on plans by ratcheting up the potential for physician billing abuse,'' and ''would serve to disclose employees [sic] medical information to scrutiny by non-professionals which may have the potential of infringing on a patient's right to privacy and interfere in their relationships with their doctors.'' The American Association of Occupational Health Nurses suggested adding occupational and environmental health nurses, who are registered nurses, as health care providers because they interface with workers, human resource personnel, safety personnel and others in administering the FMLA in many workplaces.

The Department believes that the express inclusion of PAs in the definition of ''health care provider'' is an appropriate clarification, not a significant change. As the AAPA noted, PAs generally already are included within the definition because the vast majority of group health plans accept them when substantiating a claim for benefits. Moreover, other government agencies recognize them as providers of health care services. Both of these facts demonstrate that PAs do have the necessary training to make the determinations required by the Act. The Department does not believe that this clarification will have an impact on potential billing abuse or the disclosure of medical information. Therefore, the final rule includes PAs as health care providers in § 825.125(b)(2), and it makes conforming changes in §§ 825.115 and 825.800. The final rule does not add occupational and environmental health nurses to the list of health care providers. Registered nurses are not currently included on the list, and the rulemaking record does not demonstrate that these registered nurses should be treated differently than other nurses.

Section 825.126 (Leave Because of a Qualifying Exigency)

The NDAA provides a new qualifying reason for taking FMLA leave which allows eligible employees of covered employers to take leave for any qualifying exigency arising out of the fact that a spouse, son, daughter, or parent is on active duty or has been notified of an impending call or order to active duty in support of a contingency operation. The Department has organized the discussion of this new leave entitlement into two major categories: (1) An employee's entitlement to qualifying exigency leave; (2) the specific circumstances under which qualifying exigency leave may be taken.

Entitlement to Qualifying Exigency Leave

Under the NDAA, an eligible employee of a covered employer may take leave for a qualifying exigency arising out of the fact that the employee's spouse, son, daughter, or parent is on active duty or has been notified of an impending call or order to active duty in the Armed Forces in support of a contingency operation. 29 U.S.C. 2612(a)(1)(E). Specifically, the statute defines ''active duty'' as duty under both a ''call or order to active duty'' and under a provision of law referred to in 10 U.S.C. 101(a)(13)(B). 29 U.S.C. 2611(14). In the NPRM, the Department proposed to add the NDAA's definition of ''active duty'' to proposed § 825.800 by cross-referencing 10 U.S.C. 101(a)(13)(B). The Department suggested that the statutory definition did not require additional clarification and thus did not further explain the various provisions of law that are specifically referenced in 10 U.S.C. 101(a)(13)(B).

The Department has added the statutory definition of ''active duty'' to § 825.800 in the final rule as proposed. In addition, in response to public comments requesting that the Department further explain the types of active duty service by the spouse, son, daughter, or parent of an employee that would trigger an entitlement to qualifying exigency leave, § 825.126(b)(2) of the final rule specifically enumerates the provisions of law referred to in 10 U.S.C. 101(a)(13)(B): Sections 688, 12301(a), 12302, 12304, 12305, and 12406 of Title 10 of the United States Code, chapter 15 of Title 10 of the United States Code, and any other provision of law during a war or during a national emergency declared by the President or Congress. This section of the regulations also makes clear that these existing provisions of military law refer only to duty under a ''call or order to active duty'' by members of the Reserve components and the National Guard, and also to certain retired members of the Regular Armed Forces and retired Reserve. Consistent with the statutory definition, this leave entitlement does

not extend to family members of the Regular Armed Forces on active duty status because members of the Regular Armed Forces either do not serve ''under a call or order to active duty'' or are not identified in the provisions of law referred to in 10 U.S.C. 101(a)(13)(B). The final rule also provides that a ''call or order to active duty'' for purposes of leave taken because of a qualifying exigency refers to a Federal call to active duty, as opposed to a State call to active duty.

Many of the public comments received by the Department with regard to the military family leave provisions did not discuss the definition of ''active duty'' for purposes of qualifying exigency leave. A number of commenters, however, recognized the limiting nature of the statutory definition provided by Congress. *See* Society for Human Resource Management; Bank of the Commonwealth. The law firm of Spencer Fane Britt & Browne noted that this limited definition was logical:

> In case of the Regular Armed Forces, those servicemembers are employed by the Federal government itself as a conscious career choice and have accepted the terms and conditions of that employment. In the case of Reservists and the National Guard, those individuals may work elsewhere, but are willing to serve the Federal government if necessary and are willing to allow their lives to be disrupted by a call to active duty. They have not, however, accepted the terms and conditions of employment with the Federal government except as it may be necessary in connection with a call to active duty. It is the unexpected disruption to their lives that appears to be the focus of exigency leave.

This view is consistent with the statement of Representative Jason Altmire on the floor of the U.S. House of Representatives, who introduced the provision providing leave for a qualifying exigency:

> [W]hat this legislation does is allow family members of our brave men and women serving in the Guard and Reserve to use Family and Medical Leave Act time to see off, to see the deployment, or to see the members return when they come back, and to use that, importantly, to deal with economic issues, and get the household economics in order.

153 Cong. Rec. H15326 (*see* daily ed. Dec. 12, 2007).

Several commenters urged the Department to provide additional detail and explanation in the final rule as to the statutory references contained in the NDAA, noting that most employers are not familiar with the specific statutory references and that both employees and employers would likely be confused without an explanation of who is covered. *See* National Coalition to Protect Family Leave; National Association of Manufacturers; Colorado Department of Personnel & Administration; Willcox & Savage. The Bank of the Commonwealth noted that without specific guidance there is a risk of discrimination complaints being brought by servicemembers in military towns. In contrast, the Equal Employment Advisory Council concurred with the Department's original position that the definition of ''active duty'' needed no further clarification.

The Department also concludes that the statutory language found in 10 U.S.C. 101(a)(13)(B) is unambiguous. Congress expressly incorporated an existing provision of law regarding active duty when defining an employee's entitlement to qualifying exigency leave under the FMLA. As such, Congress provided that leave for a qualifying exigency is intended for use by employees who have a spouse, son, daughter, or parent called to active duty as a part of the Reserve components and the National Guard, or as certain retired members of the Regular Armed Forces and retired Reserve Employees who have a spouse, son, daughter, or parent on active duty status as a member of the Regular Armed Forces are not entitled to qualifying exigency leave.

Had Congress intended qualifying exigency leave to extend to family members of those in the Regular Armed Forces, it would have provided a different statutory definition that referenced alternative provisions of Title 10 to define ''active duty.'' For example, a definition of ''active duty'' that cited to both 10 U.S.C. 101(a)(13)(A) and (B), rather than to (B) only, would have provided clear coverage to all members of the Armed Forces. Alternatively, a reference to the provisions of 10 U.S.C. 101(d) would have also provided a broader definition of ''active duty.'' In comparison, the provisions of the NDAA allowing an eligible employee to take leave to care for a ''covered servicemember'' (also referred to as ''military caregiver leave'') do provide a broader definition of the military service covered by that leave entitlement. In that instance, the NDAA defines a ''covered servicemember,'' in part, as ''a member of the Armed Forces (including National Guard or Reserves).'' This distinction further highlights the limitation Congress imposed for who should be eligible to take qualifying exigency leave.

The Department also concurs with the commenters that more specific guidance regarding the statutes listed under 10 U.S.C. 101(a)(13)(B) would be helpful. The Department understands that most employers and employees will be unfamiliar with the military terminology used by the NDAA in establishing the new FMLA military family leave entitlements. For this reason, the final rule does not simply rely on a statutory cross-reference to establish the definition of the term ''active duty.'' Rather, the final rule provides in § 825.126(b)(2) a brief explanation of each of the statutes listed in 10 U.S.C. 101(a)(13)(B) to provide more detailed guidance on the definition of ''active duty.''

Some commenters asked about situations where a State (*e.g.*, a governor) calls the National Guard or Reserve to active duty. Spencer Fane Britt & Browne urged the Department to ''[c]larify that a call to active duty is a *Federal* call to active duty as opposed to a *State* call to active duty of a State's own National Guard or state militia.'' The Department agrees that the exclusion of State calls to active duty is clear in the NDAA. The statutes referred to in 10 U.S.C. 101(a)(13)(B) refer exclusively to Federal calls to active duty in support of a contingency operation. The final rule therefore clarifies that a call to active duty for purposes of leave taken because of a qualifying exigency refers to a Federal call to active duty. State calls to active duty are not covered unless under order of the President of the United States pursuant to one of the provisions of law identified in § 825.126(b)(2).

The NDAA also provides a definition of the term ''contingency operation.'' The statute defines the term as having the same meaning given such term in section 10 U.S.C. 101(a)(13). 29 U.S.C. 2611(15). In the NPRM, the Department considered adding the definition of ''contingency operation'' in proposed § 825.800 as defined in the NDAA and cross-referencing 10 U.S.C. 101(a)(13). The Department suggested that the definition did not require additional clarification.

The Department has added the statutory definition of ''contingency operation'' to § 825.800 in the final rule as proposed. In addition, in response to public comments requesting greater clarity, § 825.126(b)(3) of the final rule defines ''contingency operation'' by fully restating the statutory language of 10 U.S.C. 101(a)(13). Specifically, this statutory reference provides that a military operation qualifies as a contingency operation if it (1) is designated by the Secretary of Defense as an operation in which members of the armed forces are or may become involved in military actions, operations, or hostilities against an enemy of the United States or against an opposing

military force; or (2) results in the call or order to, or retention on, active duty of members of the uniformed services under section 688, 12301(a), 12302, 12304, 12305, or 12406 of Title 10 of the United States Code, chapter 15 of Title 10 of the United States Code, or any other provision of law during a war or during a national emergency declared by the President or Congress. The provisions listed under (2) above are the same as those used to define ''active duty'' and generally refer to members of the National Guard and Reserve. In addition, this section specifies that the active duty orders of a covered military member will generally specify if the covered military member is serving in support of a contingency operation by citation to the relevant section of Title 10 of the United States Code and/or by reference to the specific name of the contingency operation.

As with the comments received by the Department with regard to the definition of ''active duty,'' many of the comments regarding the definition of ''contingency operation'' urged the Department to be as specific as possible in the final regulations. In fact, some of the comments addressed both terms together. *See* Food Marketing Institute; Colorado Department of Personnel & Administration; Bank of the Commonwealth; Society for Human Resource Management.

As with the definition of ''active duty'' in § 825.126(b)(2), the final rule in § 825.126(b)(3) references the specific statutes listed in 10 U.S.C. 101(a)(13). Because a covered military member's active duty orders will generally specify whether he or she is serving in support of a contingency operation by reference to the appropriate section of Title 10 of the United States Code and/or by reference to the specific name of the contingency operation, the Department believes that it will be fairly easy for employees and employers to determine whether a particular covered military member's active duty status qualifies the family member for qualifying exigency leave by examining the covered military member's active duty orders. As discussed in relation to § 825.309, which addresses certification requirements for qualifying exigency leave, a copy of such orders must be provided to an employer upon the first request when an employee requests leave because of a qualifying exigency. Furthermore, the certification section provides that an employer can verify a covered military member's active duty status in support of a contingency operation with the Department of Defense.

As the military operations that qualify family members of covered military members for qualifying exigency leave under FMLA may change over time, the Department does not believe that it is helpful to provide further specificity in the final regulations regarding the operations that currently qualify as contingency operations. Furthermore, because the Secretary of Defense may designate military operations as contingency operations, the Department believes that the Department of Defense, and not the Department of Labor, is in the best position to determine which operations qualify. Requiring a copy of a covered military member's active duty orders, or other appropriate documentation from the military, when qualifying exigency leave is first requested will permit an employer to verify a covered military member's duty in support of a contingency operation without requiring revision to the FMLA regulations each time the list of contingency operations is revised by the Department of Defense.

In addition, in the NPRM the Department noted that the military leave provisions of the NDAA did not alter the FMLA's existing definitions of ''son or daughter.'' Specifically, the Department asked for comments on the application of the FMLA's current definition of ''son or daughter'' to the new military family leave entitlements. Under the current FMLA definition, a son or daughter must either be (1) under 18 years of age; or (2) 18 years of age or older and incapable of self-care because of a mental or physical disability. 29 U.S.C. 2611(12). The Department explained that applying this definition for purposes of leave taken for a qualifying exigency would severely restrict the availability of the leave and would appear to contradict the intent of Congress. The Department sought comment on whether it would be appropriate to define the term ''son or daughter'' differently for purposes of FMLA leave taken because of a qualifying exigency.

The final rule does not alter the FMLA's definition of ''son or daughter,'' but rather establishes a separate definition of ''son or daughter on active duty or call to active duty status'' for the purpose of leave for a qualifying exigency. Section 825.126(b)(1) defines a ''son or daughter on active duty or call to active duty status'' as an employee's biological, adopted, or foster child, stepchild, legal ward, or a child for whom the employee stood in loco parentis, who is on active duty or call to active duty status, and who is of any age. *See also* §§ 825.122 and 825.800.

The Department received a large number of comments requesting that the Department apply a broader definition of ''son or daughter'' for purposes of leave for a qualifying exigency in order to adhere to the intent of law. *See* Senator Dodd and Representative Woolsey *et al.*; Catholic Charities, Diocese of Metuchen; National Partnership for Women & Families; TOC Management Services. The National Association of Manufacturers did not object to the Department providing a new definition for ''son or daughter,'' as long as the Department clarified that the definition applies only to the military provisions. In contrast, Infinisource, Inc., asserted that the NDAA ''did not explicitly expand'' the definition of ''son or daughter'' and thus it should not be altered for purposes of military family leave.

The Department agrees with the overwhelming majority of comments that the existing FMLA definition of ''son or daughter'' could not have been intended to apply to the qualifying exigency leave provision. Using the existing FMLA definition of ''son or daughter'' would eviscerate the qualifying exigency leave provision because for all practical purposes a parent would not be able to take leave for a qualifying exigency if the parent's son or daughter were deployed overseas as a member of the National Guard or Reserve because the majority of such sons or daughters would not be under age 18 and those older would most likely not be incapable of self-care due to a disability. This is clearly not the result intended by Congress. The NDAA allows an employee to take leave for circumstances ''arising out of the fact that the spouse, or a son, daughter, or parent of the employee is on active duty.'' Therefore, it is more consistent with the intent of the military leave amendments to define ''son or daughter on active duty or call to active duty status'' as an employee's biological, adopted, or foster child, stepchild, legal ward, or a child for whom the employee stood in loco parentis, who is on active duty or call to active duty status, and who is of any age. This definition applies specifically only to qualifying exigency leave and does not alter the definition of son or daughter for purposes of taking FMLA leave for other qualifying reasons.

Types of Qualifying Exigencies

In describing qualifying exigency leave, the NDAA simply states that leave can be taken ''[b]ecause of any qualifying exigency (as the Secretary shall, by regulation, determine) arising out of the fact that the spouse, or a son,

daughter, or parent of the employee is on active duty (or has been notified of an impending call or order to active duty) in the Armed Forces in support of a contingency operation.'' 29 U.S.C. 2612(a)(1)(E).

In the NPRM, the Department presented a lengthy discussion regarding the appropriate definition of qualifying exigency and posed a number of specific questions arising from that discussion. The Department reproduced in the NPRM the only statements made in Congress specifically addressing qualifying exigency leave. Three Members of the U.S. House of Representatives made brief statements on the House floor. Representative Jason Altmire, who introduced the provision providing for qualifying exigency leave, stated:

> This amendment allows the immediate family of military personnel to use Family Medical Leave Act time for issues directly arising from deployment and extended deployments. The wife of a recently deployed military servicemember could use the Family and Medical Leave Act to arrange for childcare. The husband of a servicemember could use the Family Medical Leave Act to attend predeployment briefings and family support sessions. The parents of a deployed servicemember could take Family Medical Leave Act time to see their raised child off or welcome them back home. This amendment does not expand eligibility to employees not already covered by the Family Medical Leave Act * * *.

153 Cong. Rec. H5132 (*see* daily ed. May 16, 2007) (statement of Representative Altmire).

> [W]hat this legislation does is allow family members of our brave men and women serving in the Guard and Reserve to use Family and Medical Leave Act time to see off, to see the deployment, or to see the members return when they come back, and to use that, importantly, to deal with economic issues, and get the household economics in order * * *.

153 Cong. Rec. H15323 (*see* daily ed. Dec. 12, 2007) (same).

> It will allow military families to use family and medical leave time to manage issues such as childcare and financial planning that arise as a result of the deployment of an immediate family member.

153 Cong. Rec. H15341 (*see* daily ed. Dec. 12, 2007) (same).

Representative Tom Udall stated:

> For every soldier who is deployed overseas, there is a family back home faced with new and challenging hardships. The toll extends beyond emotional stress. From raising a child to managing household finances to day-to-day events, families have to find the time and resources to deal with the absence of a loved one * * *. The Altmire-Udall amendment would allow spouses, parents or children of military personnel to use Family and Medical Leave Act benefits for issues related directly to the deployment of a soldier. Current FMLA benefits allow individuals to take time off for the birth of a child or to care for a family member with a serious illness. The deployment of a soldier is no less of a crisis and certainly puts new demands on families. We should ensure that the FMLA benefits given in other circumstances are provided to our fighting families during their time of need.

153 Cong. Rec. E1076 (*see* daily ed. May 17, 2007) (statement of Representative Udall).

Representative George Miller stated that:

> Under the amendment * * * a worker can take family and medical leave to deal with the issues that arise as a result of a spouse, parent, or child's deployment to a combat zone like Iraq or Afghanistan. Under this amendment family members can use the leave to take care of issues like making legal and financial arrangement and making child care arrangements or other family obligations that arise and double when family members are on active duty deployments * * *. These deployments and extended tours are not easy on families, and two-parent households can suddenly become a single-parent household and one parent is left alone to deal with paying the bills, going to the bank, picking up the kids from school, watching the kids, providing emotional support to the rest of the family. You have got to deal with these predeployment preparations.

153 Cong. Rec. H5336 (*see* daily ed. May 17, 2007) (statement of Representative Miller).

Based on these Congressional statements, the Department expressed an initial view that, given the statute's inclusion of the word ''qualifying,'' not every exigency would entitle a military family member to leave. The Department further stated in its proposal that the NDAA requires a nexus between the eligible employee's need for leave and the covered military member's active duty status and specifically solicited comment on the degree of nexus that should be required.

The Department asked for comment on whether the types of qualifying exigencies should be limited to those items of an urgent or one-time nature arising from deployment as opposed to routine, everyday life occurrences. The Department suggested that leave for qualifying exigencies should be limited to non-medical related exigencies since the leave entitlement for qualifying exigencies was in addition to the existing qualifying reasons for FMLA leave, which already permit an eligible employee to take FMLA leave to care for a son or daughter, parent, or spouse with a serious health condition.

The Department also sought comment on whether it would be appropriate to develop a list of pre-deployment, deployment, and post-deployment qualifying exigencies. The Department asked whether particular types of exigencies should qualify, such as making arrangements for child care, making financial and legal arrangements to address the covered military member's absence, attending counseling related to the active duty of the covered military member, attending official ceremonies or programs where the participation of the family member is requested by the military, attending to farewell or arrival arrangements for a covered military member, and attending to affairs caused by the missing status or death of a covered military member. Finally, the Department sought comment on whether there were any other exigencies that should qualify and whether any list developed by the Department should be a *per se* list of qualifying exigencies.

Section 825.126(a) of the final rule defines qualifying exigency by providing a specific and exclusive list of reasons for which an eligible employee can take leave because of a qualifying exigency. These reasons are divided into seven general categories: (1) Short-notice deployment, (2) Military events and related activities, (3) Childcare and school activities, (4) Financial and legal arrangements, (5) Counseling, (6) Rest and recuperation, (7) Post-deployment activities, and (8) Additional activities.

For Short-notice deployment, § 825.126(a)(1) allows qualifying exigency leave to address any issue that arises from the fact that a covered military member is notified of an impending call or order to active duty seven or less calendar days prior to the date of deployment. Leave taken for this purpose can be used for a period of seven calendar days beginning on the date the covered military member is notified of an impending call or order to active duty.

For Military events and related activities, § 825.126(a)(2) allows qualifying exigency leave to attend any official ceremony, program, or event sponsored by the military and to attend family support and assistance programs and informational briefings sponsored or promoted by the military, military service organizations, or the American Red Cross that are related to the active duty or call to active duty status of a covered military member.

For Childcare and school activities, § 825.126(a)(3) allows an eligible employee to take qualifying exigency leave to arrange childcare or attend certain school activities for a biological, adopted, or foster child, a stepchild, or a legal ward of the covered military

member, or a child for whom the covered military member stands in loco parentis, who is either under age 18, or age 18 or older and incapable of self-care because of a mental or physical disability at the time that FMLA leave is to commence. Qualifying exigency leave may be taken under this section (1) to arrange for alternative childcare when the active duty or call to active duty status of a covered military member necessitates a change in the existing childcare arrangement; (2) to provide childcare on an urgent, immediate need basis (but not on a routine, regular, or everyday basis) when the need to provide such care arises from the active duty or call to active duty status of a covered military member; (3) to enroll the child in or transfer the child to a new school or day care facility when enrollment or transfer is necessitated by the active duty or call to active duty status of a covered military member; and (4) to attend meetings with staff at a school or a day care facility, such as meetings with school officials regarding disciplinary measures, parent-teacher conferences, or meetings with school counselors, when such meetings are necessary due to circumstances arising from the active duty or call to active duty status of a covered military member.

For Financial and legal arrangements, § 825.126(a)(4) allows qualifying exigency leave to make or update financial or legal arrangements to address the covered military member's absence while on active duty or call to active duty status, such as preparing and executing financial and healthcare powers of attorney, transferring bank account signature authority, enrolling in the Defense Enrollment Eligibility Reporting System (''DEERS''), obtaining military identification cards, or preparing or updating a will or living trust. It also allows leave to act as the covered military member's representative before a federal, state, or local agency for purposes of obtaining, arranging, or appealing military service benefits while the covered military member is on active duty or call to active duty status and for a period of 90 days following the termination of the covered military member's active duty status.

For Counseling, § 825.126(a)(5) allows qualifying exigency leave to attend counseling provided by someone other than a healthcare provider for oneself, for the covered military member, or for the biological, adopted, or foster child, a stepchild, or a legal ward of the covered military member, or a child for whom the covered military member stands in loco parentis, who is either under age 18, or age 18 or older and incapable of self-care because of a mental or physical disability at the time that FMLA leave is to commence, provided that the need for counseling arises from the active duty or call to active duty status of a covered military member.

For Rest and recuperation, § 825.126(a)(6) provides qualifying exigency leave to spend time with a covered military member who is on short-term, temporary rest and recuperation leave during the period of deployment. Eligible employees may take up to five days of leave for each instance of rest and recuperation.

For Post-deployment activities, § 825.126(a)(7) allows qualifying exigency leave to attend arrival ceremonies, reintegration briefings and events, and any other official ceremony or program sponsored by the military for a period of 90 days following the termination of the covered military member's active duty and to address issues that arise from the death of a covered military member while on active duty status, such as meeting and recovering the body of the covered military member and making funeral arrangements.

Finally, § 825.126(a)(8) provides qualifying exigency leave for Additional Activities, which allows leave to address other events which arise out of the covered military member's active duty or call to active duty status provided that the employer and employee agree that such leave shall qualify as an exigency, and agree to both the timing and duration of such leave.

The Department received a wide array of comments regarding how to define ''qualifying exigency.'' Several commenters requested a *per se* list, or at least as exhaustive a list as possible. *See* National Business Group on Health; Jackson Lewis; Catholic Charities, Diocese of Metuchen; Association of Corporate Counsel's Employment and Labor Law Committee; Equal Employment Advisory Council. Jackson Lewis argued that without a *per se* list administering such leave would be extremely difficult because employers would be forced to ''interrogate employees regarding the circumstances surrounding their requests for qualifying exigency leave.'' ORC Worldwide requested a *per se* list, but suggested that it be non-exhaustive. In contrast, other commenters stated that a *per se* list would not be practicable or provide employers enough flexibility, but that examples or flexible criteria would be helpful. *See* TOC Management Services; the Chamber; National Association of Manufacturers. Others urged the Department to reject the use of a *per se* list, and instead to provide general guidelines or broad categories and examples or non-exhaustive lists of the types of situations that would be qualifying exigencies. *See* National Military Family Association; National Partnership for Women & Families, in joint comments with the National Military Family Association; Senator Dodd and Representative Woolsey *et al.* Senator Dodd and Representative Woolsey *et al.* suggested specific categories:

> (1) Military events and meetings; (2) childcare and childcare arrangements; (3) counseling for self, family and children, (4) legal, financial and other critical household obligations; and (5) family needs and obligations related to the servicemember's departure, return, or period leave * * *.

Others did not specifically suggest or reject the idea of a *per se* list, but requested that the Department provide a clear definition. *See* Burr & Forman; Colorado Department of Personnel & Administration; Infinisource.

The comments were equally divided as to whether qualifying exigencies should be limited to one-time events or should include recurring or routine events also. The National Partnership for Women & Families, in joint comments with the National Military Family Association, urged the Department to include both urgent and routine events as qualifying exigencies, stating that ''[t]here is nothing in the statute that limits this leave solely to urgent matters.'' Infinisource, the National Coalition to Protect Family Leave, the Society for Human Resource Management, Delphi, and Jackson Lewis urged the Department to limit it to urgent, one-time, non-routine exigencies. These commenters also suggested that it not include medical exigencies. Delphi, the National Coalition to Protect Family Leave, and the Society for Human Resource Management also emphasized that causation should be an important factor in defining qualifying exigency.

The comments were more consistent as to the timing of the exigencies that should qualify. Most commenters who addressed this issue agreed that qualifying exigencies should include events that occur pre-deployment, during deployment, and post-deployment. *See* National Military Family Association; National Partnership for Women & Families, in joint comments with the National Military Family Association; Association of Corporate Counsel's Employment and Labor Law Committee. The exception was the National Business Group on Health, which

referred only to exigencies pre- and post-deployment, but not during deployment.

The Department believes it is critical that employees fully understand their rights and employers fully understand their obligations under this new leave entitlement. Accordingly, the final rule specifically identifies the circumstances under which qualifying exigency leave may be taken. The Department believes this approach is preferable because it provides the clearest guidance to both employees and employers regarding the circumstances under which qualifying exigency leave may be taken. By organizing the list of qualifying exigencies into categories covering Short-notice deployment, Military events and related activities, Childcare and school activities, Financial and legal arrangements, Counseling, Rest and recuperation, Post-deployment activities, and Additional activities, the final rule reflects the broad areas of common exigencies highlighted by many commenters.

At the same time, the Department also recognizes the need to provide some flexibility for both employees and employers to address unforeseen circumstances. The Department understands that there may be additional circumstances beyond those specified in the Department's final rule for which the use of qualifying exigency leave might be appropriate. For this reason, § 825.126(a)(8) of the final rule allows job-protected leave to address other events which arise out of the covered military member's active duty or call to active duty status in support of a contingency operation, provided that the employer and employee agree that such leave shall qualify as an exigency, and agree to both the timing and duration of such leave. This provision ensures that employees have the ability to take job-protected FMLA leave for unforeseen circumstances, but also requires effective communication between employees and employers regarding such leave so that it does not adversely impact or burden the employer's business operations.

While many members of the National Guard and Reserve receive their orders as far as several months in advance, thereby allowing abundant time to plan for the covered military member's absence, there may be some situations where some members of the National Guard and Reserve receive their notices or orders only a few days in advance. The Department recognizes that in these circumstances, a number of personal arrangements must be made by the covered military member and his or her family member in a very short period of time. Section 825.126(a)(1) of the final rule therefore allows leave to address any issue that arises from the fact that a covered military member is notified of an impending call or order to active duty seven or less calendar days prior to the date of deployment. Leave taken for this purpose can be used for a period of seven calendar days beginning on the date the covered military member is notified of an impending call or order to active duty. During this seven day period, an employee may take FMLA leave without demonstrating that the need for leave otherwise qualifies as an exigency under one of the other provisions of § 825.126(a). The employee also may take FMLA leave during this seven day period for any other exigency specifically enumerated in the other provisions of § 825.126(a). For example, if an employee's spouse receives orders to active duty in support of a contingency operation on October 5, and will be deployed on October 9, the employee would be eligible for leave under this section on October 5, 6, 7, 8, 9, 10, and 11 and may take such leave in order to make or update financial or legal arrangements, to spend time with the military member, or for any other reason related to the call or order to active duty. Leave taken by the employee outside of these seven days must qualify under one of the other exigencies listed in § 825.126(a).

Section 825.126(a)(2) of the final rule allows qualifying exigency leave for military events and related activities to attend any official ceremony, program, or event sponsored by the military and to attend family support or assistance programs and informational briefings sponsored or promoted by the military, military service organizations, or the American Red Cross that are related to the active duty or call to active duty status of a covered military member. This provision is self-explanatory. The Department believes that activities sponsored by the military, a military service organization, or the American Red Cross which relate to the active duty or call to active duty status of the military member are precisely the types of activities Congress intended to cover when extending job-protected FMLA leave to the family members of covered military members. Among other things, this provision is intended to cover leave taken for arrival and departure ceremonies, pre-deployment briefings, briefings for the family during the period of deployment, and post-deployment briefings which occur while the covered military member is on active duty or call to active duty status.

The Department received a large number of comments regarding the use of exigency leave to arrange for and provide childcare. Several commenters distinguished between arranging or planning for childcare, where the need is directly caused by the covered military member's call to active duty status, and routine situations, such as a babysitter canceling, or having to arrive late or leave early to drop off or pick up a child, arguing that the former should qualify as an exigency while the latter should not. *See* Equal Employment Advisory Council; National Association of Manufacturers; National Coalition to Protect Family Leave. In contrast, the National Partnership for Women & Families, in joint comments with the National Military Family Association, and Senator Dodd and Representative Woolsey *et al.* urged the Department to permit a broader set of childcare related circumstances to be qualifying exigencies, such as: Finding child care, enrolling in new schools, changing a work schedule to pick up or drop off children, arranging for summer care, attending school functions, attending counseling for the child, and transporting the child to and from medical or tutoring appointments and afterschool activities.

Section 825.126(a)(3) of the final rule allows qualifying exigency leave for a broad array of childcare and school activities in accord with the floor statements by the Members of the U.S. House of Representatives who sponsored this provision. In formulating the list of childcare and school activities that are qualifying exigencies, the Department identified childcare and school activities that require attention because the covered military member is on active duty or call to active duty status, rather than routine events that occur regularly for all parents. Section 825.126(a)(3)(i) allows qualifying exigency leave to arrange for alternative childcare when the active duty or call to active duty status of a covered military member necessitates a change in the existing childcare arrangement. This could include, for example, leave to enroll a child in a summer camp or similar kind of summer day care at the end of the school year if a covered military member is still on active duty or call to active duty status. It would also cover circumstances where the absence of a covered military member because of active duty status disrupts the preexisting childcare arrangement, such as when the covered military member is no longer present to transport a child to and/or from childcare and the employee must take qualifying exigency leave to make new arrangements.

Section 825.126(a)(3)(ii) allows qualifying exigency leave to provide

childcare on an urgent, immediate need basis (but not on a routine, regular, or everyday basis) when the need to provide such care arises directly or indirectly from the active duty or call to active duty status of a covered military member. This provision would permit, for example, an eligible employee to take leave to care for the child of a covered military member on active duty if the child has become sick and needs to be immediately picked up from daycare or school. The employee could provide immediate childcare on a temporary basis, but would be expected to find alternative childcare if the child's illness continues.

Section 825.126(a)(3)(iii) allows an employee to enroll in or transfer a child to a new school or day care facility when enrollment or transfer is necessitated by the active duty or call to active duty status of a covered military member. Such leave may be used, for example, to enroll a child into a new school or day care facility during the school year when the child has moved or relocated due to the active duty or call to active duty status of a covered military member.

Lastly, § 825.126(a)(3)(iv) allows qualifying exigency leave to attend meetings with staff at a school or a daycare facility, such as meetings with school officials regarding disciplinary measures, parent-teacher conferences, or meetings with school counselors, when such meetings are necessary due to circumstances arising from the active duty or call to active duty status of a covered military member. The Department has heard firsthand from military family organizations how children are impacted by the absence of a parent who is on active duty and believes that it is appropriate to permit family members of these covered military members to take FMLA leave in order to attend school meetings when such meetings are necessary due to circumstances arising from the active duty or call to active duty status of a covered military member. The Department does not, however, intend for this leave to be used to meet with staff at a school or daycare facility for routine academic concerns.

The Department received many comments regarding the ability to take leave to make financial and legal arrangements. Several commenters stated that making financial or legal arrangements to address the covered military member's leave should be included. *See* U.S. Postal Service; National Coalition to Protect Family Leave; Association of Corporate Counsel's Employment and Labor Law Committee; Senator Dodd and Representative Woolsey *et al.*. The National Coalition to Protect Family Leave suggested that the final determination ''should be subject to an overriding case-by-case determination by the employer,'' and also suggested that preparation of the following legal documents should be qualifying exigencies: ''last will and testament, living trust, financial and health care powers of attorney, safety deposit box, beneficiary designations on financial accounts and insurance plans/policies, signatory authorizations on bank accounts, [and] change of address on mail delivery so that bills and other important communications are forwarded to the appropriate person.'' TOC Management Services emphasized that there should be a nexus between the financial or legal arrangement and the covered military member's deployment. As an example, it pointed to an employee who needs leave to go to a bank only open during work hours when the employee's deploying spouse's signature is necessary to withdraw money, in which case there is a sufficient nexus, versus an employee who needs leave to shop for a new car that is needed because of the spouse's deployment, in which case there is not a sufficient nexus. Senator Dodd and Representative Woolsey *et al.* suggested that leave should be allowed to prepare a will, refinance a mortgage, or designate a power of attorney, as well as to address legal or financial situations that arise during or after deployment. In addition, the National Partnership for Women & Families, in joint comments with the National Military Family Association, suggested that the Department should include ''[a]cting as servicemember's representative in front of federal or state agencies or the military in order to obtain benefits'' as an example of a qualifying exigency.

As suggested by the floor statements of Representatives Jason Altmire, Tom Udall, and George Miller, the Department agrees that Congress intended employees to be able to take qualifying exigency leave to make certain financial or legal arrangements. Therefore, § 825.126(a)(4)(i) allows qualifying exigency leave to make or update financial or legal arrangements to address the covered military member's absence while on active duty or call to active duty status, such as preparing and executing financial and healthcare powers of attorney, transferring bank account signature authority, enrolling in the Defense Enrollment Eligibility Reporting System (''DEERS''), obtaining military identification cards, or preparing or updating a will or living trust. While this list of examples is not exclusive, it does illustrate that leave under this provision is intended to address issues directly related to the covered military member's absence, and not routine matters such as paying bills. Section 825.126(a)(4)(ii) allows such leave to be taken to act as the covered military member's representative before a federal, state, or local agency for purposes of obtaining, arranging, or appealing military service benefits while the covered military member is on active duty or call to active duty status, and for a period of 90 days following the termination of the covered military member's active duty status.

Many commenters discussed the inclusion of counseling as a qualifying exigency. Fisher & Phillips stated that ''attending counseling related to the service member's active duty is a medical issue, and * * * this form of leave is not designed for medical issues.'' Similarly, the Illinois Credit Union League stated that ''counseling should not constitute an example of an exigency, as it is a recurrent activity and is medically related.'' On the other hand, the National Partnership for Women & Families, in joint comments with the National Military Family Association, offered that attending counseling for children, for oneself, or for the covered military member should be listed as examples of qualifying exigencies. The U.S. Postal Service also listed ''attending counseling related to the covered military member's active duty'' as a non-medical exigency. Senator Dodd and Representative Woolsey *et al.* commented that a ''servicemember deploys to Iraq, leaving behind a wife, children, and parents. This deployment places a significant mental strain on each of these individuals, and these family members should be permitted to use leave to attend mental health counseling, alone or as a group.''

The Department expects that most counseling will fall under the existing FMLA but recognizes that there may be circumstances wherein military families may seek counseling that is non-medical in nature. Section 825.126(a)(5) allows qualifying exigency leave to attend counseling provided by someone other than a healthcare provider for oneself, for the covered military member, or for the biological, adopted, or foster child, a stepchild, or a legal ward of the covered military member, or a child for whom the covered military member stands in loco parentis, who is either under age 18, or age 18 or older and incapable of self-care because of a mental or physical disability at the time

that FMLA leave is to commence, provided that the need for counseling arises from the active duty or call to active duty status of a covered military member. This provision is intended to cover counseling not already covered by the FMLA because the provider is not recognized as a health care provider as defined in §§ 825.125 and 825.800. For example, this could include counseling provided by a military chaplain, pastor, or minister, or counseling offered by the military or a military service organization that is not provided by a health care provider. In any instance where the need for counseling arises from a serious health condition, the employer has a right to require a WH–380 certification. *See* § 825.305.

A few comments expressed concern about allowing qualifying exigency leave for rest and recuperation and similar leave. The Chamber recommended that ''an employer should not be required to provide an employee a 45-day non-emergency leave of absence to vacation with a military service member who is on a Rest and Recuperation (''R&R'') leave overseas.'' *See also* ORC Worldwide; HR Policy Association. The Independent Bakers Association, in contrast, suggested that ''R&R should be included'' as an exigency ''as it does occur during active duty.''

Given the importance of fostering strong relationships among military families, and the limited opportunities available for covered military members to spend time with their families while on active duty, the Department believes it is appropriate for qualifying exigency leave to be used for a limited time while a covered military member is on leave from active duty. Section 825.126(a)(6) of the final rule allows qualifying exigency leave for rest and recuperation to spend time with a covered military member who is on short-term, temporary leave while on active duty in support of a contingency operation. This temporary leave covers rest and recuperation leave taken during the period of deployment. The final rule limits the use of leave under this provision to a period of up to five days of leave for each instance of rest and recuperation.

The Department also received comments regarding coverage of certain post-deployment activity. The National Military Family Association urged the Department to ''make clear that post-deployment goes beyond the service member's return home'' and suggested, for example, that ''the spouse of a National Guard member should be able to use FMLA leave to attend a post-deployment reintegration weekend, sponsored by the unit, 90 days after the unit returned home.'' Senator Dodd and Representative Woolsey *et al.* noted that ''[p]rior to and up to 90 days following the deployment, the military will likely provide a number of deployment briefings or screenings aimed at providing servicemembers and their families with information related to the deployment, as well as mental and physical health screenings[,]'' and that the participation of family members in such briefings ''is critical.'' The Military Family Research Institute at Purdue University expressed concern that ''there is little acknowledgement that the post-deployment period also requires completion of a substantial set of logistical tasks, as well as substantial personal adjustments and extensive training.'' This commenter stated further that:

> Service members in both the active and reserve components are required to attend reintegration briefings and mandatory assessments of physical and mental health following return from deployment, and family members are encouraged to attend many of the reintegration activities, some of which are held away from home and may require overnight stays. In the reserve component, service members are placed on active duty for the purpose of attending these activities * * * it would be appropriate to consider this active duty related to a contingency operation * * *. [I]t would be in the best interest of families for the regulation * * * to acknowledge that post-deployment reintegration training and assessments are important * * * [and] have a great deal to do with the well-being of service members and family members.

The Department recognizes the importance of post-deployment activities for military families. Section 825.126(a)(7) allows leave to attend arrival ceremonies, reintegration briefings and events, and any other official ceremony or program sponsored by the military for a period of 90 days following the termination of the covered military member's active duty status. This provision also allows an employee to take leave to address issues that arise from the death of a covered military member on active duty, such as meeting and recovering the body of the covered military member and making funeral arrangements. The Department is mindful of the statutory language of the NDAA that leave for a qualifying exigency must arise out of the fact that a covered military member ''is'' on active duty or has been notified of an impending call to active duty status in support of a contingency operation. The present tense used in the statutory language places certain limitations on the Department's ability to allow for activities that occur once the covered military member is no longer on active duty. A reasonable reading of the statute, however, allows for a limited number of post-deployment activities, the need for which immediately and foreseeably arise once the servicemember is on active duty or has been notified of an impending call to active duty status in support of a contingency operation. Providing an unlimited post-deployment leave entitlement, however, would strain the statutory limitation and could impose unreasonable burdens on employers years after the period of active duty has ended.

Relying on the comments by the National Military Family Association and Senator Dodd and Representative Woolsey *et al.*, the Department believes a period of 90 days following the covered military member's return from active duty status is a sufficient amount of time to cover relevant post-deployment activities. The Department also notes that as part of the Yellow Ribbon Reintegration Program, which was established by the NDAA, the Department of Defense (''DOD'') will provide reintegration programs for National Guard and Reserve members and their families at approximately 30-, 60-, and 90-day intervals following demobilization, release from active duty, or full-time National Guard Duty. Because the Yellow Ribbon Reintegration Program was also established by the NDAA, it is appropriate that the reintegration programs created under the Yellow Ribbon Reintegration Program be included as events for which employees can take leave under the military family leave provisions. The 90-day time frame in § 825.126(a)(7) is intended to cover any programs considered to be 90-day reintegration programs sponsored by the DOD. Programs that are a part of the DOD's 90-day reintegration event should be considered a qualifying exigency under § 825.126(a)(7) even when such programs may fall a few days outside the period of 90 days following the termination of the covered military member's active duty.

Section 825.127 (Leave To Care for a Covered Servicemember With a Serious Injury or Illness) (i.e., ''Military Caregiver Leave'')

Section 585(a) of the NDAA amends the FMLA to allow an eligible employee who is the spouse, son, daughter, parent, or next of kin of a ''covered servicemember'' to take 26 workweeks of leave during a 12-month period to care for the servicemember. The provisions in the NDAA providing for military caregiver leave became effective

January 28, 2008. In order to provide guidance to employees and employers about this new leave entitlement as soon as possible, the NPRM sought public comment on a number of issues related to the development of regulations to implement the military caregiver leave provisions, and stated that the next step in the rulemaking process would be to issue final regulations. In the interim, the Department has required that employers act in good faith in providing military caregiver leave under the new legislation by using existing FMLA-type procedures as appropriate. In order to address issues unique to the taking of this leave, the final rule creates a new § 825.127, which explains: (1) An employee's entitlement to military caregiver leave; and (2) the specific circumstances under which military caregiver leave may be taken.

Entitlement to Military Caregiver Leave

Under the NDAA, an eligible employee who is the spouse, son, daughter, parent, or next of kin of a covered servicemember shall be entitled to a total of 26 workweeks of leave during a ''single 12-month period'' to care for the servicemember. The NPRM requested comment on a number of issues relating to an eligible employee's entitlement to such leave. For example, the Department sought public comment on the definition of a ''covered servicemember,'' as well as on the scope of injuries or illnesses for which care may be provided under the new leave entitlement. The Department also sought public comment on the required family relationship between the employee seeking to take military caregiver leave and the covered servicemember, including how the Department should define the terms ''next of kin'' and ''son or daughter'' for purposes of such leave.

Section 825.127(a) of the final rule explains that an eligible employee may take FMLA leave to care for a covered servicemember with a ''serious injury or illness'' incurred in the line of duty on active duty for which the servicemember is (1) undergoing medical treatment, recuperation, or therapy; or (2) otherwise in outpatient status; or (3) otherwise on the temporary disability retired list. This section incorporates the NDAA's statutory definition of a ''covered servicemember'' and clarifies that the definition of a ''covered servicemember'' includes current members of the Regular Armed Forces, current members of the National Guard or Reserves, and members of the Regular Armed Forces, the National Guard and the Reserves who are on the temporary disability retired list (''TDRL''). Under the final regulations, *former* members of the Regular Armed Forces, *former* members of the National Guard and Reserves, and members on the permanent disability retired list are not considered covered servicemembers. Section 825.127(b) of the final regulations defines who may take leave to care for a ''covered servicemember.'' This section sets forth definitions for ''son or daughter of a covered servicemember,'' ''parent of a covered servicemember'' and ''next of kin''—all of which are new terms applicable only to the taking of military caregiver leave by an eligible employee.

Who Is a Covered Servicemember

In order for an eligible employee to be entitled to take FMLA leave to care for a servicemember, the NDAA requires that the servicemember be a ''covered servicemember'' who is receiving treatment for a ''serious injury or illness'' that ''may render the member medically unfit to perform the duties of the member's office, grade, rank, or rating.'' A ''covered servicemember'' is defined by statute as a member of the Armed Forces, including a member of the National Guard or Reserves, who is undergoing medical treatment, recuperation, or therapy, is otherwise in ''outpatient status,'' or is otherwise on the temporary disability retired list, for a ''serious injury or illness.'' 29 U.S.C. 2611(16). A ''serious injury or illness'' is defined by the NDAA as an injury or illness incurred by the covered servicemember in line of duty on active duty in the Armed Forces that may render the member medically unfit to perform the duties of the member's office, grade, rank, or rating. 29 U.S.C. 2611(19).

In light of the NDAA's focus on a servicemember's ability to perform his or her military duties when determining whether the servicemember is a ''covered servicemember'' with a ''serious injury or illness,'' the Department sought comments on whether eligible employees were entitled to take FMLA leave to care for a servicemember whose serious injury or illness was incurred in the line of duty, but does not manifest itself until after the servicemember has left military service. The Department asked how, in such circumstances, one would determine whether the injury or illness renders, or may render, the former servicemember medically unfit to perform the duties of the member's office, grade, rank, or rating, when the servicemember is no longer in the military.

The majority of the comments received by the Department on this issue took the position that the clear statutory language of the NDAA amendments does not provide for the taking of military caregiver leave for a servicemember whose injury or illness manifests itself after the servicemember has left military service. For example, the National Association of Manufacturers stated that ''by statutory definition, a 'serious injury or illness' is one 'that may render the member medically unfit to perform the duties of the member's office, grade, rank, or rating'. A person who is discharged from the service is no longer a 'member' of the service and is not included in the definition.'' Jackson Lewis concurred with this view stating that the statutory language ''requires that the condition render the servicemember 'medically unfit to perform the duties of the member's office, grade, rank, or rating.' This language suggests the condition must present while the servicemember is still active in the military.'' Jackson Lewis presented, as a ''practical matter,'' the additional complications that would result in the FMLA medical certification process if such coverage was permitted:

> Given the complications that have arisen in the past 15 years over the certification process for serious health conditions, imagine the difficulty of requiring physicians and employers to determine, potentially years later, whether a condition was triggered in the line of duty and whether its belated presentation renders the service member unfit to perform his or her office, grade, or rank from months or years prior.

Id. The U.S. Postal Service stated that the NDAA provisions ''clearly limit the definition of 'covered servicemember' to those who are current members of the Armed Forces. Accordingly, a servicemember who resigns or retires from the Armed Services is not a covered servicemember.'' This commenter recognized, however, that a ''retired servicemember would nonetheless be covered if he or she were on the Temporary Disability Retired List.''

A minority of commenters took the position that FMLA leave should be available to care for a covered servicemember whose injury or illness manifests itself after the servicemember has left military service. Senator Dodd and Representative Woolsey *et al.* stated: ''Congress certainly did not intend to disqualify injuries that servicemembers incurred in the line of duty, simply because those injuries did not develop or were not diagnosed until after they left the service.'' The National Partnership for Women & Families, in joint comments with the National

Military Family Association, also asserted that ''nothing'' in the NDAA indicates that ''retired or discharged servicemembers'' should be denied coverage.

The Department concludes that the statutory language providing for military caregiver leave does not extend the right to take FMLA leave to providing care to retired military servicemembers (unless such individuals are on the temporary disability retired list) or to discharged military servicemembers. While Congress expressly provided that leave could be taken to care for a servicemember on the temporary disability retired list, Congress did not include language indicating its desire to include other discharged or retired members of the Armed Forces, National Guard, or Reserves as ''covered servicemembers.'' Moreover, the standard provided by Congress for determining if a covered servicemember has a serious injury or illness (*i.e.*, whether the condition ''may render the member medically unfit to perform the duties of the member's office, grade, rank, or rating'') cannot be readily applied to those who are no longer serving in the Regular Armed Forces, National Guard or Reserves. Accordingly, § 825.127(a) of the final rule provides that the term ''covered servicemember'' does not include individuals retired or discharged from service, unless they are placed on the temporary disability retired list.

In addition to requiring that the member of the military for whom care is needed has a serious injury or illness, the NDAA also requires that the member be (1) undergoing medical treatment, recuperation, or therapy; (2) otherwise in outpatient status; or (3) on the temporary disability retired list. *See* 29 U.S.C. 2611(16). In the NPRM, the Department suggested that, since determining whether a member of the military is in ''outpatient status'' or on the temporary disability retired list for a serious illness or injury would likely be relatively straightforward, no further clarification of those portions of the definition of covered servicemember would be needed. As to whether a servicemember was ''undergoing medical treatment, recuperation, or therapy'' for a serious injury or illness, the Department's initial view, as stated in the NPRM, was that all treatment, recuperation, or therapy provided to a servicemember for a serious injury or illness, and not just that provided by the military, should be covered. However, the Department sought public comments on this issue. Additionally, the Department asked whether there should be a temporal proximity requirement between the covered servicemember's injury or illness and the treatment, recuperation, or therapy for which care is required. The Department also asked if it should rely on a determination made by the Department of Defense (''DOD'') as to whether a servicemember is undergoing medical treatment, recuperation, or therapy for a serious injury or illness.

Comments from employers and employer groups regarding the coverage of servicemembers who receive treatment, recuperation or therapy from a non-military source were mixed. The U.S. Postal Service believed that allowing coverage for an illness or injury treated solely by a private health care provider, wholly outside the system of care provided by the military, is ''inconsistent'' with the definitions provided in the NDAA and is also ''contrary to the express language of the [NDAA] and to its legislative history.'' On the other hand, the Equal Employment Advisory Council stated that certification provided by the DOD should be sufficient to certify a ''serious injury or illness'' so long as the military branches are ''capable'' of providing the certification regardless of whether the treatment, recuperation, or therapy is being supplied by an Armed Forces or a ''civilian provider.''

The National Partnership for Women & Families, in joint comments with the National Military Family Association, believed any treatment, recuperation, or therapy, and not just that provided by the military, should qualify. They argued that: (1) The statute makes no distinction between servicemembers treated by the military and those who are not; (2) servicemembers are, in fact, treated by both the military and private facilities; and (3) wounded servicemembers may not be located near a military treatment facility (which will make it more difficult for the servicemembers and their family members). The Military Family Research Institute at Purdue University also argued that care provided by non-military sources should be covered, noting that ''[m]embers of the reserve component are expected to receive some or all of their care from providers in civilian communities.''

Both the DOD and the Department of Veterans Affairs (''VA'') have informed the Department that individuals who would be deemed ''covered servicemembers'' under the NDAA do not receive care solely from DOD health care providers, and that such ''covered servicemembers'' also may receive care from either VA health care providers or DOD TRICARE military health system authorized private health care providers.[4] It is the Department's understanding based on discussions with the DOD and the VA that members of the National Guard and Reserves and servicemembers on the temporary disability retired list are more likely to receive care from DOD TRICARE authorized private health care providers than from DOD or VA health care providers, especially if the servicemember resides in a rural or remote area.

After due consideration of the comments, and taking into account the information provided by the DOD and VA regarding the current provision of medical care to servicemembers intended to be covered by the NDAA, the Department believes that military caregiver leave should not be limited to caring for only those servicemembers who receive medical treatment, recuperation or therapy from a DOD health care provider. Accordingly, § 825.127 of the final rule does not require that a servicemember be receiving medical treatment, recuperation, or therapy from a DOD health care provider in order to be a ''covered servicemember.'' As discussed more fully under § 825.310 addressing certification for military caregiver leave, the final rule provides that a request to take military caregiver leave may be supported by a certification that is completed by any one of the following health care providers: (1) A DOD health care provider; (2) a VA health care provider; (3) a DOD TRICARE network authorized private health care provider; or (4) a DOD non-network TRICARE authorized private health care provider. As part of a sufficient certification, these health care providers may be asked to certify that the servicemember is undergoing medical treatment,

[4] TRICARE is the health care program serving active duty service members, National Guard and Reserve members, retirees, their families, survivors and certain former spouses worldwide. As a major component of the Military Health System, TRICARE brings together the health care resources of the uniformed services and supplements them with networks of civilian health care professionals, institutions, pharmacies and suppliers to provide access to high-quality health care services while maintaining the capability to support military operations. To be eligible for TRICARE benefits, one must be registered in the Defense Enrollment Eligibility Reporting System (DEERS). *See http://tricare.mil/mybenefit/home/overview/WhatIsTRICARE.* The Military Health System is a partnership of medical educators, medical researchers, and healthcare providers and their support personnel worldwide. This DOD enterprise consists of the Office of the Assistant Secretary of Defense for Health Affairs; the medical departments of the Army, Navy, Marine Corps, Air Force, Coast Guard, and Joint Chiefs of Staff; the Combatant Command surgeons; and TRICARE providers (including private sector healthcare providers, hospitals, and pharmacies). *See http://mhs.osd.mil/aboutMHS.aspx.*

recuperation, or therapy for a serious injury or illness.

With respect to whether there should be a temporal proximity requirement between the covered servicemember's injury or illness and the treatment, recuperation, or therapy for which care is required, most employers and employer groups argued that such a requirement should be imposed. The Equal Employment Advisory Council, the Illinois Credit Union League, the International Public Management Association for Human Resources (in joint comments with the International Municipal Lawyers Association), and the Pennsylvania Governor's Office of Administration all believed that there should be a ''one year'' temporal proximity requirement. The International Public Management Association for Human Resources, in joint comments with the International Municipal Lawyers Association, wrote that providing a time-frame will ''bring needed certainty to the law,'' and that, ''[f]or long-term recoveries, employees remain entitled to the 12 weeks of leave provided under the FMLA.'' AT&T argued that the DOD or the VA ''should also determine if there should be a temporal proximity requirement between the servicemember's injury or illness and the treatment, recuperation or therapy.''

On the other hand, the College and University Professional Association for Human Resources wrote that ''[n]othing in the statutory language appears to support a temporal limitation between injury and treatment, but the NDAA does require the servicemember be 'a member of the Armed Forces'. This seems to suggest that the individual must have some continued connection to the military.'' The Association of Corporate Counsel's Employment and Labor Law Committee also did not advocate a temporal proximity requirement because it viewed such a time limitation as ''artificial'' and argued it could deny leave to family of servicemembers who are undergoing care for an injury caused in the line of duty. This commenter argued, however, that ''because it is important to establish a causal connection between the care provided and the military service, we do believe that the Department should limit the definition to include only care provided by the Armed Forces, including Veterans hospitals and those to whom the Armed Forces has delegated the task of providing health care.'' This commenter viewed the latter type of limitation ''to be much more fair to employees than a temporal proximity requirement as it is more closely aligned with the goals of the statute—to provide leave to family members when their loved one is seeking treatment for an injury sustained in the line of duty.''

Employee groups also generally argued against the imposition of any temporal proximity requirement. The National Partnership for Women & Families, in joint comments with the National Military Family Association, stated that ''[a]s long as a health care provider certifies that the servicemember's injury or illness led to the treatment, recuperation or therapy, the leave should qualify under the injured servicemember FMLA provisions.'' Finally, Senator Dodd and Representative Woolsey *et al.,* also stated that the Department should not impose a temporal proximity requirement because ''the relevant question is whether the servicemember, at the time of diagnosis or treatment, might not be able to perform the duties that he or she had when he or she was on active duty, in light of the diagnosed injury or illness.''

Given that the entitlement to military caregiver leave is limited to providing care to current members of the Regular Armed Forces, the National Guard, and Reserves or those on the temporary disability retired list, the Department does not believe that a temporal proximity requirement is necessary. As long as the servicemember's injury or illness is a serious one which may render the member medically unfit and was incurred in the line of duty on active duty, and the servicemember is a current member of the Armed Forces, the National Guard, or Reserves undergoing medical treatment, recuperation or therapy, in outpatient status, or on the temporary disability retired list because of the injury or illness, an eligible family member may take FMLA leave to provide care to the servicemember. In most cases, the Department believes that the need to care for the servicemember and the date of the onset of injury or illness will be close in time. While the Department recognizes that the NDAA includes servicemembers who are on the temporary disability retired list, the Department notes that an individual may remain on the temporary disability retired list no longer than five years before he or she is either returned to active duty service or assigned permanent disability (in which case the individual would no longer be a ''covered servicemember'' under the NDAA). *See http://www.tricare.mil/mhsophsc/mhs_supportcenter/glossary/Tg.htm.* Moreover, because the NDAA provides that an eligible employee may only take FMLA leave during a ''single 12-month period'' to care for a covered servicemember with a particular serious injury or illness, the Department does not believe that further limiting the time period between the date of the injury or illness and the need to provide care is necessary.

The Department also received comments that addressed whether the military caregiver leave provisions only extend to family members providing care to members of the National Guard and Reserves, or whether eligible employees also may take such leave to care for members of the Regular Armed Forces with a serious injury or illness. Commenters, including Spencer Fane Britt & Browne, the National Coalition to Protect Family Leave, and the Society for Human Resource Management, noted that the NDAA provision defining the term ''serious injury or illness'' provides that ''[t]he term 'serious injury or illness', in the case of a member of the Armed Forces, including a member of the National Guard or Reserves, means an injury or illness incurred by the member in line of duty on *active duty* in the Armed Forces * * *'' 29 U.S.C. 2611(19) (emphasis added). These commenters asked the Department to reconcile the language of this provision which specifically includes both Regular Armed Forces and members of the National Guard and Reserves with the requirement that the injury or illness be incurred while on ''active duty''—a term which is also defined by the NDAA and, as discussed above with respect to qualifying exigency leave, is limited to members of the National Guard and Reserves.

While these commenters noted that the NDAA definition of ''active duty'' is limited to National Guard and Reserve members, the commenters argued that, in the context of military caregiver leave, ''Congress obviously did not intend to limit [such] leave to only those in the National Guard or Reserve.'' The law firm of Willcox & Savage contended that Congress' inclusion of the term ''active duty'' in the definition of ''serious injury or illness'' creates an ''internal and irreconcilable inconsistency'' because limiting the definition of ''active duty'' to the National Guard and Reserves is not ''consistent'' with the language ''including a member of the National Guard and Reserves'' in the definition of serious injury or illness. Like Spencer Fane Britt & Browne and the National Coalition to Protect Family Leave, Willcox & Savage believed that the Department should ''clarify'' this ''internal irreconcilable inconsistency'' in its final regulations.

The Department agrees that applying the NDAA's definition of ''active duty''

to the provisions regarding military caregiver leave renders other language in those provisions superfluous. Specifically, applying the narrow definition of ''active duty'' found in section 585(a)(1) of the NDAA (29 U.S.C. 2611(14)) would undermine the specific statutory language in the military caregiver leave provisions defining a covered servicemember as ''a member of the Armed Forces, including a member of the National Guard and Reserves'' (29 U.S.C. 2611(16)) and defining a ''serious injury or illness'' in the case of a ''a member of the Armed Forces, including a member of the National Guard and Reserves'' (29 U.S.C. 2611(19)). As the law firm of Willcox & Savage wrote, the inclusion of the specific language ''including a member of the National Guard and Reserves'' in the NDAA's definition of ''serious injury or illness'' suggests that Congress intended broader coverage for military caregiver leave than for qualifying exigency leave. Unlike qualifying exigency leave, where the need for FMLA leave to address pre-deployment, during deployment, and post-deployment situations may be unique to National Guard and Reserve families who are typically not accustomed to having their family member deployed, the need for FMLA leave to care for a seriously injured or ill servicemember is the same whether the servicemember is a member of the Regular Armed Forces or the National Guard or Reserves. Accordingly, the Department has concluded that the better reading of the NDAA provisions providing for military caregiver leave extends such leave to family members providing care to members of the Regular Armed Forces, as well as members of the National Guard and Reserves, with a serious injury or illness. Section 825.127(a) reflects this conclusion.

Several commenters, including Spencer Fane Britt & Browne and the National Coalition to Protect Family Leave, also argued that the inclusion of the term ''active duty'' in the definition of ''serious injury or illness'' indicates that the injury or illness must be incurred while the servicemember is serving under a call to active duty under one of the statutory provisions cited in 10 U.S.C. 101(a)(13)(B), and that this language meant that injuries or illnesses incurred by National Guard or Reserve members who have not actually been called to active duty by the federal government should not be considered a ''serious injury or illness'' for the purpose of taking FMLA leave. The Society for Human Resource Management also asserted its belief that ''caregiver leave apparently was not intended to cover illnesses/injuries incurred by National Guard or Reserve members who have not actually been called to active duty by the federal government, *e.g.*, where a State has a state-related emergency and the National Guard is called to duty by the Governor of the State.''

For the reasons discussed immediately above, the Department has decided not to apply the NDAA definition of ''active duty'' to the provisions regarding military caregiver leave because to do so renders other language in those provisions superfluous. Additionally, the Department believes it is important to remember that the NDAA military caregiver leave provision amending the FMLA was based upon the recommendation of the July 2007 Report of the President's Commission on Care for America's Returning Wounded Warriors, ''Serve, Support, Simplify: Report of the President's Commission on Care for America's Returning Wounded Warriors'' (2007) (commonly referred to as either the Wounded Warriors Report or the Dole-Shalala Report). This report addressed the need for care of wounded warriors serving in the National Guard or Reserves as well as those serving in the Regular Armed Forces. Finally, consultations with the DOD have indicated that the NDAA statutory definition of ''active duty'' applicable to qualifying exigency leave is not one commonly used by the military when determining whether a servicemember has incurred an injury or illness in the line of duty. In light of this information, and after due consideration of the comments regarding the definition of ''active duty'' in the context of military caregiver leave, the Department believes that the DOD, or its authorized health care representative, is in the best position to determine whether an injury was ''incurred in line of duty on active duty in the Armed Forces'' since those terms are terms of art used by the military in other contexts. Accordingly, as discussed in greater detail below with respect to the certification requirements for taking military caregiver leave, the Department has provided that an employer may request that an employee seeking to take military caregiver leave obtain appropriate certification that a servicemember's serious injury or illness was incurred in line of duty on active duty. This approach allows an employer to verify that a particular injury qualifies for FMLA leave under the military caregiver leave provisions while providing appropriate deference to the military's existing processes for determining whether an injury was incurred in line of duty on active duty in the Armed Forces.

Who Is Entitled To Take Military Caregiver Leave

With respect to who may take military caregiver leave, the NDAA provides that such leave is available to an eligible employee who is the ''spouse, son, daughter, parent, or next of kin of a covered servicemember.'' The Department sought comments on two specific issues related to who is entitled to take military caregiver leave. First, the Department asked whether the existing FMLA definition of ''son or daughter'' should be applied to military caregiver leave. Second, the Department asked a series of questions regarding how it should interpret ''next of kin'' as that term does not apply to other types of FMLA leave.

Under the existing FMLA definition of son or daughter, a son or daughter must either be (1) under 18 years of age or; (2) 18 years of age or older and incapable of self-care because of a mental or physical disability. 29 U.S.C. 2611(12). Applying this definition to the military caregiver leave entitlement would mean that most, if not all, adult children would not be entitled to take military caregiver leave to care for a parent who is a covered servicemember. This is so even though the same adult child could care for their parent (covered servicemember) if the parent's serious injury or illness also qualified as a serious health condition under the FMLA. Recognizing that applying the current definition of ''son or daughter'' for purposes of military caregiver leave would severely undermine the clear intent of the NDAA military caregiver provisions, the Department sought comment on whether it would be appropriate to define the term ''son or daughter'' differently for purposes of FMLA leave taken to care for a covered servicemember.

The majority of commenters—whether employer- or employee-focused—believed it would be appropriate for the Department to apply a different definition of ''son or daughter'' for leave taken to care for a covered servicemember. For example, the National Partnership for Women & Families, in joint comments with the National Military Family Association, the National Coalition to Protect Family Leave, the National Retail Federation, the Pennsylvania Governor's Office of Administration, and the Legal Aid Society-Employment Law Center, all agree that the term ''son or daughter''

should be defined to include adult children for purposes of military family leave.

The comments submitted by Senator Dodd and Representative Woolsey *et al.* stressed that it is appropriate and ''in fact crucial'' that the Department define ''son or daughter'' differently for military caregiver leave:

> As DOL itself commented, it is absurd to extend leave only to those sons or daughters of injured servicemembers who are under the age of 18 or ''incapable of self-care.'' Moreover, Congress demonstrated its intent for the terms ''son'', ''daughter'', and ''parent'' to have unique meanings under the military family provisions of the FMLA, because it designated the ''employee'' as the ''son, daughter, [or] parent'' of ''a covered service member'', whereas the originally enacted FMLA provisions *inversely* designate the ''employee'' as a person who takes leave to ''care for [his or her] * * * son or daughter, or parent''.

The National Association of Manufacturers also commented that applying the FMLA definition of ''son or daughter'' to the military family leave provisions would not fulfill the intent of the law. Additionally, TOC Management Services wrote that limiting the leave for children less than 18 years of age would ''essentially defeat the spirit of the law.'' While agreeing that a different definition of son or daughter should be applied to the military caregiver leave provisions, the National Coalition to Protect Family Leave recommended ''[t]he definition of 'son or daughter' should be retained 'as is' for all other forms of FMLA leave, including FMLA leave due to the serious health condition of a son or daughter.''

The Department agrees with these commenters. Applying the existing FMLA definition of ''son or daughter'' to the military caregiver leave provision would significantly undermine the NDAA's extension of FMLA leave to the son or daughter of a covered servicemember. Under nearly all circumstances, doing so would mean that an adult son or daughter would not be able to take leave to care for a covered servicemember parent. The Department does not believe such a result was intended. Accordingly, § 825.127(b)(1) of the final rule establishes a separate definition of ''son or daughter of a covered servicemember'' for the purpose of military caregiver leave. Section 825.127(b)(1) defines a ''son or daughter of a covered servicemember'' as ''the covered servicemember's biological, adopted, or foster child, stepchild, legal ward, or a child for whom the covered servicemember stood in loco parentis, and who is of any age.'' *See also* §§ 825.122 and 825.800. The Department also notes that this definition is not intended to apply to leave taken for other FMLA-qualifying reasons.

The law firm of Spencer Fane Britt & Browne requested that the Department also clarify the definition of ''parent'' for purposes of military caregiver leave. The firm argued that a parent should only be entitled to take military caregiver leave to care for a covered servicemember son or daughter when the son or daughter is under the age of 18, or 18 years or older and incapable of self-care because of a mental or physical disability, because those restrictions currently apply to leave taken by a parent to care for a child with a serious health condition. To allow otherwise would be ''inherently unfair to employees with adult children who are not serving in the military,'' according to this commenter. The Department does not agree with Spencer Fane Britt & Browne's proposal to define ''parent'' in such a manner for purposes of military caregiver leave. However, this commenter's proposal did raise an issue that the Department believes must be addressed in the final regulations. Under the existing FMLA definition of parent, a parent means a biological, adoptive, step or foster father or mother, or any other individual who stood in loco parentis to the employee when the employee was a son or daughter. 29 U.S.C. 2611(7). However, in the context of military caregiver leave, the parent who seeks to take leave is the parent of the covered servicemember, not the parent of the employee. Accordingly, § 825.127(b)(2) establishes a separate definition of ''parent of a covered servicemember'' for the purpose of military caregiver leave. Section 825.127(b)(2) defines ''parent of a covered servicemember'' as the ''covered servicemember's biological, adoptive, step or foster father or mother, or any other individual who stood in loco parentis to the servicemember.'' See also §§ 825.122 and 825.800. This term does not include parents ''in law.''

The NDAA also provides that a covered servicemember's ''next of kin'' is eligible to take FMLA leave to care for the servicemember and defines the term ''next of kin'' as the ''nearest blood relative'' of a covered servicemember. 29 U.S.C. 2611(18). In the NPRM, the Department sought comments on a number of issues relating to who should qualify as an eligible next of kin, including (1) whether the Department should adopt for FMLA purposes a list of individuals the DOD generally considers to be the ''next of kin'' of a servicemember; (2) whether a servicemember's next of kin should be limited to a single individual or include relatives of close consanguinity; (3) whether a covered servicemember could designate his or her next of kin for FMLA purposes, including whether the Department should deem the servicemember's Committed and Designated Representative (''CADRE'') as the next of kin for FMLA purposes; and (4) whether an employer should be able to confirm an employee's status as the next of kin.

Comments from employees and groups representing employees generally argued in favor of creating a definition of next of kin that was as comprehensive as possible. For example, the National Partnership for Women & Families, in joint comments with the National Military Family Association, proposed using a combination of the DOD list provided in the NPRM, state law definitions, and the Department of Veterans Affairs definition of domestic partners and partners, and also permitting more than one individual to take leave as a servicemember's next of kin. *See also* Legal Aid Society-Employment Law Center. Similarly, comments from Senator Dodd and Representative Woolsey *et al.* asked the Department to define the term next of kin in an ''expansive and flexible'' manner.

Comments from employers largely urged the Department to adopt a rule that would ''simplify'' the administration of military caregiver leave and provide ''clarity.'' U.S. Postal Service; *see also* University of Texas System; WorldatWork. Many employers and employer representatives, however, either expressed concern about the appropriateness of relying on the DOD list for this purpose or argued that the DOD list should only be adopted to the extent that it complied with the statutory requirement that a servicemember's next of kin be a blood relative. *See, e.g.*, National Coalition to Protect Family Leave; Association of Corporate Counsel's Employment and Labor Law Committee; Hewitt Associates; Equal Employment Advisory Council; *but see* Independent Bakers Association and Public Management Association for Human Resources in joint comments with the International Municipal Lawyers Association (supporting use of DOD list). Employers and employer groups also urged the Department to avoid relying on state law interpretations to define a servicemember's next of kin because such an approach would be overly burdensome to employers with multi-state operations and might be perceived as unfair since an individual's eligibility

for FMLA leave would vary state by state. *See, e.g.*, National School Boards Association; Fisher & Phillips; Association of Corporate Counsel's Employment and Labor Law Committee; TOC Management Services; HR Policy Association; Spencer Fane Britt & Browne.

Many commenters representing employers asked the Department to specify that only one individual is eligible to take military caregiver leave as a servicemember's next of kin, with several noting the potential burden of allowing multiple individuals to take 26 weeks of leave. *See, e.g.*, Association of Corporate Counsel's Employment and Labor Law Committee; National Association of Manufacturers; Burr & Forman. On the other hand, the National Coalition to Protect Family Leave and the Society for Human Resource Management urged the Department to avoid a ''literal interpretation of 'nearest blood relative' '' and to adopt a ''more practical interpretation'' such as by defining next of kin as the ''nearest blood relative willing and able to care for the injured service member.'' The law firm of Spencer Fane Britt & Browne supported allowing multiple individuals to serve as next of kin provided that all such individuals were the same level of relationship to the servicemember.

A majority of commenters were in favor of permitting a servicemember to designate his or her next of kin in some circumstances. Senator Dodd and Representative Woolsey *et al.* stated that ''most of all, the intent of Congress was for the servicemember, and not the government'' to choose the family member who is in the ''best position'' to serve as his or her next of kin. These Members stressed that ''whatever approach'' the Department chooses, a servicemember ''should not be compelled'' to rely on a next of kin who lives far away, is estranged from the servicemember, or is not equipped to tend for the servicemember. *See also* National School Boards Association (permit servicemember to designate any one person as next of kin); Spencer Fane Britt & Browne (make list of next of kin subject to any CADRE designation). The National Partnership for Women & Families, in joint comments with the National Military Family Association, supported recognizing a servicemember's designation of his or her next of kin, although they argued that any such designation should ''not mean that other family members cannot take leave.'' The National Coalition to Protect Family Leave, the Society for Human Resource Management, and the Chamber were in favor of relying on a servicemember's CADRE designation as long as the NDAA's ''statutory restrictions with respect to blood relatives'' were retained. Southwest Airlines suggested that designation be allowed as an ''alternative'' and ''only'' in the event that the covered servicemember does not have a nearest blood relative who falls within a specified next of kin list.

Several commenters, including the Equal Employment Advisory Council, the National Partnership for Women & Families in joint comments with the National Military Family Association, and the U.S. Postal Service, stated that employers should be able to seek confirmation of next of kin status in accordance with the existing FMLA procedures for documenting other types of familial relationships. Other commenters requested that the Department establish unique procedures for confirming an employee's next of kin status. *See, e.g.*, Society for Human Resource Management and Spencer Fane Britt & Browne (both suggesting verification by DOD in most cases).

Section 825.127(b)(3) of the final rule defines a servicemember's ''next of kin'' as the servicemember's nearest blood relative, other than the covered servicemember's spouse, parent, son, or daughter, in the following order of priority: blood relatives who have been granted legal custody of the servicemember by court decree or statutory provisions, brothers and sisters, grandparents, aunts and uncles, and first cousins, unless the covered servicemember has specifically designated in writing another blood relative as his or her nearest blood relative for purposes of military caregiver leave under FMLA, in which case the designated individual shall be deemed to be the covered servicemember's next of kin. The final rule permits an employer to confirm an employee's status as a covered servicemember's next of kin through the procedures for confirming familial relationships set forth in § 825.122(j).

The Department believes that the final rule provides the flexibility intended by Congress when providing that a servicemember's next of kin may take military caregiver leave while also giving meaning to the statutory requirement that the next of kin be the servicemember's ''nearest blood relative.'' In the first instance, this approach provides employees and employers with a clear rule to apply by defining a list of familial relationships, in order of priority, which will qualify an individual as a servicemember's nearest blood relative. As suggested by a number of commenters, this list incorporates those portions of the DOD list of next of kin that reflect blood relationships and does not rely on the interpretation of state law. The list also adds a servicemember's aunts, uncles and first cousins as eligible next of kin based on the suggestions of commenters. The Department has decided against relying on state law interpretations of next of kin because it believes both employers and employees will be best served by a consistent definition that does not vary by the location of the employer, the employee or the covered servicemember.

The final rule also makes clear that the next of kin of a covered servicemember is a relative other than the spouse, parent, son, or daughter of the covered servicemember, as those individuals are separately covered by the express terms of the statute. A number of commenters suggested that a person who is not the servicemember's spouse, son, daughter, or parent should only be considered ''next of kin'' if ''none'' of the foregoing family members are available to provide care. AT&T; *see also* Spencer Fane Britt & Browne. Because an employee is not required to certify that he or she is the ''only'' individual available to provide care for a family member when taking FMLA leave for other qualifying reasons, the Department declines to impose such a requirement when an employee requests leave as a servicemember's next of kin.

The final rule also provides that all family members sharing the closest level of familial relationship to the servicemember shall be considered the servicemember's next of kin, unless the servicemember has specifically designated an individual as his or her next of kin for military caregiver leave purposes. In the absence of a designation, where a servicemember has three siblings, all three siblings will be considered the servicemember's next of kin. The Department notes that in such a case all siblings are equally close to the covered servicemember in terms of consanguinity and the Department believes that it would be inappropriate to force the injured servicemember to choose a caregiver from among his or her siblings. The Department believes this approach is preferable to specifically incorporating a ''willing and able component'' into the definition of ''next of kin'' because the Department believes it would be difficult for an employee to prove—and for an employer to verify—that, in fact, the employee is the only next of kin ''willing and able'' to provide care to the covered servicemember. The Department does not anticipate that

permitting multiple individuals to serve as ''next of kin'' will prove overly burdensome for employers since it is unlikely that all such individuals will work for the same employer or request leave at the same time.

The final rule also recognizes that, in some circumstances, a servicemember may consider, and so designate, another blood relative to be his or her ''nearest blood relative'' based on the closeness of their personal relationship. As suggested by many of the comments, the Department believes that such individuals should be considered the servicemember's next of kin for military caregiver leave purposes. Because the statute defines a servicemember's next of kin as the ''nearest blood relative'' without specifying whether nearness should be determined by blood or other relationship, the Department believes that the term ''next of kin'' may appropriately include any one blood relative designated by the servicemember as the next of kin based on closeness of relationship. Allowing a servicemember to designate his or her next of kin for military caregiver leave purposes, but limiting the availability of such a designation to one individual strikes an appropriate balance between those comments that suggested that only one individual should be eligible to take FMLA leave as next of kin and those that urged the Department to recognize the servicemember's choice of caregiver.

The final rule provides that an employer who wants proof of an individual's status as a covered servicemember's ''next of kin''—either to confirm that the employee and servicemember share one of the familial relationships specified in § 825.127(b)(3) or to confirm that the employee has been specifically designated as the servicemember's next of kin—may seek reasonable documentation of the familial relationship from the employee under § 825.122(j). Where an employee is seeking to take leave as a servicemember's designated next of kin, such documentation may take the form of a simple statement from the servicemember indicating that the employee has been designated as the servicemember's next of kin for purposes of military caregiver leave. In those cases where the servicemember has not specifically designated a next of kin for military caregiver leave purposes, a simple statement from the employee or other documentation outlining the employee's familial relationship to the servicemember will suffice.

The Department has taken this approach because it believes that it is beneficial to both employees and employers to adopt, wherever possible, similar procedures for administering military caregiver leave and leave taken for other FMLA qualifying reasons. Furthermore, the Department believes that the procedures for confirming family relationships should be no more burdensome when an employee seeks to take FMLA leave to care for a covered servicemember than when an employee seeks to take FMLA leave for some other qualifying reason. Adopting the same approach for confirming familial relationships for all types of FMLA leave also adequately addresses employers' concerns about potential misuse of FMLA leave by employees. Under § 825.216(d) of the final rule, an employee who fraudulently obtains FMLA leave from an employer is not protected by the FMLA's job restoration or maintenance of health benefits provisions. This provision is unchanged from the current regulations and serves as a check on an employee's ability to seek FMLA leave based on a fraudulent assertion of familial relationship.

Circumstances Under Which Military Caregiver Leave May Be Taken

The NDAA provides eligible employees with a total of 26 workweeks of leave during a ''single 12-month period'' to care for a covered servicemember. 29 U.S.C. 2612(a)(3). In the NPRM, the Department sought comment on how this new leave entitlement should be administered, including whether such leave was a one-time entitlement and whether eligible employees may take more than one period of military caregiver leave to care for multiple covered servicemembers with a serious injury or illness, or the same covered servicemember with multiple serious injuries or illnesses. The Department also sought comment on how the ''single 12-month period'' should be determined. Finally, the Department sought comment on how military caregiver leave should be designated, particularly when such leave also might qualify as leave to care for a family member with a serious health condition.

Section 825.127(c) of the final rule explains that an eligible employee may take no more than 26 workweeks of military caregiver leave in any ''single 12-month period.'' This section also provides that the 26-workweek entitlement is to be applied as a per-servicemember, per-injury entitlement, meaning that an eligible employee may take 26 workweeks of leave to care for one covered servicemember in a ''single 12-month period'' and then take another 26 workweeks of leave in a different ''single 12-month period'' to care for another covered servicemember or to care for the same covered servicemember with a subsequent serious injury or illness. The final rule provides that the ''single 12-month period'' begins on the first day the eligible employee takes military caregiver leave and ends 12 months after that date, and explains how to calculate an employee's FMLA leave entitlement during this ''single 12-month period'' when an employee requests military caregiver leave and leave for another FMLA-qualifying reason. Section 825.127(c)(4) provides that an employer should designate leave that qualifies as both military caregiver leave and leave taken to care for a family member with a serious health condition as leave to care for a covered servicemember in the first instance.

Most of the comments received agreed that the 26-workweek entitlement for military caregiver leave is different than the 12-workweek entitlement for other FMLA-qualifying reasons in that the 26 weeks is not a yearly entitlement that ''renews'' each year. *See, e.g.*, The Southern Company; Catholic Charities, Diocese of Metuchen; Equal Employment Advisory Council; and Colorado Department of Personnel & Administration. A majority of the comments relied on the clause in section 585(a)(2)(B)(3) of the NDAA that military caregiver leave ''shall only be available during a single 12-month period'' (29 U.S.C. 2612(a)(3)) as evidence that Congress intended the 26 weeks to be a one-time entitlement. *See, e.g.*, Society for Human Resource Management; Association of Corporate Counsel's Employment and Labor Law Committee; U.S. Postal Service; Berens & Tate. Commenters varied, however, on whether this ''one-time entitlement'' would nonetheless allow an eligible employee to take multiple periods of 26 workweeks of leave in order to care for different covered servicemembers or to care for a single servicemember who suffers multiple serious injuries or illnesses.

In its comments, the Society for Human Resource Management contended that the military caregiver leave must be a ''one-time opportunity'' because the sentence restricting leave to ''a single 12-month period'' would not have been necessary otherwise. Additionally, this commenter pointed to the immediately preceding sentence in the statute that states the 26 weeks of leave may be taken ''during a 12-month period'' and wrote: ''This is different from regular FMLA leave which may be taken 'during *any* 12-month period'. The use of the word 'a' as opposed to 'any'

strongly suggests that Congress intended to differentiate caregiver leave from all other types of FMLA leave regarding its availability.'' (Emphasis in original.) The Association of Corporate Counsel's Employment and Labor Law Committee also argued that Congress intended the military caregiver leave provisions of the NDAA to be a ''one-time entitlement'' and stated that ''if this was not the intent, Congress would not have included the phrase 'single twelve-month period' in this section.'' The law firm of Berens & Tate argued that permitting eligible employees to take leave in separate 12-month periods for separate covered servicemembers would have a ''devastating'' impact on employers and would create an ''enormous problem'' for employers trying to staff their workforce, especially during times of war.

On the other hand, comments submitted on behalf of Senator Dodd and Representative Woolsey *et al.* stated that the extension of FMLA leave for ''those caring for injured servicemembers has often been referred to as a 'one-time entitlement', but leave would be available *once per servicemember, per injury*.'' (Emphasis in original.) The National Partnership for Women & Families, in joint comments with the National Military Family Association, and a few employers, also argued that the Department should permit eligible employees to take more than one period of military caregiver leave if such leave was needed to care for more than one covered servicemember with a serious injury or illness, or to care for the same covered servicemember who sustains a second serious injury or illness. One such commenter, AT&T, provided the following example:

> For example, if the service member is injured and requires care while he/she recuperates, the family member would be entitled to 26 weeks within a 12-month period. However, after recovery if the service member is re-deployed and suffers another injury, assuming it occurs after the previous 12-month period had expired, the family member could possibly be entitled to an additional 26 weeks at that time.

The Department agrees that the military caregiver leave provisions, while a one-time entitlement, should be applied on a per-covered-servicemember, per-injury basis. As to the per-servicemember component, the Department agrees with the law firm of Willcox & Savage that to apply the statute otherwise would ''negate its central purpose.'' The Department believes that the entitlement should also extend per-injury based on the ''reality,'' as noted in the joint comments from the National Partnership for Women & Families and the National Military Family Association, that servicemembers are injured and treated and then re-injured again on active duty. This per injury entitlement is limited to *subsequent* serious injuries and illnesses. This means, for example, if a covered servicemember incurs a serious injury or illness during his or her first deployment and then incurs another serious injury or illness during a second deployment, an eligible employee would be entitled to two separate 26-workweek entitlements during separate ''single 12-month periods'' to care for the covered servicemember. Alternatively, if the covered servicemember incurs a serious injury or illness and subsequently manifests a second serious injury or illness at a later time, an eligible employee would be entitled to an additional 26-workweek entitlement to care for the covered servicemember in a separate ''single 12-month period.'' In each of these examples, in order for the eligible employee to receive an additional 26-workweek entitlement for a covered servicemember's subsequent injury, the covered servicemember must still be a member of the Armed Forces, or the National Guard or Reserves, including those on the temporary disability retired list. However, the per-injury entitlement does not mean that an eligible employee receives multiple 26-workweek entitlements for multiple injuries incurred and simultaneously manifested by a covered servicemember in a single incident. For example, if a covered servicemember incurs a serious leg injury and a serious arm injury in an accident, an eligible employee would not be entitled to separate 26-workweek entitlements for each serious injury. Additionally, if a covered servicemember experiences a later aggravation or complication of his or her earlier serious injury or illness for which an eligible employee took 26 workweeks of leave, the employee would not be entitled to an additional 26 workweeks of leave for the aggravation or complication of the initial serious injury or illness. Finally, if an eligible employee is caring for a covered servicemember whose serious injury or illness extends beyond the employee's 26-workweek leave entitlement, the employee is not eligible for an additional 26-workweek entitlement to continue to care for the covered servicemember. The Department notes, however, that in this situation the covered servicemember's other eligible family members could take such leave. Additionally, even after an employee has exhausted his or her military caregiver leave entitlement, the employee may be entitled to use his or her normal 12-week FMLA leave entitlement to provide care to the servicemember due to the same injury or illness. The Department believes, given the reason the military caregiver provision was enacted we must capture those instances, hopefully rare, when such circumstances arise to ensure leave to care for these servicemembers is available despite the burden the per-covered-servicemember, per-injury interpretation may place on some employers. The Department notes further that the statute and thereby the final rule provide that an eligible employee is limited to no more than 26 weeks of FMLA leave in any ''single 12-month period,'' even where such leave is requested to care for multiple servicemembers.

A number of commenters asked the Department to make clear that an employee cannot ''carry-over'' unused weeks of military caregiver leave from one 12-month period to another. The Equal Employment Advisory Council recommended ''that the regulations clarify that an eligible employee who takes leave to care for a covered servicemember, but does not use the entire 26-workweek entitlement, be required to forfeit the balance of his or her remaining servicemember leave entitlement at the end of the single 12-month period.'' The Colorado Department of Personnel & Administration also recommended that the Department make ''clear'' that there is no ''carryover'' of the leave from year to year. The Department agrees with these comments. Therefore, § 825.127(c)(1) of the final rule provides that once an eligible employee begins taking leave to care for a covered servicemember with a particular serious injury or illness, he or she may take up to 26 workweeks of leave during the 12 months following the first date leave is taken. If the employee does not use his or her entire entitlement during this ''single 12-month period,'' the remaining workweeks of leave are forfeited. However, because the final rule also permits an eligible employee to take 26 workweeks of leave in different ''single 12-month periods'' to care for multiple servicemembers or to care for the same servicemember with a subsequent serious injury or illness, this section also makes clear that an employee may be eligible to take additional periods of 26 workweeks of leave in subsequent ''single 12-month periods'' if the leave is to care for a different covered servicemember or to

care for the same servicemember with a subsequent serious injury or illness.

In the NPRM, the Department also sought comment on how the ''single 12-month period'' should be measured and whether an employer should be permitted to choose a method for establishing the ''single 12-month period,'' as an employer is able to do for other FMLA-qualifying reasons. The Department also sought comment on how this provision should be implemented if different methods are used to establish the 12-month period for leave taken to care for a covered servicemember versus leave for other FMLA-qualifying reasons. Finally, the Department asked for comment on how an employee's leave entitlement should be calculated when an employee takes military caregiver leave and FMLA leave for other qualifying reasons during the ''single 12-month period'' used for military caregiver leave.

Section 825.127(c)(1) of the Department's final regulations states that the ''single 12-month period'' for military caregiver leave begins on the first day the eligible employee takes military caregiver leave and ends 12 months after that date, regardless of the method used by the employer to determine the employee's 12 workweeks of leave entitlement for other FMLA-qualifying reasons. This section further provides that an eligible employee is entitled to a combined total of 26 workweeks of military caregiver leave and leave for any other FMLA-qualifying reason in a ''single 12-month period,'' provided that the employee may not take more than 12 workweeks of leave for any other FMLA-qualifying reason.

A majority of the commenters agreed that an employee's leave balance for military caregiver leave should be calculated from the date on which the eligible employee is first needed to care for the covered servicemember (*i.e.*, the date when an eligible employee first takes leave). Senator Dodd and Representative Woolsey *et al.* stated that the 12-month period should begin when the employee ''first utilizes'' military family leave, ''even if'' the employer establishes the 12-month period for standard FMLA leave on a different basis. Similarly, the College and University Professional Association for Human Resources noted that unlike leave for other FMLA-qualifying reasons in which an employer may choose the type of leave year, there ''is no such flexibility'' with respect to military caregiver leave, and that ''[b]ecause such leave is a one-time entitlement, the leave year must be measured forward from the first day of leave. This is the only way to ensure the employee may use his or her full 26 weeks.''

However, other commenters stated that an employer should be able to choose the 12-month period for this type of leave, as is the case with leave taken for other FMLA qualifying reasons. The City of Medford (OR) commented that the Department should allow an employer to establish the 12-month period ''in the same manner that it does for employees currently on FMLA leave.'' Similarly, the International Franchise Association stated that the Department ''must make it clear'' that an employer is entitled to apply its normal 12-month period in calculating military caregiver leave.

The Department has determined that the most appropriate method for establishing the ''single 12-month period'' for purposes of military caregiver leave is a period that commences on the date an employee first takes leave to care for a covered servicemember with a serious injury or illness. Establishing the ''single 12-month period'' based on the date of the covered servicemember's injury or illness instead of from the employee's first leave to care for the servicemember might limit the employee's ability to utilize the 26-week entitlement because the employee may not commence caring for the servicemember until a much later date. Similarly, applying the employer's normal FMLA leave year to leave to care for a covered servicemember would also result in employees being unable to utilize their 26-week entitlement if the employee's first use of leave did not coincide with the commencement of the employer's FMLA leave year.

In choosing this method, the Department is cognizant of the concerns expressed by employers and human resource professionals regarding the complexity and administrative burden of tracking leave under two different 12-month leave periods. However, the Department does not believe that the potential administrative burden caused by a relatively short period of overlapping 12-month periods outweighs the possibility that other approaches might diminish an eligible employee's entitlement of up to a full 26 weeks of military caregiver leave. As the law firm Spencer Fane Britt & Browne noted, an employer ''will only face such an execution challenge for a period of a year or so (or until there is no overlap between the two 12-month periods) for each employee who takes [covered servicemember] leave.'' The Department realizes that under the per-servicemember, per-injury interpretation, it is possible that an eligible employee may have more than one entitlement of 26 weeks with a single employer. However, the Department believes these occurrences will be rare and for most eligible employees the 26 weeks of military caregiver leave will be a one-time entitlement.

A number of commenters asked that the Department provide examples of how employers should ''reconcile'' the use of leave to care for a covered servicemember with other FMLA leave if two different leave years are used. The following example explains how an employer would calculate an employee's entitlement to military caregiver leave when it utilizes a calendar year method for other FMLA qualifying reasons:

The employer uses the calendar year method (January 2009–December 2009) for determining an employee's leave balance for FMLA leave taken for all qualifying reasons other than military caregiver leave. An employee first takes military caregiver leave in June 2009. Between June 2009 and June 2010 (the ''single 12-month period'' for military caregiver leave), the employee can take a combined total of 26 workweeks of leave, including up to 12 weeks for any other qualifying FMLA reason if he has not yet taken any FMLA leave in 2009.

If, however, the employee had already taken five weeks of FMLA leave for his own serious health condition when he began taking military caregiver leave in June 2009, he would then be entitled to no more than seven weeks of FMLA leave for reasons other than to care for a covered servicemember during the remainder of the 2009 calendar year (*i.e.*, the 12 weeks yearly entitlement minus the five weeks already taken). Although his entitlement to FMLA leave for reasons other than military caregiver leave is limited by his prior use of FMLA leave during the calendar year, the employee is still entitled to take up to 26 weeks of FMLA leave to care for a covered servicemember from June–December 2009.

Beginning in January 2010, the employee is entitled to an additional 12 weeks of FMLA leave for reasons other than to care for a covered servicemember. If the employee takes four weeks of FMLA leave for his own serious health condition in January 2010, this would reduce both the number of available weeks of FMLA leave remaining in calendar year 2010 (*i.e.*, the 12 weeks yearly entitlement minus the four weeks already taken) and the number of weeks of FMLA leave available for either military caregiver leave or other FMLA qualifying reasons during the ''single 12-month period'' of June 2009–June 2010.

Once the employee exhausts his or her 26-workweek entitlement, he or she may not take any additional FMLA leave for any reason until the ''single 12-month period'' ends. Thus, for example, if the employee took 20 workweeks of military caregiver leave from June–December 2009, four workweeks of leave in January 2010 for his or her own serious health condition, and another two

workweeks of military caregiver leave in March 2010, the employee will have exhausted his or her 26-workweek entitlement for the ''single 12-month period'' of June 2009–June 2010. While the employee would still have eight weeks of FMLA leave available in calendar year 2010, the employee could not take such leave until after June 2010, when the ''single 12-month period'' ends.

The Department also sought comment in the NPRM on how to designate leave that may qualify as both military caregiver leave and leave to care for a spouse, parent, or child with a serious health condition. Specifically, the Department asked whether the employer or employee should be able to determine how such leave is counted and whether such leave should be subject to retroactive designation in any circumstance.

The Department has decided that the same designation rules should apply to leave taken to care for a covered servicemember and leave taken for other FMLA-qualifying reasons. Section 825.300(d)(1) of the final rule provides that, in all circumstances, it is the employer's responsibility to designate leave, paid or unpaid, as FMLA-qualifying, and to give notice of the designation to the employee. The final rule extends this requirement, as well as the rules regarding retroactive designation, to the designation of military caregiver leave in § 825.127(c)(4). This section of the final rule also provides that, in the case of leave that qualifies as both military caregiver leave and leave to care for a family member with a serious health condition, the employer must designate such leave as military caregiver leave in the first instance.

The Department received a multitude of comments addressing the initial designation of leave that may qualify as both military caregiver leave and leave to care for a family member with a serious health condition. Comments submitted on behalf of Senator Dodd and Representative Woolsey *et al.* stated that an employee should have the right to choose whether the leave counts as leave taken to care for a family member with a serious health condition or military caregiver leave. While the Society for Human Resource Management argued that the employee should be the individual who determines whether he or she is applying for military caregiver leave or leave for any other FMLA-qualifying reason, to ''minimize the potential for disputes,'' this commenter also asked the Department to require an employee to specifically apply for military caregiver leave through the use of ''specific language.'' The Association of Corporate Counsel's Employment and Labor Law Committee argued that when leave may count as either military caregiver leave or leave taken to care for a spouse, parent, or child with a serious health condition, the employer should be able to determine how much leave should be designated, ''including allowing the two types of leave to run concurrently.'' This commenter wrote that if this approach is not adopted, the ''default'' should be to apply the military caregiver leave first. The law firm Jackson Lewis also believed ''the best practical solution'' is to apply military caregiver leave first, because ''[o]therwise, there is the potential for additional administrative uncertain[t]y in what is already a confusing, two track time-table for calculating the different types of leave.'' The National Partnership for Women & Families, in joint comments with the National Military Family Association, argued that ''[l]eave that qualifies under both provisions of the FMLA should count towards both leave ceilings simultaneously; if retroactive designation is required in order to accomplish the simultaneous use of leave, retroactive designation should be allowed.''

The Department believes that in the case of military caregiver leave, as with other types of FMLA leave, it is the employer's responsibility to designate the leave, paid or unpaid, as FMLA-qualifying, and to give notice of the designation to the employee. For military caregiver leave that also qualifies as leave taken to care for a family member with a serious health condition, the final rule provides that an employer must designate such leave as military caregiver leave first. The Department believes that applying military caregiver leave first will help to alleviate some of the administrative issues caused by the running of the separate ''single 12-month period'' for military caregiver leave. The final rule also prohibits an employer from counting leave that qualifies as both military caregiver leave and leave to care for a family member with a serious health condition against both an employee's entitlement to 26 workweeks of military caregiver leave and 12 workweeks of leave for other qualifying reasons. The Department has taken this approach because designating and counting one block of leave against two different leave entitlements would impose additional, unnecessary burdens on employees. For example, in order to appropriately designate such leave as both military caregiver leave and leave taken because of a serious health condition, an employee might be required to provide two separate certifications when taking one block of leave.

As to retroactive designation of leave, the majority of employers and employer groups commented that the Department should allow the employer to change the initial designation of the leave retroactively. For example, the Society for Human Resource Management, the National Coalition to Protect Family Leave, and Spencer Fane Britt & Browne argued that an employer should be permitted, but not required, with the consent of an employee, to retroactively change the following: (1) A military caregiver leave designation to another applicable FMLA leave designation if doing so would be more favorable to the employee; or (2) another applicable FMLA leave designation to a military caregiver leave designation if doing so would be more favorable to the employee. A few commenters representing employers, however, expressed concern that permitting retroactive designation could complicate calculation of the ''single 12-month period.'' For example, Jackson Lewis noted that if leave is retroactively designated as leave for a serious health condition when it was first approved as military caregiver leave, it is unclear whether the ''single 12-month period'' would begin on the date the leave was first designated as military caregiver leave or when the military caregiver leave is set to begin. Jackson Lewis noted that the same problem would be present if the leave was first designated as leave for a serious health condition and then later designated as military caregiver leave. Finally, comments submitted on behalf of Senator Dodd and Representative Woolsey *et al.* stated that an employee should have the right to change the designation retroactively.

The Department believes that an employer should be permitted to retroactively designate military caregiver leave pursuant to § 825.301(d) in the same situations under which retroactive designation is permitted for other types of FMLA leave. Given the circumstances surrounding the need for military caregiver leave, the Department is aware that an employer may not have enough information from an employee to designate leave until after the leave has commenced and/or ascertain whether the leave qualifies as military caregiver leave or leave for a family member with a serious health condition under the FMLA. At the same time, the Department recognizes the comments submitted by Jackson Lewis and the ''complications'' that could arise by the

substitution of one type of leave for another given the ''single 12-month period'' under military caregiver leave and the Department's requirement that this period be measured from the day the employee first needs leave—regardless of the employer's normal 12-month period for other FMLA-qualifying leave. Thus, as is the case for other types of FMLA leave, an employer may retroactively designate leave as military caregiver leave in appropriate circumstances, but is not required to do so.

The Department also requested comments on the NDAA provisions permitting an employer to limit the aggregate amount of leave to which eligible spouses employed by the same employer may be entitled in some circumstances. The NDAA provides that a husband and wife employed by the same employer are limited to a combined total of 26 workweeks of leave during the relevant 12-month period if the leave taken is to care for a covered servicemember or a combination of leave taken to care for a covered servicemember and leave for the birth or placement of a healthy child or to care for a parent with a serious health condition. Because the NDAA did not alter the existing 12-week limitation that applies to leave taken by spouses employed by the same employer for leave taken for the birth or placement of a healthy child or to care for a parent with a serious health condition, the Department sought comment on how this new limitation on the leave entitlement of spouses employed by the same employer would interact with the existing limitation, particularly if different 12-month periods are used to determine eligibility for leave taken to care for a covered servicemember and leave for other reasons. The Department received few comments on these provisions of the NDAA.

Section 825.127(d) of the final rule incorporates the NDAA's statutory limitation on the amount of leave spouses employed by the same employer may take during the ''single 12-month period'' by providing that a husband and wife who are eligible for FMLA leave and are employed by the same covered employer may be limited to a combined total of 26 weeks of leave during the ''single 12-month period'' described in § 827.127(c) if the leave is taken for birth of the employee's son or daughter or to care for the healthy child after birth, for placement of a healthy son or daughter with the employee for adoption or foster care, or to care for the child after placement, to care for the employee's parent with a serious health condition, or to care for a covered servicemember with a serious injury or illness. This section also clarifies that this limitation—like the existing 12-week limitation on leave taken by spouses employed by the same employer for other FMLA qualifying reasons—applies even though the spouses are employed at two different worksites of an employer located more than 75 miles from each other, or by two different operating divisions of the same company. On the other hand, as is the case for the existing 12-week limitation, if one spouse is ineligible for FMLA leave, the other spouse would be entitled to a full 26 weeks of FMLA leave to care for a covered servicemember.

The Department is aware this approach may result in two different 12-month periods being used to calculate the 26-workweek limitation and the 12-workweek limitation, and that in some circumstances, spouses employed by the same employer may be eligible to take more than 26 workweeks of FMLA leave in succession as a result. The Department does not believe, however, that the potential administrative burden caused by a relatively short period of overlapping 12-month periods outweighs the possibility that other approaches might diminish the spouses' entitlement to up to a combined total of 26 workweeks of military caregiver leave and their entitlement to a combined total of 12 workweeks of FMLA leave for other qualifying reasons.

Subpart B—Employee Leave Entitlements Under the Family and Medical Leave Act

Section 825.200 (Amount of Leave)

Section 825.200 explains the basic leave entitlement provided under the Act, and provides instructions for how to determine the 12-month period during which the FMLA leave entitlement may be used, and how to calculate the amount of leave used. Eligible employees are entitled to a set number of ''workweeks'' of FMLA leave, and an employee's normal ''workweek'' prior to the start of the FMLA leave is the basis for determining how much leave an employee uses when taking leave on an intermittent or reduced leave schedule basis.

The only change that the Department proposed in this section was to clarify how to count holidays in cases where an employee takes leave in increments of less than a full workweek. Specifically, the Department proposed to clarify in § 825.200(f) (§ 825.200(h) in the final rule) that, if an employee needs less than a full week of FMLA leave, and a holiday falls within that partial week of leave, the hours that the employee does not work on the holiday cannot be counted against the employee's FMLA leave entitlement if the employee would not otherwise have been required to report for work on that day. The Department did not propose any change in the treatment of holidays which occur during a full week of FMLA leave, and which are counted against the employee's FMLA entitlement. This is a clarification and does not represent a change in the Department's enforcement position. The Department has adopted the proposed clarification.

Many commenters, including the National Coalition to Protect Family Leave and the Chamber of Commerce of the United States of America (the ''Chamber''), supported the proposed clarification of the treatment of holidays falling during a partial week of FMLA leave as appropriate and instructive. *See also* Hewitt Associates; National Business Group on Health; American Association of Occupational Health Nurses; City of Medford (OR). The AFL–CIO also supported the proposed clarification as consistent with the statutory mandate to count ''only the leave actually taken.'' *See* 29 U.S.C. 2612(b)(1). However, the AFL–CIO and other groups, such as the National Partnership for Women & Families, opposed the continuation of the current rule that holidays are counted against an employee's FMLA entitlement when they fall within full workweeks of leave, asserting that it is inconsistent with the method of counting holidays when less than a full week of leave is used. *See also* National Treasury Employees Union. In these commenters' view, holidays should never be counted because employees are not required to be at work on those days, and therefore should not have to use FMLA leave.

Other commenters argued that holidays should count against an employee's FMLA entitlement even when less than a full week of leave is used. For example, the Equal Employment Advisory Council opposed the proposed change as administratively burdensome and vulnerable to employee abuse, and recommended instead that holidays which fall during a partial week of leave be charged as FMLA leave when the employee has taken FMLA leave on the days before and after the holiday. Jackson Lewis suggested that employees be charged FMLA leave for all holidays, regardless of when they fall, and that employees should have to provide medical evidence of health on the holiday if they do not want the day charged as FMLA

leave. Burr & Forman argued that the proposed rule makes leave calculation unnecessarily more complex by excluding such holidays, especially for employers who have ''holiday shutdowns,'' and could result in arbitrarily allowing some employees a greater length of time in which to take intermittent leave. *See also* Illinois Credit Union League.

The Department acknowledges employer concerns regarding not counting holidays against the FMLA entitlement when FMLA leave is taken in less than a full workweek, but believes that the proposed clarification is consistent with the statutory intent that leave be measured in terms of ''a total of 12 workweeks of leave'' but that it may also be taken ''intermittently or on a reduced leave schedule'' when medically necessary or by agreement. *See* 29 U.S.C. 2612(a), (b)(1). Holidays regularly occur during normal workweeks, and should be counted when they fall within weekly blocks of leave. On the other hand, the Department believes that where leave is taken in less than a full workweek, the employee's FMLA leave entitlement should only be diminished by the amount of leave actually taken. The Department believes that maintaining the existing rule, together with the proposed clarification, is the most reasonable and practical approach.

The Department made one additional change to § 825.200(c) of the final regulation in response to a request by Hewitt Associates to provide additional examples of how to calculate an employee's leave entitlement when the employer uses the ''rolling backward leave year,'' as permitted by § 825.200(b)(4). The Department agrees that additional explanation of this method of calculating the leave year would be helpful, and has therefore expanded the example currently found in § 825.200(c). Moreover, an additional example of the ''rolling leave year'' calculation can be found in Wage and Hour Opinion Letter No. FMLA–2005–3–A (Nov. 17, 2005).

The Department also made a number of changes to § 825.200 in the final rule to reflect the new military family leave provisions. Paragraph (a) is amended to make clear that the 12 workweeks of FMLA leave entitlement does not apply to military caregiver leave, for which 26 workweeks of leave in a ''single 12-month period'' may be taken. A new § 825.200(a)(5) is added to include qualifying exigency leave in the list of qualifying reasons for leave limited to a total of 12 workweeks. In addition, a new paragraph (f) is added to explain and detail the amount of time available under the military caregiver leave entitlement, specifically that an eligible employee's leave entitlement is limited to a total of 26 workweeks of leave during a ''single 12-month period'' to care for a covered servicemember with a serious injury or illness. Lastly, a new paragraph (g) is added to explain the limitations on the total amount of leave that can be taken during the ''single 12-month period'' described in paragraph (f).

Section 825.201 (Leave To Care for a Parent)

The Department proposed to reorganize this and other sections in order to make the regulations more clear and accessible. The text of current § 825.201, which covers when leave for the birth or placement for adoption or foster care of a child must conclude, has been incorporated into new §§ 825.120 and 825.121, as discussed above. Proposed § 825.201 now covers only leave taken to care for a parent, and highlights the statutory limitations on taking such leave in situations when both a husband and wife work for the same employer and seek leave to be with a healthy child following a birth or placement for adoption or foster care, or to care for a parent with a serious health condition, which were previously set forth in § 825.202. The final rule adopts the proposed changes.

The Department received very few comments on this section, and none opposed the proposed reorganization. Those comments that the Department did receive concerned issues specifically addressed by the statute. For example, Hewitt Associates requested that the Department provide additional explanation regarding the ''same employer'' limitation when a husband and wife both seek leave to care for a parent. Southwest Airlines requested that the Department extend the ''same employer'' limitation to unmarried couples, not just to spouses. The Department notes that the effect of the restrictions on FMLA leave for spouses employed by the same employer are determined case-by-case and the restrictions themselves are statutory and beyond the Department's authority to alter. *See* 29 U.S.C. 2612(f). The final rule also includes a cross-reference to § 825.127(d), which addresses the spousal limitation for military caregiver leave.

Section 825.202 (Intermittent Leave or Reduced Leave Schedule)

The Department proposed to reorganize this and other sections in order to make the regulations more clear and accessible, but did not propose significant changes to the substance. We proposed to consolidate leave provisions relating to intermittent or reduced schedule leave in cases of medical necessity and for the birth or placement of a child into a new § 825.202 (from current §§ 825.203 and 825.117), and to shift issues of scheduling, counting, and certification requirements for such leave into other sections, with appropriate cross-references. *See* proposed § 825.120 (Leave for pregnancy or birth), § 825.121 (Leave for adoption or foster care), § 825.203 (Scheduling of intermittent or reduced schedule leave), § 825.205 (Increments of leave for intermittent or reduced schedule leave), and § 825.306 (Content of medical certification). The NPRM also proposed to move language from current § 825.203(b) governing the use of intermittent or reduced schedule leave after the birth, adoption, or placement of a child, to proposed § 815.202(c), entitled ''Birth or placement,'' together with cross-references to proposed §§ 825.120 and 825.121, which also deal with pregnancy, birth, adoption, and foster care placement. Finally, we proposed adding the subheadings ''Definition,'' ''Medical necessity,'' and ''Birth or placement'' to § 825.202(a), (b), and (c), respectively. The final rule adopts § 825.202 as proposed, with two minor changes to § 825.202(b). The final rule also incorporates appropriate references to military caregiver leave and includes a new paragraph (d) providing for intermittent or reduced schedule leave for a qualifying exigency.

Proposed § 825.202(b) defines ''medical necessity'' for intermittent leave, combining existing language from current § 825.117 and illustrations from current § 825.203(c). It also includes a cross-reference to proposed § 825.306, which explains what constitutes sufficient information on the medical certification form. As noted above, most commenters generally supported the reorganization of the regulations. The Equal Employment Advisory Council also noted that the reorganization served as a ''clarification of threshold requirements'' for intermittent leave. The Department has adopted the proposed changes.

In addition to the changes proposed in the NPRM, the Department has determined that the parenthetical phrase in the first sentence of proposed § 825.202(b) ''(as distinguished from voluntary treatments and procedures)'' is confusing and unnecessary, and therefore has deleted it from the final rule. Under the FMLA, it is a threshold requirement that there be a medical need for leave due to a serious health

condition, regardless of whether the underlying medical procedure was viewed as ''voluntary'' or ''required.'' Other language regarding ''voluntariness'' was initially included in the definition of ''serious health condition'' in the Interim Final Rule published in 1993, 58 FR 31794, 31817 (June 4, 1993), but was deleted from the Final Regulations issued in 1995. As the Department explained at that time, ''[t]he term 'voluntary' was considered inappropriate because all treatments and surgery are voluntary.'' 60 FR 2180, 2195 (Jan. 6, 1995).

The Department has also adopted the suggestion of two commenters, the Society for Human Resource Management and the National Coalition to Protect Family Leave, to modify the third sentence of § 825.202(b). Specifically, both groups suggested that the Department delete the word ''related'' from the phrase ''treatment of a related serious health condition,'' which they viewed as unnecessary and potentially problematic. The Department agrees and has made the proposed change. Both groups also suggested that the Department delete the ''recovery'' clause at the end of the same sentence, since ''recovery'' is already included elsewhere as part of the definition of ''incapacity'' in proposed § 825.113(b). The Department declines to make this change, since the language simply carries forward existing rights and criteria for using intermittent or reduced schedule leave (from current regulatory text at § 825.203(c)) and appears to be clear and well-understood by all parties.

Lastly, a new paragraph (d) is added to the final rule to address intermittent or reduced schedule leave for qualifying exigency leave.

Section 825.203 (Scheduling of Intermittent or Reduced Schedule Leave)

In addition to reorganizing this section as noted above, the Department proposed in the NPRM to clarify that employees who take intermittent leave for planned medical treatment when medically necessary have a statutory obligation to make a ''reasonable effort'' to schedule such treatment so as not to disrupt unduly the employer's operations. Section 825.117 of the current regulations requires merely that ''[e]mployees needing intermittent FMLA leave or leave on a reduced leave schedule must attempt to schedule their leave so as not to disrupt the employer's operations,'' which the Department believes does not fully describe the employee's obligation under the law. *See* 29 U.S.C. 2612(e)(2) (requiring that employees who need foreseeable leave for planned medical treatment must ''make a reasonable effort to schedule the treatment so as not to disrupt unduly the operations of the employer''). The Department has adopted the proposed change. *See also* § 825.302(e).

Most commenters welcomed this clarification. *See* National Coalition to Protect Family Leave; TOC Management Services; American Foundry Society; National Association of Wholesaler-Distributors. The National Association of Wholesaler-Distributors commented that the proposal ''accurately implements the language of the FMLA and clarifies that an employee who needs intermittent or reduced schedule leave for planned medical treatment must make a 'reasonable effort' to schedule the leave so that the leave does not unduly disrupt the employer's business.'' Some commenters, such as the Equal Employment Advisory Council and Hewitt Associates, asked the Department to provide a definition of ''reasonable effort.'' The Equal Employment Advisory Council suggested, for example, that an employee be required to prove that a doctor's office is not open on Saturday in order to justify a weekday doctor visit. Jackson Lewis asked for ''a vehicle to hold employees accountable'' for meeting their obligations in this regard.

The Department believes that the statutory standard ''reasonable effort'' does not require further definition. In general, employees must try to arrange treatment on a schedule that accommodates the employer's needs, but such treatment schedules may not always be possible, depending on the nature of the employee's medical condition, the urgency, nature, and extent of the planned treatment, and the length of the recovery time needed. The scheduling of planned medical treatment is ultimately a medical determination within the purview of the health care provider. While the employee must make a reasonable effort in scheduling the leave, if the health care provider determines that there is a medical necessity for a particular treatment time, the medical determination prevails. If it is just a matter of scheduling convenience for the employee, the employee must make a reasonable effort not to disrupt unduly the employer's business operations.

Section 825.204 (Transfer of an Employee to an Alternative Position During Intermittent Leave or Reduced Schedule Leave)

Section 825.204 explains when an employer may transfer an employee to an alternative position in order to accommodate intermittent leave or a reduced leave schedule. The NPRM proposed no substantive changes in this section, but added subheadings of (a) ''Transfer,'' (b) ''Compliance,'' (c) ''Equivalent pay and benefits,'' (d) ''Employer limitations,'' and (e) ''Reinstatement of employee'' for clarity. The Department also solicited comments on whether this regulatory provision should be changed and, if so, how, noting that many commenters who responded to the December 2006 RFI wanted the option to transfer or otherwise alter the duties of employees using unscheduled or unforeseeable intermittent leave, in addition to those who request foreseeable leave for planned medical treatment. *See* 72 FR 35608 (June 28, 2007).

A significant number of commenters representing employers, including the Equal Employment Advisory Council, the National Coalition to Protect Family Leave, and the Society for Human Resource Management, supported allowing employers to transfer employees who take any intermittent leave, regardless of the purpose or foreseeability of the need for leave. *See also* TOC Management Services; Food Marketing Institute; National Retail Federation; Metropolitan Transportation Authority (NY); Spencer Fane Britt & Browne. These commenters argued that some employees are frequently absent on short notice, which the commenters claimed can be disruptive and can make scheduling extremely difficult, and contended that their ability to manage these absences would be enhanced if they could transfer such employees. The Association of American Railroads argued that ''unforeseeable use of intermittent leave is, if anything, a more appropriate circumstance for transfer or reassignment because unforeseeable absences may undermine the employer's ability to carry out its business.'' The U.S. Postal Service contended that Congress did not intend to permit unforeseeable intermittent leave for chronic conditions, and that employers should be free to transfer employees who frequently use unscheduled, intermittent leave, in addition to those who seek foreseeable leave for planned medical treatment as provided in the statute.

Commenters representing employees and employee groups were uniformly opposed to any expansion of the employer's right to transfer employees who take intermittent FMLA leave for reasons other than planned medical treatment. *See, e.g.*, Communications Workers of America; National Federation of Federal Employees; and

National Partnership for Women & Families. The AFL–CIO contended that such a change would run contrary to the plain language of the statute, which expressly permits transfers in cases of intermittent or reduced schedule leave ''that is foreseeable based on planned medical treatment.'' 29 U.S.C. 2612(b)(2). The AFL–CIO asserted that this implies a prohibition on transfers in any other situation. The National Treasury Employees Union agreed, contending that the Department is without authority to expand this provision since Congress itself determined the scope of the transfer option and chose to limit it to cases involving ''planned medical treatment.''

The AFL–CIO and the National Partnership for Women & Families both argued that the distinction also makes sense from a policy standpoint, since an employer would be able to plan for an employee's absences due to planned medical treatment, but would be unable to do so where an employee needs unforeseeable intermittent leave. Both the AFL–CIO and the Communications Workers of America also expressed concern that allowing employers to transfer employees in such situations might increase the possibility of retaliation by employers.

The Department believes that by expressly permitting transfers in cases of intermittent or reduced schedule leave ''that is foreseeable based on planned medical treatment,'' 29 U.S.C. 2612(b)(2), the statutory language strongly suggests that this is the only situation where such transfers are allowed. Additionally, the statute clearly requires that such transfers be temporary in nature, and that the employee be reinstated to the original position upon completion of the recurring leave period. *See* 29 U.S.C. 2612(b)(2), 2614(a)(1). The Department acknowledges that this standard may seem to discount the fact that some employees may take intermittent leave regularly, frequently, and predictably—even if unforeseeably—and do so on the advice or recommendation from their physician, which some would argue is akin to planned medical treatment. *See* Report on the Department of Labor's Request for Information, Chapters IV, VIII, and XI, 72 FR at 35571, 35608, and 35619 (June 28, 2007). While this may be the case, the Department finds no statutory basis to permit transfers to an alternative position for those taking unscheduled or unforeseeable intermittent leave. Accordingly, the Department declines to expand the situations in which an employer may temporarily transfer an employee to an alternative position.

Section 825.205 (Increments of FMLA Leave for Intermittent or Reduced Schedule Leave)

Section 825.205 explains how to count increments of leave in cases of intermittent or reduced schedule leave. The Department did not propose any substantive changes to this section, but did propose to move language from current § 825.203(d) to paragraph (a) of this section, and to add the title ''Minimum increment.'' It also proposed to renumber current paragraphs (b) through (d) as § 825.205(b)(1), (2), and (3) for purposes of clarity, and to add the title ''Calculation of leave'' to paragraph (b), but did not propose any changes to the text of those sections. The preamble to the NPRM discussed the extensive comments the Department had received in response to the Request for Information ''expressing concerns about the size of the increments of intermittent leave that may be taken;'' the impacts of the use of unscheduled intermittent leave, particularly on time-sensitive business models; the many suggestions to the record to allow employers to require that intermittent leave be taken in greater increments (*e.g.*, two or four hour blocks, or one day or one week blocks) and conversely, the commenters who defended the current rule on minimum increments of leave. The preamble to the NPRM also requested comment on whether to create an exception to the minimum increment rule in situations where physical impossibility prevents an employee from commencing work mid-way through a shift, and asked for comment on whether and how to clarify the application of FMLA leave to overtime hours. The final rule incorporates the proposed changes with additional clarifications, as well as new language addressing physical impossibility, calculation of leave, overtime, and a cross-reference to the special rules for intermittent or reduced schedule leave taken by employees of schools, as described in more detail below.

Paragraph (a) of proposed § 825.205 set forth the general rule from current § 825.203(d) that employers may account for intermittent or reduced schedule leave in the smallest increments used by their payroll systems to account for absences or use of leave, so long as it is one hour or less. The Department again received many comments from employers expressing their concerns about the size of increments of intermittent leave that may be taken, especially when such leave is unforeseeable. At the same time, we also received many comments from employees stressing the importance of their ability to take such leave in small amounts of time when suffering from serious health conditions, or when caring for family members with serious health conditions.

Employers and their representatives argued that it was difficult to manage their workforce needs adequately when employees were permitted to take very small amounts of leave (*e.g.*, in minutes), when they may have policies for the use of other forms of leave in larger increments, especially when other employees were required to fill in for those who were absent, and that larger increments of leave would reduce the current administrative and staffing burdens placed on employers. *See, e.g.*, National Association of Manufacturers; Domtar Paper Company; Society for Human Resource Management; National Newspaper Association; and Food Marketing Institute. Both the Equal Employment Advisory Council and the Chamber cited members who track leave in increments as small as six minutes, which they contend is especially difficult for FMLA administration. The National Coalition to Protect Family Leave asserted that the current regulation penalizes employers with sophisticated payroll systems capable of tracking the increments of leave down to one minute. The Chamber argued that increasing the minimum increment would greatly ease recordkeeping burdens on employers, reduce the opportunity for abuse of FMLA leave, and improve predictability for employers. The National Association of Manufacturers stated that a larger increment would lower the incidence of what it believes to be employees improperly using FMLA leave to cover late arrivals. These employers argued strongly that the minimum increment should be enlarged, and suggested various minimums ranging from two hours to four hours or a half day. *See, e.g.*, the Chamber (half day or 1 hour); Equal Employment Advisory Council (half day); National Association of Manufacturers (four-hour or two-hour increments); Domtar Paper Company (four hours); Society for Human Resource Management (half day or two hours); National Coalition to Protect Family Leave (same). Indeed, the Delphi Corporation pointed out that an employee could use FMLA leave to cover late arrivals of almost two hours per day, every day, without ever exhausting the employee's annual leave entitlement. The Equal Employment Advisory Council similarly noted that ''[a]n employee in fact could take one day off a week as intermittent leave and still have plenty of FMLA leave left at

the end of the year.'' Finally, some commenters sought clarification of the ''one hour or less'' language in both the current and proposed regulation. The National Coalition to Protect Family Leave requested that the Department clarify that ''in all cases, regardless of an employer's payroll system'' an employer may track leave in increments of ''at least an hour.'' The National Coalition believed it is ''arbitrary'' to require employers to track leave in the smallest increments that its payroll system tracks when that system may not be used to track FMLA or other leave usage. They noted that the current requirement by the Department penalizes employers who have more sophisticated payroll systems that can track payroll in increments as small as one minute, as compared to employers who do not use such systems.

By contrast, employee organizations opposed any increase in the increment of intermittent leave, arguing that it would harm employees by forcing them to take more leave than is medically necessary and would unfairly diminish their FMLA entitlement. *See, e.g.*, National Partnership for Women & Families; American Association of University Women; AFL–CIO; American Association of Occupational Health Nurses. 9to5 cited the example of an employee using intermittent FMLA leave in two-hour increments to take her daughter to cancer treatments, and contended that requiring such an employee to use leave in half-day or larger increments would unnecessarily diminish her FMLA entitlement. They also asserted that the longer absences might be even more disruptive to the workplace than shorter ones. The Communications Workers of America argued that employers are not burdened by being required to account for FMLA leave in the same increment used for other absences, but that employees would be burdened by increasing the increment of intermittent leave.

The Department has carefully considered all comments on this issue, and has decided to adopt § 825.205 as proposed with additional clarifying language. Both the current and proposed standard permit employers to limit the increment of leave for FMLA purposes to the shortest period of time the employer uses to account for other types of use of leave, provided it is one hour or less. The current regulation at § 825.203(d) provides: ''an employer may limit leave increments to the shortest period of time that the employer's payroll system uses to account for absences or use of leave, provided it is one hour or less.'' As explained above, the Department moved essentially this same language to proposed § 825.205(a) which provided: ''Minimum increment. When an employee takes leave on an intermittent or reduced leave schedule, an employer may limit leave increments to the shortest period of time that the employer's payroll system uses to account for absences or use of leave, provided it is one hour or less.'' As the Department stated in the preamble to the current regulations in 1995: ''In providing guidance on this issue in the Interim Final Rule, it seemed appropriate to relate the increments of leave to the employer's own recordkeeping system in accounting for other forms of leave or absences * * * however, this section will be clarified to provide explicitly that the phrase 'one hour or less' is dispositive.'' 60 FR 2202 (Jan. 6, 1995). The preamble to the current regulation further stated that the ''employer's own recordkeeping system in accounting for other forms of leave or absences * * * controls with regard to increments of FMLA leave of less than one hour.'' *Id.*

Because the comments indicate some confusion in practice between the current § 825.203(d) regulatory language, as carried over to proposed § 825.205(a), and the preamble discussion of current § 825.203(d), the Department adopts the final rule with the following modifications. The Department restates its original view that ''one hour or less is dispositive.'' Employers are not required to account for FMLA leave in increments of six minutes or even fifteen minutes simply because their payroll systems are capable of doing so, and the regulatory language in the final § 825.205(a) does not so require. What matters is how the employer actually accounts for the leave. The final regulation eliminates the confusing and inconsistent references to either payroll systems or recordkeeping systems and eliminates the term ''absences'' to further lessen any confusion and focuses on ''use of leave.'' The final regulation adjusts the proposed language to make clear the employer must account for the intermittent or reduced schedule leave under FMLA ''using an increment no greater than the shortest period of time that the employer uses to account for use of other forms of leave provided it is not greater than one hour.'' Accordingly, while employers may choose to use a smaller increment to account for FMLA leave than they use to account for other forms of leave, they may not use a larger increment for FMLA leave. Thus, if an employer uses different increments to account for different types of leave (*e.g.*, accounting for sick leave in 30-minute increments and vacation leave in one-hour increments), the employer could not account for FMLA leave in an increment larger than the smallest increment used to account for any other type of leave (*i.e.*, 30 minutes). Additionally, under no circumstances can an employer account for FMLA leave in increments of greater than one hour, even if such increments are used to account for non-FMLA leave. Employers may choose to account for FMLA leave taken in any increment not to exceed one hour as long as they account for leave taken for other reasons in the same or larger increment. The Department has also modified the final rule to recognize policies which account for use of leave in different increments at different points in time, thus, permitting employers to maintain a policy that leave of any type may only be taken in a one-hour increment during the first hour of a shift (*i.e.*, a policy intended to discourage tardy arrivals). As a further point of clarity, the final rule changes the current and proposed rules' language of ''provided it is one hour or less'' to ''provided it is not greater than one hour.'' The Department emphasizes that in all cases employees may not be charged FMLA leave for periods during which they are working. For example, if an employee needs FMLA leave due to the flare-up of a condition 30 minutes before the end of the employee's shift, the employee may not be charged with more than 30 minutes of FMLA leave, even if the employer otherwise uses one hour as its shortest increment of leave, because the employee has already worked the first 30 minutes of the last hour of his or her shift. If such a flare up occurred at the beginning of a shift, however, the employee could be required to take up to one hour of FMLA leave in accordance with the employer's leave policy, provided the employee does not work during that hour.

The final rule also makes explicit that employers may use a smaller increment to account for FMLA leave, a flexibility that was implicit in the permissive wording of the current regulation. Finally, the final rule provides additional flexibility in accounting for FMLA leave by allowing for leave systems that utilize different increments at different points of time while adhering to the principle in the current regulation that FMLA leave users may not be charged leave in a larger increment than users of non-FMLA leave. The Department remains committed, however, to the one hour outer limit on use of FMLA leave and

therefore declines to adopt any of the comments recommending intermittent leave be accounted for in larger increments such as two-hour, four-hour, or half or full-day increments.

The Department has made one other revision in the final rule to reorganize the text in proposed § 825.205 by moving the final three sentences from proposed paragraph (a) into paragraph (b) in the final rule, where related concepts for the calculation of the amount of FMLA leave used are addressed. The final rule also restores a cross-reference in paragraph (b) to the special rules for intermittent or reduced schedule leave taken by employees of schools, §§ 825.601 and 825.602.

In the NPRM, the Department also sought comment as to whether, in situations in which physical impossibility prevents an employee using intermittent leave or working a reduced leave schedule from commencing work mid-way through a shift, an exception should be made to allow the entire shift to be designated as FMLA leave and counted against the employee's FMLA entitlement. In an opinion letter, the Department had previously taken the position that where a flight attendant's need for three hours of intermittent FMLA leave caused her to miss her normal flight assignment, only the three hours needed could be charged against her FMLA entitlement, with the remainder of the absence being charged to another form of paid or unpaid leave. Wage and Hour Opinion Letter FMLA–42 (Aug. 23, 1994). In the preamble, the Department questioned whether this interpretation was appropriate, because it may expose employees to disciplinary action based on the additional hours of non-FMLA unprotected leave that they must take.

Employers and employer groups strongly supported the creation of such an exception. *See, e.g.*, the Chamber; Equal Employment Advisory Council; National Coalition to Protect Family Leave; Society for Human Resource Management; Southwest Airlines; Hewitt Associates. Commenters representing transportation employers in particular supported a physical impossibility exception to the minimum increment of leave rule. The Association of American Railroads supported the creation of an exception but suggested that it should apply not just where it is impossible for the employee to return to the workplace but also where it is ''unreasonable,'' ''impracticable,'' or barred by a collective bargaining agreement; it also argued that the exception should include workers in fixed locations such as train dispatchers who work in a station or office. The Chicago Transit Authority argued that the exception should apply to all ''fixed time work assignments, such as scheduled public transit runs,'' and that the minimum time increment should be the length of the employee's scheduled run. This, it argued, would protect the employee's entire absence, and also allow employers to better plan for and arrange assignments for entire blocks of work.

Spencer Fane Britt & Browne suggested that the exception should be expanded to apply in three situations: (1) Where it is physically impossible for the employee to complete the assigned shift; (2) where another employee was called in to cover the absence; and (3) ''where an employee is chronically late to work allegedly because of an FMLA chronic condition.'' In all three cases, Spencer Fane contended that it is ''inherently unfair'' and ''disruptive'' to permit the FMLA leave-taker to return to work mid-shift. The New York City (NY) Law Department suggested that the exception should apply to positions requiring 24/7 coverage where there must always be someone working, and that the employee should be charged FMLA leave for the entire shift even if only a few minutes of leave are needed.

Most commenters on behalf of employees, on the other hand, opposed creating any exception to the minimum increment rule, and argued that the 1994 opinion letter was correct. *See, e.g.*, National Partnership for Women & Families; Center for WorkLife Law. The American Train Dispatchers Association argued that such a change would ''allow the carriers to charge [transportation] employees for time that they do not use for FMLA-related purposes, in contravention of the statute's language and intent,'' and cited the example of an engineer who needed four hours of intermittent FMLA leave to accompany his wife to chemotherapy, but would be charged instead for the entire length of the engine's trip—up to eight or ten hours. In its view, this result would violate 29 U.S.C. 2652, which provides that FMLA rights ''shall not be diminished'' by collective bargaining agreements or employment benefit plans or programs. The AFL–CIO and the Communications Workers of America questioned whether employees were being subject to discipline in such situations and argued that the statutory prohibition against interference would prohibit employers from imposing discipline on employees who return from intermittent leave and are ready to work, regardless of whether the rest of the shift is counted as FMLA leave or some other form of leave. The Communications Workers of America also argued that air carriers already routinely handle such situations in cases of non-FMLA leave by reassigning workers, allowing them to cover for each other, or assigning them to alternative work schedules or alternative administrative work. The Center for WorkLife Law argued that the term ''physical impossibility is vague and overbroad,'' and the creation of such an exception ''will have a significant and unnecessary negative effect on caregivers.'' In its view, foreseeable leave can almost always be handled in advance by assigning the employee to an alternative route or shift; and employees should always be allowed to resume work mid-shift if they can reach the worksite.

After reviewing the comments, the Department has decided to include an exception for physical impossibility, which is set forth in § 825.205(a)(2) of the final rule. The Department believes that the existing policy exposes employees to the risk of discipline in situations in which an employee's need for a short FMLA-protected absence from work actually results in a much longer absence because of the unique nature of the worksite. Whether it is a train that is 300 miles away, or a plane over the Atlantic Ocean, or a ''clean room'' in a laboratory that must remain sealed for the entire workshift, some workplaces exist that prevent employees from joining (or leaving) the work mid-way through the ''shift.'' Thus, a three-hour FMLA absence may result in an employee's inability to work for eight hours, or until the end of the shift or route. Where this occurs, the Department believes that the entire period of absence should be considered FMLA leave and should be protected under the Act. The Department does not believe that a physical impossibility exception contravenes 29 U.S.C. 2612(b) or any other provision of the Act because only the amount of leave used will be counted against the employee's FMLA leave entitlement and the FMLA does not require employers to provide alternative work to employees when the employee is unable to return to his or her same or equivalent position due to physical impossibility.

The Department intends the exception to be applied narrowly. The exception is limited to situations in which an employee is physically unable to access the worksite after the start of the shift, or depart from the workplace prior to the end of the shift. Moreover, within those situations, the exception is limited to the period of time in which the physical impossibility remains. Thus, although the exception may apply to a flight attendant, train conductor, ferry

operator, bus driver, or truck driver whose worksite is on board an airplane, train, boat, bus, or truck or a laboratory technician whose workplace is inside a ''clean room'' that must remain sealed for a certain period of time, the exception will only apply until the vehicle has returned to the departure site or while the clean room remains sealed. For example, the physical impossibility exception will apply to a flight attendant until such time as he or she is able to rejoin his or her crew at the departure point, which likely is a longer period of time for a flight attendant who is scheduled to fly cross-country than it is for one who is scheduled to fly a shuttle between Washington and New York. Similarly, a physical impossibility will generally exist for a longer period of time when a driver works for an inter-city bus company than it would when a driver works for a metropolitan transit system. In both cases, the physical impossibility remains until the bus returns to the terminal; such a return, however, may take place much more frequently in the latter example.

Employers may not use this new exception to prevent employees taking intermittent FMLA leave from commencing work late or leaving work early when there is no physical impossibility preventing the employee from accessing or leaving the workplace during the ''shift.'' Additionally, even where physical impossibility prevents the employee from accessing the workplace, if the employee is assigned alternative work (*e.g.*, pursuant to a collective bargaining agreement or employer policy) only the amount of leave actually taken may be counted against the employee's FMLA leave entitlement. The Department recognizes that employers may provide alternative work, particularly where there is advance notice of the need for leave, and nothing about this exception prevents employers from providing such work. Employers also have an obligation not to discriminate between employees who take FMLA leave and other forms of leave; for example, if they routinely offer alternative work to employees returning from short periods of non-FMLA leave, such as sick leave or jury duty, then they must also offer such work to employees returning from short periods of FMLA leave.

The Department did not propose any changes to § 825.205(b), which deals with calculation of leave. However, a number of commenters reported that they or their clients have difficulty calculating leave entitlement and leave usage, especially for employees who use intermittent leave, work overtime, or work part-time, seasonal or irregular schedules. *See, e.g.*, Burr & Forman; TOC Management Services; Equal Employment Advisory Council; Food Marketing Institute; the Chamber; National Coalition to Protect Family Leave; National Newspaper Association. The American Postal Workers Union, Clerk Division, Chicago Region, complained that seasonal fluctuations in work hours can lead to employees receiving different amounts of FMLA-protected leave depending on the time of year in which the leave is taken.

The Department has made several revisions to the section entitled ''Calculation of leave'' to address issues that arise when an employee's schedule varies. The first clarifies that the method for determining the amount of FMLA leave taken by an employee is to compare the number of hours actually worked by the employee in a FMLA workweek to the number of hours the employee would have worked in that workweek, but for the FMLA leave taken. The difference is the amount of FMLA leave taken. That amount is divided by the number of hours the employee would have worked had the employee not taken leave of any kind, including FMLA leave. The result represents the proportion (percentage) of a FMLA workweek that the employee has taken. The resulting percentage may be converted to hours for tracking purposes; any such conversion must equitably reflect the employee's leave allotment. An employee does not ''accrue'' FMLA-protected leave at any particular hourly rate; an eligible employee is entitled to 12 workweeks of leave (or 26 workweeks in the case of military caregiver leave) and the total number of hours contained in those workweeks is necessarily dependent on the specific hours that would have been worked by the employee. The Department has also changed the rule for calculating an employee's leave entitlement when an employee works a schedule that varies so much from week-to-week that no ''normal'' schedule or pattern can be discerned, and the employer cannot determine with any certainty how many hours the employee would have worked, but for the taking of the FMLA leave. In such circumstances, the Department believes that calculating a weekly average over the 12 months prior to the leave period (rather than just the prior 12 weeks as required under the current rule) should give a truer picture of the employee's actual average workweek.

In the preamble to the proposed rule, the Department clarified its position on when overtime hours not worked due to a serious health condition could be counted against an employee's FMLA leave entitlement. 73 FR 7894 (Feb. 11, 2008). The issue of overtime is not addressed in the current regulations, but was discussed in the 1995 preamble to the current rule. *See* 60 FR 2202 (Jan. 5, 1995) (preamble accompanying current § 825.203). Many commenters requested both that the Department's position be clarified and that it be included in the regulatory text, rather than just addressed in the preamble. *See, e.g.*, Society for Human Resource Management; National Coalition to Protect Family Leave; TOC Management Services. The Department agrees, and has added a new § 825.205(c), which addresses when overtime hours not worked due to FMLA leave can be counted against an employee's FMLA entitlement. Consistent with the discussion in the preamble to the proposal, the final rule states that where an employee would normally be required to work overtime, but cannot do so because of a FMLA-qualifying condition, the employee may be charged FMLA leave for the hours not worked. This new regulatory section is not a change in policy but is simply intended to clarify in the regulations the Department's existing policy.

Employer commenters generally supported the proposed clarification. *See, e.g.*, Pennsylvania Governor's Office of Administration; Domtar Paper Company; Society for Human Resource Management; National Coalition to Protect Family Leave; TOC Management Services. For example, the U.S. Postal Service claimed that ''the ambiguity in the current regulatory language regarding overtime has hindered efforts to bring uniformity'' in this area; it embraced the clarification as ''eminently sensible,'' and ''not only fair, but also necessary.''

Some commenters argued that employers should not be restricted to only counting mandatory or required overtime hours not worked against an employee's FMLA entitlement. For example, the Society for Human Resource Management and the National Coalition to Protect Family Leave argued that employees should be charged FMLA leave in circumstances in which an employer rotates overtime on a volunteer basis among its employees but employees are subject to possible disciplinary action for failing to ''volunteer.'' Spencer Fane Britt & Browne argued that employers should be able to charge employees FMLA leave for all overtime hours not worked even where the overtime at issue is voluntary, and that failing to do so will hurt employee morale.

Groups representing employees also generally agreed with the Department's desire to clarify the treatment of overtime, but felt that the preamble discussion was not as clear as it might have been. The AFL–CIO simplified the proposed test to ''whether the employee is required to work the overtime,'' and noted that the key distinction is between voluntary and mandatory overtime, notwithstanding the Department's ''apparent rejection of that distinction.'' It also asked for more examples, as did the National Partnership for Women & Families and National Federation of Federal Employees. The Department agrees that the appropriate focus is whether the employee would have been required to work the overtime hours but for the taking of FMLA leave, and has added an example to the proposed rule to illustrate this principle. The American Postal Workers Union commented that the proposed clarification will compound rather than moderate the administrative complexity of the rule. Rather than focusing on whether the employee was required to work, it suggested that employees only be charged FMLA leave for overtime hours which ''were part of the employee's regular schedule,'' as opposed to voluntary, ad hoc or ''as needed'' hours.

Many Postal Service employees also opposed being charged any FMLA leave for overtime hours not worked. For example, the American Postal Workers Union Clerk Division, Chicago Region expressed a concern that being charged for overtime hours could diminish an employee's entitlement below 12 workweeks, and could be arbitrary and unfair if the amount of leave charged was to vary according to seasonal overtime requirements. The Department points out that overtime is factored into the FMLA entitlement because both the entitlement and the leave usage rate are based on the employee's required (*i.e.*, scheduled) hours of work. The Department believes it is fair, therefore, that overtime not worked be counted against the FMLA entitlement when the employee would have been required to work the overtime hours but for the use of FMLA leave.

Finally, employers may not discriminate in the assignment of mandatory overtime between employees who take FMLA leave and others. For example, an employer cannot schedule only FMLA leave takers for required overtime in order to deplete their FMLA leave entitlement, while allowing other employees to volunteer for overtime.

Section 825.206 (Interaction With the FLSA)

No changes were proposed to this section beyond updating the cross-references to the FLSA regulations revised in 2004 for salaried executive, administrative, professional, or computer employees under 29 CFR Part 541, and no comments were received on it. The final rule adopts § 825.206 as proposed with revisions to address the new types of leave available under the NDAA amendments.

Section 825.207 (Substitution of Paid Leave)

Section 825.207 addresses the interaction between unpaid FMLA leave and employer-provided paid leave and echoes the statutory language that paid leave may be substituted for unpaid FMLA leave. In the NPRM the Department proposed to change its position on the substitution of paid vacation and personal leave and to allow employers to apply their normal leave policies to the substitution of all types of paid leave for unpaid FMLA leave. The Department thus proposed to delete current paragraphs (b), (c), (e), and (h) of this section. The proposal redesignated current paragraphs (f) and (g) as proposed paragraphs (b) and (c). The Department proposed to modify its discussion of FMLA-qualifying leave that is covered by an employer's disability benefit plan in paragraph (d), and to move its discussion of FMLA-qualifying leave that is covered by workers' compensation to a new paragraph (e). Finally, the Department proposed to redesignate current § 825.207(i), which addresses the interaction between public employees' use of compensatory time off and FMLA leave, as paragraph (f) and to remove the prohibition against substitution of accrued compensatory time for unpaid FMLA leave. The final rule includes all of the proposed changes and makes additional modifications in paragraphs (a), (d), and (e), as discussed below.

Proposed § 825.207(a) clarified that ''substitution'' of paid leave for FMLA purposes means that the unpaid FMLA leave and the paid leave provided by an employer run concurrently. The Department also proposed in this section to allow employers to apply their normal policies for taking paid leave when an employee substitutes paid leave for unpaid FMLA leave regardless of the type of paid leave substituted. The proposal differed from current § 825.207, which prohibits employers from imposing any limits on the substitution of paid vacation or personal leave. Under the current regulation, employers may restrict the substitution of paid sick or medical leave under the FMLA to situations in which they would otherwise provide such paid leave, but are not permitted to restrict the substitution of paid vacation or personal leave in any manner. Employers are also permitted under the current rule to restrict the substitution of paid family leave to circumstances for which they would normally provide family leave. The proposal required that employees who seek to substitute accrued paid leave of any kind for unpaid FMLA leave must comply with the terms and conditions of the employer's normal leave policy. It also proposed new language clarifying that employers are required to notify employees of any additional requirements for the use of paid leave (*e.g.*, paid leave only being available in full day increments or upon completion of a specific leave request form), and stated that if employees do not or cannot meet those requirements, they remain entitled to unpaid FMLA leave as guaranteed by the statute. The Department also proposed new language intended to ensure that employers do not discriminate between FMLA leave users and others in the provision of paid leave.

Employee representatives generally opposed the proposed revision of this section on two grounds—first, they claimed that it would hurt employees, who often cannot afford to take unpaid leave, and second, they believed that it conflicted with Congressional intent regarding the substitution of paid leave. *See, e.g.*, National Partnership for Women & Families; AFL–CIO; American Association of University Women; Family Caregiver Alliance; Sargent Shriver National Center on Poverty Law; Women Employed; American Postal Workers Union; and Communications Workers of America. A Better Balance: The Work and Family Legal Center claimed that as many as three out of four eligible workers cannot afford to take leave without pay, and that it can be very difficult for employees to understand and navigate employer paid leave policies. Community Legal Services/AIDS Law Project of Pennsylvania argued that the ability to utilize paid leave for FMLA reasons is critical to low wage employees, who often live paycheck to paycheck and cannot afford any delay in pay, whereas it makes little difference to employers, since they will have to make the accrued leave payments eventually.

The National Partnership for Women & Families and the AFL–CIO, among others, also argued that the proposed change is contrary to Congress's intent

and to the Department's own prior interpretation of the FMLA. They argued that the plain language of 29 U.S.C. 2612(d)(2)(A) permits employees to substitute (or employers to require substitution of) ''any of the accrued paid vacation leave, personal leave, or family leave of the employee * * * for any part'' of their unpaid FMLA leave. They further argued that this language supersedes any employer policies restricting the use of such leave when substituted for FMLA leave, and that the Department properly construed the law in its current regulations to override such limitations. *See* AFL–CIO; National Partnership for Women & Families. By contrast, they argued, Congress expressly permitted employers to set their own rules governing sick and medical leave, and to require employees to comply with such rules, by providing in subsection (B) that ''nothing in this title shall require an employer to provide paid sick or paid medical leave in any situation in which such employer would not normally provide any such paid leave.'' 29 U.S.C. 2612(d)(2)(B). In their view, ''the text and structure of the FMLA make abundantly clear that Congress intended that no limitations be placed on employees' ability to substitute paid vacation or personal leave while on FMLA leave.''

Other groups representing unionized employees, such as the International Association of Machinists & Aerospace Workers *et al.*,[5] the American Train Dispatchers Association, and the Communications Workers of America, argued that any change in this provision could cause a real hardship to workers, especially in transportation and other industries. They asserted that collective bargaining agreements frequently require employees to select or ''bid'' for their vacation up to a year in advance, that winning bids are usually determined by seniority, and that time off may be restricted or completely foreclosed during peak summer and holiday travel periods. They argued that the proposed regulation would have the effect of disallowing the substitution of paid vacation leave for unpaid FMLA leave if an employee happens to need FMLA leave before or after his or her pre-selected vacation period, or on an emergency basis. They also noted that many agreements require substantial advance notice for using personal leave. In such settings, they argued, it would be almost impossible to substitute paid leave for unforeseeable medical emergencies, premature childbirth, or for unforeseeable intermittent leave needed as a result of a chronic condition.

Many commenters agreed with the Department's statement in the NPRM that the differing treatment of ''medical leave,'' ''family leave,'' ''sick leave,'' and ''vacation leave'' in current § 825.207 was confusing and made it difficult for both employers and employees to know when paid leave may or may not be substituted for unpaid FMLA leave. *See, e.g.*, TOC Management Services; Equal Employment Advisory Council; the Chamber; Hewitt Associates. Additionally, employers and employer representatives strongly supported the Department's proposal that they be allowed to apply their normal leave rules when paid leave of any type is substituted for unpaid leave under FMLA. *See, e.g.*, Hewitt Associates; American Foundry Society; College and University Professional Association for Human Resources; Domtar Paper Company. The National Coalition to Protect Family Leave commented that the Department's current regulation treats FMLA leave takers more favorably than employees using non-FMLA leave, and that all employees seeking to use paid leave voluntarily provided by employers should be required to comply with the terms and conditions of the paid leave policy. The National Coalition to Protect Family Leave asserted that this is consistent with the main statutory goal of the FMLA, that nothing in the FMLA be construed so that it would ''discourage'' employers from ''adopting or retaining'' more generous leave policies. It further noted that employers may choose to waive restrictions on leave use in order to facilitate the substitution of paid leave, but should not be required to do so.

The National Association of Manufacturers supported the change, noting that ''[t]here is perhaps no other single proposal that would permit employers to streamline the leave process while, at the same time, controlling abuses of the system.'' However, this commenter asked what would happen if an employer's paid leave policy required the use of a full day of leave and an employee wished to substitute paid leave for a two-hour FMLA absence—could the employer require the employee to use a full day of paid leave or would the employer be required to provide the employee with two hours of paid leave? *See also* Retail Industry Leaders Association. The Equal Employment Advisory Council also supported the proposal and agreed that it is a ''more accurate interpretation of the statutory language'' and ''correctly implements Congressional intent'' regarding the substitution of paid leave. However, they opposed any additional notice requirements, urging that a simple cross-reference to an employee handbook or Intranet site should be adequate notice of the employer's paid leave policy. Finally, they also specifically supported the Department's proposed clarification of the term ''substitution'' as meaning that paid leave and unpaid FMLA leave run concurrently.

The Department has carefully considered all the comments regarding the proposed change to its position on the substitution of paid leave and has decided to adopt the regulation as proposed. The language in both paragraphs of 29 U.S.C. 2612(d)(2), as well as its legislative history, makes clear that in all cases the substitution of paid leave pursuant to section 102(d)(2) of the Act is limited to the substitution of ''accrued'' paid leave. *See* 29 U.S.C. 2612(d)(2)(A) & (B); H.R. Rep. No. 103–8, Pt. 1, at 38 (1993); S. Rep. No. 103–3, at 27–28 (1993). Accrued paid leave is often subject to limits on its use. As explained in the NPRM, and for the reasons discussed below, the Department believes that the better interpretation of section 102(d)(2)(B) is that it was intended to emphasize the limits on the situations in which an employer must allow the substitution of paid sick or medical leave, but does not preclude requiring compliance with the normal procedural rules pursuant to which the leave was accrued for paid personal or vacation leave. For example, it clarifies that an employer is not obligated to allow an employee to substitute paid sick leave for unpaid FMLA leave in order to care for a child with a serious health condition if the employer's normal sick leave rules allow such leave only for the employee's own illness. *See* current § 825.207(c) (explaining that employers are not required to allow substitution of paid medical or sick leave to care for a family member if the employer does not normally allow the use of medical or sick leave for that purpose; employers are also not required to provide paid sick or medical leave for serious health conditions that are not normally covered by their medical or sick leave plans).

The Department has never read the substitution provision as literally as the employee commenters urge. Indeed, the current regulations recognize that employers may place restrictions on the use of ''family leave,'' a type of leave referenced in section 102(d)(2)(A) of the

[5] Comments submitted by the law firm of Guerrieri, Edmond, Clayman & Bartos on behalf of the International Association of Machinists & Aerospace Workers, the Transportation Communications International Union, the Transport Workers Union, and the United Transportation Union.

Act, without any explicit limitation on an employer's ability to restrict its substitution. *See* current § 825.207(b) (noting that employers may enforce restrictions in family leave plans that limit the use of such leave to particular family members). This restriction is supported by the legislative history, which states that ''[t]he term 'family leave' is used [in the section] to refer to paid leave provided by the employer covering the particular circumstances for which the employee is seeking leave * * *.'' H.R. Rep. No. 103–8, Pt. 1, at 38 (1993); *see also* S. Rep. No. 103–3, at 27 (1993). Under the current regulations, the Department has also always permitted substitution of paid time off (''PTO''), a type of leave not referenced in the statute. *See* current § 825.207(e).

The legislative history of the substitution provision indicates that Congress understood that employers commonly restrict the situations in which employees may take paid sick, medical, and family leave. As explained in the Senate Committee Report, ''nothing in the act requires an employer to provide paid sick leave or medical leave in any situation in which the employer does not normally provide such leave.'' S. Rep. No. 103–3, at 27–28 (1993); *see also* H.R. Rep. No. 103–8, Pt. 1, at 38 (1993). As the comments make clear, employers also often place procedural requirements (as opposed to limiting the reasons) on an employee's ability to take personal or vacation leave. The legislative history does not indicate that Congress intended to prohibit employers from applying their normal procedural requirements for the use of paid leave to requests to substitute any type of paid leave (including personal or vacation leave) for FMLA leave. As noted in the NPRM, this interpretation is consistent with the Department's recognition in opinion letters that both an employee's right to use paid leave and an employer's right to require substitution are subject to the terms pursuant to which the leave was accrued. *See* Wage and Hour Opinion Letter FMLA–81 (June 18, 1996) (''[T]he Department interprets these provisions to mean that the employee has both earned the [vacation] leave and is able to use that leave during the FMLA leave period.''); Wage and Hour Opinion Letter FMLA–61 (May 12, 1995) (''The Department interprets these provisions to mean that the employee has both earned the leave and is able to use that leave during the FMLA period * * *. [An] employer could not require [an] employee to substitute [vacation] leave that is not yet available to the employee to use under the terms of the employer's leave plan.''); Wage and Hour Opinion Letter FMLA–75 (Nov. 14, 1995) (''[W]here an employee may only use leave under the employer's plan during a specified period when the plant is shut down, the employee has not fully vested in the right to substitute that leave for purposes of FMLA.'').

Therefore, an employee's right to substitute accrued paid leave is limited by the terms and conditions pursuant to which the applicable leave is accrued, as long as those terms are non-discriminatory. An employer may limit substitution of paid sick, medical or family leave to those situations for which the employer would normally provide such paid leave (*e.g.*, such policies may restrict the use of paid leave only to the employee's own health condition or to specific family members). Employers must allow substitution of paid vacation, personal leave, or ''paid time off'' for any situation covered by the FMLA. In all cases, however, the normal procedural rules subject to which the leave was accrued apply—unless waived by the employer—regardless of the type of paid leave substituted. For example, if an employer's paid sick leave policy prohibits the use of sick leave in less than full day increments, employees would have no right to use less than a full day of paid sick leave regardless of whether the sick leave was being substituted for unpaid FMLA leave. Similarly, if an employer's paid personal leave policy requires two days' notice for the use of personal leave, an employee seeking to substitute paid personal leave for unpaid FMLA leave would need to provide two days' notice. Employers, of course, may choose to waive such procedural rules and allow an employee's request to substitute paid leave in these situations, but they are not required to do so. Additionally, employers may choose to waive procedural requirements even in the absence of an employee request to do so.

Where an employer's paid leave policy requires the use of such leave in an increment of time larger than the amount of FMLA leave requested by an employee, if the employee wishes to substitute paid leave for unpaid FMLA leave, the employee must take the larger increment of leave required under the paid leave policy unless the employer chooses to waive that requirement. The employer is not required to permit the employee to substitute paid leave for the smaller increment of unpaid FMLA leave. Thus, in the previously cited example by the National Association of Manufacturers, where the employee takes two hours of FMLA leave and requests to substitute paid leave which must normally be used in full-day increments, the employer must grant the two hours of unpaid FMLA leave, but may choose to deny the substitution of paid leave, or to waive its normal minimum increment and allow the employee to substitute paid leave for the two-hour FMLA absence. The employee has the right to take two hours of unpaid FMLA leave, but under the terms of the employer's paid leave policy does not have a right to substitute paid leave unless he or she chooses to take the full day of leave (thus fulfilling the requirements of the employer's paid leave policy). The FMLA guarantees only unpaid leave, not payment for that leave. Paid leave is offered by employers as a matter of employer policy and may be limited by an employer's nondiscriminatory policies.

Where an employee chooses to take a larger increment of leave in order to be able to substitute paid leave for unpaid FMLA leave, the entire amount of leave taken shall count against the employee's FMLA entitlement. This is consistent with the rule in cases where it is physically impossible for an employee to commence work late or leave work early, as set forth in final § 825.205(a)(2) above. In both situations, the entire amount of leave actually taken is protected under the FMLA and may be counted against the employee's FMLA entitlement.

In order to assist employees in understanding and complying with this interpretation, § 825.207(a) requires that employers notify employees of any additional requirements for the use of paid leave. In response to comments, the Department has clarified in the final rule that this information must be included with the rights and responsibilities notice required under § 825.300(c). At the employer's option, this information may be included in the text of the rights and responsibilities notice itself, or the employer may attach a copy of the paid leave policy to the notice, or provide a cross-reference to a leave policy in an employee handbook or other source available to employees, where paid leave policies are customarily set forth.

The Department proposed to delete current § 825.207(b) and (c), which provide different rules for substitution of different kinds of paid leave, and which have been superseded by proposed paragraph (a). Current § 825.207(f) and (g) were redesignated as proposed § 825.207(b) and (c). Proposed paragraph (b) confirmed that if paid leave is not substituted for unpaid FMLA leave, the employee remains entitled to all accrued paid leave, while

proposed paragraph (c) explained that paid leave used for purposes not covered by the FMLA could not count against the employee's FMLA leave entitlement. The final rule adopts these changes.

The Department proposed several revisions to current § 825.207(d), which addresses the interaction between paid disability benefits and unpaid FMLA leave. Specifically, the Department proposed to move language from current § 825.207(d)(1), providing that employers may apply more stringent requirements for receipt of disability payments, to new § 825.306(c). We proposed to retain the remaining language from current § 825.207(d)(1), making clear that substitution of paid leave does not apply where the employee is receiving paid disability leave. In addition, the Department proposed to add a new provision stating that although neither the employer nor the employee may require the substitution of paid leave in such circumstances, they may voluntarily agree, where state law permits, to supplement the disability plan benefits with paid leave. The Department also proposed to move paragraph (d)(2) of this section, which deals with the interaction of unpaid FMLA leave with a workers' compensation absence, to a new paragraph (e).

Commenters generally supported the proposed revisions to § 825.207(d), but some requested that the Department modify it further. Several commenters including TOC Management Services and Bracewell & Giuliani suggested that this section be broadened to apply to disability leave for any serious health condition, not just for childbirth. The Department notes that it has always read the provision as applying to paid disability leave due to any serious health condition. *See also Repa* v. *Roadway Express, Inc.*, 477 F.3d 938, 941 (7th Cir. 2007) (holding that the restriction in § 825.207(d)(1) on substitution of paid leave for FMLA leave covered under a disability leave plan is not limited to leave for childbirth). Accordingly, the final regulation removes the reference to childbirth and refers simply to disability leave to make clear that the provision applies to any disability leave that is FMLA-qualifying, whether the disability is caused by childbirth or another serious health condition.

The National Association of Manufacturers was generally supportive of the proposal permitting an employer to supplement disability benefits with paid leave, but asked for clarification on how to calculate use of FMLA leave in a case where the employee is receiving disability benefits equivalent to two-thirds of his or her pay, and the employer and employee agree to use paid leave to supplement those benefits so that the employee receives his or her full pay. This commenter asked whether the employee's FMLA leave usage is determined by the amount of leave taken, or the amount of paid leave used (*i.e.*, is 100 percent of the disability leave counted against the employee's FMLA entitlement, or only one third of the time). In response, the Department wishes to clarify that paid disability leave due to a FMLA-qualifying serious health condition is counted against an employee's FMLA leave entitlement, regardless of whether the employee is using accrued paid leave to supplement the disability benefits. Any supplemental payments are the result of a voluntary agreement between employer and employee. The amount of leave protected under the FMLA, and thus counted against the employee's FMLA leave entitlement, is determined by the amount of leave taken due to the serious health condition, not the amount of paid leave (if any) used to supplement the disability payments. For example, if an employee needs six weeks of leave for surgery and recovery due to a FMLA-qualifying serious health condition and the leave is covered by the employer's disability benefit plan, which replaces two-thirds of the employee's income during the leave, and assuming that the employee has not otherwise exhausted his or her FMLA entitlement, the full six weeks of leave would be FMLA-protected and would count against the employee's FMLA entitlement. Neither party can require substitution of accrued paid leave because the disability leave is not unpaid. The employer and the employee may, however, agree to use accrued paid leave to supplement the amount paid under the disability plan, if permitted by state law and by the plan itself.

The Department has also clarified the final regulatory text in § 825.207(d) to delete the term ''running concurrently.'' The Department has deleted this term in order to avoid causing confusion with the new language in § 825.207(a) specifying that the ''substitution'' of paid leave means paid leave running concurrently with FMLA leave. Employees on paid disability leave due to a FMLA-protected condition are not on unpaid FMLA leave and therefore the statutory provision for the substitution of paid leave does not apply.

The Department proposed to delete current § 825.207(e), which provides that employers cannot place any limitations on substitution of paid vacation or personal leave for FMLA purposes, for the reasons discussed above. The NPRM proposed to redesignate current paragraph (d)(2), which addresses serious health conditions that are caused by on-the-job illnesses or injuries covered under workers' compensation, as a new § 825.207(e).

Several commenters including TOC Management Services, Vercruysse Murray & Calzone, and Bracewell & Giuliani requested that the Department add language to proposed § 825.207(e) that would permit employers to supplement workers' compensation benefits with additional pay, by agreement and where allowed by state law, as the Department proposed to do with disability benefits. As these commenters explained, many states limit workers' compensation benefits to two-thirds of the employee's salary, and many employees would welcome the opportunity to supplement their income in this way. In these commenters' view, such an agreement would allow the employee to recoup the equivalent of 100 percent of his or her regular salary, and to be treated the same as someone who is receiving disability benefits. The Department agrees that it is appropriate to allow employers and employees to voluntarily agree to supplement workers' compensation benefits with accrued paid leave and has therefore added language to § 825.207(e) providing for such agreements, where state law permits. As with the disability benefit supplementation discussed above, any such payment must be by agreement and is neither required or affected by the FMLA. The Department wishes to emphasize to employers and employees that the utilization of paid leave in this context is by agreement and is not considered a ''substitution'' of paid leave. As discussed above in connection with the supplementation of disability benefits, the full amount of workers' compensation leave taken due to a FMLA-protected serious health condition would be counted against the employee's FMLA leave entitlement regardless of whether any paid leave is used to supplement such benefits.

For the reasons noted above, the Department has also eliminated the term ''running concurrently'' in § 825.207(e) and replaced it with a statement that workers' compensation leave may be counted against the employee's FMLA entitlement. As discussed previously, the concept of ''substitution'' of paid leave under the FMLA is not applicable in this context because the employee's leave is not unpaid. However, if the workers' compensation benefits cease for any reason and the employee is still

on leave, the substitution provision may become applicable at that time.

The NPRM proposed to delete current § 825.207(h), which states that where paid leave is substituted for unpaid FMLA leave and the employer's procedural requirements for taking paid leave are less stringent than the requirements of the FMLA, employees cannot be required to comply with the higher FMLA standards. As explained in the NPRM, this section conflicts with section 102(e) of the FMLA, 29 U.S.C. 2612(e), which requires employees to provide 30 days' notice for foreseeable leave whenever possible, and with section 103 of the FMLA, 29 U.S.C. 2613, which permits employers to require certification of the need for any FMLA leave for a serious health condition.

Finally, in proposed § 825.207(f) the Department proposed to revise current § 825.207(i) to allow the substitution of compensatory time accrued by public agency employees under the Fair Labor Standards Act (FLSA) for unpaid FMLA leave. Comments on this issue were mixed. The National Federation of Federal Employees commented that the proposal would benefit employees by providing them with another option in lieu of using unpaid leave. However, it questioned whether the Department has the statutory authority to permit such substitution, because compensatory time is not one of the forms of leave referenced in the statute's substitution of paid leave provision. *See* 29 U.S.C. 2612(d)(2). The AFL–CIO opposed the change for the same reason, citing the Department's initial position and *Christensen* v. *Harris County*, 529 U.S. 576 (2000), for its conclusion that compensatory time is a form of overtime pay rather than a form of accrued paid leave which may be substituted under the FMLA. It argued that the proposed change is not authorized by *Christensen*, and that the Department should retain the current rule. Public employers, on the other hand, supported the change as an example of improved consistency and equity. *See, e.g.*, Colorado Department of Personnel & Administration; City of Medford (OR); Alaska Department of Administration; City of American Canyon (CA); Pennsylvania Governor's Office of Administration.

The Department believes that the proposed revision is not prohibited by the Act and is consistent with the United States Supreme Court's decision in *Christensen*, in which the Court found that public employers always have the right to cash out a public sector employee's compensatory time or require the employee to use the time. In addition, the Department agrees with the commenters that substitution of compensatory time for otherwise unpaid FMLA leave would be beneficial both to the employee, by minimizing the financial impact of unpaid leave, and to the employer, by allowing the two benefits to run concurrently.

Section 825.208 (Reserved)

Current § 825.208 has been renumbered as proposed § 825.301, and is discussed below. The section was therefore reserved to avoid extensive renumbering of other sections.

Section 825.209 (Maintenance of Employee Benefits)

No changes were proposed to this section. The Department received no comments on this section and the final rule adopts this section as proposed.

Section 825.210 (Employee Payment of Group Health Benefit Premiums)

Section 825.210 addresses an employee's obligation to pay his or her share of group health plan premiums while on FMLA leave. The Department proposed to revise paragraph (f) of this section by deleting the word ''unpaid,'' because an individual who is simultaneously taking FMLA leave and receiving payments as a result of a workers' compensation injury is not on unpaid leave. *See* § 825.207(e). In addition, the Department proposed to make several technical corrections by changing the cross-references at the end of § 825.210(d) and (f) to reflect the renumbering of other sections dealing with employer notice and workers' compensation. The internal cross-reference at the end of § 825.210(f) was deleted as unnecessary.

The Department received no comments on this section and the final rule adopts the section as proposed.

Section 825.211 (Maintenance of Benefits Under Multi-Employer Health Plans)

No changes were proposed to this section. The Department received no comments on this section and the final rule adopts this section as proposed.

Section 825.212 (Employee Failure To Make Health Premium Payments)

Section 825.212 explains that an employer may terminate an employee's health insurance coverage while the employee is on FMLA leave if the employee fails to pay the employee's share of the premiums, the grace period has expired, and the employer provides sufficient and timely notice to the employee. The Department proposed to add language to paragraph (c) of this section to make clear that if an employer allows an employee's health insurance to lapse due to the employee's failure to pay his or her share of the premium as set forth in the regulations, the employer still has a duty to reinstate the employee's health insurance when the employee returns to work, and the employer may be liable for harm suffered by the employee as a result of the violation if it fails to do so. This proposal is a clarification and does not represent a change in the Department's enforcement position.

Few comments were received on this section. The American Association of University Women supported the clarification, which they termed ''common sense.'' The Chamber requested that language be added to clarify that employers will not be held liable for medical costs incurred during a lapse in coverage prior to the employee's return to work, while the National Retail Federation expressed concern regarding the employer's ability to recoup the cost of maintaining the employee's insurance coverage. The Department believes that the proposed addition is clear in stating that employers may only be held liable for their failure to restore an employee's health insurance upon the employee's return from FMLA leave. As explained in the NPRM, employers have a variety of alternatives to terminating an employee's health insurance when the employee fails to make premium payments, such as payroll deductions or other deductions after the employee returns to work, to the extent recovery is allowed under applicable laws, or as set forth in revised § 825.213 below. Accordingly, the final rule adopts § 825.212 as proposed.

Section 825.213 (Employer Recovery of Benefit Costs)

This section explains what process an employer may follow to recoup insurance premiums from an employee when the employee does not return from leave in certain circumstances. The Department proposed to move language from current § 825.310(h) to this section, in order to combine it with other issues involving repayment of health premiums. This language provides that where an employer requires medical certification that an employee's failure to return to work was due to the continuation, recurrence, or onset of a serious health condition, so that the employee does not have to repay the employer for health insurance premiums paid during FMLA leave, the employee must bear the cost of any such certification, and associated travel costs. The Department received no comments

on this section and adopts § 825.213 as proposed.

Section 825.214 (Employee Right To Reinstatement)

The Department proposed organizational changes and minor clarifications to § 825.214. We proposed to add a heading titled ''[g]eneral rule'' to emphasize that the section sets forth the general rule on reinstatement obligations under the FMLA, to move language from current § 825.214(b) on limitations on reinstatement to § 825.216(c), and to combine such language with language from § 825.216(d) on concurrent workers' compensation absences during FMLA leave. The Department did not receive any significant comments on these proposed changes and adopts the proposed changes without modification.

Section 825.215 (Equivalent Position)

The Department proposed only minor organizational changes to paragraphs (a), (b), (e), and (f) of this section, as outlined below. We did not propose any changes to paragraphs (c)(1) and (d). The only substantive proposed change was in paragraph (c)(2), to allow an employer to disqualify an employee from a bonus or other payment based on the achievement of a specified goal such as hours worked, products sold, or perfect attendance, where the employee has not met the goal due to FMLA leave, unless the bonus or payment is otherwise paid to employees on an equivalent non-FMLA leave status. The proposal included as an example an employee who used paid vacation leave for a non-FMLA purpose and received the payment and stated that in such a situation, an employee who substituted paid vacation leave for FMLA leave also must receive the payment.

The Department adopts the organizational changes to paragraphs (a), (b), (e), and (f) without modification. Proposed paragraph (c)(2) is adopted with a slight modification to the language for clarification purposes. An employer may disqualify an employee from a bonus or other payment based on the achievement of a specified goal, such as hours worked, products sold, or perfect attendance, where the employee has not met the goal due to FMLA leave unless otherwise paid to employees on an equivalent leave status for a reason that does not qualify as FMLA leave. Thus, the Department has changed the phrase ''unless otherwise paid to employees on an equivalent non-FMLA leave status'' to ''unless otherwise paid to employees on an equivalent leave status for a reason that does not qualify as FMLA leave.'' The final rule uses the same example as in the proposal. The final rule also modifies paragraph (c)(1) to include the same limitation on the employer's ability to deny a pay increase.

The Department proposed to title paragraph (a) ''[e]quivalent position'' and paragraph (b) ''[c]onditions to qualify.'' The Department did not receive any significant comments on these proposed minor changes. Paragraph (a) establishes that an equivalent position is one that is virtually identical to the employee's former position in terms of pay, benefits and working conditions, including privileges, perquisites and status. The regulation further states that the equivalent position must involve the same or substantially similar duties and responsibilities, which must entail substantially equivalent skill, effort, responsibility, and authority. The Equal Employment Advisory Council maintained that ''virtually identical'' as used in the regulation means the ''same,'' which renders the use of the term ''equivalent'' in the statute meaningless. It suggested that the Department replace the term ''virtually identical'' with ''equivalent,'' ''comparable,'' or ''substantially similar.'' The National Retail Federation suggested that the term ''substantially similar'' be used rather than ''virtually identical.'' According to this commenter, retail employers often have only one or two of any particular position in a store and finding an equivalent position can be difficult. The Department declines to change the term ''virtually identical'' in paragraph (a). The Department believes that the standards articulated in paragraph (a) give effect to the statute's requirement that an employer restore the employee to the same or equivalent position. The Department wishes to note that ''virtually identical'' speaks to pay, benefits and working conditions including privileges, perquisites and status while ''substantially similar'' speaks to an employee's duties and responsibilities. *See* current and proposed § 825.215(a).

Employers, employer organizations, and law firms representing employers generally supported the proposal in paragraph (c)(2) to allow employers to deny bonuses based on the achievement of a specified goal to employees who failed to meet the goal because of FMLA leave. Many commenters, including the Chamber, Southwest Airlines, College and University Professors Association, National Business Group on Health, and AT&T, stated that the current regulation is unfair and has caused many employers to curtail or eliminate incentive bonuses and awards programs, particularly those based on attendance. They welcomed the proposed change as remedying an inequitable situation and suggested that the change would likely result in increased employee morale. One commenter, Schreiber Foods, stated that this change would help employee morale because employees on FMLA leave would not be treated more favorably than other employees. Several commenters stated that they believed that the current regulation is unfair to employees who do not miss any days of work because it gives the same perfect attendance bonus to employees who have been absent for up to 12 weeks on FMLA leave. *See, e.g.*, Schreiber Foods, Principle Business Enterprises, Manufacturers Alliance, and National Business Group on Health. Similarly, the National Association of Manufacturers and AT&T emphasized that the current regulation unfairly allows employees on FMLA leave to receive more favorable treatment than employees who take non-FMLA leave and are disqualified from attendance and similar bonuses.

Several employer commenters requested further clarification on how the proposed regulation would apply. La-Z-Boy Midwest requested that the Department clarify that it can continue to award perfect attendance bonuses to employees who have used vacation leave. The law firm Vercruysse Murray & Calzone took issue with the regulatory requirement that employers may not disqualify employees on FMLA leave from bonuses or awards for achievement of a specified goal where such bonuses or awards are paid to employees on an equivalent non-FMLA leave status. According to this commenter, this exception ''virtually swallows the proposed rule'' because employees may choose to take FMLA leave concurrently with paid vacation or personal time-off leave, which most employers do not count against perfect attendance bonuses. *Id.* Further, according to this commenter, it is not clear under the proposed regulation what happens when an employee takes FMLA leave and a portion of the leave is covered by a paid leave program but the other portion is not covered by any paid leave program.

Employee organizations and unions generally opposed the proposed change. Working America/Working America Education Fund stated that the proposed change would discourage employees from taking FMLA leave or penalize employees if they do take FMLA leave, which it contended would violate the statute. The AFL–CIO and the National Partnership for Women &

Families both referenced Wage and Hour Opinion Letter FMLA–31 (Mar. 21, 1994), which stated that denying a perfect attendance award to an employee who took FMLA leave when the employee would otherwise qualify for the award is tantamount to interfering with the employee's exercise of FMLA rights. A Better Balance: The Work and Family Legal Center commented that the proposed change runs counter to the principle in § 825.220(c) which prohibits employers from using FMLA leave as a negative factor in employment actions and counting such leave against employees under ''no fault'' attendance policies. The National Partnership for Women & Families noted that the majority of employees take FMLA leave because they have to address their own or a family member's serious health condition, and that employees in such time of need should not be penalized with loss of income for taking leave that federal law entitles them to take. The Hastings College of Law's Center for WorkLife Law suggested that the term ''equivalent non-FMLA leave status'' in the proposed regulation is open to different interpretations, but that, whichever interpretation is followed, it will likely result in a small number of employees who would fall within this exception and thus only a small number of employees will not be disqualified from bonuses or awards for taking FMLA leave. This commenter suggested that a more equitable alternative compliant with the basic principles of the FMLA would be to pro-rate the bonuses or awards.

The Department believes that proposed paragraph (c)(2) provides a fairer result for all employees than the current regulation and therefore adopts the proposed change. Allowing an employer to disqualify employees taking FMLA leave from bonuses or awards for the achievement of a specified goal unless the bonus is awarded to employees on an equivalent leave status for a reason that does not qualify as FMLA leave puts employees who take FMLA leave on equal footing with employees who take leave for non-FMLA reasons. The Department does not view this as interference because employees taking FMLA leave are not being treated differently than employees taking equivalent non-FMLA leave. Accordingly, employees taking FMLA leave neither lose any benefit accrued prior to taking leave, nor accrue any additional benefit to which they would not otherwise be entitled. *See* 29 U.S.C. 2614(a)(2) and (3). The revised regulation does not contradict the principle in § 825.220(c) that prohibits employers from using the taking of FMLA leave as a negative factor in employment actions or counting FMLA leave under ''no fault'' attendance policies. Penalizing an employee for taking FMLA leave under a ''no fault'' attendance policy is distinct from disqualifying an employee from a bonus or award for attendance because the former faults an employee for taking leave itself whereas the latter denies a reward for achieving the job-related performance goal of perfect attendance. The Department notes that employers are free to prorate such bonuses or awards in a non-discriminatory manner; nothing in these regulations prohibits employers from doing so.

The Department clarifies that safety awards, like attendance awards, are predicated on the achievement of a specified job-related performance goal, and therefore safety awards are to be treated similarly as attendance awards under the revised regulation. Having concluded that both attendance and safety awards are more appropriately characterized as being based on the achievement of a work goal, the Department has concluded that its prior distinction between bonuses or awards based on performance and those premised on the absence of an occurrence is no longer useful. Bonuses that are not premised on the achievement of a goal, such as a holiday bonus awarded to all employees, may not be denied to employees because they took FMLA leave.

In response to the commenters' concerns, the Department reiterates that bonus or awards programs based on the achievement of a specified goal must be administered without discriminating against employees who exercise their FMLA leave rights. For this reason, the proposal specifically prohibits an employer from disqualifying an employee from a bonus or other payment if such bonus or payment is given to employees on an ''equivalent non-FMLA leave status.'' However, as the comments illustrate, the term ''equivalent non-FMLA leave status'' is ambiguous and therefore the Department has modified this language to use the term ''equivalent leave status for a reason that does not qualify as FMLA leave'' instead. Equivalent leave status refers, for example, to vacation leave, paid time-off, or sick leave. Leave for a reason that does not qualify as FMLA leave refers, for example, to vacation or sick leave that is not for an FMLA purpose (*i.e.*, the vacation or sick leave is not also FMLA leave). Thus, for example, if an employer policy does not disallow an attendance bonus to an employee who takes vacation leave, the employer cannot deny the bonus to an employee who takes vacation leave for an FMLA purpose (*i.e.*, substitutes paid vacation leave for FMLA leave). However, if an employer's policy is to disqualify all employees who take leave without pay from such bonuses or awards, the employer may deny the bonus to an employee who takes unpaid FMLA leave. If an employer does not count vacation leave against an attendance bonus but does count unpaid leave against the attendance bonus, the employer may deny the bonus to an employee who takes 12 weeks of FMLA leave, two weeks of which the employee substitutes paid vacation leave, but ten of which the employee takes as unpaid FMLA leave. The Department believes that this is the fairest result in keeping with the FMLA's requirements. Because this non-discrimination principle is equally applicable to pay increases, the final rule changes § 825.215(c)(1) to state that pay increases based upon seniority, length of service or performance need not be granted to employees on FMLA leave unless otherwise granted to employees on an equivalent leave status for a reason that does not qualify as FMLA leave.

The Department proposed no substantive changes to paragraphs (e) and (f) of this section. The NPRM proposed changing the heading of paragraph (e) to ''[o]ther issues related to equivalent terms and conditions of employment,'' and adding a heading titled ''[d]e minimis exception'' to paragraph (f). The NPRM also proposed moving the final sentence of current paragraph (f), which reminded employers that putting an employee in a job slated for lay-off when the employee's original position would not be eliminated would not meet the definition of an equivalent position, to § 825.216(a)(1) where related issues are discussed, for organization and clarification purposes. The Department did not receive any significant comments on these proposed minor changes and adopts the proposed changes to paragraphs (e) and (f) without modification.

Section 825.216 (Limitations on an Employee's Right to Reinstatement)

The Department proposed minor changes to § 825.216. The NPRM proposed incorporating into paragraph (a)(1) the last sentence from current § 825.215(f), which states that restoration to a job slated for lay-off would not meet the requirements of an equivalent position. This was proposed for organizational and clarification purposes, but no substantive change

was intended. Similarly, the Department proposed to re-order current paragraph (b) as paragraph (a)(3) for purposes of organizational structure and clarity. The Department proposed re-lettering current paragraph (c) as paragraph (b). The Department proposed a new paragraph (c) to address an employer's obligations when an employee cannot return to work after FMLA leave is exhausted because the serious health condition continues. This section combines language from current §§ 825.214(b) and 825.216(d), because both sections address limitations on reinstatement when an employee has exhausted his or her FMLA leave entitlement and is unable to perform the essential functions of his or her job. No substantive changes were intended. The Department proposed moving language from current § 825.312(g) and (h) that address the fraudulent use of FMLA leave and outside employment during FMLA leave, respectively, and therefore address limitations on reinstatement, to § 825.216 to proposed paragraphs (d) and (e), respectively. The Department did not receive any significant comments on these proposed changes and adopts the proposed changes without modification.

Sections 825.217–825.219 (Explanation of Key Employees and Their Rights)

The Department proposed minor changes to § 825.217(b) to update the reference to the definition of ''salary basis'' now contained in 29 CFR 541.602 (previously codified in 29 CFR 541.118) and to add ''computer employees'' to the list of employees who may qualify for exemption from the minimum wage and overtime requirements of the FLSA under those regulations if they meet certain duties and salary tests. The Department adopts the proposed changes to § 825.217 without modification.

The Department received very few comments on this proposed change. The National Retail Federation suggested that the Department use the term ''information technology employee'' rather than ''computer employee.'' The Department declines to change the term used because the FLSA regulations use the term ''computer employees'' and the Department specifically references the FLSA regulations in this section. The Department intends that the term ''computer employee'' as used in this section shall have the same meaning it has in the FLSA regulations.

Although no change was proposed to the definition of ''key employee,'' both the National Retail Federation and the Illinois Credit Union League urged the Department not to rely exclusively on the salary test to determine whether an employee is a ''key employee.'' However, the regulation simply reflects the statutory definition of a ''key employee'' as a salaried eligible employee who is among the highest paid 10 percent of the employees employed within 75 miles. *See* 29 U.S.C. 2614(b)(2). Therefore, the requested change would require a statutory amendment.

The Department did not propose any changes to §§ 825.218 or 825.219 and the final rule adopts them without modification.

Section 825.220 (Protection for Employees Who Request Leave or Otherwise Assert FMLA Rights)

The Department did not propose any changes to paragraph (a). The Department proposed to modify paragraph (b) in § 825.220 by adding new language setting forth the remedies for interfering with an employee's rights under the FMLA. The Department proposed to specifically reference retaliation in paragraph (c) in order to clarify that the prohibition against interference includes a prohibition against retaliation as well as a prohibition against discrimination. The Department also proposed to clarify in paragraph (c) that the statutory prohibition against interference applies to employees or prospective employees who have exercised or attempted to exercise FMLA rights. The Department proposed to clarify that the waiver provision in paragraph (d) that states ''[e]mployees cannot waive, nor may employers induce employees to waive, their rights under FMLA'' applies only to prospective FMLA rights; it does not prevent employees from settling past FMLA claims without Department or court approval. The Department also proposed to modify the language in paragraph (d) regarding light duty by deleting the final sentence of current paragraph (d) that states ''[i]n such a circumstance, the employee's right to restoration to the same or an equivalent position is available until 12 weeks have passed within the 12-month period, including all FMLA leave taken and the period of 'light duty.' ''

The Department adopts the proposed changes to paragraphs (b) and (c) without modifications. The Department adopts proposed paragraph (d) regarding waiver with a modification to the language to make clear that the waiver prohibition does not prevent the settlement or release of FMLA claims by employees based on past employer conduct without the approval of the Department or a court. The Department also adopts proposed paragraph (d) regarding light duty with modification to the language for clarification. The final rule clarifies that the waiver prohibition does not prevent an employee's voluntary and uncoerced acceptance of a light duty assignment while recovering from a serious health condition and the employee's acceptance of the light duty assignment does not constitute a waiver of the employee's prospective rights, including the right to be restored to the same position the employee held when the FMLA leave commenced or an equivalent position. Thus, an employee who voluntarily returns to a light duty position retains the right to job restoration to the same or equivalent position until the end of the 12-month period that the employer uses to calculate FMLA leave.

The Department did not receive a significant number of comments on the proposal in paragraph (b) to add new language setting forth the remedies for interfering with an employee's rights under the FMLA. The AFL–CIO supported the Department's proposal. The Department adopts the proposal without modification.

In regards to proposed § 825.220(c), the Department indicated in the proposed rule that it had received several comments requesting that the Department strengthen or clarify the regulatory provisions implementing the Act's prohibitions on interference and discrimination. 73 FR 7900 (Feb. 11, 2008). In accordance with such comments, the Department proposed in paragraph (c) to state explicitly that the Act's prohibition on interference in 29 U.S.C. 2615(a)(1) includes claims that an employer has discriminated or retaliated against an employee for having exercised his or her FMLA rights. Section 2615(a)(1) makes it unlawful for an employer to interfere with, restrain, or deny the exercise of or the attempt to exercise any right provided for under the Act. Although section 2615(a)(2) of the Act also may be read to bar retaliation (*see Bryant* v. *Dollar General Corp.*, 538 F.3d 394 (6th Cir. 2008)), the Department believes that section 2615(a)(1) provides a clearer statutory basis for § 825.220(c)'s prohibition of discrimination and retaliation. *See Colburn* v. *Parker Hannifin Corp.* 429 F.3d 325, 331 (1st Cir. 2005) (recognizing retaliation as a form of interference prohibited by § 2615(a)(1) of the Act and 29 CFR 825.220(c)). The Department did not receive any comments on this proposed clarification and adopts the proposal without modification.

The Department proposed to clarify that the waiver provision in paragraph

(d) that states ''[e]mployees cannot waive, nor may employers induce employees to waive, their rights under FMLA'' applies only to prospective FMLA rights. Courts have disagreed as to whether this language prohibits only the prospective waiver of FMLA rights, or also prohibits the retrospective settlement or release of FMLA claims based on past employer conduct, such as through a settlement or severance agreement, without Department or court approval. *Compare Taylor* v. *Progress Energy*, 493 F.3d 454 (4th Cir. 2007), *cert. denied*, — U.S. —, 2008 WL 2404107 (June 16, 2008) (interpreting Department's regulation to prevent employees from settling past claims for FMLA violations with employers without the approval of the Department or a court) *with Faris* v. *Williams WPC–I, Inc.*, 332 F.3d 316 (5th Cir. 2003) (plain reading of the Department's regulation prohibits prospective waiver of rights only and not retrospective settlement of claims). The Department disagrees with the Fourth Circuit's interpretation of the regulation. Therefore, in the interest of clarity, the Department proposed to make explicit in paragraph (d) of this section that employees and employers are permitted to agree voluntarily to the settlement of past claims without having first to obtain the permission or approval of the Department or a court.

Nearly all the employers, employer organizations, and law firms representing employers who commented on this issue supported the Department's proposed clarification. The Equal Employment Advisory Council stated that, while the current regulation ''clearly allows'' waivers in settling past claims, they supported the Department's proposal to make it more explicit. *See also* Association of Corporate Counsel's Employment and Labor Law Committee. Several commenters, including the Chamber, Domtar Paper Company, the National Federation of Independent Business, Hewitt Associates, and HR Policy Association, emphasized the economic and efficiency benefits to all parties of allowing settlements without Department or court approval. Several commenters such as the National Restaurant Association, the Manufacturers Alliance, and HR Policy Association, emphasized the importance of this regulation for severance agreements. The law firm Burr & Forman requested additional clarification of the term ''past'' in the proposal and specifically requested that severance agreements, including those where the employee may or may not know of any FMLA claims, be permitted without Department or court approval.

Employee organizations opposed the proposed clarification. Several commenters, including A Better Balance: The Work and Family Legal Center, Human Rights Campaign, Sargent Shriver National Center on Poverty Law, and Family Caregiver Alliance, emphasized the unequal position of employees and employers in settling cases or signing severance agreements, with employees' immediate financial needs forcing employees to forego their FMLA rights and thereby allowing employers to escape FMLA liability. According to these commenters, requiring Department or court approval is an important means of addressing this inequality. They argued that allowing settlements or severance agreements without Department or court approval would hamper enforcement of the FMLA. In addition, many of the commenters, including the AFL–CIO, the National Partnership for Women & Families, the ACLU, and Women Employed, reiterated many of the reasons relied on by the Fourth Circuit in *Taylor* to support their recommendation that the Department not allow unsupervised waivers of past FMLA claims. Specifically, they argued that the Department's proposal contradicts the Department's position in the 1995 regulation, based on statements in the 1995 preamble. These commenters urged the Department to reject the proposal because private settlement of prospective or retrospective claims undermines Congressional intent in imposing minimum labor standards. They maintained that the FMLA should be interpreted consistently with the FLSA, which prohibits employees from waiving their rights without Department or court approval, instead of with Title VII and other anti-discrimination laws which allow unsupervised settlements. They also contended that employers have an incentive to deny FMLA benefits if they can settle violation claims for less than the cost of complying with the statute.

The Department's interpretation of the waiver provision is well known from its participation in *Taylor*. The Department has never interpreted current § 825.220(d) as prohibiting the unsupervised settlement or release of claims based on past employer conduct and has never enforced it as such. This interpretation is consistent with the statute. Nothing in the text of the FMLA requires Department or court approval of a settlement or release of FMLA claims based on past employer conduct or prohibits waiver of FMLA claims based on past employer conduct. The statute is silent on this issue. The enforcement provision in FMLA does not reference the supervised settlement provision in section 16(c) of the FLSA, 29 U.S.C. 216(c). Instead, FMLA's enforcement provision directs the Secretary to receive, investigate, and attempt to resolve FMLA complaints in the same manner that the Secretary receives, investigates, and attempts to resolve complaints under sections 6 and 7 of the FLSA (29 U.S.C. 206 and 207). 29 U.S.C. 2617(b)(1). Consistent with this statutory authorization, the Secretary has established an administrative process pursuant to which the Wage and Hour Division investigates and attempts to resolve FMLA complaints in the same way that it handles FLSA complaints. The supervised settlement practice, however, is unique to the FLSA. *See Barrentine* v. *Arkansas Best Freight Sys.*, 450 U.S. 728, 740 (1981); *Brooklyn Sav. Bank* v. *O'Neil*, 324 U.S. 697, 706–07 (1945). The judicial prohibition against private settlements under the FLSA is based on policy considerations unique to the FLSA. The FLSA is a remedial statute setting the floor for minimum wage and overtime pay. It was intended to protect the most vulnerable workers, who lacked the bargaining power to negotiate a fair wage or reasonable work hours with their employers. The judicially-imposed restrictions on private settlements under the FLSA have not been read into other employment statutes that reference the FLSA and should not be read into the FMLA. Even the Age Discrimination in Employment Act (''ADEA''), which explicitly references section 16(c) of the FLSA (29 U.S.C. 216(c)), *see* 29 U.S.C. 626(b), has not been interpreted as requiring supervised settlements. Like the ADEA, the FMLA is not primarily focused on pay, and protects all segments of the workforce, from low wage workers to highly paid professionals.

Because of the perceived ambiguity in the 1995 regulation, the Department now clarifies that it intends, as it has always intended, for the waiver prohibition to apply only to prospective FMLA rights. The Department notes that it intended under the proposal to allow employees to enter severance agreements releasing FMLA claims based on past employer conduct, in addition to allowing settlement of FMLA claims in situations where the employee has filed a claim against the employer. The Department has never interpreted the waiver provision as applying to the settlement of claims or

to the release of FMLA claims in severance agreements based on past employer conduct, whether known or unknown to the employee at the time of entering the severance agreement. In the interest of further clarity, the Department has modified the language in the final rule. By changing the language from settling past FMLA claims to settling or releasing FMLA claims based on past conduct by the employer, the Department intends to make clear that an employee may waive his or her FMLA claims based on past conduct by the employer, whether such claims are filed or not filed, or known or unknown to the employee as of the date of signing the settlement or the severance agreement. Thus, an employee may sign a severance agreement with his or her employer releasing the employer from all FMLA claims based on past conduct by the employer. An employee may also settle an FMLA claim against his or her employer without Department or court approval. The Department believes this promotes the efficient resolution of FMLA claims and recognizes the common practice of including a release of a broad array of employment claims in severance agreements.

The Department also proposed to modify the language in § 825.220(d) regarding light duty. The current regulation states that the waiver prohibition does not prevent an employee's voluntary and uncoerced acceptance of a light duty assignment while recovering from a serious health condition. The regulation further states that ''[i]n such a circumstance, the employee's right to restoration to the same or an equivalent position is available until 12 weeks have passed within the 12-month period, including all FMLA leave taken and the period of 'light duty.' '' The Department is aware that at least two courts have interpreted this language to mean that an employee uses up his or her twelve week FMLA leave entitlement while performing work in a light duty assignment. *See Roberts* v. *Owens-Illinois, Inc.*, 2004 WL 1087355 (S.D. Ind. 2004); *Artis* v. *Palos Community Hospital*, 2004 WL 2125414 (N.D. Ill. 2004). These holdings differ from the Department's interpretation of the current regulation, as further expressed in a 1995 opinion letter issued by the Department that states that an employee who voluntarily accepts a light duty position:

> Retains rights under FMLA to job restoration to the same or an equivalent position held prior to the start of the leave for a cumulative period of up to 12 workweeks. This ''cumulative period'' would be measured by the time designated as FMLA leave for the workers' compensation leave of absence and the time employed in a light duty assignment. The period of time employed in a light duty assignment cannot count, however, against the 12 weeks of FMLA leave.

Wage and Hour Opinion Letter FMLA–55 (Mar. 10, 1995).

Given the apparent confusion over this provision, the Department proposed to delete this sentence. In support of the proposal, the Department stated that the current regulation does not serve the statute's purpose to provide job protection when FMLA leave is taken. 73 FR 7901 (Feb. 11, 2008). Deleting this language would ''ensure that employees retain their right to reinstatement for a full 12 weeks of leave instead of having that right diminished by time spent in a light duty position.'' *Id.* The Department stated that it wished to make clear that ''when an employee is performing a light duty assignment, that employee's rights to FMLA leave and to job restoration are not affected by such light duty assignment.'' *Id.* The Department invited comments on whether the deletion of this language would negatively impact an employee's ability to return to his or her original position from a voluntary light duty position. *Id.* The Department adopts the proposal with clarifying modifications.

It is clear from the comments that the proposal was interpreted in different ways by different groups. Employee organizations and unions, as well as several employer organizations, interpreted the proposal to protect an employee's right to reinstatement while in a light duty position, regardless of the amount of time the employee works in the light duty position. In other words, these commenters read the proposal as preserving the employee's right to reinstatement to the employee's original position or an equivalent position while in a voluntary light duty position, regardless of how long that period may be. Based on this interpretation, employee organizations and unions were supportive. *See* AARP, National Partnership for Women & Families, the National Federation of Federal Employees, MomsRising.org. The AFL–CIO cited the Department's statement in the preamble to the proposed rule—''when an employee is performing a light duty assignment, that employee's rights to FMLA leave and to job restoration are not affected by such light duty assignment''—and concluded that the proposed change would not negatively impact an employee's ability to return to his or her original position. *See also* A Better Balance: The Work and Family Legal Center. The AFL–CIO recommended, however, that the Department include the language cited above in the text of the regulation.

Several employer commenters interpreted the proposal similarly and expressed disapproval. The Southern Company, American Health Care Association/National Center for Assisted Living, and Hewitt Associates, stated that the proposed modification of this regulation would discourage employers from offering light duty positions because the reinstatement right is not exhausted during a period of light duty, which creates an open-ended right to reinstatement. These commenters argued that holding the position open for an indeterminate amount of time would be too burdensome to employers and therefore employers would be less likely to offer light duty positions. Under the current version of the regulation, the employer has certainty that the employee is entitled to the original (or an equivalent) position for only 12 weeks. Under the proposal as they interpreted it, the employer will no longer have this certainty.

In contrast, several employers and employer organizations and law firms interpreted the Department's proposal as not protecting an employee's right to reinstatement while in a light duty position. The National Coalition to Protect Family Leave and the Society for Human Resource Management commented that, in most instances, employers would like to return employees to their original position as soon as the employee is able to do so and therefore the Department's proposed change should have no impact on an employee's reinstatement rights. They noted, however, that this may not be the case where an employee has been unable to perform his or her original position for an extended period of time and the employer has filled that original position with another employee. These comments appear to interpret the proposal as providing no right to reinstatement to the employee's original position from a light duty position. The National Retail Federation interpreted the proposal in the same manner and suggested that the proposal will discourage employees from accepting light duty positions when returning from FMLA leave because the employee is no longer on FMLA leave when he or she returns to a light duty position, and therefore is no longer entitled to a right to reinstatement to the same or equivalent position.

Other commenters simply expressed uncertainty as to the correct interpretation of the proposal and the Department's intention. *See* Spencer Fane Britt & Browne, Tennessee Valley

Chapter of the Society for Human Resource Management, and the National Association of School Boards. The law firm Spencer Fane Britt & Browne and Tennessee Valley Chapter of the Society for Human Resource Management questioned how the Department would interpret the employee's reinstatement rights under the proposal: Would an employee have reinstatement rights the entire time the employee works in a light duty position or would an employee have no reinstatement rights? These commenters urged the Department to adopt the interpretation that an employee who accepts a light duty position has no reinstatement rights. The law firm Spencer Fane Britt & Browne argued that an employee waives his or her right to reinstatement each day that the employee works in the light duty position. According to this commenter, interpreting the proposed regulation otherwise would permit an employee to be guaranteed reinstatement for an indefinite period of time, including a longer period than the FMLA otherwise allows.

The Department intended its proposal to protect an employee's right to restoration to the position the employee held when the FMLA leave commenced or to an equivalent position while in a light duty assignment. An employee who takes FMLA leave has a right to be restored to the same position the employee held when the FMLA leave commenced or an equivalent position. 29 U.S.C. 2614(a)(1). An employee may not prospectively waive this right. Therefore, when an employee voluntarily accepts a light duty assignment, the employee does not waive his or her restoration right while working in the light duty assignment. Likewise, the time the employee works in the light duty assignment does not count as FMLA leave. Thus, the employee's right to restoration is essentially held in abeyance during the period of time an employee performs a light duty assignment pursuant to a voluntary agreement between the employee and the employer. At the conclusion of the voluntary light duty assignment, the employee has the right to be restored to the position the employee held at the time the employee's FMLA leave commenced or to an equivalent position, provided that the employee is able to perform the essential functions of such a position. If the voluntary light duty assignment ends before the employee is able to perform the essential functions of such a position, the employee may use the remainder of his or her FMLA leave entitlement and would be eligible to return to the same position the employee held when the FMLA leave first commenced or to an equivalent position, provided that the employee is able to perform the essential functions of such a position at the end of his or her FMLA leave. For example, if an employee takes four weeks of FMLA leave and voluntarily accepts a light duty assignment that the employer has offered for ten weeks, at the conclusion of that ten week period, the employee either returns to the same position the employee held when the FMLA leave commenced or to an equivalent position, or, if the employee is unable to return to that position the employee may use the remainder of his or her FMLA leave. At the conclusion of the employee's FMLA leave, the employee would have a right to be restored to the same position the employee held when the original FMLA leave commenced or to an equivalent position as long as the employee is able to perform the essential functions of the position. The Department notes that whenever an employee performs his or her own job for less than a full schedule, the employee is using intermittent or reduced schedule leave and is not performing light duty for purposes of FMLA.

However, when an employee has already used his or her full 12 weeks of FMLA leave entitlement in a 12-month period and then voluntarily accepts a light duty position because the employee is unable to resume working in his or her original position, that employee no longer has a right under the FMLA to restoration. If an employee exhausts his or her FMLA leave entitlement and is still unable to perform the essential functions of his or her original or equivalent position, the employee no longer has an FMLA right to restoration.

The Department recognizes that in the case of open-ended light duty assignments, this could potentially lead to an employee's right to restoration to his or her original position extending for an indefinite period. In order to address the administrative difficulties such an open-ended restoration right would present, the final rule provides that an employee's right to restoration while in a light duty assignment expires at the end of the 12-month leave year period that the employer uses to calculate FMLA leave. The Department believes that this is a reasonable limitation that is consistent with the statute's reference to a 12-month period for leave purposes. For example, where an employer uses a calendar year to calculate FMLA leave, and an employee takes four weeks of FMLA leave and returns in September to a light duty assignment that is not limited in duration and which neither the employer nor the employee chooses to end, the employee has a right to restoration that extends through the end of that calendar year, but would not extend beyond that calendar leave year.

While this new provision in the final rule could potentially create a disincentive for employers to offer light duty positions because it provides a more open-ended right to reinstatement than the current regulation allows, nothing prevents employers from offering light duty positions for a finite period of time. Because the employer provides the light duty position on a voluntary basis, just as the employee accepts it on a voluntary basis, an employer may impose time limits as part of the offer of a light duty assignment. In addition, because the light duty assignment is voluntary, the employer or the employee may end the assignment at any time. If the employer offers the light duty assignment for a limited period of time or decides to end the assignment at any point, and the employee is not able to return to the same or equivalent position at the conclusion of that period of time, the employee may use the remainder of his or her FMLA leave, after which the employee has a right to restoration to the same position the employee held when the FMLA leave first commenced or an equivalent position. If, however, the employee is unable to resume work after exhausting his or her 12 weeks of leave in a 12-month period, the employer's FMLA obligation to restore the employee to the original position ceases. At that point, the employer may, for example, permanently assign the employee to a different position or terminate the employee.

Several of the employer commenters reiterated the request made in response to the Request for Information, 72 FR 35605 (June 28, 2007), that employers be allowed to require employees to accept a light duty position that is consistent with the employee's medical restrictions in lieu of the employee taking FMLA leave. *See* American Foundry Society, Schreiber Foods, the Chamber, College and University Professional Association for Human Resources, Berens & Tate, and Spencer Fane Britt & Browne. As explained in the preamble to the proposed rule, 73 FR 7900 (Feb. 11, 2008), the Department does not believe that such a requirement comports with the statutory right to take 12 weeks of FMLA leave for a serious health condition. The FMLA guarantees employees 12 weeks of unpaid leave for the reasons enumerated in the statute; it does not permit employers to require

employees to work a light duty position rather than taking FMLA leave.

Other employer commenters requested that the time an employee works in a light duty assignment count against the employee's 12-week FMLA leave entitlement. *See* National Business Group on Health and Equal Employment Advisory Council. The National Business Group on Health pointed to the hardship that an employee working a light duty position imposes both on the employer and on other employees who are forced to take on the responsibilities of the employee who is not performing the functions of his or her original position as justification for counting the light duty time as FMLA leave. The Equal Employment Advisory Council distinguished a light duty position that the employer creates for a particular employee recovering from a serious health condition from a light duty position that already exists and that the employer allows the employee to fill. The Equal Employment Advisory Council recommended that, where the employer created a light duty position for a particular employee, the time spent working in this light duty position should count against the employee's FMLA entitlement because the employee is functionally still on leave; time spent in a light duty position that already exists should not count against the employee's FMLA entitlement. Employee commenters, including Community Legal Services, Inc./AIDS Law Project of Pennsylvania, the Coalition of Labor Union Women, and Catherine Scott, emphasized the importance of not counting the time an employee works in a light duty position against an employee's 12-week leave entitlement.

The Department continues to reject the employers' suggestion on this issue. The time an employee works in a voluntary light duty position does not count against the employee's FMLA entitlement. The Department acknowledges that allowing an employee to work a light duty position may cause certain burdens to the employer. However, the FMLA does not require an employer to offer a light duty position; the employer does so voluntarily. The distinction between a light duty position created for a particular employee and a light duty position that already exists is irrelevant for FMLA purposes because, under the FMLA, the employer offers a light duty position on a voluntary basis.

Subpart C—Employee and Employer Rights and Obligations Under the Act

Section 825.300 (Employer Notice Requirements)

The NPRM proposed to consolidate the employer notice requirements, which appear in current §§ 825.300, 825.301, 825.110 and 825.208, into one comprehensive section addressing an employer's notice obligations. Current § 825.300 addresses the requirement that employers post a notice on employee rights and responsibilities under the law and, where a significant portion of the employer's workers are not literate in English, provide the notice in a language in which the employees are literate. This section also addresses the civil money penalty provision in the law for employers who willfully violate the posting requirement. Current § 825.301 requires an employer to include information about the FMLA in any written guidance such as an employee handbook or other document that the employer provides to its employees. In the case of an employee's request for FMLA leave, current § 825.301 also requires the employer to provide the employee with a written notice that details the specific expectations and obligations of the employee and the consequences of a failure to meet these obligations. Additional notice requirements, such as notifying employees of their FMLA eligibility and designation of their FMLA leave, appear elsewhere in current §§ 825.110 and 825.208.

Proposed § 825.300 consolidated these employer notice requirements under the major topics of ''general,'' ''eligibility,'' and ''designation'' notices, and ''consequences of failing to provide notice.'' The final rule adopts the consolidated format, but makes additional changes to further clarify employer obligations to provide notice to employees as outlined below. The Department continues to believe that a key component of making the FMLA a success is effective communication between employees and employers. Enhanced communication increases employee awareness of rights and responsibilities and facilitates the smooth administration of the FMLA. The Department anticipates that this consolidated format and the notice requirements contained herein will further this goal.

Several commenters strongly supported consolidating the employer notice requirements into one general area of the regulations. The Equal Employment Advisory Council (''EEAC'') noted that, ''[b]y identifying specifically the 'general', 'eligibility' and 'designation' notice requirements, the proposal clarifies for both employers and employees their respective obligations under the FMLA.'' The City of Portland (OR) agreed that ''[p]lacing all of the notice requirements in consecutive sections is an improvement'' but felt employee notice requirements should precede the employer notice sections. *See also* WorldatWork; the Chamber. While not agreeing with all the proposed rule changes, Jackson Lewis agreed with ''the 'theme' of shared responsibility that permeates the Proposed Regulations. By increasing the emphasis on employers' 'general notice' obligations *and* employees' obligations to give adequate and timely notice * * * the DOL's proposal prepares the groundwork for a more reasonable exercise of FMLA rights and obligations.''

General Notice Requirements

Proposed § 825.300(a) addresses the general notice requirements that appear in current §§ 825.300 and 825.301(a). Proposed § 825.300(a)(1) retained the requirement from the current rule that every covered employer post and keep posted in conspicuous places on its premises where notices to employees and applicants are usually posted a notice providing information about the FMLA. The Department proposed to allow electronic posting of the general notice so long as it otherwise met all of the requirements of the section, and sought comment on whether the electronic posting alternative would be workable and would ensure that employees and applicants obtain the required FMLA information. Additionally, the Department proposed in paragraph (a)(1) to increase from $100 to $110 the civil money penalty assessment for an employer's willful failure to post the required notice, consistent with the requirements of the Debt Collection Improvement Act of 1996 amendment of the Federal Civil Penalties Inflation Adjustment Act of 1990. For purposes of clarity, the Department proposed to separate out into paragraph (a)(2) the requirement in the current rule that a covered employer post the general notice even if no employees are eligible for FMLA leave. Proposed § 825.300(a)(3) required covered employers with eligible employees to distribute the general notice by including it in an employee handbook or by distributing a copy to each employee at least once a year, either in paper or electronic form. Proposed § 825.300(a)(4) permitted employers to meet their obligation to both post and distribute the general

notice by duplicating the text of the prototype notice contained in Appendix C. The proposal required that, when the employer employs a significant portion of employees who are not literate in English, the employer provide the poster and general notice to employees in a language in which they are literate, and it also retained language in the current rule requiring notice to sensory-impaired individuals as required under applicable federal and state law. Additionally, the Department proposed revisions to its prototype general notice to provide employees more useful information on their FMLA rights and responsibilities.

The final rule adopts § 825.300(a) with the following modifications. Language similar to current § 825.301(a)(1) has been added to § 825.300(a)(3) of the final rule to clarify that if employers have employee handbooks or other written materials concerning benefits and leave, such written materials must include the general notice information. Where such materials do not exist, the final rule requires an employer to provide the general notice to new employees upon being hired, rather than requiring that it be distributed to all employees annually. Additionally, the final rule in § 825.300(a)(4) clarifies that employers may meet the general notice requirements by either duplicating the prototype general notice in Appendix C or by using another format so long as the information provided, at a minimum, includes all of the information contained in the prototype general notice.

Several commenters were concerned that electronic posting of the general notice as permitted in proposed § 825.300(a)(1) would be insufficient to alert individuals to their rights and responsibilities under the law. The National Partnership for Women & Families commented that, while electronic posting could be beneficial to some employees and applicants who might work at locations other than the employer's worksite or who might be applying for a position online, it ''should be required as an addition, rather than a substitution, to employers actually posting the FMLA poster.'' *See also* American Association of University Women; AFL–CIO; Communications Workers of America. Other commenters, however, specifically approved of the Department's proposal to allow electronic posting of the general notice. Verizon commented that ''[p]ermitting electronic forms of communication recognizes the reality of the times, encourages efficiency and provides employees with access to information at the time of their choice.'' *See also* AT&T; Willcox and Savage; National School Boards Association; College and University Professional Association for Human Resources; National Association of Manufacturers.

Some employers also questioned whether the statute allowed the Department to require a notice to applicants for employment in proposed § 825.300(a)(1). Spencer Fane Britt & Browne stated ''we find no basis in the Act for requiring that employers make applicants aware of the FMLA and the rights they may have a year down the road'' if the applicant is hired and remains employed. *See also* Society for Human Resource Management; National Coalition to Protect Family Leave; Willcox and Savage. Other employers felt electronic notification of applicants would be confusing and burdensome and suggested the Department eliminate or scale back the requirement. The Northern California Human Resources Association specifically questioned the definition of ''applicant'' and noted that ''the number of unqualified applicants for an open position is significantly high.'' The commenter asked when the ''disclosure'' should occur and also questioned ''what FMLA regulations would need to be provided?'' *See also* Judi Moran; Hewitt Associates; Southern Company.

The final rule adopts § 825.300(a)(1) as proposed, including the provision that the posting requirement may be satisfied through an electronic posting of the general notice as long as it otherwise meets the requirements of this section. The Department believes that electronic posting of the notice can facilitate increased employee awareness while limiting cost burdens on employers. For the posting requirement to be met, however, all employees and applicants for employment must have access to the information. Thus, for example, if an employer has some employees who do not have employer-provided computer access or who are not otherwise able to access the information electronically, the employer must post on its premises where it can be readily seen a paper copy of the information contained in the general notice, such as a copy of the prototype general notice in Appendix C. Additionally, electronic posting does not excuse the employer from the statutory requirement to post in a location viewable by applicants for employment. 29 U.S.C. 2619(a). Therefore, if the employer posts such information on an intranet that is not accessible to applicants, additional posting would be necessary in a conspicuous place where notices for applicants for employment are customarily posted.

Numerous commenters responded to the proposed annual notification requirement in § 825.300(a)(3). Employee groups suggested that all employers, including those who have handbooks, should be required to distribute the general notice annually to all employees. *See* National Partnership for Women & Families; American Association of University Women; A Better Balance: The Work and Family Legal Center. Several employers opposed the annual notification requirement, arguing that it goes beyond the statutory requirement to post a general notice. *See* City of Colorado Springs (CO); City of Independence (MO); Catholic Charities, Diocese of Metuchen; Fisher & Phillips; National Coalition to Protect Family Leave; National Franchise Association. Spencer Fane Britt & Browne stated:

> We are not even convinced that any required distribution of the General Notice should be required if it is posted in conspicuous places for employees to read. The Act's only notice requirement is a poster. The DOL drafted the poster as required notice to employees of his/her FMLA rights and obligations. In the *Ragsdale* decision, even the Supreme Court questioned, although did not rule on, whether the DOL's other notice requirements for employers went beyond the Act.

The Association of Corporate Counsel's Employment and Labor Law Committee commented that because employers must post the policy in a conspicuous place, ''it seems unnecessary to require an annual distribution of the policy, especially given the administrative costs this will impose on the employer.'' The American Health Care Association also objected to the annual notice requirement, stating that employers that do not have handbooks typically will be smaller employers with limited budgets and no human resources department. Fisher & Phillips commented that only an employee with a current need for leave will read the available information and thus the annual distribution requirement ''simply creates an additional administrative burden that will not improve the quality of employee's knowledge of their rights.'' The Metropolitan Transportation Authority (NY) suggested that ''it should be sufficient for the employer to distribute such notices [once upon hiring the employee] and to post the notice in conspicuous locations throughout the workplace.'' Vercruysse Murray & Calzone objected to the handbook or annual notice requirement beyond the posting requirement, calling it a ''level of overkill [that] is virtually

unprecedented and can result in significant expense to employers who must reprint handbooks or handbook inserts or distribute hard copies of the notice to large numbers of employees in workplaces where not all employees are connected electronically.'' Some employers specifically addressed electronic distribution of the annual general notice to all employees under proposed § 825.300(a)(3). AT&T commented that ''expansion of the posting requirements to include annual [notification] would be workable if done electronically.'' The Southern Company requested that this section be clarified to provide that the annual notice requirement can be satisfied by including the notice in an employee handbook that is maintained electronically as long as all employees have access to the electronic handbook, stating that this would be a cost-effective solution that still meets the Department's goals. Harrill & Sutter, on the other hand, objected to any distribution that was limited to an electronic posting, stating that employees forget about such postings.

In light of the numerous comments regarding the administrative burden and expense of the proposed annual distribution requirement, particularly for employers with large numbers of employees who do not have access to a company-provided computer, the final rule modifies this provision. The final rule requires employers that do not have employee handbooks or other written materials concerning benefits and leave that are distributed to all employees to provide the general notice to each employee when the employee is hired. Under the current rule, employers that do not have a handbook or similar written material are only required to advise employees of their FMLA rights and responsibilities after they request FMLA leave. The additional notice provided in the final rule, given to employees when they are hired, will alert employees to their FMLA rights and responsibilities before they are facing a significant family event like the birth or adoption of a child or a serious medical emergency affecting the employee or a family member. Thus, the new general notice requirement will provide important information to employees at a time when they are not in a crisis situation and when it is likely that they are receiving other important information that they will retain for future reference regarding their new employment. A covered employer with no eligible employees would not be required to distribute the general notice, although the employer would have to comply with this requirement even if it only has one eligible employee. The Department adopts the provision permitting distribution of the handbook or general notice to new employees through electronic means for the same reasons that it adopts the proposal to permit electronic posting of the general notice discussed above. With regard to the use of an electronic employee handbook, the Department believes that having the FMLA notice incorporated into an employee handbook that is maintained electronically can satisfy this general notice requirement, so long as all of the requirements of this section are met, *i.e.*, that the information is accessible to all employees of the employer, that it is made available to employees not literate in English (if required), and that the information provided includes, at a minimum, all of the information contained in the prototype general notice.

A few commenters addressed the provision in proposed § 825.300(a)(4) permitting employers to meet the general notice requirements by duplicating the text of the prototype general notice contained in Appendix C. Vercruysse Murray & Calzone commented that ''some employers will simply use the FMLA notice/poster as their FMLA policy and do away with more specific policies that are currently in place'' leaving out important information, such as the employer's 12-month leave period, because it is not contained in the notice/poster. TOC Management Services also objected to the use of the prototype notice in employee handbooks, stating that ''handbook policies are more informative than a generic general notice'' and that to require employers to use the general notice in their handbook will inevitably lead to confusion. The final rule in § 825.300(a)(4) clarifies that employers may use a copy of the prototype general notice in Appendix C or may use employer-drafted FMLA policy information (including information specific to the employer's policies) for inclusion in an employee handbook or for distribution to new employees, so long as it contains, at a minimum, all of the information included in the prototype general notice and is consistent with that notice.

A few commenters noted that the Department's proposed general notice did not include information advising employees of the type of information the employee will need to provide to the employer when requesting leave to meet the employee notice standards in §§ 825.302 and 825.303. One commenter, Robert Schwartz, who objected to the employee notice obligations, also objected that the draft general notice ''simply warns employees that they must furnish 'sufficient' information for the employer to determine if the leave may qualify for FMLA protection and the expected start date and duration of the leave'' without alerting employees to additional information they will need to provide. *See also* Society for Human Resource Management; National Coalition to Protect Family Leave. In the final rule, the Department has updated the prototype general notice to indicate more clearly the type of information an employee may need to provide to his or her employer for the notice to be ''sufficient.'' *See* §§ 825.302 and 825.303.

Several commenters sought clarification of the requirement in proposed § 825.300(a)(4) that employers with a ''significant portion'' of employees not literate in English provide the poster and general notice in a language in which they are literate. Jackson Lewis questioned whether the ''employment of more than a few non-English literate employees'' would trigger the obligation or if ''a workforce of 25% non-English literate employees'' would trigger it. Catholic Charities, Diocese of Metuchen commented ''[t]he regulation should define what constitutes a significant portion. * * * [and] provide clarification of the measures, if any, that employers are required to take so as to ensure that workers are informed of the contents of the poster and general notice when only a small number of employe[es] are not literate in English.'' The Equal Employment Advisory Council recommended the Department clarify that the ''alternative notice is required only where the workforce in a particular location is literate in a language other than English'' to more readily accommodate those employers with multiple locations. Finally, the Communications Workers of America stated that ''the agency should more closely monitor all of the FMLA notices that employers are providing to employees, including ensuring that this information is provided in many languages other than English in appropriate work locations.'' The final rule in § 825.300(a)(4) adopts the proposal on this topic without change. Nonetheless, the Department notes that employers with multiple locations may post notices in different languages at different locations, if the posted notices are provided in languages in which the employees are literate at each location. Additionally, the final rule applies the same ''significant portion of workers not

literate in English'' standard for translation of the notification of eligibility and rights and responsibilities in § 825.300(b)(2) and (c)(1).

Finally, two commenters addressed the proposed increase (from $100 to $110) in the Civil Money Penalty (CMP) required under § 825.300(a)(1). One commenter, Tracy Hutchinson, suggested that penalties for employers who ''ignore the law'' should be much harsher including jail time. The Coalition of Labor Union Women commented that the proposed increase was ''inadequate to discourage employers from ignoring their clear statutory obligation to provide sufficient FMLA notice to their workers.''

Section 109(b) of the FMLA (29 U.S.C. 2619(b)) provides that any employer who willfully violates the Act's requirement to post the FMLA notice as required by section 109(a) may be assessed a CMP not to exceed $100 for each separate offense. This CMP amount was set by the Congress as part of the original FMLA of 1993. The Department proposed to increase the CMP to $110 to meet requirements of the Debt Collection Improvement Act of 1996, which amended the Federal Civil Penalties Inflation Adjustment Act of 1990 to require that federal agencies adjust certain CMPs for inflation. As amended, the law requires each agency to initially adjust for inflation all covered CMPs, and to periodically make further inflationary adjustments thereafter. The statute applies a cap, for the initial adjustment only, which limits the amount of the first penalty increase to 10 percent of the current penalty amount. Therefore, although the amount of inflation since June of 1993 has exceeded 10 percent, the Department's proposal to amend § 825.300(a) to provide for assessment of a penalty of $110 for willful violations of the posting requirement is limited by these statutory constraints and is adopted as proposed.

Eligibility Notice

The Department proposed to consolidate the existing eligibility notice requirements in current §§ 825.110 and 825.301 into one section in § 825.300(b) and to strengthen and clarify them. Consistent with the requirement in current § 825.110(d), proposed § 825.300(b)(1) required an employer to advise an employee of his or her eligibility status when the employee requests leave under the FMLA. The Department proposed in § 825.300(b)(1) to extend the time frame for an employer to respond to an employee's request for FMLA leave from two business days to five business days of the employee's request for leave or of the employer acquiring knowledge that the leave may be for a FMLA-qualifying reason. The Department sought comment on whether this increased time frame would both impart sufficient information to employees in a timely manner and be workable for employers. Proposed § 825.300(b)(2) specified what information an employer must convey to an employee as to eligibility status, including whether the employee still has FMLA leave available in the current 12-month FMLA leave period. It also required, if the employee was determined not to be eligible or to have no FMLA leave available, that the employer state the reasons why the employee was not eligible. If the employee was determined to be eligible, proposed § 825.300(b)(3) required the employer to provide the employee with specific notice of his or her rights and obligations under the law and the consequences of failing to meet those obligations, consistent with current § 825.301(b)(1). The Department proposed to add language at § 825.300(b)(3)(iii) requiring that, when an employer notifies an eligible employee of the right to substitute employer-provided paid leave and the conditions related to any such substitution, the employer also must inform the employee that he or she may take unpaid FMLA leave if the employee does not comply with the terms and conditions of the employer's paid leave policies (*see* discussion *supra* at § 825.207). Proposed § 825.300(b)(3)(v) provided that employers should include a list of the employee's essential job functions with the eligibility notice if they will require that those functions be addressed in a fitness-for-duty certification when the employee returns to work. Proposed § 825.300(b)(4) retained the language from current § 825.301(b)(2) which provides that the eligibility notice may, but is not required to, include other information, such as whether the employer will require periodic reports of the employee's status and intent to return to work. Proposed § 825.300(b)(5) provided that the eligibility notice should be accompanied by any required medical certification forms. Consistent with current § 825.301(c), proposed § 825.300(b)(6) required that the eligibility notice to be provided no less often than the first time in each six-month period that the employee gives notice of the need for leave (if the employee takes leave in that six-month period) and, if leave has already begun, that the notice be mailed to the employee's address of record. It also required that the notice be given within a reasonable time after notice of the need for leave is given by the employee, and should be within five business days if feasible. Proposed § 825.300(b)(7) provided that if the information changed with respect to a subsequent period of FMLA leave during the six-month period, the employer should, within five business days, provide notice to the employee of any information that has changed from a previous eligibility notice. Consistent with the current § 825.301(c)(2), proposed § 825.300(b)(8) provided that if an employer requires a medical certification or fitness-for-duty certification, written notice of the requirement must be given for each notice of a need for leave, unless the employer communicates in writing to employees that such information will always be required in connection with certain absences and then oral notice must still be given. Proposed § 825.300(b)(9) retained the requirement from current § 825.300(d) that employers are expected to responsively answer employees' questions about their rights and responsibilities under the FMLA. Finally, proposed § 825.300(b)(10) referenced an optional prototype eligibility notice, included as Appendix D, which reflected the changes in the proposed regulation and the Department's attempt to simplify the form for easier use and adaptability.

The final rule adopts proposed § 825.300(b) with several modifications. Final § 825.300(b)(1) reinserts the qualifying phrase ''absent extenuating circumstances'' that appears in current § 825.110(d) and clarifies the frequency that the eligibility notice must be provided, codifying in the regulations Wage and Hour Opinion Letter FMLA–112 (Sept. 11, 2000). Final § 825.300(b)(2) requires that, if an employee is not eligible for FMLA leave, the employer's notice to the employee need only state at least one reason why the employee is not eligible. A new § 825.300(b)(3) has been added to the final rule clarifying when subsequent eligibility notice must be provided in the same leave year. Proposed § 825.300(b)(3) has been redesignated as final § 825.300(c) setting forth the employer's obligation to provide notice of the employee's rights and responsibilities. The final rule clarifies that this Rights and Responsibilities notice must be provided at the same time the eligibility notice is provided. The final rule deletes the requirement in proposed § 825.300(b)(3)(v) that the employer provide a list of the essential job functions with the eligibility notice. The final rule requires that this list of

essential job functions be provided with the designation notice if the employer will require that the fitness-for-duty certification address the employee's ability to perform the essential functions of the position. The final rule renumbers proposed § 825.300(b)(4) and (b)(5) as final § 825.300(c)(2) and (c)(3). The final rule deletes proposed § 825.300(b)(6) and (b)(8). Proposed § 825.300(b)(7) is renumbered as final § 825.300(c)(4) and modified to require the employer to notify the employee of any change in the information contained in the notice of rights and responsibilities within five business days of the first notice of the need for leave following any such change.

Many commenters addressed the requirement in proposed § 825.300(b)(1) that the eligibility notice be conveyed within five business days after the employee either requests leave or the employer acquires knowledge that the employee's leave may be for an FMLA-qualifying reason. Many employers and employer representatives supported increasing the time to provide the eligibility notice from two to five business days. Infinisource, Inc. and Cummins Inc. noted that the increased time frame will allow employers to gather the information necessary to determine eligibility and respond to a leave request. *See also* Hinshaw & Culbertson; U.S. Small Business Administration's Office of Advocacy; Community Health and Counseling Services. Hewitt Associates commented that the increased time was ''a significant improvement'' as ''[e]mployers have consistently been challenged by completing the eligibility * * * notice within two days given the confirmations to be made and calculations to be performed.'' Hewitt Associates also noted, however, that the increased time frame was a ''trade-off'' as the proposed regulations ''would require employers to provide even more information than they do currently.'' Southwest Airlines commented that the new time frame was ''a welcome addition, particularly in light of the additional extensive information to be included'' and also noted it was ''particularly appropriate when considering * * * employers with multiple work locations.'' Other commenters felt the increased time was still insufficient. Verycruysse Murray & Calzone commented that, ''the relaxation of the response period from two business days to five days will not be sufficient for many employers to ensure that all of the information to be gathered and communicated is correct and accurately reflected on the form.'' Willcox and Savage stated the process of verifying the employee's eligibility and availability of leave ''can be extremely time-consuming, especially if intermittent leave has been used'' and suggested providing a ten-day time frame. New York City (NY) Law Department stated that five business days may not be adequate for employees who use unscheduled intermittent leave and suggested that it should be sufficient for an employer to provide such employees eligibility notification once upon completion of a medical certification rather than each time the employee uses intermittent leave.

On the other hand, some commenters objected that five days was too long for the employee to have to wait for a determination of eligibility. The Legal Aid Society, Employment Law Center asked, ''What is an employee expected to do while waiting for her employer to determine her eligibility? Take the time off work and risk being terminated * * * ?'' *See also* Tracy Hutchinson. Another commenter, Frank Sample, pointed out that ''[a]n employee denied information for a week may make improper decisions regarding their care and treatment which is wholly unfair to an ill employee or their family.'' Other commenters stated that the two-day time frame was reasonable and the increase to five days unnecessary. *See,* Linda Gore; Cindy Whitmore; Richard Mielke. The National Partnership for Women & Families also opposed the increased time frame, objecting that ''throughout the NPRM, there are proposed changes that shorten employees' time frames for meeting requirements for FMLA leave while employers would be given more time to respond to requests for FMLA leave.'' *See also* AFL–CIO.

The final rule in § 825.300(b)(1) adopts the Department's proposal to increase the time frame for providing the eligibility notice from two to five business days and also reinstates the ''absent extenuating circumstances'' language from current § 825.110(d). The numerous comments that the two-day turnaround time is, in practice, very difficult to meet illustrate the necessity of this change. The Department also believes that extending this time frame to five business days affords the employer with the opportunity to calculate more accurately whether the employee is, in fact, eligible without compromising the employee's FMLA rights.

Addressing proposed § 825.300(b)(1) more generally, the Metropolitan Transportation Authority (NY) commented that the ''trigger [for determining eligibility] also needs to be revisited'' and indicated that it was unreasonable to require a large employer to ''discern from thousands of sick leave requests the ones that may indicate a pattern of leave usage that may be consistent'' with the FMLA. The Department acknowledges that the timing and frequency of the eligibility notice was unclear in the NPRM and could be read to require the employer to provide the notice every time an employee gave notice of an absence that might be FMLA-protected. Proposed § 825.300 contained elements drawn from current §§ 825.110(d), 825.208 and 825.301, each of which had different timing requirements for the provision of information related to eligibility, designation, and notice of rights and responsibilities, respectively. While the consolidation of the employer notice requirements into a single section in the proposal made it easier for employers to identify and comply with their notice obligations, the proposal did not resolve the differing timing requirements for the various notices employers must provide. For example, proposed § 825.300(b)(1) was based on current § 825.110(d) and required the eligibility notice to be provided within five business days of the employer learning that an employee's absence might be FMLA-protected. In contrast, § 825.300(b)(6) was based on current § 825.301(b) and required the eligibility notice to be provided no less often than every six months (assuming the employee used FMLA leave during the six-month period).

In order to clarify the employer's notice obligations, the final rule re-establishes the distinction in current §§ 825.110(d) and 825.301(b) between notice of the employee's eligibility (*i.e.*, whether the employee meets the requirements of § 825.110(a)) and notice of the employee's rights and responsibilities, and separates the latter into final § 825.300(c). As discussed below, the final rule also clarifies the timing of these two notices and moves the obligation to notify the employee whether he or she has FMLA leave available to the designation notice because the employer is already required to make that determination at the designation stage. The Department believes that these revisions will clarify the rule and result in information being provided to employees in the most logical and timely fashion without resulting in redundant notices or undue burden on employers.

Final § 825.300(b)(1) clarifies the eligibility determination process and codifies in the regulations Wage and Hour Opinion Letter FMLA–112 (Sept. 11, 2000). The eligibility notice

addresses only whether the employee meets the statutory eligibility criteria as discussed in § 825.110(a): Employment by the employer for 12 months; 1,250 hours of service in the 12-month period immediately preceding the request for leave; and employment at a worksite where 50 or more employees are employed within 75 miles. The determination of employee eligibility to take FMLA leave is addressed separately from the determination of whether the employee has FMLA leave to take (or has exhausted all available FMLA leave entitlement) and whether the reason for which the employee needs leave is covered under the FMLA. As clarified in Wage and Hour Opinion Letter FMLA–112, once an employee has been determined to be eligible to take FMLA leave for a particular FMLA-qualifying serious health condition, the employee remains eligible to take FMLA leave for that serious health condition for the remainder of the leave year (although the employee may exhaust his or her FMLA leave entitlement). Wage and Hour Opinion Letter FMLA–112 (stating that ''an employee's eligibility, once satisfied, for intermittent FMLA leave for a particular condition would last through the entire current 12-month period as designated by the employer for FMLA leave purposes''). The final rule applies this same standard to leave taken for a qualifying exigency and for military caregiver leave. If an employee needs leave for a different FMLA-qualifying reason during the same leave year, the employee's eligibility to take FMLA leave (*i.e.*, whether the employee has worked 1,250 hours of service in the immediately preceding 12 months and whether 50 or more employees are employed at the worksite) is determined separately as to leave for that reason. Accordingly, final § 825.300(b)(1) clarifies that the eligibility notice must be provided ''at the commencement of the first instance of leave in the 12-month FMLA leave year for each FMLA-qualifying reason'' and that eligibility to take FMLA leave ''as to that reason for leave does not change during the leave year.'' If an employee needs FMLA leave due to a different FMLA-qualifying reason in the same leave year and is determined not to be eligible as to that second qualifying reason, § 825.300(b)(3) of the final rule requires the employer to notify the employee of the change in eligibility status within five business days, absent extenuating circumstances, of the employee's request for leave due to the second reason. The final rule sets out in similar fashion the frequency with which eligibility must be determined for leave to care for a covered servicemember with a serious injury or illness.

To further clarify the eligibility determination procedure under the final rule, the employer's obligation to notify the employee of the specific expectations and obligations related to the employee's FMLA leave is moved from proposed § 825.300(b)(3) to final § 825.300(c) titled ''Rights and responsibilities notice.'' The Department notes that this is not a new notice obligation; the same obligation exists under current § 825.301(b) and was included in proposed § 825.300(b)(3). Moving this requirement into a separate paragraph more closely resembles the structure of the current regulations, which address the employer's obligation to notify the employee of his or her eligibility and the obligation to notify the employee of the expectations and obligations associated with the leave in different sections of the rule. Lastly, the final rule also modifies some of the data elements in both the eligibility and rights and responsibilities notices; those changes are discussed below in connection with the comments regarding the corresponding provisions in the NPRM.

Several commenters addressed proposed § 825.300(b)(2) that required employers to provide employees with specific information regarding eligibility and whether the employee still has any FMLA leave available in the current 12-month FMLA leave period. Willcox and Savage objected that the proposed accounting and reporting requirements are unwarranted and burdensome, especially absent ''any assurance that the employee will take the contemplated leave,'' and that the employer may not have recorded the hours uniformly or consistently with ''specific twelve-month periods.'' Other commenters objected to the content of the eligibility notice. AT&T commented that the eligibility notice ''invites employees to request information about eligibility and entitlement without imminent need for leave'' and expressed concern that employees will inundate their managers with such requests. Spencer Fane Britt & Browne commented that it would be burdensome (both in the amount of time needed for the calculations and in the potential for error) for the employer and questioned the usefulness of explaining exactly why the employee is not eligible if an ineligible employee does not have FMLA rights. *See also* Vercruysse Murray & Calzone.

The final rule in § 825.300(b)(2) adopts the proposal with modifications. The Department notes that the requirement to inform employees if they are eligible to take FMLA leave is not a new one, and the obligation has always been triggered by the employee providing notice of the need for leave that may be covered under the FMLA. *See* current §§ 825.110(d), 825.302, 825.303. Proposed § 825.300(b)(2), which is retained in the final rule, added a new requirement that when an employer determines that an employee is not, in fact, eligible to take FMLA leave, the employer must so inform the employee and indicate the reasons the employee is not eligible. The final rule modifies this obligation, however, by limiting the notification that an employee is ineligible to any one of the potential reasons why an employee fails to meet the eligibility requirements. Thus, for example, if an employee has worked for the employer for fewer than 12 months, the employer would be able to so indicate to the employee and would not, then, still be required to calculate (and notify the employee of the results of those calculations) whether the employee had worked 1,250 hours in the 12 months prior to the requested leave. The final rule also removes from the eligibility notice the requirement that the employer notify the employee whether the employee still has FMLA leave available. The determination of whether the employee has FMLA leave available or has exhausted the FMLA leave entitlement is part of the designation of FMLA leave process under both current § 825.208 and proposed § 825.300(c). Accordingly, the final rule moves the requirement to inform the employee of whether he or she has FMLA leave available to new § 825.300(d), which addresses the designation notice.

Rights and Responsibilities Notice

As discussed above, the final rule moved proposed § 825.300(b)(3) to final § 825.300(c), separating the notice of rights and responsibilities from the notice of eligibility. To simplify the timing of the notice of rights and responsibilities and to avoid unnecessary administrative burden on employers, § 825.300(c)(1) of the final rule requires employers to provide this notice to employees at the same time they provide the eligibility notice. Additionally, if the information in the notice of rights and responsibilities changes, § 825.300(c)(4) also requires the employer to notify the employee of any changes within five business days of the first notice of the need for FMLA leave subsequent to any change. This timing requirement will ensure that employees receive timely notice of the expectations and obligations associated with their FMLA leave each leave year

and also receive prompt notice of any change in those rights or responsibilities when leave is needed during the leave year. The final rule also makes several changes in the information included in the notice of rights and responsibilities, which are addressed below.

Several commenters addressed proposed § 825.300(b)(3), which is moved to paragraph (c) of this section in the final rule, specifying the information that must be included in the eligibility notice. The final rule modifies proposed § 825.300(b)(3)(i), which is moved to final § 825.300(c)(1)(i), to require employers to notify employees of the method used for establishing the 12-month period for FMLA entitlement, or, in the case of military caregiver leave, the start date of the ''single 12-month period.'' The Department believes that this change will provide employees with information that is crucial to their understanding of their FMLA leave rights. The final rule redesignates proposed § 825.300(b)(3)(ii) and (iii) as § 825.300(c)(1)(ii) and (iii), but otherwise makes no changes in these paragraphs (other than incorporating references to the military family leave provisions where applicable). In commenting on proposed § 825.300(b)(3)(iii), Vercruysse Murray & Calzone objected to the level of detail required regarding the conditions applicable to any paid leave that is substituted for FMLA leave, because this information is typically contained in employee handbooks or paid leave plans. The Department redesignates proposed § 825.300(b)(3)(iii) as § 825.300(c)(1)(iii) and adopts it as proposed, requiring that employers include in the eligibility notice an explanation of conditions applicable to the use of paid leave that runs concurrently with unpaid FMLA. The Department notes that this requirement is in current § 825.301(b)(1)(iii). The NPRM only proposed to expand this section to require that employers also notify employees of their continuing entitlement to take unpaid FMLA leave if they do not comply with employer-required conditions for use of paid leave. To clarify, however, the Department notes that an employer may meet the requirements of providing information about the conditions related to the substitution of paid leave by reference to existing, employee-accessible copies of such policies. *See* Appendix D.

A number of commenters addressed the requirement in proposed § 825.300(b)(3)(v) that an employer provide a list of the essential functions of the employee's position with the eligibility notice if the employer will require a fitness-for-duty certification that addresses those functions. Domtar Paper Company supported the proposed change, stating that while it will require additional administrative burden for employers, it ''is a valid requirement if the employer wants the option to be able to determine fitness for duty at some point in the future.'' *See also* National Business Group on Health; Community Health and Counseling Services. Other commenters opposed this proposal, arguing that it would be administratively burdensome to provide a list of the employee's essential job functions at the eligibility notice stage. Hewitt Associates commented that ''many [employers] struggle with maintaining usable job descriptions.'' Vercruysse Murray & Calzone commented that five days would not be sufficient for large employers to find the applicable job description, verify its accuracy, and revise it as necessary to reflect the actual essential functions of the employee's position, or in other cases, to create new job descriptions. ORC Worldwide commented that the proposal would be burdensome because ''large employers would feel compelled to require Fitness-for-Duty certifications in all instances to preserve their rights. Allowing employers additional time to properly evaluate the employee's condition and determine whether there are any job-related concerns will also minimize the burden on employees, who would otherwise not be required to submit medical documentation for brief absences.'' The Equal Employment Advisory Council commented the proposal would be burdensome ''by requiring employers to assess and list the essential functions of the job that are unique to each employee requesting leave when it may not ever be necessary to do so'' and specifically recommended that ''the employer be permitted to state in the Eligibility Notice merely that a fitness-for-duty certification *may* be required.'' (Emphasis in original.) The HR Policy Association also questioned the utility of providing a list of essential functions of the employee's job with the eligibility notice, noting that ''at the Eligibility Notice stage, an employer has not yet received the medical certification form from the employee's health care provider, which details the employee's medical condition and allows an employer to determine whether a Fitness-for-Duty certification is even permissible under the law.'' (*See also* discussion of § 825.310, which discusses additional comments on this subject.)

After careful consideration of these comments, the Department has modified the timing requirement for providing the list of essential functions of the employee's position if the employer will require that the fitness-for-duty certification address the employee's ability to perform those functions. For the reasons discussed in § 825.310, employers will not be required to provide the list of essential functions with the eligibility notice. Instead, as noted in the designation notice discussion below, if the employer will require that the fitness-for-duty certification specifically address the employee's ability to perform the essential functions of the employee's job, the employer must provide the employee with a list of the essential functions no later than with the designation notice required by final § 825.300(d), and the employer must also indicate in the designation notice that the fitness-for-duty certification must address the employee's ability to perform those essential functions. As a consequence of these modifications, the final rule deletes proposed § 825.300(b)(3)(v) and renumbers the remaining paragraphs in § 825.300(c)(1) accordingly.

The Department did not receive significant comments on proposed § 825.300(b)(4). The final rule redesignates paragraph (b)(4) as (c)(2) and changes the reference from ''eligibility notice'' to ''notice of rights and responsibilities,'' but otherwise makes no change.

A few comments addressed proposed § 825.300(b)(5), which states that the eligibility notice should be accompanied by any required medical certification form. Verizon requested clarification of the requirement that any required medical certification form accompany the eligibility notice:

> In Verizon, over 6,000 eligibility notices are sent out each week. Approximately 2,800 medical certification forms are received each week for processing. The paper that is wasted with respect to those that do not submit a certification form is, at Verizon alone, over half a million sheets of paper per year * * *. While it is the employer's obligation to make required certification forms available in a manner that is reasonable (i.e., included with eligibility letter, electronically, or upon request), we are sure that the Department will clarify that it is not requiring that employers engage in the wasteful extravagance of mailing literally tons of paper for no purpose.

See also National Restaurant Association. The Department did not intend that proposed § 825.300(b)(5) be read to require the employer to provide the employee with the medical certification form in instances when one would not be submitted and has altered the wording of this provision in final

§ 825.300(c)(3) to indicate that the medical certification may be included with the notice of rights and responsibilities. The Department notes that both the employer and employee have an interest in the prompt determination of whether leave is covered by the FMLA and the early provision of any required medical certification form facilitates this determination; employers are not, however, required to provide the certification form with the notice of rights and responsibilities.

Although proposed § 825.300(b)(6) sets forth a timing requirement that was inconsistent with the timing requirement contained in proposed § 825.300(b)(1), the Department did not receive any significant comment regarding this provision. As explained above, § 825.300(b) of the final rule clarifies the timing of the eligibility notice and final § 825.300(c) clarifies the timing of the notice of rights and responsibilities. The requirement to provide both of these notices is timed to the employee's need for this information, which, in many cases, is much less frequent than either with each FMLA-protected absence or every six months. Accordingly, the final rule deletes proposed § 825.300(b)(6).

The Department did not receive significant comments on proposed paragraphs (b)(7), (b)(8), (b)(9), or (b)(10) of this section. The final rule redesignates paragraph (b)(7) as (c)(4) and clarifies that notice of any changes in the rights and responsibilities notice must be provided within five business days of the first notice of an employee's need for leave subsequent to any change. The final rule deletes proposed paragraph (b)(8), which addressed notification of the requirement for medical certification or fitness-for-duty certification, because final paragraph (c)(1)(ii) addresses information regarding the requirement for medical certification, and the requirement for information regarding fitness-for-duty certification is addressed in the designation notice in final § 825.300(d). Proposed paragraph (b)(9) is redesignated as final paragraph (c)(5) and adopted without change. Finally, proposed paragraph (b)(10) has been adopted as final paragraph (c)(6), and the prototype notice is redesignated as the ''Notice of Eligibility and Rights and Responsibilities.'' Final § 825.300(c)(6) has also been modified to permit electronic distribution of the notice of rights and responsibilities, so long as the employer can demonstrate that the employee (who may already be on leave and who may not have access to employer-provided computers) has access to the information electronically.

Designation Notice

Under the current and proposed regulations, the employer must notify the employee when leave is designated as FMLA leave. Proposed § 825.300(c) outlined the requirements of the designation notice an employer must provide to an employee. (Additional requirements concerning employer designation of FMLA leave are found at proposed and final § 825.301.) The Department's proposal sought to clarify and strengthen the existing designation notice requirements contained in current § 825.208(b) in a number of ways.

Proposed § 825.300(c)(1) required that, once the employer has enough information to determine whether the leave qualifies as FMLA leave, the employer must notify the employee within five business days of making the determination whether the leave has or has not been designated as FMLA leave. This was an increase from the two-day time frame in current § 825.208(b)(1). Proposed § 825.300(c)(1) also required the employer to inform the employee of the number of hours, days or weeks that would be designated as FMLA leave. To the extent it is not possible to provide such information (such as in the case of unforeseeable intermittent leave), the Department proposed that the employer be required to provide such information to the employee every 30 days if the employee took leave during the 30-day period. In addition, proposed § 825.300(c)(1) provided that if the employer requires that paid leave be substituted for unpaid leave, or that paid leave taken under an existing leave plan be counted as FMLA leave, the employer must inform the employee of this designation at the time the leave is designated as FMLA leave. Proposed § 825.300(c)(2) required the designation notice to be in writing, but indicated that it may be in any form, including a notation on the employee's pay stub, and that if the leave is not designated as FMLA leave, the notice to the employee may be in the form of a simple written statement. Proposed § 825.300(c)(3) permitted an employer to provide an employee with both the eligibility and designation notice at the same time in cases where the employer had adequate information to designate leave as FMLA leave when an employee requested the leave. Proposed § 825.300(c)(4) referred to a new optional prototype designation notice in Appendix E that an employer could use to satisfy its obligation to notify an employee that leave taken for a qualifying reason is or is not designated as FMLA leave.

The final rule redesignates proposed paragraph (c) as final paragraph (d) of this section and makes several changes to clarify the timing and content of the designation notice, as well as the shift of notice of the requirement for a fitness-for-duty certification from the eligibility notice in the NPRM to the designation notice in the final rule. The final rule moves the statement of the employer's obligation to provide the designation notice from proposed § 825.301(a) to final § 825.300(d)(1) so that the structure of the designation notice in paragraph (d) of this section more closely parallels the structure of the eligibility notice in paragraph (b) of this section and the rights and responsibilities notice in paragraph (c) of this section. The final rule in paragraph (d)(1) also includes reference to the military family leave provisions. The Department moved proposed § 825.300(c)(3) to § 825.300(d)(2) in the final rule, and made minor wording changes. Final § 825.300(d)(3) requires employers to notify employees of the requirement to provide a fitness-for-duty certification no later than the designation notice. Proposed paragraphs (c)(2) and (c)(4) of this section have been combined and redesignated as final § 825.300(d)(4). A new paragraph (d)(5) has been added to this section of the final rule requiring the employer to notify the employee if the information provided in the designation notice changes (*e.g.*, if the employee exhausts the FMLA leave entitlement). Lastly, the final rule distinguishes between designation of leave for a specific qualifying reason as FMLA-covered and notification of the particular hours of leave that have been counted against the FMLA entitlement, a distinction that is implicit in current § 825.208 and in proposed § 825.300(c), and moves the obligation to notify the employee of the amount of leave counted as FMLA to final § 825.300(d)(6).

The Department received many comments on designation. Several commenters supported the proposal at § 825.300(c)(1) to increase the time frame for providing the designation notice from two to five business days. *See* Retail Industry Leaders Association. Cummins Inc. commented that the increased time frame ''coupled with the strengthened medical certification process, will provide the necessary time for employers to appropriately respond to an FMLA leave request.'' The Illinois Credit Union League supported the extended time frame but requested additional time ''if the individual with FMLA responsibilities is out of the

office on vacation, for example.'' Verizon acknowledged that five days is ''certainly reasonable'' but objected that the time frame was ''inflexible'' because it did not provide for ''exceptional or unusual circumstances.'' Some employers, on the other hand, objected that the five business days proposed was still inadequate. Southwest Airlines noted that the requirement was ''particularly unreasonable for employers * * * with multiple worksites and/or local, decentralized recordkeeping.'' *See also* Metropolitan Transportation Authority (NY); Regence. Spencer Fane Britt & Browne stated, ''[a]lthough we believe the five-day rule is an improvement over the existing two-day rule and certainly more realistic, we question whether such a rule is even necessary in light of the *Ragsdale* decision'' and interpreted the proposed rule to allow notification outside the five-day rule ''if the employee suffers no harm.'' Others viewed the increase less favorably. *See* Cindy Whitmore. The National Partnership for Women & Families commented that the change ''provides another example of the pattern in the NPRM of employees requesting leave having less time to meet new requirements and time frames and employers having more time to respond to requests.'' The Communications Workers of America also opposed ''giving employers additional time to process FMLA paperwork without giving employees an equal extension of time to provide responsive documentation requests'' and further expressed a concern that the failure to timely designate leave may result in related absences also being denied, ultimately leading employees ''to abandon their FMLA rights.''

A significant number of comments from employers, employer representatives, and employer associations objected to proposed § 825.300(c)(1)'s requirement that, in situations involving unscheduled intermittent leave, employers provide employees notice every 30 days of the amount of leave that has been designated as FMLA-qualifying if the employee took leave during the 30-day period. Community Health and Counseling Services called the notification requirement ''an administrative nightmare—especially with the time records always in arrears upwards of two weeks.'' The New York City (NY) Law Department commented that this proposal placed ''an undue burden on employers who may have many employees frequently using intermittent leave.'' This commenter and the Chamber suggested that employers be required to provide employees with such information upon request, but not more often than every 30 days. The Catholic Charities, Diocese of Metuchen recommended the designation notice ''only be provided to the employee more frequently than every six months if the employee's leave will not be considered FMLA leave.'' The Unified Government of Wyandotte County/Kansas City (KS) agreed, stating its concern about the increased workload that will be caused by the reporting of leave used to employees taking leave each month. Willcox and Savage commented that the proposal was unnecessary since many employees using unscheduled intermittent leave do not begin to exhaust their twelve-week entitlement. *See also* Ohio Department of Administrative Services; Columbus (OH) City Attorney's Office; Illinois Credit Union League; and Vercruysse Murray & Calzone. The AFL–CIO, however, supported the requirement and stated the information required to be provided in a 30-day notice ''will also facilitate leave-related decisions by employees who take unforeseen, intermittent leave.'' Community Legal Services, Inc./AIDS Law Project of Pennsylvania also supported the Department's proposal but urged the Department ''to go further and require that employers inform employees who are on leave when they are within a week of exhausting their FMLA leave.''

The Department considers communication between the employer and the employee to be critical to the smooth administration of the FMLA and has significantly modified the process for designating FMLA leave to ensure that employees receive timely notification both that leave for a particular condition will be FMLA-protected and the number of hours that will be counted against their FMLA leave entitlement in a manner that is not unduly burdensome for employers. The Department is cognizant of the various factors that employers must consider before determining whether an employee's leave should be designated as FMLA leave and the administrative burden imposed by having to make this determination in a short time frame. Accordingly, final § 825.300(d)(1) modifies the timing of the designation notice, requiring the employer to notify the employee whether a leave of absence will be designated as FMLA leave within five business days absent extenuating circumstances of when the employer has sufficient information to determine whether the leave is being taken for a FMLA-qualifying reason. Final § 825.300(d)(1) further clarifies that only one designation notice is required for each FMLA-qualifying reason per leave year, regardless of whether the leave is taken as a continuous block of leave or on an intermittent or reduced leave schedule basis. In order to clarify the distinction between designating leave taken for a qualifying reason as FMLA-protected and notifying the employee of the number of hours counted against the FMLA leave entitlement, the final rule moves the latter requirement to a new paragraph (d)(6) of this section; this requirement applies also to the military family leave provisions. This distinction is implicit in both current § 825.208 and proposed §§ 825.300(c) and 825.301(a). Under § 825.300(d)(6) of the final rule, if the amount of leave needed is known at the time of the employer's designation of the leave as FMLA leave, the employer must notify the employee of the amount of leave that will be counted against the employee's FMLA leave entitlement in the designation notice. The Department finds persuasive the comments that the automatic 30-day tracking, recording, and reporting to intermittent FMLA leave-takers of the amount of leave counted as FMLA required by proposed § 825.300(c)(1) would be unduly burdensome. Accordingly, in situations in which the amount of leave to be taken is not known at the designation stage (*e.g.*, when unforeseeable intermittent leave will be needed), the final rule modifies the employer's obligation, requiring employers to inform the employee of the number of hours counted against the FMLA leave entitlement only upon employee request, and no more often than every 30 days if FMLA leave was taken during that period. In order to lessen the burden of this notification, and consistent with current § 825.208(b)(2), the final rule also permits the employer to notify the employee of the hours counted against the FMLA leave entitlement orally and follow up with written notification on a pay stub at the next payday (unless the next payday is in less than one week, in which case the notice must be no later than the subsequent payday). By clarifying that this requirement can be met with simple notation of FMLA leave on a pay stub, the Department believes that employers will be able to provide the necessary information to employees in a timely fashion with minimal additional burden. To further encourage employers to provide notice to the employee at the earliest possible stage, the Department has also moved proposed § 825.300(c)(3) to final

§ 825.300(d)(2), to emphasize that the employer is expressly permitted to provide the designation and eligibility notices simultaneously upon an employee's request for FMLA leave, if the employer has sufficient information to do so at that time.

The Department has included a new § 825.300(d)(3), consistent with the changes in the final rule in § 825.300(c) and the discussion above, to require that the employer provide written notice of any requirement for a fitness-for-duty certification, including indicating whether the fitness-for-duty certification must address the employee's ability to perform the essential functions of the employee's position and, if so, to provide a list of the essential functions of the employee's position, with the designation notice. If the employee handbook or other written documents clearly provide that a fitness-for-duty certificate will be required, written notice is not required, but oral notice must be provided.

The final rule combines proposed § 825.300(c)(2) and (c)(4), both of which addressed the form of the designation notice, and redesignates them as § 825.300(d)(4). Because pay stub designation is more appropriate for notifying employees of the amount of leave counted against the FMLA leave entitlement, reference to designation by pay stub notation has been deleted from this paragraph of the final rule and moved to final § 825.300(d)(6). As noted above, final § 825.300(d)(6) reinstates oral notification of the amount of leave counted as FMLA leave with written follow-up notification; such designation is permitted under current § 825.208(b)(2), but had been removed from proposed § 825.300(c). The prototype designation notice referenced in final § 825.300(d)(4) has been modified consistent with the final rule.

Finally, the final rule adds a new § 825.300(d)(5) that requires employers to notify employees if the information in the designation notice changes. For example, if an employee exhausts his or her FMLA leave entitlement and the leave will no longer be designated as FMLA leave, the employer must provide the employee with written notice of this change consistent with this section.

Consequences of Failing To Provide Notice

The Department proposed a new paragraph at § 825.300(d) to address concerns arising out of the U.S. Supreme Court's decision in *Ragsdale* v. *Wolverine World Wide, Inc.*, 535 U.S. 81 (2002). This paragraph provided a remedy provision that is dependent on an employee having suffered individualized harm as a result of any violation of the general, eligibility, or designation notice requirements. The Department's proposal clarified that failure to comply with the notice requirements set forth in this section could constitute interference with, restraint of, or denial of the use of FMLA leave. The proposal further provided that, if the employee is able to demonstrate harm as a result of the employer's failure to provide a required notice, the employer could be liable for the harm suffered as a result of the violation, such as lost compensation and benefits, other monetary losses, and appropriate equitable or other relief, including employment, reinstatement, or promotion. *See also* § 825.301(e).

Few commenters addressed this provision and most agreed with the proposed changes. The National Partnership for Women & Families, for example, agreed that proposed § 825.300(d) is necessary given the *Ragsdale* decision, and suggested the final rule make clear that ''one of the equitable remedies an employee may obtain is additional leave.'' As in any action arising under the FMLA, any remedy is specific to the facts of the individual's circumstance, and a court may order any appropriate relief. Therefore, no change to the proposal is necessary, and the final rule adopts proposed paragraph (d) as final paragraph (e) without modification. *See also* the preamble discussion of § 825.301 for additional discussion of the designation and remedy provisions.

Section 825.301 (Employer Designation of FMLA Leave)

The Department proposed to delete current § 825.301, which addressed employer notices to employees, because its requirements were incorporated into proposed § 825.300 as discussed above. Provisions in current § 825.208 addressing designation of FMLA leave, to the extent not incorporated into proposed § 825.300(c), were moved to proposed § 825.301.

Proposed § 825.301(a) stated an employer's obligations regarding timely designation of leave as FMLA-qualifying and reiterated the requirement to notify the employee of the designation within five business days as proposed in § 825.300. This section required that the employer's designation decision be based only on information received from the employee or the employee's representative and also provided that, if the employer does not have sufficient information about the employee's reason for leave, the employer should inquire further of the employee or of the employee's spokesperson. The section further provided that, in the case of intermittent leave or leave on a reduced schedule, only one such notice is required unless the circumstances regarding leave have changed. Proposed § 825.301(b) outlined employee responsibilities, with cross-references to proposed §§ 825.302 and 825.303, which addressed what constitutes sufficient information an employee must communicate to an employer when needing FMLA leave. Among other things, proposed § 825.301(b) required that an employee (or his or her spokesperson) provide sufficient information to allow the employer to determine that the leave qualifies under the FMLA, but the employee need not expressly assert rights under the Act or even mention the FMLA. Proposed § 825.301(b) also explained that the consequences for an employee's failure to satisfy these responsibilities could include delay or denial of FMLA leave. Proposed § 825.301(b), as a matter of clarification, deleted the word ''unpaid'' found in current § 825.208(a)(2), as these employee responsibilities apply whether the leave is paid or unpaid. Proposed § 825.301(c) provided that if there is a dispute between an employee and employer about whether leave qualifies as FMLA leave, it should be resolved through discussion and the dispute resolution documented. Proposed § 825.301(d) permitted retroactive designation under certain circumstances. Additionally, the Department proposed in § 825.301(d) that in all cases where leave is FMLA-qualifying, an employer and an employee can mutually agree that the leave be retroactively designated as FMLA leave. Proposed § 825.301(e) clarified that, if an employer failed to timely designate leave and if an employee establishes that he or she has suffered harm as a result of the employer's actions, a remedy may be available. Proposed § 825.301(e) provided that failure to timely designate may constitute an interference with, restraint of, or denial of, the exercise of an employee's FMLA rights. This section clarified that, if the employee is able to establish prejudice as a result of the employer's failure to designate leave properly, an employer could be liable for compensation and benefits lost by reason of the violation, for other monetary losses sustained as a direct result of the violation, and for appropriate equitable relief, including employment, reinstatement, promotion, or any other relief tailored to the harm suffered. The Department provided examples to illustrate the type of circumstance where an employee may

or may not be able to show that harm has occurred as a result of the employer's actions. Lastly, the Department's proposal eliminated the ''provisional designation'' concept that appears in current § 825.208(e)(2).

Southwest Airlines noted that the provision in proposed § 825.301(a) allowing only one designation notice in the case of intermittent or reduced schedule leave, unless the circumstances of the leave have changed, coupled with the new requirement to provide designation notice as often as every 30 days created ''confusion as to whether an employer is obligated to provide the designation notice every 30 days, or only once.'' The Department agrees that the proposal did not clearly distinguish between the employer's obligation to designate a leave of absence as FMLA-qualifying, which generally applies only once per leave year for each FMLA-qualifying reason, and the employer's obligation to notify the employee of how much leave is to be counted against the employee's FMLA leave entitlement, which must be determined for each absence. As discussed above, the final rule clarified these two obligations in final § 825.300(d)(1) and (d)(6). As part of this clarification, both the general statement of the employer's obligation to designate leave as FMLA-protected and the statement regarding the need to designate intermittent and reduced schedule leave only once were moved from proposed § 825.301(a) to final § 825.300(d)(1), with modifications.

The Department did not receive significant comments regarding proposed § 825.301(b) and (c). Therefore, the final rule adopts these provisions as proposed with minor editorial changes, including the deletion of some references to ''paid leave'' that were unnecessary.

Several commenters agreed that proposed § 825.301(d) and (e) accurately reflected the Supreme Court's decision in *Ragsdale* v. *Wolverine World Wide, Inc.*, 535 U.S. 81 (2002). *See* Equal Employment Advisory Council; the Association of Corporate Counsel's Employment and Labor Law Committee; TOC Management Services; the Chamber; Community Health and Counseling Services; National Association of Wholesaler-Distribution. The American Foundry Society concurred but requested clarification regarding at ''what point an employer's obligations are triggered to make follow-up inquiries.'' The AFL–CIO agreed specifically with the proposed revisions to § 825.301(e) concerning remedies. Hewitt Associates commented that ''employers will find [the example provided in that section] highly instructive'' and suggested adding other examples. The National Retail Federation however, objected that the ''equitable relief language for harm caused by interference with FMLA rights is problematic'' and ''too vague about how the loss of FMLA rights directly results in monetary harm.'' The Illinois Credit Union League commented that the remedy provision (specifically citing to the provision as it appears at proposed § 825.300(d)) was ''particularly troubling'' and objected that ''interference with a 'right' suggests something more than failure to provide notice.'' The National Association of Convenience Stores stated the *Ragsdale* decision rendered the designation requirements of no effect and recommended that any designation requirement be eliminated from the regulations.

The Department does not believe that the *Ragsdale* decision limited the Department's ability to require employer notices beyond a posted general notice. The *Ragsdale* decision invalidated the categorical penalty imposed by § 825.700(a) of the current regulations. The Court stated ''in so holding we do not decide whether the notice and designation requirements are themselves valid or whether other means of enforcing them might be consistent with the statute.'' 535 U.S. at 96. In fact, the Court also stated, ''[t]o be sure, 12 more weeks might be an appropriate make-whole remedy for an employee who would not have taken any leave at all if the [designation] notice had been given,'' lending further support to the validity of the regulatory notice requirements. *Id.* at 93. Therefore, the final rule adopts proposed § 825.301(d) and (e) without modification. The Department notes that retroactive designation consistent with this provision must be accompanied by appropriate notice to the employee as required under § 825.300 and can only be undertaken where it does not cause harm or injury to the individual or where the employee and employer mutually agree to the retroactive designation.

Finally, several commenters addressed the elimination of the ''provisional designation'' concept. The Metropolitan Transportation Authority (NY) supported the elimination, noting that it was a confusing concept for both employers and employees. The National Partnership for Women & Families on the other hand, stated that the Department ''does not explain how this change could affect workers and whether the lack of a provisional designation accompanied by DOL's proposal to grant employers more time to respond to employee's requests for FMLA leave will make employees less likely to take FMLA leave as they will not know quickly whether the leave will be covered.'' The American Association of University Women stated that the elimination of the ''provisional'' designation status was ''particularly troubling'' in light of the increased time frame afforded employers and questioned whether workers might ''be less likely to take leave because it will take that much longer to know whether they are covered, and the leave is not provisionally designated in the meantime.'' The AFL–CIO commented that the ''[p]reliminary designation of FMLA leave gives employees the comfort of knowing that their requests for leave will be approved provided they give their employer requisite information 'which confirms the leave is for an FMLA reason.' ''

The final rule eliminates the ''provisional designation'' concept as proposed. The process for ''provisional designation'' of leave may have caused confusion over whether leave is protected prior to the actual designation, especially in cases where the leave does not eventually qualify for the Act's protections. The Department continues to believe that the deletion of a ''provisional'' designation concept will result in less confusion for employees. If employees take leave that ultimately is determined not to be FMLA-qualifying, it is not protected. A preliminary FMLA designation may have given false comfort to leave takers that their leave would be protected when, in fact, it was not. However, whether the leave is provisionally designated as FMLA leave or not, the leave is only protected by the statute if it is determined to be FMLA-qualifying, such as by timely completion of the medical certification process. Therefore, the proposed rule deleting this provision is adopted.

Section 825.302 (Employee Notice Requirements for Foreseeable FMLA Leave)

Section 825.302 addresses an employee's obligation to provide notice of the need for foreseeable FMLA leave. Proposed § 825.302(a) retained both the current requirement that an employee must give at least 30 days notice when the need for FMLA leave is foreseeable at least 30 days in advance, and the requirement that notice be provided ''as soon as practicable'' if leave is foreseeable but 30 days notice is not practicable. The proposed section further added the requirement that when an employee gives less than 30

days advance notice, the employee must respond to a request from the employer to explain why it was not practicable to give 30 days notice. Proposed § 825.302(b) deleted the second sentence of current § 825.302(b), which defined ''as soon as practicable'' as ''ordinarily * * * within one or two business days of when the need for leave becomes known to the employee.'' The NPRM further provided examples of when notice of the need for leave that is foreseeable less than 30 days in advance could practicably be provided. Proposed § 825.302(c) retained the standard from the current regulation that an employee need not assert his or her rights under the FMLA or even mention the FMLA to put the employer on notice of the need for FMLA leave. The NPRM clarified, however, the information the employee must provide in order to provide sufficient notice to the employer of the need for FMLA leave and added that the employee has an obligation to respond to an employer's questions designed to determine whether leave is FMLA-qualifying. The Department sought comment as to whether a different notice standard requiring that employees expressly assert their FMLA rights should apply in situations in which an employee had previously provided sufficient notice of a serious health condition necessitating leave and was subsequently providing notice of dates of leave due to that same condition. Proposed § 825.302(d) retained the current requirement that an employee comply with the employer's usual notice and procedural requirements for calling in absences and requesting leave, but deleted current language stating that an employer cannot delay or deny FMLA leave if an employee fails to follow such procedures. The proposal qualified the employee's obligation to comply with the employer's customary notice and procedural requirements by noting that the obligation applied ''absent unusual circumstances'' and provided examples of what might constitute unusual circumstances. No changes were proposed to §§ 825.302(e) and 825.302(f). Proposed § 825.302(g) retained language stating that employers may waive employees' FMLA notice requirements but deleted language stating that employers could not enforce FMLA notice requirements if those requirements were stricter than the terms of a collective bargaining agreement, state law or employer leave policy.

Section 825.302(a) of the final rule retains the requirement that employees respond to requests from employers to explain why it was not possible to give 30 days notice of their need for FMLA leave. It also makes clear that the 30-day notice requirement applies to FMLA leave taken for an expected birth, placement for adoption or foster care, planned medical treatment for a serious health condition of the employee or of a family member, or the planned medical treatment for a serious injury or illness of a covered servicemember. For FMLA leave taken for a qualifying exigency, notice must be provided as is practicable. The final rule also retains in § 825.302(b) the statutory standard that notice of the need for leave that is foreseeable less than 30 days in advance must be provided ''as soon as practicable'' and provides guidance as to what notice the Department expects will be practicable in such circumstances. Section 825.302(c) of the final rule continues to provide guidance as to what information an employee may need to provide to constitute sufficient notice, but clarifies that the types of information listed are merely examples and may not be required in all situations. The general notice poster has been revised to include this information as well. The final rule also maintains the employee's obligation to respond to employer inquiries designed to determine if leave is FMLA-qualifying. It adds a requirement that, for FMLA leave taken because of a qualifying exigency, the employee shall provide sufficient information that indicates that a family member is on active duty or call to active duty status, that the requested leave is for one of the reasons listed in § 825.126(a), and the anticipated duration of the absence. Additionally, the final rule requires employees seeking leave for a previously certified FMLA condition, covered servicemember's serious injury or illness, or qualifying exigency to inform the employer that the leave is for a condition, covered servicemember's serious injury or illness, or qualifying exigency that was previously certified or for which the employee has previously taken FMLA leave. The final rule maintains the standard in proposed § 825.302(d) that ''absent unusual circumstances'' employees may be required to comply with employer policies for requesting leave so long as those policies do not require notice to be provided sooner than is practicable. The final rule makes a minor change to § 825.302(e) to clarify that the reference to the scheduling of intermittent leave is merely an example and that the employee's obligation to make reasonable efforts to schedule planned medical treatment so as not to unduly disrupt the employer's operations applies to all FMLA leave whether it is taken as a continuous block of leave or as intermittent or reduced schedule leave. The final rule modified proposed § 825.302(f) to include appropriate references to the military family leave provisions, including the requirement that, for intermittent or reduced schedule leave taken to care for a covered servicemember with a serious injury or illness, the employee shall attempt to schedule such leave to not unduly disrupt the employer's operations. The final rule makes no changes to proposed § 825.302(f) and (g).

Several commenters representing employees took issue with the requirement in the proposed rule that employees who fail to provide 30 days notice of the need for foreseeable leave must explain the reasons for their failure to do so upon request from their employer for such information. *See, e.g.*, National Treasury Employees Union; National Partnership for Women & Families; Legal Aid Society-Employment Law Center; Community Legal Services, Inc./AIDS Law Project of Pennsylvania; American Postal Workers Union. These commenters viewed the requirement as unnecessary and potentially invasive of employee privacy. The AFL–CIO asserted that the requirement ''unduly intrudes upon employee privacy'' and argued that ''[t]here is no reason to give employers unfettered discretion to demand that employees explain why they did not give 30 days notice of leave, particularly where the explanation may require the disclosure of sensitive medical or other personal information.''

The few employer representatives that specifically addressed this notice requirement argued that it would facilitate employers' ability to plan for employee absences. Jackson Lewis noted, ''[w]hen the need for leave is foreseeable (as is often the case when an employee seeks leave for childbirth, surgery and recovery), employees should provide advance notification to their employer so that the employer has the time necessary to redistribute work to other employees.'' *See also* National Roofing Contractors Association; Equal Employment Advisory Council. The Equal Employment Advisory Council requested that the regulation go further and require that employees provide documentation to support their inability to provide additional notice.

The Department believes that an employee's obligation to explain the reason he or she was unable to provide 30 days advance notice of the need for

foreseeable leave is implicit in the current regulation, which allows for the provision of less than 30 days notice only in those circumstances in which 30 days notice was not practicable. *See* § 825.302(a); *see also* 29 U.S.C. 2612(e)(1) and (2) (employee shall provide 30 days notice of the need for foreseeable leave due to applicable FMLA-qualifying reasons, unless circumstances require that the leave begin in less than 30 days, in which case the employee shall provide such notice as is practicable). Because employees already may be required to provide such an explanation, the Department does not view the explicit acknowledgement of this obligation in proposed § 825.302(a) as imposing any additional burden on employees. Additionally, the Department believes that early notice of the need for FMLA-protected leave is essential to the smooth functioning of FMLA leave in the workplace and that making clear that employees may be required to explain why they provided less than 30 days notice of the need for foreseeable leave emphasizes the importance of the notice requirement under the FMLA. Accordingly, the final regulation retains the requirement from the proposal that in applicable situations employees must provide an explanation upon request from their employer of the reason why they were unable to provide 30 days notice of the need for foreseeable FMLA leave.

The NPRM raised a number of issues regarding the notice requirements for the military family leave provisions. While the NDAA applies the existing FMLA notice requirements to military caregiver leave, it establishes a different notice requirement for qualifying exigency leave. Under the NDAA, in such circumstances where leave taken for a qualifying exigency is foreseeable, eligible employees must provide notice to the employer that is ''reasonable and practicable.'' 29 U.S.C. 2612(e)(3). The Department stated an initial view that proposed §§ 825.302 and 825.303 should be extended to military caregiver leave. An employee using military caregiver leave would then be generally expected to provide the employer at least 30 days advance notice before FMLA leave is to begin when the need for the leave is foreseeable based on planned medical treatment for the covered servicemember. The Department asked whether military caregiver leave should be incorporated into this and all of the appropriate provisions in proposed §§ 825.302 and 825.303. In addition, the Department stated its initial view that §§ 825.302 and 825.303 should also be applied to qualifying exigency leave. The Department asked, if §§ 825.302 and 825.303 were not applied to qualifying exigency leave, what other notice requirements should be used.

The Department received many comments on employee notice requirements and the military family leave provisions. The Delphi Corporation offered that the ''new provisions should, to the greatest possible extent, track the current regulatory scheme. Any regulations concerning the administration of these leaves—including notice provisions and certification requirements—should track the non-military FMLA requirements. This will help minimize disruption and confusion caused by the new provisions.'' The Manufacturers Alliance/MAPI stated that ''[j]ust as the proposed FMLA regulations require the employee to give the employer notice of the need for foreseeable and unforeseeable leave, the same notice requirements should extend to leave taken to care for a covered service member and to leave taken for a qualifying exigency.'' Others addressed their comments specifically to notice for qualifying exigency leave. The National Coalition to Protect Family Leave expressed concern that the NDAA only requires notice for qualifying exigency leave ''if the need for leave is foreseeable. The language almost implies that no notice at all is required if exigency leave is unforeseeable. We believe the Department should apply the same principles of foreseeability as described in the proposed regulations * * * in sections 825.302 and 825.303.'' This commenter also stated that employees should ''notify their employers as soon as reasonable and practical when the employee learns that the servicemember has been called to active duty * * *. However, such notice of a call to active duty * * * should not be considered notice of a need for [qualifying exigency] leave. The employee should still be required to provide notice when the actual need for leave becomes known.'' *Id.* The Independent Bakers Association suggested that ''[m]eetings and appointments should be scheduled in advance. Notice to employers should be provided as soon as the employee is aware of the need to take off.'' The National Association of Manufacturers commented:

> The statute requires that when the need for leave because of a family member's active duty is ''foreseeable,'' the employee should provide notice ''as is reasonable and practicable.'' The statute is silent with regard to notice when the need for leave is not foreseeable. The [National Association of Manufacturers] recognizes that even in the instance of when the need is foreseeable, there may be very limited notice; but the [National Association of Manufacturers] believes that the Department should clarify that an employee should provide notice as soon as practicable in either circumstance.
>
> Allowing no notice would present production issues and foreclose planning to accommodate the absence. This becomes more evident since the leave is based on exigent circumstances. In such circumstances, we believe the Department should require the employee to provide the employer with notice when the employee learns of the need for leave. The [National Association of Manufacturers] proposes that the Department consider incorporating the Department of Defense regulations interpreting the notice provisions under the Uniformed Services Employment and Reemployment Rights Act (''USERRA'') for these regulations. There, DoD recommends that a servicemember provide 30 days notice of the upcoming absence when feasible. In addition, notice can be provided for the employee by others, such as an appropriate military officer. Another approach could be to conform all notice requirements under FMLA with those in USERRA, which would lead to a similar result. Either alternative would be a meaningful improvement.

In the final rule, the same requirements for providing notice for foreseeable leave that apply to existing FMLA leave are extended to military caregiver leave. Because Congress specifically amended the FMLA to include military caregiver leave under the existing statutory provisions regarding notice for foreseeable leave, it makes sense for the Department to do the same for the regulatory notice provisions for foreseeable leave. The statutory amendments regarding qualifying exigency leave created a free-standing notice provision for such leave that requires employees to provide such notice as is ''reasonable and practicable.'' The Department agrees with those commenters who argued that ''reasonable and practicable'' should be interpreted the same as ''practicable'' and that the same standard of ''practicable'' should thus apply to leave for any FMLA-qualifying reason. Accordingly, in all cases of foreseeable leave due to a qualifying exigency, an employee is required to provide notice ''as soon as practicable'' and § 825.302 has been modified to apply to such leave. Thus, § 825.302(a) in the final rule is changed to incorporate references to military caregiver leave and also makes clear that the 30-day advanced notice requirement for foreseeable leave does not apply to qualifying exigency leave. Employees are not obligated to provide notice to an employer when they first become aware of a covered family member's active duty or call to

active duty status. The Department believes this is an unnecessary requirement because many employees with a covered military member may never need to use qualifying exigency leave. Notice for qualifying exigency leave should be provided when the employee first seeks to take leave for a qualifying exigency.

When the need for FMLA leave is foreseeable less than 30 days in advance, an employee must ''provide such notice as is practicable.'' 29 U.S.C. 2612(e)(1), (2)(B). Proposed § 825.302(b) deleted language from current § 825.302(b) defining ''as soon as practicable'' as ''ordinarily * * * mean[ing] at least verbal notification to the employer within one or two business days of when the need for leave becomes known to the employee.'' As discussed in the preamble to the proposed rule, the ''one or two business days'' timeframe was intended as an illustrative outer limit, but had come to be read as allowing employees two business days from learning of their need for leave to provide notice to their employers regardless of whether it would have been practicable to provide notice more quickly. 73 FR 7907 (Feb. 11, 2008). *See* Wage and Hour Opinion Letter FMLA–101 (Jan. 15, 1999).

Several employee representatives specifically opposed the deletion of the ''one or two business days'' language in proposed § 825.302(b). *See, e.g.*, National Partnership for Women & Families; Community Legal Services, Inc./AIDS Law Project of Pennsylvania; PathWaysPA; Human Rights Campaign. The National Partnership for Women & Families noted that the Department was proposing to shorten the amount of time that employees had to provide notice of the need for FMLA leave at the same time that it was proposing to give employers more time to respond to the employee's notice. Many commenters viewed the proposed requirement that employees provide notice of the need for leave that is foreseeable less than 30 days in advance either on the same day or the next business day to be unduly restrictive and to impose an unnecessary hurdle to employees seeking to utilize FMLA leave. *See, e.g.*, Community Legal Services, Inc./AIDS Law Project of Pennsylvania; Human Rights Campaign; Denise Evans; PathWaysPA; Maine Department of Labor. The United Food and Commercial Workers International Union argued that the current regulation does not permit employees to wait two days if it is practicable for them to provide notice sooner and that therefore no regulatory change is needed as to the timing of notice for FMLA leave foreseeable less than 30 days in advance.

Employee representatives also took issue with the statement in the preamble that:

> Absent emergency situations, where an employee becomes aware of the need for FMLA leave less than 30 days in advance, the Department expects that it will be practicable for the employee to provide notice of the need for leave either the same day (if the employee becomes aware of the need for leave during work hours) or the next business day (if the employee becomes aware of the need for leave after work hours).

73 FR 7908 (Feb. 11, 2008). The Legal Aid Society—Employment Law Center questioned whether under the proposed regulation an employee diagnosed with early stage breast cancer would be required to tell her employer about her diagnosis before telling her family. Similarly, the National Partnership for Women & Families noted that under the proposed rule an employee learning that the date for her cesarean section has been moved up may be required to inform her employer before her family. *See also* American Postal Workers Union (''The examples provided by the proposed regulation in § 825.302(b) make no allowance for employees who, although they may be aware of a medical appointment, are not aware of the FMLA or of its employee notice requirements.'').

Conversely, employer representatives overwhelmingly supported the deletion of the ''two-day rule.'' *See, e.g.*, Equal Employment Advisory Council; the Chamber; National Newspaper Association; National Small Business Association. Commenters including the Equal Employment Advisory Council and the Chamber argued that prompt notice of an employee's need for FMLA leave is essential to the employer's ability to manage the workplace. *See also* HR Policy Association; AT&T. The Chamber stated that the lack of advance notice of absences was one of the biggest problems employers faced under the current regulations. They argued that deleting the ''two-day rule'' would reduce what they perceived to be the abuse of FMLA leave. AT&T noted that advance notice of absences is essential to its ability to comply with federal- and state-mandated service levels in some call centers.

HR Policy Association and the National Association of Manufacturers agreed with the statement in the preamble that the Department expected that it would be practicable for employees to provide notice the same day or the next business day. The National Coalition to Protect Family Leave and the National Restaurant Association however, argued that employees should be required to comply with the timing requirements of employers' normal policies for reporting absences.

The Department notes that prompt notice of an employee's need for FMLA leave not only allows an employer to manage its staffing needs but also facilitates the prompt determination of FMLA coverage. When an employee's need for FMLA leave is foreseeable, it is in the employee's interest that the determination of whether the leave is FMLA-protected be made prior to the commencement of the leave. Prompt notice of the need for leave to the employer allows the employer to determine whether or not certification will be required. Wherever possible, it is preferable that the employer receive all information necessary to determine whether the leave will be designated as FMLA-protected prior to the date of the leave.

The Department wishes to stress that both current and proposed § 825.302(b) defined ''as soon as practicable'' as ''as soon as both possible and practical, taking into account all the facts and circumstances of the individual case.'' The deletion of the ''two-day rule'' does not change the fact that whether notice is given as soon as practicable will be determined based upon the particular facts and circumstances of the employee's situation. For example, if an employee receives a call during the workday from her health care provider telling her that she had been diagnosed with breast cancer and will have a need for FMLA leave, the employee would not be expected to inform her employer of the need for leave the same day. Given the facts and circumstances related to the gravity of the condition and when the employee became aware of the diagnosis, it would not be practicable for the employee to provide notice to her employer of her impending need for leave to treat her cancer prior to having the opportunity to discuss the diagnosis with her family. In contrast, if an employee receives a call during the workday from her health care provider telling her that an appointment previously scheduled for Friday is being moved to Thursday, the employee would be expected to inform her employer of the change in her need for leave the same day. The examples provided in the proposed rule have been replaced with the statement that:

> Where an employee becomes aware of a need for FMLA leave less than 30 days in advance, it should be practicable for the employee to provide notice of the need for leave either the same day or the next business day. In all cases, however, the

determination of when an employee could practicably provide notice must take into account the individual facts and circumstances.

Thus, the employee's obligation is always to provide notice as soon as practicable. In the normal course, the Department expects that employees will be able to provide notice of the need for leave that is foreseeable less than 30 days in advance either the same day or the next business day. In cases involving unusual facts and circumstances, such as the diagnosis of a serious disease, additional time may be necessary before the employee can practicably provide notice to the employer of the need for leave.

Proposed § 825.302(c) retained the standard from current § 825.302(c) that an employee need not expressly assert his or her rights under the FMLA or even mention the FMLA, but instead must provide sufficient information to make his or her employer aware that FMLA rights may be at issue. To clarify the employee's notice obligation, proposed § 825.302(c) added language clarifying what information the employee must provide to make the employer aware of the employee's need for FMLA-protected leave.

The employee must provide sufficient information that indicates that a condition renders the employee unable to perform the functions of the job, or if the leave is for a family member, that the condition renders the family member unable to perform daily activities; the anticipated duration of the absence; and whether the employee or the employee's family member intends to visit a health care provider or has a condition for which the employee or the employee's family member is under the continuing care of a health care provider.

73 FR 7981 (Feb. 11, 2008). The proposed rule also added language explaining an employee is obligated to respond to an employer's questions designed to determine whether or not the absence is FMLA-qualifying, and that failure to respond to reasonable inquiries may result in the denial of FMLA protection if the employer is unable to determine whether the leave is FMLA-qualifying. Additionally, the preamble to the proposed rule sought comments ''as to whether a different notice standard requiring employees to expressly assert their FMLA rights should apply in situations in which an employee has previously provided sufficient notice of a serious health condition necessitating leave and is subsequently providing notice of dates of leave due to the condition that were either previously unknown or changed.'' *Id.* at 7908.

Employee representatives including the AFL–CIO and the National Employment Lawyers Association expressed concern that the proposed language was unduly proscriptive and would be difficult for employees to comply with. The National Partnership for Women & Families and the Sargent Shriver National Center on Poverty Law pointed out that not all of the listed elements would be applicable in some situations covered by the FMLA. Some commenters viewed the increased specificity in the proposed regulation as serving no purpose other than providing employers with another opportunity to deny FMLA protection to qualifying leave. *See* United Food and Commercial Workers International Union; Communications Workers of America. Community Legal Services, Inc./AIDS Law Project of Pennsylvania analyzed the proposal as follows: ''The true effect of this change would simply be to give the employers additional grounds for denying FMLA leave, by claiming that leave requests which lacked one or more of the new requirements did not put them on notice of a possible FMLA-eligible leave request, and that therefore they did not need to inquire further.'' The National Partnership for Women & Families and the AFL–CIO expressed a concern that employees would lose FMLA protection because they would be unaware of the specific types of information required and noted that the proposed rule did not establish any mechanism for informing employees of the additional information they would be required to provide. *See also* Sargent Shriver National Center on Poverty Law; Community Legal Services, Inc./AIDS Law Project of Pennsylvania. A labor union attorney, Robert M. Schwartz, noted that the new notice requirements were not included in the proposed general notice and poster.

Employer commenters indicated that requiring employees to provide additional information regarding their need for leave would facilitate the process of identifying, and protecting, FMLA leave. *See* the Chamber; Catholic Charities, Diocese of Metuchen. The Equal Employment Advisory Council stated that ''[i]nformation such as the inability to perform work, the anticipated duration of the absence, and the need to see a health care provider is critical to trigger for the employer the possibility that the employee may be requesting FMLA-qualifying leave.'' Jackson Lewis, however, commented that the additional information required under the proposed rule may still not be sufficient to put employers on notice that an employee's leave should be FMLA-protected. Several employer representatives also requested that the Department go further and require employees to expressly assert their FMLA rights in all instances. *See, e.g.*, National Restaurant Association; National Coalition to Protect Family Leave; National Newspaper Association; Spencer Fane Britt & Browne; Society for Human Resource Management; National Association of Convenience Stores; American Foundry Society. Jackson Lewis suggested that employees be required ''to specifically request FMLA leave for all absences less than one week/five business days in duration.'' The Equal Employment Advisory Council expressed its support for requiring employees to respond to employer requests for follow-up information regarding their need for leave, noting that ''the employee's cooperation is necessary to substantiate a request for legally protected leave.''

Most employee commenters who addressed the Department's inquiry regarding requiring employees to expressly assert their FMLA rights when they were requesting leave based on a condition for which they had previously provided sufficient notice, opposed the idea. *See, e.g.*, National Partnership for Women & Families; United Food and Commercial Workers International Union; Community Legal Services, Inc./AIDS Law Project of Pennsylvania. Community Legal Services, Inc./AIDS Law Project of Pennsylvania argued that ''[e]mployees who have already established a right to FMLA leave should not be vulnerable to losing their jobs simply because they neglect to use the magic words in giving notice to an employer that was already aware of why they have been out on leave.'' The Communications Workers of America, however, asserted that the use of a separate notice standard in such instances would be beneficial.

Many employer representatives, including a number of employers with large workforces such as the U.S. Postal Service and AT&T supported requiring employees to specifically reference the FMLA when requesting leave due to a previously-certified FMLA-protected condition. See *also* Southern Company; New York City (NY) Law Department; Vercruysse Murray & Calzone; National Association of Manufacturers; Society for Human Resource Management; Spencer Fane Britt & Browne; National School Boards Association. The U.S. Postal Service noted that requiring employees to specifically reference a previously-certified FMLA condition would be particularly helpful in situations in which employees have multiple FMLA conditions and

employers need to identify the condition for which the leave is being taken. The Equal Employment Advisory Council and Jackson Lewis, however, opposed having a separate notice standard in these circumstances because they perceived it as a lessening of the employee's notice obligation. Manufacturers Alliance/MAPI suggested that the uncertainty surrounding employee notice of the need for FMLA leave could be resolved if the Department created a form which employees could be required to use to request FMLA leave.

Finally, several commenters including the National Partnership for Women & Families and the National Employment Lawyers Association expressed concern that proposed § 825.302(c) fundamentally altered the employer's obligation to inquire if additional information was necessary to determine whether an employee's need for leave is FMLA-protected. *See also* Sargent Shriver National Center on Poverty Law; Community Legal Services, Inc./AIDS Law Project of Pennsylvania. The AFL–CIO asserted that the proposed rule affirmatively ''shifts the burden to employees to provide information that is currently the employer's obligation to obtain if the initial notice is insufficient.''

By setting forth the types of information that an employee may have to provide in order to put an employer on notice of the employee's need for FMLA-protected leave, the Department did not intend to establish a list of information that must be provided in all cases. Instead, the Department intended to provide additional guidance to employees so that they would know what information to provide to their employers. The Department agrees with those commenters who noted that the nature of the information necessary to put the employer on notice of the need for FMLA leave will vary depending on the circumstances. For example, an employee who informs her supervisor that she is pregnant and needs to attend a doctor's appointment related to her pregnancy has provided sufficient notice of her need for FMLA-protected leave. Likewise, where an employee is seriously injured at work and the employer sends the employee to the hospital by ambulance, the employer has sufficient information to be on notice that the employee's leave may be FMLA-protected. Accordingly, the final rule has been changed to read: ''Depending on the situation, such information may include that a condition renders the employee unable to perform the functions of the job, or if the leave is for a family member, that the condition renders the family member unable to perform daily activities; that the employee is pregnant or has been hospitalized overnight; the anticipated duration of the absence, if known; and whether the employee or the employee's family member is under the continuing care of a health care provider.'' The Department wishes to emphasize that the employer's obligation to inquire if it needs additional information to determine whether the leave is FMLA-qualifying remains the same as it is under the current regulations. No change in this obligation was proposed in the NPRM and none is intended in the final rule.

Section 825.302(c) of the final rule has been changed to include a different notice standard when the employee requests leave for a previously-certified FMLA-qualifying reason. The Department believes that in such situations, because employees are already aware that leave for such reason is FMLA-protected, it is not overly burdensome to require them to specifically reference either the particular reason or their need for FMLA leave. Where an employee has previously taken FMLA leave for more than one qualifying reason, the employer may need to inquire further to determine for which reason the leave is being taken and employees will be required to respond to such inquiries. The Department believes that this requirement will facilitate employers' ability to appropriately designate and protect FMLA leave. Because incidents of unforeseeable leave are often related to previously-certified FMLA-qualifying reasons, a similar notice standard has also been included in § 825.303 of the final rule.

Finally, § 825.302(c) in the final rule has been modified to incorporate appropriate references to military caregiver leave and provides that for qualifying exigency leave the employee must provide notice with sufficient information that indicates that a family member is on active duty or call to active duty status, that the requested leave is for one of the reasons listed in § 825.126(a), and the anticipated duration of the absence. It also states that an employer may request certification in the case of both military caregiver leave and qualifying exigency leave.

Section 825.302(d) of the proposed rule retained the requirement that an employee comply with the employer's usual notice and procedural requirements for calling in absences and requesting leave, but deleted language stating that the employer could not delay or deny FMLA leave if the employee failed to follow such procedures. The proposed rule qualified the employee's obligation to comply with the employer's usual reporting requirements, however, by noting that it applies ''absent unusual circumstances'' and providing examples of what might constitute such circumstances. The proposed rule also clarified that where the employer's usual reporting procedure allowed less time for reporting absences than § 825.302(a), the employer could not enforce its policy as to timing.

Employee representatives strongly opposed allowing employers to delay or deny FMLA protection because of an employee's failure to comply with the employer's usual requirements for requesting leave. *See, e.g.*, AFL–CIO; Community Legal Services, Inc./AIDS Law Project of Pennsylvania; American Postal Workers Union; National Partnership for Women & Families; Coalition of Labor Union Women. The AFL–CIO noted that the ''unusual circumstances'' exception would not provide employees with sufficient protection to prevent them from being denied FMLA leave due to the rigid application of employer policies. The American Postal Workers Union and the American Association of University Women argued that employers should not be able to enforce their usual policies unless they could show that they were harmed by the employee's failure to comply with the policy.

Employer commenters, however, argued that employees should be required to follow the same procedures for requesting leave regardless of whether their need for leave was covered by the FMLA. *See, e.g.*, National Coalition to Protect Family Leave; Equal Employment Advisory Council; TOC Management Services; Retail Industry Leaders Association; Society for Human Resource Management; Association of Corporate Counsel's Employment and Labor Law Committee. The Chamber argued that allowing employers to apply their normal procedures for requesting leave to FMLA leave requests would help reduce confusion and duplicative policies. The Equal Employment Advisory Council and the Association of Corporate Counsel's Employment and Labor Law Committee specifically supported the deletion of language from the current regulation stating that employers could not delay or deny FMLA protection where an employee fails to provide timely FMLA notice. The Equal Employment Advisory Council and others commented in favor of the clarification in the preamble to the proposed rule that where FMLA-

protected leave is delayed or denied because the employee failed to provide timely notice, and the employee is absent during the period in which he or she is not entitled to FMLA protection, the employer may treat the absence in the same manner it would treat any other unexcused absence. *See also* U.S. Postal Service; Retail Industry Leaders Association.

The Department recognizes that call-in procedures are routinely enforced in the workplace and are critical to an employer's ability to ensure appropriate staffing levels. Such procedures frequently specify both when and to whom an employee is required to report an absence. The Department believes that employers should be able to enforce non-discriminatory call-in procedures, except where an employer's call-in procedures are more stringent than the timing for FMLA notice as set forth in § 825.302(a). In that situation, the employer may not enforce the more stringent timing requirement of its internal policy. Additionally, where unusual circumstances prevent an employee seeking FMLA-protected leave from complying with the procedures, the employee will be entitled to FMLA-protected leave so long as the employee complies with the policy as soon as he or she can practicably do so. Unusual circumstances would include where the employer's procedure requires employees to report absences to a specific individual, and that individual was absent on a particular day, or the individual's voice mail box was full. Because the example of an employee unable to report an absence due to his or her medical condition is more appropriately viewed as unforeseeable leave, the example has been replaced with an employee unable to comply with the employer's requirement for the reasons discussed above. In such an instance, the employee would satisfy his or her FMLA notice obligation by providing notice in accordance with the employer's policy as soon as the employee can practicably do so.

Although the proposed rule made no changes in § 825.302(e), one change has been made in the final rule. The phrase ''for example'' has been added to the third sentence to emphasize that the reference to the use of intermittent leave for planned medical treatment is only one example of when an employee is obligated to make a reasonable effort to schedule leave so as not to disrupt unduly the employer's operations. The employee's obligation applies to all foreseeable FMLA leave for planned medical treatment, whether that leave is taken in a single continuous block of leave or intermittently. 29 U.S.C. 2612(e)(2)(A).

No changes were proposed to § 825.302(f). The final rule modifies paragraph (f) to incorporate references to the military family leave provisions. The rule makes clear that the requirement that an employee and employer attempt to work out a schedule without unduly disrupting the employer's operations applies only to military caregiver leave. It does not apply to qualifying exigency leave.

Proposed § 825.302(g) retained only the first sentence of current § 825.302(g) stating that employers may waive employees' FMLA notice requirements. The proposal deleted the remainder of current § 825.302(g), which addressed whether employers could require compliance with FMLA notice requirements where the provisions of a collective bargaining agreement, state law, or applicable leave plan allow for less advance notice to the employer. This proposal did not draw a significant number of comments.

Three unions, however, objected to the deletion of the language referencing less restrictive procedures in collective bargaining agreements. *See* National Association of Letter Carriers; National Treasury Employees Union; AFL–CIO. While the AFL–CIO agreed that the vacation leave example in current § 825.302(g) was confusing and should be deleted, it argued that it was important to retain the second and fourth sentences of the current regulation to provide guidance on less strict notice provisions in collective bargaining agreements. The National Treasury Employees Union argued that the deletion was inconsistent with 29 U.S.C. 2652, which states that nothing in FMLA ''shall be construed to diminish the obligation of an employer to comply with any collective bargaining agreement or any employment benefit program or plan that provides greater family or medical leave rights to employees than the rights established under this Act.'' *See also* National Partnership for Women & Families. Finally, the National Partnership for Women & Families objected to the deletion generally, not just as it applied to collective bargaining agreements. Only two employer representatives directly addressed proposed § 825.302(g) and both supported the proposed changes. *See* Equal Employment Advisory Council; TOC Management Services. The Equal Employment Advisory Council argued that current § 825.302(g) was confusing and inconsistent with the employer's right to notice under the FMLA.

The final rule makes no substantive changes to proposed § 825.302(g). The FMLA does not relieve employers of their obligation to comply with state and local laws, collective bargaining agreements, or employment benefit programs that provide ''greater family or medical leave rights.'' 29 U.S.C. 2651(b), 2652(a). These statutory obligations are not diminished by the revisions made to § 825.302(g). The Department does not believe that these obligations should be addressed in § 825.302(g) as they are fully discussed in §§ 825.700 and 825.701 of both the current and final rules. A cross-reference has been added in § 825.302(g) of the final rule, however, to § 825.304, which also addresses waiver of an employee's notice obligations.

Section 825.303 (Employee Notice Requirements for Unforeseeable FMLA Leave)

Section 825.303 addresses an employee's obligation to provide notice when the need for FMLA leave is unforeseeable. Proposed § 825.303(a) retained the current standard that employees must provide notice of their need for unforeseeable leave ''as soon as practicable under the facts and circumstances of the particular case.'' The proposed rule replaced language stating that, except in extraordinary circumstances, employees would be expected to give notice ''within no more than one or two working days of learning of the need for leave,'' with the requirement that employees provide notice ''promptly'' and provided examples of appropriate notice. Proposed § 825.303(b) retained the current standard that an employee need not assert his or her rights under the FMLA or even mention the FMLA to put the employer on notice of the need for unforeseeable FMLA leave. The proposal added the same clarifying language used in proposed § 825.302(c) explaining the information the employee must provide in order to provide sufficient notice to the employer of the need for FMLA leave and added that the employee has an obligation to respond to an employer's questions designed to determine whether leave is FMLA-qualifying. The proposal also added a specific statement that calling in ''sick,'' without providing additional information, will not be sufficient notice under the Act. The preamble to the proposed rule also sought comment on whether employees needing unforeseen leave for a previously-certified FMLA condition (*e.g.*, a flare-up of a chronic condition) should be required to expressly assert their FMLA rights. Finally, proposed

§ 825.302(c) added the requirement that, except when extraordinary circumstances exist, employees must comply with employers' usual and customary notice and procedural requirements for requesting leave and provided examples.

Section 825.303(a) of the final rule retains the standard from the current regulation that employees must provide notice of the need for unforeseeable FMLA leave ''as soon as practicable.'' The final rule replaces the statement that employees will be expected to give notice to their employer ''promptly'' with the statement that it generally should be practicable for the employee to provide notice of leave that is unforeseeable within the time prescribed by the employer's usual and customary notice requirements applicable to such leave. Section 825.303(b) of the final rule continues to provide guidance as to what information an employee may need to provide to constitute sufficient notice, but clarifies that the types of information listed are merely examples and may not be required in all situations. It adds a requirement that, for FMLA leave taken because of a qualifying exigency, the employee shall provide sufficient information that indicates that a family member is on active duty or call to active duty status, that the requested leave is for one of the reasons listed in § 825.126(a), and the anticipated duration of the absence. Additionally, the final rule requires employees seeking leave for a previously certified FMLA condition, covered servicemember's serious injury or illness, or qualifying exigency to inform the employer that the leave is for a condition, covered servicemember's serious injury or illness, or qualifying exigency that was previously certified or for which the employee has previously taken FMLA leave. The final rule also retains the statement that calling in ''sick'' is not sufficient notice of the need for FMLA leave and the requirement that employees respond to employer questions designed to determine if leave is FMLA-qualifying. The final rule in § 825.303(c) provides that, absent unusual circumstances, employees must comply with employers' usual notice and procedural requirements for requesting leave. This section makes clear that in the case of an emergency requiring leave because of an employee's own serious health condition, because of a qualifying exigency, or to care for a family member with a serious health condition or a covered servicemember with a serious injury or illness, written advance notice pursuant to an employer's internal rules and procedures may not be required. This section also makes clear that FMLA-protected leave may be delayed or denied when an employee does not comply with the employer's usual notice and procedural requirements and no unusual circumstances justify the failure to comply.

Employee representatives objected to the proposed regulation's shortening of the time for employees to provide notice of the need for unforeseeable leave. *See, e.g.*, National Partnership for Women & Families; United Food and Commercial Workers International Union; Community Legal Services, Inc./AIDS Law Project of Pennsylvania; National Employment Lawyers Association; Human Rights Campaign. The AFL–CIO and the United Food and Commercial Workers International Union took issue with the statement in the preamble to proposed § 825.303(a) that ''the Department expects that in all but the most extraordinary circumstances, employees will be able to provide notice to their employers of the need for leave at least prior to the start of their shift.'' 73 FR 7910 (Feb. 11, 2008). The United Food and Commercial Workers International Union objected to the examples provided in the proposed rule of an employee caring for a child with asthma and providing notice of the unforeseen need for leave ''promptly,'' arguing that the example ''fails to consider the timing of the child's asthma in relationship to the start of the employee's shift, whether following the attack the employee believes further treatment may be advisable, or whether, at the time of the asthma attack, the employee had to interrupt other responsibilities which have to be completed such as getting other children to school.'' The United Food and Commercial Workers International Union also noted that the term ''promptly'' was undefined and argued that it could be read to conflict with the statutory standard that notice must be provided ''as soon as practicable.'' The National Partnership for Women & Families questioned how the proposed regulation would work, noting that ''[i]t is unclear how employers will ascertain whether the employee could have called in earlier or not and who will determine if 'extraordinary circumstances' actually existed.'' *See also* PathWaysPA; Sargent Shriver National Center on Poverty Law.

Employer representatives overwhelmingly supported replacing the ''one or two working days'' standard with the requirement that employees provide notice of the unforeseen need for FMLA leave ''promptly.'' *See, e.g.*, Equal Employment Advisory Council; National Newspaper Association; Jackson Lewis. Several commenters emphasized that timely notice of absences is even more critical to an employer's operations when the need for leave is unforeseen. *See* Equal Employment Advisory Council; American Health Care Association; National Association of Manufacturers; AT&T; National Small Business Association. The Equal Employment Advisory Council and other commenters supported the statement in the preamble to the proposed rule that, absent extraordinary circumstances, employees would be expected to notify their employers of the need for unforeseen FMLA leave prior to the start of their shifts. *See also* American Health Care Association. Several law firms suggested that the final rule would be improved if this language from the preamble were incorporated into the regulatory text. *See* Spencer Fane Britt & Browne; Willcox & Savage; Vercruysse Murray & Calzone; *see also* TOC Management Services. The National Coalition to Protect Family Leave and others, however, objected to setting the standard at prior to the start of the shift and instead suggested that employer call-in policies should determine the timing of notice for unforeseen leave. *See* Spencer Fane Britt & Browne; Society for Human Resource Management; National Restaurant Association; National Newspaper Association. Spencer Fane Britt & Browne, for example, commented:

> Under the Proposed Rule, an employee can literally call in absent one minute before the start of the shift with impunity. In some industries, however, employers require as much as two hours advance notice because of scheduling issues and the need to find a replacement. It is literally impossible to have a replacement on site when an employee merely calls in right before the start of his/her shift. This is a particular problem in time-sensitive, critical services, and interdependent jobs (*e.g.*, health care, transportation, utilities, assembly line, work group operations, law enforcement and fire protection, *etc.*).

The Department has concluded that the statement in the proposed regulatory text that ''[w]here the need for leave is unforeseeable, it is expected that an employee will give notice to the employer promptly'' does not provide useful guidance for applying the ''as soon as practicable'' standard. As noted in the discussion of § 825.303(c) below, ''as soon as practicable'' is the governing standard. The Department believes that the employer's usual and customary notice requirements for taking such leave are a useful guide for providing notice of the need for unforeseeable

FMLA leave because the Department anticipates that providing notice ''as soon as practicable'' will generally be consistent with an employer's reasonable notice requirements for taking such leave. Accordingly, § 825.303(a) of the final rule replaces the statement that employees will be expected to give notice to their employers ''promptly'' with the statement that it generally should be practicable for the employee to provide notice of leave that is unforeseeable within the time prescribed by the employer's usual and customary notice requirements applicable to such leave, with a cross-reference to § 825.303(c). Where unusual circumstances prevent the employee from complying with the employer's normal reporting policy, the employee will satisfy the FMLA notice obligation if he or she provides notice to the employer ''as soon as practicable'' under the circumstances. The final rule retains the examples from proposed § 825.303(a) because the Department believes that they provide useful guidance on how the ''as soon as practicable'' standard should be applied.

Employee representatives commenting on proposed § 825.303(b) objected, as they did in responding to proposed § 825.302(c), that the listing in the regulation of the information necessary to notify an employer of the need for unforeseeable FMLA leave was overly prescriptive and presented an unnecessary hurdle for employees seeking to use FMLA leave. *See, e.g.*, National Partnership for Women & Families; AFL–CIO; United Food and Commercial Workers International Union; Communications Workers of America. The United Food and Commercial Workers International Union argued that under the proposed rule employees would be required to provide information which they may well not know at the time they initially provide notice of the need for unforeseeable leave. Other commenters expressed concern that employees would not be aware of their increased notice obligation and would therefore lose FMLA protection because they did not include all of the necessary information in providing notice of the need for leave. *See* National Partnership for Women & Families; National Employment Lawyers Association; Sargent Shriver National Center on Poverty Law. The National Partnership for Women & Families argued that the problems that employers allegedly face with unforeseen intermittent leave could be addressed without altering the employee's notice obligation:

> To the extent that employers feel that employees are abusing unforeseeable leave, especially intermittent unforeseeable leave, employers should address those problems as an issue of management of their employees. There is no need to change the regulations for a federal statute for the entire country especially without sufficient evidence that such change is necessary.

The National Employment Lawyers Association questioned whether the proposed regulation inappropriately shifted the burden from the employer to inquire if additional information was needed to determine if leave was FMLA-qualifying to the employee to provide all necessary information in the initial notice. *See also* National Partnership for Women & Families; United Food and Commercial Workers International Union; Community Legal Services, Inc./AIDS Law Project of Pennsylvania; Sargent Shriver National Center on Poverty Law.

Employer representatives also reiterated their comments on proposed § 825.302(c) when commenting on § 825.303(b), arguing that requiring employees to provide the enumerated information would facilitate the identification and protection of FMLA-qualifying leave. *See* the Chamber; Association of Corporate Counsel's Employment and Labor Law Committee. The National Coalition to Protect Family Leave and Society for Human Resource Management suggested that if employees were required to provide the information listed in proposed § 825.303(b), it would be equally appropriate and more effective to require them to specifically assert their FMLA rights when requesting unforeseen leave. *See also* National Newspaper Association; National Restaurant Association; Spencer Fane Britt & Browne. TOC Management Services and other commenters specifically supported the inclusion in the proposed regulation of the statement that simply calling in ''sick'' was insufficient to put an employer on notice of the need for unforeseen FMLA leave. *See also* American Health Care Association; Association of Corporate Counsel's Employment and Labor Law Committee; the Chamber. The Association of Corporate Counsel's Employment and Labor Law Committee and the National Newspaper Association specifically supported the requirement that employees respond to follow-up inquiries from employers to determine whether leave is FMLA-qualifying. One law firm, Vercruysse Murray & Calzone, commented that language in the proposed preamble stating that employees would be expected to provide additional information to their employers if a condition that initially did not appear to be a serious health condition developed into one should be included in the text of the final regulation.

Employers and their representatives generally supported requiring employees to expressly assert their FMLA rights when taking leave for a previously certified FMLA-qualifying reason, with several commenters noting that the need for such a requirement was even more imperative when the need for leave was unforeseen. *See, e.g.*, American Health Care Association; Association of Corporate Counsel's Employment and Labor Law Committee; Southern Company. In particular, the U.S. Postal Service highlighted the problems faced by employers when employees with multiple FMLA-certified conditions notify their employers of an unscheduled absence. Vercruysse Murray & Calzone asserted that employees with approved FMLA certifications for chronic conditions frequently do not specify the reason for their absence, and argued that since such employees have ''already been approved for FMLA leave and have been notified of their rights and responsibilities under the FMLA, they should be required to specify, when reporting an absence, that the absence relates to their previously approved FMLA leave.'' Employee representatives generally opposed requiring employees to specifically assert their FMLA rights when requesting unforeseen leave due to a serious health condition for which they have previously been certified. *See* National Partnership for Women & Families; Community Legal Services, Inc./AIDS Law Project of Pennsylvania; United Food and Commercial Workers International Union. The Communications Workers of America, however, supported the application of the different notice standard in these circumstances, but expressed concern as to how employees would learn of such a new requirement.

As discussed above in § 825.302(c), the Department did not intend in proposed § 825.303(b) to establish a list of information that must be provided in all cases. Accordingly, for the reasons discussed above in the preamble to § 825.302(c), the final rule has been changed to read: ''Depending on the situation, such information may include that a condition renders the employee unable to perform the functions of the job; that the employee is pregnant or has been hospitalized overnight; whether the employee or the employee's family member is under the continuing care of a health care provider; if the leave is due to a qualifying exigency, that a

covered military member is on active duty or call to active duty status, that the requested leave is for one of the reasons listed in § 826.126(a), and the anticipated duration of the absence; or if the leave is for a family member that the condition renders the family member unable to perform daily activities or that the family member is a covered servicemember with a serious injury or illness; the anticipated duration of the absence, if known.'' The Department also wishes to emphasize that the employer's obligation to inquire if additional information is needed to determine whether the leave is FMLA-qualifying remains the same as it is under the current regulations. No change in this obligation was proposed in the NPRM and none is intended in the final rule. Final § 825.303(b) retains the obligation that employees respond to employer inquiries designed to determine whether leave is FMLA-qualifying. In addition, references to both military caregiver leave and qualifying exigency leave are added to § 825.303(b). This paragraph is altered to provide that for qualifying exigency leave, the employee must provide notice with sufficient information that indicates that a family member is on active duty or call to active duty status, that the requested leave is for one of the reasons listed in § 825.126(a), and the anticipated duration of the absence. Section 825.303(b) has also been changed to include a different notice standard when the employee requests unforeseen leave due to a previously certified FMLA-qualifying reason. As explained in connection with the revisions to final § 825.302(c), the Department believes that in such circumstances, because employees are already aware that leave for the reason is FMLA-protected, it is not overly burdensome to require them to specifically reference their FMLA-qualifying reason or their need for FMLA leave. When an employee has more than one previously certified FMLA-qualifying reason, the employer may need to inquire further to determine for which FMLA-qualifying reason the leave is being taken, and employees will be required to respond to such inquires. The Department believes this requirement will facilitate an employer's ability to appropriately designate and protect FMLA leave.

Employee representatives objected to the requirement in proposed § 825.303(c) that employees comply with the employer's usual and customary notice and procedural requirements for requesting leave, except when extraordinary circumstances exist. *See* National Partnership for Women & Families; United Food and Commercial Workers International Union; Community Legal Services, Inc./AIDS Law Project of Pennsylvania. Community Legal Services, Inc./AIDS Law Project of Pennsylvania emphasized that in low-wage settings employees may not be familiar with their employers' procedures for requesting leave. Employer representatives, however, argued that employees should follow the same procedures for absence reporting regardless of whether the leave was for a FMLA condition. *See, e.g.*, National Coalition to Protect Family Leave; Retail Industry Leaders Association; National Restaurant Association; Ohio Department of Administrative Services; College and University Professional Association for Human Resources. Jackson Lewis objected to allowing an exception from the requirement for extraordinary circumstances.

As discussed above in connection with the revisions to § 825.302(d), the Department recognizes that call-in procedures are a routine part of many workplaces and are critical to an employer's ability to manage its work force. Adherence to such policies is even more critical when the need for leave is unforeseen. Accordingly, the final rule in § 825.303(c) provides that, absent unusual circumstances, employees must comply with their employer's usual and customary notice and procedural requirements for requesting leave. The Department modified the standard from ''extraordinary circumstances'' in the proposal to ''unusual circumstances'' in the final rule to make the standard consistent with that used in § 825.302(d). In the final rule, the Department deleted the sentence that FMLA leave may not be delayed or denied where the employer's policy requires notice to be given sooner than set forth in § 825.303(a) and the employee provides timely notice as required in that section. Because final § 825.303(a) makes the employer's usual and customary notice requirements the benchmark for providing timely notice for unforeseeable leave in most cases, this sentence no longer makes sense. Nonetheless, it is important to note that ''as soon as practicable'' is the governing standard; the Department anticipates that an employer's reasonable notice requirements for taking unforeseeable leave will be consistent with this standard in most circumstances. The final rule in § 825.303(d) includes the provision that FMLA-protected leave may be delayed or denied when an employee does not comply with the employer's usual notice and procedural requirements and no unusual circumstances justify the failure to comply. The Department included this provision to make it consistent with § 825.302(d).

Section 825.304 (Employee Failure To Provide Notice)

Proposed § 825.304 clarified what an employer may do if an employee fails to provide the required notice for FMLA leave. Specifically, the proposed section separated into different paragraphs the rules applicable to leave foreseeable at least 30 days in advance, leave foreseeable less than 30 days in advance, and unforeseeable leave. The proposed section provided examples of what it means to delay FMLA leave in cases of both foreseeable and unforeseeable leave. The proposed rule retained language from current § 825.304(c) stating that FMLA leave cannot be delayed due to lack of required employee notice if the employer has not complied with its notice requirements, as set forth in proposed § 825.300. The final rule reorganizes § 825.304 by moving paragraph (e) to paragraph (a) (and vice versa) as set forth in the proposed rule and by deleting the reference to annual distribution of employee notices to conform to changes made in final § 825.300.

The Department received few comments specifically addressing proposed § 825.304. The Equal Employment Advisory Council, Jackson Lewis, and the Pennsylvania Governor's Office of Administration noted that the clarification of employers' rights when employees fail to meet their FMLA notice obligations provided needed guidance to employers. The United Food and Commercial Workers International Union, however, strongly opposed permitting employers to discipline employees or delay the start of FMLA leave when employees needing unforeseeable leave fail to comply with employer call-in procedures.

The Department believes that proposed § 825.304 provides helpful guidance clarifying the consequences of an employee's failure to provide timely notice of the need for FMLA leave. While current § 825.304 addresses the delay of FMLA protection where an employee fails to provide 30 days notice of the need for FMLA leave, the regulation does not explain the consequences for failure to provide timely notice when the need for leave was either foreseeable less than 30 days

in advance or unforeseeable. Moreover, the current regulation does not explain the effect of delaying FMLA protection if the employee was absent during the period in which the protection was appropriately delayed. The Department believes that § 825.304 as proposed more clearly explains the consequences of an employee's failure to provide timely FMLA notice. Accordingly, except for the organizational changes in re-ordering paragraphs (a) and (e) noted above, the final rule adopts proposed § 825.304 without change.

Section 825.305 (Certification, General Rule)

The FMLA permits employers to require employees to provide a certification from their health care provider (or their family member's health care provider, as appropriate) to support the need for leave due to a serious health condition. 29 U.S.C. 2613. Section 825.305 of the regulations sets forth the general rules governing employer requests for medical certification to substantiate an employee's need for FMLA leave due to a serious health condition. The new military family leave provisions also permit employers to require employees to provide a certification in the case of leave taken for a qualifying exigency or to care for a covered servicemember with a serious injury or illness. Accordingly, § 825.305 in the final rule has been retitled and edited to apply generally to all types of certification. In most cases, for example, references to ''medical certification'' have been changed to simply ''certification.''

In the NPRM, no changes were proposed to current § 825.305(a), which states the general rule that employers may require certification from a health care provider where the employee's need for leave is due to a serious health condition of the employee or a covered family member. Current § 825.305(b) sets forth the timing requirement for providing the certification. Proposed § 825.305(b) increased the time frame in which an employer should request medical certification from two to five business days after notice of the need for FMLA leave and applied the general 15-day time period for providing a requested certification to all cases, including where the employee provides notice of the need for leave 30 days in advance. The Department also requested comment as to whether it should add a requirement under this section that employers must notify employees when a requested certification is not received within the 15-day time frame. Proposed § 825.305(c) added definitions of incomplete and insufficient certifications and set forth a procedure for curing an incomplete or insufficient certification that requires an employer to notify the employee in writing as to what additional information is necessary for the medical certification and provide seven calendar days to provide the additional information. Proposed § 825.305(d) clarified that if an employee fails to submit a complete and sufficient certification, despite the opportunity to cure the deficiency as set forth in § 825.305(c), the employer may deny the taking of FMLA leave. This proposed section also clarified that, when certification is required by the employer, it is the employee's obligation to either provide a complete and sufficient certification or provide any necessary authorization for the health care provider to release a complete and sufficient certification directly to the employer; this obligation applies regardless of whether the certification requested is an initial certification, a recertification, a second or third opinion, or a fitness for duty certification. Current § 825.305(e) states that if a less stringent medical certification standard applies under the employer's sick leave plan, only that lesser standard may be required when the employee substitutes any form of paid leave for FMLA leave. The proposed rule deleted this provision because it conflicted with the employer's right under 29 U.S.C. 2613 to require as a prerequisite to FMLA leave for a serious health condition that the employee provide a medical certification to substantiate the serious health condition. The proposed rule added a new § 825.305(e) allowing for annual medical certifications in those cases in which a serious health condition extends beyond a single leave year; this addition codified the Department's interpretation of the certification requirement in Wage and Hour Opinion Letter FMLA–2005–2–A (Sept. 14, 2005). The final rule adopts § 825.305 as proposed with one clarification to § 825.305(e) and with appropriate edits to reflect the military family leave provisions.

Proposed § 825.305(b) increased the time frame during which an employer should request medical certification from two to five business days after receiving notice of the employee's need for FMLA leave. The Department did not receive substantial comment on this proposal. For the most part, those commenters that addressed this proposal specifically supported the increase in the time frame to allow employers to process the employee's initial request for FMLA leave and determine if medical certification will be required. *See, e.g.*, the Chamber; TOC Management Services; National Retail Federation; College and University Professional Association for Human Resources. The National Small Business Association noted that the increased time frame would be particularly helpful for small businesses, which must divert resources from other functions to administer FMLA requests.

Current § 825.305(b) states that where the need for leave is foreseeable and notice is provided 30 days in advance, the employee must provide any requested medical certification prior to the commencement of the leave; in all other cases, the employee must provide medical certification within 15 days after the leave is requested ''unless it is not practicable under the particular circumstances to do so despite the employee's diligent, good faith efforts.'' Proposed § 825.305(b) applied the 15-day time frame, subject to the employee's diligent, good faith efforts, to all cases of FMLA leave in order to make it consistent with the timing requirements set forth in § 825.311 of the regulations. The Department did not receive extensive comments regarding this proposed change. The Chamber and the Association of Corporate Counsel's Employment and Labor Law Committee supported the application of the 15-day time frame to all requests for certification because it establishes a clear deadline that would facilitate FMLA administration. The AFL–CIO, however, objected to the proposed change arguing that the shorter time frame would burden employees.

Both proposed § 825.305(b) and (c) provide employees additional time in which to either initially submit the medical certification or cure a deficiency in the certification if the employee is unable to comply with the initial time frame ''despite the employee's diligent, good faith efforts.'' Several commenters requested that the Department provide additional guidance on what constitutes ''diligent, good faith efforts'' sufficient to justify allowing the employee additional time to provide or cure a medical certification. *See, e.g.*, Hewitt Associates; UMC of Southern Nevada; Dalton Corp. The AFL–CIO suggested that ''an employee who has requested a medical certification and has followed up at least once with his or her healthcare provider'' should be considered to have met the ''diligent, good-faith efforts'' standard justifying additional time within which to submit the certification. The Society for Human Resource Management and the National Coalition to Protect Family Leave suggested that where employees are

unable to submit a certification within 15 days despite diligent, good faith efforts, final § 825.305(b) should provide a single seven day extension to submit the certification so that the process would be clear and would mirror the cure process in proposed § 825.305(c).

The preamble discussion of proposed § 825.305(b) also sought comment on whether employers should be required to notify employees if a requested certification was not submitted within the 15-day time frame and allow the employee another seven days to provide the certification. Several employee representatives, including the National Partnership for Women & Families and the AFL–CIO supported requiring employers to provide notice to employees when a certification was not received within the initial time frame and provide additional time for the employee to submit the certification. *See also* National Treasury Employees Union; PathWaysPA. The National Treasury Employees Union noted that employees frequently request that their health care providers submit the certification directly to their employer and assume that the health care provider has done so. The AFL–CIO agreed that employers should be required to notify employees when a certification is not received, but suggested that the additional grace period for submitting the certification should be 15 days instead of seven. Catholic Charities, Diocese of Metuchen also supported allowing employees additional time to submit a certification. Employer representatives, however, almost uniformly opposed requiring employers to provide such notification because of the administrative burden doing so would impose. *See, e.g.*, Burr and Forman; Equal Employment Advisory Council; AT&T; National Association of Manufacturers; Willcox & Savage; Manufacturers Alliance/MAPI; Southwest Airlines; Berens & Tate; National School Boards Association. The Southern Company argued that such a requirement would inappropriately shift the employee's statutory responsibility to provide a medical certification to the employer and would, in effect, convert the intended 15-day period for providing certification into a 22-day period in all cases. Jackson Lewis and the Ohio Department of Administrative Services objected that requiring employers to inform employees that a certification has not been received would be overly paternalistic.

The final rule adopts proposed § 825.305(b) without change. First, as to this section's time frames for employers, the Department believes that the increase in the general time frame for the employer to request the employee to furnish a certification from a health care provider from two to five business days is reasonable and consistent with other similar changes. *See* final §§ 825.300(b) and (c); 825.301(a). Second, as to this section's time frames governing employees' follow-up with employers, the Department believes that applying the 15-day time period as the outer limit of the time period by which the employee must respond to all requests for certification will facilitate the prompt determination of whether leave qualifies for FMLA protection. By requiring employees seeking leave that is foreseeable 30 days in advance to provide any requested certification within the time frame requested by the employer—which must allow at least 15 calendar days after the certification is requested by the employer—employers should have sufficient time to review the certification, request additional information or clarification in accordance with § 825.305(c) if necessary, and determine whether the leave is FMLA-protected prior to employees commencing their leave. In all cases, employees who are unable to meet the 15-day time frame despite their diligent, good faith efforts must be allowed additional time to supply the certification. In all cases, it is imperative that employees communicate to their employers the efforts they are making to secure the completed medical certification. In assessing whether employees have made diligent, good faith efforts to submit a timely certification, employers should consider all the circumstances, including the employee's efforts to schedule appointments and follow-up with the health care provider's office, or other appropriate offices in the case of qualifying exigency leave or military caregiver leave, to ensure that the certification is completed; employers should be mindful that employees must rely on the cooperation of their health care providers and other third parties in submitting the certification and that employees should not be penalized for delays over which they have no control. The Department has decided not to require employers to provide notice to employees when a certification is not received because of the administrative burden this would impose. The Department is aware that many employers, in an effort to ensure that employees are aware of their FMLA rights, routinely send FMLA notifications and requests for certification for a wide range of absences, even when employees have not indicated that the absences are FMLA-qualifying. In such cases, there may be many reasons why an employee does not return the certification and requiring the employer to track every employee's time from the certification request and follow-up when a certification is not returned would create a significant burden on the employer and would be of questionable value to employees whose need for leave may be completely unrelated to the FMLA. Employees who request that their health care providers submit the certification directly to their employer can check with their employer to ensure that the certification has been received and follow-up with their health care provider if it has not. Such employee follow-up would be evidence of the employee's diligent, good faith efforts to provide timely certification. The Department deleted the phrase ''from a health care provider'' from the first sentence in the final rule. As noted above, this provision applies to all certifications for FMLA leave, including certification for qualifying exigency leave, which does not depend on a health care provider completing the certification.

Proposed § 825.305(c) defined the process by which an employee could cure an incomplete or insufficient certification, requiring employers to state in writing what additional information was necessary and establishing a seven-day period for the employee to provide the additional information. The Department proposed to define the cure procedure to address employee concerns that some employers made repeated requests for additional information without specifying why the certification was deficient, and employer concerns that without a defined process, it was unclear how many opportunities an employee must be given to cure a deficient certification. Overall, the Department received very positive feedback regarding the cure procedure in proposed § 825.305(c).

Several unions and other employee representatives supported the process in proposed § 825.305(c) for curing an incomplete or insufficient certification. *See, e.g.*, National Partnership for Women & Families; American Civil Liberties Union; AFL–CIO; Association of Professional Flight Attendants; National Postal Mail Handlers Union. The AFL–CIO commented that requiring employers to state in writing what additional information was required when they determine that a certification is incomplete or insufficient was justified based on employee complaints of employers making repeated requests for additional information. The

Association of Professional Flight Attendants, however, asserted that the proposal could be improved by requiring that employers ''provide sufficient detail for the health care provider to cure the deficiency.'' *See also* National Postal Mail Handlers Union. The National Association of Letter Carriers argued that limiting the cure period to seven days set an artificial deadline that would increase the likelihood that FMLA protection would be denied; the American Postal Workers Union suggested that an additional 15 days would be appropriate.

Employer representatives were also supportive of the proposed cure procedure. *See, e.g.*, the Chamber; Society for Human Resource Management; Equal Employment Advisory Council; TOC Management Services; National Coalition to Protect Family Leave; College and University Professional Association for Human Resources; Domtar Paper Company; American Foundry Society. The National Association of Manufacturers found the cure process to be ''appropriate;'' the National Newspaper Association described it as ''both explicit and fair;'' Spencer Fane Britt & Browne noted the process was ''workable and fair;'' and Hewitt Associates asserted that the proposed regulation ''provid[ed] a needed structure to the employer's obligation for incomplete or insufficient forms.'' Some commenters, however, opposed the additional seven-day period to cure a deficient certification, arguing that the 15-day period for submitting a complete and sufficient certification should not be extended. *See, e.g.*, Independent Bakers Association; Burr and Forman; Vercruysse Murray & Calzone. Jackson Lewis argued that the seven-day period to cure the certification should not be subject to extension even when the employee is unable to meet the deadline despite diligent, good faith efforts. The Metropolitan Transportation Authority (NY) opposed the cure procedure, noting that the requirement that employers inform employees in writing of the reasons the certification is deficient imposes an additional administrative burden on employers. *See also* Independent Bakers Association. AT&T and the U.S. Postal Service, however, supported requiring employers to inform employees of the additional information necessary for the medical certification, noting that they have already been providing this information to their employees in writing and do not find it unduly burdensome. The U.S. Postal Service noted the benefit of this procedure, stating that ''keeping lines of communication open between the employee and FMLA coordinator is crucial to help employees navigate their way through sometimes complex regulatory requirements during times of individual and family crisis.'' The Food Marketing Institute argued that employers should be required to inform employees of technical deficiencies in a certification but, where the employer finds the certification to be vague, should not be required to provide specific instructions as to how the deficiency could be corrected.

Several commenters also found the definitions of incomplete and insufficient certifications in proposed § 825.305(c) to be useful additions to the regulations. *See, e.g.*, National Coalition to Protect Family Leave; Society for Human Resource Management; Equal Employment Advisory Council; American Foundry Society; Spencer Fane Britt & Browne; Retail Industry Leaders Association; Dalton Corp.; Scott D. Macdonald Esq. The Chamber stated that the clarification of these standards would ''immediately and drastically improve FMLA communications.'' The AFL–CIO disagreed, however, stating it was ''greatly troubled'' by the definition of an ''insufficient certification'' as one containing ''vague, ambiguous or nonresponsive'' information. The AFL–CIO noted that in some cases, particularly those involving chronic conditions, medical providers may not be able to provide the level of certainty that employers desire in providing the frequency and duration of anticipated absences due to the condition. *See also* National Partnership for Women & Families (''DOL must make clear that a medical certificate may not be considered insufficient simply because the health care provider cannot supply a definite date by which the serious health condition will end or cannot predict when intermittent leave may be necessary.''). The National Postal Mail Handlers Union and the Association of Professional Flight Attendants requested that the Department state that a range of occurrences or a duration of ''indefinite,'' ''unknown,'' or ''lifetime'' should not be considered vague, ambiguous or non-responsive.

The final rule adopts § 825.305(c) as proposed without any substantive changes. The Department believes that the procedure for curing a deficient certification set forth in this section will go a long way toward lessening the friction between employers and employees during the certification process by increasing communication and providing a clear and manageable process for resolving questions regarding certifications. The Department believes the seven-calendar-day time frame to cure a deficient certification is appropriate because the employee need only follow-up with the health care provider's office, or other appropriate office in the case of leave for a qualifying exigency or military caregiver leave to ensure that the complete certification is sent. In the case of a serious health condition, an employee should not need to schedule any additional medical treatment during this period. The Department also believes that it is appropriate that this time frame be extended when employees are unable to meet it despite diligent, good faith efforts. As discussed above regarding § 825.305(b), while employees have an obligation to provide a complete and sufficient certification in a timely manner, employers must be cognizant of the fact that employees must rely on health care providers and other third parties to complete the certification and in some circumstances employees will not be able to comply with the time frame specified in this section despite their best efforts to do so. The Department has also retained the proposed definitions of incomplete and insufficient certifications because it believes that they provide useful guidance for employers in assessing whether a certification is sufficient to support a request for FMLA leave. While a medical certification should include the clearest information that is practicable for the health care provider to provide regarding the employee's need for leave, the Department is aware that precise responses are not always possible, particularly regarding the frequency and duration of incapacity due to chronic conditions. The Department does expect, however, that over time health care providers should be able to provide more detailed responses to these questions based on their knowledge of the employee's (or family member's) condition. For example, while an initial certification for a newly diagnosed chronic serious health condition may provide a relatively large range of expected incapacity, subsequent certifications in new leave years should be able to provide more specific information regarding the anticipated frequency and duration of incapacity based on the employee's actual experience during the intervening period.

Proposed § 825.305(d) explained the consequences of an employee's failure to provide a complete and sufficient certification. Employers welcomed the clarification that employees bear the

burden of ensuring that a complete and sufficient FMLA certification is submitted to the employer upon request in order to substantiate their right to FMLA-protected leave. *See, e.g.*, U.S. Postal Service; Association of Corporate Counsel's Employment and Labor Law Committee; the Chamber.

Finally, the proposed regulation deleted current § 825.305(e), which addresses the employee's certification obligation when the employer's sick leave plan requires less stringent medical certification than the FMLA and the employee substituted paid leave. Proposed § 825.305(e) replaced this requirement with a new provision allowing employers to require a new certification on an annual basis for conditions lasting beyond a single leave year. This addition codified the Department's interpretation of the certification requirement set forth in Wage and Hour Opinion Letter FMLA2005–2–A (Sept. 14, 2005).

The AFL–CIO and the National Association of Letter Carriers opposed the deletion of current § 825.305(e), which states that if the employer's sick leave plan has less stringent certification requirements, an employer can only require that lesser certification when an employee substitutes paid leave for FMLA leave. The National Association of Letter Carriers argued that the deletion would needlessly create a double standard in workplaces, with the documentation required for paid leave varying depending on whether the leave was FMLA-protected. TOC Management Services, however, argued that the deletion of current § 825.305(e) resolved confusion as to whether employers could require FMLA medical certification in all cases. *See also* Association of Corporate Counsel's Employment and Labor Law Committee; Equal Employment Advisory Council.

The AFL–CIO, American Postal Workers Union, and the National Postal Mail Handlers Union also opposed the provision in proposed § 825.305(e) allowing for a new medical certification each year for conditions lasting longer than a single leave year, arguing that there was no statutory basis for this new requirement. These commenters argued that annual medical certifications imposed an unnecessary and meaningless burden on employees with stable, long-term chronic health conditions. Employer commenters, however, argued that allowing employers to require annual medical certification would provide employers with a much needed tool for managing intermittent FMLA leave. *See, e.g.*, the Chamber; U.S. Postal Service; American Foundry Society; National Association of Manufacturers; Retail Industry Leaders Association; National Small Business Association; Hewitt Associates; WorldatWork. TOC Management Services requested that the Department clarify that annual certifications would be considered ''new'' certifications, on which employers would be entitled to request second opinions, as opposed to ''recertifications,'' on which the regulations do not permit second opinions. *See also* Equal Employment Advisory Council (''In particular, because the statute does not allow for second or third opinions on recertification, the recognition that a new leave year should trigger an employer's right to require a new certification is important.''). The National Retail Federation asked that the Department allow employers to request a new certification every six months.

The Department believes that current § 825.305(e) created needless confusion and conflicted with the statutory right of employers to require certification of a serious health condition from a health care provider to substantiate the employee's right to FMLA-protected leave. *See* 29 U.S.C. 2613. Additionally, for the reasons explained in Wage and Hour Opinion Letter FMLA2005–2–A (Sept. 14, 2005), the Department believes that allowing employers to require annual medical certifications of conditions lasting longer than a single leave year is an appropriate interpretation of the employer's statutory right to certification and provides a useful tool for administering the FMLA in the workplace. The Department does not believe that the requirement will be burdensome, particularly in light of the requirement that employees with chronic serious health conditions receive treatment by a health care provider at least twice per year. *See* § 825.115(c)(1). Finally, as the Department stated in the 2005 opinion letter, such new annual medical certifications are subject to clarification, including second and third opinions, as provided in § 825.307. Accordingly, the final rule adopts § 825.305(e) as proposed with the additional clarification that the clarification and authentication provisions of § 825.307 apply to new annual certifications.

Section 825.306 (Content of Medical Certification for Leave Taken Because of an Employee's Own Serious Health Condition or the Serious Health Condition of a Family Member)

Current § 825.306 addresses how much information an employer can obtain in the medical certification to substantiate the existence of a serious health condition (of the employee or a family member) and the employee's need for leave due to the condition. This section also explains that the Department provides an optional form (Form WH–380) for use in the medical certification process; other forms may be used, but they may only seek information related to the condition for which leave is sought, and no additional information beyond that contained in the WH–380 may be required. As discussed in the preamble to the proposed rule, the Department has received significant feedback from stakeholders, including health care providers, that the current WH–380 is confusing and could be improved. In addition to proposing a revised WH–380, the Department sought comment as to whether multiple forms would be clearer. The preamble to proposed § 825.306 also contained an extensive discussion of the interaction between the FMLA certification process and the Department of Health and Human Services' Health Insurance Portability and Accountability Act (HIPAA) Privacy Rule, which governs the privacy of individually identifiable health information created or held by HIPAA-covered entities. Proposed § 825.306(a) contained the information necessary for a complete certification set forth in current § 825.306(b) with a number of changes, including the addition of the health care provider's specialization; guidance as to what may constitute appropriate medical facts, including that a health care provider may provide a diagnosis; and whether intermittent or reduced schedule leave is medically necessary. Proposed § 825.306(b) retained language from current § 825.306(a) and (b) regarding the Department's optional Form WH–380. The proposed rule deleted current § 825.306(c), which contains language similar to current § 825.305(e) regarding lesser certification requirements in employer sick leave plans. Proposed § 825.306(c) incorporated language from current § 825.307(a)(1) explaining the interaction between workers' compensation and the FMLA with regard to the clarification of medical information. The proposed section also clarified that if an employee ordinarily is required to provide additional medical information to receive payments under a paid leave plan or benefit plan, an employer may require that the employee provide the additional information to receive those payments, as long as it is made clear to the employee that the additional information is requested only in

connection with qualifying for the paid leave benefit and does not affect the employee's right to unpaid FMLA leave. The proposed rule contained a new § 825.306(d), which clarified that where a serious health condition may also be a disability, employers are not prevented from following the procedures under the Americans with Disabilities Act (ADA) for requesting medical information. The proposed rule also contained a new § 825.306(e), which codified in the regulations the Department's long-standing position that employers may not require employees to sign a release of their medical information as a condition of taking FMLA leave. The final rule adopts § 825.306 as proposed with mostly minor changes, which are discussed below. The title of § 825.306 is modified in the final rule to clarify that this section does not apply to the military family leave provisions. Additionally, the Department has revised the current optional certification form WH–380 into two separate optional forms, one for the employee's own serious health condition and one for the serious health condition of a covered family member.

The Department received few comments on the inclusion in proposed § 825.306(a)(1) of the health care provider's specialization in the information that may be required on a certification. *See, e.g.*, Equal Employment Advisory Council (''Particularly considering the broad definition of 'healthcare provider,' the scope of the provider's expertise is important information that the employer needs to determine whether the certification is sufficient.''); Spencer Fane Britt & Browne (specialization is irrelevant unless employers are allowed to require that the certification be provided by an appropriate specialist); National Partnership for Women & Families (''the identification of the specialty could lead to the employer gaining information regarding the medical condition of the employee that is unnecessary to the determination of whether the employee qualifies for FMLA leave''). The Department notes it has always included the ''Type of Practice'' as part of the medical certification form. The Department believes that the health care provider's medical specialty/type of practice is useful and appropriate to the medical certification form and has retained this requirement in the final rule.

Many comments were received on proposed § 825.306(a)(3), which stated that the statement of appropriate medical facts ''may include information on symptoms, diagnosis, hospitalization, doctors visits, whether medication has been prescribed, any referrals for evaluation or treatment (physical therapy, for example), or any other regimen of continuing treatment.'' 73 FR 7983 (Feb. 11, 2008). Employees and their representatives objected to the proposal because they felt that a diagnosis should not be provided. *See, e.g.*, Family Caregiver Alliance; National Treasury Employees Union; National Partnership for Women & Families; American Postal Workers Union; National Association of Letter Carriers; Texas Classroom Teachers Association; Darcy Bowles; Craig Stiver; Jon Arnold. The AFL–CIO expressed concern that specifying medical facts, including diagnosis, ''may'' be provided on the certification would result in employers rejecting as insufficient certifications that do not contain this information. Employer representatives, on the other hand, considered the proposal to provide useful clarification for the health care provider. *See, e.g.*, Manufacturers Alliance/MAPI; Equal Employment Advisory Council; American Foundry Society; Dalton Corp. A number of employer representatives requested that the list of appropriate medical facts be made mandatory so that employers could require a diagnosis to support a request for FMLA leave. *See, e.g.*, the Chamber; Society for Human Resource Management; National Association of Manufacturers; National Association of Wholesaler-Distributors; National Business Group on Health; National Coalition to Protect Family Leave; Food Marketing Institute. The Department notes that the determination of what medical facts are appropriate for inclusion on the certification form will vary depending on the nature of the serious health condition at issue, and is appropriately left to the health care provider. Accordingly, the Department declines to set forth a mandatory list of medical facts that must be included in the FMLA certification. Similarly, the Department continues to believe that it would not be appropriate to require a diagnosis as part of a complete and sufficient FMLA certification. Whether a diagnosis is included in the certification form is left to the discretion of the health care provider and an employer may not reject a complete and sufficient certification because it lacks a diagnosis.

Several employer representatives praised the inclusion in proposed § 825.306(a)(6), (7), and (8) of the statutory requirement that there must be a medical necessity for leave taken on an intermittent or reduced leave schedule basis due to a serious health condition. *See, e.g.*, Equal Employment Advisory Council; International Public Management Association for Human Resources; City of Medford (OR); American Foundry Society; Dalton Corp. The National Association of Letter Carriers, however, objected to the inclusion of this language arguing that it ''would impose unnecessary requirements on employees and their health providers to disclose confidential medical information.'' Because leave may only be taken intermittently or on a reduced leave schedule due to the employee's or a family member's serious health condition when medically necessary, the final rule retains the requirement that a certification supporting the need for such leave must include information sufficient to establish the medical necessity for intermittent or reduced schedule leave. *See* 29 U.S.C. 2612(b)(1).

The Equal Employment Advisory Council and the Chamber specifically supported the proposed clarification in § 825.306(c) that where an employee's serious health condition is covered by workers' compensation and the workers' compensation procedures permit the employer to request additional information beyond that included in a FMLA certification, the employer may follow the workers' compensation procedure. Both of these commenters also agreed with the proposal in this section to allow employers to request additional information in accordance with a paid disability leave policy or disability plan that requires greater information to qualify for payment or benefits. The AFL–CIO, however, opposed this proposal and argued that it was inconsistent with the Department's proposal to delete current § 825.305(e), which prevented employers from requiring FMLA certification where the employers' sick leave plan had less stringent certification requirements and paid leave was substituted for unpaid FMLA leave. *See also* American Postal Workers Union. The Department disagrees with the AFL–CIO comment. The proposed clarifications in current § 825.306(c) and the deletion of current § 825.305(e) are wholly consistent with each other. Taken together, these changes reflect both an employer's statutory right to require a minimally sufficient certification to substantiate the employee's right to FMLA-protected leave in all cases, and an employer's right to additional information when another benefit plan or program requires greater information in order to qualify the employee for payment or benefits beyond those provided by the FMLA.

The Equal Employment Advisory Council, the Chamber, and TOC Management Services supported the Department's clarification in § 825.306(d) that employers may follow the procedures for requesting medical information under the ADA where the employee's serious health condition may also be a disability within the meaning of that Act. The Equal Employment Opportunity Commission, which enforces Title I of the ADA, was also supportive of this clarification, noting in its comments that it often receives ''questions from employers who are worried that they will violate the FMLA if they follow the ADA's procedures for requesting medical information in these circumstances.'' The Texas Classroom Teachers Association, however, suggested that the regulation be modified so that an employer could only follow ADA procedures where an employee requests an accommodation ''not otherwise provided by the FMLA.'' Hewitt Associates asked for clarification as to whether additional medical information received pursuant to § 825.306(c) and (d) may be used to determine employees' eligibility for FMLA leave. *See also* Metropolitan Transportation Authority (NY). The final rule revises § 825.306(c) and (d) to further clarify that additional information received pursuant to workers' compensation, paid leave, or ADA procedures may be considered in determining an employee's entitlement to FMLA-protected leave.

Lastly, employee representatives supported the clarification in § 825.306(e) that while employees may choose to comply with an authorization, release, or waiver allowing the employer to communicate directly with the employee's health care provider, they may not be required to provide such an authorization, release, or waiver permitting their employer to contact their health care provider directly as part of the FMLA certification process. *See, e.g.*, National Partnership for Women & Families; AFL–CIO; American Association of University Women; National Postal Mail Handlers Union; Coalition of Labor Union Women. *See also* Equal Employment Advisory Council. The Metropolitan Transportation Authority (NY), however, argued that employees should be required to execute a release of their medical information as part of the FMLA certification process. The Equal Employment Advisory Council and the Association of Corporate Counsel's Employment and Labor Law Committee supported the statement in this section that employees are responsible for providing complete and sufficient certification and that their failure to do so may result in the denial of FMLA leave. The Department continues to believe that employees should not be required to execute any type of release or authorization permitting their employers to receive medical information directly from their health care providers as part of the FMLA certification process. Of course, an employee remains free to choose to comply with the certification requirement in this manner by executing an authorization providing for the release of information required for a complete and sufficient certification. Accordingly, the final rule adopts § 825.306(e) as proposed, with only minor editorial changes. As stated in the regulation, however, in all cases where certification is requested, it is the employee's obligation to provide a complete and sufficient certification and the failure to do so may result in the denial of FMLA leave.

The Department received generally favorable comments regarding the proposed revision to the WH–380 optional medical certification form. *See* Equal Employment Advisory Council; Domtar Paper Company; Spencer Fane Britt & Browne; National Treasury Employees Union. *But see* Vercruysse Murray & Calzone; Illinois Credit Union League. Most commenters who addressed the issue supported the creation of multiple certification forms, most often suggesting separate forms for leave due to the serious health condition of the employee and the employee's family member. *See, e.g.*, Equal Employment Advisory Council; Hewitt Associates; American Health Care Association; National Partnership for Women & Families; Communications Workers of America; Southern Company. *See also* Spencer Fane Britt & Browne (suggesting separate forms for block and intermittent or reduced schedule leave); American Health Care Association/National Center for Assisted Living (suggesting a separate certification form for chronic serious health conditions). A few commenters, however, opposed the creation of multiple forms. *See* Jackson Lewis; National Treasury Employees Union; Scott D. Macdonald Esq.; Pennsylvania Governor's Office of Administration (noting that the Commonwealth of Pennsylvania switched from using two forms to using a single form because employees frequently filled out the wrong form). The Communications Workers of America, the Coalition of Labor Union Women, and the Academic Pediatric Association *et al.*, encouraged the Department to make use of the WH–380 mandatory. Based on the comments received, the Department has decided to include two optional certification forms in the final rule, one form to be used when the need for leave is due to the employee's own serious health condition and a second form to be used when the need for leave is to care for a family member with a serious health condition. Section 825.306(b) of the final rule has been modified accordingly to reflect that there are two optional certification forms. The Department also altered several of the questions from the single optional certification form proposed in the NPRM to better explain the information needed to support a request for each type of leave. The Department believes that using separate forms will make the forms shorter, clearer, and easier for health care providers to complete. The Department further believes that the purpose behind the two forms is sufficiently clear that it will not cause confusion. Because many serious health conditions require a combination of both a continuous block of leave and intermittent leave, the Department is not promulgating separate certification forms for block and intermittent leave. The Department also declines to mandate the use of either of the optional Department of Labor certification forms; where certification is requested, the employee's obligation is to provide a complete and sufficient certification, regardless of the form used.

Several commenters offered specific comments on the proposed revision to the Department's optional medical certification form. A number of commenters praised the Department's deletion of checkboxes on the current form for health care providers to indicate the type of serious health condition at issue. *See, e.g.*, Society for Human Resource Management; National Coalition to Protect Family Leave; American Foundry Society; College and University Professional Association for Human Resources; National Business Group on Health; Bridgestone Firestone North American Tire. These commenters noted that whether the medical facts satisfy one of the definitions of a serious health condition under the regulations is a legal determination, not a medical one; they also reported significant confusion resulting from health care providers checking a type of serious health condition that was inconsistent with the medical information contained in the rest of the form. *See* Society for Human Resource Management; National

Coalition to Protect Family Leave; College and University Professional Association for Human Resources; *see also* Equal Employment Advisory Council. Other commenters, however, objected that the proposed changes would impermissibly result in employers making medical judgments that should be made by health care providers. *See* National Partnership for Women & Families; Association of Professional Flight Attendants; Mary Lundquist. The National Partnership for Women & Families objected to the removal from the proposed form of the definitions of serious health condition, asserting that ''employees will be unable to determine themselves if they qualify for FMLA leave and will be unable to challenge the employer's determination that they do not qualify without legal or medical assistance.'' Because the Department has added a definition of serious health condition to the notice of Employee Rights under FMLA that must be posted, and provided to all employees at hiring, the Department disagrees with the National Partnership's assertion that removing this same information from the certification form will impact an employee's ability to determine for themselves if they qualify for FMLA leave. Moreover, the Department believes that requiring a health care provider to determine which definition of serious health condition is applicable has caused considerable confusion, with employers frequently receiving certifications with multiple and contradictory boxes checked, or with medical facts contained in the certification that are inconsistent with the serious health condition that has been checked. Accordingly, the optional certification forms contained in the final rule do not include boxes to indicate which definition of serious health condition is applicable. As the Department stated in the NPRM, the health care provider should determine the appropriate relevant medical facts to include on the certification and the employer should determine whether the certification is complete and sufficient to meet the regulatory definition of serious health condition. 73 FR 7915 (Feb. 11, 2008).

The Illinois Credit Union League and Cummins Inc. objected to being required to include on the certification form a statement of the essential functions of the position, arguing that it was unduly burdensome to require employers to set forth the essential functions of the employee's position or to provide a job description. The Equal Employment Advisory Council, however, supported the requirement that the health care provider provide information sufficient to establish the employee is unable to perform one or more of the essential functions of the employee's job, noting that the inability to perform the essential functions of the job due to a serious health condition is a ''threshold requirement'' that is ''the foundation for this type of FMLA leave.'' *See also* Association of Corporate Counsel's Employment and Labor Law Committee. The Illinois Credit Union League requested that the references to employees' job duties or functions in questions 6 and 7 be standardized to refer to ''essential functions.'' *See also* Scott R. Macdonald Esq.

In response to the concern of some commenters, the final rule makes clear in § 825.123(b) that an employer may, but is not required to, provide a list of essential functions when it requires a medical certification. The Department believes it is in the best interests of both employers and employees when such information is provided by the employer at the time it requests medical certification, so that the health care provider may assess the employee's ability to perform his or her job based on the most complete description of the employee's duties. The Department recognizes, however, that the FMLA imposes no legal obligation on employers to create or maintain written job descriptions or a list of essential functions for each position. Accordingly, the final form WH–380E has been revised to make clear that, in those cases in which the employer chooses not to include information on the certification form identifying the employee's essential functions, the health care provider may assess the employee's ability to perform his or her job based on the employee's own description of his or her job functions. For this same reason, and because the determination of whether a particular job duty is an ''essential function'' as that term is used for purposes of the FMLA is a legal, not a medical, conclusion, the final form WH–380E also retains the references to an employee's ''functions'' in questions 6 and 7.

The Department notes that an employer may use the procedures set forth in § 825.307 to clarify a certification that does not clearly specify that an employee is unable to perform one or more essential functions of the position. For example, if a certification specifies only that an employee is unable to lift heavy items, an employer may clarify with the health care provider whether the employee can perform the essential function of his or her job of lifting 20 pounds. In order to minimize the need for such clarifications, the Department strongly encourages employers to provide a list of essential functions when it requests medical certification.

Several commenters objected to the wording of question 3, which asks the health care provider to describe the relevant medical facts, arguing that as worded in the proposed form health care providers would not be aware that the medical facts listed, including diagnosis, were not mandatory. *See, e.g.*, National Partnership for Women & Families; Communications Workers of America; Coalition of Labor Union Women; Texas Classroom Teachers Association; Academic Pediatric Association, et al. Other commenters requested, as they had in response to proposed § 825.306(a), that the provision of a diagnosis and the other listed medical facts be made mandatory on the medical certification form. *See, e.g.*, Society for Human Resource Management; National Coalition to Protect Family Leave; American Foundry Society; Independent Bakers Association; National Newspaper Association; Illinois Credit Union League. The National Business Group on Health and Hewitt Associates suggested that including the list of conditions set forth in current § 825.114(c), which are ordinarily not serious health conditions, would provide useful guidance to health care practitioners in completing the medical certification form. As discussed above regarding proposed § 825.306(a)(3), the determination of what medical facts are appropriate for inclusion on the certification form is within the discretion of the health care provider and will vary depending on the nature of the condition for which leave is sought. The Department has revised the certification form to clearly indicate that the medical facts listed are merely examples and are not required in all cases. The Department does not believe that it is necessary to include the list of conditions set forth in final § 825.113(d) (current § 825.114(c)) on the certification forms; the health care provider will determine the medical facts relating to the employee's or family member's health condition, and where those medical facts meet one of the definitions of serious health condition the employee's need for leave will be FMLA-protected regardless of whether the condition is one of those listed.

Vercruysse Murray & Calzone objected to the statement in the form's instructions to the employee that failure to provide the requested information ''may result in a denial'' of FMLA leave,

arguing that failure to provide such information will always result in such a denial and the instructions should so indicate. *See also* Hewitt Associates. The Department believes that this instruction is correct. Employers are not required to request medical certification and in appropriate circumstances may protect leave under the FMLA despite the employee's failure to return the certification form.

Several commenters also objected to the instructions to the health care provider in section III of the proposed form, arguing that instead of indicating that the terms ''lifetime,'' ''unknown,'' or ''indeterminate'' ''may not be sufficient to determine FMLA coverage,'' the instructions should state clearly that such terms are not sufficient to support a request for FMLA-protected leave. *See, e.g.*, Society for Human Resource Management; National Coalition to Protect Family Leave; American Foundry Society; Hewitt Associates; National Newspaper Association; Spencer Fane Britt & Browne. *But see* National Partnership for Women & Families (''We are concerned that this instruction, coupled with the proposed direct contact between the employer and employee's health care provider could lead to employer representatives demanding that health care providers give more definite answers when they cannot.''); Communications Workers of America. The Academic Pediatric Association et al. argued that ''lifetime,'' ''unknown,'' and ''indeterminate'' may be medically appropriate answers for some conditions and that the ''lack of medical certainty should not supply a de facto reason for denying FMLA leave.'' The Department believes that the instructions are correct as proposed. While terms such as ''lifetime,'' ''unknown,'' or ''indeterminate'' will not be sufficient where more specific estimates are possible, there will be situations in which such terms are an appropriate response reflecting the health care provider's best medical judgment and will therefore be sufficient.

Finally, several commenters addressed the Department's discussion of the Health Insurance Portability and Accountability Act (HIPAA) and the HIPAA Privacy Rule. The National Coalition to Protect Family Leave and the Equal Employment Advisory Council agreed with the Department's observation that the HIPAA Privacy Rule sets the standard for the protection of employee medical information. *See also* U.S. Postal Service; American Health Care Association; Society for Human Resource Management; Retail Industry Leaders Association. Infinisource, Inc., concurred, stating that ''DOL correctly recognized with the advent of HIPAA since the FMLA regulations were last finalized, a framework already exists for ensuring privacy.'' Commenters representing employees, however, objected that the HIPAA Privacy Rule does not provide sufficient protection for employee medical privacy. *See, e.g.*, AFL–CIO; National Treasury Employees Union; National Association of Letter Carriers; National Postal Mail Handlers Union. As the Department explained in the NPRM, the HIPAA Privacy Rule governs disclosures of medical information to employers or their representatives by employees' health care providers that are HIPAA-covered entities and sets a far higher standard for protection of employee medical information than the current FMLA regulations. The impact of HIPAA is discussed further in § 825.307 as it relates to the process of clarification and authentication of medical certifications.

Section 825.307 (Authentication and Clarification of Medical Certification for Leave Taken Because of an Employee's Own Serious Health Condition or the Serious Health Condition of a Family Member)

Current § 825.307 addresses the employer's ability to clarify or authenticate a complete and sufficient FMLA certification. Current § 825.307(a) permits an employer, with the employee's permission, to have its own health care provider contact the employee's health care provider in order to clarify or authenticate a FMLA certification. Proposed § 825.307(a) defined ''authentication'' and ''clarification,'' clarifying that ''authentication'' involves providing the health care provider with a copy of the certification and requesting verification that the information on the form was completed and/or authorized by the provider; no additional medical information may be requested and the employee's permission is not required. In contrast, ''clarification'' involves contacting the employee's health care provider in order to understand the handwriting on the medical certification or to understand the meaning of a response; no additional information beyond that included in the certification form may be requested and any contact with the employee's health care provider must comply with the requirements of the HIPAA Privacy Rule. The NPRM removed the requirement that the employer utilize a health care provider to make the contact with the employee's health care provider, and the requirement that the employee consent to the contact. Proposed § 825.307(a) required that prior to any contact with the employee's health care provider for purposes of clarification or authentication of the FMLA certification, the employee must first be given an opportunity to cure any deficiencies in the certification pursuant to the procedures set forth in § 825.305(c). The proposed rule also made clear that the employee is not obligated to permit his or her health care provider to communicate with the employer, but that if such contact is not permitted and the employee does not otherwise clarify the certification, the employer may deny the taking of FMLA leave. Proposed § 825.307(b) consolidated language from current § 825.307(a)(2) and (b) setting forth the requirements for an employer to obtain a second opinion, and added language requiring the employee or the employee's family member to authorize his or her health care provider to release relevant medical information pertaining to the serious health condition at issue if such information is requested by the second opinion health care provider. Proposed § 825.307(c) added the same requirement to provide relevant medical information if requested by the third opinion health care provider. Proposed § 825.307(d) increased the number of days the employer has to provide an employee with a requested copy of a second or third opinion from two to five business days. The NPRM proposed no changes to current § 825.307(e) and (f), involving travel expenses for second and third opinions and certifications by foreign health care providers, respectively. The Department did note in the preamble, however, that it was aware of significant concerns regarding foreign medical certifications and asked for comment as to what changes would allow for better authentication of such certifications.

The final rule makes three changes to proposed § 825.307. First, in response to many comments from employee groups and individual employees expressing concern for employee medical privacy, § 825.307(a) of the final rule modifies the process by which an employer may contact an employee's health care provider to clarify who may contact the employee's health care provider and to ensure that the employee's direct supervisor is not the point of contact. The final rule also revises the reference to the HIPAA Privacy Rule in this section to make clear that its requirements must be satisfied whenever individually-identifiable health information of an employee is

shared with an employer by a HIPAA-covered health care provider. Second, § 825.307(f) has been modified to require employees to provide, upon request by the employer, a translation of FMLA certifications that are completed by foreign medical providers in languages other than English. In addition, the title of § 825.307 is modified in the final rule to clarify that this section does not apply to the military family leave provisions.

The Department's proposal to allow direct contact (*i.e.*, without the use of a health care provider) between employers and employees' health care providers resulted in a significant number of comments to the NPRM. Employees and their representatives expressed both generalized concerns arising from the removal of the requirement of employee consent, and specific concerns regarding the possibility of direct supervisors being made aware of sensitive medical information. Employers and their representatives expressed overwhelming support for the proposal, arguing that it would streamline the certification process and decrease administrative costs.

While most of the comments focused on the clarification process, several commenters representing employers specifically supported the Department's proposal regarding authentication of FMLA certifications. These commenters noted that the current regulation's requirement of employee consent for authentication of a FMLA certification is problematic because the purpose of authenticating a certification is to ensure that fraud has not been committed. Consent is unlikely in such situations and defeats the purpose. *See, e.g.*, AT&T; International Public Management Association for Human Resources; HR Policy Association; National Small Business Association; National Association of Manufacturers; the Chamber; Equal Employment Advisory Council. The National Association of Letter Carriers, however, argued that if such direct contact between the employer and the employee's health care provider is necessary to ensure the authenticity of a certification, the employer should be required to make such contact only in writing in order to ensure that additional medical information is not disclosed. The American Civil Liberties Union specifically objected to removing the requirement of employee consent in order for an employer to authenticate a FMLA certification. *See also* National Treasury Employees Union; AFL–CIO. The Department declines to require that the authentication process be limited to a written process. The Department has modified the final rule to make clear that, to the extent that authentication requires a HIPAA-covered health care provider to share individually-identifiable health information with an employer, the HIPAA Privacy Rule will require a valid HIPAA authorization.

Regarding the clarification process, the Department received a significant number of comments, many coming from individual employees, opposing the Department's proposal to allow employers to contact an employee's health care provider for purposes of clarifying a certification without the employee's permission and without using a health care provider to make the contact. *See, e.g.*, Richard Baerlocher; Theodore Rabinowitz; Kenneth Kelble; Robin Arnold; Donna Long; Bob Gunter; Sarah Blackman; Susan Fuchs. Many commenters representing employees were particularly concerned that the proposed rule would allow an employee's direct supervisor to contact the employee's health care provider. *See, e.g.*, National Postal Mail Handler's Union; Legal Aid Society—Employment Law Center; National Association of Letter Carriers. The Service Employees International Union argued that the prospect of a direct supervisor contacting a health care provider ''would deter valid requests for leave from employees who resent this invasion of their own and their family member's privacy.'' *See also* National Employment Lawyers Association; Women Employed. The National Partnership for Women & Families noted that under the proposed regulation there was nothing to prevent an employer from utilizing the employee's supervisor, or even a coworker, to clarify a FMLA certification. *See also* Women Employed; Family Caregiver Alliance; American Association of University Women.

Commenters also objected to allowing individuals without medical training to contact an employee's health care provider. *See, e.g.*, National Postal Mail Handlers Union; Association of Professional Flight Attendants; Women Employed; National Association of Letter Carriers; PathWaysPA. The AFL–CIO argued that the employee protections afforded by requiring provider-to-provider contact far outweigh any expense or delay incurred as a result of such requirement. The Communications Workers of America argued that allowing employer representatives who lack medical training to contact employee health care providers would significantly increase the burden on the healthcare system.

Several commenters representing employees expressed concern that once employers were allowed to make contact with an employee's health care provider without having to use the employer's own health care provider, there would be no way to ensure that employers limited themselves to requesting clarification of the certification and did not request additional medical information. *See, e.g.*, National Association of Letter Carriers; Family Caregiver Alliance; American Civil Liberties Union; American Association of University Women. The National Postal Mail Handlers Union argued that the appropriate mechanism for an employer to gather additional information regarding an employee's medical condition is the second opinion process, not direct contact with the employee's health care provider. *See also* Service Employees International Union; Communications Workers of America.

Finally, commenters representing employees also argued that the requirement in current § 825.307(a) that the employee consent to any contact with his or her health care provider provides greater protection for employee medical privacy than does requiring employers to comply with the HIPAA Privacy Rule. The AFL–CIO, for example, argued that the HIPAA Privacy Rule's protections are insufficient because they do not provide a remedy against employers for the unauthorized disclosure of protected health information. *See also* Air Line Pilots Association. The National Treasury Employees Union and the National Association of Letter Carriers both argued that the current FMLA regulations provide greater protection for employee medical information than does HIPAA. The National Postal Mail Handlers Union argued that if the Department included proposed § 825.307(a) in the final rule despite employee objections, it should make clear that a HIPAA-compliant authorization for employer contact could be narrowly limited to cover only the information included in the FMLA certification form. *See also* Association of Professional Flight Attendants.

Commenters representing employers overwhelmingly supported the proposed changes to the clarification process. *See, e.g.*, Infinisource, Inc.; AT&T; Society for Human Resource Management; Association of Corporate Counsel's Employment and Labor Law Committee; National Coalition to Protect Family Leave; National Association of Manufacturers. The Chamber described the proposal to permit contact between the employer without the use of a health

care provider representing the employer and the employee's health care provider as ''among the most impactful changes proposed'' in the NPRM and assured that ''employers are mindful of the sensitive nature of the information involved and consider this additional privilege extremely limited * * * [they] do not view this as permission to go on a 'fishing expedition' and delve further into an employee's private affairs than necessary to evaluate the request for leave.'' The Equal Employment Advisory Council asserted that allowing human resources professionals to contact the employee's health care provider would allow the necessary information to be obtained more efficiently because the individual making the contact would be familiar with both the FMLA's requirements and the employee's job functions. The National Newspapers Association noted that allowing direct employer contact with the employee's health care provider was a ''significant improvement'' for small businesses that do not have health care providers on staff. *See also* National Federation of Independent Business. The Society for Human Resource Management and the National Coalition to Protect Family Leave urged the Department to clarify in the final rule that employees may choose to authorize their employers to contact their health care providers at the outset of the clarification process, and are not required to first seek to cure the certification themselves pursuant to § 825.305(c). Finally, numerous employers and employer representatives commented that the HIPAA Privacy Rule has supplanted the consent requirement of the current regulation and sets the appropriate standard for guaranteeing employee medical privacy. *See, e.g.*, National Coalition to Protect Family Leave; Equal Employment Advisory Council; American Health Care Association; Society for Human Resource Management; Retail Industry Leaders Association. For example, the U.S. Postal Service stated that ''HIPAA restrictions will continue to protect unwarranted disclosures but at the same time, employers will be able to process FMLA requests more expeditiously when allowed direct access to a provider.''

The Department understands the concerns expressed by employees and their representatives that the proposed regulation did not prohibit an employee's direct supervisor from contacting the employee's health care provider. The Department agrees that employers should not be able to use the employee's direct supervisor to contact an employee's health care provider. Accordingly, § 825.307(a) of the final rule specifies that the employer representative contacting the employee's health care provider must be either a health care practitioner, a human resources professional, a leave administrator, or a management official, but in no case may the employer representative be the employee's direct supervisor. The Department recognizes that many employers utilize third party providers to manage all or part of their leave administration; such third party providers may be used for the purposes of authenticating or clarifying FMLA certifications. The Department declines, however, to restrict employers to utilizing only health care providers for purposes of authenticating or clarifying an employee's FMLA certification. As is the case under the existing process set forth in current § 825.307(a), the final rule restricts the employer to contacting the health care provider for the purpose of understanding the handwriting on the medical certification or the meaning of a response. In light of the fact that an employer may make similar, or even more detailed, inquiries without utilizing a health care provider when determining an employee's eligibility for other related benefits, the Department does not believe that employers should be so constrained under the FMLA. For example, the Department notes that employers are not constrained by any such restriction under the Americans with Disabilities Act, as amended, and, in fact, commonly utilize human resources professionals or other management officials to communicate with employees' health care providers when appropriate under that Act. The Department encourages employers to continue to utilize health care practitioners when contacting an employee's health care provider to clarify FMLA certifications wherever possible, but § 825.307(a) of the final rule permits employers to use other appropriate representatives in order to streamline the authentication and clarification process, speed the determination of whether an employee's leave is FMLA-protected and reduce the associated administrative costs.

The final rule also maintains the requirement from the proposal that communication between employers and employees' HIPAA-covered health care providers for purposes of clarification of FMLA certifications comply with the requirements of the HIPAA Privacy Rule and clarifies that the requirements of the HIPAA Privacy Rule must be satisfied whenever individually-identifiable health information of an employee is shared with an employer by a HIPAA-covered health care provider. As the Department noted in the NPRM, the HIPAA Privacy Rule provides far more protection for employee medical information than current § 825.307(a). For example, although the current regulation requires an employee's permission for an employer to contact the employee's HIPAA-covered health care provider, it does not dictate the form such permission may take. Under the current regulation, employees could verbally consent to such contact. In contrast, in order for a health care provider that is a HIPAA-covered entity to share employee health information with an employer, the authorization must be valid under the HIPAA Privacy Rule, which requires that the authorization must be a written document containing the name of the health care provider, a description of the information to be disclosed, the name or specific identification of the person to whom the disclosure may be made, a description of the purpose of the requested disclosure, an expiration date or event for the authorization, and a signature of the individual making the authorization. 45 CFR 164.508(c)(1). In addition, three required statements regarding the revocation of the authorization, the conditioning of treatment or payment, and the potential for redisclosure must also be included as provided at 45 CFR 164.508(c)(2). Finally, the HIPAA Privacy Rule at 45 CFR 164.508(b)(3), prohibits a HIPAA authorization from being combined with certain other documents.

Hence, the HIPAA authorization supplants and serves the same purpose as the ''with the employee's permission'' standard under the current FMLA rule. In such cases employees will be made aware that their employers may need to contact the employees' HIPAA-covered health care provider because the employee will have to complete a HIPAA authorization form with his or her health care provider, at which point in time employees can choose to allow the authorization or not. If the employee chooses not to authorize such contact under the HIPAA Privacy Rule, he or she has the same responsibilities as under the current FMLA rule to provide a complete and sufficient medical certification form. Finally, the Department notes that because employers are not covered entities under HIPAA, the HIPAA Privacy Rule does not provide a remedy to employees for employers' dissemination of confidential medical information. However, § 825.500(g) of

both the current and final rules requires employers to maintain medical certifications created for purposes of the FMLA as confidential medical records in separate files from the usual personnel files.

Finally, the Department agrees that employees may choose to forego the opportunity to utilize the cure procedure in § 825.305(c) if they wish their employer to proceed immediately with curing any deficiencies in the certification through direct contact with their health care provider. The Department does not believe that any change is necessary in the proposed regulatory language in this regard, however, as the regulation requires only that the employee be given the opportunity to cure any deficiencies in this manner; it does not require that the employee avail himself or herself of that opportunity. The Department also does not believe that any change is necessary to clarify the scope of information involved in the clarification process. The final rule maintains the standard set forth in current § 825.307(a) limiting the scope of clarification to the information set forth in the certification. The Department's addition of a definition of the term ''clarification'' is not intended to broaden the type or amount of information an employer may obtain as part of the existing clarification process.

The Department received comments from several employers and their representatives regarding the proposal in § 825.307(b) and (c) to require employees or their family members to authorize their health care providers to release all relevant medical information pertaining to the serious health condition at issue if requested by the provider of the second or third opinion in order to render a sufficient and complete medical opinion. These commenters universally agreed that this proposal would enhance the second and third opinion process. *See, e.g.*, the Chamber; Society for Human Resource Management; Equal Employment Advisory Council; American Foundry Society; Domtar Paper Company; National Business Group on Health; National Association of Manufacturers; AT&T. The U.S. Postal Service argued that both the employer and the employee will benefit from this proposal because the second or third opinion provider will be better able to assess the employee's medical condition and may also be able to rely on prior test results in some cases, thus sparing employees unnecessary additional medical testing. *See also* National Coalition to Protect Family Leave. The Department believes that it is appropriate to require employees or their family members to make such authorizations in this context because the information will be conveyed directly to the second or third opinion health care provider, as opposed to being provided to the employer as is the case with clarification. While the Department received very few comments on the proposal in § 825.307(d) to increase from two to five business days unless extenuating circumstances prevent such action the amount of time employers have to provide a copy of a second or third opinion to an employee who requests one, TOC Management Services and Infinisource, Inc. specifically supported this proposal. *But see* Richard Baerlocher (urging the Department to retain the current two-day time frame). The final rule adopts § 825.307(b), (c), and (d) as proposed without any changes.

Finally, the Department received comments from several employer representatives regarding FMLA certifications filled out by foreign medical care providers. The Equal Employment Advisory Council and others suggested that employees should be expected to provide an English translation of a medical certification provided in another language. *See also* National School Boards Association; Vercruysse Murray & Calzone. The National Coalition to Protect Family Leave, the Society for Human Resource Management, and the American Foundry Society argued that employers should be automatically entitled to get a second opinion on any certification provided by a foreign health care provider. Spencer Fane Britt & Browne argued an employee should be required to have his or her own health care provider in the United States authenticate and verify any FMLA certification completed by a foreign health care provider.

The final rule modifies § 825.307(f) to require that employees provide a written translation of any certification by a foreign health or provider that is completed in a language other than English. The Department believes that in most situations either the employee or the employee's family member will be able to provide the written translation and such a translation will satisfy the rule. Therefore, the Department does not anticipate that this requirement will impose a significant burden on employees. The provision of an English translation of the certification will facilitate the employer's ability to determine whether or not the leave is FMLA protected, and whether additional clarification or authentication is required. The Department recognizes that providing for translation of certifications by foreign health care providers does not fully address all of the concerns employers have regarding such certifications. The Department believes, however, that this approach, while limited, recognizes the legitimate need of employees to take FMLA leave to care for family members in foreign countries and the need of employers to be able to verify that such leave is being appropriately used.

Section 825.308 (Recertifications for Leave Taken Because of an Employee's Own Serious Health Condition or the Serious Health Condition of a Family Member)

Current § 825.308 of the regulations addresses the employer's ability to seek recertification of an employee's medical condition. Section 825.308(a) of the current regulations sets forth the rule for recertification for pregnancy, chronic, or permanent/long-term conditions and generally permits recertification no more often than every 30 days in connection with an absence. Current § 825.308(b) states that where a certification specifies a minimum duration of incapacity of more than 30 days, or specifies a minimum period of intermittent or reduced schedule leave, recertification generally may not be required until the specified minimum duration has passed. Section 825.308(c) of the current regulations provides that in all situations not covered by § 825.308(a) and (b), employers may generally request recertification every 30 days. Current § 825.308(d) requires employees to provide recertification within at least 15 calendar days of the employer's request, unless it is not practicable to do so despite the employee's diligent, good faith efforts. Current § 825.308(e) provides that recertification is at the employee's expense and that no second or third opinions may be required on recertification. In the NPRM, the Department proposed to reorganize § 825.308 for purposes of clarity. Proposed § 825.308(a), titled ''30-day rule,'' permitted recertification every 30 days in connection with an absence. Proposed § 825.308(b), titled ''More than 30 days,'' stated the rule from current § 825.308(b) that where the certification indicates a minimum period of incapacity in excess of 30 days, recertification generally may not be required until the minimum duration has passed and added an example to clarify the application of this rule. The proposal also permitted an employer to request recertification every six months in connection with an absence in all

cases. Proposed § 825.308(c), titled ''Less than 30 days,'' explained under what circumstances an employer could require recertification more frequently than every 30 days and provided examples of circumstances that might justify requesting more frequent recertification. Proposed § 825.308(d) was unchanged from the current regulations other than the addition of the title ''Timing.'' The proposal contained a new § 825.308(e), titled ''Content,'' which clarified that an employer may request the same information on recertification as required for the initial certification as set forth in § 825.306, and the employee has the same obligation to cooperate in providing recertification as he or she does in providing the initial certification. Proposed § 825.308(e) also clarified that employers may provide the employee's health care provider with a record of the employee's absence pattern and ask whether the leave pattern is consistent with the employee's serious health condition. Current § 825.308(e) was redesignated as proposed § 825.308(f) without any changes. The Department requested comment, however, regarding its decision to retain the current regulation's prohibition against second and third opinions on recertification. The final rule adopts § 825.308 as proposed, with minor clarifications in § 825.308(b) as discussed below. The title is also modified in the final rule to clarify that this section does not apply to the military family leave provisions.

The NPRM proposed to resolve uncertainty under current § 825.308 as to how often employers could seek recertification of chronic conditions where the certification indicates that the duration of the condition is ''lifetime.'' Under the current regulation, it is unclear whether such certifications would be subject to recertification every 30 days under § 825.308(a) because the conditions are chronic, or whether they would never be subject to recertification under § 825.308(b)(2) because the certification indicated a need for intermittent leave for the employee's lifetime. The NPRM clarified that conditions that will last an extended period of time, including conditions for which the duration is indicated as ''lifetime,'' ''indefinite,'' or ''unknown,'' would fall under proposed § 825.308(b). Under that section, employers would not be able to seek recertification until the minimum duration specified in the certification had passed, but would always be entitled to seek recertification every six months in connection with an absence. In other words, if the certification specified a duration of greater than six months, the employer would still be able to seek recertification at six-month intervals. (Where the requirements of proposed § 825.308(c) were met, recertification would also be permitted pursuant to that section.) The proposal represented a change in the Department's position, which had previously been that certifications indicating an ''indefinite'' or ''unknown'' duration were subject to recertification every 30 days. *See* Wage and Hour Opinion Letter FMLA2004–2–A (May 25, 2004). The Department received significant comments from both employers and employees regarding this proposal. By and large, the comments confirmed the confusion that exists in this area. Despite the Department's explanation in the NPRM that permitting six-month recertification of long-term or permanent health conditions would result in fewer recertifications for many employees with chronic serious health conditions than currently permitted, most employees and their representatives interpreted the proposal as an increase in their recertification burden. Employers and their representatives were divided as to whether the Department's proposal represented an increase or a diminution in their recertification right.

Most employees and their representatives opposed the proposal in § 825.308(b) to permit recertification every six months for long-term or permanent conditions, viewing it as unnecessary in the absence of some change in the condition and as imposing an increased burden on employees. *See, e.g.*, National Postal Mail Handlers Union; National Federation of Federal Employees; Academic Pediatric Association *et al.*; Association of Professional Flight Attendants; Diane North; Mary Freeman; Gregory Sheffield, Jr. The Communications Workers of America suggested that employees with chronic serious health conditions should not be required to recertify more than once per year. *See also* National Partnership for Women & Families. The American Postal Workers Union suggested that recertification of chronic conditions should only be permitted where circumstances change or new information justifies the request. The Academic Pediatric Association *et al.* argued that requiring recertification of chronic or lifelong conditions ''does not serve any useful purpose.'' The AFL–CIO, however, supported the proposed change as it applies to conditions of indefinite, unknown, or lifetime duration, but opposed six-month recertification for conditions with a defined duration in excess of six months (*e.g.*, for a condition that will last nine months). In support of six-month recertification for chronic serious health conditions, the AFL–CIO argued that ''[r]ecertifications on a 30-day basis for long-term conditions are not only burdensome to employees and their health care providers, but are highly unlikely to elicit useful information for making leave decisions under the FMLA.''

Many commenters representing employees also noted that recertification imposes a financial burden on employees because health care providers charge for the additional medical examination and/or paperwork associated with recertification. *See, e.g.*, Communications Workers of America; Sargent Shriver National Center on Poverty Law; Association of Professional Flight Attendants; National Partnership for Women & Families; National Postal Mail Handlers Union. The National Partnership for Women & Families requested that, if the Department finalized § 825.308 as proposed, it make clear that the two visits required under the proposed definition of a chronic serious health condition in § 825.115(c)(1) could be satisfied by the six-month visits for recertification.

Employers and their representatives were split as to whether the six-month recertification rule was an improvement on the current recertification provision. Several large employers and employer associations supported permitting recertification on a six-month basis for long-term or permanent conditions. *See, e.g.*, AT&T; the Chamber; Equal Employment Advisory Council; National Association of Manufacturers; HR Policy Association; WorldatWork; Manufacturers Alliance; TOC Management Services. The U.S. Postal Service stated that the six-month recertification proposal for conditions of unknown or permanent duration ''eliminates the ambiguity that had been a hallmark of the recertification provisions and is sorely needed.'' The National Business Group on Health asserted that the Department's proposal ''will help to alleviate situations where, under current rules, doctors can provide multi-year medical certifications for serious health conditions that may no longer be present after some months or longer.'' The Chamber argued that ''requiring more frequent certifications will not present any additional hardship to employees, as employees with chronic conditions are likely to be visiting their health care providers at lease twice a year already.''

Other commenters, however, argued that 30-day recertification for chronic serious health conditions would be more appropriate. *See, e.g.*, Metropolitan Transportation Authority (NY); International Public Management Association for Human Resources; Ohio Department of Administrative Services; City of Medford (OR); National Association of Wholesaler-Distributors; American Foundry Society. The Society for Human Resource Management objected that the proposal would require employers to permit potential misuse of leave to continue for months before being able to obtain a recertification. Jackson Lewis suggested that recertification every 60 days would be more appropriate. The Association of Corporate Counsel's Employment and Labor Law Committee suggested that recertification be should be permitted every three months. *See also* National School Boards Association. The law firm of Willcox & Savage argued that ''[s]ix-month recertifications would be entirely inadequate to ensure that intermittent leave is used for qualified reasons and to limit misuse of intermittent leave.''

The law firms of Spencer Fane Britt & Browne and Vercruysse Murray & Calzone expressed confusion as to the interaction of the ''[m]ore than 30 days'' rule and the ''30-day rule.'' Both of these commenters asked whether the 30-day recertification rule would apply to long-term conditions requiring short periods of intermittent leave. They questioned what serious health conditions would be covered by § 825.308(a) if these long-term or permanent conditions were instead covered under § 825.308(b). These commenters attributed their confusion to the use of the phrase ''minimum period of incapacity'' in proposed § 825.308(b), and questioned whether the Department meant the duration of ''incapacity'' or the duration of the ''condition.'' *See also* Equal Employment Advisory Council.

The Department views the conflicting comments it received regarding proposed § 825.308(b) as indication of the need to further clarify the recertification regulation. The Department agrees that, as proposed in the NPRM, it was unclear whether § 825.308(b) applied to permanent or long-term conditions requiring short periods of intermittent leave (*i.e.*, chronic conditions). Accordingly, final § 825.308(b) is modified to clarify that the rule applies to conditions where the minimum duration of the condition, as opposed to the duration of the period of incapacity, exceeds 30 days. This is a clarification, not a change in the Department's enforcement position. Current § 825.308(b) has two subsections, the first of which addresses certifications specifying a minimum period of incapacity in excess of 30 days, and the second of which addresses certifications specifying a minimum period during which intermittent or reduced schedule leave will be needed; in both situations an employer may not request recertification until the minimum period specified has passed. Accordingly, the Department has always interpreted the current regulation as applying to those situations in which the certification states that an employee will need leave due to a serious health condition for a specified period in excess of 30 days, regardless of whether that leave is taken as a single continuous block or on an intermittent basis. The final rule also provides an example of how the six-month recertification provision would apply. Not all situations will fit within final § 825.308(b), and, as the final rule makes clear, employers are entitled to recertification on a 30-day basis, unless the requirements of paragraphs (b) or (c) are met. In all cases, where the criteria of § 825.308(c) are met, employers may seek recertification in less than 30 days.

The Department declines in the final rule to permit recertification of long-term or permanent conditions more frequently than every six months unless the conditions set forth in § 825.308(c) are met. As explained in the NPRM, the Department is concerned about the burden frequent recertifications place on employees suffering from permanent or long-term serious health conditions. The Department believes that permitting recertification on a six-month basis represents the appropriate balance between the employer's right to receive updated medical information to support the need for FMLA leave, and the employee's right to take such leave. As noted in the NPRM, the six-month period for recertification generally coincides with the requirement of periodic visits of twice per year for treatment in the definition of a chronic serious health condition in § 825.115(c)(1). To the extent that an employee visits his or her health care provider for treatment in connection with obtaining a recertification, that visit could count towards satisfying the periodic treatment criteria for a chronic serious health condition if it occurs every six months.

The Department also received several comments from employer representatives supporting the Department's proposal in § 825.308(e) to expressly permit employers to provide an employee's health care provider with information regarding the employee's absences due to the serious health condition, with many commenters indicating that this change would significantly improve their ability to administer FMLA leave. *See, e.g.*, HR Policy Association; Pennsylvania Governor's Office of Administration; Southwest Airlines; American Foundry Society; Equal Employment Advisory Council. The AFL–CIO, however, argued that proposed § 825.308(e) was an unnecessary addition to the regulations as the Department had already taken this position in Wage and Hour Opinion Letter FMLA2004–2–A (May 25, 2004). The Department believes it is appropriate to include this language in the regulatory text and therefore the final rule adopts § 825.308(e) as proposed.

Finally, the National Association of Manufacturers and the National Association of Wholesaler-Distributors, as well as many other commenters, objected to the Department's continued prohibition in proposed § 825.308(f) on second and third opinions on recertification. *See also* Vercruysse Murray & Calzone; TOC Management Services; Jackson Lewis; Metropolitan Transportation Authority (NY); Independent Bakers Association; Pennsylvania Governor's Office of Administration; International Public Management Association for Human Resources; City of Medford (OR); American Foundry Society. The National Association to Protect Family Leave and the Society for Human Resource Management argued that the statute does not prohibit second and third opinions on recertification and that permitting them would reduce the number of second and third opinions on initial certifications, which would benefit both employers and employees. The Southern Company argued that the Department's proposal to permit employers to require new certifications of ongoing conditions on an annual basis, which would be subject to second and third opinions, was not sufficient to allow employers to effectively manage employee leave and that employers should therefore be permitted to seek second and third opinions on recertifications as well. *See also* Berens & Tate; National Coalition to Protect Family Leave. Spencer Fane Britt & Browne argued that employers should be entitled to get a second opinion whenever they are permitted to seek recertification in less than 30 days under § 825.308(c), and in other situations every three months.

The Department declines in the final rule to permit second or third opinions on recertification. As discussed above,

§ 825.305(e) of the final rule will permit employers to require a new certification on an annual basis for conditions lasting longer than a single leave year, and such new certifications will be subject to second and third opinions. The Department believes that allowing employers the option of a second and third opinion once per leave year is sufficient and that permitting second and third opinions on recertifications would impose an additional burden on employees that would be disproportionate to any benefit to employers.

Section 825.309 (Certification for Leave Taken Because of a Qualifying Exigency)

Under the military family leave provisions of the NDAA, an employer may require that leave taken because of a qualifying exigency be ''supported by a certification issued at such time and in such manner as the Secretary may by regulation prescribe.'' 29 U.S.C. 2613(f). Because the NDAA gives the Secretary of Labor the authority to prescribe a new certification requirement for FMLA leave taken because of a qualifying exigency, the Department's NPRM included a discussion of a number of issues related to the Department's implementation of a certification requirement for qualifying exigency leave. The Department specifically sought comment on the type of information that should be provided in a certification related to qualifying exigency leave in order for it to be considered complete and sufficient. The Department expressed an initial view that, in addition to providing confirmation of the covered military member's active duty or call to active duty status, an employee could be asked to provide certification that an absence is due to a qualifying exigency. The Department sought comment on whether an employee should provide certification of the qualifying exigency by statement or affidavit or by another means. The Department also sought comment on whether the certification requirements should vary depending on the nature of the qualifying exigency for which leave is being taken.

In addition, the Department asked for comments regarding who should bear the cost, if any, of obtaining certifications related to leave taken because of a qualifying exigency and what timing requirements should be applied to such certifications. The Department also asked whether an employer should be permitted to clarify, authenticate, or validate an active duty or call to active duty certification or a certification that a particular event is a qualifying exigency, and what limitations, if any, should be imposed on an employer's ability to seek such clarification, authentication, or validation. Lastly, the Department sought comment on whether a recertification process should be established for certifications related to leave taken because of a qualifying exigency and, if so, how that process should compare to the recertification process used for existing FMLA leave entitlements.

While the Department has attempted to mirror the existing FMLA certification process wherever possible for qualifying exigency leave, the unique nature of this leave necessitates that an employee provide different information in order to confirm the need for leave. In the final rule, the certification requirements for leave taken because of a qualifying exigency are set forth in § 825.309. Section 825.309(a) of the final rule establishes that an employer may require that the employee provide a copy of the covered military member's active duty orders or other documentation issued by the military which indicates that the covered military member is on active duty (or has been notified of an impending call or order to active duty) in support of a contingency operation, and the dates of the covered military member's active duty service. Section 825.309(b) establishes that each time leave is first taken for one of the qualifying exigencies specified in § 825.126, an employer may require an employee to provide a certification that sets forth certain information. Section 825.309(c) of the final rule describes the optional form (Form WH–384) developed by the Department for employees' use in obtaining certification that meets the FMLA's certification requirements. The form is optional for employers and reflects the certification requirements established in § 825.309(b) so that it is easier for an employee to furnish appropriate information to support his or her request for leave because of a qualifying exigency. Form WH–384, or another form containing the same basic information, may be used by the employer; however, no information may be required beyond that specified in this section. Section 825.309(d) of the final rule establishes the verification process for certifications.

The Department received many comments that agreed that it is appropriate to require a copy of the covered military member's active duty orders or some other form of documentation issued by the military which indicates that the covered military member is on active duty (or has been notified of an impending call or order to active duty) in support of a contingency operation for certification purposes. *See* National Partnership for Women & Families, in joint comments with the National Military Family Association; U.S. Postal Service; National Coalition to Protect Family Leave; Society for Human Resource Management; Equal Employment Advisory Council; Hewitt Associates; AT&T; South Carolina, Office of Human Resources; Pennsylvania Governor's Office of Administration. Hewitt Associates also suggested that ''[i]f military orders are not readily available, employers should permit employees to provide secondary documentation confirming that the family member is on active military duty.'' TOC Management Services went further to suggest that the Department ''develop a 'qualifying exigency certification,' to be completed by the military servicemember's commanding officer (or other authorized military personnel).'' Senator Dodd and Representative Woolsey *et al.* suggested that certification should ''consist of activation orders or letters from a commanding officer.''

The Department agrees with the majority of commenters that a complete and sufficient certification for purposes of qualifying exigency leave should include a copy of the covered military member's active duty orders. The orders will confirm that the covered military member is on active duty (or has been notified of an impending call to active duty) in support of a contingency operation. The Department also believes that it is appropriate to allow an employee to provide other documentation issued by the military in order to establish that the covered military member is on active duty or has been notified of an impending call or order to active duty for purposes of qualifying exigency leave. Accordingly, § 825.309(a) provides that an employer may request, as part of a complete and sufficient certification to support a request for qualifying exigency leave, a copy of the covered military member's active duty orders or other documentation issued by the military which indicates that the covered military member is on active duty or call to active duty status in support of a contingency operation, and the dates of the covered military member's active duty service. In addition, to alleviate as much of the burden as possible on employees using this new leave entitlement, this provision provides that this information need only be provided to the employer the first time an employee requests leave because of a

qualifying exigency arising out of a particular active duty or call to active duty of a covered military member. While additional information is required to provide certification for subsequent requests for exigency leave, an employee is only required to give a copy of the active duty orders to the employer once. A copy of new active duty orders or other documentation issued by the military only needs to be provided to the employer if the need for leave because of a qualifying exigency arises out of a different active duty or call to active duty order of the same or a different covered military member.

A number of commenters addressed whether an employer should be able to request documentation beyond the covered military member's active duty orders, and provided suggestions on the types information an employee could be required to provide. Senator Dodd and Representative Woolsey *et al.* commented that ''a simple personal statement * * * stating the reason for the leave and that the leave arises from the deployment or return of the servicemember'' is sufficient. The National Partnership for Women & Families, in joint comments with the National Military Family Association, suggested that notes from the service provider or the military association should be sufficient, such as a note from a counselor when the leave is needed to attend counseling. The National Coalition to Protect Family Leave recommended that an employee provide written documentation unless there are extraordinary or extenuating circumstances, or documentation does not exist, and that such documentation be from an independent source if available; a statement or affidavit should be sufficient only if there is no other alternative method of certification available. The Equal Employment Advisory Council requested that an employee provide proof of the need for leave and sign an affidavit declaring the reason for taking leave. The Chamber stated that an employee ''should provide the employer with detailed information about the reasons for leave.'' TOC Management Services suggested that an employee be required to submit a statement or affidavit. Hewitt Associates noted that:

> The list of qualifying exigencies may be too broad and indefinite to create a form that speaks to the leave reasons themselves. In addition, in many cases, there may not be a clear third party like a physician, teacher, or department able to certify the leave. Employers that are concerned with abuse could rely upon company rules prohibiting dishonesty, misrepresentation, and/or the falsification of company documents and a reminder of such rules and policies could be included on the form itself.

In the final rule, the Department seeks to provide an appropriate balance between providing employers with a reasonable amount of information to demonstrate the validity of the qualifying exigency and ensuring that employees are not overburdened with unnecessary steps that do not enhance the utility of the certification. For example, the Department does not believe that it is necessary for an employee to sign an affidavit to provide a meaningful certification. Such a requirement would place a burden on employees that would potentially delay or frustrate their ability to utilize qualifying exigency leave. Most employers have policies in place that prohibit employees from providing false information and enforcing such policies would have substantially the same effect as an affidavit in deterring abuse. Section 825.309(b)(1)–(5) of the final rule allows an employer to require an employee to provide a reasonable amount of information for certification. Where applicable, this information should be readily available to the employee and should not impose a significant obstacle.

Section 825.309(b)(1) requires the employee to provide a signed statement or description of the facts regarding each qualifying exigency for which FMLA leave is requested and stipulates that such facts must be sufficient to support the need for leave. Where an employee needs intermittent leave for a particular qualifying exigency, only one certification is required for that qualifying exigency. For example, there are many types of qualifying exigencies within the category of childcare and school activities. Thus, an employee would need to provide one certification for enrolling a child in school, and a separate certification for arranging for alternative childcare; the employee, however, would only need one certification for a series of related parent-teacher conferences. The final rule also provides a number of examples of written documents that could support a request of leave, such as a copy of a meeting announcement for informational briefings sponsored by the military, a document confirming an appointment with a counselor or school official, or a copy of a bill of services for the handling of legal or financial affairs. These examples illustrate that, whenever possible, the employee's statement should include demonstrable information that relates to the type of leave being taken.

Section 825.309(b)(2) of the final rule requires the inclusion of the approximate date on which the qualifying exigency commenced or will commence. Section 825.309(b)(3) stipulates that if an employee requests leave because of a qualifying exigency for a single, continuous period of time, the employee should provide the beginning and end dates for such absence. If an employee requests leave because of a qualifying exigency on an intermittent or reduced schedule basis, § 825.309(b)(4) of the final rule requires an estimate of the frequency and duration of the qualifying exigency. These sections will not always apply to every kind of qualifying exigency. When applicable, however, all three of these provisions will assist employers by providing them with sufficient information to adequately prepare for the employee's absence in connection with qualifying exigency leave.

Finally, in § 825.309(b)(5) of the final rule, the Department allows the employer to require the inclusion of appropriate contact information when an exigency involves meeting with a third party. In addition to the name, title, organization, address, telephone number, fax number, and e-mail address for the individual or entity with which the employee is meeting, the contact information can also include a brief description of the purpose of the meeting. Although the Department recognizes that not every qualifying exigency involves a third party, for those exigencies where a third party is involved such detailed information should provide meaningful assurance and validation for employers.

The Department also received a few comments regarding the creation of a certification form to be used by employees and employers. Infinisource, Inc. and the Equal Employment Advisory Council suggested that the Department provide a sample qualifying exigency certification form.

The final rule provides an optional form (Form WH–384) that is described in § 825.309(c) and included in Appendix G to the regulations. The form reflects the certification requirements so as to permit an employee to furnish appropriate information to support his or her request for leave because of a qualifying exigency. This optional Form WH–384, or another form containing the same basic information, may be used by the employer. The final rule makes clear, however, that no information may be required beyond that specified in § 825.309 and in all instances the information on the form must relate only to the qualifying exigency for which the current need for leave exists.

The Department believes Form WH–384 will benefit both employees and employers by providing all the certification requirements in a clear, easy to follow format.

The Department also received many comments on the issues of authentication and recertification. Many commenters requested that employers be permitted to clarify or authenticate military active duty orders and the event necessitating qualifying exigency leave. *See* AT&T; Pennsylvania Governor's Office of Administration; Catholic Charities, Diocese of Metuchen; National Association of Manufacturers; Association of Corporate Counsel's Employment and Labor Law Committee. The Association of Corporate Counsel's Employment and Labor Law Committee suggested that employers be permitted to contact third parties involved in the need for leave, such as calling ''a childcare provider to confirm that they were consulted to provide care as a result of a servicemember's call to duty.'' Senator Dodd and Representative Woolsey *et al.* and the National Partnership for Women & Families, in joint comments with the National Military Family Association, argued that there should be no need to clarify or authenticate military active duty orders. The National Partnership for Women & Families, in joint comments with the National Military Family Association, acknowledged, however, that ''[e]mployers should be able to authenticate the certifications for the actual leave—for example by calling the school and checking that the parent was scheduled for a conference at that time.'' Senator Dodd and Representative Woolsey *et al.* similarly suggested that an ''employer could request additional information if it suspects that the employee is misusing the leave entitlement.'' On the subject of recertification, AT&T and Catholic Charities requested that recertifications be allowed. Catholic Charities asserted that ''the employer should have the right to request a recertification every 30 days regardless of the duration of time that the certification states the employee is to be out.'' AT&T asserted that recertifications should be permitted at least once every six months for intermittent qualifying exigency leave.

The Department agrees that employers should have the opportunity to verify certain information in the certification in a limited way that respects the privacy of the employee. Section 825.309(d) of the final rule describes the verification process. If an employee submits a complete and sufficient certification to support his or her request for leave because of a qualifying exigency, the employer may not request additional information from the employee. However, if the qualifying exigency involves meeting with a third party, the employer may contact the individual or entity with whom the employee is meeting for purposes of verifying a meeting or appointment schedule and the nature of the meeting between the employee and the specified individual entity. For example, an employer could call a school to confirm that a meeting took place between the employee and the teacher of a child of a covered military member. The section provides that no additional information may be requested by the employer and the employee's permission is not required in order to verify meetings or appointments with third parties.

In addition, the final rule allows an employer to contact an appropriate unit of the Department of Defense to request verification that a covered military member has been called to active duty status (or notified of an impending call to active duty status) in support of a contingency operation. Again, no additional information may be requested by the employer and the employee's permission is not required. This verification process will protect employees from unnecessary intrusion while still providing a useful tool for employers to verify the certification information given to them.

With regard to recertification, however, the Department agrees with the comments that suggested that recertification is unnecessary; the final rule does not provide for recertification. An employee is already required to provide certification to the employer in connection with leave taken for a qualifying exigency. *See* discussion regarding § 825.309(b)(1), *supra.* A recertification would most likely result in the employee providing the employer with a copy of the same active duty orders already provided to the employer. Section 825.309(a), however, does state that a copy of new active duty orders or other documentation issued by the military shall be provided to the employer if the need for leave because of a qualifying exigency arises out of a different active duty or call to active duty order of the same or a different covered military member.

Section 825.310 (Certification for Leave Taken To Care for a Covered Servicemember (Military Caregiver Leave))

The military family leave provisions of the NDAA amended the FMLA's certification requirements to permit an employer to request that leave taken to care for a covered servicemember be supported by a medical certification. 29 U.S.C. 2613(a). The FMLA's existing certification requirements, however, focus on providing information related to a serious health condition—a term that is not relevant to leave taken to care for a covered servicemember. At the same time, the military family leave provisions of the NDAA did not explicitly require that a sufficient certification for purposes of military caregiver leave provide relevant information regarding the covered servicemember's serious injury or illness. In light of this, the Department sought comment in the NPRM on the appropriate requirements and content of a certification for leave to care for a covered servicemember. The Department also sought comment on whether a certification from the DOD or VA should be sufficient to establish whether a servicemember has a serious injury or illness that was incurred by the member in the line of duty on active duty in the Armed Forces.

Section 825.310 of the final rule provides that when leave is taken to care for a covered servicemember with a serious injury or illness, an employer *may* require an employee to support his or her request for leave with a sufficient certification. Section 825.310(a) of the final rule permits an employer to require that certain necessary information to support the request for leave be supported by a certification from one of the following authorized health care providers: (1) A DOD health care provider; (2) a VA health care provider; (3) a DOD TRICARE network authorized private health care provider; or (4) a DOD non-network TRICARE authorized private health care provider. Section 825.310(b)–(c) of the final rule sets forth the information an employer may request from an employee (or the authorized health care provider) in order to support the employee's request for leave. As indicated in § 825.310(d) of the final rule, the Department has developed a new optional form, Form WH–385, which may be used to obtain appropriate information to support an employee's request for leave to care for a covered servicemember with a serious injury or illness. An employer may use this optional form, or another form containing the same basic information; however, as is the case for any required certification for leave taken to care for a family member with a serious health condition, no information may be required beyond that specified in § 825.310 of the final rule. In all instances, the information on any required certification must relate only to

the serious injury or illness for which the current need for leave exists.

Additionally, § 825.310(e) of the final rule provides that an employer requiring an employee to submit a certification for leave to care for a covered servicemember must accept as sufficient certification ''invitational travel orders'' (''ITOs'') or ''invitational travel authorizations'' (''ITAs'') issued by the DOD for a family member to join an injured or ill servicemember at his or her bedside. If an employee will need leave to care for a covered servicemember beyond the expiration date specified in an ITO or an ITA, the final rule provides that an employer may request further certification from the employee. Lastly, § 825.310(f) of the final rule provides that in all instances in which certification is requested, it is the employee's responsibility to provide the employer with complete and sufficient certification and failure to do so may result in the denial of FMLA leave.

The majority of comments received from both employees and employers regarding certification requirements for military caregiver leave requested that the Department create a separate certification process for such leave, rather than incorporate such requests into the certification process used for other FMLA qualifying reasons. For example, the National Partnership for Women & Families, in joint comments with the National Military Family Association, wrote that because the ''triggering events'' for an employee to use leave for an injured servicemember are significantly different from those for leave taken for other FMLA-qualifying reasons, ''the medical certification requirements for leave to care for an injured servicemember should match those in the statute, rather than being grafted onto requirements in the existing FMLA.'' The National School Boards Association also commented that a certification for covered servicemember leave should focus on each aspect of the definition of ''serious injury or illness'' and ''should not focus on 'serious health condition' because this term does not trigger the right to take military family leave.'' Finally, comments submitted by Senator Dodd and Representative Woolsey *et al.* suggested that any required certification should provide employers who request certification with ''essential information.''

The Department agrees with those comments that suggested that the certification requirements for taking leave to care for a covered servicemember must necessarily be different than those for taking leave to care for a family member with a serious health condition since the ''triggers'' for taking each type of leave are different. The NDAA's definitions of ''serious injury or illness'' and ''covered servicemember'' contain specific components that are unique to military servicemembers that would not adequately be addressed if the certification requirements for a serious health condition were adopted for purposes of military caregiver leave. Moreover, adopting the existing FMLA certification requirements for purposes of military caregiver leave would permit an employer, in some instances, to obtain medical and other information that is not relevant to support a request to take FMLA leave to care for a covered servicemember.

Accordingly, the final rule creates a new regulatory section, § 825.310, which sets forth separate certification requirements for military caregiver leave. This section, as suggested by the majority of commenters, provides that an employer may seek a certification which provides information specific to the NDAA requirements for taking leave to care for a covered servicemember, including: (1) Whether the servicemember has incurred a serious injury or illness; (2) whether the injury or illness may render the servicemember medically unfit to perform the duties of the member's office, grade, rank, or rating; (3) whether the injury or illness was incurred by the member in line of duty on active duty; and (4) whether the servicemember is undergoing medical treatment, recuperation, or therapy, is otherwise on outpatient status, or is otherwise on the temporary disability retired list. The Department notes that the optional certification form (WH–385) for covered servicemember leave includes two additional categories of internal DOD casualty assistance designations used by DOD health care providers ((VSI) Very Seriously Ill/Injured and (SI) Seriously Ill/Injured) that also meet the standard of a serious injury or illness.

At the same time, the Department also agrees with those commenters who recommended that a certification for military caregiver leave should contain certain information about the need for leave that is also required of individuals requesting FMLA leave to care for a family member with a serious health condition. *See e.g.*, Jackson Lewis; Association of Corporate Counsel's Employment and Labor Law Committee; and AT&T. This information includes (1) the probable duration of the injury or illness; (2) frequency and duration of leave required; (3) if leave is requested on an intermittent or reduced schedule basis, an estimate of the frequency and duration of such leave; and (4) the family relationship of the eligible employee to the covered servicemember. The Department believes it is reasonable to require all individuals requesting leave to care for a family member to provide this information, regardless of whether the family member has a serious health condition or is a covered servicemember with a serious injury or illness. Accordingly, § 825.310(a)–(c) of the final rule permit an employer to require such information. As is the case with the certification process for leave taken to care for a family member with a serious health condition, no information may be required beyond that specified in § 825.310 of the final rule.

Most of the commenters also agreed with the Department's initial view in the NPRM that the DOD and the VA are in the best position to determine what constitutes a ''serious injury or illness.'' Additionally, the majority of commenters also supported employees providing certification from the DOD (or relevant military branch) or VA to support a request for leave to care for a covered servicemember. Domtar Paper Company wrote that, ''the DOL should adopt DOD certification for FMLA purposes. We agree that military branches, as well as the Department of Veterans' Affairs do a good job in making these determinations.'' The Illinois Credit Union League believed a certification from ''either Department'' should be ''sufficient.'' As to ''serious injury or illness,'' Hewitt Associates supported providing DOD or VA with ''deference in this analysis.''

Based upon extensive discussions with the DOD, as well as with the VA, the Department believes that the DOD should not be the only entity able to certify that an eligible employee is needed to care for a covered servicemember with a serious injury or illness. At the present time, servicemembers with serious injuries or illnesses intended to be covered by the NDAA amendments do not receive care solely from DOD health care providers. Rather, such covered servicemembers also may receive care from either VA health care providers or DOD TRICARE military health system authorized private health care providers. Indeed, it is the Department's understanding that members of the National Guard and Reserves, especially in more rural areas, will be more likely to receive care from DOD TRICARE authorized private health care providers than from DOD or even VA health care providers.[6]

[6] Based upon discussions with the DOD, it is the Department's understanding that some covered

Additionally, servicemembers on the temporary disability retired list may be receiving care from these private health care providers. Accordingly, § 825.310(a) of the final rule provides that any of the following health care providers may complete an employer-required certification to support a request for military caregiver leave: (1) A DOD health care provider; (2) a VA health care provider; (3) a DOD TRICARE network authorized private health care provider; or (4) a DOD non-network TRICARE authorized private health care provider.

If a VA or a DOD TRICARE authorized health care provider is unable to make any of the military-related determinations (*i.e.*, whether the serious injury or illness may render the covered servicemember medically unfit to perform the duties of the member's office, grade, rank, or rating and/or whether the serious injury or illness was incurred in line of duty on active duty) as part of the certification process, § 825.310(a) of the final rule provides that such health care providers may complete the certification form by relying on a determination from an authorized DOD representative (such as a recovery care coordinator). The Department believes this solution sufficiently protects an employer's right to obtain a sufficient certification while not unduly burdening an employee seeking to take leave by unnecessarily restricting the health care providers who may complete such a certification. Based on consultation with the DOD, it is the Department's understanding that every covered servicemember will have a DOD representative who can serve as a point of contact for health care providers who need information relating to the military-related determinations requested in the FMLA certification form. For example, the most seriously injured or ill covered servicemembers (*i.e.*, those servicemembers receiving injuries that the DOD terms catastrophic or severe) will have either a ''Federal Recovery Coordinator'' or ''Recovery Care Coordinator'' assigned to assist the covered servicemember and his or her family.

Although the military caregiver leave provisions of the NDAA permit an eligible employee who is the next of kin of a covered servicemember to take leave to care for a covered servicemember, the NDAA's certification requirements appear to permit an employer to obtain a certification issued by the health care provider of the employee's next of kin, rather than the covered servicemember. *See* 29 U.S.C. 2613(a). In the NPRM, the Department stated that it believes that an employer should only be able to obtain a certification from the health care provider or military branch of the covered servicemember for whom the eligible employee is caring, and not the health care provider of the next of kin. The comments addressing this issue agreed with the Department that an employer should only be able to obtain a certification from the health care provider or military branch of the covered servicemember for whom the eligible employee is caring. The U.S. Postal Service wrote: ''A provider's medical certification of a health condition can only pertain to his/her patient, which in this case is the covered servicemember. No other interpretation makes sense. A physician simply cannot provide any medical documentation for a 'next of kin' when that person receives no treatment, therapy, etc. Notably, the overall FMLA scheme is one that requires certification of a patient's condition from the treating provider. There is no logical basis for construing the servicemember certification requirements any differently.'' Additionally, the National School Boards Association wrote that ''[t]he results of the statute as written are odd and would only serve to inconvenience everyone in the process particularly the servicemember whose medical certification would have to come from a doctor [with] whom the service member has no relationship.''

After reviewing all of the comments, the Department agrees with those comments that stated that an employer should only be able to obtain a certification from the health care provider of the covered servicemember for whom the eligible employee is caring. To permit an employer to obtain a medical certification issued by the health care provider of the ''next of kin,'' rather than the servicemember is illogical, and does not serve the interests of either employees or employers. Accordingly, the final rule provides that any certification supporting a request for FMLA leave by a covered servicemember's next of kin should be issued by the health care provider of the covered servicemember—not the health care provider of the next of kin.

Additionally, § 825.310(e) of the final rule provides that an employer must accept the submission of ''invitational travel orders'' (''ITOs'') or ''invitational travel authorizations'' (''ITAs'') issued for medical purposes, in lieu of the DOL optional certification form or an employer's own form, as sufficient certification of a request for military caregiver leave during the time period specified in the ITOs or ITAs. Based on consultation with the DOD, it is the belief of the Department that the issuance of such orders or authorizations, by themselves, qualifies a servicemember as a ''covered servicemember'' for purposes of the military caregiver leave provisions of the FMLA. The issuance of an ITO or ITA for medical purposes permits the family member of the injured or ill servicemember to travel immediately to the servicemember's bedside, at DOD's expense. These ITOs or ITAs for medical purposes are not issued by the DOD as a matter of course, but rather only when the servicemember is, at minimum, seriously injured or ill. It is the Department's understanding that, in such cases, the ITO or ITA is issued to a servicemember's family upon the direction of a DOD health care provider and will state on its face that the travel order or authorization is for ''medical purposes.''

The Department believes that permitting ITOs or ITAs to serve as sufficient certification is appropriate in light of the fact that the DOD has determined that the injury or illness incurred by the servicemember is serious enough to warrant the immediate presence of a family member at the servicemember's bedside. Moreover, in many circumstances where ITOs or ITAs are issued, it may be extremely difficult for an employee to provide an otherwise timely certification that complies with the requirements of § 825.310 to an employer. The Department also believes this approach appropriately accommodates an employer's right to obtain a sufficient certification from an employee in order to designate such leave as FMLA qualified.

Given the seriousness of the injuries or illness incurred by a servicemember whose family member receives an ITO or ITA, and the immediate need for the family member at the servicemember's bedside, it is the Department's intention to remove as many certification hurdles for the employee as possible for the duration of the order or authorization. Accordingly, the final rule further provides that during the period of time specified in the ITO or ITA, an eligible employee may take leave to care for the covered servicemember in a continuous block of time or on an intermittent basis.

servicemembers in more remote areas of the United States may not have a local health care provider who is in the DOD TRICARE network. In these situations, TRICARE authorizes non-network health care providers to administer care to these servicemembers. These ''non-network'' health care providers are specifically included in the regulations as one of the categories of health care providers authorized to complete certifications for leave to care for a covered servicemember.

An eligible employee who provides an ITO or ITA to support his or her request for leave may not be required to provide any additional or separate certification that leave taken on an intermittent basis during the period of time specified in the ITO or ITA is medically necessary. The final rule also provides that an employer must not refuse to accept an ITO or ITA because the order or authorization is not signed by a health care provider. As long as the ITO or ITA is issued by the DOD, an employer must accept it. While an ITO or ITA is only issued to family members upon the direction of a DOD health care provider, the actual order or authorization may or may not be signed by a health care provider.

If an employee will need leave to care for a covered servicemember beyond the expiration date specified in an ITO or ITA, the final rule permits an employer to require that the employee have one of the authorized health care providers listed under § 825.310(a) complete the DOL optional certification form (WH–385) or an employer's own form, as requisite certification for the remainder of the employee's necessary leave period. The Department is permitting this additional certification, if an employer so chooses, in order to allow an employer to obtain information about the employee's continued need for leave once the ITO or ITA expires, including specific information regarding the servicemember's injury or illness and its expected duration. The Department believes this approach is reasonable since the ITO or ITA will not provide the employer with such information initially. Furthermore, the Department believes that once an ITO or ITA expires, the employee will be in a better position to have an authorized health care provider furnish a complete certification as to the servicemember's medical condition and the employee's continuing need for leave.

The final rule also permits an eligible employee who is a spouse, parent, son, daughter or next of kin of a covered servicemember to submit an ITO or ITA issued to another family member as sufficient certification for the duration of time specified in the ITO or ITA, even if the employee seeking leave is not the named recipient on the ITO or ITA. Thus, for example, a covered servicemember's son may submit an ITO issued to the servicemember's spouse to support the son's request for FMLA leave to care for the servicemember during the time period specified by the ITO. An employer must accept such an ITO or ITA from the employee as sufficient certification, in lieu of the Department's optional certification form (WH–385) or an employer's own certification form, for the duration of time specified in the order or authorization.

The DOD does not issue an ITO or ITA to every family member of an injured or ill servicemember who might be eligible to take FMLA leave to care for the covered servicemember. It is the Department's understanding that if the DOD issues an ITO or ITA at all, they do so for between one and three family members of the servicemember. However, in some situations, the servicemember may have additional family members who are eligible to take FMLA leave to care for the servicemember, even if the DOD has not authorized an ITO for that person. For example, an ITO or ITA can be issued to the spouse of a servicemember without also being issued to a servicemember's parents, children, or siblings. The Department believes that all family members of a covered servicemember who are eligible to take FMLA leave to care for the covered servicemember should be able to rely on the DOD's issuance of an ITO or ITA as sufficient certification to support a request for FMLA leave during the effective period of the ITO or ITA. Like a named recipient in an ITO or ITA, an employee using another family member's orders or authorizations may take the leave in a continuous block or on an intermittent basis for the duration of time specified in the ITO or ITA without providing an additional or separate certification that such leave is medically necessary. However, an employer may require an employee to provide confirmation of covered family relationship to the seriously injured or ill servicemember pursuant to § 825.122(j) of the FMLA in support of the employee's use of an ITO or ITA.

In addition to requesting comment on the appropriate certification process for military caregiver leave, the Department also sought comment on whether the clarification, authentication, second and third opinion, and recertification provisions applicable to FMLA leave taken to care for a family member with a serious health condition should be applied to certifications supporting FMLA leave taken to care for a covered servicemember. Sections 825.310(d) and (e)(2) of the final rule provide that an employer may seek to authenticate and clarify a certification provided in support of a request for leave to care for a covered servicemember, including ITOs or ITAs. The final rule does not permit an employer to seek second and/or third opinions of an employee's need to care for a covered servicemember in any case. Because leave to care for a covered servicemember is a one-time entitlement that must be used within a ''single 12-month period,'' the final rule also does not provide a recertification process for leave to care for a covered servicemember. The final rule does permit an employer to require an employee to provide confirmation of covered family relationship to the covered servicemember pursuant to § 825.122(j).

Comments addressing whether the FMLA clarification, authentication, second and third opinion, and recertification processes used for other types of FMLA leave should apply to military caregiver leave were mixed. The U.S. Postal Service wrote that ''[c]onsistent with the other provisions of the FMLA, the employer should have the ability to seek clarification, authentication, recertification, and second/third opinions, if necessary.'' Infinisource, Inc. commented that there are ''clear advantages'' for adopting the same certification scheme for military caregiver leave that exists for leave for a serious health condition, and that ''[t]his would include first and subsequent certifications, second opinions and third opinions. It would be easiest for employers and employees alike to know that there is one set of rules for all types of FMLA leave.''

However, other commenters believed that a certification for military caregiver leave should not require the same follow-up mechanisms as permitted under the FMLA for a serious health condition. AT&T wrote that if leave to care for a covered servicemember is limited to a single 12-month period, there should be ''no need for a general recertification (*i.e.*, once every 6 months) after initial certification has been secured.'' The National Partnership for Women & Families, in joint comments with the National Military Family Association, argued that the authentication and clarification processes applicable to other types of FMLA leave should not apply to leave taken to care for a covered servicemember because requiring ''frequent certification'' will be difficult for the family members of servicemembers and will discourage them from taking leave, particularly given the likelihood that the employee will be away from home because the servicemember is in a ''highly specialized'' hospital unit. These commenters also argued that recertification is not necessary because the NDAA limits the leave taking to one 12-month period.

The Department agrees with those commenters that argued that similar procedures should be used for all types

of FMLA leave whenever feasible in order to minimize the number of different procedures that have to be followed by both employees requesting leave and employers administering leave programs. Accordingly, the final rule permits employers to authenticate and clarify medical certifications submitted to support a request for leave to care for a covered servicemember using the procedures applicable to FMLA leave taken to care for a family member with a serious health condition. However, the Department also agrees with those comments that suggested that it would not be appropriate to apply the recertification and second and third opinion processes used for other types of FMLA leave to military caregiver leave. Because an employee's use of military caregiver leave is limited to a ''single 12-month period'' from the date such leave is first taken, the Department has concluded that recertification and second and third opinions are not warranted for purposes of military caregiver leave. In addition, because the statutory standard for determining whether a family member has a serious injury or illness is dependent on several determinations which can only be made by the military, including whether the injury may render the servicemember unfit to perform his or her duties and whether the injury was incurred in the line of duty on active duty, the Department believes it would be inappropriate to permit second and third opinions regarding these determinations.

The Department also specifically sought comment in the NPRM on whether there should be different timing requirements for the provision of any required certification for military caregiver leave. The final rule applies the same timing requirements to all requests for FMLA leave. Thus, under § 825.305(b) of the final rule, an employee seeking to take military caregiver leave must provide the requested certification to the employer within the time frame requested by the employer (which must allow at least 15 calendar days after the employer's request), unless it is not practicable under the particular circumstances to do so despite the employee's diligent, good faith efforts.

A number of commenters expressed concerns regarding timely receipt of certifications from the DOD. The Unum Group stated that a certification from the DOD should be sufficient to establish whether a serious injury or illness exists, but that employers should also be able to use a certification from a health care provider as well ''because of potential time concerns with receiving the certification from the Department of Defense.'' The Manufacturers Alliance/MAPI expressed concern with the timeliness in which the DOD and VA can provide certifications, stating that ''numerous media reports about some returning injured servicemembers who have faced obstacles and delays in receiving treatment through these Departments—often as a result of missing or inaccurate paperwork—at least call into question whether these Departments have the full capability to supply certifications with sufficient medical information in a timely fashion. Neither employers nor employees would be well served if they must wait months to obtain these certifications.'' The National Partnership for Women & Families, in joint comments with the National Military Family Association, commented that ''given the well documented delays and uneven outcomes of employees going through the military disability system, we are concerned that any certification requirement created by the DOD or VA will be overly burdensome and may lead to unequal results.'' Therefore, these commenters recommended that the Department develop a ''simple form, similar to the medical forms used in the rest of the FMLA, which will allow private health care providers, DOD, or the VA to make this a simple and expedited process.'' They also suggested that the Department should consult with the DOD and VA to determine which office within these organizations would be responsible for issuing certifications and set a ''maximum amount of time'' by which the offices should respond to such a request—''for example, a maximum of 15 days.'' In contrast, a number of employers and employer groups, including the Equal Employment Advisory Council, ORC Worldwide, and AT&T, recommended that the timing requirements set out in the Department's NPRM for the certification of a serious health condition should be applied to the certification for military caregiver leave.

The Department agrees with the comments submitted by Senator Dodd and Representative Woolsey *et al.* that delays in the provision of service at the DOD and VA could ''undermine the intent of the law'' in providing family assistance to those who need it most. The Department is fully cognizant of the special circumstances surrounding this type of leave and the fact that an employee may have very little notice before he or she is needed to care for a seriously injured or ill servicemember. As noted by the National Partnership for Women & Families, in joint comments with the National Military Family Association, employees may need to travel in order to be with an injured servicemember and may not be near a specific DOD or VA office where paperwork can be completed. In addition, the Department fully recognizes and acknowledges the concerns expressed by commenters regarding the timely receipt of certifications from the DOD. It is for these reasons that the Department is requiring employers to accept ITOs and ITAs as sufficient certification for those employees who must travel immediately to the bedside of their seriously injured or ill servicemember.

Furthermore, these timing concerns guided the Department in working with the DOD to create the Department's optional certification form (WH–385). Consistent with the recommendation received from the National Partnership for Women & Families, in joint comments with the National Military Family Association, the Department created a ''simple form, similar to the medical forms used in the rest of the FMLA'' which will allow the DOD, VA, and DOD TRICARE private health care providers to make this a ''simple and expedited process.'' The Department also believes that the inclusion of TRICARE private health care providers as one of the categories of health care providers authorized to complete a certification will give greater flexibility to employees seeking to certify that they are needed to care for a covered servicemember with a serious injury or illness. Additionally, the Department believes the inclusion of these private health care providers will allay the concerns of commenters that there might be significant delays in the receipt of certifications if only the DOD and/or VA could complete the necessary certification.

The Department has taken significant steps to simplify the certification process for military caregiver leave, such as creating, with the assistance of the DOD, a simplified Department optional certification form, by requiring an employer to accept ITOs or ITAs as sufficient certification, and by authorizing TRICARE private health care providers to issue certifications. Given these provisions, the Department does not believe that different timing requirements should be created for the receipt of certifications for military caregiver leave. Thus, the final rule provides that an employee seeking FMLA leave to care for a covered servicemember must comply with the timing requirements for certifications set forth in § 825.305(b). Under this

section, an employee seeking FMLA leave to care for a covered servicemember must provide the requested certification to the employer within the time frame requested by the employer (which must allow at least 15 calendar days after the employer's request), unless it is not practicable under the particular circumstances to do so despite the employee's diligent, good faith efforts.

Section 825.311 (Intent To Return to Work)

The Department did not propose any changes in § 825.309 in the NPRM and received no significant comments on this section. In the final rule, § 825.309 is renumbered as § 825.311 to account for the new military family leave sections (§§ 825.309 and 825.310) and is otherwise adopted as proposed.

Section 825.312 (Fitness-for-Duty Certification)

Section 825.312 addresses the fitness-for-duty certification that an employee may be required to submit upon return to work from FMLA leave. This section was numbered § 825.310 in the NPRM but is renumbered as § 825.312 in the final rule to account for the new military family leave sections (§§ 825.309 and 825.310). The Department proposed to add a sentence to paragraph (a) clarifying that employees have the same obligation to provide a complete certification or provide sufficient authorization to the health care provider in order for that person to provide the information directly to the employer in the fitness-for-duty certification process as they do in the initial certification process. The Department did not propose any changes to current paragraph (b). The Department proposed to change current paragraph (c) in two respects. First, the Department proposed to change the requirement in current paragraph (c) that the fitness-for-duty certification need only be a ''simple statement.'' The Department proposed to allow an employer to require that the fitness-for-duty certification address the employee's ability to perform the essential functions of the employee's job as long as the employer provides the employee with a list of those essential job functions at the same time that the employer provides the eligibility notice required by proposed § 825.300(b). Second, the Department proposed to allow an employer to contact the employee's health care provider directly, consistent with the procedure in proposed § 825.307(a), for purposes of authenticating or clarifying the fitness-for-duty certification. The Department did not propose any changes to current paragraph (d). The Department proposed to modify current paragraph (e) to require that the employer advise the employee in the eligibility notice required by proposed § 825.300(b) if the employer will require a fitness-for-duty certification to return to work. The Department proposed to add language to current paragraph (f) to make clear that the employee is not entitled to the reinstatement protections of the Act if he or she does not provide the required fitness-for-duty certification or request additional FMLA leave. The Department proposed to change current paragraph (g) to allow an employer to require a fitness-for-duty certification up to once every 30 days if an employee has used intermittent or reduced schedule leave during the 30-day period and if reasonable safety concerns exist regarding the employee's ability to perform his or her duties, based on the serious health condition for which the employee took such leave. Finally, the Department proposed deleting current paragraph (h) as redundant with § 825.213 regarding repayment of health insurance premiums if the employee is unable to return to work as a result of a continuation of a serious health condition.

The final rule adopts the proposed change to paragraph (a). The Department has moved the statements in current paragraph (b) that discusses the applicability of provisions in state or local law or collective bargaining agreements that govern an employee's return to work to a new paragraph (g) in the final rule. The Department has also moved the discussion of the ADA in current paragraph (b) to a new and separate paragraph (h) in the final rule. Due to the reorganization of this section in the final rule, proposed paragraph (c) is paragraph (b) in the final rule. In paragraph (b) in the final rule, the Department adopts the proposed change but modifies the language to make clear that an employer may require that a fitness-for-duty certification specifically address the employee's ability to perform the essential functions of the employee's job. To do so, the final rules explain that the employer must provide the employee with a list of the essential job functions no later than with the designation notice required by § 825.300(d), rather than with the eligibility notice as proposed, and the employer must indicate in the designation notice that the certification must address the employee's ability to perform those essential functions. In addition, the Department has moved the statement in current paragraph (e) that no second or third opinions on a fitness-for-duty certification may be required to paragraph (b) in the final rule. Current paragraph (d) is paragraph (c) in the final rule. Current paragraph (e) is paragraph (d) in the final rule. The Department has modified the notice requirement in paragraph (d) in the final rule to provide that, if the employer will require a fitness-for-duty certification, the employer must advise the employee of this requirement in the designation notice and indicate therein whether that certification must address the employee's ability to perform the essential functions of the employee's job. Current paragraph (f) is paragraph (e) in the final rule. The Department adopts the proposed change to current paragraph (f) without modifications. Current paragraph (g) is paragraph (f) in the final rule. The Department adopts the proposal in this paragraph regarding uniformly-applied policies permitting fitness-for-duty certifications for intermittent and reduced schedule leave users when reasonable safety concerns are present and adds a definition of ''reasonable safety concerns.'' ''Reasonable safety concerns'' means a reasonable belief of a significant risk of harm to the individual employee or others. In determining whether reasonable safety concerns exist, an employer should consider the nature and severity of the potential harm and the likelihood that potential harm will occur. In addition, the Department has added a notice requirement to this paragraph requiring the employer, if it chooses to require a fitness-for-duty certification as allowed by this paragraph, to inform the employee at the same time it issues the designation notice that for each subsequent instance of intermittent or reduced schedule leave, the employee will be required to submit a fitness-for-duty certification unless one has already been submitted within the past 30 days. Alternatively, the employer can set a different interval for requiring a fitness-for-duty certification as long as it does not exceed more than once every 30 days and the employer advises the employee of the requirement in advance of the employee taking intermittent or reduced schedule leave. The Department deletes current paragraph (h) in the final rule.

The Department received few substantive comments on its proposal to add a sentence to paragraph (a) clarifying that employees have the same obligation to provide a complete certification or provide sufficient authorization to the health care provider to enable that person to provide the

information directly to the employer in the fitness-for-duty certification process as they do in the initial certification process. The Equal Employment Advisory Council supported the proposal, noting the importance of the fitness-for-duty certification to an employee's exercise of the right to reinstatement. The Department adopts the proposed clarification to paragraph (a) without modification.

The Department did not propose any changes to current paragraph (b), which addresses the applicability of provisions in state or local law or collective bargaining agreements that govern an employee's return to work, and the ADA in the fitness-for-duty context. However, to make clear that the statements in this paragraph apply to all of the provisions in § 825.312, the Department has moved the statements in current paragraph (b) to the end of the section in the final rule. Thus, the statement that provisions in state or local law or the terms of a collective bargaining agreement that govern an employee's return to work shall be applied is in paragraph (g) in the final rule. Additionally, for reasons discussed below, the Department has moved the discussion of the ADA contained in current paragraph (b) to a new paragraph (h) in the final rule in order to highlight the relationship between the FMLA's fitness-for-duty certification and the ADA. The Department does not intend for either of these changes to be substantive.

In response the proposal in paragraph (c) to allow employers to require that fitness-for-duty certifications contain more than a ''simple statement'' of the employee's ability to return to work, many employers and employer organizations welcomed the ability to obtain a certification that addresses the employee's ability to perform the essential functions of the job. *See* National Association of Manufacturers; National Business Group on Health; ORC Worldwide; National Restaurant Association; AT&T; International Public Management Association for Human Resources/International Municipal Lawyers Association. Domtar Paper Company recognized that providing a list of essential job functions may be burdensome to employers, but asserted that it was worth the effort if the employer wants a more useful fitness-for-duty certification.

In contrast, employee organizations and unions opposed this proposed change, because they believed it would be duplicative, onerous, and costly for employees. *See* United Food and Commercial Workers International Union; Coalition of Labor Union Women; National Partnership for Women & Families; Tracy Hutchinson. The Coalition of Labor Union Women commented that the additional information that an employee is required to provide will likely increase the cost to employees because it might necessitate an additional medical evaluation. Commenters including Richard Baerlocher and the United Food and Commercial Workers International Union asserted that a more detailed certification could delay an employee's return to work, which could require the employee to take more FMLA leave than needed or face discipline if the employee has no leave remaining. These commenters argued that this will discourage employees from taking FMLA leave. The United Food and Commercial Workers International Union also questioned the necessity of a detailed fitness-for-duty certification when the initial medical certification for FMLA leave requires the employee's health care provider to assess the employee's condition in relationship to the employee's essential job functions. This commenter argued that because the health care provider has already considered the essential functions of the employee's position in completing the initial certification, by certifying that the employee is fit to return to duty, the health care provider necessarily certifies that the employee's serious health condition no longer prevents the employee from being able to perform the essential functions of his or her job.

The Department notes that the current regulation already allows an employer to delay an employee's return to work until the employee provides a fitness-for-duty certification, assuming the employer has appropriately notified the employee of the requirement. The only difference under the proposed regulation is that the employer may, if it so chooses, require that the fitness-for-duty certification address the employee's ability to perform the essential functions of the job. Because the employee will know in advance (as discussed below) that a fitness-for-duty certification is required, and that it must address the employee's ability to perform the essential functions of the employee's job, and will have the list of essential job functions to present to his or her health care provider, the additional requirement that the fitness-for-duty certification address the employee's ability to perform the essential functions of the job should not impose any additional delay in the employee's return to work. Additionally, requiring the health care provider to address the employee's essential job functions when determining whether the employee is fit to return to duty will produce a more meaningful fitness-for-duty certification. The fact that the employee's health care provider certified, in the medical certification submitted in support of the request for leave, that the employee was unable to perform the essential functions of the employee's position does not mean that the health care provider will specifically consider these functions again when the employee seeks to return to work unless specifically called upon to do so.

The AFL–CIO commented that the Department's proposal to allow employers to require a fitness-for-duty certification that addresses an employee's ability to perform the essential functions of the position for all employees goes beyond what it asserted was a more limited request by employer groups to allow more detailed certifications for employees in safety-sensitive jobs. The Department notes that the FMLA does not obligate employers to restore any employee to the same or equivalent position if the employee is unable to resume work. Resuming work requires that the employee be able to perform the essential functions of the job. Accordingly, an employer is entitled in all cases in which it is authorized to obtain a fitness-for-duty certification to require that the certification address the employee's ability to perform the essential functions of the position. An employer's rights and obligations on this issue are not limited to employees working in safety-sensitive jobs.

Several employers and employer organizations, while supportive of the proposal, viewed the timing requirements under the proposal as problematic. *See* Equal Employment Advisory Council; ORC Worldwide; HR Policy Association; Manufacturers Alliance. Their comments on this subject addressed proposed paragraph (e)'s requirement that the employer inform the employee in the eligibility notice if the employer will require a fitness-for-duty certification to return to work and proposed paragraph (c)'s requirement that the employer provide the list of essential job functions with the eligibility notice. Specifically, they argued that this timing requirement is premature (for reasons discussed in detail in conjunction with the discussion of paragraph (e) below). These commenters stated that requiring employers to provide a list of essential job functions with the eligibility notice will be burdensome and costly to employers because in order to preserve the option of requiring a fitness-for-duty certification, they will be forced to

prepare lists of essential job functions in all instances; whereas if they could determine later whether a fitness-for-duty certification will be required and whether the fitness-for-duty certification needs to address the employee's ability to perform the essential job functions, they may decide not to require a fitness-for-duty certification at all or not to require a certification that addresses an employee's essential job functions in certain cases. These commenters recommended that employers be permitted to provide the list of essential job functions at a later time. The Equal Employment Advisory Council suggested that the fitness-for-duty certification notice requirement should come, at the earliest, at the designation notice stage. ORC Worldwide suggested there be no time limit on when an employer must advise an employee of the fitness-for-duty certification requirement because this will change on a case-by-case basis. According to the Manufacturers Alliance and the HR Policy Association, a later notice requirement would not be burdensome to employees because employees could simply fax or email the fitness-for-duty certification and list of essential job functions to their health care providers upon receiving notice that the fitness-for-duty certification is needed. The National Association of Manufacturers and AT&T suggested altering the timing to allow an employer to provide the list of essential job functions directly to the health care provider when seeking authentication or clarification of the fitness-for-duty certification.

As an initial matter, the Department notes that it has not prepared or issued a fitness-for-duty certification form. It appears that several commenters erroneously assumed that the Department had proposed a separate fitness-for-duty certification form for an employee's health care provider to complete. There is no fitness-for-duty certification form, nor is there any specific format such a certification must follow as long as it contains the required information. The Department also notes that this section permits an employer to require that the fitness-for-duty certification address the employee's ability to perform the essential functions of his or her position. However, the employer can chose to accept a simple statement fitness-for-duty certification (or not require a fitness-for-duty certification at all). The Department has modified the language in the final rule in paragraph (b) to make this distinction clear. Specifically, if the employer chooses to require a certification that addresses the employee's ability to perform the essential functions of the employee's job, the employer must so indicate in the designation notice (in addition to providing a list of the essential functions of the employee's job).

In response to the comments about the timing requirements in the proposal, the Department has changed the timing requirement in what was proposed paragraph (e) and is now paragraph (d) in the final rule (discussed in detail below) to coincide with the designation notice instead of the eligibility notice. For consistency, the Department has also changed paragraph (b) in the final rule to require the employer to provide the list of essential functions no later than with the designation notice. Therefore, final paragraph (b) states that if the employer will require that the fitness-for-duty certification address the employee's ability to perform the essential job functions, the employer must provide the employee with the list of the essential job functions no later than with the designation notice required by § 825.300(d).

The AFL–CIO and the law firm Sherman & Howard each addressed the preparation of the list of essential job functions. The AFL–CIO commented that the proposal would appear to give employers the ability to determine the essential job functions regardless of whether a written job description already exists. The AFL–CIO believes that employers that do not already have written job descriptions should not be able to create a list of essential functions for the purpose of determining if an employee is fit to return to duty because employers will use this as an opportunity to create arbitrary lists to penalize employees for taking FMLA leave. In contrast, the law firm Sherman & Howard requested that employers be able to provide the list of essential job functions regardless of whether those functions are listed in a formal job description. While employers must set forth the essential functions of an employee's position if they wish to require a fitness for duty certification that specifically addresses those functions, there is no requirement that an employer have pre-existing written job descriptions. There is no legal requirement under the FMLA that employers have written or formal job descriptions for all positions. It would be unreasonably burdensome to impose such a requirement. The Department notes, however, that an employer may rely on its determination of the essential functions of a position in denying an employee's return to work only to the extent that the essential functions it has listed are in fact essential functions of the position.

In conjunction with these proposed changes, the Department requested input concerning whether additional information or procedures, such as a second and third opinion process, should be permitted where an employer has reason to doubt the validity of the fitness-for-duty certification. Several employers and employer organizations requested that the Department establish a second and third opinion process for fitness-for-duty certifications. *See* Equal Employment Advisory Council; TOC Management Services; National School Boards Association. The Independence (MO) Human Resources Department and Catholic Charities noted that this is particularly important in safety-sensitive positions. The Society for Human Resource Management and the National Coalition to Protect Family Leave argued that prohibiting an employer from seeking second and third opinions presents safety concerns and conflicts with the fitness-for-duty assessment permitted under the ADA. The Southern Company expressed concern that an employee may pressure his or her health care provider to certify that the employee is able to return to work before he or she is truly ready. This commenter suggested that permitting a second and third opinion would address this problem. The Association of American Railroads requested that employers be allowed to apply the same fitness-for-duty certification standards to employees returning from FMLA leave as employers apply to employees returning from other forms of leave. The law firm Vercruysse Murray & Calzone suggested that employers be allowed to delay an employee's return to work pending a second and third opinion. The Equal Employment Advisory Council noted that the current regulation allows employers to require an employee to submit to a medical examination after returning from leave so long as the examination is consistent with ADA standards. It requested that the final regulation explicitly permit such a post return-to-work examination, in addition to second and third opinions on a fitness-for-duty certification. Others, including the law firm Spencer Fane Britt & Browne and Central Carolina Society for Human Resource Management suggested as an alternative to second and third opinions in the fitness-for-duty context that employers be allowed to require a full medical examination by the employer's health care provider before allowing an employee to return to work. These

commenters maintained that employers should use such examinations only on a uniformly applied basis that does not distinguish between FMLA leave and non-FMLA leave. On a similar note, the U.S. Department of Transportation, Federal Railroad Administration requested that employers be able to use their own health care providers to evaluate an employee's fitness to return to duty.

The Equal Employment Opportunity Commission commented that, contrary to some of the other commenters' assertions, prohibiting second and third opinions on fitness-for-duty certifications does not conflict with the ADA. The ADA does not expressly regulate second and third opinions. The Equal Employment Opportunity Commission stated that the current regulation already addresses the Commission's highest priority by making clear in current paragraph (b) (paragraph (h) in the final rule) that a fitness-for-duty examination must be job-related and consistent with business necessity.

The National Federation of Federal Employees and the AFL–CIO were opposed to including a second and third opinion process in the fitness-for-duty certification procedure. Both commenters maintained that the statute does not permit second and third opinions for fitness-for-duty certifications. On a related note, the Association of Professional Flight Attendants suggested that if an employer questions an employee's general ability to perform the essential functions of the job, the employer may choose to send the employee to a doctor for a general fitness-for-duty examination at the employer's expense and on-the-clock for the employee.

The Department declines to establish a second and third opinion process for a fitness-for-duty certification. A second and third opinion process would impose a significant burden on employees because it would delay an employee's return to work from FMLA leave. The statute permits an employee to return to work based on a uniformly-applied policy permitting a fitness-for-duty certification from the employee's health care provider, 29 U.S.C. 2614(a)(4). A fitness-for-duty certification need only address the condition for which FMLA leave was taken and the employee's ability to perform the essential functions of the job. The employee's health care provider determines whether a separate examination is required in order to determine the employee's fitness to return to duty under the FMLA. The statute does not require that an employee returning from FMLA leave submit to a medical examination by an employer's health care provider. An employer may not require that an employee submit to a medical exam by the employer's health care provider as a condition of returning to work. A medical examination at the employer's expense by an employer's health care provider may be required only after the employee has returned from FMLA leave and must be job-related and consistent with business necessity as required by the ADA. Thus, if an employer is concerned about the health care provider's fitness-for-duty certification, the employer may, consistent with the ADA, require a medical exam at the employer's expense after the employee has returned to work from FMLA leave as stated in paragraph (h) in the final rule. The employer cannot, however, delay the employee's return to work while arranging for and having the employee undergo a medical examination. The Department has moved the statement that no second or third opinions on a fitness-for-duty certification may be required from current paragraph (e) to paragraph (b) in the final rule because this follows logically the discussion regarding the content of the certification and the employer's ability to authenticate or clarify the fitness-for-duty certification.

The second change the Department included in proposed paragraph (c) was to allow an employer to contact the employee's health care provider directly, consistent with the procedure in proposed § 825.307(a), for purposes of authenticating or clarifying the fitness-for-duty certification. In conjunction with this change, the Department deleted the statement that no additional information may be acquired because the process of clarifying the fitness-for-duty certification may result in the employer obtaining additional information not initially provided on the fitness-for-duty certification; any additional information, however, must be limited to the condition for which the leave was taken and the employee's ability to perform the essential functions of the position.

The Service Employee International Union, the American Association of University Women, and the National Employment Lawyers Association opposed the Department's proposal to allow direct contact between the employer and the employee's health care provider consistent with the procedure proposed in § 825.307(a). The National Employment Lawyers Association expressed concern that this will have a chilling effect on whether employees will feel secure in taking FMLA leave for their own serious health condition. This issue of employer contact with the employee's health care provider is discussed extensively in regard to § 825.307. For the same reasons outlined there, the Department retains the provision allowing for an employer to contact directly the employee's health care provider to clarify or authenticate a fitness-for-duty certification. As discussed above in § 825.307, the Department has modified § 825.307(a) to specify the manner in which the employer may contact the employee's health care provider. Because paragraph (b) explicitly references § 825.307(a), the procedures set forth in § 825.307(a) apply in the fitness-for-duty certification context.

As noted above, several commenters objected to proposed paragraph (e)'s requirement that the employer advise the employee in the eligibility notice if a fitness-for-duty certification will be required. *See, e.g.*, Equal Employment Advisory Council; ORC Worldwide; HR Policy Association; Manufacturers Alliance. They argued that this timing requirement is premature. The Equal Employment Advisory Council stated that this is inconsistent with the Department's proposed simplification of the notice process and will result in an undue administrative burden on both employers and employees because some employers do not require medical documentation until an employee misses a threshold number of workdays. According to this commenter, requiring notice at the eligibility notice stage will instead force employers to require a fitness-for-duty certification in all instances in which the FMLA permits them to do so and will force some employees to obtain fitness-for-duty certifications that would otherwise not have been required. The HR Policy Association expressed these same concerns and asserted that this timing requirement could create a greater burden on employers and employees rather than a lesser burden. The Equal Employment Advisory Council suggested that the fitness-for-duty certification notice requirement should come, at the earliest, at the designation notice stage. ORC Worldwide and the HR Policy Association suggested there be no time limit on when an employer must advise an employee of the fitness-for-duty certification requirement because this will change on a case-by-case basis.

In response to the comments about the timing requirements, the Department has modified these requirements. As outlined in the comments, an employer may not know

at the eligibility notice stage if it will need a fitness-for-duty certification. It may depend on the nature of the employee's health condition and the duration of the leave. Requiring that an employer state that it will require a fitness-for-duty certification in order to preserve its right to request one later could have the effect of forcing an employer to require such certifications in all instances, even when it would not do so otherwise. However, in order to reduce the burden on the employee, if the employer is going to require a fitness-for-duty certification prior to returning the employee to work, the employer must provide notice of this requirement no later than in the designation notice and indicate in the designation notice whether certification must address the employee's ability to perform the essential functions of the employee's job. Further, if the employer will require a fitness-for-duty certification that addresses the employee's ability to perform the essential job functions, the employer must provide the employee with the list of essential functions as required by final paragraph (b) no later than with the designation notice.

The Department did not receive any significant comments specifically addressed to the change in proposed paragraph (f) to add language to current paragraph (f) to make clear that the employee is not entitled to the reinstatement protections of the Act if he or she does not provide the required fitness-for-duty certification or request additional FMLA leave. The Department adopts the proposal without modification. Due to the reorganization of this section, current paragraph (f) is paragraph (e) in the final rule.

Proposed paragraph (g) allowed employers to require a uniformly-applied policy permitting a fitness-for-duty certification for employees returning from intermittent or reduced schedule leave if reasonable safety concerns existed, but limited the frequency of such certifications to once in a 30-day period in which intermittent or reduced schedule leave was taken. Numerous employee unions and organizations opposed proposed paragraph (g), focusing most of their criticism on the increased costs that requiring fitness-for-duty certifications for employees returning from intermittent or reduced schedule leave would impose on employees. *See, e.g.*, National Federation of Federal Employees; Coalition of Labor Union Women; National Employment Lawyers Association; AFL–CIO; National Partnership for Women & Families; A Better Balance: The Work and Family Legal Center. These commenters said that requiring an employee in a safety-sensitive position to obtain a fitness-for-duty certification every 30 days when the employee has taken intermittent leave during the 30-day period will increase the costs to the employee of taking FMLA leave, which may cause employees to forego taking FMLA leave. Robert Schwartz noted that an employee who is absent one day a month because of a back condition could be required to submit twelve certifications a year. Robert Jusino commented that this is especially costly for employees who do not have health insurance or have a high deductible. He and the American College of Occupational and Environmental Medicine each suggested that the Department require the employer to pay for the fitness-for-duty certification if the employer is going to require it when an employee takes intermittent or reduced schedule leave. Similarly, in response to the Department's request for suggestions on how to minimize the cost to employees, A Better Balance: The Work and Family Legal Center urged the Department to require employers to share a portion of the cost of the required medical visits by providing paid sick leave to cover the appointments, and in the case of employers who do not provide health insurance, requiring the employer to pay the cost of the medical visit necessary to obtain the fitness-for-duty certification. The AFL–CIO argued that permitting fitness-for-duty certifications for intermittent FMLA absences under any circumstances is particularly unworkable and costly to employees with chronic conditions such as migraines or asthma because the duration of the leave is uncertain and the employee may not be able to schedule an appointment with his or her health care provider or request that the provider prepare the certification until the employee knows that the condition has subsided. The AFL–CIO argued that in these cases, because the certification is a condition of restoring the employee to work, the employee will be forced to take more leave than actually needed while obtaining the certification.

Employee commenters also questioned the value of the fitness-for-duty certification in the intermittent and reduce schedule leave context even when the employer has safety concerns. The AFL–CIO maintained that this requirement is unnecessary in situations where the employee's health condition has not changed. It argued that there is no purpose in requiring repeat certifications other than imposing a burden on employees to discourage them from taking such leave. The National Employment Lawyers Association urged the Department to allow an employer to require a fitness-for-duty certification for intermittent leave users only if there is an observed material change in the employee's condition.

Lastly, several employee commenters pointed out that the term ''reasonable safety concerns'' is ambiguous and urged the Department to define the term. *See, e.g.*, National Employment Lawyers Association; AFL–CIO; National Partnership for Women & Families; National Employment Lawyers Association. The National Partnership for Women & Families questioned whether the safety concerns must be related to safety issues of the job or safety issues posed by the serious health condition or both, and how this term interacts with the ADA's direct threat standard. Kindra Obermeier expressed concern that employers will require a fitness-for-duty certification for intermittent or reduced schedule leave as a blanket policy, not limited to the existence of reasonable safety concerns.

Employers and employer organizations generally supported allowing fitness-for-duty certifications for intermittent or reduced schedule leave where reasonable safety concerns exist, but some felt that the proposal did not go far enough. Several of these commenters supported the proposal, stating that allowing employers to require a fitness-for-duty certification once in a 30-day period when leave is taken during that period adequately addressed their safety concerns and struck the appropriate balance. *See, e.g.*, U.S. Postal Service; Association of American Railroads; National Association of Manufacturers; the Chamber; Spencer Fane Britt & Browne; Southwest Airlines; Navy Federal Credit Union; Southern Company; AT&T. The Southern Company recognized that this will impose some burden on employees, but believed that the safety considerations outweigh that burden. The U.S. Postal Service stated that the ADA's direct threat standard (29 CFR 1630.2(r)) is itself sufficient to restrain employers from requesting certifications on an unwarranted and repetitive basis, and recommended that the Department specifically apply the ADA standard.

Numerous employers and employer organizations, however, stated that the proposal did not go far enough because allowing a fitness-for-duty certification only once in a 30-day period when the employee takes more than one instance of leave during that period does not

adequately address employers' safety concerns. They urged the Department to allow employers to require a fitness-for-duty certification after each instance of intermittent or reduced schedule leave. *See, e.g.*, Society for Human Resource Management; National Coalition to Protect Family Leave; Food Marketing Institute; Colorado Department of Personnel & Administration; Schreiber Foods; South Carolina Office of Human Resources; Jackson Lewis; New York City (NY) Law Department; City of Medford (OR); City of American Canyon (CA); Dalton Corp.; International Public Management Association for Human Resources/International Municipal Lawyers Association. WorldatWork suggested that this would be particularly appropriate where employee abuse is suspected. The law firm Willcox & Savage and the National School Board Association believed that the fitness-for-duty certification for employees returning from intermittent leave should not be limited to situations where safety concerns exist. They argued that all employees should be able to perform the essential functions of the position, and requiring a certification regardless of whether there are safety concerns would be a means of controlling abuse of intermittent leave.

The National School Boards Association and the law firm Spencer Fane Britt & Browne also requested that the Department define ''reasonable safety concerns.'' The National School Boards Association suggested that the Department make clear that the safety concerns must arise due to a particular health condition in relation to an employee's position. As an example, this commenter suggested that a teacher who suffers from seizures could not be required to provide a fitness-for-duty certification, but a bus driver could. The law firm Spencer Fane Britt & Browne suggested that the term include, at a minimum, the possibility of risk of harm or injury to the employee or others, whether the employee works around or with dangerous/hazardous equipment or products, whether there are OSHA considerations, and whether there are Department of Transportation driver medical qualification considerations.

The Department agrees with the commenters that the term ''reasonable safety concerns'' needs further clarification. Therefore, the Department has revised the regulation to include a definition of this term. ''Reasonable safety concerns'' means a reasonable belief of significant risk of harm to the individual employee or others. In determining whether reasonable safety concerns exist, an employer should consider the nature and severity of the potential harm and the likelihood that potential harm will occur. The Department intends for this to be a high standard. The determination that there are reasonable safety concerns must rely on objective factual evidence, not subjective perceptions. In other words, the employer must have a reasonable belief, based on the objective information available, that there is a significant risk of harm. Both the employee's condition for which FMLA leave was taken and the employee's essential job functions are relevant to determine if there are reasonable safety concerns. For example, a delivery person whose essential job functions require him or her to lift articles over a certain weight and who suffers from a back condition that limits his or her ability to lift items above that weight may present reasonable safety concerns upon return from intermittent or reduced schedule FMLA leave due to the employee's back condition. An air traffic controller who takes intermittent leave to treat high blood pressure may present reasonable safety concerns upon return from intermittent or reduced schedule FMLA leave due to the employee's high blood pressure. A roofer who experiences panic attacks may present reasonable safety concerns upon return from intermittent or reduced schedule FMLA leave due to the employee's panic attacks. In contrast, an office worker who has periodic seizures would likely not present reasonable safety concerns. Similarly, a cashier who suffers from migraines would likely not present reasonable safety concerns upon return from intermittent or reduced schedule FMLA leave due to the employee's migraines.

The Department recognizes that this new regulation may impose additional costs on some employees. However, because the Department has defined the term ''reasonable safety concerns'' to create a high standard, and employers may only request a fitness-for-duty certification pursuant to a uniformly-applied practice or policy, the Department estimates that a relatively small group of employees will fall into this category. For these employees, the significant safety concerns that their conditions present in the context of their essential job functions outweigh the burden imposed.

The Department wishes to emphasize that, even where employers have a uniformly-applied policy of requesting fitness-for-duty certifications, employees who take intermittent or reduced schedule leave may only be required to provide such certifications where reasonable safety concerns are present, and employers cannot under this regulation require such certifications in all intermittent or reduced schedule leave situations. Furthermore, the requirement may not be used to penalize employees who take intermittent or reduced schedule leave. An employer may impose this requirement only if there are reasonable safety concerns present, as discussed above. The Department's objective in allowing an employer to require a fitness-for-duty certification for intermittent or reduced schedule leave is to ensure the safety of all employees in the workplace and the public when there are legitimate reasonable safety concerns.

The Department declines to adopt the suggestion that a fitness-for-duty certification for intermittent or reduced schedule leave be allowed only when there is a material change in the employee's condition. This would not adequately address employers' legitimate safety concerns. Likewise, the fact that an employee's condition has not changed does not eliminate the reasonable safety concerns that may be present depending on the particular condition for which leave was taken and the employee's essential job functions.

The Department also declines to adopt the request to allow a fitness-for-duty certification after each instance of intermittent or reduced schedule leave. This would impose an unreasonable burden on employees. If an employer is concerned that an employee's intermittent or reduced schedule leave that occurs more often than once in a 30-day period presents safety concerns, the employer may require the employee, once returned to work from FMLA leave, to submit to a medical exam as long as the exam is job-related and consistent with business necessity as required by the ADA (see discussion above). Alternatively, if there are changed circumstances in the employee's medical condition, § 825.308(c) permits an employer to require recertification.

As provided in paragraph (d) of this section, if the employer will require a fitness-for-duty certification, it must notify the employee in the designation notice of this requirement. However, the Department recognizes that this is logistically difficult when the intermittent or reduced schedule leave is unforeseen and the employer may provide the designation notice after the employee is ready to return to work. In order to provide sufficient advance notice to the employee of the fitness-for-duty certification requirement in connection with intermittent leave, the Department has adopted a modified

notice requirement for a fitness-for-duty certification in such circumstances. When an employee uses intermittent or reduced schedule leave for a condition that presents reasonable safety concerns, if the employer chooses to require a fitness-for-duty certification, the employer shall inform the employee at the time it issues the designation notice that for each subsequent instance of intermittent or reduced schedule leave, the employee will be required to submit a fitness-for-duty certification unless one has already been submitted within the past 30 days. Alternatively, an employer can set a different interval of time for a fitness-for-duty certification requirement as long as it does not exceed once every 30 days and as long as the employer advises the employee of the requirement in advance of the employee taking the intermittent or reduced schedule leave. The Department recognizes that the first time an employee uses intermittent or reduced schedule leave and reasonable safety concerns exist, it may be difficult to inform the employee of the fitness-for-duty certification requirement in a timely manner. In such instances, however, the employer may, consistent with the ADA, require a medical exam after the employee has returned to work from FMLA leave.

The Department did not receive any comments on its proposal to delete current paragraph (h) as redundant with § 825.213. Therefore, the Department has deleted current paragraph (h) in the final rule. As stated above, the Department has moved the statement regarding the applicability of the provisions in state or local law or the terms of collective bargaining agreements that govern an employee's return to work in current paragraph (b) to a new paragraph (h) in the final rule in order to make clear that this applies to all of the provisions in this section.

As stated above, the Department has also moved the discussion of the ADA in current paragraph (b) to a new paragraph (h) in the final rule. The Department has modified the discussion of the ADA in paragraph (h) to make clear that medical examinations after the employee has returned to work from FMLA leave must be job related and consistent with business necessity. The Department has also included the statement in § 825.306(d) that ''[i]f an employee's serious health condition may also be a disability within the meaning of the ADA, the FMLA does not prevent the employer from following the procedure for requesting medical information under the ADA'' in paragraph (h). Based on the comments, it appears that both employers and employees are confused regarding the interaction between the ADA and the FMLA in relation to fitness-for-duty certifications. By moving the discussion to a separate paragraph and including the statement in § 825.306(d) regarding the ADA, the Department intends to make clear that, once an employee returns to work and is no longer on FMLA leave, an employer may require a medical exam under the guidelines and restrictions imposed by the ADA. At that point, the FMLA's fitness-for-duty regulation no longer applies.

Section 825.313 (Failure To Provide Certification)

Current § 825.311 provides that if an employee fails to provide medical certification in a timely manner, the employer may delay the taking of FMLA leave until it has been provided. Current § 825.311(a) addresses the failure to provide timely certification of the foreseeable need for FMLA leave, and § 825.311(b) addresses the failure to provide timely certification when the need for FMLA leave is not foreseeable. Current § 825.311(c) addresses an employee's failure to provide timely certification of the employee's fitness to return to work pursuant to § 825.310 (§ 825.312 in the final rule). In the NPRM, the Department proposed to explain more clearly the implications of an employee's failure to provide medical certification in a timely manner. To that end, the Department proposed to amend the wording in current § 825.311(a) and (b) permitting an employer to ''delay'' FMLA leave to instead clarify that an employer may ''deny'' FMLA leave until the required certification as provided. As explained in the NPRM, the proposed change in language was intended to ensure that both employees and employers understood the potential impact of a failure to provide medical certification in a timely manner, but was not a substantive change from the current regulation. The Department also proposed a new § 825.311(c) that addressed the consequences of failing to provide timely recertification. Current § 825.311(c) was redesignated as § 825.311(d) in the proposed rule, without a substantive change. The final rule adopts § 825.311 as proposed, but the section is renumbered as § 825.313 to account for the new military family leave sections (§§ 825.309 and 825.310). Section 825.313(c) also clarifies that recertification does not apply to leave taken for a qualifying exigency or to care for a covered servicemember.

The Department received very few comments regarding proposed § 825.311 (§ 825.313 in the final rule). The Equal Employment Advisory Council supported the Department's clarification regarding the consequences of an employee's failure to provide medical certification but asked the Department to state even more explicitly in the final rule that any absences an employee may have during the period in which the employer may deny FMLA protection due to the failure to provide timely certification may be treated as unexcused, even if certification is later provided that covers the period of time in which the protection was denied. The law firm of Vercruysse Murray & Calzone expressed concern that this section could be read as prohibiting employers from disciplining or terminating employees for absences that occur during the period in which employers are permitted to deny FMLA protection due to the employee's failure to provide timely certification. TOC Management Services argued that employees should not be given 15 days of protection, as indicated in the example in § 825.311(a), when they fail to provide timely medical certification. The National Retail Federation requested clarification as to whether FMLA leave can be denied from the date the employer requests the certification or from the date that the employee fails to timely provide the certification. The Pennsylvania Governor's Office of Administration asked for clarification of the employer's ability to retroactively designate leave as FMLA-protected when an employee provides late certification.

The Department believes that § 825.311 as proposed (§ 825.313 in the final rule) is clear as to the consequences of an employee's failure to provide timely certification or recertification. Any absences that occur during the period in which an employer has the right to deny FMLA protection due to the failure to provide timely certification may be treated under the employer's normal attendance policies. The Department disagrees that, where employees fail to provide timely certification, employers should be able to deny FMLA protection for the entire period from the request for certification until such time as the certification is provided. Employees must be provided at least 15 calendar days to provide the requested certification, and are entitled to additional time when they are unable to meet that deadline despite their diligent, good-faith efforts. The Department expects that in all cases employees will communicate to their employers the efforts they are making to secure the completed medical certifications. *See* §§ 825.305(b) and

825.308(d). Accordingly, an employee's certification (or recertification) is not untimely until that period has passed, as the regulation indicates. Finally, the Department notes that § 825.313 permits employers to deny FMLA protection when an employee fails to provide a timely certification or recertification, but it does not require employers to do so. Employers always have the option of accepting an untimely certification and not denying FMLA protection to any absences that occurred during the period in which the certification was delayed.

Sections 825.400–825.600

The Department noted in the NPRM that conforming changes would need to be made to §§ 825.400–825.600, which include Subpart D—Enforcement Mechanisms, Subpart E—Recordkeeping Requirements, and Subpart F—Special Rules Applicable to Employees of Schools, in order to incorporate the new military family leave entitlements. The Department proposed no other substantive changes to these sections, although it did propose new titles and very minor editorial changes, such as adding a reference to the Department's Web site in proposed § 825.401(a), updating the reference in proposed § 825.500(c)(4) to the new employer eligibility notice requirement proposed in § 825.300(b), and deleting a cross-reference in proposed section 825.601(b).

Subpart D—Enforcement Mechanisms (Sections 825.400–825.404)

There were very few comments on §§ 825.400–825.404 of the proposal. The final rule adopts proposed §§ 825.400–825.404 without change, except as explained below with respect to the incorporation of appropriate references to the military family leave entitlements.

The military family leave amendments to the FMLA provide for the recovery of damages equal to, in a case involving the need for leave to care for a covered servicemember in which wages, salary, employment benefits or other compensation have not been denied or lost to the employee, any actual monetary losses sustained by the employee up to a sum equal to a total of 26 weeks of wages (rather than the usual 12 weeks). 29 U.S.C. 2617. In order to implement this provision, the preamble to the NPRM stated the Department's belief that a conforming revision would be required to § 825.400(c), which, as proposed, provided that an employee is entitled to wages, employment benefits, or other compensation lost or denied to the employee by reason of the violation or, where no such tangible loss has occurred, any actual monetary losses sustained as a direct result of an employer's violation of one or more of the provisions of FMLA up to an amount equal to a total of 12 weeks of wages. *See* 73 FR at 7932. Accordingly, the final rule amends § 825.400(c) to provide that, in a case involving the military caregiver leave, an employee is entitled to actual monetary losses sustained up to sum equal to a total of 26 weeks of wages for the employee. The final rule makes no other changes to proposed §§ 825.400–825.404.

Section 825.500 (Recordkeeping Requirements)

The only change proposed in § 825.500 was to paragraph (c)(4) to include a reference to the eligibility notice requirement in proposed § 825.300(b) and to delete the reference to the general notice form. The final rule adopts these proposed changes, incorporates a reference to the notice requirements for military family leave, and further clarifies that employers should retain all written notices given to employees as required under the FMLA and these regulations.

Comments on the FMLA recordkeeping provisions centered on proposed § 825.500(g), which, like the current regulations, requires that certain records created for purposes of FMLA be maintained as confidential medical records. The American Postal Workers Union, for example, recommended that FMLA medical certifications be accessible only to trained professionals employed by or representing the employer. Many employees raised concerns about supervisors disclosing information about an employee's serious health condition. Catholic Charities, Diocese of Metuchen urged that the Department clarify whether this section of the recordkeeping provisions applies to fitness-for-duty documents.

The Department believes this section of the proposed rule, which closely tracks the current regulation, adequately addresses the issues raised by these comments. The proposed regulation provided that records and documents relating to medical certifications, recertifications, or medical histories of employees or employees' family members, created for purposes of FMLA, are to be maintained as confidential medical records in separate files/records from the usual personnel files, and that if the ADA is also applicable, such records are to be maintained in conformance with ADA confidentiality requirements (*see* 29 CFR 1630.14(c)(1)); except that: (1) Supervisors and managers may be informed regarding necessary restrictions on the work or duties of an employee and necessary accommodations; (2) first aid and safety personnel may be informed (when appropriate) if the employee's physical or medical condition might require emergency treatment; and (3) government officials investigating compliance with FMLA (or other pertinent law) are to be provided relevant information upon request. Because a fitness-for-duty certification is a type of medical certification, the Department does not believe that a separate reference to fitness-for-duty certifications is required in this section. As is the case under the current regulations, fitness-for-duty certifications are to be maintained as confidential medical records pursuant to § 825.500(g).

The Department did make two minor changes in § 825.500(c)(4) of the final rule, which requires an employer to maintain copies of notices provided to an employee pursuant to the FMLA. The proposed recordkeeping requirement did not specifically mention the designation notice (Form WH–382). In response to a comment from the Metro Regional Transit Authority in Akron, Ohio, the final rule clarifies in § 825.500(c)(4) that employers must maintain copies of all written notices given to employees as required under the FMLA and these regulations, and not just eligibility notices. Finally, in § 825.500(g), a reference to ''medical certifications'' is changed to ''certifications'' to incorporate certifications related to the military family leave provisions.

Subpart F—Special Rules Applicable to Employees of Schools (Sections 825.600–825.604)

There were very few comments on §§ 825.600–825.604 of the proposal. The National School Boards Association commented that the possible regulatory changes the Department discussed in the preamble regarding the application of the military family leave amendments to eligible instructional employees of local educational agencies appeared consistent with the new legislation. The American Federation of Teachers commented on the need for the availability of FMLA leave for its 1.4 million members and stated that ''without the ability to use FMLA leave, many AFT members would have risked losing their jobs and/or essential health insurance in order to provide necessary care for themselves or for a family member. Increased restrictions on using such leave could therefore have a

devastating impact upon workers.'' Other than changes to titles and very minor editorial changes, the proposed text for §§ 825.600—825.604 was the same as the current regulations. The preamble to the proposed rule, however, stated that three related regulatory changes would be required to incorporate the new military family leave provisions into these sections of the FMLA regulations. 73 FR at 7932–33.[7]

First, the military family leave amendments provide that an employer covered by 29 U.S.C. 2618 can require-in the case of an instructional employee who requests FMLA leave intermittently or on a reduced leave schedule for foreseeable planned medical treatment of a covered servicemember and who, as a result, will be on leave for greater than 20 percent of the total number of working days during the period of leave-that the employee choose to either (1) take leave for a period or periods of particular duration; or (2) transfer temporarily to an available alternative position with equivalent pay and benefits that better accommodates recurring periods of leave. In order to incorporate this change, the Department stated in the preamble to the proposed rule that a minor technical revision would be required to current and proposed § 825.601(a)(1) to provide that the provisions of that section apply when an eligible instructional employee needs intermittent leave or leave on a reduced schedule to care for a covered servicemember, in addition to applying to situations where the employee takes such leave to care for a family member with a serious health condition or for the employee's own serious health condition. In all three cases, the provision would continue to apply only to intermittent leave or leave on a reduced leave schedule, which is foreseeable based on planned medical treatment, and requires the employee to be on leave for more than 20 percent of the total number of working days over the period the leave would extend. The final rule incorporates this change.

Second, the military family leave amendments extend some of the limitations on leave near the end of an academic term to leave requested during this period to care for a covered servicemember. The Department stated in the preamble to the proposed rule that it believed the text of § 825.602(a)(2) and (a)(3) would need to be changed in order to apply the limitations on leave near the end of an academic term to military family leave. 73 FR at 7933. Specifically, current and proposed § 825.602(a)(2) provide that if an instructional employee begins leave for a purpose other than the employee's own serious health condition during the five-week period before the end of the term, the employer may require the employee to continue taking leave until the end of the term if the leave will last more than two weeks and the employee would return to work during the two-week period before the end of the term. Current and proposed § 825.602(a)(3) provide that an employer may require an instructional employee to continue taking leave until the end of the term if the employee begins leave that will last more than five working days for a purpose other than the employee's own serious health condition during the three-week period before the end of the term.

Because the military family leave amendments extend the limitations in § 825.602(a)(2) and (a)(3) only to leave taken to care for a covered servicemember, and not leave taken because of a qualifying exigency, the Department stated in the NPRM that these two FMLA regulatory sections would need to be changed in order to specifically reference the types of leave that are subject to the limitations, namely: (1) Leave because of the birth of a son or daughter, (2) leave because of the placement of a son or daughter for adoption or foster care, (3) leave taken to care for a spouse, parent, or child with a serious health condition, and (4) leave taken to care for a covered servicemember. 73 FR at 7933. The final rule incorporates these changes and a minor grammatical change to § 825.602(a)(3). No other changes have been made to proposed §§ 825.600–825.604.

Subpart G—Effect of Other Laws, Employer Practices, and Collective Bargaining Agreements on Employee Rights Under FMLA (Sections 825.700–825.702)

Section 825.700 (Interaction With Employer's Policies)

Current § 825.700(a) provides that an employer may not diminish the rights established by the FMLA through an employment benefit program or plan, but that an employer may provide greater leave rights than the FMLA requires. The NPRM proposed to delete the last sentence of § 825.700(a), which states that if an employee takes paid or unpaid leave and the employer does not designate the leave as FMLA leave, the leave taken does not count against an employee's FMLA entitlement, in order to conform to the U.S. Supreme Court's decision in *Ragsdale* which invalidated this provision. The Department proposed no changes to current § 825.700(b), which provides that an employer may amend existing leave programs, so long as they comply with the FMLA, and that nothing in the Act is intended to discourage employers from adopting or retaining more generous leave policies. The Department proposed to delete § 825.700(c)(1) and (2) from the current regulations, as they discuss the initial applicability of the statute and periods of employment prior to the statute's effective date, which are no longer necessary.

There were only a few comments on these changes. The Association of Corporate Counsel's Employment and Labor Law Committee and the Equal Employment Advisory Council commented that they supported the changes in § 825.700(a) to align the regulations with the *Ragsdale* decision. The final rule adopts § 825.700 as proposed and makes no further changes.

Section 825.701 (Interaction With State laws)

Section 401(b) of the FMLA, 29 U.S.C. 2651(b), provides that ''Nothing in this Act or any amendment made by this Act shall be construed to supersede any provision of any State or local law that provides greater family or medical leave rights than the rights established under this Act or any amendment made by this Act.'' When § 825.701 of the current rule was proposed for public comment, a number of employer groups argued that this part of the statute should be interpreted to apply only in the case of more generous State or local law *substantive* provisions, such as eligibility and coverage requirements, amount of leave, benefits and employment protections, and substitution requirements, and not to *procedural* provisions such as notification of leave and certification requirements. These commenters argued at that time that any State or local law's (or implementing regulation's) procedural provision that is inconsistent with the FMLA should be preempted because of the administrative difficulty in trying to determine if a particular State or local law's procedural provision is more or less generous to the employee than the FMLA procedural provisions. *See* the discussion on this topic in the preamble to the current rule at 60 FR at 2230–32 (Jan. 6, 1995).

Because the wording of the statute provides that the FMLA does not

[7] The military family leave provisions of the NDAA that extend the entitlement to take FMLA leave to care for a covered servicemember and because of a qualifying exigency to eligible instructional employees of local agencies are codified in subsections (c)(1), (d)(2), and (d)(3) of 29 U.S.C. 2618.

supersede ''any provision'' of any State or local law that provides greater family or medical leave ''rights'' than those provided under the FMLA, the Department stated in the preamble to the current rule that it was not possible to apply section 401(b) of the statute only to substantive provisions that provide more generous family or medical leave benefits and not to procedural provisions that may extend greater rights:

> There is no basis under this [statutory] language or the legislative history to distinguish between procedural provisions that extend greater rights to employees and substantive provisions that provide more generous family or medical leave benefits to employees * * *. Given the literal language of FMLA, DOL has no authority to preempt State laws to the extent they provide more generous leave rights to employees. The results about which the majority of the comments complained occur by operation of law (FMLA and State family and medical leave laws), and cannot be mitigated by regulation.

Id.

Although no changes to § 825.701 were proposed in the NPRM, the Department received a few comments regarding this section. TOC Management Services raised a question regarding § 825.701(a)(4). Specifically, TOC Management Services commented,

> Nothing in the [FMLA] statute limits the employer's ability to request the second opinion if state law limits the ability. State leave laws regulate their specific leave provisions, not the FMLA. Clearly an employer would not have the ability to ask for the second opinion if the employee's leave only qualified under state law and such second opinions were prohibited by that state. But when an employee is taking FMLA leave (even if it runs concurrently with state leave), 29 U.S.C. 2601–2654 sets the parameters of that leave. The DOL cannot enact regulations that contradict the statute; 29 U.S.C. 2623(c)(1) provides employers with the right to obtain second opinions and the DOL cannot deprive employers of that statutory right.

The Legal Aid Society-Employment Law Center also commented that ''many large corporations that operate throughout the Unites States utterly fail to comply with California's more restrictive privacy laws in California * * * [and that] DOL must take action to ensure that large companies, which operate throughout the United States, comply with California's more protective privacy and medical confidentiality laws.''

The Department disagrees with the comment from TOC Management Services that nothing in the FMLA limits the employer's ability to request a second opinion in the case of FMLA leave contrary to State law, ''even if it runs concurrently with state leave.'' It is correct that State and local family and medical leave laws do not supersede or preempt the FMLA. As explained above, however, section 401(b) of the FMLA, 29 U.S.C. 2651(b), provides that the FMLA does not supersede or preempt provisions of State or local laws (whether substantive or procedural) that afford employees with greater rights than the FMLA. Thus, an employer must comply with all the provisions of the FMLA and any parallel State or local law that applies to a given leave request.

Conversely, the Department disagrees with the Legal Aid Society-Employment Law Center's comment that the Department should take action to ensure that companies comply with State privacy and confidentiality laws. The Department's Wage and Hour Division administers and enforces the FMLA and has no authority to administer or enforce any State laws.

Based on its consideration of these two comments, however, the Department has decided that the examples in § 825.701(a)(3) and (a)(4) are not helpful because they can be read incorrectly to suggest that the Department is assuming the responsibility for the administration or enforcement of provisions of State or local laws that afford employees with greater rights than the FMLA. As indicated above, the Department's Wage and Hour Division administers and enforces the FMLA and has no authority to administer or enforce State or local family and medical leave laws. Employers who contact local Wage and Hour offices with questions about State laws are referred to the appropriate State government agency.

Thus, in order to avoid any misimpression that the Wage and Hour Division enforces State or local family and medical leave laws, the examples in the current § 825.701(a)(3) and (a)(4) have been removed from the text of the final rule. This change has no policy or legal effect whatsoever on the continued application of the principle embodied in section 401(b) of the FMLA, 29 U.S.C. 2651(b), that the FMLA does not supersede or preempt any provision of a State or local law that affords an employee with greater rights than the FMLA. This change in the final rule is intended only to clarify that the Department administers and enforces the FMLA; State and local government agencies administer and enforce the laws for which they are responsible; and employers must comply with all applicable laws. Where a State or local law applies concurrently with the FMLA, there is unfortunately no way for employers to avoid the administrative burden that each leave request is to be considered first under one law (including its benefit and procedural provisions) and then the other(s). No other changes to the proposed text for § 825.701 have been made.

Section 825.702 (Interaction With Federal and State Anti-Discrimination Laws)

Current § 825.702 addresses the interaction between the FMLA and other Federal and State anti-discrimination laws. The Department proposed to add a new paragraph (g) in this section to discuss the interaction between the Uniformed Services Employment and Reemployment Rights Act of 1994 (USERRA) and the FMLA and incorporate the information in a 2002 guidance memorandum on this matter. Existing paragraph (g) of this section was proposed to be redesignated as paragraph (h). The only other change in the proposal was to conform the cross-reference in § 825.702(d)(2) to the proper paragraph in proposed § 825.207. These changes are included in the final rule.

The Chamber stated that it supports the clarification in proposed new § 825.702(g), ''which codifies guidance issued by the Department in July 2002, especially in light of the reentry into the workforce of thousands of service members in the coming years.'' The Equal Employment Advisory Council, however, commented that the ''Department's proposal to confer eligibility on military service members pursuant to the Uniformed Services Employment and Reemployment Rights Act (USERRA) * * * exceeds the Department's authority,'' and that the proposed new § 825.702(g), and a related new paragraph in § 825.110(c)(2) (in the section entitled ''Eligible employee'') should be deleted.

The Department does not agree with this latter comment. The NPRM included this new § 825.702(g) simply to incorporate the substance of a July 22, 2002 guidance memorandum, available at *http://www.dol.gov/vets/media/fmlarights.pdf*, stating the Department's opinion on the application of uniformed servicemembers' rights under USERRA to family and medical leave. Under USERRA, servicemembers who are reemployed are entitled to the rights and benefits that they would have attained if they had remained continuously employed. The rights and benefits protected by USERRA include those provided by employers and those required by another statute, such as the right to leave under the FMLA. Accordingly, under USERRA, a

returning servicemember would be entitled to FMLA leave if the hours that he or she would have worked for the civilian employer during the period of military service would have met the FMLA eligibility threshold. This is not an expansion of FMLA rights through regulation; this is a requirement of USERRA.

Section 825.702(b)–(e) of the current and proposed rule discuss the interaction between the FMLA and the ADA, as amended. As indicated in the preamble to the proposed rule, the Department received a number of comments in response to the RFI that discussed the relationship between the FMLA and the ADA, particularly regarding job modification, light duty, and reassignment. *See* 73 FR at 7923 (Feb. 11, 2008). Many of those comments were discussed in Chapter VII of the Department's 2007 Report on the RFI comments. *See* 72 FR at 35599 (June 28, 2007). The preamble to the proposed rule stated that the Department could do nothing to alter the fact that the two statutes serve distinctly different purposes, provide different rights, and have different eligibility criteria. *See* 73 FR at 7924. Although the Department did not propose any regulatory changes, it did provide a lengthy discussion in the preamble to the proposed rule regarding the interaction between the FMLA and the ADA to aid both employees and employers.

In response to the NPRM, comments from employer groups continued to express frustration over the difficulty of reconciling the two statutes. The National Federation of Independent Business commented that ''employers must navigate the complexities of both laws in order to determine whether an employee should be granted medical leave in a given situation * * *. [A]n employee's condition must be looked at from both perspectives to determine whether the FMLA, ADA, or both apply * * *. [For example,] an impaired employee entitled to ADA protections is not limited to the 12 weeks leave permitted under the FMLA [and this can] lead to situations where employers simply play it safe by extending FMLA leave beyond 12 weeks without question because of concerns that an employee would file an ADA discrimination lawsuit.'' The NPRM also prompted a significant number of comments on the Department's preamble discussion of the interaction between the FMLA and the ADA.

The Department recognizes the difficulty employers face in addressing both ADA and FMLA compliance issues that can arise on a particular leave request and the frustration that this administrative burden causes. The Department continues to believe that the administrative burden of complying with the FMLA and the ADA cannot be reduced through revisions to the regulatory requirements under the FMLA. The FMLA legislative history clearly states that the ''purpose of the FMLA is to make leave available to eligible employees and employers within its coverage, and not to limit already existing rights and protection,'' and it specifically recognizes that ''the leave provisions of the [FMLA] are wholly distinct from the reasonable accommodation obligations of employers covered under the [ADA].'' S. Rep. No. 103–3, at 38 (1993). Thus, where both laws may apply, the applicability of each statute needs to be evaluated independently. For these reasons, the final rule does not make any changes to this regulatory section in response to these comments. The words ''as amended'' have been added to the reference to the ADA in § 825.702(a), and to the definition of the ADA in § 825.800, to reflect the passage of the Americans with Disabilities Amendments Act of 2008, which makes several changes to the definition of the term ''disability'' under the ADA. The Department notes that the EEOC will be revising its ADA regulations to comply with these amendments, which become effective on January 1, 2009.

Subpart H—Definitions

Section 825.800 (Definitions)

The current § 825.800 contains the definitions of significant terms used in the regulations. Changes to definitions that would be affected by the Department's proposed rule were included in the NPRM. Specifically, changes and clarifications were proposed to the definitions of the terms ''continuing treatment,'' ''eligible employee,'' ''employee,'' ''health care provider,'' ''serious health condition,'' ''parent,'' and ''son or daughter.''

The Department received two comments on the content of the definitions. WorldAtWork commented that the definition of ''son or daughter'' should be expanded to children over age 18 who do not have a mental or physical disability if they meet other conditions. Because ''son or daughter'' is defined by the statute itself, the Department is not adopting this comment. *See* 29 U.S.C. 2611(12). The American Academy of Physician Assistants stated its support for the Department's inclusion of physician assistants in the definition of ''health care provider.''

One commenter, Illinois Credit Union League expressed concern that the cross-references made the definitions difficult to read; another commenter, Catholic Charities, Diocese of Metuchen suggested that the definitions should be placed at the beginning of the rule. The Department agrees that it is preferable to avoid cross-references to other sections in the definitions. This is not always possible, however, without including very lengthy text in a definition that is identical to text in another section. Also, no other commenters suggested moving the definitions section to the front of the regulation, and its current position in § 825.800 is a familiar location to many people. Consequently, these two comments were not adopted in the final rule.

The final rule adopts § 825.800 as proposed except where changes were needed to conform the definitions to changes in other sections of the final rule. Specifically, the final rule includes additional changes to the definitions for ''continuing treatment'' and ''serious health condition.''

In the NPRM, the Department also stated that it was considering the addition of certain new terms related to the military family leave entitlements to the definitions found in § 825.800. Specifically, the Department stated that it would add the terms ''active duty,'' ''contingency operation,'' ''covered servicemember,'' ''outpatient status,'' ''next of kin,'' and ''serious injury or illness.'' These terms are discussed in depth in the sections of the preamble related to qualifying exigency leave (§ 825.126) and military caregiver leave (§ 825.127).

In the final rule, § 825.800 contains new definitions for the terms ''active duty or call to active duty status,'' ''contingency operation,'' ''covered military member,'' and ''son or daughter on active duty or call to active duty status'' in relation to qualifying exigency leave. It also contains new definitions for the terms ''covered servicemember,'' ''parent of a covered servicemember,'' ''outpatient status,'' ''next of kin of a covered servicemember,'' ''serious injury or illness,'' and ''son or daughter of a covered servicemember'' in relation to military caregiver leave. The definitions for these terms in § 825.800 reflect the definitions for these terms found in §§ 825.126, 825.127, 825.309, and 825.310.

Paperwork Reduction Act

The Office of Management and Budget (OMB) has assigned control number 1215–0181 to the FMLA information collections. In accordance with the

Paperwork Reduction Act of 1995 (PRA), the February 11, 2008, NPRM solicited comments on the FMLA information collections as they were proposed to be changed. 44 U.S.C. 3506(c)(2). The Department also submitted a contemporaneous request for OMB review of the proposed revisions to the FMLA information collections, in accordance with 44 U.S.C. 3507(d). On March 11, 2008, the OMB issued a notice that continued the previous approval of the FMLA information collections under the existing terms of clearance. The OMB asked the Department to resubmit the information collection request upon promulgation of a final rule and after considering public comments on the FMLA NPRM. While the Department received comments regarding substantive aspects of the FMLA information collections, no comments directly addressed the methodology for estimating the public burdens under the PRA. In order to facilitate a full understanding of all the issues involved and avoid duplication within this preamble, the public comments addressing FMLA information collections imposed by this final rule are discussed in the applicable portions of this preamble. The following table shows where the various information collections appear in the final rule.

Information collection name	Regulatory citation(s) within 29 CFR 825
Employee's Notice of Need for FMLA Leave.	§§ .100(d), .301(b), .302, .303.
Notice to Employee of FMLA Eligibility.	§ .300(b).
Notice to Employee of FMLA Rights and Responsibilities.	§ .300(c).
Notice to Employee of FMLA Designation.	§§ .127(c)(4), .300(d), .301(a), .312.
Medical Certification/ Recertification (Self and Family).	§§ .100(d), .305–.308.
Fitness-For-Duty Medical Certification.	§§ .100(d), .212(a)(3), .216(b), .312.
Notice to Employee of Incomplete or Insufficient Medical Certification.	§ .305(c).
Notice to Employee of Change of 12-Month Period for Determining Entitlement.	§ .200(d)(1), (e).
Employee's Periodic Status Report.	§ .311.
Documenting Family Relationships.	§§ .122(j), .310(d), (e)(3).
"Key Employee" Notification.	§§ .219, .300(c)(1)(v).
Notice to Employee of Pending Cancellation of Health Benefits.	§ .212(a)(1).
Documenting Call to Military Active Duty.	§ .309(a).
Certification of Qualifying Exigency.	§§ .309(b)–(c).
Servicemember's Designation of Next of Kin.	§§ .122(d), .127(b)(3).
Certification for Serious Injury or Illness of Covered Servicemember.	§§ .307(a), .310.
General Recordkeeping.	§ .500.

Interested parties may obtain prototype FMLA notices via the Wage and Hour Division's Forms Web site at *http://www.dol.gov/esa/whd/forms/index.htm*, contacting the Wage and Hour Division at 1–866–4US–WAGE (1–866–487–9243), or visiting a Wage and Hour Division District Office. A list of District Office addresses is available on the Internet at *http://www.dol.gov/esa/whd/america2.htm*. Prototype FMLA forms are also available through the forms.gov Web site. Specifically, the Wage and Hour Division offers the following prototype notices: Certification of Serious Health Condition—Employee's Own Condition (Form WH–380–E), Certification of Serious Health Condition—Employee's Family Member's Condition (Form WH–380–F), Notice of FMLA Eligibility and Rights and Responsibilities (Form WH–381), Notice to Employee of FMLA Designation (Form WH–382), Certification of Qualifying Exigency (Form WH–384), Certification for Serious Injury or Illness of Covered Servicemember (Form WH–385).

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 Department has resubmitted the revised FMLA information collections to the OMB for approval, and the Department intends to publish a notice announcing the OMB's decision regarding this information collection request. A copy of the information collection request can be obtained at *http://www.RegInfo.gov* or by contacting the Wage and Hour Division as shown in the **FOR FURTHER INFORMATION CONTACT** section of this preamble. The existing FMLA information collection authorization will remain in effect until the OMB finally approves the new information collection request or this final rule takes effect on January 16, 2009, whichever date is later.

VI. Executive Order 12866 and the Small Business Regulatory Enforcement Fairness Act

This rule has been drafted and reviewed in accordance with Executive Order 12866, section 1(b), Principles of Regulation. The Department has determined that this rule is an "economically significant" regulatory action under section 3(f)(1) of Executive Order 12866. Based on the analysis presented below, the Department has determined that the final rule will have an annual effect on the economy of $100 million or more. For similar reasons, the Department has concluded that this rule is a major rule under the Small Business Regulatory Enforcement Fairness Act of 1996 (5 U.S.C. 801 *et seq.*). Therefore, the Department has prepared a Regulatory Impact Analysis ("RIA") in connection with this rule as required under Section 6(a)(3) of the Order and the Office of Management and Budget has reviewed the rule. The RIA is presented in its entirety below.

Regulatory Impact Analysis

Chapter 1: Executive Summary

The final rule will revise the FMLA regulations published in 1995 and implement the new changes required by the National Defense Authorization Act for FY 2008 ("NDAA"), Public Law 110–181. The Department determined that changes to the 1995 regulations were necessary because a decision by the U.S. Supreme Court and a number of decisions by other federal courts invalidated aspects of the regulations, the Department's experience administering the law, and public comments that it has received. The NDAA expanded the FMLA to allow eligible employees of covered employers to take FMLA-qualifying leave "[b]ecause of any qualifying exigency (as the Secretary [of Labor] shall, by regulation, determine) arising out of the fact that the spouse, or a son, daughter, or parent of the employee is on active duty (or has been notified of an impending call or order to active duty) in the Armed Forces in support of a contingency operation." The NDAA also provides that "an eligible employee who is the spouse, son, daughter, parent, or next of kin of a covered servicemember shall be entitled to a total of 26 workweeks of leave during a 12-month period to care for the servicemember." (Pub. L. 110–181, Section 585(a)).

Based upon an analysis presented in more detail in the Preliminary Regulatory Impact Analysis (PRIA),

which was in turn based on an analysis by CONSAD Research and the 2000 Westat Report the Department estimates that 285,237 firms are covered by Title I of the FMLA.[8] These firms operate 1.1 million establishments and employ 95.8 million workers. In 2005, 77.1 million workers or 80.5 percent of the workers employed at the covered establishments met the FMLA eligibility requirements (*i.e.*, have been employed by their employer for 12 months and have worked for their employer at least 1,250 hours during the previous 12 months). Based upon CONSAD's projection of 2000 FMLA leave usage rates to 2007, the Department estimates that 7.0 million workers took an estimated 10.5 million FMLA leaves. In addition, the Department estimates that 139,000 workers will take FMLA leave under the military leave provisions of the NDAA.

The Department estimates that the revisions will result in total first year net costs of $327.7 million and annual reoccurring costs of $244.4 million for both workers and employers. Based upon a five year pay-off period and a real interest rate of 3.0 percent (OMB Circular A–4),[9] total annualized costs for the revisions for both workers and employers is $262.6 million. Based upon a five year pay-off period and a real interest rate of 7.0 percent, total annualized costs for the revisions for both workers and employers is $264.7 million. For employers, the largest cost is the $257.3 million in recurring costs related to the new military leave provisions (§§ 825.126 and .127). For workers, the largest cost is the $19.8 million in recurring costs associated with the additional fitness-for-duty certifications that may be required if a worker has used intermittent leave and a reasonable safety concern exists (§ 825.312(f)).

The annualized costs for employers based upon a 7.0 percent discount rate is $230.6 million, or about $2.41 for each of the 95.8 million workers employed at establishments covered by Title I of the FMLA; and about $2.99 for each of the 77.1 million workers eligible to take FMLA leave; and about $32.48 for each of the 7.1 million workers who will take FMLA leave.[10] The $230.6 million in costs also represents less than 0.006 percent of the estimated $3.7 trillion in payroll costs for the establishments covered by Title I of the FMLA (CONSAD). Therefore, the Department has determined that the costs of the final rule do not represent a significant economic impact for most establishments covered by Title I of the FMLA.

The annualized costs for workers is $34.1 million, or about $0.36 for each of the 95.8 million workers employed at establishments covered by Title I of the FMLA; and about $0.44 for each of the 77.1 million workers eligible to take FMLA leave; and about $4.80 for each of the 7.1 million workers who will take FMLA leave. Therefore, the Department has determined that the costs of the final rule do not represent a significant economic impact for most workers who take leave under Title I of the FMLA.

The Department anticipates that substantial but unquantifiable benefits will accrue from the proposed revisions to the FMLA regulations. First, associated with the addition of the provisions for military leave, the families of servicemembers will no longer have to worry about losing their jobs or health insurance due to absences to care for a covered seriously injured or ill servicemember or due to a qualifying exigency resulting from active duty or call to active duty in support of a contingency operation. Second, the clarifications to the regulations and the revisions to improve the communications between employers and employees should reduce the uncertainty and the worries about FMLA leave. Third, the revisions should reduce the costs of unforeseeable intermittent FMLA leave in high-impact, time-sensitive operations. And, finally, the proposed changes related to fitness-for-duty certifications should reduce some presenteeism.

Chapter 2: Industry Profile

The industry profile presents the Department's best estimates of the number of establishments covered by the FMLA and the number of workers employed at those establishments. Title I of the FMLA covers private-sector employers of 50 or more employees, public agencies and certain federal employers and entities, such as the U.S. Postal Service and the Postal Regulatory Commission. To be eligible for FMLA benefits, an employee must: (1) Work for a covered employer; (2) have worked for the employer for a total of 12 months; (3) have worked at least 1,250 hours over the previous 12 months; and (4) work at a location where at least 50 employees are employed by the employer within 75 miles. The NDAA amendments did not affect these eligibility requirements and, therefore, have no impact on either the number of covered establishments or eligible employees.

The industry profile estimates presented in the PRIA were developed by CONSAD Research. Just as the Department did for the Request for Information (RFI), ''CONSAD used data from the 2000 Westat Report as the basis for many of its estimates. However, rather than applying the Westat coverage, eligibility, and usage rates to data from the Current Population Survey (''CPS''), CONSAD primarily used data from the U.S. Census Bureau, 2005 County Business Patterns (''CBP''). The CBP data was used because it provides data on the number of employees, establishments, and the size of the payroll in each industry, as well as these data by size of establishment. However, since the CBP only covers most non-agricultural businesses in the private sector, CONSAD supplemented the CBP with data from other sources including the U.S. Department of Agriculture, Census of Agriculture, 2002, the U.S. Census Bureau, Census of Governments, Compendium of Public Employment, 2002, the annual reports of certain Federal agencies (Bonneville Power Authority and Tennessee Valley Authority), the Association of American Railroads, Railroad Service in the United States, 2005, and the U.S. Postal Service, Annual Report, 2006. CONSAD estimated the number of firms based upon the U.S. Census Bureau, Statistics of U.S. Business, 2004.'' 73 FR at 7941.

In the PRIA, the Department used the estimated number of FMLA covered workers that was developed by CONSAD using the data sources listed above. *Id.* at 7942. The Department estimated the number of workers eligible to take FMLA leave by applying estimates from the 2000 Westat Report to the Department's coverage estimates. The number of workers eligible to take FMLA leave in each industry was calculated by multiplying Westat's estimate that 80.5 percent of workers employed at covered establishments are eligible to take FMLA leave[11] by the number of workers covered by the FMLA in each industry. *Id.* at 7943.

In the PRIA, the Department estimated the number of workers who took FMLA leave in 2005 by multiplying the number of covered and eligible workers times the percentage of covered and eligible workers who took FMLA leave, after adjusting the percentage in the 2000 Westat Report to account for the increase in FMLA usage

[8] The CONSAD analysis is available at: *www.regulations.gov*, ESA–2008–0001–0002; and the 2000 Westat Report is available at *www.regulations.gov*, ESA–2006–0022–0006.

[9] Available on the Internet at: *http://www.whitehouse.gov/omb/circulars/a004/a-4.html.*

[10] As noted above, 7.0 million workers take FMLA leave, and the Department estimates that 139,000 additional workers will take FMLA leave under the military leave provisions of the NDAA, for a total of 7.1 million.

[11] DOL estimate developed from 2000 Westat Report, p. A–2–21.

over time. *Id.* at 7943. The number of workers who took intermittent FMLA leave in 2005 was estimated using Westat's estimate that 23.9 percent of workers who take FMLA leave take some of the leave intermittently. *Id.* at 7943–44.

Since the FMLA leave provisions for military families were enacted after the 2000 Westat Report was completed, the Department estimated the number of FMLA covered and eligible workers who would take qualifying exigency leave or caregiver leave in the PRIA using a model developed by CONSAD with data from the Defense Manpower Data Center, the Current Population Survey and the Decennial Census of Population. First, CONSAD developed a model to estimate the number of parents, spouses, and adult sons and daughters of servicemembers; it then calculated the employment rates for parents and spouses who might need to take military family leave, using the employment rates for age ranges expected to be associated with the age range of the military servicemembers. *Id.* at 7954–55.

For qualifying exigency leave, the Department developed estimates in the PRIA of the number of servicemembers deployed or activated for contingency operations based upon Department of Defense data and then used the CONSAD model to develop estimates of the potential number of family members who may be eligible for qualifying exigency leave under the FMLA. ''Preliminary estimates from the Department of Defense suggest that there are approximately 339,000 servicemembers currently deployed on or activated for contingency operations. Based on these numbers, the Department used the model in the CONSAD Report to develop estimates of the number of FMLA covered and eligible workers who would take leave for a qualifying exigency. Based on the age distribution of active duty servicemembers, the Department estimated the number of currently deployed or activated personnel in contingency operations by age and number of family members potentially eligible for qualifying exigency leave.'' *Id.* at 7956.

For caregiver leave, the Department developed estimates in the PRIA of the number of seriously injured servicemembers based upon Department of Defense data and then utilized the CONSAD model to develop estimates of the potential number of caregivers who may be eligible for FMLA leave. ''[T]he Department estimates that there are 1,500 to 14,000 seriously injured servicemembers whose potential caregivers may be eligible for FMLA leave * * * Based on the assumption that the age distribution of seriously wounded servicemembers is the same as the age distribution of all military servicemembers * * *, the Department used CONSAD's model to compute the numbers of servicemembers with serious injuries or illnesses who will have no potential caregivers, and one, two, three, four, or five or more potential caregivers who may be eligible for FMLA leave.'' *Id.* at 7955.

The Department received no substantive comments on its PRIA estimates of the number of establishments covered by the FMLA, the number of workers employed at those establishments, and FMLA leave usage. The Department believes the lack of substantive comments is due to the fact that the Department used a methodology in the PRIA that was similar to the methodology used in the Request for Information (RFI), and that the methodology and estimates presented in the PRIA were based upon a careful review of the comments the Department received in response to the RFI and the refinements that were made to the methodology at that stage of the rulemaking. For example, in response to comments on the RFI that FMLA leave usage has probably increased since Westat conducted its surveys in the 1999–2000 time period (*see* 72 FR 35622–23), the Department adjusted the FMLA usage rates developed by Westat (*see* 73 FR 7943). The Department also supplemented the data in the 2000 Westat Report that was used in the PRIA with data that was submitted in response to the RFI.

Comments received by the Department on its PRIA estimates focused on the age of the data the Department used to develop its estimates and the need for the Department to conduct a new data collection before proceeding with this rulemaking. For example, the United States Congress, Joint Economic Committee (''JEC'') stated ''[r]ather than commission a survey * * * the Department develops their main source of data on FMLA coverage, eligibility, and usage by extrapolating forward the trends from previously commissioned surveys * * * The Department also relies on non-representative, industry sponsored data * * *.'' Similarly, the Institute for Women's Policy Research stated ''[t]he proposed regulations rely on data from non-representative and possibly biased samples; from a survey conducted in 2000 that did not directly address some of the key issues for which changes are proposed; from generalizations about individual employers' reports of their experiences that cannot be compared with the entire universe of employers; and from judgments about how use of the FMLA may have changed since the 2000 survey was conducted.'' The National Partnership for Women & Families stated that ''[s]ince 2000, DOL has not conducted any rigorous surveys or analysis of how the FMLA is working * * * If DOL is going to change regulations that DOL's own survey data show have been working well for over a decade, DOL should have empirical evidence to support those changes.'' *See also* AFL–CIO, American Association of University Women, Communications Workers of America, Disability Policy Collaboration.

This issue was initially raised in response to the RFI and the Department addressed it in the Report on the RFI prior to publishing the NPRM and PRIA. Although the Department recognizes that the RFI is not the same as conducting a nationally representative FMLA survey, the Department ''believes that the RFI was a useful information collection method that yielded a wide variety of objective survey data and research, as well as a considerable amount of company-specific data and information that supplements and updates our knowledge of the impacts of FMLA leave. In fact, several organizations conducted national surveys in response to the RFI.'' 72 FR at 35621.

The Department continues to believe the RFI was a satisfactory alternative to conducting another national survey. As noted in the report, the RFI yielded a wealth of data, some of which would have been difficult to obtain in a survey. Further, the necessity to combine multiple data sources from multiple years is a common concern in regulatory analysis and is not a unique issue for the FMLA rulemaking.

Rulemakings can frequently take years to complete. Even if a data collection is conducted before the rulemaking begins, it is not unusual for the data to be years old by the time the rulemaking is completed. Requiring the data to be ''up to date'' would leave very short time frames for rulemakings to be completed and would allow parties to hinder the proceedings simply by delaying them until the data are older than some arbitrary age limitation. Further, requiring all data be obtained from government surveys would be prohibitively costly and would result in rulemakings taking even longer than they currently do. For example, under this scenario, if some aspect of a rulemaking (*e.g.*, an alternative that arose during the public comment

period) were not covered by existing survey data, then an agency would be required to go out and conduct a new survey, and designing and conducting a new survey could take a number of years during which time some of the other data may become dated.

Finally, requiring an agency to only use recent government surveys would have a chilling effect on the ability of agencies to use data obtained through public comments in response to RFIs and NPRMs. In fact, the Department was able to collect a considerable amount of data in response to the RFI and NPRM. ''Some of the data submitted [in response to the RFI] were national surveys (*e.g.*, AARP, International Foundation of Employee Benefit Plans, Society for Human Resource Management, National Association of Manufacturers, U.S. Chamber of Commerce, WorldatWork, and the College and University Professional Association for Human Resources). Others submitted surveys or collections of reports from their clients, customers, or members (*e.g.*, Willcox & Savage, Kalamazoo Human Resources Management Association, Manufacturers Alliance, Air Conference, Association of American Rail Roads, Retail Industry Leaders Association, National Federation of Independent Business, HR Policy Association, International Public Management Association for Human Resources, and American Bakers Association). Numerous other comments provided data from individual companies (*e.g.*, United Parcel Service, U.S. Postal Service, Honda, Southwest Airlines, YellowBook, Madison Gas and Electric Company, Edison Electric, Verizon, Delphi, MGM Mirage, Union Pacific, and Palmetto Health) or government and quasi-government agencies (*e.g.*, New York City, Dallas Area Rapid Transit, Fairfax County, VA, the Port Authority of Allegheny County, PA, and the City of Portland, OR). Other comments provided references to previously published studies (*e.g.*, Darby Associates, the Center for WorkLife Law, Women Employment Rights, and the Family Care Alliance). Many comments were also received from labor organizations and family advocates (*e.g.*, AFL–CIO, Communications Workers of America, National Partnership for Women and Families, Families USA, 9to5, National Association of Working Women). Finally, the Department received many comments from workers who took FMLA leave.'' 72 FR at 35620.

Moreover, additional data was submitted in response to the NPRM, including new membership surveys (*e.g.*, WorldatWork, College and University Professional Association for Human Resources (''CUPA–HR''), Hinshaw & Culbertson, and Working America), corporate data (*e.g.*, Unum Group), and data on the costs being incurred by individual workers (*e.g.*, Jay Zeunen Sr.).

Given the FMLA surveys previously conducted by the Department, the availability of data from other government surveys and the wealth of data submitted by the public in response to the RFI and NPRM, the Department concludes that it has sufficient data to meet its responsibilities in this rulemaking. This position was supported by the National Coalition to Protect Family Leave which stated ''[t]here is in the record a substantial amount of data, analysis and conjecture on which to base a description of various attributes of benefits and costs arising from over a decade of experience under the FMLA.'' 72 FR at 35621.

Therefore, for its coverage estimates, the Department will continue to use the estimates developed by CONSAD and presented in Table 4 of the NPRM (73 FR 7943) and reproduced in Table 1 below. In 2005, there were 285,237 private sector firms and government entities covered by Title 1 of the FMLA. These covered entities operated 1.1 million establishments and employed 95.8 million workers. In 2005, an estimated 77.1 million workers, or 80.5 percent of the workers employed at the covered establishments, met the FMLA eligibility requirements (*i.e.*, have been employed by their employer for 12 months and have worked for their employer at least 1,250 hours during the previous 12 months). Table 5 of the NPRM (73 FR 7944) presented the estimated distribution of these workers by industry.

TABLE 1—ESTIMATED NUMBER OF FMLA COVERED FIRMS, ESTABLISHMENTS AND EMPLOYMENT, 2005

Thousands of FMLA Covered Entities	285.2
Thousands of FMLA Covered Establishments	1,134.6
Thousands of Workers Employed at FMLA Covered Establishments	95,793.5

Source: U.S. Department of Labor, ESA, 2008.

For its estimates of FMLA leave usage under the 1995 regulations, the Department will continue to use the estimates developed by CONSAD and presented in Table 5 of the NPRM. (73 FR 7944). In 2005, approximately 7.0 million workers (*i.e.*, 7.3 percent of workers employed at establishments covered by Title I of the FMLA) took FMLA leave and 1.7 million workers (23.9 percent of all workers who took FMLA leave) took intermittent FMLA leave.

Comments from the JEC criticized the Department's use of the 23.9 percent estimate from the 2000 Westat employee survey arguing that this was only one of many estimates in the 2000 Westat Report. ''The Department estimated the number of workers who took intermittent leave in 2005 * * * [based upon] Westat's estimate that 23.9 percent of workers who take FMLA take some leave intermittently. However, the data that are available from the survey seem to suggest a wide range of possible leave-takers who might use leave intermittently.'' The Department examined the entire 2000 Westat employer and employee questionnaires prior to publishing estimates in the RFI and the NPRM, and determined that question 5B of the 2000 Westat employee survey provides the best basis for estimating intermittent leave use. Based upon the JEC comment and one from Albelda, Boushey and Lovell (cited in the Report on the RFI, 72 FR 35626, Footnote 32), the Department has carefully re-examined the survey instrument and stands by its earlier determination.

Although intermittent leave is brought up in other questions, it is important to examine the ''skip patterns'' in the questionnaire when determining the appropriate question and data to use. Question 5B was asked of all leave takers, which is why it was used by the Department as the basis for its estimate. Question 8 of the Westat employee survey, an alternative suggested by some commenters, was only asked of leave takers who indicated that they took multiple leaves during the 18 month survey period. (*See* the last programming note on page D–10 of the 2000 Westat Report). Since Question 8 was not asked of all leave takers, and since there was some concern about the meaning of ''leave'' in the 2000 Westat employee survey (*see* 73 FR at 7944), the Department does not believe that Question 8 is appropriate to use as the basis for its estimate.

Similarly, some commenters suggested that Question 17A of the Westat employee survey should be used. However, as was noted by the JEC, Question 17A was only asked of ''employees who took a leave that the establishment classified as FMLA leave.'' The Department does not believe that Question 17A is appropriate to use as the basis for its estimate because the 2000 Westat survey data suggests that

many employees are unaware that their employers have designated their leave as FMLA leave. (*See* the discussion of § 825.300(c) in this preamble and the discussions regarding estimating the number of workers who took FMLA leave in 71 FR at 69511 (Dec. 1, 2006) and 72 FR at 35623–24 (June 28, 2007).) Therefore, the Department concludes that Question 5B of the Westat employee survey provides the best basis for estimating the number of workers who took intermittent FMLA leave. Moreover, as was discussed in the Report on the RFI, the 23.9 percent estimate based on Question 5B is consistent with data submitted by the public on the use of intermittent FMLA leave. *See id.* at 35625.

The Department based its estimates of the leave that will be taken under the military leave provisions of the NDAA on the analysis presented in Appendix A of the PRIA (73 FR at 7954). However, after reviewing that preliminary analysis the Department has made some revisions.

In the NPRM, based upon the President's Commission on Care for America's Returning Wounded Warriors and other sources, the Department estimated that each year approximately 1,500 servicemembers would incur a serious injury or illness in training and contingency operations. Using the age distribution of the military and the likely family structure based on that age distribution, the Department estimated that these 1,500 serious injuries would result in approximately 1,900 caregivers taking FMLA leave. In the NPRM, the Department also provided an alternative estimate based upon estimates from the Department of Defense (''DOD'') Disability System. DOD separates or retires for disability reasons (with benefits) about 14,000 servicemembers annually. Based upon this estimate of serious illnesses and injuries (*e.g.*, illnesses and injuries serious enough to cause servicemembers to separate from the military), the Department estimated there would be about 17,700 potential caregivers for servicemembers who are separated through the DOD Disability System every year.

The statute defines the term ''serious injury or illness'' for members of the Armed Forces, including members of the National Guard or Reserves, as ''an injury or illness incurred by the member in the line of duty on active duty in the Armed Forces that may render the member medically unfit to perform the duties of the member's office, grade, rank, or rating.'' As discussed in the preamble above, the final rule provides that a request to take military caregiver leave may be supported by a certification that is completed by any one of the following health care providers: (1) A DOD health care provider; (2) a VA health care provider; (3) a DOD TRICARE network authorized private health care provider; or (4) a DOD non-network TRICARE authorized private health care provider. Depending upon how the four different types of DOD or VA authorized health care providers interpret the statutory definition of serious injury or illness, the estimates in the NRPM may be too low. For example, in 2001, there were 1.9 million reported injuries in the military of which 32,000 resulted in lost duty time.[12] If lost duty time injuries were classified as serious, then about 40,500 workers would be eligible for caregiver leave.

Although not all lost duty time injuries are likely to be certified for caregiver leave, the Department believes that the estimate based on disability retirement alone is probably too low. Therefore, the Department's best estimate is that about 29,100 workers will take military caregiver leave each year.[13]

In the NRPM, the Department preliminarily estimated there were 339,000 servicemembers currently deployed or activated in support of contingency operations and that this would result in 330,000 family members taking FMLA leave for a qualifying exigency. (73 FR at 7957). However, these estimates included all servicemembers on active duty in contingency operations. As discussed in the preamble, under the statute only family members of the servicemembers in the Reserves and National Guard would qualify for the exigency leave. Of the 339,000 servicemembers deployed on or activated for contingency operations in October 2007, one-third or 113,000 were Reserve and National Guard personnel. This would result in about 110,000 family members being eligible to take qualifying exigency leave each year.[14]

Although the Department has no experience with the patterns of leave use under the NDAA amendments, it assumes, as it did for the 1995 FMLA final rule, that most workers taking FLMA leave for qualifying exigencies or to provide care to a seriously injured or ill servicemember will not use their entire 12-week or 26-week allotment. In addition, given the nature of the leave that would be taken under the military leave provisions of the NDAA, the Department assumes that all workers taking this type of leave will take some leave intermittently. Table 2 presents the Department's best estimates for FMLA usage.

TABLE 2—ESTIMATED USE OF FMLA LEAVE *

Millions of Workers Taking FMLA Leave	7.100
Millions of Workers Taking FMLA Leave Under the 1995 Regulations	7.000
Millions of Workers Taking FMLA Leave to Care for Seriously Ill or Injured Servicemembers	0.029
Millions of Workers Taking FMLA Leave for Qualifying Exigencies	0.110
Millions of Workers Taking Intermittent FMLA Leave	1.800
Millions of Workers Taking Intermittent FMLA Leave under the 1995 regulations	1.700
Millions of Workers Taking Intermittent FMLA Leave to Care for Seriously Ill or Injured Servicemembers	0.029
Millions of Workers Taking Intermittent FMLA Leave for Qualifying Exigencies	0.110

* Based upon the 2005 estimates in Table 1.
Source: U.S. Department of Labor, ESA, 2008.

Chapter 3: Estimated Costs of the Final Revisions

This chapter presents a provision-by-provision analysis of the changes in costs that would be incurred by employers and workers covered by Title I of the FMLA. The estimates presented in the PRIA were developed using three approaches.

First, the PRIA assessed the impacts that are generally applicable to most employers and their employees. ''For employers, the most significant costs will be the first year cost of reviewing and implementing the proposed revisions and the cost of providing employees with additional and more specific notifications. After the first year, however, these costs will be more than offset by the reduction in administrative costs and increased productivity resulting from employees providing better notice of their need for FMLA leave * * * Although the vast majority of FMLA leave-takers will see no difference, the Department estimates that employees will incur * * *

[12] DOD Military Injury Metrics Working Group White Paper, November 2002, pg. G1, Available at: *http://www.ergoworkinggroup.org/ewgweb/SubPages/ProgramTools/Metrics/MilitaryInjuryMetricsWhitepaperNov02rev.pdf.*

[13] This estimate is the average of 17,700 and 40,500.

[14] The reason there are fewer family members eligible to take qualifying exigency leave than there are Reserve and Guard personnel is because not every member of the Reserve and Guard will have a covered and eligible family member.

additional expenses related to taking FMLA leave, primarily as the result of the increased number of certifications that they will have to provide their employers.'' 73 FR at 7952.

Second, the PRIA qualitatively discussed the impacts on employers and employees with highly time-sensitive operations. The Department noted that ''[i]n many situations, the absence of just a few employees can have a significant impact. For example, with respect to unscheduled intermittent leaves, some employers find they have to over-staff on a continuing basis just to make sure they have sufficient coverage on any particular day (such as hourly positions in manufacturing, public transportation, customer service, health care, call centers, and other establishments that operate on a 24/7 basis). Some employers require their employees to work overtime to cover the absent employee's work. Both of these options result in additional costs. Unfortunately, without an accurate production function for each of these industries, it is not possible to quantitatively estimate the impact that the absence of these workers, including unforeseen absences, will have on the time-sensitive operations.'' *Id.* at 7954.

Third, the Department estimated the magnitude of the potential costs associated with the NDAA military family leave provisions by comparing the additional number of workers who might take FMLA leave under the new requirements with those currently taking FMLA leave. *Id.* at 7957.

The Department received no substantive comments on the methodology that it used to estimate the costs in the PRIA. Although there were some comments about the lack of draft provisions for the NDAA amendments and the potential burden that such provisions could impose, most of the comments that the Department received on its methodology focused upon the underlying data. ''Since 2000, DOL has not conducted any rigorous surveys or analysis of how the FMLA is working.'' (National Partnership for Women & Families). ''I am confused about why some businesses are lobbying for these changes, when they cannot demonstrate that the provisions have affected their business operations.'' (Andrea Barreiro). ''The lack of adequate data may have led the Department to underestimate the costs of the Proposed Rules for employees.'' (JEC). ''There is no data about what conditions the individuals have or in what industries they are employed. Lacking this data, DOL cannot know if its proposed changes will remedy the claimed problems.'' (Disability Policy Collaboration).

Some criticized the Department's reliance on the 2000 Westat Report. For example, the Institute of Women's Policy Research stated ''[t]he most recent data available on FMLA coverage, eligibility, and use are from a survey commissioned by the DOL and conducted by Westat in 2000. Even when the survey results were published in 2001, these data were unable to illuminate many aspects of FMLA use, because of difficulty distinguishing between FMLA-qualifying leaves and other leaves for similar circumstances that did not meet the criteria for FMLA leave, and lack of emphasis on some topics that are now a bigger concern. These data may not reflect the current average or range of experiences with the FMLA of either workers or employers.'' The Equal Employment Advisory Council also noted that ''[w]hile the 2000 Westat Report * * * suggests little, if any, burden associated with administering FMLA leave, we believe the Report does not accurately reflect the level of difficultly employers have experienced in attempting to comply with current FMLA regulations.''

Others criticized the Department for using data supplied by the public. ''The Department also relies on non-representative, industry-sponsored survey data for developing its recommendations.'' (JEC). ''It is unlikely that information collected in this manner gives an accurate picture of workers' or employers' experiences with the FMLA. DOL assumptions * * * [draw on] non-representative survey of self-interested respondents * * * Survey methodologists recognize that individuals invited to participate in non-random-sampled surveys are more likely to respond if they have strong feelings about the issues on the survey instrument.'' (The Institute of Women's Policy Research)

The Department recognizes that the 2000 Westat Report has certain limitations that affect the accuracy of the Department's estimates. In fact, the Department raised many of these limitations in the RFI (*see* 71 FR at 69510–13) and was even criticized by some commenters for raising these limitations (*see* 72 FR at 35621). As the Department has previously noted, one purpose of the RFI ''was to supplement existing data and information on the wide variety of economic impacts that the FMLA is likely to have on both workers and employers, including productivity and profitability.'' *Id.* at 35628.

In fact, the RFI provided the Department a vast quantity of data to supplement the data in the 2000 Westat Report. The Department did not indiscriminately utilize these data. Rather, whenever possible, the Department prudently tried to validate estimates (including those based on the 2000 Westat Report) by corroborating them from multiple sources. Some of this validation was presented in the Report on the RFI (*see*, for example, the discussions at 71 FR at 35623–26) and some in the PRIA (*see*, for example, the discussions at 73 FR at 7942–43, 7946, and 7949–50). Moreover, based upon its assessments, which were founded on professional judgment and the comments received in response to the RFI, the Department made appropriate adjustments to the raw survey data. (*See*, for example, the discussions at 73 FR 7943, 7948 and 7952.)

The Department notes that it has been a long-standing established procedure in regulatory assessment to combine data from multiple sources and multiple years in order to address the limitations of any one data source. In fact, this very procedure was used to develop the estimates for the 1995 FMLA regulations. ''The Department's analysis was principally based on a previous analysis of the cost impact of prior versions of FMLA legislation pending before the U.S. Congress which were conducted by the U.S. General Accounting Office (GAO). The latest GAO report on FMLA legislation, updated to reflect the 1993 enactment * * * [was] based on a survey of selected firms in the Detroit, Michigan and Charleston, South Carolina areas.'' (60 FR at 2236 (Jan. 6, 1995)). An examination of the 1993 GAO report referenced by the Department (GAO/HRD–93–14R) indicates that the 1993 GAO estimates were in fact based upon a 1987 GAO report (GAO/HRD–88–34).

> To calculate an estimate for the cost to employers of providing unpaid leave to eligible workers that reflect 1992 employment and cost information we made three adjustments to our previous cost estimates. First, we updated employers' health insurance costs. Second, we increased the number of likely beneficiaries to reflect employment growth. Third, we adjusted the duration of leave an employee would take to reflect provisions of * * * the Family and Medical Leave Act of 1993. (GAO/HRD–93–14R at 3)

According to the 1987 GAO report ''[t]o develop our cost estimates, we obtained data from numerous sources.'' Two of the sources cited in the report were the 1985 National Health Interview Survey, which was used to estimate ''the number likely to take leave under the sick child and temporary medical leave provisions'' and the 1982 National Long-Term Care Survey, which was used to estimate ''the number likely to

take leave under the ill parent provision * * *'' (GAO/HRD–88–34 at 2). Since none of the underlying data in the 1985 and 1982 surveys was updated by either GAO or the Department, by the time the Department published its 1995 FMLA regulations the underlying data were a decade or more old.

The Department also notes that statistical agencies also use data from multiple sources to adjust their survey data. For example, the Bureau of Labor Statistics (''BLS'') estimates the monthly unemployment rate based upon the Current Population Survey (''CPS'') of approximately 60,000 households (*http://www.bls.gov/cps/cps_htgm.htm*). According to the CPS Technical Documentation, the Census Bureau adjusts the CPS population controls (weights) every year based on administrative data, such as birth and death statistics, along with the Census Bureau's estimates of net international migration (reflecting both legal and illegal immigration). (*http://www.bls.gov/cps/documentation.htm#pop*)

The Department, therefore, concludes that the general approach presented in the NPRM to estimate the impacts of the proposed changes to the FMLA regulations by combining data from multiple sources and multiple years is reasonable. It is consistent with the approach commonly used by regulatory agencies. In fact, it is very similar to the approach previously used by the GAO and the Department to estimate the impacts of the 1995 FMLA regulations (*e.g.*, basing the rates on data from multiple sources and updating the estimates to reflect population and employment changes). The Department's approach (although less sophisticated) is also similar in many respects to that used by statistical agencies. In the example cited above, the sample frames used by the BLS to estimate the unemployment rate at times may be as much as a decade old. Therefore, the Bureau uses data from other sources (*e.g.*, birth and death statistics and Census Bureau's estimates of net international migration) to adjust the sample frame, even though it recognizes that the adjustments are imperfect and will require the Bureau to periodically revise its estimates.

Thus, Department continued to use this approach for estimating the impacts of the regulatory changes in the final rule. The provision-by-provision analysis of the final rule (including and the new provisions implementing the NDAA amendments) is presented below. As was the case in the PRIA, the provision-by-provision analysis is followed by a discussion of the qualitative impact on time-sensitive operations.[15]

Cost of Reviewing and Implementing Revisions

Any change in a regulation will result in costs for the regulated community to review the changes and revise their policies and procedures. For the PRIA, the Department estimated: ''on average, a human resource professional at each firm with FMLA covered establishments will spend an average of six hours to review the revised FMLA provisions, adjust existing company policies accordingly, and disseminate information to managers and staff.'' 73 FR at 7945. Although the Department did not receive any comments on this estimate, because of the provisions associated with the NDAA, for the final rule the Department estimates that it will take eight hours instead of six hours.

Given that the average hourly wage and benefits rate of a Human Resource compensation and benefits specialist is $36.51,[16] the average one-time cost per covered firm is $292.08 (8 hours × $36.51). Multiplying this average cost per firm by the estimated 285,237 entities[17] that have FMLA covered establishments results in an estimated one-time cost of about $83.3 million for employers to review the changes and revise their policies and procedures.

Although the Department did not receive any comments on this estimate, because of the new provisions associated with the NDAA, for the final rule the Department is estimating that it will take eight rather than six hours to review the revised FMLA provisions, adjust existing company policies accordingly, and disseminate information to managers and staff. This change results in first year costs of $80 million for the final rule.

The FMLA and Its Purpose (§§ 825.100 and .101)

In the final rule, the Department added references to the NDAA military family leave to §§ 825.100 and .101. The impact of these changes is to expand the list of criteria under which an eligible employee can qualify for FMLA-protected leave. The cost associated with this update is included in the cost of reviewing and implementing the final rule.

Clarifying the Treatment of Professional Employer Organizations (§ 825.106)

The Department is clarifying how the joint employment rules apply to a Professional Employer Organization (''PEO''). PEOs that contract with client employers merely to perform administrative functions—including payroll, benefits, regulatory paperwork, and updating employment policies—are not joint employers with their clients. However, where a PEO has the right to exercise control over the activities of the client's employees, or has the right to hire, fire or supervise them, or benefits from the work that the employees perform, they are more likely to be considered a joint employer. Essentially, in order to determine whether a PEO is a joint employer all of the facts and circumstances must be evaluated to assess the economic realities of the situation.

In the PRIA, the Department stated ''[a]lthough data limitations inhibit the Department from estimating the impact of this clarification, the Department expects that very few workers or employers will be impacted by this clarification. *Id.* Although the Department received several comments on § 825.106, none of them provided data or addressed the Department's estimated impact. Therefore, the Department concludes that very few workers or employers will be impacted by this clarification.

Clarifying the Definition of ''Public Agency'' (§ 825.108)

Although the Department proposed no changes to this section, in the final rule the definition of ''public agency'' was revised to conform to that used in the FLSA. The Department expects that very few workers or employers will be impacted by this clarification.

Clarifying the Definition of ''Eligible Employee'' (§ 825.110)

Current § 825.110 sets forth the eligibility standards employees must meet in order to take FMLA leave. The Department proposed a new § 825.110(b)(1) to provide that although the 12 months of employment need not be consecutive, employment prior to a continuous break in service of five years or more need not be counted. As discussed in the preamble above, the final rule modifies the proposal by extending the permissible gap to seven years. In the PRIA, the Department determined that very few workers will be impacted by this clarification because ''[i]n order to be impacted

[15] However, the latter discussion was moved to another chapter.

[16] Bureau of Labor Statistics, ''National Compensation Survey: Occupational Wages in the United States, June 2006.'' Rate assumes hourly wage plus 40% for benefits.

[17] This estimate includes private sector entities, state and local government entities, and quasi-governmental employers. See Table 4 of the PRIA. *Id.* at 7943.

* * * a worker would have to (1) be employed for at least 1,250 hours during the previous 12 months, (2) have a break in employment with that employer for more than 5 years, and (3) need time from the earlier period of employment with the same employer to meet the 12 months of employment requirement for FMLA eligibility. Very few workers are likely to meet these three conditions. For example, part-time employees would have to work an average of 25 hours per week for 50 weeks to meet the 1,250 hours employed requirement. So the only ones impacted are those who want to use FMLA leave and who need a few additional weeks of employment from their previous period of employment more than 5 years ago with the same employer. Similarly, returning full-time employees will need more than seven months of employment at 40 hours per week to meet the 1,250 hours employed requirement. So the only ones impacted are those who want to use FMLA leave and who need a few extra months of employment from their previous period of employment more than 5 years ago with the same employer.'' *Id.*, Footnote 33. Even fewer workers are likely to be impacted by the final rule, which extends the period to seven years.

Although the Department received several comments on this change, as noted in the preamble discussion above, none of the comments provided estimates of the number of employers or workers who would be impacted by the change, nor did they dispute the Department's assessment. Therefore, the Department concludes that very few workers or employers will be impacted by this change.

The final rule also adopts the two exceptions to the cap set forth in § 825.110(b)(2) for breaks in service resulting from an employee's fulfillment of National Guard or Reserve military service obligations and breaks where a written agreement exists concerning the employer's intention to rehire the employee after the break in service. The final rule also adopts the provision in § 825.110(b)(4) stating that an employer may consider prior employment falling outside the cap, provided that it does so uniformly with respect to all employees with similar breaks.

The Department also proposed and has adopted in the final rule § 825.110(d), which clarifies that an employee may attain FMLA eligibility while out on a continuous block of leave when the employee satisfies the requirement for 12 months of employment. The Department believes that this change will have a minimal burden on employers because it would only apply to employers who voluntarily allow employees to go out on leave before the employee has satisfied the 12-month requirement.

Finally, the Department deleted the ''deeming'' provisions in current § 825.110(c) and (d). This change should have no impact on employers or employees because the Department believes that it cannot enforce the deeming provisions of the current rule in light of the Supreme Court's 2002 *Ragsdale* decision.

Determining of Whether 50 Employees are Employed Within 75 Miles (§ 825.111)

Current § 825.111 sets forth the standards for determining whether an employer employs 50 employees within 75 miles for purposes of employee eligibility. The Department proposed and is adopting a modification to § 825.111(a)(3) that when an employee is jointly employed by two or more employees, the employer's worksite is the primary employer's office from which the employee is assigned or reports, unless the employee has physically worked for at least one year at a facility of a secondary employer, in which case the employee's worksite is that location.

In the PRIA, the Department stated that it anticipates that this clarification will have little net impact. ''Some employees currently covered by FMLA may not be covered if their official worksite is changed because they have worked more than one year at an establishment which has less than 50 employees within 75 miles, while other employees not currently covered may become covered if their worksite is changed to an establishment which has 50 or more employees within 75 miles.'' *Id.* at 7946.

The Department did not receive comments disputing this assessment although Burr & Forman was concerned about the potential impact of this revision on small businesses using leased employees. The firm stated that this revision ''would result in not only administrative burdens, but also will result in additional costs in orienting and training temporary employees rotating into slots vacated by those on leave.'' After carefully considering this comment, the Department disagrees because the change impacts the eligibility of the jointly employed worker, and regardless of the eligibility of the worker, the jointly employed worker must still be counted as an employee by both the primary and the secondary employers. That is, the small business would have to count the leased employees towards the 50 or more employee threshold for FMLA coverage whether or not those employees have their home office or the actual physical place where they work as their official worksite. Therefore, the Department concludes that this change will have little *net* impact on workers or employers.

Qualifying Reasons for Leave, General Rule (§ 825.112)

The Department proposed no substantive changes to § 825.112 but did propose moving several paragraphs of the current rule to other sections to improve the organization of the regulations. This reorganization has been adopted in the final rule and will improve understanding of the rules but will not substantively impact workers or employers.

Serious Health Condition (§ 825.113) and Inpatient Care (§ 825.114)

The Department proposed and has adopted changes to § 825.113 to incorporate the definitions of ''incapacity'' and ''treatment'' from current § 825.114 and to move the definition of ''parent, spouse, son or daughter'' to § 825.122. In addition, § 825.113 of the final rule adopts, with limited change, language from § 825.114 that illustrates the types of treatments and conditions not ordinarily expected to be covered by the definition of serious health condition. The reorganization and clarification will improve understanding of the rules but will unlikely have an identifiable impact on either employers or workers.

Clarifying the Definition of ''Continuing Treatment'' (§ 825.115)

Proposed § 825.115 defined ''continuing treatment'' for purposes of establishing a serious health condition. Two changes were proposed from current regulations and they were adopted in the final rule.

First, current § 825.114(a)(2)(i)(A) establishes that an employee can meet the definition of serious health condition if, in connection with a period of incapacity of more than three consecutive calendar days, the employee or family member is treated two or more times by a health care provider. However, the current ''two visit'' requirement for serious health conditions is open-ended. In § 825.115(a)(1), the Department proposed and has adopted a clarification specifying that the two visits to a health care provider must take place within 30 days unless extenuating circumstances exist to meet the definition. The final rule also clarifies that the period of incapacity must be

more than three consecutive ''full'' calendar days; that the 30-day period begins with the first day of incapacity; and that the first visit to the health care provider must occur within 7 days of the first day of incapacity.

Second, the current definition of a chronic serious health condition in § 825.114(a)(2)(iii) is similarly open-ended because the regulations do not define the term ''periodic visit.'' In § 825.115(c)(1), as discussed in the preamble above, the Department proposed and has adopted a clarification defining the term ''periodic treatment'' as visiting a health care provider at least twice a year for the same condition.

In the PRIA, the Department stated that the proposed clarifications were ''unlikely to have any identifiable impact on FMLA leave-takers for several reasons. First, of the five different definitions of continuing treatment contained in current § 825.114(a)(2)(i)–(v), the Department is proposing to update only two. Those workers who meet the other tests will not be affected * * *. The proposed changes also do not affect employees who take FMLA leave for serious health conditions that required an overnight hospital stay or workers who will qualify on the basis of one visit to a health care professional and a continuing regimen of treatment. Second, serious health conditions usually require two visits to a health care provider within 30 days, and workers with chronic serious health conditions typically visit their health care providers twice a year. Finally, the Department has also proposed an 'extenuating circumstances' exception to the 30-day rule in § 825.115(a)(1), so it is likely that very few workers will be negatively impacted by the proposed changes. In fact, the Department believes it is providing FMLA protection to more workers by clarifying that the period should be 30 days, instead of adopting the stricter regulatory interpretation offered by the United States Court of Appeals for the Tenth Circuit. Further, to the extent that some employers have chosen to provide their own more stringent definition of the term 'periodic' for FMLA purposes, clarifying the term 'periodic' for chronic conditions to mean 'at least twice a year' will reduce uncertainty in the workplace and decrease the burden for some workers.'' 73 FR at 7946.

In response to the NPRM the Department received many comments from individual employees and employee representatives that the Department's assessment was incorrect and that these changes would increase the burden on workers taking FMLA leave. For example, in response to the Department's proposal to clarify in § 825.115(a) that the two visits to a health care provider must take place within a 30-calendar-day period unless extenuating circumstances exist, the Communications Workers of America (''CWA'') stated ''this arbitrary change [requiring treatment by a health care provider twice within a 30-day period] will impose an unwarranted burden on employees and their health care providers * * *.'' The National Postal Mail Handlers Union stated that ''[t]o require the employee to visit the doctor a second time within 30 days imposes an undue cost and inconvenience on the employee, and a burden on the already overburdened health care system. The employee is likely to have a co-pay for this additional (and medically unnecessary) visit and the employee's insurance may even refuse to cover such a medically unnecessary appointment, potentially imposing great cost on the employee.''

In response to the Department's proposal to clarify in § 825.115(c) that the term ''periodic visit'' for chronic conditions means visiting a health care provider at least twice a year for the same condition, many members of the American Postal Workers Union (''APWU'') stated ''[t]he new regulations would pose an unreasonable burden on employees who suffer from long-term or chronic conditions, requiring them to make unnecessary visits to their doctor, and forcing them to pay for the extra visits.'' The JEC stated ''an employee with an incurable disease, such as diabetes, may not actually need to go to the doctor that often. This rule may in fact lead to the need *for more intermittent leave* for those employees so that they can go to the doctor * * *.''

After carefully reviewing all of the comments related to the clarification that the two visits to a health care provider must take place within a 30-day period unless extenuating circumstances exist, and re-examining its assessment in the PRIA, the Department stands by its earlier determination that this clarification is unlikely to have any identifiable impact on FMLA leave-takers. As noted in the PRIA, serious health conditions usually require two visits to a health care provider within 30 days. In fact, the final rule's requirement of two visits to a health care provider is encompassed by the current standard. Therefore, workers will not have any additional costs under this ''test'' than they did before. The only difference is the costs for the two visits will be borne within 30 days instead of over some indefinite period. Further, the final rule also includes the ''extenuating circumstances'' exception to the 30-day standard in § 825.115(a)(1), so it is unlikely that any workers will be negatively impacted by the proposed changes. In fact, the Department believes it is providing FMLA protection to more workers by clarifying that the period should be 30 days, instead of adopting the stricter regulatory interpretation offered by the United States Court of Appeals for the Tenth Circuit.

After carefully reviewing all of the comments related to the clarification that the term ''periodic visit'' means visiting a health care provider at least twice per year for the same condition, the Department stands by its determination in the PRIA that this clarification is unlikely to have any identifiable impact on FMLA leave-takers. As noted in the PRIA, workers with chronic serious health conditions that are currently covered by the FMLA typically visit their health care providers twice a year. In fact, the current standard of ''periodic'' visits for chronic conditions is implicitly the same as the final rule's requirement of two visits per year. As noted in the preamble, the Department does not agree with comments from employee groups that because many chronic conditions are stable and require limited treatment, the twice per year standard is burdensome since that view effectively ignores the requirement for ''periodic'' visits in the current regulations. As with the requirement of two treatment visits within 30 days, the determination of whether two treatment visits per year are necessary is a medical determination to be made by the health care provider. The clarification more effectively identifies the types of chronic conditions Congress intended to cover under the FMLA, without including some conditions that the Department believes are not currently covered. The Department also notes that ''two visits to a health care provider'' every year is not the sole criterion in the regulations for determining a covered chronic serious health condition. Therefore, workers with currently covered chronic conditions are unlikely to incur any additional costs under this ''test'' than they did before. Further, to the extent that some employers have chosen to provide their own more stringent definition of the term ''periodic'' for FMLA purposes, clarifying the term ''periodic'' for chronic conditions to mean visits at least twice a year may reduce uncertainty in the workplace and may decrease the burden for some workers.

Leave for Treatment of Substance Abuse (§ 825.119)

The Department proposed and has adopted in the final rule consolidating in a single location the provisions in current §§ 825.112(g) and 825.114(d). This reorganization will have no impact on either employers or workers.

Leave for Pregnancy or Birth (§ 825.120)

The Department proposed and has adopted in the final rule consolidating the existing regulations pertaining to pregnancy and birth in a single location. In the final rule the Department also clarifies that a husband is entitled to FMLA-protected leave if he is needed to care for his wife who is incapacitated due to her pregnancy (*e.g.*, if the pregnant wife is unable to transport herself to a doctor's appointment). As with all care for covered family members under the FMLA such care may include providing psychological comfort and reassurance. The Department also clarified that FMLA leave to care for a pregnant woman is available to the spouse and not, for example, to a boyfriend or fiancé who is the father of the unborn child. The reorganization and clarification will have no impact on either employers or workers.

Leave for Adoption or Foster Care (§ 825.121)

The Department proposed and has adopted the consolidation of the existing regulations pertaining to the rights and obligations with regard to adoption and foster care. The reorganization will have no impact on either employers or workers.

Clarifying the Definitions of Spouse, Parent, Son and Daughter (§ 825.122)

The proposal relocated these definitions from existing § 825.113 and made some minor editorial changes. In addition, § 825.122(f) of the proposal added language that the employer could require the employee to provide documentation to confirm a family relationship such as a sworn, notarized statement or a submitted and signed tax return. In the final rule the Department adopted the edits but did not adopt the proposed language in paragraph (f) regarding the additional documentation necessary to confirm the family relationship, and retained the current regulation instead. The Department also further reorganized this section by inserting clarifying definitions related to military caregiver leave and moving the language about documentation confirming a family relationship to new § 825.122(j). In addition, in the final rule the Department clarified (as did the proposal) that an adult child must be incapable of self-care because of a disability at the time FMLA leave is to commence. The reorganization, edits and clarifications will have no impact on either employers or workers.

Unable To Perform the Functions of the Position (§ 825.123)

The Department proposed no substantive changes to this section but proposed to clarify in paragraph (b) that a sufficient medical certification must specify what functions the employee is unable to perform. The final rule adopts the proposal with one minor change. In order to make the terminology consistent with 29 U.S.C. 2613(b)(3) and (4)(B), paragraph (b) of the final rule uses the term ''essential functions.'' The edits and clarifications will have no impact on either employers or workers.

Needed To Care for a Family Member or Covered Servicemember (§ 825.124)

The proposal relocated the regulations that define the phrase ''needed to care for'' a family member from § 825.116. In addition, the Department clarified that the employee need not be the only individual, or even the only family member, available to provide care to the family member with a serious health condition. The reorganization and clarification will have no impact on either employers or workers.

Definition of Health Care Provider (§ 825.125)

The Department proposed and has adopted a change to the definition of health care provider by clarifying the status of a physician assistant (''PA''). Corresponding changes were also made to § 825.115 (Continuing treatment) and § 825.800 (Definitions). The reorganization and clarifications will have no impact on either employers or workers. As was noted previously in the preamble, most PAs are already included in the definition of health care provider because the vast majority of group health plans accept them when substantiating a claim for benefits.

Leave Because of a Qualifying Exigency (§ 825.126) and Leave To Care for a Covered Servicemember With a Serious Injury or Illness (§ 825.127)

Section 825.126 (addressing what is referred to as ''qualifying exigency leave'' in this document) implements the provision of the NDAA that eligible employees may take up to 12 weeks of FMLA leave for any qualifying exigency arising out of the fact that the spouse, son, daughter or parent of the employee is on active duty or has been notified of an impending call to active duty status in support of a contingency operation. As discussed in the preamble, for the purposes of § 825.126 servicemembers include members of the National Guard, the Reserves, and certain retired members of the Regular Armed Forces and retired Reserve who are the spouse, son, daughter or parent of the eligible employee. Section 825.126 also includes a list of qualifying exigencies.

Section 825.127 (addressing what is referred to as ''military caregiver leave'' in this document) implements the provision of the NDAA that provides that eligible employees may take up to 26 weeks of FMLA leave during a single 12-month period to care for a ''covered servicemember'' with a serious injury or illness incurred by the servicemember in the line of duty on active duty that may render the servicemember medically unfit to perform the duties of his or her office, grade, rank or rating. For the purposes of this section, a ''covered servicemember'' must be a member of the Armed Forces, including a member of the National Guard or Reserves, who has a serious injury or illness for which he or she is (1) undergoing medical treatment, recuperation or therapy; or (2) otherwise in ''outpatient status;'' or (3) otherwise on the temporary disability retired list (''TRDL''). Former members of the Armed Forces, former members of the National Guard and Reserves, and members on the permanent disability retired list (''PDRL'') are not ''covered servicemembers.'' In order to care for a covered servicemember, an employee must be the spouse, son, daughter, parent or next of kin of a covered servicemember.

As discussed in the PRIA (*id.* at 7954), the Department identified the potential number of covered and eligible workers who may be impacted by the military family leave provisions but did not develop specific cost estimates for these provisions. Rather, based upon the potential increase in the number of FMLA-eligible workers who would take FMLA leave due to the military family leave provisions and the assumption that the costs of military family leave are similar to the costs of current FMLA leaves, the Department estimated that the cost of the FMLA could potentially increase by as much as 5 percent,[18] *Id.*

[18] As was discussed in the PRIA, the Department believed that a 5 percent cost increase may be an over-estimate because (1) the NDAA did not change the scope of covered employers or eligible workers under the FMLA and many of the costs of the FMLA are related to the coverage of the establishment or the eligibility of workers rather than the number of workers taking leave, and (2) just as all workers eligible to take FMLA leave do not take FMLA leave when they or a qualified family member have a serious health condition,

at 7957. Although the Department received many comments on the NDAA provisions, they primarily indicated support for the new entitlements and provided recommendations on how they should be implemented. None of the comments addressed the estimation of potential impacts.

Because §§ 825.126 and 825.127 are new provisions, the Department has no history on which to base its estimates. For example, there are no existing surveys (either conducted by the public or the federal government) that can be used as a basis to estimate the leave patterns of workers taking either qualifying exigency leave under § 825.126 or military caregiver leave under § 825.127. Therefore, the Department is using a different approach to estimate the impacts of §§ 825.126 and 825.127 than it used to estimate the impacts of the other provisions.

First, based upon its analysis of the provisions, the Department developed typical profiles of the leave patterns of workers that it estimates would take qualifying exigency leave under § 825.126 and military caregiver leave under § 825.127. The Department believes that a typical employee who will take qualifying exigency leave under § 825.126 will have the following leave pattern:

- Upon notification of the deployment of the servicemember, the eligible employee will take a block of one week of unforeseeable FMLA leave to address qualifying exigencies (*e.g.*, under § 825.126(a)(1)(i)).
- During the deployment of the servicemember, the eligible employee will take ten days of unforeseeable FMLA leave to address qualifying exigencies under § 825.126(a).
- During the deployment of the servicemember, the eligible employee will take a block of one week of foreseeable FMLA leave to join the servicemember while the servicemember is on ''Rest and Recuperation'' (§ 825.126(a)(6)).
- Post deployment of the servicemember, the eligible employee will take a block of one week of foreseeable FMLA leave to address qualifying exigencies (§ 825.126(a)(7)).

The Department believes that a typical employee who will take military caregiver leave under § 825.127 will have the following leave pattern:

- Upon receiving notification of the serious injury or illness of the covered servicemember the eligible employee will take a block of four weeks of unforeseeable FMLA leave to care for the covered servicemember.
- The eligible employee will subsequently take a second block of two weeks of unforeseeable FMLA leave to care for the covered servicemember after the covered servicemember is transferred to a rehabilitation facility.
- During the single 12-month period, the eligible employee will take two one-week blocks of unforeseeable FMLA leave to care for the covered servicemember, under the assumption that the covered servicemember may experience an unanticipated complication.
- During the single 12-month period, the eligible employee will schedule and take 40 individual days of foreseeable FMLA leave to care for the covered servicemember.

Next, the Department assessed the costs associated with each type of leave. As noted in the NPRM, the Department recognized that the NDAA ''does not change the scope of the FMLA in terms of the establishments covered or the eligibility of workers. Many of the costs of the FMLA are related to the coverage of the establishment or the eligibility of workers rather than the number of workers taking leave.'' *Id.* at 7957. The Department determined that the marginal costs related to workers taking both kinds of military family leave under §§ 825.126 and 825.127 result from the cost of providing health insurance during the period the worker is on leave and the efficiency costs associated with unexpected absences. The Department believes these two categories of costs are reasonable proxies for the opportunity cost of the NDAA provisions, since health insurance coverage represents the marginal compensation an employer is still required to cover under the FMLA when a worker is absent, and unexpected absences have long been identified in this rulemaking and other FMLA leave studies as a potential source of burden above and beyond the cost of a replacement worker. Since FMLA leave is unpaid, as was done in the promulgation of the 1995 FMLA regulation, the Department is not assessing the costs associated with the replacement workers as a cost of this rulemaking.

The Department based the costs of providing health insurance on data from the BLS, Employer Costs for Employee Compensation survey. According to the June 2008 report (USDL: 08–1271), employers spend an average of $2.25 per hour on health insurance (*see* Table 1, pg. 5). Based upon the assumption that typical employees work 8-hour days and 40-hour workweeks, typical employees will cost their employer approximately $450 for the estimated 200 hours (*i.e.*, 25 days × 8 hours per day) of FMLA leave that they will take for qualifying exigency leave under § 825.126 and $1,440 for the estimated 640 hours (*i.e.*, 80 days × 8 hours per day) of FMLA leave that they will take for military caregiver leave under § 825.127.

The Department based the costs of unforeseeable FMLA leave on data from the *Unscheduled Absence Survey* by CCH [19] and a 2008 Employee Absenteeism survey conducted by WorldatWork.[20] According to the CCH 2005 survey, the average per-employee cost of unscheduled absenteeism is $660. Since this estimate was per employee, the Department converted it to a per day estimate. According to the 2008 WorldatWork Employee Absenteeism survey, employees averaged 5.3 days of unplanned absences per year. Applying this rate to the $660 cost per employee results in an estimated cost of $125 per day for unplanned absences. Based upon comments made regarding the need for employee notification, the Department assumes that this cost only applies to the first day of the blocks of unforeseeable FMLA leave because employers will have had time to schedule coverage on the subsequent days. Therefore, the Department estimates that the one block and 10 individual days of unforeseeable FMLA leave taken by a typical employee for qualifying exigency leave under § 825.126 will cost employers $1,375 and the four blocks of unforeseeable FMLA leave taken by a typical employee for military caregiver leave under § 825.127 will cost employers $500.

Thus the Department estimates a typical employee utilizing FMLA leave under the provisions of the NDAA will cost his or her employer approximately $1,825 for qualifying exigency leave under § 825.126 and $1,940 for military caregiver leave under § 825.127. Based on an estimated 110,000 eligible employees taking qualifying exigency leave under § 825.126, the Department estimates that § 825.126 will result in added costs to employers of $200.8 million. Based on an estimated 29,100 eligible employees taking military caregiver leave under § 825.127, the Department estimates that § 825.127 will result in added costs to employers of $56.5 million.

similarly, not all employees eligible to take FMLA leave will do so under the new military family leave provisions. *Id.* at 7957.

[19] Available at: *http://www.cch.com/Press/news/2005/200510121h.asp.*

[20] Available at: *http://www.worldatwork.org/waw/adimComment?id=28206.*

The Department also estimated other costs associated with the military leave provisions, such as those related to the employer notification provisions in § 825.300. Those costs are presented in the appropriate sections below.

The Department did not assess any additional costs for foreseeable FMLA leave taken under §§ 825.126 and 825.127. The Department believes that employers covered by the FMLA will have the systems in place to handle these foreseeable FMLA leaves after the occurrence of the initial unforeseeable FMLA leaves were taken. Moreover, after the employee has supplied the initial information for the employer to determine that the initial unforeseeable leave qualifies as FMLA leave, the certification requirements for the subsequent leave taken under §§ 825.126 and 825.127 are less burdensome. Finally, the marginal administrative costs for the foreseeable FMLA leaves taken under §§ 825.126 and 825.127 are negligible (*e.g.*, once the eligible employee has taken the initial unforeseen leave under either §§ 825.126 or 825.127, the employer is on notice that additional leaves will follow, so that the costs to employers of administering subsequent scheduled leaves taken under either §§ 825.126 or 825.127 will be nominal).

Amount of Leave (§ 825.200)

Section 825.200 explains the basic leave entitlement. The Department proposed and has adopted a clarification regarding how holidays are counted when they fall in a week that an employee needs less than a full week of FMLA leave. Specifically, in these situations, it has been the Department's enforcement position not to count the holidays against the employee's 12-week entitlement. The Department has not made any changes in the treatment of holidays which fall within a full week of FMLA leave. The Department also added additional explanation to the rolling leave year calculation. These clarifications will have no impact on either employers or workers.

Leave To Care for a Parent (§ 825.201)

The Department proposed and has adopted some changes to make the regulations more clear and accessible. The requirements regarding leave for the birth, adoption or foster care of a child have been relocated to § 825.120 and § 825.121. Therefore, § 825.201 now only covers leave to care for a parent, which was previously in § 825.202. The reorganization and edits will have no impact on either employers or workers.

Intermittent Leave or Reduced Schedule Leave (§ 825.202)

The Department proposed and has adopted some changes to make the regulations more clear and accessible. The Department made three edits in final rule. First, the parenthetical phrase ''(as distinguished from voluntary treatments and procedures)'' was deleted because it was an unnecessary and confusing reference to provisions in the 1993 interim rule that were dropped when the 1995 regulations were promulgated. Next, a clear definition of ''medical necessity'' for intermittent leave was included by combining existing language from current § 825.117 and illustrations from current § 825.203(c). Finally, as explained in the preamble, the Department agreed with commenters to delete the word ''related'' from the phrase ''treatment of related serious health condition'' as an unnecessary term and potentially problematic. Overall, the aforementioned changes to this section were well received by commenters to the NPRM. The reorganization and edits will have no impact on either employers or workers.

Scheduling of Intermittent or Reduced Schedule Leave (§ 825.203)

The Department proposed and has adopted some changes to make the regulations more clear and accessible. In addition, the Department proposed and has adopted an editorial change to clarify that employees who take intermittent FMLA leave have a statutory obligation to make a ''reasonable effort'' to schedule such leave so as not to disrupt unduly the employer's operations. The reorganization and clarification that more closely follows the statutory language will have no impact on either employers or workers.

Transfer of an Employee to an Alternative Position During Intermittent Leave or Reduced Schedule Leave (§ 825.204)

The Department proposed and has adopted some non-substantive editorial changes to this section such as adding new subheadings. In addition, the NPRM solicited comments on whether to alter the rules to expand employers' ability to transfer workers who take intermittent FMLA leave to alternative positions. As discussed in the preamble above, the Department found no statutory basis to permit transfers to an alternative position for those taking unscheduled or unforeseeable intermittent leave and declined to make this change in the final rule. The non-substantive edits will have no impact on either employers or workers.

Increments of FMLA Leave for Intermittent or Reduced Schedule Leave (§ 825.205)

The Department proposed and has adopted some changes to make the regulations more clear and accessible such as relocating some of the language currently in § 825.203 and adding subtitles. The reorganization and clarification will have no impact on either employers or workers.

In addition, the NPRM requested comments on whether the minimum increment of leave should be raised for all workers or in situations where a physical impossibility prevents an employee from commencing work part-way through a shift. As discussed in the preamble above, the Department retained the current requirement that employers use the shortest period of time their leave system uses to account for other types of leave as long as it does not exceed one hour. In doing so, the Department also recognized that employers may account ''for absences or use of leave in varying increments at different times of the day or shift.'' This clarification coupled with the one hour increment discussed above allows employers to assess FMLA-leave time in increments of an hour to tardy employees, so long as the employees do not work during the time charged as leave. However, the Department went on to adopt changes related to situations where it is not possible for an employee to commence work part-way through a shift.

The language in the final rule makes it clear that the Department intends the exception to be applied narrowly to situations where an employee is physically unable to access the worksite after the start of the shift such as where a flight attendant or a railroad conductor is scheduled to work aboard an airplane or train, or a laboratory employee is unable to enter or leave a sealed ''clean room'' during a certain period of time.

According to the Bureau of Labor Statistics, Occupational Employment Survey, approximately 3.75 million employees work on flight crews, train crews, ship crews, and as truck, bus, and subway drivers. The Department also estimates another 150,000 employees work in clean rooms for a total of 3.9 million workers.[21] It is likely

[21] According to a 1999 report in the San Francisco Chronicle, roughly 74,000 people across the country work in clean rooms building semiconductors. The report is available at: *http://www.sfgate.com/cgi-bin/article.cgi?f=/c/a/1999/04/19/BU86426.DTL&type=printable.* The Department has doubled this

that about 80.5 percent of these workers are covered and eligible to take FMLA leave; that about 9.1 percent of those workers will take FMLA leave; and that about 23.9 percent of those workers will take intermittent FMLA leave, or about 68,000 workers. Further, since the Department intends the physical impossibility exception to be applied narrowly, this is likely to be an overestimate of the number of workers who actually will be impacted by the change because it likely includes a number of workers who will not fit into the exception examples provided in the preamble above.

Using Data from the BLS' Occupation Employment Statistics survey, the Department estimates that the median hourly wage for flight crews, train crews, ship crews, drivers, and clean room workers to be about $17.66 per hour.

Assuming that the regulatory change will result in an average of eight hours of additional unpaid leave for each of the estimated 68,000 workers who take intermittent leave in situations where it is not possible for them to commence work part-way through a shift, then at most $9.6 million per year (*e.g.*, 68,000 workers per year × 8 hours per worker × $17.66 per hour) would be transferred from these employees to their employers in the form of unpaid FMLA leave or using accrued paid leave.[22] Again, since the Department intends the physical impossibility exception to be applied narrowly, this is likely to be an overestimate of the cost of this provision.

Finally, in response to comments, the Department is making two revisions to the calculation of leave to address issues that arise when an employee's schedule varies. First, the Department clarified that workweeks and fractions thereof may be converted to hours for tracking purposes. Second, the Department changed the rule for calculating an average workweek when the employee has no normal schedule to a 12-month rather than a 12-week average to account for seasonal variation. As discussed in the preamble above, the Department believes that it has addressed the commenters' concerns by changing the calculation of leave so that overtime is factored into the leave entitlement, either because the regular schedule is over 40 hours or because the employee is on a variable schedule and the hours are averaged over a 12-month period. The Department concludes that the changes to the calculation of leave will have no impact on either employers or workers.

Substitution of Paid Leave (§ 825.207)

The Department proposed and has adopted several changes to § 825.207 allowing employers to apply their normal paid leave policies to the substitution of all types of paid leave for unpaid leave. In addition, the Department proposed and has adopted changes that permit employers and employees to voluntarily agree to supplement workers' compensation benefits with accrued paid leave; allow the substitution of compensatory time accrued by public agency employees; and deleted current § 825.207(h), which states that where paid leave is substituted for unpaid FMLA leave and employer's procedural requirements for taking paid leave are less stringent than the requirements of the FMLA, employees cannot be required to comply with the higher FMLA standards. Finally, the Department made a few editorial changes such as deleting the term ''running concurrently.''

Several commenters criticized the Department's assessment in the PRIA that the proposed changes to this section would have little impact. *Id.* at 7947. The JEC stated ''[t]he Department does not provide evidence that employees can easily access paid leave or vacation time, or whether they can easily use paid time off for FMLA. While some FMLA leaves can be planned or requested far in advance, many cannot.'' The Institute for Women's Policy Research stated ''DOL does not report having surveyed employers about the conditions they may impose on taking paid leave, such as whether the leave must be requested some number of days or weeks in advance, whether a minimum amount of paid leave must be taken at once, or whether the leave must be coordinated with co-workers' leave.'' The National Partnership for Women & Families stated ''if an employer does not allow vacation leave during certain times of the year, requires five days notice for vacation time, or requires that vacation time be taken in four hour blocks, an employee will have to abide by these rules when taking leave concurrently with FMLA leave in order to be paid while on FMLA leave * * * Many employees cut their leaves short because they cannot afford to go too long without a paycheck. DOL's proposed new rule may increase the number of employees that will have to face the agonizing choice between a paycheck and their health or the health of a loved one.'' The Coalition of Labor Union Women (''CLUW'') noted that ''information from members indicates that the vast majority of unpaid leaves are unscheduled, caused by unforeseen medical problems. CLUW is concerned that this regulatory change will make it more difficult for an employee to qualify for much-needed leave without income loss.'' The AFL–CIO stated that ''[m]any collective bargaining agreements require employees to bid on vacation time on an annual basis, and the Department's reinterpretation would foreclose the use of paid vacation leave in these workplaces.'' The Institute for Women's Policy Research also stated that ''[i]t seems entirely reasonable to expect that some share of FMLA leave-takers will not be able to meet their employer's general paid leave requirements and thus will not be paid during their FMLA leave. This will place a new financial burden on workers.''

The Department notes that it presented evidence based on data in the 2000 Westat Report that suggests many employees can easily access paid leave or vacation time. *Id.* at 7947. According to the 2000 Westat Report, 77.8 percent of leave-takers reported that it was easy to get their employer to let them take time off. This suggests that a large majority of workers will have no problem complying with their employers' leave policies. Moreover, the Department concurs with the Institute for Women's Policy Research that it is entirely reasonable to expect that some FMLA leave-takers will not be able to meet their employers' general paid leave requirements and thus will not be paid during their FMLA leave. In fact, the Department presented data in the PRIA from the 2000 Westat Report that suggests 14 percent of workers reported that it was difficult to get time off and that a similarly small percentage of the workers who received paid vacation or personal leave during their FMLA leave may have some difficulty satisfying their employers' paid leave policies.

The Department notes that the analysis presented in the PRIA was *not*

estimate to account for clean rooms in other industries and employment growth since 1999.

[22] Based on the comments, the Department has determined that under the current regulations some employers end up having to pay two workers for the same shift when one worker shows up late for work because they take intermittent FMLA leave (*i.e.*, the worker called in to take the shift of the employee on FMLA leave, and the employee returning from FMLA leave). For example, the Airline Industrial Relations Conference (comment for the RFI), noted that an ''employee could use intermittent FMLA leave to miss the heavy flight bank, causing the carrier to either operate short-handed or to call in a replacement worker who likely must be paid a shift premium, then come in to work the rest of the shift during which no flights may arrive or depart, leaving the carrier now over-staffed.'' Under the final rule, the employee could remain on unpaid FMLA leave. Since under the final rule the employer would no longer have to pay two employees for the same shift, the value of the unpaid leave of the employee on FMLA leave is effectively a transfer to the employer.

based upon the assertion that very few workers would lose the ability to use paid vacation and personal leave when they take FMLA leave under the revised provisions. Rather, based upon data from the 2000 Westat Report, the Department determined that 63.8 percent of workers do *not* run either paid vacation or personal leave concurrently with their FMLA leave. Moreover, of those workers who do use the types of paid leave covered by the update in the final rule, many are likely to have *no* problem complying with their employers' paid leave policies. According to the 2000 Westat Report, 77.8 percent of leave-takers reported that it was easy to get their employer to let them take time off.

In addition, a number of commenters pointed out that allowing employees to have paid vacation leave run concurrently with their unpaid FMLA leave without having to meet their employer's normal paid vacation leave-taking rules, places employees using FMLA leave in a more favorable position regarding the use of employer provided paid leave than their coworkers taking vacation or personal leave for non-FMLA reasons.

However, the Department recognizes that the inability to take paid vacation leave concurrently with FMLA leave may have an impact on some workers. Those workers who are covered by a collective bargaining agreement (''CBA'') that requires them to bid on their vacations may not be able to substitute paid vacation leave for unpaid FMLA leave under the final rule unless their CBAs are changed. In addition, it is likely that some workers who take FMLA leave that is unscheduled and unforeseen will not be able to comply with their employers' procedures (particularly those related to advanced notice) for taking vacation or personal leave.

For the purposes of this RIA, however, the revisions have no impact on the workers' ability to take unpaid protected FMLA leave or the workers' ability to use accrued paid leave under their employers' procedures. Workers who do not or cannot satisfy their employer's procedures for taking paid leave will still remain entitled to all the protections of unpaid FMLA leave, and for the workers who may no longer be able to substitute paid vacation in all situations, these workers will still be entitled to use their accrued paid leave at some other time. Thus any impacts resulting from the final rule will be in the nature of a lost opportunity to have paid leave run concurrently with FMLA leave rather than actual income losses. How the lost opportunities affect individual workers will depend on the amount of deferred paid leave and the workers' financial status. Ultimately, the FMLA is an unpaid leave statute that does *not* convey the right to the paid leave that workers may have accrued but are not yet fully vested in. *See* Wage and Hour Opinion Letter FMLA–75 (November 14, 1995). Nor does the Department believe that Congress intended to put FMLA leave-takers in a more favorable position regarding the use of employer provided paid leave than their coworkers taking vacation or personal leave for non-FMLA reasons. Therefore, the Department believes it has appropriately determined for the purposes of the RIA that the updated text in the final rule will have only minor unquantifiable impacts on workers.

Employee Payment of Group Health Benefit Premiums (§ 825.210)

The Department proposed and adopted some editorial changes (*e.g.*, deleting the word unpaid) and some technical corrections (*e.g.*, related to the cross-references) to § 825.210. These editorial changes and technical corrections will have no impact on employers or workers.

Employee Failure To Make Health Premium Payments (§ 825.212)

The Department proposed and adopted a revision to § 825.212(c), which clarifies that if an employer allows an employee's health insurance to lapse due to the employee's failure to pay his or her share of the premium, the employer still has a duty to reinstate the employee's health insurance when the employee returns to work, and the employer may be liable for harm suffered by the employee as a result of a failure to do so. Since this revision was a clarification of and not a change to the Department's enforcement position, it will have no impact on employers or workers.

Employer Recovery of Benefit Costs (§ 825.213)

The Department proposed and adopted a revision to § 825.213 to move language from current § 825.310(h) in order to combine it with other issues involving repayment of health premiums. This relocation of the language will have no impact on employers or workers.

Employee Right to Reinstatement (§ 825.214)

The Department proposed and adopted organizational changes and minor edits to § 825.214 by moving language from current § 825.214(b) to § 825.216(c). This relocation of the language and minor edits will have no impact on employers or workers.

Equivalent Position (§ 825.215)

The Department proposed and adopted minor organizational changes to § 825.215 such as adding subtitle headings and making some editorial changes. The only substantive change proposed and adopted was modifying perfect attendance awards in § 825.215(c)(2) to allow employers to disqualify employees from bonuses or other payments based on achievement of a specified job-related performance goal where the employee has not met the goal due to FMLA leave *so long as this is done in a nondiscriminatory manner*. In the final rule the Department replaced the proposed phrase ''unless otherwise paid to employees on equivalent non-FMLA leave status'' with ''unless otherwise paid to employees on an equivalent leave status for a reason that does not qualify as FMLA leave.'' The final rule also changed § 825.215(c)(1) to include the same limitation on the employer's ability to deny pay increases.

As was noted in the PRIA, ''[p]erfect attendance incentives are traditionally offered by employers where the costs of absent employees (*i.e.*, the cost of the production delay itself or the cost of overstaffing or overtime to avoid the delay) are high. Employers would offer the bonuses to motivate workers not to be absent, thereby avoiding costs that are far in excess of the bonus. In such situations, both employers and employees gain from the bonus. Employers reduce their costs. Employees increase their income * * * The Department believes that this revision will restore perfect attendance awards to their intended purpose. By reducing the uncertainty surrounding employee incentive plans, this revision may encourage more employers to provide larger bonuses as incentives to reduce absenteeism among all workers.'' *Id.* at 7947 (footnote omitted).

Several employee organizations and unions opposed the change asserting that it would provide a disincentive to take FMLA leave (*e.g.*, Working America/Working America Education Fund, Center for WorkLife Law, and National Partnership for Women & Families). However, as was noted in the NRPM, employers believe ''the current regulatory requirements are illogical and unfair, and have caused many companies to modify, or eliminate altogether, perfect attendance reward programs. Other employers stated that they would not consider implementing a perfect attendance program because,

by requiring that employers provide awards to individuals with less than perfect attendance, these commenters believe that the Department has placed employees taking FMLA leave in a better position than those who take no leave. Many employees also commented on the perceived unfairness of providing a 'perfect attendance' award to individuals who had been absent from work for up to 12 weeks of the eligible time period.'' *Id.* at 7898.

The Department concludes that making the change is more favorable to workers than the current trend of companies eliminating all perfect attendance awards. The revisions were drafted to reduce the disincentive for employers to provide such awards by treating workers who take FMLA leave in a similar manner to employees ''on equivalent leave status for a reason that does not qualify as FMLA leave.'' Although the Department expects that some reduction in unnecessary absenteeism will reduce overall employer costs, data limitations inhibit the Department from quantifying the impact of this revision.

Similarly, the nondiscriminatory treatment of FMLA leave for pay increases based upon seniority, length of service or performance in revised § 825.215(c)(1) should eliminate the disincentive for employers to provide these pay increases on these bases.

Limitations on an Employee's Right to Reinstatement (§ 825.216)

The Department proposed and adopted organizational changes and minor edits to § 825.216 such as moving language from current § 825.214(b) and § 825.312, as well as reordering and combining paragraphs to § 825.216(c). This relocation of the language and minor edits will have no impact on employers or workers.

Explanation of Key Employees and Their Rights (§ 825.217 through 825.219)

The Department proposed and has adopted minor changes to update the reference to ''salary basis.'' The updated reference will have no impact on employers or workers.

Protection for Employees Who Request Leave or Otherwise Assert FMLA Rights (§ 825.220)

The Department proposed and has adopted new language in § 825.220 setting forth the remedies for interfering with an employee's FMLA rights, such as referencing retaliation. The Department also proposed and has adopted a change to § 825.220(c) to clarify that the prohibition against interference includes a prohibition against retaliation as well as a prohibition against discrimination. These clarifications will have no impact on employers or workers.

The Department also proposed and has adopted modified language in § 825.220(d) to clarify that the prohibition against employees waiving their rights applies only to prospective FMLA rights and does not apply to settling past FMLA claims. The Department concurs with the comments of the College and University Professional Association for Human Resources that the primary impact of ''this clarification * * * will help promote voluntary resolution of claims and reduce unnecessary litigation.'' Although it should be easier for employers and workers to settle FMLA claims, data limitations prevent the Department from quantifying the benefits of this clarification.

Finally, the Department proposed and adopted clarifying modifications to § 825.220(d) so that light duty does not count against the employee's 12 week FMLA leave entitlement.

Since the Department received no comments on its analysis presented in the NPRM, it retains that analysis for the final rule. ''Under FMLA employees have no right to a light duty position. Therefore, employers will only offer such duty to employees when it is advantageous for them to do so. This will continue to be the case under the revised provision. Although the Department believes that this change will have a negligible impact on employers, a few workers whose employers are counting their light duty hours towards their 12 weeks of FMLA leave will now have more hours of leave available. The only impact that the Department anticipates is that some workers may not be offered light duty because their employers will not consider such duty cost-effective if the time is not counted against the worker's FMLA allotment, either for purposes of restoration rights or length of leave.'' *Id.* at 7947.

Changes to the Employer Notification Requirements (§ 825.300)

The Department proposed a reorganization of the notice requirements so that all of the employer notice requirements were consolidated in § 825.300 under the major topics of ''general,'' ''eligibility,'' and ''designation'' notices, and ''consequences of failing to provide notice.'' The final rule adopts the consolidated format, but makes additional changes to further clarify employer obligations to provide notice to employees. In addition, the final rule creates a new section, titled ''*Rights and responsibilities notice*'' and relocates provisions from proposed § 825.300(b)(3) to that section. Each of the major topics is discussed below.

General Notice (§ 825.300(a))

Current § 825.300 addresses the statutory posting requirement applicable to employers (29 U.S.C. 2619(a)). The Department proposed and retained the current requirement that covered employers must post the general notice even if no employees are eligible for FMLA leave (see current § 825.300(a) and final § 825.300(a)(2)). The Department also proposed and has adopted changes to allow electronic posting and to increase the civil money penalties for willful violations of the posting requirement. The Department believes that electronic posting of the notice can facilitate increased employee awareness while limiting cost burdens on employers. Although electronic posting should result in some cost savings for employers, the Department has not quantified this impact because it will depend on many site-specific factors such as the accessibility of the notice to both employees and applicants. Increasing the civil money penalties from $100 to $110 was statutorily required by the Federal Civil Penalties Inflation Adjustment Act of 1990 as amended by the Debt Collection and Improvement Act of 1996 and will partially address the erosion of the penalties due to inflation over time.

Current § 825.300(c) requires that if the employer's workforce is comprised of a significant portion of workers who are not literate in English then the employer must post the notice in a language in which the employees are literate. The Department proposed retaining this requirement that appears in the final rule in § 825.300(a)(4). The final rule explicitly informs employers that prototypes are available from the Wage and Hour Division office nearest the employer or may be downloaded from the agency's Internet Web site. Thus, because no changes have been made to the requirement there are no impacts on workers or employers; to the extent employers avail themselves of Wage and Hour Division prototypes, however, their costs should be reduced.

Under current § 825.301(a)(1), the general notice must contain the same information that is required to be posted in current § 825.300(a), and a prototype notice is available in current Appendix C.

In the NPRM, proposed § 825.300(a)(3) required covered employers with eligible employees to distribute a general notice of

information about the FMLA to employees either by including it in an employee handbook or by distributing a copy to each employee at least once a year, either in paper or electronic format, regardless of whether an employee requests leave. Based upon the comments received (see preamble discussion), the Department modified this provision in the final rule so that employers are required to provide the general notice either by including it in an employee handbook or other written guidance to employees concerning employee benefits or leave rights, if such written materials exist, or by distributing a copy to each *new employee upon hire*. The Department has retained the proposal in the final rule that the general notice may be distributed by electronic means, and has also updated Appendix C.

In the proposal, the Department estimated the costs that would be incurred by employers who do not have handbooks. *Id.* at 7948. Many employers commented about the burden that the proposed requirement would impose.

For the final rule, the Department has determined that because *current* § 825.301(a)(2) and (c) require employers to provide the general notice to employees no less often than the first time in each six-month period that an employee gives notice of the need for leave, and the *final* § 825.301(a) only requires the general notice to be posted and included in employee handbooks or other written guidance, or in the alternative, distributed to each new employee upon hiring, the burden and cost to employers of this subsection of the general notice requirements will be reduced.

In the proposal, the Department estimated the costs that would be incurred by employers who do not have handbooks. *Id.* at 7948. Many employers commented about the *burden* that the new requirement would impose. For example, Spencer Fane Britt & Browne asserted ''[t]here is also no other federal employment law that requires such onerous notice requirements * * *.'' (*See also* the preamble discussion of § 825.300(a)(3)). However, since none of the comments specifically addressed the Department's approach, the Department will use the same approach in the final rule to estimate the increased costs for covered employers without handbooks with an adjustment so that costs are only associated with new employees:

> CONSAD estimated the number of additional notices that may be required for this provision, based upon data from the 2000 Westat Report * * * employers currently send out about 1 million general notices to employees requesting leave * * * Under the new provision * * * 6.8 million additional general notices [will be] sent out each year * * * 2.2 million * * * will be emailed, 4.2 million will be hand-delivered at work, and 0.4 million notices will be sent by regular mail * * * Of the 1.135 million FMLA covered establishments, an estimated 92,000 (8.1%) do not include FMLA information in an employee handbook and will be required to send annual notices to employees * * * the estimated cost to prepare the 29,000 email notices is about $1.1 million * * * and the estimated cost for 57,000 firms to hand deliver notices is about $3.4 million * * * The estimated cost * * * to prepare and deliver the notice through regular mail is about $0.6 million * * * Adding all of these costs together yields a total estimated annual additional cost of about $5.1 million for the general notice proposal. *Id.* at 7948.

After receiving these general notices when they are hired, some employees who previously did not take FMLA leave, may choose to do so because they acquire additional information from the notice regarding the protections afforded by the FMLA. Based upon data from Westat, in the PRIA the Department estimates that the number of FMLA leave-takers will increase by about 37,000 employees because of the proposed general notice provision resulting in annual estimated administrative costs of approximately $1.7 million. *Id.*

The Department used data from the Job Openings and Labor Turnover Survey (''JOLTS'') to adjust the PRIA estimates for providing the general notice to new employees rather than all employees on an annual basis. According to the 2008 annual release, hires in 2007 were equivalent to 42 percent of employment. (USDL 08–0332 at 5.)[23] Applying this 42 percent to the costs for all workers results in an estimated $2.1 million for the general notice (*i.e.*, 42% of $5.1 million) and $0.7 million for increased leave use (*i.e.*, 42% of $1.7 million).

Eligibility Notice (§ 825.300(b))

The Department proposed and adopted changes to consolidate and strengthen the existing eligibility notices in § 825.300(b). Consistent with current § 825.110, the employer continues to be responsible for communicating eligibility status.

The Department proposed and adopted an extension to the time frame for the employer to respond to an employee's request for leave in § 825.300(b)(1) from 2 days to 5 days. In the final rule, the Department reinserted the phrase ''absent extenuating circumstances'' that appears in current § 825.110(d).

In the NPRM, the Department stated ''[p]roviding more time will reduce mistakes and provide greater certainty in the workplace, and this typically benefits both workers and employers.'' *Id.* at 7949. Based on the comments supporting the extension (see, for example, Infinisource, Hinshaw & Culbertson, U.S. Small Business Administration's Office of Advocacy, Community Health and Counseling Services, Hewitt Associates, and Southwest Airlines), the Department concludes that its initial assessment was correct, despite the fact that many comments argued for shorter or longer periods (see the preamble discussion of § 825.300(b)).

In the PRIA, the Department combined the savings resulting in the longer time given employers to provide both the eligibility and designation notices in a single calculation. For the final rule, the Department has determined that two calculations are necessary because the number of eligibility notices will be greater than the number of designation notices.

As noted in the PRIA, CONSAD, 2.1 at 20, estimated that the 95.8 million workers employed in establishments covered by the FMLA made 12.7 million leave requests in 2005. *See id.* The Department estimates that the changes related to increasing the time permitted to provide the eligibility notices will save employers an average of five minutes per notice of a ''compensation and benefits specialist'' time in processing each request. At a cost of $36.51 per hour, saving 0.08 hours on each of the estimated 12.7 million leaves requested results in a savings of about $37.1 million.

Proposed § 825.300(b)(2) required employers to notify employees both of their eligibility status and the availability of FMLA entitlement. The Department notes that the requirement to inform employees if they are eligible to take FMLA leave is not a new one, and the obligation has always been triggered by the employee providing notice of the need for leave that may be covered under the FMLA. *See* current §§ 825.110(d), 825.302, 825.303. The new requirement in proposed § 825.300(b)(2), which is retained in the final rule, is that when an employer determines that an employee is not, in fact, eligible to take FMLA leave, the employer must inform the employee and indicate why the employee is not eligible. If the employee is not eligible for FMLA leave, the proposal would have required employers to list the reasons why the employee is not eligible

[23] Available at: *http://www.bls.gov/news.release/archives/jolts_03122008.htm.*

or that the employee has no FMLA leave available ''including as applicable that the employee has no remaining FMLA leave available in the 12-month period, the number of months the employee has been employed by the employer, the number of hours of service during the 12-month period, and whether the employee is employed at a worksite where 50 or more employees are employed by the employer within 75 miles of that worksite.'' *Id.* at 7978. However, the Department's assessment in the PRIA was ''that there will be very little additional burden, since the employer is already required to calculate such information in order to determine eligibility.'' *Id.* at 7949.

The Department received a number of comments on this proposed revision. For example, National Association of Manufacturers (''NAM'') stated that ''[p]roposed § 825.300(b)(2) may present a significant administrative burden on employers because it invites employees to request information about eligibility and entitlement without imminent need for leave. Currently, employers need only calculate eligibility and verify remaining leave if an employee has expressed a need for foreseeable leave, or at the time that the need for leave arises. NAM members are concerned that employers will be obligated to respond to requests for verification of eligibility and entitlement in addition to all of the requests they already receive from employees with an actual need for leave. The proposed regulation should require that employers need only provide information about FMLA eligibility and entitlement in concert with an imminent need for leave.'' Hewitt Associates stated ''employers must send a separate notice that informs employees that they are ineligible * * * [This] will mean a large increase in notifications produced as the current regulations have not required employers to communicate FMLA data to ineligible employees.'' And, according to Society for Human Resource Management ''[t]he practical import of this requirement is that any time an employee requests leave that involves any type of medical issue, the employer would be required to send out paperwork indicating that the employee is not eligible or entitled to leave.''

In response to these and other comments (see the preamble discussion of § 825.300(b)(2)), the Department changed the proposed requirements. The provision in the final rule permits the employer to limit the notification that the employee is ineligible to any one of the potential reasons why an employee fails to meet the eligibility requirements. In addition, in recognition of the potential inaccuracies in the employer's estimates the Department modified this provision to indicate that the information is a ''good faith estimate.'' The Department disagrees with the Society for Human Resource Management's assertion, however, that the revised provisions will increase employers' burden because they will be obligated to respond to employee requests for verification of eligibility. Current § 825.301(d), which has been relocated to § 825.300(b)(5), specifies that ''[e]mployers are also expected to responsively answer questions from employees concerning their rights and responsibilities under the FMLA.'' So there is no new obligation being created except for providing the notice in writing to workers who are ineligible to take FMLA leave.

As noted in the PRIA, CONSAD estimated that 12.7 million of the 95.8 million workers employed in establishments covered by the FMLA requested FMLA leave in 2005, and that these requests resulted in 7.0 million workers taking FMLA leave. *Id.* at 7949. This strongly suggests that 5.7 million workers were denied FMLA leave either because the worker was found to be ineligible, or because the condition did not rise to the level of a serious health condition. In the PRIA, all of the denials were implicitly assumed to be eligible workers being denied due to the condition so all of the costs were attributed to changes in the designation notice. This is clearly not the case. For the final rule, the Department is attributing one-half of the denials to the workers being found ineligible, and one-half of the workers who were denied FMLA leave on the basis that the workers' or the family members' condition did not rise to the level of a serious health condition.

The Department assumes that the 2.85 million workers (*i.e.*, 5.7 million divided by 2) who were denied FMLA leave on the basis of eligibility will on average receive 1.5 denial notices per year.[24] The Department estimates that creating and distributing 4.3 million eligibility notices (*i.e.*, 2.85 million times 1.5) to workers found to be ineligible will cost employers on average about 10 minutes of a ''compensation and benefits specialist'' time for each notice. This estimate does *not* include the time for the calculations, since the calculations are required by both the current and revised provisions to determine eligibility. At a cost of $36.51 per hour for each of the estimated 4.3 million requests from workers found to be ineligible to take FMLA leave will result in additional costs of about $26.2 million (*i.e.*, 4.3 million times $36.51/6).

The remainder of § 825.300(b) is based upon current § 825.301(a) with some minor conforming edits such as changing the two day period to five days as was done in § 825.300(b)(1) (see preamble discussion). In addition, in response to comments that providing a list of essential job functions with the eligibility notice would create an administrative burden for employers, the final rule was restructured so that employers are required to provide employees with the list of essential job functions no later than the designation notice, if the employer requires a fitness-for-duty certification to return to work. These changes from the current rule will have no impact on employers or workers.

Finally, the Department estimates that the additional eligibility notices for the 139,000 workers taking military leave under §§ 825.126 and .127 will each take about 10 minutes of a Human Resource Compensation and Benefits Specialist's time to prepare. At an average hourly wage and benefits rate of $36.51, this will result in additional costs of $0.8 million (*i.e.*, 139,000 × $36.51/6).

Rights and Responsibilities Notice (§ 825.300(c))

The final rule moved proposed § 825.300(b)(3) to final § 825.300(c), separating the notice of rights and responsibilities from the notice of eligibility. To simplify the timing of the notice of rights and responsibilities and to avoid unnecessary administrative burden on employers, § 825.300(c)(1) of the final rule requires employers to provide this notice to employees at the same time that they provide the eligibility notice. Additionally, if the information in the notice of rights and responsibilities changes, § 825.300(c)(4) also requires the employer to notify the employee of any changes within five business days of the first notice of the need for FMLA leave subsequent to any change. This timing requirement will ensure that employees receive timely notice of the expectations and obligations associated with their FMLA leave each leave year and also receive prompt notice of any change in those rights or responsibilities during the leave year. In addition, the final rule makes some clarifying changes to the

[24] This accounts for some workers being denied multiple times due to different reasons. For example, a worker who is initially denied because they have worked less than 12 months for the employer may be subsequently denied on the basis that they did not work 1,250 hours in the previous 12 months.

language of proposed § 825.300(b)(3). Also, in response to comments that providing a list of essential job functions with the eligibility notice would create an administrative burden for employers (*see*, for example, Hewitt Associates, Vercruysse Murray & Calzone, ORC Worldwide, AT&T, and NAM), the final rule was restructured so that employers are required to notify employees no later than the designation notice that a fitness-for-duty certification is required and to provide the list of essential job functions at that time, if the employer wants the worker's ability to perform these functions addressed in the fitness-for-duty certification. Finally, the prototype notice is referenced in § 825.300(c)(6). Since the requirements of this section are in current § 5.301(b)(1), these changes will have no impact on employers or their employees.

However, the additional workers taking FMLA leave under the military leave provisions in §§ 825.126 and 825.127 will result in additional rights and responsibilities notices. The Department estimates that each rights and responsibilities notice will take about 20 minutes of a Human Resource Compensation and Benefits Specialist's time to prepare. At an average hourly wage and benefits rate of $36.51, preparing 139,000 rights and responsibilities notices will result in additional costs of $1.7 million (*i.e.*, 139,000 × $36.51/3).

Designation Notice (§ 825.300(d))

Under current and proposed regulations, employers must notify the employee in writing when the leave is designated as FMLA leave. Section 825.300(d) outlines the requirements of the designation notice an employer must provide to an employee. Additional requirements are located in § 825.301. The revisions were designed to strengthen and clarify the existing requirements currently located in § 825.208(b). In the final rule, the Department is requiring employers to provide the list of essential job functions to employees (in those cases in which this is to be addressed in the fitness-for-duty certification as discussed above) no later than with the designation notice for those workers who are required to provide a fitness-for-duty certification in order to return to work. The cost of providing the list of essential job functions for employers is estimated below in the section of the RIA that discusses § 825.310. Because of this change, several of the provisions have been renumbered.

The proposed § 825.300(c)(1) required that an employer notify the employee within five business days (a change from the current requirement of two business days) that the leave is designated as FMLA leave once the employer has sufficient information to make such a determination. In the final rule, the Department adopts this change but reinserts the phrase ''absent extenuating circumstances'' that appears in current § 825.208(b)(1) and makes some minor editorial edits. Several comments stated that increasing the time to provide the designation notice would reduce the burden on employers. *See, e.g.*, Retail Industry Leaders Association, Illinois Credit Union League, Verizon, and Cummins.

Since the Department did not receive any comments on its methodology for estimating the costs of the designation notice in the PRIA, the Department is using a similar approach here. CONSAD estimated that the 95.8 million workers employed in establishments covered by the FMLA made 12.7 million leave requests in 2005. The Department estimated above, that 1.1 million leave requests were denied on the basis that the workers were ineligible. The remaining 11.6 million leave requests require designation notices. As in the PRIA, the Department estimates that the changes related to increasing the time permitted to provide the eligibility notices will save employers an average of 5 minutes per notice of a ''compensation and benefits specialist'' time in processing each request. At a cost of $36.51 per hour, saving 0.08 hours on each of the estimated 11.6 million determination notices results in a savings of about $33.9 million for employers.

Proposed § 825.300(c)(2) requires the employer to notify the employee if the leave is not designated as FMLA leave and the reason the leave was not designated. This change has also been adopted in § 825.300(d)(1) with minor editorial changes. Since the Department did not receive any substantive comments on the estimates presented in the PRIA, a similar approach to estimate the costs is used for the final rule. As noted above, based on the CONSAD analysis, the Department estimated that 5.7 million covered employees who request FMLA leave each year are denied that leave. The Department assumes that one-half of these workers are denied FMLA leave on the basis that the worker was ineligible for FMLA leave, and one-half are due to the condition not qualifying as a serious health condition. To account for multiple denials based upon different conditions, the Department assumes that these workers would average 1.5 denials per year. Based upon an estimated 0.5 hours to process each of these requests at a cost of $36.51 per hour, the Department estimates that providing the 2.85 million workers (*i.e.*, 5.7 million/2) with the explanation why their requests for FMLA has been denied will result in a cost to employers of about $52.0 million (*i.e.*, 2.85 million times $36.51/2).

Proposed § 825.300(c)(3) permits employers to provide both the eligibility notice and the designation notice at the same time. This change has been adopted as § 825.300(d)(2) with minor editorial changes. The Department assumes that employers will have sufficient information to provide both the eligibility and designation notices for about 25 percent of the approved FMLA leaves (*e.g.*, the employer will probably issue both notices at the same time for many unforeseeable health conditions that result in an overnight hospital stay). The Department estimates that the changes related to providing both notices at the same time will save employers an average of 10 minutes per notice of a Human Resource Compensation and Benefits Specialist's time in processing each leave. At a cost of $36.51 per hour, saving 0.17 hours on 25 percent of 10.5 million leaves results in a savings of about $16.3 million for employers.

The new provisions related to fitness-for-duty certifications are located in § 825.300(d)(3). As discussed above, this change was made in response to comments that the proposed requirement to include this information with the eligibility notice would have unduly burdened employers. Since the final requirement is based upon current § 825.301(b)(1)(v) it will have no impact on employers or workers.

Proposed § 825.300(c)(4) referenced a new prototype designation notice. The form is referenced in § 825.300(d)(4) in the final rule. Although the inclusion of a prototype designation notice should make compliance easier for employers, the Department has not assessed the savings.

Proposed § 825.300(c)(1) expressly required that the employer inform the employee of the number of hours, days or weeks that would be designated as FMLA leave. The Department has adopted this with the change discussed below as § 825.300(d)(6) in the final rule. Since the Department did not receive any substantive comments on the methodology used in the PRIA (*id.* at 7949) to estimate the burden of providing the estimated amount of designated FMLA leave to workers, the same approach was used for the final rule. The Department assumes it would take an additional 10 minutes of Human

Resource Compensation and Benefits Specialist's time to process each designation because of the new requirement to provide the amount of time that will be designated as FMLA leave to workers. Based upon 10.5 million leaves, this will result in about $65.9 million in additional costs.

To the extent that future leave would be needed but the exact amount of leave was unknown, proposed § 825.300(c)(1) also required that the employer inform the employee every 30 days that leave was designated as FMLA leave and advise the employee of the amount so designated. In the PRIA, the Department estimated that providing designation notices every 30 days to workers with chronic conditions would cost employers approximately $121.9 million per year. *Id.* The Department received many comments about the burden this provision would impose on employers. For example, the Chamber of Commerce of the United States of America (the ''Chamber''), stated ''[s]uch a requirement will require employers to constantly monitor and communicate with numerous, if not hundreds, of employees who take intermittent FMLA leave. This requirement is therefore unduly burdensome.'' *See also*, Community Health and Counseling Services, New York City Law Department, NY, Unified Government of Wyandotte County/ Kansas City (KS), and Vercruysse Murray and Calzone. In response to these comments, § 825.300(d)(6) of the final rule requires that if it is not possible to provide the hours, days or weeks that will be counted against the employee's FMLA leave entitlement (such as in the case of unforeseeable intermittent leave), then the amount of leave counted against the employee's FMLA leave entitlement must be provided upon the request by the employee, and then only every 30 days and only if the employee has taken FMLA leave. Since the new language in the final rule is simply a clarification of existing § 825.301(d), this change will have no impact on employers or workers.

However, the additional workers taking FMLA leave under the military leave provisions in §§ 825.126 and 825.127 will result in additional designation notices. The Department estimates that each rights and responsibilities will take about 20 minutes of a Human Resource Compensation and Benefits Specialist's time to prepare. At an average hourly wage and benefits rate of $36.51, preparing 139,000 designation notices will result in additional costs of $1.7 million (*i.e.*, 139,000 × $36.51/3).

Consequences of Failing To Provide Notice (§ 825.300(e))

The Department proposed in § 825.300(d) and has adopted as § 825.300(e) a remedy provision tailored to individualized harm for any violation of the general, eligibility, or designation notice requirements. This provision arises out of the U.S. Supreme Court's *Ragsdale* decision which invalidated the remedy provision in current § 825.301(f). As in any action arising under the FMLA, any remedy is specific to the facts of the individual's circumstances, and a court may order appropriate relief. For the purposes of this RIA the Department assumes full compliance with the final rule and, therefore, has not estimated any cost associated with this provision.

Employer Designation of FMLA Leave (§ 825.301)

The Department proposed and has adopted the relocation of the requirements of current § 825.301 into § 825.300 (see the discussion above) and the requirements in current § 825.208 addressing the designation of FMLA leave, in order to consolidate all the designation requirements in one place. In addition, as is discussed in the preamble, the Department proposed and adopted several changes necessitated by the U.S. Supreme Court's *Ragsdale* decision. For example, the Department has changed the remedy provisions because the current remedy provisions have not been enforceable since *Ragsdale*. In addition, the Department made some editorial changes and clarifications such as removing the references to ''unpaid leave'' and ''paid'' leave because the provisions apply to all FMLA leave. Finally, the Department proposed and adopted the elimination of the ''provisional designation'' concept in current § 825.208(e)(2) because it could cause confusion over whether leave is protected prior to the actual designation, especially in cases where the leave does not eventually qualify for the Act's protections.

Although many comments supported the Department's proposal to delete the provisional designation, some employee representatives commented that workers benefit from the designation because it allows employers to make a quick determination. The National Partnership for Women & Families noted that ''DOL does not explain how this change could affect workers and whether the lack of a provisional designation accompanied by DOL's proposal to grant employers more time to respond to employee's requests for FMLA leave will make employees less likely to take FMLA leave as they will not know quickly whether the leave will be covered.'' *See also*, Communications Workers of America, American Association of University Women, and AFL–CIO. As noted in the preamble, the Department believes provisional designation gives the workers a false sense of comfort that their leave is job protected under the FMLA. If an employee takes leave under a provisional designation and the leave is subsequently determined not to qualify as FMLA leave then the leave will not be protected regardless of the provisional designation. The Department believes that it is better *not* to provide workers with a provisional designation so that they can make alternative arrangements if possible to avoid taking unprotected leave or take leave with the full knowledge that it may be unprotected.

The Department, therefore, concludes that none of these changes should have an impact on employers and their employees.

Employees Notifying Their Employers of the Need for Leave (§§ 825.302, .303 and .304)

Sections 825.302, 825.303 and 825.304 of the current regulations require an employee to notify his or her employer of the need for leave and to generally schedule leave for planned medical treatments in a way that the absences do not unduly disrupt the employer's business operations. The Department proposed and adopted several revisions to these requirements intended to reduce the impact of leave taking and uncertainty in the workplace without negatively impacting leave-needers.

Sections 825.302, 825.303 and 825.304 of the final rule require an employee who seeks leave due to a condition for which the employer has previously provided FMLA-protected leave to inform the employer that the leave is for a condition that was previously certified or for which the employee has previously taken FMLA leave. This change should reduce the burden on employers with no impact on employees. However, data is not available for the Department to estimate the savings that will result from this change.

The final rule also requires the employee to provide notice as soon as practicable and comply with the employer's usual procedures for calling in and requesting leave, except where unusual circumstances exist. If the employee fails to comply with these requirements, the employer may delay FMLA coverage for the leave. As the Department stated in the PRIA the

''changes should reduce some of the uncertainty and disruptions caused by employees taking unforeseeable FMLA leave with little or no advance notice to their employers.'' *Id.* at 7950.

As noted in both the RFI Report (72 FR at 35631) and the PRIA (73 FR at 7950), ''unscheduled leave is more disruptive to employers than foreseeable leave. By its very definition, foreseeable FMLA leave can be anticipated and planned for as employees are aware of their need in advance and can easily notify their employers prior to taking FMLA leave. Even in cases where the exact timing of the leave is not known 30 days in advance, the Department believes that most employees taking foreseeable FMLA will easily be able to comply with their employers' leave policies (see discussion in preamble). On the other hand, by its very nature, unforeseeable leave presents difficulties for both employees and their employers, particularly as to the requirement that the employee provide notice of the need for leave as soon as practicable.''

In response to the NPRM, CUPA–HR stated that ''call-in procedures can be 'critical to an employer's ability to ensure appropriate staffing levels.' This issue is of major concern for CUPA–HR members, with close to 65 percent of those participating in a recent survey reporting problems with notice for leave and unscheduled absences.'' The Society for Human Resource Management (''SHRM'') stated that ''[w]hen unforeseen leave is used, in many cases co-workers bear the burden of such call-ins, because employers do not have enough time to adequately staff for the employee absences and still run their operations if the co-worker is allowed to depart from work. In other cases, the co-worker must bear the burden of performing their own job and that of the employee on FMLA leave because of the lack of notice provided.''

In the PRIA the Department estimated that the ''net impact of all of the revisions discussed in §§ 825.302, 825.303 and 825.304 would be a net savings of about $121.8 million.'' 73 FR at 7951. The Department's estimated savings were based upon its estimate of the potential number of leaves impacted by the revisions. According to a 2007 survey conducted by the Society for Human Resource Management (the SHRM survey),[25] ''34 percent of FMLA leave takers for episodic conditions did not provide notice before the day the leave was taken and 12 percent provided notice more than one day after the leave was taken. Therefore, according to SHRM's survey about 46 percent of employees are not providing notice prior to the start of their workday. This estimate is consistent with the findings of the Employment Policy Foundation, which found that 41 percent of employees are not providing notice prior to the start of their workday or shift. Thus, the Department estimates that no notice is currently being provided prior to the start of the workday for 4.8 million leaves (*i.e.*, 46% of 10.5 million leaves).'' *Id.* at 7950.

The JEC criticized the Department's estimate of the no or short notice leaves stating ''[t]he Department relies on an estimate for the prevalence of lack of notice that seems unreasonably high * * * the SHRM data are not based on a nationally representative sample, but rather on a survey of self-selected SHRM human resource practitioners. Further, the description of SHRM's analysis does not make clear how or if SHRM dealt with 'notice' when the employee fell sick at work or needed to leave work to care for a sick family member. The Department's statement that the SHRM's finding is consistent with that of the Employment Policy Foundation (EPF) does not bolster the claim. The EPF is an industry-sponsored non-profit that has now gone out of business; their reports are currently not available to the public and their analysis should not be relied on as the basis for policymaking because it may be biased and is now unverifiable. It is unclear whether the SHRM survey is referring to all FMLA leaves or only intermittent leave and the final number seems much higher than expected. The term ''episodic conditions'' implies that the survey only applies to a subset of leaves * * * If 46 percent of all leaves provide no advance notice, this implies that two-thirds of all non-new child leaves do not provide notice, since the Westat Report finds that a quarter of leaves are for pregnancy or care for a new child and are therefore foreseeable in most cases. This high share of employees providing no notice seems highly suspect * * *.''

First, the Department notes that although the JEC asserts that the SHRM ''estimate for the prevalence of lack of notice * * * seems unreasonably high'', the JEC provides no data to support its assertion. If the JEC is basing its assertion on data, these data were not given to the Department in any of the comments to the RFI or the NRPM. Nor did the Department find such data in any of the comments or literature reviewed by CONSAD or DOL staff. Therefore, the Department concludes that the JEC assertion was not based upon any data; in contrast, the Department's PRIA estimate was based on available data.

Next, the JEC asserts that the Department should not use the SHRM survey because it is unrepresentative and SHRM's findings cannot be confirmed by the EPF report because the EPF report is unavailable to the public.[26] Although SHRM conducted a membership survey, the survey respondents represented a broad range of firms based upon industry, staff size, unionization, and region (SHRM Survey). The Department would normally be concerned about the over representation of medium and large firms, which comprised approximately 75 percent of the respondents that reported size; however, this is not a significant issue in this analysis because the FMLA specifically excludes small businesses with fewer than 50 employees from the scope of coverage.

Moreover, as discussed previously, the Department attempted to validate estimates including those from the Westat surveys by comparing them to estimates from alternative sources. The Department agrees with the JEC that this validation is particularly important when using data from membership surveys. Although this validation was not always possible despite the Department's efforts to collect data in the RFI, in this instance the SHRM estimate was collaborated by estimates from the EPF. In spite of some limitations in both the SHRM and EPF surveys, the fact that their estimates are very close to each other provides confidence in the use of these estimates. The JEC's assertion that the Department cannot use the EPF survey to validate the SHRM survey because the EPF report is unavailable to the public is incorrect. The Department placed the EPF report in the publicly available RFI docket[27] as it did many other materials (*e.g.*, the Westat report[28]) that were referenced in the RFI. These materials are still available on the regulations.gov Web site.

The JEC makes a valid point that the application of SHRM's 46 percent rate to all leaves may have overstated the impacts of the revisions because the 46 percent rate applied to ''episodic conditions'' implying that it only applies to a subset of leaves. So the

[25] FMLA and Its Impact on Organizations: A Survey Report by the Society for Human Resource Management, July 2007, available at: *www.shrm.org/hrresources/surveys_published/FMLA%20And%20Its%20Impact%20On%20Organizations%20Survey%20Report.pdf.*

[26] A similar criticism of the SHRM survey was made by the Institute for Women's Policy Research.

[27] Available at: *www.regulations.gov/fdmspublic/ContentViewer?objectId=09000064801e8894&disposition=attachment&contentType=pdf.*

[28] Available at: *www.regulations.gov/fdmspublic/ContentViewer?objectId=09000064801ec387&disposition=attachment&contentType=pdf.*

Department has reassessed the findings of the SHRM survey and presents a summary of the review below.

SHRM found that 8 percent of workers at covered establishments took FMLA leave in the past year (SHRM survey), which is comparable to CONSAD's estimate of 7.3 percent based upon adjusted Westat survey data (73 FR at 7943). As previously discussed in the PRIA, the issue with both the SHRM and Westat surveys is that employees may take leave that involves more than one event or episode. ''There also is some uncertainty over how respondents interpreted the term 'leave' (*i.e.*, whether it means each incident/absence or a group of absences for a single qualifying condition). For example, 1.3 percent of the covered and eligible leave-takers who reported taking leave intermittently reported taking *no FMLA* leaves. Another 53.2 percent of the covered and eligible leave-takers who reported taking leave intermittently reported taking only *one* FMLA leave. Thus, it would appear that many workers considered a leave to be a single qualified reason (*e.g.*, pregnancy and birth of a child) regardless of the number of incidents/absences (*e.g.*, for pre-natal care, morning sickness, childbirth, recovery from child birth).'' *Id.* at 7944.

When reviewing the findings in the SHRM survey for the PRIA, the Department felt that it was not appropriate to remove leave taken for family reasons, even though SHRM reported (at 17) that employees can and do provide significant notice for the actual birth or adoption. Similarly, the Department did not feel that it was appropriate to remove leave taken for catastrophic events even though the SHRM survey breaks these out in Figure 7 (at 17). For example, while SHRM states ''[f]or catastrophic event[s], it should come as no surprise when an employee provides notice on the same day of leave due to its unforeseeable nature (50%),'' the Department felt that the employee may have subsequent episodes of treatment, rehabilitation, and flare-ups. Therefore, in the PRIA the Department applied the rate for episodic conditions to all leaves.

However, based upon its reconsideration of the SHRM survey, the Department has reanalyzed the data towards the goal of applying the rate for episodic conditions to only a subset of leaves that may be a better estimate of those leaves that are truly episodic. According to Table 10 of the SHRM survey, leaves for family-related reasons [29] account for 38 percent of leaves and leaves for medical reasons [30] account for 59 percent of leaves. Together these two reasons account for nearly 100 percent or all reasons for leave given rounding errors. Since Table 10 also states that leaves for episodic conditions [31] account for 32 percent of leaves, the leave for episodic conditions must overlap the leave for family-related and medical reasons.

Moreover, the estimated number of episodic leaves based on the 2000 Westat Report can be calculated by subtracting the Department's estimate of 7.0 million workers who had at least one FMLA leave episode in 2005 from its estimate of 10.5 million FMLA leaves taken in 2005.[32] If the resulting 3.5 million episodic (or multiple event) FMLA leaves is divided by the 10.5 million estimated total FMLA leaves, then episodic conditions accounted for 33 percent of leaves in the 2000 Westat employee survey, a figure almost identical to the SHRM estimate. Therefore, the Department now believes that it is appropriate to only apply SHRM's notification rate for episodic conditions to one-third of FMLA leaves. Thus, the Department estimates that no notice is currently being provided prior to the start of the workday for 1.6 million leaves (*i.e.*, 46 percent of the estimated 3.5 million leaves for episodic conditions).[33]

The Department believes that this estimate probably understates the actual amount of leave taken for episodic conditions because, as previously stated, the 10.5 million estimated number of leaves may be understated because of issues with the term ''leave.'' However, this is somewhat, although not completely, compensated by the fact that some leaves for episodic conditions will not be affected by the revisions to §§ 825.302, 825.303 and 825.304.[34] As was noted by the JEC, there has been no attempt to estimate the number of employees who either fell sick at work or needed to leave work to care for a sick family member. As is the case for catastrophic events, the changes to §§ 825.302, 825.303 and 825.304 will not increase the amount of notice that the employees can provide for these unforeseeable leaves, so these leaves should not be included in the basis for the savings resulting from the changes.

Since there were no comments on the remainder of the Department's analysis of the revisions to §§ 825.302, 825.303 and 825.304, the Department simply divided the PRIA estimate of $121.8 million by three to arrive at an estimated net savings of about $40.6 million.

Medical Certifications (§§ 825.305, 825.306 and 825.307)

Sections 25.305, 825.306 and 825.307 specify the requirements for medical certifications. Each section is discussed below, followed by the Department's estimate of the impact of the combined updates to the medical certification provisions.

General Rule for Medical Certifications (§ 825.305)

Section 825.305 sets forth the general rules governing employer requests for medical certification to substantiate an employee's need for FMLA leave due to a serious health condition. The Department proposed and adopted a change to § 825.305(b) to increase the usual time frame during which an employer should request medical certification from two business days to five business days after the employee provides notice of the need for FMLA leave. This change is consistent with the modifications made to § 825.300. The Department also proposed and adopted a change to § 825.305(b), in order to make it consistent with the timing requirements of § 825.311, by requiring the employee to provide the requested certification to the employer within the time frame requested by the employer (which must allow at least 15 calendar days after the employer's request),

[29] Family-related reasons include maternity, birth or adoption of a child or newly placed foster child. (SHRM Survey)

[30] Medical reasons include an employee's serious health condition or care for a child, spouse or parent who has a serious health condition. (SHRM Survey)

[31] Episodic condition includes ongoing injuries, ongoing illnesses and/or non-life-threatening conditions. (SHRM Survey)

[32] Note these estimates do not include the estimated 200,000 employees who will take an estimated 300,000 leaves under the military leave provisions of the NDAA because when estimating the costs of §§ 825.126 and .127 the Department did not include costs that would be saved by the revisions to §§ 825.302, .303 and .304.

[33] The Department notes that SHRM's 46% estimate is not only consistent with the EPF estimates as was noted previously, but is also consistent with the WorldatWork estimate that 51% of intermittent leaves are unscheduled and that notice for 56% of intermittent leaves occurs either on the day of the absence (43%) or the day following the absence (10%).

[34] According to WorldatWork, notice of 7% of intermittent leaves occurs during the work shift. However, WorldatWork also estimated that notice for 56% of intermittent leaves occurs either on the day of the absence or the day following the absence. So if the notices given during the work shift are removed, then according to WorldatWork, notice for 49% of intermittent leaves was either provided on the day of the absence but prior to the shift or the day after the shift. (1528.1, attachment at 7) This estimate is slightly higher than the 46% SHRM estimate of the no or short notice leaves used by the Department.

unless it is not practicable under the particular circumstances to do so despite the employee's diligent, good faith efforts.

The Department proposed and adopted additions to § 825.305(c) to clarify the meaning of incomplete and insufficient certifications and set forth a procedure for curing incomplete or insufficient certifications. As a result, the final rule requires the employer to notify the employee in writing of what information is necessary for completing the medical certification and to provide the employee at least seven calendar days to furnish the additional information.

The Department proposed and adopted changes to § 825.305(d) to clarify that if an employee fails to submit a complete and sufficient certification despite the opportunity afforded by the provisions of § 825.305(c), the employer may deny the taking of FMLA leave. In addition, the Department proposed and adopted a clarification that when the employer requires a certification, the employee's obligation to provide either a complete and sufficient certification or provide any necessary authorization for the healthcare provider to release a complete and sufficient certification directly to the employer applies to initial certifications, recertifications, second and third opinions and fitness-for-duty certifications.

Finally, the Department proposed and adopted the deletion of § 825.305(e), which specified that if the employee's sick leave plan had less stringent requirements than the FMLA, only the less stringent requirements may be required when the employee substitutes any form of paid leave for FMLA leave. The Department proposed and adopted updates to § 825.305(e), consistent with Opinion Letter FMLA2005–2–A, clarifying that an employer can require annual medical certifications in those cases where a serious health condition extends beyond a single leave year.

Both §§ 825.305(b) and 825.305(c) provide employees with additional time or a more specific time period to either initially submit the medical certification or to cure a deficiency. Section 825.305(b) increases the time an employer can request medical certification from the employee from two business days to five business days after receiving the employee notice of the need for leave. Providing more time will reduce mistakes and provide greater certainty in the workplace, and this typically benefits both workers and employers. The clarification in § 825.305(c) of the meaning of incomplete and insufficient certifications should also provide greater certainty in the workplace, benefiting both workers and employers. Finally, the change in § 825.305(c), requiring that when an employer determines that a medical certification is incomplete or insufficient, the employer must state in writing what additional information is necessary and provide the employee with seven calendar days to cure the deficiency (additional time must be allowed where the employee is unable to obtain the additional information despite diligent good faith efforts) will also provide greater certainty in the workplace and benefit both workers and employers.

As discussed in the preamble, several commenters believe these updates will ''immediately and drastically improve FMLA communications'' (the Chamber); reduce the number of times ''the employees are forced to go back to their health care providers repeatedly in a vain attempt to guess what the * * * [employer] would like'' (National Postal Mail Handlers Union); and ''alleviate delay and uncertainty in the FMLA approval process as well as unnecessary administrative burdens associated with repeated follow-up communications related to the certification process * * * both employers and employees will understand what their obligations are in the certification process'' (Society for Human Resource Management).

Content of the Medical Certifications (§ 825.306)

Section 825.306 addresses how much information an employer can obtain in the medical certification to substantiate the existence of a serious health condition. It also references optional form WH–380 for use in the certification process and specifies that while other forms may be used, no additional information beyond that contained in WH–380 may be required.

The Department proposed and adopted several revisions to the medical certification form in § 825.306 to implement the statutory requirements for ''sufficiency'' of the medical certification as set forth in 29 U.S.C. 2613(b), and to make it easier for health care providers to understand and complete. The Department also proposed and adopted with modifications several revisions to optional form WH–380. The Department proposed and adopted the deletion of § 825.306(c), which contained language similar to that deleted from § 825.305(e). The Department proposed and adopted the incorporation of language from current § 825.307(a)(1), explaining the interaction between workers' compensation and the FMLA with regard to the clarification of medical information in § 825.306(c). Finally, the Department proposed and adopted additions to this provision clarifying that if an employee is required to submit additional information to receive payments under a paid leave or benefit plan, the employer may require that the employee provide the information to receive those payments as long as it is made clear to the employee that the additional information is requested only in connection with qualifying for paid leave and does not affect the employee's right to unpaid FMLA leave. The Department also added new § 825.306(d) clarifying that where a serious health condition is a disability under the ADA, employers are not prevented from following the procedures under the ADA for requesting medical information, and new § 825.306(e) codifying the Department's long-standing position that employers may not require employees to sign a release of their medical information as a condition of taking FMLA leave, but that employees must submit a complete and sufficient certification upon request.

Similar to the changes made to § 825.305, the clarifications in § 825.306 should provide greater certainty in the workplace, benefiting both workers and employers. As the CUPA–HR noted in its comments, ''[i]n the past, there has been unnecessary confusion over certifications, with close to 70 percent of CUPA–HR members responding to a survey reporting that they received vague information in certifications and close to half reporting challenges in authenticating or verifying information * * *.''

Authentication and Clarification of the Medical Certification (§ 825.307)

Current § 825.307 addresses the employer's ability to clarify or authenticate an FMLA certification. Section 825.307(a) permits an employer, with the employee's permission, to have its own health care provider contact the employee's health care provider in order to clarify or authenticate an FMLA certification. The Department proposed and adopted a change to § 825.307(a) that allows employers to contact the employee's health care provider directly. In response to privacy concerns expressed by employees and their representatives, the Department added a requirement to the final rule that specifies the employer's representative contacting the employee's health care provider must be a human resource professional, a leave administrator, or a management official, but in no case may it be the employee's direct supervisor.

As discussed in the preamble, two types of contact between the employer and the employee's health care provider are permitted. An employer may contact the employee's health care provider for the purposes of clarification and authentication of the medical certification. In both cases, however, the employer may request no additional information beyond that included in the certification form and any sharing of individually identifiable health information by a HIPAA-covered health care provider must be in compliance with the HIPAA Privacy Rule at 45 CFR Parts 160 and 164. The revision also specifies that the employee is not required to permit his or her health care provider to communicate with the employer, but that if such contact is *not* permitted and the employee does not otherwise clarify an unclear certification, the employer may deny the designation of FMLA leave. The revision also specifies that prior to making any contact with the health care provider, the employer must first provide the employee an opportunity to cure any deficiencies in the certification pursuant to the procedures set forth in § 825.305(c).

In § 825.307(b), the Department also proposed and adopted the consolidation of current § 825.307(a)(2) and (b) setting forth the requirements for an employer to obtain a second opinion and added language requiring the employee or the employee's family to authorize his or her health care provider to release any medical information pertaining to the serious health condition at issue if such information is requested by the second opinion health care provider. The Department also proposed and adopted a similar requirement for the third opinion in § 825.307(c).

The new provision in § 825.307(d) extends the time allowed for an employer to provide the results of second and third opinions of medical certifications from two business days to five.

No changes were made to § 825.307(e) and (f) involving travel expenses for second and third opinions. In response to comments regarding medical certifications from foreign health care providers, the final rule modifies § 825.307(f) to require that employees provide a written translation of any certification by a foreign health care provider that is completed in a language other than English. The Department believes that in most situations either the employee or a member of the employee's family will be able to provide the translation, so this change should have a minimal impact on workers.

The changes to § 825.307 should expedite the certification process, thereby reducing the uncertainty to both employers and their employees. Similar to the changes made to §§ 825.305 and .306, providing greater certainty in the workplace should benefit both workers and employers. SHRM stated that the current regulatory requirement ''creates unnecessary delay and expense for employers'' and that ''the proposed changes should help ensure that the certification process is more efficient and less burdensome.'' The Chamber stated the changes ''will streamline the medical certification'' and ''are among the most impactful changes proposed by the Department.'' The National Coalition to Protect Family Leave noted that smaller employers will no longer ''have to incur the unnecessary expense of finding a health care provider to make contact with the employee's provider and educate them on what information the employer needs to be clarified.'' The National Newspaper Association applauded the Department on its proposed revisions to streamline the medical certification process stating that the ''bright-line rule helps to eliminate confusion and frustration for both the employee and employer'' and that ''permitting the employer to authenticate the certificate directly with the health care provider is a significant improvement in the FMLA regulations for small businesses.''

Estimated Impacts of the Revisions to the Medical Certification Requirements

In the PRIA, the Department estimated the savings that would result from the changes to medical certification requirements in §§ 825.305, 825.306 and 825.307 based upon the estimated number of leaves that involve serious health conditions and thus may require medical certifications. ''According to the 2000 Westat Report, 73.6 percent of leave-takers took leave for a serious health condition (either their own or for a covered family member), and 92 percent of covered establishments required medical documentation for covered leave due to a serious health condition. [footnote omitted] The Department estimates that these provisions will affect about 7.1 million FMLA leaves taken for serious health conditions (*i.e.*, 7.0 million leave-takers × 73.6% × 1.5 leaves × 92% = 7.1 million). The Department also estimates that these changes, as well as the changes discussed above, will result in a net savings to employers of on average about 15 minutes of a 'compensation and benefits specialist' time in processing each leave request. [footnote omitted] At a cost $36.51 per hour, saving 0.25 hours on each of the estimated 7.1 million leaves taken results in a savings of about $64.8 million for employers.'' *Id.* at 7951.

Since the Department received no substantive comments on this estimate, it is retaining it in this analysis.

Recertifications (§ 825.308)

Current § 825.308 addresses the employer's ability to seek recertification of the employee's medical condition. The changes to this section are intended to address the uncertainty regarding how often an employer can seek recertification.

Section 825.308(a) of the current regulations sets forth the rule for recertification for pregnancy, chronic or permanent/long-term conditions and generally permits recertifications no more often than every 30 days in connection with an absence. The Department proposed and has adopted in the final rule a clarification to § 825.308(a) entitled the ''30 day rule'' that sets forth a general rule permitting recertification every 30 days in connection with an absence.

Section 825.308(b)(1) of the current regulations states that where a certification specifies a minimum duration of incapacity of more than 30 days, generally employers may not request recertifications until the specified minimum duration has passed. Section 825.308(b)(2) of the current regulations states that for FMLA leave taken intermittently or on a reduced leave schedule basis, generally employers may not request recertification in less than the minimum period specified on the certification as necessary for such leave.

As discussed in the preamble, the Department proposed to resolve the uncertainty under current § 825.308 as to how often employers could seek recertification of chronic conditions where the certification indicates that the duration of the condition is ''lifetime.'' Under the current regulation, it is unclear whether such certification would be subject to recertification every 30 days under § 825.308(a) because the conditions are chronic, or whether they would never be subject to recertification under § 825.308(b)(2) because the certification indicated the need for intermittent leave for the employee's lifetime. As noted in the NPRM, the Department proposed in § 825.308(b) to permit employers, in all cases, to request recertifications in connection with absences every *six months* if the certification indicated the ongoing need for intermittent leave. The proposal represented a change in the Department's position, which had

previously been that certifications indicating an ''indefinite'' or ''unknown'' duration were subject to recertification every *30 days. See* Wage and Hour Opinion Letter FMLA2004–2–A (May 25, 2004), where implicit in the four scenarios that are the subject of the opinion letter is the assumption that each scenario would involve some intermittent or reduced schedule leave. In the PRIA, the Department assumed that ''this clarification will not impact either employers or employees.'' *Id.* 7951.

Further, as noted in the preamble above, the current 825.308(b) has two subsections, the first of which addresses certifications specifying a minimum period of incapacity in excess of 30 days, and the second of which addresses certifications specifying a minimum period during which intermittent or reduced schedule leave will be needed; in both situations an employer may not request recertification until the minimum period has passed. The Department has interpreted current § 825.308(b) as applying to those situations in which the certification states that an employee will need leave due to a serious health condition for a specified period in excess of 30 days, regardless of whether that leave is taken as a single continuous block of leave or on an intermittent or reduced schedule basis.

In the final rule, § 825.308(b) has also been modified to clarify that the rule applies to conditions where the minimum duration of *the condition*, as opposed to the minimum duration of *the incapacity*, exceeds 30 days. This is a clarification, not a change in the Department's enforcement position. The final rule also provides an example of how the six-month recertification provision would apply.

Section 825.308(c) of the current regulations provides that in all situations not covered by § 825.308(a) and (b), employers may generally request recertifications at any reasonable interval, including less than every 30 days, but only if certain circumstances exist as described in current § 825.308(c)(1), (2), and (3). The Department proposed and adopted entitling § 825.308(c) ''Less than 30 days'' which explains, similar to current § 825.308(c)(1), (2), and (3), under what circumstances the employers could request recertifications more frequently than every 30 days. Examples were also added to this provision.

Section 825.308(d) of the current regulations requires employees to provide recertifications within 15 calendar days of the employer's request, unless it is not practicable to do so despite the employee's diligent, good faith efforts. The only change made to § 825.308(d) was entitling it ''Timing.''

Section 825.308(e) of the current regulations provides that recertification is at the employee's expense and that no second opinion may be required for recertification. Current § 825.308(e) was redesignated as § 825.308(f) with no other change.

The Department proposed and adopted the addition of new recertification requirements in § 825.308(e), entitled ''Content,'' which clarifies that an employer may request the same information on recertification as required for the initial certification in § 825.306, and that the employee has the same obligation to cooperate in providing the recertification as in providing the initial certification. In addition, the Department proposed and adopted a clarification that employers may provide the employee's health care provider with a record of the employee's absence pattern and ask whether the leave is consistent with the employee's serious health condition.

The Department received significant comments from both employers and employees regarding this proposal that confirmed the confusion that exists in this area. Some employers and their representatives interpreted proposed § 825.308(b) as diminishing their recertification rights, while others interpreted it as increasing their rights. Most employees and their representatives interpreted proposed § 825.308(b) as increasing their recertification burden. However, the AFL–CIO supported the proposed change, arguing that recertifications on a 30-day basis for long-term conditions are burdensome on employees.

The Institute for Women's Policy Research provided an alternative estimate of the potential increased burden on workers. ''According to the Federal Register document, there are 2 million FMLA leave-takers with a chronic health condition. Analysis of the 2006 National Health Interview Survey shows that 10.9 percent of workers with one of five major chronic health diseases (diabetes, chronic obstructive pulmonary disease, asthma, congestive heart disease, and hypertension) have not seen a physician in the last year, and another 14.2 percent have visited a physician only once in the past year (Institute for Women's Policy Research analysis). If workers with other chronic health diseases have similar health-care utilization rates, requiring these leave-takers to have at least two doctor visits per year will result in an additional 720,000 doctor visits annually. At an average cost of $71.72 and assuming each visit takes two hours of workers' time (including travel and waiting), valued at $17.57 per hour (the wage used by the DOL in its impact estimates), and that that time is unpaid, this requirement will cost nearly $77 million per year in medical expenses and lost wages.''

The Department disagrees with this estimate for two reasons. First, as explained in the preamble, and noted above, the proposed and final § 825.308(b) represents a change in the Department's position from permitting a recertification every 30 days for chronic or permanent/long-term conditions regardless of whether the leave is taken as a single continuous block of leave or on an intermittent or reduced schedule basis to permitting a recertification every six months where the certification provides no time-frame, or indicates a minimum duration of ''lifetime,'' or ''indefinitely.'' Arguably, this will reduce the burden on workers.

Second, a chronic serious health condition within the meaning of § 825.114(a)(2)(iii) of the current FMLA regulations requires periodic treatment by a health care provider. General statistics involving all workers with chronic conditions are inappropriate. The fact that over 10 percent of the workers in the study analyzed by the Institute for Women's Policy Research reported not seeing a physician in the past year indicates that either their conditions did not meet the requirements of current § 825.114(a)(2)(iii)(A), and thus are not chronic serious health conditions qualifying for FMLA leave, or they were answering the question specifically concerning physicians as opposed to all qualifying health care providers for FMLA purposes such as physician assistants. Moreover, the analysis submitted by the Institute for Women's Policy Research does not include the savings that would result from the change under the proposed and final rule that recertifications for chronic serious health conditions cannot be required more frequently than once every six months, which is less frequently than some employers currently require.

In reexamining this proposed and final provision, and carefully considering all of the comments, the Department concludes that this provision will not increase the burden on either employers or employees, and arguably may reduce the costs associated with recertifications. However, data limitations prevent the Department from making a specific estimate.

The proposed and adopted change to § 825.308(e) will provide employers with a tool to determine if the employee's pattern of FMLA leave is consistent with their condition, or possible misuse. However, as noted in the RFI Report, the Department cannot assess from the record how much leave taking is actual abuse and how much is legitimate, and therefore cannot estimate what impact this proposal would have on the alleged misuse of FMLA leave. *See id.* at 7951.

Certification for Leave Taken Because of a Qualifying Exigency (§ 825.309)

Under the military family leave provisions of the NDAA, an employer may require that leave taken because of a qualifying exigency be ''supported by a certification issued at such time and in such manner as the Secretary may by regulation prescribe.'' While the Department has attempted to mirror the existing FMLA certification process wherever possible for qualifying exigency leave, the unique nature of this leave necessitates that an employee provide different information in order to confirm the need for leave. In the final rule, the certification requirements for leave taken because of a qualifying exigency are set forth in § 825.309.

Section 825.309(a) of the final rule establishes that an employer may require an employee to provide a copy of the covered military member's active duty orders or other documentation issued by the military which indicates that the covered military member is on active duty (or has been notified of an impending call or order to active duty) in support of a contingency operation, and the dates of the covered military member's active duty service. § 825.309(b) establishes that each time leave is first taken for one of the qualifying exigencies specified in § 825.118, an employer may require an employee to provide a certification that sets forth certain information. Section 825.309(c) of the final rule describes the optional form developed by the Department for employees' use in obtaining certification that meets the FMLA's certification requirements. Section 825.309(d) of the final rule establishes the verification process for certifications.

The Department estimates that requesting, reviewing and verifying the certifications for the estimated 110,000 workers taking exigency leave under § 825.126 will take an average of about 20 minutes of a Human Resource Compensation and Benefits Specialist's time. At an average hourly wage and benefits rate of $36.51, this will result in additional costs of $1.3 million (*i.e.*, 110,000 × $36.51/3).

Certification for Leave Taken To Care for a Covered Servicemember (§ 825.310)

The military family leave provisions of the NDAA amended the FMLA's certification requirements to permit an employer to request that leave taken to care for a covered servicemember be supported by a medical certification. The FMLA's existing certification requirements, however, focus on providing information related to a serious health condition—a term that is not relevant to leave taken to care for a covered servicemember.

Section 825.310 of the final rule provides that when leave is taken to care for a covered servicemember with a serious injury or illness, an employer may require an employee to support his or her request for leave with a sufficient certification. Section 825.310(a) permits an employer to require that certain necessary information support the request for leave. Section 825.310(b) of the final rule sets forth the information an employer may request from an employee in order to support his or her request for leave. Section 825.310(c) of the final rule describes the optional form developed by the Department for employees' use in obtaining certification that meets the FMLA's certification requirements. Section 825.310(d) describes alternatives to the optional form that employers must accept from employees obtaining certifications.

The Department estimates that requesting, reviewing and verifying the certifications for the estimated 29,100 workers taking caregiver leave under § 825.127 will take an average of about 30 minutes of a Human Resource Compensation and Benefits Specialist's time. At an average hourly wage and benefits rate of $36.51, this will result in additional costs of $0.5 million (*i.e.*, 29,100 × $36.51/3).

Intent To Return To Work (§ 825.311)

The Department did not propose any changes in § 825.309 in the NPRM and received no significant comments on this section. In the final rule, § 825.309 is renumbered as § 825.311 to account for the new military family leave sections (§§ 825.309 and 825.310) and is otherwise adopted as proposed. This change will not result in any costs to employers or workers.

Employer Refusal To Reinstate an Employee (formerly § 825.312)

Current § 825.312 addresses the conditions under which an employer can refuse to reinstate an employee after FMLA leave. Current § 825.312(a)–(f) address when an employer can delay or deny FMLA leave to an employee, or deny reinstatement after FMLA leave, when an employee fails to timely provide the required notifications and certifications set forth in the regulations. As these sections are duplicative of other regulatory sections, the Department proposed and adopted their deletion and the renumbering of current paragraphs (g) and (h) as § 825.216(d) and (e). As no substantive changes have been made, and none of the comments disputed the Department's assessment, the Department concludes that these changes will impose no additional costs on workers or employers.

Certifications for Fitness-For-Duty (§ 825.312)

Current § 825.310, which was renumbered in the final rule as § 825.312, addresses the fitness-for-duty certification that an employee may be required to submit upon return to work from FMLA leave.

The Department proposed in § 825.310(a) and adopted in § 825.312(a) the addition of a sentence clarifying that employees have the same obligation to provide complete certification or provide sufficient authorization to the health care provider in order for that person to provide the information directly to the employer in the fitness-for-duty certification process as they do in the initial certification process.

The final rule, deleted the current § 825.310(b) and moved the discussion of the applicability of state or local law, or collective bargaining agreements that govern an employee's return to work, to a new § 825.312(g). The Department also moved the discussion of the ADA to a new § 825.312(h) in the final rule.

Current § 825.310(c) states that the fitness-for-duty certification may be a simple statement. The Department proposed two changes. First, the employer would be permitted to require that the fitness-for-duty certification address the employee's ability to perform the essential functions of the employee's job as long as the employer provides the employee with a list of those essential job functions at the same time that the employer provides the eligibility notice required by proposed § 825.300(b). Second, the employer would be permitted to contact the employee's health care provider directly, consistent with the procedure in proposed § 825.307(a), for purposes of authenticating or clarifying the fitness-for-duty certification. These changes were generally adopted in the final rule but the subsection has been renumbered as § 825.312(b). However,

in the final rule, the Department also modified the language to specify that, if the employer requires that the fitness-for-duty certification address the employee's ability to perform the essential functions of the employee's job, then the employer must provide the employee with a list of those essential job functions no later than the *designation notice* required by § 825.300(c) and specify in the designation notice that the fitness-for-duty certification must address the employee's ability to perform those essential functions.

The Department did not propose or make any changes to current § 825.310(d). This paragraph has been renumbered as 825.312(c) in the final rule.

Current § 825.310(e) requires employers to advise the employee if the employer will require fitness-for-duty certification to return to work. If the employer has a handbook explaining employment policies and benefits, the handbook should explain the employer's general policy regarding any requirement for fitness-for-duty certification to return to work. Specific notice shall also be given to any employee from whom fitness-for-duty certification will be required either at the time the notice of the need for leave is given or immediately after leave commences and the employer is advised of the medical circumstances requiring the leave, unless the employee's condition changes from one that did not previously require certification pursuant to the employer's practice or policy. No second or third fitness-for-duty certification may be required. Current § 825.310(e) also does not allow second or third fitness-for-duty certifications.

The Department's proposed § 825.310(e) required employers to advise their employees in the eligibility notice required by § 825.300(b) if the employer will require a fitness-for-duty certification to return to work, and retained the prohibition on second or third fitness-for-duty certifications.

In the final rule, proposed § 825.310(e) has been renumbered as § 825.312(d), and it has been modified to state that if the employer requires a fitness-for-duty certification, the employer must advise the employee of this requirement in the designation notice and indicate therein whether that certification must address the employee's ability to perform the essential functions of the employee's job. The final rule also retains the prohibition on second or third fitness-for-duty certifications, but has moved the statement to paragraph (b) in the final rule.

The Department proposed changes to language in § 825.310(f) to clarify that the employee is not entitled to the reinstatement protections of the Act if he or she does not provide the required fitness-for-duty certification or request additional FMLA leave. These changes have been adopted in renumbered 825.312(e) of the final rule.

The Department proposed a change to § 825.310(g) permitting an employer to require a fitness-for-duty certification up to once every 30 days if an employee has used intermittent or reduced schedule leave during the 30-day period and if reasonable safety concerns exist regarding the employee's ability to perform his or her duties, based on the serious health condition for which the employee took such leave. This change has been adopted and renumbered as § 825.312(f) in the final rule.

Finally, the Department proposed and adopted the deletion of current § 825.310(h) as redundant with § 825.213 regarding repayment of health insurance premiums if the employee is unable to return to work as a result of a continuation of a serious health condition.

In the PRIA, the Department stated that ''[t]hese proposed changes have several important impacts. First, they would better protect the safety and health of workers taking leave, and their coworkers. Second, [proposed] § 825.310(c) will reduce administrative burdens. Third, the proposed change to § 825.308(e) will reduce uncertainty in the workplace by permitting an employer to determine if an employee's pattern of leave is consistent with the serious health condition.'' *Id.* at 7952.

As noted in the preamble, many employees and employee representatives opposed the proposed change permitting employers to require a fitness-for-duty certification to address an employee's ability to perform essential job functions because they believe it would be duplicative, onerous, and costly for workers. Some commenters argued that the proposal would discourage workers from taking FMLA leave. One commenter argued that because the health care provider has already considered the essential functions of the employee's position in completing the initial certification, by certifying that the employee is fit to return to duty, the health care provider necessarily certifies that the employee's serious health condition no longer prevents the employee from being able to perform the essential functions of his or her job.

In the PRIA, the Department determined that proposed § 825.310(c) allows for a fitness-for-duty certification similar to that of the initial medical certification of the FMLA leave and, therefore, did not estimate any additional costs for workers. *Id.* at 7952. However, the Department estimated that the additional information needed for a fitness-for-duty certification will result in an estimated $4.7 million in additional costs to health care providers to review the employee's essential job functions and provide the additional information. The Department believes that although these costs would most likely be passed on to workers, the workers' health insurance would likely pay for much of these added costs. *Id.* at 7952.

After reviewing the comments, Department has determined that under the final rule workers will visit their health care providers the same number of times as they do under the current regulations for the following reasons. The *current* regulation already allows an employer to delay an employee's return to work until the employee provides a fitness-for-duty certification as long as the employer has appropriately notified the employee of the requirement. The fact that health care providers have already considered the job functions of the employee's position in completing the initial medical certification under current § 825.306(b)(4)(ii) does not preclude employers from requiring workers to visit a health care provider to obtain a fitness-for-duty certification under current § 825.310(c), even if the fitness-for-duty certification need only be a simple statement of an employee's ability to return to work (as long as employers have complied with all of the requirements in current § 825.310). Therefore, the Department has determined that § 825.312(b) will impose no additional costs on workers aside from those identified below.

The Department estimates that the additional information needed for a fitness-for-duty certification will result in an estimated $4.7 million in additional costs to health care providers to review the employee's essential job functions and provide the additional information. The Department believes that although these costs would likely be passed on to employees, workers' health insurance may pay for some of these added costs.

Proposed § 825.310(g) (§ 825.312(f) in the final rule) permits an employer to require an employee to furnish a fitness-for-duty certification every 30 days if an employee has used intermittent leave during that period and reasonable safety concerns exist. Based on the costs of additional fitness-for-duty certifications that would be required under this provision, the PRIA estimated about

$6.6 million per year in additional costs to workers. *Id.* at 7952.

Several employees and employee groups commented on the costs this change would impose on workers. For example, the Coalition of Labor Union Women stated that ''employees will be burdened with the financial costs of these added examinations which will increase the risk that they will forego FMLA leave or be denied it unfairly.'' The National Employment Lawyers Association, Massachusetts Chapter stated ''it could be unduly burdensome for employees who are using intermittent leave because of a chronic condition to have to get recertified every 30 days. In some instances, such a person may not even need FMLA leave more than once in a 30-day period. To require the employee to get re-certified that often could require him or her to be recertified every time he or she takes FMLA leave * * *.'' The AFL-CIO stated that the ''requirement is unworkable because employees generally take intermittent leave in periods that last for no more than a few days (and may even last for less than a full day). It is highly unlikely that an employee will be able to obtain a fitness-for-duty certification from the health care provider without giving more advance notice * * * failure to obtain a certification as soon as the employee is able to return to work will only prolong the employee's unpaid absence.''

Based upon these comments and those of individual workers, particularly members of the APWU, the Department has revised its methodology to include an estimate for lost income or paid leave resulting from the potential delay in workers' return to duty while they obtain the required fitness-for-duty certifications.

As was the case in the PRIA, since a fitness-for-duty certification can only be required when a reasonable safety concerns exists, the Department anticipates that this revision is likely to impact very few workers. For the final rule, the Department developed this estimate based upon an approach used in the PRIA. *Id.* at 7952. According to the 2000 Westat Report, 52.4 percent of workers take leave for their own serious health condition. *Id.* Therefore, about 3.7 million (*i.e.*, 52.4% of 7 million) take FMLA leave for their own serious health condition. The 2000 Westat Report also found that 23.9 percent of workers took it intermittently,[35] suggesting that about 880,000 workers (*i.e.*, 23.9% of 3.7 million) take intermittent FMLA leave for their own serious health conditions.

In the PRIA, the Department assumed that five percent of these leave-takers, or 44,000 workers, will be required to have a fitness-for-duty certification where reasonable safety concerns exist. Although the Department received many comments on how burdensome the proposed revision would be on workers and the impact that it might have, none of the comments provided any data or evidence to suggest that the Department's five percent assumption was incorrect. As discussed in the preamble, the Department intends for the term ''reasonable safety concerns'' to be a high standard. The determination that there are reasonable safety concerns must rely on objective factual evidence, not subjective perceptions. Although this new regulation may impose additional costs on some employees, the Department continues to believe that at most five percent of these leave-takers, or 44,000 workers, will be required to provide fitness-for-duty certifications under § 825.312(f) (*i.e.*, 5.0% of 880,000).

As in the PRIA (*see id.*), the Department assumes that on average these workers will be required to provide three fitness-for-duty certifications for the intermittent leave they take at an average of $50 cost per certification. Thus the 132,000 additional certifications (*i.e.*, 3 certifications per worker × 44,000 workers) will cost workers about $6.6 million per year.

In addition, since these workers may not be allowed to return to work until they obtain a fitness-for-duty certification, these workers may remain on paid or unpaid leave. As noted by the AFL–CIO, for workers with chronic conditions taking intermittent FMLA leave, the inability to obtain a certification as soon as the employee is able to return to work will prolong the employee's paid or unpaid absence. However, some of these workers will be able to obtain the fitness-for-duty certifications without any loss of income because they will be able to obtain the required certification before they are ready to return to work.[36] Therefore, the Department assumes that each of the three fitness-for-duty certifications will on average result in the loss of one-half of an 8-hour work day. Based upon a fully loaded average hourly rate for production and nonsupervisory workers on private nonfarm payrolls of $24.60 (*id.* at 7950), the Department estimates that the ''cost'' for workers of the paid or unpaid leave associated with each certification will be on average about $100. Therefore, the ''cost'' of the unpaid or paid leave will be about $13.2 million per year (*i.e.*, $100 per certification times 132,000 certifications).

Although the Department recognizes that this provision will impose a direct cost on workers who do not have health insurance or have a high deductible, the Department expects a large portion of this cost is likely to be paid by the employee's health insurance, some of which is financed by employers. As noted in the PRIA, according to the Bureau of Labor Statistics, 2007 National Compensation Survey, 90 percent of establishments with 50 or more employees offer health care benefits, and 81 percent of workers in those establishments have access to those health care benefits. Further, employers with 50 or more employees paid for 81 percent of health insurance premiums for single coverage, and 73 percent for family coverage. *Id.* at 7952–53.

Thus the Department estimates that the revision to § 825.312(f) will result in annual costs of about $19.8 million to workers (*i.e.*, $6.6 million for additional visits to the health care providers plus $13.2 million in lost income or paid leave).

The Department used the same approach as in the PRIA to estimate the impact of these additional certifications on employers. *Id.* Based upon the assessment that it would take an additional 30 minutes of a ''compensation and benefits specialist's'' time at a cost of $36.51 per hour to request and process each certification, the 132,000 fitness-for-duty certifications will result in about $2.4 million in additional costs for employers.

Although the net impact of the revisions to § 825.312 will be a cost of about $2.4 million for employers and $19.8 million for employees (§ 825.312(f)), the changes in § 825.312 will increase workplace safety by making sure that workers are healthy enough to return to work and do not pose a health or safety risk to themselves or others. Although many employers and employer organizations recognize that this provision will impose some additional cost on the workplace, they generally believe that the safety considerations outweigh the cost. However, data limitations inhibit the Department from quantifying the health and safety benefits of this provision for workers and employers.

[35] The 2000 Westat Report, Table 2.3, p. 2–5; and those that answered yes to Question A5B of Westat's employee questionnaire.

[36] For example, some workers will be able to visit their health care provider during the period that they are on FMLA leave solely to obtain the required fitness-for-duty certification.

Failure To Provide Medical Certification (§ 825.313)

Current § 825.311, renumbered as § 825.313 in the final rule, provides that if an employee fails to provide medical certification in a timely manner, the employer may ''delay'' the taking of FMLA leave until it has been provided. The Department proposed and adopted a clarification that would permit employers to ''deny'' FMLA leave until the medical certification is provided and added § 825.311(c) (renumbered § 825.313(c) in the final rule) which addressed the consequences to employees for failing to provide timely recertification. As discussed in the NPRM (*id.* at 7922) and in this preamble, these are not substantive changes to the current rule, but clarifications intended to ensure that both employees and employers understand the potential impact of a failure to provide certification in a timely manner. Although the Department received several comments on this clarification, as noted in the preamble discussion above, none of the comments disputed the Department's assessment. Therefore, the Department concludes that very few, if any, workers or employers will be impacted by this clarification.

Enforcement Mechanisms (§§ 825.400–825.404)

Only minor editorial changes were proposed to the enforcement mechanisms in §§ 825.400–825.404. The final rule adopts these changes. In addition, the final rule makes a conforming revision to § 825.400(c) to add that employees taking FMLA leave for the new military family leave entitlements under §§ 825.126 and 825.127 are entitled to actual monetary losses sustained as a direct result of an employer's violation of one or more of the provisions of the FMLA. The Department concludes that these changes will have no quantifiable impacts.

Recordkeeping (§ 825.500)

Current § 825.500 deals with the recordkeeping requirements. In addition to minor editorial changes, the Department proposed and adopted a revision to § 825.500(c)(4) to include the eligibility notice in § 825.300(b). The final rule also clarifies that employers must maintain copies of all written notices given to employees. These changes should have very little impact on either workers or employers.

Special Rules Applicable to Employees of Schools (§§ 825.600–825.604)

Only changes to the titles and other minor editorial changes were proposed to the special rules for schools in §§ 825.600–825.604. The final rule adopts these changes, which should have very little impact on either workers or employers.

In addition, the final rule makes conforming revisions to §§ 825.601 and 825.602 so that the special rules are applicable when an eligible instructional employee takes leave to care for a covered servicemember under § 825.127, as is specified by the statute. Since the eligible instructional employees have been taking FMLA leave under the special rules for more than a decade, these changes should have very little impact on either workers or employers.

Effect of Other Laws, Employer Practices, and Collective Bargaining Agreements on Employee Rights Under FMLA (§§ 825.700 Through 825.702)

The Department proposed and adopted several revisions to § 825.700 because they either dealt with the initial applicability of the standard or because they were invalidated by *Ragsdale*. Since these provisions have no effect, their deletion will have no economic impact on either workers or employers.

In the final rule, the Department also deleted two examples in § 825.701(a) regarding the interaction of the FMLA and state law because the examples may be incorrectly read to suggest that the Department is assuming responsibility for the administration or enforcement of state or local laws. Since the Department only administers and enforces the FMLA and not state or local laws, this deletion will have no impact on either workers or employers, except to avoid potential misunderstandings regarding the Department's enforcement role under the FMLA.

The Department proposed and adopted the addition of a new paragraph to § 825.702 (the interaction with federal and state anti-discrimination laws) to clarify the interaction between the FMLA and USERRA. Since this addition is not an expansion of FMLA rights through regulation but merely an instruction of how USERRA affects the rights of uniformed servicemembers to FMLA leave, it will have little impact on either workers or employers, except to avoid potential misunderstandings.

Similarly, the Department proposed and has adopted with modifications clarifications to the interaction between the FMLA and the ADA. This also is not an expansion of FMLA rights through regulation but merely interpretive guidance that will have little impact on either workers or employers, except to avoid potential misunderstandings.

Definitions (§ 825.800)

The Department proposed and adopted changes and clarifications to several terms in § 825.800 including ''continuing treatment,'' ''eligible employee,'' ''employee,'' ''health care provider,'' ''serious health condition,'' ''parent'' and ''son or daughter.'' In addition, due to the implementation of the NDAA provisions for military leave, the final rule makes other changes in the proposed definitions of the terms ''continuing treatment'' and ''serious health condition'' and adds new definitions for the terms ''active duty or call to active duty status,'' ''contingency operation,'' ''covered military member,'' ''covered servicemembers,'' ''parent of a covered servicemember,'' ''outpatient status,'' ''son or daughter on active duty or call to active duty,'' ''serious injury or illness'' in the case of a member of the Armed Forces, ''son or daughter of a covered servicemember'' and ''next of kin of a covered servicemember.'' The change or addition of these definitions will have little impact on either workers or employers, except to avoid potential misunderstandings.

Summary of Impacts

The Department estimates that the revisions will result in a total first year net costs of $327.7 million and annual reoccurring costs of $244.4 million for both workers and employers. Based upon a five year pay-off period and a real interest rate of 3.0 percent (OMB Circular A–4),[37] total annualized costs for the revisions for both workers and employers is $262.6 million. Based upon a five year pay-off period and a real interest rate of 7.0 percent, total annualized costs for the revisions for both workers and employers is $264.7 million. For employers, the largest cost is the $257.3 million in recurring costs related to the new military leave provisions (§§ 825.126 and 825.127). For workers, the largest cost is the $19.8 million in recurring costs associated with the additional fitness-for-duty certifications that may be required if a worker has used intermittent leave and a reasonable safety concern exists (§ 825.312(f)).

Table 3 presents a summary of the impacts discussed above.

[37] Available on the Internet at: *http://www.whitehouse.gov/omb/circulars/a004/a-4.html.*

TABLE 3—SUMMARY OF THE IMPACTS OF THE REVISIONS TO THE FMLA REGULATIONS

Provision	Cost to employers ($millions)	Cost to employees ($millions)
First Year Costs	$83.3	$0.0
§ 825.126	200.8	0.0
§ 825.127	56.5	0.0
§ 825.205	−9.6	9.6
§ 825.300(a)	2.8	0.0
§ 825.300(b)	−10.1	0.0
§ 825.300(c)	1.7	0.0
§ 825.300(d)	69.4	0.0
§§ 825.302–.304	−40.6	0.0
§§ 825.305–.307	−64.8	0.0
§ 825.309	1.3	0.0
§ 825.310	0.5	0.0
§ 825. 312(b)	0.0	4.7
§ 825.312(f)	2.4	19.8
Total First Year Costs	293.6	34.1
Total Reoccurring Costs	210.3	34.1

Source: U.S. Department of Labor.

Chapter 4: Feasibility of the Revised Regulation

This chapter discusses the feasibility of paying for the estimated $264.7 million in total annualized costs associated with the revisions based upon a 7.0 percent discount rate.

The annualized costs for employers is $230.6 million, or about $2.41 for each of the 95.8 million workers employed at establishments covered by Title I of the FMLA; and about $2.99 for each of the 77.1 million workers eligible to take FMLA leave; and about $32.48 for each of the 7.1 million workers who will take FMLA leave.[38] The $230.6 million in costs also represents less than 0.006 percent of the estimated $3.7 trillion in payroll costs for the establishments covered by Title I of the FMLA (CONSAD). Therefore, the Department has determined that the costs of the final rule do not represent a significant economic impact for most establishments covered by Title I of the FMLA.

While it is certainly possible that some establishments may have several employees who take military leave under new §§ 825.126 and 825.127, the associated $1,825 cost for each employee taking exigency leave under § 825.126 and $1,940 for each employee taking military caregiver leave under § 825.127 should not have a significant impact on otherwise financially healthy establishments. Based upon a fully loaded average hourly rate for production and nonsupervisory workers on private nonfarm payrolls of $24.60 (73 FR at 7950), and the assumption of an average 2,000 hour working year (*i.e.*, 8 hours per day × 5 days per week × 50 weeks per year), $1,940 would represent an increase of about 4 percent in the average annual cost of $49,500 for such employees.

The annualized costs for workers is $34.1 million, or about $0.36 for each of the 95.8 million workers employed at establishments covered by Title I of the FMLA; and about $0.44 for each of the 77.1 million workers eligible to take FMLA leave; and about $4.80 for each of the 7.1 million workers who will take FMLA leave. Therefore, the Department has determined that the costs of the final rule do not represent a significant economic impact of for most workers who take leave under Title I of the FMLA.

However, it is possible that some of the 44,000 workers who will need additional fitness-for-duty certifications under § 825.312(f) will incur significant impacts. Although the estimated $150 in lost wages plus health care provider office visits charges represents about 0.04 percent of the average annual $35,000 earnings of such employees, these employees may be required to obtain several fitness-for-duty certifications. At the extreme, if some employees without health insurance were required to obtain a fitness-for-duty certification each month, $1,800 (*i.e.*, $150 × 12) would represent over 5 percent of the average annual $35,000 earnings of such employees. In this example, these workers could be motivated to work with their employers to transfer to alternative positions that did not involve ''reasonable safety concerns.''

However, the Department expects a large portion of this cost is likely to be paid by the employee's health insurance, some of which is financed by employers. As noted in the PRIA, according to the Bureau of Labor Statistics, 2007 National Compensation Survey, 90 percent of establishments with 50 or more employees offer health care benefits, and 81 percent of workers in those establishments have access to those health care benefits. Further, employers with 50 or more employees paid for 81 percent of health insurance premiums for single coverage, and 73 percent for family coverage. *Id.* at 7952–53.

Chapter 5: Benefits Not Quantified

The Department anticipates that substantial but unquantifiable benefits will accrue from the proposed revisions to the FMLA regulations. First, associated with the addition of the provisions for military leave, the families of servicemembers will no longer have to worry about losing their jobs or health insurance due to absences to care for a covered seriously injured or ill servicemember or due to a qualifying exigency resulting from active duty or call to active duty in support of a contingency operation. Second, the clarifications to the regulations and the revisions to improve the communications between employers and employees should reduce the uncertainty and the worries about FMLA leave. Third, the revisions should reduce the costs of unforeseeable intermittent FMLA leave in high-impact, time-sensitive operations. And, finally, the revisions related to fitness-

[38] As noted above, 7.0 million workers took FMLA leaves, and the Department estimates that 139,000 additional workers will take FMLA leave under the military leave provisions of the NDAA, for a total of 7.1 million.

for-duty certifications should reduce presenteeism. Each of these benefits is discussed qualitatively below.

The Benefits of Military Leave

According to the comments submitted by several members of Congress ''[t]hese new provisions, which constitute the first expansion of the FMLA since its enactment 15 years ago, are designed to make it easier for workers with family in military service to balance their work and family lives during these particularly demanding times without the fear of losing their jobs * * *'' The inclusion of military leave provisions in the FMLA was overwhelmingly supported by employers and employees, as well as both their representatives.

• National Partnership for Women & Families/National Military Family Association stated ''[w]e strongly support the expansion of the FMLA and the use of FMLA leave by military families, and we believe that the leave provided by the expansion of the FMLA will be of great assistance to military families * * * we urge the Department to create regulations that are fair to employees and recognize and honor the sacrifice made by military servicemembers and their families * * * The expansion of FMLA leave for military families enjoys bipartisan support, and the regulations for this leave should not be controversial.''

• The National Postal Mail Handlers Union ''urges the Department to act promptly in issuing regulations to implement the newly enacted provisions allowing employees that have family members serving our nation to take time off in order to handle issues arising out of their family members' military service.''

• The National Military Family Association ''strongly urges the DOL to issue the regulations for the military expansions of the FMLA * * * We have heard from military families frustrated that they could not access leave—military families need access to the FMLA leave now.''

• The Southern Company Entities ''strongly support the legislative intent and effort of expanding the FMLA to cover certain events and aspects of military service of employees and their family members. We understand and agree with the need for employees to be absent from work in certain situations related to military service or in situations where they are needed to assist family members recovering from injuries sustained in their military service.''

• The National Business Group on Health stated ''[e]mployers recognize the importance of added flexibility and the need to support military families.''

• ''The NAM and our member companies are very supportive of the many men and women who serve in the Armed Forces, including the Reserves and the National Guard. Similarly, we understand the need for employees whose family members have been called to active duty to take time off from work in order to handle critical and pressing matters resulting from the servicemember's absence. We also understand employees' needs to care for a loved one injured during their service in the military. The NAM hopes that any new military FMLA regulations will recognize the current supportive environment in the workplace related to military service * * *''

• Waushara County (WI) stated ''[w]e have many guard (spouse) employees that are being called to active duty and the impact may be extensive. Specifics on how and when this leave is applicable will help to alleviate problems in the administration of the Act.''

• Many of the write-in campaigns for the NPRM voiced support for military leave. For example, many SHRM members stated ''I support the legislative intent of expanding the FMLA to cover these qualifying events'' and numerous individual workers stated ''I do support the provisions dealing with 'light duty' and military family leave * * *.''

These provisions should not only make it easier for workers with family in military service to balance their work and family lives without fear of losing their jobs but the knowledge that their family members have such leave available should also mitigate some of the burdens felt by servicemembers faced with serious illness or injury or deployment in support of contingency operations.

The Benefits From the Clarifications to the Regulations and the Revisions To Improve Communications

Many of the revisions were designed to clarify the requirements that the FMLA imposes on both employees and employers, and to improve the communication between the parties. As was noted in the Report on the RFI (72 FR at 35556–60 (June 28, 2007)), the knowledge that employees can take FMLA leave without fear of losing their jobs or health insurance has been critical in getting them through difficult times. ''[I]t is easy to lose perspective about the overall value of the workplace protections provided by the Act. That value is best shown in the comments submitted by individual employees and, in some instances their employers or representatives.'' *Id.*

Employees will benefit from better communications resulting from the changes because it allows them to better understand their rights and responsibilities under the FMLA.

• ''As a cancer survivor myself, I cannot imagine how much more difficult those days of treatments and frequent doctor appointments would've been without FMLA.'' *Id.*

• ''I was out of work for a short period of time due to a serious medical condition that was treatable. FMLA gives the employee the ability to tend to these concerns with their full attention, to recuperate without sacrificing their career [or] their livelihood.'' *Id.*

• ''FMLA saved my job and I also believe saved my life, and to this day gives me a sense of security against any discipline or termination based on my legitimate medical needs.'' *Id.*

• ''Knowing that I was protected meant I didn't have to choose between my Father's health and my job.'' *Id.*

• ''A Cingular employee with a good work record has Lupus which causes periodic flare-ups that prevent her from working and require weekly therapy and regular doctor visits. FMLA has allowed her to remain stress-free * * * because she does not need to worry about losing her job.'' *Id.*

• ''[A]n employee said she was '[s]o thankful when my employer informed me of this law because it gave my mom peace of mind knowing that I would be available for her when she needed me.' '' *Id.*

• ''I was secure in the knowledge that I could come right back to my job, and I developed a keen sense of loyalty to my employer which has more than once prevented me from looking for work elsewhere.'' (72 FR 35559).

''The Department received many comments [to the RFI] emphasizing the positive impact the FMLA has on employee morale and how it increases worker retention and lowers turnover costs. By reducing employee turnover, some commenters argued that the FMLA reduces employer costs.'' *Id.* at 35629.

Employers will also benefit from better communications resulting from the changes to §§ 825.302—825.304 because they will allow employers to staff their operations more efficiently and thereby reduce costs.

• Southwest Airways noted in comments to the RFI that the Department's current ''informal two-day notice practice is an arbitrary standard that fails to recognize an employer's legitimate operational need for timely notice and that contradicts with an employee's statutory duty to provide

such notice as is practicable.'' *Id.* at 35576.

• NAM stated ''[a]s currently interpreted by DOL, the FMLA has become the single largest source of uncontrolled absences and, thus, the single largest source of all the costs those absences create: Missed deadlines, late shipments, lost business, temporary help, and over-worked staff.'' *Id.*

• The Chamber stated in its comments to the NPRM that the ''[l]ack of advance notice for unscheduled absences is one of the biggest disruptions employers point to as an unintended consequence of the current regulations.''

• The University of Minnesota noted ''[d]ealing with such situations is extremely difficult. Supervisors do not know if the employee will come in to work on any given day. They do not know if the employee will work an entire shift. Employees will simply notify their supervisors, in many cases after the fact, that they have experienced symptoms and cannot come in to work, or must leave work early. A comment by a supervisor regarding a performance issue may result in the employee excusing himself/herself for the rest of the day. Without proper notice, a supervisor cannot make plans for a replacement * * * Nonetheless, the current statutory and regulatory provisions provide employers with few options.'' 72 FR at 35579.

• SHRM also noted in their comments to the NPRM that the need for standard call-in procedures because without them ''employers do not have enough time to adequately staff for the employee absences and still run their operations if the co-worker is allowed to depart from work. In other cases, the co-worker must bear the burden of performing their own job and that of the employee on FMLA leave because of the lack of notice provided.''

The Benefits in the High-Impact, Time-Sensitive Operations

As the Department noted in the PRIA, the lack of employee notice is especially difficult for employers with time-sensitive operations.

''Comments in response to the RFI indicate that firms in industries with time-sensitive operations incur greater costs than the typical establishments. These vulnerable industries include manufacturing, health care, transportation, public safety, and communications * * * a high-impact employee can have a more costly effect in highly time-sensitive industries than others. Examples provided in response to the RFI indicate that if an employer is unable to plan for the absence of a high-impact employee in one of these industries because of late notification, the following disruptive events can occur:

• Manufacturing assembly lines may be interrupted if there is not a stand-by employee to take the absent employee's place.

• Passengers are delayed and productivity losses increase if an airline pilot, flight attendant, bus driver, or train engineer does not show up for work at their expected time.

• Adequate public safety may not be provided when police officers, emergency dispatch workers, fire fighters, and paramedic shifts are not fully covered because of inadequate notice * * *.

* * * some employers find they have to over staff on a continuing basis just to make sure they have sufficient coverage on any particular day (such as hourly positions in manufacturing, public transportation, customer service, health care, call centers, and other establishments that operate on a 24/7 basis). Some employers require their employees to work overtime to cover the absent employee's work. Both of these options result in additional costs * * * However, to the extent the proposed rule reduces the cost of uncertainty in staffing, time-sensitive operations are likely to see larger productivity benefits than other industries.'' 73 FR at 7953–54.

The Benefits of Reduced Presenteeism

Revisions to the fitness-for-duty requirements should help employers address the growing problem of presenteeism. According to a survey conducted by Harris Interactive for CCH ''[t]he problem of presenteeism—when employees come to work even though they are ill and pose problems of contagion and lower productivity—is an emerging area of concern for organizations. Nearly half (48 percent) of employers surveyed reported that presenteeism is a problem in their organizations, up over 20 percent from the 39 percent who saw it as a problem last year * * * While the direct hit to the bottom line isn't immediately evident with presenteeism, the hidden, indirect costs are very high * * * When someone doesn't feel well, they are simply not as productive, nor is the quality of their work as high * * * Then, there is the added problem of spreading illnesses to other employees who in turn either call in sick, or come in sick * * *.''[39]

Presenteeism was discussed in the Report on the RFI. ''According to the Center for Worklife Law, 'The cost of lost productivity due to presenteeism is significantly greater than the cost of lost productivity due to absenteeism. The total annual cost of lost productivity is $250 billion. Presenteeism accounts for $180 billion or 72% of that total * * * Although many commenters [to the RFI] cited the overall costs of presenteeism and asserted that FMLA has some positive impact on limiting those costs, no one attempted to quantify the marginal effect or economic impact that enactment of the FMLA had on the issue. However, the lack of a quantitative estimate does not mean that the FMLA does not have an impact on presenteeism.'' 72 FR at 35628–29.

Regulatory Flexibility Act

The Regulatory Flexibility Act requires that agencies prepare a regulatory flexibility analyses for final rules unless they are not expected to have a significant economic impact on a substantial number of small entities. 5 U.S.C. 603, 605(b).

The FMLA applies to public agencies and to private sector employers that employ 50 or more employees for each working day during 20 or more calendar weeks in the current or preceding calendar year (including workers who are jointly employed). 29 U.S.C. 2611(4). In addition, the FMLA excludes employees from eligibility for FMLA leave if the total number of employees, including those jointly employed, by that employer within 75 miles of that worksite is less than 50. 29 U.S.C. 2611(2)(B)(ii). As explained in the FMLA's legislative history, ''[t]he act exempts small businesses and limits coverage of private employers to employers who employ 50 or more employees for each working day during 20 or more calendar weeks in the current or preceding calendar year. * * * The employer must, in addition, employ at least 50 people within a 75-mile radius of the employee's worksite.'' S. Rep. No. 103–3, at 2 (1993).

The Department examined the impact of the final rule on all firms covered under the FMLA, including those with 50 to 500 employees, and estimated the net impact of the changes would increase the overall costs for all firms, both large and small because of the new military leave provisions of the NDAA. Most small businesses (establishments), 89.4 percent, are excluded from FMLA coverage by statute.[40] An estimated 6.3

[39] *http://www.cch.com/Press/news/2005/200510121h.asp.*

[40] However, if an employer has 15 workers and jointly employs another 40 workers with a

Continued

percent of establishments employing less than 50 employees are covered by the Act because the entities employ at least 50 employees within 75 miles of the worksite. The Department estimates that 633,000 of the 1.1 million covered establishments, or 55.8 percent, have less than 50 employees. Another 481,000 establishments have 50 to 500 employees. Clearly, this is a substantial number (although a small percentage—10.6%) of small employers.[41]

The annualized costs for employers are $230.6 million based upon a 7.0 percent discount rate, which comes to about $210 for each of the estimated 1.1 million establishments and about $32.48 for each of the 7.1 million workers who will take FMLA leave. Clearly, costs of this magnitude do not represent a significant impact for most of the establishments, even the smaller businesses, covered by Title I of the FMLA.

The major cost increases for all businesses, including the smaller businesses result from the new military leave provisions in §§ 825.126 and 825.127. It is certainly possible that some small businesses in specific locations may have several employees who take military leave and the additional costs ($1,825 for each employee taking qualifying exigency leave and $1,940 for each employee taking military caregiver leave) associated with those leaves are not trivial. Based upon a fully loaded average hourly rate for production and nonsupervisory workers on private nonfarm payrolls of $24.60 (*id.* at 7950), and the assumption of an average 2,000 hour working year (*i.e.*, 8 hours per day × 5 days per week × 50 weeks per year), $1,940 would only represent an increase of about 4 percent in the average annual cost of $49,500 for such employees.

However, many of the provisions in the final rule will decrease the costs for all businesses, including smaller businesses. Some of these changes are discussed below.

• Increments of Leave for Intermittent or Reduced Schedule Leave (§ 825.205)—The final rule includes an exception that permits employers to designate the entire shift as FMLA leave and count it against the employee's FMLA leave entitlement in situations where it is not possible for an employee using intermittent leave or working a reduced leave schedule to commence work midway through a shift. Since smaller employers are less likely to have an alternative position for workers who miss their normal shift than larger employers, this change is likely to benefit smaller employers more.

• Employer Notice Requirements (§ 825.300)—The final rule increases the amount of time employers have to notify the employee of eligibility of FMLA leave and the designation of FMLA leave. Smaller employers, who typically do not have dedicated HR staff, should benefit most from this additional time.

• Authentication and Clarification of the Medical Certification (§ 825.307)—The final rule permits employers to contact the employee's health care provider directly, rather than through a third-party health care provider that represents the employer. Smaller employers, who typically do not either contract with third-party health care providers or have health care providers on staff, should benefit most from this change.

The Chief Counsel for Advocacy of the Small Business Administration (SBA) submitted comments in response to the NPRM that recommended: (1) That DOL finalize additional reforms to minimize the costs of the rulemaking on small entities; (2) narrow the definition of serious health condition in proposed § 825.114; (3) increase the minimum increment of intermittent leave in proposed § 825.203 to half a day or four hours; (4) clarify the employee notice requirements in proposed § 825.302; (5) provide further guidance on medical certifications in proposed §§ 825.305–.308; and (6) complete a Section 610 Periodic Review of the FMLA regulations. As discussed in the preamble, after carefully considering the comments the Department has modified a number of proposed sections in the final rule that reduces the cost of the final rule on all businesses, including small businesses, and clarifies the employer and employee notice requirements. The Department has also provided additional guidance on the medical certification provisions in the final rule. However, for the reasons discussed in the preamble the Department has not narrowed the definition of serious health condition, nor increased the minimum increment of intermittent leave as recommended by SBA. In response to the SBA's Section 610 review recommendation, the Department notes that during this rulemaking it did consider whether the FMLA rule should be continued without change, or should be amended or rescinded, consistent with the stated objectives of the statute, to minimize any significant economic impact of the rules upon a substantial number of small entities. Specifically, the Department considered the following factors during this rulemaking: (1) The continued need for the rule; (2) the nature of complaints or comments received concerning the rule from the public; (3) the complexity of the rule; (4) the extent to which the rule overlaps, duplicates, or conflicts with other Federal rules, and, to the extent feasible, with State and local government rules; and (5) the length of time since the rule was published in 1995, and the degree to which technology, economic conditions, and case law has changed. However, because the new military leave provisions could impose a cost on some small entities, the Department is committed to conducting a complete Section 610 review of the FMLA at the appropriate time.

Consequently, the Department has certified to the Chief Counsel for Advocacy of the Small Business Administration that this final rule will not have a significant economic impact on a substantial number of small entities within the meaning of the Regulatory Flexibility Act, and therefore, a regulatory flexibility analysis is not required for this rule.

Executive Order 13132 (Federalism)

This rule does not have federalism implications as outlined in Executive Order 13132 regarding federalism. The rule does not have substantial direct effects on the states, on the relationship between the national government and the states, or on the distribution of power and responsibilities among the various levels of government.

Executive Order 13175, Indian Tribal Governments

This rule was reviewed under the terms of Executive Order 13175 and determined not to have ''tribal implications.'' The rule does not have ''substantial direct effects on one or more Indian tribes, on the relationship between the federal government and Indian tribes, or on the distribution of power and responsibilities between the federal government and Indian tribes.'' As a result, no tribal summary impact statement was prepared.

Effects on Families

The final rule was assessed as required by section 654 of the Treasury and General Government Appropriations Act, 1999, and the Department has determined that it will not adversely affect the well-being of a significant number of families. As discussed in the preamble, the Department expects a large portion of the cost of the final rule to be paid by the employee's health insurance, some

temporary employment agency, then the employer would be covered by the FMLA.

[41] The Department of Labor based these estimates on the Westat 2000 establishment survey data.

of which is financed by employers. As previously noted, according to the Bureau of Labor Statistics, 2007 National Compensation Survey, 90 percent of establishments with 50 or more employees offer health care benefits, and 81 percent of workers in those establishments have access to those health care benefits. Further, employers with 50 or more employees paid for 81 percent of health insurance premiums for single coverage, and 73 percent for family coverage. *Id.* at 7952–53.

Executive Order 13045, Protection of Children

Executive Order 13045, dated April 23, 1997 (62 FR 19885), applies to any rule that (1) is determined to be ''economically significant'' as defined in Executive Order 12866, and (2) concerns an environmental health or safety risk that the promulgating agency has reason to believe may have a disproportionate effect on children. This rule is not subject to Executive Order 13045 because, although the rule addresses family and medical leave provisions of the FMLA including the rights of employees to take leave for the birth or adoption of a child and to care for a healthy newborn or adopted child, and to take leave to care for a son or daughter with a serious health condition, it does not concern environmental health or safety risks that may disproportionately affect children.

Environmental Impact Assessment

The Department reviewed this rule in accordance with the requirements of the National Environmental Policy Act of 1969 (NEPA), 42 U.S.C. 4321 *et seq.*; the regulations of the Council on Environmental Quality, 40 CFR 1500 *et seq.*; and the Departmental NEPA procedures, 29 CFR part 11, and found that the rule will not have a significant impact on the quality of the human environment. Thus, no environmental assessment or environmental impact statement was prepared.

Executive Order 13211, Energy Supply

This rule is not subject to Executive Order 13211. It will not have a significant adverse effect on the supply, distribution or use of energy.

Executive Order 12630, Constitutionally Protected Property Rights

This rule is not subject to Executive Order 12630, because it does not involve implementation of a policy ''that has takings implications'' or that could impose limitations on private property use.

Executive Order 12988, Civil Justice Reform Analysis

This rule was drafted and reviewed in accordance with Executive Order 12988 and will not unduly burden the federal court system. The rule was: (1) Reviewed to eliminate drafting errors and ambiguities; (2) written to minimize litigation; and (3) written to provide a clear legal standard for affected conduct and to promote burden reduction.

List of Subjects in 29 CFR Part 825

Employee benefit plans, Health, Health insurance, Labor management relations, Maternal and child health, Teachers.

Signed at Washington, DC, this 4th day of November 2008.

Victoria A. Lipnic,

Assistant Secretary, Employment Standards Administration.

Alexander J. Passantino,

Acting Administrator, Wage and Hour Division.

■ For the reasons set out in the preamble, Title 29, Chapter V of the Code of Federal Regulations is amended revising Part 825 to read as follows:

PART 825—THE FAMILY AND MEDICAL LEAVE ACT OF 1993

Subpart A—Coverage Under the Family and Medical Leave Act

Sec.
825.100 The Family and Medical Leave Act.
825.101 Purpose of the Act.
825.102 [Reserved]
825.103 [Reserved]
825.104 Covered employer.
825.105 Counting employees for determining coverage.
825.106 Joint employer coverage.
825.107 Successor in interest coverage.
825.108 Public agency coverage.
825.109 Federal agency coverage.
825.110 Eligible employee.
825.111 Determining whether 50 employees are employed within 75 miles.
825.112 Qualifying reasons for leave, general rule.
825.113 Serious health condition.
825.114 Inpatient care.
825.115 Continuing treatment.
825.116 [Reserved]
825.117 [Reserved]
825.118 [Reserved]
825.119 Leave for treatment of substance abuse.
825.120 Leave for pregnancy or birth.
825.121 Leave for adoption or foster care.
825.122 Definitions of spouse, parent, son or daughter, next of kin of a covered servicemember, adoption, foster care, son or daughter on active duty or call to active duty status, son or daughter of a covered servicemember, and parent of a covered servicemember.
825.123 Unable to perform the functions of the position.
825.124 Needed to care for a family member or covered servicemember.
825.125 Definition of health care provider.
825.126 Leave because of a qualifying exigency.
825.127 Leave to care for a covered servicemember with a serious injury or illness.

Subpart B—Employee Leave Entitlements Under the Family and Medical Leave Act

825.200 Amount of leave.
825.201 Leave to care for a parent.
825.202 Intermittent leave or reduced leave schedule.
825.203 Scheduling of intermittent or reduced schedule leave.
825.204 Transfer of an employee to an alternative position during intermittent leave or reduced schedule leave.
825.205 Increments of FMLA leave for intermittent or reduced schedule leave.
825.206 Interaction with the FLSA.
825.207 Substitution of paid leave.
825.208 [Reserved]
825.209 Maintenance of employee benefits.
825.210 Employee payment of group health benefit premiums.
825.211 Maintenance of benefits under multi-employer health plans.
825.212 Employee failure to pay health plan premium payments.
825.213 Employer recovery of benefit costs.
825.214 Employee right to reinstatement.
825.215 Equivalent position.
825.216 Limitations on an employee's right to reinstatement.
825.217 Key employee, general rule.
825.218 Substantial and grievous economic injury.
825.219 Rights of a key employee.
825.220 Protection for employees who request leave or otherwise assert FMLA rights.

Subpart C—Employee and Employer Rights and Obligations Under the Act

825.300 Employer notice requirements.
825.301 Designation of FMLA leave.
825.302 Employee notice requirements for foreseeable FMLA leave.
825.303 Employee notice requirements for unforeseeable FMLA leave.
825.304 Employee failure to provide notice.
825.305 Certification, general rule.
825.306 Content of medical certification for leave taken because of an employee's own serious health condition or the serious health condition of a family member.
825.307 Authentication and clarification of medical certification for leave taken because of an employee's own serious health condition or the serious health condition of a family member; second and third opinions.
825.308 Recertifications for leave taken because of an employee's own serious health condition or the serious health condition of a family member.
825.309 Certification for leave taken because of a qualifying exigency.
825.310 Certification for leave taken to care for a covered servicemember (military caregiver leave).
825.311 Intent to return to work.

825.312 Fitness-for-duty certification.
825.313 Failure to provide certification.

Subpart D—Enforcement Mechanisms

825.400 Enforcement, general rules.
825.401 Filing a complaint with the Federal Government.
825.402 Violations of the posting requirement.
825.403 Appealing the assessment of a penalty for willful violation of the posting requirement.
825.404 Consequences for an employer when not paying the penalty assessment after a final order is issued.

Subpart E—Record-Keeping Requirements

825.500 Record-keeping requirements.

Subpart F—Special Rules Applicable to Employees of Schools

825.600 Special rules for school employees, definitions.
825.601 Special rules for school employees, limitations on intermittent leave.
825.602 Special rules for school employees, limitations on leave near the end of an academic term.
825.603 Special rules for school employees, duration of FMLA leave.
825.604 Special rules for school employees, restoration to ''an equivalent position.''

Subpart G—Effect of Other Laws, Employer Practices, and Collective Bargaining Agreements on Employee Rights Under FMLA

825.700 Interaction with employer's policies.
825.701 Interaction with State laws.
825.702 Interaction with Federal and State anti-discrimination laws.

Subpart H—Definitions

825.800 Definitions.

Appendix A to Part 825—Index [Reserved]

Appendix B to Part 825—Certification of Health Care Provider (Forms WH–380E & WH–380F)

Appendix C to Part 825—Notice to Employees Of Rights Under FMLA (WH Publication 1420)

Appendix D to Part 825—Notice of Eligibility and Rights & Responsibilities (Form WH–381)

Appendix E to Part 825—Designation Notice to Employee of FMLA Leave (Form WH–382)

Appendix F to Part 825—[Reserved]

Appendix G to Part 825—Certification of Qualifying Exigency for Military Family Leave (Form WH–384)

Appendix H to Part 825—Certification for Serious Injury or Illness of Covered Servicemember for Military Family Leave (Form WH–385)

Authority: 29 U.S.C. 2654.

Subpart A—Coverage Under the Family and Medical Leave Act

§ 825.100 The Family and Medical Leave Act.

(a) The Family and Medical Leave Act of 1993, as amended, (FMLA or Act) allows ''eligible'' employees of a covered employer to take job-protected, unpaid leave, or to substitute appropriate paid leave if the employee has earned or accrued it, for up to a total of 12 workweeks in any 12 months (*see* § 825.200(b)) because of the birth of a child and to care for the newborn child, because of the placement of a child with the employee for adoption or foster care, because the employee is needed to care for a family member (child, spouse, or parent) with a serious health condition, because the employee's own serious health condition makes the employee unable to perform the functions of his or her job, or because of any qualifying exigency arising out of the fact that the employee's spouse, son, daughter, or parent is a covered military member on active duty (or has been notified of an impending call or order to active duty) in support of a contingency operation. In addition, ''eligible'' employees of a covered employer may take job-protected, unpaid leave, or substitute appropriate paid leave if the employee has earned or accrued it, for up to a total of 26 workweeks in a ''single 12-month period'' to care for a covered servicemember with a serious injury or illness (*see* § 825.127(c)). In certain cases, FMLA leave may be taken on an intermittent basis rather than all at once, or the employee may work a part-time schedule.

(b) An employee on FMLA leave is also entitled to have health benefits maintained while on leave as if the employee had continued to work instead of taking the leave. If an employee was paying all or part of the premium payments prior to leave, the employee would continue to pay his or her share during the leave period. The employer may recover its share only if the employee does not return to work for a reason other than the serious health condition of the employee or the employee's covered family member, the serious injury or illness of a covered servicemember, or another reason beyond the employee's control.

(c) An employee generally has a right to return to the same position or an equivalent position with equivalent pay, benefits, and working conditions at the conclusion of the leave. The taking of FMLA leave cannot result in the loss of any benefit that accrued prior to the start of the leave.

(d) The employer generally has a right to advance notice from the employee. In addition, the employer may require an employee to submit certification to substantiate that the leave is due to the serious health condition of the employee or the employee's covered family member, due to the serious injury or illness of a covered servicemember, or because of a qualifying exigency. Failure to comply with these requirements may result in a delay in the start of FMLA leave. Pursuant to a uniformly applied policy, the employer may also require that an employee present a certification of fitness to return to work when the absence was caused by the employee's serious health condition (*see* §§ 825.312 and 825.313). The employer may delay restoring the employee to employment without such certificate relating to the health condition which caused the employee's absence.

§ 825.101 Purpose of the Act.

(a) FMLA is intended to allow employees to balance their work and family life by taking reasonable unpaid leave for medical reasons, for the birth or adoption of a child, for the care of a child, spouse, or parent who has a serious health condition, for the care of a covered servicemember with a serious injury or illness, or because of a qualifying exigency arising out of the fact that the employee's spouse, son, daughter, or parent is on active duty or call to active duty status in support of a contingency operation. The Act is intended to balance the demands of the workplace with the needs of families, to promote the stability and economic security of families, and to promote national interests in preserving family integrity. It was intended that the Act accomplish these purposes in a manner that accommodates the legitimate interests of employers, and in a manner consistent with the Equal Protection Clause of the Fourteenth Amendment in minimizing the potential for employment discrimination on the basis of sex, while promoting equal employment opportunity for men and women.

(b) The FMLA was predicated on two fundamental concerns—the needs of the American workforce, and the development of high-performance organizations. Increasingly, America's children and elderly are dependent upon family members who must spend long hours at work. When a family emergency arises, requiring workers to attend to seriously-ill children or parents, or to newly-born or adopted infants, or even to their own serious illness, workers need reassurance that

they will not be asked to choose between continuing their employment, and meeting their personal and family obligations or tending to vital needs at home.

(c) The FMLA is both intended and expected to benefit employers as well as their employees. A direct correlation exists between stability in the family and productivity in the workplace. FMLA will encourage the development of high-performance organizations. When workers can count on durable links to their workplace they are able to make their own full commitments to their jobs. The record of hearings on family and medical leave indicate the powerful productive advantages of stable workplace relationships, and the comparatively small costs of guaranteeing that those relationships will not be dissolved while workers attend to pressing family health obligations or their own serious illness.

§ 825.102 [Reserved]

§ 825.103 [Reserved]

§ 825.104 Covered employer.

(a) An employer covered by FMLA is any person engaged in commerce or in any industry or activity affecting commerce, who employs 50 or more employees for each working day during each of 20 or more calendar workweeks in the current or preceding calendar year. Employers covered by FMLA also include any person acting, directly or indirectly, in the interest of a covered employer to any of the employees of the employer, any successor in interest of a covered employer, and any public agency. Public agencies are covered employers without regard to the number of employees employed. Public as well as private elementary and secondary schools are also covered employers without regard to the number of employees employed. (*See* § 825.600.)

(b) The terms ''commerce'' and ''industry affecting commerce'' are defined in accordance with section 501(1) and (3) of the Labor Management Relations Act of 1947 (LMRA) (29 U.S.C. 142 (1) and (3)), as set forth in the definitions at § 825.800 of this part. For purposes of the FMLA, employers who meet the 50-employee coverage test are deemed to be engaged in commerce or in an industry or activity affecting commerce.

(c) Normally the legal entity which employs the employee is the employer under FMLA. Applying this principle, a corporation is a single employer rather than its separate establishments or divisions.

(1) Where one corporation has an ownership interest in another corporation, it is a separate employer unless it meets the ''joint employment'' test discussed in § 825.106, or the ''integrated employer'' test contained in paragraph (c)(2) of this section.

(2) Separate entities will be deemed to be parts of a single employer for purposes of FMLA if they meet the ''integrated employer'' test. Where this test is met, the employees of all entities making up the integrated employer will be counted in determining employer coverage and employee eligibility. A determination of whether or not separate entities are an integrated employer is not determined by the application of any single criterion, but rather the entire relationship is to be reviewed in its totality. Factors considered in determining whether two or more entities are an integrated employer include:

(i) Common management;

(ii) Interrelation between operations;

(iii) Centralized control of labor relations; and

(iv) Degree of common ownership/financial control.

(d) An ''employer'' includes any person who acts directly or indirectly in the interest of an employer to any of the employer's employees. The definition of ''employer'' in section 3(d) of the Fair Labor Standards Act (FLSA), 29 U.S.C. 203(d), similarly includes any person acting directly or indirectly in the interest of an employer in relation to an employee. As under the FLSA, individuals such as corporate officers ''acting in the interest of an employer'' are individually liable for any violations of the requirements of FMLA.

§ 825.105 Counting employees for determining coverage.

(a) The definition of ''employ'' for purposes of FMLA is taken from the Fair Labor Standards Act, § 3(g), 29 U.S.C. 203(g). The courts have made it clear that the employment relationship under the FLSA is broader than the traditional common law concept of master and servant. The difference between the employment relationship under the FLSA and that under the common law arises from the fact that the term ''employ'' as defined in the Act includes ''to suffer or permit to work.'' The courts have indicated that, while ''to permit'' requires a more positive action than ''to suffer,'' both terms imply much less positive action than required by the common law. Mere knowledge by an employer of work done for the employer by another is sufficient to create the employment relationship under the Act. The courts have said that there is no definition that solves all problems as to the limitations of the employer-employee relationship under the Act; and that determination of the relation cannot be based on ''isolated factors'' or upon a single characteristic or ''technical concepts,'' but depends ''upon the circumstances of the whole activity'' including the underlying ''economic reality.'' In general an employee, as distinguished from an independent contractor who is engaged in a business of his/her own, is one who ''follows the usual path of an employee'' and is dependent on the business which he/she serves.

(b) Any employee whose name appears on the employer's payroll will be considered employed each working day of the calendar week, and must be counted whether or not any compensation is received for the week. However, the FMLA applies only to employees who are employed within any State of the United States, the District of Columbia or any Territory or possession of the United States. Employees who are employed outside these areas are not counted for purposes of determining employer coverage or employee eligibility.

(c) Employees on paid or unpaid leave, including FMLA leave, leaves of absence, disciplinary suspension, *etc.*, are counted as long as the employer has a reasonable expectation that the employee will later return to active employment. If there is no employer/employee relationship (as when an employee is laid off, whether temporarily or permanently) such individual is not counted. Part-time employees, like full-time employees, are considered to be employed each working day of the calendar week, as long as they are maintained on the payroll.

(d) An employee who does not begin to work for an employer until after the first working day of a calendar week, or who terminates employment before the last working day of a calendar week, is not considered employed on each working day of that calendar week.

(e) A private employer is covered if it maintained 50 or more employees on the payroll during 20 or more calendar workweeks (not necessarily consecutive workweeks) in either the current or the preceding calendar year.

(f) Once a private employer meets the 50 employees/20 workweeks threshold, the employer remains covered until it reaches a future point where it no longer has employed 50 employees for 20 (nonconsecutive) workweeks in the current and preceding calendar year. For example, if an employer who met the 50 employees/20 workweeks test in the calendar year as of September 1, 2008, subsequently dropped below 50

employees before the end of 2008 and continued to employ fewer than 50 employees in all workweeks throughout calendar year 2009, the employer would continue to be covered throughout calendar year 2009 because it met the coverage criteria for 20 workweeks of the preceding (*i.e.*, 2008) calendar year.

§ 825.106 Joint employer coverage.

(a) Where two or more businesses exercise some control over the work or working conditions of the employee, the businesses may be joint employers under FMLA. Joint employers may be separate and distinct entities with separate owners, managers, and facilities. Where the employee performs work which simultaneously benefits two or more employers, or works for two or more employers at different times during the workweek, a joint employment relationship generally will be considered to exist in situations such as:

(1) Where there is an arrangement between employers to share an employee's services or to interchange employees;

(2) Where one employer acts directly or indirectly in the interest of the other employer in relation to the employee; or,

(3) Where the employers are not completely disassociated with respect to the employee's employment and may be deemed to share control of the employee, directly or indirectly, because one employer controls, is controlled by, or is under common control with the other employer.

(b)(1) A determination of whether or not a joint employment relationship exists is not determined by the application of any single criterion, but rather the entire relationship is to be viewed in its totality. For example, joint employment will ordinarily be found to exist when a temporary placement agency supplies employees to a second employer.

(2) A type of company that is often called a ''Professional Employer Organization'' (PEO) contracts with client employers to perform administrative functions such as payroll, benefits, regulatory paperwork, and updating employment policies. The determination of whether a PEO is a joint employer also turns on the economic realities of the situation and must be based upon all the facts and circumstances. A PEO does not enter into a joint employment relationship with the employees of its client companies when it merely performs such administrative functions. On the other hand, if in a particular fact situation, a PEO has the right to hire, fire, assign, or direct and control the client's employees, or benefits from the work that the employees perform, such rights may lead to a determination that the PEO would be a joint employer with the client employer, depending upon all the facts and circumstances.

(c) In joint employment relationships, only the primary employer is responsible for giving required notices to its employees, providing FMLA leave, and maintenance of health benefits. Factors considered in determining which is the ''primary'' employer include authority/responsibility to hire and fire, assign/place the employee, make payroll, and provide employment benefits. For employees of temporary placement agencies, for example, the placement agency most commonly would be the primary employer. Where a PEO is a joint employer, the client employer most commonly would be the primary employer.

(d) Employees jointly employed by two employers must be counted by both employers, whether or not maintained on one of the employer's payroll, in determining employer coverage and employee eligibility. For example, an employer who jointly employs 15 workers from a temporary placement agency and 40 permanent workers is covered by FMLA. (A special rule applies to employees jointly employed who physically work at a facility of the secondary employer for a period of at least one year. *See* § 825.111(a)(3).) An employee on leave who is working for a secondary employer is considered employed by the secondary employer, and must be counted for coverage and eligibility purposes, as long as the employer has a reasonable expectation that that employee will return to employment with that employer. In those cases in which a PEO is determined to be a joint employer of a client employer's employees, the client employer would only be required to count employees of the PEO (or employees of other clients of the PEO) if the client employer jointly employed those employees.

(e) Job restoration is the primary responsibility of the primary employer. The secondary employer is responsible for accepting the employee returning from FMLA leave in place of the replacement employee if the secondary employer continues to utilize an employee from the temporary placement agency, and the agency chooses to place the employee with the secondary employer. A secondary employer is also responsible for compliance with the prohibited acts provisions with respect to its jointly employed employees, whether or not the secondary employer is covered by FMLA. *See* § 825.220(a). The prohibited acts include prohibitions against interfering with an employee's attempt to exercise rights under the Act, or discharging or discriminating against an employee for opposing a practice which is unlawful under FMLA. A covered secondary employer will be responsible for compliance with all the provisions of the FMLA with respect to its regular, permanent workforce.

§ 825.107 Successor in interest coverage.

(a) For purposes of FMLA, in determining whether an employer is covered because it is a ''successor in interest'' to a covered employer, the factors used under Title VII of the Civil Rights Act and the Vietnam Era Veterans' Adjustment Act will be considered. However, unlike Title VII, whether the successor has notice of the employee's claim is not a consideration. Notice may be relevant, however, in determining successor liability for violations of the predecessor. The factors to be considered include:

(1) Substantial continuity of the same business operations;

(2) Use of the same plant;

(3) Continuity of the work force;

(4) Similarity of jobs and working conditions;

(5) Similarity of supervisory personnel;

(6) Similarity in machinery, equipment, and production methods;

(7) Similarity of products or services; and

(8) The ability of the predecessor to provide relief.

(b) A determination of whether or not a ''successor in interest'' exists is not determined by the application of any single criterion, but rather the entire circumstances are to be viewed in their totality.

(c) When an employer is a ''successor in interest,'' employees' entitlements are the same as if the employment by the predecessor and successor were continuous employment by a single employer. For example, the successor, whether or not it meets FMLA coverage criteria, must grant leave for eligible employees who had provided appropriate notice to the predecessor, or continue leave begun while employed by the predecessor, including maintenance of group health benefits during the leave and job restoration at the conclusion of the leave. A successor which meets FMLA's coverage criteria must count periods of employment and hours worked for the predecessor for purposes of determining employee eligibility for FMLA leave.

§ 825.108 Public agency coverage.

(a) An ''employer'' under FMLA includes any ''public agency,'' as defined in section 3(x) of the Fair Labor Standards Act, 29 U.S.C. 203(x). Section 3(x) of the FLSA defines ''public agency'' as the government of the United States; the government of a State or political subdivision of a State; or an agency of the United States, a State, or a political subdivision of a State, or any interstate governmental agency. ''State'' is further defined in Section 3(c) of the FLSA to include any State of the United States, the District of Columbia, or any Territory or possession of the United States.

(b) The determination of whether an entity is a ''public'' agency, as distinguished from a private employer, is determined by whether the agency has taxing authority, or whether the chief administrative officer or board, *etc.,* is elected by the voters-at-large or their appointment is subject to approval by an elected official.

(c)(1) A State or a political subdivision of a State constitutes a single public agency and, therefore, a single employer for purposes of determining employee eligibility. For example, a State is a single employer; a county is a single employer; a city or town is a single employer. Whether two agencies of the same State or local government constitute the same public agency can only be determined on a case-by-case basis. One factor that would support a conclusion that two agencies are separate is whether they are treated separately for statistical purposes in the Census of Governments issued by the Bureau of the Census, U.S. Department of Commerce.

(2) The Census Bureau takes a census of governments at 5-year intervals. Volume I, Government Organization, contains the official counts of the number of State and local governments. It includes tabulations of governments by State, type of government, size, and county location. Also produced is a universe list of governmental units, classified according to type of government. Copies of Volume I, Government Organization, and subsequent volumes are available from the Superintendent of Documents, U.S. Government Printing Office, Washington, DC 20402, U.S. Department of Commerce District Offices, or can be found in Regional and selective depository libraries, or online at *http://www.census.gov/govs/www/index.html*. For a list of all depository libraries, write to the Government Printing Office, 710 N. Capitol St., NW., Washington, DC 20402.

(d) All public agencies are covered by the FMLA regardless of the number of employees; they are not subject to the coverage threshold of 50 employees carried on the payroll each day for 20 or more weeks in a year. However, employees of public agencies must meet all of the requirements of eligibility, including the requirement that the employer (*e.g.*, State) employ 50 employees at the worksite or within 75 miles.

§ 825.109 Federal agency coverage.

(a) Most employees of the government of the United States, if they are covered by the FMLA, are covered under Title II of the FMLA (incorporated in Title V, Chapter 63, Subchapter 5 of the United States Code) which is administered by the U.S. Office of Personnel Management (OPM). OPM has separate regulations at 5 CFR Part 630, Subpart L. Employees of the Government Printing Office are covered by Title II. While employees of the Government Accountability Office and the Library of Congress are covered by Title I of the FMLA, the Comptroller General of the United States and the Librarian of Congress, respectively, have responsibility for the administration of the FMLA with respect to these employees. Other legislative branch employees, such as employees of the Senate and House of Representatives, are covered by the Congressional Accountability Act of 1995, 2 U.S.C. 1301.

(b) The Federal Executive Branch employees within the jurisdiction of this part 825 include:

(1) Employees of the Postal Service;

(2) Employees of the Postal Regulatory Commission;

(3) A part-time employee who does not have an established regular tour of duty during the administrative workweek; and,

(4) An employee serving under an intermittent appointment or temporary appointment with a time limitation of one year or less.

(c) Employees of other Federal executive agencies are also covered by this part 825 if they are not covered by Title II of FMLA.

(d) Employees of the judicial branch of the United States are covered by these regulations only if they are employed in a unit which has employees in the competitive service. For example, employees of the U.S. Tax Court are covered by this part 825.

(e) For employees covered by these regulations, the U.S. Government constitutes a single employer for purposes of determining employee eligibility. These employees must meet all of the requirements for eligibility, including the requirement that the Federal Government employ 50 employees at the worksite or within 75 miles.

§ 825.110 Eligible employee.

(a) An ''eligible employee'' is an employee of a covered employer who:

(1) Has been employed by the employer for at least 12 months, and

(2) Has been employed for at least 1,250 hours of service during the 12-month period immediately preceding the commencement of the leave, and

(3) Is employed at a worksite where 50 or more employees are employed by the employer within 75 miles of that worksite. (*See* § 825.105(b) regarding employees who work outside the U.S.)

(b) The 12 months an employee must have been employed by the employer need not be consecutive months, *provided*

(1) Subject to the exceptions provided in paragraph (b)(2) of this section, employment periods prior to a break in service of seven years or more need not be counted in determining whether the employee has been employed by the employer for at least 12 months.

(2) Employment periods preceding a break in service of more than seven years must be counted in determining whether the employee has been employed by the employer for at least 12 months where:

(i) The employee's break in service is occasioned by the fulfillment of his or her National Guard or Reserve military service obligation. The time served performing the military service must be also counted in determining whether the employee has been employed for at least 12 months by the employer. However, this section does not provide any greater entitlement to the employee than would be available under the Uniformed Services Employment and Reemployment Rights Act (USERRA), 38 U.S.C. 4301, *et seq.*; or

(ii) A written agreement, including a collective bargaining agreement, exists concerning the employer's intention to rehire the employee after the break in service (*e.g.*, for purposes of the employee furthering his or her education or for childrearing purposes).

(3) If an employee is maintained on the payroll for any part of a week, including any periods of paid or unpaid leave (sick, vacation) during which other benefits or compensation are provided by the employer (*e.g.*, workers' compensation, group health plan benefits, *etc.*), the week counts as a week of employment. For purposes of determining whether intermittent/occasional/casual employment qualifies

as ''at least 12 months,'' 52 weeks is deemed to be equal to 12 months.

(4) Nothing in this section prevents employers from considering employment prior to a continuous break in service of more than seven years when determining whether an employee has met the 12-month employment requirement. However, if an employer chooses to recognize such prior employment, the employer must do so uniformly, with respect to all employees with similar breaks in service.

(c)(1) Except as provided in paragraph (c)(2) of this section, whether an employee has worked the minimum 1,250 hours of service is determined according to the principles established under the Fair Labor Standards Act (FLSA) for determining compensable hours of work. (*See* 29 CFR part 785). The determining factor is the number of hours an employee has worked for the employer within the meaning of the FLSA. The determination is not limited by methods of recordkeeping, or by compensation agreements that do not accurately reflect all of the hours an employee has worked for or been in service to the employer. Any accurate accounting of actual hours worked under FLSA's principles may be used.

(2) Pursuant to USERRA, an employee returning from fulfilling his or her National Guard or Reserve military obligation shall be credited with the hours of service that would have been performed *but for* the period of military service in determining whether the employee worked the 1,250 hours of service. Accordingly, a person reemployed following military service has the hours that would have been worked for the employer added to any hours actually worked during the previous 12-month period to meet the 1,250 hour requirement. In order to determine the hours that would have been worked during the period of military service, the employee's pre-service work schedule can generally be used for calculations.

(3) In the event an employer does not maintain an accurate record of hours worked by an employee, including for employees who are exempt from FLSA's requirement that a record be kept of their hours worked (*e.g.*, bona fide executive, administrative, and professional employees as defined in FLSA Regulations, 29 CFR part 541), the employer has the burden of showing that the employee has not worked the requisite hours. An employer must be able to clearly demonstrate, for example, that full-time teachers (*see* § 825.800 for definition) of an elementary or secondary school system, or institution of higher education, or other educational establishment or institution (who often work outside the classroom or at their homes) did not work 1,250 hours during the previous 12 months in order to claim that the teachers are not eligible for FMLA leave.

(d) The determination of whether an employee has worked for the employer for at least 1,250 hours in the past 12 months and has been employed by the employer for a total of at least 12 months must be made as of the date the FMLA leave is to start. An employee may be on ''non-FMLA leave'' at the time he or she meets the eligibility requirements, and in that event, any portion of the leave taken for an FMLA-qualifying reason after the employee meets the eligibility requirement would be ''FMLA leave.'' (*See* § 825.300(b) for rules governing the content of the eligibility notice given to employees.)

(e) Whether 50 employees are employed within 75 miles to ascertain an employee's eligibility for FMLA benefits is determined when the employee gives notice of the need for leave. Whether the leave is to be taken at one time or on an intermittent or reduced leave schedule basis, once an employee is determined eligible in response to that notice of the need for leave, the employee's eligibility is not affected by any subsequent change in the number of employees employed at or within 75 miles of the employee's worksite, for that specific notice of the need for leave. Similarly, an employer may not terminate employee leave that has already started if the employee-count drops below 50. For example, if an employer employs 60 employees in August, but expects that the number of employees will drop to 40 in December, the employer must grant FMLA benefits to an otherwise eligible employee who gives notice of the need for leave in August for a period of leave to begin in December.

§ 825.111 Determining whether 50 employees are employed within 75 miles.

(a) Generally, a worksite can refer to either a single location or a group of contiguous locations. Structures which form a campus or industrial park, or separate facilities in proximity with one another, may be considered a single site of employment. On the other hand, there may be several single sites of employment within a single building, such as an office building, if separate employers conduct activities within the building. For example, an office building with 50 different businesses as tenants will contain 50 sites of employment. The offices of each employer will be considered separate sites of employment for purposes of FMLA. An employee's worksite under FMLA will ordinarily be the site the employee reports to or, if none, from which the employee's work is assigned.

(1) Separate buildings or areas which are not directly connected or in immediate proximity are a single worksite if they are in reasonable geographic proximity, are used for the same purpose, and share the same staff and equipment. For example, if an employer manages a number of warehouses in a metropolitan area but regularly shifts or rotates the same employees from one building to another, the multiple warehouses would be a single worksite.

(2) For employees with no fixed worksite, *e.g.*, construction workers, transportation workers (*e.g.*, truck drivers, seamen, pilots), salespersons, *etc.*, the ''worksite'' is the site to which they are assigned as their home base, from which their work is assigned, or to which they report. For example, if a construction company headquartered in New Jersey opened a construction site in Ohio, and set up a mobile trailer on the construction site as the company's on-site office, the construction site in Ohio would be the worksite for any employees hired locally who report to the mobile trailer/company office daily for work assignments, *etc.* If that construction company also sent personnel such as job superintendents, foremen, engineers, an office manager, *etc.*, from New Jersey to the job site in Ohio, those workers sent from New Jersey continue to have the headquarters in New Jersey as their ''worksite.'' The workers who have New Jersey as their worksite would not be counted in determining eligibility of employees whose home base is the Ohio worksite, but would be counted in determining eligibility of employees whose home base is New Jersey. For transportation employees, their worksite is the terminal to which they are assigned, report for work, depart, and return after completion of a work assignment. For example, an airline pilot may work for an airline with headquarters in New York, but the pilot regularly reports for duty and originates or begins flights from the company's facilities located in an airport in Chicago and returns to Chicago at the completion of one or more flights to go off duty. The pilot's worksite is the facility in Chicago. An employee's personal residence is not a worksite in the case of employees, such as salespersons, who travel a sales territory and who generally leave to work and return from work to their personal residence, or employees who work at home, as under the concept of flexiplace or telecommuting. Rather,

their worksite is the office to which they report and from which assignments are made.

(3) For purposes of determining that employee's eligibility, when an employee is jointly employed by two or more employers (*see* § 825.106), the employee's worksite is the primary employer's office from which the employee is assigned or reports, unless the employee has physically worked for at least one year at a facility of a secondary employer, in which case the employee's worksite is that location. The employee is also counted by the secondary employer to determine eligibility for the secondary employer's full-time or permanent employees.

(b) The 75-mile distance is measured by surface miles, using surface transportation over public streets, roads, highways and waterways, by the shortest route from the facility where the employee needing leave is employed. Absent available surface transportation between worksites, the distance is measured by using the most frequently utilized mode of transportation (*e.g.*, airline miles).

(c) The determination of how many employees are employed within 75 miles of the worksite of an employee is based on the number of employees maintained on the payroll. Employees of educational institutions who are employed permanently or who are under contract are ''maintained on the payroll'' during any portion of the year when school is not in session. *See* § 825.105(c).

§ 825.112 Qualifying reasons for leave, general rule.

(a) *Circumstances qualifying for leave.* Employers covered by FMLA are required to grant leave to eligible employees:

(1) For birth of a son or daughter, and to care for the newborn child (*see* § 825.120);

(2) For placement with the employee of a son or daughter for adoption or foster care (*see* § 825.121);

(3) To care for the employee's spouse, son, daughter, or parent with a serious health condition (*see* §§ 825.113 and 825.122);

(4) Because of a serious health condition that makes the employee unable to perform the functions of the employee's job (*see* §§ 825.113 and 825.123);

(5) Because of any qualifying exigency arising out of the fact that the employee's spouse, son, daughter, or parent is a covered military member on active duty (or has been notified of an impending call or order to active duty) in support of a contingency operation (*see* §§ 825.122 and 825.126); and

(6) To care for a covered servicemember with a serious injury or illness if the employee is the spouse, son, daughter, parent, or next of kin of the servicemember (*see* §§ 825.122 and 825.127).

(b) *Equal application.* The right to take leave under FMLA applies equally to male and female employees. A father, as well as a mother, can take family leave for the birth, placement for adoption, or foster care of a child.

(c) *Active employee.* In situations where the employer/employee relationship has been interrupted, such as an employee who has been on layoff, the employee must be recalled or otherwise be re-employed before being eligible for FMLA leave. Under such circumstances, an eligible employee is immediately entitled to further FMLA leave for a qualifying reason.

§ 825.113 Serious health condition.

(a) For purposes of FMLA, ''serious health condition'' entitling an employee to FMLA leave means an illness, injury, impairment or physical or mental condition that involves inpatient care as defined in § 825.114 or continuing treatment by a health care provider as defined in § 825.115.

(b) The term ''incapacity'' means inability to work, attend school or perform other regular daily activities due to the serious health condition, treatment therefore, or recovery therefrom.

(c) The term ''treatment'' includes (but is not limited to) examinations to determine if a serious health condition exists and evaluations of the condition. Treatment does not include routine physical examinations, eye examinations, or dental examinations. A regimen of continuing treatment includes, for example, a course of prescription medication (*e.g.*, an antibiotic) or therapy requiring special equipment to resolve or alleviate the health condition (*e.g.*, oxygen). A regimen of continuing treatment that includes the taking of over-the-counter medications such as aspirin, antihistamines, or salves; or bed-rest, drinking fluids, exercise, and other similar activities that can be initiated without a visit to a health care provider, is not, by itself, sufficient to constitute a regimen of continuing treatment for purposes of FMLA leave.

(d) Conditions for which cosmetic treatments are administered (such as most treatments for acne or plastic surgery) are not ''serious health conditions'' unless inpatient hospital care is required or unless complications develop. Ordinarily, unless complications arise, the common cold, the flu, ear aches, upset stomach, minor ulcers, headaches other than migraine, routine dental or orthodontia problems, periodontal disease, *etc.*, are examples of conditions that do not meet the definition of a serious health condition and do not qualify for FMLA leave. Restorative dental or plastic surgery after an injury or removal of cancerous growths are serious health conditions provided all the other conditions of this regulation are met. Mental illness or allergies may be serious health conditions, but only if all the conditions of this section are met.

§ 825.114 Inpatient care.

Inpatient care means an overnight stay in a hospital, hospice, or residential medical care facility, including any period of incapacity as defined in § 825.113(b), or any subsequent treatment in connection with such inpatient care.

§ 825.115 Continuing treatment.

A serious health condition involving continuing treatment by a health care provider includes any one or more of the following:

(a) *Incapacity and treatment.* A period of incapacity of more than three consecutive, full calendar days, and any subsequent treatment or period of incapacity relating to the same condition, that also involves:

(1) Treatment two or more times, within 30 days of the first day of incapacity, unless extenuating circumstances exist, by a health care provider, by a nurse under direct supervision of a health care provider, or by a provider of health care services (*e.g.*, physical therapist) under orders of, or on referral by, a health care provider; or

(2) Treatment by a health care provider on at least one occasion, which results in a regimen of continuing treatment under the supervision of the health care provider.

(3) The requirement in paragraphs (a)(1) and (2) of this section for treatment by a health care provider means an in-person visit to a health care provider. The first (or only) in-person treatment visit must take place within seven days of the first day of incapacity.

(4) Whether additional treatment visits or a regimen of continuing treatment is necessary within the 30-day period shall be determined by the health care provider.

(5) The term ''extenuating circumstances'' in paragraph (a)(1) of this section means circumstances beyond the employee's control that

prevent the follow-up visit from occurring as planned by the health care provider. Whether a given set of circumstances are extenuating depends on the facts. For example, extenuating circumstances exist if a health care provider determines that a second in-person visit is needed within the 30-day period, but the health care provider does not have any available appointments during that time period.

(b) *Pregnancy or prenatal care.* Any period of incapacity due to pregnancy, or for prenatal care. *See also* § 825.120.

(c) *Chronic conditions.* Any period of incapacity or treatment for such incapacity due to a chronic serious health condition. A chronic serious health condition is one which:

(1) Requires periodic visits (defined as at least twice a year) for treatment by a health care provider, or by a nurse under direct supervision of a health care provider;

(2) Continues over an extended period of time (including recurring episodes of a single underlying condition); and

(3) May cause episodic rather than a continuing period of incapacity (*e.g.*, asthma, diabetes, epilepsy, *etc.*).

(d) *Permanent or long-term conditions.* A period of incapacity which is permanent or long-term due to a condition for which treatment may not be effective. The employee or family member must be under the continuing supervision of, but need not be receiving active treatment by, a health care provider. Examples include Alzheimer's, a severe stroke, or the terminal stages of a disease.

(e) *Conditions requiring multiple treatments.* Any period of absence to receive multiple treatments (including any period of recovery therefrom) by a health care provider or by a provider of health care services under orders of, or on referral by, a health care provider, for:

(1) Restorative surgery after an accident or other injury; or

(2) A condition that would likely result in a period of incapacity of more than three consecutive, full calendar days in the absence of medical intervention or treatment, such as cancer (chemotherapy, radiation, *etc.*), severe arthritis (physical therapy), or kidney disease (dialysis).

(f) Absences attributable to incapacity under paragraph (b) or (c) of this section qualify for FMLA leave even though the employee or the covered family member does not receive treatment from a health care provider during the absence, and even if the absence does not last more than three consecutive, full calendar days. For example, an employee with asthma may be unable to report for work due to the onset of an asthma attack or because the employee's health care provider has advised the employee to stay home when the pollen count exceeds a certain level. An employee who is pregnant may be unable to report to work because of severe morning sickness.

§ 825.116 [Reserved]

§ 825.117 [Reserved]

§ 825.118 [Reserved]

§ 825.119 Leave for treatment of substance abuse.

(a) Substance abuse may be a serious health condition if the conditions of §§ 825.113 through 825.115 are met. However, FMLA leave may only be taken for treatment for substance abuse by a health care provider or by a provider of health care services on referral by a health care provider. On the other hand, absence because of the employee's use of the substance, rather than for treatment, does not qualify for FMLA leave.

(b) Treatment for substance abuse does not prevent an employer from taking employment action against an employee. The employer may not take action against the employee because the employee has exercised his or her right to take FMLA leave for treatment. However, if the employer has an established policy, applied in a non-discriminatory manner that has been communicated to all employees, that provides under certain circumstances an employee may be terminated for substance abuse, pursuant to that policy the employee may be terminated whether or not the employee is presently taking FMLA leave. An employee may also take FMLA leave to care for a covered family member who is receiving treatment for substance abuse. The employer may not take action against an employee who is providing care for a covered family member receiving treatment for substance abuse.

§ 825.120 Leave for pregnancy or birth.

(a) *General rules.* Eligible employees are entitled to FMLA leave for pregnancy or birth of a child as follows:

(1) Both the mother and father are entitled to FMLA leave for the birth of their child.

(2) Both the mother and father are entitled to FMLA leave to be with the healthy newborn child (*i.e.*, bonding time) during the 12-month period beginning on the date of birth. An employee's entitlement to FMLA leave for a birth expires at the end of the 12-month period beginning on the date of the birth. If state law allows, or the employer permits, bonding leave to be taken beyond this period, such leave will not qualify as FMLA leave. *See* § 825.701 regarding non-FMLA leave which may be available under applicable State laws. Under this section, both the mother and father are entitled to FMLA leave even if the newborn does not have a serious health condition.

(3) A husband and wife who are eligible for FMLA leave and are employed by the same covered employer may be limited to a combined total of 12 weeks of leave during any 12-month period if the leave is taken for birth of the employee's son or daughter or to care for the child after birth, for placement of a son or daughter with the employee for adoption or foster care or to care for the child after placement, or to care for the employee's parent with a serious health condition. This limitation on the total weeks of leave applies to leave taken for the reasons specified as long as a husband and wife are employed by the ''same employer.'' It would apply, for example, even though the spouses are employed at two different worksites of an employer located more than 75 miles from each other, or by two different operating divisions of the same company. On the other hand, if one spouse is ineligible for FMLA leave, the other spouse would be entitled to a full 12 weeks of FMLA leave. Where the husband and wife both use a portion of the total 12-week FMLA leave entitlement for either the birth of a child, for placement for adoption or foster care, or to care for a parent, the husband and wife would each be entitled to the difference between the amount he or she has taken individually and 12 weeks for FMLA leave for other purposes. For example, if each spouse took 6 weeks of leave to care for a healthy, newborn child, each could use an additional 6 weeks due to his or her own serious health condition or to care for a child with a serious health condition. Note, too, that many State pregnancy disability laws specify a period of disability either before or after the birth of a child; such periods would also be considered FMLA leave for a serious health condition of the mother, and would not be subject to the combined limit.

(4) The mother is entitled to FMLA leave for incapacity due to pregnancy, for prenatal care, or for her own serious health condition following the birth of the child. Circumstances may require that FMLA leave begin before the actual date of birth of a child. An expectant mother may take FMLA leave before the birth of the child for prenatal care or if

her condition makes her unable to work. The mother is entitled to leave for incapacity due to pregnancy even though she does not receive treatment from a health care provider during the absence, and even if the absence does not last for more than three consecutive calendar days. For example, a pregnant employee may be unable to report to work because of severe morning sickness.

(5) The husband is entitled to FMLA leave if needed to care for his pregnant spouse who is incapacitated or if needed to care for her during her prenatal care, or if needed to care for the spouse following the birth of a child if the spouse has a serious health condition. *See* § 825.124.

(6) Both the mother and father are entitled to FMLA leave if needed to care for a child with a serious health condition if the requirements of §§ 825.113 through 825.115 and 825.122(c) are met. Thus, a husband and wife may each take 12 weeks of FMLA leave if needed to care for their newborn child with a serious health condition, even if both are employed by the same employer, provided they have not exhausted their entitlements during the applicable 12-month FMLA leave period.

(b) *Intermittent and reduced schedule leave.* An eligible employee may use intermittent or reduced schedule leave after the birth to be with a healthy newborn child only if the employer agrees. For example, an employer and employee may agree to a part-time work schedule after the birth. If the employer agrees to permit intermittent or reduced schedule leave for the birth of a child, the employer may require the employee to transfer temporarily, during the period the intermittent or reduced leave schedule is required, to an available alternative position for which the employee is qualified and which better accommodates recurring periods of leave than does the employee's regular position. Transfer to an alternative position may require compliance with any applicable collective bargaining agreement, federal law (such as the Americans with Disabilities Act), and State law. Transfer to an alternative position may include altering an existing job to better accommodate the employee's need for intermittent or reduced leave. The employer's agreement is not required for intermittent leave required by the serious health condition of the mother or newborn child. *See* §§ 825.202 through 825.205 for general rules governing the use of intermittent and reduced schedule leave. *See* § 825.121 for rules governing leave for adoption or foster care. *See* § 825.601 for special rules applicable to instructional employees of schools.

§ 825.121 Leave for adoption or foster care.

(a) *General rules.* Eligible employees are entitled to FMLA leave for placement with the employee of a son or daughter for adoption or foster care as follows:

(1) Employees may take FMLA leave before the actual placement or adoption of a child if an absence from work is required for the placement for adoption or foster care to proceed. For example, the employee may be required to attend counseling sessions, appear in court, consult with his or her attorney or the doctor(s) representing the birth parent, submit to a physical examination, or travel to another country to complete an adoption. The source of an adopted child (*e.g.*, whether from a licensed placement agency or otherwise) is not a factor in determining eligibility for leave for this purpose.

(2) An employee's entitlement to leave for adoption or foster care expires at the end of the 12-month period beginning on the date of the placement. If state law allows, or the employer permits, leave for adoption or foster care to be taken beyond this period, such leave will not qualify as FMLA leave. *See* § 825.701 regarding non-FMLA leave which may be available under applicable State laws. Under this section, the employee is entitled to FMLA leave even if the adopted or foster child does not have a serious health condition.

(3) A husband and wife who are eligible for FMLA leave and are employed by the same covered employer may be limited to a combined total of 12 weeks of leave during any 12-month period if the leave is taken for the placement of the employee's son or daughter or to care for the child after placement, for the birth of the employee's son or daughter or to care for the child after birth, or to care for the employee's parent with a serious health condition. This limitation on the total weeks of leave applies to leave taken for the reasons specified as long as a husband and wife are employed by the ''same employer.'' It would apply, for example, even though the spouses are employed at two different worksites of an employer located more than 75 miles from each other, or by two different operating divisions of the same company. On the other hand, if one spouse is ineligible for FMLA leave, the other spouse would be entitled to a full 12 weeks of FMLA leave. Where the husband and wife both use a portion of the total 12-week FMLA leave entitlement for either the birth of a child, for placement for adoption or foster care, or to care for a parent, the husband and wife would each be entitled to the difference between the amount he or she has taken individually and 12 weeks for FMLA leave for other purposes. For example, if each spouse took 6 weeks of leave to care for a healthy, newly placed child, each could use an additional 6 weeks due to his or her own serious health condition or to care for a child with a serious health condition.

(4) An eligible employee is entitled to FMLA leave in order to care for an adopted or foster child with a serious health condition if the requirements of §§ 825.113 through 825.115 and 825.122(c) are met. Thus, a husband and wife may each take 12 weeks of FMLA leave if needed to care for an adopted or foster child with a serious health condition, even if both are employed by the same employer, provided they have not exhausted their entitlements during the applicable 12-month FMLA leave period.

(b) *Use of intermittent and reduced schedule leave.* An eligible employee may use intermittent or reduced schedule leave after the placement of a healthy child for adoption or foster care only if the employer agrees. Thus, for example, the employer and employee may agree to a part-time work schedule after the placement for bonding purposes. If the employer agrees to permit intermittent or reduced schedule leave for the placement for adoption or foster care, the employer may require the employee to transfer temporarily, during the period the intermittent or reduced leave schedule is required, to an available alternative position for which the employee is qualified and which better accommodates recurring periods of leave than does the employee's regular position. Transfer to an alternative position may require compliance with any applicable collective bargaining agreement, federal law (such as the Americans with Disabilities Act), and State law. Transfer to an alternative position may include altering an existing job to better accommodate the employee's need for intermittent or reduced leave. The employer's agreement is not required for intermittent leave required by the serious health condition of the adopted or foster child. *See* §§ 825.202 through 825.205 for general rules governing the use of intermittent and reduced schedule leave. *See* § 825.120 for general rules governing leave for pregnancy and birth of a child. *See*

§ 825.601 for special rules applicable to instructional employees of schools.

§ 825.122 Definitions of spouse, parent, son or daughter, next of kin of a covered servicemember, adoption, foster care, son or daughter on active duty or call to active duty status, son or daughter of a covered servicemember, and parent of a covered servicemember.

(a) *Spouse.* Spouse means a husband or wife as defined or recognized under State law for purposes of marriage in the State where the employee resides, including common law marriage in States where it is recognized.

(b) *Parent.* Parent means a biological, adoptive, step or foster father or mother, or any other individual who stood in loco parentis to the employee when the employee was a son or daughter as defined in paragraph (c) of this section. This term does not include parents ''in law.''

(c) *Son or daughter.* For purposes of FMLA leave taken for birth or adoption, or to care for a family member with a serious health condition, son or daughter means a biological, adopted, or foster child, a stepchild, a legal ward, or a child of a person standing in loco parentis, who is either under age 18, or age 18 or older and ''incapable of self-care because of a mental or physical disability'' at the time that FMLA leave is to commence.

(1) ''Incapable of self-care'' means that the individual requires active assistance or supervision to provide daily self-care in three or more of the ''activities of daily living'' (ADLs) or ''instrumental activities of daily living'' (IADLs). Activities of daily living include adaptive activities such as caring appropriately for one's grooming and hygiene, bathing, dressing and eating. Instrumental activities of daily living include cooking, cleaning, shopping, taking public transportation, paying bills, maintaining a residence, using telephones and directories, using a post office, *etc.*

(2) ''Physical or mental disability'' means a physical or mental impairment that substantially limits one or more of the major life activities of an individual. Regulations at 29 CFR 1630.2(h), (i), and (j), issued by the Equal Employment Opportunity Commission under the Americans with Disabilities Act (ADA), 42 U.S.C. 12101 *et seq.*, define these terms.

(3) Persons who are ''in loco parentis'' include those with day-to-day responsibilities to care for and financially support a child, or, in the case of an employee, who had such responsibility for the employee when the employee was a child. A biological or legal relationship is not necessary.

(d) *Next of kin of a covered servicemember.* ''Next of kin of a covered servicemember'' means the nearest blood relative other than the covered servicemember's spouse, parent, son, or daughter, in the following order of priority: Blood relatives who have been granted legal custody of the covered servicemember by court decree or statutory provisions, brothers and sisters, grandparents, aunts and uncles, and first cousins, unless the covered servicemember has specifically designated in writing another blood relative as his or her nearest blood relative for purposes of military caregiver leave under the FMLA. When no such designation is made, and there are multiple family members with the same level of relationship to the covered servicemember, all such family members shall be considered the covered servicemember's next of kin and may take FMLA leave to provide care to the covered servicemember, either consecutively or simultaneously. When such designation has been made, the designated individual shall be deemed to be the covered servicemember's only next of kin. *See* § 825.127(b)(3).

(e) *Adoption.* ''Adoption'' means legally and permanently assuming the responsibility of raising a child as one's own. The source of an adopted child (*e.g.*, whether from a licensed placement agency or otherwise) is not a factor in determining eligibility for FMLA leave. *See* § 825.121 for rules governing leave for adoption.

(f) *Foster care.* Foster care is 24-hour care for children in substitution for, and away from, their parents or guardian. Such placement is made by or with the agreement of the State as a result of a voluntary agreement between the parent or guardian that the child be removed from the home, or pursuant to a judicial determination of the necessity for foster care, and involves agreement between the State and foster family that the foster family will take care of the child. Although foster care may be with relatives of the child, State action is involved in the removal of the child from parental custody. *See* § 825.121 for rules governing leave for foster care.

(g) *Son or daughter on active duty or call to active duty status.* ''Son or daughter on active duty or call to active duty status'' means the employee's biological, adopted, or foster child, stepchild, legal ward, or a child for whom the employee stood in loco parentis, who is on active duty or call to active duty status, and who is of any age. *See* § 825.126(b)(1).

(h) *Son or daughter of a covered servicemember.* ''Son or daughter of a covered servicemember'' means the servicemember's biological, adopted, or foster child, stepchild, legal ward, or a child for whom the servicemember stood in loco parentis, and who is of any age. *See* § 825.127(b)(1).

(i) *Parent of a covered servicemember.* ''Parent of a covered servicemember'' means a covered servicemember's biological, adoptive, step or foster father or mother, or any other individual who stood in loco parentis to the covered servicemember. This term does not include parents ''in law.'' *See* § 825.127(b)(2).

(j) *Documenting relationships.* For purposes of confirmation of family relationship, the employer may require the employee giving notice of the need for leave to provide reasonable documentation or statement of family relationship. This documentation may take the form of a simple statement from the employee, or a child's birth certificate, a court document, *etc.* The employer is entitled to examine documentation such as a birth certificate, *etc.*, but the employee is entitled to the return of the official document submitted for this purpose.

§ 825.123 Unable to perform the functions of the position.

(a) *Definition.* An employee is ''unable to perform the functions of the position'' where the health care provider finds that the employee is unable to work at all or is unable to perform any one of the essential functions of the employee's position within the meaning of the Americans with Disabilities Act (ADA), as amended, 42 U.S.C. 12101 *et seq.*, and the regulations at 29 CFR 1630.2(n). An employee who must be absent from work to receive medical treatment for a serious health condition is considered to be unable to perform the essential functions of the position during the absence for treatment.

(b) *Statement of functions.* An employer has the option, in requiring certification from a health care provider, to provide a statement of the essential functions of the employee's position for the health care provider to review. A sufficient medical certification must specify what functions of the employee's position the employee is unable to perform so that the employer can then determine whether the employee is unable to perform one or more essential functions of the employee's position. For purposes of FMLA, the essential functions of the employee's position are to be determined with reference to the position the employee held at the time

notice is given or leave commenced, whichever is earlier. *See* § 825.306.

§ 825.124 Needed to care for a family member or covered servicemember.

(a) The medical certification provision that an employee is ''needed to care for'' a family member or covered servicemember encompasses both physical and psychological care. It includes situations where, for example, because of a serious health condition, the family member is unable to care for his or her own basic medical, hygienic, or nutritional needs or safety, or is unable to transport himself or herself to the doctor. The term also includes providing psychological comfort and reassurance which would be beneficial to a child, spouse or parent with a serious health condition who is receiving inpatient or home care.

(b) The term also includes situations where the employee may be needed to substitute for others who normally care for the family member or covered servicemember, or to make arrangements for changes in care, such as transfer to a nursing home. The employee need not be the only individual or family member available to care for the family member or covered servicemember.

(c) An employee's intermittent leave or a reduced leave schedule necessary to care for a family member or covered servicemember includes not only a situation where the condition of the family member or covered servicemember itself is intermittent, but also where the employee is only needed intermittently—such as where other care is normally available, or care responsibilities are shared with another member of the family or a third party. *See* §§ 825.202 through 825.205 for rules governing the use of intermittent or reduced schedule leave.

§ 825.125 Definition of health care provider.

(a) The Act defines ''health care provider'' as:

(1) A doctor of medicine or osteopathy who is authorized to practice medicine or surgery (as appropriate) by the State in which the doctor practices; or

(2) Any other person determined by the Secretary to be capable of providing health care services.

(b) Others ''capable of providing health care services'' include only:

(1) Podiatrists, dentists, clinical psychologists, optometrists, and chiropractors (limited to treatment consisting of manual manipulation of the spine to correct a subluxation as demonstrated by X-ray to exist) authorized to practice in the State and performing within the scope of their practice as defined under State law;

(2) Nurse practitioners, nurse-midwives, clinical social workers and physician assistants who are authorized to practice under State law and who are performing within the scope of their practice as defined under State law;

(3) Christian Science Practitioners listed with the First Church of Christ, Scientist in Boston, Massachusetts. Where an employee or family member is receiving treatment from a Christian Science practitioner, an employee may not object to any requirement from an employer that the employee or family member submit to examination (though not treatment) to obtain a second or third certification from a health care provider other than a Christian Science practitioner except as otherwise provided under applicable State or local law or collective bargaining agreement;

(4) Any health care provider from whom an employer or the employer's group health plan's benefits manager will accept certification of the existence of a serious health condition to substantiate a claim for benefits; and

(5) A health care provider listed above who practices in a country other than the United States, who is authorized to practice in accordance with the law of that country, and who is performing within the scope of his or her practice as defined under such law.

(c) The phrase ''authorized to practice in the State'' as used in this section means that the provider must be authorized to diagnose and treat physical or mental health conditions.

§ 825.126 Leave because of a qualifying exigency.

(a) Eligible employees may take FMLA leave while the employee's spouse, son, daughter, or parent (the ''covered military member'') is on active duty or call to active duty status as defined in § 825.126(b)(2) for one or more of the following qualifying exigencies:

(1) *Short-notice deployment.*

(i) To address any issue that arises from the fact that a covered military member is notified of an impending call or order to active duty in support of a contingency operation seven or less calendar days prior to the date of deployment;

(ii) Leave taken for this purpose can be used for a period of seven calendar days beginning on the date a covered military member is notified of an impending call or order to active duty in support of a contingency operation;

(2) *Military events and related activities.*

(i) To attend any official ceremony, program, or event sponsored by the military that is related to the active duty or call to active duty status of a covered military member; and

(ii) To attend family support or assistance programs and informational briefings sponsored or promoted by the military, military service organizations, or the American Red Cross that are related to the active duty or call to active duty status of a covered military member;

(3) *Childcare and school activities.*

(i) To arrange for alternative childcare when the active duty or call to active duty status of a covered military member necessitates a change in the existing childcare arrangement for a biological, adopted, or foster child, a stepchild, or a legal ward of a covered military member, or a child for whom a covered military member stands in loco parentis, who is either under age 18, or age 18 or older and incapable of self-care because of a mental or physical disability at the time that FMLA leave is to commence;

(ii) To provide childcare on an urgent, immediate need basis (but not on a routine, regular, or everyday basis) when the need to provide such care arises from the active duty or call to active duty status of a covered military member for a biological, adopted, or foster child, a stepchild, or a legal ward of a covered military member, or a child for whom a covered military member stands in loco parentis, who is either under age 18, or age 18 or older and incapable of self-care because of a mental or physical disability at the time that FMLA leave is to commence;

(iii) To enroll in or transfer to a new school or day care facility a biological, adopted, or foster child, a stepchild, or a legal ward of the covered military member, or a child for whom the covered military member stands in loco parentis, who is either under age 18, or age 18 or older and incapable of self-care because of a mental or physical disability at the time that FMLA leave is to commence, when enrollment or transfer is necessitated by the active duty or call to active duty status of a covered military member; and

(iv) To attend meetings with staff at a school or a daycare facility, such as meetings with school officials regarding disciplinary measures, parent-teacher conferences, or meetings with school counselors, for a biological, adopted, or foster child, a stepchild, or a legal ward of the covered military member, or a child for whom the covered military member stands in loco parentis, who is either under age 18, or age 18 or older and incapable of self-care because of a

mental or physical disability at the time that FMLA leave is to commence, when such meetings are necessary due to circumstances arising from the active duty or call to active duty status of a covered military member;

(4) *Financial and legal arrangements.*

(i) To make or update financial or legal arrangements to address the covered military member's absence while on active duty or call to active duty status, such as preparing and executing financial and healthcare powers of attorney, transferring bank account signature authority, enrolling in the Defense Enrollment Eligibility Reporting System (DEERS), obtaining military identification cards, or preparing or updating a will or living trust; and

(ii) To act as the covered military member's representative before a federal, state, or local agency for purposes of obtaining, arranging, or appealing military service benefits while the covered military member is on active duty or call to active duty status, and for a period of 90 days following the termination of the covered military member's active duty status;

(5) *Counseling.* To attend counseling provided by someone other than a health care provider for oneself, for the covered military member, or for the biological, adopted, or foster child, a stepchild, or a legal ward of the covered military member, or a child for whom the covered military member stands in loco parentis, who is either under age 18, or age 18 or older and incapable of self-care because of a mental or physical disability at the time that FMLA leave is to commence, provided that the need for counseling arises from the active duty or call to active duty status of a covered military member;

(6) *Rest and recuperation.*

(i) To spend time with a covered military member who is on short-term, temporary, rest and recuperation leave during the period of deployment;

(ii) Eligible employees may take up to five days of leave for each instance of rest and recuperation;

(7) *Post-deployment activities.*

(i) To attend arrival ceremonies, reintegration briefings and events, and any other official ceremony or program sponsored by the military for a period of 90 days following the termination of the covered military member's active duty status; and

(ii) To address issues that arise from the death of a covered military member while on active duty status, such as meeting and recovering the body of the covered military member and making funeral arrangements;

(8) *Additional activities.* To address other events which arise out of the covered military member's active duty or call to active duty status provided that the employer and employee agree that such leave shall qualify as an exigency, and agree to both the timing and duration of such leave.

(b) A ''covered military member'' means the employee's spouse, son, daughter, or parent on active duty or call to active duty status.

(1) A ''son or daughter on active duty or call to active duty status'' means the employee's biological, adopted, or foster child, stepchild, legal ward, or a child for whom the employee stood in loco parentis, who is on active duty or call to active duty status, and who is of any age.

(2) ''Active duty or call to active duty status'' means duty under a call or order to active duty (or notification of an impending call or order to active duty) in support of a contingency operation pursuant to: Section 688 of Title 10 of the United States Code, which authorizes ordering to active duty retired members of the Regular Armed Forces and members of the retired Reserve who retired after completing at least 20 years of active service; Section 12301(a) of Title 10 of the United States Code, which authorizes ordering all reserve component members to active duty in the case of war or national emergency; Section 12302 of Title 10 of the United States Code, which authorizes ordering any unit or unassigned member of the Ready Reserve to active duty; Section 12304 of Title 10 of the United States Code, which authorizes ordering any unit or unassigned member of the Selected Reserve and certain members of the Individual Ready Reserve to active duty; Section 12305 of Title 10 of the United States Code, which authorizes the suspension of promotion, retirement or separation rules for certain Reserve components; Section 12406 of Title 10 of the United States Code, which authorizes calling the National Guard into federal service in certain circumstances; chapter 15 of Title 10 of the United States Code, which authorizes calling the National Guard and state military into federal service in the case of insurrections and national emergencies; or any other provision of law during a war or during a national emergency declared by the President or Congress so long as it is in support of a contingency operation.

(i) Employees are eligible to take FMLA leave because of a qualifying exigency when the covered military member is on active duty or call to active duty status in support of a contingency operation pursuant to one of the provisions of law identified in paragraph (b)(2) of this section as either a member of the reserve components (Army National Guard of the United States, Army Reserve, Navy Reserve, Marine Corps Reserve, Air National Guard of the United States, Air Force Reserve and Coast Guard Reserve), or a retired member of the Regular Armed Forces or Reserve. An employee whose family member is on active duty or call to active duty status in support of a contingency operation as a member of the Regular Armed Forces is not eligible to take leave because of a qualifying exigency.

(ii) A call to active duty for purposes of leave taken because of a qualifying exigency refers to a Federal call to active duty. State calls to active duty are not covered unless under order of the President of the United States pursuant to one of the provisions of law identified in paragraph (b)(2) of this section in support of a contingency operation.

(3) The active duty orders of a covered military member will generally specify if the servicemember is serving in support of a contingency operation by citation to the relevant section of Title 10 of the United States Code and/or by reference to the specific name of the contingency operation. A military operation qualifies as a contingency operation if it:

(i) is designated by the Secretary of Defense as an operation in which members of the armed forces are or may become involved in military actions, operations, or hostilities against an enemy of the United States or against an opposing military force; or

(ii) results in the call or order to, or retention on, active duty of members of the uniformed services under section 688, 12301(a), 12302, 12304, 12305, or 12406 of Title 10 of the United States Code, chapter 15 of Title 10 of the United States Code, or any other provision of law during a war or during a national emergency declared by the President or Congress. 10 U.S.C. 101(a)(13).

§ 825.127 Leave to care for a covered servicemember with a serious injury or illness.

(a) Eligible employees are entitled to FMLA leave to care for a current member of the Armed Forces, including a member of the National Guard or Reserves, or a member of the Armed Forces, the National Guard or Reserves who is on the temporary disability retired list, who has a serious injury or illness incurred in the line of duty on active duty for which he or she is

undergoing medical treatment, recuperation, or therapy; or otherwise in outpatient status; or otherwise on the temporary disability retired list. Eligible employees may not take leave under this provision to care for former members of the Armed Forces, former members of the National Guard and Reserves, and members on the permanent disability retired list.

(1) A ''serious injury or illness'' means an injury or illness incurred by a covered servicemember in the line of duty on active duty that may render the servicemember medically unfit to perform the duties of his or her office, grade, rank or rating.

(2) ''Outpatient status,'' with respect to a covered servicemember, means the status of a member of the Armed Forces assigned to either a military medical treatment facility as an outpatient; or a unit established for the purpose of providing command and control of members of the Armed Forces receiving medical care as outpatients.

(b) In order to care for a covered servicemember, an eligible employee must be the spouse, son, daughter, or parent, or next of kin of a covered servicemember.

(1) A ''son or daughter of a covered servicemember'' means the covered servicemember's biological, adopted, or foster child, stepchild, legal ward, or a child for whom the covered servicemember stood in loco parentis, and who is of any age.

(2) A ''parent of a covered servicemember'' means a covered servicemember's biological, adoptive, step or foster father or mother, or any other individual who stood in loco parentis to the covered servicemember. This term does not include parents ''in law.''

(3) The ''next of kin of a covered servicemember'' is the nearest blood relative, other than the covered servicemember's spouse, parent, son, or daughter, in the following order of priority: blood relatives who have been granted legal custody of the servicemember by court decree or statutory provisions, brothers and sisters, grandparents, aunts and uncles, and first cousins, unless the covered servicemember has specifically designated in writing another blood relative as his or her nearest blood relative for purposes of military caregiver leave under the FMLA. When no such designation is made, and there are multiple family members with the same level of relationship to the covered servicemember, all such family members shall be considered the covered servicemember's next of kin and may take FMLA leave to provide care to the covered servicemember, either consecutively or simultaneously. When such designation has been made, the designated individual shall be deemed to be the covered servicemember's only next of kin. For example, if a covered servicemember has three siblings and has not designated a blood relative to provide care, all three siblings would be considered the covered servicemember's next of kin. Alternatively, where a covered servicemember has a sibling(s) and designates a cousin as his or her next of kin for FMLA purposes, then only the designated cousin is eligible as the covered servicemember's next of kin. An employer is permitted to require an employee to provide confirmation of covered family relationship to the covered servicemember pursuant to § 825.122(j).

(c) An eligible employee is entitled to 26 workweeks of leave to care for a covered servicemember with a serious injury or illness during a ''single 12-month period.''

(1) The ''single 12-month period'' described in paragraph (c) of this section begins on the first day the eligible employee takes FMLA leave to care for a covered servicemember and ends 12 months after that date, regardless of the method used by the employer to determine the employee's 12 workweeks of leave entitlement for other FMLA-qualifying reasons. If an eligible employee does not take all of his or her 26 workweeks of leave entitlement to care for a covered servicemember during this ''single 12-month period,'' the remaining part of his or her 26 workweeks of leave entitlement to care for the covered servicemember is forfeited.

(2) The leave entitlement described in paragraph (c) of this section is to be applied on a per-covered-servicemember, per-injury basis such that an eligible employee may be entitled to take more than one period of 26 workweeks of leave if the leave is to care for different covered servicemembers or to care for the same servicemember with a subsequent serious injury or illness, except that no more than 26 workweeks of leave may be taken within any ''single 12-month period.'' An eligible employee may take more than one period of 26 workweeks of leave to care for a covered servicemember with more than one serious injury or illness only when the serious injury or illness is a subsequent serious injury or illness. When an eligible employee takes leave to care for more than one covered servicemember or for a subsequent serious injury or illness of the same covered servicemember, and the ''single 12-month periods'' corresponding to the different military caregiver leave entitlements overlap, the employee is limited to taking no more than 26 workweeks of leave in each ''single 12-month period.''

(3) An eligible employee is entitled to a combined total of 26 workweeks of leave for any FMLA-qualifying reason during the ''single 12-month period'' described in paragraph (c) of this section, provided that the employee is entitled to no more than 12 weeks of leave for one or more of the following: because of the birth of a son or daughter of the employee and in order to care for such son or daughter; because of the placement of a son or daughter with the employee for adoption or foster care; in order to care for the spouse, son, daughter, or parent with a serious health condition; because of the employee's own serious health condition; or because of a qualifying exigency. Thus, for example, an eligible employee may, during the ''single 12-month period,'' take 16 weeks of FMLA leave to care for a covered servicemember and 10 weeks of FMLA leave to care for a newborn child. However, the employee may not take more than 12 weeks of FMLA leave to care for the newborn child during the ''single 12-month period,'' even if the employee takes fewer than 14 weeks of FMLA leave to care for a covered servicemember.

(4) In all circumstances, including for leave taken to care for a covered servicemember, the employer is responsible for designating leave, paid or unpaid, as FMLA-qualifying, and for giving notice of the designation to the employee as provided in § 825.300. In the case of leave that qualifies as both leave to care for a covered servicemember and leave to care for a family member with a serious health condition during the ''single 12-month period'' described in paragraph (c) of this section, the employer must designate such leave as leave to care for a covered servicemember in the first instance. Leave that qualifies as both leave to care for a covered servicemember and leave taken to care for a family member with a serious health condition during the ''single 12-month period'' described in paragraph (c) of this section must not be designated and counted as both leave to care for a covered servicemember and leave to care for a family member with a serious health condition. As is the case with leave taken for other qualifying reasons, employers may retroactively designate leave as leave to care for a covered servicemember pursuant to § 825.301(d).

(d) A husband and wife who are eligible for FMLA leave and are employed by the same covered employer may be limited to a combined total of 26 workweeks of leave during the ''single 12-month period'' described in paragraph (c) of this section if the leave is taken for birth of the employee's son or daughter or to care for the child after birth, for placement of a son or daughter with the employee for adoption or foster care, or to care for the child after placement, to care for the employee's parent with a serious health condition, or to care for a covered servicemember with a serious injury or illness. This limitation on the total weeks of leave applies to leave taken for the reasons specified as long as a husband and wife are employed by the ''same employer.'' It would apply, for example, even though the spouses are employed at two different worksites of an employer located more than 75 miles from each other, or by two different operating divisions of the same company. On the other hand, if one spouse is ineligible for FMLA leave, the other spouse would be entitled to a full 26 workweeks of FMLA leave.

Subpart B—Employee Leave Entitlements Under the Family and Medical Leave Act

§ 825.200 Amount of leave.

(a) Except in the case of leave to care for a covered servicemember with a serious injury or illness, an eligible employee's FMLA leave entitlement is limited to a total of 12 workweeks of leave during any 12-month period for any one, or more, of the following reasons:

(1) The birth of the employee's son or daughter, and to care for the newborn child;

(2) The placement with the employee of a son or daughter for adoption or foster care, and to care for the newly placed child;

(3) To care for the employee's spouse, son, daughter, or parent with a serious health condition;

(4) Because of a serious health condition that makes the employee unable to perform one or more of the essential functions of his or her job; and,

(5) Because of any qualifying exigency arising out of the fact that the employee's spouse, son, daughter, or parent is a covered military member on active duty (or has been notified of an impending call or order to active duty) in support of a contingency operation.

(b) An employer is permitted to choose any one of the following methods for determining the ''12-month period'' in which the 12 weeks of leave entitlement described in paragraph (a) of this section occurs:

(1) The calendar year;

(2) Any fixed 12-month ''leave year,'' such as a fiscal year, a year required by State law, or a year starting on an employee's ''anniversary'' date;

(3) The 12-month period measured forward from the date any employee's first FMLA leave under paragraph (a) begins; or,

(4) A ''rolling'' 12-month period measured backward from the date an employee uses any FMLA leave as described in paragraph (a).

(c) Under methods in paragraphs (b)(1) and (b)(2) of this section an employee would be entitled to up to 12 weeks of FMLA leave at any time in the fixed 12-month period selected. An employee could, therefore, take 12 weeks of leave at the end of the year and 12 weeks at the beginning of the following year. Under the method in paragraph (b)(3) of this section, an employee would be entitled to 12 weeks of leave during the year beginning on the first date FMLA leave is taken; the next 12-month period would begin the first time FMLA leave is taken after completion of any previous 12-month period. Under the method in paragraph (b)(4) of this section, the ''rolling'' 12-month period, each time an employee takes FMLA leave the remaining leave entitlement would be any balance of the 12 weeks which has not been used during the immediately preceding 12 months. For example, if an employee has taken eight weeks of leave during the past 12 months, an additional four weeks of leave could be taken. If an employee used four weeks beginning February 1, 2008, four weeks beginning June 1, 2008, and four weeks beginning December 1, 2008, the employee would not be entitled to any additional leave until February 1, 2009. However, beginning on February 1, 2009, the employee would again be eligible to take FMLA leave, recouping the right to take the leave in the same manner and amounts in which it was used in the previous year. Thus, the employee would recoup (and be entitled to use) one additional day of FMLA leave each day for four weeks, commencing February 1, 2009. The employee would also begin to recoup additional days beginning on June 1, 2009, and additional days beginning on December 1, 2009. Accordingly, employers using the rolling 12-month period may need to calculate whether the employee is entitled to take FMLA leave each time that leave is requested, and employees taking FMLA leave on such a basis may fall in and out of FMLA protection based on their FMLA usage in the prior 12 months. For example, in the example above, if the employee needs six weeks of leave for a serious health condition commencing February 1, 2009, only the first four weeks of the leave would be FMLA-protected.

(d)(1) Employers will be allowed to choose any one of the alternatives in paragraph (b) of this section for the leave entitlements described in paragraph (a) of this section provided the alternative chosen is applied consistently and uniformly to all employees. An employer wishing to change to another alternative is required to give at least 60 days notice to all employees, and the transition must take place in such a way that the employees retain the full benefit of 12 weeks of leave under whichever method affords the greatest benefit to the employee. Under no circumstances may a new method be implemented in order to avoid the Act's leave requirements.

(2) An exception to this required uniformity would apply in the case of a multi-State employer who has eligible employees in a State which has a family and medical leave statute. The State may require a single method of determining the period during which use of the leave entitlement is measured. This method may conflict with the method chosen by the employer to determine ''any 12 months'' for purposes of the Federal statute. The employer may comply with the State provision for all employees employed within that State, and uniformly use another method provided by this regulation for the leave entitlements described in paragraph (a) for all other employees.

(e) If an employer fails to select one of the options in paragraph (b) of this section for measuring the 12-month period for the leave entitlements described in paragraph (a), the option that provides the most beneficial outcome for the employee will be used. The employer may subsequently select an option only by providing the 60-day notice to all employees of the option the employer intends to implement. During the running of the 60-day period any other employee who needs FMLA leave may use the option providing the most beneficial outcome to that employee. At the conclusion of the 60-day period the employer may implement the selected option.

(f) An eligible employee's FMLA leave entitlement is limited to a total of 26 workweeks of leave during a ''single 12-month period'' to care for a covered servicemember with a serious injury or illness. An employer shall determine the ''single 12-month period'' in which the 26-weeks-of-leave-entitlement

described in this paragraph occurs using the 12-month period measured forward from the date an employee's first FMLA leave to care for the covered servicemember begins. *See* § 825.127(d)(1).

(g) During the ''single 12-month period'' described in paragraph (f), an eligible employee's FMLA leave entitlement is limited to a combined total of 26 workweeks of FMLA leave for any qualifying reason. *See* § 825.127(d)(2).

(h) For purposes of determining the amount of leave used by an employee, the fact that a holiday may occur within the week taken as FMLA leave has no effect; the week is counted as a week of FMLA leave. However, if an employee is using FMLA leave in increments of less than one week, the holiday will not count against the employee's FMLA entitlement unless the employee was otherwise scheduled and expected to work during the holiday. Similarly, if for some reason the employer's business activity has temporarily ceased and employees generally are not expected to report for work for one or more weeks (*e.g.*, a school closing two weeks for the Christmas/New Year holiday or the summer vacation or an employer closing the plant for retooling or repairs), the days the employer's activities have ceased do *not* count against the employee's FMLA leave entitlement. Methods for determining an employee's 12-week leave entitlement are also described in § 825.205.

§ 825.201 Leave to care for a parent.

(a) *General rule*. An eligible employee is entitled to FMLA leave if needed to care for the employee's parent with a serious health condition. Care for parents-in-law is not covered by the FMLA. *See* § 825.122(b) for definition of parent.

(b) *''Same employer'' limitation.* A husband and wife who are eligible for FMLA leave and are employed by the same covered employer may be limited to a combined total of 12 weeks of leave during any 12-month period if the leave is taken to care for the employee's parent with a serious health condition, for the birth of the employee's son or daughter or to care for the child after the birth, or for placement of a son or daughter with the employee for adoption or foster care or to care for the child after placement. This limitation on the total weeks of leave applies to leave taken for the reasons specified as long as a husband and wife are employed by the ''same employer.'' It would apply, for example, even though the spouses are employed at two different worksites of an employer located more than 75 miles from each other, or by two different operating divisions of the same company. On the other hand, if one spouse is ineligible for FMLA leave, the other spouse would be entitled to a full 12 weeks of FMLA leave. Where the husband and wife both use a portion of the total 12-week FMLA leave entitlement for either the birth of a child, for placement for adoption or foster care, or to care for a parent, the husband and wife would each be entitled to the difference between the amount he or she has taken individually and 12 weeks for FMLA leave for other purposes. For example, if each spouse took 6 weeks of leave to care for a parent, each could use an additional 6 weeks due to his or her own serious health condition or to care for a child with a serious health condition. *See also* § 825.127(d).

§ 825.202 Intermittent leave or reduced leave schedule.

(a) *Definition*. FMLA leave may be taken ''intermittently or on a reduced leave schedule'' under certain circumstances. Intermittent leave is FMLA leave taken in separate blocks of time due to a single qualifying reason. A reduced leave schedule is a leave schedule that reduces an employee's usual number of working hours per workweek, or hours per workday. A reduced leave schedule is a change in the employee's schedule for a period of time, normally from full-time to part-time.

(b) *Medical necessity*. For intermittent leave or leave on a reduced leave schedule taken because of one's own serious health condition, to care for a parent, son, or daughter with a serious health condition, or to care for a covered servicemember with a serious injury or illness, there must be a medical need for leave and it must be that such medical need can be best accommodated through an intermittent or reduced leave schedule. The treatment regimen and other information described in the certification of a serious health condition and in the certification of a serious injury or illness, if required by the employer, addresses the medical necessity of intermittent leave or leave on a reduced leave schedule. *See* §§ 825.306, 825.310. Leave may be taken intermittently or on a reduced leave schedule when medically necessary for planned and/or unanticipated medical treatment of a serious health condition or of a covered servicemember's serious injury or illness, or for recovery from treatment or recovery from a serious health condition or a covered servicemember's serious injury or illness. It may also be taken to provide care or psychological comfort to a covered family member with a serious health condition or a covered servicemember with a serious injury or illness.

(1) Intermittent leave may be taken for a serious health condition of a parent, son, or daughter, for the employee's own serious health condition, or a serious injury or illness of a covered servicemember which requires treatment by a health care provider periodically, rather than for one continuous period of time, and may include leave of periods from an hour or more to several weeks. Examples of intermittent leave would include leave taken on an occasional basis for medical appointments, or leave taken several days at a time spread over a period of six months, such as for chemotherapy. A pregnant employee may take leave intermittently for prenatal examinations or for her own condition, such as for periods of severe morning sickness. An example of an employee taking leave on a reduced leave schedule is an employee who is recovering from a serious health condition and is not strong enough to work a full-time schedule.

(2) Intermittent or reduced schedule leave may be taken for absences where the employee or family member is incapacitated or unable to perform the essential functions of the position because of a chronic serious health condition or a serious injury or illness of a covered servicemember, even if he or she does not receive treatment by a health care provider. *See* §§ 825.113 and 825.127.

(c) *Birth or placement*. When leave is taken after the birth of a healthy child or placement of a healthy child for adoption or foster care, an employee may take leave intermittently or on a reduced leave schedule only if the employer agrees. Such a schedule reduction might occur, for example, where an employee, with the employer's agreement, works part-time after the birth of a child, or takes leave in several segments. The employer's agreement is not required, however, for leave during which the mother has a serious health condition in connection with the birth of her child or if the newborn child has a serious health condition. *See* § 825.204 for rules governing transfer to an alternative position that better accommodates intermittent leave. *See also* § 825.120 (pregnancy) and § 825.121 (adoption and foster care).

(d) *Qualifying exigency*. Leave due to a qualifying exigency may be taken on an intermittent or reduced leave schedule basis.

§ 825.203 Scheduling of intermittent or reduced schedule leave.

Eligible employees may take FMLA leave on an intermittent or reduced schedule basis when medically necessary due to the serious health condition of a covered family member or the employee or the serious injury or illness of a covered servicemember. *See* § 825.202. Eligible employees may also take FMLA leave on an intermittent or reduced schedule basis when necessary because of a qualifying exigency. If an employee needs leave intermittently or on a reduced leave schedule for planned medical treatment, then the employee must make a reasonable effort to schedule the treatment so as not to disrupt unduly the employer's operations.

§ 825.204 Transfer of an employee to an alternative position during intermittent leave or reduced schedule leave.

(a) *Transfer or reassignment.* If an employee needs intermittent leave or leave on a reduced leave schedule that is foreseeable based on planned medical treatment for the employee, a family member, or a covered servicemember, including during a period of recovery from one's own serious health condition, a serious health condition of a spouse, parent, son, or daughter, or a serious injury or illness of a covered servicemember, or if the employer agrees to permit intermittent or reduced schedule leave for the birth of a child or for placement of a child for adoption or foster care, the employer may require the employee to transfer temporarily, during the period that the intermittent or reduced leave schedule is required, to an available alternative position for which the employee is qualified and which better accommodates recurring periods of leave than does the employee's regular position. *See* § 825.601 for special rules applicable to instructional employees of schools.

(b) *Compliance.* Transfer to an alternative position may require compliance with any applicable collective bargaining agreement, federal law (such as the Americans with Disabilities Act), and State law. Transfer to an alternative position may include altering an existing job to better accommodate the employee's need for intermittent or reduced schedule leave.

(c) *Equivalent pay and benefits.* The alternative position must have equivalent pay and benefits. An alternative position for these purposes does not have to have equivalent duties. The employer may increase the pay and benefits of an existing alternative position, so as to make them equivalent to the pay and benefits of the employee's regular job. The employer may also transfer the employee to a part-time job with the same hourly rate of pay and benefits, provided the employee is not required to take more leave than is medically necessary. For example, an employee desiring to take leave in increments of four hours per day could be transferred to a half-time job, or could remain in the employee's same job on a part-time schedule, paying the same hourly rate as the employee's previous job and enjoying the same benefits. The employer may not eliminate benefits which otherwise would not be provided to part-time employees; however, an employer may proportionately reduce benefits such as vacation leave where an employer's normal practice is to base such benefits on the number of hours worked.

(d) *Employer limitations.* An employer may not transfer the employee to an alternative position in order to discourage the employee from taking leave or otherwise work a hardship on the employee. For example, a white collar employee may not be assigned to perform laborer's work; an employee working the day shift may not be reassigned to the graveyard shift; an employee working in the headquarters facility may not be reassigned to a branch a significant distance away from the employee's normal job location. Any such attempt on the part of the employer to make such a transfer will be held to be contrary to the prohibited acts of the FMLA.

(e) *Reinstatement of employee.* When an employee who is taking leave intermittently or on a reduced leave schedule and has been transferred to an alternative position no longer needs to continue on leave and is able to return to full-time work, the employee must be placed in the same or equivalent job as the job he or she left when the leave commenced. An employee may not be required to take more leave than necessary to address the circumstance that precipitated the need for leave.

§ 825.205 Increments of FMLA leave for intermittent or reduced schedule leave.

(a) *Minimum increment.* (1) When an employee takes FMLA leave on an intermittent or reduced leave schedule basis, the employer must account for the leave using an increment no greater than the shortest period of time that the employer uses to account for use of other forms of leave provided that it is not greater than one hour and provided further that an employee's FMLA leave entitlement may not be reduced by more than the amount of leave actually taken. If an employer accounts for use of leave in varying increments at different times of the day or shift, the employer may not account for FMLA leave in a larger increment than the shortest period used to account for other leave during the period in which the FMLA leave is taken. If an employer accounts for other forms of leave use in increments greater than one hour, the employer must account for FMLA leave use in increments no greater than one hour. An employer may account for FMLA leave in shorter increments than used for other forms of leave. For example, an employer that accounts for other forms of leave in one hour increments may account for FMLA leave in a shorter increment when the employee arrives at work several minutes late, and the employer wants the employee to begin work immediately. Such accounting for FMLA leave will not alter the increment considered to be the shortest period used to account for other forms of leave or the use of FMLA leave in other circumstances.

(2) Where it is physically impossible for an employee using intermittent leave or working a reduced leave schedule to commence or end work mid-way through a shift, such as where a flight attendant or a railroad conductor is scheduled to work aboard an airplane or train, or a laboratory employee is unable to enter or leave a sealed ''clean room'' during a certain period of time, the entire period that the employee is forced to be absent is designated as FMLA leave and counts against the employee's FMLA entitlement.

(b) *Calculation of leave.* (1) When an employee takes leave on an intermittent or reduced leave schedule, only the amount of leave actually taken may be counted toward the employee's leave entitlement. The actual workweek is the basis of leave entitlement. Therefore, if an employee who would otherwise work 40 hours a week takes off 8 hours, the employee would use ⅕ of a week of FMLA leave. Similarly, if a full-time employee who would otherwise work 8-hour days works 4-hour days under a reduced leave schedule, the employee would use ½ week of FMLA leave. Where an employee works a part-time schedule or variable hours, the amount of FMLA leave that an employee uses is determined on a pro rata or proportional basis. For example, if an employee who would otherwise work 30 hours per week, but works only 20 hours a week under a reduced leave schedule, the employee's ten hours of leave would constitute one-third (⅓) of a week of FMLA leave for each week the employee works the reduced leave schedule. An employer may convert these fractions to their hourly equivalent so long as the conversion equitably reflects the

employee's total normally scheduled hours. *See also*, §§ 825.601 and 825.602, special rules for schools.

(2) If an employer has made a permanent or long-term change in the employee's schedule (for reasons other than FMLA, and prior to the notice of need for FMLA leave), the hours worked under the new schedule are to be used for making this calculation.

(3) If an employee's schedule varies from week to week to such an extent that an employer is unable to determine with any certainty how many hours the employee would otherwise have worked (but for the taking of FMLA leave), a weekly average of the hours scheduled over the 12 months prior to the beginning of the leave period (including any hours for which the employee took leave of any type) would be used for calculating the employee's leave entitlement.

(c) *Overtime*. If an employee would normally be required to work overtime, but is unable to do so because of a FMLA-qualifying reason that limits the employee's ability to work overtime, the hours which the employee would have been required to work may be counted against the employee's FMLA entitlement. In such a case, the employee is using intermittent or reduced schedule leave. For example, if an employee would normally be required to work for 48 hours in a particular week, but due to a serious health condition the employee is unable to work more than 40 hours that week, the employee would utilize eight hours of FMLA-protected leave out of the 48-hour workweek ($8/48 = 1/6$ workweek). Voluntary overtime hours that an employee does not work due to a serious health condition may not be counted against the employee's FMLA leave entitlement.

§ 825.206 Interaction with the FLSA.

(a) Leave taken under FMLA may be unpaid. If an employee is otherwise exempt from minimum wage and overtime requirements of the Fair Labor Standards Act (FLSA) as a salaried executive, administrative, professional, or computer employee (under regulations issued by the Secretary, 29 CFR part 541), providing unpaid FMLA-qualifying leave to such an employee will not cause the employee to lose the FLSA exemption. *See* 29 CFR 541.602(b)(7). This means that under regulations currently in effect, where an employee meets the specified duties test, is paid on a salary basis, and is paid a salary of at least the amount specified in the regulations, the employer may make deductions from the employee's salary for any hours taken as intermittent or reduced FMLA leave within a workweek, without affecting the exempt status of the employee. The fact that an employer provides FMLA leave, whether paid or unpaid, and maintains records required by this part regarding FMLA leave, will not be relevant to the determination whether an employee is exempt within the meaning of 29 CFR part 541.

(b) For an employee paid in accordance with the fluctuating workweek method of payment for overtime (*see* 29 CFR 778.114), the employer, during the period in which intermittent or reduced schedule FMLA leave is scheduled to be taken, may compensate an employee on an hourly basis and pay only for the hours the employee works, including time and one-half the employee's regular rate for overtime hours. The change to payment on an hourly basis would include the entire period during which the employee is taking intermittent leave, including weeks in which no leave is taken. The hourly rate shall be determined by dividing the employee's weekly salary by the employee's normal or average schedule of hours worked during weeks in which FMLA leave is not being taken. If an employer chooses to follow this exception from the fluctuating workweek method of payment, the employer must do so uniformly, with respect to all employees paid on a fluctuating workweek basis for whom FMLA leave is taken on an intermittent or reduced leave schedule basis. If an employer does not elect to convert the employee's compensation to hourly pay, no deduction may be taken for FMLA leave absences. Once the need for intermittent or reduced scheduled leave is over, the employee may be restored to payment on a fluctuating work week basis.

(c) This special exception to the ''salary basis'' requirements of the FLSA exemption or fluctuating workweek payment requirements applies only to employees of covered employers who are eligible for FMLA leave, and to leave which qualifies as FMLA leave. Hourly or other deductions which are not in accordance with 29 CFR part 541 or 29 CFR 778.114 may not be taken, for example, from the salary of an employee who works for an employer with fewer than 50 employees, or where the employee has not worked long enough to be eligible for FMLA leave without potentially affecting the employee's eligibility for exemption. Nor may deductions which are not permitted by 29 CFR part 541 or 29 CFR 778.114 be taken from such an employee's salary for any leave which does not qualify as FMLA leave, for example, deductions from an employee's pay for leave required under State law or under an employer's policy or practice for a reason which does not qualify as FMLA leave, *e.g.*, leave to care for a grandparent or for a medical condition which does not qualify as a serious health condition or serious injury or illness; or for leave which is more generous than provided by FMLA. Employers may comply with State law or the employer's own policy/practice under these circumstances and maintain the employee's eligibility for exemption or for the fluctuating workweek method of pay by not taking hourly deductions from the employee's pay, in accordance with FLSA requirements, or may take such deductions, treating the employee as an ''hourly'' employee and pay overtime premium pay for hours worked over 40 in a workweek.

§ 825.207 Substitution of paid leave.

(a) Generally, FMLA leave is unpaid leave. However, under the circumstances described in this section, FMLA permits an eligible employee to choose to substitute accrued paid leave for FMLA leave. If an employee does not choose to substitute accrued paid leave, the employer may require the employee to substitute accrued paid leave for unpaid FMLA leave. The term ''substitute'' means that the paid leave provided by the employer, and accrued pursuant to established policies of the employer, will run concurrently with the unpaid FMLA leave. Accordingly, the employee receives pay pursuant to the employer's applicable paid leave policy during the period of otherwise unpaid FMLA leave. An employee's ability to substitute accrued paid leave is determined by the terms and conditions of the employer's normal leave policy. When an employee chooses, or an employer requires, substitution of accrued paid leave, the employer must inform the employee that the employee must satisfy any procedural requirements of the paid leave policy only in connection with the receipt of such payment. *See* § 825.300(c). If an employee does not comply with the additional requirements in an employer's paid leave policy, the employee is not entitled to substitute accrued paid leave, but the employee remains entitled to take unpaid FMLA leave. Employers may not discriminate against employees on FMLA leave in the administration of their paid leave policies.

(b) If neither the employee nor the employer elects to substitute paid leave for unpaid FMLA leave under the above conditions and circumstances, the employee will remain entitled to all the

paid leave which is earned or accrued under the terms of the employer's plan.

(c) If an employee uses paid leave under circumstances which do not qualify as FMLA leave, the leave will not count against the employee's FMLA leave entitlement. For example, paid sick leave used for a medical condition which is not a serious health condition or serious injury or illness does not count against the employee's FMLA leave entitlement.

(d) Leave taken pursuant to a disability leave plan would be considered FMLA leave for a serious health condition and counted in the leave entitlement permitted under FMLA if it meets the criteria set forth above in §§ 825.112–825.115. In such cases, the employer may designate the leave as FMLA leave and count the leave against the employee's FMLA leave entitlement. Because leave pursuant to a disability benefit plan is not unpaid, the provision for substitution of the employee's accrued paid leave is inapplicable, and neither the employee nor the employer may require the substitution of paid leave. However, employers and employees may agree, where state law permits, to have paid leave supplement the disability plan benefits, such as in the case where a plan only provides replacement income for two-thirds of an employee's salary.

(e) The Act provides that a serious health condition may result from injury to the employee ''on or off'' the job. If the employer designates the leave as FMLA leave in accordance with § 825.300(d), the leave counts against the employee's FMLA leave entitlement. Because the workers' compensation absence is not unpaid, the provision for substitution of the employee's accrued paid leave is not applicable, and neither the employee nor the employer may require the substitution of paid leave. However, employers and employees may agree, where state law permits, to have paid leave supplement workers' compensation benefits, such as in the case where workers' compensation only provides replacement income for two-thirds of an employee's salary. If the health care provider treating the employee for the workers' compensation injury certifies the employee is able to return to a ''light duty job'' but is unable to return to the same or equivalent job, the employee may decline the employer's offer of a ''light duty job.'' As a result the employee may lose workers' compensation payments, but is entitled to remain on unpaid FMLA leave until the employee's FMLA leave entitlement is exhausted. As of the date workers' compensation benefits cease, the substitution provision becomes applicable and either the employee may elect or the employer may require the use of accrued paid leave. *See also* §§ 825.210(f), 825.216(d), 825.220(d), 825.307(a) and 825.702(d)(1) and (2) regarding the relationship between workers' compensation absences and FMLA leave.

(f) Section 7(o) of the Fair Labor Standards Act (FLSA) permits public employers under prescribed circumstances to substitute compensatory time off accrued at one and one-half hours for each overtime hour worked in lieu of paying cash to an employee when the employee works overtime hours as prescribed by the Act. This section of the FLSA limits the number of hours of compensatory time an employee may accumulate depending upon whether the employee works in fire protection or law enforcement (480 hours) or elsewhere for a public agency (240 hours). In addition, under the FLSA, an employer always has the right to cash out an employee's compensatory time or to require the employee to use the time. Therefore, if an employee requests and is permitted to use accrued compensatory time to receive pay for time taken off for an FMLA reason, or if the employer requires such use pursuant to the FLSA, the time taken may be counted against the employee's FMLA leave entitlement.

§ 825.208 [Reserved]

§ 825.209 Maintenance of employee benefits.

(a) During any FMLA leave, an employer must maintain the employee's coverage under any group health plan (as defined in the Internal Revenue Code of 1986 at 26 U.S.C. 5000(b)(1)) on the same conditions as coverage would have been provided if the employee had been continuously employed during the entire leave period. All employers covered by FMLA, including public agencies, are subject to the Act's requirements to maintain health coverage. The definition of ''group health plan'' is set forth in § 825.800. For purposes of FMLA, the term ''group health plan'' shall not include an insurance program providing health coverage under which employees purchase individual policies from insurers provided that:

(1) No contributions are made by the employer;

(2) Participation in the program is completely voluntary for employees;

(3) The sole functions of the employer with respect to the program are, without endorsing the program, to permit the insurer to publicize the program to employees, to collect premiums through payroll deductions and to remit them to the insurer;

(4) The employer receives no consideration in the form of cash or otherwise in connection with the program, other than reasonable compensation, excluding any profit, for administrative services actually rendered in connection with payroll deduction; and,

(5) The premium charged with respect to such coverage does not increase in the event the employment relationship terminates.

(b) The same group health plan benefits provided to an employee prior to taking FMLA leave must be maintained during the FMLA leave. For example, if family member coverage is provided to an employee, family member coverage must be maintained during the FMLA leave. Similarly, benefit coverage during FMLA leave for medical care, surgical care, hospital care, dental care, eye care, mental health counseling, substance abuse treatment, *etc.*, must be maintained during leave if provided in an employer's group health plan, including a supplement to a group health plan, whether or not provided through a flexible spending account or other component of a cafeteria plan.

(c) If an employer provides a new health plan or benefits or changes health benefits or plans while an employee is on FMLA leave, the employee is entitled to the new or changed plan/benefits to the same extent as if the employee were not on leave. For example, if an employer changes a group health plan so that dental care becomes covered under the plan, an employee on FMLA leave must be given the same opportunity as other employees to receive (or obtain) the dental care coverage. Any other plan changes (*e.g.*, in coverage, premiums, deductibles, *etc.*) which apply to all employees of the workforce would also apply to an employee on FMLA leave.

(d) Notice of any opportunity to change plans or benefits must also be given to an employee on FMLA leave. If the group health plan permits an employee to change from single to family coverage upon the birth of a child or otherwise add new family members, such a change in benefits must be made available while an employee is on FMLA leave. If the employee requests the changed coverage it must be provided by the employer.

(e) An employee may choose not to retain group health plan coverage during FMLA leave. However, when an employee returns from leave, the employee is entitled to be reinstated on

the same terms as prior to taking the leave, including family or dependent coverages, without any qualifying period, physical examination, exclusion of pre-existing conditions, *etc. See* § 825.212(c).

(f) Except as required by the Consolidated Omnibus Budget Reconciliation Act of 1986 (COBRA) and for ''key'' employees (as discussed below), an employer's obligation to maintain health benefits during leave (and to restore the employee to the same or equivalent employment) under FMLA ceases if and when the employment relationship would have terminated if the employee had not taken FMLA leave (*e.g.*, if the employee's position is eliminated as part of a nondiscriminatory reduction in force and the employee would not have been transferred to another position); an employee informs the employer of his or her intent not to return from leave (including before starting the leave if the employer is so informed before the leave starts); or the employee fails to return from leave or continues on leave after exhausting his or her FMLA leave entitlement in the 12-month period.

(g) If a ''key employee'' (*see* § 825.218) does not return from leave when notified by the employer that substantial or grievous economic injury will result from his or her reinstatement, the employee's entitlement to group health plan benefits continues unless and until the employee advises the employer that the employee does not desire restoration to employment at the end of the leave period, or the FMLA leave entitlement is exhausted, or reinstatement is actually denied.

(h) An employee's entitlement to benefits other than group health benefits during a period of FMLA leave (*e.g.*, holiday pay) is to be determined by the employer's established policy for providing such benefits when the employee is on other forms of leave (paid or unpaid, as appropriate).

§ 825.210 Employee payment of group health benefit premiums.

(a) Group health plan benefits must be maintained on the same basis as coverage would have been provided if the employee had been continuously employed during the FMLA leave period. Therefore, any share of group health plan premiums which had been paid by the employee prior to FMLA leave must continue to be paid by the employee during the FMLA leave period. If premiums are raised or lowered, the employee would be required to pay the new premium rates. Maintenance of health insurance policies which are not a part of the employer's group health plan, as described in § 825.209(a), are the sole responsibility of the employee. The employee and the insurer should make necessary arrangements for payment of premiums during periods of unpaid FMLA leave.

(b) If the FMLA leave is substituted paid leave, the employee's share of premiums must be paid by the method normally used during any paid leave, presumably as a payroll deduction.

(c) If FMLA leave is unpaid, the employer has a number of options for obtaining payment from the employee. The employer may require that payment be made to the employer or to the insurance carrier, but no additional charge may be added to the employee's premium payment for administrative expenses. The employer may require employees to pay their share of premium payments in any of the following ways:

(1) Payment would be due at the same time as it would be made if by payroll deduction;

(2) Payment would be due on the same schedule as payments are made under COBRA;

(3) Payment would be prepaid pursuant to a cafeteria plan at the employee's option;

(4) The employer's existing rules for payment by employees on ''leave without pay'' would be followed, provided that such rules do not require prepayment (*i.e.*, prior to the commencement of the leave) of the premiums that will become due during a period of unpaid FMLA leave or payment of higher premiums than if the employee had continued to work instead of taking leave; or,

(5) Another system voluntarily agreed to between the employer and the employee, which may include prepayment of premiums (*e.g.*, through increased payroll deductions when the need for the FMLA leave is foreseeable).

(d) The employer must provide the employee with advance written notice of the terms and conditions under which these payments must be made. *See* § 825.300(c).

(e) An employer may not require more of an employee using unpaid FMLA leave than the employer requires of other employees on ''leave without pay.''

(f) An employee who is receiving payments as a result of a workers' compensation injury must make arrangements with the employer for payment of group health plan benefits when simultaneously taking FMLA leave. *See* § 825.207(e).

§ 825.211 Maintenance of benefits under multi-employer health plans.

(a) A multi-employer health plan is a plan to which more than one employer is required to contribute, and which is maintained pursuant to one or more collective bargaining agreements between employee organization(s) and the employers.

(b) An employer under a multi-employer plan must continue to make contributions on behalf of an employee using FMLA leave as though the employee had been continuously employed, unless the plan contains an explicit FMLA provision for maintaining coverage such as through pooled contributions by all employers party to the plan.

(c) During the duration of an employee's FMLA leave, coverage by the group health plan, and benefits provided pursuant to the plan, must be maintained at the level of coverage and benefits which were applicable to the employee at the time FMLA leave commenced.

(d) An employee using FMLA leave cannot be required to use ''banked'' hours or pay a greater premium than the employee would have been required to pay if the employee had been continuously employed.

(e) As provided in § 825.209(f) of this part, group health plan coverage must be maintained for an employee on FMLA leave until:

(1) The employee's FMLA leave entitlement is exhausted;

(2) The employer can show that the employee would have been laid off and the employment relationship terminated; or,

(3) The employee provides unequivocal notice of intent not to return to work.

§ 825.212 Employee failure to pay health plan premium payments.

(a)(1) In the absence of an established employer policy providing a longer grace period, an employer's obligations to maintain health insurance coverage cease under FMLA if an employee's premium payment is more than 30 days late. In order to drop the coverage for an employee whose premium payment is late, the employer must provide written notice to the employee that the payment has not been received. Such notice must be mailed to the employee at least 15 days before coverage is to cease, advising that coverage will be dropped on a specified date at least 15 days after the date of the letter unless the payment has been received by that date. If the employer has established policies regarding other forms of unpaid leave that provide for the employer to cease

coverage retroactively to the date the unpaid premium payment was due, the employer may drop the employee from coverage retroactively in accordance with that policy, provided the 15-day notice was given. In the absence of such a policy, coverage for the employee may be terminated at the end of the 30-day grace period, where the required 15-day notice has been provided.

(2) An employer has no obligation regarding the maintenance of a health insurance policy which is not a ''group health plan.'' *See* § 825.209(a).

(3) All other obligations of an employer under FMLA would continue; for example, the employer continues to have an obligation to reinstate an employee upon return from leave.

(b) The employer may recover the employee's share of any premium payments missed by the employee for any FMLA leave period during which the employer maintains health coverage by paying the employee's share after the premium payment is missed.

(c) If coverage lapses because an employee has not made required premium payments, upon the employee's return from FMLA leave the employer must still restore the employee to coverage/benefits equivalent to those the employee would have had if leave had not been taken and the premium payment(s) had not been missed, including family or dependent coverage. *See* § 825.215(d)(1) through (5). In such case, an employee may not be required to meet any qualification requirements imposed by the plan, including any new preexisting condition waiting period, to wait for an open season, or to pass a medical examination to obtain reinstatement of coverage. If an employer terminates an employee's insurance in accordance with this section and fails to restore the employee's health insurance as required by this section upon the employee's return, the employer may be liable for benefits lost by reason of the violation, for other actual monetary losses sustained as a direct result of the violation, and for appropriate equitable relief tailored to the harm suffered.

§ 825.213 Employer recovery of benefit costs.

(a) In addition to the circumstances discussed in § 825.212(b), an employer may recover its share of health plan premiums during a period of unpaid FMLA leave from an employee if the employee fails to return to work after the employee's FMLA leave entitlement has been exhausted or expires, unless the reason the employee does not return is due to:

(1) The continuation, recurrence, or onset of either a serious health condition of the employee or the employee's family member, or a serious injury or illness of a covered servicemember, which would otherwise entitle the employee to leave under FMLA; or

(2) Other circumstances beyond the employee's control. Examples of ''other circumstances beyond the employee's control'' are necessarily broad. They include such situations as where a parent chooses to stay home with a newborn child who has a serious health condition; an employee's spouse is unexpectedly transferred to a job location more than 75 miles from the employee's worksite; a relative or individual other than a covered family member has a serious health condition and the employee is needed to provide care; the employee is laid off while on leave; or, the employee is a ''key employee'' who decides not to return to work upon being notified of the employer's intention to deny restoration because of substantial and grievous economic injury to the employer's operations and is not reinstated by the employer. Other circumstances beyond the employee's control would not include a situation where an employee desires to remain with a parent in a distant city even though the parent no longer requires the employee's care, or a parent chooses not to return to work to stay home with a well, newborn child.

(3) When an employee fails to return to work because of the continuation, recurrence, or onset of either a serious health condition of the employee or employee's family member, or a serious injury or illness of a covered servicemember, thereby precluding the employer from recovering its (share of) health benefit premium payments made on the employee's behalf during a period of unpaid FMLA leave, the employer may require medical certification of the employee's or the family member's serious health condition or the covered servicemember's serious injury or illness. Such certification is not required unless requested by the employer. The cost of the certification shall be borne by the employee, and the employee is not entitled to be paid for the time or travel costs spent in acquiring the certification. The employee is required to provide medical certification in a timely manner which, for purposes of this section, is within 30 days from the date of the employer's request. For purposes of medical certification, the employee may use the optional DOL forms developed for these purposes (*see* §§ 825.306(b), 825.310(c)–(d) and Appendices B and H of this part). If the employer requests medical certification and the employee does not provide such certification in a timely manner (within 30 days), or the reason for not returning to work does not meet the test of other circumstances beyond the employee's control, the employer may recover 100% of the health benefit premiums it paid during the period of unpaid FMLA leave.

(b) Under some circumstances an employer may elect to maintain other benefits, *e.g.*, life insurance, disability insurance, *etc.*, by paying the employee's (share of) premiums during periods of unpaid FMLA leave. For example, to ensure the employer can meet its responsibilities to provide equivalent benefits to the employee upon return from unpaid FMLA leave, it may be necessary that premiums be paid continuously to avoid a lapse of coverage. If the employer elects to maintain such benefits during the leave, at the conclusion of leave, the employer is entitled to recover only the costs incurred for paying the employee's share of any premiums whether or not the employee returns to work.

(c) An employee who returns to work for at least 30 calendar days is considered to have ''returned'' to work. An employee who transfers directly from taking FMLA leave to retirement, or who retires during the first 30 days after the employee returns to work, is deemed to have returned to work.

(d) When an employee elects or an employer requires paid leave to be substituted for FMLA leave, the employer may not recover its (share of) health insurance or other non-health benefit premiums for any period of FMLA leave covered by paid leave. Because paid leave provided under a plan covering temporary disabilities (including workers' compensation) is not unpaid, recovery of health insurance premiums does not apply to such paid leave.

(e) The amount that self-insured employers may recover is limited to only the employer's share of allowable ''premiums'' as would be calculated under COBRA, excluding the 2 percent fee for administrative costs.

(f) When an employee fails to return to work, any health and non-health benefit premiums which this section of the regulations permits an employer to recover are a debt owed by the non-returning employee to the employer. The existence of this debt caused by the employee's failure to return to work does not alter the employer's responsibilities for health benefit coverage and, under a self-insurance

plan, payment of claims incurred during the period of FMLA leave. To the extent recovery is allowed, the employer may recover the costs through deduction from any sums due to the employee (*e.g.*, unpaid wages, vacation pay, profit sharing, *etc.*), provided such deductions do not otherwise violate applicable Federal or State wage payment or other laws. Alternatively, the employer may initiate legal action against the employee to recover such costs.

§ 825.214 Employee right to reinstatement.

General rule. On return from FMLA leave, an employee is entitled to be returned to the same position the employee held when leave commenced, or to an equivalent position with equivalent benefits, pay, and other terms and conditions of employment. An employee is entitled to such reinstatement even if the employee has been replaced or his or her position has been restructured to accommodate the employee's absence. *See also* § 825.106(e) for the obligations of joint employers.

§ 825.215 Equivalent position.

(a) *Equivalent position.* An equivalent position is one that is virtually identical to the employee's former position in terms of pay, benefits and working conditions, including privileges, perquisites and status. It must involve the same or substantially similar duties and responsibilities, which must entail substantially equivalent skill, effort, responsibility, and authority.

(b) *Conditions to qualify.* If an employee is no longer qualified for the position because of the employee's inability to attend a necessary course, renew a license, fly a minimum number of hours, etc., as a result of the leave, the employee shall be given a reasonable opportunity to fulfill those conditions upon return to work.

(c) *Equivalent pay.* (1) An employee is entitled to any unconditional pay increases which may have occurred during the FMLA leave period, such as cost of living increases. Pay increases conditioned upon seniority, length of service, or work performed must be granted in accordance with the employer's policy or practice with respect to other employees on an equivalent leave status for a reason that does not qualify as FMLA leave. An employee is entitled to be restored to a position with the same or equivalent pay premiums, such as a shift differential. If an employee departed from a position averaging ten hours of overtime (and corresponding overtime pay) each week, an employee is ordinarily entitled to such a position on return from FMLA leave.

(2) Equivalent pay includes any bonus or payment, whether it is discretionary or non-discretionary, made to employees consistent with the provisions of paragraph (c)(1) of this section. However, if a bonus or other payment is based on the achievement of a specified goal such as hours worked, products sold or perfect attendance, and the employee has not met the goal due to FMLA leave, then the payment may be denied, unless otherwise paid to employees on an equivalent leave status for a reason that does not qualify as FMLA leave. For example, if an employee who used paid vacation leave for a non-FMLA purpose would receive the payment, then the employee who used paid vacation leave for an FMLA-protected purpose also must receive the payment.

(d) *Equivalent benefits.* ''Benefits'' include all benefits provided or made available to employees by an employer, including group life insurance, health insurance, disability insurance, sick leave, annual leave, educational benefits, and pensions, regardless of whether such benefits are provided by a practice or written policy of an employer through an employee benefit plan as defined in Section 3(3) of the Employee Retirement Income Security Act of 1974, 29 U.S.C. 1002(3).

(1) At the end of an employee's FMLA leave, benefits must be resumed in the same manner and at the same levels as provided when the leave began, and subject to any changes in benefit levels that may have taken place during the period of FMLA leave affecting the entire workforce, unless otherwise elected by the employee. Upon return from FMLA leave, an employee cannot be required to requalify for any benefits the employee enjoyed before FMLA leave began (including family or dependent coverages). For example, if an employee was covered by a life insurance policy before taking leave but is not covered or coverage lapses during the period of unpaid FMLA leave, the employee cannot be required to meet any qualifications, such as taking a physical examination, in order to requalify for life insurance upon return from leave. Accordingly, some employers may find it necessary to modify life insurance and other benefits programs in order to restore employees to equivalent benefits upon return from FMLA leave, make arrangements for continued payment of costs to maintain such benefits during unpaid FMLA leave, or pay these costs subject to recovery from the employee on return from leave. *See* § 825.213(b).

(2) An employee may, but is not entitled to, accrue any additional benefits or seniority during unpaid FMLA leave. Benefits accrued at the time leave began, however, (*e.g.*, paid vacation, sick or personal leave to the extent not substituted for FMLA leave) must be available to an employee upon return from leave.

(3) If, while on unpaid FMLA leave, an employee desires to continue life insurance, disability insurance, or other types of benefits for which he or she typically pays, the employer is required to follow established policies or practices for continuing such benefits for other instances of leave without pay. If the employer has no established policy, the employee and the employer are encouraged to agree upon arrangements before FMLA leave begins.

(4) With respect to pension and other retirement plans, any period of unpaid FMLA leave shall not be treated as or counted toward a break in service for purposes of vesting and eligibility to participate. Also, if the plan requires an employee to be employed on a specific date in order to be credited with a year of service for vesting, contributions or participation purposes, an employee on unpaid FMLA leave on that date shall be deemed to have been employed on that date. However, unpaid FMLA leave periods need not be treated as credited service for purposes of benefit accrual, vesting and eligibility to participate.

(5) Employees on unpaid FMLA leave are to be treated as if they continued to work for purposes of changes to benefit plans. They are entitled to changes in benefits plans, except those which may be dependent upon seniority or accrual during the leave period, immediately upon return from leave or to the same extent they would have qualified if no leave had been taken. For example, if the benefit plan is predicated on a pre-established number of hours worked each year and the employee does not have sufficient hours as a result of taking unpaid FMLA leave, the benefit is lost. (In this regard, § 825.209 addresses health benefits.)

(e) *Equivalent terms and conditions of employment.* An equivalent position must have substantially similar duties, conditions, responsibilities, privileges and status as the employee's original position.

(1) The employee must be reinstated to the same or a geographically proximate worksite (*i.e.*, one that does not involve a significant increase in commuting time or distance) from where the employee had previously been employed. If the employee's original worksite has been closed, the employee is entitled to the same rights

as if the employee had not been on leave when the worksite closed. For example, if an employer transfers all employees from a closed worksite to a new worksite in a different city, the employee on leave is also entitled to transfer under the same conditions as if he or she had continued to be employed.

(2) The employee is ordinarily entitled to return to the same shift or the same or an equivalent work schedule.

(3) The employee must have the same or an equivalent opportunity for bonuses, profit-sharing, and other similar discretionary and non-discretionary payments.

(4) FMLA does not prohibit an employer from accommodating an employee's request to be restored to a different shift, schedule, or position which better suits the employee's personal needs on return from leave, or to offer a promotion to a better position. However, an employee cannot be induced by the employer to accept a different position against the employee's wishes.

(f) *De minimis exception.* The requirement that an employee be restored to the same or equivalent job with the same or equivalent pay, benefits, and terms and conditions of employment does not extend to de minimis, intangible, or unmeasurable aspects of the job.

§ 825.216 Limitations on an employee's right to reinstatement.

(a) An employee has no greater right to reinstatement or to other benefits and conditions of employment than if the employee had been continuously employed during the FMLA leave period. An employer must be able to show that an employee would not otherwise have been employed at the time reinstatement is requested in order to deny restoration to employment. For example:

(1) If an employee is laid off during the course of taking FMLA leave and employment is terminated, the employer's responsibility to continue FMLA leave, maintain group health plan benefits and restore the employee cease at the time the employee is laid off, provided the employer has no continuing obligations under a collective bargaining agreement or otherwise. An employer would have the burden of proving that an employee would have been laid off during the FMLA leave period and, therefore, would not be entitled to restoration. Restoration to a job slated for lay-off when the employee's original position is not would not meet the requirements of an equivalent position.

(2) If a shift has been eliminated, or overtime has been decreased, an employee would not be entitled to return to work that shift or the original overtime hours upon restoration. However, if a position on, for example, a night shift has been filled by another employee, the employee is entitled to return to the same shift on which employed before taking FMLA leave.

(3) If an employee was hired for a specific term or only to perform work on a discrete project, the employer has no obligation to restore the employee if the employment term or project is over and the employer would not otherwise have continued to employ the employee. On the other hand, if an employee was hired to perform work on a contract, and after that contract period the contract was awarded to another contractor, the successor contractor may be required to restore the employee if it is a successor employer. *See* § 825.107.

(b) In addition to the circumstances explained above, an employer may deny job restoration to salaried eligible employees (''key employees,'' as defined in § 825.217(c)), if such denial is necessary to prevent substantial and grievous economic injury to the operations of the employer; or may delay restoration to an employee who fails to provide a fitness-for-duty certificate to return to work under the conditions described in § 825.312.

(c) If the employee is unable to perform an essential function of the position because of a physical or mental condition, including the continuation of a serious health condition or an injury or illness also covered by workers' compensation, the employee has no right to restoration to another position under the FMLA. The employer's obligations may, however, be governed by the Americans with Disabilities Act (ADA), as amended. *See* § 825.702, state leave laws, or workers' compensation laws.

(d) An employee who fraudulently obtains FMLA leave from an employer is not protected by FMLA's job restoration or maintenance of health benefits provisions.

(e) If the employer has a uniformly-applied policy governing outside or supplemental employment, such a policy may continue to apply to an employee while on FMLA leave. An employer which does not have such a policy may not deny benefits to which an employee is entitled under FMLA on this basis unless the FMLA leave was fraudulently obtained as in paragraph (d) of this section.

§ 825.217 Key employee, general rule.

(a) A ''key employee'' is a salaried FMLA-eligible employee who is among the highest paid 10 percent of all the employees employed by the employer within 75 miles of the employee's worksite.

(b) The term ''salaried'' means ''paid on a salary basis,'' as defined in 29 CFR 541.602. This is the Department of Labor regulation defining employees who may qualify as exempt from the minimum wage and overtime requirements of the FLSA as executive, administrative, professional, and computer employees.

(c) A ''key employee'' must be ''among the highest paid 10 percent'' of all the employees—both salaried and non-salaried, eligible and ineligible—who are employed by the employer within 75 miles of the worksite.

(1) In determining which employees are among the highest paid 10 percent, year-to-date earnings are divided by weeks worked by the employee (including weeks in which paid leave was taken). Earnings include wages, premium pay, incentive pay, and non-discretionary and discretionary bonuses. Earnings do not include incentives whose value is determined at some future date, *e.g.*, stock options, or benefits or perquisites.

(2) The determination of whether a salaried employee is among the highest paid 10 percent shall be made at the time the employee gives notice of the need for leave. No more than 10 percent of the employer's employees within 75 miles of the worksite may be ''key employees.''

§ 825.218 Substantial and grievous economic injury.

(a) In order to deny restoration to a key employee, an employer must determine that the restoration of the employee to employment will cause ''substantial and grievous economic injury'' to the operations of the employer, not whether the absence of the employee will cause such substantial and grievous injury.

(b) An employer may take into account its ability to replace on a temporary basis (or temporarily do without) the employee on FMLA leave. If permanent replacement is unavoidable, the cost of then reinstating the employee can be considered in evaluating whether substantial and grievous economic injury will occur from restoration; in other words, the effect on the operations of the company of reinstating the employee in an equivalent position.

(c) A precise test cannot be set for the level of hardship or injury to the

employer which must be sustained. If the reinstatement of a ''key employee'' threatens the economic viability of the firm, that would constitute ''substantial and grievous economic injury.'' A lesser injury which causes substantial, long-term economic injury would also be sufficient. Minor inconveniences and costs that the employer would experience in the normal course of doing business would certainly not constitute ''substantial and grievous economic injury.''

(d) FMLA's ''substantial and grievous economic injury'' standard is different from and more stringent than the ''undue hardship'' test under the ADA (*see also* § 825.702).

§ 825.219 Rights of a key employee.

(a) An employer who believes that reinstatement may be denied to a key employee, must give written notice to the employee at the time the employee gives notice of the need for FMLA leave (or when FMLA leave commences, if earlier) that he or she qualifies as a key employee. At the same time, the employer must also fully inform the employee of the potential consequences with respect to reinstatement and maintenance of health benefits if the employer should determine that substantial and grievous economic injury to the employer's operations will result if the employee is reinstated from FMLA leave. If such notice cannot be given immediately because of the need to determine whether the employee is a key employee, it shall be given as soon as practicable after being notified of a need for leave (or the commencement of leave, if earlier). It is expected that in most circumstances there will be no desire that an employee be denied restoration after FMLA leave and, therefore, there would be no need to provide such notice. However, an employer who fails to provide such timely notice will lose its right to deny restoration even if substantial and grievous economic injury will result from reinstatement.

(b) As soon as an employer makes a good faith determination, based on the facts available, that substantial and grievous economic injury to its operations will result if a key employee who has given notice of the need for FMLA leave or is using FMLA leave is reinstated, the employer shall notify the employee in writing of its determination, that it cannot deny FMLA leave, and that it intends to deny restoration to employment on completion of the FMLA leave. It is anticipated that an employer will ordinarily be able to give such notice prior to the employee starting leave. The employer must serve this notice either in person or by certified mail. This notice must explain the basis for the employer's finding that substantial and grievous economic injury will result, and, if leave has commenced, must provide the employee a reasonable time in which to return to work, taking into account the circumstances, such as the length of the leave and the urgency of the need for the employee to return.

(c) If an employee on leave does not return to work in response to the employer's notification of intent to deny restoration, the employee continues to be entitled to maintenance of health benefits and the employer may not recover its cost of health benefit premiums. A key employee's rights under FMLA continue unless and until the employee either gives notice that he or she no longer wishes to return to work, or the employer actually denies reinstatement at the conclusion of the leave period.

(d) After notice to an employee has been given that substantial and grievous economic injury will result if the employee is reinstated to employment, an employee is still entitled to request reinstatement at the end of the leave period even if the employee did not return to work in response to the employer's notice. The employer must then again determine whether there will be substantial and grievous economic injury from reinstatement, based on the facts at that time. If it is determined that substantial and grievous economic injury will result, the employer shall notify the employee in writing (in person or by certified mail) of the denial of restoration.

§ 825.220 Protection for employees who request leave or otherwise assert FMLA rights.

(a) The FMLA prohibits interference with an employee's rights under the law, and with legal proceedings or inquiries relating to an employee's rights. More specifically, the law contains the following employee protections:

(1) An employer is prohibited from interfering with, restraining, or denying the exercise of (or attempts to exercise) any rights provided by the Act.

(2) An employer is prohibited from discharging or in any other way discriminating against any person (whether or not an employee) for opposing or complaining about any unlawful practice under the Act.

(3) All persons (whether or not employers) are prohibited from discharging or in any other way discriminating against any person (whether or not an employee) because that person has—

(i) Filed any charge, or has instituted (or caused to be instituted) any proceeding under or related to this Act;

(ii) Given, or is about to give, any information in connection with an inquiry or proceeding relating to a right under this Act;

(iii) Testified, or is about to testify, in any inquiry or proceeding relating to a right under this Act.

(b) Any violations of the Act or of these regulations constitute interfering with, restraining, or denying the exercise of rights provided by the Act. An employer may be liable for compensation and benefits lost by reason of the violation, for other actual monetary losses sustained as a direct result of the violation, and for appropriate equitable or other relief, including employment, reinstatement, promotion, or any other relief tailored to the harm suffered (*see* § 825.400(c)). ''Interfering with'' the exercise of an employee's rights would include, for example, not only refusing to authorize FMLA leave, but discouraging an employee from using such leave. It would also include manipulation by a covered employer to avoid responsibilities under FMLA, for example:

(1) Transferring employees from one worksite to another for the purpose of reducing worksites, or to keep worksites, below the 50-employee threshold for employee eligibility under the Act;

(2) Changing the essential functions of the job in order to preclude the taking of leave;

(3) Reducing hours available to work in order to avoid employee eligibility.

(c) The Act's prohibition against ''interference'' prohibits an employer from discriminating or retaliating against an employee or prospective employee for having exercised or attempted to exercise FMLA rights. For example, if an employee on leave without pay would otherwise be entitled to full benefits (other than health benefits), the same benefits would be required to be provided to an employee on unpaid FMLA leave. By the same token, employers cannot use the taking of FMLA leave as a negative factor in employment actions, such as hiring, promotions or disciplinary actions; nor can FMLA leave be counted under ''no fault'' attendance policies. *See* § 825.215.

(d) Employees cannot waive, nor may employers induce employees to waive, their prospective rights under FMLA. For example, employees (or their collective bargaining representatives)

cannot ''trade off'' the right to take FMLA leave against some other benefit offered by the employer. This does not prevent the settlement or release of FMLA claims by employees based on past employer conduct without the approval of the Department of Labor or a court. Nor does it prevent an employee's voluntary and uncoerced acceptance (not as a condition of employment) of a ''light duty'' assignment while recovering from a serious health condition (*see* § 825.702(d)). An employee's acceptance of such ''light duty'' assignment does not constitute a waiver of the employee's prospective rights, including the right to be restored to the same position the employee held at the time the employee's FMLA leave commenced or to an equivalent position. The employee's right to restoration, however, ceases at the end of the applicable 12-month FMLA leave year.

(e) Individuals, and not merely employees, are protected from retaliation for opposing (*e.g.*, filing a complaint about) any practice which is unlawful under the Act. They are similarly protected if they oppose any practice which they reasonably believe to be a violation of the Act or regulations.

Subpart C—Employee and Employer Rights and Obligations Under the Act

§ 825.300 Employer notice requirements.

(a) *General notice.* (1) Every employer covered by the FMLA is required to post and keep posted on its premises, in conspicuous places where employees are employed, a notice explaining the Act's provisions and providing information concerning the procedures for filing complaints of violations of the Act with the Wage and Hour Division. The notice must be posted prominently where it can be readily seen by employees and applicants for employment. The poster and the text must be large enough to be easily read and contain fully legible text. Electronic posting is sufficient to meet this posting requirement as long as it otherwise meets the requirements of this section. An employer that willfully violates the posting requirement may be assessed a civil money penalty by the Wage and Hour Division not to exceed $110 for each separate offense.

(2) Covered employers must post this general notice even if no employees are eligible for FMLA leave.

(3) If an FMLA-covered employer has any eligible employees, it shall also provide this general notice to each employee by including the notice in employee handbooks or other written guidance to employees concerning employee benefits or leave rights, if such written materials exist, or by distributing a copy of the general notice to each new employee upon hiring. In either case, distribution may be accomplished electronically.

(4) To meet the requirements of paragraph (a)(3) of this section, employers may duplicate the text of the notice contained in Appendix C of this part or may use another format so long as the information provided includes, at a minimum, all of the information contained in that notice. Where an employer's workforce is comprised of a significant portion of workers who are not literate in English, the employer shall provide the general notice in a language in which the employees are literate. Prototypes are available from the nearest office of the Wage and Hour Division or on the Internet at *http://www.wagehour.dol.gov*. Employers furnishing FMLA notices to sensory-impaired individuals must also comply with all applicable requirements under Federal or State law.

(b) *Eligibility notice.* (1) When an employee requests FMLA leave, or when the employer acquires knowledge that an employee's leave may be for an FMLA-qualifying reason, the employer must notify the employee of the employee's eligibility to take FMLA leave within five business days, absent extenuating circumstances. *See* § 825.110 for definition of an eligible employee. Employee eligibility is determined (and notice must be provided) at the commencement of the first instance of leave for each FMLA-qualifying reason in the applicable 12-month period (*see* §§ 825.127(c) and 825.200(b)). All FMLA absences for the same qualifying reason are considered a single leave and employee eligibility as to that reason for leave does not change during the applicable 12-month period.

(2) The eligibility notice must state whether the employee is eligible for FMLA leave as defined in § 825.110(a). If the employee is not eligible for FMLA leave, the notice must state at least one reason why the employee is not eligible, including as applicable the number of months the employee has been employed by the employer, the number of hours of service worked for the employer during the 12-month period, and whether the employee is employed at a worksite where 50 or more employees are employed by the employer within 75 miles of that worksite. Notification of eligibility may be oral or in writing; employers may use Appendix D of this part 825 to provide such notification to employees. The employer is obligated to translate this notice in any situation in which it is obligated to do so in § 825.300(a)(4).

(3) If, at the time an employee provides notice of a subsequent need for FMLA leave during the applicable 12-month period due to a different FMLA-qualifying reason, and the employee's eligibility status has not changed, no additional eligibility notice is required. If, however, the employee's eligibility status has changed (*e.g.*, if the employee has worked less than 1,250 hours of service for the employer in the 12 months preceding the commencement of leave for the subsequent qualifying reason or the size of the workforce at the worksite has dropped below 50 employees), the employer must notify the employee of the change in eligibility status within five business days, absent extenuating circumstances.

(c) *Rights and responsibilities notice.* (1) Employers shall provide written notice detailing the specific expectations and obligations of the employee and explaining any consequences of a failure to meet these obligations. The employer is obligated to translate this notice in any situation in which it is obligated to do so in § 825.300(a)(4). This notice shall be provided to the employee each time the eligibility notice is provided pursuant to paragraph (b) of this section. If leave has already begun, the notice should be mailed to the employee's address of record. Such specific notice must include, as appropriate:

(i) That the leave may be designated and counted against the employee's annual FMLA leave entitlement if qualifying (*see* §§ 825.300(c) and 825.301) and the applicable 12-month period for FMLA entitlement (*see* §§ 825.127(c), 825.200(b), (f), and (g));

(ii) Any requirements for the employee to furnish certification of a serious health condition, serious injury or illness, or qualifying exigency arising out of active duty or call to active duty status, and the consequences of failing to do so (*see* §§ 825.305, 825.309, 825.310, 825.313);

(iii) The employee's right to substitute paid leave, whether the employer will require the substitution of paid leave, the conditions related to any substitution, and the employee's entitlement to take unpaid FMLA leave if the employee does not meet the conditions for paid leave (*see* § 825.207);

(iv) Any requirement for the employee to make any premium payments to maintain health benefits and the arrangements for making such payments (*see* § 825.210), and the possible consequences of failure to make such

payments on a timely basis (*i.e.*, the circumstances under which coverage may lapse);

(v) The employee's status as a ''key employee'' and the potential consequence that restoration may be denied following FMLA leave, explaining the conditions required for such denial (*see* § 825.218);

(vi) The employee's rights to maintenance of benefits during the FMLA leave and restoration to the same or an equivalent job upon return from FMLA leave (*see* §§ 825.214 and 825.604); and

(vii) The employee's potential liability for payment of health insurance premiums paid by the employer during the employee's unpaid FMLA leave if the employee fails to return to work after taking FMLA leave (*see* § 825.213).

(2) The notice of rights and responsibilities may include other information—*e.g.*, whether the employer will require periodic reports of the employee's status and intent to return to work—but is not required to do so.

(3) The notice of rights and responsibilities may be accompanied by any required certification form.

(4) If the specific information provided by the notice of rights and responsibilities changes, the employer shall, within five business days of receipt of the employee's first notice of need for leave subsequent to any change, provide written notice referencing the prior notice and setting forth any of the information in the notice of rights and responsibilities that has changed. For example, if the initial leave period was paid leave and the subsequent leave period would be unpaid leave, the employer may need to give notice of the arrangements for making premium payments.

(5) Employers are also expected to responsively answer questions from employees concerning their rights and responsibilities under the FMLA.

(6) A prototype notice of rights and responsibilities is contained in Appendix D of this part; the prototype may be obtained from local offices of the Wage and Hour Division or from the Internet at *www.wagehour.dol.gov*. Employers may adapt the prototype notice as appropriate to meet these notice requirements. The notice of rights and responsibilities may be distributed electronically so long as it otherwise meets the requirements of this section.

(d) *Designation notice*. (1) The employer is responsible in all circumstances for designating leave as FMLA-qualifying, and for giving notice of the designation to the employee as provided in this section. When the employer has enough information to determine whether the leave is being taken for a FMLA-qualifying reason (*e.g.*, after receiving a certification), the employer must notify the employee whether the leave will be designated and will be counted as FMLA leave within five business days absent extenuating circumstances. Only one notice of designation is required for each FMLA-qualifying reason per applicable 12-month period, regardless of whether the leave taken due to the qualifying reason will be a continuous block of leave or intermittent or reduced schedule leave. If the employer determines that the leave will not be designated as FMLA-qualifying (*e.g.*, if the leave is not for a reason covered by FMLA or the FMLA leave entitlement has been exhausted), the employer must notify the employee of that determination. If the employer requires paid leave to be substituted for unpaid FMLA leave, or that paid leave taken under an existing leave plan be counted as FMLA leave, the employer must inform the employee of this designation at the time of designating the FMLA leave.

(2) If the employer has sufficient information to designate the leave as FMLA leave immediately after receiving notice of the employee's need for leave, the employer may provide the employee with the designation notice at that time.

(3) If the employer will require the employee to present a fitness-for-duty certification to be restored to employment, the employer must provide notice of such requirement with the designation notice. If the employer will require that the fitness-for-duty certification address the employee's ability to perform the essential functions of the employee's position, the employer must so indicate in the designation notice, and must include a list of the essential functions of the employee's position. *See* § 825.312. If the employer handbook or other written documents (if any) describing the employer's leave policies clearly provide that a fitness-for-duty certification will be required in specific circumstances (*e.g.*, by stating that fitness-for-duty certification will be required in all cases of back injuries for employees in a certain occupation), the employer is not required to provide written notice of the requirement with the designation notice, but must provide oral notice no later than with the designation notice.

(4) The designation notice must be in writing. A prototype designation notice is contained in Appendix E of this part; the prototype designation notice may be obtained from local offices of the Wage and Hour Division or from the Internet at *http://www.wagehour.dol.gov*. If the leave is not designated as FMLA leave because it does not meet the requirements of the Act, the notice to the employee that the leave is not designated as FMLA leave may be in the form of a simple written statement.

(5) If the information provided by the employer to the employee in the designation notice changes (*e.g.*, the employee exhausts the FMLA leave entitlement), the employer shall provide, within five business days of receipt of the employee's first notice of need for leave subsequent to any change, written notice of the change.

(6) The employer must notify the employee of the amount of leave counted against the employee's FMLA leave entitlement. If the amount of leave needed is known at the time the employer designates the leave as FMLA-qualifying, the employer must notify the employee of the number of hours, days, or weeks that will be counted against the employee's FMLA leave entitlement in the designation notice. If it is not possible to provide the hours, days, or weeks that will be counted against the employee's FMLA leave entitlement (such as in the case of unforeseeable intermittent leave), then the employer must provide notice of the amount of leave counted against the employee's FMLA leave entitlement upon the request by the employee, but no more often than once in a 30-day period and only if leave was taken in that period. The notice of the amount of leave counted against the employee's FMLA entitlement may be oral or in writing. If such notice is oral, it shall be confirmed in writing, no later than the following payday (unless the payday is less than one week after the oral notice, in which case the notice must be no later than the subsequent payday). Such written notice may be in any form, including a notation on the employee's pay stub.

(e) *Consequences of failing to provide notice*. Failure to follow the notice requirements set forth in this section may constitute an interference with, restraint, or denial of the exercise of an employee's FMLA rights. An employer may be liable for compensation and benefits lost by reason of the violation, for other actual monetary losses sustained as a direct result of the violation, and for appropriate equitable or other relief, including employment, reinstatement, promotion, or any other relief tailored to the harm suffered (*see* § 825.400(c)).

§ 825.301 Designation of FMLA leave.

(a) *Employer responsibilities*. The employer's decision to designate leave as FMLA-qualifying must be based only

on information received from the employee or the employee's spokesperson (*e.g.*, if the employee is incapacitated, the employee's spouse, adult child, parent, doctor, *etc.*, may provide notice to the employer of the need to take FMLA leave). In any circumstance where the employer does not have sufficient information about the reason for an employee's use of leave, the employer should inquire further of the employee or the spokesperson to ascertain whether leave is potentially FMLA-qualifying. Once the employer has acquired knowledge that the leave is being taken for a FMLA-qualifying reason, the employer must notify the employee as provided in § 825.300(d).

(b) *Employee responsibilities*. An employee giving notice of the need for FMLA leave does not need to expressly assert rights under the Act or even mention the FMLA to meet his or her obligation to provide notice, though the employee would need to state a qualifying reason for the needed leave and otherwise satisfy the notice requirements set forth in § 825.302 or § 825.303 depending on whether the need for leave is foreseeable or unforeseeable. An employee giving notice of the need for FMLA leave must explain the reasons for the needed leave so as to allow the employer to determine whether the leave qualifies under the Act. If the employee fails to explain the reasons, leave may be denied. In many cases, in explaining the reasons for a request to use leave, especially when the need for the leave was unexpected or unforeseen, an employee will provide sufficient information for the employer to designate the leave as FMLA leave. An employee using accrued paid leave may in some cases not spontaneously explain the reasons or their plans for using their accrued leave. However, if an employee requesting to use paid leave for a FMLA-qualifying reason does not explain the reason for the leave and the employer denies the employee's request, the employee will need to provide sufficient information to establish a FMLA-qualifying reason for the needed leave so that the employer is aware that the leave may not be denied and may designate that the paid leave be appropriately counted against (substituted for) the employee's FMLA leave entitlement. Similarly, an employee using accrued paid vacation leave who seeks an extension of unpaid leave for a FMLA-qualifying reason will need to state the reason. If this is due to an event which occurred during the period of paid leave, the employer may count the leave used after the FMLA-qualifying reason against the employee's FMLA leave entitlement.

(c) *Disputes*. If there is a dispute between an employer and an employee as to whether leave qualifies as FMLA leave, it should be resolved through discussions between the employee and the employer. Such discussions and the decision must be documented.

(d) *Retroactive designation*. If an employer does not designate leave as required by § 825.300, the employer may retroactively designate leave as FMLA leave with appropriate notice to the employee as required by § 825.300 provided that the employer's failure to timely designate leave does not cause harm or injury to the employee. In all cases where leave would qualify for FMLA protections, an employer and an employee can mutually agree that leave be retroactively designated as FMLA leave.

(e) *Remedies*. If an employer's failure to timely designate leave in accordance with § 825.300 causes the employee to suffer harm, it may constitute an interference with, restraint of, or denial of the exercise of an employee's FMLA rights. An employer may be liable for compensation and benefits lost by reason of the violation, for other actual monetary losses sustained as a direct result of the violation, and for appropriate equitable or other relief, including employment, reinstatement, promotion, or any other relief tailored to the harm suffered (*see* § 825.400(c)). For example, if an employer that was put on notice that an employee needed FMLA leave failed to designate the leave properly, but the employee's own serious health condition prevented him or her from returning to work during that time period regardless of the designation, an employee may not be able to show that the employee suffered harm as a result of the employer's actions. However, if an employee took leave to provide care for a son or daughter with a serious health condition believing it would not count toward his or her FMLA entitlement, and the employee planned to later use that FMLA leave to provide care for a spouse who would need assistance when recovering from surgery planned for a later date, the employee may be able to show that harm has occurred as a result of the employer's failure to designate properly. The employee might establish this by showing that he or she would have arranged for an alternative caregiver for the seriously-ill son or daughter if the leave had been designated timely.

§ 825.302 Employee notice requirements for foreseeable FMLA leave.

(a) *Timing of notice*. An employee must provide the employer at least 30 days advance notice before FMLA leave is to begin if the need for the leave is foreseeable based on an expected birth, placement for adoption or foster care, planned medical treatment for a serious health condition of the employee or of a family member, or the planned medical treatment for a serious injury or illness of a covered servicemember. If 30 days notice is not practicable, such as because of a lack of knowledge of approximately when leave will be required to begin, a change in circumstances, or a medical emergency, notice must be given as soon as practicable. For example, an employee's health condition may require leave to commence earlier than anticipated before the birth of a child. Similarly, little opportunity for notice may be given before placement for adoption. For foreseeable leave due to a qualifying exigency notice must be provided as soon as practicable, regardless of how far in advance such leave is foreseeable. Whether FMLA leave is to be continuous or is to be taken intermittently or on a reduced schedule basis, notice need only be given one time, but the employee shall advise the employer as soon as practicable if dates of scheduled leave change or are extended, or were initially unknown. In those cases where the employee is required to provide at least 30 days notice of foreseeable leave and does not do so, the employee shall explain the reasons why such notice was not practicable upon a request from the employer for such information.

(b) *As soon as practicable* means as soon as both possible and practical, taking into account all of the facts and circumstances in the individual case. When an employee becomes aware of a need for FMLA leave less than 30 days in advance, it should be practicable for the employee to provide notice of the need for leave either the same day or the next business day. In all cases, however, the determination of when an employee could practicably provide notice must take into account the individual facts and circumstances.

(c) *Content of notice*. An employee shall provide at least verbal notice sufficient to make the employer aware that the employee needs FMLA-qualifying leave, and the anticipated timing and duration of the leave. Depending on the situation, such information may include that a condition renders the employee unable to perform the functions of the job; that the employee is pregnant or has been

hospitalized overnight; whether the employee or the employee's family member is under the continuing care of a health care provider; if the leave is due to a qualifying exigency, that a covered military member is on active duty or call to active duty status, and that the requested leave is for one of the reasons listed in § 825.126(a); if the leave is for a family member, that the condition renders the family member unable to perform daily activities, or that the family member is a covered servicemember with a serious injury or illness; and the anticipated duration of the absence, if known. When an employee seeks leave for the first time for a FMLA-qualifying reason, the employee need not expressly assert rights under the FMLA or even mention the FMLA. When an employee seeks leave due to a FMLA-qualifying reason, for which the employer has previously provided FMLA-protected leave, the employee must specifically reference the qualifying reason for leave or the need for FMLA leave. In all cases, the employer should inquire further of the employee if it is necessary to have more information about whether FMLA leave is being sought by the employee, and obtain the necessary details of the leave to be taken. In the case of medical conditions, the employer may find it necessary to inquire further to determine if the leave is because of a serious health condition and may request medical certification to support the need for such leave (*see* § 825.305). An employer may also request certification to support the need for leave for a qualifying exigency or for military caregiver leave (*see* §§ 825.309, 825.310). When an employee has been previously certified for leave due to more than one FMLA-qualifying reason, the employer may need to inquire further to determine for which qualifying reason the leave is needed. An employee has an obligation to respond to an employer's questions designed to determine whether an absence is potentially FMLA-qualifying. Failure to respond to reasonable employer inquiries regarding the leave request may result in denial of FMLA protection if the employer is unable to determine whether the leave is FMLA-qualifying.

(d) *Complying with employer policy*. An employer may require an employee to comply with the employer's usual and customary notice and procedural requirements for requesting leave, absent unusual circumstances. For example, an employer may require that written notice set forth the reasons for the requested leave, the anticipated duration of the leave, and the anticipated start of the leave. An employee also may be required by an employer's policy to contact a specific individual. Unusual circumstances would include situations such as when an employee is unable to comply with the employer's policy that requests for leave should be made by contacting a specific number because on the day the employee needs to provide notice of his or her need for FMLA leave there is no one to answer the call-in number and the voice mail box is full. Where an employee does not comply with the employer's usual notice and procedural requirements, and no unusual circumstances justify the failure to comply, FMLA-protected leave may be delayed or denied. However, FMLA-protected leave may not be delayed or denied where the employer's policy requires notice to be given sooner than set forth in paragraph (a) of this section and the employee provides timely notice as set forth in paragraph (a) of this section.

(e) *Scheduling planned medical treatment*. When planning medical treatment, the employee must consult with the employer and make a reasonable effort to schedule the treatment so as not to disrupt unduly the employer's operations, subject to the approval of the health care provider. Employees are ordinarily expected to consult with their employers prior to the scheduling of treatment in order to work out a treatment schedule which best suits the needs of both the employer and the employee. For example, if an employee who provides notice of the need to take FMLA leave on an intermittent basis for planned medical treatment neglects to consult with the employer to make a reasonable effort to arrange the schedule of treatments so as not to unduly disrupt the employer's operations, the employer may initiate discussions with the employee and require the employee to attempt to make such arrangements, subject to the approval of the health care provider. *See* §§ 825.203 and 825.205.

(f) Intermittent leave or leave on a reduced leave schedule must be medically necessary due to a serious health condition or a serious injury or illness. An employee shall advise the employer, upon request, of the reasons why the intermittent/reduced leave schedule is necessary and of the schedule for treatment, if applicable. The employee and employer shall attempt to work out a schedule for such leave that meets the employee's needs without unduly disrupting the employer's operations, subject to the approval of the health care provider.

(g) An employer may waive employees' FMLA notice requirements. *See* § 825.304.

§ 825.303 Employee notice requirements for unforeseeable FMLA leave.

(a) *Timing of notice*. When the approximate timing of the need for leave is not foreseeable, an employee must provide notice to the employer as soon as practicable under the facts and circumstances of the particular case. It generally should be practicable for the employee to provide notice of leave that is unforeseeable within the time prescribed by the employer's usual and customary notice requirements applicable to such leave. *See* § 825.303(c). Notice may be given by the employee's spokesperson (*e.g.*, spouse, adult family member, or other responsible party) if the employee is unable to do so personally. For example, if an employee's child has a severe asthma attack and the employee takes the child to the emergency room, the employee would not be required to leave his or her child in order to report the absence while the child is receiving emergency treatment. However, if the child's asthma attack required only the use of an inhaler at home followed by a period of rest, the employee would be expected to call the employer promptly after ensuring the child has used the inhaler.

(b) *Content of notice*. An employee shall provide sufficient information for an employer to reasonably determine whether the FMLA may apply to the leave request. Depending on the situation, such information may include that a condition renders the employee unable to perform the functions of the job; that the employee is pregnant or has been hospitalized overnight; whether the employee or the employee's family member is under the continuing care of a health care provider; if the leave is due to a qualifying exigency, that a covered military member is on active duty or call to active duty status, that the requested leave is for one of the reasons listed in § 825.126(a), and the anticipated duration of the absence; or if the leave is for a family member that the condition renders the family member unable to perform daily activities or that the family member is a covered servicemember with a serious injury or illness; and the anticipated duration of the absence, if known. When an employee seeks leave for the first time for a FMLA-qualifying reason, the employee need not expressly assert rights under the FMLA or even mention the FMLA. When an employee seeks leave due to a qualifying reason, for which the employer has previously

provided the employee FMLA-protected leave, the employee must specifically reference either the qualifying reason for leave or the need for FMLA leave. Calling in ''sick'' without providing more information will not be considered sufficient notice to trigger an employer's obligations under the Act. The employer will be expected to obtain any additional required information through informal means. An employee has an obligation to respond to an employer's questions designed to determine whether an absence is potentially FMLA-qualifying. Failure to respond to reasonable employer inquiries regarding the leave request may result in denial of FMLA protection if the employer is unable to determine whether the leave is FMLA-qualifying.

(c) *Complying with employer policy*. When the need for leave is not foreseeable, an employee must comply with the employer's usual and customary notice and procedural requirements for requesting leave, absent unusual circumstances. For example, an employer may require employees to call a designated number or a specific individual to request leave. However, if an employee requires emergency medical treatment, he or she would not be required to follow the call-in procedure until his or her condition is stabilized and he or she has access to, and is able to use, a phone. Similarly, in the case of an emergency requiring leave because of a FMLA-qualifying reason, written advance notice pursuant to an employer's internal rules and procedures may not be required when FMLA leave is involved. If an employee does not comply with the employer's usual notice and procedural requirements, and no unusual circumstances justify the failure to comply, FMLA-protected leave may be delayed or denied.

§ 825.304 Employee failure to provide notice.

(a) *Proper notice required*. In all cases, in order for the onset of an employee's FMLA leave to be delayed due to lack of required notice, it must be clear that the employee had actual notice of the FMLA notice requirements. This condition would be satisfied by the employer's proper posting of the required notice at the worksite where the employee is employed and the employer's provision of the required notice in either an employee handbook or employee distribution, as required by § 825.300.

(b) *Foreseeable leave—30 days*. When the need for FMLA leave is foreseeable at least 30 days in advance and an employee fails to give timely advance notice with no reasonable excuse, the employer may delay FMLA coverage until 30 days after the date the employee provides notice. The need for leave and the approximate date leave would be taken must have been clearly foreseeable to the employee 30 days in advance of the leave. For example, knowledge that an employee would receive a telephone call about the availability of a child for adoption at some unknown point in the future would not be sufficient to establish the leave was clearly foreseeable 30 days in advance.

(c) *Foreseeable leave—less than 30 days*. When the need for FMLA leave is foreseeable fewer than 30 days in advance and an employee fails to give notice as soon as practicable under the particular facts and circumstances, the extent to which an employer may delay FMLA coverage for leave depends on the facts of the particular case. For example, if an employee reasonably should have given the employer two weeks notice but instead only provided one week notice, then the employer may delay FMLA-protected leave for one week (thus, if the employer elects to delay FMLA coverage and the employee nonetheless takes leave one week after providing the notice (*i.e.*, a week before the two week notice period has been met) the leave will not be FMLA-protected).

(d) *Unforeseeable leave*. When the need for FMLA leave is unforeseeable and an employee fails to give notice in accordance with § 825.303, the extent to which an employer may delay FMLA coverage for leave depends on the facts of the particular case. For example, if it would have been practicable for an employee to have given the employer notice of the need for leave very soon after the need arises consistent with the employer's policy, but instead the employee provided notice two days after the leave began, then the employer may delay FMLA coverage of the leave by two days.

(e) *Waiver of notice*. An employer may waive employees' FMLA notice obligations or the employer's own internal rules on leave notice requirements. If an employer does not waive the employee's obligations under its internal leave rules, the employer may take appropriate action under its internal rules and procedures for failure to follow its usual and customary notification rules, absent unusual circumstances, as long as the actions are taken in a manner that does not discriminate against employees taking FMLA leave and the rules are not inconsistent with § 825.303(a).

§ 825.305 Certification, general rule.

(a) *General*. An employer may require that an employee's leave to care for the employee's covered family member with a serious health condition, or due to the employee's own serious health condition that makes the employee unable to perform one or more of the essential functions of the employee's position, be supported by a certification issued by the health care provider of the employee or the employee's family member. An employer may also require that an employee's leave because of a qualifying exigency or to care for a covered servicemember with a serious injury or illness be supported by a certification, as described in §§ 825.309 and 825.310, respectively. An employer must give notice of a requirement for certification each time a certification is required; such notice must be written notice whenever required by § 825.300(c). An employer's oral request to an employee to furnish any subsequent certification is sufficient.

(b) *Timing*. In most cases, the employer should request that an employee furnish certification at the time the employee gives notice of the need for leave or within five business days thereafter, or, in the case of unforeseen leave, within five business days after the leave commences. The employer may request certification at some later date if the employer later has reason to question the appropriateness of the leave or its duration. The employee must provide the requested certification to the employer within 15 calendar days after the employer's request, unless it is not practicable under the particular circumstances to do so despite the employee's diligent, good faith efforts or the employer provides more than 15 calendar days to return the requested certification.

(c) *Complete and sufficient certification*. The employee must provide a complete and sufficient certification to the employer if required by the employer in accordance with §§ 825.306, 825.309, and 825.310. The employer shall advise an employee whenever the employer finds a certification incomplete or insufficient, and shall state in writing what additional information is necessary to make the certification complete and sufficient. A certification is considered incomplete if the employer receives a certification, but one or more of the applicable entries have not been completed. A certification is considered insufficient if the employer receives a complete certification, but the information provided is vague, ambiguous, or non-responsive. The

employer must provide the employee with seven calendar days (unless not practicable under the particular circumstances despite the employee's diligent good faith efforts) to cure any such deficiency. If the deficiencies specified by the employer are not cured in the resubmitted certification, the employer may deny the taking of FMLA leave, in accordance with § 825.313. A certification that is not returned to the employer is not considered incomplete or insufficient, but constitutes a failure to provide certification.

(d) *Consequences.* At the time the employer requests certification, the employer must also advise an employee of the anticipated consequences of an employee's failure to provide adequate certification. If the employee fails to provide the employer with a complete and sufficient certification, despite the opportunity to cure the certification as provided in paragraph (c) of this section, or fails to provide any certification, the employer may deny the taking of FMLA leave, in accordance with § 825.313. It is the employee's responsibility either to furnish a complete and sufficient certification or to furnish the health care provider providing the certification with any necessary authorization from the employee or the employee's family member in order for the health care provider to release a complete and sufficient certification to the employer to support the employee's FMLA request. This provision will apply in any case where an employer requests a certification permitted by these regulations, whether it is the initial certification, a recertification, a second or third opinion, or a fitness for duty certificate, including any clarifications necessary to determine if such certifications are authentic and sufficient. *See* §§ 825.306, 825.307, 825.308, and 825.312.

(e) *Annual medical certification.* Where the employee's need for leave due to the employee's own serious health condition, or the serious health condition of the employee's covered family member, lasts beyond a single leave year (as defined in § 825.200), the employer may require the employee to provide a new medical certification in each subsequent leave year. Such new medical certifications are subject to the provisions for authentication and clarification set forth in § 825.307, including second and third opinions.

§ 825.306 Content of medical certification for leave taken because of an employee's own serious health condition or the serious health condition of a family member.

(a) *Required information.* When leave is taken because of an employee's own serious health condition, or the serious health condition of a family member, an employer may require an employee to obtain a medical certification from a health care provider that sets forth the following information:

(1) The name, address, telephone number, and fax number of the health care provider and type of medical practice/specialization;

(2) The approximate date on which the serious health condition commenced, and its probable duration;

(3) A statement or description of appropriate medical facts regarding the patient's health condition for which FMLA leave is requested. The medical facts must be sufficient to support the need for leave. Such medical facts may include information on symptoms, diagnosis, hospitalization, doctor visits, whether medication has been prescribed, any referrals for evaluation or treatment (physical therapy, for example), or any other regimen of continuing treatment;

(4) If the employee is the patient, information sufficient to establish that the employee cannot perform the essential functions of the employee's job as well as the nature of any other work restrictions, and the likely duration of such inability (*see* § 825.123(b) and (c));

(5) If the patient is a covered family member with a serious health condition, information sufficient to establish that the family member is in need of care, as described in § 825.124, and an estimate of the frequency and duration of the leave required to care for the family member;

(6) If an employee requests leave on an intermittent or reduced schedule basis for planned medical treatment of the employee's or a covered family member's serious health condition, information sufficient to establish the medical necessity for such intermittent or reduced schedule leave and an estimate of the dates and duration of such treatments and any periods of recovery;

(7) If an employee requests leave on an intermittent or reduced schedule basis for the employee's serious health condition, including pregnancy, that may result in unforeseeable episodes of incapacity, information sufficient to establish the medical necessity for such intermittent or reduced schedule leave and an estimate of the frequency and duration of the episodes of incapacity; and

(8) If an employee requests leave on an intermittent or reduced schedule basis to care for a covered family member with a serious health condition, a statement that such leave is medically necessary to care for the family member, as described in §§ 825.124 and 825.203(b), which can include assisting in the family member's recovery, and an estimate of the frequency and duration of the required leave.

(b) DOL has developed two optional forms (Form WH–380E and Form WH–380F, as revised) for use in obtaining medical certification, including second and third opinions, from health care providers that meets FMLA's certification requirements. (*See* Appendix B to this Part 825.) Optional form WH–380E is for use when the employee's need for leave is due to the employee's own serious health condition. Optional form WH–380F is for use when the employee needs leave to care for a family member with a serious health condition. These optional forms reflect certification requirements so as to permit the health care provider to furnish appropriate medical information. Form WH–380E and WH–380F, as revised, or another form containing the same basic information, may be used by the employer; however, no information may be required beyond that specified in §§ 825.306, 825.307, and 825.308. In all instances the information on the form must relate only to the serious health condition for which the current need for leave exists.

(c) If an employee is on FMLA leave running concurrently with a workers' compensation absence, and the provisions of the workers' compensation statute permit the employer or the employer's representative to request additional information from the employee's workers' compensation health care provider, the FMLA does not prevent the employer from following the workers' compensation provisions and information received under those provisions may be considered in determining the employee's entitlement to FMLA-protected leave. Similarly, an employer may request additional information in accordance with a paid leave policy or disability plan that requires greater information to qualify for payments or benefits, provided that the employer informs the employee that the additional information only needs to be provided in connection with receipt of such payments or benefits. Any information received pursuant to such policy or plan may be considered in determining the employee's entitlement to FMLA-protected leave. If the employee fails to provide the information required for receipt of such

payments or benefits, such failure will not affect the employee's entitlement to take unpaid FMLA leave. *See* § 825.207(a).

(d) If an employee's serious health condition may also be a disability within the meaning of the Americans with Disabilities Act (ADA), as amended, the FMLA does not prevent the employer from following the procedures for requesting medical information under the ADA. Any information received pursuant to these procedures may be considered in determining the employee's entitlement to FMLA-protected leave.

(e) While an employee may choose to comply with the certification requirement by providing the employer with an authorization, release, or waiver allowing the employer to communicate directly with the health care provider of the employee or his or her covered family member, the employee may not be required to provide such an authorization, release, or waiver. In all instances in which certification is requested, it is the employee's responsibility to provide the employer with complete and sufficient certification and failure to do so may result in the denial of FMLA leave. *See* § 825.305(d).

§ 825.307 Authentication and clarification of medical certification for leave taken because of an employee's own serious health condition or the serious health condition of a family member; second and third opinions.

(a) *Clarification and authentication.* If an employee submits a complete and sufficient certification signed by the health care provider, the employer may not request additional information from the health care provider. However, the employer may contact the health care provider for purposes of clarification and authentication of the medical certification (whether initial certification or recertification) after the employer has given the employee an opportunity to cure any deficiencies as set forth in § 825.305(c). To make such contact, the employer must use a health care provider, a human resources professional, a leave administrator, or a management official. Under no circumstances, however, may the employee's direct supervisor contact the employee's health care provider. For purposes of these regulations, ''authentication'' means providing the health care provider with a copy of the certification and requesting verification that the information contained on the certification form was completed and/or authorized by the health care provider who signed the document; no additional medical information may be requested. ''Clarification'' means contacting the health care provider to understand the handwriting on the medical certification or to understand the meaning of a response. Employers may not ask health care providers for additional information beyond that required by the certification form. The requirements of the Health Insurance Portability and Accountability Act (''HIPAA'') Privacy Rule (*see* 45 CFR parts 160 and 164), which governs the privacy of individually-identifiable health information created or held by HIPAA-covered entities, must be satisfied when individually-identifiable health information of an employee is shared with an employer by a HIPAA-covered health care provider. If an employee chooses not to provide the employer with authorization allowing the employer to clarify the certification with the health care provider, and does not otherwise clarify the certification, the employer may deny the taking of FMLA leave if the certification is unclear. *See* § 825.305(d). It is the employee's responsibility to provide the employer with a complete and sufficient certification and to clarify the certification if necessary.

(b) *Second opinion.* (1) An employer who has reason to doubt the validity of a medical certification may require the employee to obtain a second opinion at the employer's expense. Pending receipt of the second (or third) medical opinion, the employee is provisionally entitled to the benefits of the Act, including maintenance of group health benefits. If the certifications do not ultimately establish the employee's entitlement to FMLA leave, the leave shall not be designated as FMLA leave and may be treated as paid or unpaid leave under the employer's established leave policies. In addition, the consequences set forth in § 825.305(d) will apply if the employee or the employee's family member fails to authorize his or her health care provider to release all relevant medical information pertaining to the serious health condition at issue if requested by the health care provider designated to provide a second opinion in order to render a sufficient and complete second opinion.

(2) The employer is permitted to designate the health care provider to furnish the second opinion, but the selected health care provider may not be employed on a regular basis by the employer. The employer may not regularly contract with or otherwise regularly utilize the services of the health care provider furnishing the second opinion unless the employer is located in an area where access to health care is extremely limited (*e.g.*, a rural area where no more than one or two doctors practice in the relevant specialty in the vicinity).

(c) *Third opinion.* If the opinions of the employee's and the employer's designated health care providers differ, the employer may require the employee to obtain certification from a third health care provider, again at the employer's expense. This third opinion shall be final and binding. The third health care provider must be designated or approved jointly by the employer and the employee. The employer and the employee must each act in good faith to attempt to reach agreement on whom to select for the third opinion provider. If the employer does not attempt in good faith to reach agreement, the employer will be bound by the first certification. If the employee does not attempt in good faith to reach agreement, the employee will be bound by the second certification. For example, an employee who refuses to agree to see a doctor in the specialty in question may be failing to act in good faith. On the other hand, an employer that refuses to agree to any doctor on a list of specialists in the appropriate field provided by the employee and whom the employee has not previously consulted may be failing to act in good faith. In addition, the consequences set forth in § 825.305(d) will apply if the employee or the employee's family member fails to authorize his or her health care provider to release all relevant medical information pertaining to the serious health condition at issue if requested by the health care provider designated to provide a third opinion in order to render a sufficient and complete third opinion.

(d) *Copies of opinions.* The employer is required to provide the employee with a copy of the second and third medical opinions, where applicable, upon request by the employee. Requested copies are to be provided within five business days unless extenuating circumstances prevent such action.

(e) *Travel expenses.* If the employer requires the employee to obtain either a second or third opinion the employer must reimburse an employee or family member for any reasonable ''out of pocket'' travel expenses incurred to obtain the second and third medical opinions. The employer may not require the employee or family member to travel outside normal commuting distance for purposes of obtaining the second or third medical opinions except in very unusual circumstances.

(f) *Medical certification abroad.* In circumstances in which the employee or

a family member is visiting in another country, or a family member resides in another country, and a serious health condition develops, the employer shall accept a medical certification as well as second and third opinions from a health care provider who practices in that country. Where a certification by a foreign health care provider is in a language other than English, the employee must provide the employer with a written translation of the certification upon request.

§ 825.308 Recertifications for leave taken because of an employee's own serious health condition or the serious health condition of a family member.

(a) *30-day rule.* An employer may request recertification no more often than every 30 days and only in connection with an absence by the employee, unless paragraphs (b) or (c) of this section apply.

(b) *More than 30 days.* If the medical certification indicates that the minimum duration of the condition is more than 30 days, an employer must wait until that minimum duration expires before requesting a recertification, unless paragraph (c) of this section applies. For example, if the medical certification states that an employee will be unable to work, whether continuously or on an intermittent basis, for 40 days, the employer must wait 40 days before requesting a recertification. In all cases, an employer may request a recertification of a medical condition every six months in connection with an absence by the employee. Accordingly, even if the medical certification indicates that the employee will need intermittent or reduced schedule leave for a period in excess of six months (*e.g.*, for a lifetime condition), the employer would be permitted to request recertification every six months in connection with an absence.

(c) *Less than 30 days.* An employer may request recertification in less than 30 days if:

(1) The employee requests an extension of leave;

(2) Circumstances described by the previous certification have changed significantly (*e.g.*, the duration or frequency of the absence, the nature or severity of the illness, complications). For example, if a medical certification stated that an employee would need leave for one to two days when the employee suffered a migraine headache and the employee's absences for his or her last two migraines lasted four days each, then the increased duration of absence might constitute a significant change in circumstances allowing the employer to request a recertification in less than 30 days. Likewise, if an employee had a pattern of using unscheduled FMLA leave for migraines in conjunction with his or her scheduled days off, then the timing of the absences also might constitute a significant change in circumstances sufficient for an employer to request a recertification more frequently than every 30 days; or

(3) The employer receives information that casts doubt upon the employee's stated reason for the absence or the continuing validity of the certification. For example, if an employee is on FMLA leave for four weeks due to the employee's knee surgery, including recuperation, and the employee plays in company softball league games during the employee's third week of FMLA leave, such information might be sufficient to cast doubt upon the continuing validity of the certification allowing the employer to request a recertification in less than 30 days.

(d) *Timing.* The employee must provide the requested recertification to the employer within the timeframe requested by the employer (which must allow at least 15 calendar days after the employer's request), unless it is not practicable under the particular circumstances to do so despite the employee's diligent, good faith efforts.

(e) *Content.* The employer may ask for the same information when obtaining recertification as that permitted for the original certification as set forth in § 825.306. The employee has the same obligations to participate and cooperate (including providing a complete and sufficient certification or adequate authorization to the health care provider) in the recertification process as in the initial certification process. *See* § 825.305(d). As part of the information allowed to be obtained on recertification for leave taken because of a serious health condition, the employer may provide the health care provider with a record of the employee's absence pattern and ask the health care provider if the serious health condition and need for leave is consistent with such a pattern.

(f) Any recertification requested by the employer shall be at the employee's expense unless the employer provides otherwise. No second or third opinion on recertification may be required.

§ 825.309 Certification for leave taken because of a qualifying exigency.

(a) *Active Duty Orders.* The first time an employee requests leave because of a qualifying exigency arising out of the active duty or call to active duty status of a covered military member (as defined in § 825.126(b)(2)), an employer may require the employee to provide a copy of the covered military member's active duty orders or other documentation issued by the military which indicates that the covered military member is on active duty or call to active duty status in support of a contingency operation, and the dates of the covered military member's active duty service. This information need only be provided to the employer once. A copy of new active duty orders or other documentation issued by the military shall be provided to the employer if the need for leave because of a qualifying exigency arises out of a different active duty or call to active duty status of the same or a different covered military member;

(b) *Required information.* An employer may require that leave for any qualifying exigency specified in § 825.126 be supported by a certification from the employee that sets forth the following information:

(1) A statement or description, signed by the employee, of appropriate facts regarding the qualifying exigency for which FMLA leave is requested. The facts must be sufficient to support the need for leave. Such facts should include information on the type of qualifying exigency for which leave is requested and any available written documentation which supports the request for leave; such documentation, for example, may include a copy of a meeting announcement for informational briefings sponsored by the military, a document confirming an appointment with a counselor or school official, or a copy of a bill for services for the handling of legal or financial affairs;

(2) The approximate date on which the qualifying exigency commenced or will commence;

(3) If an employee requests leave because of a qualifying exigency for a single, continuous period of time, the beginning and end dates for such absence;

(4) If an employee requests leave because of a qualifying exigency on an intermittent or reduced schedule basis, an estimate of the frequency and duration of the qualifying exigency; and

(5) If the qualifying exigency involves meeting with a third party, appropriate contact information for the individual or entity with whom the employee is meeting (such as the name, title, organization, address, telephone number, fax number, and e-mail address) and a brief description of the purpose of the meeting.

(c) DOL has developed an optional form (Form WH–384) for employees' use in obtaining a certification that meets

FMLA's certification requirements. (*See* Appendix G to this Part 825.) This optional form reflects certification requirements so as to permit the employee to furnish appropriate information to support his or her request for leave because of a qualifying exigency. Form WH–384, or another form containing the same basic information, may be used by the employer; however, no information may be required beyond that specified in this section.

(d) *Verification.* If an employee submits a complete and sufficient certification to support his or her request for leave because of a qualifying exigency, the employer may not request additional information from the employee. However, if the qualifying exigency involves meeting with a third party, the employer may contact the individual or entity with whom the employee is meeting for purposes of verifying a meeting or appointment schedule and the nature of the meeting between the employee and the specified individual or entity. The employee's permission is not required in order to verify meetings or appointments with third parties, but no additional information may be requested by the employer. An employer also may contact an appropriate unit of the Department of Defense to request verification that a covered military member is on active duty or call to active duty status; no additional information may be requested and the employee's permission is not required.

§ 825.310 Certification for leave taken to care for a covered servicemember (military caregiver leave).

(a) *Required information from health care provider.* When leave is taken to care for a covered servicemember with a serious injury or illness, an employer may require an employee to obtain a certification completed by an authorized health care provider of the covered servicemember. For purposes of leave taken to care for a covered servicemember, any one of the following health care providers may complete such a certification:

(1) A United States Department of Defense (''DOD'') health care provider;

(2) A United States Department of Veterans Affairs (''VA'') health care provider;

(3) A DOD TRICARE network authorized private health care provider; or

(4) A DOD non-network TRICARE authorized private health care provider.

(b) If the authorized health care provider is unable to make certain military-related determinations outlined below, the authorized health care provider may rely on determinations from an authorized DOD representative (such as a DOD recovery care coordinator). An employer may request that the health care provider provide the following information:

(1) The name, address, and appropriate contact information (telephone number, fax number, and/or email address) of the health care provider, the type of medical practice, the medical specialty, and whether the health care provider is one of the following:

(i) A DOD health care provider;

(ii) A VA health care provider;

(iii) A DOD TRICARE network authorized private health care provider; or

(iv) A DOD non-network TRICARE authorized private health care provider.

(2) Whether the covered servicemember's injury or illness was incurred in the line of duty on active duty;

(3) The approximate date on which the serious injury or illness commenced, and its probable duration;

(4) A statement or description of appropriate medical facts regarding the covered servicemember's health condition for which FMLA leave is requested. The medical facts must be sufficient to support the need for leave. Such medical facts must include information on whether the injury or illness may render the covered servicemember medically unfit to perform the duties of the servicemember's office, grade, rank, or rating and whether the member is receiving medical treatment, recuperation, or therapy;

(5) Information sufficient to establish that the covered servicemember is in need of care, as described in § 825.124, and whether the covered servicemember will need care for a single continuous period of time, including any time for treatment and recovery, and an estimate as to the beginning and ending dates for this period of time;

(6) If an employee requests leave on an intermittent or reduced schedule basis for planned medical treatment appointments for the covered servicemember, whether there is a medical necessity for the covered servicemember to have such periodic care and an estimate of the treatment schedule of such appointments;

(7) If an employee requests leave on an intermittent or reduced schedule basis to care for a covered servicemember other than for planned medical treatment (*e.g.*, episodic flare-ups of a medical condition), whether there is a medical necessity for the covered servicemember to have such periodic care, which can include assisting in the covered servicemember's recovery, and an estimate of the frequency and duration of the periodic care.

(c) *Required information from employee and/or covered servicemember.* In addition to the information that may be requested under § 825.310(b), an employer may also request that such certification set forth the following information provided by an employee and/or covered servicemember:

(1) The name and address of the employer of the employee requesting leave to care for a covered servicemember, the name of the employee requesting such leave, and the name of the covered servicemember for whom the employee is requesting leave to care;

(2) The relationship of the employee to the covered servicemember for whom the employee is requesting leave to care;

(3) Whether the covered servicemember is a current member of the Armed Forces, the National Guard or Reserves, and the covered servicemember's military branch, rank, and current unit assignment;

(4) Whether the covered servicemember is assigned to a military medical facility as an outpatient or to a unit established for the purpose of providing command and control of members of the Armed Forces receiving medical care as outpatients (such as a medical hold or warrior transition unit), and the name of the medical treatment facility or unit;

(5) Whether the covered servicemember is on the temporary disability retired list;

(6) A description of the care to be provided to the covered servicemember and an estimate of the leave needed to provide the care.

(d) DOL has developed an optional form (WH–385) for employees' use in obtaining certification that meets FMLA's certification requirements. (*See* Appendix H to this Part 825.) This optional form reflects certification requirements so as to permit the employee to furnish appropriate information to support his or her request for leave to care for a covered servicemember with a serious injury or illness. WH–385, or another form containing the same basic information, may be used by the employer; however, no information may be required beyond that specified in this section. In all instances the information on the certification must relate only to the serious injury or illness for which the current need for leave exists. An

employer may seek authentication and/or clarification of the certification under § 825.307. However, second and third opinions under § 825.307 are not permitted for leave to care for a covered servicemember. Additionally, recertifications under § 825.308 are not permitted for leave to care for a covered servicemember. An employer may require an employee to provide confirmation of covered family relationship to the seriously injured or ill servicemember pursuant to § 825.122(j) of the FMLA.

(e) An employer requiring an employee to submit a certification for leave to care for a covered servicemember must accept as sufficient certification, in lieu of the Department's optional certification form (WH–385) or an employer's own certification form, ''invitational travel orders'' (''ITOs'') or ''invitational travel authorizations'' (''ITAs'') issued to any family member to join an injured or ill servicemember at his or her bedside. An ITO or ITA is sufficient certification for the duration of time specified in the ITO or ITA. During that time period, an eligible employee may take leave to care for the covered servicemember in a continuous block of time or on an intermittent basis. An eligible employee who provides an ITO or ITA to support his or her request for leave may not be required to provide any additional or separate certification that leave taken on an intermittent basis during the period of time specified in the ITO or ITA is medically necessary. An ITO or ITA is sufficient certification for an employee entitled to take FMLA leave to care for a covered servicemember regardless of whether the employee is named in the order or authorization.

(1) If an employee will need leave to care for a covered servicemember beyond the expiration date specified in an ITO or ITA, an employer may request that the employee have one of the authorized health care providers listed under § 825.310(a) complete the DOL optional certification form (WH–385) or an employer's own form, as requisite certification for the remainder of the employee's necessary leave period.

(2) An employer may seek authentication and clarification of the ITO or ITA under § 825.307. An employer may not utilize the second or third opinion process outlined in § 825.307 or the recertification process under § 825.308 during the period of time in which leave is supported by an ITO or ITA.

(3) An employer may require an employee to provide confirmation of covered family relationship to the seriously injured or ill servicemember pursuant to § 825.122(j) when an employee supports his or her request for FMLA leave with a copy of an ITO or ITA.

(f) In all instances in which certification is requested, it is the employee's responsibility to provide the employer with complete and sufficient certification and failure to do so may result in the denial of FMLA leave. *See* § 825.305(d).

§ 825.311 Intent to return to work.

(a) An employer may require an employee on FMLA leave to report periodically on the employee's status and intent to return to work. The employer's policy regarding such reports may not be discriminatory and must take into account all of the relevant facts and circumstances related to the individual employee's leave situation.

(b) If an employee gives unequivocal notice of intent not to return to work, the employer's obligations under FMLA to maintain health benefits (subject to COBRA requirements) and to restore the employee cease. However, these obligations continue if an employee indicates he or she may be unable to return to work but expresses a continuing desire to do so.

(c) It may be necessary for an employee to take more leave than originally anticipated. Conversely, an employee may discover after beginning leave that the circumstances have changed and the amount of leave originally anticipated is no longer necessary. An employee may not be required to take more FMLA leave than necessary to resolve the circumstance that precipitated the need for leave. In both of these situations, the employer may require that the employee provide the employer reasonable notice (*i.e.*, within two business days) of the changed circumstances where foreseeable. The employer may also obtain information on such changed circumstances through requested status reports.

§ 825.312 Fitness-for-duty certification.

(a) As a condition of restoring an employee whose FMLA leave was occasioned by the employee's own serious health condition that made the employee unable to perform the employee's job, an employer may have a uniformly-applied policy or practice that requires all similarly-situated employees (*i.e.*, same occupation, same serious health condition) who take leave for such conditions to obtain and present certification from the employee's health care provider that the employee is able to resume work. The employee has the same obligations to participate and cooperate (including providing a complete and sufficient certification or providing sufficient authorization to the health care provider to provide the information directly to the employer) in the fitness-for-duty certification process as in the initial certification process. *See* § 825.305(d).

(b) An employer may seek a fitness-for-duty certification only with regard to the particular health condition that caused the employee's need for FMLA leave. The certification from the employee's health care provider must certify that the employee is able to resume work. Additionally, an employer may require that the certification specifically address the employee's ability to perform the essential functions of the employee's job. In order to require such a certification, an employer must provide an employee with a list of the essential functions of the employee's job no later than with the designation notice required by § 825.300(d), and must indicate in the designation notice that the certification must address the employee's ability to perform those essential functions. If the employer satisfies these requirements, the employee's health care provider must certify that the employee can perform the identified essential functions of his or her job. Following the procedures set forth in § 825.307(a), the employer may contact the employee's health care provider for purposes of clarifying and authenticating the fitness-for-duty certification. Clarification may be requested only for the serious health condition for which FMLA leave was taken. The employer may not delay the employee's return to work while contact with the health care provider is being made. No second or third opinions on a fitness-for-duty certification may be required.

(c) The cost of the certification shall be borne by the employee, and the employee is not entitled to be paid for the time or travel costs spent in acquiring the certification.

(d) The designation notice required in § 825.300(d) shall advise the employee if the employer will require a fitness-for-duty certification to return to work and whether that fitness-for-duty certification must address the employee's ability to perform the essential functions of the employee's job.

(e) An employer may delay restoration to employment until an employee submits a required fitness-for-duty certification unless the employer has failed to provide the notice required in paragraph (d) of this section. If an employer provides the notice required,

an employee who does not provide a fitness-for-duty certification or request additional FMLA leave is no longer entitled to reinstatement under the FMLA. *See* § 825.313(d).

(f) An employer is not entitled to a certification of fitness to return to duty for each absence taken on an intermittent or reduced leave schedule. However, an employer is entitled to a certification of fitness to return to duty for such absences up to once every 30 days if reasonable safety concerns exist regarding the employee's ability to perform his or her duties, based on the serious health condition for which the employee took such leave. If an employer chooses to require a fitness-for-duty certification under such circumstances, the employer shall inform the employee at the same time it issues the designation notice that for each subsequent instance of intermittent or reduced schedule leave, the employee will be required to submit a fitness-for-duty certification unless one has already been submitted within the past 30 days. Alternatively, an employer can set a different interval for requiring a fitness-for-duty certification as long as it does not exceed once every 30 days and as long as the employer advises the employee of the requirement in advance of the employee taking the intermittent or reduced schedule leave. The employer may not terminate the employment of the employee while awaiting such a certification of fitness to return to duty for an intermittent or reduced schedule leave absence. Reasonable safety concerns means a reasonable belief of significant risk of harm to the individual employee or others. In determining whether reasonable safety concerns exist, an employer should consider the nature and severity of the potential harm and the likelihood that potential harm will occur.

(g) If State or local law or the terms of a collective bargaining agreement govern an employee's return to work, those provisions shall be applied.

(h) Requirements under the Americans with Disabilities Act (ADA), as amended, apply. After an employee returns from FMLA leave, the ADA requires any medical examination at an employer's expense by the employer's health care provider be job-related and consistent with business necessity. For example, an attorney could not be required to submit to a medical examination or inquiry just because her leg had been amputated. The essential functions of an attorney's job do not require use of both legs; therefore such an inquiry would not be job related. An employer may require a warehouse laborer, whose back impairment affects the ability to lift, to be examined by an orthopedist, but may not require this employee to submit to an HIV test where the test is not related to either the essential functions of his or her job or to his/her impairment. If an employee's serious health condition may also be a disability within the meaning of the ADA, the FMLA does not prevent the employer from following the procedures for requesting medical information under the ADA.

§ 825.313 Failure to provide certification.

(a) *Foreseeable leave.* In the case of foreseeable leave, if an employee fails to provide certification in a timely manner as required by § 825.305, then an employer may deny FMLA coverage until the required certification is provided. For example, if an employee has 15 days to provide a certification and does not provide the certification for 45 days without sufficient reason for the delay, the employer can deny FMLA protections for the 30-day period following the expiration of the 15-day time period, if the employee takes leave during such period.

(b) *Unforeseeable leave.* In the case of unforeseeable leave, an employer may deny FMLA coverage for the requested leave if the employee fails to provide a certification within 15 calendar days from receipt of the request for certification unless not practicable due to extenuating circumstances. For example, in the case of a medical emergency, it may not be practicable for an employee to provide the required certification within 15 calendar days. Absent such extenuating circumstances, if the employee fails to timely return the certification, the employer can deny FMLA protections for the leave following the expiration of the 15-day time period until a sufficient certification is provided. If the employee never produces the certification, the leave is not FMLA leave.

(c) *Recertification.* An employee must provide recertification within the time requested by the employer (which must allow at least 15 calendar days after the request) or as soon as practicable under the particular facts and circumstances. If an employee fails to provide a recertification within a reasonable time under the particular facts and circumstances, then the employer may deny continuation of the FMLA leave protections until the employee produces a sufficient recertification. If the employee never produces the recertification, the leave is not FMLA leave. Recertification does not apply to leave taken for a qualifying exigency or to care for a covered servicemember.

(d) *Fitness-for-duty certification.* When requested by the employer pursuant to a uniformly applied policy for similarly-situated employees, the employee must provide medical certification, at the time the employee seeks reinstatement at the end of FMLA leave taken for the employee's serious health condition, that the employee is fit for duty and able to return to work (*see* § 825.312(a)) if the employer has provided the required notice (*see* § 825.300(e)); the employer may delay restoration until the certification is provided. Unless the employee provides either a fitness-for-duty certification or a new medical certification for a serious health condition at the time FMLA leave is concluded, the employee may be terminated. *See also* § 825.213(a)(3).

Subpart D—Enforcement Mechanisms

§ 825.400 Enforcement, general rules.

(a) The employee has the choice of:

(1) Filing, or having another person file on his or her behalf, a complaint with the Secretary of Labor, or

(2) Filing a private lawsuit pursuant to section 107 of FMLA.

(b) If the employee files a private lawsuit, it must be filed within two years after the last action which the employee contends was in violation of the Act, or three years if the violation was willful.

(c) If an employer has violated one or more provisions of FMLA, and if justified by the facts of a particular case, an employee may receive one or more of the following: Wages, employment benefits, or other compensation denied or lost to such employee by reason of the violation; or, where no such tangible loss has occurred, such as when FMLA leave was unlawfully denied, any actual monetary loss sustained by the employee as a direct result of the violation, such as the cost of providing care, up to a sum equal to 26 weeks of wages for the employee in a case involving leave to care for a covered servicemember or 12 weeks of wages for the employee in a case involving leave for any other FMLA qualifying reason. In addition, the employee may be entitled to interest on such sum, calculated at the prevailing rate. An amount equaling the preceding sums may also be awarded as liquidated damages unless such amount is reduced by the court because the violation was in good faith and the employer had reasonable grounds for believing the employer had not violated the Act. When appropriate, the employee may also obtain appropriate equitable relief,

such as employment, reinstatement and promotion. When the employer is found in violation, the employee may recover a reasonable attorney's fee, reasonable expert witness fees, and other costs of the action from the employer in addition to any judgment awarded by the court.

§ 825.401 Filing a complaint with the Federal Government.

(a) A complaint may be filed in person, by mail or by telephone, with the Wage and Hour Division, Employment Standards Administration, U.S. Department of Labor. A complaint may be filed at any local office of the Wage and Hour Division; the address and telephone number of local offices may be found in telephone directories or on the Department's Web site.

(b) A complaint filed with the Secretary of Labor should be filed within a reasonable time of when the employee discovers that his or her FMLA rights have been violated. In no event may a complaint be filed more than two years after the action which is alleged to be a violation of FMLA occurred, or three years in the case of a willful violation.

(c) No particular form of complaint is required, except that a complaint must be reduced to writing and should include a full statement of the acts and/or omissions, with pertinent dates, which are believed to constitute the violation.

§ 825.402 Violations of the posting requirement.

Section 825.300 describes the requirements for covered employers to post a notice for employees that explains the Act's provisions. If a representative of the Department of Labor determines that an employer has committed a willful violation of this posting requirement, and that the imposition of a civil money penalty for such violation is appropriate, the representative may issue and serve a notice of penalty on such employer in person or by certified mail. Where service by certified mail is not accepted, notice shall be deemed received on the date of attempted delivery. Where service is not accepted, the notice may be served by regular mail.

§ 825.403 Appealing the assessment of a penalty for willful violation of the posting requirement.

(a) An employer may obtain a review of the assessment of penalty from the Wage and Hour Regional Administrator for the region in which the alleged violation(s) occurred. If the employer does not seek such a review or fails to do so in a timely manner, the notice of the penalty constitutes the final ruling of the Secretary of Labor.

(b) To obtain review, an employer may file a petition with the Wage and Hour Regional Administrator for the region in which the alleged violations occurred. No particular form of petition for review is required, except that the petition must be in writing, should contain the legal and factual bases for the petition, and must be mailed to the Regional Administrator within 15 days of receipt of the notice of penalty. The employer may request an oral hearing which may be conducted by telephone.

(c) The decision of the Regional Administrator constitutes the final order of the Secretary.

§ 825.404 Consequences for an employer when not paying the penalty assessment after a final order is issued.

The Regional Administrator may seek to recover the unpaid penalty pursuant to the Debt Collection Act (DCA), 31 U.S.C. 3711 *et seq.*, and, in addition to seeking recovery of the unpaid final order, may seek interest and penalties as provided under the DCA. The final order may also be referred to the Solicitor of Labor for collection. The Secretary may file suit in any court of competent jurisdiction to recover the monies due as a result of the unpaid final order, interest, and penalties.

Subpart E—Recordkeeping Requirements

§ 825.500 Recordkeeping requirements.

(a) FMLA provides that covered employers shall make, keep, and preserve records pertaining to their obligations under the Act in accordance with the recordkeeping requirements of section 11(c) of the Fair Labor Standards Act (FLSA) and in accordance with these regulations. FMLA also restricts the authority of the Department of Labor to require any employer or plan, fund, or program to submit books or records more than once during any 12-month period unless the Department has reasonable cause to believe a violation of FMLA exists or the Department is investigating a complaint. These regulations establish no requirement for the submission of any records unless specifically requested by a Departmental official.

(b) No particular order or form of records is required. These regulations establish no requirement that any employer revise its computerized payroll or personnel records systems to comply. However, employers must keep the records specified by these regulations for no less than three years and make them available for inspection, copying, and transcription by representatives of the Department of Labor upon request. The records may be maintained and preserved on microfilm or other basic source document of an automated data processing memory provided that adequate projection or viewing equipment is available, that the reproductions are clear and identifiable by date or pay period, and that extensions or transcriptions of the information required herein can be and are made available upon request. Records kept in computer form must be made available for transcription or copying.

(c) Covered employers who have eligible employees must maintain records that must disclose the following:

(1) Basic payroll and identifying employee data, including name, address, and occupation; rate or basis of pay and terms of compensation; daily and weekly hours worked per pay period; additions to or deductions from wages; and total compensation paid.

(2) Dates FMLA leave is taken by FMLA eligible employees (*e.g.*, available from time records, requests for leave, *etc.,* if so designated). Leave must be designated in records as FMLA leave; leave so designated may not include leave required under State law or an employer plan which is not also covered by FMLA.

(3) If FMLA leave is taken by eligible employees in increments of less than one full day, the hours of the leave.

(4) Copies of employee notices of leave furnished to the employer under FMLA, if in writing, and copies of all written notices given to employees as required under FMLA and these regulations (*see* § 825.300(b) through (c)). Copies may be maintained in employee personnel files.

(5) Any documents (including written and electronic records) describing employee benefits or employer policies and practices regarding the taking of paid and unpaid leaves.

(6) Premium payments of employee benefits.

(7) Records of any dispute between the employer and an eligible employee regarding designation of leave as FMLA leave, including any written statement from the employer or employee of the reasons for the designation and for the disagreement.

(d) Covered employers with no eligible employees must maintain the records set forth in paragraph (c)(1) of this section.

(e) Covered employers in a joint employment situation (*see* § 825.106) must keep all the records required by paragraph (c) of this section with respect to any primary employees, and

must keep the records required by paragraph (c)(1) with respect to any secondary employees.

(f) If FMLA-eligible employees are not subject to FLSA's recordkeeping regulations for purposes of minimum wage or overtime compliance (*i.e.*, not covered by or exempt from FLSA), an employer need not keep a record of actual hours worked (as otherwise required under FLSA, 29 CFR 516.2(a)(7)), provided that:

(1) Eligibility for FMLA leave is presumed for any employee who has been employed for at least 12 months; and

(2) With respect to employees who take FMLA leave intermittently or on a reduced leave schedule, the employer and employee agree on the employee's normal schedule or average hours worked each week and reduce their agreement to a written record maintained in accordance with paragraph (b) of this section.

(g) Records and documents relating to certifications, recertifications or medical histories of employees or employees' family members, created for purposes of FMLA, shall be maintained as confidential medical records in separate files/records from the usual personnel files, and if the ADA, as amended, is also applicable, such records shall be maintained in conformance with ADA confidentiality requirements (*see* 29 CFR 1630.14(c)(1)), except that:

(1) Supervisors and managers may be informed regarding necessary restrictions on the work or duties of an employee and necessary accommodations;

(2) First aid and safety personnel may be informed (when appropriate) if the employee's physical or medical condition might require emergency treatment; and

(3) Government officials investigating compliance with FMLA (or other pertinent law) shall be provided relevant information upon request.

Subpart F—Special Rules Applicable to Employees of Schools

§ 825.600 Special rules for school employees, definitions.

(a) Certain special rules apply to employees of ''local educational agencies,'' including public school boards and elementary and secondary schools under their jurisdiction, and private elementary and secondary schools. The special rules do not apply to other kinds of educational institutions, such as colleges and universities, trade schools, and preschools.

(b) Educational institutions are covered by FMLA (and these special rules) and the Act's 50-employee coverage test does not apply. The usual requirements for employees to be ''eligible'' do apply, however, including employment at a worksite where at least 50 employees are employed within 75 miles. For example, employees of a rural school would not be eligible for FMLA leave if the school has fewer than 50 employees and there are no other schools under the jurisdiction of the same employer (usually, a school board) within 75 miles.

(c) The special rules affect the taking of intermittent leave or leave on a reduced leave schedule, or leave near the end of an academic term (semester), by instructional employees. ''Instructional employees'' are those whose principal function is to teach and instruct students in a class, a small group, or an individual setting. This term includes not only teachers, but also athletic coaches, driving instructors, and special education assistants such as signers for the hearing impaired. It does not include, and the special rules do not apply to, teacher assistants or aides who do not have as their principal job actual teaching or instructing, nor does it include auxiliary personnel such as counselors, psychologists, or curriculum specialists. It also does not include cafeteria workers, maintenance workers, or bus drivers.

(d) Special rules which apply to restoration to an equivalent position apply to all employees of local educational agencies.

§ 825.601 Special rules for school employees, limitations on intermittent leave.

(a) Leave taken for a period that ends with the school year and begins the next semester is leave taken consecutively rather than intermittently. The period during the summer vacation when the employee would not have been required to report for duty is not counted against the employee's FMLA leave entitlement. An instructional employee who is on FMLA leave at the end of the school year must be provided with any benefits over the summer vacation that employees would normally receive if they had been working at the end of the school year.

(1) If an eligible instructional employee needs intermittent leave or leave on a reduced leave schedule to care for a family member with a serious health condition, to care for a covered servicemember, or for the employee's own serious health condition, which is foreseeable based on planned medical treatment, and the employee would be on leave for more than 20 percent of the total number of working days over the period the leave would extend, the employer may require the employee to choose either to:

(i) Take leave for a period or periods of a particular duration, not greater than the duration of the planned treatment; or

(ii) Transfer temporarily to an available alternative position for which the employee is qualified, which has equivalent pay and benefits and which better accommodates recurring periods of leave than does the employee's regular position.

(2) These rules apply only to a leave involving more than 20 percent of the working days during the period over which the leave extends. For example, if an instructional employee who normally works five days each week needs to take two days of FMLA leave per week over a period of several weeks, the special rules would apply. Employees taking leave which constitutes 20 percent or less of the working days during the leave period would not be subject to transfer to an alternative position. ''Periods of a particular duration'' means a block, or blocks, of time beginning no earlier than the first day for which leave is needed and ending no later than the last day on which leave is needed, and may include one uninterrupted period of leave.

(b) If an instructional employee does not give required notice of foreseeable FMLA leave (*see* § 825.302) to be taken intermittently or on a reduced leave schedule, the employer may require the employee to take leave of a particular duration, or to transfer temporarily to an alternative position. Alternatively, the employer may require the employee to delay the taking of leave until the notice provision is met.

§ 825.602 Special rules for school employees, limitations on leave near the end of an academic term.

(a) There are also different rules for instructional employees who begin leave more than five weeks before the end of a term, less than five weeks before the end of a term, and less than three weeks before the end of a term. Regular rules apply except in circumstances when:

(1) An instructional employee begins leave more than five weeks before the end of a term. The employer may require the employee to continue taking leave until the end of the term if—

(i) The leave will last at least three weeks, and

(ii) The employee would return to work during the three-week period before the end of the term.

(2) The employee begins leave during the five-week period before the end of

a term because of the birth of a son or daughter; the placement of a son or daughter for adoption or foster care; to care for a spouse, son, daughter, or parent with a serious health condition; or to care for a covered servicemember. The employer may require the employee to continue taking leave until the end of the term if—

(i) The leave will last more than two weeks, and

(ii) The employee would return to work during the two-week period before the end of the term.

(3) The employee begins leave during the three-week period before the end of a term because of the birth of a son or daughter; the placement of a son or daughter for adoption or foster care; to care for a spouse, son, daughter, or parent with a serious health condition; or to care for a covered servicemember. The employer may require the employee to continue taking leave until the end of the term if the leave will last more than five working days.

(b) For purposes of these provisions, ''academic term'' means the school semester, which typically ends near the end of the calendar year and the end of spring each school year. In no case may a school have more than two academic terms or semesters each year for purposes of FMLA. An example of leave falling within these provisions would be where an employee plans two weeks of leave to care for a family member which will begin three weeks before the end of the term. In that situation, the employer could require the employee to stay out on leave until the end of the term.

§ 825.603 Special rules for school employees, duration of FMLA leave.

(a) If an employee chooses to take leave for ''periods of a particular duration'' in the case of intermittent or reduced schedule leave, the entire period of leave taken will count as FMLA leave.

(b) In the case of an employee who is required to take leave until the end of an academic term, only the period of leave until the employee is ready and able to return to work shall be charged against the employee's FMLA leave entitlement. The employer has the option not to require the employee to stay on leave until the end of the school term. Therefore, any additional leave required by the employer to the end of the school term is not counted as FMLA leave; however, the employer shall be required to maintain the employee's group health insurance and restore the employee to the same or equivalent job including other benefits at the conclusion of the leave.

§ 825.604 Special rules for school employees, restoration to ''an equivalent position.''

The determination of how an employee is to be restored to ''an equivalent position'' upon return from FMLA leave will be made on the basis of ''established school board policies and practices, private school policies and practices, and collective bargaining agreements.'' The ''established policies'' and collective bargaining agreements used as a basis for restoration must be in writing, must be made known to the employee prior to the taking of FMLA leave, and must clearly explain the employee's restoration rights upon return from leave. Any established policy which is used as the basis for restoration of an employee to ''an equivalent position'' must provide substantially the same protections as provided in the Act for reinstated employees. *See* § 825.215. In other words, the policy or collective bargaining agreement must provide for restoration to an ''equivalent position'' with equivalent employment benefits, pay, and other terms and conditions of employment. For example, an employee may not be restored to a position requiring additional licensure or certification.

Subpart G—Effect of Other Laws, Employer Practices, and Collective Bargaining Agreements on Employee Rights Under FMLA

§ 825.700 Interaction with employer's policies.

(a) An employer must observe any employment benefit program or plan that provides greater family or medical leave rights to employees than the rights established by the FMLA. Conversely, the rights established by the Act may not be diminished by any employment benefit program or plan. For example, a provision of a CBA which provides for reinstatement to a position that is not equivalent because of seniority (*e.g.*, provides lesser pay) is superseded by FMLA. If an employer provides greater unpaid family leave rights than are afforded by FMLA, the employer is not required to extend additional rights afforded by FMLA, such as maintenance of health benefits (other than through COBRA), to the additional leave period not covered by FMLA.

(b) Nothing in this Act prevents an employer from amending existing leave and employee benefit programs, provided they comply with FMLA. However, nothing in the Act is intended to discourage employers from adopting or retaining more generous leave policies.

§ 825.701 Interaction with State laws.

(a) Nothing in FMLA supersedes any provision of State or local law that provides greater family or medical leave rights than those provided by FMLA. The Department of Labor will not, however, enforce State family or medical leave laws, and States may not enforce the FMLA. Employees are not required to designate whether the leave they are taking is FMLA leave or leave under State law, and an employer must comply with the appropriate (applicable) provisions of both. An employer covered by one law and not the other has to comply only with the law under which it is covered. Similarly, an employee eligible under only one law must receive benefits in accordance with that law. If leave qualifies for FMLA leave and leave under State law, the leave used counts against the employee's entitlement under both laws. Examples of the interaction between FMLA and State laws include:

(1) If State law provides 16 weeks of leave entitlement over two years, an employee needing leave due to his or her own serious health condition would be entitled to take 16 weeks one year under State law and 12 weeks the next year under FMLA. Health benefits maintenance under FMLA would be applicable only to the first 12 weeks of leave entitlement each year. If the employee took 12 weeks the first year, the employee would be entitled to a maximum of 12 weeks the second year under FMLA (not 16 weeks). An employee would not be entitled to 28 weeks in one year.

(2) If State law provides half-pay for employees temporarily disabled because of pregnancy for six weeks, the employee would be entitled to an additional six weeks of unpaid FMLA leave (or accrued paid leave).

(3) If State law provides six weeks of leave, which may include leave to care for a seriously-ill grandparent or a ''spouse equivalent,'' and leave was used for that purpose, the employee is still entitled to his or her full FMLA leave entitlement, as the leave used was provided for a purpose not covered by FMLA. If FMLA leave is used first for a purpose also provided under State law, and State leave has thereby been exhausted, the employer would not be required to provide additional leave to care for the grandparent or ''spouse equivalent.''

(4) If State law prohibits mandatory leave beyond the actual period of pregnancy disability, an instructional employee of an educational agency subject to special FMLA rules may not be required to remain on leave until the

end of the academic term, as permitted by FMLA under certain circumstances. (*See* Subpart F of this part.)

(b) [Reserved]

§ 825.702 Interaction with Federal and State anti-discrimination laws.

(a) Nothing in FMLA modifies or affects any Federal or State law prohibiting discrimination on the basis of race, religion, color, national origin, sex, age, or disability (*e.g.*, Title VII of the Civil Rights Act of 1964, as amended by the Pregnancy Discrimination Act). FMLA's legislative history explains that FMLA is ''not intended to modify or affect the Rehabilitation Act of 1973, as amended, the regulations concerning employment which have been promulgated pursuant to that statute, or the Americans with Disabilities Act of 1990 [as amended] or the regulations issued under that act. Thus, the leave provisions of the [FMLA] are wholly distinct from the reasonable accommodation obligations of employers covered under the [ADA], employers who receive Federal financial assistance, employers who contract with the Federal government, or the Federal government itself. The purpose of the FMLA is to make leave available to eligible employees and employers within its coverage, and not to limit already existing rights and protection.'' S. Rep. No. 103–3, at 38 (1993). An employer must therefore provide leave under whichever statutory provision provides the greater rights to employees. When an employer violates both FMLA and a discrimination law, an employee may be able to recover under either or both statutes (double relief may not be awarded for the same loss; when remedies coincide a claimant may be allowed to utilize whichever avenue of relief is desired (*Laffey* v. *Northwest Airlines, Inc.*, 567 F.2d 429, 445 (D.C. Cir. 1976), *cert. denied*, 434 U.S. 1086 (1978)).

(b) If an employee is a qualified individual with a disability within the meaning of the ADA, the employer must make reasonable accommodations, *etc.*, barring undue hardship, in accordance with the ADA. At the same time, the employer must afford an employee his or her FMLA rights. ADA's ''disability'' and FMLA's ''serious health condition'' are different concepts, and must be analyzed separately. FMLA entitles eligible employees to 12 weeks of leave in any 12-month period due to their own serious health condition, whereas the ADA allows an indeterminate amount of leave, barring undue hardship, as a reasonable accommodation. FMLA requires employers to maintain employees' group health plan coverage during FMLA leave on the same conditions as coverage would have been provided if the employee had been continuously employed during the leave period, whereas ADA does not require maintenance of health insurance unless other employees receive health insurance during leave under the same circumstances.

(c)(1) A reasonable accommodation under the ADA might be accomplished by providing an individual with a disability with a part-time job with no health benefits, assuming the employer did not ordinarily provide health insurance for part-time employees. However, FMLA would permit an employee to work a reduced leave schedule until the equivalent of 12 workweeks of leave were used, with group health benefits maintained during this period. FMLA permits an employer to temporarily transfer an employee who is taking leave intermittently or on a reduced leave schedule for planned medical treatment to an alternative position, whereas the ADA allows an accommodation of reassignment to an equivalent, vacant position only if the employee cannot perform the essential functions of the employee's present position and an accommodation is not possible in the employee's present position, or an accommodation in the employee's present position would cause an undue hardship. The examples in the following paragraphs of this section demonstrate how the two laws would interact with respect to a qualified individual with a disability.

(2) A qualified individual with a disability who is also an ''eligible employee'' entitled to FMLA leave requests 10 weeks of medical leave as a reasonable accommodation, which the employer grants because it is not an undue hardship. The employer advises the employee that the 10 weeks of leave is also being designated as FMLA leave and will count towards the employee's FMLA leave entitlement. This designation does not prevent the parties from also treating the leave as a reasonable accommodation and reinstating the employee into the *same* job, as required by the ADA, rather than an equivalent position under FMLA, if that is the greater right available to the employee. At the same time, the employee would be entitled under FMLA to have the employer maintain group health plan coverage during the leave, as that requirement provides the greater right to the employee.

(3) If the same employee needed to work part-time (a reduced leave schedule) after returning to his or her same job, the employee would still be entitled under FMLA to have group health plan coverage maintained for the remainder of the two-week equivalent of FMLA leave entitlement, notwithstanding an employer policy that part-time employees do not receive health insurance. This employee would be entitled under the ADA to reasonable accommodations to enable the employee to perform the essential functions of the part-time position. In addition, because the employee is working a part-time schedule as a reasonable accommodation, the FMLA's provision for temporary assignment to a different alternative position would not apply. Once the employee has exhausted his or her remaining FMLA leave entitlement while working the reduced (part-time) schedule, if the employee is a qualified individual with a disability, and if the employee is unable to return to the same full-time position at that time, the employee might continue to work part-time as a reasonable accommodation, barring undue hardship; the employee would then be entitled to only those employment benefits ordinarily provided by the employer to part-time employees.

(4) At the end of the FMLA leave entitlement, an employer is required under FMLA to reinstate the employee in the same or an equivalent position, with equivalent pay and benefits, to that which the employee held when leave commenced. The employer's FMLA obligations would be satisfied if the employer offered the employee an equivalent full-time position. If the employee were unable to perform the essential functions of that equivalent position even with reasonable accommodation, because of a disability, the ADA may require the employer to make a reasonable accommodation at that time by allowing the employee to work part-time or by reassigning the employee to a vacant position, barring undue hardship.

(d)(1) If FMLA entitles an employee to leave, an employer may not, in lieu of FMLA leave entitlement, *require* an employee to take a job with a reasonable accommodation. However, ADA may require that an employer offer an employee the opportunity to take such a position. An employer may not change the essential functions of the job in order to deny FMLA leave. *See* § 825.220(b).

(2) An employee may be on a workers' compensation absence due to an on-the-job injury or illness which also qualifies as a serious health condition under FMLA. The workers' compensation absence and FMLA leave may run concurrently (subject to proper notice and designation by the employer). At

some point the health care provider providing medical care pursuant to the workers' compensation injury may certify the employee is able to return to work in a ''light duty'' position. If the employer offers such a position, the employee is permitted but not required to accept the position (*see* § 825.220(d)). As a result, the employee may no longer qualify for payments from the workers' compensation benefit plan, but the employee is entitled to continue on unpaid FMLA leave either until the employee is able to return to the same or equivalent job the employee left or until the 12-week FMLA leave entitlement is exhausted. *See* § 825.207(e). If the employee returning from the workers' compensation injury is a qualified individual with a disability, he or she will have rights under the ADA.

(e) If an employer requires certifications of an employee's fitness for duty to return to work, as permitted by FMLA under a uniform policy, it must comply with the ADA requirement that a fitness for duty physical be job-related and consistent with business necessity.

(f) Under Title VII of the Civil Rights Act of 1964, as amended by the Pregnancy Discrimination Act, an employer should provide the same benefits for women who are pregnant as the employer provides to other employees with short-term disabilities. Because Title VII does not require employees to be employed for a certain period of time to be protected, an employee employed for less than 12 months by the employer (and, therefore, not an ''eligible'' employee under FMLA) may not be denied maternity leave if the employer normally provides short-term disability benefits to employees with the same tenure who are experiencing other short-term disabilities.

(g) Under the Uniformed Services Employment and Reemployment Rights Act of 1994, 38 U.S.C. 4301–4333 (USERRA), veterans are entitled to receive all rights and benefits of employment that they would have obtained if they had been continuously employed. Therefore, under USERRA, a returning service member would be eligible for FMLA leave if the months and hours that he or she would have worked for the civilian employer during the period of military service, combined with the months employed and the hours actually worked, meet the FMLA eligibility threshold of 12 months and 1,250 hours of employment. *See* § 825.110(b)(2)(i) and (c)(2).

(h) For further information on Federal antidiscrimination laws, including Title VII and the ADA, individuals are encouraged to contact the nearest office of the U.S. Equal Employment Opportunity Commission.

Subpart H—Definitions

§ 825.800 Definitions.

For purposes of this part:

Act or *FMLA* means the Family and Medical Leave Act of 1993, Public Law 103–3 (February 5, 1993), 107 Stat. 6 (29 U.S.C. 2601 *et seq., as amended*).

Active duty or call to active duty status means duty under a call or order to active duty (or notification of an impending call or order to active duty) in support of a contingency operation pursuant to Section 688 of Title 10 of the United States Code, which authorizes ordering to active duty retired members of the Regular Armed Forces and members of the retired Reserve who retired after completing at least 20 years of active service; Section 12301(a) of Title 10 of the United States Code, which authorizes ordering all reserve component members to active duty in the case of war or national emergency; Section 12302 of Title 10 of the United States Code, which authorizes ordering any unit or unassigned member of the Ready Reserve to active duty; Section 12304 of Title 10 of the United States Code, which authorizes ordering any unit or unassigned member of the Selected Reserve and certain members of the Individual Ready Reserve to active duty; Section 12305 of Title 10 of the United States Code, which authorizes the suspension of promotion, retirement or separation rules for certain Reserve components; Section 12406 of Title 10 of the United States Code, which authorizes calling the National Guard into federal service in certain circumstances; chapter 15 of Title 10 of the United States Code, which authorizes calling the National Guard and state military into federal service in the case of insurrections and national emergencies; or any other provision of law during a war or during a national emergency declared by the President or Congress so long as it is in support of a contingency operation. *See also* § 825.126(b)(2).

ADA means the Americans With Disabilities Act (42 U.S.C. 12101 *et seq.*, as amended).

Administrator means the Administrator of the Wage and Hour Division, Employment Standards Administration, U.S. Department of Labor, and includes any official of the Wage and Hour Division authorized to perform any of the functions of the Administrator under this part.

COBRA means the continuation coverage requirements of Title X of the Consolidated Omnibus Budget Reconciliation Act of 1986, as amended (Pub. L. 99–272, title X, section 10002; 100 Stat. 227; 29 U.S.C. 1161–1168).

Commerce and *industry or activity affecting commerce* mean any activity, business, or industry in commerce or in which a labor dispute would hinder or obstruct commerce or the free flow of commerce, and include ''commerce'' and any ''industry affecting commerce'' as defined in sections 501(1) and 501(3) of the Labor Management Relations Act of 1947, 29 U.S.C. 142(1) and (3).

Contingency operation means a military operation that:

(1) Is designated by the Secretary of Defense as an operation in which members of the armed forces are or may become involved in military actions, operations, or hostilities against an enemy of the United States or against an opposing military force; or

(2) Results in the call or order to, or retention on, active duty of members of the uniformed services under section 688, 12301(a), 12302, 12304, 12305, or 12406 of Title 10 of the United States Code, chapter 15 of Title 10 of the United States Code, or any other provision of law during a war or during a national emergency declared by the President or Congress. *See also* § 825.126(b)(3).

Continuing treatment by a health care provider means any one of the following:

(1) *Incapacity and treatment.* A period of incapacity of more than three consecutive, full calendar days, and any subsequent treatment or period of incapacity relating to the same condition, that also involves:

(i) Treatment two or more times, within 30 days of the first day of incapacity, unless extenuating circumstances exist, by a health care provider, by a nurse under direct supervision of a health care provider, or by a provider of health care services (*e.g.*, physical therapist) under orders of, or on referral by, a health care provider; or

(ii) Treatment by a health care provider on at least one occasion, which results in a regimen of continuing treatment under the supervision of the health care provider.

(iii) The requirement in paragraphs (1)(i) and (ii) of this definition for treatment by a health care provider means an in-person visit to a health care provider. The first in-person treatment visit must take place within seven days of the first day of incapacity.

(iv) Whether additional treatment visits or a regimen of continuing

treatment is necessary within the 30-day period shall be determined by the health care provider.

(v) The term ''extenuating circumstances'' in paragraph (1)(i) of this definition means circumstances beyond the employee's control that prevent the follow-up visit from occurring as planned by the health care provider. Whether a given set of circumstances are extenuating depends on the facts. *See also* § 825.115(a)(5).

(2) *Pregnancy or prenatal care.* Any period of incapacity due to pregnancy, or for prenatal care. *See also* § 825.120.

(3) *Chronic conditions.* Any period of incapacity or treatment for such incapacity due to a chronic serious health condition. A chronic serious health condition is one which:

(i) Requires periodic visits (defined as at least twice a year) for treatment by a health care provider, or by a nurse under direct supervision of a health care provider;

(ii) Continues over an extended period of time (including recurring episodes of a single underlying condition); and

(iii) May cause episodic rather than a continuing period of incapacity (*e.g.*, asthma, diabetes, epilepsy, *etc.*).

(4) *Permanent or long-term conditions.* A period of incapacity which is permanent or long-term due to a condition for which treatment may not be effective. The employee or family member must be under the continuing supervision of, but need not be receiving active treatment by, a health care provider. Examples include Alzheimer's, a severe stroke, or the terminal stages of a disease.

(5) *Conditions requiring multiple treatments.* Any period of absence to receive multiple treatments (including any period of recovery therefrom) by a health care provider or by a provider of health care services under orders of, or on referral by, a health care provider, for:

(i) Restorative surgery after an accident or other injury; or

(ii) A condition that would likely result in a period of incapacity of more than three consecutive full calendar days in the absence of medical intervention or treatment, such as cancer (chemotherapy, radiation, etc.), severe arthritis (physical therapy), kidney disease (dialysis).

(6) Absences attributable to incapacity under paragraphs (2) or (3) of this definition qualify for FMLA leave even though the employee or the covered family member does not receive treatment from a health care provider during the absence, and even if the absence does not last more than three consecutive full calendar days. For example, an employee with asthma may be unable to report for work due to the onset of an asthma attack or because the employee's health care provider has advised the employee to stay home when the pollen count exceeds a certain level. An employee who is pregnant may be unable to report to work because of severe morning sickness.

Covered military member means the employee's spouse, son, daughter, or parent on active duty or call to active duty status. *See also* § 825.126(b).

Covered servicemember means a current member of the Armed Forces, including a member of the National Guard or Reserves, who is undergoing medical treatment, recuperation, or therapy, is otherwise in outpatient status, or is otherwise on the temporary disability retired list, for a serious injury or illness incurred in the line of duty on active duty. *See also* § 825.127(a).

Eligible employee means:

(1) An employee who has been employed for a total of at least 12 months by the employer on the date on which any FMLA leave is to commence, except that an employer need not consider any period of previous employment that occurred more than seven years before the date of the most recent hiring of the employee, *unless*:

(i) The break in service is occasioned by the fulfillment of the employee's National Guard or Reserve military service obligation (the time served performing the military service must be also counted in determining whether the employee has been employed for at least 12 months by the employer, but this section does not provide any greater entitlement to the employee than would be available under the Uniformed Services Employment and Reemployment Rights Act (USERRA)); or

(ii) A written agreement, including a collective bargaining agreement, exists concerning the employer's intention to rehire the employee after the break in service (*e.g.*, for purposes of the employee furthering his or her education or for childrearing purposes); and

(2) Who, on the date on which any FMLA leave is to commence, has been employed for at least 1,250-hours of service with such employer during the previous 12-month period, *except that*:

(i) An employee returning from fulfilling his or her National Guard or Reserve military obligation shall be credited with the hours-of-service that would have been performed *but for* the period of military service in determining whether the employee worked the 1,250 hours of service (accordingly, a person reemployed following military service has the hours that would have been worked for the employer added to any hours actually worked during the previous 12-month period to meet the 1,250-hour requirement);

(ii) To determine the hours that would have been worked during the period of military service, the employee's pre-service work schedule can generally be used for calculations; and

(3) Who is employed in any State of the United States, the District of Columbia or any Territories or possession of the United States.

(4) Excludes any Federal officer or employee covered under subchapter V of chapter 63 of title 5, United States Code.

(5) Excludes any employee of the United States House of Representatives or the United States Senate covered by the Congressional Accountability Act of 1995, 2 U.S.C. 1301.

(6) Excludes any employee who is employed at a worksite at which the employer employs fewer than 50 employees if the total number of employees employed by that employer within 75 miles of that worksite is also fewer than 50.

(7) Excludes any employee employed in any country other than the United States or any Territory or possession of the United States.

Employ means to suffer or permit to work.

Employee has the meaning given the same term as defined in section 3(e) of the Fair Labor Standards Act, 29 U.S.C. 203(e), as follows:

(1) The term ''employee'' means any individual employed by an employer;

(2) In the case of an individual employed by a public agency, ''employee'' means—

(i) Any individual employed by the Government of the United States—

(A) As a civilian in the military departments (as defined in section 102 of Title 5, United States Code),

(B) In any executive agency (as defined in section 105 of Title 5, United States Code), excluding any Federal officer or employee covered under subchapter V of chapter 63 of Title 5, United States Code,

(C) In any unit of the legislative or judicial branch of the Government which has positions in the competitive service, excluding any employee of the United States House of Representatives or the United States Senate who is covered by the Congressional Accountability Act of 1995,

(D) In a nonappropriated fund instrumentality under the jurisdiction of the Armed Forces, or

(ii) Any individual employed by the United States Postal Service or the Postal Regulatory Commission; and

(iii) Any individual employed by a State, political subdivision of a State, or an interstate governmental agency, other than such an individual—

(A) Who is not subject to the civil service laws of the State, political subdivision, or agency which employs the employee; and

(B) Who—

(*1*) Holds a public elective office of that State, political subdivision, or agency,

(*2*) Is selected by the holder of such an office to be a member of his personal staff,

(*3*) Is appointed by such an officeholder to serve on a policymaking level,

(*4*) Is an immediate adviser to such an officeholder with respect to the constitutional or legal powers of the office of such officeholder, or

(*5*) Is an employee in the legislative branch or legislative body of that State, political subdivision, or agency and is not employed by the legislative library of such State, political subdivision, or agency.

Employee employed in an instructional capacity. See the definition of *Teacher* in this section.

Employer means any person engaged in commerce or in an industry or activity affecting commerce who employs 50 or more employees for each working day during each of 20 or more calendar workweeks in the current or preceding calendar year, and includes—

(1) Any person who acts, directly or indirectly, in the interest of an employer to any of the employees of such employer;

(2) Any successor in interest of an employer; and

(3) Any public agency.

Employment benefits means all benefits provided or made available to employees by an employer, including group life insurance, health insurance, disability insurance, sick leave, annual leave, educational benefits, and pensions, regardless of whether such benefits are provided by a practice or written policy of an employer or through an ''employee benefit plan'' as defined in section 3(3) of the Employee Retirement Income Security Act of 1974, 29 U.S.C. 1002(3). The term does not include non-employment related obligations paid by employees through voluntary deductions such as supplemental insurance coverage. (*See* § 825.209(a).)

FLSA means the Fair Labor Standards Act (29 U.S.C. 201 *et seq.*).

Group health plan means any plan of, or contributed to by, an employer (including a self-insured plan) to provide health care (directly or otherwise) to the employer's employees, former employees, or the families of such employees or former employees. For purposes of FMLA the term ''group health plan'' shall not include an insurance program providing health coverage under which employees purchase individual policies from insurers provided that:

(1) No contributions are made by the employer;

(2) Participation in the program is completely voluntary for employees;

(3) The sole functions of the employer with respect to the program are, without endorsing the program, to permit the insurer to publicize the program to employees, to collect premiums through payroll deductions and to remit them to the insurer;

(4) The employer receives no consideration in the form of cash or otherwise in connection with the program, other than reasonable compensation, excluding any profit, for administrative services actually rendered in connection with payroll deduction; and,

(5) The premium charged with respect to such coverage does not increase in the event the employment relationship terminates.

Health care provider means:

(1) The Act defines ''health care provider'' as:

(i) A doctor of medicine or osteopathy who is authorized to practice medicine or surgery (as appropriate) by the State in which the doctor practices; or

(ii) Any other person determined by the Secretary to be capable of providing health care services.

(2) Others ''capable of providing health care services'' include only:

(i) Podiatrists, dentists, clinical psychologists, optometrists, and chiropractors (limited to treatment consisting of manual manipulation of the spine to correct a subluxation as demonstrated by X-ray to exist) authorized to practice in the State and performing within the scope of their practice as defined under State law;

(ii) Nurse practitioners, nurse-midwives, clinical social workers and physician assistants who are authorized to practice under State law and who are performing within the scope of their practice as defined under State law;

(iii) Christian Science Practitioners listed with the First Church of Christ, Scientist in Boston, Massachusetts. Where an employee or family member is receiving treatment from a Christian Science practitioner, an employee may not object to any requirement from an employer that the employee or family member submit to examination (though not treatment) to obtain a second or third certification from a health care provider other than a Christian Science practitioner except as otherwise provided under applicable State or local law or collective bargaining agreement.

(iv) Any health care provider from whom an employer or the employer's group health plan's benefits manager will accept certification of the existence of a serious health condition to substantiate a claim for benefits; and

(v) A health care provider listed above who practices in a country other than the United States, who is authorized to practice in accordance with the law of that country, and who is performing within the scope of his or her practice as defined under such law.

(3) The phrase ''authorized to practice in the State'' as used in this section means that the provider must be authorized to diagnose and treat physical or mental health conditions.

Incapable of self-care means that the individual requires active assistance or supervision to provide daily self-care in several of the ''activities of daily living'' (ADLs) or ''instrumental activities of daily living'' (IADLs). Activities of daily living include adaptive activities such as caring appropriately for one's grooming and hygiene, bathing, dressing and eating. Instrumental activities of daily living include cooking, cleaning, shopping, taking public transportation, paying bills, maintaining a residence, using telephones and directories, using a post office, etc.

Instructional employee: See the definition of *Teacher* in this section.

Intermittent leave means leave taken in separate periods of time due to a single illness or injury, rather than for one continuous period of time, and may include leave of periods from an hour or more to several weeks. Examples of intermittent leave would include leave taken on an occasional basis for medical appointments, or leave taken several days at a time spread over a period of six months, such as for chemotherapy.

Mental disability: See the definition of *Physical or mental disability* in this section.

Next of kin of a covered servicemember means the nearest blood relative other than the covered servicemember's spouse, parent, son, or daughter, in the following order of priority: Blood relatives who have been granted legal custody of the covered servicemember by court decree or statutory provisions, brothers and sisters, grandparents, aunts and uncles, and first cousins, unless the covered servicemember has specifically designated in writing another blood

relative as his or her nearest blood relative for purposes of military caregiver leave under the FMLA. When no such designation is made, and there are multiple family members with the same level of relationship to the covered servicemember, all such family members shall be considered the covered servicemember's next of kin and may take FMLA leave to provide care to the covered servicemember, either consecutively or simultaneously. When such designation has been made, the designated individual shall be deemed to be the covered servicemember's only next of kin. *See also* § 825.127(b)(3).

Outpatient status means, with respect to a covered servicemember, the status of a member of the Armed Forces assigned to either a military medical treatment facility as an outpatient; or a unit established for the purpose of providing command and control of members of the Armed Forces receiving medical care as outpatients. *See also* § 825.127(a)(2).

Parent means a biological, adoptive, step or foster father or mother, or any other individual who stood in loco parentis to the employee when the employee was a son or daughter as defined below. This term does not include parents ''in law.''

Parent of a covered servicemember means a covered servicemember's biological, adoptive, step or foster father or mother, or any other individual who stood in loco parentis to the covered servicemember. This term does not include parents ''in law.'' *See also* § 825.127(b)(2).

Person means an individual, partnership, association, corporation, business trust, legal representative, or any organized group of persons, and includes a public agency for purposes of this part.

Physical or mental disability means a physical or mental impairment that substantially limits one or more of the major life activities of an individual. Regulations at 29 CFR part 1630, issued by the Equal Employment Opportunity Commission under the Americans with Disabilities Act (ADA), 42 U.S.C. 12101 *et seq.*, as amended, define these terms.

Public agency means the government of the United States; the government of a State or political subdivision thereof; any agency of the United States (including the United States Postal Service and Postal Regulatory Commission), a State, or a political subdivision of a State, or any interstate governmental agency. Under section 101(5)(B) of the Act, a public agency is considered to be a ''person'' engaged in commerce or in an industry or activity affecting commerce within the meaning of the Act.

Reduced leave schedule means a leave schedule that reduces the usual number of hours per workweek, or hours per workday, of an employee.

Secretary means the Secretary of Labor or authorized representative.

Serious health condition means an illness, injury, impairment or physical or mental condition that involves inpatient care as defined in § 825.114 or continuing treatment by a health care provider as defined in § 825.115. Conditions for which cosmetic treatments are administered (such as most treatments for acne or plastic surgery) are not ''serious health conditions'' unless inpatient hospital care is required or unless complications develop. Restorative dental or plastic surgery after an injury or removal of cancerous growths are serious health conditions provided all the other conditions of this regulation are met. Mental illness or allergies may be serious health conditions, but only if all the conditions of § 825.113 are met.

Serious injury or illness means an injury or illness incurred by a covered servicemember in the line of duty on active duty that may render the servicemember medically unfit to perform the duties of the member's office, grade, rank, or rating. *See also* § 825.127(a)(1).

Son or daughter means a biological, adopted, or foster child, a stepchild, a legal ward, or a child of a person standing in loco parentis, who is either under age 18, or age 18 or older and ''incapable of self-care because of a mental or physical disability'' at the time that FMLA leave is to commence.

Son or daughter of a covered servicemember means a covered servicemember's biological, adopted, or foster child, stepchild, legal ward, or a child for whom the covered servicemember stood in loco parentis, and who is of any age. *See also* § 825.127(b)(1).

Son or daughter on active duty or call to active duty status means the employee's biological, adopted, or foster child, stepchild, legal ward, or a child for whom the employee stood in loco parentis, who is on active duty or call to active duty status, and who is of any age. *See also* § 825.126(b)(1).

Spouse means a husband or wife as defined or recognized under State law for purposes of marriage in the State where the employee resides, including common law marriage in States where it is recognized.

State means any State of the United States or the District of Columbia or any Territory or possession of the United States.

Teacher (or employee employed in an instructional capacity, or instructional employee) means an employee employed principally in an instructional capacity by an educational agency or school whose principal function is to teach and instruct students in a class, a small group, or an individual setting, and includes athletic coaches, driving instructors, and special education assistants such as signers for the hearing impaired. The term does not include teacher assistants or aides who do not have as their principal function actual teaching or instructing, nor auxiliary personnel such as counselors, psychologists, curriculum specialists, cafeteria workers, maintenance workers, bus drivers, or other primarily noninstructional employees.

BILLING CODE 4510–27–P

Appendix A to Part 825—Index [Reserved]

Appendix B to Part 825—Certification of Health Care Provider (Forms WH–380E & WH–380F)

Appendix B

Certification of Health Care Provider for Employee's Serious Health Condition (Family and Medical Leave Act)

U.S. Department of Labor
Employment Standards Administration
Wage and Hour Division

OMB Control Number: 1215-0181
Expires: XX/XX/XXX

SECTION I: For Completion by the EMPLOYER

INSTRUCTIONS to the EMPLOYER: The Family and Medical Leave Act (FMLA) provides that an employer may require an employee seeking FMLA protections because of a need for leave due to a serious health condition to submit a medical certification issued by the employee's health care provider. Please complete Section I before giving this form to your employee. Your response is voluntary. While you are not required to use this form, you may not ask the employee to provide more information than allowed under the FMLA regulations, 29 C.F.R. §§ 825.306-825.308. Employers must generally maintain records and documents relating to medical certifications, recertifications, or medical histories of employees created for FMLA purposes as confidential medical records in separate files/records from the usual personnel files and in accordance with 29 C.F.R. § 1630.14(c)(1), if the Americans with Disabilities Act applies.

Employer name and contact: _____

Employee's job title: _____ Regular work schedule: _____

Employee's essential job functions: _____

_____

Check if job description is attached: _____

SECTION II: For Completion by the EMPLOYEE

INSTRUCTIONS to the EMPLOYEE: Please complete Section II before giving this form to your medical provider. The FMLA permits an employer to require that you submit a timely, complete, and sufficient medical certification to support a request for FMLA leave due to your own serious health condition. If requested by your employer, your response is required to obtain or retain the benefit of FMLA protections. 29 U.S.C. §§ 2613, 2614(c)(3). Failure to provide a complete and sufficient medical certification may result in a denial of your FMLA request. 20 C.F.R. § 825.313. Your employer must give you at least 15 calendar days to return this form. 29 C.F.R. § 825.305(b).

Your name: _____
First Middle Last

SECTION III: For Completion by the HEALTH CARE PROVIDER

INSTRUCTIONS to the HEALTH CARE PROVIDER: Your patient has requested leave under the FMLA. Answer, fully and completely, all applicable parts. Several questions seek a response as to the frequency or duration of a condition, treatment, etc. Your answer should be your best estimate based upon your medical knowledge, experience, and examination of the patient. Be as specific as you can; terms such as "lifetime," "unknown," or "indeterminate" may not be sufficient to determine FMLA coverage. Limit your responses to the condition for which the employee is seeking leave. Please be sure to sign the form on the last page.

Provider's name and business address: _____

Type of practice / Medical specialty: _____

Telephone: (_____) _____ Fax:(_____) _____

CONTINUED ON NEXT PAGE

PART A: MEDICAL FACTS

1. Approximate date condition commenced: _____

   Probable duration of condition: _____

   Mark below as applicable:
   Was the patient admitted for an overnight stay in a hospital, hospice, or residential medical care facility?
   ___No ___Yes. If so, dates of admission:

   _____

   Date(s) you treated the patient for condition:

   _____

   Will the patient need to have treatment visits at least twice per year due to the condition? ___No ___ Yes.

   Was medication, other than over-the-counter medication, prescribed? ___No ___Yes.

   Was the patient referred to other health care provider(s) for evaluation or treatment (e.g., physical therapist)?
   ____No ____Yes. If so, state the nature of such treatments and expected duration of treatment:

   _____

2. Is the medical condition pregnancy? ___No ___Yes. If so, expected delivery date: _____

3. Use the information provided by the employer in Section I to answer this question. If the employer fails to provide a list of the employee's essential functions or a job description, answer these questions based upon the employee's own description of his/her job functions.

   Is the employee unable to perform any of his/her job functions due to the condition: ____ No ____ Yes.

   If so, identify the job functions the employee is unable to perform:

   _____

4. Describe other relevant medical facts, if any, related to the condition for which the employee seeks leave (such medical facts may include symptoms, diagnosis, or any regimen of continuing treatment such as the use of specialized equipment):

   _____

   _____

   _____

   _____

   _____

   _____

   _____

CONTINUED ON NEXT PAGE

PART B: AMOUNT OF LEAVE NEEDED

5. Will the employee be incapacitated for a single continuous period of time due to his/her medical condition, including any time for treatment and recovery? ___No ___Yes.

   If so, estimate the beginning and ending dates for the period of incapacity: _____.

6. Will the employee need to attend follow-up treatment appointments or work part-time or on a reduced schedule because of the employee's medical condition? ___No ___Yes.

   If so, are the treatments or the reduced number of hours of work medically necessary? ___No ___Yes.

   Estimate treatment schedule, if any, including the dates of any scheduled appointments and the time required for each appointment, including any recovery period:

   _____

   Estimate the part-time or reduced work schedule the employee needs, if any:

   _____ hour(s) per day; _____ days per week from _____ through _____

7. Will the condition cause episodic flare-ups periodically preventing the employee from performing his/her job functions? ____No ____Yes.

   Is it medically necessary for the employee to be absent from work during the flare-ups? ____ No ____ Yes. If so, explain:

   _____

   _____

   Based upon the patient's medical history and your knowledge of the medical condition, estimate the frequency of flare-ups and the duration of related incapacity that the patient may have over the next 6 months (e.g., 1 episode every 3 months lasting 1-2 days):

   Frequency: _____ times per _____ week(s) _____ month(s)

   Duration: _____ hours or ___ day(s) per episode

ADDITIONAL INFORMATION: IDENTIFY QUESTION NUMBER WITH YOUR ADDITIONAL ANSWER.

_____

_____

_____

_____

_____

_____

CONTINUED ON NEXT PAGE

Signature of Health Care Provider **Date**

PAPERWORK REDUCTION ACT NOTICE AND PUBLIC BURDEN STATEMENT

If submitted, it is mandatory for employers to retain a copy of this disclosure in their records for three years. 29 U.S.C. § 2616; 29 C.F.R. § 825.500. Persons are not required to respond to this collection of information unless it displays a currently valid OMB control number. The Department of Labor estimates that it will take an average of 20 minutes for respondents to complete this collection of information, including the time for reviewing instructions, searching existing data sources, gathering and maintaining the data needed, and completing and reviewing the collection of information. If you have any comments regarding this burden estimate or any other aspect of this collection information, including suggestions for reducing this burden, send them to the Administrator, Wage and Hour Division, U.S. Department of Labor, Room S-3502, 200 Constitution Ave., NW, Washington, DC 20210. **DO NOT SEND COMPLETED FORM TO THE DEPARTMENT OF LABOR; RETURN TO THE PATIENT.**

Appendix B

Certification of Health Care Provider for Family Member's Serious Health Condition (Family and Medical Leave Act)

U.S. Department of Labor
Employment Standards Administration
Wage and Hour Division

OMB Control Number: 1215-0181
Expires: XX/XX/XXX

SECTION I: For Completion by the EMPLOYER

INSTRUCTIONS to the EMPLOYER: The Family and Medical Leave Act (FMLA) provides that an employer may require an employee seeking FMLA protections because of a need for leave to care for a covered family member with a serious health condition to submit a medical certification issued by the health care provider of the covered family member. Please complete Section I before giving this form to your employee. Your response is voluntary. While you are not required to use this form, you may not ask the employee to provide more information than allowed under the FMLA regulations, 29 C.F.R. §§ 825.306-825.308. Employers must generally maintain records and documents relating to medical certifications, recertifications, or medical histories of employees' family members, created for FMLA purposes as confidential medical records in separate files/records from the usual personnel files and in accordance with 29 C.F.R. § 1630.14(c)(1), if the Americans with Disabilities Act applies.

Employer name and contact: _____

_____

SECTION II: For Completion by the EMPLOYEE

INSTRUCTIONS to the EMPLOYEE: Please complete Section II before giving this form to your family member or his/her medical provider. The FMLA permits an employer to require that you submit a timely, complete, and sufficient medical certification to support a request for FMLA leave to care for a covered family member with a serious health condition. If requested by your employer, your response is required to obtain or retain the benefit of FMLA protections. 29 U.S.C. §§ 2613, 2614(c)(3). Failure to provide a complete and sufficient medical certification may result in a denial of your FMLA request. 29 C.F.R. § 825.313. Your employer must give you at least 15 calendar days to return this form to your employer. 29 C.F.R. § 825.305.

Your name: _____
First Middle Last

Name of family member for whom you will provide care: _____
First Middle Last

Relationship of family member to you: _____

If family member is your son or daughter, date of birth: _____

Describe care you will provide to your family member and estimate leave needed to provide care:

_____

_____

_____

_____ _____
Employee Signature Date

CONTINUED ON NEXT PAGE

SECTION III: For Completion by the HEALTH CARE PROVIDER

INSTRUCTIONS to the HEALTH CARE PROVIDER: The employee listed above has requested leave under the FMLA to care for your patient. Answer, fully and completely, all applicable parts below. Several questions seek a response as to the frequency or duration of a condition, treatment, etc. Your answer should be your best estimate based upon your medical knowledge, experience, and examination of the patient. Be as specific as you can; terms such as "lifetime," "unknown," or "indeterminate" may not be sufficient to determine FMLA coverage. Limit your responses to the condition for which the patient needs leave. Page 3 provides space for additional information, should you need it. Please be sure to sign the form on the last page.

Provider's name and business address:_____

Type of practice / Medical specialty: _____

Telephone: (_____)_____ Fax:(_____)_____

PART A: MEDICAL FACTS

1. Approximate date condition commenced: _____

   Probable duration of condition: _____

   Was the patient admitted for an overnight stay in a hospital, hospice, or residential medical care facility?
   ___No ___Yes. If so, dates of admission: _____

   Date(s) you treated the patient for condition: _____

   Was medication, other than over-the-counter medication, prescribed? ___No ___Yes.

   Will the patient need to have treatment visits at least twice per year due to the condition? ___No ____ Yes

   Was the patient referred to other health care provider(s) for evaluation or treatment (e.g., physical therapist)?
   ____ No ____Yes. If so, state the nature of such treatments and expected duration of treatment:

   _____

   _____

2. Is the medical condition pregnancy? ___No ___Yes. If so, expected delivery date: _____

3. Describe other relevant medical facts, if any, related to the condition for which the patient needs care (such medical facts may include symptoms, diagnosis, or any regimen of continuing treatment such as the use of specialized equipment):

_____

_____

_____

_____

CONTINUED ON NEXT PAGE

PART B: AMOUNT OF CARE NEEDED: When answering these questions, keep in mind that your patient's need for care by the employee seeking leave may include assistance with basic medical, hygienic, nutritional, safety or transportation needs, or the provision of physical or psychological care:

4. Will the patient be incapacitated for a single continuous period of time, including any time for treatment and recovery? ___No ___Yes.

   Estimate the beginning and ending dates for the period of incapacity: _____

   During this time, will the patient need care? __ No __ Yes.

   Explain the care needed by the patient and why such care is medically necessary: _____

   _____

   _____

   _____

   _____

   _____

5. Will the patient require follow-up treatments, including any time for recovery? ___No ___Yes.

   Estimate treatment schedule, if any, including the dates of any scheduled appointments and the time required for each appointment, including any recovery period:

   _____

   Explain the care needed by the patient, and why such care is medically necessary: _____

   _____

6. Will the patient require care on an intermittent or reduced schedule basis, including any time for recovery? __ No __ Yes.

   Estimate the hours the patient needs care on an intermittent basis, if any:

   _____ hour(s) per day; _____ days per week from _____ through _____

   Explain the care needed by the patient, and why such care is medically necessary: _____

   _____

   _____

   _____

   _____

CONTINUED ON NEXT PAGE

7. Will the condition cause episodic flare-ups periodically preventing the patient from participating in normal daily activities? ____No ____Yes.

   Based upon the patient's medical history and your knowledge of the medical condition, estimate the frequency of flare-ups and the duration of related incapacity that the patient may have over the next 6 months (e.g., 1 episode every 3 months lasting 1-2 days):

   Frequency: _____ times per _____ week(s) _____ month(s)

   Duration: _____ hours or ___ day(s) per episode

   Does the patient need care during these flare-ups? ____ No ____ Yes.

   Explain the care needed by the patient, and why such care is medically necessary: _____

   _____

   _____

   _____

   _____

ADDITIONAL INFORMATION: IDENTIFY QUESTION NUMBER WITH YOUR ADDITIONAL ANSWER.

_____

_____

_____

_____

_____

_____

_____ _____

Signature of Health Care Provider **Date**

PUBLIC BURDEN STATEMENT

If submitted, it is mandatory for employers to retain a copy of this disclosure in their records for three years. 29 U.S.C. § 2616; 29 C.F.R. § 825.500. Persons are not required to respond to this collection of information unless it displays a currently valid OMB control number. The Department of Labor estimates that it will take an average of 20 minutes for respondents to complete this collection of information, including the time for reviewing instructions, searching existing data sources, gathering and maintaining the data needed, and completing and reviewing the collection of information. If you have any comments regarding this burden estimate or any other aspect of this collection information, including suggestions for reducing this burden, send them to the Administrator, Wage and Hour Division, U.S. Department of Labor, Room S-3502, 200 Constitution Ave., NW, Washington, DC 20210.

DO NOT SEND COMPLETED FORM TO THE DEPARTMENT OF LABOR; RETURN TO THE PATIENT.

 CONTINUED ON NEXT PAGE

Appendix C to Part 825–Notice to Employees Of Rights Under FMLA (WH Publication 1420)

EMPLOYEE RIGHTS AND RESPONSIBILITIES
UNDER THE FAMILY AND MEDICAL LEAVE ACT

Basic Leave Entitlement
FMLA requires covered employers to provide up to 12 weeks of unpaid, job-protected leave to eligible employees for the following reasons:

- For incapacity due to pregnancy, prenatal medical care or child birth;
- To care for the employee's child after birth, or placement for adoption or foster care;
- To care for the employee's spouse, son or daughter, or parent, who has a serious health condition; or
- For a serious health condition that makes the employee unable to perform the employee's job.

Military Family Leave Entitlements
Eligible employees with a spouse, son, daughter, or parent on active duty or call to active duty status in the National Guard or Reserves in support of a contingency operation may use their 12-week leave entitlement to address certain qualifying exigencies. Qualifying exigencies may include attending certain military events, arranging for alternative childcare, addressing certain financial and legal arrangements, attending certain counseling sessions, and attending post-deployment reintegration briefings.

FMLA also includes a special leave entitlement that permits eligible employees to take up to 26 weeks of leave to care for a covered servicemember during a single 12-month period. A covered servicemember is a current member of the Armed Forces, including a member of the National Guard or Reserves, who has a serious injury or illness incurred in the line of duty on active duty that may render the servicemember medically unfit to perform his or her duties for which the servicemember is undergoing medical treatment, recuperation, or therapy; or is in outpatient status; or is on the temporary disability retired list.

Benefits and Protections
During FMLA leave, the employer must maintain the employee's health coverage under any "group health plan" on the same terms as if the employee had continued to work. Upon return from FMLA leave, most employees must be restored to their original or equivalent positions with equivalent pay, benefits, and other employment terms.

Use of FMLA leave cannot result in the loss of any employment benefit that accrued prior to the start of an employee's leave.

Eligibility Requirements
Employees are eligible if they have worked for a covered employer for at least one year, for 1,250 hours over the previous 12 months, and if at least 50 employees are employed by the employer within 75 miles.

Definition of Serious Health Condition
A serious health condition is an illness, injury, impairment, or physical or mental condition that involves either an overnight stay in a medical care facility, or continuing treatment by a health care provider for a condition that either prevents the employee from performing the functions of the employee's job, or prevents the qualified family member from participating in school or other daily activities.

Subject to certain conditions, the continuing treatment requirement may be met by a period of incapacity of more than 3 consecutive calendar days combined with at least two visits to a health care provider or one visit and a regimen of continuing treatment, or incapacity due to pregnancy, or incapacity due to a chronic condition. Other conditions may meet the definition of continuing treatment.

Use of Leave
An employee does not need to use this leave entitlement in one block. Leave can be taken intermittently or on a reduced leave schedule when medically necessary. Employees must make reasonable efforts to schedule leave for planned medical treatment so as not to unduly disrupt the employer's operations. Leave due to qualifying exigencies may also be taken on an intermittent basis.

Substitution of Paid Leave for Unpaid Leave
Employees may choose or employers may require use of accrued paid leave while taking FMLA leave. In order to use paid leave for FMLA leave, employees must comply with the employer's normal paid leave policies.

Employee Responsibilities
Employees must provide 30 days advance notice of the need to take FMLA leave when the need is foreseeable. When 30 days notice is not possible, the employee must provide notice as soon as practicable and generally must comply with an employer's normal call-in procedures.

Employees must provide sufficient information for the employer to determine if the leave may qualify for FMLA protection and the anticipated timing and duration of the leave. Sufficient information may include that the employee is unable to perform job functions, the family member is unable to perform daily activities, the need for hospitalization or continuing treatment by a health care provider, or circumstances supporting the need for military family leave. Employees also must inform the employer if the requested leave is for a reason for which FMLA leave was previously taken or certified. Employees also may be required to provide a certification and periodic recertification supporting the need for leave.

Employer Responsibilities
Covered employers must inform employees requesting leave whether they are eligible under FMLA. If they are, the notice must specify any additional information required as well as the employees' rights and responsibilities. If they are not eligible, the employer must provide a reason for the ineligibility.

Covered employers must inform employees if leave will be designated as FMLA-protected and the amount of leave counted against the employee's leave entitlement. If the employer determines that the leave is not FMLA-protected, the employer must notify the employee.

Unlawful Acts by Employers
FMLA makes it unlawful for any employer to:

- Interfere with, restrain, or deny the exercise of any right provided under FMLA;
- Discharge or discriminate against any person for opposing any practice made unlawful by FMLA or for involvement in any proceeding under or relating to FMLA.

Enforcement
An employee may file a complaint with the U.S. Department of Labor or may bring a private lawsuit against an employer.

FMLA does not affect any Federal or State law prohibiting discrimination, or supersede any State or local law or collective bargaining agreement which provides greater family or medical leave rights.

FMLA section 109 (29 U.S.C. § 2619) requires FMLA covered employers to post the text of this notice. Regulations 29 C.F.R. § 825.300(a) may require additional disclosures.

For additional information:
1-866-4US-WAGE (1-866-487-9243) TTY: 1-877-889-5627
WWW.WAGEHOUR.DOL.GOV

U.S. Wage and Hour Division

U.S. Department of Labor | Employment Standards Administration | Wage and Hour Division

WHD Publication 1420 (Rev. XX-XXX)

Appendix D to Part 825—Notice of Eligibility and Rights & Responsibilities (Form WH-381)

Appendix D

Notice of Eligibility and Rights & Responsibilities (Family and Medical Leave Act)

U.S. Department of Labor
Employment Standards Administration
Wage and Hour Division

OMB Control Number: 1215-0181
Expires: XX/XX/XXX

In general, to be eligible an employee must have worked for an employer for at least 12 months, have worked at least 1,250 hours in the 12 months preceding the leave, and work at a site with at least 50 employees within 75 miles. While use of this form by employers is optional, a fully completed Form WH-381 provides employees with the information required by 29 C.F.R. § 825.300(b), which must be provided within five business days of the employee notifying the employer of the need for FMLA leave. Part B provides employees with information regarding their rights and responsibilities for taking FMLA leave, as required by 29 C.F.R. § 825.300(b), (c).

[Part A – NOTICE OF ELIGIBILITY]

TO: _____
Employee

FROM: _____
Employer Representative

DATE: _____

On _____, you informed us that you needed leave beginning on _____ for:

_____ The birth of a child, or placement of a child with you for adoption or foster care;

_____ Your own serious health condition;

_____ Because you are needed to care for your ____ spouse; _____child; _____ parent due to his/her serious health condition.

_____ Because of a qualifying exigency arising out of the fact that your ____ spouse; _____son or daughter; _____ parent is on active duty or call to active duty status in support of a contingency operation as a member of the National Guard or Reserves.

_____ Because you are the ____ spouse; _____son or daughter; _____ parent; _____ next of kin of a covered servicemember with a serious injury or illness.

This Notice is to inform you that you:

_____ Are eligible for FMLA leave (See Part B below for Rights and Responsibilities)

_____ Are **not** eligible for FMLA leave, because (only one reason need be checked, although you may not be eligible for other reasons):

- _____ You have not met the FMLA's 12-month length of service requirement. As of the first date of requested leave, you will have worked approximately ___ months towards this requirement.
- _____ You have not met the FMLA's 1,250-hours-worked requirement.
- _____ You do not work and/or report to a site with 50 or more employees within 75-miles.

If you have any questions, contact _____ or view the FMLA poster located in _____.

[PART B-RIGHTS AND RESPONSIBILITIES FOR TAKING FMLA LEAVE]

As explained in Part A, you meet the eligibility requirements for taking FMLA leave and still have FMLA leave available in the applicable 12-month period. **However, in order for us to determine whether your absence qualifies as FMLA leave, you must return the following information to us by _____.** (If a certification is requested, employers must allow at least 15 calendar days from receipt of this notice; additional time may be required in some circumstances.) If sufficient information is not provided in a timely manner, your leave may be denied.

____ Sufficient certification to support your request for FMLA leave. A certification form that sets forth the information necessary to support your request ____**is**/____ **is not** enclosed.

____ Sufficient documentation to establish the required relationship between you and your family member.

____ Other information needed: _____

_____

_____

____ No additional information requested

CONTINUED ON NEXT PAGE

If your leave does qualify as FMLA leave you will have the following **responsibilities** while on FMLA leave (only checked blanks apply):

____ Contact _____ at _____ to make arrangements to continue to make your share of the premium payments on your health insurance to maintain health benefits while you are on leave. You have a minimum 30-day (or, indicate longer period, if applicable) grace period in which to make premium payments. If payment is not made timely, your group health insurance may be cancelled, provided we notify you in writing at least 15 days before the date that your health coverage will lapse, or, at our option, we may pay your share of the premiums during FMLA leave, and recover these payments from you upon your return to work.

____ You will be required to use your available paid _____ **sick,** _____ **vacation**, and/or _____**other leave** during your FMLA absence. This means that you will receive your paid leave and the leave will also be considered protected FMLA leave and counted against your FMLA leave entitlement.

____ Due to your status within the company, you are considered a "key employee" as defined in the FMLA. As a "key employee," restoration to employment may be denied following FMLA leave on the grounds that such restoration will cause substantial and grievous economic injury to us. We ___**have**/____ **have not** determined that restoring you to employment at the conclusion of FMLA leave will cause substantial and grievous economic harm to us.

____ While on leave you will be required to furnish us with periodic reports of your status and intent to return to work every _____. (Indicate interval of periodic reports, as appropriate for the particular leave situation).

If the circumstances of your leave change, and you are able to return to work earlier than the date indicated on the reverse side of this form, you will be required to notify us at least two workdays prior to the date you intend to report for work.

If your leave does qualify as FMLA leave you will have the following **rights** while on FMLA leave:

- You have a right under the FMLA for up to 12 weeks of unpaid leave in a 12-month period calculated as:

  _____ the calendar year (January – December).

  _____ a fixed leave year based on _____.

  _____ the 12-month period measured forward from the date of your first FMLA leave usage.

  _____ a "rolling" 12-month period measured backward from the date of any FMLA leave usage.

- You have a right under the FMLA for up to 26 weeks of unpaid leave in a single 12-month period to care for a covered servicemember with a serious injury or illness. This single 12-month period commenced on _____.
- Your health benefits must be maintained during any period of unpaid leave under the same conditions as if you continued to work.
- You must be reinstated to the same or an equivalent job with the same pay, benefits, and terms and conditions of employment on your return from FMLA-protected leave. (If your leave extends beyond the end of your FMLA entitlement, you do not have return rights under FMLA.)
- If you do not return to work following FMLA leave for a reason other than: 1) the continuation, recurrence, or onset of a serious health condition which would entitle you to FMLA leave; 2) the continuation, recurrence, or onset of a covered servicemember's serious injury or illness which would entitle you to FMLA leave; or 3) other circumstances beyond your control, you may be required to reimburse us for our share of health insurance premiums paid on your behalf during your FMLA leave.
- If we have not informed you above that you must use accrued paid leave while taking your unpaid FMLA leave entitlement, you have the right to have ____ **sick,** ____**vacation,** and/or ___ **other leave** run concurrently with your unpaid leave entitlement, provided you meet any applicable requirements of the leave policy. Applicable conditions related to the substitution of paid leave are referenced or set forth below. If you do not meet the requirements for taking paid leave, you remain entitled to take unpaid FMLA leave.

  ____For a copy of conditions applicable to sick/vacation/other leave usage please refer to _____ available at: _____.

  ____Applicable conditions for use of paid leave:_____

  _____

  _____

  _____

  _____

Once we obtain the information from you as specified above, we will inform you, within 5 business days, whether your leave will be designated as FMLA leave and count towards your FMLA leave entitlement. If you have any questions, please do not hesitate to contact:

_____at _____.

PAPERWORK REDUCTION ACT NOTICE AND PUBLIC BURDEN STATEMENT

It is mandatory for employers to provide employees with notice of their eligibility for FMLA protection and their rights and responsibilities. 29 U.S.C. § 2617; 29 C.F.R. § 825.300(b), (c). It is mandatory for employers to retain a copy of this disclosure in their records for three years. 29 U.S.C. § 2616; 29 C.F.R. § 825.500. Persons are not required to respond to this collection of information unless it displays a currently valid OMB control number. The Department of Labor estimates that it will take an average of 10 minutes for respondents to complete this collection of information, including the time for reviewing instructions, searching existing data sources, gathering and maintaining the data needed, and completing and reviewing the collection of information. If you have any comments regarding this burden estimate or any other aspect of this collection information, including suggestions for reducing this burden, send them to the Administrator, Wage and Hour Division, U.S. Department of Labor, Room S-3502, 200 Constitution Ave., NW, Washington, DC 20210. **DO NOT SEND THE COMPLETED FORM TO THE WAGE AND HOUR DIVISION.**

Appendix E to Part 825—Designation Notice to Employee of FMLA Leave (Form WH-382)

Appendix E

Designation Notice (Family and Medical Leave Act)

U.S. Department of Labor
Employment Standards Administration
Wage and Hour Division

OMB Control Number: 1215-0181
Expires: XX/XX/XXX

Leave covered under the Family and Medical Leave Act (FMLA) must be designated as FMLA-protected and the employer must inform the employee of the amount of leave that will be counted against the employee's FMLA leave entitlement. In order to determine whether leave is covered under the FMLA, the employer may request that the leave be supported by a certification. If the certification is incomplete or insufficient, the employer must state in writing what additional information is necessary to make the certification complete and sufficient. While use of this form by employers is optional, a fully completed Form WH-382 provides an easy method of providing employees with the written information required by 29 C.F.R. §§ 825.300(c), 825.301, and 825.305(c).

To: _____

Date: _____

We have reviewed your request for leave under the FMLA and any supporting documentation that you have provided. We received your most recent information on _____ and decided:

_____ **Your FMLA leave request is approved. All leave taken for this reason will be designated as FMLA leave.**

The FMLA requires that you notify us as soon as practicable if dates of scheduled leave change or are extended, or were initially unknown. Based on the information you have provided to date, we are providing the following information about the amount of time that will be counted against your leave entitlement:

_____ Provided there is no deviation from your anticipated leave schedule, the following number of hours, days, or weeks will be counted against your leave entitlement: _____

_____ Because the leave you will need will be unscheduled, it is not possible to provide the hours, days, or weeks that will be counted against your FMLA entitlement at this time. You have the right to request this information once in a 30-day period (if leave was taken in the 30-day period).

Please be advised (check if applicable):

_____ You have requested to use paid leave during your FMLA leave. Any paid leave taken for this reason will count against your FMLA leave entitlement.

_____ We are requiring you to substitute or use paid leave during your FMLA leave.

_____ You will be required to present a fitness-for-duty certificate to be restored to employment. If such certification is not timely received, your return to work may be delayed until certification is provided. A list of the essential functions of your position ___ **is** ___ **is not** attached. If attached, the fitness-for-duty certification must address your ability to perform these functions.

_____ **Additional information is needed to determine if your FMLA leave request can be approved:**

_____ The certification you have provided is not complete and sufficient to determine whether the FMLA applies to your leave request. You must provide the following information no later than _____, unless it is not
(Provide at least seven calendar days)
practicable under the particular circumstances despite your diligent good faith efforts, or your leave may be denied.

_____
(Specify information needed to make the certification complete and sufficient)

_____

_____ We are exercising our right to have you obtain a second or third opinion medical certification at our expense, and we will provide further details at a later time.

_____ Your FMLA Leave request is Not Approved.
_____ The FMLA does not apply to your leave request.
_____ You have exhausted your FMLA leave entitlement in the applicable 12-month period.

PAPERWORK REDUCTION ACT NOTICE AND PUBLIC BURDEN STATEMENT

It is mandatory for employers to inform employees in writing whether leave requested under the FMLA has been determined to be covered under the FMLA. 29 U.S.C. § 2617; 29 C.F.R. §§ 825.300(d), (e). It is mandatory for employers to retain a copy of this disclosure in their records for three years. 29 U.S.C. § 2616; 29 C.F.R. § 825.500. Persons are not required to respond to this collection of information unless it displays a currently valid OMB control number. The Department of Labor estimates that it will take an average of 10 – 30 minutes for respondents to complete this collection of information, including the time for reviewing instructions, searching existing data sources, gathering and maintaining the data needed, and completing and reviewing the collection of information. If you have any comments regarding this burden estimate or any other aspect of this collection information, including suggestions for reducing this burden, send them to the Administrator, Wage and Hour Division, U.S. Department of Labor, Room S-3502, 200 Constitution Ave., NW, Washington, DC 20210. **DO NOT SEND THE COMPLETED FORM TO THE WAGE AND HOUR DIVISION.**

Appendix F to Part 825—[Reserved]

Appendix G to Part 825—Certification of Qualifying Exigency for Military Family Leave (Form WH-384)

Appendix G

Certification of Qualifying Exigency For Military Family Leave (Family and Medical Leave Act)

U.S. Department of Labor
Employment Standards Administration
Wage and Hour Division

OMB Control Number: 1215-0181
Expires: XX/XX/XXX

SECTION I: For Completion by the EMPLOYER

INSTRUCTIONS to the EMPLOYER: The Family and Medical Leave Act (FMLA) provides that an employer may require an employee seeking FMLA leave due to a qualifying exigency to submit a certification. Please complete Section I before giving this form to your employee. Your response is voluntary, and while you are not required to use this form, you may not ask the employee to provide more information than allowed under the FMLA regulations, 29 C.F.R. § 825.309.

Employer name: _____

Contact Information: _____

SECTION II: For Completion by the EMPLOYEE

INSTRUCTIONS to the EMPLOYEE: Please complete Section II fully and completely. The FMLA permits an employer to require that you submit a timely, complete, and sufficient certification to support a request for FMLA leave due to a qualifying exigency. Several questions in this section seek a response as to the frequency or duration of the qualifying exigency. Be as specific as you can; terms such as "unknown," or "indeterminate" may not be sufficient to determine FMLA coverage. Your response is required to obtain a benefit. 29 C.F.R. § 825.310. While you are not required to provide this information, failure to do so may result in a denial of your request for FMLA leave. Your employer must give you at least 15 calendar days to return this form to your employer.

Your Name: _____
First Middle Last

Name of covered military member on active duty or call to active duty status in support of a contingency operation:

_____
First Middle Last

Relationship of covered military member to you: _____

Period of covered military member's active duty: _____

A complete and sufficient certification to support a request for FMLA leave due to a qualifying exigency includes written documentation confirming a covered military member's active duty or call to active duty status in support of a contingency operation. Please check one of the following:

___ A copy of the covered military member's active duty orders is attached.
___ Other documentation from the military certifying that the covered military member is on active duty (or has been notified of an impending call to active duty) in support of a contingency operation is attached.
___ I have previously provided my employer with sufficient written documentation confirming the covered military member's active duty or call to active duty status in support of a contingency operation.

CONTINUED ON NEXT PAGE

PART A: QUALIFYING REASON FOR LEAVE

1. Describe the reason you are requesting FMLA leave due to a qualifying exigency (including the specific reason you are requesting leave):

_____

_____

_____

_____

_____

_____

2. A complete and sufficient certification to support a request for FMLA leave due to a qualifying exigency includes any available written documentation which supports the need for leave; such documentation may include a copy of a meeting announcement for informational briefings sponsored by the military, a document confirming an appointment with a counselor or school official, or a copy of a bill for services for the handling of legal or financial affairs. Available written documentation supporting this request for leave is attached. __ Yes __ No __ None Available

PART B: AMOUNT OF LEAVE NEEDED

1. Approximate date exigency commenced: _____

   Probable duration of exigency: _____

2. Will you need to be absent from work for a single continuous period of time due to the qualifying exigency? ___No ___Yes.

   If so, estimate the beginning and ending dates for the period of absence:

   _____.

3. Will you need to be absent from work periodically to address this qualifying exigency? ___No ___Yes.

   Estimate schedule of leave, including the dates of any scheduled meetings or appointments:_____

   _____

   _____

   _____

   Estimate the frequency and duration of each appointment, meeting, or leave event, including any travel time (i.e., 1 deployment-related meeting every month lasting 4 hours):

   Frequency: _____ times per _____ week(s) _____ month(s)

   Duration: _____ hours ___ day(s) per event.

CONTINUED ON NEXT PAGE

PART C:

If leave is requested to meet with a third party (such as to arrange for childcare, to attend counseling, to attend meetings with school or childcare providers, to make financial or legal arrangements, to act as the covered military member's representative before a federal, state, or local agency for purposes of obtaining, arranging or appealing military service benefits, or to attend any event sponsored by the military or military service organizations), a complete and sufficient certification includes the name, address, and appropriate contact information of the individual or entity with whom you are meeting (i.e., either the telephone or fax number or email address of the individual or entity). This information may be used by your employer to verify that the information contained on this form is accurate.

Name of Individual: _____ Title: _____

Organization: _____

Address: _____

Telephone: (_____) _____ Fax: (_____) _____

Email: _____

Describe nature of meeting: _____

_____

_____

_____

_____

_____

_____

_____

_____

PART D:

I certify that the information I provided above is true and correct.

_____ _____

Signature of Employee Date

PAPERWORK REDUCTION ACT NOTICE AND PUBLIC BURDEN STATEMENT

If submitted, it is mandatory for employers to retain a copy of this disclosure in their records for three years. 29 U.S.C. § 2616; 29 C.F.R. § 825.500. Persons are not required to respond to this collection of information unless it displays a currently valid OMB control number. The Department of Labor estimates that it will take an average of 20 minutes for respondents to complete this collection of information, including the time for reviewing instructions, searching existing data sources, gathering and maintaining the data needed, and completing and reviewing the collection of information. If you have any comments regarding this burden estimate or any other aspect of this collection information, including suggestions for reducing this burden, send them to the Administrator, Wage and Hour Division, U.S. Department of Labor, Room S-3502, 200 Constitution AV, NW, Washington, DC 20210. **DO NOT SEND THE COMPLETED FORM TO THE WAGE AND HOUR DIVISION; RETURN IT TO THE EMPLOYER.**

Appendix H to Part 825—Certification for Serious Injury or Illness of Covered Servicemember for Military Family Leave (Form WH-385)

Appendix H

Certification for Serious Injury or Illness of Covered Servicemember - - for Military Family Leave (Family and Medical Leave Act)

U.S. Department of Labor
Employment Standards Administration
Wage and Hour Division

OMB Control Number: 1215-0181
Expires: XX/XX/XXX

Notice to the EMPLOYER **INSTRUCTIONS to the EMPLOYER:** The Family and Medical Leave Act (FMLA) provides that an employer may require an employee seeking FMLA leave due to a serious injury or illness of a covered servicemember to submit a certification providing sufficient facts to support the request for leave. Your response is voluntary. While you are not required to use this form, you may not ask the employee to provide more information than allowed under the FMLA regulations, 29 C.F.R. § 825.310. Employers must generally maintain records and documents relating to medical certifications, recertifications, or medical histories of employees or employees' family members, created for FMLA purposes as confidential medical records in separate files/records from the usual personnel files and in accordance with 29 C.F.R. § 1630.14(c)(1), if the Americans with Disabilities Act applies.

SECTION I: For Completion by the EMPLOYEE and/or the COVERED SERVICEMEMBER for whom the Employee Is Requesting Leave **INSTRUCTIONS to the EMPLOYEE or COVERED SERVICEMEMBER:** Please complete Section I before having Section II completed. The FMLA permits an employer to require that an employee submit a timely, complete, and sufficient certification to support a request for FMLA leave due to a serious injury or illness of a covered servicemember. If requested by the employer, your response is required to obtain or retain the benefit of FMLA-protected leave. 29 U.S.C. §§ 2613, 2614(c)(3). Failure to do so may result in a denial of an employee's FMLA request. 29 C.F.R. § 825.310(f). The employer must give an employee at least 15 calendar days to return this form to the employer.

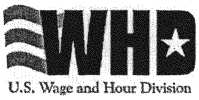
SECTION II: For Completion by a UNITED STATES DEPARTMENT OF DEFENSE ("DOD") HEALTH CARE PROVIDER or a HEALTH CARE PROVIDER who is either: (1) a United States Department of Veterans Affairs ("VA") health care provider; (2) a DOD TRICARE network authorized private health care provider; or (3) a DOD non-network TRICARE authorized private health care provider **INSTRUCTIONS to the HEALTH CARE PROVIDER:** The employee listed on Page 2 has requested leave under the FMLA to care for a family member who is a member of the Regular Armed Forces, the National Guard, or the Reserves who is undergoing medical treatment, recuperation, or therapy, is otherwise in outpatient status, or is otherwise on the temporary disability retired list for a serious injury or illness. For purposes of FMLA leave, a serious injury or illness is one that was incurred in the line of duty on active duty that may render the servicemember medically unfit to perform the duties of his or her office, grade, rank, or rating.

A complete and sufficient certification to support a request for FMLA leave due to a covered servicemember's serious injury or illness includes written documentation confirming that the covered servicemember's injury or illness was incurred in the line of duty on active duty and that the covered servicemember is undergoing treatment for such injury or illness by a health care provider listed above. Answer, fully and completely, all applicable parts. Several questions seek a response as to the frequency or duration of a condition, treatment, etc. Your answer should be your best estimate based upon your medical knowledge, experience, and examination of the patient. Be as specific as you can; terms such as "lifetime," "unknown," or "indeterminate" may not be sufficient to determine FMLA coverage. Limit your responses to the condition for which the employee is seeking leave.

CONTINUED ON NEXT PAGE

Certification for Serious Injury or Illness of Covered Servicemember - - for Military Family Leave (Family and Medical Leave Act)

U.S. Department of Labor
Employment Standards Administration
Wage and Hour Division



SECTION I: For Completion by the EMPLOYEE and/or the COVERED SERVICEMEMBER for whom the Employee Is Requesting Leave: (This section must be completed first before any of the below sections can be completed by a health care provider.)

Part A: EMPLOYEE INFORMATION

Name and Address of Employer (this is the employer of the employee requesting leave to care for covered servicemember):

_____

Name of Employee Requesting Leave to Care for Covered Servicemember:

_____
First Middle Last

Name of Covered Servicemember (for whom employee is requesting leave to care):

_____
First Middle Last

Relationship of Employee to Covered Servicemember Requesting Leave to Care:
☐ Spouse ☐ Parent ☐ Son ☐ Daughter ☐ Next of Kin

Part B: COVERED SERVICEMEMBER INFORMATION

(1) Is the Covered Servicemember a Current Member of the Regular Armed Forces, the National Guard or Reserves? ___Yes ____No

If yes, please provide the covered servicemember's military branch, rank and unit currently assigned to:

_____

Is the covered servicemember assigned to a military medical treatment facility as an outpatient or to a unit established for the purpose of providing command and control of members of the Armed Forces receiving medical care as outpatients (such as a medical hold or warrior transition unit)? ___Yes ___No If yes, please provide the name of the medical treatment facility or unit:

_____

(2) Is the Covered Servicemember on the Temporary Disability Retired List (TDRL)? ____Yes ____No

Part C: CARE TO BE PROVIDED TO THE COVERED SERVICEMEMBER

Describe the Care to Be Provided to the Covered Servicemember and an Estimate of the Leave Needed to Provide the Care:

_____

CONTINUED ON NEXT PAGE

SECTION II: For Completion by a United States Department of Defense ("DOD") Health Care Provider or a Health Care Provider who is either: (1) a United States Department of Veterans Affairs ("VA") health care provider; (2) a DOD TRICARE network authorized private health care provider; or (3) a DOD non-network TRICARE authorized private health care provider. If you are unable to make certain of the military-related determinations contained below in Part B, you are permitted to rely upon determinations from an authorized DOD representative (such as a DOD recovery care coordinator). (Please ensure that Section I above has been completed before completing this section.) Please be sure to sign the form on the last page.

Part A: HEALTH CARE PROVIDER INFORMATION

Health Care Provider's Name and Business Address:

_____

Type of Practice/Medical Specialty: _____

Please state whether you are either: (1) a DOD health care provider; (2) a VA health care provider; (3) a DOD TRICARE network authorized private health care provider; or (4) a DOD non-network TRICARE authorized private health care provider: _____

Telephone: ( ) _____ Fax: ( ) _____ Email: _____

PART B: MEDICAL STATUS

(1) Covered Servicemember's medical condition is classified as (Check One of the Appropriate Boxes):

☐ **(VSI) Very Seriously Ill/Injured** – Illness/Injury is of such a severity that life is imminently endangered. Family members are requested at bedside immediately. (Please note this is an internal DOD casualty assistance designation used by DOD healthcare providers.)

☐ **(SI) Seriously Ill/Injured** – Illness/injury is of such severity that there is cause for immediate concern, but there is no imminent danger to life. Family members are requested at bedside. (Please note this is an internal DOD casualty assistance designation used by DOD healthcare providers.)

☐ **OTHER Ill/Injured** – a serious injury or illness that may render the servicemember medically unfit to perform the duties of the member's office, grade, rank, or rating.

☐ **NONE OF THE ABOVE** (Note to Employee: If this box is checked, you may still be eligible to take leave to care for a covered family member with a "serious health condition" under § 825.113 of the FMLA. If such leave is requested, you may be required to complete DOL FORM WH-380 or an employer-provided form seeking the same information.)

(2) Was the condition for which the Covered Service member is being treated incurred in line of duty on active duty in the armed forces? ____ Yes ____ No

(3) Approximate date condition commenced: _____

(4) Probable duration of condition and/or need for care: _____

(5) Is the covered servicemember undergoing medical treatment, recuperation, or therapy? ____Yes ___No. If yes, please describe medical treatment, recuperation or therapy:

CONTINUED ON NEXT PAGE

PART C: COVERED SERVICEMEMBER'S NEED FOR CARE BY FAMILY MEMBER

(1) Will the covered servicemember need care for a single continuous period of time, including any time for treatment and recovery? ___ Yes ___ No
If yes, estimate the beginning and ending dates for this period of time: _____

(2) Will the covered servicemember require periodic follow-up treatment appointments?
___ Yes ___ No If yes, estimate the treatment schedule: _____

(3) Is there a medical necessity for the covered servicemember to have periodic care for these follow-up treatment appointments? ____Yes _____No

(4) Is there a medical necessity for the covered servicemember to have periodic care for other than scheduled follow-up treatment appointments (e.g., episodic flare-ups of medical condition)? ____Yes ____No If yes, please estimate the frequency and duration of the periodic care:

_____

_____

Signature of Health Care Provider: _____ **Date:** _____

PAPERWORK REDUCTION ACT NOTICE AND PUBLIC BURDEN STATEMENT

If submitted, it is mandatory for employers to retain a copy of this disclosure in their records for three years, in accordance with 29 U.S.C. § 2616; 29 C.F.R. § 825.500. Persons are not required to respond to this collection of information unless it displays a currently valid OMB control number. The Department of Labor estimates that it will take an average of 20 minutes for respondents to complete this collection of information, including the time for reviewing instructions, searching existing data sources, gathering and maintaining the data needed, and completing and reviewing the collection of information. If you have any comments regarding this burden estimate or any other aspect of this collection information, including suggestions for reducing this burden, send them to the Administrator, Wage and Hour Division, U.S. Department of Labor, Room S-3502, 200 Constitution AV, NW, Washington, DC 20210. **DO NOT SEND THE COMPLETED FORM TO THE WAGE AND HOUR DIVISION; RETURN IT TO THE PATIENT.**

[FR Doc. E8–26577 Filed 11–14–08; 8:45 am]
BILLING CODE 4510–27–C

Federal Register

Monday,
November 17, 2008

Part III

Election Assistance Commission

Publication of State Plan Pursuant to the Help America Vote Act; Notice

ELECTION ASSISTANCE COMMISSION

Publication of State Plan Pursuant to the Help America Vote Act

AGENCY: U.S. Election Assistance Commission (EAC).

ACTION: Notice.

SUMMARY: Pursuant to sections 254(a)(11)(A) and 255(b) of the Help America Vote Act (HAVA), Public Law 107–252, the U.S. Election Assistance Commission (EAC) hereby causes to be published in the **Federal Register** material changes to the HAVA State plans previously submitted by Louisiana and Nevada.

DATES: This notice is effective upon publication in the **Federal Register**.

FOR FURTHER INFORMATION CONTACT: Bryan Whitener, Telephone 202–566–3100 or 1–866–747–1471 (toll-free).

Submit Comments: Any comments regarding the plans published herewith should be made in writing to the chief election official of the individual State at the address listed below.

SUPPLEMENTARY INFORMATION: On March 24, 2004, the U.S. Election Assistance Commission published in the **Federal Register** the original HAVA State plans filed by the 50 States, the District of Columbia and the Territories of American Samoa, Guam, Puerto Rico, and the U.S. Virgin Islands. 69 FR 14002. HAVA anticipated that States, Territories and the District of Columbia would change or update their plans from time to time pursuant to HAVA section 254 (a)(11) through (13). HAVA sections 254(a)(11)(A) and 255 require EAC to publish such updates.

The revised State plans from Louisiana and Nevada address material changes in the respective activities and budgets of the previously submitted State plans. In accordance with HAVA section 254(a)(12), all the State plans submitted for publication provide information on how the respective State succeeded in carrying out its previous State plan. The States all confirm that these material changes to their respective State plans were developed and submitted to public comment in accordance with HAVA sections 254(a)(11), 255, and 256.

Upon the expiration of 30 days from November 17, 2008, the States are eligible to implement the material changes addressed in the plans that are published herein, in accordance with HAVA section 254(a)(11)(C).

EAC wishes to acknowledge the effort that went into revising this State plan and encourages further public comment, in writing, to the State election official listed below.

Chief State Election Officials

The Honorable Jay Dardenne, Secretary of State, Twelve United Plaza, 8585 Archives Avenue, P.O. Box 94125, Baton Rouge, Louisiana 70809, Phone: (225) 922–0900, Fax: (225) 922–0945, E-mail: *elections@sos.louisiana.gov.*

Mr. Matthew M. Griffin, Deputy Secretary for Elections, Office of the Secretary of State, 101 N. Carson Street, Suite 3, Carson City, Nevada 89701–4786, Phone: (775) 684–5708, Fax: (775) 684–5725, E-mail:

Thank you for your interest in improving the voting process in America.

Dated: October 14, 2008.

Thomas R. Wilkey,

Executive Director, U.S. Election Assistance Commission.

BILLING CODE 6820–KF–P

STATE OF LOUISIANA

DEPARTMENT OF STATE

HELP AMERICA VOTE ACT OF 2002
As required by Public Law 107-252

CONSOLIDATED STATE PLAN

PRESENTED TO: U.S. ELECTION ASSISTANCE COMMISSION

Jay Dardenne
Secretary of State
September 16, 2008

TABLE OF CONTENTS

Overview of the Louisiana Election System		3
Section 1.	Meeting the Requirements of HAVA	5
Section 2.	Managing Disbursement of HAVA Funds	23
Section 3.	Educational Programs	24
Section 4.	Voting System Standards	29
Section 5.	HAVA Fund	29
Section 6.	State Budget	30
Section 7.	Louisiana's Maintenance of Effort	34
Section 8.	Performance Goals and Measures	34
Section 9.	Administrative Complaint Procedure	39
Section 10.	Use of Title I Payment	40
Section 11.	State Plan Management	43
Section 12.	Changes To State Plan From Previous Fiscal Year	44
Section 13.	Help America Vote Advisory Committee	53
Appendix 1	Absentee Ballot Instructions	
Appendix 2	Act 403 of the 2006 Regular Session of the Louisiana Legislature	
Appendix 3	Louisiana's Mail Voter Registration Application	

Overview of the Louisiana Election System

From 1962 to 2004, the State of Louisiana administered all elections in this state through a bifurcated system of elections management between the Louisiana Department of State (Department of State) and the Louisiana Department of Elections and Registration (Department of Elections and Registration). The Secretary of State served as the Chief Election Officer for the State of Louisiana and oversaw the preparation and certification of ballots for all elections, the promulgation of all election returns, and the administration of the election laws, except those relating to voter registration and the custody of voting machines. The Commissioner of Elections was constitutionally and statutorily charged with administering the laws relating to the custody of voting machines and voter registration. With regard to the registration of voters, the Commissioner of Elections was instructed to direct and assist the Registrars of Voters in voter registration, promulgation of rules and regulations relative to voter registration, maintenance of a statewide database of voter registration data, and coordination of Louisiana's compliance with the National Voter Registration Act of 1992 (NVRA). These two statewide officials were assisted by the local election officials, Clerks of Court and Registrars of Voters, in the conduct of all elections occurring in the State of Louisiana.

On January 12, 2004, Louisiana ended its bifurcated system of elections management at the state level by merging the Department of Elections and Registration into the Department of State. As a result, all elections and registration functions for Louisiana are now administered by the Secretary of State as the Chief Election Officer for the state.[1]

Louisiana is committed to providing accurate, efficient, and technologically advanced election systems to its constituents. Since the mid-1950s, Louisiana has conducted all Election Day voting on voting machines. The first voting machines to be introduced in Louisiana were the Shoup 2.5 lever-operated voting machines. Since that time, Louisiana has upgraded its voting equipment to include lever-operated voting machines and electronic voting systems each of which provides a printed copy of election results. In 2002, the State of Louisiana installed touchscreen electronic voting systems for use in absentee/early voting statewide and for Election Day voting in two parishes. These machines were equipped to accommodate individuals with disabilities, including those who are visually impaired, physically disabled, or have a hard time interpreting the written word.

[1] References in this plan may be made to the Secretary of State and/or Commissioner of Elections. After January 12, 2004, the responsibility for all functions of both constitutional officers lies with the Secretary of State.

The extent of Louisiana's cutting-edge election system is not limited to its voting equipment. In 1987, the Department of Elections and Registration placed the Elections and Registration Information Network (ERIN) online. ERIN is a statewide, centralized election management system. ERIN is designed to maintain voter registration records for every voter in the State of Louisiana in a central location; provide access to those voter records to authorized users in the Department of Elections and Registration and parish Registrars of Voters' offices; generate forms and reports required by the Registrars of Voters, including printing precinct registers for elections; and providing an interactive computerized accounting system for the payment of all election expenses in the state and an accounts receivable system that generates invoices to responsible parties based upon pro-rata formulas established by state law.

Between the 2000 Presidential Election and the passage of the Help America Vote Act of 2002 (HAVA), Louisiana had implemented a significant number of reforms and efficiencies that are required by HAVA. Louisiana had begun the move to more technologically advanced and accessible voting systems, begun refining its statewide centralized voter registration system, and switched from a punch card absentee voting system to a mark sense paper ballot system (referred to as "paper ballot").

The original State Plan for Louisiana was developed jointly by the Department of State and the Department of Elections and Registration in conjunction with the Louisiana Help America Vote Advisory Committee and the Governor. It detailed the plans, budget, and goals that Louisiana sought to attain in its election and voter registration process using funds authorized by HAVA within the deadlines established in the Act.

Based on activities conducted under HAVA, the Secretary of State determined that a revised State Plan for Louisiana was necessary to outline the state's accomplishments to date, and address the remaining activities to be conducted under the requirements of HAVA. The State Plan was amended on November 10, 2006.

Louisiana will receive additional Title II federal funds in the amount of $1,720,843 and the State Plan is being amended again to reflect the additional funding and activities that will be conducted with the new federal allocation.

Meeting the Requirements of HAVA

SECTION 1: How the State will use the requirements payment to meet the requirements of Title III, and, if applicable under Section 251(a)(2), to carry out other activities to improve the administration of elections. (Section 254(a)(1), 42 U.S.C. §15404(a)(1))

Section 1.1 Voting System Standards (Section 301(a)):

HAVA requires that each voting system used in an election for Federal office on and after January 1, 2006 shall meet the following requirements:

- Permit the voter to verify the votes selected by the voter on the ballot before the ballot is cast and counted.
- Provide the voter with the opportunity to change the ballot or correct any error before the ballot is cast and counted.
- If the voter selects votes for more than one candidate for single office: notify the voter that the voter has selected more than one candidate for a single office on the ballot; notify the voter of the effect of casting multiple votes for the office before the ballot is cast and counted; and provide the voter with the opportunity to correct the ballot before the ballot is cast and counted.

HAVA further requires that all paper ballot systems meet the following requirements:

- Establish a voter education program specific to that voting system that notifies each voter of the effect of casting multiple votes for an office and provide the voter with instructions on how to correct the ballot before it is cast and counted, including instructions on how to correct the error through the issuance of a replacement ballot if the voter was otherwise unable to change the ballot or correct any error.
- Voting system shall ensure that any notification required under Section 301 preserves the privacy of the voter and the confidentiality of the ballot.

Louisiana's HAVA Compliance:

Louisiana previously had four types of voting systems in place for Election Day voting, early voting in person, and absentee voting by mail.

Prior to the implementation of a new voting system in Louisiana for Election Day voting, Louisiana conducted elections on lever-operated voting machines and electronic voting systems. Fifty of Louisiana's sixty-four parishes were equipped with the AVM-POM lever-operated voting machines (AVM-POM). Fourteen parishes were outfitted with electronic voting systems. The electronic voting systems were provided by two different vendors: twelve parishes utilized AVC Advantage Full Face DRE voting systems (AVC Advantage), manufactured by Sequoia Voting Systems, Inc., and two parishes utilized iVotronic touchscreen voting systems (iVotronics), manufactured by Elections Systems & Software.

For early voting in person, ballots were cast on the iVotronic voting system. When the request for proposal process for a new HAVA compliant voting system was completed, it was recommended by the review committee and approved by the Secretary of State to replace the iVotronic voting system with the AVC Edge voting system, and the iVotronic voting system has been returned to the manufacturer. The State has received all of the AVC Edge voting systems to replace the iVotronic voting system. The AVC Edge voting system is HAVA compliant and accessible for individuals with disabilities, and is used for early voting in person in all parishes.

All absentee by mail ballots are cast on mark sense paper ballots and are currently read by NCS Optiscan 5 scanners. The State is determining whether to replace the NCS Optiscan 5 scanners with Optech Insight Absentee Ballot Tabulators to scan and tabulate votes on mark sense paper ballots.

The voting systems that were previously in place in Louisiana allowed the voter to review his selections and alter any selection prior to activating the cast vote mechanism. All three voting systems prevented an overvote by refusing to allow the voter to make more selections than are permitted in a particular candidate, constitutional amendment, or proposition election. The iVotronic voting systems gave the user a message stating that he has attempted to select more selections than are allowed in that election and to change one of his previous selections. The AVM-POM voting machines and AVC Advantage voting systems would not allow the voter to depress an additional lever or electronic selection key, and the voter had to deselect his previous choice to alter one of the selections.

When paper ballots are mailed out to the voter, the paper ballot is accompanied by instructions informing the voter on how to cast a vote on the paper ballot, including the proper technique in marking the selection and correcting a selection.

The Louisiana Legislature adopted provisions that instructed the Secretary of State to amend the instructions for casting a paper ballot to include information relative to using a pencil to mark the paper ballot allowing for corrections, and instructions on what effect selecting more than the allowed number of selections in a single election would have on the counting of the voter's ballot. The current instructions for completing a paper ballot are attached as Appendix "1".

On January 5, 2005, the Secretary of State adopted new voting system standards for Louisiana that require each election device to be contained within a booth that provides privacy to the voter. All voting apparatus used in Louisiana are shielded either by a curtain or booth such that the selections of the voter cannot be seen. In addition, the voting system standards require that the system "provide secrecy in the act of voting such that the selection of a voter cannot be determined after that vote has been cast." The AVC Advantage and AVC Edge voting systems assign each vote cast to a random position within the voting system's computer memory, so as to avoid the ability to determine an individual's vote.

Section 1.1.a. Audit capacity:

- Voting system shall produce a record with an audit capacity for such system.
- Manual audit capacity: Voting system shall produce a permanent paper record with a manual audit capacity for such system; shall provide the voter with an opportunity to change the ballot or correct any error before the permanent paper record is produced; and the paper record produced shall be available as an official record for any recount conducted with respect to any election in which the system is used.

Louisiana's HAVA Compliance:

Each voting system previously in place in the State of Louisiana produced a permanent paper record of the results tallied by that voting system. All AVM-POM voting machines produced a paper record by sliding a platen over the raised numbers on the counters, similar to an old-style credit card imprinting device. All electronic voting systems produced a printed results tape generated by the voting system's computer memory. Lastly, all scanners used to calculate results of absentee by mail paper ballots were attached to a computer that provided a printed result of the tally.

Upon the completion of the replacement of the AVM-POM lever-operated voting machines with AVC Advantage voting systems, all voting systems used in Louisiana will be capable of printing not only a paper record of the final results, but also a paper record of each vote cast in the election.

Section 1.1.b. Accessibility for individuals with disabilities:

- Voting system shall be accessible for individuals with disabilities, including nonvisual accessibility for the blind and visually impaired, in a manner that provides the same opportunity for access and participation as for other voters; use at least one direct recording electronic voting system or other voting system equipped for individuals with disabilities at each polling place; and if used Title II money to purchase voting machines, meet the voting system standards for disability access by January 1, 2007.

Louisiana's HAVA Compliance:

Previously, two parishes used the iVotronic voting systems for Election Day voting and all sixty-four parishes used the iVotronic voting systems in the Registrar of Voters' offices for early voting in person. The state replaced the iVotronic voting systems for early voting with the AVC Edge voting systems. In addition, the two parishes that previously used the iVotronic voting systems for Election Day voting are using the AVC Advantage voting systems. The AVM-POM voting machines were replaced with the AVC Advantage voting systems that accommodate individuals confined to a wheelchair by lowering the ballot screen to a level that an individual would be able to reach. Both voting systems, the AVC Advantage and AVC Edge, are capable of being equipped with an audio voting keypad to accommodate individuals with disabilities.

HAVA provides that the requirement for a voting system to be accessible for individuals with disabilities is met if each polling place has at least one direct recording electronic voting system or other voting system equipped for individuals with disabilities. Louisiana has a voting system at each precinct that is accessible for individuals with disabilities.

Section 1.1.c. Alternative language accessibility:

- System shall provide alternative language accessibility pursuant to Section 203 of the Voting Rights Act of 1965.

Louisiana's HAVA Compliance:

According to the United States Department of Justice, Louisiana currently is not mandated to provide a foreign language ballot based upon statistics provided by the United States Bureau of Census, except for the Coushatta Tribe of Louisiana in Allen Parish. This tribe has waived its right to have a ballot printed in its native language.

The AVC Advantage and AVC Edge voting systems are capable of accommodating multiple languages.

Section 1.1.d. Error rates:

- Error rate of the voting system in counting ballots shall comply with the error rate standards established under Section 3.2.1 of the voting system standards issued by the Federal Election Commission (FEC) in effect on October 29, 2002.

Louisiana's HAVA Compliance:

Both the AVC Advantage and AVC Edge voting systems meet the error rate standard provided in Section 3.2.1 of the 2002 FEC voting system standards.

Section 1.1.e. Uniform definition of what constitutes a vote:

- State shall adopt uniform and nondiscriminatory standards that define what constitutes a vote and what will be counted as a vote for each category of voting system used in the State.

Louisiana's HAVA Compliance:

Act 1220 of the 2003 Regular Session of the Louisiana Legislature complies with the HAVA requirement for a uniform definition of what constitutes a vote and what will be counted as a vote, as follows:

a) Provides that in order to cast a vote on a voting system, a voter shall make at least one selection in a candidate or proposition election and that voting is completed by activating the cast vote mechanism.

b) Provides that in order to cast a vote on a paper ballot, a voter must make a selection for a candidate, or for or against a proposition by completely filling in the oval to the right of a selection and returning the ballot to the appropriate election official within the applicable deadline set forth by law. Also provides that if a voter makes selections for more than the number of candidates to be elected for an office or makes selections for and against the proposition, the selections for that office or proposition will be void.

SECTION 1.1 VOTING SYSTEM STANDARDS		
VOTING SYSTEM STANDARDS	VOTING MACHINE COMPLIANCE IN LOUISIANA	
	AVC Advantage	AVC Edge
Permit the voter to verify the votes selected by the voter on the ballot before the ballot is cast and counted.	**Yes**	**Yes**
Provide the voter with the opportunity to change the ballot or correct any error before the ballot is cast and counted.	**Yes**	**Yes**
If the voter selects for more than one candidate for a single office, notify the voter that the voter has selected more than one candidate for a single office on the ballot; notify the voter before the ballot is cast and counted on the effect of casting multiple votes for the office, and provide the voter with the opportunity to correct the ballot before the ballot is cast and counted.	**The AVC Advantage does not allow the voter to cast more than the maximum number of votes in a particular race. It will not allow the voter to illuminate another button to cast an overvote. It thereby meets this requirement and the notification part of this requirement is self-evident.**	**The AVC Edge does not allow the voter to cast more than the maximum number of votes in a particular race. It will not allow the voter to touch another button to cast an overvote. It thereby meets this requirement and the notification part of this requirement is self-evident.**
Voting system shall produce a record with audit capacity for such system, including manual audit capacity.	**AVC Advantage provides a printed version of the final results and a printed log of each vote cast on the voting system.**	**AVC Edge provides a printed version of the final results and a printed log of each vote cast on the voting system.**

SECTION 1.1 VOTING SYSTEM STANDARDS (CONTINUED)		
VOTING SYSTEM STANDARDS	VOTING SYSTEM COMPLIANCE IN LOUISIANA	
	AVC Advantage	AVC Edge
Voting system shall be accessible for individuals with disabilities, including nonvisual accessibility for the blind and visually impaired.	**AVC Advantage provides access to individuals with disabilities and to visually impaired voters.**	**AVC Edge provides access to individuals with disabilities and to visually impaired voters.**
Voting system shall provide alternative language accessibility pursuant to Section 203 of the Voting Rights Act.	**AVC Advantage ballot style will allow alternate languages to be printed beside English text.**	**AVC Edge electronic ballot will allow for alternate languages.**
Error rate of system shall comply with the error rate standard established under Section 3.2.1 of the voting system standards issued by the FEC in effect on October 29, 2002.	**AVC Advantage meets the error rate standard under Section 3.2.1.**	**AVC Edge meets the error rate standard under Section 3.2.1.**
State shall adopt uniform and nondiscriminatory standards that define what constitutes a vote and what will be counted as a vote for each category of voting systems used in the state.	**Act 1220 defines what constitutes a vote and what shall be counted as a vote on an electronic voting system.**	**Act 1220 defines what constitutes a vote and what shall be counted as a vote on an electronic voting system.**

SECTION 1.1 VOTING SYSTEM STANDARDS (CONTINUED)	
VOTING SYSTEM STANDARDS	**PAPER BALLOT COMPLIANCE IN LOUISIANA**
	Paper Ballots used in Absentee Voting by Mail and Provisional Voting
Establish education program that notifies each voter of the effect of casting multiple votes for an office and provide instructions on how to correct the ballot before it is cast and counted.	Louisiana already has in place an instruction sheet that is distributed with absentee by mail ballots pursuant to Act 1220 that includes instructions on filling out the ballot in pencil to allow for corrections and specific information about how to properly alter a selection.
Uniform and nondiscriminatory standard that defines what constitutes a vote and what will be counted as a vote.	Act 1220 defined what constitutes a vote and what shall be counted as a vote on a paper ballot distributed during absentee by mail voting or provisional voting.

Section 1.2 Provisional Voting (Section 302):

HAVA requires that provisional voting be permitted in Federal elections on and after January 1, 2004 as follows:

- If an individual declares that he is a registered voter in the jurisdiction in which he desires to vote and that he is eligible to vote in an election for Federal office, but his name is not on the official list of eligible voters at a polling place or an election official asserts that the individual is not eligible to vote, the individual may cast a provisional ballot.
- The election official must notify the voter that he is eligible to cast a provisional ballot.
- The voter may cast a provisional ballot or absentee provisional ballot at the polling place or Registrar of Voters' office after signing an affirmation that states that he is a registered voter in the jurisdiction and that he is eligible to vote in the Federal election.

- The election official shall transmit the provisional ballot or the voter information contained in the written affirmation to the appropriate state or local election official to verify if the individual is eligible to vote.
- If the appropriate state or local election official determines that the individual is eligible to vote under state law, the individual's provisional ballot shall be counted as a vote in the Federal election in accordance with state law.
- At the time the individual casts a provisional ballot, the appropriate state or local election official shall give the voter written information that explains how to ascertain whether his vote was counted, and, if his vote was not counted, the reason that his vote was not counted.
- The appropriate state or local election official shall establish a free access system for an individual who casts a provisional ballot to determine whether his vote was counted, and if his vote was not counted, the reason that his vote was not counted.
- The state or local official must maintain reasonable procedures to protect the security, confidentiality, and integrity of personal information used for the free access system. Access to the information concerning the provisional ballot will be restricted to the individual voter who casts the provisional ballot.
- A provisional ballot shall also be cast by any individual who votes for a Federal office after the polls close pursuant to a court order or any other order extending the poll hours. Those provisional ballots cast shall be held separate from other provisional ballots cast by voters who cast provisional ballots during regular poll hours.

Louisiana's HAVA Compliance:

Louisiana complied with the provisional voting requirements of HAVA and legislation was passed in the 2003 Regular Session of the Louisiana Legislature to provide for provisional voting. Act 423 of 2003 Regular Session of the Louisiana Legislature implemented provisional voting in Louisiana only in elections for Federal office as follows:

1) Authorizes an individual to cast a provisional paper ballot for candidates for Federal office only if his name does not appear on the precinct register and he has not been authorized by the Registrar of Voters to vote by affidavit or his eligibility to vote has been challenged by the election poll workers or registrar/deputy registrar.

2) Procedure for provisional voting for Federal office at a polling place or the Registrar of Voters' office:

- Applicant fills in the provisional ballot envelope flap and signs the certificate on the flap attesting that he is a registered voter in the parish and is eligible to vote in the election for Federal office.
- Applicant marks the provisional paper ballot, places the provisional ballot in the provisional ballot envelope, seals the envelope, and returns the provisional ballot envelope to the commissioner or registrar/deputy registrar.
- Applicant who casts a provisional ballot shall be provided written instructions by the commissioner or registrar/deputy registrar that explains how the applicant may ascertain whether his provisional vote was counted, and, if his provisional vote was not counted, the reason his vote was not counted.

3) Counting of provisional ballots:

- The parish Registrar of Voters compiles a list of the names of individuals who voted on a provisional ballot.
- The Registrar of Voters, Secretary of State, and other state and local agencies shall compile and provide available registration documentation for the Parish Board of Election Supervisors (Parish Board) to determine if an individual casting a provisional ballot is a registered voter and eligible to vote in the Federal election.
- The Parish Board shall be responsible for counting and tabulation of provisional ballots for Federal office.
- Provisional ballots shall be counted by the Parish Board on the third day following the election.
- Candidates, their representatives, and qualified electors may be present during the counting and tabulation of provisional ballots.
- The Parish Board shall determine if a provisional ballot shall be counted.
- All provisional ballots that are rejected by the Parish Board shall be sealed in the special provisional ballot envelope. No rejected provisional ballot shall be counted.
- A member of the Parish Board shall remove the flaps from the valid provisional ballots. The valid provisional ballot flaps and supporting registration documentation shall then be placed in the designated envelope and transmitted to the Registrar of Voters.
- The members of the Parish Board shall count the valid provisional ballots by hand and the total number of provisional votes cast for a Federal candidate shall be entered on the final provisional ballot vote report and the results shall be certified.

- A copy of the signed list of provisional voters indicating which ballots were counted and which ballots were rejected shall be transmitted to the Secretary of State.

4) Provisional voting for Federal office during extension of poll hours:

- An applicant who votes during the extension of poll hours pursuant to a court order or any other order extending the poll hours shall vote by provisional ballot for Federal offices.
- The provisional ballots cast during the extension of poll hours shall be kept separate and placed in a separate envelope.
- The provisional ballots cast during the extension of poll hours shall be counted according to the same procedure set forth for provisional ballots cast during early voting in person or during regular poll hours.
- An emergency as defined by Louisiana law, La. R.S. 18:401.1, does not constitute a circumstance in which polling hours are delayed necessitating the use of provisional ballots.

5) Results of Federal election:

- The results of the Federal election prepared by the Parish Board shall also include the total provisional votes for each candidate for Federal office.

The Secretary of State, in conjunction with the Clerks of Court and Registrars of Voters, have complied fully with the requirements of HAVA for provisional voting as follows:

1) The Secretary of State prepared the forms that are required for provisional voting in Louisiana.

2) The Secretary of State established a free access telephone system that allows an individual who casts a provisional ballot to ascertain whether his vote was counted, and, if his vote was not counted, the reason that his vote was not counted. The provisional ballot instructions include a toll-free telephone number where access to the information about an individual's provisional ballot will be restricted to the individual who casts the ballot.

3) The Secretary of State provided an updated informational pamphlet supplement setting forth instructions for provisional voting, counting and tabulating provisional ballots, and posting of additional information for provisional voting required by HAVA. This supplement has been incorporated into the informational pamphlet that is provided to the commissioners.

4) The Clerks of Court and Registrars of Voters are responsible for implementing provisional voting for Federal offices at the polling places on Election Day and during early voting in person, respectively.

5) Provisional voting has been conducted in the following elections in Louisiana: March 9, 2004 (Presidential Preference Primary); November 2, 2004 (Presidential Election and Congressional Primary); December 4, 2004 (Congressional General); November 7, 2006 (Congressional Primary); December 9, 2006 (Congressional General); February 9, 2008 (Presidential Preference Primary); March 8, 2008 (Special Congressional First Party Primary); April 5, 2008 (Special Congressional Second Party Primary); and May 3, 2008 (Special Congressional General).

Section 1.3 Voting Information Requirements (Section 302(b)):

Section 302(b) of HAVA requires, with respect to Federal elections held on and after January 1, 2004, the following voting information to be publicly posted at each polling place on the day of each election for Federal office:

- A sample version of the ballot that will be used for that election;
- Information regarding the date of the election and the hours during which polling places will be open;
- Instructions on how to vote, including how to cast a vote and how to cast a provisional ballot;
- Instructions for mail-in registrants and first-time voters under Section 303(b);
- General information on voting rights under applicable federal and state laws, including information on the right of an individual to cast a provisional ballot and instructions on how to contact the appropriate officials if these rights are alleged to have been violated; and
- General information on federal and state laws regarding prohibitions on acts of fraud and misrepresentation.

Louisiana's HAVA Compliance:

Louisiana law requires the following information for Election Day voting, early voting in person, and absentee voting by mail:

1) La. R.S. 18:421B. requires the Secretary of State to develop and print cards of instruction to voters and commissioners which shall not be inconsistent with the constitution and laws of the United States or of this state and which shall be approved by the Attorney General.

2) La. R.S. 18:552A.(2) requires the Secretary of State to furnish the parish custodian of voting machines (Clerk of Court) for each parish two sample ballots for each voting precinct at which voting shall be conducted in an election.

3) La. R.S. 18:562 provides the requirements for the identification of voters. The Secretary of State prepared an informational poster that sets forth the requirements of R.S. 18:562, and informs the voter that he may sign an affidavit and vote if he does not have a Louisiana driver's license, a Louisiana special identification card, or other generally recognized picture identification.

4) La. R.S. 18:1306B.(2) requires the Secretary of State to prepare instructions, approved by the Attorney General, generally describing the particular absentee by mail counting equipment utilized in the election to count absentee by mail ballots. The instructions inform the voter how to cast his vote, which shall include instructions for marking the absentee by mail ballot and examples of the correct and incorrect methods of marking the ballot, if applicable.

5) La. R.S. 18:1306B.(3) requires the Secretary of State to prepare instructions, approved by the Attorney General, generally describing the particular early voting counting equipment used in the election to count early voting ballots or voting machines used to cast early voting ballots. The instructions inform the voter how to cast his vote, which shall include instructions for marking the early voting ballot and examples of the correct and incorrect methods of marking the ballot, if applicable.

Legislation was passed during the 2003 Regular Session of the Louisiana Legislature to comply with the HAVA voting information requirements.

Act 1220 of the 2003 Regular Session of the Louisiana Legislature:

a) Requires the Secretary of State, in the case of a Federal election, to supply informational posters as required by the Help America Vote Act of 2002.

b) Requires the commissioners to post informational posters, if required, in addition to instructions, the statement of proposed constitutional amendments on the ballot, and a sample ballot in a conspicuous place at the principal entrance to the polling place.

Act 423 of the 2003 Regular Session of the Louisiana Legislature:

a) Requires the commissioner or registrar/deputy registrar to provide an applicant who casts a provisional ballot with written instructions for how the applicant may ascertain whether the provisional vote was counted, and if the provisional vote was not counted the reason the vote was not counted.

The Secretary of State updated the following publications to meet the requirements of HAVA: 1) instructions on how to vote, including how to cast a vote and how to cast a provisional ballot, and 2) the informational pamphlet required by R.S. 18:1306 for absentee voting by mail to provide the voter who votes on a paper ballot with instructions on how to correct the ballot before it is cast and counted.

The Secretary of State also prepared new informational posters to provide the following: information regarding the date of the election and the hours during which polling places will be open; instructions for mail-in registrants and first time voters under Section 303(b); general information on voting rights under applicable federal and state laws, including information on the rights of an individual to cast a provisional ballot and instructions on how to contact the appropriate officials if these rights are alleged to have been violated; and general information on federal and state laws regarding prohibitions on acts of fraud and misrepresentation.

Section 1.4 Computerized Statewide Voter Registration List (Section 303(a)):

Title III, Section 303(a) sets forth the computerized statewide voter registration list requirements:

- Requires a single, uniform, official, centralized, interactive computerized list of all legally registered voters in the state and each voter assigned a unique identifier.
- Any election official may obtain immediate access to the list or database.
- Requires computerized list maintenance.
- Requires removal of individuals in accordance with the NVRA.
- Requires coordination of felony status and death records with state agencies.
- Requires security preventing unauthorized access.
- Requires verification of certain voter registration information provided by applicants. (Should an individual provide the last four digits of his social security number, verification must be obtained from the Social Security Administration via link through the Office of Motor Vehicles that the number provided is an accurate and valid number. State Election Officials and Motor Vehicle Authority shall enter into an agreement to match information in the statewide registration database and the OMV database to verify accuracy of information provided on voter registration application.)

- Requires applicant to provide driver's license number, if issued, or last four digits of social security number, if issued. If applicant has neither, a unique number will be generated to identify the individual.
- Requires sharing of information in databases.

Compliance with Section 303(a) of HAVA must be completed on or before January 1, 2004, unless the state is granted a waiver of the deadline until January 1, 2006.

Louisiana's HAVA Compliance:

Since 1987, Louisiana has had in place a single, centralized computerized list of voters registered to vote in the State of Louisiana. By and large, the Elections and Registration Information Network (ERIN) already accomplished most of what HAVA envisioned. The system maintains all records of registered voters throughout the state and assigns each voter a unique identification number. However, the Department of State had to make a number of alterations to conform to the HAVA requirements.

ERIN already provided access to the Registrar of Voters in each parish. However, HAVA required all local election officials to have access to the system. Thus, the Clerk of Court, as the Chief Election Officer in each parish, was given inquiry access to ERIN. In order to accomplish this, the Clerk of Court in each parish was linked to the ERIN system via a series of routers, switches, and lines. This project was completed in 2004.

ERIN meets the requirements for removal of individuals in accordance with the NVRA. Duplicate names are eliminated from the list. In addition, regular list maintenance is performed, placing individuals who do not respond to mailings on an inactive list and removing them from the list of voters if they are inactive for the course of two Federal general elections. ERIN data is also compared to felony lists provided by the Louisiana Department of Public Safety and Corrections (DPS). Federal and state clerks of court receive death notices from the Louisiana Department of Health and Hospitals (DHHS). Individuals who have been convicted of a felony are suspended while under an order of imprisonment. Similarly, death notices are matched against ERIN data to allow for the removal of deceased voters. No modifications are necessary to meet HAVA's removal of voters requirement in keeping with the provisions of the NVRA.

ERIN provides customized software security disallowing unauthorized access. No modifications are necessary to meet the security requirements of HAVA.

In order to meet the registration information verification requirements of HAVA, certain modifications were required to the ERIN system as detailed below:

- Added field for driver's license number on application entry screen and forms.
- Added driver's license number and Louisiana Department of Public Safety and Corrections, Office of Motor Vehicles (OMV) data to add/update screen.
- Developed applications to process verification and exchange information with OMV.
- Developed programs to update/add/load information provided by OMV.
- Developed reports for Registrars of Voters.

In addition to the in-house changes to ERIN, certain changes were made by the OMV to both its software and procedures to ensure compliance with the HAVA information verification requirements:

- The registrant's driver's license number is being preprinted on in-person voter registration applications submitted from the OMV.
- The exchange of information processes with the Department of State were developed.
- An interface with the Social Security Administration on the social security number verification method was developed.

The Department of State and DPS are currently exchanging information electronically via a secure encrypted protocol (VPN). An exchange data format has been developed to secure exchange data between the departments. In order to accomplish this information sharing, the following alterations were made to ERIN:

- Developed encryption software scripts.
- Developed program to capture data.

All of the changes necessary to meet the mandatory requirements of HAVA have been completed but work continues to enhance both the functionality and security of the interface developed between the agencies.

Section 1.5 Requirements for Voters Who Register By Mail (Section 303(b)):

Section 303(b) of HAVA sets forth the requirements for persons who register to vote by mail. The changes affect the information that is contained on the mail-in registration form and the information or proof of identity provided by the mail-in registrant.

Any mail-in registration form must contain the following information:

- Whether the registrant is a citizen of the United States.
- Whether the registrant will be 18 years of age or older by the next election date.
- Instructions on discontinuing the application process if the answer to one of these two questions is "no".
- Instructions that certain verification information must be provided with the mail-in registration form in order to avoid the necessity for the provision of additional verification information upon voting for the first time.

If the registrant has a driver's license number, that number must appear on the voter registration form. If the registrant does not have a driver's license number but has a social security number, at least the last four digits of the registrant's social security number must be provided on the voter registration form. If these numbers are issued and are not provided, the registration application cannot be processed. Certain alternative information may be provided by a mail-in registrant in order to avoid additional identification requirements upon voting for the first time. This information includes:

- A copy of a current and valid photo identification; or
- A copy of a current utility bill, bank statement, government check, paycheck, or other government document that shows the name and address of the voter.

Persons who fall into one of the following categories are exempted from the additional identification requirements:

- A registrant authorized to receive an absentee ballot under the Uniform and Overseas Citizens Absentee Voting Act (UOCAVA);
- A registrant authorized to vote otherwise than in person by Section 3(b)(2)(B)(ii) of the Voting Accessibility for the Elderly and Handicapped Act (VAEHA); or
- A registrant entitled to vote other than in person under any other Federal law.

If this identifying information is not provided or the registrant does not fall into one of the categories of authorized persons under UOCAVA, VAEHA, or any other Federal law, the new registrant must provide the following information upon voting for the first time in-person or by mail:

- Current and valid photo identification; or

- A copy of a current utility bill, bank statement, government check, paycheck, or other government document that shows the name and address of the voter.

If this information is not provided, the voter will only be allowed to cast a provisional ballot.

Louisiana's HAVA Compliance:

In Act 1220 of the 2003 Regular Legislative Session, the legislature made changes that require all registrants to provide either a valid and current photo identification, driver's license number, social security number, or copy of a current utility bill, bank statement, government check, paycheck, or other government document that shows the name and address of the registrant as a part of the registration process. This sought to assure that Louisiana would have the information necessary to apply Section 303(b)(3) and be exempted from Sections 303(b)(1) and 303(b)(2).

Act 403 of the 2006 Regular Session of the Louisiana Legislature addressed the requirements for the driver's license number or the last four digits of the social security number. Act 403 provides that no voter registration application shall be complete unless the applicant provides one of the following forms of identification: 1) a Louisiana driver's license number or Louisiana special identification card number, is issued, or the last four digits of the social security number, if issued; or 2) if the applicant does not have Louisiana driver's license number, Louisiana special identification card number or a social security number, the applicant must submit a copy of a current and valid photo identification or a copy of a current utility bill, bank statement, government check, paycheck, or other government document that shows the name and address of the applicant. See Act 403 of the 2006 Regular Session of the Louisiana Legislature attached as Appendix "2".

Louisiana revised its mail voter registration application (Form #0110) to comply with HAVA. See Form #0110 attached as Appendix "3". The mail voter registration application has been precleared by the United States Department of Justice, Voting Rights Division.

Section 1.6 Other activities to improve the administration of elections:

The State of Louisiana will issue a certification pursuant to 42 U.S.C. §15401 that the state will use the Title II requirements payments to carry out other activities to improve the administration of elections for Federal office. The State's proposed uses of the requirements payments are not inconsistent with the requirements of

Title III of HAVA and the use of the funds is consistent with the requirements of Section 251(b) of HAVA. These activities will include, but not be limited to, the following:

•Act 135 of the 2008 Regular Session of the Louisiana Legislature continued the program authorizing early voting at additional locations and as the program is expanded the Department of State may need to procure additional voting systems and equipment.

•Providing the capability for e-mailing ballots to military and overseas voters after the integration of the LASOS system into ERIN.

•Establishing and using an on-line educational training program for election officials and poll workers through the Department of State's website.

•Expanding the project to provide images of voter registration documents for disaster recovery and to provide continuity of business in the offices of the Registrars of Voters.

•Providing functionality in the ERIN system to track provisional ballots and implementing an enhanced website so that a voter can determine if his provisional ballot was counted, and if the ballot was not counted, the reason for the rejection of the ballot.

•Analyzing the business processes involved in elections and automating the form submission and approval process of manual forms used by the Department of State during the election cycles.

•Web conferencing between the Department of State and election officials to discuss projects/problems/processes impacting elections for Federal office.

Managing Disbursement of HAVA Funds

SECTION 2. How the State will distribute and monitor the distribution of the requirements payment to units of local government or other entities in the State for carrying out the activities described in paragraph (1), including a description of – (A) the criteria to be used to determine the eligibility of such units or entities for receiving the payment; and (B) the methods to be used by the State to monitor the performance of the units or entities to whom the payment is distributed, consistent with the performance goals and measures adopted under paragraph (8). (Section 254(a)(2), 42 U.S.C. §15404(a)(3))

The (ERIN) system and the (LASOS) system are funded solely through Louisiana's annual state appropriations bill. All funds are expended through Louisiana's Integrated Statewide Information System (ISIS) and follow the criteria of eligibility contained in the Department of State's Financial Accounting and Administrative Policy for allowable expenses and the Louisiana Procurement Code.

In Louisiana, the procurement of voting systems is done on a state level rather than a parish level by the Department of State. As a result, there are no distributions of HAVA requirements payments for the procurement of voting systems to parishes, units of local government, or other entities.

All other HAVA requirements payments are paid through the Department of State; however, in the event that requirements payments are distributed to parishes, the parishes will be required to provide all necessary documentation to substantiate expenses to be reimbursed to the parish.

All funds expended under HAVA are subject to financial and compliance audits through federal auditors, the Louisiana Legislative Auditor's Office and the Department of State's Internal Audit Division.

Educational Programs

Section 3. How the State will provide for programs for voter education, election official education and training, and poll worker training which will assist the State in meeting the requirements of Title III. (Section 254(a)(3), 42 U.S.C. §15404(a)(3))

Section 3.1 Election Official Education and Training:

The Clerk of Court for each parish is the Chief Election Officer of the parish and is responsible for the following election functions: qualifying local and municipal candidates; conducting general courses of instruction for commissioners-in-charge and commissioners; serving as a member of the Parish Board of Election Supervisors; and selecting deputy custodians.

The Registrar of Voters for each parish is responsible for the following voter registration and election functions: conducting voter registration; maintaining accurate voter registration records; conducting the annual canvass of registered voters; making changes to voter registration rolls relative to reapportionment and

changes in district lines; conducting early voting in person and absentee voting by mail; and serving as a member of the Parish Board of Election Supervisors.

The Parish Board of Election Supervisors consists of the Clerk of Court, the Registrar of Voters, the chairman of the parish executive committee of the Democratic and Republican parties or their designees, and a member appointed by the Governor. This body is responsible for the following: selecting the commissioners-in-charge at the beginning of each calendar year; drawing or appointing the commissioners prior to an election; sealing the voting systems before they are delivered to the polling places; breaking the seals on the voting systems after the election; certifying the official results of any election in the parish; and counting provisional ballots for Federal elections.

The Secretary of State keeps the Clerks of Court and Registrars of Voters updated on changes in the law, including changes required by HAVA. In addition, the informational pamphlet required by La. R.S. 18:421 is continually being updated to provide instructions and additional information that may be required by HAVA.

The Department of State will continue to prepare training DVDs for the Clerks of Court and Registrars of Voters to use for elections for Federal office with specific information relating to the races that are on the ballot.

Section 3.2 Poll Worker Training:

The Clerk of Court for each parish is required to conduct courses of instruction for election poll workers (commissioners-in-charge, commissioners, and alternate commissioners). La. R.S. 18:431A. requires each Clerk of Court to semiannually conduct a general course of instruction for the commissioners and provide them with the following: a copy of the informational pamphlet provided by the Secretary of State; instructions for the use of the voting systems; instructions for conducting primary and general elections; and instructions on the commissioner's duty to offer a voter the opportunity to sign an affidavit and vote if the voter does not have picture identification. Commissioners' training also includes information about the proper etiquette for individuals with disabilities, and procedural techniques to best serve individuals with disabilities during the voting process. Each Clerk of Court was provided with a Clerk of Court Training DVD prepared by the Department of State for use at commissioner schools. This DVD contains training information and instructions on the following: use of the AVC Advantage voting system; use of the new audio voting keypad; and the proper etiquette when an individual with a disability goes to the polls on Election Day. On Election Day, the audio voting keypad shall be offered by the commissioners to individuals who are visually impaired, blind, illiterate, physically disabled, or have difficulty understanding the written word.

La. R.S. 18:431B. authorizes the Clerk of Court to conduct a course of instruction, if needed, for commissioners-in-charge, commissioners, and alternate commissioners who are drawn or appointed to serve in each election. The course primarily covers the procedures to be used in the election for which the officials were selected.

The Secretary of State, in addition to amending the informational pamphlet to address the requirements of HAVA, has prepared precinct supply packets containing the following informational brochures on the voting process to election poll workers: information regarding the date of the election and the hours during which polling places will be open; instructions for mail-in registrants and first time voters under Section 303(b) of HAVA; general information on voting rights under applicable federal and state law, including information on the right of an individual to cast a provisional ballot and instructions on how to contact the appropriate officials if these rights are alleged to have been violated; and general information on federal and state laws regarding prohibitions on acts of fraud and misrepresentation.

Since 2006, The *Informational Pamphlet for Election Day Voting* that is used to train the election poll workers (commissioners) has been revised to incorporate the provisions of provisional voting for elections for Federal office. Revisions to the *Informational Pamphlet for Election Day Voting* will continue to be made to incorporate federal and state legislative changes relating to elections for Federal office.

The Department of State will establish an online poll worker education program which will assist voters in qualifying to serve as election poll workers. In addition, existing election poll workers will be able to access the Department of State's website to review election procedures.

Section 3.3 Voter Education:

Voter education is of vital importance to the election process. Voter education includes the following: educating voters as to what is contained on the ballot; use of the AVC Advantage and AVC Edge voting systems; polling place locations; election dates for Election Day voting, early voting in person, and absentee voting by mail; voting at the precinct on Election Day; casting an absentee by mail ballot; early voting process; provisional voting; and registering to vote. The goal of voter education is to provide educational programs and information to all voters to facilitate a firm understanding of the election and registration processes and applicable laws that govern the conduct of elections in Louisiana. To that end, the Secretary of State is making it a priority to coordinate with governmental agencies

and non-governmental organizations to ensure that all strata of the Louisiana population are reached through voter education programs. In addition, the State is making this information available to individuals with disabilities and is working with the disability community on how to more efficiently and effectively provide this information.

Act 286 of the 2003 Regular Session of the Louisiana Legislature requires the Secretary of State in administering the laws relating to the custody of voting systems and voter registration to do the following:

- Prescribe uniform rules, regulations, forms, and instructions as to standards for effective nonpartisan voter education. Standards shall address but shall not be limited to voter education concerning voter registration, balloting procedures, distribution of sample ballots, and effective voter education methods.
- Review current voter education programs within Louisiana.
- Prepare an annual report on the effectiveness of voter education programs.
- Develop activities, events, informational posters and pamphlets, and public service announcements for the implementation of an annual voter registration week, and generally be responsible for implementation of such voter registration week.

The rules and regulations relating to the annual voter registration week were adopted by the Secretary of State and published in the December 20, 2005 issue of the "Louisiana Register."

The Department of State implemented a more comprehensive voter education program to comply with the requirements of Act 286 of the 2003 Regular Session of the Louisiana Legislature and the following activities have been included in the program since 2006:

•Expansion of website information on registration and voting, including providing more comprehensive information relating to elections for Federal office. The Department of State is also preparing an instructional presentation for the Department of State's website that will show how to use the voting systems, including information for voters with disabilities.

•Expansion of the toll-free telephone system for election information.

•Coordination with parish election officials to establish community-based programs for voter outreach and education programs.

•Participation in the National Student/Parent Mock election with the Department of State's elections outreach division coordinating the activities for the State of Louisiana.

•Dissemination of public service announcements for voter education and registration information.

•Conducting seminars throughout Louisiana for voter education and registration. In August of 2008, the Department of State will conduct voting rights seminars for the elderly and individuals with disabilities that will include information on closed party primary congressional elections and the seminars will be advertised in radio advertisements on a statewide basis.

Act 560 of the 2006 Regular Session of the Louisiana Legislature provided for a closed party primary system for congressional elections in Louisiana. In the fall of 2008, Louisiana will hold its first statewide closed party primary congressional elections since 1976. The Department of State will conduct a statewide media campaign geared toward educating the electorate about federal elections and how federal elections interact with state and local elections. The media campaign will also include information on accessibility for voters with disabilities.

In 2008, the following brochures and pamphlets will be published:

Guide to Using the Audio Voting Keypad; State of Louisiana Voting Rights for the Elderly and Individuals with Disabilities; and Voting in Louisiana: A How to Guide. The publications will be updated, as needed, due to legislative and procedural changes and the updated versions of the publications will be placed on the Department of State's website.

Audio Voting Keypad Quick Chart - A new instructional sheet that was designed to streamline the instructions for use of the audio voting keypad. In addition, the Department of State will have the chart printed in Braille to use when conducting voter education seminars. The chart is on the Department of State's website and is available for visually impaired voters who are screen readers.

Voting System Standards

SECTION 4. How the State will adopt voting system guidelines and processes which are consistent with the requirements of Section 301. (Section 254(a)(4), 42 U.S.C. §15404(a)(4))

The State of Louisiana has both statutory provisions and administrative rules relative to the types and forms of voting systems that can be certified for use in the state. On January 5, 2005, the Secretary of State adopted Louisiana's most recent version of the voting system standards that meet with his requirements for durability, accuracy, efficiency, and capacity. All voting systems must be certified by the Secretary of State based upon recommendations from a committee of experts appointed by him prior to use in the state (La. R.S. 18:1361).

HAVA Fund

SECTION 5. How the State will establish a fund described in subsection (b) for the purposes of administering the State's activities under this part, including information on fund management. (Section 254(a)(5), 42 U.S.C. §15404(a)(5))

Act 142 of the 2003 Regular Session of the Louisiana Legislature established the Help Louisiana Vote Fund as a special fund in the State Treasury for the deposit of all funds received pursuant to HAVA. Act 142 provides that federal monies shall be deposited into the fund and allocated by the State Treasurer to one of the following five accounts: Election Administration Account; Voting Systems Account; HAVA Requirements Account; Voting Access Account; and College Program Account. The Help Louisiana Vote Fund is a separate fund from the state general fund and all interest earned on the investment of the monies in the fund shall be credited to the Help Louisiana Vote Fund.

The Secretary of State has provided written instructions to the State Treasurer as to the appropriate account into which the HAVA funds shall be deposited, including interest. Appropriations have been made by the Louisiana Legislature from the fund, and the Secretary of State will continue to oversee the expenditure of the monies from the fund in compliance with HAVA and the State of Louisiana accounting guidelines.

State Budget

SECTION 6. The State's proposed budget for activities under this part, based on the State's best estimates of the costs for such activities and the amount of funds to be made available, including specific information on – A) the costs of the activities required to be carried out to meet the requirements of Title III; B) the portion of the requirements payment which will be used to carry out activities to meet such requirements; and C) the portion of the requirements payment which will be used to carry out other activities. (Section 254 (a)(6), 42 U.S.C. §15404 (a)(6))

Title I Funds:

In federal fiscal year 2003, Louisiana received $4,911,421 in Title I, Section 101 funds for the purpose of improving the administration of elections for Federal office and $7,351,684 in Title I, Section 102 funds as reimbursement for the replacement of the AVM-POM lever voting machines. No state match funds were required for any Title I funds.

Title II Funds (Requirements Payments):

Louisiana received Title II federal funds in federal fiscal year 2004 ($12,549,220) and in federal fiscal year 2005 ($22,518,452). As of federal fiscal year 2005, the total amount of Title II payments received by Louisiana was $35,067,672. On January 24, 2008, Louisiana received notification of a new federal allocation of $1,720,843 in Title II federal funds. With this additional federal allocation, the total amount of Title II requirements payments will be $36,788,515.

Under the provisions of Title II, the State of Louisiana must provide a state match of five percent of the total of the requirements payments received which will be $1,936,238. The United States Election Assistance Commission (EAC) has advised the State of Louisiana that a state match will not be required for any interest accumulations received on Title II requirements payments.

The proposed budget for HAVA funds was based on the priorities detailed below. Federal funding was first used to address the mandates placed on the State of Louisiana by HAVA, specifically for the following: procurement of electronic voting systems; accessibility for individuals with disabilities; computerized statewide voter registration list; computerized list maintenance; and verification of registration information.

The original budget estimates in the August 1, 2003 State Plan were based on various projections, the unknown cost of procuring electronic voting systems, and the uncertainty in the amount of funds necessary to implement the requirements of HAVA. After proceeding with the HAVA grant and procuring the HAVA compliant voting systems for Louisiana, it was determined that the original estimated budget for Title II federal expenses for Louisiana should be revised. In November of 2006, the Department of State through the Help America Vote Advisory Committee amended the State Plan based upon projected needs for HAVA funding.

Annually, federal funds, interest funds collected and state funds are allocated to HAVA in the Department of State's budget request and annual state appropriations bill. These funds will continue to be requested and appropriated until the HAVA program is complete and/or all funds appropriated to HAVA have been expended.

Budget for Title II Federal Expenses Based Upon the Louisiana State Plan dated August 1, 2003:

Budget Item	Title II Federal Funds Allocated
Replacement of non-compliant lever-operated voting systems and upgrade of existing electronic voting systems to meet disability access requirements.	$32,192,122
Statewide voter registration database, including software and hardware, and upgrade/replacement of software and hardware for Clerks of Court, Registrars of Voters and Secretary of State to provide access to ERIN and improve ballot preparation and voting system programming.	$1,402,707
Voter education, election official education and training, and poll worker training for meeting the requirements of Title III of HAVA.	$946,827
Update voting system standards.	$35,068
Development of state plan(s), production of reports, monitoring of performance goals, fiscal management and management of the state plan.	$455,880
Telecommunications.	$35,068
Voting information requirements.	0 - State funds[2]
Provisional voting.	0 - State funds
State-based administrative complaint procedure.	0 - State funds
Requirements for first time voters who register by mail.	0 - State funds

The total amount of federal funds received by the Department of State was $35,067,672. The State of Louisiana would be required to provide a match of five percent totaling $1,845,666.95.

[2] "State funds" denotes that money for this program or project will be provided out of funding allocated to the Department of State as a part of its annual state funded budgets.

Budget for Title II Federal Expenses Based Upon Amendment #1 to the Louisiana State Plan dated November 10, 2006

Budget Item	Title II federal funds allocated	Title II federal budget balance as of 7/31/08
Replacement of non-compliant lever-operated voting systems and upgrade of existing electronic voting systems to meet disability access requirements, including installation, implementation and training.	$26,800,000	$0
1) Statewide voter registration database, including software and hardware, and services to upgrade/replace obsolete software and hardware for Clerks of Court, Registrars of Voters and Secretary of State to provide access to ERIN and improve voter registration, ballot preparation and voting system programming. 2) Implementation of technology to significantly enhance and improve voter registration, absentee and election day voting and reporting of activities. These improvements will require significant investments in hardware, software and services both at the state and local level. Initiatives will be focused on reducing manual data entry and processing, insuring the integrity of the process through more automated records retention, development of more secure, direct, interactive and integrated connections between local, state and federal agencies to insure proper list maintenance, web enabling functions making it easier for the citizenry to update their records and providing stakeholders with significantly enhanced statistical and reporting capabilities.	$7,722,672	$0
Voter education, election official education and training, and poll worker training for meeting the requirements of Title III of HAVA.	$525,000	$0
Update voting system standards.	0 – State funds[3]	$0
Development of state plan(s), production of reports, monitoring of performance goals, fiscal management and management of the state plan.	$20,000	$19,420
Telecommunications.	0 – State funds	$0
Voting information requirements.	0 – State funds	$0
Provisional voting.	0 – State funds	$0
State-based administrative complaint procedure.	0 – State funds	$0
Requirements for first time voters who register by mail.	0 – State funds	$0

The total amount of federal funds received by the Department of State was $35,067,672. All current and future interest collections will be placed into funding for the statewide voter registration and election system.

[3] "State funds" denotes that money for this program or project will be provided out of funding allocated to the Department of State as a part of its annual state funded budgets.

Budget for Title II Federal Expenses Based Upon Amendment #2 to the Louisiana State Plan

The total amount of Title II federal funds received by Louisiana will be $36,788,515. The Department of State will apply for the additional funding in the amount of $1,720,843 upon issuance of a certification to the EAC. All current and future interest collections will be distributed between the categories listed below, as needed, and to perform other activities to improve the administration of elections for Federal office. As of June 30, 2008, Louisiana has received $3,399,269 in interest collections of which $1,291,327 has been expended or encumbered. The balance of interest collections as of June 30, 2008 is $2,107,942.

Budget Item	Amendment #2, Title II federal funds budget balance
1) Enhancement, improvement, upgrade and acquisition of equipment for voting systems for absentee by mail voting, early voting and election day voting; purchase of additional voting systems for early voting and election day voting, including installation, implementation and training; and security of voting systems and registration system for early voting at remote sites. 2) Statewide voter registration database, including software and hardware, and services to upgrade/replace obsolete software and hardware for Clerks of Court, Registrars of Voters and Secretary of State to provide access to ERIN and improve voter registration, ballot preparation and voting system programming. 3) Implementation of technology to significantly enhance and improve voter registration, absentee and election day voting and reporting of activities. These improvements will require significant investments in hardware, software and services both at the state and local level. Initiatives will be focused on reducing manual data entry and processing, insuring the integrity of the process through more automated records retention, development of more secure, direct, interactive and integrated connections between local, state and federal agencies to insure proper list maintenance, web enabling functions making it easier for the citizenry to update their records and providing stakeholders with significantly enhanced statistical and reporting capabilities. 4) Implementation of on-line election official education and training and poll worker training. 5) Activities to improve the administration of elections for Federal office.	$1,239,263
Voter education and outreach, election official education and training, and poll worker training.	$500,000
Development of state plan(s), production of reports, monitoring of performance goals, fiscal management and management of the state plan.	$1,000
TOTAL TITLE II FEDERAL FUNDS BUDGET BALANCE (AMENDMENT #2)	$1,740,263

Louisiana's Maintenance of Effort

SECTION 7. How the State, in using the requirements payment, will maintain the expenditures of the State for activities funded by the payment at a level that is not less than the level of such expenditures maintained by the State for the fiscal year ending prior to November 2000. (Section 254(a)(7), 42 U.S.C. §15404(a)(7))

Louisiana has a state-driven election system and Louisiana has and will maintain the expenditures of the state for activities funded by the payment at a level equal to or greater than the level of such expenditures for Louisiana for expenditures consistent with the requirements of Title III of HAVA. Under the provisions of EAC Advisory 07-003-A, the fiscal year to be used as the base should be the state fiscal year encompassing June 18, 2003, which is the first date that Louisiana received its first disbursement of HAVA funds. Therefore, state Fiscal Year 2002-2003 is the base year and the maintenance of effort level is $15,998,618 and this is the actual amount of expenses incurred in state Fiscal Year 2002-2003.

Performance Goals and Measures

SECTION 8. How the state will adopt performance goals and measures that will be used by the State to determine its success and the success of units of local government in the State in carrying out the plan, including timetables for meeting each of the elements of the plan, descriptions of the criteria the State will use to measure performance and the process used to develop such criteria, and a description of which official is to be held responsible for ensuring that each performance goal is met. (Section 254(a)(8), 42 U.S.C. §15404(a)(8))

Section 8.1 Replacement of lever voting machines:

1) Deadline: First Federal election on and after January 1, 2006. Louisiana received a waiver to extend the deadline from the first Federal election on and after January 1, 2004 to the first Federal election on and after January 1, 2006.

2) Criteria: Replacement of AVM-POM voting machines that comply with Title III of HAVA in the fifty parishes that used AVM-POM voting machines in the 2000 Federal election.

3) How Criteria are Judged: Success of meeting the performance goal is based on the number of the AVM-POM voting machines remaining in use in Louisiana after the 2006 deadline. The State of Louisiana met its goal in 2006.

4) Responsible Official: Secretary of State.

Section 8.2 Voting accessibility for individuals with disabilities:

1) Deadline: First Federal election on and after January 1, 2006.

2) Criteria: Provide at least one direct recording electronic voting system for individuals with disabilities in each precinct in Louisiana.

3) How Criteria are Judged: Success of meeting the performance goal will be based on the placement or retrofitting of direct recording electronic voting systems until each precinct has a voting system that is accessible to individuals with disabilities. The State of Louisiana met its goal in 2006.

4) Responsible Official: Secretary of State in conjunction with the Clerks of Court and Registrars of Voters.

Section 8.3 Statewide voter registration system:

1) Deadline: January 1, 2006.

2) Criteria: Implementation "in a uniform and nondiscriminatory manner, a single, uniform, official, centralized, interactive, computerized statewide voter registration list that is defined, maintained, and administered at the State level that contains the name and registration information of every legally registered voter in the State and assigns a unique identifier to each legally registered voter in the State".

3) How Criteria are Judged: Success of meeting this performance goal was based on implementation of minor changes to ERIN to meet the requirements of HAVA. The State of Louisiana met its goal prior to January 1, 2006.

4) Responsible Official: Secretary of State in conjunction with the Registrars of Voters.

Section 8.4 Provisional voting:

1) Deadline: January 1, 2004.

2) Criteria: Implementation of provisional voting for Federal elections and establishment of a free access system so that provisional voters can ascertain if their provisional ballots were counted.

3) How Criteria are Judged: Success of meeting this performance goal was based on the implementation of provisional voting in each parish at the polling places on Election Day and during early voting in person, and establishment of the free access system required for provisional voters. The State of Louisiana met its goal in 2004.

4) Responsible Official: Secretary of State in conjunction with the Clerks of Court and Registrars of Voters.

Section 8.5 Posting of voting information:

1) Deadline: January 1, 2004.

2) Criteria: Posting of the required information at each polling place required by Section 302(b) of HAVA.

3) How Criteria are Judged: Success of meeting this performance goal was based on the preparation of the required information and the posting of the information at each polling place and each Registrar of Voters' office. The State of Louisiana met its goal in 2004.

4) Responsible Official: Secretary of State in conjunction with the Clerks of Court and Registrars of Voters.

Section 8.6 Voter education on how to correctly cast a ballot for a paper ballot voting system:

1) Deadline: January 1, 2006.

2) Criteria: Establishment of a voter education program for a paper ballot voting system that notifies the voter of the effect of casting multiple votes for an office and how to correct the ballot before it is cast and counted.

3) How Criteria are Judged: Success of meeting this performance goal was based on the establishment and implementation of the voter education program for the

paper ballot voting system used in Louisiana. The State of Louisiana met its goal prior to January 1, 2006.

4) Responsible Official: Secretary of State in conjunction with the Clerks of Court and Registrars of Voters.

Section 8.7 Integration of the existing LASOS system into ERIN:

1) Deadline: September 30, 2009.

2) Criteria: Currently, the LASOS system (candidate qualifying, ballots, commissions, offices and races; election administration; commissioner pay; and election results) and the ERIN system (registration) are maintained in two separate systems requiring duplicate maintenance of essential elements for building elections. The mechanisms by which elections are conducted will be migrated into the voter registration system to have a single system of data. This integration will benefit all future federal elections.

3) How Criteria are Judged: Success of meeting this performance goal will be based on the completion of the migration to one statewide system for all election matters.

4) Responsible Official: Secretary of State in conjunction with the Clerks of Court and Registrars of Voters.

Section 8.8 Establishment of a new election results reporting website:

1) Deadline: November 4, 2008.

2) Criteria: During federal election cycles, the volume of requests to the Department of State's website for election results is greater than the system currently has the capacity to process. The website will be enhanced to improve the user experience, to enable better reporting for the media, and to allow greater access than is currently available.

3) How Criteria are Judged: The success of meeting this performance goal will be based on expediting access to election results, especially during the high volume period on election day.

4) Responsible Official: Secretary of State in conjunction with the Clerks of Court and Registrars of Voters.

Section 8.9 Implementation of GIS system and other measures to improve redistricting and the reapportionment process:

1) Deadline: January 1, 2010.

2) Criteria: With the upcoming federal decennial census, the Department of State will need a more efficient way to manage the reapportionment process and concurrent redistricting of voters due to the current manual determination of correct districts for voters.

3) How Criteria are Judged: The success of meeting this performance goal will be based on reducing the timeframe for completing the reapportionment process and increasing the accuracy of the process.

4) Responsible Official: Secretary of State in conjunction with the Registrars of Voters.

Section 8.10 Scanning deployment to remaining parishes:

1) Deadline: December, 2009.

2) Criteria: Implementation of scanning of registration documents will provide images of voter registration documents for protection of documents for disaster recovery; expedite processing of absentee by mail requests; expedite processing of provisional ballots; expedite verification of party registration of voters for congressional closed party primary elections; and provide business continuity in the offices of the Registrars of Voters, including entering registration data with a higher degree of accuracy.

3) How Criteria are Judged: The success of meeting this performance goal will be based on implementing the scanning project in the remaining parishes within the established timeframe, including providing training to the Registrars of Voters.

4) Responsible Official: Secretary of State in conjunction with the Registrars of Voters.

Section 8.11 Provisional voting tracking:

1) Deadline: Fall, 2010.

2) Criteria: Providing functionality in the ERIN system to track eligible voters who cast provisional ballots that are counted, including providing an automated mechanism to track provisional ballots that are rejected. Implementing an

enhanced website so that a voter can determine if his provisional ballot was counted, and if the ballot was not counted, the reason for the rejection of the ballot.

3) How Criteria are Judged. The success of meeting this performance goal will be based on implementing the process within the established timeframe.

4) Responsible Official: Secretary of State in conjunction with the Registrars of Voters.

Section 8.12 Continuation of early voting program:

1) Deadline: Fall, 2008 (ongoing).

2) Criteria: Conducting early voting at additional locations in the state that are not located in the offices of the parish Registrars of Voters.

3) How Criteria are Judged: The success of meeting this performance goal will be based on implementing early voting at additional locations in the state, including establishing secure locations for the conduct of early voting, providing staff, and providing early voting equipment.

4) Responsible Official: Secretary of State in conjunction with the Registrars of Voters.

Administrative Complaint Procedure

SECTION 9 of the uniform, nondiscriminatory State-based administrative complaint procedures in effect under Section 402. (Section 254(a)(9), 42 U.S.C. §15404(a)(9))

Act 423 of the 2003 Regular Session of the Louisiana Legislature established a uniform, nondiscriminatory procedure for the resolution of a complaint alleging a violation of any provision of Title III of HAVA for an election for federal office.

Elements of the Louisiana's Administrative Complaint Procedure include:

- The complaint must be in writing, signed by the complainant, executed before a notary public, and sworn to under oath.
- The complaint shall be filed with the Secretary of State within 90 days after the final certification of the Federal election.
- The complainant may request that the State Board of Election Supervisors (State Board) conduct a hearing on the record.
- The complainant, any respondent, or any other interested person may appear at the hearing and testify or present tangible evidence in connection with the complaint.
- The State Board shall determine whether a violation of Title III has occurred and shall issue a written decision.
- The final decision of the State Board shall be issued within 90 days from the date the complaint was filed, and the decision shall be posted on the Secretary of State's website.
- If the State Board fails to issue a final decision within 90 days from the date the complaint was filed or within any extension to which the complainant consents, the complaint shall be referred for final resolution to the Division of Administrative Law.
- An administrative law judge shall issue a written resolution of the complaint within 60 days after the final board decision was due.
- The final decision of the State Board or the final resolution of the administrative law judge may be judicially reviewed by filing a petition in the Nineteenth Judicial District Court, Parish of East Baton Rouge, within 30 days after the mailing of the notice of the final decision.

Use of Title I Payment

SECTION 10. If the State received any payment under Title I, a description of how such payment will affect the activities proposed to be carried out under the plan, including the amount of funds available for such activities. (Section 254(a) (10), 42 U.S.C. §15404(a)(10))

Louisiana received $4,911,421 in Title 1, Section 101 funds for the purpose of improving the administration of elections for Federal office.

Budget for Title I, Section 101 Federal Expenses Based Upon the Louisiana State Plan dated August 1, 2003

Budget Item	Title I Federal Funds Allocated
Replacement of lever voting systems and upgrade of existing electronic voting systems to meet disability access requirements.	$3,698,300
Voter registration system, equipment and information technology.	$137,520
Toll-free telephone system.	$44,203
Remaining Section 101 funds to be used for purposes outlined in Section 101.	$1,031,398

Budget for Title I, Section 101 Federal Expenses Based Upon Amendment #1 to the Louisiana State Plan dated November 10, 2006

Budget Item	Title I, Section 101 federal funds allocated	Title I, Section 101, federal budget balance as of 7/31/08
Replacement of paper ballot voting system for early voting in person with new voting system, including installation, implementation and training.	$1,538,759	$0
1) Statewide voter registration database, including software and hardware, and services to upgrade/replace obsolete software and hardware for Clerks of Court, Registrars of Voters and Secretary of State to provide access to ERIN and improve voter registration, ballot preparation and voting system programming. 2) Implementation of technology to significantly enhance and improve voter registration, absentee and election day voting and reporting of activities. These improvements will require significant investments in hardware, software and services both at the state and local level. Initiatives will be focused on reducing manual data entry and processing, insuring the integrity of the process through more automated records retention, development of more secure, direct, interactive and integrated connections between local, state and federal agencies to insure proper list maintenance, web enabling functions making it easier for the citizenry to update their records and providing stakeholders with significantly enhanced statistical and reporting capabilities.	$3,322,662	$3,099,289
Remaining Section 101 funds to be used for purposes outlined in Section 101.	$50,000	$0
TOTAL TITLE I, SECTION 101, FEDERAL FUNDS (AMENDMENT #1)	$4,911,421	$3,099,289

The total amount of Title I, Section 101 federal funds received by the Department of State was $4,911,421. All current and future interest collections will be placed into funding for the statewide voter registration and election system.

Louisiana received $7,351,684 in Title I, Section 102 funds as reimbursement for the replacement of the AVM-POM voting machines. The Louisiana State Plan dated August 1, 2003 provided that $654,360 of the $7,351,684 would be used as reimbursement for the replacement of the lever voting systems and the money would serve as part of the five percent match required by Section 253(b)(5) of HAVA. The $654,360 will remain in the Section 102 account and the funds will be used solely for the purpose of replacing the AVM-POM lever voting machines.

Budget for Title I, Section 101 Federal Expenses Based Upon Amendment #2 to the Louisiana State Plan

Louisiana received $4,911,421 in Title 1, Section 101 funds for the purpose of improving the administration of elections for Federal office. All current and future interest collections will be distributed between the categories listed below as needed, and for purposes outlined in Section 101 of HAVA. As of June 30, 2008, Louisiana has received $817,093 in interest collections on Title I, Section 101 funds and none of the accumulated interest has been expended or encumbered.

Budget Item	Amendment #2, Title I, Section 101 federal funds budget balance
1) Enhancement, improvement, upgrade and acquisition of equipment for voting systems for absentee by mail voting, early voting and election day voting; purchase of additional voting systems for early voting and election day voting, including installation, implementation and training; and security of voting systems and registration system for early voting at remote sites. 2) Statewide voter registration database, including software and hardware, and services to upgrade/replace obsolete software and hardware for Clerks of Court, Registrars of Voters and Secretary of State to provide access to ERIN and improve voter registration, ballot preparation and voting system programming. 3) Implementation of technology to significantly enhance and improve voter registration, absentee and election day voting and reporting of activities. These improvements will require significant investments in hardware, software and services both at the state and local level. Initiatives will be focused on reducing manual data entry and processing, insuring the integrity of the process through more automated records retention, development of more secure, direct, interactive and integrated connections between local, state and federal agencies to insure proper list maintenance, web enabling functions making it easier for the citizenry to update their records and providing stakeholders with significantly enhanced statistical and reporting capabilities. 4) Implementation of on-line election official education and training and poll worker training. 5) Purposes outlined in Section 101 of HAVA.	$3,099,289
TOTAL TITLE I, SECTION 101, FEDERAL FUNDS (AMENDMENT #2)	**$3,099,289**

State Plan Management

Section 11. How the state will conduct ongoing management of the plan, except that the State may not make any material change in the administration of the plan unless the change: (A) is developed and published in the Federal Register in accordance with Section 255 in the same manner as the State plan; B) is subject to public notice and comment in accordance with Section 256 in the same manner as the State plan; and C) takes effect only after the expiration of the 30-day period which begins on the date the change is published in the Federal Register in accordance with subparagraph (A). (Section 254(a)(11), 42 U.S.C. §15404(a)(11))

The Secretary of State as the "chief election officer of the state" will continue to be responsible for the ongoing management and implementation of Louisiana's plan with input from the Clerks of Court and Registrars of Voters to continue to comply with the requirements of HAVA.

The State of Louisiana agrees that it may not make any material change in the administration of the State plan unless the change:

1) Is developed and published in the Federal Register in accordance with Section 255 of HAVA in the same manner as the State Plan;

2) Is subject to public notice and comment in accordance with Section 256 of HAVA in the same manner as the State Plan; and

3) Takes effect only after the expiration of the 30-day period which begins on the date the change is published in the Federal Register.

Changes to State Plan from Previous Fiscal Year

SECTION 12. In the case of a State with a State plan in effect under this subtitle during the previous fiscal year, a description of how the plan reflects changes from the State Plan for the previous fiscal year and of how the State succeeded in carrying out the State Plan for such previous fiscal year. (Section 254(a)(12), 42 U.S.C. §15404(a)(12))

Amendment #1 to the state plan contained funding changes to the state plan dated August 1, 2003 as follows:

1) Updated the estimated budget allocation for Title II federal funds.

2) Updated the estimated budget allocation and use of the Title I payments for Title I, Section 101 funds.

3) Provides that the $654,360 of Title I, Section 102 funds will not be used for state matching funds for Title II federal funds.

Amendment #2 to the state plan contains changes to the state plan dated November 10, 2006 as follows:

1) Updates the activities to improve the administration of elections for Federal office.

2) Updates the activities relating to educational programs for election officials, election poll workers, and voters.

3) Updates the budget allocations and use of the Title II federal funds, increases the federal funding by $1,720,843, and updates the budget allocations for current and future interest accumulations.

4) Updates and provides additional performance goals and measures that will be used by the State of Louisiana to determine its success in carrying out the plan.

5) Updates the budget allocations and use of the Title I payments for Title I, Section 101 funds and updates the budget allocations for current and future interest accumulations.

State of Louisiana's Progress on the Implementation of HAVA:

Compliance with Section 301, Replacement of Lever Voting Machines, and Disability Access:

Louisiana requested and received a waiver pursuant to Section 102(a)(3)(B) of HAVA to move the deadline for the replacement of the lever voting machines until the first Federal election held after January 1, 2006.

Implementation of Voting Systems:

Early voting: The Department of State completed the implementation of the AVC Edge voting system in all parishes in the state for early voting that was conducted prior to the September 30, 2006 statewide election.

Election day voting: The Department of State completed implementation of the AVC Advantage voting system in all parishes in the state for the September 30, 2006 statewide election. In addition, the Department of State purchased additional AVC Advantage voting systems for one voting system precincts in June of 2008 and the voting systems were purchased with state general fund dollars.

Early voting program:

Act 135 of the 2008 Regular Session of the Louisiana Legislature authorizes the continuation of the program for early voting at additional locations selected by the Secretary of State based on feasibility, accessibility, and the number of registered voters. The Department of State, in conjunction with the Registrars of Voters in two parishes, conducted early voting at additional locations in 2007 and the Department is in the process of expanding the program and has requested approval from the Louisiana Legislature to conduct the early voting program in additional parishes for the fall elections in 2008.

Provisional Voting:

Act 423 of the 2003 Regular Session of the Louisiana Legislature authorized provisional voting in federal elections only in Louisiana.

In 2003 and 2004, the Department of State prepared forms for use in provisional voting. The Secretary of State established a free access system to allow an individual who casts a provisional ballot to ascertain whether his vote was counted, and, if his vote was not counted the reason his vote was not counted. The Secretary of State prepared an updated informational pamphlet supplement providing election officials and poll workers with instructions for provisional voting, counting and tabulation of provisional ballots, and posting of information on provisional voting. The Secretary of State worked in conjunction with the Clerks of Court and Registrars of Voters to implement provisional voting for Election Day voting and early voting.

Provisional voting was conducted in elections for Federal offices on March 9, 2004 (Presidential Preference Primary); November 2, 2004 (Presidential Election and Congressional Primary); December 4, 2004 (Congressional General); November 7, 2006 (Congressional Primary); December 9, 2006 (Congressional General); February 9, 2008 (Presidential Preference Primary); March 8, 2008 (Special Congressional First Party Primary); April 5, 2008 (Special Congressional Second Party Primary); and May 3, 2008 (Special Congressional General).

PROVISIONAL VOTING STATISTICS (2004, 2006 and 2008)

ELECTION DATE	NUMBER OF PROVISIONAL BALLOTS CAST	NUMBER OF PROVISIONAL BALLOTS COUNTED	NUMBER OF PROVISIONAL BALLOTS REJECTED
March 9, 2004	273	168	105
November 2, 2004	5,880	2,312	3,568
December 4, 2004	29	25	4
November 7, 2006	274	137	137
December 9, 2006	69	58	11
February 9, 2008	2634	132	2502
March 8, 2008	164	31	133
April 5, 2008	93	11	82
May 3, 2008	9	6	3

Voting Information Requirements:

The Secretary of State provided each Clerk of Court with sample ballots to post at each precinct prior to the adoption of HAVA.

Act 1220 of the 2003 Regular Session of the Louisiana Legislature requires the Secretary of State to supply informational posters as required by HAVA. The act also requires the commissioners to post informational posters at the precinct. The Secretary of State prepared new informational posters that provided the following information: instructions for mail-in registrants and first time voters under Section 303(b); general information on voting rights under applicable federal and state

laws, including information on the right of an individual to cast a provisional ballot and instructions on how to contact the appropriate officials if these rights are alleged to have been violated; and general information on federal and state laws regarding prohibitions on acts of fraud and misrepresentation.

In 2004, the Department of State furnished posters providing the date of the election and poll hours to be posted at every precinct in the State of Louisiana. In addition, the Department of State prepared instructions that inform voters how to vote, how to cast a vote, and how to cast a provisional ballot.

In 2005, the Department of State amended the instructions for absentee voting by mail that were prepared in 2003 to comply with HAVA.

In 2006, posters indicating the accessible entrance at the polling place were added to every precinct supply package.

Computerized Statewide Voter Registration List:

In 2004, the Secretary of State consolidated the network connecting the local Registrars of Voters and Clerks of Court. This consolidation provided inquiry access to ERIN to each Clerk of Court in each parish.

Registration information verification:

In 2004, the Department of State began negotiations with the OMV to implement the verification requirements for driver's license number or the last four digits of the social security number. On October 28, 2005, the Department of State entered into an agreement with DPS for the verification of registration information for Louisiana driver's license number or Louisiana special identification card number.

On December 12, 2005, the DPS entered into an agreement with the Social Security Administration (SSA) for the verification of the last four digits of the social security number of applicants for registration.

In the fall of 2005, the Department of State established procedures for the verification of registration information including forms and instructions for use by the Registrars of Voters in verifying registration information. In addition, the Department of State conducted training seminars for the Registrars of Voters on the procedures for implementing the verification process.

On January 1, 2006, the Department of State began the process on the ERIN system for the verification of new voter registration applications by matching with the DPS-OMV records or the last four digits of the social security number. The process is continuing for registration applications as required by Section 303(a)(5)(A) of HAVA.

During the 2006 Regular Session of the Louisiana Legislature, Act 403 was enacted setting forth the statutory procedures for conducting the verification of registration information. See Appendix "2".

ERIN system modernization:

During the process for defining the modifications to the ERIN system to meet the HAVA requirements, it was determined that the changes were more extensive than originally planned and while the new verification process would work, it was cumbersome. Since the ERIN system had been in operation since the late 1980's, it was determined that the system was in need of a technology refresh. During the year, the functional requirements for the new system were documented and a contract was awarded through a bid process for the modernization of the system. Development work was initiated in the fall of 2005.

Computer upgrades:

In preparation for the new system, all of the PC's in the local Registrar of Voters' offices were upgraded to the most current models. Concurrently, planning began in earnest for the changes to the network that were needed to provide more secure connectivity throughout the state while providing an additional level of redundancy necessary to eliminate single points of failure that caused outages for a number of parishes at one time.

ERIN upgrades:

In 2006, development of the new system continued and Phase I of the project went live on August 1, 2006. This new system contains all of the functionality from the old, but adds more user friendly functionality for meeting some specific HAVA requirements, such as duplicate registrant detection and verification procedures.

The Department of State completed the following major enhancements and programs: improving the canvass process; adding voter queue for applications received after the close of books; continuing the process of reviewing information contained in the Social Security Administration Death Master File; redesigning the election results website; migration and redesign of the Louisiana Poll Locator; processing user group requests; and obtaining and delivering new printers to registrars of voters.

Records retention:

The project to insure the retention of voter registration records through imaging (scanning), indexing, storage and retrieval of paper documents for the Orleans and Cameron Parish Registrars of Voters was completed in September of 2007 and the project will be expanded to the remaining parishes in the State of Louisiana.

Requirements of Registration Applications:

In 2003, Act 1220 required all registrants to provide either a valid and current photo identification, driver's license number, social security number, or copy of a current utility bill, bank statement, government check, paycheck, or other government document that shows the name and address of the registrant as a part of the registration process.

In October of 2005, the Louisiana mail voter registration application was amended to address the requirements of Section 303(b)(4)(A) of HAVA. The registration application was precleared by the United States Department of Justice, Voting Rights Division on December 19, 2005.

In 2006, Act 403 was enacted requiring a registrant to provide his Louisiana driver's license number or Louisiana special identification card number, if issued, or the last four digits of his social security number, if issued. Act 403 also provides that if the applicant does not have a Louisiana driver's license number, Louisiana special identification card number, or a social security number, that the applicant must provide a copy of a current and valid photo identification or a copy of a current utility bill, bank statement, government check, paycheck or other government document that shows the name and address of the applicant. The registration application cannot be processed if the applicant does not provide one of the forms of required identification.

Act 403 also requires that the registration information be verified before the applicant is added to the registration rolls. The requirement in state law that the applicant's registration information must be verified exempts the registrant from the additional verification requirements of Section 303(b)(1) and (b)(2) of HAVA.

Election Official Education and Training:

Prior to the federal elections in 2004, the Department of State conducted training sessions for election officials on provisional voting. A supplement to the Informational Pamphlet was published and provided to the election officials to train election poll workers. In addition, each Clerk of Court was provided a VHS

tape to use during election poll worker training on the etiquette of working with individuals with disabilities.

Prior to the federal elections in 2006, the Department of State conducted training sessions for election officials on provisional voting.

In 2007, each Clerk of Court was provided with a Clerk of Court Training DVD prepared by the Department of State for use at commissioner schools. This DVD contains training information and instructions on the following: use of the AVC Advantage voting system; use of the new audio voting keypad; and the proper etiquette when an individual with a disability goes to the polls on Election Day. On Election Day, the audio voting keypad shall be offered by the election poll workers to individuals who are visually impaired, blind, illiterate, physically disabled, or have difficulty understanding the written word.

The *Informational Pamphlet for Election Day Voting* was revised to include updated voting information and incorporate the provisions of provisional voting.

The Department of State conducted training sessions for election officials on the congressional closed party primary elections and provisional voting prior to the special congressional elections in the spring of 2008. The Department of State also prepared DVDs for the Clerks of Court and Registrars of Voters to use for training with specific information relating to the special congressional elections that were held in the spring of 2008 and the elections for Federal office that are scheduled for the fall of 2008.

Training on the new voting system:

In 2006, the Department of State held parish by parish and statewide training on the new voting system for local election officials and fully supported the first two elections in every parish on the new voting system. The Department of State continues to provide training and support on the voting systems.

Voter Education:

Voter registration week:

In Act 286 of the 2003 Regular Session of the Louisiana Legislature, the Department of State was required to adopt rules and regulations relating to the annual voter registration week. On December 20, 2005, the rules that were adopted by the Secretary of State were published in the "Louisiana Register".
In August of 2005, the State of Louisiana conducted its first annual voter registration week (August 22-26, 2005) to inform the citizens of Louisiana as to

voter registration and the voting process. The Department of State's Outreach Division and parish Registrars of Voters continued their voter registration and voting information process activities throughout 2005. In January of 2006, the Department of State compiled information from its Outreach Division and from the parish Registrars of Voters. A comprehensive report was provided to the Governor, President of the Louisiana Senate, Speaker of the Louisiana House of Representatives, Chairman of the Senate and Governmental Affairs Committee of the Louisiana Legislature, and the Chairman of the House and Governmental Affairs Committee of the Louisiana Legislature. In addition, a copy of the report was given to each parish Registrar of Voters.

The annual voter registration week authorized by Act 286 of the 2003 Regular Session of the Louisiana Legislature was held August 7-11, 2006; August 27-31, 2007; and July 14-18, 2008.

Informational pamphlets and brochures:

The following information was printed and distributed to the citizens of Louisiana and to aging and disability consortiums:

Your Voice Register and Vote: A How to Guide - This brochure contains the information an individual will need on voter registration, voting, special handicap program, election poll workers, complaints, and contacts. The Department of State printed 50,000 copies of this brochure. All copies have been distributed to the Registrars of Voters, Clerks of Court, the Department's Outreach Program, and to aging and disability consortium groups throughout the State of Louisiana. The Department of State updated this brochure in time for the annual voter registration week and for voter outreach programs to demonstrate the new voting systems for the fall of 2006.

State of Louisiana Voting Rights for Individuals with Disabilities and Residents of Nursing Homes - This brochure is printed in larger print with simplified verbiage. It contains information for individuals with disabilities concerning voter registration, voting, special handicap program, complaints, and contacts. The Department of State printed 5,000 copies of this brochure. All copies have been distributed to the Registrars of Voters, Clerks of Court, the Department's Outreach Program, and to aging and disability consortium groups throughout the State of Louisiana. The Department of State updated this brochure in time for the annual voter registration week and for voter outreach programs for the fall of 2006. In 2006, the Department of State held nine regional seminars for individuals with disabilities to provide voting information and demonstrate the new voting systems with the audio voting keypad.

State of Louisiana Assisting Persons with Disabilities and Residents of Nursing Homes with the Right to Vote - This pamphlet provides more technical information for individuals with disabilities concerning voter registration, voting, special handicap program, complaints, and contacts. The Department of State printed 5,000 copies of this pamphlet. The majority of these copies have been distributed to the Registrars of Voters, Clerks of Court, the Department's Outreach Program, and to aging and disability consortium groups throughout the State of Louisiana.

Louisiana Voter Registration Facts - This pamphlet contains information on voter registration in the State of Louisiana. The Department of State printed 50,000 copies of this pamphlet. The majority of these copies have been distributed to the Registrars of Voters, and the Department's Outreach Program for use at colleges, universities, community colleges, and high schools to encourage young individuals to register to vote in Louisiana.

Guide to the Audio Voting Keypad - This pamphlet is ready to be published and will be distributed statewide and used at the eight regional seminars for individuals with disabilities.

In 2006, the following brochures and pamphlets were published:

Guide to Using the Audio Voting Keypad; State of Louisiana Voting Rights for Individuals with Disabilities and Residents of Nursing Homes; and *Your Voice Register and Vote: A How to Guide.* The publications will be updated, as needed, due to legislative and procedural changes and the updated versions of the publications will be placed on the Department of State's website.

Audio Voting Keypad Quick Chart - A new instructional sheet that was designed to streamline the instructions for the use of the audio voting keypad. In addition, the Department of State used the charts when conducting voter education seminars. The chart is on the Department of State's website and is available for visually impaired voters who are screen readers.

Seminars:

In 2006, the Department of State held nine regional seminars for individuals with disabilities to provide voting information and demonstrate the new voting systems with the audio voting keypad.

In 2008, the Department of State will hold nine regional seminars for individuals with disabilities, the elderly and various organizations that work with individuals with disabilities and the elderly to provide information on registration, voting and the congressional closed party primary elections.

Help America Vote Advisory Committee

SECTION 13. A description of the committee which participated in the development of the State plan in accordance with Section 255 and the procedures followed by the committee under such Section and Section 256. (Section 254 (a)(13), 42 U.S.C. §15404(a)(13))

In May of 2008, Jay Dardenne, Secretary of State, named the following members to serve on the Louisiana Help America Vote Advisory Committee:

Honorable Jay Dardenne (Chairman)
Secretary of State
Department of State
Post Office Box 94125
Baton Rouge, Louisiana 70804-9125
Secretary of State

Honorable Louie Bernard
Clerk of Court, Natchitoches Parish
Post Office Box 476
Natchitoches, LA 71458-0476
Chief Parish Election Official

Mr. Jason Collier
9929 Mint Drive
Baton Rouge, LA 70809
Representative of the Disabilities Community

Honorable Richard "Rick" Gallot, Jr.
State Representative
Post Office Box 1117
Ruston, Louisiana 71273-1117
Chairman of the House & Governmental Affairs Committee of the Louisiana Legislature (Democrat)

Honorable Jon A. Gegenheimer
Clerk of Court, Jefferson Parish
Post Office Box 10
Gretna, Louisiana 70054
Chief Parish Election Official in the second largest jurisdiction

Honorable Robert W. "Bob" Kostelka
State Senator
Post Office Box 2122
Monroe, Louisiana 71207
Chairman of the Senate & Governmental Affairs Committee of the Louisiana Legislature (Republican)

Ms. Angie LaPlace
Commissioner of Elections
Post Office Box 94125
Baton Rouge, Louisiana 70804
Representative of the Louisiana Department of State

Honorable John Moreau
Registrar of Voters, St. Landry Parish
Post Office Box 818
Opelousas, LA 70571-0818
Representative of the Registrars of Voters

Honorable Arthur Morrell
Clerk of the Criminal Court, Orleans Parish
2700 Tulane Ave., Room 115
New Orleans, Louisiana 70119
Chief Parish Election Official in the largest jurisdiction

Honorable Karen Carter Peterson
State Representative
1215 Prytania St., Suite 364
New Orleans, Louisiana 70130
Representative of the Louisiana Legislative Black Caucus

Honorable Linda Rodrigue
Registrar of Voters, Terrebonne Parish
Post Office Box 9189
Houma, LA 70361
Representative of the Registrars of Voters

Honorable John Russell
Registrar of Voters, Tangipahoa Parish
Post Office Box 895
Amite, LA 70422-0895
Representative of the Registrars of Voters

Ms. Lois V. Simpson, Executive Director
The Advocacy Center
1010 Common Street, Suite 2600
New Orleans, LA 70112-2429
Representative of the Disabilities Community

Honorable M. J. "Mert" Smiley
State Representative
18590 Highway 16, Suite 5
Port Vincent, Louisiana 70726
Representative of the House & Governmental Affairs Committee of the Louisiana Legislature (Republican)

Honorable John R. Smith
State Senator
611-B South 5th St.
Leesville, Louisiana 71446
Representative of the Senate & Governmental Affairs Committee of the Louisiana Legislature (Democrat)

Ms. Uma Subramanian
Deputy Executive Counsel to the Governor
Post Office Box 94004
Baton Rouge, Louisiana 70804-9004
Representative of the Governor's Office

The Louisiana Help America Vote Advisory Committee (2003) met on June 5, 2003 and adopted the Preliminary State Plan. After the public notice and comment period, the plan was submitted for publication in the Federal Register and the State Plan became final on August 1, 2003.

The Louisiana Help America Vote Advisory Committee (2006) adopted the Preliminary Amended State Plan on June 29, 2006. After the public notice and comment period, the amended plan was submitted for publication in the Federal Register and the Amended State Plan became final on November 10, 2006.

The Louisiana Help America Vote Advisory Committee (2008) adopted the Preliminary Amended State Plan Amendment #2 on July 31, 2008. The plan was made available on the Department of State's website for public inspection and comment for more than thirty days. In addition, the Department of State published notice in the Official State Journal on August 13, 2008 and August 30, 2008 that the Preliminary Amended State Plan Amendment #2 was available at the office of the Department of State, Legal Division, for public inspection and comment. The Department of State did not receive any public comments as of the close of business on September 15, 2008 regarding the Preliminary Amended State Plan Amendment #2.

The State Plan dated August 1, 2003, the Amended State Plan dated November 10, 2006 and the Amended State Plan Amendment #2 dated September 16, 2008 have been merged into the Consolidated State Plan.

APPENDIX 1

ABSENTEE BALLOT INSTRUCTIONS

DEADLINES FOR REGISTRAR OF VOTERS TO RECEIVE ABSENTEE BALLOTS BY MAIL:

FOR Uniformed and Overseas Citizens	ELECTION DAY
For sequestered jurors	BEFORE POLLS CLOSE ON ELECTION DAY
For all others	THE DAY BEFORE ELECTION DAY

REGULAR ABSENTEE BALLOT (White)

Instructions for voting WHITE regular absentee ballot for primary election

1. Fill in all information required in the certificate on the white ballot envelope flap. DO NOT SIGN CERTIFICATE AT THIS TIME.
2. Follow instructions on the ballot to vote your ballot.

   NOTE: Be sure to completely fill in the oval to the right of your selection with a black lead pencil. If you incorrectly mark the ballot, erase the incorrect mark completely and make a new mark. If you are unable to make a change on the ballot or correct any error on the ballot and need a replacement ballot, notify the registrar of voters for your parish. If you make selections for more than the number of candidates to be elected for an office, or make selections both for and against a proposition, your selections for that office or proposition will be void.
3. Place ballot in white ballot envelope and seal. DO NOT DETACH FLAP.
4. **Sign the certificate on the flap in the presence of a notary public OR in the presence of two witnesses, who must also sign the certificate.**
5. Place the sealed ballot envelope in the return envelope addressed to the Registrar of Voters. Add postage, if necessary, and deposit it in the mail.
6. Your vote will be counted either by op-scan reader or manually.

SPECIAL ABSENTEE BALLOT (Green)

Instructions for voting GREEN special absentee ballot for general election - Uniformed and Overseas Citizens

(This ballot is the only ballot you will receive for the general election.)

1. Fill in all information required in the certificate on the green ballot envelope flap. DO NOT SIGN CERTIFICATE AT THIS TIME.
2. Vote your ballot as follows:
   a. In order to be certain that you will cast a vote that will be counted for a candidate who advances to the general election (runoff election) for a particular office, you must indicate your order of preference for each candidate by placing number one (1) in the box next to the name of the candidate who is your first choice, the number two (2) next to the name of the candidate who is your second choice, and so on until you have placed a number next to the name of each candidate. By numbering the candidates according to your order of preference, if your first choice candidate is eliminated in the primary and your second choice candidate advances to the general election, your second choice candidate will receive your vote and so on until your order of preference is exhausted.
   b. You may, but are not required to, number all of the candidates for an office on the ballot. However, if you choose to number only one candidate, for instance, and if that candidate does not advance to the general election, you will NOT have cast a vote for a candidate for that office in the general election.
3. Place ballot in green ballot envelope marked "SPECIAL ABSENTEE BALLOT-GENERAL ELECTION" and seal. DO NOT DETACH FLAP.

PROPOSED CONSTITUTIONAL AMENDMENT BALLOT: If you have been provided with a ballot containing a proposed constitutional amendment, you must be careful to return it in the proper envelope for tabulation. This ballot will reflect either the primary election date or the general election date. If it reflects the same date as the white regular absentee ballot for the primary election, place it in the white envelope. If it reflects the same date as the green special absentee ballot for the general election, place it in the green envelope.

4. **Sign the certificate on the flap in the presence of a notary public OR in the presence of two witnesses, who must also sign the certificate.**
5. Place the sealed ballot envelope in the return envelope addressed to the Registrar of Voters. Add postage, if necessary, and deposit it in the mail.
6. Your vote will be counted either by op-scan reader or manually.

ASSISTANCE TO VOTERS

A voter is entitled to receive assistance in voting if he is (1) unable to read, or (2) unable to vote without assistance because of a physical handicap, including blindness. Persons prohibited from assisting voters:

1. No candidate can assist a voter.
2. No employer or employer's agent can assist an employee.
3. No union agent can assist a union member.

Except as provided above, voters entitled to assistance in voting may receive th assistance of any person of his choice.

The person assisting the voter in signing his name or making his mark shall explain to th voter that a signature or mark so made constitutes certification that all statements in th certificate are true and correct and that any person who knowingly provides false incorrect statements is subject to a fine or imprisonment, or both. *(R.S. 18:1310 ar 18:1461)*

APPENDIX 2

ACT 403 OF THE 2006 REGULAR SESSION OF THE LOUISIANA LEGISLATURE

: Regular Session, 2006

ACT No. 403

HOUSE BILL NO. 909
BY REPRESENTATIVE BRUNEAU

1 AN ACT 2 To amend and reenact R.S. 18:104(A)(16)(introductory paragraph), 115(F)(2)(d)(ii), 132, 3 133(A), 401.3(D)(4), 425(B)(1), 426(A)(1), 434(B)(7), 441(B)(1), 533(A), 4 553(B)(1)(b) and (2), 564(D)(2), 571, 572(A)(1), 573(A)(2), 583(D)(1), 601, 654, 5 1309(B), 1313(F)(1), 1334(heading), 1351(12), 1353(C)(4), and 1355(12), (13), (14), 6 (15), (16), and (17), to enact R.S. 18:18(D), 101.1, 104(G), 115(F)(2)(d)(iii), 152.1, 7 425(A)(4), 1308.3(C), 1314(F), and 1351(13), and to repeal R.S. 18:1353(C)(5) and 8 1355(18), relative to the election code; to make changes to the election code; to 9 authorize the secretary of state to enter into certain agreements with other states; to 10 provide for procedures for verification of registration information; to provide relative 11 to the forms of identification an applicant may use when registering to vote; to 12 require the registrar to verify that a displaced person applying to vote absentee by 13 mail has not registered in another jurisdiction; to provide relative to the offices and 14 branch offices of the registrars of voters when an emergency has affected such 15 office; to provide relative to the re-creation of destroyed records of the registrar; to 16 provide relative to procedures for tabulating legislative ballots regarding the 17 secretary of state's emergency plan; to authorize and provide for the use of additional 18 commissioners from other parishes when a parish has a shortage due to an 19 emergency; to provide relative to the requirements for the selection of 20 commissioners; to provide relative to the requirements to have the political party 21 designation of a candidate on the ballot; to provide for certification of polling places 22 as handicapped accessible; to provide relative to the location of multiple precincts 23 within a polling location; to specify when the filling of an anticipated vacancy is 24 premature; to specify certain requirements for a notice of retirement or resignation to become effective; to provide for the beginning of legislative service for certain purposes; to provide relative to proof of eligibility to vote with assistance; to remove references to voting machines, equipment, and paraphernalia no longer in use; and to provide for related matters. Be it enacted by the Legislature of Louisiana: Section 1. R.S. 18:104(A)(16)(introductory paragraph), 115(F)(2)(d)(ii), 132, 133(A), 401.3(D)(4), 425(B)(1), 426(A)(1), 434(B)(7), 441(B)(1), 533(A), 564(D)(2), 583(D)(1), 601, 654, 1309(B), 1313(F)(1), and 1334(heading) are hereby amended and reenacted and R.S. 18:18(D), 101.1, 104(G), 115(F)(2)(d)(iii), 152.1, 425(A)(4), 1308.3(C), and 1314(F) are hereby enacted to read as follows:

§18. Secretary of state; powers and duties

* * *

D. The secretary of state may enter into cooperative agreements with other states to share voter registration information for purposes of determining whether a voter is registered in more than one state.

* * *

§101.1. Verification of registration information The voter registration information provided by the applicant shall be verified as follows:

A. Applicants who have a Louisiana driver's license, Louisiana special identification card, or social security number:

(1) The registration information provided by the applicant shall be verified to ensure that the Louisiana driver's license number, Louisiana special identification card number, or the last four digits of the social security number provided by the applicant match the information maintained by the Louisiana Department of Public Safety and Corrections or the Social Security Administration.

(a) If a match is made, the registrar of voters shall add the applicant to the official list of voters and the registrar shall send a notice of registration to the applicant.

(b) If a match cannot be made, the registrar of voters shall notify the applicant in writing and inform him that he has ten days from the date on which the verification letter was mailed to respond to the verification letter. If the applicant responds to the verification letter and the registrar determines that the registration information can be verified and that he is eligible to register, the applicant shall be added to the official list of voters and the registrar shall send a notice of registration to the applicant. In the event the applicant does not respond to the verification letter within ten days, the application shall be rejected and the registrar shall so advise the applicant in writing. If the registrar's verification letter is returned by the United States Postal Service, the application shall be rejected and the registrar shall attempt to notify the applicant of such action.

(c) In the event the applicant responds to the verification letter and the registrar determines that the registration information cannot be verified, the registrar shall notify the applicant in writing and inform him that he has ten days from the date on which the final verification letter was mailed to appear in person at the registrar of voters office to prove his identity. If the applicant appears in person and the registrar determines that the applicant is able to prove his identity and that he is eligible to register, the applicant shall be added to the official list of voters and the registrar shall send a notice of registration to the applicant. If the applicant fails to appear in person at the registrar of voters office or fails to prove his identity, the application shall be rejected and the registrar shall so advise the applicant in writing. If the registrar's final verification letter is returned by the United States Postal Service, the application shall be rejected and the registrar shall attempt to notify the applicant of such action.

B. Applicants who do not have a Louisiana driver's license, Louisiana special identification card, or social security number:

(1) The registration information provided by an applicant who does not have a Louisiana driver's license, Louisiana special identification card, or social security number shall be verified with one of the following:

(a) A copy of a current and valid photo identification.

(b) A copy of a current utility bill, bank statement, government check, paycheck, or other

government document that shows the name and address of the applicant.
(2) If the applicant has not provided the registration information required in this Subsection, the registrar of voters shall notify the applicant in writing of the missing information and inform him that he has ten days from the date on which the notice was mailed to provide the information. If the applicant provides the information and the registrar determines that he is eligible to register, the applicant shall be added to the official list of voters and the registrar shall send a notice of registration to the applicant. In the event the applicant does not respond to the request for the missing information within ten days, the application shall be rejected and the registrar shall so advise the applicant in writing. If the registrar's request for missing information is returned by the United States Postal Service, the application shall be rejected and the registrar shall attempt to notify the applicant of such action.

* * *

§104. Application for registration; form

A. The secretary of state, subject to approval by the attorney general as to content, shall prescribe the form that shall be used uniformly by each registrar in the state and any person authorized to accept voter registration applications in registering qualified citizens to vote. The form shall contain spaces for at least the following information with respect to the applicant:

* * *

(16) Louisiana driver's license number or Louisiana special identification card number, if issued, or if no Louisiana driver's license or Louisiana special identification card has been issued, the last four digits of the social security number, if issued. The full social security number of the applicant may be provided on a voluntary basis by the applicant. If the applicant has neither a Louisiana driver's license number nor, a Louisiana special identification card, or a social security number, the applicant shall attach one of the following items to his application:

* * *

G. No voter registration application shall be complete unless the applicant provides one of the forms of identification provided for in Paragraph (16) of Subsection A of this Section.

* * *

§115. Registration by mail

* * *

F.

* * *

(2) The provisions of Paragraph (1) of this Subsection shall not apply in the case of the following:

* * *

(d)

* * *

(ii) When a person has submitted an application to vote absentee by mail pursuant to this Subparagraph, the registrar shall, prior to sending the absentee by mail ballot, contact the appropriate election official in the jurisdiction where the applicant has requested for his absentee by mail ballot to be sent, attempt to verify that the person has not registered to vote in that jurisdiction, or if such jurisdiction has a statewide voter registration database, in that state. If the registrar finds that the person has registered in that jurisdiction or state, the person shall not be permitted to vote absentee by mail and the registrar shall proceed in accordance with the applicable provisions of Part V of this Chapter.
(iii) Upon expiration of the effectiveness of Item (i) of this Subparagraph, any voter who has voted absentee by mail pursuant to this Subparagraph who has not voted during early voting or at the polls on election day shall not be considered to have previously voted in the parish in which he is registered for purposes of Paragraph (1) of this Subsection and shall be subject to the requirements of that Paragraph.

* * *

§132. Offices furnished registrar; supplies; expenses

A. Except as otherwise provided by law, the governing authority of each parish shall furnish the office space required by law for the registrar and also shall be responsible for the cost of all equipment and supplies, including all furniture, books, stationery, and other expenses for the operation of each office necessary to enable the registrar fully to discharge his duties. The parish governing authority shall provide space for the registrar's principal office in the courthouse or in close proximity thereto, and this office shall be accessible and convenient to the residents of the parish. The space to be used for this office shall be specifically designated by the parish governing authority, which shall designate adequate space to enable the registrar to fully discharge his duties. No other official or unit of government shall have authority to designate or allocate such office space. Before the expenses are paid, the registrar shall furnish the head of the parish governing authority a budget of anticipated expenses for each succeeding year.

B. If the office of the registrar is destroyed, inaccessible, or unsafe during or following a gubernatorially declared state of emergency, the registrar may utilize a temporary office to discharge his duties until an office that meets the requirements of this Section becomes available. Such temporary office shall be located within the parish, or if there is no appropriate location within the parish due to the emergency, then in an immediately adjacent parish, or if there is no appropriate location in any immediately adjacent parish due to the emergency, then in the nearest parish in which there is an appropriate location.

§133. Branch offices; mobile registration units; mandatory registration drives

A. All branch offices, whether temporary or permanent, shall be located in permanent buildings, except mobile registration units. However, if a branch office of a registrar is destroyed, inaccessible, or unsafe during or following a gubernatorially declared state of emergency, the registrar may utilize a temporary building as a branch office until an office that meets the requirements of this Section becomes available. Such branch office shall be located within the parish, or if there is no appropriate location within the parish due to the emergency, then in an immediately adjacent parish, or if there is no appropriate location in any immediately adjacent parish due to the emergency, then in the nearest parish in which there is an appropriate location.

* * *

§152.1. Destruction of records of the registrar of voters

If original records of a registrar of voters are destroyed as a result of catastrophic loss or damage, every attempt shall be made to re-create the records. Computer records

from the secretary of state's database shall be deemed the original records until such time as the records can be re-created.

* * *

§401.3. Emergency plan by secretary of state; gubernatorial and legislative approval

* * *

D.

* * *

(4) On At any time after the deadline for submitting the ballots as provided in Paragraph (3) of this Subsection, but prior to the seventeenth eighteenth day after the date on which the ballots were mailed, or prior to the seventh eighth day after the date on which the ballots were delivered to the members of the legislature in session as provided in this Subsection, the secretary of the Senate and the clerk of the House of Representatives shall, at a public meeting, jointly open and tabulate the vote in roll call order for each house of the legislature. The clerk and the secretary shall hold such ballots unopened and shall not disclose the contents to any person until the day when such ballots are opened and tabulated. The tabulation sheet shall indicate by name each member who voted in favor of the plan, each member who voted against the plan, each member who did not return the ballot by the deadline, and each member whose ballot was invalid because it was not marked or signed by the member. The secretary of the Senate and the clerk of the House of Representatives shall each sign the tabulation sheet and cause a certified copy thereof to be transmitted to the secretary of state, the governor, and the chairmen of the Senate Committee on Senate and Governmental Affairs and House Committee on House and Governmental Affairs.

* * *

§425. Commissioners

A.

* * *

(4) For an election held within one year following the date of the issuance of any gubernatorial proclamation declaring a state of emergency, if a parish board of election supervisors determines that there is a parishwide shortage of commissioners because a significant number of commissioners have been temporarily displaced due to such emergency, the board may submit a written request to the secretary of state, on or before the twenty-third day prior to an election, for additional commissioners from other parishes. The written request shall include the number of additional commissioners requested and an explanation of the need for additional commissioners. If the secretary of state determines that there is a need for additional commissioners and that the allocation of additional commissioners is feasible, the secretary of state shall approve the request and notify the parish board of election supervisors of the parish affected by the emergency. The board of such affected parish shall request the parish boards of election supervisors to submit lists of available commissioners by the fifteenth day prior to the election. The board of the affected parish shall select commissioners to serve in the affected parish from such lists based on availability, proximity and, to the extent possible, the requirements for representation based on recognized political party affiliation as provided for in R.S. 18:434(B)(7). The clerk of court of the affected parish shall ensure that the selected commissioners have received adequate training on the voting machines that are used in the affected parish and on any procedures necessary for the conduct of the election. The selected commissioners, upon approval by the secretary of state, shall be entitled to appropriate reimbursement for travel expenses.

B. Qualifications and classifications. (1) A qualified voter who is not entitled to assistance in voting and is not a candidate in the election may be selected as a commissioner in any precinct of the ward where he is registered to vote, except pursuant to R.S. 18:434(B) and (D) in which case he may be selected as a commissioner in any precinct of the parish where he is registered to vote or as otherwise provided in Paragraph (4) of Subsection A of this Section.

* * *

§426. Alternate commissioners; qualifications, powers, and duties; oath and compensation

A. Qualifications. (1) A qualified voter who is not entitled to assistance in voting and is not a candidate in the election may be selected as an alternate commissioner in any precinct of the ward where he is registered to vote, except pursuant to R.S. 18:434(D) in which case he may be selected as a commissioner in any precinct of the parish where he is registered to vote or as otherwise provided in R.S. 18:425(A)(4).

* * *

B.

* * *

(7) When the appropriate number of commissioners have been selected, as provided in Paragraphs (4), (5), and (6) of this Subsection, the person conducting the drawing shall determine if each recognized political party recognized pursuant to R.S. 18:441(C) having one or more local or municipal candidates on the ballot to be voted on in the precinct is represented by at least one commissioner. If none, one ball shall be set aside for each recognized political party recognized pursuant to R.S. 18:441(C) thus still to be represented, beginning with the last ball drawn for a person affiliated with a recognized political party recognized pursuant to R.S. 18:441(C) that has more than one commissioner at the precinct. The drawing shall continue until one of the persons affiliated with each of such political parties is selected, unless there are no remaining certified commissioners in the parish to represent such political parties.

* * *

§441. Recognition

* * *

B.(1) A political party shall be recognized if ninety days prior to the opening of the qualifying period for any election at least one thousand registered voters in the state are registered as being affiliated with such political party; such political party has filed a notarized registration statement as described in Paragraph (2) of this Subsection with the secretary of state; and the political party has paid a registration fee of one thousand dollars to the secretary of state upon filing the registration statement. The political party designation of a candidate shall not be listed on the ballot unless the political party was recognized prior to the close of qualifying for the office the candidate is seeking.

* * *

§533. Establishment and location of polling places; responsibility for

acts or omissions

A. Establishment. (1) The governing authority of each parish shall establish one polling place for each precinct. Each polling place shall be equipped with proper electric current, fixtures, and outlets necessary to properly operate the voting machines and otherwise to conduct the election. Each polling place shall have sanitary facilities available. The governing authority shall certify to the secretary of state that each polling place meets the accessibility standards for individuals with disabilities adopted by the secretary of state.

(2) The parish governing authority shall, to the extent possible, locate multiple precincts in a polling location, if it determines after due consideration that to locate multiple polling places within the same polling location would be efficient, cost-effective, and convenient to voters.

* * *

Page 10 of 22

§564. Assistance in voting

* * *

D.

* * *

(2) A voter shall also be entitled to assistance without having filed with the registrar a statement setting forth the necessity and reasons for this assistance if, on election day, the voter presents to the commissioner-in-charge a physician's certificate indicating the voter's inability to vote without assistance because of a physical handicap, or a current mobility-impaired identification card bearing a photograph of the voter and the international symbol of accessibility issued by the secretary of the Department of Public Safety and Corrections as authorized by the provisions of R.S. 47:463.4. The commissioner-in-charge shall place the any physician's certificate presented by a voter in the envelope marked "Registrar of Voters" and attach the envelope to the precinct register.

* * *

§583. Procedure for anticipated vacancies

* * *

D.(1) An appointment to fill an anticipated vacancy shall be made at the time the office is actually vacated and such appointment shall be made in accordance with the provisions of law applicable to the filling of vacancies in the affected office. An appointment to fill an anticipated vacancy that is made prior to the time the office is actually vacated is premature and without effect.

* * *

§601. Vacancy in office of state legislators; legislative service

A. If a vacancy in the office of a state legislator occurs and if six months or more of the term remains unexpired, then within ten days of the vacancy occurring, the presiding officer of the house in which the vacancy occurs shall determine the dates of the primary and general elections and the dates of the qualifying period for the election and shall issue a proclamation advising of the vacancy and setting forth the election dates and dates of the qualifying period for candidates. However, if the deadline for issuing the proclamation falls on a Saturday, Sunday, or other legal holiday, then the next day which is not a Saturday, Sunday, or legal holiday shall be deemed to be the final day for issuing such proclamation. The speaker of the House of Representatives or the president of the Senate shall immediately forward such information to the secretary of state, who shall within twenty-four hours after receipt of the information notify all election officials having any duty to perform in connection with a special election to fill such vacancy, including the parish boards of election supervisors for the parish or parishes in which the vacancy occurred. The secretary of state shall also publish the proclamation in the official journal of each parish in which the election is to be held.

B. For purposes of Article III, Section 4(E) of the Constitution of Louisiana only, the service of a person who is elected to fill an unexpired term in the office of state legislator shall begin at the time such person takes the oath of office before his house of the legislature.

* * *

§654. Effect of filing of resignations

A. Except for members of the legislature, a notice of retirement or resignation shall not be effective until the original notice of retirement or resignation is received by the secretary of state and shall become irrevocable upon such receipt by the secretary of state.

B. A notice of retirement or resignation of a member of the legislature shall become irrevocable upon receipt by the presiding officer of the house of the legislature to which the member was elected.

* * *

§1308.3. Special provision for temporarily displaced persons

C. When a person has submitted an application to vote absentee by mail pursuant to this Section, the registrar shall, prior to sending the absentee by mail ballot, contact the appropriate election official in the jurisdiction where the applicant has requested for his absentee by mail ballot to be sent, attempt to verify that the person has not registered to vote in that jurisdiction, or if such jurisdiction has a statewide voter registration database, in that state. If the registrar finds that the person has registered in that jurisdiction or state, the person shall not be permitted to vote absentee by mail and the registrar shall proceed in accordance with the applicable provisions of Part V of Chapter 4 of this Code.

§1309. Early voting application and early voting

* * *

B. For the purpose of facilitating early voting, the registrar may designate, in addition to the location for early voting provided in Subsection A hereof, one branch office wherein early voting may be conducted. Any such branch office shall be located in a public building and the hours during which early voting may be conducted therein shall be fixed by the registrar as provided in Subsection A of this Section. However, if a branch office of a registrar is destroyed, inaccessible, or unsafe during or following a gubernatorially declared state of emergency, the registrar may utilize a temporary building as a branch office to discharge his duties until an office that meets the requirements of this Section becomes available. Such temporary office shall be located within the parish, or if there is no appropriate location within the parish due to the emergency, then in an immediately adjacent parish, or if there is no appropriate location in any immediately adjacent parish due to the emergency, then in the nearest parish in which there is an appropriate location.

* * *

§1313. Tabulation and counting of absentee by mail and early voting ballots

* * *

F. The procedure for counting absentee by mail or early voting ballots shall be as follows:

(1) A member of the board shall remove the envelopes containing the absentee by mail and early voting ballots and early voting absentee applications from the special absentee by mail and early voting ballot envelope.

* * *

§1314. Absentee by mail and early voting commissioners

* * *

F. For an election held within one year following the date of the issuance of any gubernatorial proclamation declaring a state of emergency, if a parish board of election supervisors determines that there is a parishwide shortage of absentee by mail and early voting commissioners because a significant number of absentee by mail and early voting commissioners have been temporarily displaced due to such emergency, the board may submit a written request to the secretary of state for additional absentee by mail and early voting commissioners from other parishes in the same manner as provided in R.S. 18:425(A)(4). Approval, selection, training, and reimbursement of expenses of such absentee by mail and early voting commissioners shall be in the same manner as provided in R.S. 18:425(A)(4). Nothing in Subsection A of this Section shall prohibit an absentee by mail and early voting commissioner from serving in another parish pursuant to this Subsection.

* * *

§1334. Electioneering in connection with early voting in nursing homes; enforcement; penalty

* * *

Section 2. R.S. 18:553(B)(1)(b) and (2), 571, 572(A)(1), 573(A)(2), 1351(12), 1353(C)(4), and 1355(12), (13), (14), (15), (16), and (17) are hereby amended and reenacted and R.S. 18:1351(13) is hereby enacted to read as follows:

§553. Inspection and preparation of voting machines at polling places; precinct registers and supplemental list

* * *

B. Inspection of the voting machines. After the commissioners take their oath and before the time for opening the polls, the commissioners, in the presence of the watchers, shall prepare the polling place for voting as follows:

* * *

(1)

* * *

(b) If the numbers do not agree, the commissioners shall notify the parish custodian, and the commissioners shall not proceed further in the preparation of the voting machine for voting until a representative of the parish custodian has reexamined the voting machine and certified that it is properly arranged. If the numbers agree, the commissioners shall open the envelope, take out the keys, and open the door. On mechanical voting machines incapable of producing printed ~~results, the commissioner shall open the doors concealing the counters.~~

(2)(a) On mechanical voting machines incapable of producing printed ~~results, the commissioners shall carefully examine each counter and determine that it registers zero. If a counter other than the protective counter does not register zero, the commissioners shall immediately notify the parish custodian, who shall, if practical, cause the counters to be readjusted to zero. If it is impractical to readjust the counters before the polls open, the commissioners shall immediately make a written statement of the letter and number designating each counter and the number registered on the counter. The commissioners shall post this statement at the polling place throughout the election. When the commissioners count and tabulate the votes, they shall subtract the number registered on the counter before the polls opened from the number registered on that counter after the termination of voting. The commissioners shall preserve the written statement as part of the election returns.~~

(b) On printer-type mechanical and electronic voting machines, the The commissioners shall cause each machine to produce a zero proof sheet. Determine from the zero proof sheet that each counter on that machine is set at zero. Sign and certify to the correctness of each zero proof sheet. Immediately post each zero proof sheet within the polling place. If any zero proof sheet is illegible or damaged, immediately notify the parish custodian who will take action necessary to make the machine operative. If any zero proof sheet indicates that any candidate or question counter does not register zero, immediately notify the parish custodian, who will, if practical, readjust the counters. If it is impractical to readjust the counters before the polls open, immediately make a written statement of the letter and number designation on each counter and the number registered on the counter. Post this statement at the polling place throughout the election and preserve the statement as part of the election returns.

* * *

§571. Counting and tabulating the votes

A. At the termination of voting in a primary or general election, the commissioners shall announce that voting is terminated. The commissioners in the presence of the watchers shall immediately:

(1) Secure the voting machines against further voting and expose the count on the voting machines, leaving the counter in full view of the watchers.

~~(2) For mechanical voting machines, seal each voting machine with the seal provided, so that the voting and counting mechanism cannot operate.~~

(3)(2)(a) Cause each voting machine to produce a set of four identical final result tally sheets, except that when a consolidation cartridge is used only three identical final result tally sheets from each machine shall be produced.

(b) If a consolidation cartridge is used, cause the consolidation cartridge to produce a set of four identical consolidation election result sheets.

(c) Examine, sign, and certify each set of final result tally sheets and, if produced, consolidation election result sheets.

~~(d) If tabulation blank and compiled statement forms are used, transcribe the vote from each voting machine from the final result tally sheet to the tabulation blank and compiled statement forms.~~

(e)(d) If a voting machine produces a set of final result tally sheets or consolidation election result sheets which is illegible or damaged, notify the parish custodian of voting machines who shall provide technical assistance in obtaining the election results from such machine.

(4)(3)(a) Complete in triplicate Certificate No. 2 of the composite certificate designated "Machine Certificates", which shall state (i) that the voting machines were secured against further voting, (ii) the exact time the voting machines were secured against further voting, (iii) the number on each voting machine, (iv) the number shown on the public counter of each voting machine, which shall be the total number of votes cast on that machine in the election, and (v) the number shown on the protective counter of each voting machine, and (vi) for mechanical voting ~~machines, the number of the seal used on each voting machine~~.

(b) Sign the completed machine certificates.

(5)(4) Sign and certify to the correctness of the duplicate poll lists.

~~(6) In parishes in which tabulation blank and compiled statement forms are used, complete in duplicate two separate compiled statements of the election results at the proper place on the combined tabulation blank and compiled statement forms; and sign and certify as correct both originals and both duplicates of the combined tabulation blank and compiled statement forms.~~

(7)(5) Announce the results of the election in the order the offices, candidates, and propositions are listed on the ballot, announce that the results of the election will be posted at the polling place for public review, and post the results of the election at a conspicuous place at the polling place for public viewing.

~~(a) For mechanical voting machines, post one of the duplicate tabulation blank and compiled statement forms or one copy of the final result tally sheet for each voting machine.~~

(b) For electronic machines, (i) if If no consolidation election result sheet is produced, post one copy of the final result tally sheet for each voting machine, or

(ii) if a consolidation election result sheet is produced, post one copy of the consolidation election result sheet.

(8)(6) Complete in duplicate the list of commissioners. The list of commissioners shall contain the name, address, and social security number of each commissioner and the commissioner-in-charge who served at the polling place and shall be signed by each commissioner and the commissioner-in-charge. The commissioner-in-charge shall indicate beside the signature of each commissioner whether he attended the special school held prior to the election as required by the provisions of R.S. 18:431(B).

(9) (7) Place the duplicate list of commissioners, all duplicate records of challenges, all duplicate affidavits of voters, any physicians' certificates, and any address confirmation cards in the envelope marked "Registrar of Voters", seal it and attach it to the precinct register; seal the precinct register.

(10) (8) Seal any original affidavits of voters and original challenges of voters that have been executed; one of the original tabulation blank and compiled statement forms, if produced; the zero proof sheet; one copy of the final result tally sheets; one copy of the consolidation election result sheet, if produced; one of the duplicate poll lists; and a copy of the machine certificates in the envelope marked "Put in Voting Machine"; and place in or attach to a voting machine that envelope and the sealed precinct register.

(11) (9)(a) If applicable, lock the doors of the voting machines.

(b) If the voting machines do not have doors, secure the voting machines and election paraphernalia in accordance with the procedures in the informational pamphlet as provided in R.S. 18:553.1.

(12) (10) Where applicable, place the keys to the voting machines in an envelope, which then shall be sealed and signed by all of the commissioners.

B. The zero proof sheets; the original tabulation blank and compiled statement forms, if produced; final result tally sheets from each voting machine; and the consolidation election result sheets, if produced, shall be the official election results and shall form a part of the official election returns.

§572. Transmission of election returns; voting machine keys; machine certificates

A.(1) Upon completion of the counting and tabulating of votes, the commissioner-in-charge shall immediately:

(a) Mail to the secretary of state the following:

~~(i) One of the duplicate tabulation blank and compiled statement forms, if produced.~~

(ii) (i) One copy of the final result tally sheets.

(iii) (ii) One copy of the consolidated election result sheets, if produced.

(iv) (iii) One of the duplicate poll lists.

(v) (iv) One copy of the machine certificates.

(b) Deliver to the clerk of court the following:

(i) The keys to the voting machines, if applicable.

(ii) The original of the machine certificates.

(iii) The original of the signed list of commissioners.

~~(iv) One of the original tabulation blank and compiled statement forms, if produced.~~

(v) (iv) One copy of the final result tally sheets.

(vi) (v) One copy of the consolidation election result sheet, if produced.

(vii) (vi) All election result cartridges, if applicable.

* * *

§573. Evidence of election results

A.

* * *

(2) On the day immediately preceding the election, the clerk of court shall prominently post in his office a notice of the time and place where the voting machines will be opened after the election. If no order requiring an earlier opening has been issued, then at the time and place designated in the notice, the clerk of court, assisted by at least one member of the parish board of election supervisors, in the presence of the candidates or their representatives who desire to be present, shall open the voting machines and, if applicable, break the seals. Public and protective counter numbers shall be recorded and for machines other than printer type or ~~electronic, election results shall be recorded~~. Verification of the election results on each machine, as provided for in Subsection B and subject to Subsection C of this Section, shall be completed before another machine is opened.

* * *

§1351. Definitions As used in this Chapter, unless otherwise specified, the following terms shall have the meanings herein ascribed to each:

* * *

(12) "Voting machine" means the enclosure occupied by the voter when voting, as formed by the machine, its screen and privacy shield, which shall include mechanical and electronic voting machines.

~~(a) "Mechanical voting machine" means a voting machine that displays a full-faced ballot and whereby votes are cast by moving a lever.~~
(b) (13) "Electronic voting machine" means a voting machine that displays a full-face ballot, whereby votes are cast by pushing a vote indicator button on the face of the machine or a voting machine that displays a paging ballot, whereby votes are cast by selecting a vote indicator by touching the screen or using available tools on the voting system.

* * *

§1353. Secretary of state; powers and duties; voting machines; voter registration

* * *

C. In addition to any other duties and functions now or hereafter provided by law, the secretary of state shall:

* * *

~~(4) For mechanical voting machines, furnish for each polling place for each election a model showing the face of a voting machine as it is to be used in the election and a card of instructions to voters and commissioners, and also furnish a seal, if required, for sealing each machine after the termination of voting.~~
(5) (4) Prepare all machines necessary for each election and deliver the machines and other election supplies, in addition to those supplies he is required to supply to the parish custodian under R.S. 18:552, to the custody of the parish custodian in complete readiness for use at the polls.

* * *

§1355. Construction and equipment of machines; requirements Each voting machine used in an election shall be so constructed and equipped as to:

* * *

~~(12) For mechanical voting machines only, be provided with a mechanical model illustrating the manner of voting on the machine, suitable for the instruction of voters.~~
(13) (12) Contain a gong or other sound creating device which will audibly indicate that a voter has left the machine after casting his vote.
(14) (13) Contain, for elections for president and vice president, those devices needed in order to comply with R.S. 18:1259.
(15) (14) Have a lighting device which provides sufficient light to enable voters to read the ballot and to enable the election commissioners to examine the counters or tabulators.
(16) (15) Be provided with a screen, hood, or curtain which is so made and can be so adjusted as to protect the privacy of the voter while voting.
(17) (16) For a mechanical voting machine, be capable of being operated manually. For an electronic voting machine, be capable of being operated by battery power.
(18) (17) Be incapable of being reset, altered, or used except by operating the machine.

* * *

Section 3. R.S. 18:1353(C)(5) and 1355(18) are hereby repealed in their entirety. Section 4.(A) This Section and Section 1 of this Act shall become effective upon signature by the governor or, if not signed by the governor, upon expiration of the time for bills to become law without signature by the governor, as provided by Article III, Section 18 of the

Constitution of Louisiana. If vetoed by the governor and subsequently approved

HB NO. 909 **ENROLLED** 1 by the legislature, this Section and Section 1 of this Act shall become effective on the day 2 following such approval. 3 (B) Sections 2 and 3 of this Act shall become effective on January 1, 2007.

SPEAKER OF THE HOUSE OF REPRESENTATIVES

PRESIDENT OF THE SENATE
GOVERNOR OF THE STATE OF LOUISIANA
APPROVED:

APPENDIX 3

LOUISIANA MAIL VOTER REGISTRATION APPLICATION

USE THIS FORM TO: 1) register to vote 2) change your address 3) request a name change 4) change party affiliation

TO REGISTER TO VOTE AND BE ELIGIBLE TO VOTE YOU MUST: 1) be a United States citizen 2) be at least 17 years old to register but must be 18 years old to vote 3) not be under an order of imprisonment for conviction of a felony 4) not be under a judgment of full interdiction or limited interdiction where your right to vote has been suspended 5) reside in the state and parish in which you seek to register and vote.

INSTRUCTIONS FOR COMPLETING THIS FORM: All information except your signature should be printed clearly in ink, preferably black, or typed. Fill in all boxes that apply to you.

Box 1: Indicate whether you are a citizen of the United States of America. Indicate whether you will be 18 years of age on or before election day.

Box 2: Provide full name. Do not use initials for middle or maiden name.

Box 3: 'Residence Address' means the address where you live and are registering to vote. If you claim a homestead exemption, you must list the address of that residence. Do not use a post office box for your 'Residence Address'. If you use a rural route and box number, draw a map in the space labeled 'Give Location.' Write in the names of the crossroads (streets) nearest to where you live. Draw an X to show where you live. Use a dot to show any schools, churches, stores or landmarks near where you live and write the name of the landmark. Complete 'Mailing Address' only if it is different from the 'Residence Address'.

Box 4: Provide your age.

Boxes 6 & 16: You must provide your Louisiana driver's license number, if issued. If not issued, you must provide at least the last four digits of your social security number, if issued. The full social security number may be provided on a voluntary basis. If neither a social security number nor a Louisiana driver's license number has been issued, and this form is submitted by mail, and you are registering to vote for the first time, in order to avoid additional identification requirements for first time voters, attach either a) a copy of a current and valid photo identification or b) a copy of a current utility bill, bank statement, government check, paycheck, or other government document that shows your name and address.

Boxes 8, 11 & 12: The items 'race/ethnic origin', 'daytime phone' and 'home phone' are not required but are helpful.

Box 9: If you do not complete this item, your party affiliation will be listed as 'none'. If you are not affiliated with a political party, please circle 'none'. The recognized political parties are Democrat, Republican, Libertarian, Green and Reform or you may specify any other party affiliation.

Box 17: If you are using this form to request a change of name, you must print the name to be changed here.

Box 19: Date and sign the card with your signature or mark.

If returned by mail, either complete the 'Mail to:' box found on the reverse side or place in an envelope, using the address of the appropriate registrar of voters found on the reverse side. If you have not been issued a social security number or Louisiana driver's license number, you must mail it in an envelope so that you can include the required documentation with your application. Your application or envelope must be postmarked 30 days prior to the first election in which you seek to vote based on the residence listed on this application.

NOTE: 1. If you decline to register to vote, this fact will remain confidential and will be used only for voter registration purposes. If you register to vote, the office where your application was submitted will remain confidential and will be used only for voter registration purposes. 2. Your social security number will also remain confidential and is intended to be used for voter registration purposes only.

QUESTIONS? Call your Parish Registrar of Voters OR call the Department of State at **1-800-825-3805 or (225) 922-0900.**

COMPLETE AND CHECK ALL APPLICABLE BOXES AND TEAR ALONG PERFORATED LINE BEFORE MAILING.

LOUISIANA MAIL VOTER REGISTRATION APPLICATION FORM # 0110

OFFICIAL USE ONLY
COMP REG # _____ Reg Type _____ Wd / Dist _____ Pct _____ In _____ Out _____

1 Are you a citizen of the United States of America? YES ☐ NO ☐ **Will you be 18 years of age on or before election day?** YES ☐ NO ☐
If you checked 'no' in response to either of these questions, do not complete this form.

2 NAME OF APPLICANT (PLEASE PRINT NAME)
LAST FIRST FULL MIDDLE OR MAIDEN

3 RESIDENCE ADDRESS (MUST BE ADDRESS WHERE YOU CLAIM HOMESTEAD EXEMPTION, IF ANY)
HOUSE OR APT. NO. & STREET (IF RURAL, ROUTE & BOX NO.) CITY OR TOWN STATE ZIP
MAILING ADDRESS, IF DIFFERENT

GIVE LOCATION

4 AGE **5 DATE OF BIRTH** MONTH DAY YEAR
6 LA DRIVER'S LICENSE / I.D. # (CIRCLE ONE) NO YES # _____
7 SEX (CIRCLE ONE) MALE FEMALE
8 ** RACE / ETHNIC ORIGIN (CIRCLE ONE) WHITE BLACK ASIAN HISPANIC AMER. INDIAN OTHER: _____

9 PARTY AFFILIATION (CIRCLE ONE) DEM REP LIB GRN REF NONE OTHER (SPECIFY) _____
10 APPLICANT'S PLACE OF BIRTH CITY OR TOWN PARISH OR COUNTY STATE COUNTRY
11 ** DAYTIME PHONE ( )

12 ** HOME PHONE ( )
13 LAST RESIDENCE ADDRESS ADDRESS
14 PLACE OF LAST REGISTRATION PARISH OR COUNTY STATE
15 MOTHER'S MAIDEN NAME

16 * SOCIAL SECURITY # (CIRCLE ONE) NO YES # _____
17 FORMER REGISTERED NAME, IF APPLICABLE
18 Will you require assistance at the polls? (CIRCLE ONE) NO YES IF YES, GIVE REASON :

AFFIRMATION: I do hereby solemnly swear or affirm that I am a United States citizen, that I am at least 17 years old, that I am not currently under an order of imprisonment for conviction of a felony, that I am not currently under a judgment of full interdiction or limited interdiction where my right to vote has been suspended, that I am a bona fide resident of this state and parish, and that the facts given by me on this application are true to the best of my knowledge and belief. If I have provided false information, I may be subject to a fine of not more than $1,000 ($2,500 for subsequent offense) or imprisonment for not more than 1 year (5 years for subsequent offense), or both. Any false statement may constitute perjury.

19 SIGN YOUR NAME IN BOX AT RIGHT.
DATE: _____ / _____ / _____

20 IF YOU ARE UNABLE TO SIGN YOUR NAME, TWO WITNESSES TO YOUR MARK MUST SIGN HERE.
SIGNATURE: SIGNATURE:

* Last 4 digits of the social security number required if no LA driver's license issued; social security number is intended to be used for voter registration purposes only; full # OPTIONAL. ** OPTIONAL LR-1M (REV.10/05) R.S. 18:104 FORM #0110

ACADIA
Courthouse - #115
Crowley, LA 70526-4363
(337) 788-8841
ALLEN
P. O. Box 150
Oberlin, LA 70655-0150
(337) 639-4966
ASCENSION
828 S. Irma Blvd. - #205
Gonzales, LA 70737-3631
(225) 621-5780
ASSUMPTION
P. O. Box 578
Napoleonville, LA 70390-0578
(985) 369-7347
AVOYELLES
312 N. Main St. - #E
Marksville, LA 71351-2409
(318) 253-7129
BEAUREGARD
P. O. Box 952
DeRidder, LA 70634-0952
(337) 463-7955
BIENVILLE
P. O. Box 697
Arcadia, LA 71001-0697
(318) 263-7407
BOSSIER
P. O. Box 635
Benton, LA 71006-0635
(318) 965-2301
CADDO
P. O. Box 1253
Shreveport, LA 71163-1253
(318) 226-6891
CALCASIEU
1000 Ryan St. - #7
Lake Charles, LA 70601-5250
(337) 437-3572
CALDWELL
P. O. Box 1107
Columbia, LA 71418-1107
(318) 649-7364

CAMERON
P. O. Box 1
Cameron, LA 70631-0001
(337) 775-5493
CATAHOULA
P. O. Box 215
Harrisonburg, LA 71340-0215
(318) 744-5745
CLAIBORNE
507 W. Main - Suite 1
Homer, LA 71040-3914
(318) 927-3332
CONCORDIA
4001 Carter St. - #4
Vidalia, LA 71373-3021
(318) 336-7770
DESOTO
105 Franklin St.
Mansfield, LA 71052-2046
(318) 872-1149
E. BATON ROUGE
222 St. Louis - #201
Baton Rouge, LA 70802-5860
(225) 389-3940
E. CARROLL
400 First St.
Lake Providence, LA 71254
(318) 559-2015
E. FELICIANA
P. O. Box 488
Clinton, LA 70722-0488
(225) 683-3105
EVANGELINE
200 Court St. - Ste. 102
Ville Platte, LA 70586-4463
(337) 363-5538
FRANKLIN
Courthouse
6560 Main St.
Winnsboro, LA 71295-2750
(318) 435-4489
GRANT
Courthouse
200 Main St.
Colfax, LA 71417-1828
(318) 627-9938

IBERIA
300 Iberia St. - #110
New Iberia, LA 70560-4543
(337) 369-4407
IBERVILLE
P. O. Box 554
Plaquemine, LA 70765-0554
(225) 687-5201
JACKSON
500 E. Court - #102
Jonesboro, LA 71251-3400
(318) 259-2486
JEFFERSON
P. O. Box 10494
Jefferson, LA 70181-0494
(504) 736-6191
JEFFERSON DAVIS
Courthouse
300 State St.
Jennings, LA 70546-5361
(337) 824-0834
LAFAYETTE
1010 Lafayette - #313
Lafayette, LA 70501-6885
(337) 291-7140
LAFOURCHE
307 W. 4th St. - #101
Thibodaux, LA 70301-3105
(985) 447-3256
LASALLE
P. O. Box 2439
Jena, LA 71342-2439
(318) 992-2254
LINCOLN
100 W. Texas Ave. - #10
Ruston, LA 71270-4463
(318) 251-5110
LIVINGSTON
P. O. Box 968
Livingston, LA 70754-0968
(225) 686-3054
MADISON
100 N. Cedar St.
Tallulah, LA 71282-3892
(318) 574-2193

MOREHOUSE
129 N. Franklin
Bastrop, LA 71220-3815
(318) 281-1434
NATCHITOCHES
P. O. Box 677
Natchitoches, LA 71458-0677
(318) 357-2211
ORLEANS
1300 Perdido - #1W23
New Orleans, LA 70112-2127
(504) 658-8300
OUACHITA
400 St. John - #106
Monroe, LA 71201-7342
(318) 327-1436
PLAQUEMINES
P. O. Box 989
Port Sulphur, LA 70083-0989
(985) 564-2761
POINTE COUPEE
211 E. Main - #103
New Roads, LA 70760-3661
(225) 638-5537
RAPIDES
701 Murray St.
Alexandria, LA 71301-8099
(318) 473-6770
RED RIVER
P. O. Box 432
Coushatta, LA 71019-0432
(318) 932-5027
RICHLAND
P. O. Box 368
Rayville, LA 71269-0368
(318) 728-3562
SABINE
400 Capitol St. - #107
Many, LA 71449-3099
(318) 256-3697
ST. BERNARD
8201 W. Judge Perez - Rm. 104
Chalmette, LA 70043-1696
(504) 278-4231

ST. CHARLES
P. O. Box 315
Hahnville, LA 70057-0315
(985) 783- 2731
ST. HELENA
P. O. Box 543
Greensburg, LA 70441-0543
(225) 222-4440
ST. JAMES
P. O. Box 179
Convent, LA 70723-0179
(225) 562-2330
ST. JOHN
1801 W. Airline Hwy - #112
LaPlace, LA 70068-3344
(985) 652-9797
ST. LANDRY
P. O. Box 818
Opelousas, LA 70571-0818
(337) 948-0572
ST. MARTIN
Courthouse
415 S. Main
St. Martinville, LA 70582-4549
(337) 394-2204
ST. MARY
500 Main St. - #301
Franklin, LA 70538-6144
(337) 828-4100
ST. TAMMANY
701 N. Columbia St.
Covington, LA 70433-2709
(985) 809-5500
TANGIPAHOA
P. O. Box 895
Amite, LA 70422-0895
(985) 748-3215
TENSAS
P. O. Box 183
St. Joseph, LA 71366-0183
(318) 766-3931
TERREBONNE
P. O. Box 9189
Houma, LA 70361-9189
(985) 873-6533

UNION
P. O. Box 235
Farmerville, LA 71241-0235
(318) 368-8660
VERMILION
100 N. State St. - #120 Abbeville, LA 70510
(337) 898-4324
VERNON
P. O. Box 626
Leesville, LA 71496-0626
(337) 239-3690
WASHINGTON
900 Washington St. - #105
Franklinton, LA 70438-1719 (985) 839-7850
WEBSTER
P. O. Box 674
Minden, LA 71058-0674
(318) 377-9272
W. BATON ROUGE
P. O. Box 31
Port Allen, LA 70767-0031
(225) 336-2421
W. CARROLL
P. O. Box 71
Oak Grove, LA 71263-0071
(318) 428-2381
W. FELICIANA
P. O. Box 2490
St. Francisville, LA 70775-2490
(225) 635-6161
WINN
Courthouse - Room 105
Winnfield, LA 71483-3238
(318) 628-6133

APPLICANT'S RETURN ADDRESS:

PLACE STAMP HERE

OFFICIAL USE ONLY

Address Change

Name Change

Party Change

Remarks

Circle One: PA MV RG SDA SS

Received by:

MAIL TO:

REGISTRAR OF VOTERS

State of Nevada

Fiscal Year 2007-2008

Amended State Plan

Amended June 2008

As required by Public Law 107-252
***Help America Vote Act of 2002*, Section 253 (b)**

Office of the Nevada Secretary of State
101 N. Carson Street, Suite 3
Carson City, NV 89701
June 25, 2008

FY 2007-08 Amended State Plan Table of Contents

I. Introduction.....1

II. The Backdrop for Nevada's State Plan Information.....1

III. Nevada's State Plan.....2

A. Use of Requirement Payments.....4
1. Voting System Standards.....4
2. Provisional Voting & Voting Information Requirements.....5
3. Statewide Voter Registration List & Registration by Mail.....6
a. Statewide Voter Registration System
b. Requirements for Voters Who Register by Mail
4. Other Administration of Elections Improvements.....7
a. Accessibility for People with Disabilities
b. State IT Committee

B. Distribution of Requirements Payments & Eligibility.....8

C. Voter Education, Election Official, and Poll Worker Training.....9
1. Voter Education.....9
2. Election Official and Poll Worker Training.....10

D. Voting System Guidelines & Processes.....11

E. Establishment of Election Fund.....11

F. Proposed HAVA Budget.....12
1. Total Funding Received to Date.....12
2. Total Funding Expended to Date.....13
Proportionate Breakdown Graph
3. Total Funding Remaining.....14
Proportionate Breakdown Graph
4. Allocation of Remaining Funding.....15
Proportionate Breakdown Graph
a. Voting Systems Purchases/Upgrades
b. Statewide Voter Registration List Maintenance
c. Provisional Voting & Voting Information
d. Polling Place Accessibility, Ongoing Assessment
e. Voter Education & Outreach Activities
f. Election Official and Poll Worker Training
g. Technology and Personnel
5. Proposed Budget for 2008 Amended Activities.....17

G. Maintenance of Effort.....17

H. Performance Goals and Measures.....18
1. Goals.....18
2. Measures.....19

I. Administrative Complaint Procedure.....20

J. Effect of Title I Payments.....20

K. Ongoing Management of Plan.....21

L. Changes to Plan from Previous Year.....21

M. Committee Description & Development of Plan.....22

Appendix A: Administrative Complaint Procedure

Appendix B: Advisory Committee Biographies & Affiliations

Appendix C: June 25, 2008, Advisory Committee Meeting Agenda

Appendix D: Temporary Statewide Voter Registration Maintenance Regulations

Appendix E: Attestation That Nevada is in Compliance with Federal Laws as They Apply to HAVA

STATE OF NEVADA
FISCAL YEAR 2007-2008
Amended STATE PLAN

I. INTRODUCTION

The State of Nevada was informed by the U.S. Election Assistance Commission (EAC) that The Omnibus Appropriations Act for Fiscal Year 2008 (Public Law 110-161) includes $115 million to help states improve the administration of Federal elections. These funds are known as Requirements Payments (hereinafter "Funds"). The funds will be distributed to each State conditioned upon satisfying certain criteria pursuant to Help America Vote Act of 2002 (HAVA) Section 253(b). These funds are limited to specific uses outlined in Section 253(b) and may not be allocated to activities other than those expressly set forth in the EAC announcement regarding the additional funding.

In order to become eligible for the additional funding, States are required to amend their State Plans. Accordingly, only sections of the State of Nevada Fiscal Year 2007-2008 State Plan dated October 8, 2007 that are related to the necessary criteria for eligibility will be amended and incorporated.

II. THE BACKDROP FOR NEVADA'S STATE PLAN

The Secretary of State is the Chief Officer of Elections for the State of Nevada, and, as such, is responsible for the execution and enforcement of state and federal laws relating to elections.

Nevada remains one of the fastest growing states in the country. Based on figures obtained from Census 2000, Nevada's population increased by 796,424 persons between 1990 and 2000. In 2006, the State's demographer estimated Nevada's population at 2,623,050. Nevada's largest county, Clark County, continues to add approximately 5,000 new citizens per month. Currently, the State has approximately 1.2 million registered voters spread throughout its 17 counties. Moreover, more than 1,500 state, county and municipal political campaigns come under the jurisdiction of local or state election officials during each election cycle.

The Secretary of State's Office will continue to work closely with local election officials, advocacy groups, the State Legislature, and local and state law enforcement agencies to protect the integrity of Nevada's election process. This cooperative effort will include establishing various committees, including but not limited to, the State Training Committee, Election Command Center Committee, State Regulatory & Compliance Committee and the State IT Committee. The State will continue to mitigate costs associated with HAVA implementation and compliance and continue to be fiscally responsible in best utilizing the State's remaining funds.

III. NEVADA'S STATE PLAN

A. Use of Requirements Payments

Section 254(a)(1) requires a description of how the State will use the requirements payment to meet the requirements of Title III, and, if applicable under section 251((b)(2), to carry out other activities to improve the administration of elections. Title III requires the establishment of certain voting system standards, provisional voting, public posting of voting information, a computerized statewide voter registration list, and voter registration application modifications.

1. Voting Systems Standards

Section 301(a) establishes several voting system standards which must be met by January 1, 2006. Under this section, no waiver of the requirements is permitted.

HAVA requires each voting system in the state to: (a) permit voters to verify whom they have voted for and make changes to their vote in a private, secret and independent manner; (b) prevent the voter from over-voting on electronic voting systems and on optical scan ballots provide instruct on how to correct and how to avoid over-voting while marking their ballot; (c) ensure that any notification to the voter maintains the privacy, secrecy and independence of the voter's ballot; (d) produce a permanent paper record with manual audit capacity; (e) be accessible for people with disabilities through the use of at least one (1) DRE voting system placed at each polling place; (f) provide alternative language accessibility pursuant to Section 203 of the Voting Rights Act of 1965; (g) comply with error rates established by the Federal Elections Commission (FEC) as of the time HAVA was adopted; and (h) have a definition of what constitutes a vote and what will be counted. These requirements have been incorporated into Nevada statutes or regulations.

A significant amount of federal funding that has been appropriated to date was used to upgrade the voting systems throughout the State and to purchase new systems in order to comply with the above requirements. The State implemented uniform DRE voting systems for polling places throughout the state, with all DRE machines being fitted with the voter verifiable paper trail printers.

To ensure proper training for election administrators and the voting citizens of Nevada, the State has used, and depending on the availability of funds, may use additional requirements payments to educate individuals about the proper use of the voting systems. Requirements payments will be used for maintaining, modifying and improving all voting systems in the State to ensure compliance with HAVA Section 301(a) standards. Additional uses include continued education on the operation and maintenance of voting systems.

2008 Amendment

The State will use the requirements payments to meet the requirements of Title III and to carry out other activities to improve the administration of Federal elections by continuing to explore and develop enhancements to the statewide voting systems, as well as the standards and procedures to ensure Nevada voters have a positive experience with the electoral process. The State will purchase and maintain ADA-compliant voting machines, and will conduct voter education outreach programs in conjunction with various local providers and disability support agencies. Additionally, the State will continue to conduct training sessions for election officials, poll workers and Nevada voters to ensure information related to the voting systems, the standards and procedures is conveyed and understood. To this end, the State will disseminate information using mail and other web-based applications, and will provide local election officials with proper resources to accomplish the same. The State anticipates allocating the sum of $50,000.00 for this endeavor.

2. Provisional Voting and Voting Information Requirements

Section 302 requires the establishment of provisional voting and the posting of voting information at polling places by January 1, 2004. Under this section, no waiver permitted.

HAVA requires provisional voting procedures in all states to ensure that no voter who appears at the polls and desires to vote is turned away for any reason. The State adopted legislation proposed by the Secretary of State that enacts procedures to allow for provisional voting in federal races throughout the State. The procedures[4] that were adopted meet the requirements of Section 302.

The State will continue using requirements payments to maintain the free access system required by HAVA to provide voters who cast provisional ballots the ability to discover whether their ballot was counted. The State also continues to use requirements payments to develop procedures for provisional voting and to plan and conduct training and outreach concerning a voter's ability to receive and cast a provisional ballot. Finally, if adequate federal funding is available, the State may use requirements payments to assist local governments with funding offsets necessary to prepare and process provisional ballots.

Section 302 of HAVA also mandates that a sample ballot and other voting information be posted at polling places on Election Day. The State anticipates using requirements payments to defray the cost of developing, printing and posting this information in the upcoming election cycle.

The State Training Committee will continue to promulgate signage for counties to utilize as well as provide continued assistance in evaluating a county's election signage prior to printing and posting. The Secretary of State will continue to provide guidance and clarification in signage requirements.

2008 Amendment

[4] See Nevada Revised Statutes (NRS) Sections 293.3081 through 293.3086, inclusive.

The State will make enhancements to the provisional voting system by expanding information pertaining to provisional voting by exploring the addition of Internet based information and education. The State will continue providing training for local election officials and poll workers on the provisional voting procedures, the free access system available to voters to determine the status of their cast ballot and other election administration issues. The State anticipates allocating the sum of $40,113.00 for this endeavor.

3. Computerized Statewide Voter Registration List and Requirements for Voters Who Register by Mail

Section 303 requires the establishment of a computerized statewide voter registration list, first time voters who register by mail to provide identification when they cast their ballots, and changes to be made to the voter registration application by January 1, 2004. A waiver is permitted to extend compliance with Section 303(a) to January 1, 2006.

a. Statewide Voter Registration System (SVRS)

Section 303 of HAVA requires that all states establish a statewide computerized registration list of all eligible voters. This "single, uniform, official, centralized, interactive, computerized statewide voter registration list" must be administered at the State level and is considered the official list of legally registered voters in the State.

The Secretary of State's Office has a HAVA compliant statewide voter registration system in place. The Secretary of State's system was implemented prior to the 2006 election cycle and has the ability to interface with Nevada's Department of Motor Vehicles and other appropriate agencies, as required by HAVA. Additionally, this statewide voter registration database allowed all 17 counties to clear thousands of records, including duplicate records.

The State will continue to expend a portion of its requirements payments and Title I payments to fund additional upgrades and maintenance of the statewide voter registration system. Additionally, the Secretary of State will continue to explore options of database interfacing with other agencies which may not currently have electronic databases. Regulations specific to statewide voter registration maintenance procedures were promulgated prior to the 2006 election cycle.

2008 Amendment

The State has successfully implemented NevVoter, the statewide voter registration system, and will continue to monitor its accuracy and effectiveness. This will be accomplished by exploring and developing more efficient and timely methods of verifying statewide voter registration data through State and Federal agency databases. The State anticipates allocating the sum of $100,000.00 to invest in the maintenance of, as well as enhancements to NevVoter.

b. Requirements for Voters Who Register by Mail

With respect to requirements for voters who register by mail, the State revised its voter registration form in May of 2007. These recent revisions include clarifying language for identification requirements as well as providing an opportunity for county election officials to recruit poll workers.

2008 Amendment

The State will expand its efforts to ensure the registration process for mail-in, absentee, and overseas voters is efficient and timely. The State intends to continue its efforts to increase voter participation in these categories by devising and developing statewide procedures for the receipt and processing of mail-in ballots, absentee ballots and ballots returned via facsimile. Additionally, the State will provide a uniform method of disseminating information on absentee voter information to voters inside and outside the State of Nevada. The State anticipates allocating the sum of $50,000.00 for this endeavor.

4. Other Activities to Improve the Administration of Elections (Section 251(b)(2))

a. Improving Voting Accessibility for People with Disabilities

Every polling site in the State was surveyed for Americans with Disabilities Act[5] (ADA) accessibility and various types of equipment were purchased to improve access to needed areas. During FY 2007-2008, the Secretary of State will continue to improve accessibility, apply for additional federal funding to ensure ADA compliance and proper training of poll workers, and continue both voter outreach efforts to the people with disabilities community and statewide training on ADA compliance issues.

b. Develop State IT Committee

The Secretary of State will continue to utilize a statewide IT committee comprised of county and Secretary of State IT representatives and elections staff. This committee is headed by the Secretary of State's Office and works to: 1) address overall security improvements to voting equipment and the statewide voter registration database; 2) develop updates to the statewide voter registration database and accompanying changes to county election management systems; 3) coordinate election night reporting; 4) assist state training committee on preparing technical training materials; and 5) testing for voting machine software and state certification.

The State intends to continue using requirements payments to fund other activities to improve the administration of elections, including, but not limited to: (a) establishing a polling place accessibility program to ensure that all polling places in Nevada are and continue to be in compliance with the ADA; (b) providing necessary assistance to persons with limited proficiency in the English language; (c) engaging in a variety of voter education and outreach activities, including public service announcements, voting machine demonstrations, mass mailings and other related media avenues; (d) providing election official and poll worker training initiatives; (e) establishing poll worker recruitment

[5] Public Law 336 of the 101st Congress, enacted July 26, 1990.

programs; and (f) continuing to develop the Secretary of State's website to offer up-to-date, detailed election information to the public.

The State will also continue using requirements payments to fund staff positions to allow for ongoing operations and maintenance of programs and projects to sustain HAVA compliance. The State will continue to evaluate staffing needs to determine if additional positions are needed to fulfill HAVA requirements.

2008 Amendment

The State intends to develop a centralized election information management system to coordinate communications between local election officials, the Secretary of State and Nevada citizens before, during and after a federal election. This proposed system will include pre- and post- logic and accuracy testing (LAT) information, information on election audits, and the development of detailed standard operating procedures pertaining to the security for the operations, transport, and delivery of elections equipment and supplies. The system will also provide centralized method for local elections officials to exchange information on Election Day to ensure the efficient and timely notification of voting equipment failure, shortages, or other election-related issues. Additionally, the proposed system will provide an improved method of communication between local election officials to expedite corrections in the statewide voter registration list. The State anticipates allocating the sum of $300,000.00 for this endeavor.

B. Distribution of Requirements Payments and Eligibility for Distribution

Section 254(a)(2) of the act requires a description of how the State will distribute and monitor the distribution of the requirements payment to units of local government or other entities in the State for carrying out the activities described in Section 254(a)(1), including a description of—

(A) The criteria to be used to determine the eligibility of such units or entities for receiving the payment; and

(B)The methods to be used by the State to monitor the performance of the units or entities to whom the payment is distributed, consistent with the performance goals and measures adopted under Section 254(a)(8).

The Office of the Secretary of State will centrally manage activities funded by requirements payments. The Secretary of State will be accountable for all expenditures, funding levels and program controls and outcomes. The Secretary of State, in conjunction with local election officials, will determine the appropriate level of support for local activities.

To the extent that a decision is made to distribute requirements payments to units of local government and other entities for carrying out the activities described in Section 254(a)(1), the criteria to be used for determining eligibility include, but are not limited to: (a) the priority of the project to which the distribution is intended to be applied, as it relates to complying with HAVA; (b) the extent to which the recipient is in compliance with Title III of HAVA and all other state and federal election laws; (c) the recipient must maintain its current level of funding for its elections budget outside of any HAVA funds received; (d) the recipient must cooperate with the State in maintaining the statewide voter registration list and must timely implement list purging activities and reporting as required by the Secretary of State; (e) the need for the payment to ensure continued compliance with state and federal elections laws; (f) the availability to the recipient of other funding sources, including other HAVA related grants; (g) the recipient must acknowledge that it will be required to reimburse the State for all federal funds received if it does not meet the deadlines for compliance in HAVA; and (h) the recipient must develop a comprehensive accounting plan in accordance with federal criteria for separately identifying and tracking any federal funds received. The criteria for receipt of requirements payments will be agreed to in writing in advance by the Secretary of State and the unit or entity receiving the payment.

If requirements payments are so distributed, the Secretary of State will monitor the performance of each activity funded by requirements payments on a case-by-case basis. The methods to be used by the State to monitor the performance of the payment recipients may include, without limitation: (a) requiring the recipient to prepare and submit comprehensive timely reports to the Secretary of State detailing the expenditures and their relation to complying with Title III of HAVA; (b) implementing financial controls that establish financial reporting methods; and (c) developing performance indicators on a case-by-case basis for all activities funded.

2008 Amendment

Nevada manages all HAVA funding on a statewide level, and will continue to allocate HAVA funds for sub-grants to qualifying entities in the State for carrying out activities regarding the administration of Federal elections and voting systems. Due to the relatively small number of counties in Nevada, only seventeen, the administration of Federal elections and voting systems of local governments are coordinated centrally through the Nevada Secretary of State's office.

C. Voter Education, Election Official and Poll Worker Training

Section 254(a)(3) of the Act requires a description of how the State will provide for programs for voter education, election official education and training, and poll worker training which will assist the State in meeting the requirements of title III.

1. Voter Education

With voter participation and turnout declining nationally over the last twenty years, the Secretary of State's office is making a concerted effort to expand Nevada's voter outreach and education efforts.

Education is the key to improving Nevada's voter participation rate. Further exploration as to reaching various socio-economic groups as well as providing information for those who have had their rights restored or qualify to have their voting rights restored will also be included.

2008 Amendment

The State has augmented its efforts to improve its voter outreach programs and increasing the participation of its college student population by developing a partnership between the Secretary of State's office and the Nevada System of Higher Education. The State continues to explore voter outreach activities. The State will additionally expand information available on the website.

The State intends to develop data collection methods for improving voting system standards and voting information requirements. This includes, but is not limited to, researching and identifying demographic groups that have been disproportionately low in voter turnout rates to capture and report that information. The State has set a goal to meet, or exceed voter turnout rates in these demographic categories.

The State anticipates allocating the sum of $300,000.00 for these activities.

The Secretary of State's office has produced and published several informative brochures designed to educate Nevada's citizens about the voter registration process, the significance of every single vote, and the requirements of HAVA. The agency's website (www.nvsos.gov) contains a wealth of information useful to individuals and groups seeking to advance voter participation and citizen knowledge of the elections process.

The 2003 Legislature moved the Advisory Committee on Participatory Democracy (ACPD) under the auspices of the Secretary of State's office, and established the goals of 75 percent voter registration and 70 percent voter turnout by those registered voters in Nevada by 2008.

In June 2006, the Advisory Committee for Participatory Democracy (ACPD) solicited grant applications to conduct voter education and outreach to the citizens of Nevada. The grant was funded through Section 101 HAVA with minimum funding requests of $15,000 and a maximum of $65,000. The grant was limited to nonprofit, nonpartisan organizations organized for the purpose of voter education and outreach to increase participation in the election process. The Secretary of State, as recommended by the ACPD, awarded grants to four entities totaling $65,824. Each entity was required to enter into a Notice of Subgrant Award with the Secretary of State, Elections Division to ensure HAVA compliance and for reporting purposes.

The Secretary of State and the ACPD will focus on establishing partnerships with the business sector to enhance voter participation and Election Day support, while also building relationships with educational institutions and community organizations to increase youth voter participation.

2. Election Official and Poll Worker Training

The State, in conjunction with all 17 counties, has instituted a training program to provide a more centralized source of training, versus the more localized training programs that have existed in the past. In lieu of the disproportionate range of resources available at the local level across the State, building a centralized source of training has been critical in ensuring all 17 counties have access to all the training necessary to maintain their role in achieving

HAVA compliance. Centralized training in 2006 covered: 1) maintenance of the statewide voter registration list; 2) DRE maintenance, testing, programming and security; 3) provisional voting and provisional phone line reporting; 4) election date signage requirements; 5) requirements under UOCAVA for overseas citizens and the military, including use of FWAB ballots; 6) ADA accessibility training for poll workers and election staff; 7) general improvements for poll worker recruitment, training and management; 8) overall communication; 9) additional federal reporting requirements; 10) conducting mandatory post election VVPAT audit and 11) additional certifications for various federal and state requirements. The State will continue to revise and update the training materials and procedures created in 2006 through the guidance of a State Training Committee. This committee is comprised of two Secretary of State employees and four County Clerks/Registrar of Voters. Training topics will include but are not limited to: 1) restoration of felon voting rights; 2) voter identification requirements; 3) poll watchers; 4) provisional voting; 5) election security; 6) electioneering; and 7) polling place assistance.

In preparation for the 2008 Elections, comprehensive training sessions and materials addressing election issues will be conducted and distributed to all election officials. These sessions will also include independent training sessions tailored to address the various needs of Nevada's election officials.

D. Voting System Guidelines and Processes

Section 254(a)(4) requires a description of how the State will adopt voting system guidelines and processes which are consistent with the requirements of Section 301.

Nevada law mirrors the voting system guidelines and processes set forth in HAVA section 301, as outlined in Section III(A)(1) of this Plan. In addition, the Secretary of State is responsible for certifying voting systems for use in the State. The Secretary of State, in accordance with state law, cannot certify any voting system in the State unless it meets or exceeds the standards for voting systems established by the FEC. The Secretary of State will develop new guidelines and processes as necessary to ensure all voting systems in the State continue to remain in compliance with Section 301.

E. Establishment of Election Fund

Section 254(a)(5) requires a description of how the State will establish a fund described in Section 254(b) for purposes of administering the State's activities under this part, including information on fund management.

(b) Requirements for Election Fund—

(1) Election Fund Described.—For purposes of subsection (a)(5), a fund described in this subsection with respect to a State is a fund which is established in the treasury of the State government, which is used in accordance with paragraph (2), and which consists of the following amounts:

(A) Amounts appropriated or otherwise made available by the State for carrying out the activities for which the requirements payment is made to the State under this part.

(B) The requirements payment made to the State under this part.

(C) Such other amounts as may be appropriated under law.

(D) Interest earned on deposits of the fund.

The State created a special election fund in the state treasury that provides the Secretary of State with the authority to deposit into this fund all HAVA grants and state matching fund appropriations. This fund is fully compliant with Section 254(b) of HAVA. The Secretary of State works closely with the State's Budget Division and the State Controller's office to implement and enforce all fiscal controls and policies required by both state and federal law.

F. Nevada's Proposed HAVA Budget

Section 254(a)(6) requires a description of the State's proposed budget for activities under this part, based on the State's best estimates of the costs of such activities and the amount of funds to be made available, including specific information on-

(A) The costs of the activities required to be carried out to meet the requirements of Title III

(B) The portion of the requirements payment which will be used to carry out activities to meet such requirements; and

(C) The portion of the requirements payment which will be used to carry out other activities.

1. Total Funding Received to Date:

Federal Fiscal Year	Federal Appropriations	Nevada's Share	5% Match
Title I Early Payments	$650 million	$5 million	n/a
2003	$833 million	$5.7 million	$304,313
2004	$1.5 billion	$10.3 million	$546,062
2005	$0	$0	$0
2006	$0	$0	$0
2007	$0	$0	$0
Total	$3.02 billion	$21.2 million	$850,375

2008 Amendment

Federal Fiscal Year	*Federal Appropriations*	*Nevada's Share*	*5% Match*
2008	*$115 million*	*$798,107*	*$42,006*
Amended Total	*$3.117 billion*	*$21,998,107*	*$892,381*

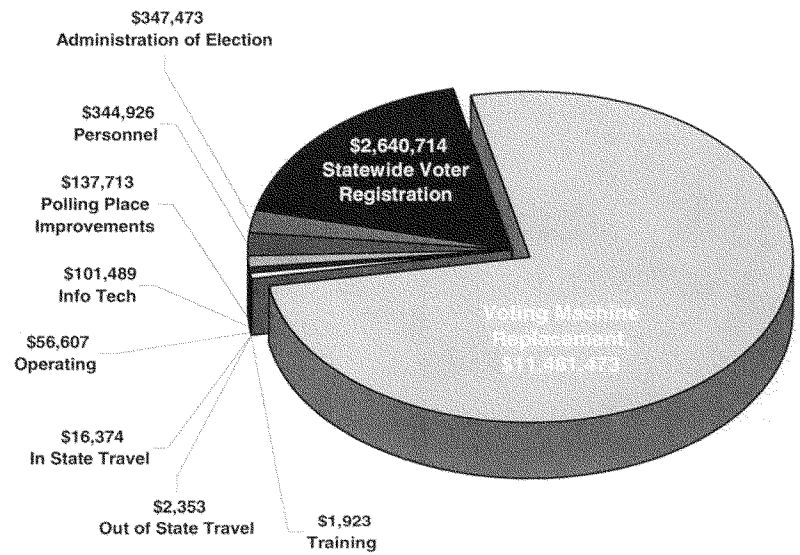
The State has also received an additional $500,000, under HAVA Title II, Section 261 for polling place accessibility. The State has been awarded yearly increments of $100,000 over

the last five years. The State began drawing these funds for the first time in 2006. These funds will continue to be utilized for voter outreach projects, improved accessibility and poll worker training.

2. Total Funding Expended to Date:

Of the initial HAVA funding received, $15,131,081 has been expended to date to meet the various requirements set forth under HAVA.

Proportionate Breakdown of HAVA Expenditures to Date

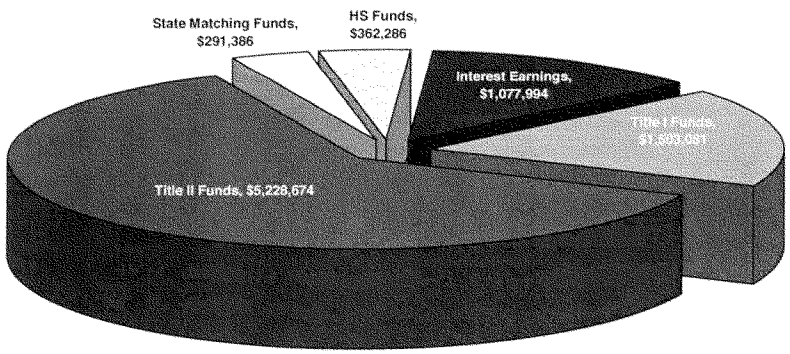


3. Total Funding Remaining to Date:

Budget Account 1051 - HAVA
Funding Received and Remaining as of June 30, 2007

Funding Source	Date Rec'd	Amount Rec'd	Amount Remaining
Title I	05/01/03	$5,000,000	$1,503,081
Title II (Federal FY 03)	08/09/04	$5,785,410	$0
Title II (Federal FY 04)	11/29/04	$10,381,400	$5,228,674
State Match – GF	07/01/04	$299,820	$0
State Match – SS	0805/04	$550,555	$291,386
HHS Funds – FFY 2003		$100,000	$0
HHS Funds – FFY 2004		$100,000	$62,286
HHS Funds – FFY 2005		$100,000	$100,000
HHS Funds – FFY 2006		$100,000	$100,000
HHS Funds – FFY 2007		$100,000	$100,000
FY 04 Interest Earned	06/30/04	$87,430	$87,430
FY 05 Interest Earned	06/30/05	$214,828	$214,828
FY 06 Interest Earned	06/30/06	$371,193	$371,193
FY 07 Interest Earned	06/30/07	$404,543	$404,543
Totals:		**$23,595,179**	**$8,463,422**

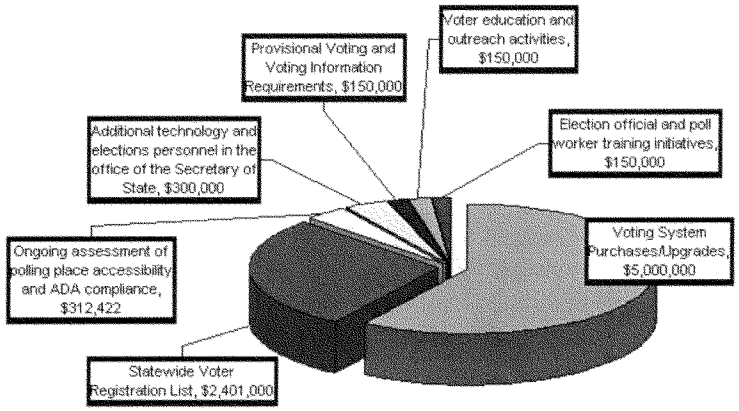
Proportionate Breakdown of Remaining HAVA Funding



4. Allocation of Remaining HAVA Funding For FY 07-08:

The remaining $8,463,422 will be utilized to continue to maintain statewide HAVA compliance. Additionally funding will be set aside to ensure that both the voting systems and the statewide voter registration database can be maintained, updated and adequately supported. As ongoing projects, funding needs have been taken into account post FY 07-08.

Estimated Allocation of Remaining HAVA Funding



a. Voting System Purchases/Upgrades:

--Continue to develop strategies to obtain funding, to update DRE machines and their respective VVPAT mechanism to ensure continued compliance with both federal and state law. Also provide additional touch screen systems fitted with voter verifiable paper audit trail printers as needed prior to the 2008 and 2010 election cycles.

--To be funded with Title I early payments, Title II requirements payments and State matching funds.

--Cost to date: $11,481,473

--Expected costs for FY 07-08: $2,000,000

--Expected costs for FY 08-09: $3,000,000

b. Establishing and Maintaining a Statewide Voter Registration List:

--Approximately, $4 to $5 million was allocated to cover base cost, with estimated ongoing maintenance costs of approximately $100,000 per year.

--The State will maintain between $2-3 million to cover any additional improvements to be made to the internally built statewide voter registration list and any additional maintenance costs which may arise.

--To be funded with Title I early payments, Title II requirements payments and State matching funds.
--Cost to date: $2,640,714
--Expected costs for FY 07-08: $401,000
--Expected costs for FY 08-09: $2,000,000

c. Provisional Voting and Voting Information Requirements:
--$150,000 was initially allocated to create and develop enhancements to the free-access system, provide necessary training and outreach, and develop voting information.
--To be funded with Title II requirements payments and State matching funds.
--Expected costs for FY 07-08: $150,000

d. Ongoing assessment of polling place accessibility and ADA compliance:
--A significant portion of HAVA Title II, Section 261 funds totaling $362,286 will continue to be allocated to improve polling place accessibility. The expenditures will also include training for election officials and poll workers, along with providing information about polling place accessibility to people with disabilities.
--Expected costs for FY 07-08: $312,422

e. Voter education and outreach activities:
-- $150,000.00 in HAVA funding will be allocated to continue with voter education and outreach activities.
--To be funded with Title I requirements payments and State matching funds.
--Expected costs for FY 07-08: $150,000

f. Election official and poll worker training initiatives:
-- $150,000, in HAVA funding will be allocated to continue training election officials and poll workers.
--To be funded with both Title I and Title II requirements payments and State matching funds.
--Expected costs for FY 07-08: $150,000

g. Additional technology and elections personnel in the office of the Secretary of State:
-- $344,926.00 has been expended on elections personnel since the implementation of HAVA in 2002.
-- Additional considerations include creating a HAVA information technology position to help maintain various aspects of HAVA compliance including programming related to voting equipment as well as statewide voter registration maintenance and further development.
--Expected costs for FY 07-08: $300,000

The State's FY 07-08 Plan, as presented herein, is limited to the extent State appropriations are made available, and is based on the assumption that adequate federal funding will be appropriated. While the State intends to fully comply with HAVA, if adequate federal funding is not made available, the manner in which the funds are disbursed or dedicated and the priorities given to particular projects may be altered from the information contained in this FY 07-08 Plan.

5. Costs and Portions of State's Proposed Budget for 2008 Amended Activities:

Activity	*Funds*	*Title I, II, III Classification*
Improvements for statewide voting systems standards	*$50,000.00*	*III*
Training for local election officials and poll workers on the provisional voting procedures	*$40,113.00*	*III*
Maintenance and enhancements to NevVoter, Nevada's statewide voter registration list	*$100,000.00*	*III*
Expand efforts regarding identification requirements of mail-in, absentee, and overseas voting	*$50,000.00*	*III*
Centralized Election Information Management System and voting information requirements	*$300,000.00*	*III/ Activities to Improve Administration of Federal Elections*
Outreach activities and data collection	*$300,000.00*	*III/ Activities to Improve Administration of Federal Elections*

G. Maintenance of Effort

Section 254(a)(7) requires a description of how the State, in using the requirements payment, will maintain the expenditures of the State for activities funded by the payment at a level that is not less than the level of such expenditures maintained by the state for the fiscal year ending prior to November 2000.

Consistent with the maintenance of effort requirement contained in HAVA, in using any requirements payments, the State will maintain expenditures for activities funded by the payment at a level equal to or greater than the level of such expenditures maintained by the State for its fiscal year that ended prior to November 2000. The total expenditures attributable to the Elections Division increased in the State's fiscal years 2001, 2002, 2003, 2004, 2005, 2006 and 2007 and are anticipated to increase in FY 08.

The State Legislature has the authority to approve these funding levels and has been apprised of the maintenance of effort requirements contained in HAVA. At this time, the Secretary of State's total HAVA budget is $8,463,422.00. $5,228,674.00 of this total amount is held in a

Title II reserve fund, 1,503,081.00 is held in a Title I reserve fund, $291,386 consists of state match funds, $362,286 is held in HHS funding and $1,077,994.00 consists of accrued interest. Projected state funded expenses for FY 2007-2008 will still exceed $250,000.

2008 Amendment

Nevada will continue to meet its Maintenance of Effort (MOE) requirement in that HAVA funds, and not State funds, will be used for Title III needs. Currently, the Secretary of State's total HAVA budget, excluding the 2008 requirements payment, is $6,922,855.93. $4,030,436.00 of this total amount is held in Title II reserve fund; $1,756,200.00 of this total amount is held in Title I reserve fund; $174,376.00 consists of the balance remaining in the state match funds; $376,536.48 is held in HHS funding; and $1,388,756.60 consists of accrued interest. Projected state funded expenses ending in FY 2008-2009 will still exceed $250,000.00

H. Performance Goals and Measures

Section 254(a)(8) requires a description of how the State will adopt performance goals and measures that will be used by the State to determine its success and the success of units of local government in the State in carrying out the plan, including timetables for meeting each of the elements of the plan, descriptions of the criteria the State will use to measure performance and the process used to develop such criteria, and a description of which official is to be held responsible for ensuring that each performance goal is met.

The Secretary of State, in collaboration with local election officials, has met all critical performance goals and will continue to institute processes to measure additional progress in relation to these time–specific goals, as well as ongoing performance goals. This process will provide local election officials with structure and continued measurable targets for accomplishment. In addition, each local election official will be required to report the progress in meeting the performance goals and measures to the Secretary of State within 60 days following every general election held in the State.

1. Performance Goals

In developing the FY 07-08 update to the State Plan, the strategies for achieving these HAVA compliant goals in the previous State Plans continue to be applicable: (1) obtain federal funding; (2) implement legislation fostering voter participation and compliance with HAVA; (3) conduct an assessment of the condition of the statewide voter registration process given these standards; (4) suggest changes to voting technology and processes to ensure accurate and reliable elections and voter confidence; and (5) develop and implement follow-through accountability activities and feedback mechanisms for complaints.

The State's primary goal is to achieve election reform and compliance with HAVA through the successful implementation of the programs outlined in the State Plan. In addition, having met HAVA compliance, the State will continue to create additional goals to continue Nevada's leadership role in election reform. Following is a description of the timetable for meeting each element of the Plan and the title of the official responsible for ensuring each such element is met:

Element	State/County Official	Timetable
Voting Systems	**State Elections Deputy County Election Official**	**Accomplished September 2004**
Voter Registration	**State Elections Deputy County Election Official**	**Accomplished in 2006**
Provisional Voting	**State Elections Deputy County Election Official**	**Ongoing**
Additional Personnel	**State Elections Deputy**	**Ongoing (as needed)**
Polling Place Accessibility	**State Elections Deputy County Election Official**	**Ongoing**
Voter Education/Outreach	**State Elections Deputy County Election Official**	**Ongoing**
Poll Worker Training	**State Elections Deputy County Election Official**	**Ongoing**
Complaint Procedures	**Deputy Attorney General**	**Adopted/Ongoing**

2. Performance Measures

The State will use the following criteria to measure performance:

--voter turnout statistics
--functionality of voting systems
--accuracy of the data contained in the statewide voter registration list
--voter satisfaction with equipment (accomplished through surveys or other strategies)
--complaints against poll workers
--complaints received versus complaints resolved
--ADA compliance

These criteria were developed through the State Planning Process. The State is further committed to exploring the use of additional performance measures.

2008 Amendment

Nevada's use of additional requirements payments will enhance current elements of our State Plan, and as such, the performance goals, measurements and timetables already established will continue to be used to measure the performance of the additional funding.

I. State-Based Administrative Complaint Procedure

Section 254(a)(9) requires a description of the uniform, nondiscriminatory State-based administrative complaint procedures in effect under section 402. This state-based administrative complaint procedure must be in effect prior to certification of the State Plan, but no later than January 1, 2004; no waiver of the procedure is permitted.

The Advisory Committee has developed and adopted a procedure for complaints that meets HAVA requirements[6]. The Secretary of State adopted regulations to place these procedures into the State Administrative Code prior to submission of the FY 03-04 State Plan. The Secretary of State will continue to review and update regulatory language on an ongoing basis. The Secretary of State has assembled the State Regulatory Committee which will continually review statutes needing clarification and develop regulatory language as needed.

In summary, the procedure provides a uniform, nondiscriminatory procedure for the resolution of any complaint alleging a violation of any provision of Title III of HAVA, including a violation that has occurred, is occurring, or is anticipated to occur. Any person who believes a violation of any provision of Title II has occurred may file a complaint with the Secretary of State. The complaint must be written, signed, sworn to and notarized. At the request of the complainant, the Secretary of State will conduct a hearing on the record that will be conducted in accordance with HAVA requirements. The Secretary of State will provide the appropriate remedy and will provide a final determination within the timeframes specified in HAVA. The procedure provides for alternative dispute resolution if the Secretary of State does not make a timely final determination. Finally, the procedure requires the Secretary of State to make reasonable accommodations to assist persons in need of special assistance for utilizing the complaint procedure.

The Secretary of State's Office has also established a statewide Election Command Center Committee which will further modify and improve various aspects of the complaint procedures to ensure the process remains a uniform and nondiscriminatory state-based administrative process. In addition to coordinating with local law enforcement agencies, the Secretary of State's Office will work closely with local district attorneys and the State's Attorney General to ensure complaints are handled proficiently and swiftly. The Secretary of State will deploy investigators from another division of the office to assist local and state agencies investigative staff and the Elections Division during voting periods to investigate complaints as they are recorded by the Secretary of State's Election Fraud and Complaint Hotline. This committee will be a concerted effort and will work closely with the State Training Committee as well on complaint procedures.

J. Effect of Title I Payments

[6] See Appendix A for copy of Administrative Complaint Procedure.

If the State received payment under Title I, Section 254(a)(10) requires a description of how such payment will affect the activities proposed by the State to be carried out under the plan, including the amount of funds available for such activities.

On April 30, 2003, the State received $5 million in Title I payments. The State has expended a portion of these funds for the voting system upgrades described in this State Plan. In addition, the State has expended these funds for ancillary devices, equipment and services associated with the voting systems contract and for travel and training activities necessary for implementing the new voting systems and the statewide voter registration system. Section 6 of this Plan specifically sets forth the State's intended additional uses for these funds.

2008 Amendment

Nevada has approximately $1,756,200.00 of this total amount held in Title I reserve fund. These funds will not affect the new activities proposed to be carried out under the 2008 requirements plan.

K. Ongoing Management of the State Plan

Section 254(a)(11) requires a description of how the State will conduct ongoing management of the plan, except that the State may not make any material change in the administration of the plan unless the change—

(A) is developed and published in the Federal Register in accordance with section 255 in the same manner as the State plan;

(B) is subject to public notice and comment in accordance with section 256 in the same manner as the State plan; and

(C) takes effect only after the expiration of the 30-day period which begins on the date the change is published in the Federal Register in accordance with subparagraph (A).

The State intends to use the State Plan as the foundation for its goals in achieving election reform and compliance with HAVA. To achieve these goals, the Secretary of State has appointed an internal committee in his office to be overseen by the Deputy Secretary for Elections. This committee is responsible for conducting ongoing management of the State Plan. To carry out this function, the committee is required to hold meetings as deemed necessary to address HAVA related issues and keep current on the State's progress toward implementation of HAVA. The Deputy Secretary for Elections, or a designee, is to report to the State Advisory Committee the activities involved with the ongoing management of the Plan. The Secretary of State will continue to hold an annual meeting of the State Advisory Committee to review and update the State Plan, as necessary. The Secretary of State may also convene the State Advisory Committee at other times during the year as deemed advisable.

2008 Amendment

Nevada's ongoing management of the plan will not change. Oversight of the State Plan will remain a function of the State Advisory Committee, the Deputy of Elections, and the Secretary of State.

L. Changes to the State Plan from the Previous Fiscal Year

In the case of a State with a State plan in effect under this subtitle during the previous fiscal year, Section 254(a)(12) requires a description of how the plan reflects changes from the State plan for the previous fiscal year and of how the State succeeded in carrying out the State plan for such previous fiscal year.

This FY 2007-08 State Plan incorporates the same basic theme as the previous plans, and generally reports on the procedures implemented by the State in carrying out the previous plan, such as upgrades to voting systems throughout the State and specific voter education and outreach efforts undertaken by the State.

This current FY 07-08 State Plan updates the status of State performance goals and the various HAVA compliant projects, such as statewide voter registration. Also provided is a general update of achievements in the areas of training, accessibility, statewide voter registration, voter machine upkeep and maintenance, and outreach. This current plan further takes into consideration the Title II, Section 261 funds which had not been drawn prior to 2006.

2008 Amendment

The amended State Plan reflects changes from the previous State Plan by increasing spending estimations for: improvements to statewide voting systems; training for local election officials and poll workers on the provisional voting procedures; maintenance and enhancements to NevVoter; expand efforts regarding mail-in, absentee, and overseas voting; centralized Election Information Management System; and outreach activities and data collection. . Additionally, the State Advisory Committee voted to change language in Section III.A.1 pertaining to voting system standards relating to over-voting. The State has succeeded in carrying out the previous State Plan by continuing to meet performance goals, HAVA compliance in expenditure of HAVA funds, and a 11.4% increase in registered voters from June 2007 to June 2008

M. Committee Description and Development of State Plan

Section 254(a)(13) requires a description of the committee which participated in the development of the State plan in accordance with section 255 and the procedures followed by the committee under such section and section 256.

The State's Advisory Committee consists of fifteen (15) members including the Secretary of State, local election officials from the two largest counties in the State and a variety of other election stakeholders[7]. The Secretary of State selected the committee membership and either he or his Chief Deputy acted as Chairperson for each meeting held.

[7] See Appendix B for Advisory Committee biographies and party affiliations.

Members of the State Advisory Committee and their qualifications are as follows:

Ross Miller, Secretary of State
Nicole Lamboley, Chief Deputy Secretary of State
Nhu Nghuyen, Senior Deputy Attorney General
Thomas Allman, Rights Advocate/Project Coordinator, Nevada Disability Advocacy & Law
LaVonne Brooks, Executive Director, High Sierra Industries
Dan Burk, Washoe County Registrar of Voters
Heidi Gansert, Assemblywoman, Washoe District 25
Jan Gilbert, N. NV Coordinator, Progressive Leadership Alliance of NV (PLAN)
Barbara Griffin, Douglas County Clerk
Joshua J. Hicks, Legal Counsel to Governor (Appointee of Governor Jim Gibbons)
Ruben Kihuen, State Assemblyman, District 11
Jennifer Lazovich, Esq., Kummer, Kaempfer Bonner Renshaw
Larry Lomax, Clark County Registrar of Voters
Richard Siegel, President, American Civil Liberties Union of Nevada
Monica Martinez Simmons, Henderson City Clerk

Advisory Committee Staff in the Office of the Secretary of State and their qualifications are as follows:

Matthew M. Griffin, Deputy Secretary of State for Elections
Ryan High, State HAVA Coordinator
Kimberly Carrubba, State Advisory Committee Secretary

In developing the State of Nevada Fiscal Year 2007-2008 Amended State Plan, the State Advisory Committee convened on Wednesday, June 25, 2008. The Committee meeting was publicly held and noticed in accordance with Nevada's Open Meeting Law. The State of Nevada Fiscal Year 2007-2008 Amended State Plan will be made available for public inspection and comment for a 30-day period prior to submission to the Election Assistance Commission (EAC). The Secretary of State will publish the adopted Plan and notice of the comment period will commence on or about June 30, 2008 and will be made available for public inspection on the Secretary of State's website and at satellite offices, the Nevada State Library, at all main county libraries, all city and county clerks' offices, and at various other public agencies throughout the State.

2008 Amendment

The amended State Plan reflects changes from the previous State Plan in the members of the State Advisory Committee staff, including the Deputy Attorney General, the State HAVA Coordinator, and the State Advisory Committee Secretary.

APPENDIX A

Administrative Complaint Procedure
NAC 293.500 – 293.560, inclusive

COMPLAINTS ALLEGING VIOLATION OF TITLE III OF HELP AMERICA VOTE ACT OF 2002

NAC 293.500 Definitions. (NRS 293.124, 293.4685) As used in NAC 293.500 to 293.560, inclusive, unless the context otherwise requires, the words and terms defined in NAC 293.505 and 293.510 have the meanings ascribed to them in those sections.
(Added to NAC by Sec'y of State by R077-03, eff. 12-4-2003)

NAC 293.505 "Complainant" defined. (NRS 293.124, 293.4685) "Complainant" means a person who files a complaint with the Secretary of State pursuant to NAC 293.515.
(Added to NAC by Sec'y of State by R077-03, eff. 12-4-2003)

NAC 293.510 "Respondent" defined. (NRS 293.124, 293.4685) "Respondent" means a state or local election official against whom a complaint is filed pursuant to NAC 293.515.
(Added to NAC by Sec'y of State by R077-03, eff. 12-4-2003)

NAC 293.515 Filing; form; delivery of copy to respondents. (NRS 293.124, 293.4685)
1. A person who believes that a violation of Title III of the Help America Vote Act of 2002, Public Law 107-252, 42 U.S.C. §§ 15481 to 15502, inclusive, has occurred, is occurring or is about to occur may file a complaint with the Office of the Secretary of State.
2. A complaint filed pursuant to subsection 1 must:
(a) Be in writing, notarized and signed and sworn by the complainant. If the Secretary of State prescribes a form for the complaint, the complaint must be filed on that form.
(b) Provide the name of each respondent and a concise statement of the facts of the alleged violation of 42 U.S.C. §§ 15481 to 15502, inclusive.
(c) Be filed in the Office of the Secretary of State in Carson City:
(1) Not later than 60 days after the occurrence of the action or event that forms the basis for the complaint or for the belief of the complainant that a violation of 42 U.S.C. §§ 15481 to 15502, inclusive, is about to occur; or
(2) Not later than 60 days after the complainant knew or, with the exercise of reasonable diligence, should have known of the action or event that forms the basis for the complaint or for the belief of the complainant that a violation of 42 U.S.C. §§ 15481 to 15502, inclusive, is about to occur,
➥ whichever is later.
3. The complainant shall mail or deliver a copy of the complaint to each respondent not later than the date on which the complaint is filed.
(Added to NAC by Sec'y of State by R077-03, eff. 12-4-2003)

NAC 293.520 Review; dismissal and refiling. (NRS 293.124, 293.4685)
1. The Secretary of State or his designee will review each complaint filed pursuant to NAC 293.515 to determine whether the complaint:
(a) States a violation of 42 U.S.C. §§ 15481 to 15502, inclusive; and
(b) Complies with the requirements of NAC 293.515.
2. If a complaint fails to state a violation of 42 U.S.C. §§ 15481 to 15502, inclusive, or does not comply with the requirements of NAC 293.515, the complaint will be dismissed without further action and notice of the dismissal will be provided to the complainant.
3. Except as otherwise provided in subsection 4, a complainant whose complaint has been dismissed pursuant to this section may refile the complaint within the time set forth in paragraph (c) of subsection 2 of NAC 293.515.
4. A complainant whose complaint has been dismissed for failure to state a violation of 42 U.S.C. §§ 15481 to 15502, inclusive, may refile the complaint only one time.
(Added to NAC by Sec'y of State by R077-03, eff. 12-4-2003)

NAC 293.525 Consolidation; official record. (NRS 293.124, 293.4685)
1. The Secretary of State may consolidate complaints filed pursuant to NAC 293.515 if the complaints relate to the same action or event or raise a common question of law or fact. The Secretary of State will notify all interested parties if two or more complaints have been consolidated.
2. The Secretary of State will compile and maintain an official record in connection with each complaint filed pursuant to NAC 293.515.
(Added to NAC by Sec'y of State by R077-03, eff. 12-4-2003)

NAC 293.530 Hearing: Request; date; notice; nature. (NRS 293.124, 293.4685)
1. A complainant may request in a complaint filed pursuant to NAC 293.515 that the Secretary of State hold a hearing on the complaint.
2. If a complainant requests a hearing in accordance with subsection 1, the Secretary of State or his designee will conduct a hearing on the complaint, unless the complaint is dismissed pursuant to NAC 293.520. The hearing will be held not sooner than 10 days but not later than 30 days after a request for a hearing has been made in accordance with subsection 1.
3. The Secretary of State will provide notice of the date, time and place of the hearing at least 10 business days before the hearing:
(a) By mailing a copy of the notice to the complainant, each respondent and any interested person who has requested in writing to be advised of the hearing;
(b) By posting a copy of the notice in a prominent place at the Office of the Secretary of State that is available to the general public; and
(c) By posting a copy of the notice on the website of the Secretary of State.
4. A hearing held pursuant to this section is not a contested case for the purposes of chapter 233B of NRS.
(Added to NAC by Sec'y of State by R077-03, eff. 12-4-2003)

NAC 293.535 Hearing: Hearing officer; procedure. (NRS 293.124, 293.4685)
1. Except as otherwise provided in this subsection, the Secretary of State or his designee will act as the hearing officer for a hearing held pursuant to NAC 293.530. If the Secretary of State is a respondent in the complaint, the Secretary of State will appoint a designee who is an independent professionally qualified person to act as the hearing officer.

2. The complainant, any respondent and any interested member of the public may appear at the hearing, in person or by teleconference, and testify or present relevant evidence in connection with the complaint. All testimony to be considered in the hearing will be taken under oath. The hearing officer may limit the testimony of witnesses, if necessary, to ensure that all interested persons may present their views. The hearing officer may recess the hearing and reconvene the hearing at a later date, time and place, which must be announced publicly at the hearing.

3. A complainant, respondent or other person who testifies or presents evidence at the hearing may, but need not, be represented by an attorney.

4. Cross-examination at the hearing will be permitted only at the discretion of the hearing officer, but a person may testify or present evidence at the hearing to contradict any other testimony or evidence presented at the hearing. If a person has already testified or presented evidence at the hearing and wishes to contradict testimony or evidence presented subsequently, that person is entitled to be heard again only at the discretion of the hearing officer, who may authorize the person to provide an oral or written response, or both.

5. The hearing will be recorded on audiotape by and at the expense of the Office of the Secretary of State. The recording will not be transcribed, but the Secretary of State, a local board of elections or any party to the hearing may obtain a transcript of the hearing at its own expense. If a board or party obtains a transcript of a hearing, the board or party shall file a copy of the transcript as part of the record and any other interested party may examine the copy of the transcript on record.

6. Any party to the proceeding may file a written brief or memorandum with the hearing officer not later than 5 business days after the conclusion of the hearing. The party shall serve a copy of any such written brief or memorandum on all other parties not later than the time the written brief or memorandum is filed with the hearing officer. No responsive or reply memorandum to such a brief or memorandum will be accepted without the specific authorization of the hearing officer.

7. At the conclusion of the hearing and after any brief or memorandum has been filed pursuant to subsection 6, the hearing officer will determine whether, by a preponderance of the evidence, a violation of 42 U.S.C. §§ 15481 to 15502, inclusive, has occurred, is occurring or is about to occur.

(Added to NAC by Sec'y of State by R077-03, eff. 12-4-2003)

NAC 293.540 Review and determination when no hearing requested. (NRS 293.124, 293.4685) If a complainant has not requested a hearing on a complaint filed pursuant to NAC 293.515, the Secretary of State or his designee will review the complaint and any accompanying record and determine whether, by a preponderance of the evidence, a violation of 42 U.S.C. §§ 15481 to 15502, inclusive, has occurred, is occurring or is about to occur. If the Secretary of State is a respondent in the complaint, the Secretary of State will appoint an independent professionally qualified person to act as his designee pursuant to this section.

(Added to NAC by Sec'y of State by R077-03, eff. 12-4-2003)

NAC 293.545 Remedial action or dismissal; issuance of final determination. (NRS 293.124, 293.4685)

1. If the Secretary of State or his designee, whether acting as a hearing officer pursuant to NAC 293.535 or reviewing a complaint pursuant to NAC 293.540, determines that a violation of 42 U.S.C. §§ 15481 to 15502, inclusive, has occurred, is occurring or is about to occur, the Secretary of State or his designee will provide the appropriate remedy, including, without limitation, an order to a respondent commanding the respondent to take specified action or prohibiting the respondent from taking specified action, with respect to a past or future election. Such a remedy will not include an award of money damages or attorney's fees.

2. If the Secretary of State or his designee, whether acting as a hearing officer pursuant to NAC 293.535 or reviewing a complaint pursuant to NAC 293.540, determines that a violation of 42 U.S.C. §§ 15481 to 15502, inclusive, has not occurred, is not occurring or is not about to occur, the Secretary of State or his designee will dismiss the complaint.

3. The Secretary of State or his designee will issue a final determination on a complaint made pursuant to subsection 1 or 2 in writing. The final determination will include an explanation of the reasons for the determination and, if applicable, the remedy selected.

4. Except as otherwise provided in NAC 293.550, a final determination of the Secretary of State or his designee on a complaint will be issued within 90 days after the complaint is filed, unless the complainant consents in writing to an extension. The final determination will be:

(a) Mailed to the complainant, each respondent and any interested person who has requested in writing to be advised of the final determination;

(b) Posted on the website of the Secretary of State; and

(c) Made available by the Secretary of State, upon request, to any interested person.

(Added to NAC by Sec'y of State by R077-03, eff. 12-4-2003)

NAC 293.550 Proceedings for alternative dispute resolution. (NRS 293.124, 293.4685)

1. If the Secretary of State or his designee does not render a final determination on a complaint filed pursuant to NAC 293.515 within 90 days after the complaint is filed, or within any extension period to which the complainant has consented, the Secretary of State will, on or before the fifth business day after the final determination was due to be issued, initiate proceedings for alternative dispute resolution by:

(a) Retaining an independent, professionally qualified person to act as an arbitrator, if the complainant consents in writing to his appointment as the arbitrator at the time of his appointment; or

(b) Designating in writing to the complainant the name of an arbitrator to serve on an arbitration panel to resolve the complaint. If proceedings for alternative dispute resolution are initiated pursuant to this paragraph, not later than 3 business days after the complainant receives such a designation from the Secretary of State, the complainant shall designate in writing to the Secretary of State the name of a second arbitrator. Not later than 3 business days after such a designation by the complainant, the two arbitrators so designated shall select a third arbitrator to complete the panel.

2. The arbitrator or arbitration panel may review the record compiled in connection with the complaint, including, without limitation, the audio recording of the hearing, any transcript of the hearing and any briefs or memoranda submitted by the parties but shall not receive any

additional testimony or evidence unless the arbitrator or arbitration panel requests that the parties present additional briefs or memoranda.

3. The arbitrator, or arbitration panel by a majority vote, shall determine the appropriate resolution of the complaint.

4. The arbitrator or arbitration panel shall issue a written resolution of the complaint not later than 60 days after the final determination of the Secretary of State was due pursuant to NAC 293.545. This period for issuing a written resolution will not be extended.

5. The final resolution of the arbitrator or arbitration panel will be:

(a) Mailed to the complainant, each respondent and any other person who requested in writing to be advised of the final resolution;

(b) Posted on the website of the Secretary of State; and

(c) Made available by the Secretary of State, upon request, to any interested person.

(Added to NAC by Sec'y of State by R077-03, eff. 12-4-2003)

NAC 293.555 Final determination or resolution not subject to appeal. (NRS 293.124, 293.4685) A final determination of the Secretary of State or his designee pursuant to NAC 293.535, 293.540 or 293.545 or the final resolution of an arbitrator or arbitration panel pursuant to NAC 293.550 is not subject to appeal in any state or federal court.

(Added to NAC by Sec'y of State by R077-03, eff. 12-4-2003)

NAC 293.560 Assistance in using procedures. (NRS 293.124, 293.4685) The Secretary of State will make reasonable accommodations to assist persons in using the procedures set forth in NAC 293.500 to 293.560, inclusive.

(Added to NAC by Sec'y of State by R077-03, eff. 12-4-2003)

APPENDIX B

Advisory Committee Biographies and Affiliations

2008 Amendment

The amended State Plan reflects changes from the previous State Plan to include the biography of the new Deputy Attorney General.

Name	*Title – Organization*	*Biography*
Ross Miller	**Secretary of State**	**Ross Miller was sworn into office on January 1st 2007. Mr. Miller is a third-generation Nevadan who previously served as a Deputy District Attorney in Clark County, Nevada. He holds a dual degree, in law (J.D.) and a Masters in Business Administration (M.B.A.), from Loyola Marymount University, in Los Angeles, and completed his undergraduate studies at Stanford University in California, earning a Bachelor of Arts major in English, with minors in Psychology and Political Science. While at Stanford, Mr. Miller served as a White House Intern, where he worked under then-Cabinet Liaison Thurgood Marshall, Jr.**
Nicole Lamboley	**Chief Deputy Secretary of State**	**Nicole Lamboley, Chief Deputy Secretary of State, was appointed by Secretary Ross Miller in January 2007. Ms. Lamboley has spent the past 18 years working in different capacities in the area of public and government affairs, about half of which have been spent working in the public sector. Prior to joining Secretary Miller's administration, she served as campaign manager for Attorney General Catherine Cortez Masto. Before that, Ms. Lamboley served as Legislative Affairs Manager for the City of Reno and was in charge of the city's state, federal and intergovernmental lobbying efforts. Her career also includes positions as Senior Regional Manager for the National Association of Manufacturers, Deputy Chief of Staff to former Nevada Governor Bob Miller, and Production Manager for the Harriman Communications' Center. Ms. Lamboley received her Bachelors degree from the University of Notre Dame and her Masters degree in Public Policy from Georgetown University.**

Name	*Title – Organization*	*Biography*
Thomas Allman	**Rights Advocate/Projects Coordinator, NDALC**	**Thomas Allman has been with Nevada Disability Advocacy & Law Center (NDALC) in Las Vegas as a Rights Advocate/Projects Coordinator for 4½ years where he has been the Help America Vote Act (HAVA) Coordinator. As NDALC's HAVA Coordinator, his agency's priority has been to assure full access to the electoral process so that people with disabilities can register to vote and vote with complete independence and privacy. Mr. Allman's duties include conducting voting rights outreach meetings to disability organizations, monitoring through site visits ADA compliance for polling places and providing monitoring and technical assistance of both State and County Election Departments to assure they are in compliance with HAVA sections as they relate to people with disabilities. His other agency duties involve coordinating the annual staff training and resolving many ADA compliance issues regarding access to private and government buildings. He has over 18 years working with people with disabilities including his over 7 years as Director of the Corrections Office for the Massachusetts Rehabilitation Commission in Boston. Both his Doctorate in Rehabilitation and Masters in Education in Counseling Psychology are from Boston College, while his J.D. is from Thomas Jefferson School of Law in San Diego.**
LaVonne Brooks	**Executive Director, High Sierra Industries (HSI) "**	**Bachelor and Master in Organizational Management and Development. First Hispanic Female appointed to serve as a City of Reno Planning Commissioner and appointed to serve as Vice Chair on the Governor's Task Force for Provider Rates in 2001 & 2002. Prior to joining HSI, LaVonne worked for an international consulting firm for 2 years and spent 14 years with a computer manufacturing company. She then owned her own training & development company specializing in improving performance through computer upgrades.**
Dan Burk	**Registrar of Voters, Washoe County**	**B.A. in Public Administration, U of North Texas (1970). M.A. in History, U of Northern Colorado (1977). Worked over 20 years in all aspects of election procedures in Oregon, from Director of Records and Elections, Liaison Officer in the Archive Division to membership on the committee for the implementation of the ADA (American Disabilities Act) regarding Oregon's standards for handicapped access to polling locations.**

Name	*Title – Organization*	*Biography*
Heidi Gansert	**Assemblywoman, Washoe Dist. 25**	**LEGISLATIVE SERVICE: Nevada Assembly, 2004-2007 (first elected November 2004) - two special and two regular sessions. Assistant Minority Leader, 2007; Minority Whip, 2005. 2007 Session: Member: Assembly Committee on Commerce and Labor; Elections, Procedures, Ethics, and Constitutional Amendments; and Ways and Means. AFFILIATIONS: Advisory Board Member, Angel Kiss Foundation; Advisory Committee Member, Nevada Organ and Tissue Donor Taskforce; Republican Women of Reno; Reno Area Triathletes. PERSONAL AND PROFESSIONAL ACHIEVEMENTS: Freshman Legislator of the Year, The Las Vegas Review Journal, 2004; Freshman Legislator of the Year, Peace Officers Research Association of Nevada; President, Legislative Leadership Academy, The Council of State Governments-WEST; Past Treasurer, College of Business Alumni Association, University of Nevada, Reno; Past President, Casa de Vida Auxiliary; Past Treasurer, Alliance to the Washoe County Medical Society.**
Jan Gilbert	**Northern Nevada Coordinator, PLAN**	**B.A. Economics from UCLA. She co-founded the Progressive Leadership Alliance of Nevada (PLAN). Prior to working on economic and environmental justice issues at the state legislature for 24 years, she began advocacy work for the League of Women Voters. She has received several Humanitarian Awards including the Women's role Model Award from the Attorney General and the Hannah Humanitarian Award from the Committee to Aid Abused Women. She also served on the Department of Human Resources Block Grant Commission for 7 years and was Chairman for two of those years.**
Barbara Griffin	**County Clerk, Douglas County**	**Barbara was first elected Clerk-Treasurer in 1986 but has worked in the Douglas County Clerk-Treasurer's office since November of 1973. Her key interest and commitment is the election process and the advancements currently being taken to allow voters easy accessibility to vote.**

Name	*Title – Organization*	*Biography*
Joshua Hicks	**General Counsel to the Governor**	**Joshua Hicks joined the Governor's office as General Counsel in January 2007. He previously served as a Senior Deputy Attorney General in the Nevada Department of Justice, representing the Secretary of State, the Nevada Tax Commission and the Nevada Department of Taxation. While at the Nevada Department of Justice, Josh argued cases in front of various Nevada District Courts, the Nevada Supreme Court, the United States District Court for the District of Nevada, the United States Bankruptcy Court for the District of Nevada, and the United States Court of Appeals for the Ninth Circuit. He was the lead attorney on eight published cases. Josh has also served as a law clerk to both the Nevada Supreme Court and the United States District Court for the District of Nevada. He received his Bachelor of Arts degree from Santa Clara University in 1995 and his Juris Doctorate from Santa Clara University in 1998. He has been a licensed attorney in Nevada since 1998. Hicks' wide ranging areas of practice include administrative and regulatory law, election law, state tax law, bill drafting, state personnel law, open meeting law, constitutional law, and public contracts. Josh lives in Reno and is a third-generation native Nevadan. He is married to KC Hicks, who works as a registered nurse in the oncology department at Renown Health.**

Name	*Title – Organization*	*Biography*
Ruben Kihuen	**Assemblyman, Clark District 11**	**Born: 1980 – Guadalajara, Jalisco, Mexico; Educated: Rancho High School, Diploma; University of Nevada, Las Vegas, B.S., Education; University of Oklahoma, Masters in Public Administration (completing). Hobbies/Special Interests: Reading, traveling, motivating youth, soccer, weight lifting and exercising, movies. LEGISLATIVE SERVICE: Nevada Assembly, 2007 (first elected November 2006). AFFILIATIONS: Board of Directors, Volunteer Center of Southern Nevada; Member, Clark County Community Development Advisory Committee; Member, North Las Vegas Citizens Advisory Committee; Volunteer, Professionals and Youth Building a Commitment (PAYBAC); Member, Latin Chamber of Commerce; Member, Nevada Hispanic Democratic Caucus; Member, National Association of Latino Elected and Appointed Officials. PERSONAL AND PROFESSIONAL ACHIEVEMENTS: Former Regional Representative to United States Senator Harry Reid; named DASHPAC National Young Leader, 2004; represented Nevada at the Next Generation Democratic Leaders Conference hosted by Senator Hillary Rodham Clinton, 2004; John F. Kennedy Award, Nevada State Democratic Party, 2006; Mexican Legend Award, Julio Cesar Chavez Educational Foundation, 2006; Community Activist of the Year, Familias Unidas de Nevada, 2005-2006; Outstanding Community Activist, City of Las Vegas, 2006; Grand Marshall, Hispanic Day Parade, 2006; Nevada High Schools Soccer Player of the Year, 1997-1998; worked as Field Organizer for the Democratic National Committee for political campaigns in Virginia, Texas, and Florida.**

Name	*Title – Organization*	*Biography*
Jennifer Lazovich	**Attorney, Kummer Kaempfer Bonner Renshaw & Ferrario**	**Jennifer Lazovich has been with the Firm since November 2001. She is a member of the Firm's Government Affairs department, and has been practicing in the areas of zoning, land use planning, and government affairs since 1998. Ms. Lazovich holds extensive experience in public affairs and government service. She worked in Washington, D.C. in the Finance Division of the National Republican Senatorial Committee. She also served internships in the Washington, D.C. office of United States Senator Harry Reid, and the Elections Division of the Nevada Secretary of State's Office. Ms. Lazovich was admitted to the Nevada Bar in 1998. She is a member of the American Bar Association, the State Bar of Nevada, and the Clark County Bar Association. She has spoken at the Lied Institute for Real Estate Studies and is a graduate of the Leadership Las Vegas program through the Las Vegas Chamber of Commerce, a member of the North Las Vegas Chamber of Commerce and a member of the North Las Vegas 2025 Visioning Committee. She has presented and published articles on issues covering zoning, land use planning, and the Southern Nevada Public Lands Management Act of 1998.**
Harvard "Larry" Lomax	**Registrar of Voters, Clark County**	**B.A. in English Literature, Stanford University (1967) and Master of Business Administration from University of North Dakota (1977). He was a Distinguished Graduate from the Air Force's Officer Training School and as a pilot flew over 4,000 hours in a 30 year career. He served on the Joint Staff in Washington D.C. and had the opportunity to work with legislators and staff members on a wide range of issues. He began his career as Assistant Registrar for Registrations in January of 1998 overseeing the training of 7,000 election board officers, processing of petitions, and election night logistics and was appointed Registrar of Voters with full responsibility for the County's Election Department in March of 1999.**

Name	*Title – Organization*	*Biography*
Nhu Nguyen	**Deputy Attorney General**	**Ms. Nguyen received her undergraduate degree from the University of California, Davis, and her law degree from the McGeorge School of Law. After graduating from law school, Ms. Nguyen was law clerk to the Honorable Judges Merlyn Hoyt and Dan Papez. Following her clerkships, Ms. Nguyen was a Staff Attorney at the Nevada Supreme Court. Ms. Nguyen is currently a Deputy Attorney General with the Nevada Attorney General's office in Carson City, NV.**
Richard Siegel, Ph.D.	**President, ACLU of Nevada"**	**Richard Siegel, Ph.D. is Professor Emeritus of Political Science at the University of Nevada Reno, President of the American Civil Liberties Union of Nevada and Chairperson of the Nevada Committee on Foreign Relations. He served on the Board of Directors of the National ACLU from 1975 to 1988. A former consultant for the United Nations in the area of human rights, he continues to teach human rights and world politics.**
Monica M. Simmons	**City Clerk, City of Henderson**	**Monica was appointed City Clerk in 1998 by the City Council following 20 years of service in the City Attorney's Office. During her 28-year tenure at the City, she has experienced unprecedented growth (from 23,567 to a current population of 265,000.) Monica serves on the Board of Directors for the international organization of Municipal Clerks and Administrators, representing 15 countries and a membership of 10,000. She was elected president of the Nevada Municipal Clerks' Association in 1994, and she is an active member with the League of Women Voters, Nevada Women's History Project, and the American Bar Association. Monica partnered with the University of Nevada/Reno to establish the first Nevada Municipal and County Clerks' accredited educational institute. At the request of the U.S. Department of State, she pursued the implementation of a full-service U.S. Passport Application Program in 2003. Monica continues her commitment to strengthening community relations through effective outreach programs, including Henderson's nationally recognized "Local Youth Vote" campaign and the recent implementation of "Vote Centers" during Henderson's Municipal Elections.**

APPENDIX C

Agenda for June 25, 2008 Advisory Committee Meeting

NEVADA STATE ADVISORY COMMITTEE

AGENDA

Meeting: **Wednesday, June 25, 2008**
9:00 a.m.

Room 105 Blasdel Building 209 E. Musser St. Carson City, Nevada	Suite 1400 Grant Sawyer Building 555 East Washington Street Las Vegas, Nevada

I. Introduction and Welcome
II. Roll Call
III. Amend State Plan to satisfy eligibility criteria for additional requirement payments*
IV. Comments of Committee Members
V. Public Comment
VI. Adjournment*

* Denotes items on which action may be taken

Notice of this meeting has been posted at the following locations:

Offices of the 17 County Clerks/Registrar of Voters
The Capitol Building, 101 N. Carson St., Carson City, Nevada
Secretary of State – Reno Office, 1755 East Plumb Ln., Ste. 231, Reno, NV 89502
Grant Sawyer State Office Building, 555 East Washington St., Las Vegas, Nevada
Nevada State Legislature, 401 S. Carson St., Carson City, Nevada
Nevada State Library and Archives, 100 N. Stewart St., Carson City, Nevada

Notice of this meeting was posted on the following website:
http://www.nvsos.gov

Posted: June 13, 2008

We are pleased to make accommodations for people with disabilities who wish to attend this meeting. Please notify the Elections Division at the Secretary of State's office by calling (775) 684-5705.

APPENDIX E

Temporary Statewide Voter Registration Maintenance Regulations
Effective 5/9/07 – 11/1/07

TEMPORARY REGULATIONS OF

THE SECRETARY OF STATE

LCB File No. _____

Effective: May 9, 2007

EXPLANATION – These regulations pertain to the statewide voter registration list required by NRS 293.675 and 42 U.S.C. 15483. Specifically, these regulations set out the procedures by which the statewide voter registration list is maintained and utilized.

EXPLANATION – Matter in italics is new; matter in brackets [~~omitted material~~] is material to be omitted.

AUTHORITY: NRS 293.124; 293.675.

A REGULATION relating to elections and providing other matters properly relating thereto.

Section 1. Chapter 293 of NAC is hereby amended by adding thereto the provisions set forth as sections 2 to 29, inclusive, of this regulation.

Sec. 2. Purpose.

1. The purpose of these temporary regulations is to codify standards and procedures for the processing, transmittal, and maintenance of voter registration records in a manner that conforms with the statewide voter registration list requirements set forth in the Help America Vote Act of 2002 (HAVA) (Pub. L. No. 107-252 (2002) 116 Stat. 1666, 42 U.S.C. § 15483) and NRS 293.675.

2. These regulations apply to the Secretary of State and all elections officials within the State of Nevada responsible for the processing, transmittal, and maintenance of voter registration records in this state.

Sec. 3. Statewide Voter Registration Database.

1. The statewide voter registration list will be maintained in a single, official, uniform, centralized and interactive computerized database administered and maintained by the Secretary of State. The database shall be known as "NevVoter."

2. NevVoter will contain the official and exclusive voter registration list to be used for the conduct of all state and federal elections in Nevada. NevVoter shall contain the name and pertinent registration information of every registered voter in Nevada.

3. Registration information held solely in a county or local database is not considered part of NevVoter unless and until that information is electronically submitted to NevVoter as prescribed by regulation.

4. Registration information maintained in NevVoter will be deemed official for a particular business day as of 9:00 a.m. each business morning. Mechanical and processing errors in the nightly electronic submitting process to NevVoter may affect the official status of registration information maintained in NevVoter for that particular business day.

5. Each county or local election official must maintain interactive and compatible software and protocols that allow a daily transfer of required registration information from County Election Management Systems to NevVoter.

Sec. 4. Definitions.

As used in this Chapter, the following words have the following definitions:
1. "Eligible voter" means any registered voter that is legally entitled to vote.

2. "Business day" means any calendar day except Saturday and Sunday or a legal holiday pursuant to Nevada law.

3. "Canceled" means the status of a voter whose registration has been canceled pursuant to law and is therefore ineligible to vote, including but not limited to convicted felons who have not had their civil rights restored and persons who have been adjudicated mentally incompetent. A voter on canceled status is deemed not registered to vote.

4. "Critical Eligibility Criteria" means voter information that, if missing, renders a person ineligible to vote. Such information includes: name; residence address; date of birth, signature; Nevada driver's license number, last four digits of social security number, unique identification number or indication that person has signed the affidavit prescribed by NRS 293.507(5).

5. "County Elections Management System" means any computerized application and database that manages voter registration and related election functions for a county, other than NevVoter.

6. "County Elections Official" means a county clerk or registrar of voters who is responsible for collecting, maintaining and processing voter registration data within a jurisdiction in the State of Nevada.

7. "Data Exchange Standards" means the document prepared by the Secretary of State that sets forth the technical rules and requirements of NevVoter.

8. "Deficient registration record" means those records submitted to NevVoter that do not meet the NevVoter data exchange standards set forth in the "Data Exchange Standards Document".

9. "Federal election" means any general, special, primary, or runoff election for any Federal office (President, Vice President, U.S. Senator or U.S. Representative), including presidential preference primaries.

10. "Full load file" means an electronic data file containing all county voter registration records. Such a file must adhere to the format standards and requirements set forth in the "Data Exchange Standards Document".

11. "Inactive voter" means a voter whose mail is returned from the address at which he registered to vote and has not provided a County Elections Official with a new residence address. Inactive voters retain the legal right to vote, but need not be mailed election material.

12. "List maintenance notices" mean any notices mailed to a registered voter for the purpose of verifying registration information about a voter and to determine a voter's ongoing eligibility to vote.

13. "Nevada driver's license" means a voter's Nevada driver's license or state identification number that has been issued by the Nevada Department of Motor Vehicles.

14. "NevValidator" means the computer interface by which an election official can compare a Nevada driver's license number or social security number on a voter's registration record with the voter's Nevada driver's license number or social security number recorded with the Nevada Department of Motor Vehicles and the Social Security Administration.

15. "NevVoter Procedures Manual" means the most recent version of the procedures manual prepared by the Secretary of State for use by County Election Officials in the administration of NevVoter.

16. "Official Identification" means the forms of proof of residency and identity required by NRS 293.517.

17. "P-17" means the status for a voter who was under age 18 at the time his voter registration was submitted, but who will be age 18 or older by election day and who has met all other legal requirements to vote.

18. "Pending" means the status for a voter who has submitted a voter registration application that is missing certain information or has incorrect required information and includes:

(a) "Active Pending" means a voter with certain registration information that needs to be confirmed but who has otherwise provided all critical eligibility criteria, or a voter who is required to provide some type of identification before voting but who is otherwise is still eligible to vote; and

(b) "Fatal Pending" means a voter who is missing critical eligibility criteria and who is ineligible to vote until the missing information is submitted to the appropriate County Elections Official.

19. "Registration record" means electronically stored data associated with an individual registered voter.

20. "Social security number" means the last four digits of a voter's social security number issued by the Social Security Administration.

21. "Voided" means the status of a voter whose registration information has been declared void pursuant to law and is therefore ineligible to vote. A voter on voided status is deemed not registered to vote.

22. "Voting History" means the electronic record of each time a voter participates in a state or Federal election.

23. "Active Voter" means an eligible voter whose residence address is current

Sec. 5. Official Statewide Voter Registration List.

1. A County Elections Official shall submit the voter registration information required by the Data Exchange Standards Document for his respective county to NevVoter in accordance with Section 12.

2. The official statewide voter registration list for Federal elections shall be maintained in NevVoter. County Elections Officials must use the NevVoter list to determine eligibility to vote, issuance of ballots, whether or not to count a provisional ballot, and for any other election related functions.

3. For the purposes of establishing the official voter registration list for a Federal election and determining voter eligibility to vote in that election, including determining the validity of any provisional ballot cast in that election, the Secretary of State shall archive a copy of all eligible voters in NevVoter on the 19th day prior to an election. No changes may be made to the archived records prior to the upcoming election except under the following circumstances:

(a) New or updated voter registration data received pursuant to the production and filing of a certified copy of a judgment of a court of competent jurisdiction directing registration to be made;

(b) Voter registration data regarding a voter determined by the Secretary of State or a County Elections Official to have been legally registered to vote as of the close of registration; or

(c) Voter registration data submitted pursuant to NRS 293.502.

4. County Election Officials shall continue to submit information to NevVoter after the 19th day prior to an election but any such records shall not be included in the archived list for the upcoming election created pursuant to subsection 3.

5. The Secretary of State shall prepare an official statewide voter registration list for the upcoming election for distribution to each County Election Official from the archived records created pursuant to subsection 3 and which must be consistent with pollbooks, rosters, master lists, and posting logs generated from a County Elections Management System for use in the upcoming election and for all other official election purposes.

6. Tthe Secretary of State shall prepare a final official statewide voter registration list for use in the upcoming election which reflects the archived records created pursuant to subsection 3, along with any permitted changes to those records, for distribution to each County Election Official and which must be consistent with pollbooks, rosters, master lists and posting logs generated from a County Elections Management System for use on the upcoming election day and for all other official election purposes.

7. Within 45 days of the date the election is certified, a County Elections Official must submit a full load file which includes the Voting History for each voter in a County Election Management System. The Secretary of State shall thereafter update the list created pursuant to subsection 6 with the Voter History of all eligible voters, and the list shall then be archived and preserved.

Sec. 6. Status of Voters in NevVoter.

1. Every person in NevVoter shall be assigned a status that will be used to determine eligibility to vote in an election.

2. Persons with "active," or "inactive" status shall be considered eligible to vote.

3. Persons with "p-17" status shall be considered eligible to vote in any election that takes place on or after that person's eighteenth birthday.

4. Persons with "void" or "cancelled" or "pend" status shall be considered ineligible to vote. A person with any such status may be placed on a different status up to the date of the election if a County Election Official determines pursuant to law that the person's status should be changed, and that change is thereafter made to a County Election Management System and submitted to NevVoter.

5. "Active" and "fatal pends", as defined in Section 4(18) are category statuses not appearing in NevVoter, but which may appear in local election management systems.

Sec. 7. Action Required.

1. A County Elections Official who receives a notice from the Secretary of State or another County Elections Official requesting a change to, or cancellation of, or verification of, a voter's registration record shall commence the requested action, including sending any required

notices, within five (5) calendar days after receipt of the notice. A County Elections Officials shall undertake all reasonable and legally required actions to research and comply with the requested action. A County Elections Official shall follow the procedures set forth in the NevVoter Procedures Manual.

2. In the event that a County Elections Official is required by law to provide a notice to a voter in order to comply with the requested action, a County Elections Official must complete the requested action and submit a fully complete and updated full load file to NevVoter within thirty (30) calendar days of the date the County Elections Official receives the notice set forth in subsection 1 of this section.

3. In the event that a County Elections Official is not required by law to provide a notice to a voter in order to comply with the requested action, including but not limited to data entry errors, a County Elections Official must complete the requested action and submit a fully complete and updated full load file to NevVoter within ten (10) calendar days of the date the County Elections Official receives the notice set forth in subsection 1 of this section.

4. A County Elections Official shall give priority to all notices received from the Secretary of State pursuant to subsection 1 of this section which pertain to voter registration applications submitted on and after January 1, 2006.

5. A County Elections Official who receives a notice pursuant to subsection 1 of this section before the date of an election must expedite and complete the required action by the date of the election.

6. A County Elections Official may, in his discretion, resolve any data entry errors regardless of how or by whom such errors were generated.

Sec. 8. Data Exchange Standards.

1. The Secretary of State shall regularly check and identify records that are not compliant with the Data Exchange Standards Document. County Elections Officials must correct deficient registration records in accordance with Section 7.

2. Except as provided in Section 5, County Elections Officials must submit all registration records listed in the Data Exchange Standards Document to NevVoter. Such records shall adhere to proper format as noted in the Data Exchange Standards Document.

3. The Secretary of State shall transmit registration records, notices, and other information regarding NevVoter to County Elections Officials each night.

4. Each County Elections Official must access NevVoter each business day to obtain the most current voter registration information.

5. The Data Exchange Standards Document may be accessed by elections officials by contacting the Secretary of State's Office.

Sec. 9. County Elections Management System Requirements.

Each elections official shall maintain a County Elections Management System that is able to submit information required by the Data Exchange Standards Document to NevVoter in accordance with Section 5 and Section 12. The Elections Management Systems shall also maintain and process all of the following information:

1. The voter's Nevada driver's license number, or for voters without a Nevada driver's license number, the last four digits of the voter's social security number, or for voters without a Nevada driver's license or a social security number, a record of whether the voter signed the affidavit required by NRS 293.507(5);

2. Whether the voter is an Active voter or whether critical eligibility criteria are missing;

3. Voting history of each registered voter in the county in which the elections official conducts and administers the elections;

4. Whether any voter failed to provide the requisite identification at the time his voter registration application was submitted;

5. Whether any voter registered by mail after January 1, 2006 and has not previously voted in a federal election;

6. The date and type for each mailing list maintenance notice sent to a voter, whether the voter to whom the list maintenance notice was directed responded to the notice, and any resulting updates to voter registration records;

7. For a voter who is listed in an Elections Management System as an inactive voter, the reason for the change in status to inactive voter and the date of the change;

8. For a voter who is listed in an Elections Management System as having a cancelled or void registration, the reason for the change in status to cancelled or void and the date of the change;

9. For a voter who is listed in an Elections Management System as having a pending registration, the reason for the pending status; and

10. The voter's unique identifier assigned pursuant to Section 29 of these regulations.

Sec. 10. Critically Deficient Registration Records.

A registration record submitted for the purposes of updating NevVoter that does not contain critical eligibility criteria shall be placed on fatal pending status. A County Elections Official shall take all reasonable steps to correct and resubmit the voter's registration record to NevVoter in accordance with the time periods and procedures set forth in Section 7 of these

regulations, and at the latest, by the Wednesday before an election. A voter who is the subject of the critically deficient registration record shall not be deemed eligible to vote until the deficient registration record is corrected, resubmitted to and accepted by NevVoter. This Section shall not preclude the right of an individual to cast a provisional ballot.

Sec. 11. Verification of Nevada Driver's License Numbers on Registration Applications Submitted on or After January 1, 2006.

1. Each business day the Secretary of State shall compare driver's license numbers for each voter in NevVoter with the driver's license data file from the Nevada Department of Motor Vehicles in order to match Nevada driver's license numbers for all registered voters in NevVoter.

2. The Secretary of State shall immediately notify a County Elections Official of any voters who the Secretary of State determines have an unmatched driver's license number as the result of the process in subsection 1 of this section.

3. A County Elections Official noticed pursuant to subsection 2 of this section shall take the necessary steps to correct and resubmit the voter's registration record to NevVoter in accordance with the time periods and procedures set forth in Section 7 of these regulations and the NevVoter Procedures Manual.

4. If, as a result of the procedure set forth in subsection 3 of this section, a County Elections Official determines that an unmatched driver's license number was the result of a data entry error, the County Elections Official shall correct the error and submit a full load file to NevVoter.

5. If a County Elections Official is unable to obtain a driver's license number as the result of the procedure set forth in subsection 3 of this section, a voter shall not be allowed to cast any ballot except a provisional ballot unless the voter has provided his social security number or has signed the affidavit required by NRS 293.507(5). A voter who provides proof of his correct driver's license number at a polling place shall be considered to have provided the correct number as of the last day to register for that election. A County Elections Official shall enter the correct number into a County Elections System and submit a full load file to NevVoter at the next time a full load file is required by these regulations.

6. The provisions of this section apply only to voter registration applications submitted on and after January 1, 2006.

7. The provisions of this section do not apply if a voter has provided a social security number that has been verified pursuant to Section 17 or if a voter has signed the affidavit required by NRS 293.507(5).

8. All voter registration applications submitted on and after January 1, 2006 and before an election must be processed by the date of the close of registration for that election.

Sec. 12. Full Load Files.

Except as provided in Section 5, or otherwise requested by the Secretary of State, County Elections Officials shall submit a full load file to NevVoter at least once every twenty-four hours, each business day.

Sec. 13. Updating NevVoter with New Registration Records and Changes to Existing Registration Records.

Except as provided in Section 5, whenever a County Elections Official receives a new registration record or a change to an existing registration record or makes a change to an existing registration record, whether in response to a notice from the Secretary of State or otherwise, the County Elections Official shall process such information and transmit a full load file to NevVoter in accordance with Section 12 on the same business day in which the changes are made to the County Elections Management System. Additionally, the County Elections Official shall keep a record of all changes made.

Sec. 14. State Death Records.

1. The Secretary of State shall compare all voter registration records with records of deceased persons from the Department of Health and Human Services each time the Department of Health and Human Services updates its records of deceased persons.

2. Whenever the Secretary of State receives new records of deceased persons from the Department of Health and Human Services the records shall be compared to the voter registration records in NevVoter to identify potential matches.

3. Upon identifying potential matches, the Secretary of State shall transmit notices of the potential matches to the appropriate County Elections Officials.

4. A County Elections Official shall correct and resubmit the voter's registration record to NevVoter in accordance with the time periods and procedures set forth in Section 7 of these regulations and the NevVoter Procedures Manual.

5. If a match is confirmed by the County Elections Official, the County Election Management System shall be updated accordingly and a full load file shall be submitted to NevVoter in accordance with Section 7 and Section 12. If a match is confirmed, a County Elections Official may consider the notice sent by the Secretary of State pursuant to subsection 3 of this section to be a sufficient notice to cancel a registration pursuant to NRS 293.540(1).

6. If a match is not confirmed by the County Elections Official, the County Elections Official shall notify the Secretary of State and shall not list the voter as deceased in a County Election Management System.

Sec. 15. Felony Records.

1. Each County Elections Official shall compare all voter registration records with records of convicted felons received from any law enforcement agency or from the Secretary of State whenever the County Elections Official receives updated felony records.

2. Whenever the County Election Official receives new records of convicted felons the records shall be compared to the voter registration records in County Elections Management System to identify potential matches.

3. Upon identifying potential matches, the County Election Official shall determine whether the convicted felon has had his right to vote restored pursuant to NRS 213.090, 213.155, 213.157 or 293.540.

4. If a County Election Official determines that a convicted felon has had his right to vote restored, the County Election Management System shall be updated accordingly and a full load file shall be submitted to NevVoter in accordance with Section 7 and Section 12.

5. If a County Elections Official determines that a convicted felon has not had his right to vote restored, the County Elections Official shall cancel the registration of that person in a County Election Management System and a full load file shall be submitted to NevVoter in accordance with Section 7 and Section 12.

Sec. 16. Duplicate Registration Records.

1. Each business day, the Secretary of State shall conduct checks within the NevVoter statewide registration list to identify potential duplicate registrations for the same voter within that list, based on established rotating criteria. Upon identification of potential duplicate registration records, the Secretary of State shall automatically send an electronic notice to the county or counties with the record or records created prior to the latest date.

2. A County Elections Official noticed pursuant to subsection 1 of this section shall correct and resubmit the voter's registration record to NevVoter in accordance with the time periods and procedures set forth in Section 7 of these regulations and the NevVoter Procedures Manual.

3. If a County Election Official confirms that duplicate registrations exist, all but the most current registration shall be cancelled in a County Election Management System and a full load file shall be submitted to NevVoter in accordance with Section 7 and Section 12. If a duplicate registration is confirmed, a notice sent pursuant to subsection 1 of this section shall operate as a cancellation notice for purposes of NRS 293.527.

Sec. 17. Verification of Social Security Numbers Listed on Registration Applications Submitted on or After January 1, 2006.

1. Each business day, the Secretary of State shall compare social security numbers for each voter in NevVoter with the social security number data file from the Social Security Administration in order to match social security numbers for all registered voters in NevVoter.

2. The Secretary of State shall immediately notify a County Elections Official of any voters who the Secretary of State determines have an unmatched social security number as the result of the process in subsection 1 of this section.

3. A County Elections Official noticed pursuant to subsection 2 of this section shall take the necessary steps to correct and resubmit the voter's registration record to NevVoter in accordance with the time periods and procedures set forth in Section 7 of these regulations and the NevVoter Procedures Manual.

4. If, as a result of the procedure set forth in subsection 3 of this section, a County Elections Official determines that an unmatched social security number was the result of a data entry error, the County Elections Official shall correct the error and submit a full load file to NevVoter.

5. If a County Elections Official is unable to obtain a social security number as the result of the procedure set forth in subsection 3 of this section, a voter shall not be allowed to cast any ballot except a provisional ballot unless the voter has provided a Nevada driver's license number or has signed the affidavit required by NRS 293.507(5). A voter who provides proof of the correct social security number at a polling place shall be considered to have provided the correct number as of the last day to register for that election. A County Elections Official shall enter the correct number into a County Elections System and submit a full load file to NevVoter at the next time a full load file is required by these regulations.

6. The provisions of this section apply only to voter registration applications submitted on or after January 1, 2006.

7. The provisions of this section do not apply if a voter has provided a Nevada driver's license number that has been verified pursuant to Section 11 or if a voter has signed the affidavit required by NRS 293.507(5).

8. All voter registration applications submitted on and after January 1, 2006 and before an election must be processed by the date of the close of registration for that election.

Sec. 18. Voting History.

A County Elections Official shall submit to the Secretary of State the Voter History of all voters who cast a ballot in each statewide and Federal election by the 45th day after each election.

Sec. 19. Certification of Elections Official.

By submitting a full load file to NevVoter, a County Election Official certifies that the information contained therein is accurate, is in compliance with State and Federal law, and was submitted to NevVoter via secure file transfer protocols and in accordance with applicable law.

Sec. 20. Obligations of State and Local Election Officials.

Any voter registration information obtained by a County Elections Official shall be electronically entered into the County Elections Management System and into NevVoter on an expedited basis at the time the information is provided. The Secretary of State shall provide such support as may be required so County Election Officials are able to submit any voter registration information into NevVoter.

Sec. 21. Computerized List Maintenance and Conduct.

1. A County Election Official is responsible for daily and routine upkeep and maintenance of all voter registration information in an Election Management System and any information that is submitted to NevVoter. Daily and routine upkeep must include efforts to identify and remove ineligible voters from the active voter rolls.

2. Routine upkeep and maintenance must be done in a manner that ensures that the name of each eligible and registered voter appears in NevVoter.

Sec. 22. Pollbooks, Rosters, Master Lists and Posting Logs.

A County Elections Official may print pollbooks, rosters, master lists and posting logs for use at a polling place from an Election Management System so long as the voter information on the Election Management System is identical to the voter information maintained in NevVoter as of the date on which the roster will be used and so long as the County Elections Official has made all certifications required by these regulations.

Sec. 23. Reports.

A County Election Official shall submit to the Secretary of State all reports generated by a County Election Official pursuant to the Data Exchange Standards Document.

Sec. 24. Security.

1. All transmissions of data to and from a County Elections Management System and NevVoter must be secured pursuant to the standards set forth in the Data Exchange Standards Document.

2. A County Elections Official shall ensure that any voter registration information that is deemed confidential by law is not disclosed to unauthorized personnel in any transmissions to and from NevVoter or NevValidator.

3. NevVoter and NevValidator may only be utilized by authorized personnel for election purposes. The Secretary of State may establish minimum criteria, including but not limited to background checks, for any such authorized personnel.

Sec. 25. Confidential Address Program.

All voter records that are confidential pursuant to NRS 293.5002 shall be maintained in a manner ensuring these records are accessible only to authorized personnel and shall not be accessible to the public. Confidential voter records under this section shall be maintained by County Election officials and the Secretary of State will periodically verify status of confidential address program participants as requested by the Secretary of State.

Sec. 26. Confidential Voter Addresses and Telephone Numbers.

A County Elections Management System shall note any voter who has requested that his address and telephone number be kept confidential pursuant to NRS 293.558. Such a notation shall be submitted to NevVoter as part of a full load file.

Sec. 27. County Elections Official Override.

A County Elections Official may override a notice from the Secretary of State or another County Elections Official sent pursuant to Sections 11, 14, 15, 16 or 17 if both the County Elections Official and the Secretary of State agree that the notice was sent in error. In the event of an override, the County Elections Official must maintain a detailed description of the reason for the override.

Sec. 28. Voters Who Are Exempt From Identification Requirements.

If a voter is exempt by law from a requirement to show identification at a polling place, such an exemption shall be noted in a County Elections Management System and shall be included in a submission of any full load file.

Sec. 29. Unique Identifier.

Each voter in NevVoter shall be assigned a unique identification number. The unique identification number shall be assigned pursuant to the procedures set forth in the Nevada Procedures Manual and the Data Exchange Standards.

APPENDIX F

Attestation That Nevada is in Compliance with Federal Laws as They Apply to HAVA

I, Ross Miller, Nevada Secretary of State and the chief election official for the State, certify that I have reviewed the Federal HAVA requirements and that the State of Nevada is in compliance with the applicable requirements. I further attest that the State of Nevada will remain in compliance will all applicable Federal laws upon receipt of requirements payments.

_____

Signature

_____

Print Name

_____

Date

[FR Doc. E8–26917 Filed 11–14–08; 8:45 am]

BILLING CODE 6820–KF–C

Federal Register

Monday,
November 17, 2008

Part IV

Department of Housing and Urban Development

24 CFR Parts 203 and 3500

Real Estate Settlement Procedures Act (RESPA): Rule To Simplify and Improve the Process of Obtaining Mortgages and Reduce Consumer Settlement Costs; Final Rule

DEPARTMENT OF HOUSING AND URBAN DEVELOPMENT

24 CFR Parts 203 and 3500

[Docket No. FR–5180–F–03]

RIN 2502–AI61

Real Estate Settlement Procedures Act (RESPA): Rule To Simplify and Improve the Process of Obtaining Mortgages and Reduce Consumer Settlement Costs

AGENCY: Office of the Assistant Secretary for Housing—Federal Housing Commissioner, HUD.

ACTION: Final rule.

SUMMARY: This final rule amends HUD's regulations to further RESPA's purposes by requiring more timely and effective disclosures related to mortgage settlement costs for federally related mortgage loans to consumers. The changes made by this final rule are designed to protect consumers from unnecessarily high settlement costs by taking steps to: improve and standardize the Good Faith Estimate (GFE) form to make it easier to use for shopping among settlement service providers; ensure that page 1 of the GFE provides a clear summary of the loan terms and total settlement charges so that borrowers will be able to use the GFE to identify a particular loan product and comparison shop among loan originators; provide more accurate estimates of costs of settlement services shown on the GFE; improve disclosure of yield spread premiums (YSPs) to help borrowers understand how YSPs can affect borrowers' settlement charges; facilitate comparison of the GFE and the HUD–1/HUD–1A Settlement Statements; ensure that at settlement borrowers are aware of final costs as they relate to their particular mortgage loan and settlement transaction; clarify HUD–1 instructions; expressly state that RESPA permits the listing of an average charge on the HUD–1; and strengthen the prohibition against requiring the use of affiliated businesses.

This final rule follows a March 14, 2008, proposed rule and makes changes in response to public comment and further consideration of certain issues by HUD. In addition, this rule provides for an appropriate transition period. Compliance with the new requirements pertaining to the GFE and settlement statements is not required until January 1, 2010. However, certain provisions are to be implemented upon the effective date of the final rule.

DATES: *Effective Date:* This rule is effective on January 16, 2009.

FOR FURTHER INFORMATION CONTACT: Ivy Jackson, Director, or Barton Shapiro, Deputy Director, Office of RESPA and Interstate Land Sales, Office of Housing, Department of Housing and Urban Development, 451 7th Street, SW., Room 9158, Washington, DC 20410–8000; telephone number 202–708–0502. For legal questions, contact Paul S. Ceja, Assistant General Counsel; Joan Kayagil, Deputy Assistant General Counsel; or Rhonda L. Daniels, Attorney-Advisor, for GSE/RESPA, Department of Housing and Urban Development, 451 7th Street, SW., Room 9262, Washington, DC 20410–0500; telephone number 202–708–3137. These telephone numbers are not toll-free. Persons with hearing or speech impairments may access these numbers through TTY by calling the toll-free Federal Information Relay Service at 800–877–8339.

SUPPLEMENTARY INFORMATION:

Background

On March 14, 2008 (73 FR 14030), HUD published a proposed rule (March 2008 proposed rule) that submitted for public comment changes to HUD's regulations designed to improve certain disclosures required to be provided under RESPA (12 U.S.C. 2601–2617). The RESPA disclosure requirements apply in almost all transactions involving mortgages that secure loans on one-to four-family residential properties. HUD's regulations implementing the RESPA requirements are codified in 24 CFR part 3500. The revisions to the regulations adopted by HUD in this final rule are intended to make the process of obtaining mortgage financing clearer and, ultimately, less costly for consumers.

The preamble of the March 2008 proposed rule presents an overview of the statutory requirements under RESPA, as well as a detailed account of HUD's efforts to initiate regulatory changes commencing in 2002. HUD refers the reader to the March 2008 proposed rule for a detailed description of the background of this rulemaking. The principles that guided HUD in the development of this rule are also included in the March 2008 proposed rule.

The preamble to this final rule highlights some of the more significant changes made at this final rule stage in response to public comment and upon further consideration of certain issues by HUD, summarizes the public comments received on the March 2008 proposed rule, and provides HUD's response to those comments. The following table of contents is provided to assist the reader in identifying where certain topics are discussed in this preamble. This final rule is also accompanied by a final regulatory impact analysis and regulatory flexibility analysis, which are addressed in sections VIII and IX of this preamble.

Table of Contents

I. Significant Changes from March 2008 Proposed Rule
II. Overview of Commenters
III. GFE and GFE Requirements—Discussion of Public Comments
A. Overall Comments on the Proposed Required GFE Form
B. Changes to Facilitate Shopping
1. New Definitions for ''GFE Application'' and ''Mortgage Application.''
2. Up-Front Fees That Impede Shopping
3. Introductory Language on the GFE Form
4. Terms on the GFE (Summary of Loan Details)
5. Period During Which the GFE Terms Are Available to the Borrower
6. Option to Pay Settlement Costs
7. Establishing Meaningful Standards for GFEs
a. Tolerances
b. Unforeseeable Circumstances
8. Lender Disclosure
9. Enforcement and Cure
10. Implementation Period
C. Lender Payments to Mortgage Brokers—Yield Spread Premiums (YSPs)
1. Disclosure of YSP on GFE
2. Definition of ''Mortgage Broker.''
3. FHA Limitation on Origination Fees of Mortgagees
IV. Modification of HUD–1/1A Settlement Statement
A. Overall Comments on Proposed Changes to HUD–1/1A Settlement Statement
B. Proposed Addendum to the HUD–1, the Closing Script
V. Permissibility of Average Cost Pricing and Negotiated Discounts—Discussion of Public Comments
A. Overview and Definition of ''Thing of Value''
B. Methodology for Average Cost Pricing
VI. Prohibition Against Requiring the Use of Affiliates—Discussion of Public Comments
VII. Technical Amendments
VIII. Regulatory Flexibility Act—Comments of the Office of Advocacy of the Small Business Administration
IX. Findings and Certifications

I. Significant Changes From March 2008 Proposed Rule

RESPA is a consumer protection statute, and, as further described in this preamble, consumer groups were, in general, very supportive of the basic goals and key components of the March 2008 proposed rule. For example, the National Consumer Law Center, in a joint comment with Consumer Action, the Consumer Federation of America, and the National Association of Consumer Advocates, stated, ''HUD has done an excellent job in moving the ball toward greater protection for consumers in the settlement process.'' In addition,

the Center for Responsible Lending, in its comment concluded: ''[W]e applaud HUD for addressing the challenge of reforming RESPA. We believe HUD's proposed GFE provides important improvements over existing requirements.''

HUD received adverse comments about many aspects of the proposed rule, primarily from mortgage industry representatives, including requests that HUD withdraw its proposal entirely or that HUD postpone its current efforts in order to work with the Federal Reserve Board to arrive at a joint regulatory approach. HUD takes these comments very seriously and appreciates the concerns raised by these commenters. HUD's view continues to be, however, that improvements in disclosures to consumers about critical information relating to the costs of obtaining a home mortgage, often the most significant financial transaction a consumer will enter into, are needed, and that such disclosures are a central purpose of RESPA. Most commenters—including consumers, industry representatives, and federal and state regulatory agencies—supported the concept of better disclosures in general, and commended both HUD's efforts and particular provisions in the proposed rule.

Moreover, given the current mortgage crisis, the foreclosure situation many homeowners are now facing because they entered into mortgage transactions that they did not fully understand, and the prospect that future homeowners may find themselves in this same situation, HUD believes that it is very important that the improvements in mortgage disclosures made by this final rule move forward immediately. Nevertheless, as noted in the preamble to the March 2008 proposed rule, HUD will continue to work with the Federal Reserve Board to achieve coordination and consistency between the Board's current regulatory efforts and HUD's requirements.

HUD has made many changes to the March 2008 proposed rule in response to public comment and further consideration of certain issues by HUD. Some of the provisions in the March 2008 proposed rule have been revised in this final rule and others have been withdrawn for further consideration. HUD believes that the result is a final rule that will give borrowers additional and more reliable information about their mortgage loans earlier in the application process, and will better assure that the mortgage loans to which they commit at settlement will be the loans of their choice. At the same time, in recognition of the concerns raised by industry commenters about the need for sufficient time for the industry to make systems and operational changes necessary to meet the requirements of the new rule, the final rule provides that the new GFE and HUD–1 will not be required until January 1, 2010. However, certain other provisions of the rule will take effect 60 days from the publication date of the final rule. The following are some of the most significant changes made at this final rule stage, and are discussed in more detail in the discussion of public comment.

- A GFE form that is shorter than had been proposed.
- Allowing originators the option not to fill out the tradeoff table on the GFE form.
- A revised definition of ''application'' to eliminate the separate GFE application process.
- Adoption of requirements for the GFE that are similar to recently revised Federal Reserve Board Truth-in-Lending regulations which limit fees charged in connection with early disclosures and defining timely provision of the disclosures.
- Clarification of terminology that describes the process applicable to, and the terms of, an applicant's particular loan.
- Inclusion of a provision to allow lenders a short period of time in which to correct certain violations of the new disclosure requirements.
- A revised HUD–1/1A settlement statement form that includes a summary page of information that provides a comparison of the GFE and HUD–1/1A list of charges and a listing of final loan terms as a substitute for the proposed closing script addition.
- Elimination of the requirement for a closing script to be completed and read by the closing agent.
- A simplified process for utilizing an average charge mechanism.
- No regulatory change in this rulemaking regarding negotiated discounts, including volume based discounts.

II. Overview of Commenters

The public comment period on the March 2008 proposed rule was originally scheduled to close on May 13, 2008. In response to numerous requests, including congressional requests, to extend the comment period, and HUD's desire to develop a better rule, HUD announced an extension of the comment period. This announcement was made on both HUD's Web site and by publication of a notice in the **Federal Register** on May 12, 2008 (73 FR 26953). At the close of the extended public comment period on June 12, 2008, HUD had received approximately 12,000 comments. Approximately two-thirds of the comments received were duplicative or repeat comments; i.e., individuals or organizations who submitted identical or virtually identical comments. For example, members of certain trade organizations, or employees of certain companies, frequently submitted identical comments.

HUD received comments from homeowners, prospective homeowners, organizations representative of consumers, and numerous industry organizations involved in the settlement process, including lending institutions, mortgage brokers, real estate agents, lawyers, title agents, escrow agents, closing agents and notaries, community development corporations, and major organizations representative of key industry areas such as bankers, mortgage bankers, mortgage brokers, realtors, and title and escrow agents, as well as from state and federal regulators.

HUD appreciates all those who took the time to review the March 2008 proposed rule and submit comments.

In addition to submission of comments, HUD representatives accepted invitations to participate in public forums and panel discussions about RESPA and HUD's March 2008 proposed rule. HUD also met, at HUD Headquarters or at the offices of the Office of Management and Budget (OMB), with interested parties, requesting meetings as provided by Executive Order 12866 (Regulatory Planning and Review), who highlighted for HUD and OMB areas of concern and support for various aspects of the rule.

All of this input contributed to HUD's decisions that resulted in this final rule.

HUD also received approximately 100 public comments that were submitted after the deadline. To the extent feasible, HUD reviewed late comments to determine if issues were raised that were not addressed in comments submitted by the deadline.

III. GFE and GFE Requirements—Discussion of Public Comments

A. Overall Comments on the Proposed Required GFE Form

Proposed Rule. HUD proposed a four-page GFE form. The first page of the GFE included a summary chart with key terms and information about the loan for which the GFE was provided, including initial loan balance; loan term; initial interest rate; initial amount owed for principal, interest, and any mortgage insurance; rate lock period; whether the interest rate can rise; whether the loan balance can rise; whether the monthly

amount owed for principal, interest, and any mortgage insurance can rise; whether the loan has a prepayment penalty; whether the loan has a balloon payment; and whether the loan includes a monthly escrow payment for property taxes and possibly other obligations. The first page of the form also included information regarding the length of time the interest rate for the GFE was valid; the length of time the other settlement charges were valid; information about when settlement must occur if the borrower proceeds with the loan; and information concerning how many days the interest rate must be locked before settlement. At the bottom of the first page, the GFE included a summary of the settlement charges. The adjusted origination charges listed on the second page, along with the charges for all other settlement charges listed on the second page, would have been totaled and listed on this page.

The second page of the GFE included a listing of estimated settlement charges. The loan originator's service charge would have been required to be listed at the top of page two, and the credit or charge (points) for the specific interest rate chosen would have been required to be subtracted or added to the service charge to arrive at the adjusted origination charge, which would have been shown on the top of page two. Page two of the GFE also would have required an estimate for all other settlement services. The GFE included categories for other settlement services including: Required services that the loan originator selected; title services and lender's title insurance; required services that the borrower would have been able to shop for; government recording and transfer charges; reserves or escrow; daily interest charges; homeowner's insurance; and optional owner's title insurance. The GFE would have required these charges to be subtotaled at the bottom of page two. The sum of the adjusted origination charges and the charges for all other settlement services would have been required to be listed on the bottom of page 2.

The third page of the GFE would have required information concerning shopping for a loan offer. In addition, page three would have included information about which settlement charges could change at settlement, and by how much such charges could change. Page 3 also would have required the loan originator to include information about loans for which a borrower would have qualified that would increase or decrease settlement charges, with a corresponding change in the interest rate of the loan. (See section III.B.6 of this preamble below.)

The fourth page of the GFE included a discussion of financial responsibilities of a homeowner. The loan originator would have been required to state the annual property taxes and annual homeowner's flood, and other required property protection insurance, but would not have been required to state estimates for other charges such as annual homeowner's association or condominium fees. The GFE included a section that advised borrowers that the type of loan chosen could affect current and future monthly payments. The proposed GFE also indicated that the borrower could ask the loan originator for more information about loan types and could look at several government publications, including HUD's Special Information Booklet on settlement charges, Truth in Lending Act (TILA) disclosures, and consumer information publications of the Federal Reserve Board. The March 2008 proposed rule invited comments on possible additional ways to increase consumer understanding of adjustable rate mortgages.

Page 4 also would have included information about possible lender compensation after settlement. In addition, page 4 would have included a shopping chart to assist the borrower in comparing GFEs from different loan originators and information about how to apply for the loan for which the GFE had been provided.

Comments

Consumer Representatives

Consumer representatives generally supported the proposed standardized GFE, while offering specific recommendations for improvement. The National Community Reinvestment Coalition recommended inclusion of the annual percentage rate (APR) on the GFE. The Center for Responsible Lending (CRL) stated that it believed that the proposed GFE has the potential to significantly improve current disclosure requirements because it offers a standardized shopping tool with better linkages to the HUD–1, requires that terms be binding, and takes important steps toward trying to alert consumers to the risky features of their loans. However, according to CRL, most consumers will not have the capacity to absorb everything in a four-page GFE and therefore it proposed an alternative two-page GFE.

CRL noted that a new GFE should ensure that consumers have the best chance possible to understand the riskiest features of their loans. CRL commended HUD for adding several features that highlight risk to the first page of the GFE: The prepayment penalty, the balloon payment, the maximum possible loan balance, the maximum monthly payment, and whether certain fees are escrowed. CRL stated that knowing the maximum monthly payment of principal, interest, and mortgage insurance is critical to the consumer's ability to determine whether or not the loan is sustainable. It recommended that other features be added to page 1, including increased emphasis on total monthly payment. It also recommended that the monthly payment amount include an estimate of property taxes, property insurance, and the other charges listed on page 4 of the proposed GFE as one total line item, on page 1.

CRL also recommended that page 1 of the GFE include the annual percentage rate (APR) instead of the note rate because the APR is the standardized measurement of loan cost in the industry, and because the APR captures the total cost of the loan. CRL further recommended that given that credit cost comprises the largest component of total loan cost, the form's emphasis on settlement costs should be reduced.

In addition, CRL recommended that the first page of the GFE also include information on the first possible date on which the interest rate can rise; an explanation of what prepayment penalties are and how they are triggered; simplified broker compensation; and notification that mortgage terms are negotiable. While CRL supported aggregating fees on page 2 of the GFE to promote mortgage loan shopping, it recommended that the tradeoff table on page 3 be revamped in order to force the rate/point tradeoff that it is intended to disclose.

The GFE proposed by CRL includes the APR, for reasons stated above. In addition, the GFE proposed by CRL includes the first date the interest rate can rise. CRL also included on page 1, ''estimated required additional housing expenses'' as well as ''total estimated maximum monthly housing costs.'' CRL stated that while it understands that consumers should not compare loans based on total estimated maximum monthly housing costs, CRL believes that it is critical that consumers, particularly those in the subprime market, begin evaluating their ability to afford the loan at the outset of the loan process. CRL's proposed GFE also includes a broader prepayment penalty disclosure than the prepayment penalty disclosure on the proposed GFE. In addition, CRL's proposed GFE includes a broker compensation disclosure, a

notice that the consumer can negotiate settlement charges and a summary of charges to facilitate reconciliation to the HUD–1.

Comments by the National Consumer Law Center (NCLC) (filed on behalf of NCLC and Consumer Action, the Consumer Federation of America, and the National Association of Consumer Advocates) stated that the proposed standardization of the GFE, the increased linkage between the GFE and the settlement statement, and the proposed requirement that some terms on the GFE be binding, are important changes that should increase consumer understanding and competition in the mortgage marketplace. NCLC recommended that HUD go further by requiring the prominent disclosure of the APR on the GFE instead of the interest rate. According to NCLC, failure to include the APR on the GFE obscures the cost of credit and hinders consumer shopping.

NCLC expressed concern that the proposed GFE gives far greater prominence to settlement costs than to interest. NCLC stated that if the GFE is successful in getting consumers to shop on settlement costs, there is a risk that consumers will neglect the primary cost component of loans, interest. According to NCLC, while settlement costs matter, they matter most not as a stand-alone cost, but in relation to the interest rate. NCLC recommended that the GFE be revised by reducing the focus on settlement costs through reduction of the font size and elimination of the bold type for settlement costs. NCLC also recommended that HUD work with the Federal Reserve Board to produce disclosures that are not misleading or that obscure the actual cost of credit. In addition, NCLC recommended that the first page of the GFE provide only a total for all settlement costs, without breaking out the origination costs.

NCLC supported the loan summary on page 1 and recommended that the summary sheet refer to the APR instead of to the interest rate. NCLC also recommended that the first page provide only a total of the estimated settlement charges, not separate lines for the origination and total settlement costs.

Industry Representatives

Generally, lenders and their associations opposed the proposed GFE on the grounds that the form is too lengthy and, in their opinion, would only confuse borrowers. The American Bankers Association commented that the proposed GFE is overly prescriptive. The Mortgage Bankers Association (MBA) stated that the length of the form will cause borrowers to ignore its important information. MBA submitted a two-page GFE as an alternative to the proposed GFE that combines the RESPA and TILA disclosures. While lenders and their associations expressed general support for the goals of the proposed rule, many lenders recommended that HUD work together with the Federal Reserve Board to produce a combined RESPA and TILA disclosure and to implement this combined product simultaneously, to replace the current RESPA and TILA disclosures provided at the time of application.

MBA stated that it generally supports grouping of the amount or ranges of specific services on the GFE in a manner that is comprehensible and comparable, but recommended that the form be modified so that it is mainly a list of charges with minimal supplementary material, as on the GFE form submitted by MBA. MBA recommended that the material on page 3 and page 4 of the proposed GFE be moved to explanatory materials such as the Special Information Booklet. While MBA stated that a summary of loan terms could be useful, it recommended that the summary be removed from the GFE and issued by the Federal Reserve Board in consultation with HUD. MBA further recommended the deletion of the term ''adjusted origination charge'' from the bottom of page 1.

A major lender expressed the concern that the proposed form is so laden with information that lenders cannot convey key cost information in a clear and conspicuous manner. This commenter stated that the proposed form would pose a significant compliance burden for lenders and would not provide borrowers with any greater understanding of their loan. Specifically, the lender objected to the disclosures required on page 3 of the proposed form.

The National Association of Mortgage Brokers (NAMB) generally supported the inclusion of information listed on page 4 of the proposed GFE. However, NAMB objected to consolidating major categories on the GFE on the grounds that such categories tend to lead to consumer confusion since components are not evident to consumers until presented with the HUD–1, on which they are disclosed separately. NAMB also asserted that the proposed GFE is in conflict with the current RESPA requirements on affiliated business disclosure, because the proposed GFE eliminates the name of the provider on the GFE. NAMB submitted, in place of the proposed GFE, a model that provides symmetrical disclosure of originator compensation. NAMB stated that its model form not only remedies the disparity among originator disclosures, it more closely mirrors the HUD–1 than the proposed GFE; it does not create groupings of disclosures that must be broken out; and it is one page, making it more user friendly.

Other Commenters

Many other commenters also expressed concern about the length of the form. The National Association of Realtors (NAR) stated that the proposed GFE fails to achieve the right balance between providing the necessary information and presenting such information simply in a manner to be useful to the consumer. NAR asserted that the disclosures, tables, and instructions in the proposed GFE will serve as a ''psychological barrier'' to many consumers who will feel overwhelmed with having to read, comprehend, and act on this amount of information. NAR stated that the decision not to include itemized costs in the proposed GFE will result in consumers getting less than the full disclosure Congress intended in the original statute. NAR asserted that the proposed GFE creates the opportunity to bury additional, undisclosed fees into ''packages'' and prevents individual provider cost comparison to the detriment of consumers.

NAR also recommended that the proposed GFE and the HUD–1 mirror each other in order to assist consumers in understanding whether the terms and expenses that were disclosed at loan application are those that are the governing terms at closing. NAR noted that, along with CRL, it previously recommended that HUD provide consumers a summary GFE accompanied by a full GFE with detailed explanations of each subcategory of fees to help consumers understand the services and fees for which they are being charged. NAR reiterated this recommendation for the final rule and, along with the American Land Title Association (ALTA), submitted a summary GFE and a full GFE for HUD's consideration.

The Credit Union National Association (CUNA) opposed increasing the GFE to the proposed four-page form. CUNA stated that the proposed form would not benefit borrowers who could be confused by the additional information, rather than helped in understanding their loan options. The National Association of Federal Credit Unions (NAFCU) stated that the length of the proposed form is too long for the purpose of the GFE, which is simply to provide a good faith estimate of settlement costs. NAFCU recommended that pages 3 and 4 of the proposed form

be consolidated into one page by removing the section on page 3 entitled ''understanding which charges can change at settlement'' and the section on page 4 entitled ''using the shopping chart.'' NAFCU suggested that the information contained in these sections should be provided in the Special Information Booklet.

The Conference of State Bank Supervisors (CSBS), the American Association of Residential Mortgage Regulators (AARMR), and the National Association of Consumer Credit Administrators (NACCA) stated that they support HUD's goal to provide clear and valuable information to consumers regarding adjustable rate mortgages on the GFE. These commenters recommended that HUD work with the Federal Reserve Board to develop coordinated, consistent, and cooperative disclosures to ensure that consumers are not confused. They recommended that the GFE contain an estimate of taxes and insurance even when there will be no reserve for taxes and insurance in the monthly payment. According to these commenters, if the estimate is not included in the monthly payment amount, the borrower will not clearly understand whether they can afford the monthly payment. While these commenters indicated their general support for the grouping of fees and charges on the proposed GFE into major settlement cost categories, they expressed concern that some in the industry might take advantage of this format by putting additional fees and charges in a totaled category.

ALTA stated that page 1 of the proposed GFE presents the summary of loan terms and the total costs for settlement services in an understandable format. However, ALTA urged HUD to improve the individual fee disclosures by using a page that is identical to page 2 of the current HUD–1. ALTA stated that revising page 2, as it recommended, would allow consumers to know all fees included within the total amount listed on the GFE summary page and to more directly compare these fees to the final charges and closing.

With respect to the categorization of fees on page 2 of the proposed GFE, ALTA objected to the proposed requirement that a single fee be disclosed for title services and lender's title insurance on Block 4 and for primary title services in the 1100 section of the HUD–1. ALTA stated that the elimination of required itemization of these fees is of concern and can only serve to lessen, rather than enhance, competition for these services.

ALTA asserted that HUD's views that consumers: (1) Shop among lenders based on the lender's estimates of charges in the 1100 series on the HUD–1, and (2) have no need to know the amounts of the various charges that comprise the aggregate amount, are in error. ALTA stated that with regard to the itemization of individual costs that comprise the aggregate Block 4 charge, consumers who want to shop for these services will be seriously disadvantaged because there is no way to determine the lender's estimated price for the title company, escrow company, attorney, or surveyor.

ALTA also stated that the disclosure of a single fee for title insurance fails to recognize that, in most areas of the country, the seller generally pays a substantial portion of the title insurance charges. ALTA noted that the March 2008 proposed rule failed to provide instruction as to how to disclose title-related fees when these costs are paid by the seller. ALTA expressed concern that if the GFE and HUD–1 do not itemize the fees for title insurance services, the possibility exists that the borrower could pay for services for which sellers currently assume payment, and this would result in higher costs to the borrower. ALTA requested that HUD continue to require title insurance fees disclosed in the 1100 series of the HUD–1 to be separately itemized on both the GFE and HUD–1.

With respect to the category for owner's title insurance on page 2 of the GFE, ALTA requested that the word ''optional'' be dropped from the disclosure on both the proposed GFE and the proposed HUD–1. ALTA expressed concern that, by including the word ''optional'' in both disclosures, HUD appears to be suggesting that a consumer does not need separate coverage for title insurance, which may discourage borrowers from obtaining owner's coverage. ALTA also noted that owner's title insurance is required in residential real estate transactions in many states and that, by labeling owner's title insurance as optional on both the GFE and the HUD–1, HUD's requirement would directly conflict with various state requirements.

Federal Agencies

The Federal Deposit Insurance Corporation (FDIC) also expressed concern about the length of the proposed GFE. While considering the proposed GFE to be an improvement over the current model form, the FDIC expressed concern about whether the proposed GFE provides information that consumers will understand in an easily understandable format. The FDIC also commented that more information about potential payment shock and the adjustment of interest rates should be included on the GFE. Specifically, the FDIC recommended that the GFE explain when an initial interest rate expires and when monthly payments increase.

The Federal Trade Commission (FTC) staff comment stated that the proposed GFE form offers several features that will benefit consumers. These features include a summary overview of loan terms and charges on the first page; the additional details regarding categories of fees and shopping options on subsequent pages; and the focus on total settlement costs, rather than itemized costs. However, FTC staff stated that the form raises concerns that warrant clarification or modification. For example, FTC staff stated that consumers may be confused based on the differences between the GFE and the HUD–1 disclosures and the TILA forms they receive, particularly the difference in monthly amounts. Rather than explain the differences in the Special Information Booklet, FTC staff recommended that HUD provide a clear explanation of the difference between the forms on the GFE and the closing script, or use an alternative disclosure on the GFE and closing script to ensure as much consistency with the TILA disclosures as possible.

The Office of Thrift Supervision (OTS) commented that HUD should consider revising its settlement cost booklet to include illustrations reflecting the impact that loan features and terms can have on the cost of the mortgage. In particular, OTS stated that such illustrations would be particularly useful in reflecting payment shock, among other features, that a borrower may experience when rates reset.

HUD Determination

In response to comments, HUD has made a number of changes to the revised GFE, including shortening the form from four pages to three and clarifying important information for borrowers throughout the form. While HUD recognizes that too much information on the form may overwhelm borrowers, HUD is also cognizant that borrowers need to be aware of the important aspects of the loan, as well as the settlement costs. While HUD considered all of the various alternative forms submitted by commenters, HUD determined that its proposed GFE, with certain modifications made at this final rule stage, would best meet the needs of borrowers to shop and compare loans from different loan originators. As

demonstrated by the testing of the form conducted by HUD's forms contractor, consumers liked the general format of the form and were not overwhelmed by its length. Accordingly, HUD has maintained several important features of the proposed GFE in the final form. Other features from the proposed form have been removed from the form, as revised at this final rule stage, and will be included in the revised Special Information Booklet. The final GFE continues to inform borrowers about critical loan and settlement cost information and allows borrowers to effectively shop among loan originators without burdening them with extraneous information.

The top of page 1 of the revised form continues to include blank spaces for the loan originator's name, address, phone number, and email address, as well as the borrower's name, the property address, and the date of the GFE. In addition, the top of the revised page 1 includes a statement about the purpose of the GFE, and information on how to shop for a loan offer. This section of the form also references HUD's Special Information Booklet on settlement charges, as well as Truth in Lending disclosures and information available at *http://www.hud.gov/respa*. Such information was included on page 4 of the proposed form. While the revised page 1 also continues to include information about important dates, such as how long the interest rate is available and how long the estimate for all other settlement charges is available, the rate lock period information that was included in the loan summary chart on the proposed GFE has been moved from the summary chart to the ''important dates'' block on the revised form. This change was made to consolidate all the information about dates in one section of the form and to minimize potential borrower confusion.

The revised page 1 also includes a summary chart of the loan on which the GFE is based, but this section of the form is now referred to as ''summary of your loan'' instead of ''summary of your loan terms,'' as proposed. The revised summary continues to include key terms and information about the loan for which the GFE was provided, but certain changes were made to headings on the chart to address specific comments. While the proposed GFE included information about the monthly escrow payment in the summary chart, the revised form includes a separate section concerning the escrow account. This section, referred to as ''escrow account information,'' informs the borrower that some lenders require an escrow account to hold funds for paying property taxes or other property-related charges in addition to the monthly payment. The section includes a disclosure as to whether an escrow account is required for the loan described in the GFE. If no escrow account is included for the loan, this section informs the borrower that the additional charges must be paid directly when due. If the loan includes an escrow account, the section informs the borrower that it may or may not cover all additional charges.

The bottom of page 1 on the revised form retains the ''summary of your settlement charges'' section, as set forth in the proposed GFE. The summary includes the amount from Block A on page 2, ''your adjusted origination charges''; the amount from Block B on page 2, ''your charges for all other settlement services''; and reflects the ''total estimated settlement charges'' as the sum of Blocks A and B.

Page 2 of the revised GFE, like page 2 of the proposed form, contains a listing of estimated settlement charges. The top of the second page continues to require that the origination charge be listed, and the credit or charge for the specific interest rate is required to be subtracted or added to the origination charge to arrive at the adjusted origination charge. However, this portion of the second page includes some minor changes from the proposed form. First, Block 2 now references ''points'' after the ''charge'' in the heading, rather than at the end of the sentence, to better inform the borrower. The heading now reads, ''Your credit or charge (points) for the specific interest rate chosen.'' In addition, to draw the borrower's attention to the effect of the credit in Block 2, the term ''reduces'' is now bolded in box 2. To draw the borrower's attention to the effect of the charge in Block 2, the term ''increases'' is now bolded in box 3 of the second block. Finally, the second sentence in box 2 and box 3 in Block 2 refers to ''settlement'' charges rather than ''upfront'' charges, in order to be consistent with other language on the form.

Page 2 of the revised GFE, like the second page of the proposed GFE, also contains an estimate for all other settlement services. While the categories from the proposed form have generally been retained on the final form, certain changes have been made to the categories to streamline the form in response to comments. Block 10 of the proposed form ''optional owner's title insurance'' is now Block 5 of the revised form and informs the borrower that the borrower may purchase owner's title insurance to protect the borrower's interest in the property.

Block 6 of the revised form, ''Required services that you can shop for,'' is the same as Block 5 of the proposed form. While Block 6 of the proposed form included both government recording charges and transfer taxes, in response to comments, government recording charges are now listed in Block 7 of the revised form, along with the explanation that ''these charges are state and local fees to record your loan and title documents.'' Block 8 now lists transfer taxes with the explanation that ''these charges are state and local fees on mortgages and home sales.'' This change was made in response to comments so that these two different types of government fees could be treated differently with respect to tolerances, as explained below.

Block 7 of the proposed form, ''Reserves or escrow,'' is now Block 9 of the revised form and is now listed as ''initial deposit for your escrow account.'' The sentence below the title now explains that the charge is held in an escrow account to pay future recurring charges on the property and includes check boxes to indicate whether the escrow includes all property taxes, all insurance or other payments. The ''other'' category may include non-tax and non-insurance escrowed items, and/or specify which taxes or insurance payments are included in the escrow if the escrow does not include all such payments.

Block 8 of the proposed form, ''Daily interest charges,'' is now Block 10 of the revised form. Block 9 of the proposed form, ''Homeowner's insurance'' is now Block 11 of the revised form.

The revised GFE requires the charges in Blocks 3 through 11 to be subtotaled at the bottom of page 2. The sum of the adjusted origination charges and the charges for all other settlement services are required to be listed on the bottom of page 2. This figure will also be listed on the bottom of page 1, in the block ''Total Estimated Settlement Charges.''

In light of comments received on various aspects of the proposed form, page 3 of the revised form has been redesigned to include the most important information from pages 3 and 4 of the proposed form. At the top of the redesigned page 3, the section ''Understanding which charges can change at settlement'' includes information to assist the borrower in comparing charges on the GFE with the charges listed on the HUD–1 settlement statement. Next, the tradeoff table provides information on different loans for which the borrower is qualified that would increase or decrease settlement

charges, with a corresponding change in the interest rate of the loan. Completing this tradeoff table is now optional. This table is intended to be read in conjunction with the section on ''adjusted origination charges'' on page 2 of the form. The tradeoff table on the final form has been modified to require ''your initial loan amount'' in the first category, as opposed to ''your initial loan balance'' on the proposed form, to be consistent with the change in terminology on the first page of the form.

Page 3 of the revised form also includes the shopping chart included on page 4 of the proposed form, to assist borrowers in comparing GFEs from different loan originators. Finally, the lender disclosure that was included on the proposed form has been retained on the revised form, as discussed below.

B. Changes to Facilitate Shopping

1. New Definitions for ''GFE Application'' and ''Mortgage Application''

Proposed Rule. The March 2008 proposed rule provided separate definitions for a ''GFE application'' and a ''mortgage application'' in an effort to promote shopping. Under the proposed rule, a loan originator would have provided a borrower a GFE once the borrower provided the originator six pieces of information that included: Borrower's name, Social Security Number, property address, gross monthly income, borrower's information on the house price or best estimate of the value of the property, and the amount of the mortgage loan sought. The rule provided that the GFE application would have to be in written form and, if provided orally, would have to be reduced to a written or electronic record. Under the March 2008 proposed rule, a separate GFE would have to be provided for each loan where a transaction involved more than one mortgage loan.

The proposed rule would have required that once a borrower chose to proceed with a particular loan originator, the loan originator could require the borrower to provide additional information through a ''mortgage application'' in order to complete final underwriting. This additional information could be used to verify the GFE, and could include income and employment verification, property valuation, an updated credit analysis, and the borrower's assets and liabilities.

The March 2008 proposed rule provided that a borrower could be rejected at the GFE application stage if the loan originator determined that the borrower was not creditworthy. The borrower could not be rejected at the mortgage application stage unless the originator determined there was a change in the borrower's eligibility based on final underwriting, as compared to information developed for such application prior to the time the borrower chose the particular originator. Under the proposed rule, the originator would have been required to document the basis for such a determination and maintain the records for no less than 3 years after settlement.

The March 2008 proposed rule also provided that where a borrower was rejected for a loan for which a GFE had been issued, but the borrower qualified for a different loan program, the originator would have to provide a revised GFE. If a borrower was rejected for a loan and no other loan product could be offered, the borrower would have to be notified within one business day and the applicable notice requirements satisfied.

Under the March 2008 proposed rule, for loans covered by RESPA, the TILA disclosures would be provided within 3 days of a written GFE application, unless the creditor, i.e. the loan originator, determined that the application could not be approved on the terms requested. The proposed rule indicated that based on consultations with the Federal Reserve Board, when a GFE application is submitted, an initial TILA disclosure would also have to be provided, so long as the application was in writing, or, in the case of an oral application, committed to written or electronic form. HUD noted that whether a GFE application under a particular set of facts triggered the Home Mortgage Disclosure Act (HMDA) or the Equal Credit Opportunity Act (ECOA) requirements would be determined under Regulation B and Regulation C, as interpreted in the Federal Reserve Board's official staff commentary.

Comments

Consumer Representatives

Consumer representatives supported early delivery of the GFE, which, under the proposed rule, would be issued when a lender receives the proposed ''GFE Application.'' However, they emphasized that enforcement and private rights of action are necessary to ensure that a meaningful GFE will be provided to consumers early in the mortgage application process.

Consumer representatives also raised the issue of whether HUD's definition of ''GFE Application'' triggers other regulatory requirements. They recognized the Federal Reserve Board's rulemaking authority under ECOA and the Fair Credit Reporting Act (FCRA) and indicated that requirements under these statutes and their implementing regulations would be triggered by the newly defined GFE application. They noted that current definitions in both statutes and their implementing regulations cover the GFE application.

According to their comments, the application of ECOA and FCRA to the GFE application is important because such application ensures binding and accurate disclosures. These commenters recommended that HUD coordinate with the Federal Reserve Board to ensure that the GFE application remains covered by ECOA and FCRA.

Industry Representatives

Industry representatives expressed significant concerns about the ''GFE Application'' and ''Mortgage Application'' approach under the March 2008 RESPA proposal. Specifically, they expressed concerns about the limited information originators would be permitted to collect in order to conduct preliminary underwriting before issuing a GFE. One commenter stated that this limitation precludes an originator from considering, at the GFE application stage, important information that a lender currently collects early in the transaction in order to develop a GFE. Some of those additional items include loan product type sought, purpose of loan, and information to compute the loan-to-value ratio. The commenters claimed that limiting consideration of this type of information would make it difficult for originators to provide a meaningful GFE, because they would be unable to provide any reliable estimate of cost or determine a borrower's ability to repay the loan. They also stated that the inability to consider important underwriting information until the mortgage application stage would result in the issuance of more than one GFE. The net result, they concluded, would lead to borrower confusion and increased costs to the borrower.

Industry commenters also expressed further operational concerns related to the limitations on underwriting information at the GFE stage. They stated that the limitation on information that loan originators can take into consideration, in developing a GFE, would force lenders to develop systems that could underwrite based on very limited information. They further stated that the originator would not have sufficient information to determine the type of property the consumer is considering—such as whether the property is commercial, industrial,

vacation, or residential—or the type of loan the consumer is considering, such as a purchase money loan, refinance, or home equity loan. They stated it is important for the lender to have this information because the lender may not engage in the kind of lending a consumer seeks.

In addition, industry commenters expressed confusion over whether a credit report was one of the six pieces of information they could collect as part of the GFE application, and requested that HUD provide clarification on this subject.

Industry representatives also requested that HUD permit borrowers to expedite the application process and proceed to the mortgage application stage, when the borrower so desires due to timing or other concerns.

Industry representatives stated that the new application definitions in the March 2008 proposed rule would present uncertainty in complying with other mortgage-related statutes and regulations. They commented that compliance with other statutes and regulations is triggered by a mortgage ''application.'' Because HUD's proposal included both a ''GFE Application'' and a ''Mortgage Application,'' they commented that it is not clear which one is the ''application'' for purposes of compliance with other regulations. In particular, lenders expressed concern with the possibility that the ''GFE Application'' would trigger compliance obligations under FCRA, ECOA, HMDA, and the TILA requirements. They requested that ambiguities surrounding compliance with these statutes and other laws be addressed to provide clarity and mitigate litigation exposure. For example, one lender noted that to calculate the spread for high-cost loans under Regulation Z and many state predatory lending laws, the index used is based on the month in which the ''application'' for credit is received by the creditor. This lender stated that it was not clear from the proposed rule whether the GFE application is an application for purposes of Regulation Z.

Industry commenters expressed confusion about preamble statements regarding whether HMDA or ECOA is triggered by the GFE Application. They indicated that the preamble stated that whether HMDA or ECOA is triggered by the GFE Application should be determined under Regulations C and B, as interpreted by the Board. They noted, however, that the preamble stated that based on consultations with the Federal Reserve Board, TILA disclosures would be provided within 3 days of a written GFE application unless the creditor determines that the application cannot be approved on the terms requested. The commenters further noted that the Regulatory Impact Analysis states ''[t]he proposed rule clarifies that only the mortgage application would be subject to Regulations B (ECOA) and C (HMDA), which is the current situation today.'' These commenters requested clarification of this matter.

Industry representatives questioned HUD's legal authority to: limit information originators can request to underwrite a loan; require that originators accept an abbreviated application from which to complete a GFE; require a new GFE when a counteroffer is made; and require a consumer to be notified within one business day of a lender's decision to reject an application, among other concerns.

Additionally, one lender commented that under HUD's March 2008 proposed rule, lenders would be required to retain the GFE application for 3 years, which is different from the 25-month retention requirement by TILA or ECOA. The lender commented that this difference presents additional expense without a substantive benefit to the consumer.

Other Commenters

The FTC staff recommended that HUD reevaluate the proposed ''GFE application,'' as this terminology is new and could generate consumer confusion in the already complex mortgage process. FTC staff suggested that HUD characterize it as the ''GFE application'' concept so that consumers do not confuse it with the mortgage application. They also recommended that HUD educate consumers about these two components of the mortgage lending process. Further, FTC indicated that the industry would also benefit from guidance on how the GFE application relates to other mortgage lending laws that include an ''application'' concept.

CSBS, AARMR, and NACCA also expressed concern over the creation of a ''GFE application'' and a ''mortgage application'' because, they asserted, these application concepts will cause consumer confusion. They recommended that HUD coordinate with other federal regulatory agencies to ensure consistency and clarity to regulatory requirements from loan application to loan closing.

HUD Determination

To address the concerns raised by the commenters about the bifurcated application approach set forth in the proposed rule, HUD has adopted a single application process for the final rule. Under this approach, at the time of application, the loan originator will decide what application information it needs to collect from a borrower, and which of that collected application information it will use, in order to issue a meaningful GFE. However, before providing the GFE, the loan originator will be assumed to have collected at least the following six items of information: the borrower's name, Social Security Number, and gross monthly income; the property address; an estimate of the value of the property; and the amount of the mortgage loan sought. The borrower's Social Security Number would be collected for purposes of obtaining a credit report. The final rule now defines ''application'' to include at least these six items of information. Therefore, under this single application process, a loan originator may ask for, or a borrower may choose to submit, more information than the loan originator intends to use to process the GFE, for example the information on a standard 1003 mortgage loan application form, but beyond the six items of information, the loan originator will determine what it needs to issue a GFE. HUD strongly urges loan originators to develop consistent policies or procedures concerning what information it will require to minimize delays in issuing GFEs.

In order to prevent overburdensome documentation demands on mortgage applicants, and to facilitate shopping by borrowers, the final rule specifically prohibits the loan originator from requiring an applicant, as a condition for providing a GFE, to submit supplemental documentation to verify the information provided by the applicant on the application. Loan originators, however, can require applicants to provide such verification information after the GFE has been provided, in order to complete final underwriting. In addition, the rule does not bar a loan originator from using its own sources before issuing a GFE to independently verify the information provided by the applicant.

Once the applicant submits to the loan originator all the mortgage application information deemed necessary by the loan originator to process the GFE, the originator will be required to deliver or mail a GFE to the applicant within 3 business days. HUD is now also limiting the fee that may be charged for providing the GFE, consistent with the Federal Reserve Board's recently finalized rule limiting the fees that consumers can be charged for the delivery of TILA disclosures (see

revisions of 12 CFR 226.119(a), 73 FR 44522, July 30, 2008).

After the GFE has been received, the loan originator may collect additional fees needed to proceed to final underwriting for borrowers who decide to proceed with a loan from that originator. As noted, at that time, verification information or any other information could be required from the applicant, such as bank statements and W–2 forms, to confirm representations made by the applicant in the application.

None of the information collected by the originator prior to issuing the GFE may later become the basis for a ''changed circumstance'' upon which a loan originator may offer a revised GFE, unless the loan originator can demonstrate that there was a change in the particular information or that it was inaccurate, or that the loan originator did not rely on that particular information in issuing the GFE. A loan originator would have the burden of demonstrating nonreliance on the collected information, but may do so by various means, including through, for example, a documented record in the underwriting file or an established policy of relying on a more limited set of information in providing GFEs. If a loan originator issues a revised GFE based on information previously collected in issuing the original GFE and ''changed circumstances,'' it must document the reasons for issuing the revised GFE, including, for example, its nonreliance on that information or the inaccuracy of the information, and retain that documentation for at least 3 years. Additional guidance on what constitutes ''changed circumstances'' will be provided by HUD during the implementation period.

Furthermore, the loan originator is presumed to have relied on the borrower's name, the borrower's monthly income, the property address, an estimate of the value of the property, the mortgage loan amount sought, and any information contained in any credit report obtained by the loan originator before providing the GFE. The loan originator cannot base a revision of the GFE on this information, unless it changes or is later found to be inaccurate. HUD determined that this approach provides the flexibility originators need to properly underwrite, while limiting bait-and-switch methods whereby the originator uses the GFE to draw in a borrower and, after a significant application fee is paid or burdensome documentation demands are made, claims that a material change has resulted in a more expensive loan offering.

If a loan originator receives information indicating that changed circumstances necessitate the issuance of a new GFE, such new GFE must be provided to the borrower within 3 business days of receipt of such information. The 3-day requirement is in response to comments on the proposed rule that stated that providing a new GFE within one day is not workable.

The approach set forth in this rule furthers HUD's goal to promote consumer shopping among mortgage originators, because it does not overly burden a consumer at an early stage. Rather, a consumer provides information that is easily communicated and pays a nominal fee in order to get a GFE.

As noted, this public policy is further supported by the Federal Reserve Board through its recently issued final rule limiting fees that can be charged for the delivery of the TILA disclosure. Under this rule, borrowers must receive the TILA disclosure before paying or incurring any fee imposed by a creditor or other person in connection with the consumer's application for a closed-end mortgage, except that creditors may charge a bona fide and reasonable fee for obtaining the consumer's credit history. Whether an application under a particular set of facts triggers ECOA or HMDA requirements must be determined under Regulation B or Regulation C, as interpreted by the Federal Reserve Board's Official Staff Commentary.

2. Up-Front Fees That Impede Shopping

Proposed Rule. The March 2008 proposed rule provided that a loan originator, at its option, could collect a fee limited to the cost of providing the GFE, including the cost of an initial credit report, as a condition of providing the GFE to a prospective borrower. The loan originator was not permitted to collect, as a condition of providing a GFE, any fee for an appraisal, inspection, or other similar service needed for final underwriting.

Comments

Consumer Representatives

Consumer representatives expressed concerns about the opportunity for consumers to be charged a fee for a GFE and a credit report. They are concerned such costs would discourage borrowers from shopping for a mortgage. They stated that lenders would charge a fee for the GFE to offset lenders' costs for issuing the GFE, because the cost of preparation of the GFE cannot otherwise be passed on to consumers. Consumer advocates pointed out that some states prohibit the collection of an application fee before credit has been extended and that HUD's proposal would be inconsistent with such laws. The consumer advocates asserted that HUD's proposal could be read to preempt these state laws. The consumer advocates recommended that HUD remain silent on the collection of such fees in relation to the GFE and should in no way support it.

Industry Representatives

Industry comments reflected some confusion as to whether and to what extent fees can be charged in connection with the GFE. Some industry commenters understood the proposal to mean that lenders can charge a fee once a borrower submits a ''mortgage application.'' Other industry commenters sought clarification about what exactly can be charged in connection with the GFE. They indicated that meeting the 3-business day requirement for delivery of the GFE to the borrower and completing the lengthy GFE form would be time consuming and costly.

Further, in a situation in which a borrower seeks an accelerated process for getting a loan, industry representatives stated that the borrower should be able to pay necessary fees for such items as, for example, an appraisal. Industry representatives also opined that under RESPA, HUD has no authority in their view to require lenders to offer GFEs without adequate compensation.

Other Commenters

CSBS, AARMR, and NACCA commented that a consumer should not be charged for the GFE because to do so locks the consumer into the transaction. These commenters stated that if HUD insists on permitting a fee to be charged, the fee charged should be limited to a credit report.

HUD Determination

HUD has long supported a public policy goal of creating a circumstance where consumers can shop for a mortgage loan among loan originators without paying significant upfront fees that impede shopping. To this end, and consistent with the Federal Reserve Board's recently issued revised regulations limiting the fees that a consumer may be charged for the delivery of TILA disclosures (73 FR 44522, July 30, 2008), HUD, in this final rule, is limiting the charge originators may impose on consumers for delivery of the GFE.

The Federal Reserve Board's rule restricts creditors from imposing a fee on a consumer in connection with the consumer's application for a mortgage before the consumer has received the TILA disclosure. The Federal Reserve Board makes an exception that allows imposition of a fee that is bona fide and reasonable in amount for obtaining the consumer's credit history. In an effort to create consistency among regulatory requirements and serve the best interests of consumers, HUD is similarly limiting the fee for the GFE to the cost of a credit report. Also, as in the proposed rule, a loan originator is expressly not permitted to charge, as a condition of providing a GFE, any fee for an appraisal, inspection, or similar settlement service.

3. Introductory Language on the GFE Form

Proposed Rule. The March 2008 proposed rule included a proposed required GFE form that explained to the borrower: (1) On page 1, the purpose of the GFE, i.e., that it is an "* * * estimate of your settlement costs and loan terms if you are approved for this loan"; and (2) on page 3, that the borrower is the "* * * only one who can shop for the best loan for you. You should shop and compare this GFE with other loan offers. By comparing loan offers, you can shop for the best loan."

Comments

Consumers did not comment on this issue. NAMB stated that the introductory language of the GFE and the language encouraging comparative shopping should be improved. Specifically, NAMB stated that the language encouraging comparative shopping incorrectly characterizes the GFE as a "loan offer." NAMB stated that this is misleading because it leaves borrowers with the impression that they have been approved for the loan and that is not the case. NAMB suggested that the "loan offer" reference be changed to "other estimates."

NAMB also recommended that the language encouraging comparative shopping be made more conspicuous and informative. NAMB encouraged HUD to adopt language set forth in the prototype disclosure forms developed by FTC. Those forms include prominent legends in large typeface that expressly advise borrowers that mortgage originators, including both brokers and lenders, do not represent borrowers, and that the "lender or broker providing this loan is not necessarily shopping on your behalf or providing you with the lowest cost loan." The FTC prototype forms also encourage borrowers to comparison shop to find the best deal.

NAMB urged HUD to adopt the FTC prototype disclosures in place of the proposed mortgage broker compensation language. However, NAMB recommended that, if the FTC forms are not adopted in their entirety, HUD should incorporate the FTC language in the GFE earlier than on page 3, and in a more prominent typeface than the typeface used for the proposed language on comparative shopping.

HUD Determination

HUD's consumer testing of the form demonstrated that consumers better understood the function of the GFE and its role in the shopping process as a result of language on the form. Accordingly, HUD has determined to maintain the language on the form that describes the purpose of the GFE and informs the borrower that only they can shop for the best loan for them. However, in the interest of streamlining the form, the revised form now includes, on page 1, the information about shopping for a loan that was on page 3 of the proposed GFE.

4. Terms on the GFE (Summary of Loan Details)

Proposed Rule. The proposed GFE included a summary of the key loan terms. The form required the disclosure of the initial loan amount; the loan term; the initial interest rate on the loan; the initial monthly payment owed for principal, interest, and any mortgage insurance; and the rate lock period. The form also required the loan originator to disclose whether the interest rate could rise; whether the loan balance could rise; whether the monthly amount owed for principal, interest, and any mortgage insurance could rise; whether the loan had a prepayment penalty or a balloon payment; and whether the loan included a monthly escrow payment for property taxes and possibly other obligations. The proposed rule required the terms "prepayment penalty" and "balloon payment" to be interpreted consistent with TILA (15 U.S.C. 1601 *et seq.*). The APR was not included on the proposed GFE.

Comments

Consumer Representatives

As part of their general support for the proposed rule, consumer advocacy organizations were positive about the inclusion of loan terms on the GFE. NCLC, in a joint letter with Consumer Action, Consumer Federation of America, and National Association of Consumer Advocates, commented that "[p]lacing the most critical information in consumers' hands in a consistent, user-friendly format should facilitate consumer shopping, market competition and transparency." They characterized HUD's summary sheet as striking a balance between disclosing critical information and preventing information overload.

CRL presented a legal argument supporting HUD's authority to require disclosure of loan terms. CRL pointed out that settlement costs are so intertwined with loan terms that those terms must be disclosed for the settlement costs to have any meaning. Other consumer groups also pointed out that these terms affect the overall price and risk for the consumer. CRL, which is affiliated with a small nonprofit lender that will have to comply with the new rule, stated that the rule is administratively feasible for larger and smaller lenders.

In addition to supporting loan terms disclosure, consumer advocacy organizations suggested several changes to make disclosure even more effective. They suggested that there should be a more strict legal mechanism for binding originators to the loan terms after disclosing them. Some consumer advocates argued for inclusion of the APR on the GFE, perhaps instead of the note rate, stating that inclusion of the APR would make comparisons easier. Some suggested that the adjustable rate disclosure should include the date when the first adjustment happens, in order to help avoid payment shock. Commenters pointed out that a monthly payment disclosure that includes taxes and different types of insurance will be more useful in judging affordability and for making comparisons to the current mortgage, when applying to refinance. They also suggested that the maximum interest rate disclosure is not likely to help borrowers and may be misleading. The commenters stated that actual dollar figures are more readily understandable. The commenters also stated that the GFE should include a clear statement that loan terms are negotiable, and all the disclosures should be more carefully harmonized with TILA.

NCLC, Consumer Action, the Consumer Federation of America, and the National Association of Consumer Advocates stated that they "applaud" inclusion of the maximum payment amount and the maximum loan balance because these help consumers understand a loan's risks, especially the risks of nontraditional loans, and help consumers judge a loan's affordability. However, these organizations suggested that HUD provide guidance to originators on how to calculate

maximum payment and maximum loan balance.

One consumer organization pointed out that much research, including an FTC study, found that borrowers often do not understand exactly what ''prepayment penalties'' are and how they work. Therefore, the organization recommended that HUD include in the prepayment penalty disclosure the following brief explanation: ''[p]ayment to lender if you refinance, sell home, or pay your loan off early''.

Consumer groups were concerned that, because the proposed GFE highlighted settlement costs, it might mislead borrowers into believing that interest costs are less important. They suggested that interest is usually much more expensive than closing costs, and should be more effectively emphasized.

Industry Representatives

Most lenders and lender organizations urged that loan terms be left off the GFE, submitting that loan terms are more properly viewed as TILA disclosures. These commenters stated that double disclosure of loan terms will be confusing to borrowers, especially since much of the terminology proposed to be used in HUD's GFE is different from that used in the TILA (e.g., ''loan amount'' vs. ''amount financed'') and some calculations are different. These organizations suggested that loan term disclosures should be coordinated with TILA, and be less lengthy. A lender proposed that originators should be allowed to substitute early TILA disclosure for the loan terms sheet. Another lender organization stated that loan terms should be included only if there is a combined RESPA/TILA form. Some credit unions stated that the APR should be included in the GFE loan terms.

Some lenders stated other aspects of the loan terms disclosure would confuse borrowers. A lender organization suggested that use of the format ''Your * * * is'' to describe the loan details would create misunderstanding, because these were loan terms being applied for, not final loan terms. The same organization also believed that inclusion of mortgage insurance in the monthly payment, without disclosing whether mortgage insurance is required, would confuse borrowers. In addition, the organization stated that some of the mechanisms behind these loan terms are too complex for single-line disclosure.

Many lenders and lender organizations submitted that HUD has no authority under RESPA to require disclosure of loan terms, because loan terms are not part of the settlement process. These lenders submitted that HUD has the authority to require disclosure of settlement costs only, and that loan terms are not settlement costs. They stated that the disclosures required by HUD would overlap or conflict with disclosures under TILA and potentially with ECOA and HMDA. One lender also stated that some of these disclosures would overlap with state-mandated disclosures.

Industry representatives commented that the Federal Reserve Board and lenders have experience and expertise in developing disclosures and informational materials on adjustable rate mortgages, and that HUD should coordinate efforts to provide improved disclosures and informational materials. Industry commenters also stated that disclosures related to ARMs give rise to different concerns than settlement costs under RESPA and that HUD should follow the Federal Reserve Board's lead in this respect. A lender stated that the rate adjustment disclosure on the proposed GFE is biased against ARMs, since it only shows that payments can increase, not decrease. This same lender suggested that it would be better to have full ARM disclosure, which industry needs because current ARM disclosures are inadequate.

NAMB supported HUD's inclusion of loan terms on the GFE, and suggested that more monthly expenses should be disclosed, such as homeowner's association dues, if applicable.

The Mortgage Insurance Companies of America (MICA) objected to the fact that mortgage insurance costs were included in the monthly payment for purposes of the question, ''Can your monthly amount owed for principal, interest, and any mortgage insurance rise? '' MICA commented that this disclosure may mislead borrowers into believing that their mortgage insurance payments can rise, when they are in fact set at the time of origination. MICA also suggested that mortgage insurance would be disclosed in the ''Required services that the loan originator selects'' category, and would also be included in the escrow disclosure.

Other Commenters

CSBS, AARMR, and NACCA commented that HUD should be aware that several states already require loan originators to disclose various loan terms, and that the GFE should avoid conflicting with these requirements. This group also suggested that, in order to avoid consumer confusion, HUD should coordinate more closely with the Federal Reserve Board's TILA disclosures.

Federal Agencies

FTC staff stated that its experience and research suggest that ''consumers in both the prime and subprime markets would benefit most from the development of a single mortgage disclosure document that consolidates information on the key costs and features of their loans, presents the information in a language and format that is easy to understand, and is provided early in the transaction to aid consumer shopping.'' However, FTC staff stated their belief that HUD's GFE did not go far enough in requiring these disclosures, and that even the GFE and the TILA form together did not disclose the necessary information. FTC staff also stated that inconsistencies between the GFE and TILA forms could lead to consumer confusion.

The FDIC commended HUD for proposing revisions to its RESPA regulations, and stated that ''[t]he earlier availability of and more relevant information on the GFE should promote comparative shopping that will enable consumers to make more informed financing decisions.'' Like the consumer organizations, the FDIC expressed its view that the GFE needs to include disclosure of when the first interest rate adjustment happens, in order to avoid payment shock.

The Federal Reserve Board staff agreed with the need for disclosure of the first rate adjustment, and stated that because the GFE's ARM disclosures are less complete than TILA disclosures, the GFE's ARM disclosures may not be as beneficial to consumers' understanding of how their loans work. The Federal Reserve Board staff's main concern, though, was that duplication of disclosures and information, and, in some instances, inconsistency between the loan terms on the GFE and the TILA form will create confusion for consumers. The Federal Reserve Board staff suggested that because RESPA and TILA overlap, the Federal Reserve Board and HUD should work together to develop a single RESPA/TILA form. In addition, the Federal Reserve Board staff stated, similar to a consumer organization comment, that the absence of taxes and insurance in the monthly payment disclosure will interfere with borrowers' ability to gauge affordability.

HUD Determination

After reviewing the comments, HUD continues to believe that consumer understanding of mortgage loans and of their settlement costs will be greatly enhanced by requiring disclosure of certain loan terms in a clear, user-friendly format on the GFE. Therefore,

the final rule includes the proposed loan summary chart on the first page of the revised GFE, with some revisions to address commenters' suggestions. To fully understand the cost of a loan for which a borrower is paying, the borrower needs to know the terms of the loan product. Loan terms, such as the interest rate, can have a direct relationship to the borrower's settlement costs, including mortgage broker compensation and other loan origination charges. HUD has emphasized the importance of disclosing the relationship between the interest rate and settlement charges in statements of policy on mortgage broker compensation and past RESPA rulemaking efforts. Disclosure of this relationship continues to be a central element of this rule.

Making it easier to understand the relationship between loan terms and loan costs is a key element in enhancing a borrower's ability to shop for the best-priced loan, including settlement charges. A borrower should know that a loan may have certain features—for example, a prepayment penalty or a balloon payment—that may affect the borrower's charges for that loan, including by affecting the mortgage broker's indirect compensation or other, direct loan origination charges. The new GFE brings together all of the relevant pricing information, including certain loan terms, on one form, thus allowing the consumer to understand and compare loans much more easily. As stated by the National Consumer Law Center, in its comment on behalf of itself, Consumer Action, the Consumer Federation of America, and the National Association of Consumer Advocates:

> ''Using a loan summary sheet is a terrific advance. As HUD recognizes, consumer shopping is facilitated when loan information is condensed and summarized. Placing the most critical information in consumers' hands in a consistent, user friendly format should facilitate consumer shopping, market competition, and transparency.''

HUD has determined that disclosure of major loan terms on the GFE is necessary to provide effective advanced disclosure to homebuyers of settlement costs, which is a key purpose of RESPA. HUD disagrees with those industry commenters that asserted that the GFE cannot list loan terms associated with settlement costs because the TILA disclosure is the appropriate form for loan terms. The Federal Reserve Board, in its comment on the rule, noted an ''overlap'' between the RESPA and TILA's purposes in this regard: ''Although RESPA's purpose is to inform consumers about settlement costs, and TILA's is to inform consumers about loan terms, these purposes overlap. Settlement costs may include loan origination fees, and consumers may finance their settlement costs.'' Under section 19(a) of RESPA, the Secretary of HUD has the authority to issue such regulations ''as may be necessary to achieve the purposes of this Act.'' The added information provided by the new GFE clearly furthers RESPA's purpose to ''provide more effective advance disclosure to homebuyers and sellers of settlement costs.'' HUD agrees with those commenters who asserted that disclosure of other settlement costs is meaningless (and therefore ineffective), absent the context provided by simultaneous disclosure of some loan terms. More effective disclosure also leads to, through borrowers' improved ability to shop for mortgages, reduced mortgage settlement costs for borrowers, a key purpose behind RESPA. HUD believes its new GFE, and its enhanced usefulness to borrowers as a shopping document, will provide an effective complement to the TILA disclosure, to provide borrowers with a more complete picture of their mortgage loans.

Some commenters, primarily industry, requested that HUD delay its disclosure reform efforts in this rulemaking, pending a joint effort at disclosure reform with the Federal Reserve Board. HUD remains ready to coordinate with the Federal Reserve Board to ensure consistency in mortgage disclosure forms. As discussed earlier in this preamble, however, HUD determined that it must move forward with this rulemaking to provide prospective homebuyers and other mortgage borrowers the benefits of the better disclosure provided by the revised forms and requirements in this rule. These revisions are particularly important given the current mortgage crisis, which is due in part to borrowers' misunderstanding or lack of knowledge about the fundamental details of their mortgage loans.

HUD also examined the comments regarding its authority to require disclosure of loan terms on the GFE, and concludes that it does have such authority. Section 5(c) of RESPA provides for ''a good faith estimate of the amount or range of charges for specific settlement services the borrower is likely to incur in connection with the settlement as prescribed by the Secretary.'' Because, under RESPA's definitions, loan origination, or the making of a mortgage loan, is a ''settlement service,'' HUD determined that it is within its authority to require that a good faith estimate of the costs associated with this specific settlement service include key information about the ''specific'' service. Without this information, the origination charges and other fees associated with the loan will be meaningless. Through RESPA, Congress entrusts HUD with establishing the contents of the GFE, and it is within HUD's discretion, and its responsibilities under RESPA, to ensure that consumers receive enough information to make intelligent shopping decisions about the costs of their loans. As noted previously in this preamble, given the current problems in the mortgage market, HUD decided to move forward with its improved mortgage disclosures, including this new first page of the GFE. The CRL, in its comment on the 2008 proposed rule, stated:

> ''In today's mortgage market, settlement costs are so intertwined with loan terms, and the illusory trade-off between rate and points is so problematic * * * loan terms simply must be included for the disclosure of settlement costs to be even remotely effective. HUD's authority to require them, therefore, is unambiguous.''

In response to comments, HUD has revised several aspects of the loan summary chart on page 1 of the GFE, to better inform borrowers of the key loan terms. First, the title of this section of the GFE has been simplified to ''Summary of your loan.'' To improve clarity, the summary chart now refers to ''initial loan amount'' instead of ''initial loan balance.'' As in the proposed rule, the revised form requires disclosure of the terms of the loan; initial interest rate; and initial amount owed for principal, interest, and any mortgage insurance. However, the information on the rate lock period has been moved out of this section of the GFE and into the ''Important dates'' section.

While some commenters recommended that the ''annual percentage rate'' or ''APR'' be added to the summary chart, HUD has determined not to add ''APR'' to the GFE. HUD recognizes that APR is a complex term, calculated without the inclusion of certain significant costs in a mortgage loan transaction, and has a unique purpose as a broad cost-of-credit measure central to the TILA disclosure. Consumers will be apprised of the APR on the TILA disclosure they receive at the same time that they receive the GFE. Accordingly, due to the specific TILA purposes of the APR and its inclusion on the concurrent TILA disclosure, HUD does not believe it is necessary to include the APR on the GFE.

HUD has, however, included on the GFE form other terms that are included

in the TILA disclosure required by the Federal Reserve Board, but that are important to borrowers' understanding the costs of their mortgage loans. For example, the GFE requires a general disclosure about the existence of prepayment penalties and balloon payments. Under the final rule, HUD would continue to interpret these terms consistent with TILA, as HUD had indicated it would do in its March 2008 proposed rule (73 FR at 14036).

Some commenters recommended that the form warn borrowers about the first change in the interest rate, to prevent payment shock. The revised form requires disclosure of the length of time before that first change. In addition, the revised form clarifies whether, even when the borrower makes payments on time, the loan balance can rise and the monthly amount owed for principal, interest, and any mortgage insurance can rise. The revised form also requires disclosure of the period of time of the first possible increase in the monthly amount owed, the amount to which it can rise at that time, and the maximum to which it can ever rise. The final rule requires the same information as in the proposed form about prepayment penalties and balloon payments. Finally, the final rule, with some revision of the proposed rule language, requires information on whether the lender requires an escrow account for the loan, for the payment of property taxes and possibly other obligations.

5. Period During Which the GFE Terms Are Available to the Borrower

Proposed Rule. Under the proposed rule, the interest rate stated on the GFE would be available until a date set by the loan originator for the loan. After that date, the interest rate, some of the loan originator charges, the per diem interest, and the monthly payment estimate for the loan could change until the interest rate is locked. The proposed rule also provided that the estimate for all the other charges would be available until 10 business days from when the GFE is provided, but could remain available longer, if the loan originator extended the period of availability.

Comments

Consumer Representatives

NCRC, CRL, and NCLC all stated that a 10-business-day time period is insufficient for shopping and recommended a 30-day binding period as more fair to consumers. NCLC stated that the 10-business day period does not seem to be sufficient time for consumers to shop for a different mortgage, obtain alternative GFEs, compare them, and then make a decision to return to a particular originator, particularly without an interest rate lock. NCLC noted that industry practice generally assumes that, in the purchase money context, a minimum of 30 days is needed to shop for and obtain a binding mortgage commitment.

CRL also noted that the 10-business-day period does not apply to the interest rate, which can come with no guarantee at all. NCLC and CRL stated that an interest rate lock must be required in order for the GFE to be effective. According to CRL, not including a requirement for an interest rate lock will force consumers to shop on settlement costs alone, which are a relatively small component of the total home settlement cost. CLR stated that, in addition, not requiring a rate lock makes it too easy for loan originators to engage in baiting and switching; that is, offering low settlement costs, only to recoup those costs by increasing the interest rate when the consumer returns 3 business days later. NCLC stated that, because interest is the largest component of the price of a mortgage, if interest rates are allowed to float, while settlement costs are fixed, consumers will be encouraged to shop on the smallest portion of mortgage costs, the settlement costs, and that lenders will be encouraged to play bait and switch games with the offered interest rate. Thus, according to NCLC, in order for the GFE to be an effective shopping tool, all costs must be fixed at the time the GFE is delivered.

Industry Representatives

MBA stated that the information concerning how long the costs and interest rate are open to borrower acceptance needs greater clarification and could be provided in accompanying materials, and not the GFE. MBA stated that if such information is included on the GFE, the rule should make clear that the interest rate on the GFE may be available until a specified hour and date, since interest rates frequently change several times a day.

The Consumer Mortgage Coalition (CMC) stated that RESPA already provides for good faith estimates of closing costs, and that it is unreasonable to interpret RESPA to limit changes in closing costs where the estimates were made in good faith. In addition, according to CMC, nothing in RESPA would appear to justify requiring lenders to keep an interest rate available for a potential borrower who has not actually applied for a loan. Therefore, CMC recommended that the ''important dates'' section on the proposed GFE be removed.

NAMB stated that it is meaningless, and potentially misleading, to suggest that a borrower would receive a specific interest rate prior to final application. NAMB recommended that more specific language be included on the form indicating that the rate may change until locked. They also recommended that the 10-business-day period during which estimated settlement charges would be available, be changed to 10 ''calendar'' days, since this would conform more closely to market realities.

HUD Determination

HUD has determined to retain the time periods set forth in the proposed rule. A central purpose of RESPA regulatory reform is to facilitate shopping in order to lower settlement costs, and there is legitimate concern that requiring GFEs to be open for too long a shopping period could unintentionally operate to increase borrower costs. This could occur if loan originators are required to commit to prices for too long a period or if the length of the period necessitates that originators make contingency plans for a large number of loans, when the yield of actual borrowers that can be expected to commit to the originator is uncertain. Accordingly, the final rule provides that the interest rate stated on the GFE will be available until a date set by the loan originator for the loan. HUD is not requiring the interest rate to be available for any specific length of time. The final rule provides that the loan originator indicate on the GFE the period during which the interest rate is available. After that time period, the interest rate, the interest rate related charges, and loan terms, including some of the loan originator charges, the per diem interest, and the monthly payment estimate for the loan could change until the interest rate is locked. The final rule also provides that the estimate for all other settlement charges and loan terms must be available for 10 business days from when the GFE is provided, but could remain available longer if the loan originator chooses to extend the period of availability. The 10-business day requirement for settlement costs essentially provides that the GFE will be available for 2 weeks, thereby providing borrowers with sufficient time to shop among various providers.

6. Option To Pay Settlement Costs

Proposed Rule. The proposed GFE advised the borrower regarding how the interest rate would affect a borrower's settlement costs. The proposed GFE would have required the loan originator to complete a tradeoff table that informed the borrower that the borrower

could choose from among the following: (1) The loan presented in the GFE; (2) an otherwise identical loan with a lower interest rate and monthly payments that will raise settlement costs by a specific amount; or (3) an otherwise identical loan with a higher interest rate and monthly payments that will lower settlement costs by a specific amount. If a higher or lower interest rate was not in fact available from the originator, the originator would have been required to provide those options that are available and indicate ''not available'' on the form, for those options that were not available. The proposed rule invited comments on whether the loan originator should be required to include a ''no cost loan'' on the tradeoff table as one of the alternative loans if the loan offered to the borrower is not the loan for which the GFE is written.

Comments

Consumer Representatives

Consumer representatives supported the concept of the tradeoff table but recommended some changes. They stated that only loans for which the borrower actually qualifies should be included in the table. They also stated that shopping on monthly payments through the tradeoff table, proposed in HUD's RESPA rule, only works if the loan terms are the same. If loan terms vary, shopping on the monthly payment can be misleading to consumers and have devastating results. These commenters also expressed concerns about the definition of ''otherwise identical,'' which anticipates that the loans offered on the tradeoff chart would vary only by interest rate. As outlined by these commenters, the problem is that if the lender pays the closing costs, the interest rate will be higher, and, if the borrower pays the closing costs, in many cases, the borrower will finance such costs through a higher loan amount. The commenters stated that the tradeoff table would not address this circumstance.

These commenters also recommend that the definition of ''otherwise identical'' be clarified, to include loans where the number and schedule of payments, the nature of the interest rate, whether fixed or adjustable, the index and margin for any adjustable rate mortgage, and the other loan characteristics, are held constant, with the exception that the interest rate and loan amount can be lower or higher than the loan reflected in the GFE.

Consumer representatives also expressed concerns that the introductory language on the tradeoff table implies that there is a one-to-one relationship between the interest rate and the settlement costs. They stated this is not the case, and, in many circumstances, the lender-paid broker compensation leads to both higher settlement charges and higher interest rates. In addition, they stated that the tradeoff table cannot effectively disclose the tradeoffs when lender-paid broker compensation is based on loan features other than an increase in the interest rate; as for example, lenders that commonly pay brokers for loans with prepayment penalties.

Some consumer representatives expressed support for a requirement that an originator be required to offer a no-cost loan on the tradeoff table if the originator has that type of product available and the borrower qualifies for such a loan. These commenters also stated that a meaningful tradeoff between settlement charges and interest rates would arise in the context of a no-cost loan.

Industry Representatives

Industry representatives recommended that the tradeoff table on page 3 of the GFE be moved to explanatory materials, including the special information booklet. One lender expressed confusion over what HUD intended by ''two other options.'' The lender stated that it was not clear whether HUD meant different loan types, rate/point structures, down payment amounts, or something else. A major lender trade organization commented that lenders should not be required to offer a no-cost loan on the tradeoff table. A major lender stated that since HUD has not defined what it means by ''no cost,'' it is difficult to provide a comment. This lender stated that many lenders now offer no-cost loan products and to force these lenders into making such disclosures would only result in consumer confusion.

One lender commented that disclosing two mortgage products on the tradeoff table, in addition to the product contemplated on the GFE, would be problematic, because this particular lender offers only two mortgage products.

Other Commenters

CSBS, AARMR and NACCA commented that the tradeoff table does not disclose that the choice a borrower makes between a charge and a credit will have an impact on the overall amount of the loan or monthly payment. The disclosure should reflect such a choice.

HUD Determination

HUD has determined to retain the tradeoff table on the GFE. However, recognizing that not all loan originators offer various loan products, full completion of the table is at the option of the loan originator. While a loan originator is required to complete the left hand column of the table that describes the loan offered in the GFE, it is not required to complete the table with respect to the middle column reflecting a loan with a lower interest rate, or the right hand column, reflecting a loan with lower settlement charges. Filling out these last two columns is optional for the loan originator, even if the loan originator has another loan for which the borrower may be eligible. However, HUD encourages loan originators to complete the tradeoff table, in light of HUD's consumer testing of the form that revealed that consumers found the tradeoff table to be one of the most useful and informative aspects of the GFE. The tradeoff table focuses consumers' attention on the information in the box on the top of page 2 of the GFE, empowering them to better shop for a mortgage. HUD strongly urges loan originators to fill out the tradeoff table in its entirety so that borrowers can better understand: (1) The disclosure of the ''charge or credit (points) for the specific interest rate chosen'' on page 2 of the GFE, and (2) what other loans may be available.

As many commenters expressed concern and confusion over the requirement to provide information about alternative loans and about ''otherwise identical'' loans, HUD is clarifying the scope of what qualifies as an ''otherwise identical'' loan. Should a loan originator determine to complete the table, the loan originator has to disclose only those loans for which the borrower would qualify under the lender's underwriting practices. For purposes of completing the tradeoff table, an ''otherwise identical'' loan is a loan where the loan amount, the number and schedule of payments, the nature of the interest rate, the index and margin for any adjustable rate mortgage, the loan terms, and characteristics such as whether there is a prepayment penalty or a balloon payment are consistent with the loan presented in the GFE. The only loan characteristic that may vary from the loan presented in the GFE is the interest rate.

No-cost loans are not required to be presented as one of the alternative loans. However, if the baseline GFE is for a no-cost loan so that the origination charge in Box 1 or the credit shown in Box 2 of the GFE offset the total of other

settlement service charges in Boxes 3 through 11 (i.e., total estimated settlement costs are zero), the originator would complete the tradeoff table by showing the same loan amount with positive closing costs (effectively the positive difference between the charge or credit for the GFE interest rate and that for the specified lower interest rate) as the first alternative to the GFE loan, and the same loan with a higher interest rate and negative closing costs (effectively the negative difference between the charge or credit for the GFE interest rate and that for the specified lower interest rate) as the second alternative. The primary purpose of the GFE tradeoff table is to ensure that borrowers understand there is a trade off between interest rates and settlement costs and to help them better understand the ''Your credit or charge (points) for the specific interest rate'' disclosure on page 2. It may also help borrowers become aware of alternative loans that are potentially available. However, it is not meant to be an exhaustive range of potential alternative loan products to the borrower. Loan originators are encouraged to discuss any alternative loan products with borrowers and provide them with their own versions of tradeoff tables showing the effects of the alternative loan terms on interest rates, monthly payments, loan amounts, and settlement costs.

7. Establishing Meaningful Standards for GFEs

a. Tolerances

Proposed Rule. Under the March 2008 proposed rule, loan originators would have been prohibited from exceeding at settlement the amount listed as ''our service charge'' on the GFE, absent unforeseeable circumstances. The proposed rule also would have prohibited the amount listed as the charge or credit to the borrower for the interest rate chosen, if the interest rate was locked, absent unforeseeable circumstances, from being exceeded at settlement. In addition, the proposed rule would have prohibited Item A on the GFE, ''Your Adjusted Origination Charges,'' from increasing at settlement once the interest rate was locked. The proposed rule also would have prohibited government and recording fees from increasing at settlement, absent unforeseeable circumstances.

Under the March 2008 proposed rule, the sum of all the other services subject to a tolerance (originator-required services where the originator selects the third party provider, originator-required services where the borrower selects from a list of third party providers identified by the originator, and optional owner's title insurance, if the borrower uses a provider identified by the originator) would have been prohibited from increasing at settlement by more than 10 percent of the sum for services presented on the GFE, absent unforeseeable circumstances. Thus, a specific charge would have been able to increase by more than 10 percent, so long as the sum of all the services subject to the 10 percent tolerance did not increase by more than 10 percent.

Comments

Supporters of Tolerances

Many commenters expressed various degrees of support for the concept of tolerances. A trade group, representing mortgage brokers as well as some large lenders, expressed support for the concept of tolerances, albeit with certain clarifications or modifications. However, the strongest support for tolerances came from federal banking regulators and groups representing consumer interests. These commenters agreed that unexpected increases in costs between those provided in the GFE and those actually charged at settlement are a significant problem for prospective borrowers, and that the tolerances proposed by HUD would be an effective way of preventing such surprises. These commenters made various suggestions for strengthening the tolerance provisions to provide additional protections for borrowers. Suggestions included calculating the tolerances item-by-item rather than by grouping certain items together and strengthening enforcement.

Opponents of Tolerances

Most lenders, trade groups representing lenders, and trade groups representing other settlement service providers were generally opposed to the proposed tolerance provisions. These commenters stated that tolerances and particularly the zero tolerance for loan originator charges are equivalent to a settlement cost guarantee, and therefore conflict with the explicit statutory requirement for an *estimate* of settlement charges. Several commenters reviewed the legislative history of section 5 of RESPA, emphasizing that the statute was designed ''to provide the prospective homebuyer with *general* information as to what their costs will be at the time of settlement.'' (See H.R. Rep. No. 667, 94th Cong., 1st Sess., at 2, 1975 U.S.C.C.A.N. 2448, 2449 (Nov. 14, 1975) (emphasis added).) These commenters also stated that tolerances may be inconsistent with the statutory provision permitting disclosure of a range of charges for settlement services.

Trade groups representing other settlement servicer providers, especially realtors and title companies, focused on the alleged potential anticompetitive effects of the tolerance provisions. These groups suggested that large lenders would seek to manage the risks associated with tolerances by contracting with large third party settlement service providers, thereby placing small settlement service providers at a competitive disadvantage.

Lenders and trade groups representing lenders and some other settlement service providers also strongly supported removing government recording and transfer charges from the tolerances. They stated that these charges are outside of the control of the loan originator and cannot be known with any certainty at the time the GFE is provided.

Several lenders and trade groups representing lenders suggested alternatives to the proposed tolerance provisions. For example, certain trade groups representing lenders recommended that tolerances not apply to the initial GFE, which would be used as a shopping tool, but tolerances would apply only to a ''final'' GFE that would be provided after a full mortgage application had been completed. These trade groups also supported more flexibility in the tolerance for the loan originator's own charges, and suggested a 5 percent tolerance rather than a ''zero tolerance.'' Another alternative suggested by at least one lender was to evaluate overall compliance with tolerances rather than compliance on a loan-by-loan basis. This suggestion, according to the commenter, would alleviate many of the difficulties in anticipating unusual aspects of individual loans but still hold lenders accountable for providing GFEs that, as a rule, accurately reflect charges at settlement. Another suggestion offered was to make providing a list of third party settlement service providers to prospective borrowers optional, with tolerances applying only where the loan originator selected the service provider or where the loan originator provided a list of service providers.

HUD Determination

Based on the comments received in response to the proposed rule, HUD has revised a number of provisions dealing with the tolerances. In particular, HUD has clarified the situations where the loan originator would no longer be bound by the tolerances. However, HUD has determined that only limited changes are necessary in the tolerance

amounts for settlement service categories in the rule. The final rule seeks to balance the borrower's interest in receiving an accurate GFE early in the application process to enable the borrower to shop effectively, with the lender's interest in maintaining flexibility to address the many issues that can arise in a complex process such as loan origination.

Many commenters recommended changes to the size of the tolerances for different categories of settlement costs, especially the zero tolerance for loan originator charges. With one exception described below, the final rule does not change the amounts of the tolerances permitted for the different categories of settlement costs. As noted in the proposed rule, HUD considered the best available data on the variation in the costs of settlement services, in particular, for title services, in determining that a 10 percent tolerance is reasonable. No commenters submitted or identified any alternative data sources that would support expanding the tolerances beyond 10 percent.

With respect to the zero tolerance for a loan originator's own charges, HUD recognizes the comments characterizing the tolerance as a potential settlement cost guarantee. However, the final rule provides substantial flexibility to loan originators in providing a revised GFE when circumstances necessitate changes. By providing such flexibility, HUD intends to prevent only those increases in the loan originator's charges that are made in ''bad faith.'' Section 19(a) provides explicit authority for the Secretary to make such interpretations as may be necessary to achieve the purposes of RESPA. Providing a clear, objective standard for what constitutes ''good faith'' under section 5 of RESPA is necessary to provide more effective advance disclosure to homebuyers and sellers of settlement costs, and as such, falls directly within the Secretary's interpretive authority under section 19(a). In the context of residential mortgage negotiations, HUD finds that the term ''good faith'' requires that, once a loan provider has quoted in writing a certain price as the cost of its own services in a specific transaction and absent the ''changed circumstances'' provided for elsewhere in the rule, the provider must adhere to the quoted price.

The one exception to the amounts of the tolerances remaining the same as in the proposed rule is the tolerance for the government recording and transfer charges. HUD has adjusted how these charges are treated under the tolerances. The final rule splits the government recording and transfer charges into two categories: government recording charges, and transfer taxes.

Transfer taxes should generally be known at the time the GFE is provided, so those taxes continue to be subject to a zero tolerance. If there are changes in the tax rates or in the price of the property after a GFE is provided, those changes would either constitute changed circumstances or new information that would be the basis for providing a revised GFE. It is HUD's view that these provisions will provide sufficient flexibility to protect loan originators from changes outside their control, while still preventing loan originators from providing ''low-ball'' estimates of transfer taxes on the GFE that could mislead prospective borrowers. Government recording charges, in contrast, often may not be known with any certainty at the time the GFE is provided, and in many cases not until close to, or at, closing. Therefore, HUD has determined that these charges should be included with the third party charges that are subject to an overall 10 percent tolerance. Because the government recording charges typically are small in relation to other settlement costs, this should provide ample flexibility to loan originators on these charges without unduly impacting the permitted tolerances for other third party settlement charges.

As noted earlier in this preamble, HUD has made a number of changes to the tolerances provisions to clarify and provide additional flexibility in managing the tolerances. As in the proposed rule, the final rule adds a paragraph to the current regulations that provides that a loan originator that violates the GFE requirements, which include the tolerance requirements, shall be deemed to have violated section 5 of RESPA. However, the final rule also provides a loan originator with an opportunity to cure any violation of the tolerance by reimbursing the borrower any amount by which the tolerances were exceeded. This reimbursement may be made at settlement or within 30 calendar days after settlement. HUD will deem a payment to have been provided in a timely fashion if it is placed in the mail by the loan originator within 30 calendar days after settlement. HUD has determined, based on the comments received, that 30 calendar days provides sufficient time for loan originators to identify and cure any tolerance violations through their post-closing review process. In most cases, HUD expects that violations will be identified at or before settlement when completing the revised HUD–1 form, which provides a clear format for comparing the charges estimated on the GFE with those actually imposed at settlement.

The opportunity to cure violations of the tolerances is an important tool for loan originators to manage compliance with the tolerance requirements. Many lenders and groups representing lenders and other settlement service providers objected to the imposition of tolerances because of the difficulty of providing accurate estimates to prospective borrowers early in the application process. The opportunity to cure will permit loan originators to give an estimate of expected settlement charges in good faith, without subjecting them to harsh penalties if the estimate turns out to be lower than the actual charges at settlement.

HUD has also made clarifying changes to the proposed provision describing the circumstances in which the GFE can be revised. As described in more detail below, changed circumstances that result in higher costs can be a basis for providing a revised GFE. In addition, information that was either not known or not relied on at the time the original GFE was provided may also be the basis for providing a modified GFE.

b. Unforeseeable Circumstances

Proposed Rule. The March 2008 proposed rule provided that loan originators would not be held to tolerances where actions by the borrower or circumstances concerning the borrower's particular transaction result in higher costs that could not have reasonably been foreseen at the time of the GFE application, or where other legitimate circumstances beyond the originator's control result in such higher costs. The proposed rule also provided that if unforeseeable circumstances would result in a change in the borrower's eligibility for the specific loan terms identified in the GFE, the borrower must be notified of the rejection for the loan and be provided a new GFE if another loan is made available.

Comments

Most of the commenters who commented on unforeseeable circumstances generally supported the proposed rule's provision on this matter, but many recommended changes or additions to the proposed definition of unforeseeable circumstances. Several lenders and trade groups representing lenders indicated that, while ''unforeseeable circumstances'' encompasses many things that would fall under the statutory requirement that estimates of settlement costs be in ''good faith,'' the two concepts are not always equivalent. Some commenters suggested

that the definition be expanded or clarified to include any situation that is outside the lender's control, even if such a situation involves a change that occurs often enough to be ''foreseeable'' in some sense. An example offered of such situation is one in which the changes in the price of the property or in the estimated value of the collateral may necessitate new information about the credit quality of the borrower that is developed during the underwriting process, or any other situation for which there is a reasonable explanation and that is still consistent with ''good faith.''

Several commenters, including FTC staff and a trade group representing mortgage brokers, found the proposed definition of ''unforeseeable circumstances'' to be vague. They suggested adding specific examples of common situations to clarify the scope of ''unforeseeable circumstances.''

These commenters also offered suggestions regarding the definition. A group representing consumer interests recommended that HUD carefully monitor how often unforeseeable circumstances override the tolerance requirements, to ensure that the exception does not swallow the rule. A joint comment letter from groups representing state regulators suggested that a provision be included requiring loan originators to provide written notice to borrowers describing the ''unforeseeable circumstance'' that resulted in the higher costs.

HUD Determination

Based on the comments received in response to the proposed rule, HUD has made a number of changes to the proposed provisions describing the circumstances in which the GFE can be revised. HUD has determined that changes are needed to the proposed grounds for providing a revised GFE.

The final rule clarifies the different types of circumstances (''changed circumstances'') that can be a basis for providing a revised GFE. The final rule continues to emphasize that market price fluctuations by themselves are not changed circumstances. For example, if an appraiser that a loan originator intends to use for a particular transaction raises its prices by $50 after the loan originator has already provided a GFE, that increase would not have constituted an unforeseeable circumstance under the proposed rule. This result would continue under the final rule, i.e., such a price increase by the appraiser would not be a ''changed circumstance'' allowing the issuance of a new GFE.

HUD recognizes that numerous commenters recommended elaborations of, or technical changes to, the definition of unforeseeable circumstances. Because many of the changes described in the proposed definition of ''unforeseeable circumstances'' happen frequently enough that they could be ''reasonably foreseen,'' the final rule replaces the definition of ''unforeseeable circumstances'' with a new definition for ''changed circumstances.'' However, the types of circumstances included in the new definition are similar to the types of circumstances that were included in the proposed rule. The first clause in the new definition of ''changed circumstances'' in the final rule still includes acts of God, war, disaster, or other emergencies as was included in the proposed rule. The final rule clarifies that the other circumstances in the second clause are separate from and in addition to the circumstances listed in the first clause. The final rule also clarifies that the other circumstances include situations where information particular to the borrower or the transaction either changes or is later found to be different from what was known at the time the GFE was provided. For example, new information affecting the borrower's credit quality or a change in the loan amount might occur often enough to be ''reasonably foreseeable'', but it would still fall within the types of circumstances included in the second clause of the definition of ''changed circumstances.''

Under the final rule, changed circumstances that result in an increase in settlement costs, such that the tolerances would be exceeded, or that result in a change in a borrower's eligibility for the loan offered, may be the basis for providing a revised GFE. For example, if the actual loan amount turns out to be higher than the loan amount indicated by the borrower at the time the GFE was provided, and certain settlement charges that are based on the loan amount increase as a result, the loan originator may provide a revised GFE reflecting those higher amounts. Compliance with the tolerance provisions would be evaluated by comparing the revised GFE with the actual amounts charged at settlement.

Similarly, if underwriting and verification show that a borrower's monthly income is different from the income relied on in providing the original GFE, and the difference results in a change in the borrower's eligibility for that loan with those particular terms, the loan originator would no longer be bound by the original GFE. If a loan with different terms is available for that borrower, then the loan originator would have the option of providing a modified GFE. Conversely, as an example, if the borrower's total assets were relied on in providing the original GFE, and those assets are not materially different from what was stated at application, then the borrower's total assets may not be used as a basis for providing a revised or modified GFE.

While these changes are intended to provide loan originators with more flexibility in providing revised GFEs, HUD is also mindful of the potential for abuse. Unscrupulous loan originators might seek to avoid providing a reliable GFE by claiming not to have relied on information provided by the prospective borrower. In order to discourage loan originators from providing ''generic'' GFEs that are not based on a preliminary evaluation of a particular borrower, the final rule limits the ability of loan originators to provide a revised GFE based on information that was collected from the borrower prior to providing the GFE. However, if a loan originator documents that it relies on a limited range of information in providing GFEs to borrowers, the loan originator may provide a revised GFE based on any other information that results in increased settlement costs or a change in the borrower's eligibility, even if the information was received by the loan originator prior to providing the GFE, subject to the provisions of the rule. Loan originators are presumed to have relied on the same minimum information that must be collected by the loan originator before providing a GFE; namely, the borrower's name, the borrower's monthly income, the property address, an estimate of the value of the property, the amount of the mortgage loan sought, and any credit report that is obtained by the loan originator before providing the GFE. These limitations on providing a revised GFE apply only if subsequent underwriting and verification confirm that the information remains substantially the same as the information provided by the borrower at the time of the GFE. For example, if the borrower's monthly income turns out to be substantially less than the monthly income stated by the borrower in the initial application, the final rule would not prevent the loan originator from either providing a revised GFE or from denying the loan altogether. If the loan originator decides to provide a revised GFE, HUD encourages the loan originator to explain to the borrower the reasons for providing a revised GFE based on the changed circumstances.

Several other provisions in the final rule that permit revisions to the GFE have not changed significantly from

those proposed. The final rule provides that a revised GFE may be provided if a borrower requests changes in the loan product, such as changing from a 30-year term to a 15-year term, or from a fixed-rate mortgage to an adjustable rate mortgage. A revised GFE would be permitted whether such change is first suggested by the loan originator, or by any other party. The final rule also provides that if a prospective borrower does not express an intent to continue with an application within 10 business days of receiving the original GFE, or such longer time specified by the loan originator on the GFE, the loan originator is no longer bound by the GFE. While HUD does not intend for the GFE form to in any way affect state laws regarding contract formation, this provision is intended to make clear that the estimated charges on a GFE are not open-ended.

The final rule also clarifies that, where a borrower has not locked a particular interest rate, or where an interest rate lock has expired, all interest rate-dependent charges on the GFE are subject to change. The charges that may change include the charge or credit for the interest rate chosen, the adjusted origination charges, and per diem interest. The loan originator's origination charge, shown in Block 1 on page 2 of the GFE, is not subject to change, even if the interest rate floats. Of course, the various specific places where the interest rate is identified on the GFE would also be subject to change if the interest rate is not locked. If the borrower later locks the interest rate, a revised GFE should be provided at that time to show the revised information.

Finally, the final rule includes the proposed provision on revision of the GFE for transactions involving new home purchases. HUD recognizes that in cases of new construction, the original GFE may be provided long before settlement is anticipated to occur. In those cases, the loan originator may provide a clear and conspicuous disclosure to the borrower that a revised GFE may be provided at any time up until 60 calendar days prior to closing. If no such disclosure is provided, or if no revised GFE is actually given, then compliance with the tolerances will be evaluated by comparing the charges on the original GFE with the actual charges at settlement. During the 60 calendar days prior to closing, a revised GFE may be provided only in accordance with the other paragraphs in this section.

In any case where a revised or modified GFE is provided to a prospective borrower, the loan originator is required to document the reasons for changes that are made and to maintain that documentation for 3 years after settlement.

8. Lender Disclosure

Proposed Rule. The proposed GFE included information for the borrower to note that lenders can receive additional fees from other sources by selling the loan at some point after settlement. However, the borrower was also informed that once the loan is obtained at settlement, the loan terms, the borrower's adjusted origination charges, and total settlement charges cannot change. The language on the proposed GFE also indicated that after settlement, any fees lenders receive in the future cannot change the loan received or the charges paid at settlement by the borrower.

Comments

Lender Representatives

Lenders and lender organizations commented that the disclosure regarding lender compensation on page 4 of the GFE is misleading and unnecessary, and should therefore be removed. These commenters suggested that because borrowers already understand how lenders are compensated, through origination charges and interest, lenders are already required to make full compensation disclosures. Sale of the loan after settlement merely allows the lender to collect the present value of that interest. One lender argued that secondary market sale of the loan actually reduces costs to borrowers rather than increasing them. Lenders also commented that the disclosure is biased against lenders because it does not point out that they can lose money selling the loan later. In addition, one lender said that the current servicing disclosure already covers this information. Lenders also suggested that because the text of the disclosure does not concern settlement costs or issues, the disclosure is outside the purview of RESPA.

Mortgage Broker Representatives

NAMB supported HUD's inclusion of the lender disclosure information, but felt that such information should be presented with greater emphasis and in more detail. NAMB suggested moving the information to page two of the GFE and presenting it as part of the YSP disclosure, in order to make clear to consumers the similarity in the two charges. According to NAMB, this change would help achieve parity of disclosures between lenders and mortgage brokers, which is essential for effective consumer disclosure.

Other Commenters

FTC staff commented that the lender disclosure is misleading and will cause confusion because it does not make clear that the terms of the loan may be dependent on anticipation of the secondary market fees described. FTC staff said there should be more explicit disclosure in the origination charge section of the GFE, making clear that lenders also get higher fees for a higher interest rate.

HUD Determination

After consideration of the comments, HUD has determined to retain the lender disclosure on the GFE. HUD is retaining the lender disclosure on the GFE because HUD believes that it is important for borrowers to be aware that lenders may receive additional fees by selling the loan after settlement. However, the disclosure has been streamlined. The disclosure on the revised form informs the borrower that some lenders may sell the loan after settlement and any fees received by the lender for selling the loan cannot change the borrower's loan or the charges paid by the borrower at settlement.

9. Enforcement and Cure

Proposed Rule. The March 2008 proposed rule provided that HUD would deem violations of the requirements for the GFE in 24 CFR 3500.7 to be violations of section 5 of RESPA. This would include instances where the charges listed on the GFE are exceeded at settlement by more than the tolerances permitted under § 3500.7(e). In similar fashion, the proposed rule provided that HUD would deem violations of the requirements for the HUD–1/1A in § 3500.8 to be violations of section 4 of RESPA.

HUD invited comments on whether a provision should be added to the RESPA regulations that allow a loan originator, for a limited time after closing, to address the failure to comply with tolerances under the proposed GFE requirements, and if so, how such a provision should be structured. HUD sought comments on whether such a provision would be useful and, if so, what the appropriate time frame would be for finding and refunding excess charges. HUD also invited comments on whether the potential for abuse of such a provision would be harmful to consumers. Comments were also sought on whether the ability of prosecutors to exercise enforcement discretion would obviate the need for such a provision.

Comments

Many comments were received on the advisability of allowing loan originators to cure potential violations of the tolerances on the GFE. Lenders and trade groups representing lenders and some settlement service providers strongly supported the addition of a provision allowing loan originators to cure potential violations of the tolerances. Several lenders reiterated their previous comment that HUD lacks authority to impose tolerance requirements on the GFE, but that if a tolerance provision were authorized by statute, they would support the inclusion of a cure provision. Among the lenders and lender trade groups that supported inclusion of a cure provision, the comments were almost evenly divided between those suggesting a 60-calendar-day period to cure potential violations of the tolerances, and those suggesting a 90-calendar-day period. Another commenter recommended that HUD consider adding a cure provision for the HUD–1 and closing script.

Consumer groups were generally supportive of stronger enforcement of RESPA's disclosure requirements, including enactment of statutory changes that would include civil money penalties for violations of those requirements. A consumer group that responded to HUD's question regarding a cure provision expressed its opposition to adding such a provision. Consumer groups, generally, raised the possibility that a cure provision could be abused by offering only partial reimbursement to a borrower. These commenters suggested that loan originators would have an incentive to cure violations even without a specific provision exempting them from liability if a potential violation is cured.

HUD Determination

Based on the comments received in response to the proposed rule and further consideration of this issue by HUD, HUD has determined that a cure provision is important to allow loan originators to more effectively manage any uncertainty in costs associated with the required tolerances on the GFE. By including a cure provision, HUD recognizes that some errors are inevitable when handling large numbers of complex transactions, and HUD does not intend for the tolerance requirements to create liability for inadvertent errors.

As described in more detail above, HUD has built an opportunity to cure violations of the tolerances into the requirements establishing the tolerances. The final rule also provides that a violation of any of the requirements for completing the HUD–1/1A shall be deemed to be a violation of section 4 of RESPA. However, the rule provides that an inadvertent or technical error in completing the HUD–1/1A shall not be deemed a violation of section 4 of RESPA, if a revised HUD–1/1A is provided to the borrower and/or seller within 30 calendar days of settlement. This opportunity to cure errors on the HUD–1/1A is consistent with HUD's longstanding policy permitting settlement agents to provide revised HUD–1/1A settlement statements where errors are discovered after settlement.

10. Implementation Period

Proposed Rule. In the March 2008 proposed rule, HUD stated that it intended to include a 12-month transition period in the final rule. During the 12-month transition period, settlement service providers and other persons could comply with either the current RESPA requirements or with the revised requirements of the amended provisions. HUD invited comments on whether such a transition period is appropriate.

Comments

Consumer representatives generally favored a 12-month implementation period, while lenders and their trade associations sought a longer implementation period on the basis that 12 months is insufficient time to prepare for compliance with the new requirements. According to one major lender, a 12-month period is far too short, given the extensive nature of the changes. This lender estimated that an 18–24 month period will be required for implementation of the proposal, as published on March 14, 2008. According to other major lenders, the proposed rule would require significant systems and operational changes well beyond the complex forms changes, and would take a minimum of 2 years to implement. A lender association stated that requiring the industry to implement changes to RESPA disclosures and then to later implement changes to TILA disclosures would result in significant and duplicative costs for systems changes, training, and staffing that would ultimately be borne by consumers. This association expressed support for an implementation period beginning 18 months after the effective date of the rule, or 18 months after the implementation period for the Federal Reserve Board's TILA rule, whichever is later.

HUD Determination

HUD has determined to proceed with adoption of a 12-month implementation period. HUD recognizes that operational changes will be required in order to implement the new rule, in addition to training staff on the new requirements. However, the need for a standardized GFE with relevant information about the loan and settlement charges is critical in light of the problems in the current market, and further delay is not warranted. HUD believes that a 12-month implementation period will provide sufficient time for systems changes and training to occur. Therefore, use of the new GFE and the new HUD–1/1A will be required as of January 1, 2010. During the transition period, the current RESPA requirements with respect to the GFE and the HUD–1/1A remain in effect and settlement service providers may choose to proceed under either the current GFE and HUD–1/1A requirements or may choose to proceed under the new GFE and HUD–1/1A requirements. However, any settlement service provider who delivers the new GFE prior to January 1, 2010, will be subject to all of the requirements related to the new GFE, including compliance with the tolerance provisions and use of the required HUD–1/1A.

Other provisions of this final rule, including the average charge and required use provisions and the technical amendments, are implemented immediately upon the effective date of the rule.

As previously stated, HUD will issue guidance on compliance with the rule's provisions during the implementation period.

C. Lender Payments to Mortgage Brokers—Yield Spread Premiums (YSPs)

1. Disclosure of YSP on GFE

The March 2008 proposed rule provided that lender payments to mortgage brokers in table-funded and intermediary transactions be clearly disclosed to consumers on the GFE and the HUD–1 settlement statements, as set forth below. The rule also proposed to streamline the current regulatory definition of ''mortgage broker.''

Under the March 2008 proposed rule, the first page of the GFE presented the net origination charge as ''your adjusted origination charges.'' The second page of the proposed GFE informed the consumer how the adjusted origination charge was computed. Block 1 disclosed as ''Our service charge'' the originator's total charge to the borrower for the loan. The rule proposed that in the case of

loans originated by mortgage brokers, the amount in Block 1 would have to include all charges received by the broker and any other originator for, or as a result of, the mortgage loan origination, including any payments from the lender to the broker for the origination. In the case of loans originated by originators other than mortgage brokers, the amount in Block 1 would have to include all charges to be paid by the borrower that are to be received by the originator for, or as a result of, the loan origination to the borrower, except any amounts denominated by the lender as discount points and which would be disclosed in Block 2.

In loans originated by mortgage brokers, Block 2 of the second page of the proposed GFE would have disclosed whether there is any charge or credit to the borrower for the specific interest rate chosen for the GFE. The second check box would have indicated whether there was a payment for a higher interest rate loan, described as the ''credit of $_____for this interest rate of _____%. This credit reduces your upfront charges.'' The third check box would have indicated a ''charge of $_____ for the interest rate of _____%. This payment (discount points) increases your upfront charges.'' Any lender payment would have been subtracted and any points would have been added to arrive at ''your adjusted origination charge'' that would also have been disclosed on the first page of the form. The proposed rule provided that for mortgage brokers, the amounts of any charge or credit in Block 2 would have to equal the difference between the price the wholesale lender pays the broker for the loan and the initial loan amount.

Comments

Consumer Representatives

Some consumer groups opposed the proposed YSP disclosure on several grounds. These groups asserted that to describe lender-paid broker compensation as a credit to reduce settlement costs is misleading. NCLC stated that there is no requirement that the lender payment will actually be used in this manner. CRL stated that the proposed language presumes a trade off through a reduction in upfront costs, and research shows that this does not occur, except in limited circumstances. According to CRL, the disclosure's characterization of the YSP as a ''credit'' only exacerbates the issue of the nonexistent trade off. CRL expressed concern that the disclosure suggests that the arrangement is saving the consumer money, when in fact the disclosure is doing the opposite. CRL also objected to the disclosure on the grounds that the disclosure does not make clear that this is a fee paid to a broker. In addition, CRL stated that it found the disclosure confusing, and noted that HUD has not tested the effectiveness of the disclosure outside of controlled circumstances. Both CRL and NCLC recommended an alternative formulation for disclosure of mortgage broker compensation.

NCLC also stated that the proposed disclosure potentially complicates TILA review. According to NCLC, without guidance from the Federal Reserve Board, it is not clear what effect treating the lender-paid broker compensation as a credit will have on the central TILA disclosures, which are the finance charge and the APR.

Industry Representatives

Lenders generally were opposed to the proposed YSP disclosure. Many lenders and their trade associations asserted that the proposed approach for disclosing YSP conflicts with pending TILA and HOEPA rule changes proposed by the Federal Reserve Board, and is also inconsistent with Advisory Letter 2003–3 of the Office of the Comptroller of the Currency (OCC). These lenders stated that it would be costly and confusing for the banking industry if HUD and the Federal Reserve Board issued varying rules, revisions, and disclosures independently. Other lenders stated that, because in their view HUD assumed that the only way for a lender to calculate payment to the broker is by tying the compensation to the borrower's interest rate, neither the proposed GFE nor the proposed HUD–1 can accommodate a lender's compensation payment to the broker based on the loan amount, or based on a flat dollar amount. According to these lenders, if a lender were to pay broker compensation that is not tied to the interest rate, there would be no way to disclose the payment without artificially inflating the charges paid by the borrower.

A major lender noted that if a broker intends to rely primarily on the lender for compensation, the dollar-for-dollar offset of the YSP against other service charges will necessitate that the broker increase the disclosed consumer paid fees. The lender commented that this has regulatory impacts under other laws. The lender stated that the origination fee is a finance charge under TILA. The lender also stated that the origination fee is also normally included in the points and fees definitions under several state high-cost laws and HOEPA, whereas YSP payments are only a finance charge under TILA to the extent included in the interest rate and are not always included in points and fees calculations. According to this commenter, the proposed definition will artificially force more loans into the ''high cost'' category which will further limit credit because many lenders do not originate these loans.

CMC stated that the proposed mortgage broker compensation disclosure wrongly conflates mortgage brokers and mortgage lenders. CMC noted that there are important differences between mortgage brokers and mortgage lenders in terms of roles in the transaction, compensation, and risk posed to consumers. CMC stated that the mortgage broker disclosure proposal fails to adequately address these differences. CMC expressed opposition to consolidating the charges of the lender and the broker together in a single ''service charge'' because, according to CMC, such consolidation effectively hides the amount of the broker's total compensation from the borrower. CMC believes that borrowers should have this information and that failure or omission to disclose could cause harm. CMC stated that disclosing YSP as a credit and lumping the YSP together with (or offsetting it against) lender fees or discounts hides the YSP in a way that is confusing and potentially harmful to the borrower. CMC recommended that broker compensation be disclosed as shown in the RESPA/TILA forms and ''mortgage broker fee agreement and disclosure'' submitted with their comments.

MBA asserted that the proposed disclosure will be unclear to borrowers while the costs occasioned by the adoption of new terminology for mortgage broker fees will, in its opinion, be enormous. MBA noted that, in its opinion, the proposed disclosure does not allow for the possibility that, in the future, some brokers will be paid on a basis other than the loan's interest rate. In addition, MBA stated that as lenders and brokers perform distinct functions in the marketplace and are perceived differently by consumers, applying the same rules to them is ill-advised. MBA proposed an alternative mortgage broker compensation disclosure that discloses the total compensation for the broker's services and the amounts paid by the lender to the broker on the borrower's behalf.

NAMB reasserted its opposition to carving out one component of the cost of a mortgage loan for the ''putative purpose of clarification and simplification.'' NAMB asserted that the proposed YSP disclosure would achieve the opposite result and would detract

from the consumer's ability to understand and comparison shop. NAMB recommended that direct competitors should be treated the same to facilitate shopping and promote consumer understanding. NAMB stated that if HUD continues to require disclosure of originator compensation, HUD must require all originators to disclose the premium value created by interest on the loan, and that HUD must provide a method for making that calculation.

According to NAMB, the proposed disclosure makes distinctions among mortgage originators with no basis for doing so, and in disregard of market realities. NAMB stated that the proposal seeks to enhance regulatory distinctions among groups of originators, long after such labels have lost their meaning in the marketplace. NAMB also criticized the proposal because it would, in NAMB's opinion, isolate a single component of cost—compensation—rather than aggregate cost. According to NAMB, compensation is relevant only to the extent that compensation serves as a ''rough proxy for the difference between the par, or wholesale, loan rate and the rate quoted to the consumer.'' In the case of mortgage brokers, that difference is called ''yield spread premium'' or YSP; in the case of lenders, that difference is called ''service release premium'' or SRP. NAMB asserted that in both cases, that differential may be readily determined prior to closing at the time the interest rate is locked and should be disclosed. NAMB also asserted that the lender's compensation after the loan is sold is irrelevant, since such compensation does not affect the price paid by the borrower. According to NAMB, what is relevant is the incremental cost to the consumer assessed at the time of closing that is attributable to the differential between the loan rate and the wholesale rate. NAMB asserted that that figure can be computed and disclosed prior to closing and recommended that HUD specify how that computation should be done, and require disclosure of the resulting figure, or in the alternative, not require such disclosure by any originators.

NAMB asserted that the methodology of HUD's testing is flawed in two respects. According to NAMB, the contractor failed to test consumer understanding of loan terms and of comparative shopping when YSP was not disclosed. Instead, according to NAMB, the contractor assumed the answer to the fundamental question of whether YSP disclosure aided consumers in comparative shopping. NAMB also stated that the testing focused only on how, not whether, to disclose YSP. NAMB stated that in doing so, the proposal ignored FTC's earlier finding that disclosing just broker compensation created confusion and led consumers to make decisions contrary to their best interests.

NAMB also asserted that HUD's testing was flawed because the testing was not conducted among actual borrowers dealing with actual loan originators. According to NAMB, the tests fail to assess the consequences of disparate disclosures in actual competitive markets. NAMB noted that, in 2004 and 2007, FTC conducted extensive studies on consumer mortgage disclosures, with a particular focus on mortgage broker compensation disclosures. NAMB further stated that the 2007 FTC study restated the conclusion of the earlier study, noting that disclosure of broker compensation ''created a substantial consumer bias against broker loans, even when the broker loans cost the same or less than direct lender loans, because the disclosures would have been required of brokers, but not direct lenders.'' (See 2007 FTC Study at 6, n. 14). NAMB also objected to the proposed mortgage broker compensation disclosure on the grounds that the proposed rule fails to evaluate how the proposed broker disclosure would relate to any of the currently mandated disclosures. According to NAMB, all 50 states regulate brokers and their compensation in various respects. Industry practice and lender requirements mandate further disclosures. NAMB asserted that to limit complexity and information overload, HUD should consider how all current mortgage broker disclosures would relate to its proposal.

NAMB also commented that HUD has not adequately addressed how its proposed mortgage broker compensation disclosure relates to the Federal Reserve Board's proposed amendments to Regulation Z, or how HUD's proposal relates to the risk-based pricing regulations recently proposed by the Federal Reserve Board and FTC pursuant to the Fair and Accurate Credit Transactions Act of 2003 (73 FR 28 966 (May 19, 2008)). NAMB recommended that HUD seek public comment on the interaction between HUD's proposal, the proposed amendments to Regulation Z, and the pending risk-based pricing regulations before proceeding to finalize the March 2008 proposed rule.

Other Commenters

The National Association of Realtors (NAR) stated that it is unclear whether consumers will understand the proposed disclosure of discount points and YSPs. According to NAR, calling the YSP a ''credit'' to the borrower without explaining or making it clear that the YSP is tied to the interest rate may mislead or confuse a consumer.

The Conference of State Bank Supervisors, the American Association of Residential Mortgage Regulators, and the National Association of Consumer Credit Administrators commented that the proposed disclosure of YSP is not parallel with the Federal Reserve Board's proposed rule amending Regulation Z. These commenters urged HUD to work closely with the Federal Reserve Board to develop seamless regulations before finalizing the proposed rule.

Federal Agencies

FTC staff expressed support for the goal of improving consumer understanding of the costs and terms of mortgage loans. However, based on the results of past FTC and HUD mortgage disclosure research, FTC staff urged HUD to consider reevaluating its proposed broker compensation disclosures, because they may adversely affect consumers and competition. FTC staff stated that alternative disclosures that clarify the role of mortgage originators, applied equally to all originators, could provide greater benefits to consumers and avoid adverse effects on consumers and competition. FTC staff urged HUD to evaluate and test alternative disclosures to determine the type or types of disclosures that will most benefit consumers. FTC staff also suggested that HUD consider, and possibly test, whether other disclosures such as one that clarifies the role of all mortgage originators would be more beneficial for consumers.

The FDIC expressed some concerns about the proposal's approach to YSP disclosure. The FDIC stated that the proposed GFE does not clarify that YSP is a payment made by a lender to a mortgage broker in exchange for referring a borrower willing to pay an above par interest rate, nor does the GFE state the amount of the YSP to be paid to a broker. Instead, according to the FDIC, the GFE seems to presume that the lender will apply the YSP as a ''credit'' that will lower settlement costs by a corresponding amount. The FDIC noted that the proposal does not impose the condition that YSP must actually function as a credit to a borrower as a requirement on lenders or brokers. The FDIC further stated that while HUD's effort, through the March 2008 proposed rule, to provide borrowers with more information about the trade off between interest rates and settlement costs is positive, this information alone does not

provide borrowers with an understanding of the economic incentives motivating the lenders and brokers with whom the borrowers are dealing.

The FDIC recommended that HUD ban YSPs to ensure that broker compensation will not be based on steering the consumer to a loan that is more expensive than one for which the borrower otherwise would qualify. The FDIC recommended that HUD ban any mortgage broker compensation that is not a flat or point-based fee.

If YSPs continue to be permitted, the FDIC recommended that their purpose and cost be clearly disclosed. The FDIC recommended that the disclosure inform the consumer that the broker is receiving a payment from the lender for placing the consumer in a loan with a higher interest rate. The FDIC stated that a YSP should not be identified as a ''credit,'' because such language would tend to make consumers believe that they are deriving a financial benefit from a YSP. The FDIC further recommended removal of the statement ''(T)his credit reduces your upfront charge,'' because this language is not balanced by a corresponding statement that informs consumers that the YSP will result in them paying a substantially higher interest rate over the life of the loan.

HUD Determination

Having reviewed the comments, and based on its testing of the forms, HUD has determined to retain the mortgage broker disclosure as proposed, with clarifying modifications. However, in order to better explain how the disclosure works, HUD is removing, from § 3500.2 of the regulations, the definition of the term ''charge or credit for the interest rate chosen'' and at the same time inserting expanded information in the instructions on how to disclose the credit or charge to provide additional guidance.

In reaching the determination to retain the mortgage broker disclosure, HUD is mindful of the concerns expressed by the commenters, but believes that the mortgage broker disclosure, read in conjunction with the tradeoff table on the form, will help the borrower understand the relationship between the interest rate and the settlement charges. While many commenters claimed that the mortgage broker disclosure as proposed was confusing and would result in bias against mortgage brokers, HUD's testing of the form demonstrated that consumers understood the relationship between the interest rate and settlement charges as presented on the form and that no bias against brokers resulted from such disclosure. As noted below, while the substance of the broker disclosure remains the same in the final rule as it was in the proposed rule, some minor stylistic changes have been made to draw the borrower's attention to specific terminology in the disclosure that HUD believes will improve the disclosure.

Since 1992, HUD has required the disclosure of YSPs on the GFE and HUD–1 settlement statements as a ''payment outside closing'' or ''POC.'' This means of disclosure has proved to be of little use to consumers. Moreover, notwithstanding that lender payments to brokers are directly based on the rate of the borrower's loan, under current HUD guidance such lender payments are not required to be included in the calculation of the broker's total charges for the transaction, nor are they clearly listed as an expense to the borrower. This omission is exacerbated by the fact that many brokers hold themselves out as shopping among various funding sources for the best loan for the borrower, while failing to explain to the borrower that the payment they receive from the lender is derived from the borrower's interest rate. While some brokers tell customers how they can use lender payments to lower the customer's upfront settlement costs, others do not.

Policy Statement 2001–1 made clear that earlier disclosure and the entry of YSPs as credits to borrowers would ''offer greater assurance that lender payments to mortgage brokers serve borrowers' best interests.''(See 66 FR 53056.) HUD could not mandate new disclosure requirements in the Policy Statement. HUD did, however, commit itself in that Policy Statement to making full use of its regulatory authority to establish clearer requirements for disclosure of mortgage broker fees, and to improve the settlement process for lenders, mortgage brokers, and consumers. (See 66 FR 53053).

It is for this reason that HUD proposed its new disclosure requirements. HUD maintains that while rate-based payments to mortgage brokers must be clearly disclosed to borrowers, at the same time, mortgage brokers also must not be disadvantaged in the marketplace, since such disadvantage will only result in decreased competition and higher costs to consumers. Many mortgage brokers offer products that are competitive with and frequently lower priced than the products of retail lenders, and HUD wishes to preserve continued competition and lower prices for consumers, as well as consumer choice.

The revised GFE form in today's rule is the result of an iterative testing process, comprised of six rounds of consumer testing of the form during the period 2003 through 2007. An additional round of testing was conducted in the summer of 2008. Working with HUD, HUD's testing contractor used the data collected during each round to improve and modify the form throughout the testing process. A summary report on each round of testing is available at: *http://www.huduser.org/publications/hsgfin/GoodFaith.html*.

HUD disagrees that its contractor's consumer testing of the GFE form was flawed. Independent reviews by experts in consumer testing and forms development found no flaws in the design of the tests. NAMB's suggestion of testing forms in actual transactions is not necessary or workable. Properly designed and implemented testing does produce correct results through an iterative process. The most difficult aspect of testing actual transactions would likely be finding loan originators (both brokers and lenders) willing to develop and test a form that is designed to improve consumer understanding in actual transactions and thereby reduce the originators' information advantage and market power in those transactions. Perhaps as difficult would be keeping tested consumers from shopping outside of the experimental group of originators to keep the test valid, especially since the forms so strongly urge consumers to shop among different originators.

The NAMB's second criticism is also not valid as the third round of testing was exactly on the point of whether to disclose the YSP. The purpose of the YSP disclosure is to inform consumers about the full cost of originating loans through a broker and to help them to understand the tradeoff between interest rates/monthly payments and origination costs so that consumers can use the relationship to their benefit. The third round of testing did not include the YSP disclosure, and the important finding was that, without the YSP disclosure, consumers did not understand the existence of the tradeoff between interest rates and origination charges as well as when the YSP was disclosed. Helping consumers understand this tradeoff is a fundamental goal of HUD's RESPA reform effort and of the design of the GFE form. The third round of testing confirmed that inclusion of the YSP disclosure helped consumers understand the tradeoff, and that if they take a loan with a relatively high interest rate, they should pay lower settlement charges. Since the need for the YSP disclosure to improve

consumer understanding of the tradeoff was established in round 3, whether a YSP disclosure should be included was not the subject of later rounds of testing. Rather, later rounds of form development and testing were aimed at making the YSP disclosure free of anti-broker bias. This effort was successful. HUD's testing found that participants using HUD's GFE were successful more than 90 percent of the time in identifying the cheapest loan whether the GFE loan was from a lender, mortgage broker, or the two loans cost the same.

As indicated, HUD has maintained the disclosure on the top of page two of the revised GFE, while making some stylistic changes to this portion of the form in the interest of borrower comprehension. The top of page 2 refers to ''Your Adjusted Origination Charges'' instead of ''Your Loan Details'' on the proposed form because this is the section of the disclosure that sets forth the origination charges. The box on the top of page 2 informs the borrower how the adjusted origination charge is computed. In response to comments recommending that ''service'' charge be deleted from the form, Block 1 now discloses as ''Our origination charge'' the originators' total charge to the borrower for the loan.

The final rule requires that in the case of loans originated by mortgage brokers, the amount in Block 1 must include all charges to be paid by the borrower that are to be received by the broker and any other originator for, or as a result of, the mortgage loan origination, including any payments from the lender to the broker for the origination. In the case of loans originated by originators other than mortgage brokers, the amount in Block 1 must include all charges to be paid by the borrower that are to be received by the originator for, or as a result of, the loan origination to the borrower, except any amounts denominated by the lender as discount points, which are disclosed in Block 2.

Block 2 discloses for loans originated by mortgage brokers whether there is any charge or a credit to the borrower for the specific interest rate chosen for its GFE. The heading for Block 2 of the proposed form included the term ''points'' at the end of the sentence. On the final form, this sentence now states, ''Your credit or charge (points) for the specific interest rate chosen.'' The second check box indicates whether there is a payment for a higher interest rate loan described as the ''credit of $_____ for this interest rate of _____%. This credit *reduces* your settlement charges.'' The word ''settlement'' has replaced the word ''upfront'' from the proposed form to be more consistent with other terminology on the form. The third check box indicates any ''charge of $_____ for this interest rate of _____%. This charge (points) *increases* your total settlement charges.'' Any lender payment is then subtracted and any points are added to arrive at ''your adjusted origination charges''. The final rule also requires that in the case where a lender compensates a broker based on a flat dollar amount, or based on the loan amount, the second box in Block 2 on page 2 must be checked.

At page 2, while lenders are not required to check the second or third boxes of Block 2, in loans where they do not make such disclosures, they are required to check Box 1 that indicates that ''The credit or charge for the interest rate of _____% is included in 'Our origination charge.' '' If lenders separately denominate any amounts due from the borrower as ''points,'' they must check the third box indicating that there are charges for the interest rate and enter the appropriate amount for points as a positive number. If lenders separately denominate any amounts as a credit to the borrower for the particular interest rate covered by the GFE, they must check the second box and enter the appropriate amount as a negative number. Lenders must also add any such positive amounts or deduct any negative amounts to arrive at ''Your Adjusted Origination Charges,'' listed on Line A of page two of the form.

In reaching its determination, HUD considered providing only the adjusted origination charge without the calculation, and disclosing the YSP and points elsewhere on the form. HUD concluded, however, that a complete disclosure of the payments to the mortgage broker as presented on page 2 of the revised form, especially when read in conjunction with the tradeoff table on page 3, is valuable to borrower understanding of: (1) The broker's total compensation; (2) how rate-based payments from lenders can help reduce borrowers' upfront origination charges and settlement costs in brokered loans; and (3) how payments to reduce the interest rate and monthly charges increase upfront charges.

As discussed above, testing by HUD's contractor demonstrated that disclosure of the YSP out of context was not useful to consumers. On the other hand, a form that requires that lenders disclose that credits or charges may be included in their service charge as well, even when the calculation for brokered loans is on the form, was not confusing for borrowers. HUD's testing demonstrated that borrowers correctly compared adjusted origination charges between loans from mortgage brokers and loans from lenders even when the YSP is included in the calculation of the adjusted origination charge. Nevertheless, to assure that borrowers choose the best value loan without being confused by the presence of a YSP, HUD established the first page of the GFE as a summary page that only includes total estimated settlement charges. HUD also considered the comments that its proposed mortgage broker disclosure requirement might be inconsistent with the approach taken by the Federal Reserve Board in its proposed rule to amend Regulation Z of TILA, 16 U.S.C. 1601, *et seq.* (73 FR 1672, January 9, 2008). However, the Federal Reserve Board recently announced that it has withdrawn its proposed mortgage broker fee agreement requirement set forth in its proposed rule (73 FR 44522, July 30, 2008).

In its consultations with the Federal Reserve Board staff, HUD raised the concerns expressed by some commenters that treating lender payments to mortgage brokers as a credit toward the origination charges could increase the points and fees of each brokered mortgage loan, thereby resulting in more loans coming under HOEPA coverage. Federal Reserve Board staff advised HUD that notwithstanding HUD's changed requirements, determinations of whether payments to a mortgage broker must be included in the finance charge and whether a loan is covered by HOEPA are based on the statutory definitions and requirements in TILA, as implemented by the Federal Reserve Board's Regulation Z, which are unaffected by HUD's RESPA rulemaking.

2. Definition of ''Mortgage Broker''

The March 2008 proposed rule would have streamlined the current regulatory definition of ''mortgage broker.'' Under the proposed definition, ''mortgage broker'' would mean a person (not an employee of the lender) or entity that renders origination services in a table-funded or intermediary transaction. The definition would also have applied to a loan correspondent approved under 24 CFR 202.8 for FHA programs. The proposed definition would have eliminated the current exclusion of an ''exclusive agent'' of a lender from the current definition of ''mortgage broker.'' Therefore, under the proposed rule, an ''exclusive agent'' of a lender who was not an employee of the lender, but who renders origination services in a table funded or intermediary transaction, would have been subject to the mortgage broker disclosure requirements set forth in the proposed rule.

Comments

Consumer groups did not comment on this issue. A lender association commented that the proposed change may be inconsistent with Regulation Z Comments 226.19–b–2(i) and 226.19(b)–3 concerning intermediary agents or brokers and the timing of disclosures. MBA stated that the definition should not be changed to include exclusive agents of lenders. MBA commented that because mortgage lenders, including their agents and employees, are functionally different from mortgage brokers, they should be treated differently. MBA stated that it does not believe that mortgage lenders or their exclusive agents warrant the same treatment as mortgage brokers. MBA asserted that borrowers do not perceive brokers in the same way as lenders and brokers do not present the same risks as lenders. MBA also stated that that term ''intermediary'' should not be injected into the definition at all, unless this term is clearly defined to cover independent mortgage brokers. According to MBA, because the term is undefined, ''intermediary'' could be misinterpreted to cover some loan officers who work for lenders and may be independent contractors.

NAMB expressed opposition to the proposed change because, according to NAMB, it would perpetuate distinctions among mortgage originators that no longer have meaning in the marketplace. NAMB noted that the roles of mortgage brokers and other originators have converged with the ubiquity of the ''originate to distribute'' model of mortgage finance, and that the regulatory structure under RESPA should reflect that fact. NAMB recommended that, at a minimum, the definition of ''mortgage broker'' be expanded to include any originator that sells loans where servicing is released within 6 months of origination, rather than securitizing them or holding them in portfolio.

CSBS, AARMR, and NACCA supported the proposed change in the definition of mortgage broker, but recommended that HUD define ''intermediary transaction.'' These commenters stated that by failing to define ''intermediary transaction,'' HUD has created potential confusion among industry participants and regulators.

HUD Determination

HUD has determined to revise the definition of ''mortgage broker.'' While HUD recognizes that mortgage lenders are functionally different from mortgage brokers, an exclusive agent of a lender who is not an employee of a lender, but who renders origination services and serves as an intermediary between the lender and the borrower, is essentially acting as a mortgage broker, and will be subject to the mortgage broker disclosure requirements, as set forth in the rule. This definition will also apply to a loan correspondent approved under 24 CFR 202.8 for Federal Housing Administration (FHA) programs.

The revised definition clarifies that a mortgage broker also means a person or entity that renders origination services and serves as an intermediary between a borrower and a lender in a transaction involving a federally related mortgage loan, including such a person or entity that closes the loan in its own name in a table-funded transaction.

3. FHA Limitation on Origination Fees of Mortgagees

Under its codified regulations, HUD places specific limits on the amount a mortgagee may collect from a mortgagor to compensate the mortgagee for expenses incurred in originating and closing a FHA-insured mortgage loan (see 24 CFR 203.27).[1] The March 2008 proposed rule would have removed the current specific limitations on the amounts mortgagees are presently allowed to charge borrowers directly for originating and closing an FHA loan. Under HUD's proposal, the FHA Commissioner would have retained authority to set limits on the amount of any fees that mortgagees charge borrowers directly for obtaining an FHA loan. In addition, the proposed rule would have also permitted other government program charges to be disclosed on the blank lines in Section 800 of the HUD–1/1A.

Comments

There was little comment on this issue. NCRC disagreed with the proposal to remove the specific limitations on the amount mortgagees are allowed to charge for originating and closing an FHA loan. NCRC stated that a government-guaranteed loan product should shield borrowers from excessive charges by establishing reasonable limits on fees. According to NCRC, while it may be acceptable to carefully raise origination fee limits, this should be done only in conjunction with establishing reasonable limits on YSPs. This commenter stated that by establishing standard limits on origination fees and YSPs, the FHA loan product can keep the nongovernment guaranteed products competing by constraining direct fee and YSP costs.

HUD Determination

HUD believes that its RESPA policy statements on lender payments to mortgage brokers restrict the total origination charges for mortgages, including FHA mortgages, to reasonable compensation for goods, facilities, or services. (See Statement of Policy 1999–1, 64 FR 10080, March 1, 1999, and Statement of Policy 2001–1, 66 FR 53052, October 18, 2001.) Moreover, the improvements to the disclosure requirements for all loans sought to be achieved as a result of this rulemaking should make total loan charges more transparent and allow market forces to lower these charges for all borrowers, including FHA borrowers. Therefore, HUD has determined to finalize the proposed rule to remove the current specific limitations on the amounts mortgagees presently are allowed to charge borrowers directly for originating and closing an FHA loan. The FHA Commissioner retains authority to set limits on the amount of any fees that mortgagees charge borrowers directly for obtaining an FHA loan.

IV. Modification of the HUD–1/1A Settlement Statement

A. Overall Comments on Proposed Changes to HUD–1/1A Settlement Statement

Proposed Rule. Under the March 2008 proposed rule, the current HUD–1/1A Settlement Statements would have been modified to allow the borrower to easily compare specific charges at closing with the estimated charges listed on the GFE. The proposed changes would have facilitated comparison of the two documents by inserting, on the relevant lines of the HUD–1/1A, a reference to the corresponding block on the GFE, thereby replacing the existing line descriptions on the current HUD–1/1A. The proposed instructions for completing the HUD–1/1A would have clarified the extent to which charges for individual services must be itemized.

Comments

Consumer Representatives

A consumer group stated that while referencing the GFE lines on the settlement statement is an important step, HUD should mandate a summary

[1] Under 24 CFR 203.27(a)(2)(i), origination fees are limited to one percent of the mortgage amount. For new construction involving construction advances, that charge may be increased to a maximum of 2.5 percent of the original principal amount of the mortgage to compensate the mortgagee for necessary inspections and administrative costs connected with making construction advances. For mortgages on properties requiring repair or rehabilitation, mortgagor charges may be assessed at a maximum of 2.5 percent of the mortgage attributable to the repair or rehabilitation, plus one percent on the balance of the mortgage. (See 24 CFR 203.27(a)(2)(ii), and (iii).)

settlement sheet that corresponds exactly to the summary sheet of the GFE. According to this group, doing so would obviate the need for a crosswalk between the GFE and the settlement statement. The consumer group stated that the HUD–1 should be easily comparable to the GFE and should facilitate, rather than hinder TILA and HOEPA compliance. The consumer group expressed concern that HUD's improvement of disclosures in the settlement context could impede review of lender compliance with the disclosure requirements under TILA. This commenter noted that the proposed HUD–1 would require lenders to disclose as a lump sum their origination charges and all title services. While this group stated that such an approach is an improvement from the perspective of consumer understanding, the group stated that not all origination and title services are clearly all in, or all out of, the TILA finance charge. Under TILA, for example, title insurance is excluded from the finance charge. The commenter stated that other charges related to title insurance, including the settlement fee, courier fee, or document preparation fees, may be included in the finance charge, particularly if they are not bona fide and reasonable. This commenter noted that similar inconsistencies are true of other origination fees. The commenter stated that absent coordination with the Federal Reserve Board on a more useful and expansive definition of the finance charge, and statutory changes to TILA itself, the final settlement statement should not bundle either all title or all origination charges. The commenter also called for itemization of all title services on both the GFE and HUD–1, so that consumers are aware of the variety of fees.

Lender Representatives

Lenders commenting on the March 2008 proposed rule generally stated that the HUD–1 should be in the same format as the GFE, to enable comparisons of estimated and actual charges. A lender association stated that the proposed changes to the HUD–1 fall short of making the GFE and HUD–1 correspond. Many lenders expressed the concern that the way the proposed HUD–1 forms are to be completed would require many changes with significant operational and technology impacts. A major lender stated that changes to the HUD–1 that consolidate disclosures raise questions about the lenders' ability to complete post-closing checks of finance charge calculations.

Mortgage Broker Representatives

Mortgage brokers commented that the HUD–1 and GFE should mirror each other and promote clarity, understanding, and ease of use for consumers. However, because the proposed GFE, at four pages, is less user-friendly in their opinion than the current version, mirroring the HUD–1 after the proposed document will not make it easier for consumers to understand and use. In regard to specific items on the new HUD–1, one broker commented that specific lines such as the splitting of title insurance between lenders and owners would not work properly. In addition, the broker commented that the form of disclosure for closing services would interfere with ''title only'' agencies, and that the form of the HUD–1 would not leave room for an acknowledgment and certification.

Title and Closing Industry Representatives

Commenters from the title industry said that the HUD–1 was still not easily comparable to the GFE. They also suggested that the title insurance disclosure requirements would conflict with the laws of some states. One title insurance company recommended that title and closing charges be kept separate.

The title industry was opposed to the breakout of the title premium between the agent and the underwriter. It was suggested that this was a private business matter and that this breakout had no effect on the amount of the premium charged. Also, the breakout does not appear on the GFE, so it will not help the consumer to see it at closing.

One escrow company objected to HUD referring to tax and insurance deposits as ''escrows'' and said that the proper term was ''impounds.'' Escrow companies also objected to HUD's reference to ''optional'' owner's title insurance and felt such reference might lead borrowers to forego needed protection. One suggested that the term ''non-required'' would be preferable, but pointed out that in some states owner's title insurance actually is required.

One escrow company commented that HUD tested only its own forms, not the forms submitted by others, so there was no evidence that HUD's forms were better. This commenter went on to say that it does not believe that consumers in a real-world situation will use these forms in the intended manner.

One closing attorney commented that the limiting of lender charges to line 801 will interfere with disclosure of such fees as an ''underwriting fee,'' ''desk underwriting fee,'' ''table funding fee,'' and ''MERS fee.'' This attorney also pointed to other operational problems with the HUD–1 and suggested that the agent/underwriter split in the title insurance premium serves no useful purpose.

HUD Determination

HUD continues to agree with the many commenters who pointed out the importance of comparability between the GFE and the HUD–1. Accordingly, to facilitate comparison between the HUD–1 and the GFE, each designated line in Section L on the final HUD–1 includes a reference to the relevant line from the GFE. Borrowers will be able to easily compare the designated line on the HUD–1 with the appropriate category on the GFE. Terminology on the HUD–1 has been modified as necessary to conform to the terminology of the GFE. For example, since Block 2 on the GFE is designated as ''your credit or charge (points) for the specific interest rate chosen'', Line 802 on the HUD–1 is also designated ''your credit or charge (points) for the specific interest rate chosen.'' Because Block 3 of the GFE ''Required services that we select'' will include multiple services such as appraisal, credit report, tax service and flood certification, each of these services are designated on separate lines of the HUD–1, with a notation that each is from GFE Block 3. The amount listed on the HUD–1 to be paid in advance for the mortgage insurance premium (included in the 900 series on the HUD–1) also contains a notation that the advance payment is from GFE Block 3. By noting the appropriate block from the GFE on each designated line of the HUD–1, borrowers will be able to easily compare the charges listed on the HUD–1 with the charges listed on the GFE.

With respect to the 1100 series for Title Insurance, the final HUD–1 includes designated lines for title services and lender's title insurance at line 1101, with a notation that this amount is from GFE Block 4. Unlike the proposed HUD–1, the final HUD–1 includes a designated line for the settlement or closing fee at line 1102, which is also from GFE Block 4. However, in order to limit unnecessary itemization of the component parts of the charge for title services, administrative and processing services related to title services must be included at line 1101 with the overall charge for title services. Because the final rule more clearly specifies the extent of itemization permitted, HUD has determined that it is no longer necessary to define ''primary title services'' as a

particular set of title services. In addition, the final HUD–1 includes a designated line for owner's title insurance at line 1103, from GFE Block 5, but the reference to ''optional'' owner's title insurance was dropped from the proposed rule in response to comments. HUD has determined to retain the designated lines for the agent's portion of the total title insurance premium (Line 1107) and the underwriter's portion of the total title insurance premium (Line 1108). Although inclusion of the agent/underwriter split on the HUD–1 differs from the GFE, it is HUD's view that this breakdown will help consumers better understand their title charges.

To further facilitate comparability between the GFE and HUD–1, HUD has determined to include a third page to the HUD–1 that includes a chart comparing the amounts listed for particular settlement costs on the GFE with the total costs listed for those charges on the HUD–1. For further discussion of this chart, see the discussion of the Closing Script issue in the next section.

B. Proposed Addendum to the HUD–1, the Closing Script

Proposed Rule. Under the March 2008 proposed rule, an addendum would have been added to the HUD–1/1A that would have compared the loan terms and settlement charges estimated on the GFE to the final charges on the HUD–1 and would have described in detail the loan terms for the specific mortgage loan and related settlement information. The settlement agent would have been required to read the addendum aloud to the borrower at settlement and provide a copy of the addendum at settlement.

Comments

Consumer Representatives

NCLC, while supportive of the closing script, requested that HUD ''clarify that lenders are responsible for the accurate delivery of the closing script'' and ''clarify that settlement agents also are responsible to the borrower for the accurate delivery of the closing script.'' NCRC supported the Department's inclusion of the closing script. It commented that the script would ''instill integrity and prevent lenders from changing loan terms and costs between the application stage and loan closing.'' NCRC stated that the script would lead borrowers to have a ''clearer understanding of loan terms and conditions.''

The California Reinvestment Coalition also supported the inclusion of the closing script, but expressed concern that the script would not be useful to borrowers who are not fluent in English and to hearing-impaired borrowers. One consumer group expressed concern for circumstances when a borrower does not have an escrow account. In this event, the group expressed its hope that the closing script would provide an estimate of monthly payments for taxes and hazard insurance.

Industry Representatives

Title and Settlement Agents and Notaries

Most comments from title and settlement agents opposed the concept of the closing script and expressed the concern that any requirement to read a closing script to the borrower and explain discrepancies between the GFE, the HUD–1 and the loan documents would constitute the ''unauthorized practice of law.'' ALTA commented that in many states, settlement agents risk engaging in the unauthorized practice of law by reviewing loan documents and answering borrower questions about final loan terms. ALTA also stated that even in states where there are no concerns about the unauthorized practice of law, the proposed closing script requirements would add a significant additional amount of time to each closing, leading to a decrease in the number of closings a settlement agent can perform. According to ALTA, this will result in higher closing fees charged to the borrower and the seller. ALTA and others also raised concerns about how the closing script requirement would be implemented in those jurisdictions that do not conduct in-person closings. These commenters also questioned how the closing script requirement would be implemented if the borrower's primary language was other than English.

The National Notary Association and the American Society of Notaries (ASN) commented that notaries are not attorneys or actual settlement agents and do not have the authority to explain settlement terms to borrowers. The ASN also noted that ''[b]y statute, notaries are strictly prohibited from explaining documents or giving any advice that can be seen as unlicensed practice of law.'' Other notaries and signing agents questioned what they would be required to do if GFE tolerances were exceeded or the borrowers asked questions they were unable to answer. They were particularly concerned that the requirement of reading, explaining, and noting any inconsistencies such as a GFE tolerance violation would cause them to be replaced by settlement agents and attorneys better able to address borrowers' questions.

Many settlement agents also stated that they were unable to address borrower questions since they were not privy to discussions and decisions between the loan originator and borrower. ALTA suggested that the lender should bear the duty of preparing and delivering the closing script to the borrower.

Lenders

Lenders and their trade associations were generally opposed to the closing script requirement. Lenders commented that a mandatory closing script is unnecessary and will add new, substantive burdens to both lenders and settlement agents and ultimately increase closing costs. These commenters further asserted that the additional time involved in preparing the script and reading it at each closing will, over time, result in an increase in fees charged by lenders and settlement agents.

MBA stated that the script would ''raise legal concerns, be too costly, provide little benefit to the consumer at closing and raise significant operational concerns.'' MBA also questioned HUD's authority to require an ''additional disclosure.''

Bank of America commented that it agreed with HUD's goal of reducing consumer confusion and dissatisfaction with the closing process, but asserted that the closing script will not resolve those issues. Bank of America stated that the disclosure of loan terms by use of a closing script would detract from the information that is disclosed in the TILA disclosure and could create more confusion than clarity. This commenter also asserted that the script does not take into account the realities of different closing practices in different parts of the country.

Peoples National Bank stated its belief that the script would add little to consumers' knowledge but would add significantly to the number and cost of documents the lender must produce: ''The fact that some predatory lenders have intentionally deceived consumers will not be cured by additional disclosures, whether on provided paper or read aloud.'' This commenter encouraged HUD to address issues related to deceptive practices through ''more effective investigation and enforcement.''

Mortgage Brokers

NAMB expressed its opposition to the closing script because it would ''increase costs for consumers and lower the number of loans that can be closed

in a day.'' Further, NAMB estimated that the additional time and resources that would be consumed by implementing the closing script would average approximately $500 per loan, with ''no commensurate, or even discernible, benefit to consumers in light of disclosures already mandated.'' NAMB further questioned whether the script would bring mortgage brokers into an advisory role that might then trigger ''state regulatory and licensing requirements'' and liability.

Other Industry Representatives

The Real Estate Service Providers Council (RESPRO) opposed the closing script concept and raised the concern that reading the script aloud in the presence of third parties raises privacy issues under the Gramm-Leach-Bliley Act, which prohibits the dissemination of personal information.

HomeServices of America, Inc. (HomeServices) wrote that ''the proposed closing script requirement is problematic and should not be implemented [because it] will not fulfill the purpose for which it is intended because it comes too late in the process and would be too costly.'' HomeServices asserted that the closing script would be ineffectual because ''many buyers would be contractually obligated to conclude the real estate transaction regardless of any inconsistencies between the GFE, the HUD–1 Settlement Statement and other loan documents and shown in the closing script.''

Other Commenters

The National Association of Insurance Commissioners, while expressing general support for the closing script, expressed its belief that borrowers would be better protected ''if the same information would be provided in writing earlier in the real estate transaction.'' The Office of the Illinois Attorney General supported the closing script and expressed the hope that by highlighting changes in terms and fees that have occurred since the GFE stage, ''(t)he script will discourage loan originators from changing key loan terms and imposing additional charges at closing, practices commonly seen in investigations conducted by our office.'' This commenter further recommended that the HUD–1 Settlement Statement and closing script addendum ''be *required* to be given to *all* borrowers 24 hours in advance, in addition to the requirement that the script be read aloud at closing.''

CSBS, AARMR and NACCA, while supporting the closing script, expressed concern about the acknowledgment page, believing that the script may unintentionally release the settlement agent and/or loan originator from liability. CSBS stated ''[p]erhaps of greatest concern to state supervisors, however, is if a consumer signs an acknowledgment stating they have been presented with the closing script and understand all portions therein, the lender will effectively be granted safe harbor if accused of deceptive tactics.'' They recommended that the acknowledgment be changed to indicate merely that the borrower was ''presented with the closing script,'' in order to avoid granting the lender safe harbor.

Federal Agency Commenters

The FDIC commented that the closing script is helpful in making plain the negative financial consequences for a consumer of entering into an ''unconventional loan product such as an interest-only loan.'' However, the FDIC stated that one shortcoming of the script is that there is no information about what a consumer can do if the loan originator exceeds the permissible tolerance.

The Office of Thrift Supervision (OTS) stated that while well intended, the proposed closing script requirement would be ''time consuming and may neither be viable nor appropriate in all cases.'' OTS suggested that if the final rule contains a closing script requirement, a written script may suffice.

While expressing its general support of the script, the FTC staff suggested that HUD consider modifications to the current proposal. FTC staff recommended placing responsibility for creating the script on lenders, rather than settlement agents and stated that, at a minimum, lenders should have the responsibility of completing as much of the closing script as possible, to decrease the risk of inaccuracies. In addition, FTC staff recommended that HUD consider making the closing script and the comparison chart more consistent with the revised GFE and HUD–1 formats. FTC staff also recommended that the final rule address the responsibilities of settlement agents if there are inconsistencies between the loan terms and charges in the GFE and those in the HUD–1 and other loan documents and also recommended additional consumer testing of the script.

HUD Determination

In response to comments received on the proposed rule and HUD's further review, HUD has eliminated the closing script requirement. However, HUD continues to believe that borrowers should be apprised of their loan terms at the closing and should also be apprised of any differences between the amounts stated on the GFE and the amounts listed on the HUD–1 settlement statement. Accordingly, to ensure that borrowers are made aware of the final settlement charges and the terms of their loan, and to help make certain that borrowers get the settlement charges and loan terms to which they agreed, HUD is requiring an additional page on the HUD–1/1A settlement statement that sets forth a comparison between the charges listed on the GFE and the charges listed on the HUD–1/1A, and summarizes the final loan terms of the borrower's loan.

By eliminating the closing script, as proposed, and including information about the loan on the additional page of the HUD–1/1A Settlement Statement, borrowers will receive the essential information that was included in the proposed closing script while eliminating potential operational challenges posed by the proposed closing script.

The instructions for completing the HUD–1/1A settlement statement provide that the loan originator shall transmit sufficient information to the closing agent to allow the closing agent to prepare the HUD–1/1A, including the new last page. The first half of the new page includes a comparison chart that sets forth the settlement charges from the GFE and the settlement charges from the HUD–1/1A to allow the borrower to easily compare whether the settlement charges exceed the charges stated on the GFE. The second half of the new page sets forth the loan terms for the loan received at settlement in a format that reflects the summary of loan terms on the first page of the GFE, but with additional related information that would be available at closing. By presenting the comparison chart and the loan terms on the new page of the HUD–1, the borrower will be made aware of any changes to the settlement charges or loan terms and be able to confirm those changes.

V. Permissibility of Average Cost Pricing and Negotiated Discounts—Discussion of Public Comments

A. Overview and Definition of ''Thing of Value''

Proposed Rule. The March 2008 proposed rule would recognize pricing techniques that result in greater competition and lower costs to consumers, specifically average cost pricing and some discounts among settlement service providers, including volume based discounts. The rule

proposed to amend 24 CFR 3500.8 and would have explained that charges for third party services may be calculated using average cost pricing mechanisms based on appropriate methods established by HUD. These mechanisms would also have accommodated volume based discounts. The proposed rule would have allowed loan originators to disclose on the HUD–1 an average cost price in accordance with one of several specific methods. The proposed rule also would have amended 24 CFR 3500.14(d) and the definition of ''thing of value'' to clarify that it would be permissible for settlement service providers to negotiate discounts in the prices for settlement services, so long as the borrower is not charged more than the discounted price.

Comments

Consumer Representatives

NCLC and CRL supported volume based discounts so long as the discounts were passed along to the consumer. However, CRL expressed concern that discounts may lead originators to steer consumers to certain settlement service providers, thus limiting consumers' choice of servicers. Therefore CRL would support additional safeguards to ensure that volume based discounts in fact benefit the consumer.

Lender Representatives

MBA commended the proposal to clarify the legality of volume based discounts, but said that it did not go far enough. MBA stated that negotiated discount arrangements for services and materials result in lower costs for consumers and are consistent with RESPA's purposes of lowering settlement costs. MBA stated, however, that by including a requirement that no more than the reduced price can be charged to the borrower, there will be little incentive for lenders to enter into discount arrangements. MBA stated that scrutiny to ensure that each and every dollar of discount is passed on to the consumer presents regulatory risks and will make the exception ''uninviting.'' MBA asserted that such a restriction is unnecessary, since market competition will result in the consumer receiving the benefit of the discounts. MBA also questioned the idea that discounts can be negotiated only by a settlement service provider, arguably excluding builders. MBA stated that such an approach could deprive consumers of negotiated discounts on house prices offered by lenders that have joint ventures and marketing agreements with builders.

The ABA and the Independent Community Bankers of America (ICBA) expressed concern that volume discounts may put smaller market participants such as community banks at a disadvantage, since most discounts will be negotiated on a volume basis. According to these commenters, smaller banks, making fewer loans, will not be able to negotiate as many or as deep discounts as larger lenders. ABA also commented that lenders should be allowed to benefit as well from negotiated discounts by not being required to pass along the entire savings to the borrower, or there is little incentive for them to enter into such arrangements.

CMC supported the proposal to clarify the legality of negotiated discounts and stated that the proposed change to the regulations would be most likely to lead to greater competition and lower overall prices in situations where the lender or other party negotiating the discount absorbs the cost of the negotiated service and does not pass on the cost to the borrower. CMC stated that a clarification that a negotiated discount would not constitute a thing of value in this situation would provide greater flexibility to negotiate lower prices. CMC urged HUD to clarify that the clarification should not be limited to discounts negotiated by settlement service providers, but should also apply to parties who may not be regarded as settlement service providers such as builders. In addition, CMC stated that HUD should allow the discounted price charged to the borrower to be calculated on an average cost price basis.

Other Commenters

ALTA and other title industry commenters stated that allowing settlement service providers to negotiate volume based discounts would be anticompetitive and disproportionately harm small businesses. ALTA stated that the ability to negotiate volume discounts on the local services that are incidental to the issuance of a title policy (such as a title search) will disadvantage the small title insurance agency that does not have the resources to guaranty a stream of business to a third party or discount its own services when the services are performed in-house. In addition, ALTA expressed concern that mortgage lenders and brokers will add to the anticompetitive effects by favoring affiliated title companies or those companies that can provide title related services on a nationwide basis. ALTA asserted that the Regulatory Impact Analysis of the proposed rule did not adequately address these issues.

ALTA also noted that although the proposed rule would allow settlement service providers to offer negotiated volume discounts, such a provision is in direct contrast to many state title insurance laws that prohibit title insurance companies and agencies from discounting the title premium or offering a rebate on title insurance fees, especially in states with ''all-inclusive'' rates. Similarly, the National Association of Insurance Commissioners (NAIC) stated that volume based discounts would be a violation of several states anti-rebating laws. NAIC expressed its concern that the rule could be found to preempt state laws to the contrary. It recommended that the provision be withdrawn or that HUD clarify that the volume based discounts and average cost pricing provisions are not intended to preempt state law.

Representative Donald A. Manzullo of the U.S. House of Representatives expressed concern over volume based discounts, which he described as a ''thinly veiled attempt to reintroduce the concept of 'bundling' services.'' The Congressman reiterated his previously stated concerns that the long term impact of volume discounts would eliminate competition and destroy small businesses. Rep. Manzullo stated that only large businesses have the resources necessary to determine the financial terms, negotiate for settlement services, or discount their own services. According to Rep. Manzullo, in order to compete, small businesses would be forced to reduce their prices and profit margins, driving many of them out of business. He stated that such an anticompetitive environment will allow large lenders to raise prices for settlement services.

Federal Agencies

The FDIC stated that it supports the requirement in the proposed definition of ''thing of value'' that no more than the discounted price may be charged to a borrower and disclosed on the HUD–1 form. In contrast, FTC staff stated that while it supports the removal of restrictions against volume based discounts, it believes that the proposed requirement to pass along the entire discount to the consumer will likely limit incentives to negotiate such discounts. According to FTC staff, requiring that 100 percent of any negotiated discount be passed on to customers reduces incentives of firms to spend resources to negotiate such discounts. FTC stated that the proposed regulation also does not clarify how to account for the overhead costs associated with price negotiation activities.

The Office of Advocacy of the Small Business Administration stated that pricing mechanisms such as volume based discounts potentially create an uneven playing field for small entities. This office reiterated concerns voiced by small businesses that volume based discounts will favor large settlement service providers at the expense of small business. According to the Office of Advocacy, some small entities may leave the market, which would ultimately result in a decrease in options and higher prices for consumers.

HUD Determination

HUD remains committed to a RESPA regulatory scheme that fosters mortgage settlement pricing mechanisms, that, as stated in the preamble to the March 2008 proposed rule ''result in greater competition and lower costs to consumers'' (73 FR at 14050). Nevertheless, given the comments received on the proposed change to HUD's current regulatory definition of ''thing of value'' and the significant operational and other questions raised by the proposed change, HUD has decided to give further consideration beyond this rulemaking to a regulatory change that explicitly allows negotiated discounts, including volume based discounts, between loan originators and other settlement service providers and not to implement the proposed change at this time. HUD wants to ensure that any change will adequately protect consumers, while at the same time provide adequate market flexibility, and due consideration to small business concerns.

It remains HUD's position, however, that discounts negotiated between loan originators and other settlement service providers, or by an individual settlement service provider on behalf of a borrower, where the discount is ultimately passed on to the borrower in full, is not, depending upon the specific circumstances of a particular transaction, a violation of Section 8 of RESPA. If the borrower fully benefits from the discount, these types of mechanisms that lower consumer costs are within RESPA's principal purposes.

In addition to further rulemaking, HUD will consider other avenues for providing guidance on negotiated discounts, including through the issuance of statements of policy.

B. Methodology for Average Cost Pricing

Proposed Rule. The March 2008 proposed rule would have permitted pricing techniques using average cost pricing. Under the proposed rule, settlement service providers who procure or who help consumers to obtain third party settlement services, would have been allowed to negotiate the pricing of those services by the third party provider. The proposed rule would have made clear that where average cost pricing is used, the evaluation of prices of third party services would focus on all of the loan originator's transactions together, rather than viewing each transaction separately. An individual borrower might be charged more or less than the actual amount paid for that service in an individual transaction, provided that borrowers are being charged no more than the average price actually received by third parties during the period in which the average price is computed.

The proposed rule specified two methods that loan originators could use to calculate an average price for a particular settlement service. As set forth in the March 2008 proposed rule, the loan originator would designate a recent 6-month period as the ''averaging period'' for purposes of calculating the average price. The same average price would then have to be used in every transaction in that class of transactions for which a GFE is provided following the averaging period until a new averaging period is established. The average price would be calculated either as (1) the actual average price for the settlement service during the averaging period; or (2) a projected average under a tiered pricing contract, based on the number of transactions that actually closed during the recent averaging period. If a loan originator used one of these methods to calculate the average price for a settlement service, HUD would deem the loan originator to have complied with the requirements of the rule.

HUD invited comments on its proposed methods for calculating average cost prices and on any alternative methods that should be permitted. Specifically, HUD invited comments on how to define ''class of transactions'' and noted as an example that ''class of transactions'' could be defined by loan type or loan-to-value ratio. HUD also invited suggestions on alternative average cost pricing methods that benefit consumers and are based on factors that would lead to charges to the consumer (and the disclosure of such charges) that are easily calculated, verified, and enforced, but difficult to manipulate in an abusive manner.

The March 2008 proposed rule provided that with regard to any pricing method used by a settlement service provider, if a violation of Section 8 of RESPA is alleged and an investigation ensues, the burden would be on the targeted settlement service provider to demonstrate compliance with a permissible pricing method through the production of relevant records.

Comments

Consumer Representatives

NCLC and CRL supported the concept of average cost pricing but expressed concern that the proposed rule used the terms ''average pricing'' and ''average cost pricing'' interchangeably. These commenters stated that ''average cost pricing'' must be based on the cost of the settlement service and established rate of return for the settlement service provider. They expressed concern that the proposed rule appeared to allow ''average pricing'' whereby an originator charges the consumer an average cost while paying the third party settlement provider a different amount for each consumer. According to these commenters, there is no reason that the originator should not charge the consumer the actual cost of the third party service and reflect such cost on the HUD–1.

NCLC stated that the current description of acceptable methods for average cost pricing are inaccurate and should either be eliminated or revised to comport with true average cost pricing formulas. CRL stated that average cost pricing is inappropriate for certain costs that are partially dependent on loan amount, such as title insurance premiums, recording costs, and transfer taxes, since average cost pricing would disadvantage those consumers purchasing or refinancing less expensive homes.

Lender Representatives

MBA supported the proposal to allow average cost pricing with some modifications and clarifications. MBA suggested, in addition to the approaches provided in the proposal, that the rule include another approach or approaches that would be less restrictive and facilitate entry into average cost pricing for other firms in order to benefit consumers. MBA recommended an approach whereby a firm would charge the average cost for a class of transactions over a prospective averaging period, during which all transactions in the class would be charged a projected average price. Under this approach, as long as the total amounts charged on transactions in the class do not exceed the amount paid to the service providers for such transactions by more than a small amount, the average price would be permissible.

MBA also recommended that a lender should be given maximum latitude to define a ''class of transactions'' based on type of service, type of property, loan type and/or geographic region. According to MBA, the lender should also have latitude to define an ''average period'' and the ''average price'' as long as the approach is ''reasonable.'' MBA also recommended that the documentation requirements be revised to ensure that they are flexible and do not impede use of the provision by requiring unnecessary burdensome documentation.

CMC supported the proposal to allow average cost pricing, and stated that such a provision could lead to flexible negotiations for settlement services, thereby increasing price competition and lowering costs to borrowers. However, CMC stated that unless such a proposal provides relief from liability under Section 8 of RESPA, there will be little incentive for loan originators or other settlement service providers to use average cost pricing. CMC also stated that placing the burden of demonstrating compliance on the settlement service provider is problematic. CMC stated that the two methods set forth in the proposed rule for calculating an average price leave open questions as to compliance and workability. According to CMC, since circumstances often change, the approach set forth in the proposal for determining the averaging period may not be practical.

CMC recommended that a simpler method would be to let the provider who will charge the average cost define the class of transactions and a prospective averaging period during which all transactions in the class would be charged a projected average price. CMC also recommended that as long as the total amounts charged on transactions in the class do not exceed the amount paid to the service providers for such transactions by more than a small amount, such as by more than 10 percent, the average price should be permissible. CMC recommended an averaging period of up to 18 months since many contracts are reviewed on an annual basis and there are seasonal variations in volume. With respect to how the class of transactions should be determined, CMC recommended that HUD not specify a set of factors for use in determining class of transactions, but rather, allow a settlement service provider to define the class in any reasonable manner. CMC also urged HUD to clarify that prices may be uniformly reduced at any point during the averaging period to ensure that the total costs charged on the transactions remain within the applicable tolerance.

In addition, CMC urged HUD to clarify that average cost pricing may be used in situations where there is more than one settlement service provider. CMC stated that the exemption for average cost pricing will be of limited value unless such pricing is available when multiple providers are providing the same service and the fees charged by these providers vary. CMC also urged HUD to coordinate with the Federal Reserve Board regarding how average cost pricing affects the calculation of the finance charge for purposes of TILA. Finally, CMC recommended that HUD clarify that the average cost pricing provision is not limited to loan originators.

Other Commenters

RESPRO expressed support for average cost pricing and recommended that the rule clarify that average cost pricing is not limited to loan originators. In addition, RESPRO stated that the proposed approaches for average cost pricing need clarification. For example, RESPRO suggested that HUD clarify what constitutes a ''recent'' 6-month period and also clarify whether a loan originator can divide up its service territory into two or more geographical areas and utilize these areas for averaging purposes.

ALTA expressed support for the average cost pricing proposal and requested HUD to clarify that average cost pricing would be available for all settlement service providers. ALTA maintained that the proposed provision on average cost pricing should not have been included in the HUD–1 section of the RESPA regulations, but rather, should have been written so as to permit lenders and others to apply average cost pricing without running the risk of violating Section 8(b) of RESPA. Accordingly, ALTA urged HUD to clarify that average cost pricing is not a violation of Section 8(b). ALTA stated that if the rule would allow title and settlement companies to use the average cost price, particularly as such pricing relates to recording fees, express delivery charges, and other third party charges for which title companies must pay, consumers would benefit from the certainty the average cost provides, and that the threat of class action litigation for title and settlement companies with respect to recording fees would be removed.

NAR stated that average cost pricing should be allowed for both borrowers and sellers, and should be extended to all settlement service providers. NAR stated that average cost pricing should be limited to small items such as courier fees and recording costs. According to NAR, if average cost pricing is allowed for larger items such as appraisals, the consumer will end up paying more for an ''average cost'' if, for example, the calculation includes a disproportionate number of expensive appraisals during a given 6-month period.

CSBS, AARMR, and NACCA commented that the proposal to allow loan originators or settlement service providers to utilize average cost pricing would be difficult for regulators to enforce and recommended that the burden of proof of compliance be placed on the lender. These commenters stated that by allowing loan originators and providers to utilize this pricing mechanism, individual transaction costs could be manipulated and inflated. These commenters noted that the current regulations can be enforced by regulators, because actual prices can be determined.

Federal Agencies

The FDIC expressed concern with the average cost pricing proposal on several grounds. First, the FDIC indicated that it is not aware of an appropriate means of evaluating whether overall consumer costs would decline as a result of average cost pricing. Second, the agency noted that even if some borrowers' settlement services costs are reduced under average cost pricing, other borrowers will pay more for a service than is warranted for their particular loan. Third, the FDIC stated that the proposal does not include controls to ensure fairness, such as whether the lender calculated the average costs appropriately.

FTC staff stated that it supports average cost pricing but recommended that HUD consider eliminating restrictions on how average costs may be calculated. FTC staff stated that it supports removing barriers to average cost pricing because there is ''no economic justification for requiring that each consumer pay his or her unique marginal cost of receiving settlement services and because doing so will likely result in lower prices for consumers.'' FTC staff added that calculating and maintaining records of such individualized costs and prices adds additional accounting and recordkeeping costs to the transaction that are not required in other competitive markets. FTC staff asserted that by removing such costs, the market will be more efficient and the result will be lower prices for consumers.

HUD Determination

Based on the comments received in response to the proposed rule, HUD has revised the average cost pricing provisions to provide more flexibility and greater clarity.

Commenters representing some consumer interests opposed implementation of the proposed average cost pricing provision, recommending that HUD limit charges for third party services to the actual cost of providing those services, plus an established rate of return. While HUD appreciates these comments, the proposed average cost pricing provision was not intended to limit the amounts charged for settlement services in this fashion, but instead simply provided for an alternative means of calculating and disclosing settlement charges on the HUD–1 or HUD–1A settlement statements. In order to avoid similar confusion about the intent of this provision in the future, the final rule uses the term ''average charge'' in place of ''average cost pricing.'' The term ''average charge'' appropriately focuses on the amount disclosed on the settlement statement, rather than the underlying costs of providing a particular settlement service.

The final rule also clarifies that an average charge may be used by any settlement service provider that obtains a service from a third party on behalf of a borrower or seller; the provision is not limited to loan originators. HUD has determined that benefits to consumers and the benefits of reduced recordkeeping requirements and pricing flexibility from this provision should not be limited to one group of settlement service providers. Any provider that is able to calculate an average charge for a service in accordance with this provision and that is able to meet the provision's recordkeeping requirements is permitted to use an average charge for that service.

In addition to these clarifying changes, HUD has made several other significant changes to provide additional flexibility in calculating average charges. HUD has determined that its objective of providing a method that benefits consumers and results in charges that are easily calculated, verified, and enforced is best served by restricting the actual charges imposed on borrowers and sellers rather than by prescribing a particular method for calculating those charges.

The final rule provides that an average charge may be used for any settlement service, provided that the total amounts received from borrowers for that service for a particular class of transactions do not exceed the total amounts paid to the providers of that service for that class of transactions. This approach leaves the method of determining the average charge to the discretion of the settlement service provider. However, the provider must ensure that the average charge used does not result in borrowers, in the aggregate, paying more for a particular settlement service than the aggregate price paid for obtaining that service from third parties. HUD has determined that this approach balances the settlement service provider's interest in flexibility in calculating an average charge with the borrower's interest in preventing excessive settlement charges. This approach is intended to promote greater efficiencies that ultimately lead to lower prices for consumers.

The final rule provides that a settlement service provider may define a class of transactions based on the period of time, type of loan, and geographic area. For example, a settlement service provider might calculate an average charge for all purchase money mortgages in the States of Georgia and South Carolina in a specified period of time. Alternatively, a settlement service provider could establish the class of transactions in which it would use a single average charge broadly, e.g., all transactions it engages in for a period of time, regardless of loan type or location. The settlement service provider must recalculate the average charge at least every 6 months. In order to prevent selective use of an average charge, the final rule provides that if an average charge is used in any class of transactions defined by the settlement service provider, then that provider must use the same average charge for every transaction within that class.

The final rule also prohibits the use of average charges for settlement services where the charge is based on the loan amount or the value of the property. Permitting average charges for those types of services would require borrowers in transactions with lower loan amounts and property values to subsidize the costs for borrowers with higher loan amounts and property values. HUD has determined that such subsidization is not in the interest of consumers. This prohibition applies to charges such as transfer taxes, daily interest charges, reserves or escrow, and all types of insurance, including mortgage insurance, title insurance, and hazard insurance.

The final rule maintains the proposed recordkeeping requirements, to ensure that average charges are calculated appropriately and that regulators and borrowers are able to determine the basis on which the average charge was determined. Any settlement service provider that uses an average charge for a particular service must maintain all documents that were used to calculate the average charge for at least three years after any settlement in which the average charge was used.

VI. Prohibition Against Requiring the Use of Affiliates—Discussion of Public Comments

Proposed Rule. Under the March 2008 proposed rule, the current definition of ''required use'' in 24 CFR 3500.2 would be changed so that consumers would be more likely to shop for the homes and home features, and the loans and settlement services, that are best for them, free from the influence of deceptive referral arrangements. Through this proposed change, HUD sought to establish that in a real estate transaction covered by RESPA, incentives that consumers may want to accept and disincentives that consumers may want to avoid should be analyzed similarly for compliance with RESPA.

The proposed change would have made clear that HUD views economic disincentives that a consumer can avoid only by purchasing a settlement service from particular providers, or from businesses to which the consumer has been referred, to be potentially as problematic under RESPA as are economic incentives that are contingent on the consumer's choice of a particular settlement service provider. The modifications in the proposed rule, however, were not intended to prevent discounts that are beneficial to consumers. The proposed definition stated that the offering by a settlement service provider of an optional package or combination of bona fide settlement services to a borrower at a total price lower than the sum of the prices of the individual settlement services would not constitute a ''required use.''

The proposed revision to the ''required use'' definition would have continued to apply in two sections of the regulations: The affiliated business exemption in 24 CFR 3500.15, and the prohibition on the seller requiring the buyer to purchase title insurance from a particular company in § 3500.16. However, in light of the other changes that would have been made by the proposed rule, the term ''required use'' would no longer have applied as it does currently in § 3500.7(e).

Comments

Consumer Representatives

NCLC stated that the proposed change to the ''required use'' definition does not go far enough to protect consumers. NCLC stated that the settlement services to obtain a home loan are only a small part of the costs of the loan. According to NCLC, the interest rate, the term of the loan, and whether a prepayment penalty is permitted, or a balloon payment is required, are all more important elements of the costs of the home loan than are the costs of settlement services. NCLC stated that ''(i)t does not make sense for the settlement services to be capped in return for a required use, while the more critical components of the costs of the loan are not limited, especially where the service itself could be discounted while the loan terms are increased.'' NCLC proposed to define ''required use'' to include the total cost of the loan in addition to the total of settlement services. CRL commended HUD's efforts in this area and agreed with NCLC that the definition of ''required use'' should include the total cost of the loan in addition to the cost of total settlement services.

The California Reinvestment Coalition supported the proposed change to the definition of ''required use'' and stated that the proposed change will ''benefit the borrower by leveling the field.''

Industry Representatives

Generally, lenders expressed opposition to the proposed change to the definition of ''required use'' on the grounds that the proposal is difficult to understand, is overbroad, and would eliminate the ability of builders and others to offer legitimate consumer discounts. MBA stated that it would be sufficient for HUD to indicate that under its current rules HUD may scrutinize discounts to assure that they are *bona fide*, rather than risking depriving borrowers of discounts altogether.

The ABA stated that the proposed change to the ''required'' use definition is ''flawed and unreasonable'' because HUD cited only anecdotal evidence that incentives have been abused by some companies to steer customers to affiliated vendors with high prices and inferior service, but offered ''no empirical evidence to support this assertion.'' The ABA also stated that the proposal runs counter to the plain meaning of the words in the statute because defining ''required use'' to mean any incentive offered to use an affiliated company contradicts the unambiguous meaning of the statutory word ''required.'' It stated that HUD should not confuse legitimate incentive arrangements among affiliated entities with undue influence or required use of a product or service.

NAMB, the Maryland Association of Mortgage Brokers (MAMB), and the Idaho Association of Mortgage Brokers (IAMB) expressed support for the proposed change in the definition of ''required use.'' NAMB stated that the proposed revision should resolve the problems with tying and required use. NAMB recommended that the new definition avoid setting a threshold higher than zero for determining what constitutes an economic incentive or disincentive. NAMB, MAMB, and IAMB all stated that the threshold for determining incentives and disincentives should be ''any thing of value.''

Builders and builder-affiliated mortgage companies opposed the proposed change to the ''required use'' definition. CTX Mortgage Company asserted that the proposed change would ''provide a significant road block for future customers to benefit from the streamlined mortgage and title services that Centex offers.'' The National Association of Home Builders (NAHB) asserted that the change would eliminate *bona fide* incentives, denying consumers significant savings in their home purchases. NAHB characterized HUD's examples of ''required use'' problems as ''ambiguous and incomplete.'' NAHB asserted that home builders with affiliated lenders have business incentives to ensure that home buyers are pleased with the experience of obtaining loans from their affiliated lenders. NAHB noted that studies of builder-affiliated mortgage companies conducted by an independent research firm have found that such firms have lower per-loan operating costs as compared to outside lenders. According to NAHB, while the savings from these economies and the other affiliate benefits are difficult to quantify, they are significant and are passed along to consumers in the form of incentives for use of a builder affiliate. NAHB stated that home builders in general do not increase the selling price of homes to offset these incentives and asserted that the vast majority of builders who provide incentives for buyer use of affiliates do so in a responsible manner that brings substantial benefits to consumers. NAHB and other commenters also suggested alternative language to the proposed definition to ensure that consumers are presented with the option to select an incentive that is *bona fide*.

RESPRO objected to the proposed change to ''required use'' and stated that it would ''prohibit many consumer incentives offered by home builders and real estate brokers in today's marketplace that provide consumers with lower costs and/or better service; is based on unsubstantiated and anecdotal evidence about alleged abuses; attempts to address violations that already are prohibited under RESPA, and is based on an inaccurate reading of anti-trust laws.'' RESPRO asserted that consumer incentives are offered to ensure that sales transactions close as quickly and as efficiently as possible. RESPRO recommended that the current definition of ''required use'' be retained.

NAR opposed the proposed change and stated that it would have at least two unintended consequences. According to NAR, the rule authorizes discounts only on the prices of the recommended provider and this would limit the kind of non-price/services promotions that joint venture owners currently and permissibly offer to promote affiliates. NAR noted that real estate agents and brokers offer a variety of inducements to clients to promote their services, such as by offering a gift certificate to a local business or a free home inspection. NAR indicated that it does not believe that HUD intended to eliminate a practice which benefits consumers. In addition, according to NAR, the proposal would allow a discounted combination of settlement services only to a borrower, and NAR believes that sellers should not be precluded from receiving discounts as incentives as sellers often pay the majority of settlement costs in a real estate transaction.

Other Commenters

The Laborers' International Union of North America (LIUNA) supported the proposed change to the ''required use'' definition, stating that it ''will promote more comparison shopping by borrowers and achieve HUD's intended goal of protecting consumers from unnecessarily high settlement costs.''

LIUNA further stated that the ''cost to the builders of incentives has already been built into the sales price, so that it is not a true discount, but a penalty for using another company.'' According to LIUNA, its research indicates that the effect of incentives ''dissuade customers from comparison shopping for lenders.'' Rather, ''customers are steered to loans that are very often more expensive, despite the incentives.'' LIUNA asserted that builders have improperly used ''related business relationships at the expense of consumers'' that ''resulted in higher costs for homebuyers * * * and have played a large part in creating the current housing crisis.'' LIUNA

provided statistics indicating that in February 2006, the average rate for a 30-year fixed-rate mortgage was 6.25 percent. In contrast, LIUNA noted that although the main benefit of an ARM is that it has a lower starting interest rate than the equivalent fixed-rate loan, approximately half of the mortgages made by certain builders in February 2006 were ARMs that had starting rates of 6.25 percent or higher. LIUNA stated that builders ''have an incentive to sell their inventory at the highest possible price, and in-house mortgage units provide the financing to make it possible. There is evidence that during the housing boom in 2004–2006 builders were only able to sell homes at such inflated prices because of the collaboration with their mortgage subsidiary and an affiliated appraisal company. This resulted in large numbers of homeowners who were ''underwater,'' owing more than the value of their home, from day one.''

CSBS, AARMR, and NACCA supported the proposed change to the ''required use'' definition. However, these commenters recommended that the definition of ''required use'' be expanded to incorporate situations where the originator fails to give a required Affiliated Business Arrangement disclosure, or provides a misleading disclosure that facilitates steering of the borrower to an affiliate. According to these commenters, absent information necessary to make the best decision, the borrower has effectively been required to use a particular provider.

The FTC staff recommended that HUD reconsider the proposed change to the definition of required use. The FTC staff stated that the expanded definition could deprive customers of the lower prices that can result from bundling related services.

HUD Determination

After reviewing comments about HUD's proposal to change the definition of ''required use'' and re-examining aspects of the proposed revised definition, HUD has determined to retain the concepts in the definition of ''required use'' set forth in the proposed rule, but with some revisions that better reflect HUD's intent in applying the definition. The new definition makes it clear that economic disincentives that are used to improperly influence a consumer's choices are as problematic under RESPA as are incentives that are not true discounts. The revisions made in the definition subsequent to the proposed rule clarify how the definition will apply in the context of the affiliated business exemption under Section 8(c) of RESPA and § 3500.15 of HUD's regulations, and similarly frames the definition to apply to ''persons'' rather than only ''borrowers.''

The change to the definition of ''required use'' will not eliminate the ability of anyone to offer legitimate consumer discounts. HUD does not interpret RESPA as preventing a settlement service provider or anyone else from offering a discount or other thing of value directly to the consumer. However, RESPA and this final rule limit tying such a discount to the use of an affiliated settlement service provider. HUD believes that consumers will utilize affiliated and preferred businesses if the costs of using those businesses are lower than the costs associated with similar services from other providers. Similarly to the proposed rule, the final rule continues to provide that settlement service providers can offer '' a combination of bona fide settlement services at a total price (net of the value of the associated discount, rebate, or other economic incentive) lower than the sum of the market prices of the individual settlement services and will not be found to have required the use of the settlement service providers as long as: (1) The use of any such combination is optional to the purchaser; and (2) the lower price for the combination is not made up by higher costs elsewhere in the settlement process.''

VII. Technical Amendments

Proposed Rule

The March 2008 proposed rule included several changes to HUD's regulations to reflect current statutory provisions. First, the proposed rule revised the mortgage servicing disclosure requirements in 24 CFR 3500.21 to be consistent with section 2103 of the Economic Growth and Regulatory Paperwork Reduction Act of 1996 (Title II of the Omnibus Consolidated Appropriations Act, 1997) (Pub. L. 104–208) and sought public comment on whether the mortgage servicing disclosure should be included as part of the GFE.

Second, the proposed rule eliminated outdated provisions regarding the phase-in period for aggregate accounting for escrow accounts in 24 CFR 3500.17. The phase-in period ended October 27, 1997. Eliminating those provisions of the codified RESPA regulations that are no longer applicable to the home settlement process simplifies and clarifies the rules for escrow accounts.

Finally, the March 2008 proposed rule would add a new § 3500.23 to make clear that the electronic disclosures permitted pursuant to the Electronic Signatures in Global and National Commerce Act (ESIGN) (15 U.S.C. 7001–7031) apply to all disclosures provided for in HUD's RESPA regulations.

Comments

Almost all of the comments that addressed the proposed technical changes to the rule expressed support for these changes. Several lenders and trade groups representing lenders and mortgage brokers commented favorably on the changes that conform the transfer of servicing disclosure regulations to the revised statutory requirements. However, lenders and their trade groups were generally opposed to including the transfer of servicing disclosure on the revised GFE.

Several groups representing consumer interests commented on the transfer of servicing regulation, and strongly supported expanding the transfer of servicing regulations beyond first lien mortgage loans. These groups indicated that the TILA regulations, which HUD cited as the basis for excluding subordinate lien mortgage loans from the transfer of servicing disclosure requirements, do not provide equivalent protections, and that the transfer of servicing requirements should therefore be expanded to cover all federally related mortgage loans. Consumer groups also recommended changes to the language used in the proposed revision to the transfer of servicing disclosure. The consumer group commenters indicated that the disclosure's description of the servicing function is unrealistically narrow, and that it should be revised to state that:

> Servicers are responsible for account maintenance activities such as sending monthly statements, accepting payments, keeping track of account balances, handling escrow accounts, engaging in loss mitigation and prosecuting foreclosures. They handle interest rate adjustments on adjustable rate mortgages, collect and report information to national credit bureaus, and remit monies to the owners of the loan.

Very few comments were received on the proposed revisions to the escrow accounting regulations, or on the proposed clarification regarding the applicability of ESIGN to RESPA. The comments that were received on these changes were primarily from trade groups representing lenders and mortgage brokers, and the comments were limited to general expressions of support for the changes proposed.

HUD Determination

Based on the comments received, HUD has determined that the changes to

the transfer of servicing requirements should be included in the final rule. These changes conform HUD's regulations to the revised statutory requirements, and resolve any questions about whether lenders must still follow the outdated provisions. No commenters raised objections to the changes proposed; the most substantial comments received were from consumer groups that advocated expanding the coverage of the transfer of servicing requirements. In light of the numerous comments from lenders and those trade groups representing lenders that opposed inclusion of the transfer of servicing disclosure on the GFE, HUD has determined not to include that disclosure on the revised GFE at this time. However, HUD is not expanding the coverage of the transfer of servicing regulations at this time. While HUD may consider doing so at a later time, significantly expanding the coverage of the transfer of servicing regulations would be beyond the scope of the technical amendments in the proposed rule and would likely require additional comment from affected parties.

The language on the revised model transfer of servicing disclosure form has been modified somewhat from the proposed rule in light of the comments received. The transfer of servicing disclosure form is not intended to provide a comprehensive list of all functions that might be performed by any servicer, but HUD agrees with those commenters that suggested that the description of the functions performed by servicers was too narrow. Accordingly, HUD has revised that sentence on the form to provide a more accurate description of the functions performed by loan servicers.

HUD has also determined that the proposed elimination of the phase-in period for aggregate accounting for escrow accounts should be included in the final rule. This change simply eliminates a regulatory provision that is no longer applicable. The only significant comments HUD received on this provision were in favor of making the change proposed.

Finally, HUD has determined that the new provision clarifying the applicability of ESIGN to RESPA should also be included in the final rule. While the electronic methods of disclosure permitted pursuant to ESIGN could be used for disclosures required under RESPA, even in the absence of this regulatory clarification, this provision will allay any doubts that industry participants may have had about the permissibility of electronic disclosures under RESPA. The only significant comments HUD received on this provision were in favor of making the proposed change.

VIII. Regulatory Flexibility Act—Comments of the Office of Advocacy of the Small Business Administration

As part of its statutory duty to review an agency's compliance with the Regulatory Flexibility Act (RFA), as amended by the Small Business Regulatory Enforcement Fairness Act (SBREFA), the Office of Advocacy of the U.S. Small Business Administration (Advocacy) reviewed the proposed rule and submitted its comments to the Department. In its letter of June 11, 2008, Advocacy expressed the concern that HUD may have underestimated the economic impact of the proposed rule on small entities. Advocacy indicated that it had met with a wide range of small entity representatives from different sectors of the industry and several of these representatives indicated that the proposed rule would have a greater economic impact than the $548 million in annual recurring compliance costs for small businesses as stated by HUD in the Economic Analysis accompanying the proposal. Accordingly, Advocacy advised HUD to document the additional costs to small businesses.

In addition, Advocacy expressed the following concerns about the proposed rule: (1) The proposed rule's tolerance levels may be problematic for loan originators because some settlement costs can change on a daily basis, making the loan originator responsible for the actions of a third party beyond its control; (2) the proposed rule's requirement that a closing script be read to the borrower at the closing will present problems for small entities; (3) the proposal to allow volume discounts will favor large settlement service providers and loan originators at the expense of small businesses; and (4) the proposed rule's characterization of YSP as a credit to the borrower will put mortgage brokers at a competitive disadvantage compared to lenders, and may create confusion among borrowers. Advocacy supported moving forward without the closing script requirement, the volume discount language, and the yield spread premium classification. In addition, Advocacy recommended that HUD clarify the provision on tolerances and encouraged HUD to provide a delay in the implementation date in the final rule to allow small businesses the opportunity to absorb the costs and comply with the new requirements.

HUD carefully considered the comments provided by Advocacy and certain modifications have been made in the final rule that address Advocacy's concerns. For example, the Department has determined not to adopt the closing script requirement set forth in the proposed rule. In addition, the proposed rule language explicitly allowing negotiated discounts, including volume based discounts between loan originators and other settlement service providers, has not been included in the final rule. HUD also revised a number of provisions on tolerances and clarified the situations where a loan originator would no longer be bound by the tolerances.

With respect to the characterization of YSP as a credit to the borrower, HUD has designed and tested the GFE form to enable borrowers to accurately determine the lowest cost loan. Testing of the GFE indicated no bias in the selection of loans with lowest settlement cost, between ''broker'' loans (YSP reported) and ''lender'' loans (no YSP reported).

With respect to statements in the Economic Analysis for the RESPA proposed rule concerning cost impacts of the rule on small businesses, HUD recognizes that there will be one-time adjustment costs and recurring costs on small businesses. Once incurred, the adjustment costs will not be incurred again. Thus, combining recurring and adjustment costs would be an accurate measure for the burden of the rule during the first year only. The recurring costs per loan are equivalent for small and large businesses. The aggregate recurring compliance cost depends on loan volume and is not underestimated for small businesses relative to large businesses. Advocacy and some other commenters questioned aspects of the cost estimates of the rule, but did not provide alternative cost estimates supported by data. HUD carefully considered an alternative analysis prepared for NAR that was not based on new data. HUD accepted and implemented suggestions in this analysis to perform a sensitivity analysis of the ratio of applications per loan in its Final Regulatory Flexibility Analysis.

With respect to Advocacy's recommendation that HUD allow a longer implementation period to mitigate the cost burden associated with the new requirements on small businesses, HUD has determined that a one-year implementation period is sufficient to make the transition to the new requirements. Many commenters agreed. Instituting a longer implementation period for small businesses would significantly weaken the effective and orderly implementation of the new rule. Allowing small firms to operate under different rules would create confusion

in the closing of loans, especially in transactions that involve both large and small firms.

IX. Findings and Certifications

Paperwork Reduction Act

The information collection requirements contained in this rule were submitted to the Office of Management and Budget (OMB) under the Paperwork Reduction Act of 1995 (44 U.S.C. 3501–3520), and were assigned OMB control number 2502–0265. In accordance with the Paperwork Reduction Act, an agency may not conduct or sponsor, and a person is not required to respond to, a collection of information, unless the collection displays a currently valid OMB control number.

Environmental Impact

A Finding of No Significant Impact with respect to the environment was made at the proposed rule stage in accordance with HUD regulations at 24 CFR part 50, which implement section 102(2)(C) of the National Environmental Policy Act of 1969 (42 U.S.C. 4332(2)(C)). That finding remains applicable to this final rule and is available for public inspection between the hours of 8:00 a.m. and 5:00 p.m. weekdays in the Regulations Division, Office of General Counsel, Department of Housing and Urban Development, 451 7th Street, SW., Room 10276, Washington, DC 20410–0500. Due to security measures at the HUD Headquarters building, an advance appointment to review the finding must be scheduled by calling the Regulations Division at 202–402–3055 (this is not a toll-free number). Individuals with speech or hearing impairments may access this number through TTY by calling the Federal Information Relay Service at 800–877–8339.

Executive Order 12866, Regulatory Planning and Review

The Office of Management and Budget (OMB) reviewed this rule under Executive Order 12866 (entitled ''Regulatory Planning and Review''). This rule was determined economically significant under the executive order.

There is strong evidence of information asymmetry between mortgage originators and settlement service providers and consumers. This information asymmetry allows loan originators and settlement service providers to capture much of the consumer surplus in this market by charging different prices to similar consumers for similar products, a process economists call price discrimination. The RESPA disclosure statute is meant to address this information asymmetry, but the evidence shows that the current RESPA regulations have not provided consumers necessary information in a way they can use effectively.

The final rule will create a more level-playing field through a more transparent and standard disclosure of loan details and settlement costs; tolerances on settlement charges leading to prices that consumers can rely on; and adding a comparison page to the HUD–1 that allows the consumer to compare the amounts listed for particular settlement costs on the GFE with the total costs listed for those charges on the HUD–1, and to double check the loan details at settlement. These changes will encourage comparison shopping by informed consumers, which will place a competitive pressure on market prices, and enable consumers to benefit.

It is estimated that borrowers will save $8.35 billion annually in origination and settlement charges. This transfer to borrowers from price-discriminating producers constitutes 12.5 percent of total charges, and represents consumer savings of $668 per loan with a range between $500 and $700 per loan.

The total one-time adjustment costs to the lending and settlement industry of the proposed GFE and HUD–1 are estimated to be $570 million, or $46 per loan. Total recurring costs are estimated to be $918 million annually, or $74 per loan. Even if all of the adjustment and recurring costs of the rule were passed along to consumers, individual consumers would still enjoy substantial benefits. If all of the adjustment and recurrent costs are passed on to borrowers in the first year and no industry efficiency gains are passed to consumers, the net consumer savings for the average consumer in the first year would be $548 and $594 per loan every year afterwards.

In addition to the private benefits, there are far reaching social benefits. The lower profitability of seeking out less-informed borrowers for less-competitive loans should lead to a reduction in this non-productive activity. If the decline in this activity represented one percent of current loan originator effort, this would result in $420 million in social surplus. Another social benefit of the rule is its contribution to sustainable homeownership. Consumers who better understand the details of their loans, and save money on their and settlement costs, are more likely to avoid risky loans, default, and foreclosure. There are substantial negative economic externalities of a foreclosure to neighboring properties and local governments, as well as private costs to the borrower and lender. The size of this social benefit would be in addition to the other benefits enumerated in the Regulatory Impact Analysis.

The costs and benefits are discussed in more detail in the Regulatory Impact Analysis that accompanies this rule.

Any changes made to the rule subsequent to its submission to OMB are identified in the docket file, which is available for public inspection in the Regulations Division, Office of General Counsel, Department of Housing and Urban Development, 451 7th Street, SW., Room 10276, Washington, DC 20410–0500. The Economic Analysis prepared for this rule is also available for public inspection in the Regulations Division. Due to security measures at the HUD Headquarters building, an advance appointment to review these items must be scheduled by calling the Regulations Division at 202–402–3055 (this is not a toll-free number). Individuals with speech or hearing impairments may access this number through TTY by calling the Federal Information Relay Service at 800–877–8339.

Federalism Impact

This rule does not have federalism implications and does not impose substantial direct compliance costs on state and local governments or preempt State law within the meaning of Executive Order 13132 (entitled ''Federalism'').

Regulatory Flexibility Act

The Secretary, in accordance with the Regulatory Flexibility Act (5 U.S.C. 605(b)), has reviewed and approved this rule and determined that the rule would have a significant economic impact on a substantial number of small entities within the meaning of the Regulatory Flexibility Act. In accordance with section 603 of the Regulatory Flexibility Act, a Final Regulatory Flexibility Analysis (FRFA) has been prepared. The FRFA is presented in an Appendix to this final rule and is included as Chapter 6 in the Regulatory Impact Analysis prepared under Executive Order 12866.

Unfunded Mandates Reform Act

Title II of the Unfunded Mandates Reform Act of 1995 (2 U.S.C. 1531–1538) (UMRA) requires federal agencies to assess the effects of their regulatory actions on state, local, and tribal governments and on the private sector. This rule does not, within the meaning of the UMRA, impose any federal

mandates on any state, local, or tribal governments nor on the private sector.

Congressional Review of Final Rules

This rule constitutes a ''major rule'' as defined in the Congressional Review Act (5 U.S.C. Chapter 8). This rule has a 60-day delayed effective date and will be submitted to the Congress in accordance with the requirements of the Congressional Review Act.

List of Subjects

24 CFR Part 203

Hawaiian Natives, Home improvement, Indians-lands, Loan programs—housing and community development, Mortgage insurance, Reporting and recordkeeping requirements, Solar energy

24 CFR Part 3500

Consumer protection, Condominiums, Housing, Mortgagees, Mortgage servicing, Reporting and recordkeeping requirements.

■ For the reasons set out in the preamble, parts 203 and 3500 of title 24 of the Code of Federal Regulations are amended as follows:

PART 203—SINGLE FAMILY MORTGAGE INSURANCE

■ 1. The authority citation shall continue to read as follows:

Authority: 12 U.S.C. 1709, 1710, 1715b, 1715z–16, and 1715u; 42 U.S.C. 3535(d).

■ 2. In § 203.27, paragraph (a)(2) is revised to read as follows:

§ 203.27 Charges, fees or discounts.

(a) * * *

(2) A charge to compensate the mortgagee for expenses incurred in originating and closing the loan, *provided* that the Commissioner may establish limitations on the amount of any such charge.

PART 3500—REAL ESTATE SETTLEMENT PROCEDURES ACT

■ 3. The authority citation shall continue to read as follows:

Authority: 12 U.S.C. 1709, 1710, 1715b, 1715z–16, and 1715u; 42 U.S.C. 3535(d).

■ 4. Section 3500.1 is revised to read as follows:

§ 3500.1 Designation and applicability.

(a) *Designation*. This part may be referred to as Regulation X.

(b) *Applicability*. The following sections, as revised by the final rule published on *November 17, 2008*, are applicable as follows:

(1) The definition of *Required use* in § 3500.2, §§ 3500.8(b), 3500.17, 3500.21, 3500.22, and 3500.23, and Appendices E and MS–1 are applicable commencing *January 16, 2009*.

(2) Section 203.27, the definitions other than *Required use* in § 3500.2, § 3500.7, §§ 3500.8(a) and(c), § 3500.9, and Appendices A and C, are applicable commencing January 1, 2010.

■ 5. In § 3500.2, paragraph (b) is amended by revising the definitions of *Application, Good faith estimate, Mortgage broker*, and *Required use*, and by adding, in alphabetical order, the following new definitions of *Balloon payment, Changed circumstances, Loan originator, Origination service, Prepayment penalty, Third party, Title service*, and *Tolerance*, to read as follows:

§ 3500.2 Definitions.

* * * * *

(b) * * *

Application means the submission of a borrower's financial information in anticipation of a credit decision relating to a federally related mortgage loan, which shall include the borrower's name, the borrower's monthly income, the borrower's social security number to obtain a credit report, the property address, an estimate of the value of the property, the mortgage loan amount sought, and any other information deemed necessary by the loan originator. An application may either be in writing or electronically submitted, including a written record of an oral application.

Balloon payment has the same meaning as ''balloon payment'' under Regulation Z (12 CFR part 226).

Changed circumstances means: (1)(i) Acts of God, war, disaster, or other emergency;

(ii) Information particular to the borrower or transaction that was relied on in providing the GFE and that changes or is found to be inaccurate after the GFE has been provided. This may include information about the credit quality of the borrower, the amount of the loan, the estimated value of the property, or any other information that was used in providing the GFE;

(iii) New information particular to the borrower or transaction that was not relied on in providing the GFE; or

(iv) Other circumstances that are particular to the borrower or transaction, including boundary disputes, the need for flood insurance, or environmental problems.

(2) Changed circumstances do not include:

(i) The borrower's name, the borrower's monthly income, the property address, an estimate of the value of the property, the mortgage loan amount sought, and any information contained in any credit report obtained by the loan originator prior to providing the GFE, unless the information changes or is found to be inaccurate after the GFE has been provided; or

(ii) Market price fluctuations by themselves.

* * * * *

Good faith estimate or *GFE* means an estimate of settlement charges a borrower is likely to incur, as a dollar amount, and related loan information, based upon common practice and experience in the locality of the mortgaged property, as provided on the form prescribed in § 3500.7 and prepared in accordance with the Instructions in Appendix C to this part.

* * * * *

Loan originator means a lender or mortgage broker.

* * * * *

Mortgage broker means a person (not an employee of a lender) or entity that renders origination services and serves as an intermediary between a borrower and a lender in a transaction involving a federally related mortgage loan, including such a person or entity that closes the loan in its own name in a table funded transaction. A loan correspondent approved under 24 CFR 202.8 for Federal Housing Administration programs is a mortgage broker for purposes of this part.

* * * * *

Origination service means any service involved in the creation of a mortgage loan, including but not limited to the taking of the loan application, loan processing, and the underwriting and funding of the loan, and the processing and administrative services required to perform these functions.

* * * * *

Prepayment penalty has the same meaning as ''prepayment penalty'' under Regulation Z (12 CFR part 226).

* * * * *

Required use means a situation in which a person's access to some distinct service, property, discount, rebate, or other economic incentive, or the person's ability to avoid an economic disincentive or penalty, is contingent upon the person using or failing to use a referred provider of settlement services. In order to qualify for the affiliated business exemption under § 3500.15, a settlement service provider may offer a combination of bona fide settlement services at a total price (net of the value of the associated discount, rebate, or other economic incentive) lower than the sum of the market prices of the individual settlement services

and will not be found to have required the use of the settlement service providers as long as: (1) The use of any such combination is optional to the purchaser; and (2) the lower price for the combination is not made up by higher costs elsewhere in the settlement process.

* * * * *

Third party means a settlement service provider other than a loan originator.

* * * * *

Title service means any service involved in the provision of title insurance (lender's or owner's policy), including but not limited to: title examination and evaluation; preparation and issuance of title commitment; clearance of underwriting objections; preparation and issuance of a title insurance policy or policies; and the processing and administrative services required to perform these functions. The term also includes the service of conducting a settlement.

* * * * *

Tolerance means the maximum amount by which the charge for a category or categories of settlement costs may exceed the amount of the estimate for such category or categories on a GFE.

■ 6. In § 3500.7, paragraphs (a) through (e) are revised; paragraph (f) is redesignated as paragraph (h); and new paragraphs (f), (g), and (i) are added, as follows:

§ 3500.7 Good faith estimate or GFE.

(a) *Lender to provide*. (1) Except as otherwise provided in paragraphs (a), (b), or (h) of this section, not later than 3 business days after a lender receives an application, or information sufficient to complete an application, the lender must provide the applicant with a GFE. In the case of dealer loans, the lender must either provide the GFE or ensure that the dealer provides the GFE.

(2) The lender must provide the GFE to the loan applicant by hand delivery, by placing it in the mail, or, if the applicant agrees, by fax, e-mail, or other electronic means.

(3) The lender is not required to provide the applicant with a GFE if, before the end of the 3-business-day period:

(i) The lender denies the application; or

(ii) The applicant withdraws the application.

(4) The lender is not permitted to charge, as a condition for providing a GFE, any fee for an appraisal, inspection, or other similar settlement service. The lender may, at its option, charge a fee limited to the cost of a credit report. The lender may not charge additional fees until after the applicant has received the GFE. If the GFE is mailed to the applicant, the applicant is considered to have received the GFE 3 calendar days after it is mailed, not including Sundays and the legal public holidays specified in 5 U.S.C. 6103(a).

(5) The lender may at any time collect from the loan applicant any information that it requires in addition to the required application information. However, the lender is not permitted to require, as a condition for providing a GFE, that an applicant submit supplemental documentation to verify the information provided on the application.

(b) *Mortgage broker to provide*. (1) Except as otherwise provided in paragraphs (a), (b), or (h) of this section, either the lender or the mortgage broker must provide a GFE not later than 3 business days after a mortgage broker receives either an application or information sufficient to complete an application. The lender is responsible for ascertaining whether the GFE has been provided. If the mortgage broker has provided a GFE, the lender is not required to provide an additional GFE.

(2) The mortgage broker must provide the GFE by hand delivery, by placing it in the mail, or, if the applicant agrees, by fax, email, or other electronic means.

(3) The mortgage broker is not required to provide the applicant with a GFE if, before the end of the 3-business-day period:

(i) The mortgage broker or lender denies the application; or

(ii) The applicant withdraws the application.

(4) The mortgage broker is not permitted to charge, as a condition for providing a GFE, any fee for an appraisal, inspection, or other similar settlement service. The mortgage broker may, at its option, charge a fee limited to the cost of a credit report. The mortgage broker may not charge additional fees until after the applicant has received the GFE. If the GFE is mailed to the applicant, the applicant is considered to have received the GFE 3 calendar days after it is mailed, not including Sundays and the legal public holidays specified in 5 U.S.C. 6103(a).

(5) The mortgage broker may at any time collect from the loan applicant any information that it requires in addition to the required application information. However, the mortgage broker is not permitted to require, as a condition for providing a GFE, that an applicant submit supplemental documentation to verify the information provided on the application.

(c) *Availability of GFE terms*. Except as provided in this paragraph, the estimate of the charges and terms for all settlement services must be available for at least 10 business days from when the GFE is provided, but it may remain available longer, if the loan originator extends the period of availability. The estimate for the following charges are excepted from this requirement: the interest rate, charges and terms dependent upon the interest rate, which includes the charge or credit for the interest rate chosen, the adjusted origination charges, and per diem interest.

(d) *Content and form of GFE*. The GFE form is set out in Appendix C to this part. The loan originator must prepare the GFE in accordance with the requirements of this section and the Instructions in Appendix C to this part. The instructions in Appendix C to this part allow for flexibility in the preparation and distribution of the GFE in hard copy and electronic format.

(e) *Tolerances for amounts included on GFE*. (1) Except as provided in paragraph (f) of this section, the actual charges at settlement may not exceed the amounts included on the GFE for:

(i) The origination charge;

(ii) While the borrower's interest rate is locked, the credit or charge for the interest rate chosen;

(iii) While the borrower's interest rate is locked, the adjusted origination charge; and

(iv) Transfer taxes.

(2) Except as provided in paragraph (f) below, the sum of the charges at settlement for the following services may not be greater than 10 percent above the sum of the amounts included on the GFE:

(i) Lender-required settlement services, where the lender selects the third party settlement service provider;

(ii) Lender-required services, title services and required title insurance, and owner's title insurance, when the borrower uses a settlement service provider identified by the loan originator; and

(iii) Government recording charges.

(3) The amounts charged for all other settlement services included on the GFE may change at settlement.

(f) *Binding GFE*. The loan originator is bound, within the tolerances provided in paragraph (e) of this section, to the settlement charges and terms listed on the GFE provided to the borrower, unless a new GFE is provided prior to settlement consistent with this paragraph (f). If a loan originator provides a revised GFE consistent with this paragraph, the loan originator must document the reason that a new GFE

was provided. Loan originators must retain documentation of any reasons for providing a new GFE for no less than 3 years after settlement.

(1) *Changed circumstances affecting settlement costs*. If changed circumstances result in increased costs for any settlement services such that the charges at settlement would exceed the tolerances for those charges, the loan originator may provide a revised GFE to the borrower. If a revised GFE is to be provided, the loan originator must do so within 3 business days of receiving information sufficient to establish changed circumstances. The revised GFE may increase charges for services listed on the GFE only to the extent that the changed circumstances actually resulted in higher charges.

(2) *Changed circumstances affecting loan*. If changed circumstances result in a change in the borrower's eligibility for the specific loan terms identified in the GFE, the loan originator may provide a revised GFE to the borrower. If a revised GFE is to be provided, the loan originator must do so within 3 business days of receiving information sufficient to establish changed circumstances.

(3) *Borrower-requested changes*. If a borrower requests changes to the mortgage loan identified in the GFE that change the settlement charges or the terms of the loan, the loan originator may provide a revised GFE to the borrower. If a revised GFE is to be provided, the loan originator must do so within 3 business days of the borrower's request.

(4) *Expiration of original GFE*. If a borrower does not express an intent to continue with an application within 10 business days after the GFE is provided, or such longer time specified by the loan originator pursuant to paragraph (c) above, the loan originator is no longer bound by the GFE.

(5) *Interest rate dependent charges and terms*. If the interest rate has not been locked by the borrower, or a locked interest rate has expired, the charge or credit for the interest rate chosen, the adjusted origination charges, per diem interest, and loan terms related to the interest rate may change. If the borrower later locks the interest rate, a new GFE must be provided showing the revised interest rate-dependent charges and terms. All other charges and terms must remain the same as on the original GFE, except as otherwise provided in paragraph (f) of this section.

(6) *New home purchases*. In transactions involving new home purchases, where settlement is anticipated to occur more than 60 calendar days from the time a GFE is provided, the loan originator may provide the GFE to the borrower with a clear and conspicuous disclosure stating that at any time up until 60 calendar days prior to closing, the loan originator may issue a revised GFE. If no such separate disclosure is provided, the loan originator cannot issue a revised GFE, except as otherwise provided in paragraph (f) of this section.

(g) *GFE is not a loan commitment*. Nothing in this section shall be interpreted to require a loan originator to make a loan to a particular borrower. The loan originator is not required to provide a GFE if the loan originator does not have available a loan for which the borrower is eligible.

* * * * *

(i) *Violations of section 5 of RESPA (12 U.S.C. 2604)*. A loan originator that violates the requirements of this section shall be deemed to have violated section 5 of RESPA. If any charges at settlement exceed the charges listed on the GFE by more than the permitted tolerances, the loan originator may cure the tolerance violation by reimbursing to the borrower the amount by which the tolerance was exceeded, at settlement or within 30 calendar days after settlement. A borrower will be deemed to have received timely reimbursement if the loan originator delivers or places the payment in the mail within 30 calendar days after settlement.

■ 7. Section 3500.8 is revised to read as follows:

§ 3500.8 Use of HUD–1 or HUD–1A settlement statements.

(a) *Use by settlement agent*. The settlement agent shall use the HUD–1 settlement statement in every settlement involving a federally related mortgage loan in which there is a borrower and a seller. For transactions in which there is a borrower and no seller, such as refinancing loans or subordinate lien loans, the HUD–1 may be utilized by using the borrower's side of the HUD–1 statement. Alternatively, the form HUD–1A may be used for these transactions. The HUD–1 or HUD–1A may be modified as permitted under this part. Either the HUD–1 or the HUD–1A, as appropriate, shall be used for every RESPA-covered transaction, unless its use is specifically exempted. The use of the HUD–1 or HUD–1A is exempted for open-end lines of credit (home-equity plans) covered by the Truth in Lending Act and Regulation Z.

(b) *Charges to be stated*. The settlement agent shall complete the HUD–1 or HUD–1A, in accordance with the instructions set forth in Appendix A to this part. The loan originator must transmit to the settlement agent all information necessary to complete the HUD–1 or HUD–1A.

(1) *In general*. The settlement agent shall state the actual charges paid by the borrower and seller on the HUD–1, or by the borrower on the HUD–1A. The settlement agent must separately itemize each third party charge paid by the borrower and seller. All origination services performed by or on behalf of the loan originator must be included in the loan originator's own charge. Administrative and processing services related to title services must be included in the title underwriter's or title agent's own charge. The amount stated on the HUD–1 or HUD–1A for any itemized service cannot exceed the amount actually received by the settlement service provider for that itemized service, unless the charge is an average charge in accordance with paragraph (b)(2) of this section.

(2) *Use of average charge*. (i) The average charge for a settlement service shall be no more than the average amount paid for a settlement service by one settlement service provider to another settlement service provider on behalf of borrowers and sellers for a particular class of transactions involving federally related mortgage loans. The total amounts paid by borrowers and sellers for a settlement service based on the use of an average charge may not exceed the total amounts paid to the providers of that service for the particular class of transactions.

(ii) The settlement service provider shall define the particular class of transactions for purposes of calculating the average charge as all transactions involving federally related mortgage loans for:

(A) A period of time as determined by the settlement service provider, but not less than 30 calendar days and not more than 6 months;

(B) A geographic area as determined by the settlement service provider; and

(C) A type of loan as determined by the settlement service provider.

(iii) A settlement service provider may use an average charge in the same class of transactions for which the charge was calculated. If the settlement service provider uses the average charge for any transaction in the class, the settlement service provider must use the same average charge in every transaction within that class for which a GFE was provided.

(iv) The use of an average charge is not permitted for any settlement service if the charge for the service is based on the loan amount or property value. For example, an average charge may not be used for transfer taxes, interest charges, reserves or escrow, or any type of

insurance, including mortgage insurance, title insurance, or hazard insurance.

(v) The settlement service provider must retain all documentation used to calculate the average charge for a particular class of transactions for at least 3 years after any settlement for which that average charge was used.

(c) *Violations of section 4 of RESPA (12 U.S.C. 2604).* A violation of any of the requirements of this section will be deemed to be a violation of section 4 of RESPA. An inadvertent or technical error in completing the HUD–1 or HUD–1A shall not be deemed a violation of section 4 of RESPA if a revised HUD–1 or HUD–1A is provided in accordance with the requirements of this section within 30 calendar days after settlement.

■ 8. In § 3500.9, paragraph (a)(1) is revised as follows:

§ 3500.9 Reproduction of settlement statements.

(a) * * *

(1) The person reproducing the HUD–1 may insert its business name and logo in section A and may rearrange, but not delete, the other information that appears in section A.

* * * * *

■ 9. Section 3500.17 is amended:

■ a. In paragraph (b) by removing the definitions of *Acceptable accounting method, Conversion date, Phase-in period, Post-rule account*, and *Pre-rule account*;

■ b. In paragraph (c) by revising the heading and paragraphs (c)(4), (5), (6), and (8);

■ c. By removing paragraph (d)(2);

■ d. By redesignating paragraphs (d) introductory text and (d)(1) as paragraphs (d)(1) and (d)(2);

■ e. By adding a new heading to paragraph (d) and by revising newly designated (d)(1) and (d)(2) introductory text; and

■ f. By removing paragraph (e)(3), to read as follows:

§ 3500.17 Escrow accounts.

* * * * *

(c) *Limits on payments to escrow accounts.* * * *

(4) *Aggregate accounting required.* All servicers must use the aggregate accounting method in conducting escrow account analyses.

(5) *Cushion.* The cushion must be no greater than one-sixth (1/6) of the estimated total annual disbursements from the escrow account.

(6) *Restrictions on pre-accrual.* A servicer must not practice pre-accrual.

* * * * *

(8) *Provisions in mortgage documents.* The servicer must examine the mortgage loan documents to determine the applicable cushion for each escrow account. If the mortgage loan documents provide for lower cushion limits, then the terms of the loan documents apply. Where the terms of any mortgage loan document allow greater payments to an escrow account than allowed by this section, then this section controls the applicable limits. Where the mortgage loan documents do not specifically establish an escrow account, whether a servicer may establish an escrow account for the loan is a matter for determination by other Federal or State law. If the mortgage loan document is silent on the escrow account limits and a servicer establishes an escrow account under other Federal or State law, then the limitations of this section apply unless applicable Federal or State law provides for a lower amount. If the loan documents provide for escrow accounts up to the RESPA limits, then the servicer may require the maximum amounts consistent with this section, unless an applicable Federal or State law sets a lesser amount.

* * * * *

(d) *Methods of escrow account analysis.* (1) The following sets forth the steps servicers must use to determine whether their use of aggregate analysis conforms with the limitations in § 3500.17(c)(1). The steps set forth in this section result in maximum limits. Servicers may use accounting procedures that result in lower target balances. In particular, servicers may use a cushion less than the permissible cushion or no cushion at all. This section does not require the use of a cushion.

(2) *Aggregate analysis.* (i) In conducting the escrow account analysis using aggregate analysis, the target balances may not exceed the balances computed according to the following arithmetic operations:

* * * * *

■ 10. Section 3500.21 is amended by revising paragraphs (b) and (c) to read as follows:

§ 3500.21 Mortgage Servicing Transfers.

* * * * *

(b) *Servicing Disclosure Statement; Requirements.* (1) At the time an application for a mortgage servicing loan is submitted, or within 3 business days after submission of the application, the lender, mortgage broker who anticipates using table funding, or dealer who anticipates a first lien dealer loan shall provide to each person who applies for such a loan a Servicing Disclosure Statement. A format for the Servicing Disclosure Statement appears as Appendix MS–1 to this part. The specific language of the Servicing Disclosure Statement is not required to be used. The information set forth in ''Instructions to Preparer'' on the Servicing Disclosure Statement need not be included with the information given to applicants, and material in square brackets is optional or alternative language. The model format may be annotated with additional information that clarifies or enhances the model language. The lender, table funding mortgage broker, or dealer should use the language that best describes the particular circumstances.

(2) The Servicing Disclosure Statement must indicate whether the servicing of the loan may be assigned, sold, or transferred to any other person at any time while the loan is outstanding. If the lender, table funding mortgage broker, or dealer in a first lien dealer loan will engage in the servicing of the mortgage loan for which the applicant has applied, the disclosure may consist of a statement that the entity will service such loan and does not intend to sell, transfer, or assign the servicing of the loan. If the lender, table funding mortgage broker, or dealer in a first lien dealer loan will not engage in the servicing of the mortgage loan for which the applicant has applied, the disclosure may consist of a statement that such entity intends to assign, sell, or transfer servicing of such mortgage loan before the first payment is due. In all other instances, the disclosure must state that the servicing of the loan may be assigned, sold or transferred while the loan is outstanding.

(c) *Servicing Disclosure Statement; Delivery.* The lender, table funding mortgage broker, or dealer that anticipates a first lien dealer loan shall deliver the Servicing Disclosure Statement within 3 business days from receipt of the application by hand delivery, by placing it in the mail, or, if the applicant agrees, by fax, e-mail, or other electronic means. In the event the borrower is denied credit within the 3 business-day period, no servicing disclosure statement is required to be delivered. If co-applicants indicate the same address on their application, one copy delivered to that address is sufficient. If different addresses are shown by co-applicants on the application, a copy must be delivered to each of the co-applicants.

* * * * *

■ 11. A new § 3500.22 is added to read as follows:

§ 3500.22 Severability.

If any particular provision of this part or the application of any particular provision to any person or circumstance is held invalid, the remainder of this part and the application of such provisions to other persons or circumstances shall not be affected by such holding.

■ 12. A new § 3500.23 is added to read as follows:

§ 3500.23 ESIGN applicability.

The Electronic Signatures in Global and National Commerce Act (''ESIGN''), 15 U.S.C. 7001–7031, shall apply to this part.

■ 13. Appendix A to part 3500 is revised in its entirety, including the heading, to read as follows:

Appendix A to Part 3500—Instructions for Completing HUD–1 and HUD–1a Settlement Statements; Sample HUD–1 and HUD–1a Statements

The following are instructions for completing the HUD–1 settlement statement, required under section 4 of RESPA and 24 CFR part 3500 (Regulation X) of the Department of Housing and Urban Development regulations. This form is to be used as a statement of actual charges and adjustments paid by the borrower and the seller, to be given to the parties in connection with the settlement. The instructions for completion of the HUD–1 are primarily for the benefit of the settlement agents who prepare the statements and need not be transmitted to the parties as an integral part of the HUD–1. There is no objection to the use of the HUD–1 in transactions in which its use is not legally required. Refer to the definitions section of HUD's regulations (24 CFR 3500.2) for specific definitions of many of the terms that are used in these instructions.

General Instructions

Information and amounts may be filled in by typewriter, hand printing, computer printing, or any other method producing clear and legible results. Refer to HUD's regulations (Regulation X) regarding rules applicable to reproduction of the HUD–1 for the purpose of including customary recitals and information used locally in settlements; for example, a breakdown of payoff figures, a breakdown of the Borrower's total monthly mortgage payments, check disbursements, a statement indicating receipt of funds, applicable special stipulations between Borrower and Seller, and the date funds are transferred.

The settlement agent shall complete the HUD–1 to itemize all charges imposed upon the Borrower and the Seller by the loan originator and all sales commissions, whether to be paid at settlement or outside of settlement, and any other charges which either the Borrower or the Seller will pay at settlement. Charges for loan origination and title services should not be itemized except as provided in these instructions. For each separately identified settlement service in connection with the transaction, the name of the person ultimately receiving the payment must be shown together with the total amount paid to such person. Items paid to and retained by a loan originator are disclosed as required in the instructions for lines in the 800-series of the HUD–1 (and for per diem interest, in the 900-series of the HUD–1).

As a general rule, charges that are paid for by the seller must be shown in the seller's column on page 2 of the HUD–1 (unless paid outside closing), and charges that are paid for by the borrower must be shown in the borrower's column (unless paid outside closing). However, in order to promote comparability between the charges on the GFE and the charges on the HUD–1, if a seller pays for a charge that was included on the GFE, the charge should be listed in the borrower's column on page 2 of the HUD–1. That charge should also be offset by listing a credit in that amount to the borrower on lines 204–209 on page 1 of the HUD–1, and by a charge to the seller in lines 506–509 on page 1 of the HUD–1. If a loan originator (other than for no-cost loans), real estate agent, other settlement service provider, or other person pays for a charge that was included on the GFE, the charge should be listed in the borrower's column on page 2 of the HUD–1, with an offsetting credit reported on page 1 of the HUD–1, identifying the party paying the charge.

Charges paid outside of settlement by the borrower, seller, loan originator, real estate agent, or any other person, must be included on the HUD–1 but marked ''P.O.C.'' for ''Paid Outside of Closing'' (settlement) and must not be included in computing totals. However, indirect payments from a lender to a mortgage broker may not be disclosed as P.O.C., and must be included as a credit on Line 802. P.O.C. items must not be placed in the Borrower or Seller columns, but rather on the appropriate line outside the columns. The settlement agent must indicate whether P.O.C. items are paid for by the Borrower, Seller, or some other party by marking the items paid for by whoever made the payment as ''P.O.C.'' with the party making the payment identified in parentheses, such as ''P.O.C. (borrower)'' or ''P.O.C. (seller)''.

In the case of ''no cost'' loans where ''no cost'' encompasses third party fees as well as the upfront payment to the loan originator, the third party services covered by the ''no cost'' provisions must be itemized and listed in the borrower's column on the HUD–1/1A with the charge for the third party service. These itemized charges must be offset with a negative adjusted origination charge on Line 803 and recorded in the columns.

Blank lines are provided in section L for any additional settlement charges. Blank lines are also provided for additional insertions in sections J and K. The names of the recipients of the settlement charges in section L and the names of the recipients of adjustments described in section J or K should be included on the blank lines.

Lines and columns in section J which relate to the Borrower's transaction may be left blank on the copy of the HUD–1 which will be furnished to the Seller. Lines and columns in section K which relate to the Seller's transaction may be left blank on the copy of the HUD–1 which will be furnished to the Borrower.

Line Item Instructions

Instructions for completing the individual items on the HUD–1 follow.

Section A. This section requires no entry of information.

Section B. Check appropriate loan type and complete the remaining items as applicable.

Section C. This section provides a notice regarding settlement costs and requires no additional entry of information.

Sections D and E. Fill in the names and current mailing addresses and zip codes of the Borrower and the Seller. Where there is more than one Borrower or Seller, the name and address of each one is required. Use a supplementary page if needed to list multiple Borrowers or Sellers.

Section F. Fill in the name, current mailing address and zip code of the Lender.

Section G. The street address of the property being sold should be listed. If there is no street address, a brief legal description or other location of the property should be inserted. In all cases give the zip code of the property.

Section H. Fill in name, address, zip code and telephone number of settlement agent, and address and zip code of ''place of settlement.''

Section I. Fill in date of settlement.

Section J. Summary of Borrower's Transaction. Line 101 is for the contract sales price of the property being sold, excluding the price of any items of tangible personal property if Borrower and Seller have agreed to a separate price for such items.

Line 102 is for the sales price of any items of tangible personal property excluded from Line 101. Personal property could include such items as carpets, drapes, stoves, refrigerators, etc. What constitutes personal property varies from state to state. Manufactured homes are not considered personal property for this purpose.

Line 103 is used to record the total charges to Borrower detailed in Section L and totaled on Line 1400.

Lines 104 and 105 are for additional amounts owed by the Borrower, such as charges that were not listed on the GFE or items paid by the Seller prior to settlement but reimbursed by the Borrower at settlement. For example, the balance in the Seller's reserve account held in connection with an existing loan, if assigned to the Borrower in a loan assumption case, will be entered here. These lines will also be used when a tenant in the property being sold has not yet paid the rent, which the Borrower will collect, for a period of time prior to the settlement. The lines will also be used to indicate the treatment for any tenant security deposit. The Seller will be credited on Lines 404–405.

Lines 106 through 112 are for items which the Seller had paid in advance, and for which the Borrower must therefore reimburse the Seller. Examples of items for which adjustments will be made may include taxes and assessments paid in advance for an entire year or other period, when settlement

occurs prior to the expiration of the year or other period for which they were paid. Additional examples include flood and hazard insurance premiums, if the Borrower is being substituted as an insured under the same policy; mortgage insurance in loan assumption cases; planned unit development or condominium association assessments paid in advance; fuel or other supplies on hand, purchased by the Seller, which the Borrower will use when Borrower takes possession of the property; and ground rent paid in advance.

Line 120 is for the total of Lines 101 through 112.

Line 201 is for any amount paid against the sales price prior to settlement.

Line 202 is for the amount of the new loan made by the Lender when a loan to finance construction of a new structure constructed for sale is used as or converted to a loan to finance purchase. Line 202 should also be used for the amount of the first user loan, when a loan to purchase a manufactured home for resale is converted to a loan to finance purchase by the first user. For other loans covered by 24 CFR part 3500 (Regulation X) which finance construction of a new structure or purchase of a manufactured home, list the sales price of the land on Line 104, the construction cost or purchase price of manufactured home on Line 105 (Line 101 would be left blank in this instance) and amount of the loan on Line 202. The remainder of the form should be completed taking into account adjustments and charges related to the temporary financing and permanent financing and which are known at the date of settlement.

Line 203 is used for cases in which the Borrower is assuming or taking title subject to an existing loan or lien on the property.

Lines 204–209 are used for other items paid by or on behalf of the Borrower. Lines 204–209 should be used to indicate any financing arrangements or other new loan not listed in Line 202. For example, if the Borrower is using a second mortgage or note to finance part of the purchase price, whether from the same lender, another lender or the Seller, insert the principal amount of the loan with a brief explanation on Lines 204–209. Lines 204–209 should also be used where the Borrower receives a credit from the Seller for closing costs, including seller-paid GFE charges. They may also be used in cases in which a Seller (typically a builder) is making an ''allowance'' to the Borrower for items that the Borrower is to purchase separately.

Lines 210 through 219 are for items which have not yet been paid, and which the Borrower is expected to pay, but which are attributable in part to a period of time prior to the settlement. In jurisdictions in which taxes are paid late in the tax year, most cases will show the proration of taxes in these lines. Other examples include utilities used but not paid for by the Seller, rent collected in advance by the Seller from a tenant for a period extending beyond the settlement date, and interest on loan assumptions.

Line 220 is for the total of Lines 201 through 219.

Lines 301 and 302 are summary lines for the Borrower. Enter total in Line 120 on Line 301. Enter total in Line 220 on Line 302.

Line 303 must indicate either the cash required from the Borrower at settlement (the usual case in a purchase transaction), or cash payable to the Borrower at settlement (if, for example, the Borrower's earnest money exceeds the Borrower's cash obligations in the transaction or there is a cash-out refinance). Subtract Line 302 from Line 301 and enter the amount of cash due to or from the Borrower at settlement on Line 303. The appropriate box should be checked. If the Borrower's earnest money is applied toward the charge for a settlement service, the amount so applied should not be included on Line 303 but instead should be shown on the appropriate line for the settlement service, marked ''P.O.C. (Borrower)'', and must not be included in computing totals.

Section K. Summary of Seller's Transaction. Instructions for the use of Lines 101 and 102 and 104–112 above, apply also to Lines 401–412. Line 420 is for the total of Lines 401 through 412.

Line 501 is used if the Seller's real estate broker or other party who is not the settlement agent has received and holds a deposit against the sales price (earnest money) which exceeds the fee or commission owed to that party. If that party will render the excess deposit directly to the Seller, rather than through the settlement agent, the amount of excess deposit should be entered on Line 501 and the amount of the total deposit (including commissions) should be entered on Line 201.

Line 502 is used to record the total charges to the Seller detailed in section L and totaled on Line 1400.

Line 503 is used if the Borrower is assuming or taking title subject to existing liens which are to be deducted from sales price.

Lines 504 and 505 are used for the amounts (including any accrued interest) of any first and/or second loans which will be paid as part of the settlement.

Line 506 is used for deposits paid by the Borrower to the Seller or other party who is not the settlement agent. Enter the amount of the deposit in Line 201 on Line 506 unless Line 501 is used or the party who is not the settlement agent transfers all or part of the deposit to the settlement agent, in which case the settlement agent will note in parentheses on Line 507 the amount of the deposit that is being disbursed as proceeds and enter in the column for Line 506 the amount retained by the above-described party for settlement services. If the settlement agent holds the deposit, insert a note in Line 507 which indicates that the deposit is being disbursed as proceeds.

Lines 506 through 509 may be used to list additional liens which must be paid off through the settlement to clear title to the property. Other Seller obligations should be shown on Lines 506–509, including charges that were disclosed on the GFE but that are actually being paid for by the Seller. These Lines may also be used to indicate funds to be held by the settlement agent for the payment of either repairs, or water, fuel, or other utility bills that cannot be prorated between the parties at settlement because the amounts used by the Seller prior to settlement are not yet known. Subsequent disclosure of the actual amount of these post-settlement items to be paid from settlement funds is optional. Any amounts entered on Lines 204–209 including Seller financing arrangements should also be entered on Lines 506–509.

Instructions for the use of Lines 510 through 519 are the same as those for Lines 210 to 219 above.

Line 520 is for the total of Lines 501 through 519.

Lines 601 and 602 are summary lines for the Seller. Enter the total in Line 420 on Line 610. Enter the total in Line 520 on Line 602.

Line 603 must indicate either the cash required to be paid to the Seller at settlement (the usual case in a purchase transaction), or the cash payable by the Seller at settlement. Subtract Line 602 from Line 601 and enter the amount of cash due to or from the Seller at settlement on Line 603. The appropriate box should be checked.

Section L. Settlement Charges.

Line 700 is used to enter the sales commission charged by the sales agent or real estate broker.

Lines 701–702 are to be used to state the split of the commission where the settlement agent disburses portions of the commission to two or more sales agents or real estate brokers.

Line 703 is used to enter the amount of sales commission disbursed at settlement. If the sales agent or real estate broker is retaining a part of the deposit against the sales price (earnest money) to apply towards the sales agent's or real estate broker's commission, include in Line 703 only that part of the commission being disbursed at settlement and insert a note on Line 704 indicating the amount the sales agent or real estate broker is retaining as a ''P.O.C.'' item.

Line 704 may be used for additional charges made by the sales agent or real estate broker, or for a sales commission charged to the Borrower, which will be disbursed by the settlement agent.

Line 801 is used to record ''Our origination charge,'' which includes all charges received by the loan originator, except any charge for the specific interest rate chosen (points). This number must not be listed in either the buyer's or seller's column. The amount shown in Line 801 must include any amounts received for origination services, including administrative and processing services, performed by or on behalf of the loan originator.

Line 802 is used to record ''Your credit or charge (points) for the specific interest rate chosen,'' which states the charge or credit adjustment as applied to ''Our origination charge,'' if applicable. This number must not be listed in either column or shown on page one of the HUD–1.

For a mortgage broker originating a loan in its own name, the amount shown on Line 802 will be the difference between the initial loan amount and the total payment to the mortgage broker from the lender. The total payment to the mortgage broker will be the sum of the price paid for the loan by the lender and any other payments to the mortgage broker from the lender, including any payments based on the loan amount or loan terms, and any flat rate payments. For

a mortgage broker originating a loan in another entity's name, the amount shown on Line 802 will be the sum of all payments to the mortgage broker from the lender, including any payments based on the loan amount or loan terms, and any flat rate payments.

In either case, when the amount paid to the mortgage broker exceeds the initial loan amount, there is a credit to the borrower and it is entered as a negative amount. When the initial loan amount exceeds the amount paid to the mortgage broker, there is a charge to the borrower and it is entered as a positive amount. For a lender, the amount shown on Line 802 may include any credit or charge (points) to the Borrower.

Line 803 is used to record ''Your adjusted origination charges,'' which states the net amount of the loan origination charges, the sum of the amounts shown in Lines 801 and 802. This amount must be listed in the columns as either a positive number (for example, where the origination charge shown in Line 801 exceeds any credit for the interest rate shown in Line 802 or where there is an origination charge in Line 801 and a charge for the interest rate (points) is shown on Line 802) or as a negative number (for example, where the credit for the interest rate shown in Line 802 exceeds the origination charges shown in Line 801).

In the case of ''no cost'' loans, where ''no cost'' refers only to the loan originator's fees, the amounts shown in Lines 801 and 802 should offset, so that the charge shown on Line 803 is zero. Where ''no cost'' includes third party settlement services, the credit shown in Line 802 will more than offset the amount shown in Line 801. The amount shown in Line 803 will be a negative number to offset the settlement charges paid indirectly through the loan originator.

Lines 804–808 may be used to record each of the ''Required services that we select.'' Each settlement service provider must be identified by name and the amount paid recorded either inside the columns or as paid to the provider outside closing (''P.O.C.''), as described in the General Instructions.

Line 804 is used to record the appraisal fee.

Line 805 is used to record the fee for all credit reports.

Line 806 is used to record the fee for any tax service.

Line 807 is used to record any flood certification fee.

Lines 808 and additional sequentially numbered lines, as needed, are used to record other third party services required by the loan originator. These Lines may also be used to record other required disclosures from the loan originator. Any such disclosures must be listed outside the columns.

Lines 901–904. This series is used to record the items which the Lender requires to be paid at the time of settlement, but which are not necessarily paid to the lender (e.g., FHA mortgage insurance premium), other than reserves collected by the Lender and recorded in the 1000-series.

Line 901 is used if interest is collected at settlement for a part of a month or other period between settlement and the date from which interest will be collected with the first regular monthly payment. Enter that amount here and include the per diem charges. If such interest is not collected until the first regular monthly payment, no entry should be made on Line 901.

Line 902 is used for mortgage insurance premiums due and payable at settlement, including any monthly amounts due at settlement and any upfront mortgage insurance premium, but not including any reserves collected by the Lender and recorded in the 1000-series. If a lump sum mortgage insurance premium paid at settlement is included on Line 902, a note should indicate that the premium is for the life of the loan.

Line 903 is used for homeowner's insurance premiums that the Lender requires to be paid at the time of settlement, except reserves collected by the Lender and recorded in the 1000-series.

Lines 904 and additional sequentially numbered lines are used to list additional items required by the Lender (except for reserves collected by the Lender and recorded in the 1000-series), including premiums for flood or other insurance. These lines are also used to list amounts paid at settlement for insurance not required by the Lender.

Lines 1000–1007. This series is used for amounts collected by the Lender from the Borrower and held in an account for the future payment of the obligations listed as they fall due. Include the time period (number of months) and the monthly assessment. In many jurisdictions this is referred to as an ''escrow'', ''impound'', or ''trust'' account. In addition to the property taxes and insurance listed, some Lenders may require reserves for flood insurance, condominium owners' association assessments, etc. The amount in line 1001 must be listed in the columns, and the itemizations in lines 1002 through 1007 must be listed outside the columns.

After itemizing individual deposits in the 1000 series, the servicer shall make an adjustment based on aggregate accounting. This adjustment equals the difference between the deposit required under aggregate accounting and the sum of the itemized deposits. The computation steps for aggregate accounting are set out in 24 CFR § 3500.17(d). The adjustment will always be a negative number or zero (-0-), except for amounts due to rounding. The settlement agent shall enter the aggregate adjustment amount outside the columns on a final line of the 1000 series of the HUD–1 or HUD–1A statement. Appendix E to this part sets out an example of aggregate analysis.

Lines 1100–1108. This series covers title charges and charges by attorneys and closing or settlement agents. The title charges include a variety of services performed by title companies or others, and include fees directly related to the transfer of title (title examination, title search, document preparation), fees for title insurance, and fees for conducting the closing. The legal charges include fees for attorneys representing the lender, seller, or borrower, and any attorney preparing title work. The series also includes any settlement, notary, and delivery fees related to the services covered in this series. Disbursements to third parties must be broken out in the appropriate lines or in blank lines in the series, and amounts paid to these third parties must be shown outside of the columns if included in Line 1101. Charges not included in Line 1101 must be listed in the columns.

Line 1101 is used to record the total for the category of ''Title services and lender's title insurance.'' This amount must be listed in the columns.

Line 1102 is used to record the settlement or closing fee.

Line 1103 is used to record the charges for the owner's title insurance and related endorsements. This amount must be listed in the columns.

Line 1104 is used to record the lender's title insurance premium and related endorsements.

Line 1105 is used to record the amount of the lender's title policy limit. This amount is recorded outside of the columns.

Line 1106 is used to record the amount of the owner's title policy limit. This amount is recorded outside of the columns.

Line 1107 is used to record the amount of the total title insurance premium, including endorsements, that is retained by the title agent. This amount is recorded outside of the columns.

Line 1108 used to record the amount of the total title insurance premium, including endorsements, that is retained by the title underwriter. This amount is recorded outside of the columns.

Additional sequentially numbered lines in the 1100-series may be used to itemize title charges paid to other third parties, as identified by name and type of service provided.

Lines 1200–1206. This series covers government recording and transfer charges. Charges paid by the borrower must be listed in the columns as described for lines 1201 and 1203, with itemizations shown outside the columns. Any amounts that are charged to the seller and that were not included on the Good Faith Estimate must be listed in the columns.

Line 1201 is used to record the total ''Government recording charges,'' and the amount must be listed in the columns.

Line 1202 is used to record, outside of the columns, the itemized recording charges.

Line 1203 is used to record the transfer taxes, and the amount must be listed in the columns.

Line 1204 is used to record, outside of the columns, the amounts for local transfer taxes and stamps.

Line 1205 is used to record, outside of the columns, the amounts for State transfer taxes and stamps.

Line 1206 and additional sequentially numbered lines may be used to record specific itemized third party charges for government recording and transfer services, but the amounts must be listed outside the columns.

Line 1301 and additional sequentially numbered lines must be used to record required services that the borrower can shop for, such as fees for survey, pest inspection, or other similar inspections. These lines may also be used to record additional itemized

settlement charges that are not included in a specific category, such as fees for structural and environmental inspections; pre-sale inspections of heating, plumbing or electrical equipment; or insurance or warranty coverage. The amounts must be listed in either the borrower's or seller's column.

Line 1400 must state the total settlement charges as calculated by adding the amounts within each column.

Page 3

Comparison of Good Faith Estimate (GFE) and HUD–1/1A Charges

The comparison chart must be prepared using the exact information and amounts from the GFE and the actual settlement charges shown on the HUD–1/1A Settlement Statement. The comparison chart is comprised of three sections: ''Charges That Cannot Increase'', ''Charges That Cannot Increase More Than 10%'', and ''Charges That Can Change''.

''Charges That Cannot Increase''. The amounts shown in Blocks 1 and 2, in Line A, and in Block 8 on the borrower's GFE must be entered in the appropriate line in the Good Faith Estimate column. The amounts shown on Lines 801, 802, 803 and 1203 of the HUD–1/1A must be entered in the corresponding line in the HUD–1/1A column. The HUD–1/1A column must include any amounts shown on page 2 of the HUD–1 in the column as paid for by the borrower, plus any amounts that are shown as P.O.C. by or on behalf of the borrower. If there is a credit in Block 2 of the GFE or Line 802 of the HUD–1/1A, the credit should be entered as a negative number.

''Charges That Cannot Increase More Than 10%''. A description of each charge included in Blocks 3 and 7 on the borrower's GFE must be entered on separate lines in this section, with the amount shown on the borrower's GFE for each charge entered in the corresponding line in the Good Faith Estimate column. For each charge included in Blocks 4, 5 and 6 on the borrower's GFE for which the loan originator selected the provider or for which the borrower selected a provider identified by the loan originator, a description must be entered on a separate line in this section, with the amount shown on the borrower's GFE for each charge entered in the corresponding line in the Good Faith Estimate column. The loan originator must identify any third party settlement services for which the borrower selected a provider other than one identified by the loan originator so that the settlement agent can include those charges in the appropriate category. Additional lines may be added if necessary. The amounts shown on the HUD–1/1A for each line must be entered in the HUD–1/1A column next to the corresponding charge from the GFE, along with the appropriate HUD–1/1A line number. The HUD–1/1A column must include any amounts shown on page 2 of the HUD–1 in the column as paid for by the borrower, plus any amounts that are shown as P.O.C. by or on behalf of the borrower.

The amounts shown in the Good Faith Estimate and HUD–1/1A columns for this section must be separately totaled and entered in the designated line. If the total for the HUD–1/1A column is greater than the total for the Good Faith Estimate column, then the amount of the increase must be entered both as a dollar amount and as a percentage increase in the appropriate line.

''Charges That Can Change''. The amounts shown in Blocks 9, 10 and 11 on the borrower's GFE must be entered in the appropriate line in the Good Faith Estimate column. Any third party settlement services for which the borrower selected a provider other than one identified by the loan originator must also be included in this section. The amounts shown on the HUD–1/1A for each charge in this section must be entered in the corresponding line in the HUD–1/1A column, along with the appropriate HUD–1/1A line number. The HUD–1/1A column must include any amounts shown on page 2 of the HUD–1 in the column as paid for by the borrower, plus any amounts that are shown as P.O.C. by or on behalf of the borrower. Additional lines may be added if necessary.

Loan Terms

This section must be completed in accordance with the information and instructions provided by the lender. The lender must provide this information in a format that permits the settlement agent to simply enter the necessary information in the appropriate spaces, without the settlement agent having to refer to the loan documents themselves.

Instructions for Completing HUD–1A

Note: The HUD–1A is an optional form that may be used for refinancing and subordinate-lien federally related mortgage loans, as well as for any other one-party transaction that does not involve the transfer of title to residential real property. The HUD–1 form may also be used for such transactions, by utilizing the borrower's side of the HUD–1 and following the relevant parts of the instructions as set forth above. The use of either the HUD–1 or HUD–1A is not mandatory for open-end lines of credit (home-equity plans), as long as the provisions of Regulation Z are followed.

Background

The HUD–1A settlement statement is to be used as a statement of actual charges and adjustments to be given to the borrower at settlement, as defined in this part. The instructions for completion of the HUD–1A are for the benefit of the settlement agent who prepares the statement; the instructions are not a part of the statement and need not be transmitted to the borrower. There is no objection to using the HUD–1A in transactions in which it is not required, and its use in open-end lines of credit transactions (home-equity plans) is encouraged. It may not be used as a substitute for a HUD–1 in any transaction that has a seller.

Refer to the ''definitions'' section (§ 3500.2) of 24 CFR part 3500 (Regulation X) for specific definitions of terms used in these instructions.

General Instructions

Information and amounts may be filled in by typewriter, hand printing, computer printing, or any other method producing clear and legible results. Refer to 24 CFR 3500.9 regarding rules for reproduction of the HUD–1A. Additional pages may be attached to the HUD–1A for the inclusion of customary recitals and information used locally for settlements or if there are insufficient lines on the HUD–1A. The settlement agent shall complete the HUD–1A in accordance with the instructions for the HUD–1 to the extent possible, including the instructions for disclosing items paid outside closing and for no cost loans.

Blank lines are provided in Section L for any additional settlement charges. Blank lines are also provided in Section M for recipients of all or portions of the loan proceeds. The names of the recipients of the settlement charges in Section L and the names of the recipients of the loan proceeds in Section M should be set forth on the blank lines.

Line-Item Instructions

Page 1

The identification information at the top of the HUD–1A should be completed as follows:

The borrower's name and address is entered in the space provided. If the property securing the loan is different from the borrower's address, the address or other location information on the property should be entered in the space provided. The loan number is the lender's identification number for the loan. The settlement date is the date of settlement in accordance with 24 CFR 3500.2, not the end of any applicable rescission period. The name and address of the lender should be entered in the space provided.

Section L. Settlement Charges. This section of the HUD–1A is similar to Section L of the HUD–1, with minor changes or omissions, including deletion of lines 700 through 704, relating to real estate broker commissions. The instructions for Section L in the HUD–1, should be followed insofar as possible. Inapplicable charges should be ignored, as should any instructions regarding seller items.

Line 1400 in the HUD–1A is for the total settlement charges charged to the borrower. Enter this total on line 1601. This total should include Section L amounts from additional pages, if any are attached to this HUD–1A.

Section M. Disbursement to Others. This section is used to list payees, other than the borrower, of all or portions of the loan proceeds (including the lender, if the loan is paying off a prior loan made by the same lender), when the payee will be paid directly out of the settlement proceeds. It is not used to list payees of settlement charges, nor to list funds disbursed directly to the borrower, even if the lender knows the borrower's intended use of the funds.

For example, in a refinancing transaction, the loan proceeds are used to pay off an existing loan. The name of the lender for the loan being paid off and the pay-off balance would be entered in Section M. In a home improvement transaction when the proceeds are to be paid to the home improvement contractor, the name of the contractor and the amount paid to the contractor would be

entered in Section M. In a consolidation loan, or when part of the loan proceeds is used to pay off other creditors, the name of each creditor and the amount paid to that creditor would be entered in Section M. If the proceeds are to be given directly to the borrower and the borrower will use the proceeds to pay off existing obligations, this would not be reflected in Section M.

Section N. Net Settlement. Line 1600 normally sets forth the principal amount of the loan as it appears on the related note for this loan. In the event this form is used for an open-ended home equity line whose approved amount is greater than the initial amount advanced at settlement, the amount shown on Line 1600 will be the loan amount advanced at settlement. Line 1601 is used for all settlement charges that both are included in the totals for lines 1400 and 1602, and are not financed as part of the principal amount of the loan. This is the amount normally received by the lender from the borrower at settlement, which would occur when some or all of the settlement charges were paid in cash by the borrower at settlement, instead of being financed as part of the principal amount of the loan. Failure to include any such amount in line 1601 will result in an error in the amount calculated on line 1604. Items paid outside of closing (P.O.C.) should not be included in Line 1601.

Line 1602 is the total amount from line 1400.

Line 1603 is the total amount from line 1520.

Line 1604 is the amount disbursed to the borrower. This is determined by adding together the amounts for lines 1600 and 1601, and then subtracting any amounts listed on lines 1602 and 1603.

Page 2

This section of the HUD–1A is similar to page 3 of the HUD–1. The instructions for page 3 of the HUD–1, should be followed insofar as possible. The HUD–1/1A Column should include any amounts shown on page 1 of the HUD–1A in the column as paid for by the borrower, plus any amounts that are shown as P.O.C. by the borrower. Inapplicable charges should be ignored.

BILLING CODE 4210–67–P

OMB Approval No. 2502-0265

A. Settlement Statement (HUD-1)

B. Type of Loan			
1. ☐ FHA 2. ☐ RHS 3. ☐ Conv. Unins. 4. ☐ VA 5. ☐ Conv. Ins.	6. File Number:	7. Loan Number:	8. Mortgage Insurance Case Number:

C. Note: This form is furnished to give you a statement of actual settlement costs. Amounts paid to and by the settlement agent are shown. Items marked "(p.o.c.)" were paid outside the closing; they are shown here for informational purposes and are not included in the totals.

D. Name & Address of Borrower:	E. Name & Address of Seller:	F. Name & Address of Lender:
G. Property Location:	H. Settlement Agent:	I. Settlement Date:
	Place of Settlement:	

J. Summary of Borrower's Transaction		K. Summary of Seller's Transaction	
100. Gross Amount Due from Borrower		**400. Gross Amount Due to Seller**	
101. Contract sales price		401. Contract sales price	
102. Personal property		402. Personal property	
103. Settlement charges to borrower (line 1400)		403.	
104.		404.	
105.		405.	
Adjustment for items paid by seller in advance		**Adjustments for items paid by seller in advance**	
106. City/town taxes to		406. City/town taxes to	
107. County taxes to		407. County taxes to	
108. Assessments to		408. Assessments to	
109.		409.	
110.		410.	
111.		411.	
112.		412.	
120. Gross Amount Due from Borrower		**420. Gross Amount Due to Seller**	
200. Amounts Paid by or in Behalf of Borrower		**500. Reductions in Amount Due to Seller**	
201. Deposit or earnest money		501. Excess deposit (see instructions)	
202. Principal amount of new loan(s)		502. Settlement charges to seller (line 1400)	
203. Existing loan(s) taken subject to		503. Existing loan(s) taken subject to	
204.		504. Payoff of first mortgage loan	
205.		505. Payoff of second mortgage loan	
206.		506.	
207.		507.	
208.		508.	
209.		509.	
Adjustments for items unpaid by seller		**Adjustments for items unpaid by seller**	
210. City/town taxes to		510. City/town taxes to	
211. County taxes to		511. County taxes to	
212. Assessments to		512. Assessments to	
213.		513.	
214.		514.	
215.		515.	
216.		516.	
217.		517.	
218.		518.	
219.		519.	
220. Total Paid by/for Borrower		**520. Total Reduction Amount Due Seller**	
300. Cash at Settlement from/to Borrower		**600. Cash at Settlement to/from Seller**	
301. Gross amount due from borrower (line 120)		601. Gross amount due to seller (line 420)	
302. Less amounts paid by/for borrower (line 220)	( )	602. Less reductions in amount due seller (line 520)	( )
303. Cash ☐ **From** ☐ **To Borrower**		**603. Cash** ☐ **To** ☐ **From Seller**	

The Public Reporting Burden for this collection of information is estimated at 35 minutes per response for collecting, reviewing, and reporting the data. This agency may not collect this information, and you are not required to complete this form, unless it displays a currently valid OMB control number. No confidentiality is assured; this disclosure is mandatory. This is designed to provide the parties to a RESPA covered transaction with information during the settlement process.

L. Settlement Charges

700. Total Real Estate Broker Fees	Paid From Borrower's Funds at Settlement	Paid From Seller's Funds at Settlement
Division of commission (line 700) as follows:		
701. $ to		
702. $ to		
703. Commission paid at settlement		
704.		

800. Items Payable in Connection with Loan			
801. Our origination charge $ (from GFE #1)			
802. Your credit or charge (points) for the specific interest rate chosen $ (from GFE #2)			
803. Your adjusted origination charges (from GFE A)			
804. Appraisal fee to (from GFE #3)			
805. Credit report to (from GFE #3)			
806. Tax service to (from GFE #3)			
807. Flood certification (from GFE #3)			
808.			

900. Items Required by Lender to Be Paid in Advance			
901. Daily interest charges from to @ $ /day (from GFE #10)			
902. Mortgage insurance premium for months to (from GFE #3)			
903. Homeowner's insurance for years to (from GFE #11)			
904.			

1000. Reserves Deposited with Lender			
1001. Initial deposit for your escrow account (from GFE #9)			
1002. Homeowner's insurance months @ $ per month $			
1003. Mortgage insurance months @ $ per month $			
1004. Property taxes months @ $ per month $			
1005. months @ $ per month $			
1006. months @ $ per month $			
1007. Aggregate Adjustment -$			

1100. Title Charges			
1101. Title services and lender's title insurance (from GFE #4)			
1102. Settlement or closing fee $			
1103. Owner's title insurance (from GFE #5)			
1104. Lender's title insurance $			
1105. Lender's title policy limit $			
1106. Owner's title policy limit $			
1107. Agent's portion of the total title insurance premium $			
1108. Underwriter's portion of the total title insurance premium $			

1200. Government Recording and Transfer Charges			
1201. Government recording charges (from GFE #7)			
1202. Deed $ Mortgage $ Releases $			
1203. Transfer taxes (from GFE #8)			
1204. City/County tax/stamps Deed $ Mortgage $			
1205. State tax/stamps Deed $ Mortgage $			
1206.			

1300. Additional Settlement Charges			
1301. Required services that you can shop for (from GFE #6)			
1302. $			
1303. $			
1304.			
1305.			

1400. Total Settlement Charges (enter on lines 103, Section J and 502, Section K)		

Comparison of Good Faith Estimate (GFE) and HUD-1 Charges		Good Faith Estimate	HUD-1
Charges That Cannot Increase	**HUD-1 Line Number**		
Our origination charge	# 801		
Your credit or charge (points) for the specific interest rate chosen	# 802		
Your adjusted origination charges	# 803		
Transfer taxes	#1203		

Charges That in Total Cannot Increase More Than 10%		Good Faith Estimate	HUD-1
Government recording charges	# 1201		
	#		
	#		
	#		
	#		
	#		
	#		
	#		
	Total		
	Increase between GFE and HUD-1 Charges	$ or %	

Charges That Can Change		Good Faith Estimate	HUD-1
Initial deposit for your escrow account	#1001		
Daily interest charges	# 901 $ /day		
Homeowner's insurance	# 903		
	#		
	#		
	#		

Loan Terms

Your initial loan amount is	$
Your loan term is	years
Your initial interest rate is	%
Your initial monthly amount owed for principal, interest, and and any mortgage insurance is	$ includes ☐ Principal ☐ Interest ☐ Mortgage Insurance
Can your interest rate rise?	☐ No. ☐ Yes, it can rise to a maximum of %. The first change will be on and can change again every after . Every change date, your interest rate can increase or decrease by %. Over the life of the loan, your interest rate is guaranteed to never be lower than % or higher than %.
Even if you make payments on time, can your loan balance rise?	☐ No. ☐ Yes, it can rise to a maximum of $.
Even if you make payments on time, can your monthly amount owed for principal, interest, and mortgage insurance rise?	☐ No. ☐ Yes, the first increase can be on and the monthly amount owed can rise to $. The maximum it can ever rise to is $.
Does your loan have a prepayment penalty?	☐ No. ☐ Yes, your maximum prepayment penalty is $.
Does your loan have a balloon payment?	☐ No. ☐ Yes, you have a balloon payment of $ due in years on .
Total monthly amount owed including escrow account payments	☐ You do not have a monthly escrow payment for items, such as property taxes and homeowner's insurance. You must pay these items directly yourself. ☐ You have an additional monthly escrow payment of $ that results in a total initial monthly amount owed of $. This includes principal, interest, any mortgage insurance and any items checked below: ☐ Property taxes ☐ Homeowner's insurance ☐ Flood insurance ☐ ☐ ☐

Note: If you have any questions about the Settlement Charges and Loan Terms listed on this form, please contact your lender.

OMB Approval No. 2502-0265

Settlement Statement (HUD-1A)

Optional Form for Transactions without Sellers

Name and Address of Borrower:	Name and Address of Lender:
Property Location: (if different from above)	Settlement Agent:
	Place of Settlement:
Loan Number:	Settlement Date:

L. Settlement Charges		
800. Items Payable in Connection with Loan		
801. Our origination charge	(from GFE #1) $	
802. Your credit or charge (points) for the specific interest rate chosen	(from GFE #2) $	
803. Your adjusted origination charges	(from GFE A)	
804. Appraisal fee to	(from GFE #3)	
805. Credit report to	(from GFE #3)	
806. Tax service to	(from GFE #3)	
807. Flood certification	(from GFE #3)	
808.		
900. Items Required by Lender to Be Paid in Advance		
901. Daily interest charges from to @ $ /day	(from GFE #10)	
902. Mortgage insurance premium for months to	(from GFE #3)	
903. Homeowner's insurance for years to	(from GFE #11)	
904.		
1000. Reserves Deposited with Lender		
1001. Initial deposit for your escrow account	(from GFE #9)	
1002. Homeowner's insurance months @ $ per month	$	
1003. Mortgage insurance months @ $ per month	$	
1004. Property taxes months @ $ per month	$	
1005. months @ $ per month	$	
1006. months @ $ per month	$	
1007. Aggregate Adjustment	–$	
1100. Title Charges		
1101. Title services and lender's title insurance	(from GFE #4)	
1102. Settlement or closing fee	$	
1103. Owner's title insurance	(from GFE #5)	
1104. Lender's title insurance	$	
1105. Lender's title policy limit $		
1106. Owner's title policy limit $		
1107. Agent's portion of the total title insurance premium	$	
1108. Underwriter's portion of the total title insurance premium	$	
1200. Government Recording and Transfer Charges		
1201. Government recording charges	(from GFE #7)	
1202. Deed $ Mortgage $ Releases $		
1203. Transfer taxes	(from GFE #8)	
1204. City/County tax/stamps Deed $ Mortgage $		
1205. State tax/stamps Deed $ Mortgage $		
1206.		
1300. Additional Settlement Charges		
1301. Required services that you can shop for	(from GFE #6)	
1302.	$	
1303.	$	
1304.		
1305.		
1400. Total Settlement Charges (enter on line 1602, Section N)		

M. Disbursements to Others	
1501.	
1502.	
1503.	
1504.	
1505.	
1506.	
1507.	
1508.	
1509	
1510.	
1511.	
1512.	
1513.	
1514.	
1515.	
1520. Total Disbursed (enter on line 1603)	

N. Net Settlement	
1600. Loan Amount	$
1601. **Plus** Cash/Check from Borrower	$
1602. **Minus** Total Settlement Charges (line 1400)	$
1603. **Minus** Total Disbursements to Others (line 1520)	$
1604. **Equals** Total Disbursements to Borrower (after expiration of any applicable rescission period required by law)	$

The Public Reporting Burden for this collection of information is estimated at 35 minutes per response for collecting, reviewing, and reporting the data. This agency may not collect this information, and you are not required to complete this form, unless it displays a currently valid OMB control number. No confidentiality is assured; this disclosure is mandatory. This is designed to provide the parties to a RESPA covered transaction with information during the settlement process.

Comparison of Good Faith Estimate (GFE) and HUD-1 Charges		Good Faith Estimate	HUD-1
Charges That Cannot Increase	**HUD-1 Line Number**		
Our origination charge	# 801		
Your credit or charge (points) for the specific interest rate chosen	# 802		
Your adjusted origination charges	# 803		
Transfer taxes	#1203		

Charges That In Total Cannot Increase More Than 10%		Good Faith Estimate	HUD-1
Government recording charges	# 1201		
	#		
	#		
	#		
	#		
	#		
	#		
	#		
	Total		
	Increase between GFE and HUD-1 Charges	$ or %	

Charges That Can Change		Good Faith Estimate	HUD-1
Initial deposit for your escrow account	#1001		
Daily interest charges	# 901 $ /day		
Homeowner's insurance	# 903		
	#		
	#		
	#		

Loan Terms

Your initial loan amount is	$
Your loan term is	years
Your initial interest rate is	%
Your initial monthly amount owed for principal, interest, and and any mortgage insurance is	$ includes ☐ Principal ☐ Interest ☐ Mortgage Insurance
Can your interest rate rise?	☐ No. ☐ Yes, it can rise to a maximum of %. The first change will be on and can change again every after . Every change date, your interest rate can increase or decrease by %. Over the life of the loan, your interest rate is guaranteed to never be lower than % or higher than %.
Even if you make payments on time, can your loan balance rise?	☐ No. ☐ Yes, it can rise to a maximum of $.
Even if you make payments on time, can your monthly amount owed for principal, interest, and mortgage insurance rise?	☐ No. ☐ Yes, the first increase can be on and the monthly amount owed can rise to $. The maximum it can ever rise to is $.
Does your loan have a prepayment penalty?	☐ No. ☐ Yes, your maximum prepayment penalty is $.
Does your loan have a balloon payment?	☐ No. ☐ Yes, you have a balloon payment of $ due in years on .
Total monthly amount owed including escrow account payments	☐ You do not have a monthly escrow payment for items, such as property taxes and homeowner's insurance. You must pay these items directly yourself. ☐ You have an additional monthly escrow payment of $ that results in a total initial monthly amount owed of $. This includes principal, interest, any mortgage insurance and any items checked below: ☐ Property taxes ☐ Homeowner's insurance ☐ Flood insurance ☐ ☐ ☐

Note: If you have any questions about the Settlement Charges and Loan Terms listed on this form, please contact your lender.

BILLING CODE 4210–67–C

■ 14. Appendix C to part 3500 is revised in its entirety, including the heading, to read as follows:

Appendix C to Part 3500—Instructions for Completing Good Faith Estimate (GFE) Form

The following are instructions for completing the GFE required under section 5 of RESPA and 24 CFR 3500.7 of the Department of Housing and Urban Development regulations. The standardized form set forth in this Appendix is the required GFE form and must be provided exactly as specified. The instructions for completion of the GFE are primarily for the benefit of the loan originator who prepares the form and need not be transmitted to the borrower(s) as an integral part of the GFE. The required standardized GFE form must be prepared completely and accurately. A separate GFE must be provided for each loan where a transaction will involve more than one mortgage loan.

General Instructions

The loan originator preparing the GFE may fill in information and amounts on the form by typewriter, hand printing, computer printing, or any other method producing clear and legible results. Under these instructions, the ''form'' refers to the required standardized GFE form. Although the standardized GFE is a prescribed form, Blocks 3, 6, and 11 on page 2 may be adapted for use in particular loan situations, so that additional lines may be inserted there, and unused lines may be deleted.

All fees for categories of charges shall be disclosed in U.S. dollar and cent amounts.

Specific Instructions

Page 1

Top of the Form—The loan originator must enter its name, business address, telephone number, and email address, if any, on the top of the form, along with the applicant's name, the address or location of the property for which financing is sought, and the date of the GFE.

''*Purpose.*''—This section describes the general purpose of the GFE as well as additional information available to the applicant.

''*Shopping for your loan.*''—This section requires no loan originator action.

''*Important dates.*''—This section briefly states important deadlines after which the loan terms that are the subject of the GFE may not be available to the applicant. In Line 1, the loan originator must state the date and, if necessary, time until which the interest rate for the GFE will be available. In Line 2, the loan originator must state the date until which the estimate of all other settlement charges for the GFE will be available. This date must be at least 10 business days from the date of the GFE. In Line 3, the loan originator must state how many calendar days within which the applicant must go to settlement once the interest rate is locked. In Line 4, the loan originator must state how many calendar days prior to settlement the interest rate would have to be locked, if applicable.

''*Summary of your loan.*''—In this section, for all loans the loan originator must fill in, where indicated:

(i) The initial loan amount;

(ii) The loan term; and

(iii) The initial interest rate.

The loan originator must fill in the initial monthly amount owed for principal, interest, and any mortgage insurance. The amount shown must be the greater of: (1) The required monthly payment for principal and interest for the first regularly scheduled payment, plus any monthly mortgage insurance payment; or (2) the accrued interest for the first regularly scheduled payment, plus any monthly mortgage insurance payment.

The loan originator must indicate whether the interest rate can rise, and, if it can, must insert the maximum rate to which it can rise over the life of the loan. The loan originator must also indicate the period of time after which the interest rate can first change.

The loan originator must indicate whether the loan balance can rise even if the borrower makes payments on time, for example in the case of a loan with negative amortization. If it can, the loan originator must insert the maximum amount to which the loan balance can rise over the life of the loan. For federal, state, local, or tribal housing programs that provide payment assistance, any repayment of such program assistance should be excluded from consideration in completing this item. If the loan balance will increase only because escrow items are being paid through the loan balance, the loan originator is not required to check the box indicating that the loan balance can rise.

The loan originator must indicate whether the monthly amount owed for principal, interest, and any mortgage insurance can rise even if the borrower makes payments on time. If the monthly amount owed can rise even if the borrower makes payments on time, the loan originator must indicate the period of time after which the monthly amount owed can first change, the maximum amount to which the monthly amount owed can rise at the time of the first change, and the maximum amount to which the monthly amount owed can rise over the life of the loan. The amount used for the monthly amount owed must be the greater of: (1) The required monthly payment for principal and interest for that month, plus any monthly mortgage insurance payment; or (2) the accrued interest for that month, plus any monthly mortgage insurance payment.

The loan originator must indicate whether the loan includes a prepayment penalty, and, if so, the maximum amount that it could be.

The loan originator must indicate whether the loan requires a balloon payment and, if so, the amount of the payment and in how many years it will be due.

''*Escrow account information.*''—The loan originator must indicate whether the loan includes an escrow account for property taxes and other financial obligations. The amount shown in the ''Summary of your loan'' section for ''Your initial monthly amount owed for principal, interest, and any mortgage insurance'' must be entered in the space for the monthly amount owed in this section.

''*Summary of your settlement charges.*''—On this line, the loan originator must state the Adjusted Origination Charges from subtotal A of page 2, the Charges for All Other Settlement Services from subtotal B of page 2, and the Total Estimated Settlement Charges from the bottom of page 2.

Page 2

''*Understanding your estimated settlement charges.*''—This section details 11 settlement cost categories and amounts associated with the mortgage loan. For purposes of determining whether a tolerance has been met, the amount on the GFE should be compared with the total of any amounts shown on the HUD–1 in the borrower's column and any amounts paid outside closing by or on behalf of the borrower.

Your Adjusted Origination Charges''

Block 1, ''*Our origination charge.*''—The loan originator must state here all charges that all loan originators involved in this transaction will receive, except for any charge for the specific interest rate chosen (points). A loan originator may not separately charge any additional fees for getting this loan, including for application, processing, or underwriting. The amount stated in Block 1 is subject to zero tolerance, i.e., the amount may not increase at settlement.

Block 2, ''*Your credit or charge (points) for the specific interest rate chosen.*''—For transactions involving mortgage brokers, the mortgage broker must indicate through check boxes whether there is a credit to the borrower for the interest rate chosen on the loan, the interest rate, and the amount of the credit, or whether there is an additional charge (points) to the borrower for the interest rate chosen on the loan, the interest rate, and the amount of that charge. Only one of the boxes may be checked; a credit and charge cannot occur together in the same transaction.

For transactions without a mortgage broker, the lender may choose not to separately disclose in this block any credit or charge for the interest rate chosen on the loan; however, if this block does not include any positive or negative figure, the lender must check the first box to indicate that ''The credit or charge for the interest rate you have chosen'' is included in ''Our origination charge'' above (see Block 1 instructions above), must insert the interest rate, and must also insert ''0'' in Block 2. Only one of the boxes may be checked; a credit and charge cannot occur together in the same transaction.

For a mortgage broker, the credit or charge for the specific interest rate chosen is the net payment to the mortgage broker from the lender (i.e., the sum of all payments to the mortgage broker from the lender, including payments based on the loan amount, a flat rate, or any other computation, and in a table funded transaction, the loan amount less the price paid for the loan by the lender). When the net payment to the mortgage broker from the lender is positive, there is a credit to the borrower and it is entered as a negative amount in Block 2 of the GFE. When the net payment to the mortgage broker from the lender is negative, there is a charge to the borrower and it is entered as a positive

amount in Block 2 of the GFE. If there is no net payment (i.e., the credit or charge for the specific interest rate chosen is zero), the mortgage broker must insert ''0'' in Block 2 and may check either the box indicating there is a credit of ''0'' or the box indicating there is a charge of ''0''.

The amount stated in Block 2 is subject to zero tolerance while the interest rate is locked, i.e., any credit for the interest rate chosen cannot decrease in absolute value terms and any charge for the interest rate chosen cannot increase. (Note: An increase in the credit is allowed since this increase is a reduction in cost to the borrower. A decrease in the credit is not allowed since it is an increase in cost to the borrower.)

Line A, ''*Your Adjusted Origination Charges.*''—The loan originator must add the numbers in Blocks 1 and 2 and enter this subtotal at highlighted Line A. The subtotal at Line A will be a negative number if there is a credit in Block 2 that exceeds the charge in Block 1. The amount stated in Line A is subject to zero tolerance while the interest rate is locked.

In the case of ''no cost'' loans, where ''no cost'' refers only to the loan originator's fees, Line A must show a zero charge as the adjusted origination charge. In the case of ''no cost'' loans where ''no cost'' encompasses third party fees as well as the upfront payment to the loan originator, all of the third party fees listed in Block 3 through Block 11 to be paid for by the loan originator (or borrower, if any) must be itemized and listed on the GFE. The credit for the interest rate chosen must be large enough that the total for Line A will result in a negative number to cover the third party fees.

''Your Charges for All Other Settlement Services''

There is a 10 percent tolerance applied to the sum of the prices of each service listed in Block 3, Block 4, Block 5, Block 6, and Block 7, where the loan originator requires the use of a particular provider or the borrower uses a provider selected or identified by the loan originator. Any services in Block 4, Block 5, or Block 6 for which the borrower selects a provider other than one identified by the loan originator are not subject to any tolerance and, at settlement, would not be included in the sum of the charges on which the 10 percent tolerance is based. Where a loan originator permits a borrower to shop for third party settlement services, the loan originator must provide the borrower with a written list of settlement services providers at the time of the GFE, on a separate sheet of paper.

Block 3, ''*Required services that we select.*''—In this block, the loan originator must identify each third party settlement service required and selected by the loan originator (excluding title services), along with the estimated price to be paid to the provider of each service. Examples of such third party settlement services might include provision of credit reports, appraisals, flood checks, tax services, and any upfront mortgage insurance premium. The loan originator must identify the specific required services and provide an estimate of the price of each service. Loan originators are also required to add the individual charges disclosed in this block and place that total in the column of this block. The charge shown in this block is subject to an overall 10 percent tolerance as described above.

Block 4, ''*Title services and lender's title insurance.*''—In this block, the loan originator must state the estimated total charge for third party settlement service providers for all closing services, regardless of whether the providers are selected or paid for by the borrower, seller, or loan originator. The loan originator must also include any lender's title insurance premiums, when required, regardless of whether the provider is selected or paid for by the borrower, seller, or loan originator. All fees for title searches, examinations, and endorsements, for example, would be included in this total. The charge shown in this block is subject to an overall 10 percent tolerance as described above.

Block 5, ''*Owner's title insurance.*''—In this block, for all purchase transactions the loan originator must provide an estimate of the charge for the owner's title insurance and related endorsements, regardless of whether the providers are selected or paid for by the borrower, seller, or loan originator. For non-purchase transactions, the loan originator may enter ''NA'' or ''Not Applicable'' in this Block. The charge shown in this block is subject to an overall 10 percent tolerance as described above.

Block 6, ''*Required services that you can shop for.*''—In this block, the loan originator must identify each third party settlement service required by the loan originator where the borrower is permitted to shop for and select the settlement service provider (excluding title services), along with the estimated charge to be paid to the provider of each service. The loan originator must identify the specific required services (e.g., survey, pest inspection) and provide an estimate of the charge of each service. The loan originator must also add the individual charges disclosed in this block and place the total in the column of this block. The charge shown in this block is subject to an overall 10 percent tolerance as described above.

Block 7, ''*Government recording charges.*''—In this block, the loan originator must estimate the state and local government fees for recording the loan and title documents that can be expected to be charged at settlement. The charge shown in this block is subject to an overall 10 percent tolerance as described above.

Block 8, ''*Transfer taxes.*''—In this block, the loan originator must estimate the sum of all state and local government fees on mortgages and home sales that can be expected to be charged at settlement, based upon the proposed loan amount or sales price and on the property address. A zero tolerance applies to the sum of these estimated fees.

Block 9, ''*Initial deposit for your escrow account.*''—In this block, the loan originator must estimate the amount that it will require the borrower to place into a reserve or escrow account at settlement to be applied to recurring charges for property taxes, homeowner's and other similar insurance, mortgage insurance, and other periodic charges. The loan originator must indicate through check boxes if the reserve or escrow account will cover future payments for all tax, all hazard insurance, and other obligations that the loan originator requires to be paid as they fall due. If the reserve or escrow account includes some, but not all, property taxes or hazard insurance, or if it includes mortgage insurance, the loan originator should check ''other'' and then list the items included.

Block 10, ''*Daily interest charges.*''—In this block, the loan originator must estimate the total amount that will be due at settlement for the daily interest on the loan from the date of settlement until the first day of the first period covered by scheduled mortgage payments. The loan originator must also indicate how this total amount is calculated by providing the amount of the interest charges per day and the number of days used in the calculation, based on a stated projected closing date.

Block 11, ''*Homeowner's insurance.*''—The loan originator must estimate in this block the total amount of the premiums for any hazard insurance policy and other similar insurance, such as fire or flood insurance that must be purchased at or before settlement to meet the loan originator's requirements. The loan originator must also separately indicate the nature of each type of insurance required along with the charges. To the extent a loan originator requires that such insurance be part of an escrow account, the amount of the initial escrow deposit must be included in Block 9.

Line B, ''*Your Charges for All Other Settlement Services.*''—The loan originator must add the numbers in Blocks 3 through 11 and enter this subtotal in the column at highlighted Line B.

Line A+B, ''*Total Estimated Settlement Charges.*''—The loan originator must add the subtotals in the right-hand column at highlighted Lines A and B and enter this total in the column at highlighted Line A+B.

Page 3

''Instructions''

''*Understanding which charges can change at settlement.*''—This section informs the applicant about which categories of settlement charges can increase at closing, and by how much, and which categories of settlement charges cannot increase at closing. This section requires no loan originator action.

''*Using the tradeoff table.*''—This section is designed to make borrowers aware of the relationship between their total estimated settlement charges on one hand, and the interest rate and resulting monthly payment on the other hand. The loan originator must complete the left hand column using the loan amount, interest rate, monthly payment figure, and the total estimated settlement charges from page 1 of the GFE. The loan originator, at its option, may provide the borrower with the same information for two alternative loans, one with a higher interest rate, if available, and one with a lower interest rate, if available, from the loan originator. The loan originator should list in the tradeoff table only alternative loans for which it would presently issue a GFE based

on the same information the loan originator considered in issuing this GFE. The alternative loans must use the same loan amount and be otherwise identical to the loan in the GFE. The alternative loans must have, for example, the identical number of payment periods; the same margin, index, and adjustment schedule if the loans are adjustable rate mortgages; and the same requirements for prepayment penalty and balloon payments. If the loan originator fills in the tradeoff table, the loan originator must show the borrower the loan amount, alternative interest rate, alternative monthly payment, the change in the monthly payment from the loan in this GFE to the alternative loan, the change in the total settlement charges from the loan in this GFE to the alternative loan, and the total settlement charges for the alternative loan. If these options are available, an applicant may request a new GFE, and a new GFE must be provided by the loan originator.

''*Using the shopping chart.*''—This chart is a shopping tool to be provided by the loan originator for the borrower to complete, in order to compare GFEs.

''*If your loan is sold in the future.*''—This section requires no loan originator action.

BILLING CODE 4210–67–P

OMB Approval No. 2502-0265

Good Faith Estimate (GFE)

Name of Originator	Borrower
Originator Address	Property Address
Originator Phone Number	
Originator Email	Date of GFE

Purpose

This GFE gives you an estimate of your settlement charges and loan terms if you are approved for this loan. For more information, see HUD's *Special Information Booklet* on settlement charges, your *Truth-in-Lending Disclosures,* and other consumer information at www.hud.gov/respa. If you decide you would like to proceed with this loan, contact us.

Shopping for your loan

Only you can shop for the best loan for you. Compare this GFE with other loan offers, so you can find the best loan. Use the shopping chart on page 3 to compare all the offers you receive.

Important dates

1. The interest rate for this GFE is available through _____. After this time, the interest rate, some of your loan Origination Charges, and the monthly payment shown below can change until you lock your interest rate.
2. This estimate for all other settlement charges is available through _____.
3. After you lock your interest rate, you must go to settlement within ☐ days (your rate lock period) to receive the locked interest rate.
4. You must lock the interest rate at least ☐ days before settlement.

Summary of your loan

Your initial loan amount is	$	
Your loan term is	years	
Your initial interest rate is	%	
Your initial monthly amount owed for principal, interest, and any mortgage insurance is	$ per month	
Can your interest rate rise?	☐ No	☐ Yes, it can rise to a maximum of %. The first change will be in .
Even if you make payments on time, can your loan balance rise?	☐ No	☐ Yes, it can rise to a maximum of $
Even if you make payments on time, can your monthly amount owed for principal, interest, and any mortgage insurance rise?	☐ No	☐ Yes, the first increase can be in and the monthly amount owed can rise to $. The maximum it can ever rise to is $.
Does your loan have a prepayment penalty?	☐ No	☐ Yes, your maximum prepayment penalty is $.
Does your loan have a balloon payment?	☐ No	☐ Yes, you have a balloon payment of $ due in years.

Escrow account information

Some lenders require an escrow account to hold funds for paying property taxes or other property-related charges in addition to your monthly amount owed of $ _____.

Do we require you to have an escrow account for your loan?

☐ No, you do not have an escrow account. You must pay these charges directly when due.

☐ Yes, you have an escrow account. It may or may not cover all of these charges. Ask us.

Summary of your settlement charges

A	Your Adjusted Origination Charges *(See page 2)*	$
B	Your Charges for All Other Settlement Services *(See page 2)*	$
A + B	Total Estimated Settlement Charges	$

Understanding your estimated settlement charges

Your Adjusted Origination Charges	
1. Our origination charge This charge is for getting this loan for you.	
2. Your credit or charge (points) for the specific interest rate chosen ☐ The credit or charge for the interest rate of [ ] % is included in "Our origination charge." (See item 1 above.) ☐ You receive a credit of $ [ ] for this interest rate of [ ] %. This credit **reduces** your settlement charges. ☐ You pay a charge of $ [ ] for this interest rate of [ ] %. This charge (points) **increases** your total settlement charges. The tradeoff table on page 3 shows that you can change your total settlement charges by choosing a different interest rate for this loan.	
A Your Adjusted Origination Charges	$

Some of these charges can change at settlement. See the top of page 3 for more information.

Your Charges for All Other Settlement Services	
3. Required services that we select These charges are for services we require to complete your settlement. We will choose the providers of these services. *Service* — *Charge*	
4. Title services and lender's title insurance This charge includes the services of a title or settlement agent, for example, and title insurance to protect the lender, if required.	
5. Owner's title insurance You may purchase an owner's title insurance policy to protect your interest in the property.	
6. Required services that you can shop for These charges are for other services that are required to complete your settlement. We can identify providers of these services or you can shop for them yourself. Our estimates for providing these services are below. *Service* — *Charge*	
7. Government recording charges These charges are for state and local fees to record your loan and title documents.	
8. Transfer taxes These charges are for state and local fees on mortgages and home sales.	
9. Initial deposit for your escrow account This charge is held in an escrow account to pay future recurring charges on your property and includes ☐ all property taxes, ☐ all insurance, and ☐ other [ ].	
10. Daily interest charges This charge is for the daily interest on your loan from the day of your settlement until the first day of the next month or the first day of your normal mortgage payment cycle. This amount is $[ ] per day for [ ] days (if your settlement is [ ]).	
11. Homeowner's insurance This charge is for the insurance you must buy for the property to protect from a loss, such as fire. *Policy* — *Charge*	
B Your Charges for All Other Settlement Services	$
A + B Total Estimated Settlement Charges	$

Instructions

Understanding which charges can change at settlement

This GFE estimates your settlement charges. At your settlement, you will receive a HUD-1, a form that lists your actual costs. Compare the charges on the HUD-1 with the charges on this GFE. Charges can change if you select your own provider and do not use the companies we identify. (See below for details.)

These charges **cannot increase** at settlement:	The total of these charges **can increase up to 10%** at settlement:	These charges **can change** at settlement:
▪ Our origination charge ▪ Your credit or charge (points) for the specific interest rate chosen *(after you lock in your interest rate)* ▪ Your adjusted origination charges *(after you lock in your interest rate)* ▪ Transfer taxes	▪ Required services that we select ▪ Title services and lender's title insurance *(if we select them or you use companies we identify)* ▪ Owner's title insurance *(if you use companies we identify)* ▪ Required services that you can shop for *(if you use companies we identify)* ▪ Government recording charges	▪ Required services that you can shop for *(if you do not use companies we identify)* ▪ Title services and lender's title insurance *(if you do not use companies we identify)* ▪ Owner's title insurance *(if you do not use companies we identify)* ▪ Initial deposit for your escrow account ▪ Daily interest charges ▪ Homeowner's insurance

Using the tradeoff table

In this GFE, we offered you this loan with a particular interest rate and estimated settlement charges. However:

- If you want to choose this same loan with **lower settlement charges,** then you will have a **higher interest rate.**
- If you want to choose this same loan with a **lower interest rate,** then you will have **higher settlement charges.**

If you would like to choose an available option, you must ask us for a new GFE.

Loan originators have the option to complete this table. Please ask for additional information if the table is not completed.

	The loan in this GFE	**The same loan with lower settlement charges**	**The same loan with a lower interest rate**
Your initial loan amount	$	$	$
Your initial interest rate[1]	%	%	%
Your initial monthly amount owed	$	$	$
Change in the monthly amount owed from this GFE	No change	You will pay $ **more** every month	You will pay $ **less** every month
Change in the amount you will pay at settlement with this interest rate	No change	Your settlement charges will be **reduced** by $	Your settlement charges will **increase** by $
How much your total estimated settlement charges will be	$	$	$

[1] *For an adjustable rate loan, the comparisons above are for the initial interest rate before adjustments are made.*

Using the shopping chart

Use this chart to compare GFEs from different loan originators. Fill in the information by using a different column for each GFE you receive. By comparing loan offers, you can shop for the best loan.

	This loan	**Loan 2**	**Loan 3**	**Loan 4**
Loan originator name				
Initial loan amount				
Loan term				
Initial interest rate				
Initial monthly amount owed				
Rate lock period				
Can interest rate rise?				
Can loan balance rise?				
Can monthly amount owed rise?				
Prepayment penalty?				
Balloon payment?				
Total Estimated Settlement Charges				

If your loan is sold in the future

Some lenders may sell your loan after settlement. Any fees lenders receive in the future cannot change the loan you receive or the charges you paid at settlement.

BILLING CODE 4210–67–C

■ 15. Appendix E to part 3500 is amended by removing the parenthetical ''(Existing Accounts)'' from the heading, ''II. Example Illustrating Single-Item Analysis (Existing Accounts)''.

■ 16. Appendix MS–1 to part 3500 is revised to read as follows:

Appendix MS–1 to Part 3500

[Sample language; use business stationery or similar heading]

[Date]

SERVICING DISCLOSURE STATEMENT NOTICE TO FIRST LIEN MORTGAGE LOAN APPLICANTS: THE RIGHT TO COLLECT YOUR MORTGAGE LOAN PAYMENTS MAY BE TRANSFERRED

You are applying for a mortgage loan covered by the Real Estate Settlement Procedures Act (RESPA) (12 U.S.C. 2601 *et seq.*). RESPA gives you certain rights under Federal law. This statement describes whether the servicing for this loan may be transferred to a different loan servicer. ''Servicing'' refers to collecting your principal, interest, and escrow payments, if any, as well as sending any monthly or annual statements, tracking account balances, and handling other aspects of your loan. You will be given advance notice before a transfer occurs.

Servicing Transfer Information

[We may assign, sell, or transfer the servicing of your loan while the loan is outstanding.]

[or]

[We do not service mortgage loans of the type for which you applied. We intend to assign, sell, or transfer the servicing of your mortgage loan before the first payment is due.]

[or]

[The loan for which you have applied will be serviced at this financial institution and we do not intend to sell, transfer, or assign the servicing of the loan.]

[INSTRUCTIONS TO PREPARER: Insert the date and select the appropriate language under ''Servicing Transfer Information.'' The model format may be annotated with further information that clarifies or enhances the model language.]

Dated: November 7, 2008.

Brian D. Montgomery,

Assistant Secretary for Housing—Federal Housing Commissioner.

Note: The following appendix will not appear in the Code of Federal Regulations.

Appendix to FR–5180 Final Rule on Regulatory Flexibility Analysis

The following Regulatory Flexibility Analysis is Chapter 6 of the final rule's Economic Analysis, which is available for public inspection and available online at *http://www.hud.gov/respa*.

Introduction

This chapter of the Regulatory Impact Analysis is the Final Regulatory Flexibility Analysis (FRFA) of the final rule as described under Section 604 of the Regulatory Flexibility Act. The requirements of the FRFA are listed below along with references to where the requirements are covered in the FRFA and where more detailed discussion can be found in other chapters of the Regulatory Impact Analysis (RIA).

A. A description of the reasons why action by the agency is being considered can be found in Section III of this chapter, in Section II of Chapter 1 of the RIA, and in greater detail in the first sections of Chapters 3 and 4 of the RIA.

B. A succinct statement of the objectives of, and legal basis for, the final rule is provided in Section III of this chapter. This is also discussed in Section II of Chapter 1 of the RIA and in greater detail in the first sections of Chapters 3 and 4 of the RIA.

C. A description and an estimate of the number of small entities to which the rule will apply or an explanation of why no such estimate is available. Section V provides data on small businesses that may be affected by the rule. As explained in Section V, Chapter 5 of the RIA also provides extensive documentation of the characteristics of the industries directly affected by the rule, including various estimates of the numbers of small entities, reasons why various data elements are not reliable or unavailable, and descriptions of methodologies used to estimate (if possible) necessary data elements that were not readily available. The industries discussed in Chapter 5 of the RIA included the following (with section reference): mortgage brokers (Section II); lenders including commercial banks, thrifts, mortgage banks, credit unions (Section III); settlement and title services including direct title insurance carriers, title agents, escrow firms, and lawyers (Section IV); and other third-party settlement providers including appraisers, surveyors, pest inspectors, and credit bureaus (Section V); and real estate agents (Section VI). As explained in Section V of this chapter, Appendix A includes estimates of revenue impacts for the new Good Faith Estimate (GFE).

D. A description of the projected reporting, record keeping, and other compliance requirements of the rule, including an estimate of the classes of small entities that will be subject to the requirement and the types of professional skills necessary for preparation of the report or record. Compliance requirements and costs are discussed in Sections VII through IX of this chapter. In no case are any professional skills required for reporting, record keeping, and other compliance requirements of this rule that are not otherwise required in the ordinary course of business of firms affected by the rule. As noted above, Chapter 5 of the RIA includes estimates of the small entities that may be affected by the rule.

E. An identification, to the extent practicable, of all relevant Federal rules which may duplicate, overlap or conflict with the final rule. The final rule provisions describing some loan terms in the new GFE and the HUD–1 are similar to the Truth in Lending Act (TILA) regulations; however the differences in approach between the TILA regulations and HUD's RESPA rule make them more complementary than duplicative. Overlaps are discussed further in this chapter.

In addition, this Chapter contains (c) a description of any significant alternatives to the final rule which accomplish the stated objectives of applicable statutes and which minimize any significant impact of the final rule on small entities. The FRFA also describes comments dealing with compliance and regulatory burden in the 2008 proposed rule. Some of the comments were on provisions of the 2008 proposed rule that have been dropped. Other comments were on impacts that the Department believes will be small or non-existent. Some of the compliance and regulatory burden comments concerned costs that are only felt during the start-up period and are one-time costs. These are discussed in Section VII.B, while comments on recurring costs of implementing the new GFE form are addressed in Section VII.C. Section VII.D discusses GFE-related changes in the final rule that reduce regulatory burden. Section VII.E discusses compliance issues related to GFE tolerances on settlement party costs, while Section VII.F discusses efficiencies associated with the new GFE.

Before proceeding further, Section II provides a brief summary of the main findings from the Regulatory Impact Analysis that relate to the final rule.

Summary of the Regulatory Impact Analysis

There is strong evidence of information asymmetry between mortgage originators and settlement service providers and consumers, allowing loan originators to capture much of the consumer surplus in this market through price discrimination. The RESPA disclosure statute is meant to address this information asymmetry, but the evidence shows that the current RESPA regulations are not effective. The final rule will create a more level-playing field through a more transparent and standard disclosure of loan details and settlement costs; tolerances on settlement charges leading to prices that consumers can rely on; and a comparison page on the HUD–1 that allows the consumer to compare the amounts listed for particular settlement costs on the GFE with the total costs listed for those charges on the HUD–1, and to double check the loan details at settlement. These changes will encourage comparison shopping by informed consumers, which will place a competitive pressure on market prices, and enable consumers to retain more consumer surplus.

Overview of Final Rule

The Department of Housing and Urban Development has issued a final rule under the Real Estate Settlement Procedures Act (RESPA) to simplify and improve the process of obtaining home mortgages and to reduce settlement costs for consumers. This Regulatory Impact Analysis and Regulatory Flexibility Analysis examine the economic effects of that rule. As this Regulatory Impact Analysis demonstrates, the final rule is expected to improve consumer shopping for mortgages and to reduce the costs of closing a mortgage transaction for the consumer. Consumer savings were estimated under a variety of scenarios about originator and

settlement costs. In the base case, the estimated price reduction to borrowers comes to $8.35 billion or $668 per loan. This represents the substantial savings that can be achieved with the final rule.

The final RESPA rule includes a new, simplified Good Faith Estimate (GFE) that includes tolerances on final settlement costs and a new method for reporting wholesale lender payments in broker transactions. The final rule allows service providers to use prices based on the average charges for the third-party services they purchase, making their business operations simpler and less costly. Competition among loan originators will put pressure for these cost savings to be passed on to borrowers. The new GFE will produce substantial shopping and price-reduction benefits for both origination and third-party settlement services.

Because the final rule calls for significant changes in the process of originating a mortgage, this Regulatory Impact Analysis identifies a wide range of benefits, costs, efficiencies, transfers, and market impacts. The effects on consumers from improved borrower shopping will be substantial under this rule. Similarly, the use of tolerances will place needed controls on origination and third-party fees. Ensuring that yield spread premiums are credited to borrowers in brokered transactions could cause significant transfers to consumers. The increased competition associated with RESPA reform will reduce settlement service costs and result in transfers to consumers from service providers. Entities that will suffer revenue losses under the final rule are usually those who are charging prices higher than necessary or are benefiting from the current system's market failure.

Note to Reader: A comprehensive summary of the problems with the current mortgage shopping system and the benefits and market impacts of the final rule is provided in Section I of Chapter 3.

Problems With the Mortgage Shopping Process and the Current GFE

The current system for originating and closing mortgages is highly complex and suffers from several problems that have resulted in high prices for borrowers. Studies indicate that consumers are often charged high fees and can face wide variations in prices, both for origination and third-party settlement services. The main points are as follows:

- There are many barriers to effective shopping for mortgages in today's market. The process can be complex and can involve rather complicated financial trade-offs, which are often not fully and clearly explained to borrowers.
- Consumers often pay non-competitive fees for originating mortgages. Most observers believe that the market breakdown occurs in the relationship between the consumer and the loan originator—the ability of the loan originator to price discriminate among different types of consumers leads to some consumers paying more than other consumers.[2]
- There is convincing statistical evidence that yield spread premiums are not always used to offset the origination and settlement costs of the consumer. Studies, including a recent HUD-sponsored study of FHA closing costs by the Urban Institute, find that yield spread premiums are often used for the originator's benefit, rather than for the consumer's benefit.[3]
- Borrowers can be confused about the trade-off between interest rates and closing costs. It may be difficult for borrowers (even sophisticated ones but surely unsophisticated ones) to understand the financial trade-offs associated with discount points, yield spread premiums, and upfront settlement costs. While many originators explain this to their borrowers, giving them an array of choices to meet their needs, some originators may only show borrowers a limited number of options.
- There is also evidence that prices paid for third-party services are highly variable, indicating that there is much potential to reduce title, closing, and other settlement costs. For example, a recent analysis of FHA closing costs by the Urban Institute shows wide variation in title and settlement costs. There is not always an incentive in today's market for originators to control these costs. Too often, high third-party costs are simply passed through to the consumer. And consumers may not be the best shoppers for third-party service providers due to their lack of expertise and to the infrequency with which they shop for these services. Consumers often rely on recommendations from the real estate agent (in the case of a home purchase) or from the loan originator (in the case of a refinance as well as a home purchase).

Today's GFE. Today's GFE does not help the above situations, as it is not an effective tool for facilitating borrower shopping nor for controlling third-party settlement costs. The current GFE is typically comprised of a long list of charges, as today's rules do not prescribe a standard form or consolidated categories. Such a long list of individual charges can be overwhelming, often confuses consumers, and seems to provide little useful information for consumer shopping. The current GFE certainly does not inform consumers what the major costs are so that they can effectively shop and compare mortgage offers among different loan originators. The current GFE does not explain how the borrower can use the document to shop and compare loans. Also, the GFE fails to make clear the relationship between the closing costs and the interest rate on a loan, notwithstanding that many mortgage loans originated today adjust up-front closing costs due at settlement, either up or down, depending on whether the interest rate on the loan is below or above ''par.'' Finally, current rules do not assure that the ''good faith estimate'' is a reliable estimate of final settlement costs. As a result, under today's rules, the estimated costs on GFEs may be unreliable or incomplete, and final charges at settlement may include significant increases in items that were estimated on the GFE, as well as additional fees, which can add to the consumer's ultimate closing costs.

Thus, today's GFE is not an effective tool for facilitating borrower shopping or for controlling origination and third-party settlement costs. There is enormous potential for cost reductions in today's market, which is too often characterized by relatively high and highly variable charges for both origination and third-party services.

In addition, today's RESPA rules hold back efficiency and competition by acting as a barrier to innovative cost-reduction arrangements. While today's mortgage market is characterized by increased efficiencies and lower prices due to technological advances and other innovations that is not the case in the settlement area where aggressive competition among settlement service providers simply does not always take place. Existing RESPA regulations inhibit average cost pricing,[4] which is an example of a cost reduction technique. Thus, a framework is needed that would encourage competitive negotiations and other arrangements that would lead to lower settlement prices. The new GFE will provide such a framework.

Approach of the Final Rule

Main Components of the New GFE and HUD–1

The GFE format simplifies the process of originating mortgages by consolidating costs into a few major cost categories.[5] The GFE ensures that in brokered transactions, borrowers receive the full benefit of the higher price paid by wholesale lenders for a loan with a high interest rate; that is, so-called yield spread premiums. On both the GFE and HUD–1, the portion of any wholesale lender payments that arise because a loan has an above-par interest rate is passed through to borrowers as a credit against other costs. Thus, there is assurance that borrowers who take on an above-par loan receive funds to offset their settlement costs. The new GFE also includes a trade-off table that will assist consumers in understanding the relationship between higher interest rates and lower settlement costs.

HUD conducted consumer tests to further improve the GFE form in the 2002 proposed rule. Numerous changes were made to make the GFE more user-friendly. The GFE form in

[2] One could see price discrimination in a competitive market that was the result of different costs associated with originating loans for different applicants. For example, those who required more work by the originator to obtain loan approval might be charged more than those whose applications required little work in order to obtain an approval. The price discrimination we refer to in this paragraph and elsewhere in this analysis is not cost-based. It is the result of market imperfections, such as poor borrower information on alternatives that leads borrowers to accept loans at higher cost than the competitive level.

[3] See Section IV.D of Chapter 2 for a discussion of these studies.

[4] The charges reported on the HUD–1 are required to be the specific charge paid in connection with the specific loan for which the HUD–1 is filled out. Pricing based on average charges is the practice of charging all borrowers the same average charge for a group of similar loans. Average cost pricing requires less record keeping and tracking for any individual loan since the numbers reported to the settlement agent need not be transaction specific. Average cost pricing is not permissible under RESPA because loan-specific prices are required.

[5] See the proposed GFE in Exhibit 3–B of Chapter 3.

the final rule includes a summary page containing the key information for shopping; during the tests, consumers reported that the summary page was a useful addition to the GFE. The trade-off table, another component of the GFE that consumers found useful, is also included in the final GFE. The final GFE is a form that consumers find to be clear and well written and, according the tests conducted, one that they can use to determine the least expensive loan. In other words, it is a shopping tool that is a vast improvement over today's GFE with its long list of fees that can change (i.e., increase) at settlement.

The final GFE includes a set of tolerances on originator and third-party costs: originators must adhere to their own origination fees, and give estimates subject to a 10 percent upper limit on the sum of certain third-party fees. The tolerances on originator and third-party costs will encourage originators not only to lower their own costs but also to seek lower costs for third-party services.

The final rule would allow service providers to use pricing based on average charges for third-party services they purchase so long as the average is calculated using a documented method and the charge on the HUD–1 is no greater than the average paid for that service. This will make internal operations for the loan originator simpler and less costly and competition among lenders will put pressure for these cost savings to be passed on to borrowers as well. The end result of all these changes should be lower third-party fees for consumers.

To increase the value of the new GFE as a shopping document, HUD is proposing revisions to the HUD–1 Settlement Statement form that will make the GFE and HUD–1 easier to compare. The revised HUD–1 uses the same language to describe categories of charges as the GFE, and orders the categories of charges in the same way. This makes it much simpler to compare the two documents and confirm whether the tolerances required in the new GFE have been met or exceeded. In addition, the final rule introduces a comparison in the revised HUD–1 that would: (1) Compare the GFE estimates to the HUD–1 charges and advise borrowers whether tolerances have been met or exceeded; (2) verify that the loan terms summarized on the GFE match those in the loan documents, including the mortgage note; and (3) provide additional information on the terms and conditions of the mortgage. These components of the rule are required together to fully realize the consumer saving on mortgage closing cost estimated here.

Given that there has been no significant change in the basic HUD–1 structure and layout, besides the addition of a comparison page, generating this new HUD–1 should not pose any problem for firms closing loans—in fact, the closing process will be much simpler given that borrowers and closing agents can precisely link the information on the initial GFE to the information on the final HUD–1.The HUD–1 has also been adjusted to ensure that the new GFE (a shopping document issued early in the process) and the HUD–1 (a final settlement document issued at closing) work well together. The layout of the revised HUD–1 has new labeling of some lines so that each entry from the GFE can be found on the revised HUD–1 with the exact wording as on the GFE. This will make it much easier to determine if the fees actually paid at settlement are consistent with the GFE, whether the borrower does it alone or with the assistance of the settlement agent. The reduced number of HUD–1 entries that should result, as well as use of the same terminology on both forms should reduce the time spent by the borrower and settlement agents comparing and checking the numbers.

The significant changes made to the final rule from the March 2008 proposed rule are:

- A GFE form that is a shorter form than had been proposed.
- Allowing originators the option not to fill out the tradeoff table on the GFE form.
- A revised definition of application to eliminate the separate GFE application process.
- Adoption of requirements for the GFE that are similar to recently revised Federal Reserve Board Truth-in-Lending regulations which limit fees charged in connection with early disclosures and defining timely provision of the disclosures.
- Clarification of terminology that describes the process applicable to, and the terms of, an applicant's particular loan.
- Inclusion of a provision to allow lenders a short period of time in which to correct certain violations of the new disclosure requirements.
- A revised HUD–1/1A settlement statement form that includes a summary page of information that provides a comparison of the GFE and HUD–1/1A list of charges and a listing of final loan terms as a substitute for the proposed closing script addition.
- Elimination of the requirement for a closing script to be completed and read by the closing agent.
- A simplified process for utilizing an average charge mechanism.
- No regulatory change in this rulemaking regarding negotiated discounts, including volume based discounts.

Estimates and Sources of Consumer Savings From the Final Rule

Overall Savings. Chapter 3 discusses the consumer benefits associated with the new GFE form and provides dollar estimates of consumer savings due to improved shopping for both originator and third-party services. Consumer savings were estimated under a variety of scenarios about originator and settlement costs.[6] In the base case, the estimated price reduction to borrowers comes to $8.35 billion annually, or 12.5 percent of the $66.7 billion in total charges (i.e., origination fees, appraisal, credit report, tax service and flood certificate and title insurance and settlement agent charges).[7] Thus, there is an estimated $8.35 billion in transfers from firms to borrowers from the improved disclosures and tolerances of the new GFE. This would represent savings of $668 per loan. Sensitivity analysis was conducted with respect to the savings projection in order to provide a range of estimates. Because title fees account for over 70 percent of third-party fees and because there is widespread evidence of lack of competition and overcharging in the title and settlement closing industry, one approach projected third-party savings only in that industry. This approach (called the ''title approach'') projected savings of $200 per loan in title and settlement fees. In this case, the estimated price reduction to borrowers comes to $8.38 billion ($670 per loan), or 12.6 percent of the $66.7 billion in total charges—savings figures that are practically identical to the base case mentioned above.[8] Other projections also showed substantial savings for consumers. As explained in Chapter 3, estimated consumer savings under a more conservative projection totaled $6.48 billion ($518 per loan), or 9.7 percent of total settlement charges. Thus, while consumer savings are expected to be $8.35 billion (or 12.5 percent of total charges) in the base case or $8.38 billion (12.6 percent of total charges) in the title approach, they were $6.48 billion (or 9.7 percent of total charges) in a more conservative sensitivity analysis. This $6.48–$8.38 billion ($518–$670 per loan) represents the substantial savings that can be achieved with the new GFE.

Industry Breakdown of Savings. Chapter 3 also disaggregates the sources of consumer savings into the following major categories: originators with a breakdown for brokers and lenders, and third-party providers with a breakdown for the title and settlement industry and other third-party providers.[9] In the base case, originators (brokers and lenders) contribute $5.88 billion, or 70 percent of the $8.35 billion in consumer savings. This $5.88 billion in savings represents 14.0 percent of the total revenue of originators, which is projected to be $42.0 billion.[10] The $5.88 billion is divided between brokers, which contribute $3.53 billion, and lenders (banks, thrifts, and mortgage banks), which contribute the remaining $2.35 billion. The shares for brokers (60 percent) and lenders (40 percent) represent their respective shares of mortgage originations. In the base case, third-party settlement service providers contribute $2.47 billion, or 30 percent of the $8.35 billion in consumer savings. This $2.47 billion in savings represents 10.0 percent of the total

[6] Throughout this Economic Analysis, the terms ''borrowers'' and ''consumers'' are often used interchangeably.

[7] Government fees and taxes and escrow items are not included in this analysis, as they are not subject to competitive market pressures.

[8] If the savings in title and settlement closing fees due to RESPA reform were only $150, then the estimated price reduction to borrowers comes to $7.76 billion, or 11.6 percent of the $66.7 billion in total charges.

[9] Readers are referred to Chapter 5 for a more detailed examination of the various component industries (e.g., title services, appraisal, etc.) as well as for the derivations of many of the estimates presented in this chapter.

[10] This assumes a 1.75 percent origination fee for brokers and lenders, which, when applied to projected originations of $2.4 trillion, yields $42.0 billion in total revenues from origination fees (both direct and indirect). See Steps (3)–(5) of Section VII.E.1 of Chapter 3 for the explanation of origination costs. Sensitivity analyses are conducted for smaller origination fees of 1.5 percent and larger fees of 2.0 percent; see Step (21) in Section VII.E.4 of Chapter 3.

revenue of third-party providers, which is projected to be $24.738 billion.[11] The $2.47 billion is divided between title and settlement agents, which contribute $1.79 billion, and other third-party providers (appraisers, surveyors, pest inspectors, etc.), which contribute $0.68 billion. Title and settlement agents contribute a large share because they account for 72.5 percent of the third-party services included in this analysis. In the title approach, title and settlement agents account for all third-party savings, which total $2.5 billion if per loan savings are $200 and $1.88 billion if per loan savings are $150.

TABLE 6–1—INDUSTRY BREAKDOWN OF CONSUMER SAVINGS

Source of savings	Transfers (billions)	Savings per loan (12.5 million loans)	Percentage of total savings (percent)
Loan Origination	$5.88	$470	70
Lenders	2.35	470 *or*	28
Brokers	3.53	470	42
Third-Party Services	2.47	198	30
Title/Settlement	1.79	143	22
Other	0.68	54	8
Total *	8.35	668	100

* Savings are 12.5% of $66.7 billion revenue in charges.

Section III.D of this executive summary presents the revenue impacts on small originators and small third-party providers.

Sources of Savings: Lower Origination and Third-Party Fees. The Regulatory Impact Analysis presents evidence that some consumers are paying higher prices for origination and third-party services. The new GFE format in the final rule will improve consumer shopping for mortgages, which will result in better mortgage products, lower interest rates, and lower origination and third-party costs for borrowers.

- The final rule simplifies the process of originating mortgages by consolidating costs into a few major cost categories. This is a substantial improvement over today's GFE that is not standardized and can contain a long list of individual charges that encourages fee proliferation. This makes it easier for the consumer to become overwhelmed and confused. The consistent and simpler presentation of the GFE will improve the ability of the consumer to shop.
- A GFE with a summary page, which includes the terms of the loan, will make it clear to the consumer whether they are comparing similar loans.
- A GFE with a summary page will make it simpler for borrowers to shop. The higher reward for shopping, along with the increased ease with which borrowers can compare loans, should lead to more effective shopping, more competition, and lower prices for borrowers.
- The GFE makes cost estimates more reliable by applying tolerances to the figures reported. This will reduce the all too frequent problem of borrowers being surprised by additional costs at settlement. With fees firmer under the GFE, shopping is more likely to result in borrowers saving money when they shop.
- The new GFE will disclose yield spread premiums and discount points in brokered loans prominently, accurately, and in a way that should inform borrowers how they may be used to their advantage. Both values will have to be calculated as the difference between the wholesale price of the loan and its par value. Their placement in the calculations that lead to net settlement costs will make them very difficult to miss. That placement should also enhance borrower comprehension of how yield spread premiums can be used to reduce up-front settlement costs. Tests of the form indicate that consumers can determine the cheaper loan when comparing a broker loan with a lender loan.
- The new GFE will better inform consumers about their financing choices by including a tradeoff table on page 3 where originators can present the different interest rate and closing cost options available to borrowers. For example, consumers will better understand the trade-offs between reducing their closing costs and increasing the interest rate on the mortgage.
- The final rule allows settlement service providers to use prices based on average charges for the third-party services they purchase.
- The above changes and the imposition of tolerances on fees will encourage originators to seek lower settlement service prices. The tolerances will lead to well-informed market professionals either arranging for the purchase of the settlement services or at least establishing a benchmark that borrowers can use to start their own search. Under either set of circumstances, this should lead to lower prices for borrowers than if the borrowers shopped on their own, since the typical borrower's knowledge of the settlement service market is limited, at best.

Savings and Transfers, Efficiencies, and Costs

As explained above, it is estimated that borrowers would save $8.35 billion in origination and settlement charges. This $8.35 billion represents transfers to borrowers from high priced producers, with $5.88 billion coming from originators and $2.47 billion from third-party settlement service providers. In addition to the transfers, there are efficiencies associated with the rule as well as costs.

Mortgage applicants and borrowers realize $1,169 million savings in time spent shopping for loans and third-party services. Loan originators save $975 million in time spent with shoppers and from average cost pricing. Third-party settlement service providers save $191 million in time spent with shoppers. Some or all of industry's total of $1,166 million in efficiency gains have the potential to be passed through to borrowers through competition. There are additional social efficiencies such as the reduction of non-productive behavior and positive externalities of preventing foreclosures (see Section X.D.).

The total one-time compliance costs to the lending and settlement industry of the GFE and HUD–1 are estimated to be $571 million, $407 million of which is borne by small business. These costs are summarized below. Total recurring costs are estimated to be $918 million annually or $73.40 per loan. The share of the recurring costs on small business is $471 million. This Chapter 6 examines in greater detail the compliance and other costs associated with the GFE and HUD–1 forms and its tolerances.

The new GFE in the final rule has some features that would increase the cost of providing it and some that would decrease the cost. Practically all of the information required on the GFE is readily available to originators, suggesting no additional costs. The fact that there are fewer numbers and less itemization of individual fees suggests reduced costs. On the other hand, there could be a small amount of additional costs associated with the optional trade-off table but that is not clear. Thus, while it is difficult to estimate, it appears that there could be a net of zero additional costs. However, if the GFE added 10 minutes per application to the time it takes to handle the forms today; annual costs would rise by $255 million at 1.7 applications per loan or ($12 per application or $20 per loan) or $405 million at 2.7 applications per loan ($32 per loan). We assume the high-cost scenario for

[11] See Step (7) of Section VII.E.1 of Chapter 3 for the derivation of the $24.738 billion.

summary table 6–5. (See Section VII.C.1 of this chapter for further details.)

The presence of tolerances will lead to some additional costs to originators of making additional arrangements for third parties to provide settlement services. If the average loan originator incurs an average of 10 minutes per loan of effort making third-party arrangements to meet the tolerances, then the total cost to originators of making third-party arrangements to meet the tolerance requirements comes to $150 million ($12 per loan). (See Section VII.E.2 of this chapter.)

There is the potential of additional underwriting costs if the number of applications requiring a credit check rise beyond the current ratio of 1.7 applications per loan. Thus, if this ratio remains constant, there will be no recurring compliance costs from additional underwriting. If, however, the demand for preliminary GFEs increases to 2.7 applications per loan, then the total costs for originators will be $138 million or $11 per loan (See Section VII.C.).

In addition to the recurring costs of the GFE, there will be one-time adjustment costs of $383 million in switching to the new form. Loan originators will have to upgrade their software and train staff in its use in order to accommodate the requirements of the new rule. It is estimated that the software cost will be $33 million and the training cost will be $58 million, for a total of $91 million (see Section VII.B.1 of this chapter). We assume that, of the loan originators' software and training costs, $73 million is attributable to the new GFE and $18 million to the new HUD–1. Once the new software is functioning, the recurring costs of training new employees in its use and the costs associated with periodic upgrades simply replace those costs that would have been incurred doing the same thing with software for the old rule. They represent no additional costs of the new rule.

Similarly, there will be a one-time adjustment cost for legal advice on how to deal with the changes related to the new GFE. The one-time adjustment cost for legal fees is estimated to be $116 million (see Section VII.B.2 of this chapter). Once the adjustment has been made, the ongoing legal costs are a substitute for the ongoing legal costs that would have been incurred under the old rule and do not represent any additional burden.

Finally with respect to the GFE, employees will have to be trained in the new GFE beyond the software and legal training already mentioned. This one time adjustment cost is estimated to be $194 million (see section VII.B.3). Again, once the transition expenses have been incurred, any ongoing training costs are a substitute for the training costs that would have been incurred anyway and do not represent an additional burden.

There are few recurring costs associated with the revised HUD–1. For originators the burden could be very small: Loan originators will not have to collect additional data beyond what is required for the GFE. In certain cases, the burden may be noticeable so we assume that the average burden is ten minutes per loan for loan originators. Settlement agents may face a recurring cost, although this is not likely either since loan originators are responsible for providing the data. The settlement agent will have to add final charges not known by the originator, and may have to fill out the entire form if the lender does not transmit the information on an already completed HUD–1 page 3. The settlement agent may also want to check the information concerning settlement costs, tolerances, and loan terms to make sure they agree with the GFE. In some cases, the settlement agent will have to calculate the tolerances. We assume that it will add five minutes on average to the time it takes to prepare a settlement. The actual distribution of the total additional time burden will differ by transaction depending on how much of the work is done by the lender. Taking loan originators into account, the total time burden is 15 minutes per loan, for a cost of $18 per loan. The recurring compliance cost to the industry would be $225 million annually, of which small business would bear $107 million annually. During a high-volume year (15.5 million loans annually), the annual recurring compliance cost of the HUD–1 would be $279 million annually. (See Section VIII.C. of Chapter 6.)

There will be one-time adjustment costs of $188 million in switching to the new HUD–1 form. Settlement firms will have to upgrade their software and train staff in its use in order to accommodate the requirements of the new rule. It is estimated that the software and training cost will be $80 million (see Section VIII.B. of Chapter 6). Once the new software is functioning, the recurring costs of training new employees in its use and the costs associated with periodic upgrades simply replace those costs that would have been incurred doing the same thing with software for the old rule. They represent no additional costs of the new rule.

TABLE 6–2—SUMMARY OF ONE-TIME ADJUSTMENT COSTS

[In millions]

Source of cost	GFE		HUD–1		Total	
	All firms	Small firms	All firms	Small firms	All firms	Small firms
Software and training	$73	$52	$80	$59	$153	$111
Legal consultation	116	70	37	18	153	88
Training on rule	194	146	71	62	265	208
Total	383	268	188	139	571	407

Similarly, there will be a one-time adjustment cost for legal advice on how to deal with the changes related to the new HUD–1. The one-time adjustment cost for legal fees is estimated to be $37 million (see Section VIII.B. of Chapter 6). Once the adjustment has been made, the ongoing legal costs are a substitute for the ongoing legal costs that would have been incurred under the old rule and do not represent any additional burden.

Finally, employees will have to be trained in the new HUD–1 beyond the software and legal training already mentioned. This one-time adjustment cost is estimated to be $71 million (see Section VIII.B. of Chapter 6). Again, once the transition expenses have been incurred, any ongoing training costs are a substitute for the training costs that would have been incurred anyway and do not represent an additional burden.

The consumer savings, efficiencies and costs associated with the GFE are discussed further in Chapter 6 and in Chapter 3. A summary of the compliance costs for the base case of 12.5 million loans annually is presented below in Table 6.1.

TABLE 6–3—COMPLIANCE COSTS OF THE FINAL RULE

[If 12.5 million loans annually]

	One-time compliance costs incurred during the first year (in millions)		Recurring compliance costs (in millions annually)		
	All firms	Small firms	All firms	Small firms	Cost per loan
GFE	$383	$268	$693	$364	$55.40

TABLE 6–3—COMPLIANCE COSTS OF THE FINAL RULE—Continued

[If 12.5 million loans annually]

	One-time compliance costs incurred during the first year (in millions)		Recurring compliance costs (in millions annually)		
	All firms	Small firms	All firms	Small firms	Cost per loan
HUD–1	188	139	225	107	18.00
Total	571	407	918	471	73.40

A natural question to raise is whether the costs of the rule will overwhelm the benefits of the rule. The assumption that consumers will benefit by a reduction of settlement costs of at least $668 per loan has not been forcefully challenged. Indeed, results from a recent statistical analysis of FHA data imply that the savings to consumers may be as much as $1,200 per loan. To accomplish this, however, industry will incur both adjustment and recurring costs. Suppose firms impose these additional costs on consumers by raising prices. It is likely that the adjustment costs will be spread out over many years, just as the cost of an investment would be. Suppose, for the sake of illustration, that all adjustment costs are all imposed on first-year borrowers only. In a normal year of 12.5 million loans, this cost would $46 per loan. The recurring compliance costs of the rule is $73.40 per loan regardless of the year. In such a scenario, the total compliance cost is $120 per loan in the first year as compared to $74 for later years. If all compliance costs were passed onto consumers then the net consumer savings is $548 the first year and $594 in subsequent years (see table 6–4 for a summary). Note that this assumes that all costs are borne by borrowers and not at all by the applicants who do not get a loan. It would be reasonable to assume that in the high-application scenario, where there is an increase in preliminary underwriting costs, that the cost of an initial credit report would be passed on to all applicants.

TABLE 6–4—PREDICTED REDUCTIONS IN THE COST OF A LOAN

[If firms impose all first-year adjustment costs on first-year borrowers]

Source of gain or loss	First year	Afterwards
Average Consumer Savings	$668	$668
One-time Adjustment Costs	−46	−0
Recurring Compliance Costs	−74	−74
Net Consumer Savings	548	594
Firms' Efficiencies	+93	+93
Borrowers' Efficiencies	+55	+55
Net Benefits to Consumer	696	742

There are other potential benefits to the consumer besides savings on settlement costs. There are aspects of this rule that will save time for industry. The value of these efficiencies could be $1,166 million for loan originators and settlement agents, for a per loan efficiency of $93. In a competitive industry, firms would pass these gains along to borrowers in the form of lower costs, a consumer benefit. Borrowers themselves will save time through the new GFE. These time savings are estimated at $1,169 million but are derived from a time savings worth $55 per applicant (seventy-five minutes at $44 per hour). In the summary of net benefits, we only include the per applicant time savings for borrowers. We make the cautious assumption that successful borrowers have submitted only one application. A fraction of the additional 8.25 million applications (in excess of 12.5 million loans) consist of: Applications approved but not accepted; applications denied by the financial institution; and applications withdrawn by the applicant. Although these individuals also realize time savings, it would be misleading to include them in a ''per loan'' figure in that the time savings of rejected applicants would not benefit the borrower. Adding the firms' and borrowers' value of time efficiencies to the net of compliance cost consumer savings gives us an estimate of the potential consumer benefits per loan: $696 in the first year and $742 afterwards.

Alternatives Considered To Make the GFE More Workable for Small and Other Businesses

Chapter 3 discusses the many comments that HUD received on the GFE in the 2002 and 2008 proposed rules and the 2005 RESPA Reform Roundtables. Chapter 4 discusses alternatives. The most basic alternative was to make no change in the current GFE. The final rule allows both the current GFE and the new GFE to be used for one year after the GFE is introduced, but requires the new GFE and HUD–1 to be used beginning January 1, 2010. This approximately one-year adjustment period responds to lenders' comments that there would be significant implementation issues with switching to a new GFE.

The main alternative concerning small businesses considered the brokers' argument that they were disadvantaged by the reporting of yield spread premiums. The new GFE was designed to ensure that there will not be any anti-competitive impacts on the broker industry. A summary page is included that presents the key cost figures for borrower shopping that does not report yield spread premiums, and that provides identical treatment for brokers and lenders. The final GFE includes language that clarifies how yield spread premiums reduce the upfront charge that borrowers pay. Section III.E of this Executive Summary discusses this in more detail.

HUD designed the GFE to make it workable for small lenders and brokers. Some examples of the changes are the following:

- In response to concerns expressed by lenders and brokers about their ability to control third-party costs and meet the specified tolerances in the 2008 proposed rule, HUD raised the tolerance on government recording charges from zero to ten percent.
- Consistent with the above, the rule creates a new definition of ''forseeable circumstances'' that clarifies and expands on the definition of ''circumstances'' in the proposed rule. For example, material information that was either not known at the time the original GFE was provided or not relied on in providing the original GFE, or information that has changed in a material way since application, may be the basis for providing a modified GFE. For example, if the actual loan amount turns out to be higher than the loan amount indicated by the borrower at the time the GFE was provided,

and certain settlement charges that are based on the loan amount increase as a result, the loan originator may provide a revised GFE reflecting those higher amounts. Compliance with the tolerance provisions would be evaluated by comparing the revised GFE with the actual amounts charged at settlement.

• HUD has adopted a streamlined single application process for the final rule. The new definition will allow loan originators more flexibility in determining the information they need to underwrite a GFE.

• The reading at settlement of a closing script is no longer required. Much of the same information will be transmitted to the borrower via a new page 3 of the HUD–1.

Alternatives. This chapter and Chapter 4 and Chapter 6 discuss other major alternatives that HUD considered in developing the final rule from the 2008 proposed rule. These chapters discuss the pros and cons of these alternatives and why HUD decided not to include them in this final rule.

Market and Competitive Impacts on Small Businesses From the Final Rule

Transfers from Small Businesses. It is estimated that $4.13 billion, or 49.5 percent of the $8.35 billion in consumer savings comes from small businesses, with small originators contributing $3.01 billion and small third-party firms, $1.13 billion.[12] Within the small originator group, most of the transfers to consumers come from small brokers ($2.47 billion, or 82 percent of the $3.01 billion); this is because small firms account for most of broker revenues but a small percentage of lender revenues. Within the small third-party group, most of the transfers come from the title and closing industry ($0.68 billion, or 60 percent of the $1.13 billion), mainly because this industry accounts for most third-party fees. In the title approach, small title and settlement closing companies account for $0.95 billion of the $2.5 billion in savings. Section VII.E.2 of Chapter 3 explains the steps in deriving these revenue impacts on small businesses, and Section VII.E.4 of Chapter 3 reports several sensitivity analyses around the estimates. In addition, Chapter 5 provides more detailed revenue impacts for the various component industries.[13]

The summary bullets in Section I.C highlight the mechanisms through which these transfers are expected to happen. Improved understanding of yield spread premiums, discount points, and the trade-off between interest rates and settlement costs; improved consumer shopping among originators; more aggressive competition by originators for settlement services; and increased competition associated with discounting—all will lead to reductions in both originator and third-party fees. As noted earlier, there is substantial evidence of non-competitive prices charged to some in the origination and settlement of mortgages due to information asymmetry between originators and borrowers. Originators (both small and large) and settlement service providers (both small and large) that have been charging high prices will experience reductions in their revenues as a result of the new GFE. There is no evidence that small businesses have been disproportionately charging high prices; for this reason, there is no expectation of any disproportionate impact on small businesses from the new GFE. The revenue reductions will be distributed across firms based on their non-competitive price behavior.

Small Brokers.[14] The main issue raised by the brokers concerned the treatment in the 2008 proposed rule of yield spread premiums on the proposed Good Faith Estimate. Mortgage Broker representatives asserted that the proposed mortgage broker disclosure would achieve the opposite result and would detract from the consumer's ability to understand and comparison shop. They recommended that lenders should be treated similarly to facilitate shopping and promote consumer understanding. The current final rule addresses the concern expressed by brokers that the reporting of yield spread premiums in the 2008 proposed rule would disadvantage them relative to lenders.

The Department hired forms development specialists, the Kleimann Communication Group, to analyze, test, and improve the forms. Starting with the GFE form proposed in 2002, they reworked the language and presentation of the yield spread premium to emphasize that it offsets other charges to reduce settlement charges, the cash needed to close the loan. The subjects tested seemed to like the trade-off table that shows the trade-off between the interest rate and up-front charges. It illustrates how yield spread premiums can reduce upfront charges. There is the summary page designed to simplify the digestion of the information on the form by including only the total estimated settlement charges from page two. This is the first page any potential borrower would see. It contains only the essentials for comparison-shopping and is simple: a standard set of yes-no questions describing the loan and a very simple summary of costs and the bottom line. Yield spread premiums are never mentioned here. Lender and broker loans get identical treatment on page 1. A mortgage shopping chart is included on page 3 of the GFE, to help borrowers comparison shop. Arrows were added to focus the borrower on overall charges, rather than one component. All of these features work against the borrower misinterpreting the different presentation of loan fees required of brokers vis-à-vis lenders.

HUD has designed the GFE form to focus borrowers on the right numbers so that competition is maintained between brokers and lenders. The forms adopted in the final rule were tested on hundreds of subjects. The tests indicate that borrowers who comparison shop will have little difficulty identifying the cheapest loan offered in the market whether from a broker or a lender.

We do not believe that the customer outreach function that brokers perform for wholesale lenders is going to change with RESPA reform. Wholesale lending, which has fueled the rise in mortgage originations over the past ten years, will continue to depend on brokers reaching out to consumer customers and supplying them with loans. Brokers play the key role in the upfront part of the mortgage process and this will continue with the final GFE.

RESPA reform is also not going to change the basic cost and efficiency advantages of brokers. Brokers have grown in market share and numbers because they can originate mortgages at lower costs than others. There is no indication that their cost competitiveness is going to change in the near future. Thus, brokers, as a group, will remain highly competitive actors in the mortgage market, as they have been in the past.

While there is no evidence to suggest any anti-competitive impact, there will be an impact on those brokers who are charging non-competitive prices. And there is convincing evidence that some brokers (as well as some lenders) overcharge consumers (see studies reviewed in Chapter 2). As emphasized throughout the Regulatory Impact Analysis, the new GFE will lead to improved and more effective consumer shopping, for many reasons—the new GFE is simple and easy to understand, it includes reliable cost estimates, it effectively discloses yield spread premiums and discounts in brokered loans without disadvantaging brokers, it provides a vehicle to show consumers options, and it explains the trade-off between closing costs and interests rates to aid in understanding of yield spread premiums. This increased shopping by consumers will reduce the revenues of those brokers who are charging non-competitive prices. Thus, the main impact on brokers (both small and large) of the final rule will be on those brokers (as well as other originators) who have been overcharging uninformed consumers, through the combination of high origination fees and yield spread premiums.[15] As noted above, small brokers are expected to experience $2.47 billion in reduced fees.

Small Lenders. Lenders include mortgage banks, commercial banks, credit unions, and thrift institutions.[16] There are over 10,000

[12] In the more conservative scenario of $6.48 billion in consumer savings, small businesses would account for $3.21 billion of the transfers to consumers, with small originators accounting for $2.36 billion, and small third-party providers, $0.84 billion.

[13] In Chapter 5, see Section II for brokers, Section III for the four lender groups (commercial banks, thrifts, mortgage banks, and credit unions), Section IV for the various title and settlement groups (large insurers, title and settlement agents, lawyers, and escrow firms), Section V.A for appraisers, Section V.B for surveyors, Section V.C for pest inspectors, and Section V.D for credit bureaus.

[14] Practically all (98.9%) of the 30,000–44,000 brokers qualify as a small business. The Bureau of Census reports that small brokers account for 70% of industry revenue.

[15] As explained throughout this chapter, it is anticipated that market competition, under this proposed GFE approach, will have a similar impact on those lenders (non-brokers) who have been overcharging consumers through a combination of high origination costs and yield spread premiums.

[16] While it is recognized that the business operations and objectives of these lender groups can differ—not only between the groups (a mortgage banker versus a portfolio lender) but even within a single group (a small community bank versus a large national bank)—they raised so many of the

Continued

lenders that would be affected by the RESPA rule, as well as almost 4,000 credit unions that originate mortgages. While two-thirds of the lenders qualify as a small business (as do four-fifths of the credit unions), these small originators account for only 23 percent of industry revenues. Thus, small lenders (including credit unions) account for only $540 million of the projected $2.35 billion in transfers from lenders.[17]

In general, there was less concern expressed by lenders (as compared with brokers) about potential anti-competitive impacts of the GFE on small businesses. Small lenders—relative to both brokers and large lenders—will remain highly competitive actors in the mortgage market, as they are today. Small mortgage banks, community banks and local savings institutions benefit from their knowledge of local settlement service providers and of the local mortgage market. Nothing in the final GFE rule changes that. Generally, lenders and their associations opposed the proposed GFE on the grounds that in their opinion the form is too lengthy and would only confuse borrowers. Lenders had numerous comments on most aspects of the 2008 proposed GFE form—some of them dealing with major issues such as the difficulty in predicting costs within a three day period and many dealing with practical and more technical issues. HUD responded to many of the issues and concerns raised by lenders; Sections V, VI, and VIII of Chapter 3 discuss lenders' comments and HUD's response.

Some lenders were concerned about their ability to produce firm cost estimates (even of their own fees) within a three-day period, given the complexity of the mortgage process. Lenders wanted clarification on their ability to make cost adjustments as a result of information they gain during the full underwriting process. The tolerances in the final rule require that lenders play a more active role in controlling third-party costs than they have in the past. However, some lenders emphasized that they have little control over fees of third-party settlement providers, while others seem to not anticipate problems in this regard. As explained in I.B above, the final rule made several adjustments to the tolerance rules, which should make them workable for lenders. In addition, the final rule allows average cost pricing, which should help lenders reduce their costs. Practically all lenders wanted clarification on the definition of application, and HUD did that. There will be an impact on those lenders (both large and small) who are charging non-competitive prices. Improved consumer shopping with the new GFE will reduce the revenues of those lenders who are charging non-competitive prices. Thus, as with brokers, the main negative impact on lenders (both small and large) of the new GFE will be on those lenders who have been overcharging uninformed consumers.

Small Title and Settlement Firms. The title and settlement industry—which consists of large title insurers, title agents, escrow firms, lawyers, and others involved in the settlement process—is expected to account for $1.79 billion of the $2.47 billion in third-party transfers under the GFE in the final rule. Within the title and settlement group, small firms are expected to account for 38.1 percent ($0.68 billion) of the transfers, although there is some uncertainty with this estimate.[18] Step (8) of Section VII.E of Chapter 3 conducts an analysis that projects all of the consumer savings in third-party costs coming from the title industry; evidence suggests there are more opportunities for price reductions in the title industry, as compared with other third-party industries. In this case, consumer savings in title costs ($150–$200 per loan) ranged from $1.88 billion to $2.50 billion. To a large extent, the title and closing industry is characterized by local firms providing services at constant returns to scale. The demand for the services of these local firms will continue under the final GFE.

Section VIII.C of Chapter 3 summarizes the key competitive issues for this industry with respect to the final rule. As noted there, the overall competitiveness of the title and closing industry should be enhanced by the RESPA rule. Chapters 2 and 5 provide evidence that title and closing fees are too high and that there is much potential for price reductions in this industry. Increased shopping by consumers, as well as increased shopping by loan originators to stay within their tolerances, will reduce the revenues of those title and closing companies that have been charging non-competitive prices.[19] Excess charges will be reduced and competition will ensure that reduced costs are passed through to consumers.

The title industry argued that greater itemization was needed in order for consumers to be able to adequately comparison shop among estimates. HUD's view is that the consolidated categories on the new GFE form provide consumers with the essential information needed for comparison-shopping. Itemization encourages long lists of fees that confuse borrowers.

It is important to keep in mind the local nature of the title industry when considering the impacts of the final RESPA reform (new GFE, tolerances, etc.) on the title industry. The title industry demonstrates a high degree of geographic specialization. Although title insurance companies do not need to be close to the properties insured, until there is widespread use of standardized electronic land record keeping accessible by the Internet,[20] the information-gathering service the industry provides will require proximity to land title records (or the establishment of ''title plants,'' i.e., duplicates of local records, the maintenance of which requires proximity to local government records). Even if a provider is efficient and charges low prices, it will not be able to compete against title and closing firms who are located sufficiently closer to the site in question. Thus, title and closing companies are by economic necessity provided by local firms. Reinforcing the local orientation are the value of local expertise and the importance of personal networks in receiving referrals.

The local orientation of the title industry could change over time. However, it is unlikely that RESPA reform would be the catalyst. The advances in technology that would change business practices are independent of what HUD does about RESPA. The only change that the final rule will introduce is that title and closing services may occur at lower prices negotiated between providers and lender originators. There will be no significant change in the local provision of title and closing work. Nor will there be a reduction of the number of these services purchased since this reform will not result in a drop in the number of mortgages that require these services. Large lenders will have to deal with multiple settlement services providers in order to ensure complete geographic coverage, and large multi-jurisdictional title firms have no apparent cost advantages over smaller title firms. In fact, large multi-jurisdictional title firms may have location-related cost disadvantages. There is no reason to believe that small title firms charging competitive prices will be adversely impacted by the changes in this rule. The demand for the services of these local firms will continue under the final GFE.

Appraisers. Like surveys and pest inspections, traditional appraisals are provided on-site at the mortgaged property. The transportation cost of visiting individual sites, especially the opportunity cost of the time spent in transit, adds substantially to the cost of providing the service. The transportation costs counterbalance, or overwhelm, any scale economies that may otherwise exist in the production of these services. The countervailing transportation cost pressures creates an effective constant returns to scale production function for this industry and can serve to explain the wide range of firm size as well as the continued success of small businesses in the appraisal industry. This explains why approximately 99.8 percent of traditional appraisal firms qualify as small businesses.

Even if large appraisal firms are efficient and charges low prices, they will not have the same advantage as providers who are located sufficiently closer to the site in question. Thus, traditional appraisals are by economic necessity provided by local firms. Reinforcing the local orientation of the appraisal industry is the value of local expertise. A profound understanding of the

same issues that it is more useful to address them in one place.

[17] Section III of Chapter 5 describes the characteristics of these component industries (number of employees, size of firms, etc.), their mortgage origination activity, and the allocation of revenue impacts between large and small lenders. That section also explains that the small business share of revenue could vary from 20 percent to 26 percent.

[18] Section IV of Chapter 5 describes the component industries and estimates the share of overall industry revenue going to small businesses.

[19] The reasons why the proposed GFE and its tolerances will lead to improved and more effective shopping for third-party services by consumers and loan originators has already been discussed, and need not be repeated here.

[20] The proposed rule does nothing to advance or retard this fundamental change in the nature of the business. It is possible that governments responsible for maintaining title records could advance to the level demonstrated in British Columbia (Canada), where even title insurance is not part of real estate transactions.

characteristics of the local real estate market is essential for a successful appraisal. In addition, local appraisal firms maintain local networks of customers and clients, based on their established track records, which should give them a solid business advantage.

The local orientation of the appraisal industry could change over time. There has been a trend towards the increasing use of automated valuation appraisals, particularly for appraising properties that are being refinanced and properties that are being used as collateral for home equity loans. The necessity for appraisers to visit all homes in need of an appraisal could be rendered less by the automated value model (AVM), but it is also the case that the databases used to create AVMs tend not to have data on whether or not there is water in the basement of the subject property. It is unlikely that RESPA reform would be the catalyst for increases in AMVs, as the technological advances are already taking place. While RESPA reform could accelerate the use of AVMs, it will not likely have an impact as to whether AVMs are eventually accepted more broadly by the lending industry. The adoption of AVMs will depend on the accuracy of these estimation models, their appropriateness for different types of properties, and their performance in mitigating the risk of default losses.

Statement of Need for and Objectives of the Rule [21]

Acquiring a mortgage is one of the most complex transactions a family will ever undertake. The consumer requires a level of financial sensibility to fully understand the product. For example, consider the trade-off between the yield spread premium and interest rate payments. Borrowers do not have access to the rate sheets that describe this trade-off. Indeed, many consumers may not even understand that there is a trade-off. To further complicate matters, the mortgage industry is continuously evolving: the range and complexity of products expands every year. Because consumers borrow fairly infrequently, the average borrower will be at an extreme informational disadvantage compared to the lender. To exacerbate this situation, the typical homebuyer may be rushed and easily steered into a bad loan because they are under pressure to make an offer on a home. This is especially the case for first-time homebuyers who will not be as likely to challenge lenders, whom they may view as unquestionable experts.

Closing costs (lender fees and title charges) add to the borrower's confusion. They are not as significant as the loan itself and total on average approximately four percent of the loan amount. However, the direct lender fees and the title charges are perhaps just as perplexing to the consumer. First, the multiplicity of fees is confusing (see Exhibits 1–3 of Chapter 3 for a list of the different names of upfront lender fees and settlement charges). The purpose of every fee and title charge is likely to be neither understood nor questioned by the average first-time homebuyer, who may be intimidated by the formality of the transaction. Second, to add to the confusion and uncertainty, even once the charges have been agreed upon, they are subject to change until the day of closing. Such informational asymmetries between the buyer and seller impede the ability of the consumer to be an effective shopper and negotiator.

Consumers have strong incentives to ensure that they are getting the best deal possible on a mortgage loan and the associated third-party settlement costs, but poorly-informed decisions have drastic consequences. First, the household itself will lose by paying more for housing and possibly by ruining their credit history in the event of default. Second, markets imperfections stemming from information asymmetries may stand in the way of achieving one of this administration's domestic priorities: expansion of homeownership. There is a wide range of positive economic externalities from homeownership that have been investigated in the empirical housing economics literature. These include household saving, wealth accumulation, property improvements, a more pleasing urban environment, an increase in political activity, a reduction of crime, better child outcomes, and a positive impact on the labor supply of women. The average loan amount is 3.5 times a household's income: even minor inefficiencies in this market will have sizeable impacts on the U.S. economy.

The current GFE format contains a long list of individual charges that can be overwhelming, often confuses consumers, and seems to provide little useful information for consumer shopping. Current RESPA regulations have led to a proliferation of charges that makes consumer shopping and the mortgage settlement process both difficult and confusing, even for the most informed shoppers. Long lists of charges certainly do not highlight the bottom-line costs so consumers can shop and compare mortgage offers among different originators. In addition, under today's rules, the estimated costs on GFEs may be unreliable or incomplete, or both, and final charges at settlement may include significant increases in items that were estimated on the GFE, as well as additional unexpected fees, which can add substantially to the consumer's ultimate closing costs. The process of shopping for a mortgage can also involve complicated financial trade-offs, which are not always clearly explained to borrowers. Today's GFE is not an effective tool for facilitating borrower shopping nor for controlling origination and third-party settlement costs.

The potential for cost reductions in today's market is also indicated by studies showing relatively high and highly variable charges for third-party services, particularly for title and closing services that account for the major portion of third-party fees. There is not enough incentive for loan originators to control settlement costs by negotiating lower costs from third-party providers; rather, they too often simply pass through increases in third-party costs to consumers. Because of their lack of expertise, consumers may not be the best shoppers for third-party services providers, leaving them to rely on recommendations from real estate agents and lenders. Thus, a framework is needed that would encourage competitive negotiations and other arrangements that would lead to lower third-party settlement prices.

Today's mortgage market is increasingly characterized by the introduction of efficiency enhancing improvements such as automated underwriting systems and, through competition, these improvements are leading to lower prices for consumers. But the one area where current RESPA regulations act as a major barrier to competition and lower settlement services is the production and pricing of settlement services. Under current law, average cost pricing (another cost reduction technique) is inhibited by existing RESPA regulations.

The goal of HUD's RESPA reform is to even the playing field. The rule will accomplish this by requiring lenders to provide consumers information that lenders already have in a format that is transparent. One of the major inefficiencies of imperfect information is the costs of acquiring information. RESPA reform will go a long way toward educating consumers. The first page of the new GFE presents a brief summary of the terms of the loan that would warn prospective borrowers of potentially expensive aspects of the loan including loan amount, maximum interest rate, prepayment penalties, and the total estimated settlement charges. The second page provides more detail on the charges for loan origination and other settlement services. The third page provides a trade-off table so that consumers will learn the relationship between the interest rate and the yield-spread premium. The third page also includes a table so that the consumer can take notes on alternative loan offers and thus comparison shop. Tolerances will limit how much settlement charges can vary once the GFE has been made and the comparison page of the HUD–1 will serve to double-check the GFE regarding settlement charges and provide a summary of the key terms of the borrower's loan at settlement. The final rule also allows settlement service providers to use pricing based on average charges, making their business operations simpler and less costly. It is expected that the new GFE will encourage shopping, increase efficiency, lower housing costs, and promote the purchase of loans that are more suited to a households' needs.

Empirical Evidence of Price Discrimination

Studies indicate that consumers are often charged relatively high fees and can face wide variations in settlement prices, both for origination and third-party settlement services. Chapter 2 offers convincing evidence that not only do borrowers find it difficult to comparison shop in today's mortgage market, but that they are all too often charged excessive prices. The enormous potential for cost reductions in today's market is indicated by studies showing that yield spread premiums do not always offset consumers' origination costs. Studies show that consumers are, in effect, charged relatively high prices in some transactions involving yield-spread premiums, and that the mortgage market is

[21] For a detailed discussion of problems with the current system, and thus the need for this proposed rule, see Sections IV and V of Chapter 2 and Sections I and VII of Chapter 3.

characterized by ''price dispersion.'' In other words, some borrowers get market price deals, but other borrowers do not. Studies show that less informed and unsuspecting borrowers are particularly vulnerable in this market. But given the fact that a borrower may be more interested in the main transaction (the home purchase), even more sophisticated borrowers may not shop aggressively for the mortgage or may not monitor the lending transaction very closely.

The Urban Institute (2008) collected data on 7,560 FHA loans. The mean total loan closing cost for all loans is $4,917 for an average loan amount of $108,237. Total charges are composed of loan charges $3,081, title charges $1,329, and other third party charges $507. It is apparent from the distribution presented below that there is significant variation in closing costs: the standard deviation is $2,381. For its statistical analysis, the Urban Institute focused on a subsample of 6,366 non-subsidized loans, for which the mean total charges are slightly higher at $5,245. Lender charges for non-subsidized loans are $3,390, of which $1,450 are direct fees and $1,940 is the average YSP.

TABLE 6–5—DISTRIBUTION OF CATEGORIES OF CLOSING COSTS AS A PERCENTAGE OF LOAN AMOUNT

[Calculated by HUD from data provided by Urban Institute]

Series	5th percentile	25th percentile	50th percentile (median)	75th percentile	95th percentile
Total Closing Cost	2.9	4.1%	5.1	6.4	8.9
Total Loan Charges	1.3	2.4%	3.2	4.2	6.2
Yield-spread premium	0.3	1.3%	2.0	2.7	3.8
Direct loan fees	0.0	0.8	1.3	1.8	3.3
Total Title Charges	0.6	0.9	1.2	1.6	2.3
Other Third-Party Charges	0.2	0.4%	0.6	0.8	1.4

A great degree of variation appears in the lender fees. Since total loan charges are correlated with loan amount, it would be useful to examine the distribution of closing costs as a percentage of loan amounts to ascertain whether the variation in fees is still present. HUD calculated the distributed of these ratios for non-subsidized loans from a data set of closing cost provided by the Urban Institute. There is slightly less variation when measured as a percentage but it is still substantial: the ratio of what the 75th percentile pays as a percentage of the loan to what the 25th percentile pays is 1.8 for total loan charges, 2.1 for the yield spread premium (indirect loan fee), and 2.4 for direct loan fees.

It is apparent that half of the borrowers pay loan charges equal or greater than 3.2% of their loan amount; one-quarter pay loan charges of at least 4.2% of their loan amount; and five percent pay loan charges of at least 6.2% of their loan amount. The variation is similar for title charges and other third-party charges. Half of the borrowers pay total closing costs equal or greater than 5.1% of their loan; one-quarter pay closing costs of at least 6.4% of their loan amount, and five percent pay closing costs of at least 8.9% of their loan amount.

HUD believes that these data provides strong indications of large price dispersion and thus price discrimination. Price discrimination will always lead to a loss in consumer surplus and unless price discrimination is perfect, it will also lead to a loss in social welfare. It should also be noted that if the variation of fees and charges paid is greater than the actual costs of providing the services, then that constitutes evidence of a violation of RESPA, which explicitly prohibits mark-ups.

First, in a competitive market the price of the good should depend on its quality and not to whom and how it is sold. If there is dispersion because the negotiations are face-to-face, this would suggest that the nature of the market exacerbates the consumer's informational disadvantage. Indeed, there is strong evidence that individuals pay different prices for reasons other than how costly service provisions will be. The Urban Institute report (2008) finds that African Americans pay an additional $415 for their loans and that Latinos pay an additional $365 (after taking into account borrower differences such as credit score and loan amount). These loans are not subprime loans but standard FHA loans. Other researchers have found similar results: Jackson and Berry (2002, see the Regulatory Impact Analysis for reference) find that mortgage brokers charge African-Americans (by $474) and Hispanics (by $580) substantially more for settlement services than other borrowers. Discrimination by race or ethnicity is not economically efficient and would not survive in a perfectly competitive market.

Second, reconsider the yield-spread premium. We mentioned that this is one of the elements of a mortgage that a consumer is not likely to understand. The yield-spread premium is compensation to the broker for selling a loan with a higher interest rate. Thus, as the interest rate rises so should the yield-spread premium. This relationship appears to hold in the data analyzed. The broker earns income from two sources: a yield-spread premium that is paid by the lender and fees that are paid by the consumer. However, the burden of the yield-spread premium is on the consumer, who pays a higher interest rate for loans with a higher yield-spread premium. If consumers were perfectly informed, there would be a negative one-to-one relationship between up-front fees and the yield-spread premium. They simply represent two different ways of compensating the broker for the effort required to originate a loan.

The Urban Institute (2008) finds no strong trade-off between the yield-spread premium and upfront cash payments. Ideally, each dollar of YSP generated by a higher interest rate would result in a one dollar reduction in upfront fees. The reality is that this is not even close to being true. The Urban Institute finds that paying one dollar of YSP to a mortgage broker reduces upfront fees by only 7 cents.[22]

This result is derived from a sample of nonsubsidized loans above with a rate above 7 percent, which is appropriate for investigating YSPs. FHA borrowers appear to get no benefit from YSPSs on brokered loans with coupon rates above 7 percent. The result is not much better when using the larger data set of all nonsubsidized loans: The Urban Institute finds that broker loan-origination fees, instead of being lower by a dollar for each dollar of YSP, are higher by 16 cents. This result is stunningly bad for borrowers. Clearly, the average FHA borrower has no idea a higher interest rate can be used to reduce upfront charges. Such a relationship is contrary to what one would expect in a market where there were only minor imperfections. Further evidence is from Jackson and Berry (2002) who studies only brokered transactions, a description of which can be found in Section IV.D.2 of Chapter 2 of the Regulatory Impact Analysis. They find that the problem of price dispersion occurs when yield spread premiums are present, because in these situations there is no single price for broker services: ''Most borrowers pay more than 1.5 percent of loan value; more than a third pay more than 2.0 percent of loan value; roughly ten percent pay more than 3.5 percent of loan value.'' Jackson and Berry find this ''price dispersion'' troubling, as it suggests that brokers use yield spread premiums as a device ''to extract unnecessary and excessive payments from unsuspecting borrowers'' (page 9).

Third, consider the confusion that the variety of loan products and permutations of those products can create. If informational asymmetries are significant, then lenders will

[22] In a sample, which is appropriate for investigating YSPs, of nonsubsidized loans with a rate above 7 percent, the Urban Institute finds that broker loan-origination fees, instead of being lower by a dollar for each dollar of YSP, are higher by 16 cents. This result is stunningly bad for borrowers. FHA borrowers appear to get no benefit from YSPSs on brokered loans with coupon rates above 7 percent.

be able to earn more when selling more complex products. Borrowers who simplify their mortgage shopping by rolling all lender/broker fees into the interest rate (i.e., get ''zero-cost'' loans) pay $1,200 less for their loans than brokers who pay lender or broker fees as measured by implicit YSPs. Borrowers who pay points realize only $20 of benefits for every $100 of points paid, for a net loss of $80. It appears that the industry is able to take advantage of loan complexity, which is evidence of price discrimination not related to the cost of originating the loan.

Fourth, consider other settlement charges. Title insurance is an industry with a strong potential for natural monopoly. The costs of title insurance are primarily related to research of property transactions. There is a large fixed cost of entry which is compiling a database of transaction and lending records. There should not be a great variation in settlement charges since the only component that does vary substantially is the insurance premium. The Urban Institute (2008) finds an average $1,329 title charge in their sample of all loans with a standard deviation of $564. They also find a significant variation by state with New York, Texas, California, and New Jersey all costing at least $1,000 more (holding property values constant) than North Carolina, the lowest-cost state. A reasonable question is what extra benefits people in the high-cost states get relative to those in low cost states, or why costs are so high if there are no extra benefits. It is also useful to analyze total title costs on a state-by-state basis due to the different legal requirements that exist among the states and the different customs that might have evolved in them as well. HUD examined within state variation of settlement fees. One measure of variability that we calculated for each state was the difference between the median of the highest quartile of title charges and the median of the lowest quartile. This is a measure of the difference between the typical charge for the highest fourth of the borrowers and the lowest fourth of the borrowers within each state. This difference was over $1,000 for nine states. Due to the extent of price dispersion, we can expect significant savings from the final rule.

The primary purpose of this discussion was to show that there is great variation in closing costs and thus room for price discrimination. HUD would like to emphasize that the goal was not to portray lenders, and especially mortgage brokers, as unscrupulous and harmful to economic welfare. On the contrary, HUD recognizes that mortgage brokers and other lenders have played a crucial role in recent trends in home ownership. It is also clear from the statistical evidence presented in this section that there are many ethical loan originators. One quarter of the borrowers in this sample paid no more than 2.4% in loan charges and 4.1% in total closing costs. Consider that if the entire market mirrored this more efficient segment, then RESPA reform would not be as urgent.

Issues Raised in Comments on the 2008 Initial Regulatory Flexibility Analysis

Section IV.A presents a review of comments on the 2008 IRFA. Sections IV.B and IV.C serve as roadmaps to other issues regarding the rule.

Comments Concerning the Initial Regulatory Flexibility Analysis

This section describes how HUD responded in this Final Regulatory Flexibility Analysis (FRFA) to comments received on the Initial Regulatory Flexibility Analysis of the 2008 proposed rule. The primary comments on the 2008 IRFA included: a report from the National Association of Realtors, prepared by Ann Schnare, who claimed that HUD had underestimated the costs of the rule; criticisms from advocates of small business that HUD had not adequately analyzed the impacts of its rule on industry structure; and an assertion by Representative Manzullo that HUD used obsolete data in its analysis.

''HUD Underestimated the Compliance Costs'' (National Association of Realtors) Ann Schnare prepared alternative estimates [23] for the National Association of Realtors (NAR) of the compliance costs of HUD's 2008 proposed reform of the Real Estate Settlement Procedures Act (RESPA) to simplify the process and reduce the costs of obtaining a mortgage loan. Their report contains worthwhile suggestions, such as performing a sensitivity analysis with respect to the number of applications per loan. However, their cost estimates are inaccurate. In Sections IV, HUD discusses the NAR's major comments that are applicable to the Regulatory Impact Analysis of the final rule.

Below iS a Summary of the NAR's Comments and HUD's Responses

The NAR states that HUD ignored a major compliance cost of the rule incurred by loan originators: the hedging costs of guaranteeing the interest rate for the shopping period of ten days. Including hedging costs dramatically increases compliance costs by a factor of four. However, the NAR made an erroneous assumption about the proposed GFE: there is no requirement of an interest-rate guarantee. Thus, hedging costs will be zero (See Section VII.D.1.).

A second criticism of the analysis of the compliance cost of the GFE is that HUD does not consider the possibility that the rule could increase the administrative costs to loan originators by generating a greater demand for GFEs. Although HUD believes that it is just as likely that applications do not increase, HUD has included a sensitivity analysis of compliance costs by the number of applications. (See Section VII.D.2.)

The NAR points to another cost not included in the IRFA: the cost of preliminary underwriting. However, this would only be a factor if the application to loan ratio were to increase. HUD assumed in the IRFA that this ratio would be constant. HUD's response was to include this cost in a high application-to-loan scenario. (See Section VII.D.3)

HUD was criticized for using inconsistent estimates of the value of time in order to raise the value of the benefits of the rule relative to the costs. In fact, the reverse is true: HUD used a higher rate to estimate the costs and a lower one to estimate the benefits (See Section VII.D.4).

The NAR questions the potential benefits of the GFE. For support, Schnare turned to a study that used a sample suffering from selection bias (See Section V.A.1.g of Chapter 2 for a description) and questioned whether the rule would solve the problem of ''bait and switch'' or any other misleading business practice. PD&R has recently received A Study of Closing Costs for FHA Mortgages (summarized above in Section III and at length in Chapter 2). The results strongly indicate that HUD's RESPA reform efforts are aimed directly at very serious problems in the market for these loan origination and other settlement services.

Impact of the Rule on Industry Structure

Many industry commenters stated that there were elements of the rule that disadvantaged small business. One of the primary concerns of small title firms is the potential adverse effect of volume discounting. The 2008 final rule set a clearer standard for compliance in the context of the new GFE. HUD merely clarified that volume discounting is legal as long as the savings are passed along to the consumer. ALTA, ICBA, NAMB, and NAR contend that volume discounts will favor large settlement service providers and loan originators/lenders at the expense of small businesses and place them at a disadvantage. The Office of Advocacy formally endorsed this position in their comment letter (June 11, 2008) and predicted that HUD's proposed clarification ''may cause small businesses to leave the market and result in higher prices for consumers in the long term.''

ALTA stated that the ability to negotiate volume discounts on the local services that are incidental to the issuance of a title policy (such as a title search) will disadvantage the small title insurance agency that does not have the resources to guaranty a stream of business to a third party or discount its own services when the services are performed in house. In addition, ALTA expressed concern that mortgage lenders and brokers will add to the anticompetitive effects by favoring affiliated title companies or those companies that can provide title related services on a nationwide basis.

Comment. Both the NAR and ALTA asserted that the Regulatory Impact Analysis of the proposed rule did not adequately address the anti-competitive issues of the proposed rule.

Response. In its Regulatory Impact Analysis, HUD very meticulously outlined the proportional impacts of the rule on small business. HUD continues to believe that as long as a small businesses is not charging consumers excessive fees, then small business will not suffer disproportionately.

To a large extent, the issue of unfavorable impacts on small business is mute. The greatest objection by small business was to volume discounts. In response to the numerous objections to HUD's clarification, HUD will not address volume discounts in the rule. HUD wants to ensure that any change will adequately protect consumers while at the same time providing adequate flexibility and due consideration to small

[23] Ann E. Schnare, ''The Estimated Costs of HUD's Proposed RESPA Regulations,'' prepared for the National Association of Realtors (June 3, 2008).

business concerns. It remains HUD's position, however, that discounts negotiated between loan originators and other settlement service providers, or by an individual settlement service provider on behalf of a borrower, where the discount is ultimately passed on to the borrower, is not, depending upon the specific circumstances of a particular transaction, a violation of section 8 of RESPA. If the borrower fully benefits from the discount, these types of mechanisms that lower consumer costs are within RESPA's principal purposes.

There may be other facets of the rule, such as tolerances, that are thought to have a disproportionate impact on small business, even on those small firms that are not charging excessive prices. Instead, HUD believes that the rule will create opportunities for efficient firms to expand their operations. This opinion is based on our observations that a distinguishing characteristic of the real estate industry is that it is very locally oriented. The value of proximity and local expertise make small firms more efficient in providing services to consumers. RESPA reform will not change that essential characteristic of the real estate industry. (See Section II.C.5. for a discussion).

Timeliness of Data

Comment. Some criticized HUD for using ''old'' data in its Regulatory Impact Analysis of the 2008 proposed rule. For example, Representative Don Manzullo wrote in his comment letter that the market has changed significantly since the data was obtained in 2002 and 2004; that these changes may impact how the rule is implemented; and that should wait until it has data on current market conditions before moving forward with the rule.

Response. HUD's initial regulatory flexibility analysis of the proposed RESPA rule, which was completed in late 2007, used the latest, at that time, officially available federal government data on small businesses provided by the Small Business Administration (SBA) as derived from two Census Bureau data sources: the 2002 Economic Census (business income or receipts), and the 2004 County Business Patterns data (number of businesses and firm employment size). These data are augmented, when possible, by highly regarded data from industry sources. For example, the SBA/Census data on mortgage brokers do not agree with estimates of the size of that industry made by the National Association of Mortgage Brokers and other observers. HUD ultimately based its analysis of the mortgage broker industry on these private sector data.

Chapter 5 of the RIA provides extensive documentation of the characteristics of the industries directly affected by the rule, including various estimates of the numbers of small entities, reasons why various data elements are not reliable or unavailable, and descriptions of methodologies used to estimate (if possible) necessary data elements that were not readily available. The industries discussed in Chapter 5 of the RIA included the following (with Chapter 5 section reference): mortgage brokers (Section II); lenders including commercial banks, thrifts, mortgage banks, credit unions (Section III); settlement and title services including direct title insurance carriers, title agents, escrow firms, and lawyers (Section IV); and other third-party settlement providers including appraisers, surveyors, pest inspectors, and credit bureaus (Section V); and real estate agents (Section VI).

The SBA does not expect to have an update (from the 2007 Economic Census) of the 2002 Economic Census data (business income or receipts) available until sometime in 2010, well beyond the time horizon for this rulemaking effort. Thus, the FRFA of the final RESPA rule will continue to rely in part on data from 2002.

More importantly, HUD's estimate of the annual regulatory burden depends primarily on our assumptions concerning the compliance cost per loan. HUD has used generous estimates of the costs of the rule but has received no hard data from industry that would allow us to refine our estimates. The aggregate impact of the rule depends on mortgage volume. Our approximation of the average year is 12.5 million transactions. It is probable that the level of originations in 2008–2009 will be lower than this amount. However, the final rule requires a twelve-month implementation period. By the time the rule is in effect, the average mortgage volume is expected to return to that of the average year.

Alternatives Considered To Minimize Impact on Small Businesses

Section VI of this chapter provides discussion of the alternatives considered by HUD in developing the final rule with a focus on those alternatives considered to minimize the impact on small business. Section VI includes a summary discussion of the following major alternatives: maintaining the status quo; not including the yield-spread premium calculation in the GFE; requiring the preparation and reading of a closing script; and clarification in the rule of the legality of volume discounting. Section VI also includes a discussion of steps HUD took to make the new GFE easier to implement for small businesses.

Comments and Responses to Other Issues

Chapters 1–5 of the Regulatory Impact Analysis include detailed summaries of the comments submitted by small businesses and other firms on various aspects of the 2008 proposed rule and in response to the 2008 IRFA. Detailed discussion of comments received can be found in the preamble. Detailed analysis responding to comments received can be found in Sections VI and VIII of Chapter 3. Detailed discussion of comments related to the compliance burden of the rule can be found in Sections VII, VIII, and IX of this chapter. Analysis responding to some specific comments on the 2008 IRFA can be found in Chapter 3. Changes made to the 2008 proposed rule in response to comments received are summarized in Section VI of this chapter.

Description and Estimate of the Number of Small Entities

Chapter 5 provides extensive documentation of the characteristics of the industries affected by the rule, including estimates of the numbers of small entities. The industries discussed in Chapter 5 included the following (with industry code and Chapter V section reference): mortgage brokers (Section II); lenders including commercial banks, thrifts, mortgage banks, credit unions (Section III); settlement and title services including direct title insurance carriers, title agents, escrow firms, and lawyers (Section IV); and other third-party settlement providers including appraisers, surveyors, pest inspectors, and credit bureaus (Section V); and real estate agents (Section VI). The specific industry names and industry codes (North American Industry Classification System, or NAICS code) for the mortgage originators and third-party firms covered in Chapter V are as follows:

Mortgage Origination Firms

1. Mortgage Loan Brokers (522310).
2. Commercial Banks (522110).
3. Savings Institutions (522120).
4. Real Estate Credit/Mortgage Bankers (522292).
5. Credit Unions (522130).

Third-Party Service Firms

1. Direct Title Insurance Carriers (524127).
2. Title Abstract and Settlement Offices (541191).
3. Offices of Lawyers (541110).
4. Other Activities Related to Real Estate (531390).
5. Offices of Real Estate Appraisers (531320).
6. Surveying and Mapping (except geophysical) Services (541370).
7. Credit Bureaus (561450).
8. Exterminating and Pest Control Services (561710).
9. Offices of Real Estate Agents and Brokers (531210).

Chapter 5 supports Chapters 3 and 6 by providing basic mortgage-related data on each industry and by explaining the various methodologies for estimating the share of industry revenue accounted by the different component industries and by small businesses within each component industry. Chapter 5 presents an overview of the industries involved in the origination and settlement of mortgage loans (see above list). Industry trends are briefly summarized and special issues related to RESPA are noted. There is also a description of the economic statistics for each industry, with an emphasis on each industry's share of small business activity. Both the estimation of the revenue share for various industry sub-sectors (e.g., large title insurers' share of total revenue in the title and settlement industry) and the estimation of the small business share of mortgage-related revenue within the industry, often involve several technical analyses that pull together data from a variety of sources, in addition to Census Bureau data. This leads to several sensitivity analyses to show the effects of alternative estimation methods and assumptions. This chapter also reports the revenue transfers from the RESPA rule for the specific industry sectors; these transfers are reported in dollar terms and, where possible, as a percentage of industry revenue. Finally, a number of technical issues and special topics, such as techniques for estimating the distribution of

retail mortgage originations, are discussed. A technical appendix to Chapter 5 provides relevant definitions and explains the methodology associated with the economic data obtained from the Census Bureau. A data appendix in Chapter 5 includes tables with the economic data (number of firms, employment, revenue, etc.) for each industry sector.

Thus, the Regulatory Impact Analysis pulls together substantial data from the Bureau of the Census and industry sources to provide estimates of revenue transfers for different industries and for small businesses within those industries. Chapter 5 provides a full technical review of the data used and the various methodologies for estimating the small business share of industry revenues.

Drawing from the analysis in Chapters 3 and 5, Appendix A to this chapter provides estimates of the revenue impacts from the new GFE. These data are presented in aggregate form ($ million) and on a per firm basis, covering all firms (both employer and non-employer), small firms (small employer firms plus non-employer firms), and very small firms (very small employer firms plus non-employer firms). Separate data for non-employer firms are also provided. In some cases, different projections are provided for some of the more important sensitivity analyses conducted in Chapters 3 and 5. The technical analyses presented in Chapter 5 indicate some uncertainty around some of the numbers (such as the number of small mortgage banks, the split of revenue among different sectors of the broad title industry, etc.). Readers are referred to the technical discussion in Chapter 5 for various qualifications with the data and for various sensitivity analyses that illustrate the effects on the estimates of alternative assumptions. In addition, Chapter 5 explains the definitions of small and very small being used here.

Alternatives Which Minimize Impact on Small Businesses

Under the Initial Regulatory Flexibility Analysis, HUD must discuss alternatives that minimize the economic impact on small entities consistent with the stated objectives of applicable statutes, including a statement of the factual, policy, and legal reasons for selecting the alternative adopted in the final rule and why each of the other significant alternatives to the rule considered by the agency was rejected. Many of the alternatives that HUD considered and implemented were directed at making the GFE less burdensome for small businesses. These changes are described below. A more detailed discussion of the changes to make the GFE easier to implement for small businesses are provided in Section VIII of Chapter 3. For a discussion of all of the major alternatives considered to the final GFE, see Chapter 4.

This Regulatory Impact Analysis discusses several steps that HUD took that will assist small businesses involved in the mortgage origination and settlement process. Examples include simplifying the new GFE form (fewer numbers, etc.), designing the new GFE form so that there is a level playing field between lenders and brokers, and delaying the phase-out of today's GFE for twelve months. HUD also made numerous other changes that were designed to make the GFE easier to use, particularly for small businesses. These changes are discussed throughout Chapter 3 and summarized in several places in the Regulatory Impact Analysis. This section will list them again, as it is useful to provide a record of the changes made to the 2008 proposed rule that should make the new GFE easier to implement for small businesses. Considered as a group, these changes are important. While many are designed to address a problem faced by large as well as small lenders, for the most part, they address problems that would place a greater burden on small than large businesses. Examples of the changes that HUD made are the following:

- Volume-based discounts. Small businesses, especially closing attorneys and escrow companies stated that lenders seeking volume discounts would place them at a competitive disadvantage to larger entities and force them out of business. HUD responded by not addressing volume discounts in its final rule.
- Tolerances. Some commented that large lenders would have an easier time meeting tolerances than small businesses by contracting with large third-party settlement-service providers, and thereby placing small settlement service providers at a competitive disadvantage. If exceeding the tolerance was an infrequent and unpredictable event, larger firms may be able to diversify the risk over a larger pool of loans. The final rule provides loan originators with an opportunity to cure any potential violation of the tolerance by reimbursing the borrower any amount by which the tolerances were exceeded. The opportunity to cure will permit loan originators to give an estimate of expected settlement charges in good faith, without subjecting them to harsh penalties if the estimate turns out to be lower than the actual charges at settlement. This change reduces the potential damages of exceeding the tolerances.

Compliance Costs and Regulatory Burden: New GFE

This section focuses on the compliance, regulatory, and other costs associated with implementing the final rule. It examines compliance and regulatory impacts of the new GFE on originators. There are two types of compliance and regulatory costs—one-time start-up costs and recurring costs. Section VII.B discusses start-up costs, noting that HUD has lengthened the phase-in period for the new GFE in order to reduce any implementation burden on the industry, particularly small firms. Section VII.C discusses recurring costs that are related to implementing the new GFE. The simplicity of the new GFE, plus the changes that HUD has made to improve the new GFE, will limit these annual costs, as discussed in Section VII.D. Section VII.E discusses compliance issues related to tolerances on settlement party costs. Finally, Section VII.F outlines efficiencies associated with the new GFE.

Before examining the specific regulatory and compliance costs, Section VII.A reviews the basic data used in estimating these costs. For a similar description of the costs on the settlement industry, see Section 0.

Data Used in Compliance Cost Estimates

The following tables provide a summary of the industry characteristics data used to develop compliance cost estimates for the GFE. Details on the derivation of these data are available in Chapter 5. The compliance costs of the GFE provisions of the rule apply mainly to retail loan originators. While wholesale lenders, for example, are involved in the mortgage origination process, they are not responsible for issuing the GFE—rather the originating lender or broker is responsible for the issuing the GFE to the borrower.[24] Therefore, data are presented only for those brokers and lenders that do retail mortgage loan originations. Settlement agents do not generate GFEs and therefore they would not be subject to these GFE-related costs. Settlement agents will, however, be involved generating HUD–1s; since there are some changes to the HUD–1 form, there are compliance costs on settlement agents associated with that change. In most cases, HUD expects that loan originators will complete the comparison page of the HUD–1 form. However, a portion of the compliance cost will be the burden on settlement agents of completing the comparison page accurately in cases where there is additional information required from the settlement agent. Other third-party providers (e.g., appraisers) will face no compliance costs from the GFE provisions of the rule.

Chapter 5 provides information on the total number of brokers and lenders that are likely to be affected by the new RESPA rule and its revised GFE form. Section II of that chapter explains that the number of brokers has grown substantially in recent years. In 2000, there were 30,000 brokers, but with the increase in refinancing, the number of brokers rose to 33,000 in 2001 and then jumped to 44,000 in 2002 and then to 53,000 in 2004. According to Census Bureau data, practically all brokers (99.1%) qualify as a small business. Thus, it is estimated that small broker firms have ranged from 32,703 to 52,523 over the past few years. As explained in Section III of Chapter 5, lenders that will be affected by the RESPA rule include: 7,402 commercial banks (4,426 or 59.8% are small), 1,279 thrift institutions (641 or 50.1% are small), 1,287 mortgage banks (1,077 or 83.7% are small), and 3,969 credit unions (3,097 or 78.0 % are small).[25] Altogether, there are 13,937 lenders (including credit unions) affected by the RESPA rule, and 9,241 of these qualify as a small business.

Table 6–6 provides the distribution of retail mortgage originations among the various industries and for small firms within each industry. Totals are estimated based on the number of mortgage originations (12,500,000 loans) that would occur in a ''normal'' year of mortgage originations (that is, not in a high-volume year with a

[24] If the wholesale lender generates the GFE, then there would be a charge to the originator (either a direct charge or a reduction in fees, compared with the case where the originator issues the GFE).

[25] See Section III.B.5 of Chapter 5 for issues related to the number of small mortgage banks. As also explained in that section, the credit unions are the ones that report some mortgage origination activity.

refinancing boom). The data below assume that brokers account for 60% of mortgage originations and lenders, the remaining 40%.[26] (See below for alternative origination volume and broker share estimates.)

TABLE 6–6—VOLUME OF RETAIL MORTGAGE ORIGINATIONS

Industry	All originations	Percent of originations	Originations by small firms	Percent industry originations by small firms
Mortgage Brokers	7,500,000	60.00	5,250,000	70.00
Commercial Banks	2,053,150	16.43	389,893	18.99
Thrifts	974,750	7.80	120,089	12.32
Mortgage Banks	1,551,500	12.41	644,803	41.56
Credit Unions	420,600	3.36	122,563	29.14
Total	12,500,000	100.00	6,527,349	52.22

As shown in Table 6–6, it is estimated that 52% of mortgages are originated by small brokers and lenders.

Table 6–7 provides the total number of workers and the number of workers in small firms engaged in retail mortgage origination by industry. It is based on the mortgage origination volumes depicted in Table 6–6 and productivity rates of 20 loans per worker per year for mortgage brokers and lenders. See Section II.B.2.c of Chapter 5 for the derivation of the 20 loans per worker in the broker industry and see Section III.B.5.g of Chapter 5 for a discussion of the 20 loans per worker in the lender industry. Given the uncertainty around these estimates (and particularly the lender estimate which is obtained by simply assuming that lender workers are as productive as brokers), alternative estimates and sensitivity analyses are provided in Chapter 5. As noted in Chapter 5, one alternative would be to choose a lower productivity number for lenders, which would be consistent with the widely held belief that brokers are more productive than lenders; in addition, it may be more appropriate to overestimate the number of lender employees affected by the RESPA rule than to underestimate them.[27] However, this analysis starts by assuming equal productivity for lenders and brokers.

TABLE 6–7—WORKERS ENGAGED IN RETAIL MORTGAGE LOAN ORIGINATION

Industry	Total workers	Workers in small firms	Percent of workers in small firms
Mortgage Brokers	375,000	288,750	77.00
Commercial Banks	102,658	19,495	18.99
Thrifts	48,738	6,004	12.32
Mortgage Banks	77,575	32,240	41.56
Credit Unions	21,030	6,128	29.14
Total	625,000	352,617	56.42

As shown in Table 6–7, it is estimated there are 625,000 workers engaged in mortgage origination, with 352,617 of these operating in small businesses. As noted above, the mortgage volume figure (12,500,000 loans based on $2.4 trillion in originations) reflects industry projections of mortgage originations for 2008. Chapters 3, 4, and 5 conduct sensitivity analyses with a higher level of originations. For example, one could consider an environment where 15,500,000 loans were originated (compared with the 12,500,000 loans in the base case). In this case, the figures in Tables 6–6 and 6–7 would change. For example, the number of workers in the broker industry would increase to 438,038 (with 337,293 in small firms) and the number of workers in the combined lender group would increase to 271,250 (with 69,296 in small firms).[28] Below, sensitivity analyses cover these higher estimates of the number of workers affected by the RESPA rule.

Compliance and Regulatory Burden: One-Time Costs

Several one-time compliance burdens can be identified that will result from the new rule. All involve the adjustment process from the old rule to the new rule. Although HUD received comments on the one-time compliance cost issues associated with the new GFE, commenters did not provide any useful data on the magnitude of these costs. There are three major areas of expected one-time compliance costs of the new GFE. Those who generate the new GFE forms, loan originators, will need new software in order to produce the new forms.[29] Their employees will need to be trained in the use of the new forms and software. Loan originators may seek legal advice to be certain that the arrangements they make to ensure that third-party service prices are accurate and within tolerances comply with the regulation. Loan originators may also seek legal advice regarding tolerances and average-cost pricing. In this section, it is estimated that these one-

[26] See Section III.B.5.d of Chapter 5 for the derivation of the distribution of retail originations among commercial banks, thrifts, and mortgage banks; the distribution used here is the ''adjusted distribution'' for the number of loans. See Chapter 5 for reasons why there is some uncertainty with the estimated distribution and for analysis of an alternative distribution.

[27] A comment should be made about the small business share for brokers. Section II.B.1 in Chapter 5 reports that small brokers account for 70% of broker industry revenue. Table 6–6 assumes that small brokers account for the same percentage (70%) of the number of loans originated by all brokers; it is possible that this percentage could be too low, given that Section II.B.2.c of Chapter 5 derives an estimate of 77% for the share of industry workers in small broker firms. The 77% figure is used in Table 6–7 (288,750 divided by 375,000) for estimating the share of workers in small broker firms. The small business share of the number of workers in each of the four lender industries in Table 6–7 is assumed to be the same as in Table 6–6 for the number of loans. See Section III.B.5 of Chapter 5 for the derivation of the small lender shares of lender originations.

[28] As explained in Chapter 5, this scenario assumes that the increase in mortgage originations comes mainly from brokers; the loans-per-worker assumption is increased to 23 for brokers (consistent with that number increasing in Olson's surveys during higher volume years) but kept at 20 for lenders since their volume does not increase much during this scenario.

[29] This analysis assumes that the mortgage broker, not the wholesale lender, produces the GFE in transactions involving mortgage brokers. To the extent that the wholesale lender is involved in producing the GFE the use of the broker data will result in an overestimation of the impact on small businesses (since small businesses make up a much larger portion of broker businesses than they do of wholesale lender businesses).

time compliance costs will total $383 million, although it is recognized below that these costs could vary with several factors such as different levels of overall mortgage activity. Small brokers and small lenders firms will experience $268 million (or 70%) of these one-time compliance costs.

Software Modification and Training Costs

Loan originators would need alterations to their software to accommodate the requirements of the new rule since they generate the new GFE. There would be one-time costs for production and installation of the new GFE (software development, etc.). Software modification, or new software, is needed because the GFE has been changed. The implementation of software varies with business size. Small originators are likely to use commercial off-the-shelf (COTS) software products while larger originators may produce their own software if in-house development is cheaper than buying from outside suppliers. HUD reviewed several software products for loan origination and closing advertised on the Internet.[30] Prices ranged from a flat $69 [31] for one license to undisclosed negotiated prices based on the number of users and feature sets purchased. Software is generally priced according to the number of users (e.g., one license per user, or enterprise licenses based on the expected number of users in the enterprise). One new requirement, implicit from the tolerances, is that originators will have to keep track of the costs listed on the GFE in order to ensure that the tolerances are not exceeded at settlement. Most of the software products HUD examined have the capability to access databases of information, including pricing information, of third-party service providers. Because these systems have the capability to access other databases, they would not need to be redesigned to carry forward prices from the GFE to the closing documents in order to determine if final settlement prices remain within tolerances. The GFE portion of the software would need to be modified to display the consolidated expense categories mandated in the rule. Redesigning the form appears to constitute a minor alteration of the software.

The new GFE also requires additional information. The first page summarizes worst case scenarios for the borrower: the maximum monthly interest rate, the maximum monthly mortgage payment, and maximum loan balance. Such information is obvious for most types of loans but could require more effort to calculate for more exotic loans such as a negative amortizing loan. Some loan origination software will already possess analytical capabilities. However, producers of less sophisticated programs will need to write a few additional lines of code to create the output for the first page of the new GFE. Nonetheless, the final rule will have no impact on the primary function of origination software and would require only minor changes.

Changes to the HUD–1 will have implications for loan origination software. The comparison page, which features a summary of the loan terms, requires lenders to provide information on the loan and settlement costs for page 3 of the HUD–1. Indeed, it is possible that most producers of loan origination software will begin to feature an application that generates an almost complete HUD–1 for the settlement agents to finish. One could add this application to loan origination software fairly easily. It will be a minor change since lenders enter most of the information needed for the comparison page for the GFE. The task facing the programmer will be to set up an interface for entry of additional escrow information needed in the comparison page, populate page 3 of the HUD–1 form with settlement cost and loan term data and print out the HUD–1 form. The software would also perform the important task of calculating the difference between the figures on the initial GFE and the actual settlement costs and then check whether they are within the tolerances.

Depending on the software that a firm has purchased there are three possibilities as to who pays the direct cost of developing new software. The first scenario is that a firm purchases an update of the program. This is a fairly standard option and is generally less than half the price of new software. Given that the changes required by the final rule are fairly minor, the price of an update should compensate software companies for the cost involved in altering their programs.

The second possibility is that a firm purchases new software, in which case the cost of redesigning the forms to comply with the rule will be built into the purchase price. Firms that would purchase new software would include new entrants into the industry, pre-existing firms that would have bought new software for reasons unrelated to the final rule, and firms that use software for which updates are not offered. Many users routinely upgrade software as new versions are released and build the expected expenses into their business plans. To the extent that software is routinely upgraded, the extra costs of implementing the GFE changes will be reduced. In these cases, the software cost to the firm of the final rule is not the purchase price of the software but rather the increase in the purchase price as a result of the costs of redesigning software to meet RESPA guidelines.

A third scenario is that software companies are obliged or volunteer to offer free updates, in which case the software cost of the final rule falls directly on software developers. However, indirectly, the cost of the new software will be shared by real estate and software firms. Software companies that offer free updates will price the risk of changes into the purchase price of the software. If a large unexpected change occurs, then the software company will bear the burden. However, the change required by RESPA will not be unexpected because the final rule will be made public and will not be costly for reasons previously discussed.

In all three scenarios, the cost of an update is a good approximation of the software cost of the rule. In the first scenario in which firms purchase an update, it would probably be an overestimate of the cost to a purchaser because an update may contain other useful improvements to the software. However, it is a reasonable estimate of the cost in that many firms would not purchase an update if not for the final rule. In the second scenario, in which a firm purchases new software, the price of an update could serve as an approximation of the cost of implementing the required changes and thus an estimate of the resulting increase in the price of new software. In the third scenario, where the software companies bear the direct cost of the change, the price of an update could serve as an estimate of the cost to software firms of producing free updates.[32]

In the first two scenarios, where firms bear the burden of the change in the software; the costs of new or updated software will depend upon the number of employees in the firm using the software. Virtually all software companies providing software to lenders for loan origination offer volume discounts. Such a pricing policy reduces the average cost for large firms. Second, in larger firms many employees will have specialized duties that do not include completing the new GFE form and so will not require updated software. Thus, it is likely that small firms will bear a greater per employee software cost from the final rule.

Based upon the discussion above and an examination of software pricing schemes, it is reasonable to make three assumptions in order to estimate the software costs of the final rule: (1) The cost per user is the cost of an update; (2) updates cost less than half of the cost of new software; (3) the costs per user for a firm decline significantly with the number of users. An example of the type of software that a firm might purchase is Bytepro Standard (by Byte Software, Inc., *http://www.bytesoftware.com*). This software has many analytical features such as the ability to calculate maximum loan amounts, which would be required by the new GFE. The software costs $395 for a two user package and $400 for five additional users. The per user cost for the first two is $198. The cost per user for an additional five is $80.

We can safely assume that the industry average of the cost of an update would be no more than $150 for the first user, $100 per user for the average small firm, and $50 for the average large firm.[33] Second, we assume that the proportion of workers involved in origination that use the software declines

[30] Examples are: Vantage ILM, *http://www.vantageilm.com;* Utopia Originator from Utopia Mortgage Software, *http://www.callutopia.com/support.html;* The Mortgage OfficeTM from Applied Business Software, *http://www.themortgageoffice.com/main.asp;* and MORvision Loan Manager from Dynatek, *http://www.dynatek.com/products.asp.*

[31] Good Faith Settlement Software by Law Firm Software; *http://www.lawfirmsoftware.com/software/good-faith-estimate.htm.* Note that this is very basic software compared to other alternatives. More sophisticated software is more expensive.

[32] Correctly estimating the cost to software firms is difficult given the nature of the output. Development is a one-time fixed cost, whereas the cost of delivering software to one user is very low. Given the decreasing average costs, the aggregate economic impact to the software industry would depend upon the number of firms.

[33] Byte Software, Inc. offers an annual support service, which would include updates, for up to ten users for $300 per year. Every additional user over ten cost $30.

with the size of the firm. For small firms, we assume that three-quarters of all workers use the software and will need an update. For large firms, we assume that only half of the workers use origination software and need an update. Given these assumptions, the total cost to the industry of an update would be $33 million, of which $26 million is borne by small firms.[34] This amounts to an average software update cost of $83 per user.

In addition, each employee using the new software would require some time to adjust to the changes. The actual amount of time required to familiarize ones self with the new software is unknown. For this example it is assumed that 2 hours are required. If the opportunity cost of time is $72.12 per hour (based on a $150,000 fully-loaded annual salary), then the opportunity cost of software training would be $144 per worker using the new software. Software users often learn about new modifications without formal training by using them with very little loss of time or productivity. Thus the software training costs estimated below are likely an upper bound. Table 6–8 shows the distribution of these costs by industry and the amount borne by small businesses within each industry. The table uses worker distributions from Table 6–7 and assumes half of the workers in large firms and three-quarters of the workers in small firms use the software and will require upgrades and training. Given these assumptions the total software training cost is $58 million, of which $38 million is borne by small firms. The grand total for software upgrade and training cost is $91 million, of which $65 million is borne by small firms.

TABLE 6–8—ONE-TIME SOFTWARE UPGRADE AND TRAINING COSTS OF THE RULE TO LOAN ORIGINATORS

Industry	Total software upgrade and training cost	Small business cost	Percentage small
Mortgage Brokers	$61,267,428	$52,891,226	86.3
Commercial Banks	11,647,288	3,570,897	30.7
Thrifts	5,249,891	1,099,855	21.0
Mortgage Banks	10,308,241	5,905,531	57.3
Credit Unions	2,569,710	1,122,511	43.7
Total	91,042,558	64,590,020	70.9

Alternative estimates could be made. If 4 hours (instead of 2 hours) of software training were required, then total costs would rise by $57 million to $148 million (with $103 million being the small business cost). Assuming that only two hours are required, but that the proportions of software users were raised to all of the workers in small firms and three-quarters of the workers in large firms, then the total software cost (including training) of the final rule would be $126 million, of which $86 million would be borne by small firms. If the proportions are increased (as in the latter scenario) and the hours are increased (as in the former scenario), then the total cost would be $206 (with $137 million being the small business cost).

The estimates in Table 6–8 above are based on a ''normal'' level of mortgage origination activity and not that of a high volume year which might occur as a result of low interest rates. High volume years bring with them increases in productivity by existing firms and employees (higher rates of loans per employee), new employees, and new entrants. New employees and new entrants would require additional software licenses even if there were no new rule changing the GFE. For this reason, basing the software upgrade compliance burden on a high volume year would overstate the burden. Using the higher rates of productivity associated with refinancing booms to compute software upgrade costs would tend to understate them. Therefore, use of the normal business volume probably provides the most appropriate estimate of this cost. Still, assuming a higher level of origination activity (15,500,000 loans) and a 65% market share for brokers, estimated software costs would be $118 million, and $86 million would be accounted for by small businesses (with one-half of employees at large firms and three-quarters of workers at small firms using the software and requiring 2 hours of training). As noted earlier, the costs of software upgrades required to implement the new GFE apply only to retail loan originators. These costs do not apply to wholesale lenders.

Another way of presenting the software and training costs to loan originators is to distinguish between the costs of the new GFE versus the HUD–1. This break-out is somewhat arbitrary but is useful for the discussion of the costs of the different components of the rule. Suppose the HUD–1 alterations constitute 20 percent of the software and training costs to loan originators, then of the $91,042,558 total costs to loan originators, $72,834,046 stem from the GFE and $18,208,512 from the HUD–1. The costs to small business would be distributed similarly: $52 million from the GFE and $13 million from the HUD–1. One could experiment with different ratios of HUD–1 to GFE costs but the total would not change.

Legal Consultation

Using the new GFE will entail a change in business practices, including making arrangements with third-party settlement service providers to ensure that prices charged will remain within the tolerances of the prices quoted. Loan originators will want to ensure that these arrangements do not violate RESPA. It is highly likely that the trade associations for the mortgage loan origination industries will produce model agreements or other guidance for members to help them comply with the new rule. Loan originators may also want to better understand if there any legal implications of average-cost pricing. Some originators may feel no further need for additional legal advice so that they would have no legal consultation expenses as a result of the rule. Larger originators may wish to seek a greater amount of legal advice, as they perceive themselves to be at greater risk of class action RESPA litigation.

The actual amount and cost of legal services that will be incurred because of the new GFE are unknown. While it is recognized that all firms might not seek legal advice, it would seem that many firms engaged in retail mortgage origination would want some minimal legal advice, so that they understand the new rules and regulations. If all 57,937 firms sought two hours of legal advice at $200 per hour, the fixed legal consultation expense would amount to $23 million. In addition, firms will seek further legal advice based on their volume of transactions; in this analysis, the total volume-based legal expense amounts to 4 times the fixed expense or $93 million. To show that this is a reasonable estimate, suppose a large originator, operating in all 50 states and the District of Columbia, required state-by-state legal reviews averaging 1-person-week (40 hours) per state. At $200 per hour, this would amount to $408,000. If all of the 100 largest originators acquired a similar amount of legal advice, the cost would come to $40.8 million, which leaves approximately $52 million for variable legal costs for other originators.[35] Under these estimates, total legal consultation expenses associated with the new GFE are expected to total $116 million and are distributed among industries and small businesses, which bear 60.3% of the legal cost, as depicted in Table 6–9, which uses information on the distribution of firms and originations.

[34] To demonstrate that our estimate is a safe ceiling, suppose that there are one hundred software firms and that each one pays six programmers an average of $150,000 a year to upgrade the software to reflect the changes incurred by the proposed rule. The total cost to the software industry would be $90 million.

[35] If the per hour cost of legal consultation were greater than $200 per hour, then these estimates would rise proportionately with the increase in hourly legal costs.

TABLE 6–9—ONE-TIME LEGAL CONSULTATION COSTS OF THE NEW GFE

Industry	Total legal consultation cost	Small business cost	Percentage cost to small business
Mortgage Brokers	$73,219,520	$56,375,264	77.0
Commercial Banks	18,186,829	4,934,375	27.1
Thrifts	7,740,284	1,182,697	15.3
Mortgage Banks	12,020,625	5,212,708	43.4
Credit Unions	4,706,743	2,147,722	45.6
Total	115,874,000	69,852,767	60.3

The costs of legal consultation required to implement the new GFE apply only to retail loan originators. Wholesale lenders and settlement agents and other third-party settlement service providers do not provide GFEs and therefore they would not be subject to these costs.

Employee Training on the New GFE

Loan originators must fill out the new GFE and be familiar with its requirements so that they can fill out the form correctly and respond to the borrower's questions about it. So, there would be a one-time expense of training loan originators' employees in the requirements of the new rule in a range of issues such as the new forms and average-cost pricing. While the actual extent of the required training is unknown, a reasonable starting point would be that one quarter of the workers in large firms and one half of the workers in small firms would require training concerning the implications of the final rule. We assume that small firms pay tuition of $250 per worker but that large firms receive a discount and pay only $125 per trainee. If the training lasts an entire day, then the opportunity cost of the time, at $72.12 an hour (based on a $150,000 fully-loaded annual salary) would be $577 per trainee. The total tuition cost to the industry would be $53 million and the opportunity cost of lost time would be $141 million, amounting to a total training cost of $194 million. The total one-time cost for RESPA training for originator staff in the new rule would come to $194 million or $310 per worker (averaged across all workers). The one-time cost for small businesses is $146 million. Table 6–10 depicts the distribution of training costs among the retail mortgage origination industries and for small businesses in each industry. It uses data on workers from Table 6–7.[36]

TABLE 6–10—ONE-TIME WORKER TRAINING COSTS OF THE NEW GFE

Industry	Total training cost	Small business cost	Percentage small business cost
Mortgage Brokers	$134,522,236	$119,387,019	88.7
Commercial banks	22,653,771	8,060,292	35.6
Thrifts	9,981,440	2,482,613	24.9
Mortgage Banks	21,285,461	13,330,070	62.6
Credit Unions	5,148,741	2,533,751	49.2
Total	193,591,648	145,793,746	75.3

As explained earlier, the costs of training are probably best estimated using the more normal mortgage environment, since many of the additional employees during a refinance wave are temporary employees who may either do only general office work that does not require any GFE-specific training or who may be trained on-the-job by existing permanent employees. Still, the higher figures are reported for those who believe they are the relevant figures.

The data and table presented above depict what is likely to be an upper bound for training costs. There are other, less costly ways in which the knowledge necessary to comply with the provisions of the final RESPA rule can be imparted to workers. Small firms, in particular, are likely to take advantage of information on complying with the final rule provided by trade associations and their business partners (such as wholesale lenders), and these firms may find the time and expense of formal training unnecessary. To the extent that this is the case, the estimates reported above will over state the impact on small businesses.

We assume that no training specific to the HUD–1 will be required. Any training in the rule concerning the GFE will cover the HUD–1 as well for the loan origination industry. Almost all of the information required for the HUD–1 is from the GFE. Training concerning tolerances is a GFE issue, even though the calculation is presented on the HUD–1.

Comments Concerning One-Time Adjustment Costs

Comments. Lenders and their trade associations opposed a 12-month implementation period on the basis that 12 months is insufficient time to prepare for compliance with the new requirements. According to one major lender, a 12-month period is far too short given the extensive nature of the changes. This lender estimated that an 18–24 month period will be required for implementation of the proposal as published on March 14, 2008. According to other major lenders, the proposed rule would require significant systems and operational changes well beyond the complex forms changes, and would take a minimum of two years to implement.

Response. HUD has determined to adopt a 12-month implementation period. HUD recognizes that operational changes will be required in order to implement the new rule, in addition to training staff on the new requirements. However, the need for a standardized GFE with relevant information about the loan and settlement charges is critical in light of the problems in the current market and further delay is not warranted. HUD believes that a 12-month implementation period will provide sufficient time for systems changes and training to occur. In order to ensure a level playing field, during the transition period, settlement service providers will be required to comply with the current RESPA requirements. The requirements set forth in the rule will apply to all settlement service providers 12 months after the effective date of the rule.

[36] Sensitivity analysis shows the effects of changing the number of workers participating in the training. If one half (rather than one-quarter) of workers at large firms and three-fourths (rather than one-half) of the workers at small firms attended training, then the total costs would be $314 million (with the small business share being $219 million); the average cost per employee would be $503. However, as noted in the text, there may be other, less costly ways in which the knowledge necessary to comply with the GFE provisions of the final rule can be imparted to workers, which will reduce the number of workers that need formal training.

Compliance and Regulatory Burden: Recurring Costs of the GFE

This section discusses recurring costs associated with the new GFE. Several topics are addressed, some of which have already been discussed in previous sections. We expect that the new GFE will probably be neutral (see the conclusion of Section 0) but that it may impose a burden of ten minutes per application. Assuming that to be the case and that the ratio of applications per loan remain at 1.7, then the annual recurring compliance cost of the GFE from completing applications would be $20.40 per loan, $255 million on all firms, of which $134 is borne by small business. If the loan to application ratio increases to 2.7, then the annual recurring compliance cost of completing applications will be $32.40 per loan, $405 million in total, of which $213 million is imposed on small business (see Table 6–11 below and section VII.D.2). Costs of the additional time spent to arrange the pricing that protects the originator from the costs of the tolerances being exceeded is estimated to be $12 per loan or $150 million annually, of which $79 million is paid by small business. This additional cost of arranging tolerances does not vary by the number of applications per loan.

TABLE 6–11—RECURRING COMPLIANCE COSTS OF THE NEW GFE BY THE NUMBER OF APPLICATIONS PER LOAN

	Per loan cost		Total cost: all firms (millions)		Total cost: small firms (millions)	
Source of Additional Cost	1.7	2.7	1.7	2.7	1.7	2.7
Processing Applications	$20.40	$32.40	$255	$405	$134	$213
Arranging Tolerances	12.00	12.00	150	150	79	79
Initial Underwriting	0.00	11.00	0	138	0	72
Total Cost of GFE	32.40	55.40	405	693	213	364

A third source of recurring compliance costs is that of underwriting additional applications. If there is no change in the application per loan ratio as a result of the rule, then the compliance costs of underwriting additional applications will be zero. If the application per loan ratio increases to 2.7, then the recurring compliance cost from preliminary underwriting will be $11 per loan, $138 million across all firms, of which $72 million is from small business (see Section VI.D.3). The total recurring compliance cost on loan originators of the rule at 1.7 applications per loan is estimated to be $32.40 per loan or a total of $405 million ($213 million from small business). At 2.7 applications per loan, the annual recurring compliance cost of the GFE is $55.40 per loan or a total of $693 million ($364 million from small business).

Cost of Implementing the New GFE Form

This section examines the various costs associated with filling out and processing the new GFE. In their comments on the 2008 proposed rule, loan originators commented that the proposed GFE was longer than today's GFE and that it would take more time to fill out. In addition to settlement charges, the proposed GFE contained loan terms, a trade-off table, a breakout of lender and broker fees, and a breakout of title agent and insurance fees.

There are several aspects of the new GFE that must be considered when estimating the overall additional costs of implementing it. The following discusses the various factors that will reduce costs and possibly add costs to the GFE process. As is made clear by the discussion, there should not be much, if any, additional cost with implementing the new GFE (as compared with implementing today's GFE).

(1) Disclosure of YSP. Under the existing scheme, mortgage brokers are required to report yield spread premiums as ''paid outside of closing'' (POC) on today's GFE and HUD–1. Page 2 of the new GFE has a separate block for yield spread premiums (as well as for discount points). In order to fill out a GFE under the final rule, the mortgage broker must have a loan in mind for which the borrower qualifies from the information available to the originator. Pricing information is readily available to mortgage brokers, so there is no additional cost incurred in determining the yield spread premium or discount points since they have to look and see if there is a yield spread premium under the current regime anyway. Since it is reasonable to assume that all brokers consult their rate sheets prior to making offers to borrowers, it is reasonable to assume that they know the difference between the wholesale price and par. It does not appear that disclosing the yield spread premium or discount points adds any new burden.

(2) Itemization of Fees. The reduction in the itemization of fees will lead to fewer unrecognizable terms on the new GFE.[37] That should lead to fewer questions about them and less time spent answering those questions. Of course, to the extent that the originator is precluded from including junk fees on the GFE, he or she will not have to spend any time trying to explain what they are. The confusion avoided may lead the borrower to better understand what is being presented so that questions on useful topics are more likely to come up and the originator can spend his time giving useful answers (or more time will be spent explaining useful things). In all, the simpler GFE produces a savings in time for originators and borrowers.[38]

(3) Summary Page. A summary page has been added to the new GFE in the final rule. But it should be noted that the summary page of the new GFE asks for basic information (e.g., note rate, loan amount) that is readily available to the originator and thus do not involve additional costs. The summary page simply moves items around or repeats items rather than requiring new work.

(4) Trade-Off Table. There is a burden to producing and explaining the worksheet in Section IV (on page 3 of the GFE) showing the alternative interest rate and upfront fee combinations (the so-called ''trade-off'' table or worksheet). Many commenters said customizing the trade-off table with the individual applicant's actual loan information would be difficult; these commenters recommended a generic example, possibly placing it in the HUD Settlement Booklet, rather than providing it with the GFE. However, it is important to remember that the information in the worksheet is likely to be a reflection of a worksheet the originator already uses to explain the interest rate/upfront fee trade-off. While there may be a burden to explaining how the interest rate-point trade-off works, this explanation is something all conscientious originators are already doing in the origination process. In today's market, most lenders and brokers likely go over alternative interest-rate-point combinations with potential borrowers. For these originators, there is no additional explanation burden arising from the production of this worksheet. To the extent that some lenders only explain one option to a particular borrower (even though they offer others), there would be some additional costs for those lenders. Today, most originators present to borrowers much more complicated sets of alternative products than captured by the worksheet. It is important to remember that the main purpose of the worksheet is simply to sensitize the borrower to the fact that alternative combinations of interest rates and closing costs are available.

With respect to customizing the worksheet to the applicant's actual offer, the information on the applicant's loan is already on the new GFE, so that would not appear to be a significant problem, as that applicant information can be linked directly into the worksheet. Then, there is the issue of the two alternative combinations, one with a lower

[37] The fees in the lender-required and selected services section will still be itemized (e.g., appraisal, credit report, flood certificate, or tax service) as will those in the lender-required and borrower selected section (e.g., survey or pest inspection). There will, however, be no itemization or long lists of various sub-tasks of lender fees or title fees, often referred to as junk fees.

[38] Several items were dropped from the new GFE, as compared with the proposed GFE: The APR, the breakout of the origination fee into its broker and lender components, and the breakout of the title services fee were dropped. These were considered unnecessary for comparison shopping.

interest rate and one with a higher interest rate. Most originators offer loans with several interest rate and point combinations from which the borrower chooses. As noted above, they probably have already discussed these alternative combinations with the applicant. The originator would pick two alternatives from among the options available but not chosen by the borrower when he picked the interest rate and point combination for which his GFE is filled out. The originator would have to punch these other two combinations into his GFE software (two interest rate and point combinations) in order for the software to fill out the form. In the event that the originator does not use software to make these calculations, they would have to be done by hand.

(5) Documentation Costs. Loan originators are required to document the reasons for changes in any GFE when a borrower is rejected or when there are changed circumstances that result in cost increases. Once a GFE has been given, there are several potential outcomes. One is that the loan goes through to closing with tolerances and other requirements met. Another is the borrower terminates the application. Borrowers could also request changes, such as an increase in the loan amount. There could also be a rejection, a counteroffer, or unforeseen circumstances.

The March 2008 proposed rule provided that a borrower could be rejected at the GFE application stage if the loan originator determined that the borrower was not credit worthy. The borrower could not be rejected at the mortgage application stage unless the originator determined there was a change in the borrower's eligibility based on final underwriting, as compared to information developed for such application prior to the time the borrower chose the particular originator. Under the proposed rule, the originator would have been required to document the basis for such a determination and maintain the records for no less than three years after settlement.

One lender commented that under HUD's March 2008 proposed rule, lenders would be required to retain the GFE application for three years which is different from the 25 month retention requirement by TILA or ECOA. The lender commented that this difference presents additional expense without a substantive benefit to the consumer.

The first two require no special treatment. Borrower requested changes do not require documentation but do require a new GFE, as explained in (5) above. The case of borrower rejection (which assumes there is no counteroffer accepted by the borrower) requires documentation today under the Equal Credit Opportunity Act (ECOA). Under ECOA, the originator must document the reason for a rejection and retain the records for 25 months, which is also the requirement in the final rule. Therefore, there is no additional documentation required in case of a rejection. There is no documentation requirement for a counteroffer, but the lender must issue a new GFE to the borrower; the minimal burden associated with issuing an additional GFE.

Documentation for changed circumstances adds a new requirement. The additional burden associated with changed circumstances comes from having to document the reasons for the increase in costs and from determining that the amounts of the increases in charges to the borrower are no more than the increases in costs incurred by the changed circumstances. The Department does not require that a justification document be prepared. Since there are no special reporting requirements when changed circumstances occur, compliance could be met by simply retaining the documentation in a case binder, as any other relevant loan information might be retained in a case binder today. For example, itemized receipts for the increased charges would simply be put in the loan case binder (as they probably are today). Case binders are stored now. The additional cost of identifying and storing the documentation in that binder would be de minimus. This would represent little burden on the originator, particularly since unforeseen circumstances will not be the norm.

There may be some record retention issues with small originators, such as brokers. If small originators retain case binders today, then their situation would be similar to other originators. If they do not retain the case binder today, then they may choose to do so, or they may rely on their wholesalers for record retention. It might well become a selling point for wholesalers. Relative costs of storage, reliability, and accessibility would determine who could best perform this function.

(6) Crosswalk from New GFE to New HUD–1. The HUD–1 in the final rule has been changed so that it matches up with the categories on the new GFE—making it simple for the borrower to compare his or her new GFE with the final HUD–1 at closing. In addition, a comparison page has been added to the HUD–1 to clarify any changes in settlement fees. The simplification of the GFE does not add any burden for the borrower to the comparison of the figures on the two forms—rather it will be reduced since it will now be easier for the borrower to match the numbers from the GFE (issued at time of shopping) with those on the HUD–1 (issued at closing). Compared with today, it also eliminates the step of adding a pointless list of component originator charges to get the relevant figure, the total origination charge. In addition, the elimination of extra itemized fees on the GFE may lead to the elimination of them on the HUD–1 since they may have been on the GFE only to overwhelm the comparison shopper. Even without the new comparison page, the settlement would have been more transparent for the borrower. However, requiring that an additional page be completed will impose some costs on the industry. Compliance costs of the this change are discussed in detail below.

(7) Mortgage Comparison Chart (''Shopping Chart''). The shopping chart is on the third page of the GFE. It is delivered to the borrower as a blank form. The borrower is free to fill it out and use it to compare different loan offers. The loan originator is only required to hand it out, but has the option of answering borrower questions about it. The short, simple, and self-explanatory nature of the form leads the Department to believe that the additional costs per form, if any, borne by an originator would approach zero.

Summary. To summarize, the discussion of the above factors identifies offsetting costs and suggests that there will be little if any additional annual costs associated with the new GFE. Practically all of the information required on the new GFE is readily available to originators, suggesting no additional costs. The fact that there are fewer numbers and less itemization of individual fees suggests reduced costs. The fact that the GFE figures are displayed on the HUD–1 will substantially simply the closing process. In addition, Section VII.D below lists further changes that HUD made to the form that are likely to reduce costs. On the other hand, there could be some small amount of additional costs associated with the optional trade-off table and documentation requirements. If there were additional costs of, for example, 10 minutes per GFE, the dollar costs would total $255 million per year (if the number of applications did not increase as a result of the result).[39] [40] But given the above discussion of offsetting effects and the improvements made to the form, there are likely to be no additional net costs with implementing the new GFE. Note, however, that there is the potential for recurring costs from changes to the HUD–1. This issue is summarized in Section VIII.C.

Detailed Response to the NAR's Analysis of the 2008 IRFA

The National Association of Realtors provided an alternative estimate of compliance costs prepared by Ann Schnare (2008). The main thrust of their report was that HUD had grossly underestimated the

[39] This calculation assumes a $150,000 fully-loaded annual salary; dividing by 2,080 hours yields $72 per hour, or $12 for ten minutes. Assuming 21,250,000 applications, produces a cost figure of $255 million. At 15 minutes, the cost estimate would rise to about $382.5 million. In the higher volume environment (26,350,000 applications), the overall cost figure would be $316.2 million if the per application cost was $12 for ten minutes.

[40] We have used a fully-loaded hourly opportunity cost of $72.12 for highly-skilled professional labor throughout the Economic Analysis. For many functions as well as locations this amount is probably an overestimate of the hourly opportunity cost. However, our goal in the Economic Analysis is to accurately measure the upper bound of the costs of the rule. An alternative method would be to generate an estimate of the average variable cost from industry-specific data. For example, in Tucson, Arizona, the average unit labor cost (salary, bonuses, time off, social-security, disability, healthcare, 401(k), and other benefits) is $30.73 per hour for loan officers ($23.97 for a Loan Officer/Counselor; $28.48 for a Consumer Loan Officer I; and $39.75 for a Consumer Loan Officer II). Additional costs to be considered are rent ($2812.50 per month for 1500 square feet) and computer equipment ($560 per month). Summing this gives us an hourly cost of $31.14. An additional ten minutes per application from handling the forms and ten minutes arranging tolerances leads to an additional twenty-seven minutes per closing and would increase costs by $14 per loan. The estimate of the recurring annual burden of the new GFE could reasonably be assumed to be $175 million, much less than the $405 million used throughout this analysis.

compliance costs of the 2008 proposed rule. The following four sections summarize major comments relevant to estimates of the compliance costs of the new GFE.

Hedging Costs of the New GFE

Comment. The NAR's primary objection to HUD's estimates of the compliance costs of the proposed GFE was that HUD does not account for the hedging costs that an interest rate guarantee would require (Schnare 2008). Indeed, the majority of the NAR's cost estimate for the GFE consists of so-called ''hedging'' expenses. They claim that the rule would require issuers of GFEs to insure against interest rate movements to keep GFE offers open for the required 10 business days. According to the NAR report, the hedging costs could range from $136 to $272 per loan. Making this assumption dramatically increases the cost estimate for the GFE. The NAR's addition of hedging costs quadruples HUD's baseline estimate of the compliance cost of the proposed rule from $45 to $181.

Response. The NAR made an erroneous assumption about the proposed Good Faith Estimate (GFE) that lead them to overstate the compliance costs. A more accurate estimate of the hedging costs would be zero. *Neither the proposed rule nor the final rule requires lenders to guarantee an interest rate quoted on a GFE for a period of ten days.* Interest-dependent items on the GFE (interest rate, monthly payment, YSP/discount points, adjusted origination fees, and daily interest charges) can have a separate availability period that can be as short as the time until a new rate sheet is issued. Only the prices on non-interest-dependent items on the GFE (total origination fees, appraisal fees, title fees, etc.) must remain available for 10 days. These interest-rate-dependent items only become fixed, for purposes of comparison to the HUD–1 at closing, when the borrower locks the interest rate.

Indeed, the NAR study acknowledges that there is no such requirement. Ann Schnare writes: ''HUD's revised GFE has multiple dates for the offer: One for the origination fee and third party settlement costs; one for the quoted interest rate; one for the settlement date; and one for the number of days that the loan must lock before closing (NAR, fn. 6, p. 10).'' HUD let these dates differ because HUD is aware that the hedging costs of an interest guarantee for a period as long as ten days would be very costly.

The loan originator will probably choose a shorter guarantee period for the interest rate because of the hedging costs. Ann Schnare admits this to be a possibility: ''the originator could choose a lock-in [41] period that is considerably shorter than the 10 business days required for other components of the GFE in order to minimize its hedging costs (NAR, p. 9).'' Choosing the guarantee period of the interests rate is a profit maximizing decision made by the originator. The originator will balance the benefits of attracting more customers by extending the guarantee period with the hedging costs of doing so. The current practice of loan originators is to quote an interest rate and other interest-rate-dependent rates with the caveat that the offer would change if market interest rates change. Since there is no reason to believe that hedging behavior will be affected by the rule, hedging costs should not be included as a compliance cost. Once this understanding of the proposed rule is introduced into the NAR's cost estimate of the proposed rule, the NAR's estimate falls from $181 to $45 (identical to HUD's estimate of the cost of the proposed rule) in their low-cost scenario; from $316 to $101 in their intermediate-cost scenario; and from $413 to $141 in their high-cost scenario.

Administrative Costs of More GFE Applications

Comment. A second major criticism by the National Association of Realtors of HUD's regulatory impact analysis of the 2008 proposed rule is that HUD underestimated the administrative costs of the proposed rule by not raising the number of loan applications per GFE. HUD's estimate of the ratio of applications to loans after the rule is implemented is equal to its estimate of the observed ratio of 1.7 in HMDA data. The NAR argues that the number of applications would rise because of increased shopping. Thus, the administrative costs of applications should rise.

Response. It is reasonable to expect that given the improvements to the GFE and the greater rewards from shopping, that the demand for applications would increase. Note, however, that maintaining a ratio of 1.7 loans per application is not inconsistent with more shopping for loan products. First, consumers may shop around and ask a variety of lenders for informal quotes to compare with their GFE. Every inquiry will not necessitate a new GFE. Second, the rule is likely to lead to lower rejection and withdrawal rates of applications because consumers will be more informed going into the loan. HUD expects applications from increased shopping behavior to replace some mortgage applications that may have otherwise resulted in rejections. However, in response to this comment, HUD provides a sensitivity analysis of the effects on administrative costs of increasing applications per loan.

For reasons explained in the above paragraph, the number of applications per loan may remain at 1.7 applications per loan. If the additional administrative burden of an application imposed by the rule is ten minutes per application (as discussed in Section VII.C.1), then the additional burden of the rule translates to 17 minutes per loan (1.7 applications per loan × ten minutes). To derive the opportunity cost of the rule, we multiply 17 minutes by $1.20 per minute (equivalent to the $72 per hour fully-loaded opportunity cost of time, which comes from our $150,000 annual figure), to per loan cost of additional applications of $20.40 per loan. The aggregate impact on the loan origination industry of the administrative burden of completing applications is calculated using the per loan figure: the annual recurring compliance cost is $255 million (12.5 million loans annually × $20.40 per loan). The small business share of the total recurring compliance cost of this administrative burden is $134 million (52.2 percent of $255 million).

Suppose that the number of applications per loans increased by one from 1.7 to 2.7. This was one of the scenarios considered in the NAR's analysis. The NAR hypothesized that this is likely given that consumers may have a greater demand for a GFE once HUD's new GFE, which provides useful and transparent information, is introduced. Calculating the compliance costs due to the additional burden of completing GFEs is straightforward. The additional time spent per loan would be 27 minutes (2.7 application per loan × 10 minutes) and the opportunity cost of that time would be $32.40 per loan (27 minutes × $1.20 per minute). The total recurring compliance cost to the origination industry from applications would be $405 million (12.5 millions loan per year × $32.40 per loan), of which $213 million is borne by small business (52.2 percent of $405 million).

Multiple Preliminary Underwritings

Comment. Every application under the new rule requires preliminary underwriting. Since borrowers who shop may seek out multiple GFEs, there will be multiple underwritings. Commenters said this will add to the underwriting burden firms incur today. The National Association of Realtors calculated an additional cost of multiple underwriting at $30 per loan for an application per loan ratio of 2.7.

Response. Every application under the final rule that generates a GFE will require preliminary underwriting in order to come up with an early offer for the borrower. Originators can charge a fee for issuing a new GFE limited to the cost of a credit report. It is hoped that the charge for this, if any, would be small enough so that it is not a significant deterrent to effective shopping. But whether or not there is a charge, there are real resource costs associated with preliminary underwriting. The additional cost generated depends on the number of applicants and the number of GFEs they receive. Since every completed loan eventually gets underwritten in full, the additional cost of preliminary underwriting depends mainly on the number of additional times that preliminary underwriting occurs beyond the one associated with the full underwriting that would have occurred under the existing scheme.

It cannot be determined how many additional GFEs the average borrower would get under the new rule. Borrowers might continue the informal shopping method that many use today—gathering information and making inquiries to lenders and brokers about their products and their rates, even before deciding to proceed with the request for a more formal quote using the GFE. In other words, they may formally apply only after deciding who offers the best terms. The simple format and clarity of the new GFE form will enhance this informal information gathering process; in fact, the increased efficiency of informal shopping (calling around, checking web sites, etc.) could be an important benefit of the new GFE. Since shoppers as well as originators will be familiar with the GFE, these forms will likely

[41] HUD's understanding is that by ''lock-in'' period, the NAR meant ''guarantee'' period.

serve as a guide for practically any conversation between a shopper and an originator, or for any initial request by a shopper for preliminary information about rates, points, and fees. For these borrowers, the new GFE simply pins down the numbers. Others, on the other hand, may obtain multiple GFEs and use them to shop.

Under the final rule, preliminary underwriting should decrease the number of applications that go to full underwriting (e.g., an applicant may be denied during the preliminary without having been charged for an appraisal); that is, some of the 8.75 million that are not originated may be disapproved at the preliminary stage rather than going through full underwriting (as they might today). This savings in appraisal, verification, and other incremental underwriting costs that are avoided would tend to offset the increase in cost resulting from the extra preliminary underwriting noted in the above paragraph. However, it is difficult to estimate these effects.

An implication of a higher ratio of applications per loan is that the total underwriting costs would increase. Others, on the other hand, may obtain multiple GFEs and use them to shop. The National Association of Realtors estimates that the cost of a preliminary underwriting is $30 ($25 credit report and $5 labor cost). There are currently 1.7 times as many applications as loans originated. Thus, the additional cost per loan for the scenario of 2.7 applications per loan is $30 ($(2.7 - 1.7) \times \$30$) and for 3.4 applications per loan, the additional cost is $52 ($(3.4 - 1.7) \times \$30$). HUD uses different parameters to estimate the cost of increased applications. Instead of a preliminary credit report cost of $25, HUD would use $5. This lower number is not inconsistent with HUD's estimated cost of $25 for a full credit report. A preliminary credit report involves only the FICO score from one credit bureau and so will be much cheaper. Our assumption of an inexpensive preliminary credit report is consistent with what representatives of credit bureaus, in discussions of the effects of the proposed rule, told HUD is likely to happen. Instead of labor costs of $5 (ten minutes at $31.14 an hour); HUD uses $6 (five minutes at $72 an hour). HUD's estimated total cost of a preliminary underwriting would be $11, reducing the additional costs from $30 to $11 at 2.7 applications per loan.

The aggregate impact on the loan origination industry of multiple preliminary underwriting is calculated using the per loan figure: the annual recurring compliance cost is $138 million (12.5 million loans annually $\times$ $11 per loan) at 2.7 loans per application. The small business share of the total recurring compliance cost from additional underwriting is $72 million (52.2 percent of $138 million). If the ratio of applications per loan does not change (remains at 1.7), then there will be no additional compliance cost from multiple preliminary underwriting.

Finally, it should be emphasized that, under the final rule, preliminary underwriting should decrease the number of applications that go to full underwriting (e.g., an applicant may be denied during the preliminary without having been charged for an appraisal). Some of the assumed 8.75 million applications[42] that are not originated may be disapproved at the preliminary stage rather than going through full underwriting (as they might today). We expect an increase in the ratio of accepted applications per loan. This savings in appraisal, verification, and other incremental underwriting costs that are avoided would tend to offset the increase in cost resulting from the extra preliminary underwriting noted above.

Estimate of the Opportunity Cost of Time

Comment. The National Association of Realtors states (see NAR 2008, fn. 10, p. 11) that HUD used one estimate of the value of an employee's time ($31.14 per hour) to calculate the burden of the proposed rule but a higher estimate ($72 per hour) of the opportunity cost of time to calculate the benefits of the time savings of the proposed rule.

Response. HUD uses the estimate of $72 per hour as the opportunity cost of time consistently throughout the regulatory impact analysis to calculate the value of the costs and the benefits of the rule to industry. It is true that HUD includes a discussion of alternative estimates of labor costs in a footnote of Chapter 6 (see below) 37 on page 6–6 of the Regulatory Flexibility Analysis. There, HUD explains that our estimate of $72 per hour may be far above other estimates of labor costs. HUD provides an example of an estimate based on industry data from Tucson, Arizona, where the hourly-wage weighted by industry is $31.14. However, this figure was only presented for illustrative purposes and was not used in the body of the analysis. Note also that HUD uses a lower value of $44 per hour as the opportunity cost of time to consumers (see HUD, 3–120).

The NAR uses the $31.14 hourly wage as a measure of the opportunity cost of an employee's time in their cost estimates of additional underwriting. However, they do not apply this figure consistently throughout their analysis and do not explain why. Because $31 is only 43% of $72, a uniform application of the NAR labor cost estimate would lower the burden of the rule significantly. For example, the recurring costs of the GFE would fall from $32 per loan to $14 in the case of 1.7 applications per loan. Although HUD will consider the NAR's preference for a lower estimate of labor costs, HUD believes that its fully-loaded and upper-bound estimate of $72 is more appropriate for a regulatory impact analysis.

Tolerances on Third-Party Fees

Under the March 2008 proposed rule, loan originators would have been prohibited from exceeding at settlement the amount listed as ''our service charge'' on the on the GFE, absent changed circumstances (''zero tolerance''). The proposed rule also would have prohibited the amount listed as the charge or credit to the borrower for the interest rate chosen, if the interest rate was locked, absent unforeseeable circumstances, from being exceeded at settlement. In addition, the proposed rule would have prohibited Item A on the GFE, ''Your Adjusted Origination Charges'' from increasing at settlement once the interest rate was locked. The proposed rule also would have prohibited government and recording fees from increasing at settlement, absent changed circumstances.

Under the March 2008 proposed rule, the sum of all the other services subject to a tolerance (originator-required services where the originator selects the third party provider, originator-required services where the borrower selects from a list of third party providers identified by the originator, and optional owner's title insurance, if the borrower uses a provider identified by the originator) would have been prohibited from increasing at settlement by more than 10 percent of the sum for services presented on the GFE, absent changed circumstances. Thus, a specific charge would have been able to increase by more than 10 percent, so long as the sum of all the services subject to the 10 percent tolerance did not increase by more than 10 percent.

The rational for the zero tolerance was that a loan originator should know the price of a service if it required the use of its chosen provider. In the case of making referrals, the loan originator could be expected to have some knowledge of the market. In fact, it should have some knowledge if it is to meet even the weakest concept of ''good faith.'' The 10 percent tolerance seemed like a reasonable limit for price dispersion for services obtained in a market that could be competitive if the buyers had good information. It is also simple for borrowers quickly to compute 10 percent of the total fee and determine if final charges are within the tolerance. In order to protect themselves from charges in excess of the limits set by the tolerances, originators would have to gather price information in the market and possibly set up agreements with some third-party providers to perform settlement services at prearranged prices. Those originators who would have gathered more information than they do today or made more pricing arrangements than they do today would have incurred an increase in regulatory burden resulting from the new rule.

Comment. Loan originators wrote that they should not be required to pay the bills for third-party fees in excess of the tolerances since they do not control those fees. They argued that their expertise is as originators, not as appraisers or title companies. They claimed that they do not know who will perform all these services at application, so the price is indeterminate. In addition, there are occasions when services beyond the normal minimum will be required, but that cannot be known at application. For example, additional appraisal work may be required or some work may have to be done to clear up a title problem. So prices and even some services that end up as being required are unknown at application.

Trade groups representing settlement service providers, especially realtors and title companies, focused on the potential anticompetitive effects of the tolerance

[42] There are currently 1.7 times as many applications as loans originated; therefore, if originations are 12.5 million, full underwriting is started (and probably completed) for about 21.25 million applications, including 8.75 million (21.25 million minus 12.5 million originations) that are not originated.

provisions. These groups suggested that large lenders would seek to manage the risks associated with tolerances by contracting with large third party settlement service providers, and thereby placing small settlement service providers at a competitive disadvantage.

In addition to their general objections to the tolerance provisions, lenders and trade groups representing lenders and other settlement service providers strongly supported removing government recording and transfer charges from the tolerances. They stated that these charges are outside of the control of the loan originator and cannot be known with any certainty at the time the GFE is provided.

If the loan originator solves its problem by using only those third-parties that agree to fixed prices, that shifts the burden to the third-party. Small third-party providers made the same argument that small originators made. They then will be disadvantaged relative to large third-party providers by having to bear the risk of the unpredictable cost that cannot be averaged out over a large number of transactions.

Response. Based on the comments received in response to the proposed rule, HUD has revised a number of provisions dealing with the tolerances, and in particular has clarified the situations where the loan originator would no longer be bound by the tolerances. However, HUD has determined that only limited changes are necessary in the tolerances themselves. Through all of these provisions, the final rule seeks to balance the borrower's interest in receiving an accurate GFE early in the application process to enable the borrower to shop around, with the lender's interest in maintaining flexibility to address the many issues that can arise in a complex process such as loan origination.

Many commenters recommended changes to the size of the tolerances for different categories of settlement costs, especially the zero tolerance for loan originator charges. With one exception (government recording and transfer charges), the final rule does not change the amounts of the tolerances permitted for the different categories of settlement costs. As noted in the rule, HUD considered the best available data on the variation in the costs of settlement services, in particular title services, in determining that a 10 percent tolerance is reasonable. No commenters submitted or identified any alternative data sources that would support expanding the tolerances beyond 10 percent.

With respect to the zero tolerance for a loan originator's own charges, HUD recognizes the comments characterizing the tolerance as a settlement cost guarantee. However, the final rule provides substantial flexibility to loan originators in providing a revised GFE when circumstances, unforeseeable or otherwise, necessitate changes. Section 19(a) provides explicit authority for the Secretary to make such interpretations as may be necessary to achieve the purposes of RESPA. Providing a clear, objective standard for what constitutes ''good faith'' under section 5 of RESPA is necessary to provide more effective advance disclosure to home buyers and sellers of settlement costs, and as such, falls directly within the Secretary's interpretive authority under section 19(a).

The one exception to the amounts of the tolerances remaining the same as in the proposed rule is the tolerance for the government recording and transfer charges. HUD has adjusted how these charges are treated under the tolerances, based on the numerous comments received on this issue. The final rule splits the government recording and transfer charges into two categories: government recording charges, and transfer taxes. Recording charges will be subject to a 10 percent tolerance instead.

The opportunity to cure potential violations of the tolerances is an important tool for loan originators to manage compliance with the tolerance requirements. Many lenders and groups representing lenders and other settlement service providers objected to the imposition of tolerances because of the difficulty of providing accurate estimates to prospective borrowers early in the application process. The opportunity to cure will permit loan originators to give an estimate of expected settlement charges in good faith, without subjecting them to harsh penalties if the estimate turns out to be lower than the actual charges at settlement.

HUD understands that tolerances will impose some burden on originators. Since the protection of tolerances kicks in only if the originator requires the use of a particular provider or if the borrower comes to the originator and asks where the services may be purchased within the tolerances, the originator must have reliable third-party settlement service provider pricing information. Some originators might simply check out the market prices for third-party services from time to time, formulate estimates such that several of the prices charged by the third parties fall within the tolerance, and trust that nobody to whom they refer the borrower charges a price in excess of the tolerance.[43] Other originators might want more protection and have contracts or business arrangements in place that have set prices for services that are not in excess of the tolerances.

Either case requires the originator to do more than today, although even today originators fill out GFEs with estimates for third-party settlement services. In the first case, the liability in the event a tolerance is exceeded would lead to at least a little more work gathering information prior to filling out the GFE. In the second case, more work would be involved in formalizing an agreement to commit the third-party to a fixed price. But as noted above, originators today have to have a working knowledge of third-party settlement service prices to fill out a GFE. Therefore, it is only the increase in burden that would need to be accounted for here.

It is difficult to estimate these incremental costs. But to provide an order of magnitude, it is estimated that it takes an average of 10 additional minutes per loan for the originator to arrange the pricing that protects the originator from the costs of the tolerances being exceeded.[44] For a brokerage firm originating 250 loans per year, 10 minutes per loan would come to 42 hours or about one week's worth of one employee's time per year. Thus, this seems to be a reasonable starting point for estimation. For the estimated 12,500,000 loans, that comes to 125,000,000 minutes or 2,083,333 hours. At $72 per hour, which translates to $12 per loan, this comes to a total of $150 million for all firms and $78 million for small firms. If it takes 20 extra minutes per loan instead of 10, these costs come to $300 million and $156 million respectively and would be two weeks of one employee's time per year for a brokerage firm making 250 loans per year. Table 6–12 details the distribution of these costs among the retail mortgage originating industries for the per loan burden of ten minutes. With a larger number of loans (15,500,000), total costs are $186 million for all firms (at 10 minutes per loan) and $97 million for small firms.

TABLE 6–12—INCREMENTAL COSTS OF THIRD-PARTY PRICING ARRANGEMENTS FOR THE NEW GFE

Industry	Total third-party pricing arrangement cost	Small business cost
Mortgage Brokers	$90,000,000	$63,000,000
Commercial Banks	24,637,800	4,678,718
Thrifts	11,697,000	1,441,070
Mortgage Banks	18,618,000	7,737,641
Credit Unions	5,047,200	1,470,754
Total	150,000,000	78,328,183

[43] Other originators may rely on vendor management companies (or vendor management departments within their own company) for pricing information about third-party services.

[44] These 10 minutes would be beyond what the originator spends today to seek out good choices for his borrowers.

One wholesale lender, ABN–AMRO, offers a One-fee program to brokers. In it, the borrower gets a fixed price for many services, including many third-party services. Under the new GFE, arrangements like this would solve the broker's tolerance compliance requirements with the wholesaler making the arrangements for many of the third-party services and negotiating the prices for them. So it may be that (mostly large) wholesalers offer (mostly small) brokers a lower cost alternative to complying with the tolerance requirements of the new rule. If so, then the small business burden above would be an overestimate. Vendor management companies are increasingly appearing in the market, not only providing third-party pricing information, but also offering monitoring and quality control services for originators.

Changes in the Final Rule To Reduce the Regulatory Burden of the GFE[45]

The final rule contains several changes from the 2008 proposed rule that are designed to reduce regulatory burden of the new GFE. Several items that commenters were concerned about have been changed from the 2008 proposed to the final GFE:

• Length of form. Many industry groups complained that the four-page proposed GFE was too long. HUD reduced the form in the final rule to three pages by consolidating the third and fourth pages but still retaining the essential trade-off table and shopping chart.

• Concept of ''GFE application''. Commenters objected to the bifurcated application process (a preliminary ''GFE application'' followed by the final ''mortgage application''), which was designed to promote shopping. There was a fear of commitment by lenders to loan terms based on a preliminary underwriting, as well as fear that that the preliminary underwriting would be based on information that was too limited (borrower's name, social security number, gross monthly income, property address; an estimate of the value of the property; and the amount of the mortgage loan sought). In response, HUD has adopted a single application process for the final rule. Under this approach, at the time of application, the loan originator will decide what application information it needs to collect from a borrower, and which of that collected application information it will use, in order to issue a meaningful GFE. HUD strongly urges loan originators to develop consistent policies or procedures concerning what information it will require to minimize delays in issuing GFEs.

• Volume-based discounts. Small businesses, especially closing attorneys and escrow companies stated that lenders seeking volume discounts would place them at a competitive disadvantage to larger entities and force them out of business. HUD responded by not addressing volume discounts in its final rule.

• Difficulty of meeting tolerances. Many lenders and groups representing lenders and other settlement service providers objected to the imposition of tolerances because of the difficulty of providing accurate estimates to prospective borrowers early in the application process. The final rule provides loan originators with an opportunity to cure any potential violation of the tolerance by reimbursing the borrower any amount by which the tolerances were exceeded. The opportunity to cure will permit loan originators to give an estimate of expected settlement charges in good faith, without subjecting them to harsh penalties if the estimate turns out to be lower than the actual charges at settlement.

Costs Associated With Changes to the HUD–1

This section discusses costs on closing agents associated with the new HUD–1. Section VIII.A explains the data and VIII.B the analysis of costs.

Data on Settlement Service Providers

Section VII.A reproduced background data on the retail mortgage origination industries. Since the GFE affects settlement service providers as well as retail mortgage originators, this section recapitulates data from Chapter 5 on the settlement services industries. Readers are referred to Section IV of Chapter 5 for a more detailed treatment of the data.

Table 6–13 provides the total number of firms, the number of small employer firms, the number of nonemployer firms, and the percent of small firms (employer and nonemployer) in industries that provide settlement services (see Chapter 5 for details on the classification of small employer firms in these industries). These constitute all of the firms in these industries in 2004, according to the Census Bureau. As discussed below, for Offices of Lawyers, Other Activities Related to Real Estate (Escrow), Surveying & Mapping Services, Extermination & Pest Control Services, and Credit Bureaus, the figures in Table 6–13 almost certainly overstate the number of firms actually participating in residential real estate settlements.[46]

TABLE 6–13—FIRMS IN INDUSTRIES PROVIDING SETTLEMENT SERVICES

Industry	Total firms	Small employer firms	Nonemployer firms	Percent small firms
Direct title insurance carriers	2,094	1,865	135	95.5
Title abstract and settlement offices	14,211	7,889	6,203	99.2
Offices of lawyers	401,553	165,127	234,849	99.6
Other activities related to real estate (escrow)	463,545	15,119	448,409	99.996
Offices of real estate appraisers	65,491	15,656	49,802	99.9
Surveying & mapping services	18,224	8,990	9,196	99.8
Extermination & pest control services	18,000	10,018	7,935	99.7
Credit bureaus	1,285	710	545	97.7
Total	984,403	225,374	757,074	99.8

Source: Census Bureau.

Table 6–14 provides the total number of employees in employer firms, and the number and percent of employees in small employer firms for each of the settlement services industries.[47] The Census Bureau does not count owners of employer and nonemployer firms as employees. The number of ''workers'' in these industries is understated by the number of employees as defined by the Census Bureau because in a nonemployer firm the owner is a production worker as is likely also true for the owner of a small employer firm. Using the Census Bureau's count of employees for computing the compliance burden of a rule may tend to

[45] See Chapter 3 for or a treatment of changes listed in this section.

[46] As shown by the fourth column, practically all firms qualify as small businesses. This is partially due to the large number of non-employer firms (which automatically qualify as a small business) included in the Bureau of Census data. See Chapter 5 for further discussion of this issue and for small business percentages for employer firms only. Also note that while the number of firms is drawn from year 2004 data, the small business percentages are based on 2002 data from the Bureau of Census; while they are estimates, they are probably highly accurate ones. Also see Chapter 5 for the source of the small business percentages and for alternative, year-2002-based small business percentages based on firms with less than 100 employees.

[47] The ''Total Employees'' data in Table 6–10 are for the year 2004. The ''Employees in Small Employer Firms'' data are obtained by multiplying the total employee data for 2004 by the percentage of employees in SBA-defined small firms obtained from 2002 Bureau of Census data; thus, the small employee data are estimates but probably highly accurate ones. See Chapter 5 for discussion of the 2002 small business percentages.

understate the burden.[48] Thus in computing the number of workers in these industries, one worker is added for each small employer firm and each nonemployer firm to the total number of employees (see Table 6–16 below for these results).

TABLE 6–14—EMPLOYEES IN INDUSTRIES PROVIDING SETTLEMENT SERVICES

Industry	Total employees in employer firms	Employees in small employer firms	Percent employed by small firms
Direct Title Insurance Carriers	75,702	7,144	9.4
Title Abstract and Settlement Offices	79,819	47,913	60.0
Offices of Lawyers	1,122,723	657,749	58.6
Other Activities Related to Real Estate (Escrow)	67,274	40,074	59.6
Offices of Real Estate Appraisers	45,021	37,300	82.8
Surveying & Mapping Services	61,623	53,610	87.0
Extermination & Pest Control Services	95,437	55,565	58.2
Credit Bureaus	25,555	5,135	20.1
Total	1,573,154	904,490	57.5

Source: Census Bureau (note: non-employer firms not included).

Table 6–15 provides information on the volume of settlements for various industries that participate in the settlement process and the number and percent handled by small firms within each industry.[49] Note that while the distribution among Direct Title Insurance Carriers, Title Abstract and Settlement Offices, Offices of Lawyers, Lawyers and Escrow, Offices of Real Estate Appraisers, and Credit Bureaus is based on all settlements, the numbers and percentages for the other industries (Surveying & Mapping Services and Extermination & Pest Control Services) represent the proportion of settlements in which they are involved.[50] The allocation is based upon estimated dollar revenues from settlements for these industries.[51] Totals are estimated based on the number of mortgage originations, 12,500,000 that would occur in a ''normal'' year of mortgage originations (i.e., not in a year with a refinancing boom).

TABLE 6–15—VOLUME OF SETTLEMENT SERVICE ACTIVITY

Industry	All settlements	Percent of settlements	Settlements by small firms	Percent industry settlements by small firms
Direct Title Insurance Carriers	5,375,000	43.00	258,000	4.80
Title Abstract and Settlement Offices	4,749,953	38.00	2,365,476	49.80
Lawyers and Escrow	2,375,048	19.00	2,137,543	90.00
Total Settlements	12,500,000	100.00	4,761,019	38.09
Offices of Real Estate Appraisers	12,500,000	100.00	10,387,500	83.10
Surveying & Mapping Services	3,600,000	28.80	2,926,800	81.30
Extermination & Pest Control Services	5,500,000	44.00	2,964,500	53.90
Credit Bureaus	12,500,000	100.00	1,312,500	10.50

A larger volume of mortgage activity can also be examined, for example, to reflect a

[48] For example, if worker training were required by the rule, and burden estimates were based on Census Bureau employee statistics, the compliance burden for nonemployer firms would be estimated at zero, while clearly at least one ''worker,'' the owner, would require the training.

[49] The small business percentages in Table 6–12 are the shares of revenue accounted for by small business, as reported and explained in Chapter 5—in other words, the small business share of revenues is being used here as a proxy for the small business share of settlements (or mortgage loans). There are two other points that should be made about these data. (1) Figures for Offices of Lawyers and Other Activities Related to Real Estate (Escrow) are combined into the new ''Lawyers and Escrow'' category. This is because there is insufficient information to allocate volumes of settlements between these two industries (see Section IV.B.5 of Chapter 5 for further explanation). As explained in Chapter 5, the small business revenue share for the combined ''Lawyers and Escrow'' category is raised to 90% (versus 47.8% for all lawyers and 86.9% for escrow firms based on 2002 Census Bureau revenue data) under the assumption that lawyer and escrow firms engaged in real estate activity are likely to be the smaller firms operating in these industries. Note that in Table 6–13 below, the 90% figure is also used for the share of employees in small firms in this combined industry. (2) As explained in Section IV.B.4 of Chapter 5, there are probably no small businesses in the Direct Title Insurance Carriers (DTIC) industry, which includes the large title insurance firms. The 4.8% figure in Table 6–12 (as well as the 9.4% figure in Table 6–10) is reported to remain consistent with the Bureau of Census data—including it or excluding it does not affect the results in any significant way.

[50] See Step (9) in VII.E.1 of Chapter 3 for the calculation of the proportion of settlements for Surveying & Mapping Services and Extermination & Pest Control Services. Because of their relatively small shares of the overall mortgage business, different shares for these industries would not materially affect the overall small business shares of revenue. While it is recognized that the other industries may not be involved in every mortgage origination and settlement transactions (e.g., an appraisal may not be required for some mortgage originations), they are certainly involved in most such transactions and, therefore, it is assumed here that they are involved in all transactions.

[51] As explained in Chapter 5, there is also some uncertainty about the distribution of mortgage-related business and revenues among the various title-related industries. Table 6–12 assumes the following distribution: Direct Title Insurance Carriers (43.0%), Title Abstract and Settlement Offices (38.0%), and Lawyer and Escrow (19.0%). Section IV.B.5 of Chapter 5 considers other distributions and suggests the following ranges for the specific industry shares: Direct Title Insurance Carriers (35%–50%), Title Abstract and Settlement Offices (29%–43%), and Lawyer and Escrow (17%–29%). Given limited available information, it is difficult to determine a precise estimate, which is why Chapter 5 includes several sensitivity analyses. But obviously, reducing the relative weight of the DTIC or increasing the relative weight of the lawyer-escrow industry would increase the small business share of settlements. Readers are referred to Section IV of Chapter 5 for a more complete analysis of the relative importance of each title-related industry, particularly as it affects the overall small business percentage for title- and settlement-related work.

''refinance environment''.[52] In this case, the volume of settlement activity would be distributed as follows: 6,665,000 for Direct Title Insurance Carriers, 5,889,941 for Title Abstract and Settlement Offices, 2,945,059 for Lawyers and Escrow, 4,464,000 for Surveying & Mapping Services, 6,820,000 for Extermination & Pest Control Services, and 15,500,000 for both Offices of Real Estate Appraisers and Credit Bureaus.[53]

The employee figures reported in Table 6–14 misstate the number of workers actually participating in residential real estate settlements. This section offers some estimates of that figure, although it is recognized that they are subject to some uncertainty given the limited information that is available. Table 6–16 provides one estimate of the total number of workers and the number and percent of workers in small firms engaged in performing settlements by industry. For Title Abstract and Settlement Offices and the combined Lawyers and Escrow industry, it is based on the volumes of settlement activity depicted in Table 6–15 and the productivity level of Title Abstract and Settlement Offices (i.e., settlements per worker).

The figure for total workers in Title Abstract and Settlement Offices is the sum of: All employees (79,819), small firms (7,889), and nonemployer firms (6,203), or 93,911. (Small firms and nonemployer firms are added to count the owners of those firms as production workers as discussed in the description of Table 6–14 above). The corresponding figure for workers in small firms is the sum of: employees of small firms (47,913), small firms (7,889), and nonemployer firms (6,203), or 62,005 workers (representing 66% of all workers in Title Abstract and Settlement Offices). These figures are reported in Table 6–16 below. In this industry, there are 50.6 settlements per worker (obtained by dividing the 4,749,953 settlements from Table 6–15 by the 93,911 workers).[54]

In the combined Lawyers and Escrow industry group, worker productivity is assumed to be half of that in Title Abstract and Settlement Offices on the grounds that these workers may not do settlements full time and because of the general lack of information on the degree of settlement activity in these broadly defined industries. Thus, the number of workers in this category (93,914) is computed by dividing the number of settlements handled by the industry from Table 6–15 divided by one-half the settlements per worker in the Title Abstract and Settlement Offices industry.

For Direct Title Insurance Carriers, many workers are not engaged in actual settlements, but rather in the title insurance function itself. Direct Title Insurance Carriers provide title insurance through agents as well as both direct sales of title insurance and associated settlement services to consumers through branch offices. They also, of course, perform the title insurance function itself. HUD examined the annual reports of the large direct title insurance carrier companies to attempt to estimate the proportion of employees of these companies engaged in providing settlement services. It is estimated that approximately 70 percent of workers in this industry, or 54,391 workers, are engaged in providing settlement services. (See Table 6–16.)[55]

TABLE 6–16—WORKERS ENGAGED PERFORMING SETTLEMENTS

Industry	Total workers	Workers in small firms	Percent of workers in small firms
Direct Title Insurance Carriers	54,391	6,401	11.77
Title Abstract and Settlement Offices	93,911	62,005	66.03
Lawyers and Escrow	93,914	84,523	90.00
Total	242,217	152,929	63.14

The estimated numbers of title and settlement workers would be larger under market conditions producing a larger volume of mortgage activity. The estimated distribution of settlements when overall mortgage volume is 115,500,000 was given earlier. To adjust the worker estimates in Table 6–16 to reflect the higher mortgage volume requires information about the increase in productivity (i.e., loans per worker) during the higher volume (or heavy refinance) environment. It is not correct to simply adjust the number of workers up by the percentage increase in mortgage loans because the number of loans per worker increases during refinance booms. The earlier analysis of brokers and lenders provided estimates of additional workers in a higher volume market. That analysis was based heavily on trend data through 2002 for the number of workers in the broker industry, as reported by David Olson and his firm, Wholesale Access. The number of loans per broker increased between low and high volume years. Similar trend data do not exist showing the number of title and settlement workers during recent refinance booms. Thus, any adjustment would be somewhat speculative. But it is also important to emphasize that workers hired during high-

[52] In the projection given in the text, home purchase loans were assumed to stay the same (7.5 million, or 60% of the 12.5 million in mortgages), while refinances increased from 5 million (or 40% of the 12.5 million mortgages) to 8 million of the 15.5 million total (home purchases remain at 7.5 million).

[53] The settlement volume for small businesses during a high volume year can be obtained using the small business percentages from Table 6–12, giving: 319,920 for Direct Title Insurance Carriers, 2,933,191 for Title Abstract and Settlement Offices, 2,650,553 for Lawyers and Escrow, 3,629,232 for Surveying & Mapping Services, 3,675,980 for Extermination & Pest Control Services, 12,880,500 for Offices of Real Estate Appraisers, and 1,627,500 for Credit Bureaus.

[54] There are two caveats with this estimate. First, the estimate depends on the number of settlements in the Title Abstract and Settlement industry, which, as discussed in an earlier footnote, could differ from the number reported in Table 6–12 (see Section IV.B.5 of Chapter 5 as well as the earlier footnote for possible ranges of estimates). Second, not all workers in the Title Abstract and Settlement industry are engaged in single-family real estate transactions, which means that the number of workers is overstated and therefore the number of settlements per worker is understated. (Unfortunately, there is no information on the proportion of Title and Abstract workers engaged in single-family mortgage activity, although it is likely that most are.) If the number of settlements per worker is too low, the projection will overstate the number of workers needed.

[55] In 2004, the DTIC industry employed 77,702 workers (based on the definition of worker used in the text). HUD estimates that approximately 70 percent, or 54,391, are engaged in providing settlement services. HUD computed an estimate of the proportion of salaries that large title insurance companies paid to workers engaged in settlement services as follows: (1) The amount of revenue required to carry out the insurance function for policies written by agents was computed as the difference between agent-generated revenue and agent commissions (or agent retention expenses); (2) two percentages were then calculated, (a) the percentage of agent-generated revenue required for the insurance function in agent-written policies as (1) divided by total agent-generated revenue, (b) the percent of all insurance revenue required for the insurance function for agent-written policies as (1) divided by total insurance revenue; (3) the salaries for employees providing the insurance function for agent-written policies was computed by multiplying (2)(b) by total salary expenses; (4) the total salaries for employees engaged in direct sales of insurance (including other settlement services) and providing the insurance function for direct-sales policies was computed by subtracting (3) from total salary expenses; (5) the salaries of employees providing the insurance function for direct-sales policies was computed by multiplying (2)(a) by (4); (6) the salaries of employees selling title insurance directly (and providing other settlement services) was computed by subtracting (5) from (4); finally (7) the percent of salaries paid to employees selling title insurance directly (and providing other settlement services) was computed by dividing (6) by total salary expenses. This analysis was carried out using 2005 data from the annual reports of four title insurance companies (First America, Land America, Fidelity National, and Stewart). The percentage computed in (7) ranged from 67.7 percent to 72.8 percent. Based on these results, HUD assumes that 70 percent of DTIC workers are engaged in providing direct title insurance sales and other settlement services.

volume years, for example, are more likely to be temporary or part-time workers. Temporary workers will likely rely on permanent workers for training or information about new rules and regulations. Thus, the numbers in Table 6–16 providing estimates of workers in the title and settlement industry serve as a reasonable basis for analyzing the effects of the new regulation among the various settlement and title industries, recognizing that the numbers could vary somewhat depending on the volume of mortgages considered in the analysis.

Estimates of the number of single-family-mortgage-related workers in Surveying & Mapping Services, Extermination & Pest Control Services, and Credit Bureaus are not included because there are insufficient data upon which to base an estimate. Mortgage-related work accounts for a relatively small portion of the overall activity of these industries, and information is not available to separate single-family-mortgage-related business from other activity. In addition, data on workers for these industries are not needed for the analysis of cost savings below. While this information is also not needed below for the appraisal industry, it is possible to produce reasonable estimates of workers for this industry because single-family-mortgage-related work likely accounts for most of the activity in this industry. Using the methodology described above (adding employees of employer firms, non-employer firms, and owners of small firms to arrive at the number of workers), the appraisal industry in the projection year would include 110,479 workers, and 102,758 of these work in small firms.[56] While some of these appraisers focus on multifamily and commercial properties and/or conduct appraisals for local governments (e.g., estimating the value of properties for tax purposes), most are likely involved in single-family mortgage-related activities.[57]

One-Time Costs of the New HUD–1

Introduction

The new HUD–1 is simpler than the existing HUD–1. Nevertheless, there will be change in the form, including the introduction of the comparison page, and the settlement industry will need to learn how the new form works. The primary focus will be on how to put the numbers in the right place. The major changes in the HUD–1 itself are to make it more comparable to the GFE. Accordingly, to facilitate comparison between the HUD–1 and the GFE, each designated line in Section L on the final HUD–1 includes a reference to the relevant line from the GFE. Borrowers will be able to easily compare the designated line on the HUD–1 with the appropriate category on the GFE. Terminology on the HUD–1 has been modified as necessary to conform to the terminology of the GFE. For example, since Block 2 on the GFE is designated as ''your credit or charge for the specific interest rate chosen'', Line 802 on the HUD–1 is also designated ''your credit or charge for the specific interest rate chosen.''

The comparison page of the HUD–1, which is an additional page, will represent a more significant change for the industry than the slight revisions of the current pages. Although some training may be required, it is not likely to be substantial since settlement agents are already very familiar with what information to provide at a closing. The comparison page displays any differences between the settlement charges on the GFE and the HUD–1 on the top half. On the bottom half of the comparison page, there is a summary of loan, in a manner similar to the GFE. The burden of the comparison page of the HUD–1 is most likely to be felt as a one-time adjustment cost imposed on software developers. In response to the March 2008 proposed rule, many lenders expressed the concern that the way the new HUD–1 forms are to be completed would require numerous changes with significant operational and technology impacts. These costs can be categorized similarly as for the new GFE: software costs (including training), legal consultation costs, and training costs. The total one-time compliance cost to the industry is $188 million, of which $139 million is borne by small business.

Settlement Software Costs

Developers of settlement software and settlement agents will be subject to software costs. They will face the following two changes: A reorganization of the HUD–1 form and the requirement of the HUD–1 comparison page explaining the crosswalk between the GFE and the final HUD–1. The changes to the HUD–1 form would not require much work from programmers. The only programming to be done is changing the manner in which information is displayed on the HUD–1 form. First, there will be fewer fees. Second, references to the corresponding figures in the GFE would need to be inserted by the software developers.

Including the comparison page would require more effort because it is completely new. The programming itself would not be challenging since the new page only contrasts data from the HUD–1 and the GFE, shows whether the tolerances are met, and displays data concerning loan terms. The more complex calculations concerning the loan terms are not required to be done by the settlement agent but by the lender. Loan originators must transmit settlement cost and loan term data to the settlement agents for page 3 (the comparison page) of the HUD–1 form. As discussed previously, lenders will provide most, if not all, of the data for the comparison page of the HUD–1. Settlement agents will need new software for the simple reason that the form will change. There will also be a strong demand by settlement agents for new software that checks the tolerance calculations given the importance of the comparison page as a means to double check the final figures.

We will assume that the costs of software updates and software training to the settlement industry are the same as for the new GFE. Given the number of workers and the distribution by firm size, the total cost of new software and training is $62 million, of which $46 million is borne by small business. The cost of the changes to software is $14 million (of which $11 million is borne by small business) and the opportunity cost of the time spent learning the new software is $48 million (of which $34 million is borne by small business).

To arrive at a total one-time cost for the HUD–1, we add the additional cost of $18 million of new loan origination software as a result of the HUD–1 to the $62 million for the settlement industry's new software, which yields a total one-time software cost of $80 million to the entire industry. Adding the $13 million of HUD–1 related software costs from small loan originators to the $46 million imposed on small settlement firms yields a total of small business one-time compliance costs of $59 million.

Legal Consultation Costs

Legal consultation will be less involved for the HUD–1 form than for the new GFE. However, settlement firms may require additional legal consultation to inform on a diverse set of issues, such as average cost-pricing, to be on the safe side. We make the same assumptions as for the GFE: All firms purchase a minimum of two hours of legal consultation at a cost of $200 an hour and that additional legal services are demanded on the basis of the volume of business. We estimate that the total legal costs to the settlement industry will be $37 million of which $18 million is borne by small business. The cost of legal fees is lower for the HUD–1 form than for the GFE because there are fewer firms involved in settlement than in mortgage origination.

Training Costs

Workers who perform settlements will need to learn how to fill out the new HUD–1 form and in some cases, calculate whether the change in settlement fees is within the tolerance. The quantities are provided to settlement agents by the GFE, so training will be much less involved. Assuming four hours of training at an opportunity cost of $72.12 per hour (based on a $150,000 fully-loaded annual salary); tuition of $250 per worker for small firms and a discounted tuition of $125 per worker for large firms; and that half of the workers in small firms and one quarter of the workers in large firms require training; then the total cost of training is $71 million, of which $62 million is borne by small business.

Recurring Costs of the New HUD–1

There are few recurring costs associated with the revised HUD–1. The revised HUD–

[56] The total number of workers is derived as follows: 45,021 employees in employer firms (from Table 6–14) *plus* 49,802 non-employer firms (from Table 6–13) *plus* 15,656 owners of small firms (from Table 6–13), which yields 110,479 workers. The number of workers in small businesses is derived as follows: 37,300 employees in small employer firms (from Table 6–14) *plus* 49,802 non-employer firms (from Table 6–13) *plus* 15,656 owners of small firms (from Table 6–13), which yields 102,758 workers in small businesses.

[57] One would think that practically all of the owners of the 49,802 non-employed firms appraised single-family properties, as well as most of the 37,300 employees in small employer firms. One could argue that the number of workers for the entire industry in 2004 is an upper bound since mortgage activity in that year was higher than in the projection year. Additionally, automated valuation models (AVMs) may have reduced the demand for appraisers; particularly on refinance loans (see Section V.A of Chapter 5 for a discussion of AVMs).

1 will very likely have fewer entries than the existing HUD–1 which will require fewer explanations of figures than is true with the existing forms. This is because of the combined subtotals presented in many sections in the new GFE in lieu of the frequently numerous broken out individual fees that we see on the GFE. The same is true when comparing the revised HUD–1 to the existing HUD–1. Comparing the new GFE to the revised HUD–1 should be simpler than in the past because it will be much easier to find entries on the new HUD–1 that correspond to the new GFE because they have the exact same description. And, of course, there are fewer entries to deal with. It is hard to imagine how simpler forms could be more costly to explain to borrowers.

There may be recurring costs from the addition of the comparison page (page 3) of the HUD–1. This new page will serve two purposes: (1) as a crosswalk between the HUD–1 form and page 2 of the GFE and (2) presenting a summary of the loan terms similar to page 1 of the GFE. The costs of completing this page are minor. For originators it could be close to zero. Although the lender has to provide the settlement agent with information on the loan terms and some of the loan settlement charges, it should not constitute an additional burden. *First*, if the loan originator used a software program to generate the GFE, he or she would already have entered those data. A typical software program would print a HUD–1 for an originator that would contain all of the required data concerning loan terms and settlement costs. The only information that is not already there is information concerning the escrow account. *Second*, transmitting the information on page 3 to the settlement agent will not constitute an additional burden either: lenders and brokers already send documents to settlement agents, the cost of an additional page will not be noticeable. However, there may be a small burden in certain cases, and so we assume that the average burden is ten minutes per loan.

Settlement agents may also face an additional burden, although this is not likely either since the lenders are responsible for providing the data. The settlement agent may have to fill out the form if the lender does not transmit it on a completed HUD–1 page 3. The settlement agent may also want to check the information concerning settlement costs, tolerances, and loan terms to make sure they agree with the GFE. In some cases, the settlement agent will have to calculate the tolerances. Preparing page 3 of the HUD–1 may also alert the settlement agent to inconsistencies that would not have to be resolved before closing. Thus, although the addition of this page may have a very small impact, we assume that it will add five minutes on average to the time it takes to prepare a settlement. Taking loan originators into account, the total time burden is fifteen minutes per loan. The compliance cost of the change to the HUD–1 for the industry as a whole is thus $18 per loan (fifteen minutes at $72 per hour).[58] The recurring compliance cost to the industry would be $225 million annually ($18 per loan × 12.5 million loans annually), of which small business would bear $107 million annually. During a high-volume year (15.5 million loans annually), the annual recurring compliance cost of the HUD–1 would be $279 million annually.

The benefits of the comparison page of the HUD–1 are not estimated separately from the benefits of the new GFE ($6.48–$8.38 billion, see Section I.B of Chapter 3). It is assumed that page 3, which displays tolerances and loan terms, reinforces the consumer savings of the new GFE by compelling settlement agents and borrower to check the compliance with the tolerances. The comparison page is a vital part of the reform. Requiring it is expected to increase the number of consumers who realize the full benefits of the final rule. The benefit of the comparison page is to double-check the final figures.

Changes in the Final Rule to Reduce the Regulatory Barrier of the HUD–1

Recurring Costs of the HUD–1 Addendum

Comment. Many comments were opposed to the proposed HUD–1 Addendum or ''script'' of the 2008 proposed rule. The purpose of requiring settlement agents to complete and read this form document was to have them describe, at settlement, the terms of the loan and to compare the settlement charges on the GFE to those on the HUD–1. The primary objection to the script was the time costs. HUD estimated the worst case scenario of the added time required of a non-conscientious agent dealing with a very complicated loan product to be an additional forty-five minutes. We assumed that the script would lead to an additional thirty minutes preparing the script, and an additional fifteen minutes to the actual closing procedure consisting of five minutes reading the script, and ten minutes answering questions. To be cautious, we applied this estimate to establish the outer bound of the opportunity cost of the closing script to the settlement firm at $54 per settlement. The total cost of the script in a normal year (12.5 million originations) could be $676 million. Settlement industry groups were concerned about the potential additional costs of preparing and reading the script.

A second objection is that the script could place a settlement agent in the position of committing the unauthorized practice of law. This would occur if they were required to answer questions concerning issues such as the loan terms for which they had no responsibility.

Response. At recent roundtables, representatives of the settlement industry have assured HUD that their primary goal is transparency and customer service. HUD assumed that without the script settlement agents would neither take any time to explain the HUD–1 to borrowers nor take any time to answer questions. Thus, HUD's cost estimate of the script may be exaggerated. In the world of the conscientious settlement agent, the additional burden of the script at closing would be closer to zero. However, because of the concern expressed concerning the implications of the potential cost and legal implications of the script, HUD will not require a script in its final rule.

To replace the script, HUD has added a page to the HUD–1 form. This will contain much of the same information but will be much easier to fill out and will not have to be read by the settlement agent. The top half will contain a table that compares settlement charges with those on the GFE and shows the amount and percentage by which the charges have changed (in order to check whether the change is within the tolerance). The bottom half of the page consists of a summary of the loan terms, very similar to the first page of the GFE.

The impact of this change is to reduce the maximum additional time imposed, which is expected to be imposed by the rule, from 45 minutes to 15 minutes per loan. At an opportunity cost of time of $72 an hour for industry, this translates to a decrease in the regulatory burden of $36 per loan, or $450 million over an expected 12.5 million loans.

Difficulty Comparing the New GFE and HUD–1

Under the March 2008 proposed rule, the current HUD–1/1A Settlement Statements would have been modified to allow the borrower to easily compare specific charges at closing with the estimated charges listed on the GFE. The proposed changes would have facilitated comparison of the two documents by inserting, on the relevant lines of the HUD–1/1A, a reference to the corresponding block on the GFE, thereby replacing the existing line descriptions on the current HUD–1/1A. The proposed instructions for completing the HUD–1/1A would have clarified the extent to which charges for individual services must be itemized. The script was proposed to facilitate the comparison.

Many commented that borrowers would require more help in comparing the new GFE to their HUD–1. Lenders, mortgage brokers and title and closing industry representatives generally stated that the HUD–1 should be in the same format as the GFE to enable comparisons of estimated and actual charges. A lender association stated that the proposed changes to the HUD–1 fall short of making the GFE and HUD–1 correspond. Lenders also stated that the proposed HUD–1 is not consistent with the disclosures mandated by TILA.

A consumer group stated that while referencing the GFE lines on the settlement statement is an important step, HUD should mandate a summary settlement sheet that corresponds exactly to the summary sheet of the GFE. According to this group, this would obviate the need for a crosswalk between the GFE and the settlement statement. The consumer group stated that the HUD–1 should be easily comparable to the GFE and should facilitate, rather than hinder TILA and HOEPA compliance.

One broker suggested that HUD had created three different documents—the GFE, the HUD–1 and the Closing Script—that

[58] As for the GFE, an alternative method could be used to generate an estimate of the opportunity cost of time spent on a script. Instead of assuming a $72.12 opportunity cost (from a $150,000 fully-loaded salary), one could construct a cost estimate from industry-specific data. For example in Tucson, Arizona, the cost of labor (compensation and benefits) of a Real Estate Clerk is $16.66 per hour and $74.61 per hour for a Real Estate Attorney.

present the same information in completely different formats, and this will add to costs and confusion.

HUD agrees with the many commenters who pointed out the importance of comparability between the GFE and the HUD–1. The main strategy for facilitating comparability between the GFE and HUD–1 will be by inclusion of a new third page comparison chart with the HUD–1. This will clearly present whether settlement fees are within the tolerances on the top half of the page and will present a description of the loan in a similar fashion to the GFE on the bottom half.

The final rule provisions for describing some loan terms in the page 1 of the GFE and page 3 of the HUD–1 are similar to the Truth in Lending Act (TILA) regulations, however the differences in approach between the TILA regulations and HUD's RESPA rule make them more complementary than duplicative. The TILA and RESPA approaches to mortgage loan terms disclosure are most similar when the loans are very simple, e.g., fixed interest rate, fixed payment loans. The approach differs for more complex loan products with variable terms. In general, TILA describes how variable terms can vary (e.g., the interest rate or index to which variable interest rates are tied, how frequently they can adjust, and what are the maximum adjustment amounts, if any), but forecasts the ''likely'' outcome based on an indefinite continuation of current market conditions (e.g., the note rate will be x in the future based in the index value y as of today). The RESPA disclosures in the GFE and HUD–1 comparison page focus the borrower on the ''worst case scenario'' for the loan product to ensure borrowers are fully cognizant of the potential risks they face in agreeing to the loan terms. The disclosures on the GFE are meant to be as simple and direct as possible to communicate differences among loan products. HUD's approach to these disclosures thus supports consumers' ability to shop for loans among different originators. For a given set of front-end loan terms (initial interest rate, initial monthly payment, and up-front fees), originators have an incentive to offer borrowers loans with worse back-end terms (e.g., higher maximum interest rate, higher prepayment penalty) to the extent capital markets are willing to pay more for loans with such terms. While brokers are required to disclose such differentials on the GFE and HUD–1, lenders are not. HUD's GFE will help consumers to quickly and easily identify and distinguish loan offers with similar front-end terms, but worse back-end terms, while shopping for the best loan. Requiring a comparison page will act to double-check the HUD–1 and thus enhance the realization of the benefits of the simpler GFE.

Efficiencies and Reductions in Regulatory and Compliance Burden

Efficiencies come from time saved by both borrowers and originators as a result of forms that are easier to use, competitive impacts in the market, the decrease in the profitability of searching for victims, and the decrease in discouraged potential homeowners. All these are ongoing as opposed to one-time costs. The value of time saved for borrowers is $1,169 million and for industry $1,166 million (the sum of time saved answering borrowers' questions and from the simplicity of average-cost pricing). There are also positive spillovers of increasing consumers' level of awareness. First, consumers will be less susceptible to predatory lenders and therefore this type of wasteful activity will be discouraged, freeing up resources for more productive purposes. Second, by better understanding the loan product, there will be a decrease in the probability of default leading to foreclosure, which can cause dramatic social costs.

Shopping Time Saved by Borrowers

Consumers will save time in shopping for both third-party services and mortgage loans as a result of the new GFE. HUD expects that the time savings for consumers will counterbalance some of the costs imposed on industry. The increased burden on originators of arranging third-party settlement services is likely to be much more than offset by a reduction in the aggregate shopping burden for third-party providers incurred by borrowers. Originators will be highly motivated to find low third-party prices. Originators could pass the savings on and make it easier to appeal to borrowers, or alternatively, could raise their origination fee by the savings in third-party fees and earn more profit per loan. Or the final result could fall somewhere in between the two. Regardless of which path any originator chooses, the lower third-party prices work to his or her advantage; originators will probably be aggressive in seeking out lower prices.

The borrower benefits to the extent that, upon receipt of the GFE, he or she immediately has good pricing information on third-party services. The borrower could immediately decide to use the originator's third parties, in which case his or her search is over. Or, the borrower could search further with the originator's prices as a good starting point and available as a fall-back, in which case the borrower's search efforts are likely to be greatly reduced. In both cases the borrower searches less, but spending less time searching does not imply less benefits from the search.

The final GFE also creates time efficiencies by making mortgage loan details more transparent to consumers. Shopping will be encouraged because consumers will have an easier time understanding and comparing loans with a standard and comprehensible GFE. The final rule increases the amount of information processed by consumers; shopping accomplished; and the benefits realized from doing so.

It is possible that under the final rule that some consumers will want to spend more time searching. Although additional time spent searching reduces the time spent on other activities such as leisure, the reward of search is an increase in consumer savings. Assuming that the GFE increases the productivity of every hour of search, it therefore also increases the relative opportunity cost of leisure. Consumers will spend more time shopping to receive additional income. Under these circumstances an increase in the time spent shopping does not constitute a burden imposed by the rule since the increase in time is voluntary. Consumers are free to remain at previous lower levels of shopping and enjoy a lower increase in saving from the rule.

We do not expect the average consumer to spend more time searching because there are other effects that should dominate the incentive described above. First, the higher productivity in search of the new GFE increases a consumer's savings at all levels of search: Consumers will be able to reduce their level of effort and retain the same level of saving previous to the rule.[59] Second, we expect that a large portion of the increase in savings will be independent of an individual's shopping behavior. As the market becomes more competitive, shoppers who are less sophisticated or less diligent may still benefit from the competitive pressure of others' shopping. This additional saving will allow consumers to spend less time searching. The time that they do spend searching, however, will be more effective and lead to greater savings. The new GFE will allow consumers to spend more time comparing and evaluating offers and less time trying to decipher the loan details.

Given that consumers will reduce the time spent searching as a result of this rule, then we would be underestimating the benefits to consumers by only counting the gain in income from reduced fees and not the gain in time saved. Considering the number of loans the average originator closes per year, the aggregate decrease in search efforts by borrowers is very likely to exceed the increase in aggregate search effort by the originators. For example, if each borrower saves an average of 15 minutes in shopping for third-party services, then the total savings to borrowers would be $234 million.[60] As discussed Sections VII.E.1 and VII.E.2 on tolerances, the new form and the tolerances will enable borrowers to save time shopping for loans and for third-party settlement service providers. If the new forms save the average applicant one hour in evaluating offers and asking originators follow-up questions, borrowers save $935 million.[61] The total value of borrower time saved

[59] These effects are equivalent to the income and substitution effects of consumer theory to understand the effect of a price change on the consumption of a good. In this case, the increase in productivity of shopping should be considered as reduction in the price of savings in terms of leisure. The income and substitution effect move in the same direction for the normal good whose price has changed but the opposite directions for the substitute.

[60] Calculated as follows: 21,250,000 projected mortgage applications (see Chapter 2) times $44 per hour times 0.25 hour (or 15 minutes) gives $233.750 million. The $44 per hour figure is based on the average income ($92,000) of mortgage borrowers, as reported by HMDA; the $92,000 income figure is divided by 2,080 hours to arrive at the hourly rate of $44.23 or $44. If the borrower saved 30 minutes in shopping time, then the total savings would be $468 million.

[61] Calculated as follows: 12,500,000 loans times 1.7 applications per loan times 1 hour per application times $44 per hour, the average hourly income of loan applicants ($92,000 per year/2,080 hours per year). See earlier footnote.

shopping for a loan and third-party services comes to $1,169 million.[62]

Time Saved by Originators and Third-Party Service Providers

Originators and third-party settlement service providers will save time as well. If half the borrower time saved in (1) above comes from less time spent with originators and third-party settlement service providers, then originators spend half an hour less per loan originated answering borrowers' follow-up questions and third-party settlement service providers spend 7.5 minutes less with borrowers for a saving of $765 million[63] and $191 million, respectively, for a total of $956 million.[64]

Time Saved From Average Cost Pricing

As discussed in Chapter 3, the final rule allows pricing based on average charges. This reduces costs because firms do not have to keep up with an itemized, customized cost accounting for each borrower. This not only saves costs when generating the GFE, it is also saves quality control and other costs afterwards. Industry sources have told HUD that this could be the source of significant cost savings.

As explained above, there will be reductions in compliance costs from average cost pricing. It is estimated that the benefits of average cost pricing (e.g., reduction in the number of fees whose reported values must be those specifically incurred in each transaction) will lead to a reduction in originator costs of 0.5 percent, or $210 million. No breakdown of fees is needed. No knowledge of an exact fee for each specific service needed for the loan is required for the GFE. In addition, no exact figure for the amount actually paid needs to be recorded for each loan and transmitted to the settlement agent for recording on the HUD–1. The originator only needs to know his or her approximate average cost when coming up with a package price that is acceptable. The cost of tracking the details for each item for each loan is gone.

[62] The benefits are calculated by using the ratio of 1.7 applications per loan, which is a measure of the current state of affairs. Although we calculate administrative costs for firms at different ratios (1.7 and 2.7), it would be misleading to calculate consumer benefits at higher ratios. Going from an average of 1.7 to 2.7 applications per loan does not save the average consumer more time. It is clear that the consumer will not be harmed because the increase in applications is voluntary but should not be counted as an efficiency. As argued in the text, we believe that the net change in time spent searching will be negative.

[63] Calculated as follows: 12,500,000 loans times 1.7 applications per loan times 0.5 hours per application times $72 per hour, the average hourly income of loan originators ($150,000 per year/2,080 hours per year).

[64] Just as we do for consumers, we estimate the value of time efficiencies using the 1.7 application per loan ratio even when comparing it to costs generated using the higher 2.7 ratio. It would not be logical to claim that we are saving a firm any time by requiring them to process additional applications. However, it may be sensible to reduce the recurring compliance costs from assuming a higher number of applications because the additional application will not be as much of a burden as it was before.

Social Efficiencies

In this section, we discuss two social efficiencies of the rule: The reduction of non-productive behavior and positive externalities of preventing foreclosures.

Reduction in Non-Productive Behavior

By reducing the profitability of searching for less-informed borrowers, the rule will lead to a more efficient allocation of resources.

The primary benefit to consumers is the transfer of surplus from firms that charge significant markups. Much of the excess fees earned by loan originators and settlement firms is extracted costlessly. Price-discriminating firms are able to assess the information asymmetry between themselves and potential borrowers and estimate the consumers' willingness to pay a markup beyond the costs of originating a loan. Most loan originators base their estimates of a consumer's level of information on signals from the consumer. They do not need to expend additional time or resources to do so. However, there is a minority of loan originators that devote significant resources to advertising to borrowers with a lower expected level of financial sophistication. If the rule leads to a reduction in predatory behavior, there will be a gain in social welfare equal to the costs of actively searching for less informed borrowers.

The loan originator acts to maximize his or her expected profit. By raising the requested settlement charges above the settlement costs, a loan originator increases his or her mark-up but increases the probability that the consumer will reject the offer. The extent of a consumer's knowledge of the market will also raise the probability of rejecting a markup. The optimal markup is the one at which the net revenues from offering loans at higher prices and a higher rejection rate equals the net revenues from offering loans at lower competitive prices and a lower rejection rate. It is expected that the rule will increase the average individual's information; increase the likelihood that they would reject excessive fees; and thus reduce the prevalence of high markups. This reduction is what constitutes the transfer to borrowers of $668 per loan.

An aggressive seeker of fees may choose to actively search for less informed borrowers who are more likely to accept loans with excessive fees. The optimal level of search effort is the one at which the marginal cost of searching is equal to the change in probability of acceptance from finding less informed clients times the markup (marginal benefit of search). By increasing the level of information among consumers, the rule will raise the marginal cost of searching for vulnerable borrowers and thus will lead to a lower optimal level of searching by loan originators.

Whenever producers expend substantial effort to extract consumer surplus, there is a deadweight loss. The predatory lender diverts resources from producing output to producing markups (consumer loss). By creating transparency and enhancing a consumer's understanding, the rule will not only lead to transfers of excess fees to consumers but will inhibit costly predatory behavior. Reducing this activity will lead to a net gain in social welfare equal to the sum of the marginal costs of extracting the markup.

The total transfer to consumers of $5.88 billion represents 14 percent of the total revenue of originators, which is projected to be $42.0 billion. As explained above, this gain in surplus is greater than the loss to producers when firms are engaged in wasteful predatory behavior. If the decline in this activity represented 1 percent of current originator effort, this would result in $420 million in social surplus. In the absence of this activity, these resources could be devoted elsewhere making society richer. The transfer to consumers is composed of both the lost excess profits from markups and the deadweight loss from the inhibited predatory activity to achieve those markups. Thus, the gain to consumers will outweigh the loss in profits of predatory firms.

External Benefits of Preventing Foreclosures

Another social benefit of the rule is its contribution to sustainable homeownership. It is more likely that consumers who understand the details of their loans will avoid default and thus foreclosure. There are two ways in which this rule will contribute to sustainable homeownership. The first is to encourage shopping by providing a transparent disclosure of settlement costs and other loan details. Such competitive market behavior should reduce settlement costs and provide a small cushion for borrowers in the eventuality of financial distress. The second is by educating consumers and helping them choose the loan that is most appropriate. A better understanding of the loan details should lead to a better understanding of the risks inherent in assuming a large financial obligation, and thus a better decision by the borrower as to the best loan or even whether homeownership is the optimal choice.

Factors that precipitate default are downward trends in property values, a loss of income of the borrower, and an increase in interest rates for borrowers with adjustable-rate mortgages (ARMs). None of these events can be predicted with certainty and understanding the loan itself cannot eliminate the uncertainty. However, a full appreciation of the potential risks of the loan should lead to a careful decision as to whether the loan vehicle is the best one given the uncertainty. For example, knowing how high your interest rate and monthly payments can go should make the loan applicant hesitant to accept an ARM unless the borrower has the income security to do so. Given the same information, different borrowers may choose different loans depending on their risk and time preferences. However, it is important that they make an informed decision.

There is strong evidence that borrowers underestimate the costs of adjustable rate loans. Buck and Pence (2008) assessed whether borrowers know their mortgage terms by comparing the distributions of these variables in the household-reported Survey of Consumer Finances (SCF) to the distributions in lender-reported data. The authors find that although most borrowers seem to know basic mortgage terms, borrowers with adjustable-rate mortgages

appear likely to underestimate or to not know how much their interest rates could change. Borrowers who could experience large payment changes if interest rates rose are more likely to report not knowing these contract terms. Difficulties with gathering and processing information appear to be a factor in borrowers' lack of knowledge. The final GFE would present critical loan terms such as the maximum monthly payment on the first page in order to better inform borrowers.

The least desirable consequence of an uninformed decision is foreclosure. The Joint Economic Committee of the U.S. Congress estimates the total costs to society at close to $80,000 per foreclosure. The foreclosed upon household pays moving costs, legal fees, and administrative charges of $7,200. A study from the Federal Reserve Bank of Chicago reported that lenders alone can lose as much as $50,000 per foreclosure. Standard and Poor's describes these costs as consisting of loss on loan and property value, property maintenance, appraisal, legal fees, lost revenue, insurance, marketing, and clean-up. Of these costs, the primary cost to lenders is the cash loss on property.

The lender and borrower are not the only parties to suffer from a foreclosure. It is often argued that there are negative impacts to the value of neighboring properties from a foreclosure. There are many reasons for these externalities. There is an amenity value to having an up kept property next door; foreclosed properties if vacant can attract crime; and there may also be a depressing effect on the local economy. A reasonable estimate of the negative externality of a foreclosure on nearby properties is $1,508. In addition, the local government loses $19,227 through diminished taxes and fees and a shrinking tax base as home prices decrease. The total benefits of preventing a foreclosure is $77,935 in averted costs. It is difficult to estimate how many foreclosures a uniform and transparent GFE with settlement fee tolerances would prevent. However, preventing 1,300 foreclosures nationwide would yield $100 million of benefits.

Other Efficiencies

There are other potential efficiencies that are anticipated from the new GFE approach but would be difficult to estimate. For example, studies indicate that one impediment to low-income and minority homeownership may be uncertainty and fear about the home buying and lending process. The new GFE approach should increase the certainty of the lending process and, over time, should reduce the fears and uncertainties expressed by low-income and minority families about purchasing a home (see Section VII.F of Chapter 3). As discussed in Section IV.D.4 of Chapter 2, improvements in lender information (e.g., interest and settlement costs) should also lend to a general increase in consumer satisfaction with the process of taking out a mortgage (see CFI Group, 2003).

[FR Doc. E8–27070 Filed 11–14–08; 8:45 am]

BILLING CODE 4210–67–P

Reader Aids

Federal Register

Vol. 73, No. 222

Monday, November 17, 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, NOVEMBER

65241–65494 3
65495–65714 4
65715–65966 5
65967–66142 6
66143–66486 7
66487–66712 10
66713–67098 12
67099–67358 13
67359–67710 14
67711–68288 17

CFR PARTS AFFECTED DURING NOVEMBER

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:
8313 65491
8314 65493
8315 65961
8316 65963
8317 65965
8318 66713
Executive Orders:
13477 65967
Administrative Orders:
Notices:
Notice of November 10, 2008 67097
Notice of November 10, 2008 67357

5 CFR

294 66143
300 66157
359 66143
362 66143
451 66143
530 66143
531 66143
532 .....65495, 66143, 66487
534 66143
536 66143
550 66143
591 .....65241, 66143
630 .....65496, 66143
731 66489
831 66143
842 66143

6 CFR

Proposed Rules:
Ch. I 65783
5 67422

7 CFR

248 65246
915 66715
981 66719
1427 65715
1735 65724
1980 65503
3560 65505
Proposed Rules:
305 66200
319 .....66200, 66807
340 66563
1735 65783

8 CFR

217 67711

9 CFR

94 65255

10 CFR

611 66721
Proposed Rules:
50 66000

12 CFR

19 66493
201 65967
204 .....65506, 67713
370 66160
585 65257
Proposed Rules:
327 67423
Ch. VI 65567
1231 67424

13 CFR

120 67099

14 CFR

23 .....65968, 66163
25 65968
29 65968
33 65968
35 65968
39 .....65507, 65509, 65511, 65972, 65975, 65977, 65979, 66497, 66512, 66737, 66738, 66740, 66743, 66745, 66747, 67359, 67361, 67363, 67368, 67372, 67374, 67376, 67379, 67383, 67714, 67716, 67718, 67720, 67722
71 .....66514, 66515
73 67102
93 .....66516, 66517
97 .....66517, 67726, 67728
Proposed Rules:
39 .....67110, 67112, 67427, 67429, 67433, 67813, 67815, 67817, 67820
25 66205
71 .....66207, 67823, 67824
121 .....66205, 67115
125 67115
129 66205
135 67115

15 CFR

740 65258
772 65258
774 65258

16 CFR

1420 67385
1500 67730

17 CFR

190 65514
232 65516
270 65516
Proposed Rules:
1 67435
38 67435

18 CFR

35 65526
40 67387

19 CFR

102 66171

20 CFR

404 ....65541, 66520
416 ....65541, 66520

Proposed Rules:

404 ....66563, 66564
405 66563
416 ....66563, 66564

21 CFR

1 66294
17 66750
101 66754
884 66522

Proposed Rules:

17 66811
1310 66815

23 CFR

Proposed Rules:

620 67117
635 67117
636 67117
710 67117

24 CFR

203 68204
3500 68204

25 CFR

15 67256
18 67256
179 67256

26 CFR

1 ....65981, 65982, 66539, 67387, 67388
602 65982
702 67103

Proposed Rules:

1 ....66001, 66568

28 CFR

Proposed Rules:

58 67435

29 CFR

825 67934
4022 67389
4044 67389

30 CFR

56 66171
57 66171
71 66171
700 67576
724 67576
773 67576
785 67576
816 67576
817 67576
845 67576
846 67576
870 67576
872 67576
873 67576
874 67576
875 67576
876 67576
879 67576
880 67576
882 67576
884 67576
885 67576
886 67576
887 67576

Proposed Rules:

926 66569

31 CFR

359 65543
560 66541

Proposed Rules:

103 ....65567, 65568, 65569, 66414
Ch. X 66414
538 67825
560 67825

32 CFR

578 66754

33 CFR

117 ....66542, 66543
165 ....65544, 65982, 67104

Proposed Rules:

117 ....66001, 66571
165 67444

36 CFR

7 67739
13 67390
223 65546
261 65984

Proposed Rules:

7 65784

37 CFR

1 ....66754, 67750
2 67759
3 67759
6 67759
7 67759
11 67750
201 66173
255 66173

38 CFR

1 65258
3 65726
4 66543
17 ....65260, 65552
20 65726
21 65260

Proposed Rules:

3 65280
17 65282

39 CFR

3020 ....67350, 67393, 67708

Proposed Rules:

3001 67455

40 CFR

49 67107
50 66964
51 66964
52 ....66182, 66554, 66555, 66759, 67776
53 66964
55 65269
58 66964
59 66184
75 65554
81 66759
131 ....65735, 67396
147 65556
180 ....65739, 66775, 66780, 67397, 67400
355 65452
370 65452
721 65743

Proposed Rules:

52 ....66209, 67825, 67827
55 65804
59 66209
63 66694
81 67821
131 67455
141 67456
143 67456

41 CFR

61–250 65766

42 CFR

422 67406
423 67406
440 66187

43 CFR

4 67256
11 65274
30 67256
404 67778

44 CFR

64 ....65775, 67414
65 ....65777, 67416
67 65778

Proposed Rules:

67 ....65811, 66574, 67463

45 CFR

1602 67791

47 CFR

64 67419
73 ....66198, 66199, 66559, 66560, 67419, 67420, 67421
90 67794

Proposed Rules:

51 ....66585, 66821
54 66821
61 66821
69 66821
73 ....66002, 66210, 66588, 66589, 66830, 67828

48 CFR

Ch. 1 ....67064, 67093, 67650, 67705
2 ....67064, 67651
3 67064
9 67064
22 67651
42 67064
52 ....67064, 67651

49 CFR

385 65565
395 65565
571 66786
585 66786
1244 66802

50 CFR

20 ....65274, 65926
21 65926
222 ....65277, 66803
223 ....65277, 66803
229 ....67801, 67803
300 67805
600 ....67805, 67809
622 67809
648 67811
679 ....66561, 66805, 67809
697 67805

Proposed Rules:

17 ....66003, 66831
226 65283
648 67829

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 NOVEMBER 17, 2008

AGRICULTURE DEPARTMENT

Animal and Plant Health Inspection Service

Agricultural Bioterrorism Protection Act of 2002:

Biennial Review and Republication of the Select Agent and Toxin List; published 10-16-08

COMMERCE DEPARTMENT

National Oceanic and Atmospheric Administration

General Provisions of the Magnuson-Stevens Fishery Conservation and Management Act; Minor Amendments to Regulations; published 11-17-08

CORPORATION FOR NATIONAL AND COMMUNITY SERVICE

AmeriCorps National Service Program; published 9-17-08

EDUCATION DEPARTMENT

Privacy Act Regulations; published 10-16-08

ENVIRONMENTAL PROTECTION AGENCY

Approval and Promulgation of Air Quality Implementation Plans:

Louisiana; published 9-16-08

Texas; Dallas/Fort Worth 1-Hour Ozone Nonattainment Area; Determination of Attainment of the 1-Hour Ozone Standard; published 10-16-08

Approval and Promulgation of Implementation Plans:

Florida; Removal of Gasoline Vapor Recovery from Southeast Florida Areas; published 9-16-08

Underground Storage Tank Program:

Approved State Program for Hawaii; published 9-17-08

Withdrawal of Federal Water Quality Standards Use Designations:

Soda Creek and Portions of Canyon Creek, South Fork Coeur d'Alene River, and Blackfoot River in ID; published 8-19-08

FEDERAL COMMUNICATIONS COMMISSION

Carriage of Digital Television Broadcast Signals; Amendment to Part 76 of the Commission's Rules; published 10-17-08

FEDERAL RESERVE SYSTEM

Reserve Requirements of Depository Institutions; published 11-17-08

HEALTH AND HUMAN SERVICES DEPARTMENT

Centers for Disease Control and Prevention

Possession, Use, and Transfer of Select Agents and Toxins; published 10-16-08

Possession, Use, and Transfer of Select Agents and Toxins; Correction; published 10-30-08

HOMELAND SECURITY DEPARTMENT

Coast Guard

Drawbridge Operation Regulation:

Cumberland River, Nashville, TN; published 10-15-08

HOMELAND SECURITY DEPARTMENT

Additional Countries Designated for the Visa Waiver Program; published 11-17-08

HOUSING AND URBAN DEVELOPMENT DEPARTMENT

Public Housing Operating Fund Program; Increased Terms of Energy Performance Contracts; published 10-16-08

INTERIOR DEPARTMENT

Fish and Wildlife Service

Endangered and Threatened Wildlife and Plants:

Designation of Critical Habitat for the San Bernardino Kangaroo Rat; published 10-17-08

INTERIOR DEPARTMENT

National Park Service

Special Regulation; Areas of the National Park System, National Capital Region; published 11-17-08

TRANSPORTATION DEPARTMENT

Federal Aviation Administration

Standard Instrument Approach Procedures, and Takeoff Minimums and Obstacle Departure Procedures; Miscellaneous Amendments; published 11-17-08

TRANSPORTATION DEPARTMENT

Pipeline and Hazardous Materials Safety Administration

Pipeline Safety:

Standards for Increasing the Maximum Allowable Operating Pressure for Gas Transmission Pipelines; published 10-17-08

COMMENTS DUE NEXT WEEK

AGRICULTURE DEPARTMENT

Animal and Plant Health Inspection Service

Agency Information Collection Activities; Proposals, Submissions, and Approvals:

Importation of Small Lots of Seed; comments due by 11-28-08; published 9-29-08 [FR E8-22835]

Johne's Disease in Domestic Animals; Interstate Movement; comments due by 11-28-08; published 9-29-08 [FR E8-22834]

National Animal Health Monitoring System; Goat 2009 Study; comments due by 11-28-08; published 9-29-08 [FR E8-22827]

Importation of Ash Plants; comments due by 11-24-08; published 9-23-08 [FR E8-22194]

Importation, Interstate Movement, and Release into the Environment of Certain Genetically Engineered Organisms; comments due by 11-24-08; published 10-9-08 [FR E8-23584]

AGRICULTURE DEPARTMENT

Rural Utilities Service

Standards and Specifications for Timber Products Acceptable for Use by Rural Development Utilities Programs' Electric and Telecommunications Borrowers; comments due by 11-28-08; published 9-29-08 [FR E8-21798]

COMMERCE DEPARTMENT

National Oceanic and Atmospheric Administration

Atlantic Highly Migratory Species; Atlantic Commercial Shark Management Measures; comments due by 11-26-08; published 10-27-08 [FR E8-25557]

DEFENSE DEPARTMENT

Defense Acquisition Regulations System

Defense Federal Acquisition Regulation Supplement; Government Property (DFARS Case 2007-D020); comments due by 11-24-08; published 9-24-08 [FR E8-22419]

ENERGY DEPARTMENT

Federal Energy Regulatory Commission

Version Two Facilities Design, Connections and Maintenance Reliability Standards; comments due by 11-24-08; published 10-23-08 [FR E8-25051]

ENVIRONMENTAL PROTECTION AGENCY

Aldicarb, Ametryn, 2,4-DB, Dicamba, Dimethipin, Disulfoton, Diuron, et al.; Tolerance Actions; comments due by 11-24-08; published 9-24-08 [FR E8-22078]

Approval and Promulgation of Air Quality Implementation Plans:

Illinois; comments due by 11-28-08; published 10-29-08 [FR E8-25659]

Virginia; Movement of Richmond and Hampton Roads 8-Hour Ozone Areas from the Nonattainment Area List to the Maintenance Area List; comments due by 11-28-08; published 10-29-08 [FR E8-25671]

West Virginia; Ambient Air Quality Standards; comments due by 11-28-08; published 10-28-08 [FR E8-25655]

Approvals and Promulgations of Implementation Plans:

State of California; 2003 State Strategy and 2003 South Coast Plan for One-Hour Ozone and Nitrogen Dioxide; comments due by 11-24-08; published 10-24-08 [FR E8-25468]

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]

Federal Requirements Under the Underground Injection Control (UIC) Program:

Carbon Dioxide (CO2) Geologic Sequestration

(GS) Wells; comments due by 11-24-08; published 7-25-08 [FR E8-16626]

National Emission Standards for Hazardous Air Pollutant Emissions:

Group I Polymers and Resins (Epichlorohydrin Elastomers Production, HypalonTM Production, Nitrile Butadiene Rubber Production, etc.); comments due by 11-24-08; published 10-10-08 [FR E8-23373]

New Mexico; Incorporation by Reference of Approved State Hazardous Waste Management Program; comments due by 11-28-08; published 10-28-08 [FR E8-25533]

New Mexico; Incorporation by Reference of State Hazardous Waste Management Program; comments due by 11-28-08; published 10-28-08 [FR E8-25535]

Pesticide Tolerances:

Cyfluthrin; comments due by 11-24-08; published 9-24-08 [FR E8-22477]

Pendimethalin; comments due by 11-24-08; published 9-24-08 [FR E8-22434]

Registration Review; Azadirachtin Docket Opened for Review and Comment; comments due by 11-24-08; published 9-24-08 [FR E8-22387]

Regulating Greenhouse Gas Emissions Under the Clean Air Act; comments due by 11-28-08; published 7-30-08 [FR E8-16432]

Revisions to the California State Implementation Plan:

San Diego Air Pollution Control District; comments due by 11-24-08; published 10-24-08 [FR E8-25310]

San Diego County Air Pollution Control District; comments due by 11-24-08; published 10-24-08 [FR E8-25311]

Texas:

Final Authorization of Initiated Changes and Incorporation by Reference of Hazardous Waste Management Program; comments due by 11-28-08; published 10-29-08 [FR E8-25589]

Final Authorization of State-initiated Changes and Incorporation by Reference of State Hazardous Waste Management Program; comments due by 11-28-08; published 10-29-08 [FR E8-25587]

FEDERAL COMMUNICATIONS COMMISSION

Television Broadcasting Services:

Fort Wayne, IN; comments due by 11-28-08; published 10-28-08 [FR E8-25724]

Superior, NE; comments due by 11-28-08; published 10-28-08 [FR E8-25725]

Universal Service Contribution Methodology, etc.; comments due by 11-26-08; published 11-12-08 [FR E8-26849]

FEDERAL DEPOSIT INSURANCE CORPORATION

Agency Information Collection Activities; Proposals, Submissions, and Approvals; comments due by 11-24-08; published 9-23-08 [FR E8-22258]

Financial Education Programs That Include the Provision of Bank Products and Services; Limited Opportunity to Resubmit Comment; comments due by 11-24-08; published 10-24-08 [FR E8-25377]

Minimum Capital Ratios; Capital Adequacy Guidelines; Capital Maintenance; Capital:

Treatment of Certain Claims on, or Guaranteed by, Fannie Mae and Freddie Mac; comments due by 11-26-08; published 10-27-08 [FR E8-25555]

Processing of Deposit Accounts in the Event of an Insured Depository Institution Failure:

Large-Bank Deposit Insurance Determination Modernization; Limited Opportunity to Resubmit Comment; comments due by 11-24-08; published 10-24-08 [FR E8-25376]

FEDERAL HOUSING FINANCE BOARD

Federal Home Loan Bank Boards of Directors:

Eligibility and Elections; comments due by 11-25-08; published 9-26-08 [FR E8-22659]

FEDERAL HOUSING FINANCING AGENCY

Federal Home Loan Bank Boards of Directors:

Eligibility and Elections; comments due by 11-25-08; published 9-26-08 [FR E8-22659]

FEDERAL RESERVE SYSTEM

Agency Information Collection Activities; Proposals, Submissions, and Approvals; comments due by 11-24-08; published 9-23-08 [FR E8-22258]

Minimum Capital Ratios; Capital Adequacy Guidelines; Capital Maintenance; Capital:

Treatment of Certain Claims on, or Guaranteed by, Fannie Mae and Freddie Mac; comments due by 11-26-08; published 10-27-08 [FR E8-25555]

HEALTH AND HUMAN SERVICES DEPARTMENT

Food and Drug Administration

Agency Information Collection Activities; Proposals, Submissions, and Approvals; comments due by 11-24-08; published 10-23-08 [FR E8-25338]

HOMELAND SECURITY DEPARTMENT

Coast Guard

Consumer Price Index Adjustments of Oil Pollution Act of 1990 Limits of Liability - Vessels and Deepwater Ports; comments due by 11-24-08; published 9-24-08 [FR E8-22444]

Security Zones:

Port of Mayaguez; PR; comments due by 11-24-08; published 9-23-08 [FR E8-22242]

Potomac and Anacostia Rivers, Washington, DC, Arlington et al.; comments due by 11-26-08; published 10-27-08 [FR E8-25435]

HOMELAND SECURITY DEPARTMENT

Privacy Act of 1974; Implementation of Exemptions:

Department of Homeland Security General Legal Records; comments due by 11-24-08; published 10-23-08 [FR E8-24997]

Privacy Act; Systems of Records; comments due by 11-28-08; published 10-28-08 [FR E8-25612]

INTERIOR DEPARTMENT

Fish and Wildlife Service

Endangered and Threatened Wildlife and Plants;

Designating the Northern Rocky Mountain Population of Gray Wolf as a Distinct Population Segment:

Removing this Distinct Population Segment from the Federal List of Endangered and Threatened Wildlife; comments due by 11-28-08; published 10-28-08 [FR E8-25629]

INTERIOR DEPARTMENT

Reclamation Bureau

Public Conduct on Bureau of Reclamation Facilities, Lands, and Waterbodies; comments due by 11-24-08; published 9-24-08 [FR E8-22423]

JUSTICE DEPARTMENT

FBI Records Management Division National Name Check Program Section User Fees; comments due by 11-25-08; published 9-26-08 [FR E8-22710]

LIBRARY OF CONGRESS

Copyright Office, Library of Congress

Fees; Extension of Time to File Comments; comments due by 11-24-08; published 10-31-08 [FR E8-26063]

NUCLEAR REGULATORY COMMISSION

List of Approved Spent Fuel Storage Casks; NAC-UMS (Revision 5); comments due by 11-26-08; published 10-27-08 [FR E8-25539]

SMALL BUSINESS ADMINISTRATION

Debt Collection:

Clarification of Administrative Wage Garnishment Regulation and Reassignment of Hearing Official; comments due by 11-26-08; published 10-27-08 [FR E8-25324]

TRANSPORTATION DEPARTMENT

Federal Aviation Administration

Airworthiness Directives:

Air Tractor, Inc. Models AT 200, AT 300, AT 400, AT 500, AT 600, and AT 800 Series Airplanes; comments due by 11-24-08; published 10-23-08 [FR E8-25286]

Aircraft Industries a.s. (Type Certificate G60EU, etc.) Model L 23 Super Blanik Sailplane; comments due by 11-28-08; published 10-29-08 [FR E8-25661]

Boeing Model 737-100, et al.; comments due by 11-

24-08; published 10-8-08 [FR E8-23828]

Boeing Model 747-100, et al.; comments due by 11-24-08; published 10-8-08 [FR E8-23821]

Boeing Model 747 Airplanes; comments due by 11-24-08; published 10-8-08 [FR E8-23824]

Bombardier Model CL 600 2C10 (Regional Jet Series 700, 701 & 702) Airplanes and Model CL 600 2D24 (Regional Jet Series 900) Airplanes; comments due by 11-24-08; published 10-23-08 [FR E8-25309]

Meetings:

Proposed Modification of Dallas/Fort Worth, TX Class B Airspace Area; comments due by 11-26-08; published 8-26-08 [FR E8-19275]

Modification of Class D Airspace:

MacDill AFB, FL; comments due by 11-28-08; published 10-14-08 [FR E8-24109]

Proposed Establishment of Special Air Traffic Rule, in the Vicinity of Luke AFB, AZ; comments due by 11-25-08; published 9-26-08 [FR E8-22568]

TREASURY DEPARTMENT
Comptroller of the Currency

Agency Information Collection Activities; Proposals, Submissions, and Approvals; comments due by 11-24-08; published 9-23-08 [FR E8-22258]

Minimum Capital Ratios; Capital Adequacy Guidelines; Capital Maintenance; Capital:

Treatment of Certain Claims on, or Guaranteed by, Fannie Mae and Freddie Mac; comments due by 11-26-08; published 10-27-08 [FR E8-25555]

TREASURY DEPARTMENT
Internal Revenue Service

Regulations Enabling Elections for Certain Transactions under Section 336(e); comments due by 11-24-08; published 8-25-08 [FR E8-19603]

TREASURY DEPARTMENT
Thrift Supervision Office

Minimum Capital Ratios; Capital Adequacy Guidelines; Capital Maintenance; Capital:

Treatment of Certain Claims on, or Guaranteed by, Fannie Mae and Freddie Mac; comments due by 11-26-08; published 10-27-08 [FR E8-25555]

VETERANS AFFAIRS DEPARTMENT

Presumption of Service Connection for Amyotrophic Lateral Sclerosis; comments due by 11-24-08; published 9-23-08 [FR E8-21998]

Vocational Rehabilitation and Employment Program; Periods of Eligibility; comments due by 11-28-08; published 12-30-99 [FR E8-22726]

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.

CFR CHECKLIST

This checklist, prepared by the Office of the Federal Register, is published weekly. It is arranged in the order of CFR titles, stock numbers, prices, and revision dates.

An asterisk (*) precedes each entry that has been issued since last week and which is now available for sale at the Government Printing Office.

A checklist of current CFR volumes comprising a complete CFR set, also appears in the latest issue of the LSA (List of CFR Sections Affected), which is revised monthly.

The CFR is available free on-line through the Government Printing Office's GPO Access Service at http://www.gpoaccess.gov/cfr/index.html. For information about GPO Access call the GPO User Support Team at 1-888-293-6498 (toll free) or 202-512-1530.

The annual rate for subscription to all revised paper volumes is $1499.00 domestic, $599.60 additional for foreign mailing.

Mail orders to the Superintendent of Documents, Attn: New Orders, P.O. Box 371954, Pittsburgh, PA 15250–7954. All orders must be accompanied by remittance (check, money order, GPO Deposit Account, VISA, Master Card, or Discover). Charge orders may be telephoned to the GPO Order Desk, Monday through Friday, at **(202) 512–1800** from 8:00 a.m. to 4:00 p.m. eastern time, or FAX your charge orders to **(202) 512-2250**.

Title	Stock Number	Price	Revision Date
1	(869–064–00001–7)	5.00	[4] Jan. 1, 2008
2	(869–064–00002–5)	8.00	Jan. 1, 2008
3 (2006 Compilation and Parts 100 and 102)	(869–064–00003–3)	35.00	[1] Jan. 1, 2008
4	(869–064–00004–1)	13.00	Jan. 1, 2008
5 Parts:			
1–699	(869–064–00005–0)	63.00	Jan. 1, 2008
700–1199	(869–064–00006–8)	53.00	Jan. 1, 2008
1200–End	(869–064–00007–6)	64.00	Jan. 1, 2008
6	(869–064–00008–4)	13.50	Jan. 1, 2008
7 Parts:			
1–26	(869–064–00009–2)	47.00	Jan. 1, 2008
27–52	(869–064–00010–6)	52.00	Jan. 1, 2008
53–209	(869–064–00011–4)	40.00	Jan. 1, 2008
210–299	(869–064–00012–2)	65.00	Jan. 1, 2008
300–399	(869–064–00013–1)	49.00	Jan. 1, 2008
400–699	(869–064–00014–9)	45.00	Jan. 1, 2008
700–899	(869–064–00015–7)	46.00	Jan. 1, 2008
900–999	(869–064–00016–5)	63.00	Jan. 1, 2008
1000–1199	(869–064–00017–3)	22.00	Jan. 1, 2008
1200–1599	(869–064–00018–1)	64.00	Jan. 1, 2008
1600–1899	(869–064–00019–0)	67.00	Jan. 1, 2008
1900–1939	(869–064–00020–3)	31.00	Jan. 1, 2008
1940–1949	(869–064–00021–1)	50.00	Jan. 1, 2008
1950–1999	(869–064–00022–0)	49.00	Jan. 1, 2008
2000–End	(869–064–00023–8)	53.00	Jan. 1, 2008
8	(869–064–00024–6)	66.00	Jan. 1, 2008
9 Parts:			
1–199	(869–064–00025–4)	64.00	Jan. 1, 2008
200–End	(869–064–00026–2)	61.00	Jan. 1, 2008
10 Parts:			
1–50	(869–064–00027–1)	64.00	Jan. 1, 2008
51–199	(869–064–00028–9)	61.00	Jan. 1, 2008
200–499	(869–064–00029–7)	46.00	Jan. 1, 2008
500–End	(869–064–00030–1)	65.00	Jan. 1, 2008
11	(869–064–00031–9)	44.00	Jan. 1, 2008
12 Parts:			
1–199	(869–064–00032–7)	37.00	Jan. 1, 2008
200–219	(869–064–00033–5)	40.00	Jan. 1, 2008
220–299	(869–064–00034–3)	64.00	Jan. 1, 2008
300–499	(869–064–00035–1)	47.00	Jan. 1, 2008
500–599	(869–064–00036–0)	42.00	Jan. 1, 2008
600–899	(869–064–00037–8)	59.00	Jan. 1, 2008
900–End	(869–064–00038–6)	53.00	Jan. 1, 2008
13	(869–064–00039–4)	58.00	Jan. 1, 2008
14 Parts:			
1–59	(869–064–00040–8)	66.00	Jan. 1, 2008
60–139	(869–064–00041–6)	61.00	Jan. 1, 2008
140–199	(869–064–00042–4)	33.00	Jan. 1, 2008
200–1199	(869–064–00043–2)	53.00	Jan. 1, 2008
1200–End	(869–064–00044–1)	48.00	Jan. 1, 2008
15 Parts:			
0–299	(869–064–00045–9)	43.00	Jan. 1, 2008
300–799	(869–064–00046–7)	63.00	Jan. 1, 2008
800–End	(869–064–00047–5)	45.00	Jan. 1, 2008
16 Parts:			
0–999	(869–064–00048–3)	53.00	Jan. 1, 2008
1000–End	(869–064–00049–1)	63.00	Jan. 1, 2008
17 Parts:			
1–199	(869–064–00051–3)	53.00	Apr. 1, 2008
200–239	(869–064–00052–1)	63.00	Apr. 1, 2008
240–End	(869–064–00053–0)	65.00	Apr. 1, 2008
18 Parts:			
1–399	(869–064–00054–8)	65.00	Apr. 1, 2008
400–End	(869–064–00055–6)	29.00	Apr. 1, 2008
19 Parts:			
1–140	(869–064–00056–4)	64.00	Apr. 1, 2008
141–199	(869–064–00057–2)	61.00	Apr. 1, 2008
200–End	(869–064–00058–1)	34.00	Apr. 1, 2008
20 Parts:			
1–399	(869–064–00059–9)	53.00	Apr. 1, 2008
400–499	(869–064–00060–2)	67.00	Apr. 1, 2008
500–End	(869–064–00061–1)	66.00	Apr. 1, 2008
21 Parts:			
1–99	(869–064–00062–9)	43.00	Apr. 1, 2008
100–169	(869–064–00063–7)	52.00	Apr. 1, 2008
170–199	(869–064–00064–5)	53.00	Apr. 1, 2008
200–299	(869–064–00065–3)	20.00	Apr. 1, 2008
300–499	(869–064–00066–1)	33.00	Apr. 1, 2008
500–599	(869–064–00067–0)	50.00	Apr. 1, 2008
600–799	(869–064–00068–8)	20.00	Apr. 1, 2008
800–1299	(869–064–00069–6)	63.00	Apr. 1, 2008
1300–End	(869–064–00070–0)	28.00	Apr. 1, 2008
22 Parts:			
1–299	(869–064–00071–8)	66.00	Apr. 1, 2008
300–End	(869–064–00072–6)	48.00	Apr. 1, 2008
23	(869–064–00073–4)	48.00	Apr. 1, 2008
24 Parts:			
0–199	(869–064–00074–2)	63.00	Apr. 1, 2008
200–499	(869–064–00075–1)	53.00	Apr. 1, 2008
500–699	(869–064–00076–9)	33.00	Apr. 1, 2008
700–1699	(869–064–00077–7)	64.00	Apr. 1, 2008
1700–End	(869–064–00078–5)	33.00	Apr. 1, 2008
25	(869–064–00079–3)	67.00	Apr. 1, 2008
26 Parts:			
§§ 1.0–1–1.60	(869–064–00080–7)	52.00	Apr. 1, 2008
§§ 1.61–1.169	(869–064–00081–5)	66.00	Apr. 1, 2008
§§ 1.170–1.300	(869–064–00082–3)	63.00	Apr. 1, 2008
§§ 1.301–1.400	(869–064–00083–1)	50.00	Apr. 1, 2008
§§ 1.401–1.440	(869–064–00084–0)	59.00	Apr. 1, 2008
§§ 1.441–1.500	(869–064–00085–8)	61.00	Apr. 1, 2008
§§ 1.501–1.640	(869–064–00086–6)	52.00	Apr. 1, 2008
§§ 1.641–1.850	(869–064–00087–4)	64.00	Apr. 1, 2008
§§ 1.851–1.907	(869–064–00088–2)	64.00	Apr. 1, 2008
§§ 1.908–1.1000	(869–064–00089–1)	63.00	Apr. 1, 2008
§§ 1.1001–1.1400	(869–064–00090–4)	64.00	Apr. 1, 2008
§§ 1.1401–1.1550	(869–064–00091–2)	61.00	Apr. 1, 2008
§§ 1.1551–End	(869–064–00092–1)	53.00	Apr. 1, 2008
2–29	(869–064–00093–9)	63.00	Apr. 1, 2008
30–39	(869–064–00094–7)	44.00	Apr. 1, 2008
40–49	(869–064–00095–5)	31.00	[6] Apr. 1, 2008
50–299	(869–064–00096–3)	45.00	Apr. 1, 2008

Title	Stock Number	Price	Revision Date
300–499	(869–064–00097–1)	64.00	Apr. 1, 2008
500–599	(869–064–00098–0)	12.00	[5] Apr. 1, 2008
600–End	(869–064–00099–8)	20.00	Apr. 1, 2008
27 Parts:			
1–39	(869–064–00100–5)	35.00	Apr. 1, 2008
40–399	(869–064–00101–3)	67.00	Apr. 1, 2008
400–End	(869–064–00102–1)	21.00	Apr. 1, 2008
28 Parts:			
0–42	(869–064–00103–0)	64.00	July 1, 2008
43–End	(869–064–00104–8)	63.00	July 1, 2008
29 Parts:			
0–99	(869–064–00105–6)	53.00	July 1, 2008
100–499	(869–064–00106–4)	26.00	July 1, 2008
500–899	(869–064–00107–2)	61.00	[7] July 1, 2008
900–1899	(869–064–00108–1)	39.00	July 1, 2008
1900–1910 (§§ 1900 to 1910.999)	(869–064–00109–9)	64.00	July 1, 2008
1910 (§§ 1910.1000 to end)	(869–064–00110–2)	46.00	[8] July 1, 2008
1911–1925	(869–064–00111–1)	33.00	July 1, 2008
1926	(869–064–00112–9)	53.00	July 1, 2008
1927–End	(869–064–00113–7)	65.00	July 1, 2008
30 Parts:			
1–199	(869–064–00114–5)	60.00	July 1, 2008
200–699	(869–064–00115–3)	53.00	July 1, 2008
700–End	(869–064–00116–1)	61.00	July 1, 2008
31 Parts:			
0–199	(869–064–00117–0)	44.00	July 1, 2008
200–499	(869–064–00118–8)	49.00	July 1, 2008
500–End	(869–064–00119–6)	65.00	July 1, 2008
32 Parts:			
1–39, Vol. I		15.00	[2] July 1, 1984
1–39, Vol. II		19.00	[2] July 1, 1984
1–39, Vol. III		18.00	[2] July 1, 1984
1–190	(869–064–00120–0)	64.00	July 1, 2008
191–399	(869–064–00121–8)	66.00	July 1, 2008
400–629	(869–064–00122–6)	53.00	July 1, 2008
630–699	(869–064–00123–4)	40.00	July 1, 2008
700–799	(869–064–00124–2)	49.00	July 1, 2008
800–End	(869–064–00125–1)	50.00	July 1, 2008
33 Parts:			
1–124	(869–064–00126–9)	60.00	July 1, 2008
125–199	(869–064–00127–7)	61.00	July 1, 2008
200–End	(869–064–00128–5)	60.00	July 1, 2008
34 Parts:			
1–299	(869–064–00129–3)	53.00	July 1, 2008
300–399	(869–064–00130–7)	43.00	July 1, 2008
400–End & 35	(869–064–00131–5)	64.00	July 1, 2008
36 Parts:			
1–199	(869–064–00132–3)	40.00	July 1, 2008
200–299	(869–064–00133–1)	37.00	July 1, 2008
300–End	(869–064–00134–0)	64.00	July 1, 2008
37	(869–064–00135–8)	61.00	July 1, 2008
38 Parts:			
0–17	(869–064–00136–6)	63.00	July 1, 2008
18–End	(869–064–00137–4)	65.00	July 1, 2008
39	(869–064–00138–2)	45.00	July 1, 2008
40 Parts:			
1–49	(869–064–00139–1)	63.00	July 1, 2008
50–51	(869–064–00140–4)	48.00	July 1, 2008
52 (52.01–52.1018)	(869–064–00141–2)	61.00	July 1, 2008
52 (52.1019–End)	(869–064–00142–1)	67.00	July 1, 2008
53–59	(869–064–00143–9)	34.00	July 1, 2008
60 (60.1–End)	(869–064–00144–7)	61.00	July 1, 2008
60 (Apps)	(869–064–00145–5)	60.00	July 1, 2008
61–62	(869–064–00146–3)	48.00	July 1, 2008
63 (63.1–63.599)	(869–064–00147–1)	61.00	July 1, 2008
63 (63.600–63.1199)	(869–064–00148–0)	50.00	[8] July 1, 2008
63 (63.1200–63.1439)	(869–064–00149–8)	53.00	July 1, 2008
63 (63.1440–63.6175)	(869–064–00150–1)	35.00	July 1, 2008
63 (63.6580–63.8830)	(869–064–00151–0)	35.00	July 1, 2008
63 (63.8980–End)	(869–064–00152–8)	38.00	July 1, 2008
64–71	(869–064–00153–6)	32.00	July 1, 2008
72–80	(869–064–00154–4)	65.00	July 1, 2008
81–84	(869–064–00155–2)	53.00	July 1, 2008
85–86 (85–86.599–99)	(869–064–00156–1)	64.00	July 1, 2008
86 (86.600–1–End)	(869–064–00157–9)	53.00	July 1, 2008
87–99	(869–064–00158–7)	63.00	July 1, 2008
100–135	(869–064–00159–5)	48.00	July 1, 2008
136–149	(869–064–00160–9)	64.00	July 1, 2008
150–189	(869–064–00161–7)	53.00	July 1, 2008
190–259	(869–064–00162–5)	42.00	July 1, 2008
260–265	(869–064–00163–3)	53.00	July 1, 2008
266–299	(869–064–00164–1)	53.00	July 1, 2008
300–399	(869–064–00165–0)	45.00	July 1, 2008
400–424	(869–064–00166–8)	59.00	July 1, 2008
425–699	(869–064–00167–6)	61.00	[8] July 1, 2008
700–789	(869–064–00168–4)	64.00	July 1, 2008
790–End	(869–064–00169–2)	64.00	July 1, 2008
41 Chapters:			
1, 1–1 to 1–10		13.00	[3] July 1, 1984
1, 1–11 to Appendix, 2 (2 Reserved)		13.00	[3] July 1, 1984
3–6		14.00	[3] July 1, 1984
7		6.00	[3] July 1, 1984
8		4.50	[3] July 1, 1984
9		13.00	[3] July 1, 1984
10–17		9.50	[3] July 1, 1984
18, Vol. I, Parts 1–5		13.00	[3] July 1, 1984
18, Vol. II, Parts 6–19		13.00	[3] July 1, 1984
18, Vol. III, Parts 20–52		13.00	[3] July 1, 1984
19–100		13.00	[3] July 1, 1984
1–100	(869–064–00170–6)	27.00	July 1, 2008
101	(869–064–00171–4)	21.00	[8] July 1, 2008
102–200	(869–064–00172–2)	56.00	July 1, 2008
201–End	(869–064–00173–1)	27.00	July 1, 2008
42 Parts:			
1–399	(869–062–00174–6)	61.00	Oct. 1, 2007
400–413	(869–062–00175–4)	32.00	Oct. 1, 2007
414–429	(869–062–00176–2)	32.00	Oct. 1, 2007
430–End	(869–062–00177–1)	64.00	Oct. 1, 2007
43 Parts:			
1–999	(869–062–00178–9)	56.00	Oct. 1, 2007
1000–end	(869–062–00179–7)	62.00	Oct. 1, 2007
44	(869–062–00180–1)	50.00	Oct. 1, 2007
45 Parts:			
1–199	(869–062–00181–9)	60.00	Oct. 1, 2007
200–499	(869–060–00182–7)	34.00	[10] Oct. 1, 2007
500–1199	(869–062–00183–5)	56.00	Oct. 1, 2007
1200–End	(869–062–00184–3)	61.00	Oct. 1, 2007
46 Parts:			
1–40	(869–062–00185–1)	46.00	Oct. 1, 2007
41–69	(869–062–00186–0)	39.00	Oct. 1, 2007
70–89	(869–062–00187–8)	14.00	Oct. 1, 2007
90–139	(869–062–00188–6)	44.00	Oct. 1, 2007
140–155	(869–062–00189–4)	25.00	Oct. 1, 2007
156–165	(869–062–00190–8)	34.00	Oct. 1, 2007
166–199	(869–062–00191–6)	46.00	Oct. 1, 2007
200–499	(869–062–00192–4)	40.00	Oct. 1, 2007
500–End	(869–062–00193–2)	25.00	Oct. 1, 2007
47 Parts:			
0–19	(869–062–00194–1)	61.00	Oct. 1, 2007
20–39	(869–062–00195–9)	46.00	Oct. 1, 2007
40–69	(869–062–00196–7)	40.00	Oct. 1, 2007
70–79	(869–062–00197–5)	61.00	Oct. 1, 2007
80–End	(869–062–00198–3)	61.00	Oct. 1, 2007
48 Chapters:			
1 (Parts 1–51)	(869–062–00199–1)	63.00	Oct. 1, 2007
1 (Parts 52–99)	(869–062–00200–9)	49.00	Oct. 1, 2007
2 (Parts 201–299)	(869–062–00201–7)	50.00	Oct. 1, 2007
3–6	(869–062–00202–5)	34.00	Oct. 1, 2007

Title	Stock Number	Price	Revision Date
7–14	(869–062–00203–3)	56.00	Oct. 1, 2007
15–28	(869–062–00204–1)	47.00	Oct. 1, 2007
29–End	(869–062–00205–0)	47.00	Oct. 1, 2007
49 Parts:			
1–99	(869–062–00206–8)	60.00	Oct. 1, 2007
100–185	(869–062–00207–6)	63.00	Oct. 1, 2007
186–199	(869–062–00208–4)	23.00	Oct. 1, 2007
200–299	(869–062–00208–1)	32.00	Oct. 1, 2007
300–399	(869–062–00210–6)	32.00	Oct. 1, 2007
400–599	(869–062–00210–3)	64.00	Oct. 1, 2007
600–999	(869–062–00212–2)	19.00	Oct. 1, 2007
1000–1199	(869–062–00213–1)	28.00	Oct. 1, 2007
1200–End	(869–062–00214–9)	34.00	Oct. 1, 2007
50 Parts:			
1–16	(869–062–00215–7)	11.00	Oct. 1, 2007
17.1–17.95(b)	(869–062–00216–5)	32.00	Oct. 1, 2007
17.95(c)–end	(869–062–00217–3)	32.00	Oct. 1, 2007
17.96–17.99(h)	(869–062–00218–1)	61.00	Oct. 1, 2007
*17.99(i)–end and 17.100–end	(869–062–00219–0)	47.00	[9] Oct. 1, 2007
18–199	(869–062–00226–3)	50.00	Oct. 1, 2007
200–599	(869–062–00221–1)	45.00	Oct. 1, 2007
600–659	(869–062–00222–0)	31.00	Oct. 1, 2007
660–End	(869–062–00223–8)	31.00	Oct. 1, 2007
CFR Index and Findings Aids	(869–064–00050–5)	65.00	Jan. 1, 2008
Complete 2008 CFR set		1,499.00	2008
Microfiche CFR Edition:			
Subscription (mailed as issued)		406.00	2008
Individual copies		4.00	2008
Complete set (one-time mailing)		332.00	2007
Complete set (one-time mailing)		332.00	2006

[1] Because Title 3 is an annual compilation, this volume and all previous volumes should be retained as a permanent reference source.

[2] The July 1, 1985 edition of 32 CFR Parts 1–189 contains a note only for Parts 1–39 inclusive. For the full text of the Defense Acquisition Regulations in Parts 1–39, consult the three CFR volumes issued as of July 1, 1984, containing those parts.

[3] The July 1, 1985 edition of 41 CFR Chapters 1–100 contains a note only for Chapters 1 to 49 inclusive. For the full text of procurement regulations in Chapters 1 to 49, consult the eleven CFR volumes issued as of July 1, 1984 containing those chapters.

[4] No amendments to this volume were promulgated during the period January 1, 2005, through January 1, 2006. The CFR volume issued as of January 1, 2005 should be retained.

[5] No amendments to this volume were promulgated during the period April 1, 2000, through April 1, 2007. The CFR volume issued as of April 1, 2000 should be retained.

[6] No amendments to this volume were promulgated during the period April 1, 2006 through April 1, 2007. The CFR volume issued as of April 1, 2006 should be retained.

[7] No amendments to this volume were promulgated during the period July 1, 2006, through July 1, 2007. The CFR volume issued as of July 1, 2006 should be retained.

[8] No amendments to this volume were promulgated during the period July 1, 2007, through July 1, 2008. The CFR volume issued as of July 1, 2007 should be retained.

[9] No amendments to this volume were promulgated during the period October 1, 2005, through October 1, 2007. The CFR volume issued as of October 1, 2005 should be retained.

[10] No amendments to this volume were promulgated during the period October 1, 2006, through October 1, 2007. The CFR volume issued as of October 1, 2006 should be retained.